VOLUME XII

{2397}

THURSDAY MORNING SESSION

March 31, 1977

9:00 A.M.

Whereupon, the following proceedings were had and entered of record on Thursday morning, March 31, 1977 at 9:00 o'clock, A.M. without the presence of the jury, the defendant being present in person:

THE COURT: Before the jury comes in, apparently we have one or two housekeeping matters.

Is the United States ready to make a report on the disclosure motion, Brady v. Maryland disclosure motion?

MR. HULTMAN: Yes, Your Honor. The government is prepared and will disclose but we certainly take no position that we're ready to under Brady. We still contend it has no applicability. I wouldn't want the Court to believe that's the basis upon which we're making the disclosure. We're just plain making it.

THE COURT: You're making it reserving your right not to make it?

MR. HULTMAN: I want the Court to know --

THE COURT: I understand.

MR. HULTMAN: I'm not making it because of any basis of Brady v. Maryland. The only point I want to make, the government is voluntarily making it because the request has been made and we have tried to do that in every instance in this case, I think, with no exception, up to this particular {2398} time including that.

Pursuant to the specific request by Counsel with reference phrased as Brady, the request was made as to who was it that prepared the Affidavit and I am prepared to respond to that as to respond in greater detail.

First of all, Your Honor, this matter took place back in the month of February of 1976 and I would submit to the Court that this was prior to any time that I was involved in the case and so I'm not speaking from personal knowledge. I'm speaking from inquiry that I have made pursuant to request yesterday.

I would indicate to the Court that I believe that what I'm about to say is absolutely accurate, although I want the record to show I'm not

speaking for my own personal experience in it.

Proceedings for extradition were in the process at that time. In fact, continued up until December of 1976 when late in December, and I don't know the exact date, the defendant was extradited in fact from Canada to the United States and then resulted in proceedings up to where we are now.

During the month of February there were proceedings that the transcript would indicate, and again because I didn't participate in them I'm not familiar with them. There were specific proceedings in Canada and the Canadian authority {2399} who is handling those proceedings is a gentleman by the name of Halprin. I think Counsel would recognize, his name appears in the transcript in various places. He, Your Honor, I don't know his official title, he's somewhat the equivalent of the United States Attorney in Canada for that particular province which is the province north of Seattle. I believe it's British Columbia if my memory is correct.

In order to prepare some immediate proceedings that were about to take place, because of the time frame that was involved, Mr. Halprin came to Rapid City and there prepared documents from evidence that he viewed and 302s he looked at and so forth and dictated the particular affidavit that Counsel has asked who in fact prepared it. That then was sent, and I have a copy of the cover letter and I'll give Counsel a copy of it, the Affidavit itself was then sent from the U.S. Attorney's office, not the main office but the one in Rapid City where the events we're talking about took place and Bruce Boyd, assistant United States Attorney in the district of South Dakota was in that office and he prepared the cover letter which in fact sent the document to Mr. Cunningham and I would read the cover letter that went and I think it then would lead to the testimony which was elicited on the stand here in the courtroom and would indicate the procedure.

{2400}

The letter from Mr. Boyd stated, it's dated

"February 27, 1976

Special Agent Courtland Cunningham

Federal Bureau of Investigation

J. Edgar Hoover Building

Washington, D.C.

RE: United States v. Leonard Peltier

Dear SA Cunningham:

Enclosed please find the original of an Affidavit pertaining to the extradition proceedings now pending against Leonard Peltier. Please read the Affidavit and make sure that it is true and accurate to the best of your recollection. If the Affidavit meets with your approval, please go before the United States District Court Deputy Clerk or Clerk and sign the same under oath. Have the Deputy Clerk fill in the appropriate day and her signature along with the seal of the Court. Immediately below the lines provided for your signature and that of the Deputy Clerk there is the certification of the Federal District Court Judge sitting in that District. Please have the Clerk of Courts or someone there locally fill in the appropriate blanks and have the United States District Court Judge sign the name. I believe the blanks are self-explanatory, however, if some confusion exists, please call the United States Attorney's Office in Rapid City, South Dakota at FTS 72-1475 or commercial 605-342-7822.

{2401}

We would appreciate your expediting the signing of this Affidavit and returning the same to this office at the earliest possible moment.

Very truly yours,

WILLIAM F. CLAYTON

United States Attorney"

That then leads to the exact testimony that was in in the courtroom that Mr. Cunningham testified to. Therein, Your Honor, I would just add that this was in February of 1976. I do know of my own knowledge that in the months of March, April and May and then during the course of the trial where the issues, only the defendants were different as far as this case. That in discovery there all of the 302s, 302s and all of the lab reports concerning the objects we're now talking about and concerned with furnished to Counsel for the defendant and I would note that two of those Counsel who are sitting at the table right now were Counsel at that particular time, Mr. Ellison and Mr. Lowe. I no way am trying to infer to bind this case in any way but just a matter of knowledge within the reservoir of knowledge known and by their organization that is constantly referred to

here, not referring to Mr. Lowe's organization, but an organization know as WKL, the Wounded Knee Legal Offense-Defense Defense Committee and the same investigator that was in that particular proceedings was the same investigator in this particular proceedings.

{2402}

Those materials included a 302 report which was dated, interview 3-09-75, and transcribed July 7, '75, of Mr. Winthrop Dale Lodge who in fact was the fingerprint man who did the finding of the exact object, and is clearly related in that document; and I would like to make that a part of the record in these proceedings right now because I am not sure whether it is in evidence or not, but I would like it as far as this proceeding wherein Item 29 on Page 4 refers specifically to the very object of which we are discussing and is concerned with here.

That information became a part of the trial record in the earlier proceedings which we are talking about, so I just want to point that the finder was known on a 302. The finder has been known at least within the material of the Defendant's counsel and those doing research, and so forth for them; that it was a matter of record in the last trial. It was a part of the transcript in the last trial, and that's the best and the most total and every explanation that I can give concerning the matters that were specifically requested and far beyond the issues and the matters that were specifically requested; and I would like this particular document to be marked as a Government's exhibit, whatever would be appropriate to designate it as different, as far as just this hearing {2403} and not as far as evidence in the trial itself.

Now, if the Court has any further question that they would like to ask of counsel, I certainly will do my best to respond.

THE COURT: If you are going to mark that as an exhibit, I would suggest you also mark that covering letter.

MR. HULTMAN: Yes, your Honor. I am sorry, I meant to do that.

There are matters, of course, which are for this hearing and in camera proceeding alone and not as far as trial.

Now, maybe the 302 will become evidentiary matter, I don't know; but I want it at least in the record at this time as far as the hearing.

MR. LOWE: May I briefly respond, your Honor?

THE COURT: You may.

MR. LOWE: I would hope that one thing I would say we would finally get on the record, that Mr. Hultman would finally understand -- I think your Honor has acknowledged this time and time again, and Mr. Hultman insists on standing up time and time again saying it over and over again -- that is, we had a six week trial last summer. We have, I would guess, maybe eight or ten file cabinet drawers full of papers. I have probably read {2404} 10 percent, 20 percent of those papers personally. I have no idea or recollection of any particular ones that I read last summer. We had a six week trial. I may have even referred specifically to some of those documents in the trial, I may have cross-examined somebody using them. I have made no general attempt to go back and read the transcript. I have made some specific attempts in specific instances to refresh my recollection.

To say, as Mr. Hultman did, that the defense team itself had knowledge of this, as opposed to at some time having seen or read it, we do not have knowledge of it. The first that I had consciousness in this trial of that affidavit was when we received the 3500 material on Special Agent Cunningham. I would guess it was three or four days, two or three days before he testified. I can't say that I did or did not see that affidavit before. I say that I had absolutely no recollection of having seen it. I may even have a piece of paper stating that I saw it, when I received it in the 3500 material last summer.

That's a far cry from saying I was conscious of it or aware of it. I don't believe I did see it last summer. If I did, I certainly have no consciousness of it, or anything that went on.

The fact that a couple of attorneys here are the same as last summer does not mean we had knowledge. He is a {2405} different Defendant. He is entitled to get all due process, all Brady versus Maryland disclosures, all 3500 material, all due process he is entitled to under the law.

I think your Honor has acknowledged that time and time again. I would hope that issue would be solved and put to rest once and for all.

As to the specific information in this covering letter which is from Bruce Boyd who is one of the Assistant United States Attorneys who has been sitting here all during this trial, God knows it would have been simple

enough for him to stand up and say, "I sent the covering letter."

Mr. Hultman says it goes to the voluntariness. I would submit that Mr. Peltier goes back to the jail voluntarily every evening. That doesn't mean there is not some compulsion that makes him go back every day.

I think we are clearly entitled to have it under the Brady case, and I would advise your Honor, that we will take it under advisement, we will look at it and the first opportunity will advise the Court if we feel anything further is necessary or whether we are entitled to anything further in the way of disclosure.

Having just heard it read and seen it for the first time, I don't have any immediate reaction.

We obviously appreciate cooperation from the {2406} Government, and we have been giving cooperation to the Government in mutual exchanges. We are clearly entitled to this information.

As far as what Mr. Halprin may have done or not done, we will have to take this and digest it and see what we can find.

I hope we can put to rest the myth that the Defendant and his team were somehow on notice because of things that were done last summer.

MR. HULTMAN: I want to respond very briefly, two items. One, if Mr. Lowe interpreted what I said to be that he specifically had the knowledge, then either I didn't say what I intended to say or he didn't grasp what it was I was trying to say, and I won't get into which it was, maybe a little of both.

All I am trying to say, your Honor, is that within the Rules, access to information, and what is within the capability is what I am talking about. I at no time could have any knowledge as to what Mr. Lowe may or may not have read. I am only referring specifically to accessibility, period, so I make that very clear.

The other thing that I just want to point out is the fact that within the accessibility it is very obvious that the matter did come to the attention of Mr. Lowe, or the issue would not have been raised; and therein lies {2407} the fact that I am just trying to make the point, that the materials have been within the capability and the accessibility of the counsel for the defense in this particular proceeding, and that's the only point that I am trying to make.

THE COURT: I think my only comment is that if we pursue this discussion any further, we will certainly be creating a situation where the court reporter is going to be making undue profits from the transcript.

MR. HULTMAN: An unjust enrichment, your Honor, is that it?

THE COURT: Plaintiff's Exhibit 149, Plaintiff's Exhibit 150, will be made a part of the record on this Brady versus Maryland disclosure matter. Those exhibits will not at this time at least be made available to the jury.

MR. LOWE: Could your Honor just identify the 302 by date? I think we probably have that.

THE COURT: The Exhibit 150 is a 302 with the date of transcription of July 7, 1975.

MR. LOWE: Thank you, your Honor.

THE COURT: And the letter, letter marked as Plaintiff's Exhibit No. 149, dated February 27, 1976, signed by Bruce W. Boyd, Assistant United States Attorney.

MR. LOWE: We have a copy. He just handed us one.

{2408}

THE COURT: The Court reserves ruling on Defendant's Exhibit 145 which was the second affidavit of William P. Zeller, and finds that there is nothing inconsistent in that affidavit with Mr. Zeller's testimony on the witness stand so the exhibit will not be received.

MR. ELLISON: Your Honor, we would like to offer the March 4th affidavit -- that was dated March 4th, 1976, with the affidavit dated April 6th, 1976, because I believe the discrepancies are apparent with regard to Paragraph 10.

{2409}

THE COURT: I would have suggested that you offer, that the offer should have been made yesterday. Now I'm going to have to reserve my ruling on that in order to examine that affidavit.

MR. ELLISON: All right. I appreciate that.

MR. CROOKS: Your Honor, might I just state the United States response? This is exactly what we've seen again and again, the setting up of a straw man.

Mr. Zeller testified very candidly concerning both affidavits. He

testified that there was an error on the first one, that that was caught before it was sent, that the correction was made, and the affidavit sent in correct form to the Canadian officials.

He's testified about it completely. It has absolutely no relevance to putting those affidavits in themselves. He's testified, his testimony is the best evidence of what happened, and the affidavits themselves are completely cumulative and have no probative value at all to this proceeding. The testimony was quite candid. He testified there was an error and we would assume that that would be the only reason that the affidavit would be admissible at all was to prove that there was in fact an error.

The error was admitted and we do not feel that that affidavit should be put in. His testimony should stand on its own weight.

{2410}

MR. TAIKEFF: Well, Your Honor, in response to Mr. Crooks I would like to ask this question, and perhaps Mr. Crooks would like to answer it. When a witness gets on the stand and testifies that he saw a person at a certain location holding an M-1 Gerand rifle, which is a rifle that loads through the top and works in a semiautomatic fashion, I wonder then why the Government offers the rifle in evidence and why Your Honor allows it in.

Of course I hear some noises coming from Mr. Crooks, not in the form of words, but in guttural sounds and I suspect that maybe I've hit the center of the target.

The fact of the matter is that each and every juror has five senses or more, but at least five that we know of, and they hear the testimony. But they have eyes, and those eyes are supposed to be put to work. So we offer them, the real evidence that goes hand in hand with the oral testimony so they can look at the thing which they've just heard the testimony about. And if it is appropriate to put the M-1 Gerand rifle in then it's surely appropriate to put the affidavit in.

If it's appropriate to put the shell casings in, everybody presumably knows a shell casing after you see the first one, why we have all the shell casings in evidence, I'd like Mr. Crooks to explain. And when he gets finished I'd like him to explain then why the affidavits don't come {2411} in.

MR. CROOKS: Well, Your Honor, I ordinarily, I will have to concede that I've admired Mr. Taikeff's presentations. However, this one completely escapes me. If Mr. Taikeff is contending that they're the same thing between offering documents which are used solely for impeachment as there is to offering hard evidence which proves a fact, and he doesn't understand the difference, I'm sure I can't explain it to him. If he can't comprehend the difference, I would suggest that I would possibly be unable to do it also.

The fact of the matter is that Mr. Zeller testified fully about the supposed inconsistent statement. I think under the rules of evidence any further offer on that in collateral. If he had denied the inconsistent statement then obviously you could put in the affidavit to show that the inconsistent statement was made. But I think it's very Horn Book Law that you can't put in evidence of collateral matters once the inconsistent statement has been admitted. It's as simple as that.

If counsel has never heard of that rule of law then I suspect that he should refer back to some of his Horn Books that he had in law school.

MR. TAIKEFF: Well, I didn't go to a law school where they used Horn Books, Your Honor. We worked by the case method of the law school I attended. {2412}

However, I think that Mr. Crooks misses the point that when we offer the two affidavits they are prior sworn statements offered as evidence in chief. Maybe that's why he doesn't understand the offer.

THE COURT: Are we ready for the jury?

MR. TAIKEFF: No, we're not Your Honor.

Your Honor, there's a proceeding set for 1:30 this afternoon. I thought I would advise the Court that at least two of the defense team are potential witnesses at that proceeding. I understand that Judge Davies is going to have a hearing on the contempt citation against Mr. Trudell; and I also understand that others who are involved in this trial may be called as witnesses.

Therefore, I give notice to Your Honor that it may be necessary to suspend these proceedings, and in view of that, and in view of the fact that the matter concerns so closely this particular case, but does not involve an alleged contempt in the presence of the Court, perhaps Your

Honor would conduct that hearing. I think overall we would probably do it in a more expeditious way because Your Honor is personally familiar with all of the general surrounding circumstances, if not the specific incident.

Judge Davies would have to familiarize himself with a much more broader range of fact to make a determination, and that would prolong the absence of certain participants {2413} in this trial. So I think it would be most expeditious and cause us the shortest delay or recess if Your Honor would have that matter transferred to himself.

THE COURT; Well, in response to your second request, Judge Davies has agreed to handle it and that will not be changed.

In response to your first request I do not intend to, with a sequestered jury and the number of people involved in this case, I do not intend to suspend the trial in this matter by reason of those proceedings.

MR. TAIKEFF: Well, what's going to happen when trial counsel is on the witness stand?

THE COURT: I'll meet that problem if it arises.

MR. TAIKEFF: All right. Then I'm just advising Your Honor that that is a real possibility.

THE COURT: It certainly would not be necessary for trial counsel to be down there except at the time that it was necessary for him to testify.

MR. TAIKEFF: That's quite correct, Your Honor.

THE COURT: Secondly, I do not understand why it would be necessary for trial counsel to testify in that matter.

MR. TAIKEFF: Because trial counsel was a witness to certain events which occurred in the corridor.

THE COURT: And I would not expect that it would be {2414} necessary for more than one trial counsel to be absent from this courtroom at any one time.

MR. TAIKEFF: Well, when one is absent, Your Honor, there is a sufficient absence to warrant a cessation in these proceedings. We have been us divided up the work in certain ways so that it is possible for one of us to be across the hall in 326 where we are not more than fifteen seconds apart.

But we're not going to proceed with one of us in another building,

perhaps tied up for another half hour because there is no way that it is then possible for the remaining trial counsel to have immediate access to the other trial counsel.

THE COURT: I would be very surprised if those proceedings were held anywhere except in this building.

MR. TAIKEFF: I was told yesterday, but I may have been misinformed, that the proceedings were to be held in the new federal building.

THE COURT: There is no other courtroom, there is no courtroom in the new federal building. The only other courtroom would be the small courtroom on the second floor down on the end of the corridor.

MR. TAIKEFF: That changes the complexion of the situation.

THE COURT: That is where I would anticipate that {2415} proceedings would be held.

MR. TAIKEFF: My statement was predicated on what I was told yesterday that it would be held in the new federal building.

THE COURT: I could be mistaken, but I do know that there is no courtroom facility in that building.

MR. TAIKEFF: Thank you, Your Honor.

THE COURT: I could be mistaken as to maybe the Judge plans to utilize some other room. But the Clerk tells me he'll find out for me.

MR. TAIKEFF: Thank you very much.

THE COURT: We'll get back to that.

DEPUTY MARSHAL: Your Honor, that will be held in the bankruptcy court at 1:30.

THE COURT: Ralph, the marshal apparently knows where it will be held. It will be held just one floor down at the end of the corridor.

Are counsel now ready for the jury?

MR. TAIKEFF: Yes, Your Honor.

MR. CROOKS: Yes, Your Honor, we are.

THE COURT: Jury may be brought in.

MR. CROOKS: Next witness will be Ed Hanson.

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

{2416}

EDWARD E. HANSON

being first duly sworn, testified as follows:

{2417}

DIRECT EXAMINATION

BY MR. CROOKS:

Q Mr. Hanson, would you give your full name again for the record, please.

A Edward Eugene Hanson.

Q Where do you live, sir?

A Live in Ontario, Oregon.

Q And what is your occupation?

A I'm employed with the Oregon State Police.

Q How long have you been with the Oregon State Police, Mr. Hanson?

A Approximately seven years.

Q And what is your present duty position or status? Are you a trooper, investigator or what was your official title?

A I'm a criminal investigator assigned to the Ontario patrol office.

Q And how long have you been in that capacity as an investigator?

A Approximately three years.

Q Calling your attention back to November of 1975, did you have occasion to be called to the scene of an incident involving a Dodge motor home and a white Plymouth automobile?

A Yes, I did.

Q And I would show you Exhibit 61 and ask whether or not these are in fact photographs of the vehicles in question?

A Yes, the are.

{2418}

Q Now during the course of your investigation, were you called upon to make any search of those vehicles?

A Yes, I was.

Q Were these searches pursuant to a search warrant of any kind?

A Yes, they were.

Q What was the nature of that?

A They were pursuant to a State Search Warrant to search for evidence of an attempted murder.

Q And insofar as the search was concerned, do you recall the day

that the search started?

A November 15, 1975 when the search started.

Q This would be the day following the purported incident?

A That's correct.

Q And do you recall the approximate time, not necessarily the exact time, but the approximate time of the day that the search commenced?

A It was approximately 4:20 P.M.

Q And who was with you when the search was commenced?

A Myself and Sergeant Zeller were conducting the search and during this time other people arrived and left and I'm not certain who was present when we actually started the search.

Q Were there special agents of the Federal Bureau of Investigation on hand?

A There were at different times; yes.

{2419}

Q And what part, if any, did they play in your search?

A They just observed the search.

Q Now insofar as the Federal Bureau of Investigation is concerned, were you aware of the fact that there had been an all points bulletin out on these vehicles?

A Yes, I was.

Q And they were looking for what? I mean, not necessarily whom but what?

A Evidence leading to the apprehension of federal fugitives.

Q And to the best of your knowledge is this a function of the FBI to pursue Federal fugitives?

A Yes, it is.

Q During the course of the search were items removed from the motor home?

A Yes, there was.

Q And at a later time was there a federal search warrant also obtained?

A Yes.

Q Do you recall when this was executed, if you recall?

A I believe their search was started on November 17 at approximately 12:05 P.M.

Q Insofar as the search made by the state troopers, who is principally doing the search? Who would you say was in charge of the search itself?

A I was actually in charge of the search but because of {2420} Sergeant Zeller's expertise in fingerprinting, he actually preceded me to make sure that the fingerprint evidence was preserved.

Q So Sergeant Zeller would principally be the initial searcher and you then would have searched after he'd been reasonably assured of preserving fingerprints, is that correct?

A That's correct.

Q All right.

Insofar as the items taken from the vehicle, were there any firearms removed?

A Yes, there was.

Q And again, referring you to Exhibit No. 61, pages 3, 4 and 5, would you examine those very briefly if you would, please.

Having examined those, do those depict firearms that you observed being taken from the recreational vehicle or the Plymouth station wagon?

A Yes, they do.

Q And were there other firearms which are not depicted in that photograph, if you recall?

A Yes, there were. There were additional ones.

Q What about an AR15, do you know what that is?

A Yes.

Q Showing you what has been marked as 34AA which has previously been identified and received into evidence as an AR15 were any weapons of this type recovered?

{2421}

A Yes, there was.

Q Now that is to say that this is the weapon, but of this type, is that correct?

A That's correct.

Q You would have no way of knowing if this was the weapon?

A I might have marked it for evidence, I don't know.

Q Well, I can assure you it was not, but I wish you would examine it.

MR. ELLISON: Your Honor, I would object to Mr. Crooks' testifying in this matter. He's perfectly capable of answering.

MR. CROOKS: I'll withdraw the remarks, Your Honor.

THE COURT: Sustained.

A This was not the weapon that I found.

Q (By Mr. Crooks) With regard to the AR15 that was found, you responded that this was not the weapon. What lead you to that conclusion?

A The AR15 --

MR. ELLISON: Objection, Your Honor. Side bar?

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

MR. ELLISON: Your Honor, the weapon that was found in Oregon has an obliterated serial number. The proof of that crime has no relationship to this particular case.

MR. CROOKS: Your Honor, I had understood we {2422} already won that ruling. I understood we were entitled to go into the fact of the obliterated serial numbers. That is in fact what the witness will say.

MR. ELLISON: Your Honor, my understanding was that the government was permitted to go into the weapon, go into the fact that certain weapons were found in the mobile home and the Plymouth. I did not hear any ruling pertaining to obliterated serial numbers.

THE COURT: The objection is overruled.

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

MR. CROOKS: Would you repeat the question. Whereupon, the following question was read back: With regard to the AR15 that was found, you responded that this was not the weapon. What lead you to that conclusion? Answer: The AR15 --)

Q (By Mr. Crooks) Let me also add before you answer that. The one I'm referring to is 34AA. How do you know this is not the weapon?

