

United States District Court
FOR THE DISTRICT OF NORTH DAKOTA
Southeastern Division

CR NO. C77-3003-01

UNITED STATES OF AMERICA,

Plaintiff,

v.

LEONARD PELTIER,

Defendant.

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**U.S. District Court for the District
of North Dakota,
Southeastern Division**

VOLUME IV

Pages 521-702

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Monday Morning Session

March 21, 1977

WHEREUPON,

The following proceedings were had and entered of record on Monday morning, March 21, 1977,
at 9:00 o'clock, A.M. without the hearing of the jury:

THE COURT: Is Counsel ready for the jury this morning?

MR. TAIKEFF: Not yet, Your Honor.

THE COURT: Very well.

MR. TAIKEFF: Your Honor, I believe Your Honor asked the government to respond to certain requests that have been made by defense counsel on Friday. I think it would be appropriate that before the government responds I correct myself in one regard. Amongst the various things that I called the Court's attention to was a request I said we made of the government in writing concerning a certain rifle with telescopic sight. In reviewing our files and in speaking with certain people on the defense team I find that although that letter was drafted it was never sent, so I withdraw the statement that such a request has been made to the government and we will make it in writing.

THE COURT: That accounts for the report of the clerk to me that he couldn't find the letter.

MR. TAIKEFF: Yes. It was in fact Mr. Hanson's request that I give him an extra copy of that letter that led me to the information which I just imparted to Your Honor. I apologize to all for the mistake on my part.

However, as to the other requests, I stand on them.

THE COURT: Thank you.

Does the government have a response?

MR. HULTMAN: Your Honor, if the Court would give me a chance at break time to get with Mr. Taikeff, I think we would be able then to get this worked out. I'm not really quite sure what this last response is. I'm confused at this point. I'd like an opportunity at least to visit with Counsel.

With reference to the first request, Your Honor, which has to do with a transcript that is about, I'm serious when I say it's about that deep (indicating). It will take me some time to reproduce it, but I am in the process of getting that started this morning and I will produce that transcript even though, Elliot, I think you have easier access almost to it than I did originally. But I will do however many thousand pages it is.

THE COURT: This relates to the extradition procedures?

MR. HULTMAN: That's correct, Your Honor. It's in effect like a transcript of these proceedings from beginning to end of what took place in Canada.

I will, as I say, I put people about that this morning {523} and it's going to take some time to get it reproduced, but I will produce that and in plenty of sufficient time, Elliot, for, prior to any witnesses of any kind that would be coming from Canada.

Secondly, Your Honor, with reference to the specific request on witnesses, I am not sure what the posture, having not talked to those witnesses myself as yet, I am not sure what their posture is in terms of whether or not they, what their position will be with reference to interview, so I think that is something that maybe the Court ought to give some guidance as to

what is going to be the procedure with reference to a determination by any of those individuals as to whether or not they are willing to consent to interview.

THE COURT: Well, as I noted, reference was made in connection with that request for possible witnesses of the United States. When would you expect those witnesses to be called?

MR. HULTMAN: Let me look at the list again, Your Honor, because I didn't get the transcript until this morning.

I would indicate to the Court with reference to two of these that they would be available and I would hope tomorrow morning that I would have a chance. That would be Draper and Anderson. On Harjo I do not know yet and on Smith I do not know yet so I can't even inform the Court yet at this time on those two. But Draper and Anderson would be available first thing tomorrow.

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THE COURT: For interview?

MR. HULTMAN: I mean, I'm not about to say, Your Honor, that they are going to be willing to. We have already had one witness or two that have refused to be interviewed by anybody up to this particular point. I have not talked to either of those individuals yet but I intend to talk to them if I can tonight or first thing in the morning and that's why I say they would be available, I know, first thing in the morning.

But on Harjo and on Smith I don't know yet when. I have no communication of any kind on those two.

MR. TAIKEFF: What we're seeking in that regard quite simply, Your Honor, perhaps in the presence of the court reporter, to advise the witnesses that we are the defense counsel, we would like to speak with them, tell them that they have a right to speak with us or not speak with us as they choose and ask whether they wish to submit to an interview. If they say no, that is the point at which it would terminate. If they say yes, we propose to proceed to interview them.

MR. HULTMAN: I will make the first two available in the morning, Your Honor. As I say, the other two I don't know yet when because I have not yet talked to any of them and as soon as I do know we certainly can follow a similar procedure with reference to Mr. Smith and Mr. Harjo. I would have them available.

MR. LOWE: Your Honor, last year we had a similar {525} procedure worked out for consent interviews with people. As a matter of fact, several said they would and several said they wouldn't. But the procedure we used in order to protect not only the court's interest in maintaining the interests free from undue pressure but also to protect defense counsel from any claims that we were using improper influence of some sort is we had the court reporter go, in that instance it was a bankruptcy courtroom, but some available room, the witness came there, was allowed to bring someone with them if they wanted, including the attorney if they wanted to. We were there and asked them and explained the Court had set up a procedure whereby if they chose and were willing to be interviewed we could do it on the record ex parte and if they didn't that would be the end of the proceedings. It worked quite well and it protected everyone's interests. I hope we might be able to obtain your cooperation in that regard again because it removes any taint from the interview.

MR. HULTMAN: A deputy marshal, as I remember, was also present during --

MR. LOWE: I think that was because those people were under protective custody, that was why the marshal was there. As I understand, nobody's in protective custody right now.

MR. HULTMAN: I'm going to have to check and find that out. There was none under when you asked me.

MR. LOWE: I would ask for an updating if there is {526} somebody in protective custody, just to be advised.

MR. HULTMAN: I will find that out.

THE COURT: I would suggest that Counsel confer at the mid-morning break and then sometime before the day is over we'll lay down some definite guidelines on procedure in this respect.

MR. HULTMAN: Very good, Your Honor.

MR. TAIKEFF: Your Honor, may I be heard on a few matters?

THE COURT: You may.

MR. TAIKEFF: Thank you.

Your Honor, I make reference to Defense Exhibit 75 for identification which is an FBI 302 which reflects the activities of the person employed by the FBI by the name of Ann M. Johnson which apparently is authorized by a special agent whose last name is O'Kloke. I believe Your Honor that the requirement of Rule 803, subdivision six of the Federal Rules of Evidence were met in connection with the information elicited from Special Agent Adams. Now there may be some confusion in the record and I confess that there is some confusion in my own mind as to whether or not that entire document was offered in evidence or whether any part or it was offered in evidence.

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MR. TAIKEFF: Mr. Hanson, by taking possession of it, has taken the position that it was offered in evidence. I seemed to recall that what I was trying to do is elicit information about it generally. It occurs to me that it would be best if that confusion were eliminated wherever it may exist. So at this time and on the basis of Rule 803 Subdivision 6 I offer in all of the documents known as Defendants Exhibit 75 for identification, and would suggest to Your Honor that I have established that that document is a report, or a record. It's based on information from a person with knowledge. It's kept in the course of the regularly conducted business activity, that is the regular practice of that business activity to take memoranda of such type.

And that was testified to, not by a custodian of the record, but by some qualified witness who recognized that document for what it was. And as indicated in the last sentence of that portion of Rule 803 the term "business" here would include the FBI.

THE COURT: Do you wish to respond?

MR. SIKMA: Yes, Your Honor.

We would object to it on the grounds stated earlier and state furthermore that document itself does not show the times which are indicated on the document are accurate or estimations or what the circumstances were surrounding the taking of that particular document; and we believe that it still {528} falls outside of the exceptions to the hearsay requirement.

And furthermore it is not a statement of this witness and not an inconsistent statement as such because the witness himself has stated the time, the witness in making the call into the individual did not state his impression of the time, and so there is no impression on the document itself except an impression of someone who's not in the courtroom.

There's no way of knowing the meanings, at least as to that particular part of the document, as to what the meanings of those times were. So I would suggest, Your Honor, that it is still outside of the exception to the hearsay requirement.

THE COURT: The Court will reserve ruling on that motion.

MR. TAIKEFF: Your Honor, --

THE COURT: I have not seen the 302.

MR. TAIKEFF: I wanted to indicate to Your Honor and at the some time give notice to the Government that if Your Honor finds that the foundation has not been adequately laid as required by Rule 803 I wish to advise Your Honor that we need that document to cross-examine other FBI witnesses, and therefore we make an application in the alternative and in the event that Your Honor rejects the offer of proof that we be permitted to call out of turn the two FBI employees, Price and Johnson, through whom the document can most assuredly introduced into evidence.

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Taking Mr. Sikma's statement arguendo as being accurate and an appropriate statement under the law then it would be necessary to call the employees, Price and Johnson, in order to introduce that document into evidence. And in view of the fact that we need that document to conduct certain cross-examinations our application then is to take those witnesses out of turn, the defense will call those two witnesses, in order to get into evidence the documents so that we may use it in the course of the Government's case.

MR. SIKMA: Your Honor, whether or not the defendant took these witnesses out of order, the defendant's counsel would not be able to use these documents to cross-examine other witnesses who were not part of the conversations or not part of the so-called communications. They could ask them whether or not they knew of certain communications and if they did there wouldn't be any inconsistencies with their testimony.

Secondly, it's not necessary if the defense were permitted to use these, the 302 concerning the interview with the person who made notes on radio transmissions, would not be necessary to have those items in evidence if they could in fact be used to question other witnesses. They are

marked for purposes of identification and it's not necessary that they be in evidence if they are indeed appropriately used to cross-examine other witnesses.

They already have used them in that means already with {530} Special Agent Adams, but Special Agent Adams was the one they are alleging has made the communication. But there are no other names on this transcript which would in any way indicate that they were, these other persons who they're presuming are going to be able to be cross-examined with this document, there are no other persons whose names are on this and are part of that particular transcription.

As Your Honor will recall the evidence shows that Special Agent Adams was there a considerable length of time before other special agents arrived, And I believe as the evidence will show later throughout the course of the trial that these other individuals arrived at a later time. They will be testifying as to what they heard, but this cannot be used in any way to impeach them because it's not a statement Or theirs. It's not something that they said.

The content of the communication perhaps might be used to impeach Special Agent Adams if the content was anything different than he stated on the witness stand. The only question is whether or not the time is different and when he made the communication he didn't say, "I'm calling at 1:30 or 12:30" or whatever the case may be. He just made the communication and it's not necessary to bring in the witnesses out of order at this time to show what they meant by these communications or if they are in fact even accurate.

This is a third-hand document, a third step removed {531} from the statements themselves. Special Agent Adams made the statement over the radio, someone else took it down and may or may not have accurately recorded the time for that communication.

Then in addition to that Special Agent O'Kloke made notes of his conversations with the two stenographers, or two clerks, who were taking notes around about that time. So the statements that the defendant, of which the defendant is speaking, are not such that could be used or could be offered into evidence at this time, nor would it be for them to be offered into evidence at this time, nor is it necessary for the defendants to start setting up whatever their case happens to be in the middle of the Government's case.

MR. TAIKEFF: Your Honor, even though I both see and hear Mr. Sikma I suspect that he and I are attending different trials. I heard him say that the document in question doesn't contain any other names. It contains perhaps a dozen different names, and the transmissions purportedly made by each Or these people between approximately 12:00 Monday noon and 7:30 P.M. that day. I don't know on what days. The document doesn't mention any other names.

Secondly, the Government has been trying strenuously to keep out one of its own documents made under circumstances which are carefully detailed in two separate 302's, which at this time I would ask the Clerk to mark for identification; and with Your Honor's permission I would like to leave those {532} documents with the Clerk so that Your Honor might read them in order to appreciate the full significance of Defense Exhibit 75 for identification.

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MR. TAIKEFF: Finally, your Honor, I would point out that contained within the many page document previously referred to as defense Exhibit 75 for identification, on Page 4 is an entry denoted 1:26 p.m., Adams to Coward. I assume "Coward" is the last name of an FBI agent

rather than a description of some person "South of Oglala, pickup came in here and he just left" which is not the entire transmission.

So clearly there is no doubt about the fact that at approximately 1:30 Agent Adams made a transmission with reference to a pickup. The Government seems to be contending that what we have here is a case of Adams testifying that there was only one transmission and that occurred at 1:30 in the afternoon.

Well, this document puts the lie to that fact. It shows that at approximately 1:30 he made a transmission concerning the pickup which came in and left, and about that there is no dispute. We concede he made such a transmission.

The issue is whether or not he made a transmission concerning a red pickup at approximately 12:18 p.m. That transmission is also recorded in their document. I can't understand why the Government, or what the basis of the Government's position is, to keep out a document made by another FBI employee which was done contemporaneously {534} except for the typing of the document. It is while these events were taking place.

The only possible position the Government could take is that it puts the lie into Agent Adams. That's no less basis to keep the document out. They have an opportunity through the witnesses or through argument to the jury to explain the apparent failure of Agent Adams to remember what he did that day, but the fact that they don't like the implications of what their document clearly says is not a basis for keeping it out. It has been fully and completely authenticated; and if it is not at this time authenticated properly in your Honor's view, then we have the FBI employees available who can satisfy your Honor, that it is authentic and that it is relevant; and the reason we need it now is because some, if not many or all of the agents whose names appear on this document and who made transmissions, will be taking the stand; and we don't want to be hampered as we were when we tried to examine Agent Adams on the subject, by Mr. Sikma or one of the other prosecutors making objections on the grounds that that document is not in evidence.

It is in evidence, and the jury can decide what weight to give it; but in the meantime I think we should have a fair and proper opportunity to cross examine the agents as to what they said on the day as the events were {535} taking place.

MR. SIKMA: I would say one other thing, your Honor: There is no showing that the events as set out in that 302, of which counsel is speaking, were made contemporaneous to the events. I think that is a fact that's in contention here.

In addition to that, your Honor, I realize there are other names in the document; and that's one of the other reasons why it shouldn't be admitted or used with regard to a particular agent's transcription.

If you want to use it to cross examine a particular agent with regard to the transcriptions that he said that he made, that's one thing; but if you want to ask him about all the other transcriptions that were made, that is another factor which I think is relevant here and in fact indicates that the document should not be put into evidence unless you are using it to impeach all of the people that take the stand here. Until you have established that fact, the other portions of the statements which are consistent with their testimony are in fact inadmissible.

THE COURT: Is there any other record of these transmissions available other than what may have been recorded in this 302, Exhibit 75?

MR. SIKMA: Right. At that early part in the incident I am not sure that there are. There are perhaps other {536} transmissions of other agents, and I could check that out for the Court.

THE COURT: I feel that I understand the position of both parties in this matter, and I am not ready to rule at this time.

MR. TAIKEFF: I understand. Mr. Hanson has marked defendant's Exhibits 81 and 82. One of them is a 302 concerning the activities of Ann M. Johnson dated June 28th, 1975. Defendant's Exhibit 82 is similarly dated, and it concerns the activities of Linda E. Price, and I am wondering whether your Honor will permit me to return them to the Clerk so that your Honor may consider them in ruling on this matter.

THE COURT: You may.

MR. TAIKEFF: Thank you, your Honor.

THE COURT: Are we now then ready for the jury?

MR. TAIKEFF: There are two other matters, your Honor. The first is to advise the Court that in the course of the weekend it came to my attention that there would be certain witnesses called who might require the assistance of an interpreter who speaks both English and Lakota.

I wish to advise the Court at the earliest possible moment of that requirement so as to avoid any delay in the proceeding.

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The last matter, your Honor, is brought to the foreground because the Government has advised us that they intend this morning to put on the medical testimony; and we anticipate the possibility that the Government will attempt to offer into evidence the photographs taken during the post-mortem examination of the dead bodies.

I believe your Honor is aware of the fact that we have taken the position in our trial memorandum that those photographs are either irrelevant, or if they are relevant, they are so prejudicial because they will tend to inflame the passions of the jury, that under Rule 403 of the Federal Rules of Evidence, your Honor, is obligated to weigh the value of the photographs of the Government in terms of its relevance to the case against the prejudice to the Defendant generated by the content of the photographs.

Now, it is our understanding, your Honor, that in making that weighing process your Honor, need consider nothing more than what it is the Government will accomplish in the way of proof that it has a legitimate right to present to the jury versus the prejudice that is recognizable on the face of the evidence.

However, in spite of the fact that, as we understand the law, that is the balancing test; and those are the two factors to be considered.

We come forward to make your Honor's decision easier {538} for your Honor to make so that your Honor can feel that while protecting the Defendant against prejudice, you do not in any way prejudice the position of the Government by depriving them of the opportunity to establish some fact.

We want to make our position in that regard very clear and unambiguous. We believe that Rule 403 provides a legal basis for your Honor making a decision which, once made, assume arguendo is against the Government, deprives them of proving whatever fact they might have proven with the evidence if the prejudice outweighs the value of the evidence, the probative value of the evidence; that the Rule allows for the Government in appropriate circumstances to be short-changed, as it were, because of the balancing test when it does come out in favor of the Defendant.

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even though the Rule contemplates that and even though Your Honor would have to make such a decision and might decide against the government in terms of not allowing them to introduce. The fact we come forward at this time, and as we have in our memorandum, and we say, "We don't want the government to be deprived of the ultimate or technical or legal fact." It is not a proper answer for the government to come forward in response and say, "Just because one side in the litigation offers a stipulation the other side is not obligated to stipulate," which I believe was the basis upon which Your Honor made an earlier ruling where we took essentially this position. We are not coming forward with a stipulation and saying, "Because we offer to stipulate the government must stipulate," we are addressing ourselves to the Court, not to the government. And we're saying to the Court that our position is that the prejudice outweighs the probative value, and under Rule 403 of the Federal Rules of Evidence we are entitled to a ruling in our favor. But in case it is a close proposition for the Court, in case it is difficult for the Court to make up its mind, we offer something in an equitable sense to encourage the Court to make a finding that will eliminate the prejudiced of the defendant. We will concede the fact, we don't offer to stipulate in the ordinary sense, we will concede the fact so the government will not be deprived.

Then, Your Honor, as we interpret Rule 403 we have a {540} simple situation. We have a pair of, a set of scales. On the government's side there is no loss whatsoever because we are willing to concede the technical information which they say the photographs will help them prove. On our side is clear cut prejudice. The scales must tip in our favor, not to exclude the government from introducing the fact but to prevent them from introducing the prejudiced.

When a court makes a ruling under 403 and finds in favor of the government, it is saying, "I'm limited to a choice between letting the evidence in or not letting the evidence in." I find that the probative value is greater in terms of its overall value than the negative value of the prejudice, therefore I must let the evidence in." But we're not limited to those two choices, Your Honor. There is an opportunity for the government, if it insists that it has to get certain technical information in to get that information to the jury, we're saying that there is no necessity to place the prejudicial matter before the jury.

Now the government might wish to be candid with the Court and stand up and say, "Your Honor, we'd like to prejudiced the jury that way, it's going to help us get a guilty verdict in this case." Well, if they did that, then Your Honor would clearly know how to rule in this matter. But the government will stand up and make some sort of a double-talk presentation and never tell Your Honor what it is they want the jury to know from these photographs concretely, specifically A, B, C, D, "That's what we {541} want the jury to know by looking at this photograph," because, Your Honor, if they say that in understandable terms we will rise and address the Court and say, "Your Honor, we concede facts A, B, C and D. What else does the government want? E, F, G and H? We concede those facts." We don't want those jurors to see those

photographs. They're horrible. They will not allow this jury to make a rational and unemotional decision in this case.

That's our position and for that reason we don't offer the stipulation. We offer to take a position which we think in equity necessitates Your Honor ruling in our favor concerning keeping the photographs away from the jury.

MR. SIKMA: Your Honor, I thank Mr. Taikeff for making my argument for me in double-talk and so forth. I would say that perhaps Mr. Taikeff is more articulate than I am in explaining in a few words of stipulation what actually occurred in the events which concerned what this trial is all about. Myself, I am not able to articulate and that's why I need the photographs. I am not able to articulate what occurred there to the extent which the photographs could be used to do so.

I cannot help and I cannot do anything about the fact that this offense which occurred, the incident which occurred was a horrible event and I do not believe that it is proper to have the jury make a determination on the guilt or innocence of an individual, and there are two questions involved here: one {542} is that the jury must determine whether or not the government has proven its case and the other whether it has not. But involving this matter I do not know how we can expect the jury to make that determination if they can't even see the basic evidence which we have available for them which is a photograph of the wounds which were committed on the occasion in question.

I have cited in my brief a hundred cases perhaps where photographs were admitted into evidence which were at least as difficult to look at as these. They are not made in such a way that they are portrayed in a manner to inflame a juror, to inflame anyone, They are portrayed realistically and they realistically show what the evidence is. They realistically portray the events as they occurred and I believe that the fair presentation of the case to the jury requires that this evidence be presented to the jury.

I know the Court has had an opportunity to view them and to be able to make up its mind on this matter.

Your Honor, I would also add that the pictures are less horrible than the actual events and yet if we had photographs or had a videotape of the actual events, surely that would be admissible to show the jury what had occurred.

MR. TAIKEFF: Perhaps Your Honor would like to look at those photographs to see what Counsel is referring to.

THE COURT: I have seen the photographs.

MR. TAIKEFF: Your Honor, I believe that the photographs {543} Your Honor saw at the side bar last week are not the photographs in question.

THE COURT: The clerk procured the photographs that apparently were taken at the time of the autopsy.

