

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.	*

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

VOLUME XI

Pages 2162-2396

{2162}

WEDNESDAY MORNING SESSION

March 30, 1977

Pursuant to adjournment as aforesaid, at 9:00 o'clock, a.m., on Wednesday, March 30, 1977, the Court met, present and presiding as before, and the trial proceeded as follows out of the presence and hearing of the jury, the Defendant being present in person:

THE COURT: At the bench yesterday a Brady versus Maryland motion for disclosure was made; and the Court reserved ruling on it. The motion arose out of the statement in Agent Cunningham's affidavit that he submitted apparently on extradition proceedings in connection with this Defendant, in which he stated in his affidavit that a certain type of expended cartridge was found in the trunk -- was it Coler's vehicle?

MR HULTMAN: Yes, sir.

THE COURT: I would raise the question, first of all, as to whether or not there is evidence that such a cartridge was in fact found in the trunk of the Coler vehicle by someone?

MR. HULTMAN: Yes, your Honor, there was; and I apologize to the Court. I have a brief, pursuant to our discussion yesterday, it is being typed right now; and I apologize to the Court that it is not in the Court's hands right now.

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The only reason for mentioning it, your Honor, is, one, I will certainly respond to any question your Honor has; but maybe it would be more appropriate -- I don't think the issue itself is going to arise again, Mr. Lowe, at least in the immediate testimony right now, won't arise with Mr. Garnmage.

MR. LOWE: No.

MR. HULTMAN: And I would suggest to the Court, if the Court would give us an opportunity to at least present that brief to the Court, that maybe prior to taking the jury up after the first recess, prior to the jury coming in this afternoon that it may be a fuller time to take the matter up, but I will certainly respond to anything the Court wishes.

One, your Honor, the evidence is known by the defense counsel. It was so shown in the last trial and will be shown again. It is there in the 302 Form and so forth, that that round was found by another agent specifically.

THE COURT: I would then ask defense counsel specifically, because the motion was an oral motion, to state specifically what it is they are asking to be disclosed.

MR. LOWE: Yes, sir, I would be happy to.

The testimony -- and again I made my motion obviously from the position of the defense theory and what {2164} we hope to prove and anticipate we will be able to prove with regard to the general development of this case; and in particular, with reference to this one cartridge case, first all, as I mentioned to your Honor at the bench yesterday, this is probably the single most important cartridge case in this entire investigation of all the perhaps hundreds that were found. This .223 cartridge case was allegedly found in the trunk of Coler's car which was, of course, down by the two bodies of the FBI Agents. The Government, we know, from last summer's trial and by just simple logic is going to argue that this cartridge could not have gotten into the trunk of the car except if it were fired by one of the people who killed the agents, and will then try by inference at least to connect up Mr. Peltier with having fired that cartridge since there is at the present time some testimony, if it is believed, that Mr. Peltier was firing an AR-15 from the vicinity of the big goose egg near the "Y" intersection, so that I will just say that the factual logic will be Mr. Peltier was firing an AR-15, AR-15's fire .223 cartridges, a .223 cartridge was found in the trunk next to the dead agent, the agents were killed with a shell out of a like weapon, ergo, Mr. Peltier is the murderer. We recognize that both because the Government has argued in the past essentially also on logic this makes that cartridge a {2165} critical cartridge.

It is also important for other reasons. It is the only cartridge found in a 20 yard radius of that car of the .223 nature. That, of course, leaves a lot of argument to both sides as to why that would be. If there were three shots that killed the agent, why wouldn't you find three cartridges.

So it is critical in terms of the really relevant evidence down at the cars. If, as is the defense theory, that cartridge was salted in the car, if that is an explanation of how that cartridge got there, that somebody put it in the trunk of the car, then it is critical for us to be able to show that the chain of custody, or that an agent like Mr. Cunningham or Lodge or Mr. Hodge, or any of the others of them, either do not have a factual basis for giving their testimony or perhaps raise inferences that they are not being candid with the jury, depending on what develops. That certainly is a roper goal of cross examination in this case.