A The serial number on the weapon that I found was obliterated and I notice that the serial number is intact on that weapon.

Q Would you point out to the jury where the serial number is that you're referring to.

A Serial number is this stamped number in this area (indicating). {2423}

Q With regard to the serial number on the other weapon, you're saying that there was no such number?

A It had been obliterated.

Q How had it been obliterated from your recollection of it: covered up or what?

A IT had been stamped out with some object making it so it could not be, wasn't legible.

Q Were there other weapons that you recall which are not photographed in Exhibit 61A aside from the AR15 as best you can recall?

A I believe there were.

Q Officer Hanson, in your examination of the Dodge motor home and the recreational vehicle, or, excuse me, and the Plymouth station wagon, were there communication devices found?

A Yes, there was.

Q And would you describe generally what you observed insofar as each vehicle concerning communication devices?

A Each vehicle contained a citizen's band radio both tuned to channel 11.

O And were there other radios aside from the ones that appear to be mounted into the vehicles, as you recall?

A Yes. There were portable radios found in the back of the motor home, or recreational vehicle.

Q And were these a commercial AM, FM type radio or are these communication type radios?

{2424}

A I think what would be commonly known as walkie-talkie type radios.

Q Now insofar as the search of the vehicle, particularly the Plymouth, was a tool box located?

A Yes.

MR. ELLISON: Objection, Your Honor. Leading.

THE COURT: Sustained.

MR. ELLISON: Move to strike any answer to this question because the question was suggestive.

Q (By Mr. Crooks) Well, would you start at the top and go to the bottom and list everything that was found in the Plymouth station wagon

then. We'll do it the long way.

A Items I seized from the Plymouth station wagon included a small baggie of vegetable material --

MR. ELLISON: Your Honor, object to this witness reading from any form of list. He has not testified that he cannot recall from his own recollection what was found in the station wagon and for purposes of expediency we're, rather than going through lengthy lists we will allow the government to ask him proper questions.

MR. CROOKS: Thank you, Counsel.

Q (By Mr. Crooks) Was there a tool box found?

A There were two tool boxes found in the Plymouth station wagon.

Q What was done with the tool boxes?

{2425}

A I kept the tool boxes for a period in my possession and then later turned them over to FBI Special Agent Steven Hancock.

Q Did you open the tool boxes yourself?

A Yes, I did.

Q And did you observe any of the contents in the tool box?

A Yes, I did.

Q And would you describe generally what you observed with regard to the tool box that you turned over to Special Agent Hancock?

A There were numerous items. Some of the items were wiring, pocket watches were with wires leading out of them, tools, plyers, side cutting plyers. In one of the tool boxes there was some empty shell casings, fired shell casings.

Q You talked about wires and some kind of device. Showing you picture number, the one on the bottom of page 5, there are items depicted. Are these similar to the items you're talking about?

A Yes, they are.

Q Do you recall when you turned the tool box over to Special Agent Hancock?

MR. ELLISON: Your Honor, again I don't believe that the witness has testified that he cannot recall specifically what he's being asked to respond to and he is again referring to his notes. We'd ask this practice be stopped.

{2426}

THE COURT: Well, the Court will allow the witness to refer to notes to refresh his recollection and Counsel is aware, of course, that you have the right to --

MR. ELLISON: Yes, Your Honor.

THE COURT: -- see those notes.

MR. ELLISON: Yes, Your Honor. However, this witness has not so far testified that he cannot testify from his own knowledge with regard to the specific question asked by Mr. Crooks and we only ask that this be done in the proper fashion.

THE COURT: Counsel will lay the proper foundation..

MR. CROOKS: All right.

Q (By Mr. Crooks) Do you recall the specific date off the top of your head?

A No, I do not.

Q Do you have notes with you that would aid you in refreshing your recollection?

A Yes, I do.

Q Would you consult those notes and then inform me if your recollection is refreshed.

A I'm unable to find that in my notes.

Q In any event, with regard to the, I believe you said two tool boxes, would they have been turned over the same day in which they were found or at a later date?

A AT a late date.

{2427}

Q With regard to the evidence which was found, aside from the tool boxes, was there another found by you and the state officers, were there other items which were also turned over to the Federal Bureau of Investigation?

A Yes. Most of the items that I seized were turned over to Special Agent Hancock.

MR. CROOKS: We have no further questions.

MR. ELLISON: I have a few questions, Your Honor.

THE COURT: You may cross-examine.

MR. ELLISON: Your Honor, if I could have just a moment to find a document.

{2428}

CROSS EXAMINATION

By MR. ELLISON:

Q Officer Hanson, in your examination on November 15th of the mobile home, was one of the items that was seized by you a .357 magnum?

A Yes, it was.

Q I show you what has been marked as Government's Exhibit 35-A, was this the .357 magnum which you found in the mobile home?

A Yes, it is.

Q And you had custody of that .357 magnum?

A Yes, I did.

Q And your custody was exclusive, wasn't it? I mean, you didn't share that custody with anyone else, did you?

A Originally I shared that custody with Sergeant Zeller.

Q Well, when you say "originally", for how long did you share that custody?

A I would say on that date I shared it with him until it was transferred to our evidence locker, from the time that it was originally found until it was transferred to our evidence locker.

Q All right. So that at the conclusion of the day on November 15th Sergeant Zeller's custody with regard to this .357 magnum ended and this .357 magnum became within your sole custody?

{2429}

A I believe that would be correct.

Q Sergeant Zeller didn't get custody of this weapon on the 16th or the 17th of November, did he?

A He could have had joint access to it.

Q Is there a difference between access and custody?

A I believe so.

Q So he may have had access to it because you were working together, is that correct?

A That's correct.

Q But you had custody of this item?

A I would say so.

Q All right.

In discussions earlier on direct examination you talked about finding a weapon which was shown to you, marked Government's Exhibit 34-AA, is that correct?

A Yes.

Q And you testified that the weapon you found had an obliterated serial number?

A That's correct.

Q Are you aware of 34-AA being simply an illustration or here for illustration purposes?

A No, I am not.

Q All right.

On direct examination you were asked whether you knew what an AR-15 was, is that correct?

{2430}

A Yes.

Q By the way, is an AR-15 an automatic weapon?

A It can either be automatic or semi-automatic. There is on the military style, there is a selector on some of them, and then some of them don't come with a selector, I believe.

Q In the military version known as the M-16?

A I believe that's correct.

Q And the civilian version is known as the AR-15?

A I believe that's correct.

Q And the AR-15 only comes in semi-automatic fashion?

A This could be so. I am not certain.

Q If you were to examine the AR-15 which I just showed you, would that help to refresh your recollection?

A Probably not. I am not that familiar with weapons.

Q O.k. When you found this AR-15 in the mobile home, there were FBI Agents present, were there not, at least in the general location?

A Yes, there were.

Q When you brought this AR-15, the FBI showed a pretty strong interest in the recovery of that item, didn't they?

A They were strongly interested in the whole series.

Q They were particularly interested in the AR-15?

A I don't recall any more interest on that weapon than any other weapons.

Q On November 18th, 1975, did you transfer custody of the {2431} .357 magnum marked as Government's Exhibit 35-A to a Special Agent of the FBI known as Steven Hancock?

A I did transfer it to him, and don't recall if that was the date.

Q I hand you what has been marked for identification purposes as Defendant's Exhibit 152.

Would you please look at that document and see if that refreshes your recollection as to the date you transferred custody of the .357 magnum marked Government's Exhibit 35-A to Special Agent Hancock?

A (Examining) It is very possible that it was that date, but I don't recall; and my notes apparently don't reflect that date that I have with me.

Q All right, but you have no doubt that it was you that transferred the .357 magnum to Special Agent Hancock?

A That's correct.

Q Did you feel any need to personally notify Sergeant Zeller about that transfer, I mean, he wasn't in custody of the item, was he?

A No. He probably would have been aware of the transfer, but I don't understand your question.

Q You were in sole custody of that .357 magnum?

A Yes.

Q As a result of that custody, since you were in sole custody, you didn't feel any particular need to contact {2432} Sergeant Zeller and ask his permission to transfer that custody?

MR. CROOKS: Your Honor, I will object to the form of the question. This is repetition, repetitious and it is argumentative.

THE COURT: Oh, the witness may answer.

A I may have asked him if he was through processing the weapon for prints before I transferred it. Therefore, he may have been aware of it.

Q (By Mr. Ellison) All right, but did you understand that, my question?

A Apparently not.

Q I will restate the question.

You didn't feel any need to ask Sergeant Zeller to transfer custody of that .357 magnum from the Oregon State Police to the FBI?

A No.

Q All right, thank you; and just one final question:

On direct examination there were a number of times in which you referred to your notes because you were unable to recall specific events in response to questions asked by Mr. Crooks. When you looked at those notes, was your memory independently refreshed or were you forced to rely upon your notes?

A It was independently refreshed.

Q On all occasions?

{2433}

A I believe so.

MR. ELLISON: I have no further questions, your Honor.

MR. CROOKS: We have nothing further.

THE COURT: You may step down.

(Witness excused.)

MR. CROOKS: The Government next calls Special Agent David Milam.

MR. TAIKEFF: While we are waiting the witness' appearance, may we approach your Honor?

THE COURT: You may.

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

MR. TAIKEFF: Your Honor, Mr. Lowe is especially concerned with the state of the record, and so I come forward not to burden either the Court or the record, but to make sure that there is no misunderstanding.

I think our position is clear concerning evidence that we feel is extraneous to the issues in this case. The testimony of the last witness touched upon many things which we think are highly prejudicial.

I think the record is clear that we took the position that the entire episode, every aspect of it is irrelevant to the case; but just to make sure that the record is protected and I satisfy Mr. Lowe's sensitivity, at this {2434} particular time I am going to move for a mistrial on the basis of the testimony that has accumulated thus far in connection with

the Oregon incident.

MR. CROOKS: We, of course, resist that. We believe that all this evidence is relevant. It is pertinent to the issues in the case.

THE COURT: Well, I think also the record is clear that that came in over Defendant's objection. The motion for mistrial is denied.

MR. TAIKEFF: May I assume, your Honor, that it would not be necessary, therefore, to object to each particular bit of evidence or reference to a particular object as long as it is clear that we are dealing with a phase of the case that we have made a broad objection to?

THE COURT: It is my understanding that the Defendant is objecting to any evidence relating to this Oregon incident.

MR. TAIKEFF: Thank you, your Honor.

MR. CROOKS: Your Honor, there is one other thing while we are waiting for the witness also, the United States would at this time also reoffer Exhibit 50, and 51, which are the communications devices seized by Special Agent Adams. We feel there is more than adequate foundation at this time to file these and --

THE CLERK: (Interrupting) It is not 50 and 51.

{2435}

MR. CROOKS: 50-A and 50-B, I stand corrected, your Honor.

Insofar as these devices, we think that there is more than adequate evidence now to tie these up, and show the relevance. They were received by Special Agent Adams in the white house at the crime scene. There was testimony that the red and white van contained communication devices, and I believe also there was testimony from Mr. Brown concerning communication devices.

We have also now shown further use of communication devices by the Defendant, tying him to the recreational vehicle and the Plymouth; and we feel at this point we have shown relevance for those exhibits, and we would offer them as such.

MR. LOWE: Well, your Honor, first of all, I would point out that the Government represented -- I am not saying it wasn't in good faith -- they represented that Mr. Draper was going to testify that there was actual communications by radio between the residences and Tent City. No such testimony was even sought, much less given.

There is no testimony to show that those two handi-talkies, first of all, were even functional; second of all, that they were on the same frequency as an radios that were found in Tent City; third, that any of the Tent City radios were functional, or if they were functional, {2436} were connected up in a way they actually did function at any time on June 26, 1975.

There is no testimony that anybody ever used a radio to communicate from the residences to Tent City or vice versa.

There is no testimony to show that the radios in the red and white van in Tent City were even capable of communicating on the same frequency as the radios in the white -- residences; and further, the natural inferences that in the middle of fire fighting -- gun fighting, a shoot-out where people are fleeing the scene, that these two radios were in their chargers inside the house, belies the fact they were used for any reason on June 26th. Nobody in their right mind would think that these people who were in the middle of a shoot-out would reinsert them in the chargers and leave them there when they were fleeing from the FBI. All the natural inferences are against the proof that the Government is trying to suggest, and in fact there is no evidence to support it, absolutely no evidence.

MR. TAIKEFF: And the property of others.

MR. LOWE: Also, the property of others. There has been no connection with Mr. Peltier in any way.

MR. TAIKEFF: Or any of the people in Tent City.

MR. LOWE: That's right.

{2437}

MR. CROOKS: I don't wish to prolong this argument or go into it. It seems to me we have shown adequate connection.

It seems to me the fact they were plugged in would indicate just as well they were being recharged for the possible escape, and apparently left behind in a hurry. There is just as much credibility to that as Mr. Lowe's argument. I don't feel that there is anything more particularly to argue. I think the Court has heard all the evidence, and we are prepared for the Court to make a ruling at this time.

MR. TAIKEFF: The Court should be reminded that was somebody else's house. That wasn't the home of anybody connected with this case.

THE COURT: I am going to continue to reserve my ruling until I hear all the evidence in the case before I act on that.

MR. CROOKS: All right.

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

DAVID A. MILAM

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. CROOKS:

Q Mr. Milam, would you again repeat your full name for the {2438} record, please?

A David A. Milam.

Q And where do you live, sir?

A Portland, Oregon.

Q And what is your occupation?

A Special Agent with the FBI.

Q How long have you been a Special Agent with the Federal Bureau of Investigation?

A Approximately six years.

Q And calling your attention back to November of 1976, what was your duty station -- or '75, what was your duty station at that time?

A Portland, Oregon.

Q Mr. Milam, with regard to the matter which we have been hearing today, were you called upon to observe or conduct a search with regard to a Dodge motorhome and a Plymouth stationwagon which had purportedly been involved in an incident around Ontario?

A Yes, I was.

Q All right. Would you describe how you became involved in this investigation?

A I originally left Portland with several other agents for Ontario, oh, it would have been Saturday, November 15th, arriving in Boise on Saturday, the 15th, drove by car to Ontario, Oregon, on Sunday, the 16th. {2439}

At that time we were awaiting a Federal search warrant for these vehicles and also awaiting the execution of a State of Oregon search

warrant, so I was in Ontario on the 16th and actually conducted the search with the Federal search warrant on the 17th.

{2440}

Q All right. With regard to the State search, were there special agents of the Federal Bureau of Investigation on hand at the time that the State search was being conducted in the area of the search?

A To the best of my knowledge there were at times.

I personally was present, this would be on the 16th, as an observer for part of the state search warrant.

On the morning of the 17th when they completed their search in the Oregon National Guard Armory in Ontario, Oregon, I was not present.

Q Insofar as the federal search was concerned did you find various items in the motor home, or the Plymouth station wagon yourself?

A Yes, I did.

Q And I would again refer to you Exhibit No. 61 which is the photograph, the first page, which is the photograph of the motor home and the Plymouth. Were these vehicles that were part of the search?

A Yes. These are the two vehicles that I did search.

Q All right. Calling your attention to the recreational vehicle first. I would hand you Exhibit No. 38-G and ask if this is an item you can identify?

A Yes. This is a can of Outers gun cleaning oil which I did remove from the motor home. It does bear my initials.

Q Now, with regard to that particular item that you have {2441} before you described as a can of gun oil, 38-G, where was it found?

A This particular item was underneath the dinette seat on the left-hand side, approximately the middle of the motor home.

Q All right. And do you recall when it was found?

A Yes. This would have been found by me on Monday the 17th of November.

Q All right.

MR. CROOKS: United States will offer Exhibit 38-G.

MR. TAIKEFF: No objection, Your Honor.

THE COURT: 38-G is received.

Q (By Mr. Crooks) I hand you 38-H, and I do not want you to in any way mention the contents of this, but what is that, just descriptive, do

go into the contents at all.

A This is one sheet of paper bearing printing that I removed from the recreational vehicle motor home.

Q And was this found by yourself?

A Yes, it was.

Q And where was it found?

A This was found in the rear lower left, referring to an upper bunk area and lower seating area of the motor home. It was on the lower left-hand side of the motor home.

Q All right. And that was found by yourself again on the 17th; is that correct?

A Yes, it was.

{2442}

Q I now hand you Exhibit No. 38-I. Ask if you can identify these particular documents?

A Yes, I can.

Q And what are they?

A These are 9, what appear to be approximately 3 by 5 pieces of white paper with black numerals, letters, that are removed from inside a folded up blue baseball cap that I located in the recreational vehicle.

Q Where was that located?

A These particular items, well, again these particular pieces of paper were contained inside of a blue baseball cap, which was the blue cap being on the right-hand side in a closet. Right approximately middle section of the motor home.

Q All right.

MR. CROOKS: United States will offer --

Q (By Mr. Crooks) And again this was found on the 17th?

A Yes, sir.

MR. CROOKS: Offer 38-I.

MR. TAIKEFF: No objection.

THE COURT: 38-I is received.

Q (By Mr. Crooks) All right. Now, insofar as Exhibit 38-I you described these as having been found wrapped up in a baseball cap found, I believe, in a closet if I recall your testimony?

A Yes.

{2443}

Q Insofar as 38-I is concerned were there documents similar to that located in other parts of the vehicle?

A Yes, there were.

Q The recreational vehicle.

And where was that?

A Located by myself?

Q Yes.

A One which bore the similar writing; however, it was one piece of paper as opposed to the nine.

Q Right.

A Was also found in the front section of the vehicle.

Q And that would be up in the driver's section or the passenger section or where?

A It would be considered the driver's compartment.

Q Okay. But these themselves were not in the driver s compartment?

A No, sir. These were actually contained in a blue baseball cap in a closet.

Q Now, with reference to the Plymouth station wagon, did you also find certain items located in that?

A Yes, I did.

Q I first hand you Exhibit 38-J and ask what that is?

A This is one sheet of white paper with similar numerals, words, similar to item 38-I.

This particular one I located in the Plymouth station {2444} wagon.

Q And whereabouts in the station wagon?

A This particular one was inside the front cover of a short-wave radio book located, it would be directly underneath where the driver would sit. It was not under the seat or out under the feet, just directly beneath the front edge of the seat on the driver's side.

Q All right. And that was inside the cover of the book; is that --

A Directly inside the front cover.

Q All right. And that, have you compared the entries on those, on 38-J with the entries on 38-I?

A Yes, I have.

Q And do they correspond in any way?

A They appear to be similar.

MR. CROOKS: Offer 38-J.

MR. ELLISON: No objection to Government's Exhibit 38-J.

THE COURT: 38-J is received.

Q (By Mr. Crooks) Officer Milam, as a special agent for the Federal Bureau of Investigation do you have occasion to use communication devices of any type other than phone and so forth?

A Yes, we do.

Q And what type of devices would these be?

A Well, we would use a radio transmission from car to car {2445} and car to base station.

Q In the use of a short-wave radio system is it common practice to use a code of any type?

A Yes, sir.

Q And would you basically describe, well, what code do you ordinarily use, what's the standard code used by police officers and others?

A Probably two basic ones. One is referred to as a 12 code. The FBI uses a 10 code, basically saying the same thing with just different numerical designations.

Q All right. And what is the purpose of a code? I mean, why do you use a code as opposed to just saying it?

A Well, I would think it would probably be several purposes. One would be a short amount of time on the air where you can use numerals to signify a sentence for example.

Also to prevent other people from necessarily knowing what you are talking about.

Q All right. And insofar as the 10 code, is that relatively standard code used among law enforcement officials?

A Yes, it is.

Q And do you know whether or not that 10 code is commonly used also by C.B.'ers or C.B. radioers, if you know?

A Definitely know that parts of it are. Whether, to what extent they would use all of it, I do not know.

Q All right. In any event with regard to what you've {2446} described earlier as appearing to be a code on J and I, is that the standard 10 code?

A Definitely not.

Q With regard to the entries referring specifically to 510, what is the entry for 510?

A 510 on both of these items, 510 is the code for bomb.

Q Do you have any way of knowing what that would refer to?

A No, sir.

Q With regard to some of the other entries here. We have 54. What is that?

A A 54 is a designation on both of these for pigs.

Q And would you have any way of knowing what that would be referring to?

A No, sir.

Q With regard to this code, we have a designation 527. What is that?

A Again 527 on both codes is the numeral designation for ammo.

Q What about 529?

A 529 in both cases is for caps.

Q And what about 528?

A 528 is an abbreviation I assume for dynamite.

Q From your knowledge and information as a law enforcement officer is there any connection between dynamite and caps?

A Yes, sir.

{2447}

Q And what are caps as they would refer to dynamite?

A Caps are usually referred to, you are referring to either an electrical or nonelectrical blasting cap which are used to initiate the actual detonation of the dynamite.

Q All right. With regard to this particular code there's a designation of 524. And what is that, what is the designation there for 524?

A 524 is a designation for roadblock.

Q All right. Moving on to another area then. With regard to your search of the Plymouth automobile did you find what appears to be a receipt of any kind, and I show you Exhibit No. 40-B?

A Yes. I did find this receipt in the Plymouth station wagon.

Q And where was it located in the Plymouth station wagon?

A The glove compartment, right-hand side of the dash. Well, dashboard inside the glove box.

Q What is the date again that this was found, if you recall?

A This was November 17, 1975.

Q Now, with regard to this particular item is it in substantially the same condition it was found, other than the laboratory processing chemical treatment?

A Yes, it appears to be.

Q All right.

{2448}

MR. CROOKS: Offer 40-B.

MR. TAIKEFF: No objection.

THE COURT: 40-B is received.

Q (By Mr. Crooks) Insofar as Exhibit 40-B is concerned, I would also hand you 40-C, which has been introduced in evidence by Mr. Van Pelt as a record of Bill Kouch Motors having sold a car to an individual identified as Mr. Peltier. And I would ask you to compare that 40-C with 40-B if you would, please.

A 40-B appears to be a Xeroxed copy of 40-C.

Q Does it appear that most of the entries on 40-C also appear on 40-B?

A Yes, sir.

Q Calling your attention particularly to the bottom of the signature of Mr., someone, Cisco I believe, slash Van Pelt, does that appear to be the same?

A Yes, sir.

Q All right.

MR. CROOKS: Your Honor, at this time we would re-offer Exhibit 40-C. I believe that it was offered subject to connecting up, and we believe that it is connected up at this time.

MR. TAIKEFF: No objection.

THE COURT: Very well.

The record may show the condition under which 40-C was {2449} received has been fulfilled.

Q (By Mr. Crooks) With regard to your examination of the recreational vehicle and the Plymouth station wagon did you make any observation concerning whether or not the two vehicles were equipped with any type of communication devices?

A Yes. At the time of my examination both of them were.

Q And what would be the nature of these communication devices?

A Both the station wagon and the recreational vehicle motor home were equipped with citizens band radios. The motor home was also equipped with what is referred to as a scanner.

Q What is a "scanner"?

A Scanner is a device whereby, depending on how it's equipped, you can pick up the transmissions of other short-wave transmissions. Such as police frequencies.

It will pick up more than one, whichever one is on the air at the particular time.

Q With regard to those citizen band radios in both vehicles, from your observation were they tuned to any particular channel, citizen band channel?