MR. TAIKEFF: I see. I thought Your Honor was referring to Exhibit 6A through D.

THE COURT: No. I was not referring to those.

In this case the Court is persuaded by the definition of murder which is, the statutory definition of murder which is alleged in the indictment in two counts: "Murder is the unlawful killing of a human being with malice of forethought, of murder perpetrated by poison, laying in wait or any other kind of willful, deliberate and malicious premeditated killing or committed in perpetration of or attempt to perpetrate any arson, rape, burglary or robbery or perpetrated from an unmeditated design unlawfully or maliciously to affect the death of any other human being other than him who is killed is murder in the first degree."

For the United States to prove murder in the first degree, they are going to have to prove willful, deliberate, premeditated and possibly malicious killing. The fact the Court understands them to be that in this case the two victims which were killed not from a distance but apparently after having been wounded from shooting from a distance, well, then, killed by some persons who approached them and discharged a {544} weapon into their body at very close range is certainly evidence that goes to whether or not the killing was premeditated, willful, malicious.

MR. TAIKEFF: We don't dispute that, Your Honor. That's the point we tried to make before.

THE COURT: I understand the point.

MR. TAIKEFF: That's not an issue in this case. It's not a disputed aspect of this case. The only question is did the defendant participate in that. That's what this trial is about.

The government doesn't have to prove first degree murder, we concede first degree murder.

THE COURT: The jury is entitled to see the evidence and my ruling in this case is that the relevancy of this evidence, and I presume it will be offered in connection with the autopsy, outweighs the possible prejudice of the defendant.

MR. TAIKEFF: Your Honor has just elaborated on the fact that the government has the burden of proving a rather difficult to prove mens rea and we have specifically stated to Your Honor that that is not the contention in this case. It doesn't have to be proven by the defendant. We're prepared to acknowledge that the deaths were a result of what we summarized in legalees as first degree murder. That's not an issue for us in this case. We're prepared to concede that point on the record {545} and before the jury.

The only question as far as we're concerned that the government has yet to prove in this case is whether or not the defendant on trial is guilty of that first degree murder and therefore it not being necessary for the government to make that proof, it is not necessary for the government to adduce that testimony or that evidence. That's the very point we're trying to impress upon the Court.

They only have one element to prove in this indictment one single element: the identity of one of the murderers; namely, one Leonard Peltier. They don't have to prove the other elements of it. We're prepared to concede them.

THE COURT: They of course also have to prove intent.

MR. TAIKEFF: There's no question but that the person or persons who are responsible for the death of the agents committed first degree murder with a requisite intent, malice of forethought

and any other legal element that must be necessary. The only question, this is a single issue trial, was one of those persons Leonard Peltier. That's what this trial is about.

THE COURT: I understand.

The Court has ruled on these pictures.

MR. LOWE: Your Honor, because this matter if it ever goes to a conviction and appeal is going to be a central question for an appellate court to decide, I'm not sure that {546} we understand in view of the offer of concession in the event that the Court would agree to withhold the pictures because of prejudice. It's not clear to me in view of that offer of concession what additional probative value the Court sees the pictures as having for the government's case other than what we have already offered to concede, if any. If there is no other I think the record ought to reflect that. If Your Honor has some additional probative value that we haven't covered, I think the record ought to reflect that so we eliminate a question in sort of the hindsight as to what Your Honor has in mind.

THE COURT: The Court has ruled that the probative value of the pictures outweighs the possible prejudicial effect on the defendant.

MR. LOWE: That in spite of our offer to concede to all elements except the identity of the actors?

THE COURT: That's correct.

MR. LOWE: I presume the Court did not intend to say that these pictures in some way would identify the actors though, there is no contention of that particularly?

MR. SIKMA: Your Honor, I think that that to some extent is true because it will corroborate certain testimony which is going to come into evidence.

MR. LOWE: We would ask for an offer of proof on that and we would be prepared, I believe, to make a concession or {547} stipulations on that information, too.

I just want the record to be clear that there are no reservations on the defense part as to what they are willing to stipulate or concede in order to avoid the prejudice of those pictures going in. We don't want a later claim that is not now made, at least by an offer of proof, to say, "Well, we weren't willing to say that," and I want the record clear on that so that we're making an unambiguous offer.

THE COURT: Any response?

MR. SIKMA: No, Your Honor.

THE COURT: Very well.

The jury may return.

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

THE COURT: Members of the jury, the Court will advise you must for your information that we have been in session since 9:00 o'clock, but we have been in session on legal matters. And I told you at the beginning of the trial that there were going to be times when legal matters have to be argued outside of the presence of the jury and that is going to result in the jury standing by.

The procedure that we're following in this trial is to, for the Court to convene at the time designated and then to take up any legal matters that appears may arise, and if there are no legal matters the jury is brought in right away. If there are legal matters they are heard, and if possible a ruling is made and then the jury is brought in.

So you will incur other delays of this kind sometimes. There'll be a short delay, sometimes a long delay. But I just want you to understand why you are, were asked to come back at 9:00 and then kept waiting for 50 minutes.

You may proceed.

MR. CROOKS: Your Honor, before Mr. Sikma calls his next witness there's one little matter, more or less of a housekeeping nature, I'd like to enter a stipulation into the record with regard to Exhibit 45B, which was the motor vehicle tax registration.

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I believe it is stipulated between counsel that Exhibit 45B was found on July 1, 1975 by Special Agent Robert Harvey in the glove compartment of a 1967 Ford Galaxie which was located in the tent area on June 26, 1975.

For the record I might further indicate that we are speaking of the vehicle described in Exhibit 13A; and that if called as a witness Special Agent Harvey would testify to the foregoing fact. Mr. Taikeff, is that stipulated?

MR. TAIKEFF: We stipulate, Your Honor.

THE COURT: Very well. Exhibit 45 will be received.

MR. SIKMA: Your Honor, I have a stipulation to read which I will file with the Court. The stipulation is: "That it is hereby stipulated and agreed between the United States of American and the defendant, Leonard Peltier and his counsel, that the bodies of Special Agents Ronald A. Williams and Special Agent Jack R. Coler were removed from the place at which they were found late in the afternoon of June 26, 1975.

"That the bodies were transported by ambulance to Rapid City, South Dakota and that when the bodies were delivered to Dr. Robert D. Bloemendaal they were in substantially the same condition as when they were found."

And I would file it at this time, Your Honor.

THE COURT: The stipulation just read by counsel will be received and filed.

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MR. SIKMA: The plaintiff calls Dr. Robert Bloemendaal.

DR. ROBERT BLOEMENDAAL,

being first duly sworn, testified on his oath as follows:

EXAMINATION

BY MR. SIKMA

Q Dr. Bloemendaal, would you please repeat your full name for the jury.

A Robert D. Bloemendaal.

Q And what is your occupation?

A I'm a pathologist.

Q Dr. Bloemendall, would you explain for the jury what a pathologist is.

A A pathologist is a physician who has your M.D. degree, who has an additional four or five years training beyond the M.D. degree in the field of pathology.

Pathology is basically limited to two main areas: clinical pathology and anatomical pathology. The clinical pathology aspect has got to do with the diagnostic tests that are performed in a hospital, primarily having to do with chemistry tests such as blood sugar. We're responsible for seeing that blood is available in the blood bank in the hospital, if someone needs blood that they get the proper type and the blood is cross-matched.

We're in charge of the bacteriology department. If someone comes in with an infection we are the ones responsible to try and determine what organism it is and what drugs might be {551} used on that organism. And other areas of the body has to do with clinical pathology.

Anatomical pathology has to do with changes in tissues that we can see grossly with the naked eye or by examining the tissues under the microscope. This has to do primarily with all the tissues that are removed from the operating room. We examine those, both grossly and under the microscope.

We're the ones that do the frozen sections, trying to tell the surgeon what is the cause of the disease, whether it is cancer or not, and reading Pap smears and different changes that we can see under the microscope in the piece of tissues or a cell from the body.

Q Okay. Would you give us a brief summary of your background and education.

MR. LOWE: We'll stipulate that Dr. Bloemendaal is a qualified pathologist. There's no dispute about that.

MR. SIKMA: Very well. Your Honor, I think it would be helpful if he summarized it without going into all of his background, which would normally be necessary to do, so the jury understands the better that of which he speaks.

THE COURT: Dr. Bloemendaal, will you just state very briefly your background, training and experience.

THE WITNESS: I took my first two years of medical school after my premedical training at the University of {552} South Dakota.

I graduated from Jefferson Medical College. I then spent five years in post-graduate training in Minneapolis and St. Paul, which I completed in 1963; and have been in the practice Or pathology since 1963.

Q (By Mr. Sikma) Did you at any time study under a forensic pathologist?

A Yes, I did.

Q And would you explain to the jury what a forensic pathologist is, just briefly.

A A forensic pathologist is a pathologist that primarily limits his practice to coroners or medical examiners type of work, sudden and unexpected deaths.

I studied under John Coe who is presently the medical examiner for Hennepin County in Minnesota, which is Minneapolis and some of the suburbs. I studied under Dr. Coe for two years.

Q As a part of this work and training did you perform autopsies on persons to determine their cause of death?

A Yes, sir, I did.

Q And did you in this regard perform autopsies on persons who died of gunshot wounds?

A Yes, I did.

Q Can you tell us about how many autopsies you've performed?

A I've never really kept track, but I would estimate 1500 {553} autopsies.

Q Now, did you have occasion to conduct autopsies on Special Agents Ronald Williams and Jack Coler?

A Yes, sir, I did.

Q And would you tell us when this took place and how it came about.

A I received a telephone call from the FBI in Rapid City, I think it was Mr. O'Kloke, on the late afternoon or early evening of June 26, 1975, asking me if I would perform an autopsy on two FBI agents. And I consented to do that.

Q Did you examine the bodies on the evening of the 26th of June, 1975?

A Yes, I did.

Q And where did that examination take place?

A That was at the Baron's Funeral Home in Rapid City, South Dakota.

Q Did you have occasion to have photographs taken of that occasion?

A Yes, sir, I did.

Q In the course of conducting the autopsies on how many occasions did you have photographs taken of Special Agents Williams and Coler?

A I had some of the photographs taken the evening of June 26 1975, and also photographs on June 27, 1975 when I actually performed the autopsies.

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Q I will show you what is marked as Government Exhibits 59 and 60, which I show to defense counsel at this time for inspection.

Your Honor, counsel has asked that I instruct the witness not to make these, or have them shown to the jury until the photographs are admitted into evidence.

THE COURT: Very well.

Q (By Mr. Sikma) Would you examine these, please, and then without showing them to the jury and tell me whether or not you can recognize them.

A Yes. I recognize the photographs in Exhibits 59 and 60.

Q Can you tell me what your purpose is in taking photographs prior to and perhaps during an autopsy?

A Well, photographs are really, I consider part of the report. They can tell so much that I cannot put into words.

They're also useful in refreshing my memory if I need to try to recall things at a later date. And we use photographs and x-rays in any of the cases where we think they would be helpful, either at the time or at a later date.

Q Okay. Now, you've indicated that you also took a series of x-rays; is that correct?

A Yes, we did

Q And what is the purpose of taking x-rays of the individuals when making an autopsy?

A An x-ray is very helpful in evaluating fractures and foreign bodies within a body.

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It is particularly helpful in evaluation of a gunshot to a body in determining the course of the missile or bullet and any fragmentation that did occur, and in actually locating the bullet or fragment of the bullet.

Q So there are times when you are conducting an autopsy when you would not find the bullets, for example, without the use of x-rays; is that correct?

A Well, -- we will not do an autopsy on the body looking for a bullet without the x-rays. We feel they are that essential, or that helpful in finding the bullet.

Q I will show you what is marked as Government Exhibits 25 and 26 and tell me whether or not you can recognize Government Exhibits 25 and 26.

Excuse me, let me show them to defense counsel first of all.

MR. SIKMA: May the record reflect that the defense counsel and defendant have stipulated to the authenticity of these documents. They are copies, they have not stipulated to the contents therein.

Q (By Mr. Sikma) Would you tell, if you can, what Government, first of all, if you recognize Government Exhibit 25?

A I recognize the second half of the document in Exhibit 25 which is the, which is a copy of the death certificate on agent Ronald A. Williams which I personally signed.

MR. SIKMA: I would offer into evidence Government {556} Exhibit 25, Your Honor.

MR. LOWE: No objection.

THE COURT: Exhibit 25 is received.

Q (By Mr. Sikma) Would you examine Government Exhibit 26.

A The second sheet of Government Exhibit No. 26 is a copy of the death certificate on Jack R. Coler which I recognize and which I personally signed.

Q I would notice that there is a time of death there which is indicated at 4:00 p.m. on the death certificate; is that correct? Do you see that?

A I believe it says 4:30 p.m. on this document.

Q Okay What does that indicate, that that is the time that the agents died, or does that indicate something else?

A I did not fill that portion out, and I do not know how that was determined regarding the hour of death.

I filled in that portion regarding the cause of death, and the hour of death was determined by someone else.

Q Could you tell, if I refresh your recollection, whether or not that reflects to the time which the agents were found rather than the time that they actually died?

MR. LOWE: Your Honor, this is asking the witness to do a lot of speculating. We stipulated the time of death as being noon, and if Mr. Sikma wants to explain to the jury we've been over this a hundred times. I have no objection to him just stating it.

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THE COURT: The objection is sustained.

MR. SIKMA: Very well, Your Honor.

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MR. SIKMA: Very well, your Honor. The Government and the Defendant have stipulated, although the jury has not heard it, that the time of death is agreed by the defendant and the Government to be approximately 12:00 noon on the 25th of June, 26th of June, 1975.

Your Honor, with that I would offer into evidence Government Exhibit 26.

MR. LOWE: No objection.

THE COURT: Exhibit 26 is received.

(Plaintiff's Exhibit No. 26, having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Sikma) I would direct your attention again to Government Exhibit 60 and ask you to examine it once again. You have indicated that these accurately reflect what you observed on the 25th and 26th of -- or excuse me, the 26th and 27th of June, 1975, is that correct?

A Yes. They accurately represent what the photographs are supposed to represent. They surely do not represent all of my findings in the course of my examination.

Q Are they helpful to you in explaining your findings?

A Very much so.

MR. SIKMA: Your Honor, at this time I would offer into evidence first Government's Exhibit 60.

MR. LOWE: I would like to have some voir dire on {559} that, your Honor, before they are admitted.

THE COURT: I am sorry?

MR. LOWE: I would like to voir dire this witness before the exhibit is admitted.

I wonder if you would like to offer the other?

MR. SIKMA: I will. I will offer Government Exhibit 59 as well.

THE COURT: You may proceed.

MR. LOWE: Mr. Bloemendaal, my name is John Lowe. I believe we met once before?

THE WITNESS: I believe we have.

MR. LOWE: We have talked about this matter also, I believe, informally from time to time.

Let me ask you some questions about the photographs in these books. First of all, some of the photographs relate to objects which you removed from the bodies, that is, fragments of metal and other such objects, do they not?

THE WITNESS: (Examining).

MR. LOWE: Bullet fragments?

THE WITNESS: One photograph in Exhibit 60 does, and as I recall, one in Exhibit 59.

MR. LOWE: All right. The items shown in those photographs, I believe, are also -- if they are not actually here in the courtroom -- they have been available to you and you have examined those, and those are physically {560} available, are they not, to your knowledge?

THE WITNESS: They were previously, and it is my understanding, that they are.

MR. LOWE: All right. Now, with regard to your use of these photographs, if you were to give a simple statement of your findings, that is, your conclusions on the basis of your pathological examination, for the purpose of this trial, and if in fact you were to do so in a situation in which the Defendants were not disputing anything -- in other words, that everybody agreed what the facts actually were -- but you nonetheless have to communicate your findings to the jury, I would like to ask you some questions in that context.

If that be the case, one of the pertinent questions would be the direction from which the bullet was fired with relation to each of the bodies, is that correct; that would be a pertinent item for you to tell the jury?

THE WITNESS: Well, basically I answer the questions that are asked of me. I don't write or direct anything specifically to the jury.

MR. LOWE: You are obviously testifying for the benefit of the jury. My point is that one of the questions that you have testified to and would presumably testify to in this matter would be the directions at which the bullets entered the bodies, isn't that correct?

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THE WITNESS: That is correct.

MR. LOWE: And if you use a pointer and a person either standing or lying, or whatever position you want them in, you can show the directions from which bullets come. They come in straight lines normally, do they not?

THE WITNESS: I agree they come in straight lines normally.

MR. LOWE: And is it possible, based on what you do know about the directions, for you to say that one of the bullets came from right to left and touched certain part of the body or penetrated at a certain place without showing a picture, that's possible, is it not?

THE WITNESS: Oh, that surely is possible.

MR. LOWE: And another item that might be expected would be to testify as to the nature of the bullet that is, to the size and velocity, isn't that true, to the best that you can, you may not always be able to say that?

THE WITNESS: Within certain limits I surely could within certain limits.

MR. LOWE: And I presume that the size of the bullet would be determined from whatever examinations you made of the fragments, whatever examinations you made of the wound, and perhaps other salient factors based on your own examination, and that you could describe to the jury as closely as possible what you were able to determine, am I {562} correct about that?

THE WITNESS: In the broad sense, yes.

MR. LOWE: Were you able to determine a specific size of bullet from the pictures in this case, or just the general description?

THE WITNESS: Just a general description. I do not claim to be an expert in ballistics or anything. I try to remove the physical material and see that it gets into someone's hands that is more knowledgeable in this area than I.

MR. LOWE: All right, sir. To the extent that you are going testify and to the extent that you would use these exhibits, however, you could describe to the jury what information you have been able to derive, based on your own knowledge and experience, about the bullet size without the necessity of showing them a picture, could you not?

THE WITNESS: Well, I would at least want to have the pictures available to me to look at to help with my description. This is part of my description, and I do not describe things in as much detail when I know I have photographs of that than if they were not available, and I would have to do it all from my notes or dictation.

MR. LOWE: Do I understand that you are saying, sitting on the witness stand right now, it would help you {563} to have the photograph in front of you as you are trying to describe the size of the bullet to the jury, for example?

THE WITNESS: Yes.

MR. LOWE: But again it would not be necessary for you to show the jury the picture in order for you to make some adequate description of the bullet to them?

MR. SIKMA: Your Honor, in part I would object to this. The witness cannot tell completely whether or not the photographs would be helpful to the jury.

MR. LOWE: That wasn't the question, your Honor.

MR. SIKMA: This is a question of fact.

MR. LOWE: This witness is an expert, and that's why I am asking him -- that would not be absolutely necessary, would it?

THE COURT: The reporter will read the question back.

(Question was read by the reporter.)

THE COURT: The objection is overruled. You may answer.

THE WITNESS: I could describe it to the jury without them seeing the pictures.

MR. LOWE: All right. Now, another question which is going to be relevant, and I again -- it may or may not be something that you have tried to determine, I understand, but that to the extent you have tried to determine -- and {564} that would be the distance of the muzzle of the gun away from the body at the time the bullet was fired; and there are certain indications on the body which a forensic pathologist can use to determine or make some estimate as to the distances involved. Did you try to make these estimates or measurements on your own, or was that someone else who did that?

THE WITNESS: The only measurements or conclusions that I would be responsible for are the ones that are in my autopsy report as I am not a forensic pathologist. I believe, as I recall, I have some definite feelings about the distance of one of the gunshot wounds. In other areas I think, for the most part, I did not state an opinion as to distance.

MR. LOWE: All right. Now, another determination that I believe you made in your autopsy report was an estimate, at least as to which of the shots or which of the bullets which entered the bodies of the two different agents were fatal shots, or which ones you estimated might have rendered the agent disabled or unconscious, am I correct in saying that you attempted to make a determination of that?

THE WITNESS: Well, I have it in my own mind. I don't recall how much detail of that is actually spelled out in my report, Mr. Lowe.

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MR. LOWE: Let me try to close this down a little bit then based on what you said. You gave me an entry there by what you have said a moment ago that may shorten this down.

Your autopsy report is basically what you are able to tell the jury, that's a summary of your findings, is that a fair summary?

THE WITNESS: It is a summary, but I am sure that I could tell the jury much more than I can put on paper.

MR. LOWE: I understand that. I don't mean to limit you by any means.

Is there, first of all, anything in the autopsy report that you cannot tell the jury without the necessity of showing the jury these very gory pictures, is there anything in there that you cannot describe in your autopsy report without subjecting the jury to the truth of seeing these gory, bloody pictures? That's what I am getting at.

THE WITNESS: Well, I am sure there are many details in a photograph that I would not describe that anyone could see in a photograph, that I wouldn't describe. Again I don't know that I can answer that question because it almost implies that I have to be able to think like the individual jury members. I don't know if they would get more out of looking at the photographs or from my description. I don't know the answer to that, sir.

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MR. LOWE: But in an undisputed setting where the findings pathologically are not disputed by the defense, is there anything in your report that requires looking at pictures in order to understand?

MR. SIKMA: Your Honor, I would object to that as calling for a legal conclusion on the part of the witness.

MR. LOWE: It is not a legal conclusion, it is a factual conclusion. This is an expert, your Honor. If he can't understand them, then it is hard to see how the jury can understand them. They are not experts.

MR. SIKMA: Furthermore, it invades the province of the jury. I think the witness testified at the outset that the photographs are essential to this matter.