A Yes. At the time I conducted my search, both the citizen band radio in the motor home and the Plymouth station wagon were on Channel 11 and both were in the "on" position.

Q All right.

MR. CROOKS: I believe that's all we have, Your Honor.

{2450}

MR. TAIKEFF: I have a few questions, Your Honor.

THE COURT: You may question him.

MR. TAIKEFF: Thank you.

{2451}

CROSS-EXAMINATION

BY MR. TAIKEFF:

Q I'm placing the radio code before the witness.

Now these activities about which you've testified occurred in the month of November, 1975, is that correct, sir?

A Yes, sir.

Q And at the time that you first went out that day or evening to

perform these professional tasks, were you aware of the fact that there was a Federal investigation concerning the death of two FBI agents on the Pine Ridge reservation?

A Yes, sir, I was.

Q And did you learn of this only in connection with or in your capacity as an FBI agent?

A Learn of which, sir? The investigation, that there was an investigation?

Q That there was such an incident and there was a search on for certain people.

A I don't understand the question.

Q Did you hear about it on television?

A No. I'm sure it was a connection with my official capacity as an agent.

Q You never read about it in the newspapers?

A I'm sure I did.

Q It got rather widespread publicity during the months following June 26th, didn't it?

A That I'm not sure of.

{2452}

Q When you read about it, you read about it in Oregon, or were you somewhere else?

A IF I read about it, it would have to have been in Oregon.

Q Did you read about it?

A I do not specifically recall.

Q Did you ever hear it on the radio?

A I don't recall, sir.

Q Now there was a can of oil which was introduced into evidence while you were testifying. Do you recall that?

A Yes, I do.

Q May I assume that you acquired that can of oil before any fingerprint tests were performed on it as far as you know?

A Yes, sir.

Q And when you first acquired this can of oil, did it have any oil on the outside, on the surface of the can?

A Did it have any oil?

Q Yes. I think that's what I said.

A I don't recall.

Q Perhaps we can refresh your recollection.

I'm placing that exhibit before you, sir. Is that the can of oil I questioned you about a moment ago?

A This is the can of oil that I found; yes, sir.

Q Did it have a cap on it?

A That I don't recall.

Q Is there a cap in that plastic bag?

{2453}

A I don't see one; no, sir.

Q Do you see anything else besides the can of oil in there?

A There's a piece of paper.

Q Anything else?

A No, sir.

Q Put it near your nose and take a deep breath.

A (Indicating.)

Q Smell anything?

A Yes, sir. I smell oil.

Now where was that can of oil when you found it?

A That was under one of the dining room, dinette dining room seats in approximately the center of the motor home on the left-hand side.

Q Did it have a cap on it at that time?

A I do not recall it, sir.

Q If it did and you saw it, you would have taken that cap and put it in the plastic bag, wouldn't you have?

A More than likely; yes.

Q Now having seen it and smelled it and touched it, does it refresh your recollection that when you picked up the can underneath that place where you found it that there was the feel of oil on the outside of the can?

A No, sir, it does not.

Q Would you say that there was no oil on the outside?

A No, I could not.

{2454}

Q I'm placing before you, sir, an affidavit of William P. Zeller which has been marked previously Defendant's Exhibit 147 for identification and I've turned it to the page which shows paragraph 10 and the signature of Mr. Zeller and the subscription of the deputy clerk who took his oath. Would you read paragraph 10 to yourself.

A I've read it.

Q Are the facts stated in that paragraph true or false?

A They're false.

Q I now show you the corresponding portion of another affidavit of William P. Zeller. This one is marked Defendant's Exhibit 145 for identification. This one is dated differently. I show you paragraph 10 and ask you to look at that and put the same question to you: are the facts stated in that paragraph true or false as far as you know them?

A Paragraph 10?

Q Yes, sir.

A And the question is?

Q As far as you know the facts stated in that paragraph true or false?

A As far as I know it's true.

Q Now, sir, you have before you the radio code, is that correct?

A Yes, sir.

Q And the radio codes indicate a code 5-4 PIGS.

{2455}

A Yes, sir.

Q Right. Do you know what that means? Does that have any meaning to you?

A Well, I know I have an idea of what is referred to many times in reference to law enforcement people; yes.

Q And code 5-10 says BOMB.

A Yes, sir.

Q Would you say, sir, that that may indicate that those radio codes were employed by a person in the cattle business who invested in unsuccessful shows?

A I wouldn't think so.

Q Thank you.

MR. TAIKEFF: No further questions.

MR. CROOKS: We have nothing further, Your Honor.

THE COURT: You may step down.

The Court will recess at this time until 11:05.

(Recess taken.)

MR. ELLISON: Your Honor, so there is no misunderstanding on the record, because I understand at the current time there is, we would like to re-offer both Defendant's Exhibit 145 and Defendant's Exhibit 147.

MR. CROOKS: Could I see those.

Your Honor, the United States will object again for the same reasons we stated repeatedly. The witness, Mr. Zeller, testified extensively about this matter. He testified {2456} concerning the discrepancy and his correction of the discrepancy and we feel that these are, have absolutely no probative value for this case. Had he denied the discrepancy, then obviously they would be entitled to introduce these for impeachment purposes, but they have no probative value whatsoever in this case. The testimony was in accord with the correct statement of fact as is reflected by the later affidavit.

MR. TAIKEFF: Your Honor, I just want to briefly add one consideration for the Court. It is one thin for the jury to hear a witness say that a certain statement is correct, another statement is incorrect. It has a certain value to the defense to bring something like that out. But for the jury to see the entire document and the formality and care with which it is prepared and the great detail which it contains in addition to the key paragraphs is significant. It adds some weight. It adds some value to the fact that there is the discrepancy. It's the same thing as a party refusing to accept the stipulation and being permitted to do so under the law because the law recognizes that a party has a right to present to the finders of fact the entire picture including all of the relevant circumstances so that the jury cannot only have their conclusions and facts but it can have the flavor of the situation.

{2457}

This is the same kind of situation. To merely limit us to adducing the fact that there is an apparent contradiction is to deprive us of a

substantial part of the value of that evidence because the jury doesn't see the nature and the quality and the content of the document in which such a contradiction is contained or such a false statement.

THE COURT: I have not yet seen 147 so I'm going to continue to reserve my ruling.

The jury may be brought in.

MR. CROOKS: The next witness, Your Honor, will be Steven Hancock.

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

STEVEN L. HANCOCK

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CROOKS:

Q Mr. Hancock, would you again give your full name for the record, please.

A Steven L. Hancock.

Q Where do you live, sir?

A Portland, Oregon.

Q And what is your occupation?

A Special agent for the Federal Bureau of Investigation.

Q And how long have you been employed as an FBI agent?

{2458}

A Six and a half years, sir.

Q Calling your attention back to November of 1975 -- excuse me. What was your duty station?

A Portland, Oregon.

Q And what area in Portland does it, or in Oregon, excuse me, does the Portland office cover?

A IT covers all of the state of Oregon.

Q And do you recall during that period of time approximately how many agents were at the Portland office?

A In the Portland office, it's approximately 60.

Q Now directing your attention back to November 14 and the days following thereafter of 1975, did you have occasion to travel to Ontario, Oregon, for the purpose of examining certain evidence?

A Yes, sir, I did.

Q And can you describe how you became involved in this part of the investigation?

A We were conducting a fugitive investigation concerning Leonard Peltier. We received information that a mobile home and a station wagon were stopped in Ontario, Oregon by the Oregon State Police and it was believed that Leonard Peltier might have been one of the occupants. That occurred on the 14th, November 14th. And the next day --

Q Go ahead. I'm sorry.

A The next day I flew out to Boise and was transported by {2459} car to Ontario, Oregon.

Q When you arrived in Ontario, where did you go?

A I went to the Oregon State Police office.

Q And do you recall the approximate time that you arrived yourself?

A It was in the afternoon. I don't recall. It was after 12:00.

Q Insofar as you were concerned, were you present when the state police officers conducted a search of their own pursuant to a state search warrant?

A Yes, sir, I was.

Q And did you observe, for instance, some of the things that came out of the vehicle during that period of time?

A Yes, sir.

Q What part, if any, did you play in their search?

A I was an observer. I did not take any part in their search.

Q At a subsequent time was there a federal search warrant obtained?

A Yes, sir.

Q And do you recall when that was actually executed or a search made pursuant thereto?

A Was executed on November 17.

Q Do you recall whether the warrant was dated on the 17th or was it dated an earlier time than that?

{2460}

A I don't recall the date on the search. I did not take part in the federal search.

Q Insofar as the state search was concerned, were certain items

found which were turned over to you as a representative of the Federal Bureau of Investigation?

A Yes, sir.

Q And would you indicate what item, if any, that would have been?

A There were items, there were document items and weapons, rifles, handguns, shotguns. There were food stuff containers.

Q All right.

What specifically -- well, was there any type of boxes or containers which were turned over to you or made available to you?

A Yes, sir.

Q And what was the nature of that?

A There were tool boxes, cardboard boxes with ammunition in them.

Q During the course of your time in Oregon, did you open one of the tool boxes or was it opened in your presence?

A Yes.

Q And what was it? Give a description of this tool box.

A The tool box doesn't have any markings on it to identify it as the make but it's a brown tool box. It appears to be a tool box that's got a red shelf in it, inside shelf that you can {2461} pull out.

Q Who gave you that tool box?

A Edward Hanson of the Oregon State Police.

Q Upon examining the contents of the tool box, did you find anything which you retained as evidence?

A Yes, sir.

Q I'll show you Exhibit No. 35F and ask what they are.

A Those are six .357 magnum rounds which I observed in the tool box and upon, which was given to me by Mr. Hanson.

Q And insofar as these . 357 rounds are concerned, in 35F, are they the shells which were in the tool box?

A Yes, sir.

MR. CROOKS: United States offers 35F.

MR. ELLISON: We have no objection, Your Honor.

THE COURT: 35F is received.

Q (By Mr. Crooks) Now pursuant to your time in Ontario, were in photographs taken by either by you or the state officials?

A Yes, sir.

Q I hand you Exhibit No. 61 and ask if you can identify these.

A Yes, sir. I took those.

Q What are they?

A Photographs of the evidence that the Oregon State Police found during their search.

Q And these photographs were taken by you yourself?

{2462}

A Yes, sir. I recognize them as mine.

Q They are various vehicles depicted on page 1. Are these vehicles which were in connection in any way with the search?

A Yes, sir. Those are the vehicles.

Q And the subsequent pages are items which you observed having come out of the vehicles, is that correct?

A Yes, sir.

MR. CROOKS: The United States at this time will offer Exhibit No. 61.

MR. ELLISON: Your Honor, I'd like to ask a question or two on voir dire.

THE COURT: You may.

MR. ELLISON: Mr.Hancock, Agent Hancock, you testified that these were photographs of the weapons which were seized by the Oregon State Police in their search of the motor home, is that correct?

THE WITNESS: Yes, sir.

MR. ELLISON: Does that include all of the weapons seized by the Oregon State Police?

THE WITNESS: No, sir.

MR. ELLISON: In fact, it selectively excludes an AR15 from those photographs, doesn't it?

MR. CROOKS: Your Honor, I'll object to this. This is not proper voir dire. This is simply cross-examination.

MR. ELLISON: No, Your Honor. This exhibit is being {2463} offered, I believe, to show the weapons that were found by the Oregon State Police and turned over to the Federal Bureau of Investigation. It is a misleading exhibit in that it does not show an AR15 which was seized.

MR. CROOKS: Your Honor --

THE COURT: That would not render it inadmissible. That would be something that you could bring out on cross- examination.

MR. ELLISON: All right. Very well. I have no further questions. Subject to the record, we have no objection.

THE COURT: Very well.

Exhibit 61 is received.

{2464}

Q (By Mr. Crooks) All right, with regard to the photographs shown on Exhibit No. 61, counsel has anticipated my next line of questioning.

Were these all of the weapons that were taken out of the vehicles as depicted in these photographs, three, four and five?

A No, sir.

Q Were there other weapons removed?

A Yes, sir.

Q And do you recall the makes or types of any of these weapons that are not shown in the picture, but that you observed having been removed?

A (Examining) There were two more weapons that were found, Valmet 7.62 caliber -- semi-automatic weapons that were taken out. There was a .44 magnum.

Q Do you recall any other ones specifically at this time?

A And there was an AR-15.

Q So two of the weapons -- well, strike that.

I hand you Exhibit No. 40-A which has already been received in evidence through Mr. Zeller -- you stated a .44 magnum -- and ask you if you can identify that?

A (Examining) Yes, sir. That's the weapon.

Q That appears to be the one you are referring to not shown in the photograph?

A Yes, sir.

Q All right. With regard to the AR-15, I would show you {2465} Government Exhibit 34-AA, and ask you whether or not the AR-15 which you observed was similar to the one I am holding in my hand?

A Yes, sir, it is similar.

Q Now, is there a difference between an AR-15 and a M-16 rifle?

A Yes, sir.

Q To your knowledge what is the difference, if you know?

A The difference is that the AR -- or that the AR-15 is a semi-automatic weapon, and the M-16 has a selector and can fire semi-automatic or full automatic.

Q The M-16, is there any particular agency or part of our Government that would use that principally?

MR. ELLISON: Your Honor, I am going to raise an objection. I believe that the correct terminology is either a M-16 or AR-15.

MR. CROOKS: I stand corrected, I misspoke.

Q (By Mr. Crooks) The M-16.

A Would you repeat that, please?

Q With regard to the M-16, is that used by any particular part of our Government or any governmental organizations in particular, if you know?

A Yes, sir, it is.

Q And what would that be?

A It is used by the Services and by the FBI.

{2466}

Q All right, and with regard to the AR-15, this would be -- what I am showing you here is Exhibit 34-AA. This would be a semi-automatic model as opposed to an automatic?

A Yes, sir.

Q And this would be, I would assume, something that would be available for civilian use?

A Yes, sir.

Q As opposed to military or police units.

Now, with regard to the weapons that were taken out of that vehicle, do you recall anything from your examination of the various weapons and the weapons that were subsequently turned over to you by the Oregon State Police, did you observe anything unusual insofar as the serial numbers were concerned?

A Yes, sir.

Q And what was that?

A Some of the weapons obtained by Trooper Hanson had obliterated

serial numbers.

Q Do you recall the total number of weapons that you observed, and then my secondary question would be, do you know which of those or how many of those had obliterated serial numbers, and how many did not?

A There were 14 total weapons. There were eight that had obliterated serial numbers.

Q By "obliterated serial number", what do you mean, Mr. Hancock?

{2467}

A That the serial number on the weapon was filed off, and in some cases stamped over with a tool to make marks in it so that it could not be read.

Q In the ordinary case, once the serial number is taken off, could a weapon then be traced through NCIC or some other usual tracing method?

A No, sir, not usually.

Q All right. With regard to the weapons that you observed having been taken from the vehicle, could you state whether or not the AR-15, which class that fell into?

A That had an obliterated serial number.

Q All right. Now, Special Agent Hancock, during the course of your examination, you testified previously that you were furnished a considerable number of items by the State Police Force, is this correct?

A Yes, sir.

Q And with regard to the items, do you recall when you received the bulk of the -- or the documents or the items from the State Police, as best you can recall?

A The majority of the items were furnished to me by Edward Hanson on November 18th.

Q All right. Insofar as some of the items which were being recovered, did you consult with Special Agent Zeller for any reason?

A Mr. Zeller, yes.

{2468}

Q Or excuse me -- I am not sure of his official title. Mr. Zeller?

A Yes, sir.

Q And did you discuss various items with him?

A Yes, sir.

Q Now, you stated previously that you were there attempting to locate, if you could, fugitives from justice, is that correct?

A Yes, sir.

Q And in what context did you talk to Mr. Zeller?

A We were interested in information that he developed through his search that would assist us in identifying -- or just identifying the individuals that were in the homes, to verify that we had Federal fugitives.

Q And do you recall when you talked to Mr. Zeller, if the date comes to you?

A I talked to him on November 17th.

Q All right, and with regard to Special Agent Zeller, did he turn documents or things over to you at that time?

A Not on the 17th.

Q All right, and did he display items to you, if you recall?

A Yes, sir.

Q All right. Did you ask him -- and I go into this because counsel has raised it on cross examination of Mr. Zeller -- did you ask him whether or not from his initial investigation {2469} he could give you information concerning latent prints?

A Yes, sir.

Q And would you explain the context in which a discussion took place concerning that, and basically what was said?

A He had done a preliminary examination on some of the weapons, a .357 magnum that was found alongside the road, this .44 here (indicating), and several other -- I believe out at the ranchhouse he took some latent prints; and he advised me at that time he had not effected any identifications on his preliminary examination and that he was going to retain these items in evidence, take them to his laboratory where he could further photograph and process the evidence.

Q All right. Do you know, or did you see whether or not he had had, for instance, his fingerprint negatives ready for you when he had talked to you?

A No, sir. He hadn't taken any pictures at that time. That's why he took the evidence back to his lab in Salem, Oregon, was to take photographs of the impressions that he had developed on the different items.

Q So insofar as the information or the items you did discuss he gave you no information on the 17th which answered your question, would that be correct?

A Yes, sir.

Q All right. When the -- when the Federal search warrant was executed, were you there during any or all or part of that {2470} search, if you recall?

A I was present during -- off and on during the Federal search, but I didn't take part in the Federal search.

MR. CROOKS: All right.

(Counsel confer.)

MR. CROOKS: That completes the direct examination, your Honor.

CROSS EXAMINATION

BY MR. ELLISON:

Q Special Agent Hancock, do you read your 302's prior to testifying to refresh your recollection?

A Yes, sir.

Q Did they refresh your recollection as to the events which you participated in in November, 1975?

A Yes, sir.

Q At the time you went out to Ontario Oregon, in November of 1975, were you aware that the FBI was conducting an investigation of the shooting deaths of two agents?

A Yes, sir.

Q And you learned of this in your official capacity, you were aware of this in your official capacity as an FBI Agent?

A Yes, sir.

Q Did you ever read or hear or see any news reports around the time of the incident on June 26th, 1975?

A The newspapers, yes.

{2471}

Q All right, and was this while you were stationed in Oregon?

A Yes.

Q By the way, Agent Hancock, what is the population of Portland? I believe you said you were stationed in Portland?

A Yes, sir. I don't really know.

Q Do you have an approximate figure?

A No, I don't know.

Q About 350,000?

A That sounds right.

Q O.k. Do you have any idea what the population figure of the entire State of Oregon is?

A No, I don't.

Q Just for purposes of clarification, on direct examination you were asked by Mr. Crooks as to the agencies, which Federal agencies would use M-16's?

A Yes, sir.

Q And the M-16 is an automatic weapon?

A It can be, semi-automatic or automatic.

Q But it can fire automatic?

A Yes, sir.

Q And the FBI does use M-16's?

A Yes, sir.

Q Now, you also testified on direct examination concerning obliterated serial numbers.

{2472}

To your knowledge are you capable -- is the FBI capable of telling, say within the period of a few weeks or perhaps longer, as to when a weapon has its serial numbers obliterated?

A I don't know.

Q Did you find any evidence during your search that the people who were in the mobile home and the Plymouth station-wagon obliterated those serial number on the weapons which you found?

A I didn't conduct any search.

Q All right. Well, are you aware of any evidence that the people in that mobile home obliterated the serial numbers on the weapons found, say, in lieu of having gotten the weapons in that condition?

A We had evidence that we -- we had evidence that we collected that we believed was used, yes, on the weapon.

Q All right, but do you have any evidence that the people who were

in the mobile home and the Plymouth stationwagon used whatever tools or whatever you found to obliterate those serial numbers?

A No, sir.

Q Now, I believe you testified on direct examination that when you went out to Ontario, Oregon, that you went there believing that Leonard Peltier might have been in one or both of those vehicles?

A Yes, sir.

{2473}

Q And you went there seeking evidence to in fact solidify your belief?

A Yes, sir.

Q And you were present during the examination by the Oregon State Patrol?

A Yes, sir.

Q Of the mobile home, and the Plymouth stationwagon?

A Yes, sir.

Q I believe that you were shown on direct examination an AR-15, is that correct?

A Yes, sir.

Q And I believe you also testified that an AR-15 was found in the mobile home by Oregon State Patrolmen?

A Yes, sir.

Q And when you took the photographs which are depicted in Government's Exhibit 61-A, did you take a photograph of the AR-15? You can move the .44 to look at the exhibit.

A (Examining) It is not in this photograph.

Q It is in other photographs?

A (Examining).

Q Please cheek the entire exhibit, Government's Exhibit 61A.

A (Examining) No, sir, it is not on this photograph, or these photographs.

Q You remember taking photographs of that AR-15 though, don't you?

{2474}

A I took a photograph of it, yes.

Q You were trying to be, in your photographic examination, you were trying to be as thorough as you could?

A Yes, sir.

Q And you turned those photographs over to the U. S. Attorney's office?

A Yes, sir.

Q Did you actually put together Government's Exhibit 61-A, or did you take --

MR. CROOKS: (Interrupting) I will object. Apparently counsel is trying to accuse our office of hiding some evidence. This is an improper question to this witness, and it is improper in any event. I object.

MR. ELLISON: Your Honor, I am not trying to accuse anyone. I am simply trying to ascertain some facts in connection with this exhibit.

MR. CROOKS: Your Honor, it is obvious that this witness had nothing to do with putting this book together. That was done by trial counsel. It is an unfair question to this witness, and it is an unfair and incorrect innuendo to our office and I resent it, and I object to it.

MR. ELLISON: I was trying to find out who actually prepared the exhibit. The information has just been furnished, so I will move to another area.

THE COURT: Very well.

{2475}

Q (By Mr. Ellison) The AR-15 was turned over to you by Trooper Hanson, is that correct?

A Yes, sir.

Q As well as the .357 magnum which is Government's Exhibit 35-A?

A I would have to look at it.

Q All right. I will show it to you.

(Counsel confer.)

{2476}

MR. ELLISON: I will withdraw my last question for the moment.

Q (By Mr. Ellison) Do you recall how many photographs you took of the AR-15?

A No, sir, not exactly.

Q Did you take more than one?

A I took maybe one or two.

Q All right. And these photographs were turned over to the U.S.

Attorney's office?

A Yes, sir.

Q All right. I show you what has been marked as Government's Exhibit 35-A. Have you ever seen that weapon before?

A Yes, sir.

Q And this weapon was turned over to you by Oregon state patrolmen Hanson?

A Yes, sir.

Q And that particular revolver was turned over to you on November 18th of 1975; is that correct?

A Yes, sir.

Q Sergeant Zeller didn't turn that pistol over to you, did he?

A No, sir.

Q I'd like to return for the moment to the AR-15 which you found, or which was found in the mobile home and turned over to you by Criminal Investigator Hanson.

{2477}

I believe you testified a few moments ago that you photographed this AR-15?

A Yes, sir.

Q And I believe you also testified that when you went out to Oregon that you were aware that the FBI was conducting an investigation into the shooting deaths of two FBI agents in Oglala on June 26th, 1975?

A Yes, sir.

Q In fact when you saw this AR-15 little bells started going off in your head, didn't you, in connection with that incident?

A No, sir. I wasn't familiar with the weapon.

Q Excuse me?

A I wasn't -- bells didn't go off. It didn't mean anything to me.