THE COURT: The reporter will again read that question back.

(Question was read by the reporter.)

THE COURT: The objection to that question is sustained.

MR. LOWE: Can you state in your opinion what the cause of death was without referring to pictures, is that possible?

THE WITNESS: Yes.

MR. LOWE: Do you know of any fact which you consider pathologically significant in this setting, based on all you know and have discussed about this case which {567} cannot be described to the jury by you without the necessity of having them look at these terrible pictures?

THE WITNESS: I have to look at the pictures in order --

MR. LOWE: (Interrupting) I understand.

THE WITNESS: When you said "look at the pictures", I don't think there is any question that I personally cannot describe any finding of mine as well as a photograph can display it, and this is true whether my report is disputed or not.

As far as I am concerned, these pictures are part of my report whether they are disputed or not. They surely represent my findings better than I can describe them.

THE WITNESS: We]l now, do they represent your findings, or are they data on which you reach your findings?

THE WITNESS: They are both. They are both part of the findings and represent data that I base my findings on.

MR. LOWE: I say "findings", I am talking about conclusions. I don't mean the findings in the sense of discovering them, seeing what is there.

In terms of your conclusions as a pathologist, aren't they merely the information or the physical evidence upon which you base your conclusions?

THE WITNESS: They are a portion of it.

MR. LOWE: That's right.

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THE WITNESS: They are a portion of it, yes, sir.

MR. LOWE: Excuse me just a moment.

(Counsel confer.)

MR. LOWE: Your Honor, I have no further questions on voir dire.

We would object to the showing of these pictures to the jury as being unnecessary. In view of what Dr. Bloemendaal has said, we are perfectly willing to have him state his conclusions and enter stipulations or concessions. There is no dispute about what his pathological findings are.

We object to both because we feel it is prejudicial to the Defendant and also unnecessary to subject them to the jury. It is also immaterial.

THE COURT: Did you care to respond?

MR. SIKMA: No, your Honor.

THE COURT: Very well. The objection is overruled.

Q (By Mr. Sikma) I would ask you, Dr. Bloemendaal, to take then first Government Exhibit 60 --

THE COURT: (Interrupting) Excuse me. Were they offered?

MR. SIKMA: Yes, your Honor, they were.

THE COURT: Very well. Exhibits 59 and 60 are received.

(Plaintiff's Exhibits Nos. 59 and 60, respectively {569} having been previously duly marked for identification, so offered in evidence, were received.)

Q (By Mr. Sikma) Would you go through and cite the pages now you are starting there, with Page 1, and explain to the jury what it is and what significance it has; and at this time so that

the jury has an idea of what you are speaking if you just hold it up -- the jury will have an opportunity later to view these more closely -- but if you just hold it up so the jury can see which picture you are talking about, so they will be able to fresh their recollection later -- would you go to Page 1 of Government Exhibit 60 first and indicate what it is?

THE WITNESS: Your Honor, can I now do that and show these to the jury when I refer to them?

THE COURT: You may now do so.

A Thank you. Government Exhibit No. 60, Page No. 1, is a photograph of a legal pad with some writing on the top of the legal pad. The writing says "Ronald A. Williams, June 27th, 1975," and along the left-hand side of the page are three labels Head, left flank and left foot.

Adjacent to these three labels are objects which were foreign material, pieces of bullets which I removed at the time of the autopsy from the head, left flank and left foot of Agent Williams.

Also, on the pad is a ruler so that I could have some idea as to the size of these fragments should that be necessary {570} at a later date.

Q (By Mr. Sikma) O.k. Take page -- the next page with the photograph.

A Page 2 is a photograph of the head and upper shoulders and portions of the hands and arms of Agent Williams as I first viewed Agent Williams.

Photograph 3 is a similar photograph, but it extends and includes the area from the upper abdomen to above the head, including both arms of Agent Williams. Both hands and up to nearly the elbow of both arms are partially or almost completely covered with blood. Most of the face of Agent Williams is also covered with blood, and there is some blood in the left axilla or armpit area of Agent Williams in photograph No. 3.

Q What is the next page?

A In addition, on Photograph 3 there is a darkened area of the skin of the lower axilla on Agent Williams, and on closer examination of Photograph No. 2 there is definite distortion of the tissues of the upper lip and nose of Agent Williams.

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The next page which has a photograph in it is page number 8.

Q Can you tell when this photograph was taken as opposed to some of the others? Tell the jury what the difference is in some of these photographs.

A Photographs Nos. 2 and 3 were taken the evening of the 26th when the bodies arrived. This is the way Agent Williams looked when I first viewed the body before it was washed down.

Photograph Nos. 8 and 9 are photographs of the body after it has been washed. Photograph No. 8 is a photograph of Agent Williams from approximately the waist to the top of the head taken from the left side. It shows a hole or gunshot wound in the left arm of Agent Williams about a

third of the way down from the shoulder to the elbow. It involves the muscles of the left arm. There is a large defect in the central portion of the face of Agent Williams involving the upper left nose and extending nearly to the eye on the left side. In addition there are numerous small defects in the skin, plus some distinct linear scratches or abrasions in the skin in a rather uniform manner. In addition, over the forehead there is some rounded, more burning type of defects.

Photograph No. 9 is the right side of Agent Williams from the chest up. This was taken on June 27, 1975 at the time of the autopsy. There are some defects or abrasions and breaks in the skin of the right anterior shoulder of Agent Williams {572} over the right side of the neck and the right side of the face and forehead. In addition, there is an incision over the base of the right neck which is an embalmer's incision. This was made by the mortician and this is a standard incision that is made on any body when they start to do their arterial embalming.

Referring to photograph No. 8, before we leave that, in the back of Agent Williams' head on the left side there is a massive hole in the top of his head on the left side. There is a very large break in the skin and there is actually a hole in the, both the skin and the bone there and actually there is brain protruding from that hole in the top of Agent Williams' head.

Photograph No. 10 is a photograph of Agent Williams from the waist up taken from the left side with the arm extended or abducted. It was taken on the evening of June 26th. It shows some of the previously described features, but in addition it also shows where the bullet that entered the outer portion of Agent Williams' arm penetrated his arm and came through on the inside of his arm. It also showed where it appeared to have struck, had split in two with a portion hitting the body of Agent Williams in an area down several inches from the apex of the axilla and the second piece striking Agent Williams just above the belt line on the left side. Again there is some bleeding around all of those gunshot wounds.

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Photograph No. 11 is a photograph of Agent Williams from about the ankles up including above the top of the head. It shows how Agent Williams was dressed at the time. At the time I first saw Agent Williams he did have trousers on and did not have any shirt or covering over the upper part of his body. It shows in lesser detail some of the features I have previously described.

Photograph No. 12 is the back or dorsal aspect of Agent Williams' right hand. There is a gunshot wound of the hand which extends from the index finger over to the base of the little finger and much of the way from the knuckles and including the knuckles nearly up to the wrist. There is a tearing of the skin. This was taken on the 27th after the body was washed.

Photograph No. 14 is a photograph of the right hand of Agent Williams from the distal end of the arm, including the wrist and the hand. It was taken prior to washing of the hand. It shows four fingers in the photograph, three of which are in a normal position, as is the thumb, and the fourth finger is markedly distorted back here as it was displaced by the gunshot wound. It also shows some very dark pigmentation on the surface of the palm of the hand of Agent Williams near the base of the little finger.

The next photograph is also a photograph of the hand of Agent Williams. This photograph is not numbered but it follows No. 14 in sequence. Again it is a little different view {574} of the right hand of Agent Williams and again it shows the distortion of one of the fingers and the veins over

the hand. It also shows a small amount of black pigmentation which was on the hand of Agent Williams.

The next photograph is a photograph taken from the left side of Agent Williams which shows a portion of his arm and elbow, the left flank and left hip and this does show in more detail the previously mentioned gunshot wound of the left flank or the gunshot wound which was present just above the belt line in one of the previous photographs.

The next photograph is a photograph of the trousers of Agent Williams from the ankles up to just below the pockets and it shows some discoloration of the trousers, two different colors, one is a red color which is blood and the second one is brownish grey or tan pigmentation which appears to be dirt or mud.

The next photograph is a photograph of the left foot of Agent Williams along with the lower portion of his trousers. It is taken from the inside of the foot. It shows a defect in the inner portion of the shoe proximal to the base of the toes and in addition it shows a tear, a portion of a tear in the inner aspect of the trousers of Agent Williams.

The following photograph is photograph Mo. 19 and it shows the left foot of Agent Williams after removal of the shoe, stocking and trousers and that photograph shows a gunshot wound {575} over the inner aspect of the left foot of Agent Williams which does correspond to the defect in the shoe shown on the previous photograph.

Photograph No. 20 is a photograph of Agent Williams taken on the evening of June 26th which shows a picture of Agent Williams taken from the right side from about the knees up to the mid-abdomen. It shows the contents of what were found in Agent Williams' pockets, which included some bullets, sunglasses, keys and other objects that I cannot recognize in that photograph.

Q With respect to the last page, you indicated there are some bullets in that photograph. Are they in any kind of container?

A Well, they are arranged in three separate groups. One of them is in a black container that appears to have some kind of a snap cover. The remainder of the bullets are loose.

Q Are these all, do these all appear to be live rounds to you?

A They do.

MR. LOWE: Objection, Your Honor. Unless the doctor is qualified to state it, I don't know if there is any dispute about it, I don't think this is the person to state whether they are live rounds or not.

THE COURT: Sustained.

Q (by Mr. Sikma) Would you go back and --

THE COURT: At this time the Court will recess until 11:15.

(Whereupon, recess taken.)

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

MR. LOWE: There is a woman in the courtroom who I believe is Mrs. Coler, the widow of Agent Coler. She has a red blouse and I think she had a white fur collar on the jacket that she had with her. And it has been reported to me that she has been intermittently crying rather obviously in the courtroom, and I don't mean by that audibly necessarily, but any juror who looked in her direction, they would, it would be obvious that here is an attractive white woman who is crying fairly substantially in a courtroom and it's not going to take long if the jury does not already know who she is, for the jury to realize that this is the widow.

I think this woman has an absolute right to be in the courtroom to the point that she does not distract, but if she's going to sit in the courtroom and cry, then I think she ought to excuse herself. I certainly am sympathetic with the reason that she would cry. I think it would be an emotional experience to go through, particularly when the court is going through autopsy information on her deceased husband. I think that at this point the mere crying in the observation of the jury is sufficient reason for her to excuse herself from the courtroom and I would ask the Court to, either through the offices of the U.S. Attorney, I'm sure they have some communication with this lady, to indicate to her that if she finds that she is going to {577} cry that she ought to excuse herself at that time. Because we believe that it's going to be very prejudicial. I'd rather nip the problem in the bud because it may get worse as time goes on.

MR. HULTMAN: Your Honor, first of all I think this falls clearly within the realm of the Court and what the decorum is, and I sit next to the bench and I haven't heard anybody crying.

I know there are many members of AIM who exuded laughter visible already in the course of these proceedings, and I think that the mother of one of the two decedents, as long as she's been kept off the stand by counsel, the Government agreed to this most certainly, has a right, as long as it doesn't interfere in any way with the proceedings, to be present in this courtroom. I'm only going to the rights, Your Honor. If it in any way does interfere in the court, that it does in any way or would prejudice any way, certainly the Government will accede very readily to any posture that the Court would indicate.

But I'm merely indicating there are all kinds of interested people sitting out there as far as the defendant is concerned and motions are given in unison on many occasions already in the course of this trial. And so I feel that only appropriate that a mother who's lost a son have an opportunity at a public trial concerning the death of her son to {578} be able to be in the courtroom as one single person in the mass of individuals out there.

Now, if she were sitting in the front with the prosecution, something that would be obvious, I certainly would agree that that would not be in order. But I don't even know where she is in the courtroom and I certainly have not heard anything, or that's been visible or audible; and so I would object that she be deprived of an opportunity to remain in the courtroom.

THE COURT: Would you state for the record where she is seated, Mr. Lowe.

MR. LOWE: As you look at the courtroom, Your Honor, she is on the far left in about the second row. She was a few moments ago, and I'm again, I'm not speaking to her being in the courtroom. Obviously I agree and I would also agree that somebody else that demonstrates

some sort of outburst or distracts the jury, I would make a similar application regardless of who it was.

But to the extent this lady cries where it's visible to the Jury, I think she ought to leave the courtroom if she gets emotional, and it's understandable that she would.

THE COURT: You say she is seated to my left?

MR. LOWE: Yes. Almost on the wall, or I believe, Judge, she was a couple of moments ago. If not, the second row. She's got a red blouse and dark hair and dark glasses. {579} An older woman.

MR. HULTMAN: It would not be Mrs. Coler.

MR. LOWE: I thought Coler was the married person and Williams was the bachelor.

MR. HULTMAN: No.

MR. LOWE: One of them has a widow.

MR. HULTMAN: Mrs. Williams is the only, to my knowledge, one that's here, that is still here. The other lady left on Friday.

MR. LOWE: Well, whoever the lady is, that's why I say I don't know who she is, except I'm led to believe that she is in some way related to the deceased agent.

MR. HULTMAN: The mother, she'd been the only possibility.

MR. LOWE: Well, whoever it was, the young woman who was crying, I was not in the court and I did not see it to note if it was Mrs. Coler or Mrs. Williams. But I was advised that it was one of them.

MR. HULTMAN: We may be talking to somebody that doesn't even fit into the category.

THE COURT: When you say "my left," you are talking about there (indicating)?

MR. LOWE: Yes, Your Honor.

THE COURT: I will observe this next period and --

MR. LOWE: I don't care who it is. If you're crying {580} in the courtroom they can get their emotions under control. And I would say the same if it was an Indian person.

MR. HULTMAN: I don't know, John. The only person that I know who is still here that was in any way related to any of the two deceased agents is Mrs. Williams, who is the mother of the deceased agent.

MR. LOWE: You should be able to see --

THE COURT: I see her now.

MR. LOWE: That was who was reported to me. But I don't mean to say it was audible. But if the jury sees that I think that is a distraction. And Your Honor can probably see better than anyone else being up on the higher here, and Mr. Hanson perhaps, and if it becomes obvious that the lady is crying I think some subtle indication ought to be made that she should excuse herself when she is unable to control her emotions.

MR. HULTMAN: Your Honor, I would, for the record, like to observe that this witness is as about as far in the courtroom as she can possibly get and still be in the courtroom. She's in the last row and the last person.

MR. LOWE: I don't care if the jury can see her.

MR. HULTMAN: I just wanted to indicate where she was in the record, Your Honor.

MR. LOWE: That's fine.

MR. HULTMAN: And that is Mrs. Williams, at least --

MR. LOWE: With the red blouse?

{581}

MR. HULTMAN: With the red blouse. That's the mother of one of the deceased agents.

MR. LOWE: She frankly didn't look old enough to be his mother.

MR. HULTMAN: She is. If you had let her on the stand, Your Honor, I would have made that observation on the record.

MR. LOWE: Well, that's who it is then and I am sympathetic with the woman. I don't mean that it's unexpected, but I think if she loses control she ought to excuse herself until she can regain her composure. I am satisfied if the Court will keep an eye on it.

THE COURT: Very well.

MR. LOWE: Thank you.

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

THE COURT: Earlier today I made the comment that I had seen Exhibits 59 and 60 as they had been furnished to me by the Clerk. I will stand corrected on that. They were furnished to one of

my law clerks by one of the attorneys for the prosecution and were handed to me by one of my law clerks.

MR. HULTMAN: Your Honor, might I also bring a matter to the Court's attention.

In earlier discussion reference was made to specific witnesses, and I did allude to two and I have discovered that a {582} third one is here and is present. And as I mentioned to Mr. Taikeff that's Mr. Smith.

I wasn't, I didn't realize who we were referring to, and that likewise I would make him available in the morning. I don't know where he is, but he is to check in this evening and I will also make him available.

I do have knowledge that he is present. In fact I was sitting eating last evening, Your Honor. So I want the record made very clear when this young gentleman came up and sat down at my table and I didn't realize it's one and the same persons that counsel was specifically referring to. So I want that on the record so that there's no misunderstanding because discovered just in the break that the third person of the hour to which there were reference was somebody who came to eat at my table last evening. And I will make sure he is available tomorrow morning as per our earlier discussions at break. But I wanted the record to reflect my mistake, Your Honor.

THE COURT: Very well. You may bring in the jury.

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

THE COURT: You may proceed.

Q (By Mr. Sikma) Dr. Bloemendaal, I would ask you that you go to Government Exhibit 59 and explain briefly to the jury what the various photographs in Government Exhibit 59 reflect.

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A Government Exhibit 59, page number 1, is a photograph similar to the first photograph in Exhibit No. 60. Only this is of the material removed from the body of Agent Coler on 6/27/75, and the areas labeled are the head, neck, neck and right chest.

Photograph number 2 is a photograph of Agent Coler as I first viewed him on the 26th. And photograph number 3 is also a photograph of Agent Coler from a different angle.

Both show primarily the head and chest of Agent Coler, and photograph number 2, there is a bullet wound involving the neck. And in photograph number 3 there is a bullet wound across the top of the head.

There is no photograph in page, on page 4.

On page 5 it is a closer up photograph of the neck and chin area of Agent Coler. There is a large gaping wound beneath the chin on Agent Coler, and in addition there is a wound over the right aspect of Agent Coler's jaw.

Photograph number 6 is a photograph from the right side of the top of Agent Coler's head and it shows a gunshot wound as it struck Agent Coler across the top of the head, which also involved the bone and the underlying brain.

Photograph number 7 is a photograph of the right arm of Agent Coler and the right side of Agent Coler's chest. It shows a gunshot wound, or a portion of the gunshot wound, involving the flexion portion, of the flexure portion of the {584} right arm of Agent Coler near the elbow; and it also shows over the posterior right chest where the, this same bullet wound in addition to striking his arm, the same bullet struck the right side of his chest.

Photographs number 8 and 9 are photographs of the right elbow area of Agent Coler, again from different angles showing the large area of tissue destruction in the area of the right elbow due to the gunshot wound involving the elbow.

In addition photograph number 9 shows a tourniquet around the left, or correction, the right, the right arm of Agent Coler between the gunshot wound and the shoulder.

Photograph number 10 is the left arm wrist and back of the agent's hand. Also a portion of the left, side of his body.

Photograph number 11 is again the right arm from a different angle and again with the tourniquet above the gunshot wound.

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Photograph No. 12, Photograph 12 is that of the trousers of Agent Coler which shows that they are spattered with blood, particularly the upper part of the right leg.

Photograph No. 13 is the crown of a tooth or a gold tooth, which are removed from the back of the mouth or the throat area of Agent Coler.

That is all the photographs in Exhibit No. 59.

Q (By Mr. Sikma) Did you have occasion to write a pathological summary concerning the autopsies which you performed?

A Yes, I did.

Q And you did one on Special Agent Williams and Special Agent Coler, is that correct?

A That is correct.

MR. SIKMA: After showing counsel for the Defendant, I will show the witness Government's Exhibit 7 for identification.

(Counsel examines document.)

THE COURT: I did not hear the designation of the exhibit.

MR. SIKMA: 7, your Honor.

THE COURT: 7.

Q (By Mr. Sikma) I ask you to tell me whether or not that is the autopsy report for Special Agent Williams and Special Agent Coler?

A Yes, it is.

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MR. SIKMA: Your Honor, at this time I would offer into evidence Government Exhibit 7.

MR. LOWE: No objection, your Honor.

THE COURT: Exhibit 7 is received.

(Plaintiff's Exhibit No. 7, having been previously duly marked for identification, so offered in evidence, was received.)

Q (By Mr. Sikma) I will show you what has been marked as Government Exhibit 22-E, 33-C, 22-D for identification.

MR. LOWE: Your Honor, counsel have discussed these. Because as far as we are aware, the defense and the prosecution agree on the pathological findings of fact, as far as I am aware there is no dispute whatsoever unless somebody comes up with a surprise we are not aware of we have suggested that the prosecution save a lot of time and just have Dr. Bloemendaal discuss these exhibits in a conclusionary fashion. There is no dispute on them. We don't plan to contest them in any way. It would save a lot of time.

MR. SIKMA: Very well. I would then offer into evidence Government's Exhibits 33-C, 22-D and E; also Government Exhibit 22-A, B and C.

MR. LOWE: Based on the representation of Mr. Sikma that these are true exhibits that we have discussed, we have no objection, your Honor.

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THE COURT: Very well. Exhibits 22-A, B and C, 22-D and E, and 33-C are received.

(Plaintiff's Exhibits Nos. 22-A through E and 33-C, respectively, having been previously duly marked for identification, so offered in evidence, were received.)

(By Mr. Sikma) O.k. Would you go through -- you have described generally what the photographs of Special Agents Williams and Coler presented to the jury. Would you describe for the jury what your findings were with regard, first of all, of Special Agent Williams with regard to the exhibits that I have shown you and photographs which you have shown to the juror.

A Exhibits 22-D, 22-E, and 33-C are fragments of bullets which have a similar appearance and in similar containers as removed at the time of the autopsy from Agent Williams from the locations labeled.

Q And in this regard would you go back to the photographs of Special Agent Williams and tell the jury, in layman's terms as much as you can, what you found his wounds to be and how you analyzed them from a pathologist's point of view?

A I felt that Agent Williams, was shot three times. I felt that he was shot one time through the outer portion of the left arm with the arm partially away from the body, that the bullet entered the outer portion of his arm, came out the inner portion of his arm, and that the casing or the jacket of the bullet split off from the main core of the bullet with the main core {588} striking him in the upper part of the chest and not penetrating the skin, and the lower portion -- or the jacket entering the lower portion of the body just above the belt line, and the Exhibit --

Q (Interrupting) Is it 33-C?

A 33-C is the copper colored fragment that I removed from the left flank or just above the left belt of the gunshot wound in Agent Williams.

Q Dr. Bloemendaal would this wound have been fatal?

A No. It would be potentially fatal without medical care, but it would not have been fatal it would have been painful and disabling, and if it were treated properly, it wouldn't have been fatal.

Q Very well.

A I felt Agent Williams received a second gunshot wound which involved the inner aspect of the left foot, which had also creased the inner portion of the leg of the trousers, striking the inside of the left foot, breaking the main bone to the big toe. It would have been very painful, it would have been disabling, but it would not have been fatal.

Exhibit 22-D appears to be the fragments of material which I removed from the left foot of Agent Williams.

I felt the third gunshot wound which Agent Williams received, he received with his hand in front of his face in manner similar to this (indicating), that the gun was in {589} striking him in the upper part of the chest and not penetrating the skin, and the lower portion -- or the jacket entering the lower portion of the body just above the belt line, and the Exhibit --

Q (Interrupting) Is it 33-C?

A 33-C is the copper colored fragment that I removed from the left flank or just above the left belt of the gunshot wound on Agent Williams.

Q Dr. Bloemendall, would this wound have been fatal?

A No. It would be potentially fatal without medical care, but it would not have been fatal. It would have been painful and disabling, and if it were treated properly, it would not have been fatal.

Q Very well.

A I felt Agent Williams received a second gunshot wound which involved the inner aspect of the left foot, which had also creased the inner portion of the leg of the trousers, striking the inside of the left foot, breaking the main bone to the big toe. It would have been very painful. It would have been disabling, but it would not have been fatal.

Exhibit 22-D appears to be the fragments of material which I removed from the left foot of Agent Williams.

I felt the third gunshot wound which Agent Williams received, he received with his hand in front of his face in a manner similar to this (indicating), that the gun was in {589} contact with Agent Williams' hand like this (indicating), that the bullet went through his hand, struck him in the face and a portion of the bullet out of the back of his head with fragments of bone and possible the bullet causing the linear scratches on the face of Agent Williams.

Exhibit No. 22-E appear to represent fragments of the bullet which I removed from the head of Agent Williams. The last gunshot wound that he had would have been immediately fatal.

Q Did you examine a white with light blue shirt that was white with light blue print on it during the course of your examination?

A There was a white shirt with some blue printing on it which was used as a tourniquet around the arm of Agent Coler.

Q I will show you what is marked as Plaintiff's Exhibit 24-A. I have shown it to counsel for the Defendant earlier this morning and ask you to examine this and tell me whether or not you recognize it?

A (Examining) It appears similar to the shirt that was removed from the arm of Agent Coler that was used as a tourniquet. I didn't specifically identify that shirt so I cannot specifically say. It appears very similar.

Q When did you remove that shirt -- or did you remove a shirt from Special Agent Coler's arm during the course of your autopsy?

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A One was removed. There were a number of there. I can't specifically say that I did remove it. I was there when it was removed and may have helped. I don't recall those details.

Q Where was this, where was this shirt when you saw it?

A The shirt was around the injured arm of Agent Coler, proximal or closer to the body from the wound. It was in a position that a tourniquet would have been in.

Q Did it appear to you to be applied in that fashion, as a tourniquet?

A That was my interpretation, yes, sir.

Q Did you examine this for bullet holes, this shirt?

A There were holes in the shirt which I felt were bullet holes, yes.

Q Did they correspond to the wound in the shoulder of Special Agent Williams?

A Yes, sir. They corresponded in that there was a hole in the shirt that corresponded to the outer portion of his arm, inner portion of his arm; and a third hole in the shirt just above the belt line which corresponded to the three defects or holes that the gunshot wound made in the body of Agent Williams.

Q These holes in the shirt corresponded then to the first gunshot wound that you described in Special Agent Williams, is that correct?

A That is correct.

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Q Now, would that lead you to draw any conclusions as a result of that, as a result of your observations did that lead you to --

A (Interrupting) Well, I concluded that that shirt did belong to Agent Williams as Agent Williams did not have a shirt on when I first saw him. The holes in the shirt corresponded to the wounds in the arm of Agent Williams, and I concluded that Agent Williams took off that shirt and applied it as a tourniquet to Agent Coler.

Q Do you recall whether or not the shirt had buttons on it when you examined it?

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A I recall it was a button shirt and I believe some of the buttons were missing.

Q What was your opinion -- first of all, did you have an opinion as to the cause of death of Special Agent Williams?

A Yes. Special Agent Williams died as a result of gunshot wound to the head.

Q I would now direct your attention to the autopsy and the photographs of Special Agent Coler.

Would you describe the wounds as they relate to your conclusions, your pathological conclusions in the examination of Special Agent Coler.

A I felt that Special Agent Coler also received three gunshot wounds. I felt the first one was to the left arm of Special Agent Coler; that the wound came from the outside, struck his arm and also struck the lateral portion and edge of the back of the chest of Agent Coler. This would have completely incapacitated that arm in that it destroyed the major muscles at the elbow joint, also the major blood vessels. It would have been very incapacitating. It was potentially fatal. It would have been fatal in a matter of minutes in that there was, would have been major bleeding from this type of wound. Without treatment this may have rendered the agent unconscious very shortly after it occurred or he may have been able to remain conscious for an extended period of time. This varies a considerable amount amongst individuals involved.

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I felt the second gunshot wound was a gunshot wound to the top of the head of Agent Coler which caught Agent Coler across the top of the head. Again, my findings indicated that the gunshot came from the right side to the left side. It would have rendered Agent Coler unconscious immediately and would surely have been potentially fatal. In my experience a certain number of people with this type of wound will survive, many of them will die from a wound like this.

The third gunshot wound which Agent Coler received was a gunshot wound in the area of the chin and the right side of the jaw which would have been immediately fatal.

Exhibit Nos. 22A, 22B and 22C represent fragments of the bullets that I removed from the posterior chest of Agent Coler, from the top of his head and from the neck and chin area. In Exhibit 22C there is also the tooth which I removed which was loose in the back of the mouth or throat of Agent Coler.

Q With regard to Special Agent Williams, do you have any opinion as to velocity of the projectile relating to the wound in the right hand and in the face on the left side of the nose of Special Agent Williams?

A Yes. I felt it was a high velocity missile.

Q Now with relationship to the Special Agent Coler, the wound you indicated to the forehead, could you tell which wound as far as the wound to the forehead and the wound in the jaw, which of those wounds occurred first in your opinion?

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A On Agent Coler I felt the wounds occurred in the following order: No. 1, he received the wound to the arm first, he received the wound to the top of the head second and the wound to the area of the chin and jaw third. And I base this on the extent of bleeding present in the first two wounds in that the third wound was immediately fatal and there would have been no significant bleeding in the other two wounds had he received the wound to the chin earlier than

the other two because that was immediately fatal and he would have not had any blood pressure to cause bleeding in the other two wounds.

MR. LOWE: We'll stipulate to that to save time. There is no need to go further on that. We agree to that conclusion and there is no contest on it.

Q (By Mr. Sikma) Dr. Bloemendall, did you have occasion to present your pathological summary, the autopsies, the photos and x-rays to any other persons for purposes of consulting with him in this regard?

A Yes, I did.

Q To whom did you present these matters?

A I personally went over my reports and x-rays with Dr. Thomas Noguchi in Los Angeles, California, in January of 1976.

I then made copies of some of the x-rays which I gave to Gary Adams to deliver to Dr. Noguchi.

On May 13, 1976 I delivered duplicates of all of my x-rays to a James Leach who was to see that Dr. John Coe of {595} Minneapolis received these x-rays. I furnished these x-rays as a result of telephone calls from Mr. Ellison and Mr. Sikma.

During this period of time I had two or three phone calls with Dr. Coe in Minneapolis asking him if I could furnish any more things or answer any questions that weren't in my report. I also reviewed portions of my findings with Dr. Noguchi in June of 1976 in Cedar Rapids, Iowa, in conjunction with another trial, and visited some with Dr. Noguchi last evening regarding my findings.

Q The physical items which you had available such as photographs, autopsy reports, the x-rays, these were all provided to Dr. Noguchi, is that correct?

A I went over all the materials that I had with Dr. Noguchi. I only provided him myself with copies of some of the x-rays. I don't recall furnishing Dr. Noguchi with anything else. I assumed that the photographs or copies of my report may have been furnished to him by someone else just as I assume that Dr. Coe got them from someone else.

MR. LOWE: Judge, there is no problem on that. If Mr. Sikma will make a representation to the Court what was provided to Dr. Noguchi, I'm sure he had availability of what he needs to make the conclusions he made, if he'll make a representation, that will be all--

MR. SIKMA: Very well, I won't find it necessary to go into this any further with this witness.

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MR. LOWE: No further questions?

MR. SIKMA: That's correct.

CROSS-EXAMINATION

BY MR. LOWE:

Q Not by way of contradiction, Dr. Bloemendaal, by way of clarification, each of the agents received three shots, I believe you stated, and I believe you said that shot numbers one and two which Agent Williams received, one in the foot and a through and through in the arm that got into the flank were not the fatal shots. Am I correct stating that? You said one was potentially fatal but in the circumstances it was not fatal?

A No. That's correct. Neither one of those shots were fatal.

Q And as to Agent Coler, the shot in his arm again would have been a potentially fatal shot because I guess bleeding and shock and other things. But in this instance your opinion is that the shot to his elbow was not one of the fatal shots, is that correct, was not the fatal shot?

A That's correct. That's correct.

Q And do I understand further that of the other two shots that Agent Coler received in the head that the best you could say, one of the two of them would have been fatal, although it's not entirely clear whether the first shot of those two across the forehead was fatal or merely rendered him unconscious. If that one was not fatal, the one through his jaw was clearly fatal, is that fair to say?

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A That's fair.

Q By way of a little clarification, again you may have said this initially because we're not disputing anything about your qualifications. I may have missed this. As a pathologist, do you have any official position as medical examiner for a jurisdiction near or in Rapid City or do you merely serve on call as an available pathologist?

A I serve on call as an available pathologist. I have no official title.

Q In the past have you on other occasions been asked to do autopsies on people who have met with sudden or violent death either from gunshot wounds or from other sources from the area around Rapid City?

A Yes, sir.

Q Have you examined the remains of people who met with sudden or violent death on the Pine Ridge Indian Reservation prior to this occasion?

A The history was that they did meet with violent death at the Pine Ridge Reservation. I have not ever personally gone down there and done an autopsy.

Q Were these persons who met with sudden or violent death on the reservation sometimes brought to Rapid City where you were asked to examine them for one reason or another?

A Yes, sir.

Q That's what I was asking. I didn't mean to confuse you on {598} that.

Are you aware that a third person died on June 26th in this event at Oglala, South Dakota, named Joe Stuntz, a native American Had you become aware --

A I'm aware that a native American died. I don't specifically recall his name.

Q Did you do any post-mortem examination of Joe Stuntz in conjunction with your other examinations?

A No, sir, I did not.

Q Do you know based on your contacts with the other people who did the pathology on these two agents whether anybody in your hospital or in the funeral home where this was done examined the body of Joe Stuntz post-mortem or whether it was done somewhere outside of Rapid City?

A It was not done by any of the four members of our group. It may have been done in Rapid City by another pathologist but if it was I'm not aware of it.

Q Did anyone give you any explanation or tell you anything to the effect that you would not be examining the third person or say anything about it at the time you did the two agents, was that subject raised at all?

{599}

As I recall, Mr. Lowe, things were very confusing at the time. We knew that we had to do two autopsies and there were all kinds of rumors that go around at a time like that, and you heard that there were other deaths. And we had no real idea where we stood there, and whether this would be all we would be involved in or many more, I couldn't give you any more, any more of a definite answer than that.

Q Would it be fair to say that you and your associates and the facilities that you had available for post-mortem examination in Rapid City where you did your post-mortem examinations were fully qualified and fully equipped to whatever was necessary to do a thorough post-mortem examination?

A I would say that we are qualified, as qualified and as well equipped as there is available in the area. There are some things that surely could be better.

Q Fine. In other words, there would be no reason, because of lack of qualified personnel or lack of equipment or anything else, why the body of Joe Stuntz would have to be sent somewhere for a post-mortem? There is no reason that you could have done a post-mortem on Joe Stuntz if you had been asked to do it?

A I think that's correct.

Q Did you at any time ever do a post-mortem examination on a person named Anna Mae Aquash?

MR. SIKMA: Your Honor, I would object to this as totally irrelevant, has no bearing whatever on this case, has no {600} bearing on this witness's testimony.

Counsel knows full well that this man did not do a post-mortem examination on this person.

MR. LOWE: Are you willing to stipulate that he did not do a post-mortem examination?

MR. SIKMA: I would like to approach the bench, Your Honor.

THE COURT: You may approach the bench.

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

MR. SIKMA: Your Honor, there are certain things we've agreed to approach the bench on. We filed an objection to this sort of thing. Counsel knows this doesn't, this does not relate to this case, has no specific relation to this case. This individual was found dead months, I don't know, it may have been a year following the death of these agents. Has no relevancy to it whatever.

I think that it's totally improper for counsel to write it up and particularly in light of the fact that he knows of our objections in the highly prejudicial nature of the matter which he is raising at this time.

MR. LOWE: Well, of course we disagree. We think it's very relevant, and we will be laying a proper foundation for introducing that evidence.

I will say for the moment that the only question I {601} intended to ask Dr. Bloemendaal was if he ever had done an autopsy in order that he did not have to be called back again from Rapid City when the defense comes up. But this is the only question, and I will vouch to the Court that that's the only inquiry we'll make. As long as they're willing to stipulate that he did not, that ends the inquiry for the time.

MR. SIKMA: That shows what counsel is doing here, Your HONOR> Mr. Ellison knows who conducted that autopsy.

MR. LOWE: The jury doesn't know.

MR. SIKMA: What difference does it make whether the jury knows. It's totally irrelevant and it has nothing to do with this witness. And you know full well that it doesn't have anything to do with this witness.

MR. LOWE: We're entitled to show that a different procedure was followed with her than it was with the agents and with Joe Stuntz.

MR. SIKMA: I think you are not entitled to show that, Your Honor. I think that's totally irrelevant. The fact a good job was --

MR. LOWE: That's only inquiry for me.

THE COURT: Let's get to the point involved here. The only point involved her, Mr. Lowe has stated that the reason he asked the question, if it should be shown to be irrelevant for him to make a determination as to whether it would be necessary to call this witness back. And Mr. Sikma {602} indicates that defense counsel knows that this witness did not make such an autopsy.

MR. LOWE: That's correct. I just want the record to show it.

THE COURT: Well, now based on the direct examination I don't see any reason that we need to go any further than that here.

MR. LOWE: I don't intend to, Judge. I'm finished on that.

THE COURT: You state for the record that this witness did not make such an examination?

MR. SIKMA: Sure, he didn't. But Mr. Ellison would know a lot more than I would.

MR. ELLISON: I would be happy to get on the stand and testify.

MR. LOWE: There are facts that I know that I've got to somehow put in evidence. And this is just one of them. And I've done what I wanted to do and that is just to get him to say that he did not. And that was all I intended to ask. This matter is closed for this witness.

THE COURT: Very well.

MR. SIKMA: Your Honor, we object to any further raising of this particular issue until counsel offers some, gives us some notice first of all of bringing it up so we have an opportunity to object. Because we don't want to get into a {603} whole trial of the entire reservation, other individuals involved.

They don't relate to this case. There's no showing that Anna Mae Aquash, that we've been able to find, was at the crime scene on the day in question, that I'm aware of. I'm not aware of any evidence that would show that she was. I can't see how this can conceivable be relevant.

MR. LOWE: It is.

THE COURT: This is covered by your Motion of Limine, was it not?

MR. SIKMA: Yes, it is Your Honor. We would request a rule on it before defendants be permitted to go into this particular issue.

THE COURT: Well, my ruling would be that before you go into the issue the matter would be brought to the Court out of the presence of the jury.

MR. LOWE: Very well, that's fine. As I say I have nothing further for him on this question. I'm not sure if I have another question before I close. But I think that's all I have.

THE COURT: Very well.

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

Q (By Mr. Lowe) Dr. Bloemendall, just to summarize what you have said and to be sure that I understand your conclusion {604} findings among all of the data that you have put out before us, would it be fair to say that your findings indicate that there were three shots fired at fairly close range, let's say less than ten feet. In one case it was a contact, and the other case it was a distance of probably less than ten feet from the muzzle. And that those three shots were the three shots which killed the agents.

And would it be further fair to say that the shots were fired from a high velocity weapon, probably a shoulder-type weapon, and that Special Agent Coler was probably lying down on his back at the time that the shots were fired. Is that consistent with your findings?

A There's certain portions of it are, and certain portions of your statement are not consistent with my findings.

Q They are not consistent or they're beyond what you determined may be --

A Certain parts are beyond and certain are not consistent.

Q Will you state what is not consistent?

A I don't think that there was anything about -- I concluded anything that some of these were less than ten feet.

Q All right. You have the one as the contact room?

A One is a contact.

Q I'll strike the portion on the rest. I think I maybe confused what Dr. Noguchi did. That's fine.

MR. LOWE: On that case we have no dispute, have no {605} further questions.

THE WITNESS: I'm not, the statement was so long, I don't know that I --

Q (By Mr. Lowe) Let me just say it again.

A -- agree with entirely what I have not disputed.

Q The three fatal shots were the ones you've described: one, Williams through the hand; one to Coler across the forehead and one to Coler in the Jaw, and they were fired with a high velocity weapon. And the Williams shot was a contact wound, meaning that the muzzle of the weapon was touching his hand or very close to it at the time it discharged.

A Yes. I agree with that.

Q That much is correct?

A Correct.

MR. LOWE: We have no dispute, no further questions.

MR. SIKMA: Your Honor, I apologize to the Court, but I believe I overlooked something on direct examination and forgot to show Dr. Bloemendaal a couple of photographs which I think he could identify.

MR. LOWE: Well, in view of the fact that we've offer to stipulate all of the pathology, Judge, I would just ask that Mr. Sikma just state what he is, he wants to show or state. We're not disputing any pathological evidence. I don't know whether it's worth taking up the time.

MR. SIKMA: Your Honor, I will offer into evidence {606} Government Exhibit 73 which I represent to the Court consists of a photograph of Special Agent Coler's trousers as they were photographed. And Government Exhibit 72A consists of one side of Special Agent Coler's shirt on the outside and the Tshirt on the reverse side. Two photographs of the T shirt on the reverse side of Government Exhibit 72A.

MR. LOWE: No objection, Your Honor.

MR. SIKMA: And I would then offer them into evidence.

MR. LOWE: No objection.

THE COURT: That is 72A and 73?

MR. SIKMA: Yes, Your Honor.

MR. LOWE: No objection.

THE COURT: Exhibits 72A and 73 are received.

MR. SIKMA: I would also submit into evidence Government Exhibit 24A, Your Honor, which has not been offered prior to this time the Clerk informs me.

MR. LOWE: Which one is that? I'm not sure.

THE CLERK: Williams' shirt.

MR. LOWE: No objection.

THE COURT: 22A?

MR. SIKMA: 24A.

THE COURT: 24A. 24A is received.

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

I wonder if this witness might be excused?

MR. LOWE: We certainly have no objection, Your Honor.

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THE COURT: You may step down and you are excused.

THE WITNESS: Thank you.

MR. SIKMA: The plaintiff calls Thomas Noguchi.

Your Honor, may we approach the bench while we're waiting for Dr. Noguchi?

THE COURT: You may.

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

MR. SIKMA: Dr. Noguchi this morning has informed me that he's made some, using some drawings to illustrate certain things about the distance and so on the distance of firing and certain effects and so forth. I would like to know if the Clerk has available a stand or if there's something available where these things can be clipped on. Perhaps the blackboard will fit.

MR. LOWE: Is that his pad there?

MR. CROOKS: What about the green board. We could take that one down.

MR. LOWE: Take the map. You don't really need the northwest map there, do you?

MR. SIKMA: No, we don't need that.

THE COURT: Why don't you remove the map and use this stand.

MR. LOWE: Would you want to break a little earlier for lunch and come back a little earlier and give him time to {608} set it up?

MR. SIKMA: That would be fine. We can get started, though.

THE COURT: You can get up through the preliminaries.

MR. SIKMA: Sure, through the preliminaries and so forth

MR. LOWE: Okay.

DR. THOMAS T. NOGUCHI,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SIKMA:

Q Sir, would you please tell the jury your name.

A I'm Dr. Thomas T. Noguchi, N-o-g-u-c-h-i.

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Q And Mr. Noguchi, what is your occupation?

A I am the chief medical examiner and the county coroner for Los Angeles County.

Q And where do you live, Dr. Noguchi?

A I reside in Los Angeles. Are you interested in any formal address, sir?

Q No. I am not.