Q Didn't have any special interest to you at all, is that what you are saying?

A Other than it had an obliterated serial number.

Q It had an obliterated serial number?

A Yes, sir.

Q In fact eight other weapons?

A Yes, sir.

Q And you arrived on November 15th?

A Yes, sir.

Q Tell me, Agent Hancock, were the weapons which were turned over to you by the Oregon State Police to the FBI lab firearms {2478} division?

A Yes, sir, they were.

Q And what was the date that the weapons were sent?

A I don't recall the date they were sent.

Q Do you remember the month that they were sent?

A They were sent the next month.

Q The next month. In December?

A Yes, sir.

Q But yet in November you sent the AR-15 to the FBI lab, didn't you?

A Yes, sir.

Q Although it didn't arose any particular interest on your part in connection with the shooting deaths of the two FBI agents?

A Not to me. Until I was informed by another agent that we might be interested in that particular weapon.

Q All right. That was a few days after you went to Ontario?

A Yes.

Q So if you personally did not have an interest, the FBI office in general in Oregon did have an interest?

A Yes. I became interested upon being informed that it might be pertinent.

Q That an AR-15 was believed to have been involved in that incident in some way?

A Yes.

{2479}

Q Okay. Agent Hanson, what is a 302? I'm sorry, Agent Hancock, what is a 302?

A It's a report, or a record of an agent's investigation.

Q all right. Does it reflect activities of an agent?

A At times, yes.

Q All right. Doesn't it also reflect the results of interviews by

an agent?

A Yes, it does.

Q In fact it includes anything that you would like to make a record of?

A Yes, sir.

Q Did you have an interview, or I believe you testified that you had an interview with Sergeant Zeller on November 17th, 1975?

A Yes, sir.

Q And in fact you dictated a 302 with reference to that interview with Sergeant Zeller?

A Yes, sir, I did.

Q What was the purpose of dictating that particular 302 on November 17, 1975?

A me purpose of that was to record for our information what evidence that he was taking with him and -- not taking with him, not turning over to us, back to his lab for further examination.

{2480}

Q All right. But at the time you dictated the 302 on November 17, 1975 was it your intention to record all of the information that Sergeant Zeller gave you as accurately as you could?

A Yes.

Q How long after the conversation with Sergeant Zeller did you dictate this 302?

A I don't recall the date it was dictated.

Q I show you what has been marked as Defendant's Exhibit 144 for identification and see if this refreshes your recollection as to the date you dictated the 302.

(Witness examining Defendant's Exhibit 144.)

A Yes, sir. It was -- the date dictated is indicated at 11/21/75.

Q All right. And did you dictate that 302 from memory, or did you take notes during the interview?

A Partially from memory and partially from notes.

Q Is it fair to say that your recollection of that interview is, was a little clearer and fresher when you dictated this on 11/21/75 than it is today?

A At that time it would be.

Q All right. And this 302 was maintained as a record of the FBI, was it not?

A Yes, sir.

Q Part of the ongoing investigation?

{2481}

A Yes, sir.

Q And I believe you've already testified that you read 302's prior to testifying in court?

A Yes, sir.

Q Did that include this particular 302?

A Yes, sir, it did.

Q All right. Defendant's Exhibit 144 which you've just looked at?

A Yes, sir.

Q Okay. Were there things that you remembered after reviewing this particular 302 which you didn't recall prior to reviewing it?

A (No response.)

Q I believe you testified it refreshed your recollection?

A Yes, sir, it did.

MR. ELLISON: Your Honor, I would offer Defendant's Exhibit 144 pursuant to Rule 612 that it was a writing used to refresh this witness's recollection prior to his testifying in court, and which he referred to while testifying.

MR. CROOKS: Your Honor, we object to this. This has gone again and again and again with these 302's, and we object to it and we object to the repetition of it.

Your Honor, there's no showing that this document is in any way inconsistent with the witness's testimony on the stand; and unless used to impeach him or for some other purposes, {2482} it does not come under 612 or any other provisions. Counsel is apparently attempting again to put something into evidence which is cumulative to the witness's oral testimony. The witness's oral testimony is the evidence in this case, not prior statements, and we object to it.

MR. ELLISON: Your Honor, Rule 612 says nothing about impeachment. Simply states that if a witness uses a writing to refresh his memory for

the purpose of testifying, either one, while testifying or, two --

MR. CROOKS: Your Honor, excuse me.

MR. ELLISON: Excuse me, Mr. Crooks. I'd like to finish my argument.

MR. CROOKS: If you want to argue law --

THE COURT: You don't need to read the rule. I have the rule here in front of me.

MR. ELLISON: Very well, Your Honor.

THE COURT: The objection is sustained.

Q (By Mr. Ellison) 302's, sir, serve a very important function, don't they?

A Yes, sir.

Q And as a general rule they are prepared carefully and accurately?

A Yes, sir.

Q Now, you did not type what has been marked as Defendant's Exhibit 144, did you?

{2483}

A No, sir, I didn't.

MR. ELLISON: I'm handing the witness Defendant's Exhibit 144.

Q (By Mr. Ellison) After a 302 is typed do you generally review the 302 to check its accuracy?

A Yes, sir.

Q And if the 302 is accurate you initial it; is that correct?

A Yes, sir.

Q And did you in fact initial what has been marked Defendant's Exhibit 144?

A Yes, sir.

Q And you reviewed that 302 carefully as to its accuracy before initialing it?

A Yes, sir.

Q Now, on direct examination Mr. Crooks went into the fact that on November 17th when you had a conversation with Sergeant Zeller that he was talking to you about a preliminary examination as far as particular items, such as the .44 Ruger, which is before you marked as Government's Exhibit 40-A; is that correct?

A Yes, sir.

Q And you testified that this was a preliminary examination comparing fingerprints, known fingerprints with those prints which were allegedly found on various items including the .44 Ruger, Government's Exhibit 40-A?

A Yes, sir.

{2484}

Q Now, Sergeant Zeller advised you, did he not, that he had compared the latent fingerprints he discovered on a .357 magnum, the one by the road, a .44 magnum, a microphone from the Plymouth station wagon and a microphone from the Dodge motor home, a window on a mobile home, outside prints on the station wagon, were the fingerprints of Leonard Peltier and he determined that they were no identical, is that true?

A Yes, sir.

Q Now, Sergeant Zeller was retaining various items including the .44 for photographing purposes and for further processing; is that correct?

A That's right.

Q He mentioned nothing in this 302 about it that his conclusions that he reached and told you during that interview were of a preliminary nature, did you? You didn't record it in your 302?

A I don't recall whether he said that or not.

Q Okay. In fact wasn't Sergeant Zeller instructed to be checking the prints that he found particularly for Leonard Peltier because you believed when you went out to Oregon that Leonard Peltier was in the mobile home?

A Yes. We asked him if he would.

Q I just have one final question, Agent Hancock.

If you had no special interest with regard to the AR-15 which was found by Oregon State Police and turned over to {2485} you personally how come that a AR-15 is missing from the group photographs depicted in Government's Exhibit 61-A?

MR. CROOKS: Your Honor, I'll object to this. It's been asked and answered and it goes to the same improper inquiry of this witness of what I decided to put into that book.

MR. ELLISON: No, Your Honor.

MR. CROOKS: It's an improper and unfair question.

MR. ELLISON: Your Honor, I'm not referring --

THE COURT: The objection is sustained. You can ask him if he knows how come it was left out as a foundation to the next question.

Q (By Mr. Ellison) Id like you to look at page 3 of Government's Exhibit 61-A. Do you see that photograph before you, the photograph --

THE COURT: For the record would you check the exhibit number.

MR. ELLISON: Yes. Government's Exhibit 61-A.

THE COURT: Would the witness check it.

THE WITNESS: It says 61.

MR. ELLISON: 61. I apologize.

Q (By Mr. Ellison) Page 3 of Government's Exhibit 61, do you see a number of photographs of weapons?

A Yes, sir.

Q It's the middle photograph of what group of photographs, {2486} a group of weapons?

A Yes, sir.

Q I ask you again with reference to that particular photograph if you had no special interest in the AR-15 how come it was missing from that group of photographs?

A It had not been found yet.

Q When was that AR-15, when was that photograph taken?

A That was the first day that the OSP conducted their search. That would be the 15th.

Q Are you aware that the AR-15 was hidden in any particular location in the mobile home?

A I don't know. I didn't search, I didn't locate it.

Q Isn't it a fact that all of those weapons that were found in the mobile home were laid out in various order, various categories, various groups on that first day and that you took a photograph of that AR-15 on that first day?

A I don't recall whether it was photographed on the first day or the second day.

Q But it's not in those photographs, is it?

A These, the picture here, were these weapons, are all the weapons that we had at that time and that's when that photograph was taken.

Q And you know how large an AR-15 is?

A Yes, sir.

Q And it was, it's your testimony that it was hidden and had {2487} not been found yet?

MR. CROOKS: Your Honor, I'll object to this. This is argumentative and repetitious.

THE COURT: Sustained.

MR. ELLISON: I have no further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. CROOKS

Q Do you still have, what, Defense Exhibit 144 in front of you? I believe the 302 form.

A Yes, sir.

Q With regard to parts of that, counsel read into the record apparently the last paragraph. With regard to that would you relate the paragraph prior to the paragraph counsel read.

A "Zeller advised that upon completion of his examination of these items he would make them available to the FBI, Portland Oregon".

MR. CROOKS: No further questions.

MR. TAIKEFF: May we approach, Your Honor?

THE COURT: You may.

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

MR. TAIKEFF: I'd like, before this witness is excused, to inquire of the Government whether they know if in giving us the 3500 material they have given us all of the Oregon police reports concerning the search and what was found and when?

{2488}

MR. CROOKS. I don't -- I had understood we did myself. But I understand that I am wrong, that we do not, because we never had them ourselves. We have given everything that the FBI gave us.

MR. TAIKEFF: Okay. We're sure that if we didn't get it it was because the Government did not have it, and question was not asked.

MR. CROOKS: We still don't.

MR. TAIKEFF: The question was not asked to suggest any impropriety.

At this time, Your Honor, we would ask that the witness not be excused and that the Government endeavor to get all of those Oregon State Police

reports concerning the search and discovery of the weapons, and we have an opportunity to examine those documents before we indicate whether or not we wish to excuse this witness.

MR. CROOKS: Well, I'm not sure I concur with that suggestion. I offered the other day, if they wanted a copy of, for instance, Mr. Zeller's notes or Mr. Hanson's, they could have asked for them and gotten them. I don't know, for instance I think Mr. Zeller and some of those guys have gone back and taken their notes with them. I don't have access to those document. The police reports are not our exhibits. We've turned over to the FBI materials which we have and I certainly don't want to assure the Court that we {2489} are somehow responsible for accounting for Oregon State Police internal documents.

MR. TAIKEFF: We're not asking them to do that.

MR. CROOKS: I assume they were available to counsel, and if the Oregon people are still here we have no objection to counsel getting copies from them. But I don't know that I should assume any responsibility for that.

MR. TAIKEFF: This witness has just given us testimony that makes the viewing of those documents important. The Government, we trust, can make an inquiry and get them immediately, either by mail or otherwise. We don't have the power to do that.

MR. CROOKS: I'm not sure that we're talking about something that comes under 3500 anyway. I'm not sure exactly what you are asking for.

MR. TAIKEFF: The very least, discoverable under Brady, at the very least if it isn't discoverable under 3500.

This witness has Just offered an explanation for the absence of a certain object from a group photograph which would have included that object had it been found at that time. His answer was that that object, namely the AR-15, was discovered at a later time. And you thought it so significant that for the first time in the course of this trial you laughed out loud in this courtroom.

Now, I think that it is pretty clear that the Oregon {2490} papers may tell us when in fact that AR-15 was found relative to the other findings. All we ask the Government to do is to do its duty and make the request. If they don't comply with your request then of course you're not

responsible.

But if you have the access to these documents by merely asking for them, and my experience shows that when an assistant United States Attorney under circumstances such as these makes such a request you get the documents immediately.

And then we ask that you turn them over for our examination.

MR. CROOKS: I'm not sure we've got any obligation to turn this type of document over for your examination in any event. But the witness's testimony was that at the time that photograph was taken the AR-15 was not found. He doesn't know when it was found.

MR. TAIKEFF: Well, very good. We won't have to find out when it was.

MR. CROOKS: It's immaterial. What does that have anything to do with him?

MR. TAIKEFF: It may impeach him and also explain something significant of the absence of that gun from this group photograph.

MR. CROOKS: Well, our position simply is that counsel had opportunity to get those notes and so forth. If the Court, we'll leave it in the Court's discretion, whatever the Court {2491} wishes to do we will attempt to comply. But I don't think that we have any obligation in this regard.

These notes and so forth were available to counsel when these witnesses testified. I'll leave it at that.

THE COURT: Specifically what are you requesting?

MR. TAIKEFF: There were reports written by the Oregon State Police in connection with the search and what was found. We believe those reports will show that the AR-15 was found along with the other weapons. We were not given those materials as part of 3500 and we make no specific complaint about that because the relevance and significance of those documents did not become apparent until this witness gave his testimony on the day following the testimony of the Oregon State Police.

Now, to begin with we should have gotten those documents as part of 3500, but at the time it was of no significance to us. Now it becomes significant. Now we ask for it, either as part of the 3500 material belatedly without any complaints about the Government not giving it to us. But we do want it. And since we're entitled to it we want it now.

Or in the alternative in Brady v. Maryland, because it most likely contains information which will explain that photograph and the testimony that this witness gave about that photograph. He cavalierly explained that that weapon {2492} was found late and we don't believe it's true. We believe they were all found at the same time.

MR. CROOKS: Well, I certainly accede to counsel's representation that in any event this would be Brady. Certainly if counsel has read the Agurs case, whether that weapon was found at the exact same time or later is completely collateral to any issue in this case. And I don't, I certainly don't think that arises the raising of reasonable doubt as to this man's guilt. That's what counsel is saying by quoting Brady under the Agurs. This isn't a Brady question at all.

MR. TAIKEFF: Your Honor, someone apparently has misread that most recent Supreme Court case. That was a case in which no request was made. We're making the request now. And that takes care of the aspect of the Agurs case that you just referred to.

MR. CROOKS. I don't propose to get into an argument.

THE COURT: What you are asking counsel to do is make an inquiry, is that it?

MR. TAIKEFF: If it's possible for the Government to obtain those reports, to ask for them whether they're here or they have to be mailed from Oregon so that we may see them. And then in the meantime this witness not be excused.

MR. LOWE: May I just add something because I think there may be some ambiguity in what Mr. Crooks said. I think {2493} when he said that the Government doesn't have them, I think he said the, you sense that perhaps the FBI has them in their files and maybe amongst some of the information with the FBI has not turned over or screened out.

Now, I'll tell Your Honor that last summer we hit this. Specifically that there were materials that the FBI had which were not placed in the possession of the U.S. Attorney because the FBI did not think it was relevant and may have been justified in making that judgment.

All I'm saying is that the second part would be for them to make inquiry, whether the FBI does have these documents or copies of them in their files, wherever they keep them.

THE COURT: It seems to me that what you are talking about insofar as retaining this witness, you are talking about rebuttal evidence.

MR. TAIKEFF: No. It may refresh his recollection, Your Honor. He may change his testimony.

MR. CROOKS: Somebody else's record?

MR. TAIKEFF: Your Honor, anything may be employed to refresh a person's recollection, even a fragrance of perfume.

THE COURT: I will ask the Government to make an inquiry to find out if that information can be obtained.

MR. CROOKS: I assume it would be Mr. Hanson. I think {2494} he's still here, and if he's here and he's got them I will make the inquiry. But if that's the Court's desire --

THE COURT: I will deny the request to hold this witness beyond today.

MR. TAIKEFF: Then we want him held as a defense witness in that case, Your Honor.

MR. LOWE: Subject --

MR. TAIKEFF: He doesn't have to remain. He has to be available to us.

THE COURT: Well, I don't think we've turned you down yet, except in one case where you attempted to subpoena the former Attorney General of the United States.

MR. TAIKEFF: And we acquiesced in that quite readily, Your Honor.

MR. CROOKS: Well, to that request United States will certainly advise Special Agent Hancock to be available for possible recall by the defendant; and there certainly is no need for a subpoena or anything like that. He'll be available just as any other FBI agent would.

THE COURT: Very well.

MR. TAIKEFF: Thank you, Your Honor.

{2495}

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

MR. ELLISON: Is the government finished with his redirect?

MR. CROOKS: Yes, I am.

MR. ELLISON: We have no further questions at this time.

THE COURT: You may step down.

MR. ELLISON: I'd like to keep Special Agent Hancock here pursuant to the discussion we had.

MR. CROOKS: Can we approach the bench one more time, Your Honor?

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

MR. HULTMAN: Your Honor, I have no objection and certainly will accommodate Counsel but I'm not going to leave people sitting around for a week at a time.

MR. TAIKEFF: We don't require he be present. Subject to call.

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

MR. CROOKS: The United States next calls Mr. Gerald Young.

GERALD JAMES YOUNG

being first duly sworn, testified as follows:

{2496}

DIRECT EXAMINATION

BY MR. CROOKS:

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

A Gerald James Young.

Q And where do you live, Mr. Young?

A Vancouver, British Columbia, Canada.

Q What is your occupation?

A I'm a member of the Royal Canadian Mounted Police.

Q How long have you been a member of the Royal Canadian Mounted Police?

A 28 years.

Q Would you explain for the jury just generally what the overall or general jurisdiction of the Royal Canadian Mounted Police is?

A We're responsible for the criminal code of Canada, provincial statutes and we have authority as peace officers throughout Canada.

Q As part of your functions, official functions as a member of the Royal Canadian Mounted Police, do you have occasion to take fingerprints impressions of individuals?

A Very infrequently, but yes.

Q I hand you Exhibit 38A and ask if you can identify that as a document

you've seen before?

A Yes.

Q And what is that?

{2497}

A These are fingerprints which I took from a man known to me now as Leonard Peltier on the 12th day of February, 1976 at Vancouver, British Columbia. It bears my signature. IT's written in my handwriting and bears the signature of Leonard Peltier which was placed on this form in my presence.

Q When was the document prepared?

A On the 12th day of February, 1976.

Q And I would ask you whether or not the individual who gave you those fingerprints is in the courtroom today?

A Yes. I see him seated. He did not have a moustache, though, as I recall, at that time.

Q You do see him seated. And where is he seated?

A He's wearing a rather colorful black shirt with stripes across the --

MR. LOWE: Identification is acknowledged in the courtroom, Your Honor.

THE COURT: Very well.

Q (By Mr. Crooks) Would you just very briefly relate to the jury the process by which the ink impressions are made which appear on that exhibit?

A Yes. I took what we call a portable inking pad with me to the provincial courthouse in Vancouver and with the cooperation of Leonard Peltier I inked his fingers on this pad by rolling the fingers toward the body and placing the impression on the fingerprints form.

{2498}

Q And there are divisions in the form, are there not, for individual fingers?

A For each finger on each hand; yes.

Q And do the small blocks on Exhibit 38A represent the impression of the finger indicated in that particular block?

A That's correct.

MR. CROOKS: United States will offer Exhibit 38A.

MR. LOWE: May I just have a moment to look at it, Your Honor?

THE COURT: You may.

MR. LOWE: May we approach the bench.

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

MR. LOWE: I gather that what the government wants really is the prints because the writing down here we find objectionable and particularly point out these words right in the last line. I don't know the government is really interested in introducing those. We'll stipulate, agree this was the fingerprint set taken by him on that date, will be no challenge of that.

MR. CROOKS: Counsel is completely correct. The only purpose of putting this in is the fingerprints. If Counsel is willing to stipulate these are in fact Leonard Peltier's fingerprints, then we would suggest simply cutting or blocking off the bottom part below the signature line and {2499} we have no problem with that.

THE COURT: Very well.

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

MR. LOWE: Your Honor, the defendant has no dispute over the fact this is the set of Mr. Peltier's prints and subject to the record, we have no objection to it being admitted as such and there is no dispute about that being a set of his prints.

THE COURT: Very well, what is the number of that exhibit?

MR. LOWE: Exhibit 38A.

May we approach the bench?

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

MR. LOWE: I believe we would so stipulate.

MR. CROOKS: I just state if Counsel could stipulate because if not then this becomes important to this man's identification.

The only thing I have, I was going to cut it off, it occurred to me maybe this is this man's record. I would prefer to cover it.

MR. LOWE: If you send it back to the jury, I'm not sure that's a good idea, they may become --

MR. CROOKS: Can ask the witness.

{2500}

MR. LOWE: We can work it out to the satisfaction of the Court. There is no dispute these prings, the question of what to do about the bottom is not necessary to deal with this witness on the witness stand.

MR. CROOKS: The only concern I have, I might be destroying his evidence or something.

MR. LOWE: We can work that out after he's off the witness stand.

THE COURT: It will be received.

MR. LOWE: The top.

THE COURT: The top.

MR. LOWE: Roughly 60 percent.

THE COURT: Counsel will work out with the witness how the lower half may be excised.

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

MR. LOWE: We have no questions for this witness, Your Honor.

THE WITNESS: May I be excused, Your Honor?

MR. CROOKS: Could you consult with us.

With the stipulation of Counsel, 38A being the fingerprints of Leonard Peltier, the United States will detach the descriptive data which is part of the exhibit, if that's satisfactory with Counsel.

THE COURT: Counsel, will you respond to the inquiry {2501} of the United States Assistant U.S. Attorney.

MR. LOWE: I'm sorry.

THE COURT: He just wants for the record your concurrence in removing the lower part of that exhibit.

MR. LOWE: We do concur it contains matters which don't relate to the trial in any way.

THE COURT: Very well.

MR. CROOKS: The United States will next call Mr. James Eugene Mulholland.

THE COURT: Is the testimony of the next witness going to be brief?

MR. CROOKS: No. It will be rather extensive, Your Honor. Mr. Mulholland is the fingerprint expert who will be dealing with numerous exhibits.

THE COURT: The Court will recess at this time then until 1:30 except that if there are any matters to be considered by the Court out of the presence of the jury, the Court will convene at 1:20 for that purpose. Court is in recess.

{2502}

AFTERNOON SESSION

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

THE COURT: The jury may be brought in.

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

(Counsel confer.)

THE COURT: You may proceed.

MR. CROOKS: If it please the Court, the United State would call Mr. Eugene Mulholland.

EUGENE MULHOLLAND, JR.

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. CROOKS:

Q Mr. Mulholland, would you give your full name again for the record, please?

A My name is Eugene Mulholland, Jr. Mulholland is spelled -- (spelling) M-u-l-h-o-l-l-a-n-d.

Q Mr. Mulholland, where do you live?

A I reside in Woodbridge, Virginia.

Q And where do you work?

{2503}

A I am employed by the Federal Bureau of Investigation.

Q And in what capacity are you employed by the Federal Bureau of Investigation?

A I am a fingerprint specialist.

Q Now, where is your official headquarters or office at?

A Washington, D.C.

Q And is that in the new building, I believe the J. Edgar Hoover Building, or is it another building?

A It is the J. Edgar Hoover Building.

Q All right. Do you have an official title other than just fingerprint examiner?

A My official title is fingerprint specialist.

Q All right, and what are your official duties as a fingerprint specialist?