Would you tell the jury what your education and background.

MR. LOWE: Your Honor, we will stipulate that Dr. Noguchi is a highly qualified forensic pathologist, wouldn't deprive the Government of some impressive credentials. They could certainly be summarized briefly.

We have no dispute with Mr. Noguchi's qualifications.

Q (By Mr. Sikma) Very well. Perhaps Dr. Noguchi, you could summarize your qualifications for the jury so they would understand a bit about your background and education and qualifications?

A All right, sir. I graduated from Nippon Medical School in Tokyo in 1951. I was appointed as an intern at University Hospital, University of Tokyo. I served one year, rotating intern at the Medical Center, from 1951 to '52.

Then I came to the United States of America and served another required rotating internship at the Orange County General Hospital, now known as Orange County Medical Center.

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Then I was appointed as a fellow at the department of Pathology at Lima Lind University School of Medicine, and then I was briefly in private practice also but had returned to the pathology residency in 1956; and I have completed the specialized training in anatomic pathology and clinical pathology, and I completed in 1960.

Then I was appointed as an Assistant Professor of Pathology. I taught in Medical School, and I was also appointed as Chief of the Autopsy Service for White Memorial Medical Center.

Then in 1961 I was appointed as a -- still being Assistant Professor, however -- I was appointed as deputy medical examiner for the Department of the Chief Medical Examiner of Los Angeles County; and I have taken one year additional specialized training in the field of forensic pathology and I have progressed through the usual ranks of what we call the deputy medical examiner.

Then I was appointed as a Chief Medical Examiner and County Coroner in 1967.

Q And you have held that position since that time?

A Yes, sir.

Q What are your duties and responsibilities in that office?

A The duty and responsibility of my office is very clearly described in the California Government Code. It is the duty of the county coroner to inquire into the circumstances {611} surrounding the death of unusual, sudden death or death by violence. That also includes death by homicidal means, a number of different type of accidents such as a traffic accident, accidents by gunshot wounds, et cetera, and also that investigation of death by suspected suicides.

Naturally, there a number of deaths later found to be deaths as a result of a natural causes such as diseases.

Q Do you have any idea of the total number of cases per year that your office is responsible for?

A Yes, I do. I am responsible for investigations and certification of death of over 16,000 cases a year.

Q And do you know how many of these deaths are caused as a result of gunshot wounds or where gunshot wounds are part of your analysis?

A Over 1,000 cases of death attributable to the gunshot wounds.

Q What kind of information -- or first of all, let me ask you: What is the purpose of your examinations as such; why do you make these examinations?

A The purpose of the examinations is that, of course -- there are different types of examinations, however. The examination on the scene before the body is to be moved where necessary physical evidence is to be secured for further examination. Naturally, a photograph is a very important aspect.

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Then when a body is to be removed to our Forensic Science Center -- the Center dedicated for this type of work -- and then close examination of the deceased's clothing, fingernails and physical evidence, such as presence or absence of gunpowders; and a careful examination of the clothing is done with photographic documentation. An x-ray is often taken in the search for floating substances such as fragments of a bullet; and then the autopsy is commenced.

The autopsy is to determine not only cause of death, such as stab wounds or gunshot wounds, but how that such injuries was caused, by not so much who had done it, but what means, whether the deceased person was facing toward an assailant, whether or not the gun was placed to the deceased person in a very close range, or which of the injuries actually would be a cause of death in the case of the multiple injuries, such as bruises, stab wounds and gunshot wounds. It is important to determine which wound was in fact fatal.

These are just brief reasons why examination is ordered to be conducted.

Furthermore, the toxicology study, such as the presence and absence of alcohol, is also important; and naturally, in preparing a case you prepare the suitable document for the examination.

Q Is it fair for me to say that what you are doing is reconstructing the circumstances around the death of an {613} individual at the time of his death?

A Yes. Often done, yes.

Q Do you in the course of your work have occasion to assist other law enforcement agencies other than Los Angeles County, other pathologists in determining how a death occurred and the circumstances surrounding the death of an individual?

A Yes.

Q Did you have occasion to meet with Mr. Bloemendaal and myself and examine the physical evidence and so forth relating to the deaths of Special Agents Ronald Williams and Jack Coler?

A Yes.

Q And Doctor, could you tell me what kind of information you had available to you at the time that you made that examination?

THE COURT: I think we completed the preliminaries and we are very close to the time I usually recess for the lunch hour so the Court will recess at this time until 1:30.

(Whereupon, at 12:25 o'clock, p.m., the trial of the within cause was recessed until 1:30 o'clock, p.m.)

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AFTERNOON SESSION

March 21, 1977

THE COURT: Please approach the bench.

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

THE COURT: The record may show that between the mid morning recess and noon recess I observed the individual which Counsel Lowe mentioned and during this period of time there was no observable display of emotion.

MR. LOWE: Fine. I would just appreciate the cooperation of any of the court personnel and Your Honor if you see that. It's a little difficult for us to observe it in back of us. Something may occur that would make her upset again if we don't take some steps.

MR. SIKMA: Your Honor, I have something that I would bring up. What I would like to ask about, Counsel, I believe secretaries and personnel that are on the defense team find it necessary with all the other benches in the front row to sit directly behind us. It makes it difficult for us in conversing and so forth, at times to carry on a conversation with people in confidence. I know we have to keep our voices down anyhow, but it certainly makes it more inconvenient. I would appreciate it, like perhaps sit on the other side. They're using the press rows anyhow. Perhaps if they're going to use the press rows they could use the one's behind.

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MR. HULTMAN: Your Honor, they're right behind us so it's closer than we are now. If there is any discussion at all the defense team --

THE COURT: Do you have some of your people --

MR. LOWE: I have no objection. My wife is sitting back there. I'd be happy to.

MR. HULTMAN: I'm not saying they are doing it. Elliot's son is sitting there and I have nothing anti-Elliot's son. That's not the point. It seems to me one bench, Your Honor, immediately behind us which is as close as to me as the Court is right now ought to at least not be with people from the defense counsel. But we might have freedom to discuss and talk without even a chance of being overheard in our discussion.

MR. LOWE: It surprises me if you didn't think you could tell me that over the lunch break.

MR. HULTMAN: I brought it up before.

MR. LOWE: You never raised it to me.

MR. HULTMAN: I have with the defense. I brought it up before.

MR. LOWE: Judge, I will ask the people to take another seat. We don't want to interfere in any way.

Anything you feel free to say in front of the press, you should feel free to say in front of anybody.

MR. HULTMAN: I haven't said the press --

MR. LOWE: You want to clear that bench?

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MR. HULTMAN: There is a different interest between the press and your defense team.

John, would you mind if I put six FBI agents in the same position behind you? It's just an obvious one I'm referring one to.

MR. LOWE: We have got no dispute.

THE COURT: The jury may be brought in.

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

Q (By Mr. Sikma) Dr. Noguchi, I asked the last question, I'll repeat it. Could you tell me what kind of information you had available to you at the time that you made these examinations?

A There are number of evidence and materials and documents available to me. I believe there were 21 photographs of Agent Williams, photograph taken at the time of examination, that is, autopsy, and I believe 15 photographs during autopsy examination of Agent Coler. And there was one large, enlarged sketch depicting Pine Ridge Indian Reservation. Six x-rays from Agent Williams, six x-ray films from Agent Coler. Subsequently clothing worn by Agent Williams and Agent Coler were available to me for examination for specific purpose as to direction of the, purpose of establishing the direction of the gunshot wounds.

Q With regard to these photographs of Special Agent Coler's clothing, are you referring to Government Exhibit 73 on Government Exhibit 72A?

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A Yes, sir. These photographs were taken under my direction, was taken by my staff photographer William Lystrup, L-v-s-t-r-u-p.

Q I'll show you Government Exhibit 24A on both sides. Are those also photographs taken at your direction?

A Yes, sir.

Q Those are Special Agent Williams' clothing, is that correct, as you understand it?

A Yes.

Q Did you also examine photographs, aerial photographs of the area around the crime scene as well as crown photographs of the area itself?

I will show you Government Exhibits 56 and 54 and ask if you've had an opportunity to examine those photographs.

A Yes.

MR. LOWE: If you represent that he has, Mr. Sikma, it's good enough for us. I don't want to have him look at each picture and wonder if they are pictures he's seen.

MR. SIKMA: I would agree with that. And I'll indicate that the witness has had an opportunity to examine Government Exhibit 57 which are photographs of Special Agent Coler's vehicle and Government Exhibit 58 which consists of photographs of Special Agent Williams' vehicle as well as the autopsy photographs of Special Agent Williams and Government Exhibit 60, in Government Exhibit 60 and the autopsy photographs of Special Agent Coler in Government Exhibit 59.

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Q (By Mr. Sikma) These items were used by you then in reconstructing the incident as you best believe it to have occurred, is that correct, Dr. Noguchi?

A Yes, sir.

Q And what kind of certainty do you base this on or what is the term that you use in order to base or to state this certainty?

A The opinion which I would express would not be a guess, would be called within a reasonable medical certainty, that is, the opinion is not only reasonable but also that opinion has a basis of, based on medical and scientific facts and circumstances.

Q Now in order to best depict your opinion, you'll notice that there is to the back of you and to your right a large chart of a human body. Would you explain to the jury what these are for, what you will use these for.

A Those --

MR. LOWE: Excuse me. May I sit over here, Your Honor, so I can see the chart. The witness blocks it from where I'm sitting.

THE COURT: You may.

A Although very important to have photographs and in addition to photographs sometimes it is necessary to draw a diagram to depict the precise location of a gunshot wound and special reference to what direction, where that came from and so forth. That is the fundamental basis for reconstructing the approximate position of that deceased at the time of gunshot wound.

Q (By Mr. Sikma) I notice that in these diagrams which you have here the individual depicted in the diagram is in a standing position. Does that mean that the persons who you have examined were in a standing position at the the incidents occurred?

A Not necessary. The purpose of this diagram is to offer standardized diagram. The reference was made specific area such as left arm raised. That is the area whereby the relationship of the arm to the trunk, the body is the basic issue. Not necessary that the deceased person, that is, special agent, was in position at the time of gunshot that he received.

Q Now from your examination of these factors, the physical evidence and photographs, do you have an opinion as to the chronology of events to a reasonable medical probability or certainty?

A Yes, I do have an opinion.

Q With regard to these events, would you outline first of all with regard to the first gunshot wound which you believe occurred, at least in your opinion from the examination of the events as they took place and that you have examined.

A May be permitted to approach diagram.

THE COURT: You may step down. Yes.

{620}

THE WITNESS: Thank you, Your Honor.

A This is a diagram of the left side of the body of Special Agent Williams. The diagram shows the left arm raised approximately 45 degrees or maybe more (indicating).

The autopsy report prepared by Dr. Bloemendaal describes very carefully as to location of gunshot wound.

If I use some coloring pen, according to the autopsy report the gunshot wound of the left arm was found the upper, left upper arm (indicating). This gunshot wound was depicted in Government Exhibit 60, page 3 and 8.

And then the autopsy report further describes the gunshot wound penetrate into the left upper arm, then exit (indicating). I will place the term "exit wound."

Then there was two additional injuries related to this gunshot wound of the left upper arm (indicating), below his armpit on the center line of the left side of the body and also there was another gunshot wound where the copper, portion of the copper jacket was recovered.

Based on the four points, try to place in center line or straight line a general impression that the left upper arm was indeed extended this fashion (indicating). This does not mean that forearm was extended this fashion (indicating), nor this way or possibly forearm could have been bent this fashion (indicating).

Q What position would you believe that Special Agent Williams {621} was in at the time that he received that wound?

A The arm was laid in this fashion (indicating). Please disregard the forearm, position of forearm. And this is approximately relative position I would consider that the points would be in straight line (indicating). This does not mean that Special Agent Williams was in this position. Could be this position, could be this position also (indicating) but the main important portion is that the relative position of left upper arm to the body (indicating).

Q Now when you tried to determine what he was doing at the time he received that wound, what things do you take into consideration? For example, the direction of the projectile of the gunshot?

A Well, certainly recognizing entrance wound and exit wound and also that the fragments of a bullet such as copper, those are the findings of great importance and further the clothing worn by Special Agent Williams also to be studied.

In this case there were holes indicating that Special Agent Williams was indeed wearing white, a blue print sports type of a shirt at the time he received gunshot wound.

Q Could you tell what things that you would believe him to be doing at the time he received this gunshot wound, what type of activity?

A Assuming back again the position of the left upper arm (indicating) and this could represent some way of holding objects {622} such as rifle or could be, could be any other, any other function. However, based on the crime scene, the photographs of having two vehicles and what the speculation might be doing such as communication. Possibly it is also consists of having communication units such as a radio unit in left hand.

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Q What would have been the lethal effect, or in other words would this have been such a wound that would have caused death?

A It is my opinion the rifle wound of the left upper arm was not lethal. However, it's a severely disabling wound because not only pain, but the wound actually penetrated the entire thickness of the left upper arm. That is, penetrate through the muscle layers so that the special agent would have extremely difficult time using left arm, left arm again.

Q Are there any other conclusions that you drew from this particular wound?

A Yes. I think a very important whether or not the muzzle distance. There was no mention of a powder residues on the surface of the shirts or surface of the skin. The shirts were examined by FBI laboratory. That based on such a report I would form the opinion that the wound of the left upper arm was a distant, distant shooting.

Q And this was in the report, a 44 magnum round?

A Yes. According to the report which I had in my possessions that a fragment recovered from the left waist area was later identified as a 44 magnum copper jacket.

Q Is this a low speed or high speed or intermediate speed projectile, do you know?

A High speed being A.R. 15 and known as M.16's. Where muzzle speed of over 3,000 feet per second. This 44 magnum would be considered as a low. There is over perhaps a thousand. But it's {624} as high speed as an M.16.

Q Very well. What is the next, as far as Special Agent Williams was concerned, what was the next wound that you considered by way of chronology.

A That is the gunshot wound of the left foot, however, as to the sequence of the left upper arm wound and left foot, could be left foot injury, could have occurred earlier than this.

However, again it is a distant shot, and from the examinations of the autopsy and detailed descriptions indicate that as I am standing here will be shooting downward, that this would be caused by, as a person kneeling like this (indicating) whereby bullet striking the left foot further.

It might also confirm that examination of a blue trousers worn by Special Agent Williams shows as near the trajectory of the left foot there is a tear of the fabric. If the special agent was in a standing position trajectory is this way, most unlikely and again the gunshot wound on the left

foot was not fatal, although it's a very painful, it's not only a hemorrhage, but based on the two gunshot wounds that Special Agent Williams would have absolutely difficult time walking or using the left hand.

Q What was the next wound in the sequence of wounds that you, gunshot wounds, that you examined that probably occurred in your opinion?

{625}

A It is my opinion, next sequence would be that rifle wound to the Special Agent J.R. Coler that is according to autopsy, it was a large gunshot wound of the right, what we call medically, anticubital area, but the bend here (indicating). And exit wound was inside of the right arm just above the elbow, slightly higher.

Then there was another gunshot wound which correspond to the gunshot wound of the right arm. That is the basis for my opinion as to approximate, relative position of the right forearm, slightly forward and forearm being slightly bent upward.

Q I will show you from Government Exhibit 57 and Government Exhibit 54 if you can explain to the jury if there is, or if there are any photographs which assist you in making a determination as to where Special Agent Coler was, or what was happening at the time of, that he received that gunshot wound.

A May I just complete this diagram? By apprising gunshot wound on the right arm then this is an exit wound and there is large, another gunshot wound. Based on that the bullet came from front to back directions nearly horizontal, but slightly downward.

Referring to the Government Exhibit 57, page 7 or 8, page 8, specifically page 17, that based on autopsy findings alone this gunshot wound was not the type of gunshot wound caused by and deformed a bullet.

{626}

Take an example. The bullet striking the right arm, penetrating, then exits the inside of my right upper arm, and then strikes my right side of body. And this condition injury observed in the autopsy report on Special Agent Coler does not match. This injuries depicts in the peoples Exhibit 59, page 7. These are large, these are large wound, caused only by the bullet striking a hard object and causing deformity that becomes a multiple bit of fragments. That core of the bullet striking the body. That object is called, scientifically we call intermediate target.

For this reason it's visible to shoot some kind of intermediate target, or front of the Special Agent Coler. Based on the photograph much as of Government Exhibit 57, page 17, showing inside of trunk of the car driven by Special Agent Coler. Showing large defect, or a hole on the lower portion of the right corner. And in addition to this photograph, Government Exhibit 57, page 8, showing the splashing of the blood on the surface of a trunk and bumper and rear like with a different type of splashing of blood indicating that were likely, most likely Special Agent Coler could have been standing or similar act. I don't mean standing straight, but behind the trunk at time, at the time the bullet struck the trunk, which was raised and causing -- and now at this time the bullet is this size (indicating). That means the bits of fragments traveling with a core striking Sgt. Coler, or Special Agent Coler.

{627}

Q I would like to direct your attention to Government Exhibit 54 on page 1 and page 9 and ask you whether or not you viewed those photographs in making that determination?

A Yes, I did.

Q And in making that determination were you able to determine with reasonable medical certainty as to the direction or the area from which that gunshot was fired?

A Yes, I do have an opinion.

Q And what is it?

A Placing the deceased Sergeant, Special Agent Coler, in the back of the car of the peoples' Exhibit -- the Government Exhibit 54, page 1, and placing the point of entry of the bullet extending further forward, that is right side of the car, and also I believe Special Agent Coler's height is about 70 or 71 inches, that is 6 feet or 6-1, this diagram is 6 feet, and that is a figure, measures 70 inches. The distance from gunshot wound of the right forearm from the floor and in regard to the height of the car where the bullet holes were found, this gives a slight horizontal, or a slightly upward trajectory.

Q What would have been the effect on Special Agent Coler after receiving this type of wound?

A This injury is indeed a very severe. This injury is almost like explosive injuries, that is the large portion of a flesh had been taken away and large blood vessels got torn {628} open, major nerves had been torn. That's not only from suffering extreme pain, extreme bleeding and of the person, Special Agent Coler will suffer great deal of shock, almost like shock. And further he would not be able to use right arm at all.

Further this type of injuries would be necessary to use other side of, other side, for example the left, left hand to try to stop the bleeding. So that Special Agent Coler more likely had both hands tied.

Q Doctor, you examined the trousers in Government Exhibit 71; is that correct?

A Yes, sir. And the photographs involved there.

Would you be able to, viewing that, make a statement as to the movement that you believe took place subsequent to the wound of which you are speaking?

A May I use the diagram?

Using a diagram, the khaki pants that Special Agent Coler was wearing, there were a number of blood stains, large. Not the small splattering type. It's a large drops of blood, mostly on the right thigh.

And also forensic scientists are trained to interpret the blood stain as to how, what is the height where the blood started dropping.

{629}

For example, a drop of blood striking a surface of the floor from the height of about four feet is considerably different from the blood that drops from a one foot, the size would be different; and further, that if a person is moving, the blood stains is different, and also that the basis for this is that, for example, blood strikes the floor, then usually round. Then the higher the blood or amount of blood is the larger, then the diameter of the bloodstains increases. Common sense, you don't have to be a Doctor to explain the detail. You can do it with a drop of water or perhaps if you would prefer, take a little color.

However, if this blood (indicating) is striking the surface, perhaps at a 45 degree, the bloodstains would not be round. It would be like this (indicating), just to remember, exclamation mark is in reverse. The blood strikes, then exclamation mark. That would be the reverse.

These telltale evidence often helps for the forensic scientist to be able to give reasonable opinion as to what might have happened.

For example, having a large gaping wound, large amount of blood gushing from the torn large arteries; and the bloodstains are only found on the left side and mostly round, give the impression this type of position (indicating).

In addition, that the examination of the photograph reveals the cloth tied around, above the gunshot wound of the {630} right arm used as form of tourniquet. This cloth (indicating) came from Special Agent Williams because the shirt that is opened -- and use a mannequin -- then hold it, much exact location of gunshot wound found on the Special Agent Williams, so that the Special Agent did not surrender his shirt before he was shot but after.

It gives additional reason for us to believe that because of having -- Special Agent Williams having injuries, painful injuries to the left, more likely based on reasonable medical certainty that clothing would be removed by Special Agent Williams' right hand. Two buttons were missing, indicating the attempt was made to rip it open -- and somehow entered to the arm of Special Agent Coler, so that is the basis of my opinion Special Agent Williams was shot in the left arm first. Then subsequently Special Agent Coler was shot as he was standing behind the trunk, not knowing exactly what he was doing, but behind the trunk is the bullet striking the open trunk, receiving injuries. Bloodstains on the bumper, rear bumper, and the lights, and so forth; and then motion of this (indicating) or more likely here (indicating) maybe. Right side, yes, would be more like this (indicating), and tourniquet came. That gives the approximate positions.

Because of the pain, because of bleeding, it would be quite reasonable to assume that Special Agent Coler has taken reclining position.

{631}

Q (By Mr. Sikma) From your examination of the photographs, can you tell approximately where he went when took the reclining position, where he went as in relationship to his vehicle.

A It is my opinion that, referring to Government Exhibit 57, Page 7, this is the left side of a car driven by Special Agent Coler. This page depicts that rear door near the rear wheel; and brown stains, according to the report prepared by the FBI, this to be human blood, and where the Special Agent was found later.