A As a fingerprint specialist, I examine items for the presence of latent prints. I compare latent prints with the known prints of an individual or individuals; and when asked to do so, to testify to my findings.

I conduct fingerprint schools at our academy in Quantico, Virginia, and throughout the United States for members of law enforcement agencies; and I am a member of the FBI's disaster squad which, upon request, will go to the scene of a disaster and aid in the identification of the disaster victims.

Q All right. How long have you been in the fingerprint aspect of the Federal Bureau of Investigation?

{2504}

A I have been employed in fingerprint work for approximately 19 and one-half years.

Q All right. Could you explain to the jury, first of all, what is referred to by the expression "inked fingerprint"?

A On the palmar surfaces of the hands are raised portions of skin known as fringe ridges. An inked fingerprint is an outline of these ridges made on a fingerprint card by first applying a thin film of printer's ink to the ridges and then pressing and rolling the fingers onto the fingerprint card.

Q All right. You used the term, "latent fingerprint". Would you explain what that is and what is meant by that term?

A The term "latent print" refers to those prints that are left on the surfaces of objects when they are touched or handled.

The friction ridges contain pores which exude perspiration, and this

perspiration will coat the surfaces of the friction ridges; and when an object is touched or handled, this perspiration and other moisture is transferred to the object, leaving an outline of these friction ridges.

These prints are generally invisible to the naked eye and require some type of developing to make them visible for comparison purposes.

Q From what you have just said, I would assume, therefore, that whether an individual touching an object would leave a fingerprint would depend to a great extent on the amount of {2505} perspiration that was on his fingerprints?

MR. LOWE: I will object to the leading questions. This man is an expert. He can answer simple questions. He is quite fluent with the English language in explaining his expertise.

THE COURT: Sustained.

Q (By Mr. Crooks) Well, does it make a difference as to whether or not a fingerprint is retained as to the amount of perspiration on the hand?

A There would certainly have to be some perspiration or other moisture on the fingers to leave a latent print, yes.

Q All right. Now, insofar as the art or science of fingerprint examination, would you explain just very briefly how fingerprints are compared and how identifications are effected from the comparisons?

A Fingerprints are compared by examining the corresponding areas of two impressions and determining whether the same ridge characteristics are present in both impressions.

When the same ridge characteristics are present in both impressions, then an identification has been effected.

Q All right. What are the -- and perhaps you have already covered part of this -- what are the basic factors which you then use as a means of identification?

A Well, there are two basic factors used. No. 1 is that the friction ridges which are present on the surfaces of the {2506} hands at the time of an individual's birth remain constant throughout the individual's entire natural life and will not change except due to severe injury or unnatural growth until decomposition sets in after death; and secondly, that no two prints of different individuals nor the different prints of the same

individual have ever been found to be alike in all respects.

Q Now, in your work as a fingerprint specialist, have you been called upon to testify as an expert in court before this occasion?

A Yes, I have.

Q Could you give us any rough estimate of how many times you have testified and qualified as an expert in fingerprints?

A It would be in excess of 100 times.

Q Now, going specifically to the facts of this case, I would hand you what has been marked, received into evidence and stipulated by counsel as being the fingerprints of Leonard Peltier, identified as Exhibit 38-A. I would ask if you have seen that before and employed it in any respect with regard to an examination which you made in this case?

A Yes, I have seen it before.

Q And is that a fingerprint card which you have employed in the work that you have done on this case?

A Yes.

Q Now, I would like to hand you several items. First of all, {2507} I will hand you Government's Exhibit 35-A which has been identified and stipulated as being the service revolver of Special Agent Jack Coler. I hand you the bag marked 38-B, in which the previous testimony has indicated 38-A was found; and Exhibit 38-E, which previous testimony has indicated was a latent fingerprint raised from 38-B.

I would ask if you have examined any or all of these items during the course of your investigation?

A (Examining) I have examined exhibit -- Government Exhibit 38-E.

Q All right. Now, with regard to Exhibit 38-E, have you compared the fingerprint impression found on that exhibit with the fingerprint card which you have before you, on which I believe the number is 38-A?

A Yes, I have.

Q And would you basically just state how you examined the exhibit, and you know, some of the things that you did or were looking for before you get into the actual comparison, if any, of the exhibits?

A Well, I compared the latent print appearing in Government Exhibit 38-E with the inked prints appearing on Government Exhibit 38-A; and it is my opinion that the latent print appearing in Government Exhibit 38-E

and the left thumb print appearing on Government Exhibit No. 38-A are impressions of one and the same finger.

{2508}

Q All right. Insofar as your comparison of 38-E which has been previously identified as being the latent fingerprint shown and circled on 38-B, did you prepare a diagram or a schematic with which you could demonstrate the process by which you reached your conclusion?

A Yes.

Q And could I have that, please?

A (Handing).

Q I now hand you what has been marked as Exhibit 38-C, and ask if you can identify that, what is it?

A Government Exhibit 38-C is a set of charted enlargements, illustrating the identification which I effected of the latent print appearing in Government Exhibit 38-E, and the left thumb print appearing on Government Exhibit 38-A.

Q And are these photographic, true and correct photographic representations of the two prints you previously described?

A Yes.

Q And was there an exhibit which was prepared by you in your office, either by yourself or under your direction and control?

A It was.

MR. CROOKS: The United States will offer Exhibit 38-C for demonstrative purposes.

(Counsel examines document.)

MR. LOWE: Subject to the record, your Honor, and for {2509} examination, we have no objection.

THE COURT: Very well. 38-C is received.

(Plaintiff's Exhibit No. 38-C, having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Crooks) I will now show you what has been received into evidence as Exhibit 38-C, and I would ask you if you would hold this up in such a manner as the jury could see it and explain to the jury -- and your Honor, may the witness have permission to leave the bench if he needs to to more --

THE COURT: (Interrupting) The witness may step down if necessary.

THE WITNESS: Thank you, your Honor.

Q (By Mr. Crooks) And would you explain to the jury what that chart shows and what you were attempting to demonstrate by its use?

A The enlargement marked "latent fingerprint" is an enlargement of the latent fingerprint appearing in Government Exhibit 38-E. The enlargement marked "inked fingerprint" is an enlargement of the left thumbprint appearing on Government Exhibit 38-A.

The black lines represent the friction ridges which I have spoken of. The red lines, numbering and lettering, were placed on the charts by myself as an aid in demonstrating these charts to you.

{2510}

Now, the friction ridges are not all continuous ridges but contain certain ridge characteristics, such as a dot and end of a ridge, a bifurcation which is the point where a single ridge divides or branches into two ridges, or possibly an island formation which is where a single ridge divides into two ridges. These two ridges run approximately parallel for a short distance, rejoin, forming again a single ridge; and when in comparing two prints one finds the same ridge characteristics present in the same relative position in both impressions, then an identification has been effected.

Now, turning your attention to the enlargement marked "inked fingerprint", I have illustrated as Point No. 1 a ridge ending in an upward direction.

Located the third ridge to the right of Point No. 1 is a second ridge ending in a upward direction. The end of this ridge I have marked as Point No. 2.

{2511}

A The second ridge down and to the right of point number 2 is a ridge which divides or branches into two ridges. The point where this ridge divides I have illustrated as point number 3.

From point number 3 moving one ridge to the right following this ridge down I came upon a second ridge which divides the branches into two ridges. The point where this ridge divides I have marked as point number 4.

Now, keeping these points in mind and turning your attention to the enlargement marked latent fingerprint. Now, number 1 is a ridge which ends in an upward direction. Located the third ridge to the right of number 1 is a second ridge which ends in an upward direction. The end of this ridge I have marked as point number two.

From point number two counting to the right two ridges there's a point where a single ridge comes down and divides, or branches into two ridges. The point where this ridge divides I have marked as point number three.

From point number three moving one ridge to the right following this ridge down I found a second ridge which divides or branches into two ridges. This point where this ridge divides I have indicated as point number 4.

The same four ridge characteristics in a relative position of both prints.

Going back to the inked fingerprint from point number 4 {2512} counting to the left to the second ridge there is a ridge which ends in an upward direction. The end of this ridge I have indicated as point number 5.

From point number 5 moving one ridge to the left following this ridge down I found that it ended in a downward direction. The end of this ridge I have marked as point number 6.

Keeping these two points in mind and going back to the latent print from point number 4 moving two ridges to the left is a ridge which ends in an upward direction. The end of that ridge I've indicated as point number 5.

From point number 5 moving one ridge to the left following ridge down I found that it ended in a downward direction. The end of this ridge I've marked as point number 6.

Here again the same ridge characteristics present in the same relative position in both prints. And it is upon these characteristics which I have just explained to you and other characteristics which I found to be the same in both prints, some of which I have marked, others of which I have not marked.

It is my opinion that the latent print appearing in Government's Exhibit 38-E is identical with the left thumb print appearing on Government

Exhibit 38-A.

Q Thank you.

With regard to the exhibit which you've previously given your opinion about, which you previously have given your {2513} opinion, 38-E which has been identified as having come from 38-B, the paper sack in which Special Agent Coler's service revolver was found, and having compared that to 38-A, I would ask you whether or not you have an opinion as to whether or not any other human being in the world, other than the person who made these fingerprints on 38-A, could have formed that fingerprint?

MR. LOWE: Your Honor, I would object to the form of the question. Counsel is invading the province of the jury. There is absolutely no reason why he cannot ask whether there's a comparison between 38-E and the left thumb print of 38-A. But all of the preamble about where 38-E came from is a question for the jury to determine based on testimony other than this witness.

And I object to the form of the question and ask that it be narrowed and restated.

THE COURT: Overruled. The witness is an expert and will be permitted to give his opinion.

MR. LOWE: Excuse me, Your Honor.

THE COURT: State whether he has an opinion.

MR. LOWE: May I just be heard so Your Honor understands what I'm stating, this witness has no factual basis for stating this. He has no factual basis for stating of his own personal knowledge whether 38-E, the photograph, is a print from 38, from the gun or from the paper bag. As I understand it at {2514} this point he has not testified that he personally made that 38-E and that's my objection.

THE COURT: On that basis I will sustain the objection and you may restate your question.

MR. CROOKS: I had assumed that I had not asked this individual or this man whether he knew. But I asked him -- there has been previous testimony that 38-E came from 38-B, which is the paper bag in which 38-E was found. And my question simply is is there anyone else in the, any other human being in the world other than the individual who made out 38-A, the fingerprint card, who could have made that print 38-E.

MR. LOWE: Now, Your Honor --

Q (By Mr. Crooks) Do you have an opinion on that?

MR. LOWE: I interpose an objection to counsel telling the witness what a previous witness has testified to. I don't understand the way he just stated it that it is part of the question to the witness. But I think it's not clear on the record and that is what I objected to before and I ask the Court to ask that he simply ask this witness proper questions.

THE COURT: Sustained.

Q (By Mr. Crooks) Mr. Mulholland, in connection with your identification did you make also other comparisons during the course of your fingerprint examination?

{2515}

A Yes, I did.

Q I first hand you Exhibit No. 38-F. Is that something you've seen before?

A Yes, it is.

Q And insofar as 38-F the previous testimony has indicated that as a --

MR. LOWE: Your Honor, I object to him telling the witness or the jury what previous testimony has or has not said about it. That's exactly what I find objectionable and I object.

MR. CROOKS: Well, Your Honor, I believe that the jury has a right for me to state simply what print that is so that they can follow the testimony. I think they're entitled to that.

MR. LOWE: It's a question for the jury as to what print that is. Not for counsel to state.

THE COURT: I think that the objection may be removed if you simply put it in the form of an assumption.

MR. CROOKS: I'll do it that way.

Q (By Mr. Crooks) Assuming that this was a print which was taken and identified by a previous witness has having come from a microphone and one that you have previously identified, have you formed an opinion as to the comparability or incomparability of that between any fingerprint impressions contained on 38-A?

MR. LOWE: I would object to the form of the question {2516} again,

Your Honor. There is no necessity for that assumption.

That assumption has no relevancy as to whether this witness can compare the print on 38-F with the known print on the print card and tell whether they're identical. And therefore it is incompetent for him to testify as to that portion of the question.

I have no objection to him asking for a comparison of 38-F and 38-A.

MR. CROOKS: Well, Your Honor, again I state it seems to me only fair to the jury that they be informed of what print this is. I'm certainly not misstating the record, am I, Counsel?

MR. LOWE: If you -- Your Honor, this is stating what the fingerprint is. That is in the province of the jury. If as a matter of explanation counsel or the Court wants to re-identify Exhibit 38-F as being a print which a certain witness testified about and identified in a certain way, that's one thing.

That's not saying that the fact is true. That's only saying that the Government witness testified about it and that would be less objectionable. But I still say that that's not a necessary element of the question for this witness, and it neither helps him nor in any way is a basis for his answer.

THE COURT: Reporter will read back the last question {2517} which Mr. Crooks asked.

(Question read back: "Question: Assuming that this was a print which was taken and identified by a previous witness as having come from a microphone and one that you have previously identified, have you formed an opinion as to the comparability or incomparability of that between any fingerprint impressions contained on 38-A?")

MR. LOWE: I have no objection to that statement being made to the jury by way of explanation. But I object to it being a part of the question to this witness because it's not necessary for him to make a comparison.

THE COURT: Overruled.

THE WITNESS: Would you repeat the question, please.

Q (By Mr. Crooks) Why don't I just restate the question leaving out the part that counsel doesn't like.

MR. LOWE: Thank you.

Q (By Mr. Crooks) With regard to 38-F which I assume everybody now

knows where it came from, with regard --

MR. LOWE: Objection, Your Honor, that is the most objectionable thing he's said today. Now, that's a direct invasion of the jury province. It's outrageous conduct for counsel. He didn't even say that that's what a witness said. He said that that was an established fact, and that is not. And that's for the jury to decide.

THE COURT: I think the jury understands what the {2518} meaning of the statement was. They've heard the evidence.

Q (By Mr. Crooks) With regard to 38-F have you made a comparison between that and any of the prints contained on 38-A, and if so, well, first have you made a comparison?

A Yes, I have.

Q And would you state if you formed an opinion with regard to that comparison?

A Yes, I have.

Q And what is your opinion?

A It is my opinion that the latent print appearing in Exhibit 38-F is identical with the right middle finger appearing on Government Exhibit 38-A.

Q Now, with regard to Exhibit 40-A and 40-D have you likewise made a comparison between the negative contained on 40-D and 40-A to determine if there is any comparability?

A I have compared the latent print on Exhibit 40-D with the ink prints appearing on 38-A.

Q And what is your opinion following that comparison?

A It is my opinion that the latent print appearing in Exhibit 40-D is identical with the left thumb print appearing on Exhibit 38-A.

Q Now, I hand you what has been marked as Government Exhibit No. 63-A which, well, I'll ask you to assume that this was testified to by a prior witness as having come from a Ford Ranchero; and ask if you made a comparison between 63-A and {2519} 38-A?

A Yes, I have.

Q And what is your opinion after that comparison?

A The latent print appearing in Exhibit 63-A is identical with the left thumb print appearing on Exhibit 38-A.

Q All right. I now hand you Exhibit 63-B which I'll ask you to assume has been previously identified by a witness has having come from a refrigerator on the Barker residence. Ask if you compare the negative contained in 63-B with 38-A and state whether or not you found them in any way comparable?

A Yes, I have.

Q And what opinion have you reached?

A The latent print appearing in Exhibit 63-B is identical with the right ring finger appearing on Exhibit 38-A.

Q All right. Now, I'd ask you some other questions concerning your actual, so to speak, on the scene investigation.

Now, did you at any time travel to the Oregon area in connection with your work?

A Yes.

Q And when was that?

A That was in November of 1975.

Q And what was the purpose of your trip to Oregon?

A To examine items that were reported to me as having been recovered from a motor home and a station wagon.

Q And did you in fact make a, or an examination of various {2520} items at the scene?

A Yes.

Q I would first hand you Exhibit 38-G which is an Outers gun oil can. Ask if this is an object that you have scene before?

A Yes, it is.

Q And where did you see it and under what circumstances?

A I saw it while I was in Portland, Oregon performing my examination of the items recovered from a Dodge motor home and a Plymouth station wagon.

Q All right. Did you attempt to ascertain whether or not there was any latent fingerprints contained on the gun oil can?

A Yes.

Q And were you successful in raising or finding a latent fingerprint?

A Yes.

Q And insofar as your observation of the particular print which was produced were you able to make a comparison between that print and

the prints contained on 38-A?

A Yes.

Q The fingerprint card?

A Yes, I was.

Q And did you form an opinion based upon your observations as to whether or not those fingerprints were in any where {2521} comparable to those contained on the gun oil can?

A Yes, I have.

Q And what is the opinion?

A It is my opinion that the latent print on Exhibit 38-G is identical with the left middle finger on Exhibit 38-A.

Q And I might ask you with regard to that print, do you have a negative which would be available if counsel wishes to see it?

A Yes.

Q All right. I now hand you what has been marked as Exhibit 38-I, marked and received as 38-I. Ask if that is an Exhibit that you've seen before?

A Yes, it is.

Q And where did you see that?

A Where did I see it?

Q Yes.

A At Portland, Oregon.

Q And did you attempt to ascertain whether or not any latent fingerprints could be found on any of the objects contained in 38-I?

A Yes.

Q And were you successful?

A Yes.

Q Would you point out to the jury which part of that exhibit you found a print of value on?

{2522}

A The latent print that I found on Exhibit 38-I is at the base of what appears to be a 3 by 5 piece of paper with a number code from 516 through 530.

Q All right. Insofar as that print was concerned how did you go about raising that print?

A It was developed with, by a chemical solution known as nynhydrin.

Q And after having developed the print and after having observed it did you compare it with the prints contained on Exhibit 38-A?

A Yes, I did.

Q And did you form an opinion as to whether or not they were in any way comparable?

A Yes, I did.

Q And what is that opinion?

A It is my opinion that the latent print developed on a piece of paper within Government Exhibit 38-I is identical with the right middle finger appearing on Government Exhibit 38-A.

{2523}

Q Now I hand you Exhibit 40B which is a copy of a motor receipt and ask if that's something you've seen before?

A Yes, I have.

Q And where did you see that?

A In Portland, Oregon.

Q Did you likewise examine that for latent fingerprints?

A Yes, I did.

Q Were you successful in raising any latent fingerprints from that exhibit?

A Yes, I was.

Q And was this again using a ninhydrin test?

A Yes, it was.

Q Now insofar as the fingerprints you raised on Exhibit 40B, did you make a comparison between that and 38A for the fingerprints contained thereon?

A Yes.

Q And what opinion, if any, did you form following your examination and comparison?

A It is my opinion that two of the latent fingerprints which was developed, which were developed on Exhibit 40B are both identical with the right thumbprint appearing on Government Exhibit 38A.

Q Now I didn't ask you with regard to the last Exhibit 38I but I will ask you with regard to 38I. Excuse me. 40B together. Did you have

available photographic negatives of {2524} the print if Counsel wish to examine them?

A Yes.

Q With regard to the prints that you last identified consisting of the prints on 38F, 38G, 38I, 40D, 40B, 36A and 63B, insofar as those prints are concerned, could they be set out in charts and demonstrated in a manner similar to what you have done with regard to 38C?

A Yes.

MR. LOWE: Your Honor, may we confer with Counsel for just a moment, please?

THE COURT: You may.

Q (By Mr. Crooks) One other exhibit which I'd like to have you express an opinion on, if you can, and I've asked you not to in any way refer to the contents of this exhibit because it is not in evidence, I hand you 38H and ask you whether not this is something you have seen before?

A Yes, it is.

Q And is that something that you developed during your trip to Oregon?

A Yes.

Q And did you find a latent print on 38H?

A Yes.

Q And insofar as Exhibit 38H was concerned, did you form an opinion or did you make a comparison between that and 38A?

A Yes, I did.

{2525}

Q And did you form an opinion as to the comparability of the prints?

A Yes, I did.

Q And what was that opinion?

A It was my opinion that one latent fingerprint developed on Exhibit 38H is identical with the left finger appearing on Government Exhibit 38A.

Q Insofar as the same list that I read to you earlier and which you have, all of which you have before you and including 38E, do you have an opinion as to whether or not all of those prints were made by the same individual?

MR. LOWE: Excuse me, Your Honor. I didn't hear the letter designation.

MR. CROOKS: I was referring, adding to the list that I previously

read 38E.

MR. LOWE: E?

MR. CROOKS: Right.

Q (by Mr. Crooks) Do you have an opinion as to whether or not all of those prints, and I'm taking all of them together, were made by one and the same individual?

A Yes.

Q And what is that opinion?

A They were made by one and the same individual.

Q And you are referring, are you not, or are you referring to the individual whose prints are found on 38A?

{2526}

A Yes, I am.

MR. CROOKS: Counsel, apparently I have misspoke as to the exhibit number.

Q (By Mr. Crooks) The exhibit which I previously handed you which was not in evidence, that is 38H, is that correct?

A Yes.

Q And I don't know what I said but Counsel tells me that I said something else. But that would have been the exhibit you were talking about?

A Yes.

MR. LOWE: Your Honor, this is hopelessly confusing. He's talked about ten different exhibits. When he said he previously talked about, I think Counsel should ask the question and make sure --

MR. HULTMAN: John --

MR. CROOKS: I'm showing you which one, E, it was not in evidence. There is only one exhibit which was not in evidence.

I believe that completes the direct examination, Your Honor.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. LOWE:

Q Mr. Mulholland, you have filed certain reports, laboratory reports summarizing or describing the results of some of the examinations that you made in conjunction with this investigation, {2527} didn't you?

A I have sent out reports; yes.

Q Do you have copies of your reports with you?

A No, I do not.

Q Did you review them prior to testifying today?

A No, I did not.

Q When was the last time you have reviewed any of your reports to be made in this investigation that you have made?

A I don't know that I have ever reviewed them other than reading them before I sent them out.

Q Do you have any documents with you today which you have been using to assist you while testifying?

A Yes, I do.

Q And will you state what the nature of those documents is?

A I have a piece of paper which I have used which refers to the items to which I have testified setting forth the particular finger with each latent I had identified.

Q And when did you, or strike that. Did you make the notation on these pieces of paper you have been looking at?

A Yes.

THE COURT: Just a moment.

Q (By Mr. Lowe) When did you make those, recently or back when you made the examination or just when?

A It was within the last several days. The exact day I {2528} do not remember.

Q Now if you didn't look at your laboratory reports recently, what did you use in order to prepare these pieces of paper?

A My work sheet.

Q You differentiate then between your laboratory reports and your work sheets?

A Yes.

Q And are these work sheets on any particular forms or are they just on pieces of paper like a legal pad or something of that nature or in a workbook?

A The front page of a work sheet is more or less a form type of document. The remaining pages are notes written on bond paper, plain bond paper.

Q Would I be correct in assuming that you take notes as you do your work on the bond paper and then at the end of a day or some period when you're dealing with particular objects you assemble them and make a cover sheet and put them together in some fashion?

A Would you repeat that, please.

Q I'm trying to determine the technique you use when you're assembling this data and I asked whether I would be correct in assuming that the bond paper is something that you make up or have typed up for you as you go along and then at a certain point you assemble various pieces with a cover sheet?

A The cover sheet is made up first and may be the only sheet {2529} which I use. However, in this particular case because of the complexity of the case, the number of latents that were developed, it was necessary for me to add to this cover sheet notes on plain bond paper.

Q Does the cover sheet have a particular form number, that is, is it a printed form?

A If it does I'm not aware of it.

Q As to whether it was a number or not?

A Yes.

Q It's a printed form as opposed to something that is made up by a typist?

A Some of it is preprinted and the remainder is typed along with some written notes.

Q Do you have any of those papers with you, those so-called working papers?

A Yes, I do.

Q Have you referred to them today at any time or do you strictly refer to your notes that you extracted?

A I do not recall if I referred to those today or not.

Q And when you say within the last couple of days, you have read your, I believe you said you read your work papers. Was that here or back at your office in Washington or Virginia, whichever it is?

A That was here.

Q Would it be fair for me to suggest that you do a lot of {2530} different fingerprint analyses and that it would be virtually impossible

for someone in your position to keep straight all the various prints and who they are connected with and what investigation and what exhibit number and everything without referring to some sort of reports or work papers or notes?

A That is the purpose for keeping the notes so that you can keep them straight.

Q My question, would it be fair for me to assume you could not remember that information generally without the assistance of some written report?

A That's a fair assumption; yes.

Q Now you've identified these work papers. Are the documents captioned work papers or some sort of a caption or title on it on the sheet you described?

A I'm not certain if it's captioned. I believe it is captioned work sheet. I'd have to look at it to be certain.

Q Do you have some with you at your seat or are they in the building?

A They're here.

Q Why don't you take a look and see.

Have you examined them and can you tell us now whether they're captioned work papers or something like that?

A It is captioned, "Latent Fingerprint Section Work Sheet."

Q We have now talked about two different types of papers, one a report and one a latent print identification section {2531} work sheet. Are there any other types of documents which you have prepared other than the notes you described with regard to these prints and your examination of them? For example, do you prepare 302 forms?

A No.

Q Do you prepare any memorandum or interoffice communications with regard to examinations other than the papers you've already described?

A Yes.

Q Have you any of those with you and have you reviewed them in the last several days?

A I do not have any of those with me. I have not reviewed any of those in the last several days.

Q When you do examinations of these types and submit reports, does a special agent who is working on the investigation as a general rule

investigate or interview you and prepare a 302 of any of this or is your laboratory report the sole source of giving the information that you obtain to the agents in the field?

A I do not; no. I am not interviewed as such. Whether an agent prepares the 302 on my conversation with him, I don't know.

Q You've described the work sheets which apparently you have with you. Let me ask first, do you have all of the work sheets which you prepared in conjunction with the examination of the {2532} items you were sent in this investigation, to the best of your knowledge?

A To the best of my knowledge, yes, I do.

Q Does that include work sheets which you may have used or made up about items not actually exhibits in this case so far as well as items which are already exhibits that you have been discussing today?

A Yes.

Q And how is it that you came to make extracts or notes, what was the process by which you decided what information to put down on notes?

A I had a conference with the Assistant United States Attorney at which time he advised me which items he had intended to show me because, as I stated before, the case is so complex and involved and there are a number of pages of work sheets involved and in order to help me in my testimony I made notes of those items which he claims he showed me along with the notations of the results of my comparisons.

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

THE COURT: You may.

MR. LOWE: Your Honor, I would request the opportunity for Counsel to view the work sheets and notes which the witness has used to prepare for testimony today and I have a suggestion which might utilize the Court's time efficiently and that would be, I think the jury might be interested and {2533} we would be interested in having them have a chance to look closely at the comparison chart which has been introduced. I think it was 40A perhaps. Whatever the exhibit is, and perhaps while the jury is looking at that, we could be reviewing the notes and documents and taking the matter up with the Court at side bar, any questions about that.

MR. CROOKS: Your Honor, may we approach the bench on this?

THE COURT: You may.

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

MR. CROOKS: Your Honor, in the first place, I hope Counsel is not trying to infer that the United States Attorney's Office is keeping something from them. I don't know why he felt it necessary to make this request in front of the jury.

And, second thing is, Counsel has received every lab report that this man has written and insofar as the notes are concerned, really is immaterial to me whether he looks at them or not. If he wishes to look at the small card, I think he's entitled to do that, but I do not think in delaying this trial so Counsel could go on some kind of a fishing expedition into this man's notes. If he wished to look at any of these notes, he could have requested them.

It's quite obvious to anybody this man takes notes, {2534} he's an expert. Counsel has had the lab reports which show the results of the examinations for a considerable period of time and I see nothing to be gained by delaying this trial so that Counsel can breeze through a large stack of documents. I think this is not timely.

MR. LOWE: Your Honor, we were delivered two stacks of reports and I believe I'm correct in saying those were the sum total of the 3500 materials we were provided.

Until I had an opportunity to cross-examine this witness, I was unaware of the existence of work papers, much less notes.

MR. CROOKS: Oh.

MR. LOWE: Mr. Crooks, will you make an offer of proof at this moment to the effect I knew about the work papers or the notes, because I think it's insulting for you to make a comment like you to the Court implying I'm not stating the truth.

MR. SIKMA: Keep your voice down, John.

MR. LOWE: I ask you to make an offer of proof.

MR. CROOKS: Your Honor, if Counsel is not aware that this man has notes of this type, then this has got to be the first time they ever examined a fingerprint expert because that's common knowledge. I'm very shocked to learn that Mr. Lowe has never understood that this man takes notes in preparation of his work report. That would be astounding to {2535} me.

MR. LOWE: Your Honor, I certainly think there is a possibility he

has notes. They are not discoverable. If he uses them to refresh his memory under Rule 612, they are discoverable, they become discoverable at that point. As to work sheets, work papers, I never would have known that. As a matter of fact, the practice among the FBI agents in this case on the 302s has been that the 302s they used to review to testify from. I frankly felt he reviewed the lab reports. That's why I asked him that question. We're entitled under Rule 612 to view any documents a witness uses while testifying and in preparation to testify and I'm suggesting that there would be no time lost, it usually takes a good 15 or 20 minutes, 10 or 15 minutes for a jury to look at something. I think at some point they want to see those comparison pictures. We're not going to lose any time. This witness has his papers with him right at the witness stand. It's not even a question of them being in his motel or in an office in the building. We're entitled to see those. We're not trying to delay this trial.

THE COURT: Do you intend, was it your intention to pass that exhibit around?

MR. CROOKS: Not particularly.

It was shown to the jury and I think they have seen about all they need to see of it. I really have no quarrel {2536} Your Honor, with what Counsel is proposing other than it's a complete waste of time.

Counsel knows as well as anyone else, he's had those lab reports, he knows what the results are. We're in here fishing for straw men again and it's a complete waste of time.

THE COURT: Well, I think that he is entitled to look at the notes so I'm going to resolve this without wasting the Court's time by taking an early recess.

MR. HULTMAN: Your Honor, could I make a statement on the record now, a different request, Your Honor. This trial has been repleat with disclosure. In fact, only let the record speak for itself as to what Mr. Taikeff has previously said on one occasion. The government at this time wants to put it in the record a general objection that the things we're now undergoing and we'll object in the future to constant discovery at this late date on things that are clearly within the purview of the reports and the leading of the reports that they have had in their possession for weeks and months. The government has bent over backwards at any time to

meet any request.

If this Counsel has any query about the specific notes we're talking about, he has had ample opportunity for weeks. This is a general objection that I want to make at this time and for any future matters of this kind. I just {2537} wanted it in the record.

MR. LOWE: I'll make one response to that. I would like to enter a general objection to Mr. Hultman not knowing the Federal Rules of Evidence. Rule 612 says I'm clearly entitled to it.

THE COURT: The Court's going to take an early recess this afternoon.

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

THE COURT: We'll recess at this time and reconvene at 3:00 o'clock. {2538}

(Whereupon, after recess, the following further proceedings were had, the Defendant being present in person:)

THE COURT: Are counsel ready for the jury?

MR. LOWE: Yes, your Honor.

THE COURT: Is the Government ready?

MR. CROOKS: We are, your Honor.

THE COURT: The jury may be brought in.

(Whereupon, at 3:02 o'clock, p.m., the jury returned to the courtroom; and the following further proceedings were had in the presence and hearing of the jury:)

THE COURT: You may proceed.

MR. LOWE: Thank you.

Q (By Mr. Lowe) At the point where we took a recess, Mr. Mulholland, I believe we had just discussed the fact that you had some notes and you had some worksheets and you had described the caption on the worksheets that indicated that that was what they were.

Let me ask you this: When you prepare reports to be sent to whomever you might be making analyses for, such as Special Agent in Charge, Portland, Oregon, wherever it might be, what is the use to which you put the worksheets when you prepare the reports, that is, do you simply prepare them by extracting the information and putting it into a report from the worksheets?

A Information that is put into the report is taken from the {2539}

worksheet, yes.

Q All right, and would you look at the worksheet that you had in relation to the items you testified to, about -- a little earlier today, and would you just state, first of all, if there is a date on the covering page of the worksheet; and if so, would you state what it is?

A There are several dates. Which one are you referring to?

Q Well, I don't know. I don't have a copy in front of me, as I think you probably know.

Is there a date on there of the preparation of the worksheet or of completion of whatever it is that is attached to the worksheet?

A There is a date upon which the typist typed the front portion of this worksheet, there is a date which shows the date that the negatives were received into our section. There is also a date indicating the time I spent processing items in the Portland Division. There are dates indicating the time that I completed this portion of my examination, and also the date that I dictated it, the date of my outgoing report.

Q All right. Would you give me the last three dates, that is, the date you completed your work, the date you dictated it and the date of your outgoing report, please?

A The date that I dictated it was January the 7th, 1976. The date that I completed it and dictated it was both January 7th, 1976. My outgoing report was dated January the 8th, 1976.

{2540}

Q All right. I show you what has been marked for identification as Defendant's Exhibit 156, and ask you if you are familiar with that document; and if so, will you tell the jury what it is?

A (Examining) This appears to be a copy of my report of January the 8th, 1976, with a few -- it appears as though someone has written handwritten notations on portions of it.

Q I am sorry. I didn't hear the last part.

A It appears as though someone has placed handwritten notations on a number of the pages which does not appear in my report.

Q All right. As to the typed material, is it essentially what you recognize to be a copy of your report?

A To the best of my recollection, yes.

Q Now, in examining specimens, first of all, on the first page of the report, there are four categories, I should say, of what are identified as specimens and one of them is 37 negatives, and I presume that those are negatives such as you have described this morning, I think 38-E was one of them, Exhibit 38-E; and am I correct in assuming that those 37 negatives which are referred to there were negatives of latents which were furnished to you by the Oregon State Police?

A The negatives were not furnished directly to me by the Oregon State Police. They were furnished to our Portland Division by the Oregon State Police.

{2541}

Q I didn't mean to infer that you necessarily got them directly from the police, but I think it says right on here "furnished by Oregon State Police", and through whatever FBI channels that came, you ultimately got them and the Oregon State Police originally sent them?

A The information that I had Was they did come from the Oregon State Police.

Q I don't think that's in dispute.

The next thing says: Items from mobile home. I gather that includes some of the things you testified to there also, gun oil can and other things, is that correct?

A Yes. Just a moment please. (Examining) Yes. The gun oil did come from the Dodge motorhome, according to my information.

Q And the next thing says: Items from Plymouth stationwagon; and I gather that that also includes one or more of the items you testified about a little earlier here today, I think there were some pieces of paper and maybe some other items?

A According to my information there were two items which I testified that came from the Plymouth stationwagon.

Q O.k. The next thing says: Major case prints of Kenneth Moses Loudhawk, Russell James Redner, Darlene Pearl Nichols and Anna Mae Aquash. Were those cards of some sort that had the known prints on them?

A Yes.

{2542}

Q Did you compare these major case prints, cards that you were given

with all of the items that are listed in the first three categories as part of your examination of these items?

A I did not compare them with all of the items. I compared them with the latent prints that were developed on a number of the items, were present in a number of the items.

Q You are being correct and much more precise than I am. I thought you would understand that I meant that.

You developed certain latent prints on some of the items, and as to other items you examined the negatives which had been developed or which were sent to you through the FBI channels.

Did you compare those with these known case prints that you have described a moment ago or identified?

A Yes.

Q And in this report how many -- you may look at the report if you want to answer this -- how many latent fingerprints, latent palm prints and latent impressions of value did you find present in the negatives which the Oregon State Police furnished, or did you develop on the items in the Dodge motorhome and the Plymouth stationwagon in total?

A At the time of this report I had found 231 latent fingerprints, 26 latent palm prints and four latent impressions which may be either fingerprints or palm prints of value for identification purposes.

Q And when you say "four latent impressions" is that a {2543} category which are not clearly fingerprints or palm prints but have identifiable ridges of some sort?

A As I just stated, the latent impressions at this point may be either fingerprints or palm prints.

Q Now, there are -- also in the first page of your report is an indication that you have the results in this report of 159 of the comparisons you have conducted, and this is a report that appears -- I don't want to count the pages, but there are multiple pages, look like maybe 10 pages or so -- is the figure 159 in there, a list of comparisons which you made and identified yourself out of the 231 plus 26 plus 4 impressions of value?

A The 159 represents the numbers of identifications that I had effected to this point of those latent prints reported.

Q As of January 8, 1976?

A Yes.

Q And then there is a list that says: Remaining latent prints, compared available prints; and then there is a list of people down there, and I gather that those were other lists of major case prints or of fingerprint cards which you had available to you to use for comparison purposes?

A Yes.

Q Now, this may have been clear from your direct examination but we had some confusion at one point, and I would like to be sure the record is straight.

{2544}

As to Coler's .357 magnum, which I believe is Exhibit 35-A, you did not personally develop any latent impressions on that gun yourself, did you?

A No.

{2545}

Q And in fact as far as you are aware did anybody ever develop any impressions on the .357 magnum that were of value? That is, Coler's weapon, 35-A?

A Not to my knowledge.

Q All right. and as to a brown paper bag which is identified as Government's Exhibit 38-B, I understand your testimony to be that you did not personally develop any latent impressions on that paper bag, but identified, well, first of all let me stop there. Is that much correct, that you did not personally develop any latents on that paper bag?

A That is correct.

Q I understand that you had a negative about which you were told something not within your personal knowledge, and that you made a comparison of a negative, and I believe the negative is 38-E and compared that with the left thumb print of exhibit 38-A and found, I believe you testified, that they were identical; is that correct?

A The latent fingerprint appearing in Government Exhibit 38-E is identical with the left thumb print appearing on Government exhibit 38-A.

Q All right. Now, am I correct in saying that you have no personal knowledge as to where the print was found which is depicted by the negative

which is identified as Government exhibit 38-E, but rely entirely for your beliefs upon what other people told you?

{2546}

A Are you referring to Government Exhibit 38-B?

Q 38-E is the negative I believe, is it not?

A Yes.

It is a negative.

Q Do you understand my question or do you want me to state it again?

A Would you repeat your question.

Q Am I correct in understanding your status with regard to Government Exhibit 38-E, the negative that you have no personal knowledge as to the source of the latent impression which is depicted in 38-E, but rely entirely on what other people have told you for any belief you may have as to where it was found?

A No.

Q I am not correct about that?

A You are not correct.

Q As to Government Exhibit 38-E you were not present when that was made, were you?

A No.

Q And as to Government Exhibit 38-E you have no idea what was photographed of your own personal knowledge in order to prepare that document, but are relying on what was reported to you; isn't that true?

A No, that's not true.

Q You were not present when a photograph was made, were you?

A No.

{2547}

Q You were not present when the photographic negative was developed?

A No.

MR. LOWE: Can I just have a moment?

(Defense counsel conferred.)

Q (By Mr. Lowe) Now, I want to ask you a couple of questions about what you can actually tell from a fingerprint other than simply comparing it to another one, and some of this may be, I'm sure is very basic for you, some of it, since I'm not a fingerprint expert, I'm not sure how basic

it is for you, but it's basic, certainly something I want to get across here.

And let me ask you first, is there any way that you can tell, first of all, let's take from a negative such as Exhibit 38-E when as to date that impression was put on the object from which it was lifted by the individual who, well, however it got on that object?

A There is no technical method of determining the age of a latent print.

Q All right. There would be some practical ways, however, for example in your report on one of the pages that happens to be on Anna Mae Aquash there is three fingerprints on an October 13, 1975 issue of People magazine; and as a practical matter that fingerprint would have to have been placed on there after the issue was printed, presumably October 13, 1975. So that's a practical way that you might be able to make some {2548} indication of when it was applied, isn't it?

A That's correct.

Q But as to an item that is found on, let's say, an unmarked piece of paper, isn't it true that a print might, if it's in a safe, dry, relatively secure environment, might last on a piece of paper for virtually years and still be identifiable as a latent impression?

A Latent prints have been developed on paper after a period of years, yes.

Q And certainly it would have been no surprise to you to find a latent impression which had been put in a particular place, let's say, particularly on paper a period of months before?

A I have done it, yes.

Q Well, would that shock you if you came to find that an impression that you had lifted had been put on a book or a piece of paper four months earlier? Would that be so unusual?

A That wouldn't shock me, no.

Q Okay. Now, in doing your examination, at various times you made all of your notes in your work papers there I believe. could that be fair to say that you keep fairly complete notes in your working papers?

A I like to think that I do.

Q Okay. And in the working papers which you have identified as having

been completed and dictated on January 7, 1976, do {2549} you have notes in there about finding latent impressions of some sort for Robert Eugene Robideau?

A I have a notation there, yes.

Q I don't recall, are they fingerprints or palm prints? Could you check and see.

(Witness checking his notes.)

A They were both palm prints.

Q And these were found on, could you tell us what items they were found on, or just generally were they found in the Dodge motor home?

A Road atlas.

Q Which vehicle was that from, if it was from a vehicle?

A That was indicated to me as having coming from the Dodge motor home.

Q Thank you.

Now, in another part of your report you have some prints found relating to Kenneth Moses Loud Hawk and I note that one of them is a fingerprint in a negative number 19 relating to a .357 revolver found near mobile home. And I would ask you whether that is one of the 37 negatives that was provided you by the Oregon State Police, or the way you were informed it was provided you?

A Would you repeat the negative number, please.

Q Yes. 19.

A Yes. I identified a fingerprint appearing in a negative {2550} number 19, which was indicated to me to be on a .357 revolver found near a mobile home with a fingerprint of Kenneth Moses Loud Hawk.

Q All right. And also on the second page of the report relating to Kenneth Moses Loud Hawk there's an indication that two fingerprints on a brown paper bag designated "A", and did you also identify that?

A Yes.

Q Now, is it uncommon in your experience to find fingerprints on paper bags in living areas, whether it's in a mobile home or a house or an apartment, when you have occasion to search the living area for prints for some reason or another?

A I don't usually search a living area for prints.

Q All right. Well, let me rephrase my question.

When you are given items which have been found in a living area, mobile home or a house or an apartment, is it unusual for, let's say, brown paper bags used for groceries or whatever it might be, is it unusual to find fingerprints on paper bags when they are provided you?

A I have developed latent prints on brown paper bags. Whether they were used for groceries, I don't know.

Mostly brown paper bags that I examine were usually bags involved in bank robberies.

Q I understand it's more likely that they want to know who robbed the bank than who bought the groceries. I didn't mean {2551} to suggest that that was a great moment.

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

THE COURT: You may.

(Mr. Lowe approached the witness.)

Q (By Mr. Lowe) Now, Exhibit 38-B is a brown paper bag, and I believe you testified as to Exhibit 38-E, which purports to be a photograph of a latent developed on this brown paper bag, and I ask you whether there's any way that you tested this bag for, to determine anything about when the print was put on there in terms of the date or time either relative to some act or an absolute date?

A As I previously testified there is no technical examination which can be conducted to determine the age of a latent print.

Q All right. Now, that paper bag was purportedly found containing Exhibits 35-A, or with 35-A inside of it, and this may state the obvious, but there's no way that you can tell the jury anything about whether Exhibit 35-A was in that paper ag, or when it was placed there, simply because of the fact that you observe a print on the bag, is there?

A No. I have no personal knowledge.

Q And as to referring back to your report of January 8, 1976, you have the results of 159 comparisons out of the total that believe is 261. 159 of them are contained in the report in some analysis, and then you say that the remaining latent prints compared to available prints of Loud Hawk, Redner, Nichols, {2552} Aquash, Dennis James Banks, Leonard Peltier, Leroy Kosata and Mark Libby Banks, but no identification effected. And

did you also make the identification attempts which resulted in that finding?

A Yes.

MR. LOWE: May I just confer with counsel for a moment?

THE COURT: You may.

(Mr. Lowe conferred with Government counsel.)

{2553}

MR. LOWE: I believe that's all I have, Your Honor.

REDIRECT EXAMINATION

BY MR. CROOKS:

Q Mr. Mulholland, Counsel had asked you several questions concerning your knowledge of a tie up between Exhibit 38E and Exhibit 38D which is the paper sack which is previously been identified and you said that you were relying on something more than just what someone else had told you and I'd ask you what if anything are you relying upon?

A The latent print which appears in Government exhibit 38E is still present on the paper bag marked Government exhibit 38D.

Q It's covered with tape so as to protect it, is it not?

A Right here (indicating).

Q I now hand you a small eyeglass. Would you examine the two and then I have a small series of questions.

MR. LOWE: May I voir dire the witness before he looks at that, Your honor, looks into the eyeglass?

May I ask the witness to look this way for a moment until the Court rules on the question. I'd like to ask a question of voir dire.

THE COURT: For the purpose of an objection?

MR. LOWE: For the purpose of an objection.

THE COURT: You may.

MR. LOWE: Prior to this point, have you looked through some sort of a magnifying glass or whatever way you use within your own techniques for the purpose of comparing {2554} exhibit 38E with 38D and to see if the negative was in fact identical with the print which is on 38D and which is covered with plastic or tape prior to today?

A Yes.

Q You have?

A Yes.

Q Then I think, Your Honor, that's the question to be asked whether he identifies it now or not. The witness can state whether he has done that and testify what he's found.

MR. CROOKS: Your Honor, it's my question and I think I'm entitled to ask it the way I choose without help from Mr. Lowe.

MR. LOWE: If he wants to do that, I don't think it makes any difference. I withdraw the objection.

THE COURT: Very well.

Q (By Mr. Crooks) Would you examine them with the glass if you feel that's necessary.

Have you completed the examination?

A Yes.

Q Do you have any opinion as to whether or not the latent fingerprint which is still on 38D is in any way comparable to the one on 38E?

A It is the same latent print.

Q Identical, would that be correct?

A Yes.

{2555}

Q Is there any question in your mind at all on that?

A No.

Q Insofar as that paper bag was concerned from your examination of it, is there any indication that there was any other print other than the one found?

A May I remove the bag from the plastic?

Q Well, I guess. Yes. If you would.

A There are no other latent prints of value.

Q Insofar as this bag is concerned from your notes, have you ever been informed that there were other prints found on it that are not now apparent on it?

A No. I had no indication of that.

Q With regard to this examination that you've testified about on cross-examination, would it be fair to conclude that there were literally hundreds of prints found on or about this area of various people, the mobile home --

A Yes. There were several hundred prints.

Q And there was only one print, however, found on the paper bag?

A That's all that I saw.

MR. CROOKS: We have no further questions.