Having additional gunshot wounds to the head, that is (indicating), rifle wound was found (indicating), his forehead, almost like horizontal direction. That is the basis of the examination of the X-rays, and such size and so forth indicate gunshot wounds were caused by a bullet traveling from right to left; and further, there is another gunshot wound (indicating). It is rather small, indicating that bullet was not deformed and would be the size of a smaller bullet, size of a smaller category. Strike at the right side of the jaw, shattering the teeth and the jawbone, and taking much of the soft tissues located in the neck area; and based on the X-rays there a number of fragments, hundreds of fragments (indicating), found on the left side of the neck.

As the bullet strikes the human body, the minute fragments fan out (indicating). From the center portion or mass and the {632} entry, one often is given (indicating), an indication of the direction of the bullet's traveling.

That is the left -- strike that, please -- right to left direction. However, there was no exit wound on the right wound of the jaw. Thus, the opening, the bullet striking the forehead more likely caused splashing of blood to the surface of the door where the Special Agent was found, so answering your question would be he must have taken reclining position, close to the car where he was found dead.

MR. LOWE: Your Honor, we have offered to stipulate that he was lying on his back on the left rear of his car, as I believe is shown in one of these pictures. I don't know if Dr. Noguchi is aware we have offered to stipulate all of this stuff. It may be he can shorten a lot of the background and state his conclusions with the assistance of the Government.

MR. SIKMA: We are going into that, your Honor.

Q (By Mr. Sikma) Would you then -- do you have other diagrams which you use for Special Agent Coler to show if you can the distance from which this gunshot wound was fired?

A Yes. Referring back to the rifle wound of the forehead (indicating), there were a number of very tiny -- tiny, I might say this, like a pepper sprinkled on the surface of a kitchen, short of a -- not as extensive, but very lightly, just sprinkle pepper on the skin (indicating), tiny; but those are found on {633} the forehead and right temple, and further, the X-ray shows the tiny metallic fragments imbedded on the surface of the soft tissue, indicating that the muzzle distance will be crossways. I don't mean very close, about in feet, that is, past two feet -- detailed studies should be performed. However, it is not a distance shooting and injury of the right jaw also gives impressions that some metallic fragments were imbedded in X-rays.

Again it is my opinion it is not a distance shot but at close range.

Q How close a range would you say in your opinion that it was fired?

A Of course, these metallic fragments does not go any considerable distance. It is naturally contact wound like this, you would have a considerable deposit of metal and unburned powder. As the distance increases, for example, two inches, you would expect to find still such but less

and less, 24 inches to be considerably less, beyond three feet may not be visible in usual examination but can only be visible in either X-ray or enlarged photograph.

Based on this, I would say that a few feet, that is the best I can offer as my opinion.

Q What would have been the lethal effect of this gunshot wound to the top of the head?

A This (indicating) Gunshot wound, not cause death instantaneously, however. Rendered person unconscious because {634} of a severe concussion. In fact, the fragments enter into the brain substance.

As to the injury to the right jaw, it is definitively fatal because of a tearing of the large blood vessels and major portions of the person's trunk.

Q Which wound was received first?

A If injuries had occurred first on the right jaw (indicating), cutting through the large blood vessels, because the blood pressure drops after bleeding, as heart pumps blood; but it is out here so the blood does not reach to the top of the head, then I would expect the injury here (indicating) would be less hemorrhagic. What I mean, is the bleeding would be less.

Now, if the injury happens first, prior to having injury to the left jaw, the autopsy findings is indeed consistent.

Based on that, I would form an opinion, more likely the rifle would be first cause on forehead, and second, right jaw.

Q What was the condition of Special Agent Coler when he received those wounds?

A He was in -- having tourniquet in reclining position. Based on some of the patients take certain positions, it is my opinion Special Agent Coler more likely taking this type of position (indicating), and he was not able to move and simply he was defenseless.

Q What was the velocity, if you know, was it high or low velocity gunshot wounds that he received in his head?

{635}

A It is my opinion that, based upon the autopsy findings, that severe destruction within the neck itself, I would form an opinion these gunshot wounds were caused by high velocity bullet like a rifle.

Q Do you know what kind of rifle, or what type, would you have an opinion as to that?

A As to the makes I do not have. I have not had opportunity of examining the bullet. It is a smaller -- the photograph shows quite a smaller entry wound, tend to give the impression that size of bullet was not a large one, like a .44 Magnum, more like a .30 or even smaller caliber.

Q How about the wound to the top of the head, was that a high velocity or medium or low velocity?

A It is my opinion the gunshot wound in the forehead also caused by high velocity wound, characterizing this explosive type of injuries, scraping the entire thickness of the skull, sending secondary missile into the brain.

Q Do you have an opinion as to whether or not the wound to the top of the head and to the jaw were fired by separate weapons or the same weapon?

A Well, based on the wound pattern, that is two wounds were found, right side of face, a metallic substance imbedded in the soft tissue of the right side of the head, it tends to give the impressions that the shooting had occurred and in the approximately fixed position, aiming to the head, and the {636} muzzle distance may have been exactly the same.

Q Did they appear to be the same from your examination?

A Yes.

Q Would that lead you to believe that it is likely that the two wounds were fired from the same gun, at approximately the same distance?

A Yes, it could well be.

Q I would direct your attention to the examination of Special Agent Williams. Would you -- and do you have a diagram which indicates the cause of his death?

{637}

A Referring to diagram for Special Agent Williams, this diagram showing standing position looking front. There were large sized opening later found to be rifle wound into left side of upper lip.

The picture, People Exhibit 60, page 2 and 4, depicts the photograph before careful examination was made, and page 8 and 9 were photograph taken after examination was conducted and face was carefully washed. This is photograph, Government Exhibit 60, page 8, showing a number of large tear which inn the diagram there is large tear which represent rifle wound.

The radiating, the penetrating wound in addition similar penetrating wound, that caused by metallic substance or the fragment of a floating substance. Those are spots are found right shoulder or neck area and right shoulder through upper right arm (indicating). And in addition, again the rifle wound to the face was not caused by a deformed, clean bullet. The bullet had already penetrated intermediate target. The bullet already exploded causing spray of metallic fragments. It is my opinion, it is my opinion that muzzle was firmly contacted to the palm of the right hand slightly below the base of the finger as evidences by dark powder embedded on the surface, did not come out by washing, penetrating through the hand, striking the face.

The inside, the back of the hand, the back of the hand {638} shows a large tear as a result of an explosive rifle wound. The position which I, the right hand contacting the muzzle of the rifle and further scientists is able to express opinion that approximate positions of the head to the

gun; that Special Agent Williams was not looking forward. Since he had injury to this left, he only uses the right hand guarding whatever is coming. Then he placed this fashion (indicating). Look, if you will, left side of face has a greater injury. Special Agent Williams' head was turning to his right (indicating) and the right shoulder forward absorbing these particles.

Naturally as bullet leaves the muzzle is accompanied with number of other substance such as unburned powder, smoke and bits of tiny metal. As bullet spins inside of a barrel where there is a tremendous speed and heat creating that surface of lead start melting. For this reason the tiny, tiny metal travels. The heavy object travels at greatest distance, that is, the bullet. The next object more likely, the shaped portion of the bullet, followed by unburned powders, then smoke, burned powders mixed with the metallic substance come from primer. The primer is the one firing pin. When the firing pins strike the metallic component from the primer, pushes and mix with the powder. These are the signs we often look for to determine muzzle distance.

Q What would have been the affect of this wound?

A This entry is instantaneously fatal.

{639}

Q Is it instantaneously fatal as the wound to the right side of Special Agent Coler? Was that also instantaneous and fatal? The right cheek. Excuse me.

A I would slightly, it is in a sense instantaneous. However, a slight gradation difference that the Special Agent Williams received injuries such as that because the head, back of head is wide open, brain torn. This I call instantaneously fatal, that is, one second after the injury, no life, is dead.

However, the injury to the right jaw of Special Agent Coler, the injury was primarily on the large, was a nerve. Although it was totally incapacitating, the person may be able to still pump the heart, although a person would expect to be unconscious.

Q With regard to the condition of Special Agent Williams prior to receiving the wound in his right hand and his face, prior to receiving the lethal gunshot, what was his condition as far as his ability to move, defend himself or otherwise move with regard to his other injuries?

A Special Agent Williams had severe injury to left arm with injury to the left side of the body. In addition he had gunshot wound to the right foot. From the bleeding and pain I would form an opinion he would not be able to move and he too somewhat defenseless.

Q Not as defenseless, however, as Special Agent Coler, is that a far statement?

{640}

A The degree of consciousness may be the factor. Special Agent Coler more likely be either losing consciousness -- based on the blood spattering that Special Agent Coler, it is my opinion he was not able to raise his head or I would say he remain with his head in lying position.

Q Would Special Agent Williams have been able to hold a gun in his left hand after receiving that wound or to use it effectively?

A Effectively? No.

MR. SIKMA: Your Honor, I would like to mark the exhibits for identification for the record if I could at this time. The drawings that are here presently.

THE COURT: Check with the clerk as far as numbers.

MR. SIKMA: We will mark this as Government Exhibit 85 and it has five pages, Your Honor. Pages 1, 2 and 3 relate to Special Agent Williams and pages 4 and 5 relate to Special Agent Coler.

Your Honor, we would offer into evidence Government's Exhibit 85.

MR. LOWE: I don't know if it's necessary to introduce it as an exhibit if we're willing to stipulate to all the facts on it. We have no objection to it if the government wants to do it. I just clutters the record.

THE COURT: Exhibit 85 is received.

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

{641}

CROSS-EXAMINATION

BY MR. LOWE:

Q Mr. Noguchi, with regard to Agent Williams' shot in the upper arm, you indicate that it was not a close in shot because there were no powder burns, no fragments and so forth. Would it be fair to say that the distance would have to be more than ten feet away from the muzzle to the arm?

A I would think so. Since there is no possibility to study, so the more likely even beyond five feet, I'm not too sure the powder deposits on the surface of the clothing.

Q But ten feet, certainly. It was no closer than ten feet. We'd be safe if we said that?

A Certainly.

Q So whoever shot Agent Williams in the upper arm was standing farther than ten feet away from him at the time, or the muzzle of his weapon was?

A Yes.

Q Now on Agent Coler's left elbow shot which I believe you indicated was an intermediate target, missile, that is, it struck an intermediate target, could this have been a ricochet type intermediate target as opposed to a penetration or are you identifying it specifically as having gone through something instead of ricocheting?

A Yes. I did state my opinion that bullet more likely striking not one layer of metal but more likely two layers of metal similar to the trunk lid of the car driven by Special Agent Coler.

{642}

Q Perhaps you are intending to say this and I was not putting it together because I was not looking at the pictures you were. Are you saying you have specific holes you say correlate to the history of this metal that ultimately ended up in his elbow? In other words, you see specific holes that you think explain what happened?

A Yes, I do.

Q Now what you did then say next is what I didn't understand or didn't quite hear. You said something about the direction and I wonder if you could just say again what you said because I either didn't hear you or I didn't understand you.

A The direction which I referred to was front to back and striking the elbow area and the core or fragment of bullet left inside slightly back of the right upper arm then striking right side of body (indicating).

Q So that the bullet came through the trunk lid raised in front of Agent Coler, as it were, came through the various layers of metal in the trunk and went in a generally downward direction into the elbow joint, and also I believe you said wounded him in the side slightly on the exit?

A Yes. That is my opinion.

Q I thought that's what you said. Not looking at the pictures I was a little confused.

Did you say there was no exit wound for the missile which went into the right side of the jaw of Agent Coler?

{643}

A Yes, I did.

Q The bullet simply fragmented and the fragments were still in his neck and shoulder and so forth, is that correct?

A Yes.

Q Would it be fair for me to summarize the results of your investigations, as I believe we share the same opinion on this, that some person or persons standing inside of ten feet of the two agents fired three shots which ultimately took the lives of these agents, one which went through the right hand of Agent Williams on a vertically contact wound, struck him in the face and killed

him instantly, two shots which struck Agent Coler in the head, one of the two which was fatal, it may not be exactly sure which one, but clearly one of the two was fatal, and then these were fired from within, as I say, a distance of about ten feet because of where the muzzles had to be in order to be compatible with the descriptions you have given the wounds, would that be a fair summary of the three fatal shots?

{644}

A Exception. The muzzle distance of the gunshot wound, or the forehead and the right jaw of the Special Agent Coler --

Q Were not contacted?

A Not in contact. But at close range, closer than ten feet, I have previously testified it is the best I can offer at this time, I would say it is a few feet. Not ten feet.

Q Right. Right. But the person would have been inside of ten feet and then depending on if the muzzle was several feet away from Agent Coler at the time the shots were fired; isn't that true?

A Yes. But I would like to leave the impressions, closer and several feet. Several gives you the impression of five or six feet, but these perhaps two or three feet or a few feet.

Q All right.

A That's highly technical.

Q That's fine, that's not inconsistent with our feelings as well.

MR. LOWE: In that case we have no areas of disagreement and I have no further questions.

MR. SIKMA: I have two further questions.

REDIRECT EXAMINATION

BY MR. SIKMA

Q You indicated the shot to the right jaw had no exit wound. What was the gunshot wound or wound underneath the jaw? I'll direct your attention to the Government Exhibit 59 and the photograph on page 5. What is, how would you describe the wound {645} underneath the jaw? That is not an entrance wound. You don't call that an exit wound?

A No. Technically even the large hole found Special Agent Coler, this is not to refer as an exit wound. This is the tear caused by the explosive effect upon the soft tissue as a bullet strikes a right jaw. Then the whole tissue swells up and that is a matter of a one thousand of a second matters however. Then the front neck area exploded.

One of the reason that I do not believe that this is exit wound is the fact that if this was the entrance wound, this was to be exit wound. Then something have to come out, then strikes left side of shoulder. So it is my opinion it is only tears as a result of an explosive rifle wound.

Q You indicated, and I don't believe it was clear which bullet hole you were referring to in the vehicle which caused the wound to Special Agent Coler's right --

MR. LOWE: Your Honor, I believe that misstates the testimony. He did not say that the bullet wound that did cause the entry, but would be consistent or might have been.

MR. SIKMA: Very well.

Q (By Mr. Sikma) Would you indicate by looking at Government exhibits there which one would you be able to point it out on?

A Government Exhibit 54, page 9, depicts the car as you are looking at trunk opened. May I be permitted to mark circle in the area of --

{646}

Q Yes. With the Court's permission.

THE COURT: Any objection.

MR. LOWE: I have no objection, Your Honor.

THE COURT: Very well. You may mark it.

THE WITNESS: Thank you, Your Honor.

A I will circle on the cellophane cover about half inch in diameter, circling around a bullet hole found in the right lower corner of the trunk as it was opened.

Q (By Mr. Sikma) Would you show that to the jury and point it out so they can see it.

A I marked the circle right lower corner of the trunk as it opened.

Q Would you point out to the point where the blood is shown on the trunk from that photograph there which you are referring to.

A I am going to use a square to mark this area covering the, what appears to be a little blood on the surface of the bumper.

Q Just one further question.

With regard to the wounds that SA Williams received is it a fair statement of your opinion that all three of those wounds could have been fatal if they were not treated? The wound to the right arm or any one of the three would have been fatal if not treated?

A It is true. Even though it is the injury to the right foot, it could be infected and without proper medical care --

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MR. LOWE: We'll stipulate to that, Your Honor. He's not stating anything but what we all know.

Q (By Mr. Sikma) With regard to the wound in the right arm. Was that also the type of wound that you would consider to be fatal if it did not receive reasonably early medical treatment?

A That wound, yes, I do.

Q And what is the reason for that?

A According to autopsy report large blood vessels had been torn up and even tourniquet, I'm not certain you'll be able to sustain adequate blood pressure for a long time.

MR. SIKMA: I have no further questions.

THE COURT: You may step down.

MR. SIKMA: Your Honor, at this time I would like the jury to have the opportunity to view the photographs in Government Exhibits 72A, 24A and 73, as well as Government Exhibits, in Government Exhibit 59 and 60 which have, to this point the jury has not had an opportunity to see these photographs.

THE COURT: Very well.

MR. LOWE: May we approach the bench, Your Honor?

THE COURT: You may.

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

MR. HULTMAN: May this witness be dismissed?

MR. LOWE: As far as I am concerned I am fine. I was {648} just going to say that this is going to take some time and could we recess, have an informality recess or something?

THE COURT: My plan is to recess after they have viewed the pictures and so forth, and I do not allow any interrogation while they are viewing the pictures. So far as the Court is concerned counsel may --

MR. LOWE: It's going to take them a good half hour to look at those things, so we'll just run around. We'll try and keep in touch.

THE COURT: I won't reconvene. I'll recess as soon as they're through.

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

MR. LOWE: Your Honor, may I approach the bench?

THE COURT: You may.

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

MR. LOWE: Mr. Robideau has been brought to the jail pursuant to the Habeas Corpus filing from Ft. Leavenworth. The arrangement that the sheriff told me would be made would be that Mr. Taikeff and I were the only ones who could see him and we could only see him during regular business hours and on weekdays. And it's rather impractical because we're in court. And I didn't know what the source of that restraint was or restriction. And to the extent that you have any control over it I was going {649} to ask if you would authorize us to see him for some reasonable period like during 7:00 to 9:00 in the evenings so we can interview him. Because they would not let me see him on weekends either, so I mean that just doesn't give us any time to see him at all.

THE COURT: And how much time did you say that you --

MR. LOWE: Well, I would say that if it was just a reasonable time during the evenings so it's a time that's convenient for the jail. If it was just an hour each evening at the same hour, like from 7:00 to 8:00 or something like that, that we were authorized to visit him, that would be more than enough I'm sure. I can't say a particular day because depending on what time we are here in court we may have to go over that evening to check with him.

But it's clear that we can't get over during the day, and it's also clear that we're not allowed on the weekends or on the evenings. So just any reasonable period of time would be fine.

THE COURT: You are really asking for an open-end arrangement?

MR. LOWE: Just access, that's all. Right now the hours are from 9:00 to 5:00, and all I'm asking is that it either be, let's say, something like 7:00 to 9:00 or 5:00 to 7:00 or 7:00 to 8:00, just so it's some period when we're not in court. I'm really not specifying what period. Anything you feel {650} is reasonable, is fine.

THE COURT: I'll talk to the marshal about it.

MR. LOWE: That would be fine. Thank you, Judge.

The same would be true of Jimmy Eagle, I presume. That wherever he is they have a similar restraint. But whatever you arrange for either one of them would be fine.

THE COURT: Fine.

MR. LOWE: Thank you, Judge.

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THE COURT: The Court is in recess until 3:40.

(Recess taken.)

(Whereupon, the following proceedings were had in the courtroom, out of the presence and hearing of the jury, the Defendant being present in person:)

THE COURT: Mr. Lowe, you may approach the bench on that last ex parte matter.

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

THE COURT: I talked to Mr. Warren, and he said that reasonable time would be made available for you and Mr. Taikeff to visit with Robideau and to visit with Eagle except that for security reasons they are keeping Robideau and Eagle in different institutions.

MR. LOWE: I understand that.

THE COURT: And Eagle at the present time, I think, is in Grand Forks. He said that a reasonable time would be worked out.

MR. LOWE: Work it out with the Sheriff or Warren?

THE COURT: Work it out with Mr. Warren. I am sure the sheriff will follow his instructions.

MR. LOWE: I don't think it would be very frequent we would need to see them. The morning would be preferable. It is impossible during the day. We will work it out.

(Whereupon, the following proceedings were had in the {652} courtroom:)

THE COURT: The jury may be brought in.

(Whereupon, at 3:43 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:)

MR. HULTMAN: May it please the Court, the Government calls Robert Ecoffey.

ROBERT DALE ECOFFEY,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. HULTMAN:

Q Would you state to the jury and to the Court your name, please?

A My name is Robert Dale Ecoffey.

Q And where do you live, Mr. Ecoffey?

A In Pine Ridge, South Dakota.

Q And how old are you?

A I am 22 years old.

Q And approximately how long have you lived in the Pine Ridge Area.

A All my life.

Q What has been the nature of your employment including the year of 1975?

A I have been working in law enforcement on the Pine Ridge Indian Reservation.

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Q And in what capacity, for what agency have you been working in law enforcement?

A Bureau of Indian Affairs.

Q And what has been the nature of your occupation and responsibilities there?

A Right now I am employed as a supervisor-guard at this time.

Q All right. When did you first come to work for the Bureau of Indian Affairs, approximately?

A I have been working there about three years.

Q All right, and were you so employed during the month of June, 1975?

A Yes, I was.

Q Now, is the Bureau of Indian Affairs an enforcement agency that represents a Department of the Federal Government other than and different from the Department of Justice?

A Yes, it is.

Q If you know -- it is?

A Yes.

Q So it is not a part of the Department of Justice, is that correct?

A That's correct.

Q Do you know what Department it is a part of, Mr. Ecoffey?

A It is in the Department of Interior.

Q Part of the Department of Interior?

A Yes.

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Q Is this a responsibility that is true not only on the Pine Ridge Reservation, but generally speaking on Indian Reservations in the United States?

A Yes, it is.

Q All right. Now, I want to take you to the day of the 24th and the 25th and the 26th of June, 1975, and ask you, first of all, when you were first made aware that there existed a Federal warrant charging Jim Eagle or James Eagle with the crime of robbery?