RECROSS-EXAMINATION

BY MR. LOWE:

Q Mulholland, you used a term a couple times that may be of special use in your profession. Let me ask you, when you speak of a latent impression of value, tell the Court what the {2556} term of value means.

A A term of value is used to distinguish a latent print which has sufficient ridge detail to be of value for identification purposes as opposed to those fragmentary latent prints that do not contain a sufficient amount of ridge detail to be of value. In other words, the prints that are of value are prints that can either be identified or nonidentified provided the comparable area of the ink prints are present for comparison purposes.

Q So that, for example, on the paper bag which has been marked as Exhibit 38D there may be many prints on there that are either smudged or too small a part of the print or a side of the finger that isn't on a print card or some other way insufficient for you to consider it as being quote "of value" end quote and using it for identification, isn't that true?

A There are not many other. There are a couple fragmentary latent prints that are of no value.

Q But as to any item that you examine and routinely as to items brought to you for testing, it's frequent that there are only a small percentage of all of the impressions of one sort or another that are actually of value, isn't that true?

A I would say it's a small percentage that are of value; yes

Q Now as to your report of January 8, 1976, I think you said this in general when we first started on cross-examination I want to ask you specifically, would I be correct in assuming {2557} that you do not remember in your own recollection all of the names and different items that you found prints on that you have described in this report that you rely on your records and on this report and other documents in order to recall what you examined?

A Yes.

Q And to the best of your ability this report insofar as the information it contains was accurate on January 8, 1976 when you submitted it, wasn't it?

A Yes. It was accurate.

MR. LOWE: Your Honor, we would offer the exhibit. I don't remember what the exhibit number is. The witness has it, I believe. We would offer it, Defendant's exhibit 156 in evidence on the grounds that it contains relevant evidence of other persons whose identifiable fingerprints were found in and about the motor home, what has been called the mobile home at times, and the Plymouth station wagon, and on the grounds that this witness does not have direct recollection from which he can testify as to these matters and this is the best evidence and is relevant evidence in this case.

MR. CROOKS: Your Honor, the United States objects to it on the same reason we have objected numerous time before. If Counsel wishes to ask this witness about anything contained in his report, we will have no objection providing it's {2558} relevant. However, this is a lengthy report pertaining to numerous identifications which have absolutely nothing to do with his testimony or even this case. I do not feel it's relevant. It does nothing but clutter up the record. I do not feel it's admissible or relevant. We object.

MR. LOWE: Your Honor, we have testimony about this mobile home and particularly that it was moved by an unknown person at some point with perhaps more than one person in it. That's the state of the testimony. We believe that this is relevant to direct evidence that the jury can properly consider in determining, first of all, who might have been in the mobile home when it was at this location in Oregon and, secondly, as to identification, for example, of the person who allegedly climbed over the fence. It is certainly relevant evidence. It is not valuable from any other source and this is the best evidence.

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

MR. LOWE: Government Counsel make his offer in front of the jury, then he wants to come to the bench.

MR. CROOKS: I don't recall arguing the facts. The fact of the matter

is if he has relevant evidence. Counsel knows the proper way to put in relevant evidence; it's through the witness. He can simply ask the witness if there is some relevant fingerprints and I have been very lenient with him in that regard and I have not objected to {2559} going into other fingerprints found. But Counsel simply wants to put the entire thing in through a report without going through the witness. This witness is a qualified expert and he can give his opinions and recollections based upon what he recalls as may perhaps be refreshed by the report. The report is irrelevant.

THE COURT: The ruling of the Court is that the report is not the best evidence and the offer of admission is denied.

MR. LOWE: May I ask the guidance of the Court I'm not sure that the Court, what the Court just said but it sounds to me, first of all, the witness said he could not recall that he would --

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

MR. HULTMAN: May we approach the bench?

(Whereupon, the following proceedings were at the bench)

MR. HULTMAN: Your Honor.

THE COURT: Just a moment.

I gave you a half an hour recess to check that report.

MR. LOWE: Yes, Your Honor.

THE COURT: I have given you unlimited time to examine this witness. This witness' testimony is the best evidence and {2560} report is not the best evidence and this is not in the interest of justice to have that report be received. If you have some additional questions to ask this witness, you may take the time to do so.

MR. LOWE: Judge, may I clarify one thing. The report is not what we looked at at the recess.

THE COURT: This report you have had. At the bench conference you indicated to me you had had this report for weeks.

MR. LOWE: There is no denial, Judge.

THE COURT: Then you have had an opportunity to study it. The witness is on the stand. If there is anything more you need from that report, that's the time to get it.

MR. LOWE: I understand that.

THE COURT: You are not going to submit that report to the jury. It is meaningless and it would only be confusing and misleading. This is why I'm concerned with these constant offers of evidence that are not in my opinion admissible.

MR. LOWE: We respectfully don't hold the same opinion Your Honor does. I understand what Your Honor is saying. I'll abide by it. I want to be clear Your Honor knows what we looked on the recess were working papers he used in preparation.

{2561}

THE COURT: The ruling of the Court is this is not the best evidence.

MR. LOWE: As I understand what the foundation of your Honor's ruling is, that this witness is the best evidence and he does not recall this information and that he relies on his report or his working papers entirely. Am I to ask him to read the working papers or read the report in order for the jury to get the information that I'm trying to get to them?

THE COURT: You have had a copy of the report. You can give him a copy of the report and you can examine him with reference to specific items in that report.

MR. LOWE: Your honor, the specific items I'm interested in getting, I believe they are relevant, Your Honor may rule it's irrelevant, I want to have the jury to know all the items that had prints of value on them in the mobile home and the Plymouth and the names of the people who were identified on those prints. Now that's exactly what this report is.

Has Your Honor had a chance to see the report?

THE COURT: I have not seen the report.

MR. CROOKS: Your Honor, I object to this aspect. The United States, whether it's done orally, through the witness or done to the Court, we have a very fervent objection to throwing I names and places that have nothing to do with {2562} the witness' testimony. He was put on for a specific purpose, to identify the prints of Mr. Peltier. That is exactly what he has done. I have been more than lenient with Counsel going into completely irrelevant things, completely beyond the scope of our direct examination.

Counsel themselves, as I understand it, have a fingerprint expert which they can call and I object very strenuously to Counsel attempting

to prove through our case something that has nothing to do with this man's direct examination.

Now I haven't objected up to this point because Counsel hasn't pushed it that far, but if he's contending he has a right through this witness to go through every identification he made, this witness would be on for a day and that's not proper and I do not feel it's relevant in any way at this time.

If he wishes to go into items that pertain to Mr. Peltier, that's fine. That's what the witness was called for.

MR. LOWE: Of course, the reason I ask to submit the report is so I don't take a day of reading it with him. That's it simply.

MR. CROOKS: The United States objects to it either way you try to prove that.

MR. LOWE: Your Honor, I would make an offer of proof {2563} that the information in this report as to the individuals identified and the location and other information about the prints that were identified to those individuals is relevant to the defense in this case. I would propose to get that to the jury.

Now I'm willing to just submit the document. I'm willing to ask the witness, giving him a copy of it and leading him through it. I'm afraid that will take a long time and do no more than giving him the report will do.

I might add, the report that we have marked has markings and we'll have to delete those. I didn't mean to do that.

THE COURT: Specifically what is it that you are trying to prove?

MR. LOWE: I'm trying to prove there were other people other than Leonard Peltier whose fingerprints were found in the nobile who were not arrested at that time and who might equally have been the person who went over the fence, who fired the shot,who drove the van away and who possessed among other things these various items that have been identified that we feel are prejudicial.

THE COURT: I think that's self-evident there were other people in the van. There has been testimony there were other people in the van.

MR: LOWE: Some of these people are also directly {2564} linked with the so-called crime scene. They are directly linked with other weapons.

THE COURT: What other people?

MR. LOWE: For example, Your Honor, LeRoy Casodos was the owner of a vehicle in which Special Agent Williams .357 magnum was found in the Rose Bud raid by the FBI. LeRoy Casodos is one of the people mentioned in this. Anna Mae Aquash was at the crime scene and I believe there is testimony she was also at Al Runnings when the Rose Bud raid was conducted.

THE COURT: I don't know what you're talking about, "Rose Bud raid."

MR. LOWE: There was a raid by the FBI at a place called Al Runnings on the Rose Bud Indian reservation at which time the M1 rifle, I don't think it's in evidence yet but one of the weapons and ammunition components and other evidence was seized which has been used in this investigation, I believe. Am I correct some of that is already in by stipulation?

MR. CROOKS: I don't know.

MR. LOWE: I think so.

If it hasn't been, I'm sure they're going to put it in.

The M1 is one item that sticks out in my mind. That's when that item was found.

{2565}

I think it's important to show there were other people at various times located with the group and with the weapons that had been at the crime scene and now are found in Oregon in order to show that there are other hypotheses consistent with the innocence of Mr. Peltier in Oregon for the jury to consider.

THE COURT: This will go beyond, it is going beyond the direct examination. It is a matter for the defense.

MR. LOWE: All right, Your Honor.

THE COURT: You can try to put that in in defense

MR. LOWE: I would present to Your Honor as a practical matter, if we have to call this witness back for this sole purpose of calling the witness. I'm willing to do that. It's going to inconvenience this witness terribly. I'm going to make the proffer now and say that will be the only other thing we will have and I'm finished. If you want to rule on relevance, if you're going to rule it's just a part of the defense case, I will represent to your Honor I'm through with this witness except for this information.

MR. CROOKS: Your Honor, number one, I strenuously object to keeping

this witness on tap.

Now, as I understand it, Counsel has got an authorization for an expert fingerprint examiner and if he wishes to come in and present evidence, I see absolutely no reason for forcing this witness back in as a defense witness.

{2566}

Now I have understood that that was the entire purpose of authorizing experts for the defense. Now if Counsel will lift the names that he wishes to be read into the record as having touched items in that motor home, I have no objection to that. There is no contest there were other people there. There were many other prints found.

THE COURT: It seems to me that's --

MR. CROOKS: That's so obvious there is no big deal.

THE COURT: It seems to me that's the logical solution.

MR. LOWE: Your Honor, that certainly would serve part of the purpose we're trying to accomplish. We also feel it's relevant as to which items were touched particularly in regard to some of them. I've read through here. Some of them have touched specific items like the receipt for the permit.

THE COURT: You have the report. Counsel has stated you can read into the record at this time names of the persons that were in the --

MR. CROOKS: That he made identifications of that would have been involved in touching something that was examined in the van or the Plymouth. I have no objection if Counsel wishes to do that. But my point is that this witness should not be held around waiting for examination that {2567} is completely and, totally immaterial. We have offered this witness for one purpose, to establish the prints of Leonard Peltier. Not even a serious attempt is made to impeach this witness' testimony, but counsel is attempting to turn them into his own witness for some purpose and that is improper.

Now I have offered, just to avoid an impasse, that if Counsel wishes to state the names of those who have made positive identifications, I'll have no objection because those people were in the van at one point in time and touched something in the van and I have no objections to that if it's done in that manner.

MR. LOWE: Let me just say, we would not hold this witness because he's an expert, Your Honor, but because he has within his reports the testimonial information we seek about these other people.

THE COURT: Counsel has just agreed.

MR. LOWE: I understand that. We're not saying we would hold him because he's expert, because of the information he has. I have made the offer and I sense from what Your Honor has said that your Honor may turn down the offer.

If Your Honor turns down the offer, then over our objection to that ruling I would at least read into the record the names which have been identified in this report and I gather that you would not oppose that.
{2568}

MR. CROOKS: No. I won't oppose that. They are in the report. He found the fingerprints of them.

MR. LOWE: I would make the offer, Judge, of the exhibit, and if you rule on that against me, then I will simply read the names that are contained here.

THE COURT: The offer of the exhibit is denied.

MR. LOWE: Your Honor, I'll read, do you have a copy of this that you're looking at?

MR. CROOKS: No, I don't.

MR. LOWE: You can look at that exhibit and I'll read it. I'll make sure I read the right ones. All right.

(Whereupon, the following proceedings were had in the courtroom in the hearing and presence of the jury:)
{2569}

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

THE COURT: The offer of the exhibit is denied.

MR. LOWE: Your Honor, pursuant to the rule of the Court, I am reading -- what is the exhibit number on that, Mr. Crooks?

MR. CROOKS: 156.

MR. LOWE: Defense Exhibit 156 for identification. I am going to read the names on the pages beginning with the third page, although it is not numbered, as to whom any identification of prints is shown in this

report. The first one is Leonard Peltier. The second is Dennis James Banks. The third Kenneth Moses Loudhawk. The fourth is Russell James Redner. The fifth is Annie Mae Aquash. The sixth is Darlene Pearl Nichols; and those are the only ones who are identified as having been identified as to prints contained in the Dodge motorhome, Plymouth stationwagon or the 37 negatives furnished by the Oregon State Police.

Did I read that correctly, Mr. Crooks?

MR. CROOKS: Yes.

MR. LOWE: All right, your Honor, and subject to the Court's ruling, I believe that's the only questions I have.

May I have just a moment to confer?

THE COURT: You may.

{2570}

(Counsel confer.)

MR. LOWE: That's all I have, your Honor.

MR. CROOKS: We have no further questions, your Honor.

THE COURT: I beg your pardon?

MR. CROOKS: We have no further questions.

THE COURT: You may step down.

MR. LOWE: Your Honor, we would ask that this witness be held subject to the previous discussion with Government counsel, and I realize there may be some question as to when that is done. I would suggest that counsel can get together after court today. I would simply like to put the Government on notice that we will make that request and not ask that the Court or Government make any concession at this point on it.

MR. CROOKS: May we approach the bench?

THE COURT: You may.

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

MR. CROOKS: What is going on now? I just agreed to what you wanted, to read the names in. Now, you are trying to get the witness committed to some kind of time, and I will object to that.

MR. LOWE: He can go back to Washington. I have not had a chance to talk to Mr. Taikeff or Mr. Ellison about the Court's ruling just now, as to whether we need {2571} additional information or not. All I am saying is that we may request that he will be needed. It may be we won't, and

as soon as we discuss it after court, we will let you know.

MR. CROOKS: Your Honor, I think the Court is well aware this man is an expert who has got testimonial duties in other cases. He is going to be all over the United States testifying in other cases. He will probably not be available, No 1.

This is harassment, there is no other word for it. Counsel has got their own expert. If they wish to present expert testimony, they have got the man. If they want to cross examine him, that's fine; but this is outrageous to hold up an expert witness and have him stand by in Washington, D.C., for a call or possible call from defense counsel.

THE COURT: I did not understand that the request was standby. The request was that he would stand by here this afternoon until after he has had an opportunity to confer with Mr. Taikeff.

MR. LOWE: And perhaps be available, which might mean be anywhere. He could be testifying somewhere else and doing other duties. If we needed him, he would be available.

I would point out to your Honor that Mr. Crooks wants {2572} to have it both ways. He does not want me to make him my own witness today on the one hand and get in what might be proper, relevant evidence as a defense matter. On the other hand, he doesn't want this man available to me when we do put on the defense case. If he doesn't want him available, he ought to allow me to make him my witness. I don't know that I have any questions.

MR. CROOKS: I have given Mr. Lowe more than I think he is entitled to by letting him read the names.

THE COURT: On the basis of the record that has been made, the names read into the record of the persons identified for the purposes of having been in those vehicles, the request is denied.

MR. LOWE: All right, your Honor.

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

MR. CROOKS: Your Honor, may Mulholland be excused.

THE COURT: You are excused. WITNESS: Thank you, your Honor.

(Witness excused.)

MR. SIKMA: The Plaintiff calls Gregory Hoeschen.

GREGORY J. HOESCHEN

being first duly sworn, testified as follows:

{2573}

DIRECT EXAMINATION

By MR. SIKMA:

Q Would you please state your name for the jury?

A Gregory J. Hoeschen.

Q And what is your occupation?

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

Q And where is your place of duty?

A I am currently working out of New York City.

Q And where were you on the morning of September 5, 1975?

A On September 5th, 1975, I participated in an arrest at Grass Mountain on the Rosebud Reservation.

Q Now, which FBI office were you working out of at that time?

A That was out of the Pierre, South Dakota, resident agency.

Q And what time of the day was it, if you recall, that you participated in an arrest on the Rosebud Reservation?

A It was approximately at daybreak, a little after daybreak, about a quarter to 7:00 in the morning.

Q Now, you say that was on the Rosebud Reservation?

A Yes.

Q And what was the nearest community to the place where you participated in this arrest?

A I believe the Rosebud itself would probably be the closest several miles.

Q How far were you from that community?

{2574}

A I would say roughly four or five miles.

Q At whose residence were you on that day?

A The residence of Al Running.

Q What time, approximately what time of the day was that at?

A About a quarter to 7:00 in the morning.

Q O.k. Was it light at that time?

A Yes.

Q Now, what was your purpose in being at this residence, specifically?

A Warrants had been issued for the arrest of five individuals who were charged with assault with a deadly weapon.

Q Do you recall who was the victim of that assault?

A I don't recall the names of the victims. There were two young Indian males who were the victims of an assault.

Q And who were the persons charged in that offense?

A The persons were Al Running, his son, Frank Running; Leonard Crow Dog, Gerald Millard and an Owen Young.

Q Now, you indicated that you were at Al Running's residence at this time. Would you tell what happened when you came to the residence?

A Yes. Myself and Special Agent Gene Crouch pulled into the driveway at the Running residence and parked in front of the residence. As we exited the car, somebody opened the door to the front of the residence, stuck his head out. At that time I recognized him as Al Running, I identified myself, {2575} saying "Al, this the FBI. You are under arrest, come out with your hands over your head."

Q O.k. Did you know Al Running?

A Yes. I had interviewed him two days prior to this arrest.

Q And what did you do next?

A He came out of the building. We secured him, and as Agent Crouch was reading him his rights, I proceeded into the residence.

Q O.k. Did you ask him any questions at that moment concerning the identity of persons in his house?

A Yes. I told him we were also looking for Frank, his son, and asked who was in the residence. He advised me that his wife and Frank were still inside.

Q Did you go into the house then?

A Yes, I did.

Q And can you tell me whether or not it was light in the house at that time?

A No. It was very dark in the house.

Q How many rooms were there in the house, if you know?

A The house was divided into actually three rooms, one after another with a door connecting them.

Q Tell me what you did and what you observed.

A As I went into the house, it was very dark; and Mrs. Running, Al's wife, approached me out of the -- in the second portion of the house. I escorted her to the front door, and {2676} then went back inside; and at that time I met Frank, Al's son, in the second portion of the house. He was coming from the back of the house, the last room in the house. Pardon me?

Q Did you hear anything at that time?

A Not right at that moment, other than I saw Frank approaching me. I identified myself, told him it was the FBI and we were placing him under arrest. I started to lead him back to the front door, and as I was leading him out, I heard some shuffling in the back room, the furtherest room in the house. I asked him who was back there, and he indicated his girlfriend was in the back room of the house.

Q What did you do at that time?

A I handed Frank over to Special Agent Palmer who was then coming in the front door, and then I proceeded to the back of the house and escorted his girlfriend out.

Q And what did you do then?

A Then I went back into the house to check to see if anybody else was in the house and turned on lights as I proceeded again to the back of the house.

Q O.k. Did you observe anything in particular as you were coming back through the house?

A As I was coming back to exit the house, after turning on lights in all three rooms, I began to see weapons throughout the house.

Q And would you state, if you recall, what weapons you {2577} observed?

A To my knowledge the first weapon I saw was a .264 Remington rifle which was leaning in the corner of the room in the second room of the house. I walked over to secure the weapon, and turning around I saw another weapon, a double-barreled shotgun in another corner. I secured that in a holster with -- it had some .44 Special, .44 Special rounds in the holster and belt, and then I proceeded to carry those out of the house, at which time I noticed by the front door two more weapons, one being a .44 single action revolver, the other being a Ruger, .44 magnum carbine.

Q O.k. Now, can you tell -- can you describe the .44 Ruger carbine? {2578}

A Only to the extent I would have to see the weapon itself. It was -- a carbine is generally shorter than a regular rifle.

Q Did you put any marks on the weapon so it would be identifiable?

A Yes. I put my initials and also my credential number I believe.

Q I will show you what is in evidence, or marked as Government Exhibit 33-A, and ask you to examine it and tell me whether or not you can identify it?

A Yes, I can.

Q How can you identify it?

A My initials are engraved on the stock of the weapon along with the date it was obtained and my FBI credential number.

Q And what did you do with this weapon?

A I tagged it for evidence and turned it over to Special Agents Doyle and Bassett along with with other weapons to be taken back to Pierre.

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

MR. TAIKEFF: May I cross-examine, Your Honor?

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. TAIKEFF

Q Your appearance at the location you've testified about was in connection with a number of arrest warrants?

A Yes, sir.

{2579}

Q And this was in connection with a case where five people were believed to have assaulted two other people?

A Yes

Q How many agents were with you on that particular occasion?

A When we went into the Running residence I can't say for sure. I would say between ten and twelve agents.

Q And were those the only agents in the immediate area?

A On the Running property, yes.

Q Well, was there some adjacent property where there were other agents?

A Yes. There was another group of agents that were going into the Crow Dog residence.

Q How many agents were there?

A I don't know.

Q Give us an estimate.

A I really couldn't say.

Q Isn't if a fact that the total number of agents involved in the arrest of those five people and the surrounding events was about sixty?

A I couldn't say for sure how many were there.

Q Well, you're not denying that it was somewhere in that order or magnitude, are you?

A No.

Q And was the military involved in that episode?

A Not to my knowledge. Not when we went into the two residences {2580} no.

Q How about immediately before or after?

A After, I believe some military people were called in to detonate some explosives that were found.

Q And were there helicopters involved?

A Yes.

Q And how were you dressed that day?

A I had dungarees, a sweater, tennis shoes I believe, a flack vest.

Q How about the other agents, were they wearing military-type clothing?

A Nothing other than the flack vest that I would say was military unless --

Q I'm sorry, I didn't mean to cut you off.

A Unless maybe a fatigue jacket or something like that. I don't know.

Q Were you carrying any weapons?

A Yes.

Q What were you carrying?

A I was carrying my .38 Special and a shotgun.

Q How about the other agents, what kind of weapons did they carry? Generally, I don't ask you for a precise --

A Generally handguns and shotguns and some carried M-16's.

Q That's a fully automatic weapon?

A Yes.

{2581}

Q Looks like a rifle but acts like a machinegun, right?

A Yes.

Q Okay. Now, you and your fellow agents made a thorough search of this area where you all landed that day?

A Yes. There was warrants for a search also issued.

Q I see. And would you say you made a rather thorough search of the area?

A Yes.

Q In which building did you find Mr. Peltier?

A To my knowledge Mr. Peltier wasn't there that day.

MR. TAIKEFF: I have no further questions.

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

THE COURT: You may step down.

MR. SIKMA: The plaintiff calls Thomas Duffin.

THOMAS DUFFIN

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SIKMA

Q Would you please tell the jury your name.

A My names is Thomas M. Duffin, D-u-f-f-i-n.

Q And what is your occupation?

A Special agent for the Federal Bureau of Investigation.

Q And was that your occupation on September 5, 1975?

A It was.

Q And out of which resident agency of the FBI were you working on that date?

{2582}

A I was working out of the, well, Pierre, North Dakota I believe.