A O.k. The first time I became aware of this was, I believe it was on the 24th of June.

Q All right. Could you just briefly in a sentence or two outline how this matter came, what was concerned with this matter, was it a matter that just concerned Jimmy Eagle, first of all?

A No, it wasn't. There was warrants charging four different subjects in an incident.

Q All right, and Jimmy Eagle was just one of the four, is that correct?

A Yes, he was.

Q And do you recall what the crimes were?

A O.k. Jimmy Eagle, I believe, was charged with robbery, Herman Thunder Hawk was charged with robbery. Teddy Pourier was charged with assault with a dangerous weapon, and Hobart Horse was charged with assault with a dangerous weapon.

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Q Had this grown up out of an incident that had happened a few days before?

A Yes, it did.

Q And was it a part of your responsibility as a member of the Bureau of Indian Affairs to seek to apprehend those particular subjects, is that a fair conclusion on my part?

A Yes, sir.

Q And is this a normal and everyday function of individuals in the capacity that you were in on this Reservation and other Reservations?

A Yes, it is.

Q I want to then take you to the 25th of June, the next day in 1975, and ask you what, if anything, happened around 5:00 clock in the evening on the 25th?

A O.k Around 5:00 p.m., in the evening I was at my office there at Pine Ridge, Law and Order building; and I met with Special Agent Ron Williams and Jack Coler. They came down into my office. Q And had you seen these Agents before and recognized them, and familiar with them?

A Yes, I did.

Q All right. Did you have any discussion of any kind at that time?

A Yes. Special Agent Williams requested any assistance in apprehending, serving a warrant on Jimmy Eagle.

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Q All right, what, if anything did you do at that time?

A O.k. I had another investigator there that was detailed to me. Me and him, a guy by the name of Glenn Littlebird, we went in our police unit; and Special Agent Coler and Williams went in Williams' unit. We proceeded toward the town of Oglala.

Q Now, you indicated that these events started in your office. By that, it is the Bureau of Indian Affairs' office, not just your office alone, is that correct?

A That's correct.

Q And on Exhibit No. 71, would you point out and using the pointer, where with relation to Exhibit 71 and approximately how far from the area represented here is where your office is located and what community?

A O.k. Pine Ridge would be about 12 miles up Highway 18. We were coming out of Pine Ridge, this direction here (indicating.)

Q All right, so you came out of your office in Pine Ridge and then you traveled on Highway 18, is that correct?

A That's correct.

Q And you went right by the area here that is projected on the map, is that correct, Exhibit 71?

A That's correct.

Q Then approximately how far beyond the area that's represented on Government's Exhibit 1 did you go in order to reach your destination of Oglala, some place in Oglala.

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A About three miles.

Q Approximately three miles?

A Yes.

Q All right. Now, you might sit down again.

Are you very familiar with this particular area that we have been discussing here, the two communities?

A Fairly.

Q Having lived all of your life in that area, is that correct?

A Yes.

Q Where did you then go in Oglala -- now, I understand there were four of you, is that correct?

A Yes, there was.

Q All right.

A O.k. First we went to the Jumping Bull residence. That's about 12 miles out of Pine Ridge.

Q All right, and where did you go in the Jumping Bull area?

A O.k. Went to the residence of Wanda Siers. We went right up to the residence.

Q All right. Did you go -- is the reason that you went there, at whose direction was it or determination to go to the Wanda Siers' residence?

A Well, it was just mine. We had information that Jimmy Eagle had been staying at this residence.

Q All right, and would you point out to the jury where it {658} was that you went and what residence to which you are referring?

A O.k. Went to the residence here (indicating).

MR. HULTMAN: Let the record show that the witness has pointed to the Wanda Siers' residence on Government Exhibit 71.

Q (By Mr. Hultman) All right. Now, would you -- who traveled with whom in coming from Pine Ridge to the Jumping Bull area and to the home of Wanda Siers'?

A O.k. I was with Glenn Littlebird in my BIA police unit, and Special Agents Williams and Coler in Williams' unit.

Q So two of you went in two separate cars?

A Yes.

Q Two Bureau of Indian Affairs' Agents, you and your fellow agent in your car, and Mr. Coler and Mr. Williams in one of their cars?

A That's correct.

Q Do you remember whose car it was as far as the agents?

A Williams'.

Q All right, Special Agent Williams' car?

A Yes.

Q All right. Now, when you arrived at the Wanda Siers' residence on the Jumping Bull property, would you indicate to the jury what you did, who did what?

A O.k. We got out of our police units, and we went up to the Wanda Siers' residence.

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Q Who specifically went to the Wanda Siers' residence?

A I and Glenn Littlebird, Special Agent Williams, and Coler.

Q All right. What, if anything, happened then?

A O.k. We went to the front door of the residence, and Special Agent Williams knocked and at this time Wanda Siers came to the door.

Q All right, and what, if anything, took place then?

A O.k. Special Agent Williams asked her if Jimmy Eagle was at the residence and advised her that we had an outstanding warrant for him, for his arrest.

Q And what, if anything, then happened?

A O.k. She advised that he hadn't been there for a couple of days, but we asked permission -- Special Agent Williams asked if we could look in her residence, and she said, "Go ahead, come on in," so we went in, made a search of the house, didn't make any contact.

Q What, if anything, did you find?

A Nothing. He wasn't there.

Q Your search was for Jimmy Eagle, is that correct?

A That's correct.

Q And was it just a general search in walking from room to room?

A Yes, it was.

Q What, if anything, did you observe while you were in the house itself?

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A O.k. There was just a real small --

MR. TAIKEFF: (Interrupting) Can't hear the witness, Your Honor.

THE COURT: Speak up, please.

A Real small house, just a two room house; and on the wall, on one of the walls there was two rifles hanging up; and I believe there was a flag, upside down flag.

Q (By Mr. Hultman) Was this out in plain view where anybody could see it upon entering the residence?

A Yes, it was.

Q Do you remember what the caliber or the make of either of the weapons were?

A O.k. one of them appeared to be a British-made rifle of some sort, and the other one was a smaller caliber, probably a .22.

Q Now, what, if anything, did you do then, did you exit the home upon not finding Jimmy Eagle?

A Yes, we did.

Q What, if anything, did you do then?

A O.k. we just walked along, walked behind the house. There was a shade that was built. Underneath the shade there was a bed, a cot. There was a young Indian male sleeping on this cot, and we woke him up; and this was John Nelson, call him "Dusty"; and Special Agent Williams asked him if he had seen Jimmy Eagle, and he advised "no", hadn't seen him for a couple of {661} days.

Q All right. What, if anything, did you do then?

A O.k., so went back around the house; and there was a small boy that was walking over towards the Siers' residence from the Jumping Bull residence, and we asked him if Jimmy Eagle was over there and he said "no", so we got in the car to leave.

Q All right. Did you observe anything in the direction from whence he came?

A Yes. There was approximately 12 persons came out of the Jumping Bull residence.

Q All right, so while you were outside at the Wanda Siers' residence and your two vehicles were there, you noticed the small boy coming from the direction of what residences in general?

A Jumping Bull.

Q All right, and you observed some additional people in the Jumping Bull residence area, is that correct?

A That's correct.

Q All right. Again on Government's Exhibit No. 71 would you show where you were, show from the direction that the young boy walked from, and where the group of people were that you are referring to so the jury will understand, on Exhibit 71?

A O.k. We were right here at this residence (indicating), and the young boy was out along here from this direction {662} (indicating).

Q And where were the group of people standing to which you have just referred to?

A They were coming out of the residence here (indicating).

Q Did they come out of the residence while you were there with the other agents?

A Yes, they did.

Q And what did they do?

A They were just standing there, just watching us.

Q All right, so they were looking in your direction then, is that correct?

A That's correct.

{663}

and continued to look in your direction while you were there?

A Yes, they do.

Q Did you recognize any of these individuals?

A None of the males I recognized. Only one I recognized as Mrs. Jumping Bull.

Q Did you recognize whether or not they were native Americans or not?

A Yes, they were.

Q But you didn't recognize any of them individually except Mrs. Jumping Bull?

A No, I didn't.

Q Did the young man indicate anything to you in response to your question concerning Jimmy Eagle?

A He just said that he wasn't over there.

Q And so what if anything did you do then?

A We got in our cars and left.

Q And where did you go?

A We proceeded to the Oglala housing area.

Q Would you indicate on Government's Exhibit 71 again the route into Wanda Sear's residence that you took in coming in and the route that you took going back out.

A We came in on this road here (indicating). We got back to the highway and went toward Oglala on 18 (indicating).

Q Where did you then go in Oglala?

A Okay. We went to LaVette Little's residence in Oglala {664} housing.

Q Do you know whether or not she's related in any way to any of the occupants in the Wanda Sear's residence?

A No, I don't.

Q What if anything happened there at the Little residence in Oglala?

A We went directly to her residence and knocked on the door. It was just two small kids there, probably 11 and 10 years old, something like that, and we asked if LaVette was home. They advised that she wasn't and so we asked if Jimmy Eagle was there and they said, "No," that he was staying down at the Wallace Little residence.

Q One, the youngsters recognized the name that you asked about and also responded as to where he was staying or living, is that correct?

A That's correct.

Q And where was that place again, the residence of whom?

A Wallace Little, Senior.

Q And where is the residence of Wallace Little?

A That's back on down the road on 18.

Q Would you show us just approximately with relationship to Government's Exhibit 71 as to where it is with relationship to 71. Can you see it on Government's Exhibit 71?

A No, you can't.

Q Tell us then by using Government's Exhibit 71 approximately {665} where that home is located.

A It's about three or four miles from the Jumping Bull, four miles back (indicating).

Q If you continue down Highway 18 toward Pine Ridge, on which side of the highway is it? Is it on the same side as Jumping Bull's or on the opposite side of the highway?

A On the opposite side.

Q On the opposite side?

A Yeah.

Q All right.

What if anything did you do next?

A We went to the Wallace Little residence and got out, knocked on the door and a young lady came to the door. She asked where, Special Agent Williams introduced himself and introduced ourselves and then we asked where Jimmy Eagle was and she said that he just left in the red pickup parked there?

Q She indicated to you that he had just left in a red pickup, is that correct?

A That's correct.

Q What if anything did you do next?

A Okay. So we got in our cars and we proceeded back to the Oglala housing, to the LaVette Little's. We talked about going back down there.

Q Is it customary for you to accompany an FBI agent, to accompany FBI agents when you are seeking to make an arrest of {666} this kind?

A Yes. We usually do. It's either the criminal investigators or an officer because we're familiar with the area, different on the reservation.

Q So you were operating in this instance, as you normally would, two of you were with two FBI agents, is that correct?

A Yes, it is.

Q What if anything did you do next?

A We went back down to the Oglala housing and we turned into the house, turned off of 18. As we passed the Oglala store there were three young male Indians walking down the road toward the highway.

Q Were you still traveling in the two cars, the same two you and your companion in your car and the two agents in the Agent Williams' car?

A Yes, we did.

Q Which car was in the lead, do you recall?

A We were.

Q You were.

And what if anything then happened when you noticed the three Indian males?

A Okay. When we drove past them, one of them resembled Jimmy Eagle. So we went down further and turned around and we was going back. Meanwhile the Williams and Coler, they stopped in their vehicle. They stopped where the kids were walking. We {667}

turned around and went back and they got out of the vehicle.

Q What if anything did you observe at this time?

A Okay.

This time I found out that none of them were Jimmy Eagle.

Q Was that from your observation at that particular moment?

A Yes, it was.

Q What else did you observe anybody else do or say at this particular time?

A Okay.

Special Agent Williams got their names and who they were.

MR. LOWE: I cannot hear the witness, Your Honor.

A Special Agent Williams asked the three boys who they were and where they lived.

Q (By Mr. Hultman) All right. And did any of them respond? You say you didn't recognize any of the three, is that correct?

A No, I didn't.

Q To your knowledge had you ever seen any of them before?

A No, I didn't.

Q What response in your presence did any of them give in response to Agent Williams' question?

A I can't really remember their names but I think one said he was Yellow Horse and one Many Horses and I can't remember the {668} third.

Q What if anything did Agent Williams do in your presence at the time he asked the question as to what their names were and they responded?

A He wrote their names down on the tablet that they were carrying, that he was carrying. Wrote their names down.

Q Was this an ordinary tablet?

A Yes.

Q That we would all recognize?

A Yes.

Q I will show you what has been marked as Government's Exhibit 15 and ask you whether or not you generally recognize what appears here, if it appears to be something that you may have seen before?

A Yes, it does. Looks like the tablet with the names.

Q Do you recognize any names on there that are familiar in any way to the names that you heard on the occasion to which you were referring?

A Okay. David Many Horses and Mike Yellow Horse.

Q But you yourself don't know specifically that this is the particular piece of paper that was being written on that night, is that correct?

A That's correct.

Q That it appears to be and the reason is it appears to be the same kind of paper and two of the names are the same as on {669} that evening. All right.

What if anything happened next?

A One of the males walking down the road, they had a towel or a jacket and in the jacket, they had it wrapped up and holding it. Special Agent Williams asked them --

Q Was that the word towel? Would you explain what the word normally means by towel?

A A towel. Wash cloth, towel, you towel. It was a towel. Appeared to be a towel.

THE COURT: You're going to have to speak up louder.

Q (By Mr. Hultman) And he asked, "What do you have in the towel," is that correct?

A That's correct.

Q What if any response was given at that time in your presence?

A The response was, "Nothing. I don't have nothing." And so Special Agent Williams said, "Let me see." So the person handed it to him and Special Agent Williams unwrapped it and inside was a clip that was full of ammo, rifle ammo.

Q You said earlier you had never seen these particular three individuals before, is that correct?

A That's correct.

Q Would you just generally describe them to the members of the jury as you recall them on that occasion?

A They were all Indian males, had long hair, long dark hair, {670} medium height, five four, five five, something like that. They were probably in their teens.

Q Now I'm going to show you at this time, I'm going to show you what has been marked previously as Government's Exhibit 69A and the only thing I want you to look at is the clip which is a part of Government's Exhibit 69A and ask you whether or not the object to which you have just referred that was in a towel carried by one of these three was similar in nature to that clip or magazine that is in Government's Exhibit 69A?

A Yes. It does, it resembles it.

Q There would be no way for you to know whether or not it is the exact one or not, is that correct?

A That's correct.

Q That was the only time that you saw it was that particular night.

Now it was a clip itself and it was loaded with ammunition, is that correct?

A Yes, it was.

Q Now what if anything did you do next?

A Okay.

At this time the three young males were placed in back of Williams' and Coler's FBI unit and were taken back to Pine Ridge because the Oglala officer was there and he was more familiar with everybody, so see if we could identify them.

Q How specifically in addition to Jimmy Eagle for whom there {671} was a warrant, there were at least three more individuals with warrants outstanding concerning that particular event, is that correct?

A That's correct.

Q Had one or more of those individuals been arrested at that particular time, if you know?

A I'm not sure.

Q In addition to these were there other warrants outstanding in your daily work that you were still looking for and in the course of your every day work?

A We have several outstanding tribal warrants for the tribal court there in Pine Ridge. I'm not sure if there are any other federal warrants that were outstanding.

Q And none of you could identify the three individuals, is that correct?

A That's correct.

Q So what if anything then happened once you got into Pine Ridge?

A Okay.

I took investigator Little Bird back to the law and order office and dumped him off and proceeded to the police department there where Special Agent Coler was with the three young men.

Q What if anything happened there?

A Okay.

{672}

At this time all Officer Frank Two Bulls was there, he was the officer in the Oglala district at this time. We wanted to know if he knew any of the three subjects and he didn't know any of them.

Q So what if anything then did you agree to do?

A Okay Officer Two Bulls took him back to the Oglala area.

Q Or wherever they wanted to return to?

A (Witness nods affirmatively.)

Q Now was there anything else that happened that particular evening?

A We just went to a couple different residences there in Pine Ridge looking for Jimmy Eagle but he wasn't around.

Q Now I want to take you to the next morning then which is the 26th of June and ask you what assignment did you work on the next morning?

A The next morning I went to town, be about 30 miles east of Pine Ridge by the name of Batesland, South Dakota, and I went with the sheriff by the name of Gene Linehan, me and Glen Little Bird.

Q Were you given then subsequently that morning another assignment or a specific assignment?

A Yes, it was. Involved a break in, a burglary happened over there.

Q So in the meantime a burglary had happened and your supervisor the next morning sent you and your assistants {673} specifically to that particular burglary responsibility, is that correct?

A That's correct.

Q So you were no longer with Agents Coler or Williams?

A No, I wasn't.

Q Now what if anything happened which brought the matter that concerns us here in this courtroom further to your attention on that day?

A Could you rephrase your question.

Q Did you proceed to go to this other community with your fellow agent to investigate the new responsibility that had been given to you or the additional responsibility given you that morning?

A Yes. Myself and Glenn Little Bird went to Batesland with the sheriff out of Hot Springs.

Q About how far away did you say that was from Pine Ridge?

A Approximately 30 miles east of Pine Ridge.

Q And what if anything happened when you got there? What did you do once you got there?

A We went to the crime scene where the burglary or break in happened and talked to the owner of the property there concerning what was missing and gathering evidence and stuff and the owner advised us the guy at the co-op station might know who broke into his place.

Q At approximately what time of the morning on the 26th did {674} you arrive at the city and place that you just now had been discussing?

A Approximately 11:30.

Q And what if anything did you do next?

A Okay. After we got done there at the crime scene and talking to the owners of the place that got broke in, we were proceeding to go to the co-op station there and talk to the owner there.

Q And how far away was that approximately from the first place you had stopped?

A Just about a mile.

Q And what if anything did you do once you arrived at the co-op station?

A Well, we was going to talk to the owner there but we got a dispatch from a dispatcher in Pine Ridge and she was advising all units to return to Pine Ridge. So I called in and asked her, I said, "What's up," you know, "what's the traffic," and she said, "Can't advise you," that it was confidential. So we went to the co-op station there and called the police department.

Q And what if anything did you learn?

A The dispatcher advised me that the agents were under fire at Jumping Bull residence and so we went out and jumped in our vehicle and proceeded directly back to Pine Ridge.

Q At approximately how far away then from Jumping Bull's were you at the time that you talked to the dispatcher?

{675}

A Approximately 40 miles.

Q Did you then proceed directly to Jumping Bull's or did you make any stop on the way?

A We went to Pine Ridge and went to the law and order office. I had my vehicle there and we had another BI unit there and got out and got in his unit.

{676}

Q And approximately at what time would this have been?

A We stopped at Pine Ridge. This was, must have been a little after noon, after 12:00.

Q In that approximate period of time; is that right?

A Yes.

Q You didn't have any reason to check the time specifically; is that correct?

A No. We were just in a hurry to get to Jumping Bull's.

Q All right. What if anything did you do there?

A Where?

Q At Pine Ridge.

A Okay. We just got out of one unit and picked up my rifle and we put it in our other unit and we just jumped in and we took off.

Q What weapons did you have on you and with you at the time prior to arriving back at Pine Ridge?

A We just had my side arm, my 38.

Q All right. Where did you go then?

A Okay. We went directly to the, towards the Jumping Bull's --

Q Now, is that then going from Pine Ridge to Jumping Bull's down Highway 18 as represented in Government's Exhibit 71?

A Yes, it was.

Q All right. Now tell us what if anything happened as you approached the Jumping Bull property.

A Okay. When we arrived, this area up here (indicating), this {677} whole area here on 18 is a flat area and it starts about a quarter of a mile down farther. And since we hit this flat and started coming across this area here we started getting shot at from the Jumping Bull area.

Q All right. How did you become aware that you were being shot at?

A You could hear the bullets flying off the car. You could hear them being shot. We had our windows rolled down because it was hot and you could hear the bullets, you know, kind of like ricochet.

Q All right. Could you tell from the general direction where they were coming?

A Yes, we could.

Q And what general direction was that?

A Jumping Bull residence.

Q All right. Now, what if anything did you do?

A Okay. We just kept driving on the straight-away and we pulled into a turnoff about, be a quarter of a mile north of Jumping Bull.

Q And would you point out on Government's Exhibit 71 if you can approximately where it was that you pulled off of Highway 18.

A Okay. Approximately in this area right here (indicating).

Q All right.

MR. HULTMAN: Let the record show that he indicated the extreme left and general area of Highway 18 as it leaves {678} Government Exhibit 71.

Q (By Mr. Hultman) Now, what if anything did you see and observe at that time?

A Okay. At that time there was approximately four police units there and an ambulance.

Q All right. And what was the description of the ambulance, if you recall? Would you give the jury a description of the ambulance?

A Okay. It was a van that was used as an ambulance. A red light on top, brown in color. Just an ambulance that we used, you know, on the whole reservation as the ambulance service.

Q Now, is this the ambulance service that's generally known and generally used on the reservation as an ambulance?

A Yes, it is.

Q And generally recognizable by anyone?

A Yes.

Q All right. Now, let me ask you about Highway 18 there. As you came down Highway 18, is Highway 18, U.S. Highway 18 just like any other U.S. highway in that particular area?

A Yes, it is.

Q And so that you traveled down it like any one of us might travel down it on that particular day if we just happened to be driving on U.S. Highway 18?

A Yes.