Q Pierre, South Dakota?

A Pardon me, South Dakota, yes.

Q And what is your present place of employment?

A New York City.

Q Do you recall specifically where you were on the morning of September 5, 1975?

A I do.

Q And where was that?

A At the Al Running residence in the, well, it would be the Rosebud Reservation in South Dakota.

Q Okay. Now, on that date what were you doing on September 5th?

A I was participating in a search and arrest, execution of arrest warrant on the Al Running residence and the out buildings on the Al Running residence.

Q Do you recall how many buildings there were on that residence?

A There were two wooden structures and one tent.

Q And did you come in on a road somewhere?

A I did.

Q And approximately how far was the main house from the road?

A I would estimate about one hundred feet.

Q And did you, which building did you first go to as far as {2583} the search is concerned in, on the Al Running residence on that date?

A I passed by the Al Running residence and proceeded to a blue and white wooden, light blue and white wooden building.

Q And approximately how far was that from the Al Running residence?

A Approximately seventy-five feet.

Q Okay. And in which direction?

A I would say directly behind it. I believe it would be from, as I recall, in a southerly direction.

Q Okay. About what time of the day was this?

A At approximately 6:45 A.M.

Q And was it light at that time?

A It was bright, daylight, bright.

Q It was daylight?

A It was daylight and it very bright, yes.

Q Okay. Would you tell the jury if, what if anything you observed as you proceeded to this small house away from the residence.

A As I approached the house I saw there were two agents in front

of me. An Agent Gilkason and an Agent Doyle and possibly an agent I recall to my left.

I saw and heard Agent Gilkason yell out in a loud voice FBI, come out of the building".

I saw two people start to emerge from the building, a {2584} male and a female, then go back into the building, then come out a second time.

A matter of seconds after that the male and female come out of the building. The female was directed to stand to the side. The male was being checked out by Agent Gilkason, and as I passed by them behind Gilkason going into the building itself I saw that this individual had a gun. He was getting into the prone position. I saw that he had a gun, a .45 automatic on his right hip and a holster.

Q And what did you do at that time?

A At that time I entered the building. I yelled, of course, to Gilkason you know, "He's loaded, he's armed". I proceeded into the building and I commenced to search the building or secure it.

Q Would you describe the building.

A Well, the building is actually made up of two parts. There's an anteroom which I call an anteroom, which would -- is an open door. It's approximately 4 foot by 6 foot. And the main building would be approximately 8 foot by 8 foot. No more than 10 foot by 10, but closer to 8 by 8.

Q And when you went inside the building was it light or dark?

A It was light.

Q Would you tell the jury what it was you observed when you went inside the building.

A When I first entered the building I observed a mattress {2585} directly opposite me in the doorway. It was approximately 4 by 6.

Under the mattress in the, from my direction, the upper right-hand corner there was a bulge under the mattress, rather substantial bulge. I thought there was someone underneath the mattress. I yelled, "FBI, get out from underneath there and come on out", two or three times. Nobody moved.

I commenced to lift the mattress and there was nobody there at the time. Just a stack of old clothing.

Q Okay. Did you see anything around the mattress at that time?

A Immediately to the left of the, well, the mattress, adjacent to the mattress I saw two knapsacks. One like a greenish brown. I would call it a --

Q Excuse me.

A A green, there were two knapsacks. One on the left would be a greenish or a brownish color. I would call it khaki. It wouldn't be a true khaki color.

The other one was a blue and white knapsack and there was a black, it was a cross between an attache case and a small suitcase, like --

Q Have you ever seen this kind of suitcase before?

A Not that particular one I haven't.

Q Have you seen this kind of suitcase?

A Oh, yes, I have.

{2586}

Q And where had you seen it before?

A This particular suitcase just in general? No specific place?

Q In general.

A Like luggage stores and the like. But not nothing, this was, it wasn't like a government-type suitcase or nothing. This was just a plain type, ordinary type case or attache case.

Q Now, was the, would you describe were the knapsacks closed or open?

A They were open. They were actually jammed packed full.

They were filled to the point of where they were bulging out, the contents were bulging out.

Q Okay And could you see what was inside of the open knapsacks?

A One knapsack, the one I referred to as a khaki knapsack, had three sticks of dynamite protruding from them and was filled with hand grenades.

There were a couple of miscellaneous items. I believe a knife was sticking out of one also.

The blue and white suitcase, there were, there was a box labeled "DuPont Blasting Caps". As I recall red and white in color. And there was a bag containing spent rounds and numerous, various denominations, calibers I should say.

There were also numerous boxes of live ammunition. Again varying

calibers, plus miscellaneous items.

A couple of {2587} walkie-talkie radios and others, I say miscellaneous items.

Q Can you describe, you indicated that there were some, what you described as hand grenades. Can you describe what they look like?

A They were practice-type hand grenades which had been armed. They had a pull friction device attached to a time fuse which in turn was attached to a blasting cap plugged into the hand grenade itself.

Q I ask you to look at page 13 of Government Exhibit 62.

(Witness examining page 13 of Government Exhibit 62.)

A Yes. That would be the type.

A fragmentation type.

Q You recognize that as a type of fragmentation type grenade which you observed at that time in the knapsacks; is that correct?

A I do.

Q What did you do at that time?

A I checked out the knapsacks a little closer for, just to see if there were any additional explosive paraphernalia or type of devices which you could use for demolitions.

I then checked to the behind of me. As you immediately come into the door of the main building there were huge stacks of food, mostly corn and eggs. I checked those also to see if anyone were behind them.

I then checked, as I say, I come into the building there were two rifles standing at the door jammed. One a .308 {2588} Mosberg, one M-1 rifle, 30 caliber Gerand, International Harvester in make, which had an obliterated serial number on it.

Q Okay. And does that rifle, you indicated an obliterated serial number. Does that have any particular type common designation?

A Well, it's an M-1. It's an M-1 Gerand.

Q Is that the name that it's commonly known by?

A I would call it that. An M-1 Gerand.

Q Is that military designation?

A That's military designation, yes. It's a military weapon.

Q Would you recognize it if you saw it again?

A I would.

Q And how would you recognize it?

A I initialed it.

Q I will show you what is marked as Government Exhibit 29-A and ask you whether or not you recognize that exhibit?

(Witness examining Government Exhibit 29-A.)

A I have initials here someplace. Just don't know if that's the one I had.

Here it is, T.M.D. right here (indicating). 957E5.

Q You initialed it?

A My initials are right there, yes (indicating).

Q Now, where would the serial number be on that weapon?

A Serial number would be on here (indicating). I understand {2589} it was obliterated here (indicating).

MR. SIKMA: May the record reflect that the witness pointed to the back of the receiver of this weapon.

Q (By Mr. Sikma) Did you have occasion to look at, or take out any of the items out of the knapsacks which you described?

A I did.

Q And can you tell me whether or not you took out of that knapsack some expended rounds or shell casings?

A I did. I took a paper bag. It was, which contained what I would estimate in excess of a hundred spent rounds.

Q What kind of rounds were these?

A Varying calibers. Anywhere from .22, .38, .357, .44 and there were some rifle cartridges also.

{2590}

Q I would show you Government Exhibit 31D and 35E and ask you whether or not you're familiar with those items.

A Yes. These were of the type taken from the paper bag.

MR. SIKMA: Your Honor, I would offer into evidence Government Exhibits 31D and 35E. I think Counsel have agreed to stipulate to the chain on these particular items.

MR. TAIKEFF: No objection subject to the record.

THE COURT: 31D and 35E are received.

MR. SIKMA: 31D as in Delta, Your Honor.

Q (By Mr. Sikma) Did you have occasion to go outside of the building again, Mr. Duffin?

A I did.

Q Did you have an opportunity to look at the person, the male individual who came out of that building?

A I did.

Q Have you ever learned of his identity?

A I did.

Q And who was that person?

A Dino Butler I know him as, but it was Darrel James Butler, his correct name, full name.

Q And have you seen him since that time?

A I saw him approximately, well, last spring, this past spring.

Q What did you do with the items that you found in that knapsack? {2591}

A I brought them outside and placed them on a blanket and, for inventory purposes.

Q And they were inventoried on that date?

A Yes.

MR. SIKMA: I have nothing further at this time.

MR. TAIKEFF: I will have a few questions, Your Honor.

THE COURT: Very well.

CROSS-EXAMINATION

BY MR. TAIKEFF:

Q Do you know anything about an AR15 being found in connection with this activity of September 5, 1975?

A No, I do not.

Q How long have you been a special agent of the FBI?

A Going on 23 years.

Q And on how many occasions have you gone out to arrest five people, or approximately that number of people at one time?

A Innumerable times.

Q And as a general rule, let's say with respect to arresting five people, how many agents do you go with?

A Would depend on the situation and the terrain and the section.

If you're talking a one room apartment house like in the city of New York, you're talking about an open area. If you're talking about farm and or mountainous terrain, it would depend completely on each particular situation.

MR. TAIKEFF: Now about situations comparable to the circumstances that {2592} surrounded the Al Runnings place. That was out in the country basically, wasn't it?

A I would say definitely; yes.

Q It was on the Indian Reservation?

A Yes.

Q Not too many houses nearby?

A Correct.

Q Open land in the main?

A No. It was pretty heavily brush there.

Q I see.

How many agents would you normally go with on an arrest party such as that?

A If I was directing the arrest, I would have at least three men for every fugitive.

Q That's 15 men?

A 15 men. And I would have for perimeter security to cut off any possible escape routes. In a situation like the Running resident, if I were directing it I would have had, if I had the manpower, I'd say an additional 20 men, roadblocks to set up on access roads. You'd have to stake out the river bordering on the property. I'd have stakeouts along the river. Again the manpower permitting, I would say conceivably at least 50 men, if the manpower --

Q You wouldn't use any jet aircraft, would you, to cover the area? {2593}

A In that terrain I would if it were available. By jet aircraft I'm talking about helicopters.

Q Gunships with 50 caliber machine guns mounted onto the side and rockets underneath?

A I wouldn't say that. I would say a helicopter to direct the operation underneath.

Q Is that essentially how many people were involved in this arrest?

A No.

Q About 50, 60 people?

A To my knowledge, to my aspect of the operation, the portion of the operation I took part in there were 11 of us.

Q You saw what was going on around you, didn't you?

A At my immediate area; yes.

Q And here was a force of at least 50 or 60 or more agents there, isn't that correct?

A Not in my section. There was a simultaneous raid conducted on the Leonard Crow Dog residence in the area of his property. I don't know how many agents there were there. There more than at our party.

I would again hazard a guess, maybe 20. I don't think more than, I don't know for a fact.

Q How many helicopters were involved?

A To my recollection, one.

Q And what kind of clothing did you wear?

{2594}

A I wore, I would say fatigue jacket.

Q Khaki colored?

A No. Mine was a blue, actually. That was a blue, heavy jean type of, heavy type material jacket on that day and I had a pair of heavy duty brush trousers and a pair of boots.

Q Were you wearing a flack vest?

A No.

Q What kind of a weapon were you carrying?

A My service revolver.

Q That's it?

A Yes.

Q How about the other agents in your party, what kind of weapons did they carry?

A Service revolvers. There were some M16s; I don't know how many. I'd say the predominant weapon there was a service revolver. Might have been a rifle or two. I don't really, I can't say for sure.

By rifle I'm talking about our type issue, .308 Winchester.

Q Is that a standard weapon for FBI agents?

A Yes.

Q If they're issued a long gun, rifle?

A Yes.

Q With a scope generally?

A It comes both ways. More a matter of preference. Some {2595} people like the scopes, some like open sights. It's really a matter of preference.

Q Are those scopes generally variable power scopes, two to seven power?

A They're at least that much. Two to seven, if not possibly nine. I believe at least seven.

Q This is, generally speaking, at this particular time, talking about 1975, standard issue scope for FBI agents?

A Throughout the entire country; yes.

Q Now you say the house in which you found the Gerand rifle and the explosives was occupied by whom?

A Occupied by Dino Butler and Kelly Jean Macoma.

Q And when did you last see that M1 Gerand?

A Ten minutes ago.

Q Prior to that.

A Prior to that. Last June.

Q Now in connection with your various precautions and your arrival on the scene, did you come under heavy fire? Yes or no?

Q No.

Q Did you come under medium fire?

A No.

Q Did you come under any fire?

A No.

Q Did anyone resist you in any way, physically try to restrain {2596} you or interfere with your activities after you identified yourselves as agents of the Federal Bureau of Investigation? Yes or no?

A No.

MR. TAIKEFF: No further questions.

REDIRECT EXAMINATION

BY MR. SIKMA:

Q Do you know how far the Al Running residence is from the Crow Dog residence?

A I don't really. I could hazard a guess of a mile. But I'm told that, as I recall, my recollection, I believe some portion of the property down along the river might abutt or be adjacent to portions of it but I don't know for sure.

MR. SIKMA: I have nothing further at this time.

MR. TAIKEFF: Nothing further, Your Honor.

THE COURT: You may step down.

MR. SIKMA: The plaintiff calls Max Marr.

MAX MARR

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SIKMA:

Q Please tell the jury your name.

A My name is Max M. Marr, M-a-r-r.

Q And what is your occupation?

A I'm a special agent with the Federal Bureau of Investigation.

Q And to what resident agency are you assigned?

A The Pierre, South Dakota.

{2597}

Q And are you assigned to work on any Indian reservation?

A Yes. Out of my resident agency we work on five.

Q And is the Rose Bud reservation one of those?

A Yes, it is.

Q Do you recall where you were on September 5, 1975?

A Yes. On September 5, 1975, I participated in a raid on the area of the Rose Bud reservation commonly called the Crow Dog's Paradise.

Q And on that day did you go to any residence other than that of Mr. Crow Dog?

A Yes, I did. Went to that of Al Running.

Q Now do you recall what time of the day it was that you went to the Al Running residence?

A I would estimate it at about 8:00 o'clock in the morning that I was detailed to the Running residence.

Q Now I take it you were detailed to the Running residence after being at the Crow Dog residence, is that correct?

A That's correct.

Q And what was the reason for being called over there to the Running residence?

A My presence was not required at the original scene at Crow Dog's Paradise and they had gotten far greater involvement in the search of the Running property and me and three other fellows were sent over there. {2598}

Q I ask you to turn around and look at Government Exhibit 70 which is a map of the western, northwestern part of the United States and the southwestern part of Canada. Do you see on that map the location of the Rosebud Reservation?

A I do.

Q Would you point it out for the jury?

A The Rosebud Reservation is indicated with this red dot (indicating). It is approximately 120 miles south of Pierre, South Dakota, south and west.

Q And about where is the Al Running residence located on that Reservation?

A It is approximately eight miles west of Rosebud, the City of Rosebud, in a community called Grass Mountain.

Q How large is the Rosebud Reservation, what are it's dimensions, approximately, if you know?

A Oh, I am sorry. I don't know the exact dimensions. It is not quite as large as Pine Ridge.

Q On the Al Running residence, were you given a specific assignment?

A I was.

Q And what was that assignment?

A When I arrived there, I was instructed by the agent in charge of the search to search an orange and white Scout, four-wheel drive type vehicle that was parked in the yard.

Q And approximately how far -- in what direction was this {2599} Scout parked from the main house?

A It was 45 to 50 yards south and slightly west of the house itself.

Q And would you tell the jury what you observed when you went to the area of this Scout?

A Well, upon approaching the Scout, myself and another agent made an observation type of tour around the automobile; and when we got to the rear of it, you could see the tailgate and rear window were open and there were two open sleepingbags and a rifle scabbard laying open across the sleepingbags. Just to the rear of this open end of the vehicle, there was a large brushy area that led on south of the residence, and with the open scabbard and stuff, it delayed our search some, but we made a physical search and observed that there was no individuals in the vehicle.

Q Did you make the search around the area to see if there was anyone in the immediate area?

A Well, we swung into the brush a little bit behind the vehicle itself, but as there were other agents in the area, we didn't go any further. We proceeded with the search of the vehicle itself.

Q And where did you proceed to search in the vehicle?

A Well, our physical search of the vehicle started with the right front or the passenger floorboard area of the vehicle.

Q And did you make a systematic search of this vehicle?

{2600}

A We did. We started at the floorboard area, listed things that we found in order, and proceeded on around right back to the rear of the vehicle again, and then ending up on the driver's side with the final part of it.

Q Now, did you have occasion to search a compartment in the console of that vehicle?

A We did. I myself opened a center console type, a Nogahide type of compartment which was in the center of the vehicle with the lid opened up.

Q That would be between the two seats in the vehicle?

A Right. The Scout automobile, this particular one, had bucket seats; and this was a console that had been placed there. It probably didn't come with the vehicle.

Q And what did you observe when you first opened the -- when you first opened this console compartment, what did you observe?

A Well, the first thing that caught my eye when I opened the compartment was the stocks or the grips of a revolver that were in open view from the top of the console itself.

Q And did you notice anything in particular about what caught your eye?

A Well, this particular weapon had an obvious obliteration on the butt of the weapon and showed that the serial number had been obliterated by some mechanical means.

Q Now, when the serial number of a weapon is obliterated, do you take any action with regard to such a weapon?

{2601}

A Well, in the course of a normal investigation, if we find an obliterated serial number, we do seize it as a contraband in itself, and that's what I did with this weapon.

Q I will show you what is marked as Government Exhibit 31-A, and ask you to look at it and tell me whether or not you recognize lt.

A Yes. This is a particular weapon that we seized that day, a two and a half inch, Model 19, .357 revolver, Smith and Wesson brand.

Q Now, with regard to that particular weapon, what -- is that a weapon commonly used, do you know any group that uses that type of weapon?

A Well, it is very commonly used in my view of the weapons, the personally owned weapons of agents I know personally carry this particular weapon. I do myself.

Q What kind is it?

A Smith and Wesson, two and a half inches, .357 magnum, Model 19.

Q With regard to the type of ammunition which that weapon fires, can you tell the jury what kind of ammunition is fired or can be fired in that type of weapon?

A Yes. This weapon is .357 caliber which is a common caliber, and it basically uses the .38 caliber ammunition or .357 magnum, either one. They are shot interchangeably. You can shoot the .38 in this and the magnum also. However, you {2602} cannot shoot the magnum in a .38 revolver.

MR. SIKMA: I would offer into evidence Government Exhibit 31-A.

MR. TAIKEFF: No objection.

THE COURT: 31-A is received.

(Plaintiff's Exhibit No. 31-A, having been previously duly marked for identification, so offered in evidence, was received.)

MR. SIKMA: Your Honor, at this time I would like to read a stipulation between Plaintiff and Defendant in this case.

It is hereby stipulated and agreed that the following firearm was in the possession of the Federal Bureau of Investigation on June 26, 1975, when they entered the Jumping Bull Hall area shortly before noon and prior to their deaths: Special Agent Ronald A. Williams possessed Exhibit 31-A, Smith and Wesson, Model 19, .357 magnum revolver with a two and a half inch barrel, Serial No. 3K-10439.

That's all I have at this time.

MR. TAIKEFF: I have a brief cross examination, if the Court please.

May I have a moment, your Honor?

THE COURT: You may.

(Counsel confer.)

{2603}

CROSS EXAMINATION

BY MR. TAIKEFF:

Q Agent Marr, may I assume that you would like the jury to have only the most accurate version of all the facts that you testified to?

A Certainly.

Q Now, you referred to a place as the City of Rosebud. What is the population of that community?

A Oh, I would guess probably two thousand-fold.

Q That's on the Reservation, is it not?

A Yes, sir.

Q Now, you were at both locations that had contact with Special Agents of the FBI on September 5, 1975, isn't that correct?

A Yes, sir.

Q What was the total number of Special Agents participating in the raid or raids that day?

A I don't know. I would offer an estimate, is that all right?

Q Oh, please do.

A I would say between 50 and 60.

Q All armed?

A Yes, sir.

Q Some wearing military type clothing, khaki clothing?

A Well, some, I suppose, wore field jackets. I myself wore {2604} a levi type of wear because of the brush.

Q Some carrying full automatic weapons?

A Yes, sir.

Q How many would you say of the 50 or 60?

A Oh, I wouldn't know. There were two with me, two of my four people had automatic weapons.

Q You, one other, and the two carried automatic weapons constituted a group of four, is that right?

A In my team there were four of us, and two had fully automatic weapons.

Q Now, you came upon a vehicle which you have described as an orange and white Scout?

A Yes, sir.

Q Scout is a model or a brand name?

A It is a brand name for International Harvester Scout, I think is the full name of it.

Q I would like to show you Defendant's Exhibit 95 in evidence and Defendant's Exhibit 93 in evidence. Do those photographs depict an International Scout?

A Yes, sir.

Q And although you probably wouldn't be able to tell whether this is the same vehicle, I show you 94 for identification and ask whether that's part of an International Scout?

A Yes, sir.

Q Now, putting aside the fact that it may be International {2605} or that the model may be called the Scout, generically speaking, what kind of a vehicle is an International Scout?

A It is a four-wheel drive, off-the-road vehicle. I think insurance companies refer to them as a four by your recreation vehicle a lot of times.

Q Well, is it a van, a pickup, a sedan, a convertible, would you give it that kind of a description?

A This particular one was like a Chevrolet Blazer, two doors and

a top on it. I don't know whether it would be a car -- like a pickup with a back, that type of thing.

Q You think it might be described as a van?

A Well, opposed to --

Q (Interrupting) Or might be described as a pickup?

A I think so.

Q Or is it a hybrid between the two?

A I think it is, yes, as a matter of fact.

Q You said that it was orange and white?

A Yes, sir, it was.

Q How distinctly orange was it, or might it have been a reddish orange?

A It could have been a reddish orange. I recall it was like the new American Safety Council's reds and oranges that came out two or three years ago. It was a rather bright color.

Q Now, in that vehicle you found that .357 Magnum, is that {2606} correct?

A Yes, sir.

Q Did you find any other weapons in that vehicle?

A Yes.

Q An AR-15?

A No, sir.

Q Was an AR-15 found that day?

A No, sir.

Q In connection with the search?

A No.

Q None at all?

A Not that day, no, sir.

Q Any ammunition for the AR-15, the .223 caliber, found in that orange and white, or perhaps reddish and white vehicle?

A There was a loaded magazine for a AR-15 type weapon, yes, sir.

Q And what was the name of the person whose vehicle that was?

A The registration papers in the glove box indicated it belonged to Leroy Casados -- (spelling) C-a-s-a-d-o-s -- approximately.

MR. TAIKEFF: Excuse me one moment.

(Counsel confer.)

MR. TAIKEFF: One more question, your Honor.

THE COURT: You may.

{2607}

Q (By Mr. Taikeff) As far as you know, in connection with that raid on the Rosebud, was any AR-15 rifle found?

A On the day of September the 5th, 1975, as far as I know there was --

Q (Interrupting) In connection with that raid and its aftermath, but not at that location?

A At that location, the following day an AR-15 was found.

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

MR. SIKMA: Your Honor, that's all the Government has of this witness. May he be excused?

THE COURT: You may step down.

(Witness excused.)

THE COURT: The Court is in recess until 9:00 o'clock tomorrow morning.

(Whereupon, at 5:02 o'clock, p.m., the trial of the within cause was adjourned until 9:00 o'clock, a.m., on Friday, April 1, 1977.)