Q And the bullets were coming across it as you came down {679} Highway 18 at you across from the Jumping Bull residence?

A Yes.

Q That area, all right.

Now, what if anything did you do next?

A Okay. We got out of the unit and then we went up to the front to see what was happening, see what we could do, you know, see what they wanted us to do.

And at this time Del Eastman, he was an agency special officer there, he got some guys together, four or five guys, something like that, and he took them around, it would be to the northeast, the residence, up a draw heave. He took them around.

Q All right. And what if anything did you do?

A Okay. I talked to one, one of the agents, I think audio visual division, and asked him, you know, who was in there. And he said he didn't know, he just said two of the agents, and that one of them was hit.

And at this time another guy by the name of Billy Allen got about four or five guys together. I was included in this group. It was me and Frank Two Bulls, Phil Clifford, Ski Jacobs and Billy Allen.

Q And while you were there in this location that you've referred to was there any firing going on at that time?

A Yeah. It seems like several, there was several shots being fired from the area of the Jumping Bull Hall, Jumping Bull residence.

{680}

Q All right. And were they coming into the general area of where you were located and these other people that you've referred to?

A Yes, they were.

Q All right. Did you hear anything else, any other sounds during this period of time that you recall?

A There was also explosions, sounded like dynamite, something like that. A lot of explosions.

Q And where were they coming from, what general area?

A They were coming from the area of the Jumping Bull residence.

Q All right. What if anything then did you do with these other four or five individuals?

A Okay. We got back in my police unit. We got back on Highway 18 and went south of the residence. And there were shots every time a car would go across the flat, they would shoot at you and, you know, they shot at us again.

And we went and pulled in, we went past the Jumping Bull residence approximately half a mile and we pulled off to the side road there and got out. And we proceeded to go up a draw, it would be southwest of the residence.

Q Now, with reference to Government Exhibit 71 and an area that is marked on that Government's exhibit as the tent area, and with relationship to Highway 18, could you show us somewhere beyond the exhibit approximately where it would be that you turned {681} off of Highway 18 and where you were located at the time you're now testifying to. Approximately how far beyond the exhibit would it be?

A It would be about a quarter of a mile right up in this area up here (indicating).

Q It would be about a quarter of a mile beyond the tent area?

A Yes.

Q All right. Along Highway 18; is that correct?

A Yes.

Q All right, fine. Thank you.

Now, what if anything happened? How long approximately did you stay in that location?

A Okay. We just pulled off there and got out of our police unit and we went up a draw there. This little log house up on the hill there, right from where we pulled off, and so we went up to this house to see if it was occupied by anybody, and it wasn't.

Q Now, is that log house sitting out in an open area?

A Yes, it is.

Q Away from the woods and creek area?

A Yes. It is up on a flat where you i went cut across.

Q Is it a continuation of the flat area that's represented on Government's Exhibit 71 which runs from Highway 18 to generally where the ridge line falls? Is it a continuation of that flat area?

{682}

A Yes, it is.

Q And you can see for a considerable distance all the way along Highway 18; is that correct?

A Yes, that's true.

Q Because one, it's flat; and two, there's no vegetation in that area?

A Yes, sir.

Q In fact there's a lot of plowed area in that general vicinity?

A Most of the flat top was plowed, and there's a few hedges. But that's about it.

Q All right. Now, approximately how long did you stay in that area, in the general vicinity of the log house to which you are referring to now?

A We just checked out the log house there. There was nobody around, so we went down in a draw and we were attempting to go around to -- and come up on the other side of the Jumping Bull Hall, the opposite direction of where the other group went.

Q And what if anything happened there?

A Okay. We came out of, came around the draw there, and there was a flat area before you got to the trees and the creek and it was an opening, say, twenty-five yards or so.

And we came around the draw there. We were attempting to starting to cross this, and we came upon heavy gunfire. So {683} we all hit the ground, pinned us down. And then we crawled to the wooded area and --

Q Now, with relationship to the area that's referred to on Government's Exhibit 71 as the tent area, where in relationship to you and the fire that you were receiving was the fire that you were receiving coming from in a general way?

A Okay. There's a bank that ran around before you get into the tree area and there was about four or five Indian males sitting on top of a bank here, and they were shooting at us.

Q It's generally beyond the tent area?

A Yes, it is.

Q To the south; is that correct?

A Yes, it is.

Q All right. Now, what if anything happened next?

A Okay. After they shot at us and pinned us down we crawled over to the wooded area for a little more cover; and Billy Allen, I remember he was saying, he said, "Well," he said "if they get above us, if they get up on the ridge there, we'll be sitting ducks, they'll have us," because there's no cover down there where we were.

And so him and, it would be Ski Jacobs, they cut back across the open part there. And each time they ran across they'd get shot at. And they made it to the bank and went up on a hill.

And then Frank and then Phil Clifford cut across and tried to get up on top and help them. And me and Frank Two Bulls {684} stayed down below.

Q All right. Approximately how long did you stay there then?

A Okay. We had been there about fifteen minutes, and then due to the lack of cover and stuff we backed off to another log house that was just about, say, fifty yards from the first one we went to. But this was down in the draw.

Q And is this farther away to the south than you were at that particular time? Did you move farther away to the south?

A Yes, we did.

Q All right. So that this would be moving at a greater distance from those individual that had brought you under fire?

A Yes.

Q All right. What if anything did you do next?

A Okay. We just waited down there at the log house and laid there approximately a couple, maybe a couple of hours. And this time here, constant shooting, you know, coming from the area of the Jumping Bull residence.

And pretty soon Officer Phil Clifford came back down over the hill and he advised that Ski Jacobs and Billy Allen left after some radio equipment and he wanted Frank to go back, or one of us to go back on the hill with him. He thought they might try to take over his location, or the log house he was at.

And so Frank went back up with him and I stayed down below, maybe another half hour, and then Frank came back down {685} and he advised me, he said the agents were, he said two agents had been killed, he said.

Q Now, about what time, just to the best of your approximation, would you venture a guess that this was in the afternoon?

A Between about 6:00 or 6:30.

Q All right. So you had been relatively then all the afternoon in the location of the first, the log house, and then the second log house to the south of the area that you had been referring to?

A Yes.

Q What if anything happened or came to your attention next?

A Okay. I decided to go back up on the hill where Officer Clifford and Two Bulls was. So I went back up to the other log house and we were just standing around there waiting for them to bring some radio equipment or something so we'd know what to do next.

And at this time we just, looking in an area, and we were just looking around and we seen about 12 to 14 subjects going up the hillside. It would be clear across the road. So we asked, you know --

Q What sort of a distance was this?

A It's about a half a mile away.

Q So you were viewing some individuals on a hillside about a half a mile away?

A Yes.

{686}

Q All right. And what if, do you recall anything about them as far as a group other than just approximately how many were in the group? Do you remember anything else?

A Okay. You see, they were carrying rifles most of them had long hair and stuff and they were going up the hill.

Q All right. What if anything transpired next that you recall

A Okay. We asked Ski Jacobs, he was the captain that was with us, we said, "Well, should we try to fire a couple shots, see if we can pin them down?" And he said, "Go ahead." And so we fired off a couple of rounds and they laid down a couple of minutes and they fired back at us. And it was too far away, and so they got up and proceeded into the hills.

Q All right. Now, did you have an occasion then to return back to the Jumping Bull property that evening?

A Yes. About, say, twenty minutes after we seen the subjects going up into the hill we, I went back down to the roadblock, the south roadblock. They had a roadblock set up down across the bridge.

At this time Glenn Little Bird, the guy that was working with us on detail, he called for my assistance at the Jumping Bull residence, him and Del Eastman. So I proceeded to the Jumping Bull residence.

Q And what if anything did you then do there?

A Okay. I got in with one of our officers, I believe it. Gerald Brown, He took me up to the residence, and when I got {687} out they wanted me to go over by the green, I think it's a green house there, and see if I can identify a body there.

They thought at this time, one of the officers said to me, he said, "I think it's Little Joe Keelsrack." And I knew him real well because I went to school with him. I used to live in Porcupine and so I went over and looked, and there was a young Indian male laying down. He was laying face down. He had a green Army jacket on that has FBI on the back of it. And I looked at his face and I didn't know who he was.

Q You didn't recognize the individual at all?

A No, I didn't.

Q You never seen him before.

Would you point out on Government's Exhibit 71 so that the jury might understand which house, as you refer to the green house that you're just referring to. Did you go view the body of the individual you've just referred to?

A It would be about the corner of this house here (indicating).

Q All right.

MR. HULTMAN: Let the record show that the witness has pointed out the green house as referred to as the green house on Government's Exhibit No. 71.

Q (By Mr. Hultman) Now, I'm going to show you what has been previously introduced into evidence here as Government's Exhibit No. 54, and in particular to page 16, and specifically photos B, C and D on page 16, and ask you whether or not you {688} recognize the scene that's portrayed there in those three photos?

A Yes. That was the body of the young man that was laying by the green house.

Q And is it generally a fair representation as something that you did observe during that period of time to which you are now testifying?

A Yes, it is.

Q And the jacket that the individual was wearing there, and it's Exhibit C, I think very fairly you can see over the pockets the words FBI. Is that the identification that you were just testifying?

A Yes, it is.

Q All right. Now, what if anything else did you do during the course of that evening?

A Okay. After I went over and looked at the body, then Little -- or Glenn Little Bird, Del Eastman called me down to the area where the agents car was parked. And so I went down there and Mr. Eastman wanted me to start drawing the crime scene.

Q And what if anything did you see there at that particular time? Did you see any automobiles or any objects of any kind?

{689}

A At this time I seen seen a white over tan Chevy, and had several bullet holes in it. The trunk was open, and laying, by the car was the bodies of Ron Williams and Jack Coler.

Q All right. I am going to show you now what has been marked as Government's Exhibit No. 54 and has previously been introduced as evidence here; and I would show you just the first photo. Photo No. 1, and ask you whether or not you have ever seen that before, and the objects that are portrayed there?

A Yes, I did.

Q And is that the occasion to which you are now testifying?

A Yes, sir.

Q And that is the car to which you have referred and the two bodies of the two agents to which you have just mentioned?

A Yes, sir.

Q What, if anything, further did you do that evening?

A And going down and looking at the bodies, just walked in the area in there, just kind of looking around for different evidence; and I walked probably 50 yards or 60 yards from the car, being in a south direction; and I found Ron Williams' checkbook, and there was a red light, assume it belonged to the vehicle.

Q All right. Would you point out on Government's Exhibit No. 71 the approximate location that you found the two objects to which you're just now testifying?

A O.k. It would be up in here (indicating).

{690}

Q And I am going to place a black "Y" at that particular point to identify it. Is that the approximate location you have just been pointing to?

A Yes.

Q All right. You may resume your seat, Mr. Ecoffey.

Was it getting at this particular point fairly late in the evening?

A Yes, it was. It was getting dark, and Delmar Eastman wanted me to go back into Pine Ridge and pick up his 35 millimeter camera, so I went back to his residence and picked it up.

Q Was there anything further that you did that evening concerning this matter?

A No.

MR. HULTMAN: Thank you. Mr. Ecoffey, I have no further questions.

MR. TAIKEFF: May we have a moment, your Honor, please?

THE COURT: You may.

(Counsel confer.)

MR. TAIKEFF: May I inquire, your Honor?

THE COURT: You may inquire.

CROSS EXAMINATION

By MR. TAIKEFF:

Q Mr. Ecoffey, you said you heard some explosions that afternoon?

{691}

A Yes, that's true.

Q How many?

A Approximately four or five, I am not sure.

Q What time of day?

A This would be right after I got there, about 12:30 quarter to 1:00.

Q Is it accurate to say that from the time you got there until you left -- withdraw that.

Is it accurate to say that from the time you got there until about 7:00 o'clock at night, there was firing go on, gunshots all afternoon?

A Yes, sir.

Q Could you say at what time the last shots were fired?

A Well, I can't really remember what time the last one was.

Q Could you put it in terms of when it got dark, how much before it got dark?

A Maybe a couple of hours, not very positive about it.

Q What time did it get dark that night?

A Be about 6:00, about 7:00, 7:30.

Q This was in June, was it not?

A Yes, it was.

Q Is it not a fact that the longest day of the year is June 21?

A I don't know.

Q Is it not a fact that it got dark that night about 8:30, {692} 9:00 o'clock"

A I am not sure.

Q Well, you said you thought it got dark about 6:30 or 7:00, did you not?

A Yes, I did.

Q Just a few moments ago?

A Yes, I did.

Q And you said shooting went on until 7:00 o'clock, isn't that correct?

A I said I wasn't sure what time the last shot was fired.

Q But you agreed it was somewhere in the vicinity of 7:00 o'clock?

MR. HULTMAN: Well, I object, your Honor. The question has been asked and answered to the best of the ability of this witness.

Q (By Mr. Taikeff) Did you not before say --

THE COURT: (Interrupting) He may answer.

A I just said a couple of hours, few hours before.

Q My question was, specific question was, did you not say three minutes ago that you thought that the shooting continued on until 7:00 o'clock?

A Yeah.

Q And didn't you say that you thought it got dark around {693} 6:30?

MR. HULTMAN: Well now, I object, your Honor. Counsel himself has indicated it gets dark about 9:00 o'clock in the question he has asked. The witness said approximately two hours before darkness. Counsel says it is 7:00 o'clock, and that's what the witness has said.

I offer at this time the question has been asked and answered. It is clear in everybody's mind, it is an attempt on the part of counsel to confuse the witness.

MR. TAIKEFF: Your Honor, I wonder who is testifying, Mr. Hultman or the witness?

THE COURT: Do you understand the question?

THE WITNESS: Yes, I do.

THE COURT: Very well. You may answer.

THE WITNESS: Rephrase the question.

MR. TAIKEFF: Yes, I will.

Q (By Mr. Taikeff) Do you mind if I ask it over again just the way I asked it before?

Didn't you say that you thought it got dark around 6:30 or 7:00 o'clock?

A Yes, that's the time I thought.

Q Now, is it a fact, or is it not a fact, that the shooting went on until it was almost dark?

A No. I said a few hours before.

Q Were you able to determine by your own personal {694} observations various places from which shooting was coming or was occurring?

A What was the last part of the question again?

Q Or where shooting was occurring, could you tell from sight or sound where shots were being fired from?

A At which time?

Q In the course of the afternoon, various times.

A Yes, I could.

Q Would you be kind enough to take that pointer and show the Court and jury one place at a time where you, based on your own personal observations, were aware that shooting was occurring; and after you show us a place, I will have to describe it for the record so pause for a moment.

A O.k. Shooting coming from this area right in her (indicating).

MR. TAIKEFF: All right. The witness is pointing to the area of the residences at the Jumping Bull compound.

Q (By Mr. Taikeff) Any other place or places?

A No. Just at the time we went up here (indicating) there was fire; and when we went across the entrance there (indicating).

Q Now, this place you just pointed to was in the upper right-hand corner of Exhibit 71. Where was the firing coming from when you were in the upper right-hand corner?

A The firing was coming from up here on the ridge, right up {695} here (indicating).

Q Is that place on the chart?

A No.

Q How much above the chart would it be, using the same scale?

A Well, it would be a quarter of a mile, a third of a mile.

Q A quarter of a mile would be about 1200 feet, you see the scale over there?

A Um-hum.

Q That's 500 feet, that's about a tenth of a mile?

A O.k.

Q Can you put it in terms of how many units, such as the scale there, above the chart?

A Say another two more.

Q So about a thousand feet above the top edge of the chart?

A Above this there (indicating).

Q All right. Now, that's where firing was coming from?

A Well, you could see it, could see who was shooting.

Q I am trying to find out the location from which the firing was coming, not where you were. Do you understand that question?

A Yes.

Q Do you understand that?

A Yes.

Q Now, you are saying that firing came from a point perhaps as much as a thousand feet above the top of the chart?

A Yes.

{696}

Q Could you tell how many separate guns were being fired from up there?

A No, I can't.

Q Were you able to determine in which way those shots were being fired, in which direction those shots were being fired?

A Yes. The bullets hitting all around us.

Q Where were you at that particular time?

A Right -- we was right up there (indicating), in that area there.

Q In the area of Tent City?

A No, up farther.

Q How much north of -- I am sorry -- how much east of Tent City? East is the top of the chart.

A It would be about a thousand yards.

Q That's where you were?

A Yes.

Q But didn't you say that's where the shooting was coming from?

A No, I didn't.

Q Well then, tell us where the shooting was coming from when you were a thousand feet north of Tent City.

A The shooting was coming from a thousand feet from here (indicating). We were down by the - about a quarter -- about 150 yards from where the shooting was coming from.

Q O.k. The shooting was between you and Tent City?

{697}

A Yes.

Q And you estimate that the shooting came from a position maybe a thousand feet beyond Tent City in an easterly direction, and you were further east of that point?

A About 150 yards, yes.

Q Did you see any of the people who were doing that shooting?

A Well, we could see them from 150 yards away.

Q How many people were there?

A Four or five.

Q What time of day was that?

A This was about a quarter to 1:00.

Q Any other people that you saw shooting or any other locations from which you saw shots fired?

A No, there isn't.

Q Now, what time was it that you saw 12 to 14 people on the hillside?

A O.k. This was around -- must have been around 6:00, 6:30.

Q Was each of them carrying a gun?

A I know several of them was carrying guns. I don't know if each individual had any.

Q Now, you say that on the evening of the 25th you went with the agents looking for Jimmy Eagle, am I right about that?

A Yes, you are.

Q And you told us that you went to a house in the Jumping Bull area and that you spoke with a woman by the name of Wanda {698} Siers, is that correct?

A That's correct.

Q Who told you her name?

A O.k. At the time --

Q (Interrupting) The question is "who".

A One of my officers.

Q And when?

A This was at a later date.

Q How late a date?

A Oh, a few weeks.

Q So when you spoke with her you didn't know her name?

A No, I didn't.

Q And do you in fact know that her name is Wanda Siers?

A Yes, I do.

Q How do you know?

A Because this officer told me that she was Wanda Siers.

Q But other than that do you have any way of knowing that she was Wanda Siers?

A Just that I believe the officer who told me.

MR. TAIKEFF: I move to strike the testimony that it was Wanda Siers on the basis that it is pure hearsay.

MR. HULTMAN: Well, if it please the Court, there is other evidence and there will be substantial evidence that this is the home in which she lives.

MR. TAIKEFF: I haven't heard that evidence yet, your {699} Honor.

THE COURT: You did not personally know that that was Wanda Siers?

THE WITNESS: At the time?

THE COURT: Yes.

THE WITNESS: No, I didn't.

THE COURT: The motion is granted. It will be stricken.

Q (By Mr. Taikeff) Earlier on your direct examination you were shown the rifle which I am holding which is Plaintiff's Exhibit 69-A. I am placing it before you on the witness stand.

Prior to today, when did you last see that rifle?

A I don't think I actually seen a rifle, it is just the clip.

Q You never saw that rifle?

A No.

Q Are you familiar with weapons, generally speaking?

A I am not expert, but I know a few.

Q You have some familiarity with them?

A Yes.

Q Could you see from looking at this weapon what it is, what kind of rifle?

A Well, my father used to own a British rifle that was like that.

Q Did you see this rifle inside that house?

A I can't say it was that rifle. I seen one resembling that.

{700}

Q Well, I don't ask you whether it is the identical rifle, but I ask you whether you saw a rifle in that house which looks substantially like this one.

A Something like that, yes.

Q Well, when you say "something like that" --

MR. HULTMAN: (Interrupting) I object, your Honor. This question has now been asked for the third time, and this witness has given a fair and accurate response to counsel's question; and I object to this as highly repetitious. The question has been asked and answered. At no time on direct examination did this witness indicate in any way that he had any knowledge of this particular weapon, only the clip, and one which resembled it.

THE COURT: I think the witness has answered the question. Sustained.

Q (By Mr. Taikeff) Did you see any guns in that house?

A Yes, I did.

Q Describe the guns that you saw.

A O.k. One was a smaller rifle, like a .22, and one looked like a British rifle.

Q What do you mean when you say a "British rifle"?

A One that resembled the rifle there.

Q The one that I just showed you?

A Um-hum.

Q Now, when you saw the clip that young person had with him, {701} did you know what caliber bullets were in that?

A No, I didn't know.

Q How old is Jimmy Eagle?

A I am not sure, approximately 20, 21 years old, something like that.

Q How old were those young people whom you encountered on the night of the 25th?

A I don't know. I don't know.

Q How old did they look to you?

A Late teens, 18, 19 years old.

Q As of June, 1975, for how long had you known Jimmy Eagle?

A Well, I can't really say exact, but I used to go to school with him.

Q Would it be fair to say that if you saw him at that time, you would recognize him?

A Yes.

Q What was the location of the place where you encountered those three young people?

A O.k. This was on the road coming out of Oglala housing, right past the Oglala store.

Q And how far is that location from the BIA jail?

A Oh, 13 miles.

THE COURT: Mr. Taikeff, we will recess at this time until 9:00 o'clock tomorrow.

Members of the jury, I just remind you that you are {702} not to discuss the case and must keep an open mind and not reach any decisions.

The Court is in recess.

(Whereupon, at 5:00 o'clock, p.m., the trial of the within cause was adjourned until 9:00 o'clock, a.m., on Tuesday, March 22, 1977.)