As to the extent that Agent Cunningham has now said, that he did not find that .223 cartridge but in fact signed an affidavit that said he did -- now claims that and said, "Well, I thought at the time I must have found it, that was my then recollection" -- I think there is a lot of evidence on which the jury could disbelieve {2166} that and think he is lying, similarly I think the jury might believe he is telling the truth; and in order to further develop that issue with the jury, we believe we are entitled at least to have disclosure of who it was that prepared the affidavit and typed in this Paragraph 6 which alleged that Special Agent Cunningham found the cartridge. Was there a covering letter? For example, if a covering letter said something to the effect that "Here is an affidavit, you sign it or else", obviously that would be relevant; and I don't represent that such a covering letter in those words exists. We simply don't know what covering letter exists, if any. That's why we were asking for disclosure.

We believe that any such documentation and the identity of the person who prepared the affidavit would be relevant evidence which would tend to exculpate Mr. Peltier. Obviously, if the covering letter said something to the effect of "Here is an affidavit for you to sign and send back, if you don't sign it you are in trouble", that obviously would be exculpatory. It would tend to discredit the finding of that cartridge.

We believe at the very least we are entitled to the following:

First, we are entitled to disclosure of the name of the person who prepared the affidavit. Now, we can do {2167} this the hard way by calling all kinds of U. S. Attorneys and FBI Agents in Charge and everything and asking them. I would like to think that in the expedition of this case, that would be disclosed to us. I think we are entitled to have it disclosed to us under Brady.

Secondly, we are at least entitled to have it disclosed to the Court what documents are involved so we can examine them under Brady v. Maryland. It may be those documents may not be relevant after we have viewed them.

Your Honor might make some evidentiary rulings that would prevent us showing them to the jury. We can't make that decision until we see the documents.

If the Government would disclose there were no documents, that this was sent to him in a plain unmarked envelope, he just knew instinctively, knew to sign it and mail it, it that's the case, the Government can make that disclosure and put the issue to rest as far as that is concerned.

That's what we are asking, the identity of the preparer of the affidavit, and any documentation which accompanied it when it was sent to Special Agent Cunningham.

We believe at least we are entitled to that in the context of having a fair trial.

THE COURT: Thank you.

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MR. LOWE: Incidentally, your Honor, I would not oppose having oral argument or having your Honor hear argument later on this day, if that would meet with your Honor's approval I would like to think if we do, we would have more than a three minute opportunity to look at this brief that Government counsel would present to the Court; and I would request the Government to give us sufficient time so that we can perhaps again check out some of the cases the Government relies on.

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THE COURT: In the time frame of this trial how soon do you need the Court's ruling on this?

MR. HULTMAN: Your Honor, I will place it in Mr. Lowe's hand at this moment as I normally do as I get it.

MR. LOWE: In response to Your Honor's question that we depend a little bit on the order that the Government calls its witnesses. There are some other witnesses that will testify about this cartridge. I don't know when they'll be called. We would certainly want to get that information before those witnesses are cross-examined.

Since I don't know when they're planning to call them I can only infer within the next day they will call these witnesses since by the estimations that Mr. Hultman has given us we are nearing the end of the Government's case. So I would think that it ought to be a matter of some urgency to find out from the Government and to have the Court --

THE COURT: And if the Court should rule that this information requested by defense counsel should be disclosed at least to the Court, is that going to result in any time delay?

MR. HULTMAN: No, Your Honor, I don't see any problem of that kind at all. One, I would just plain like to point out, Your Honor, that Mr. Lowe by his own questioning and the preparation, that it was Mr. Lodge that specifically found the documents and he has 302's I believe in his possession that {2170} would so indicate that. So there isn't any question as to what the factual issue specifically was, is or has been.

The only new, and I submit from this point on, it now becomes a collateral issue. I have no, there's not a collateral issue as far as what Mr. Lowe has done to this point, and the Government did not object in any way.

To get into the matter concerning the affidavit and the fact that that is now before the Court as the witness clearly indicated in response to counsel's questions that it was a mistake on his part. But to now go beyond that, and that's the point that I point out in the response here, now gets into all kinds of collateral matters that have no relevancy of any kind as far as this issue is concerned. And I believe that's true under the Agwis case. The witness said it was error and that's exactly what the fact is.

THE COURT. You are getting into argument on the issue right now.

MR. LOWE: Yes.

MR. HULTMAN: I thought Mr. Lowe kind of discussed --

THE COURT: I really want, at this point I just really wanted some factual information disclosed. Number one, as to whether there was such, in fact such a cartridge alone to have been found, and number two specifically what it was that the defense was asking be disclosed, and I do now have that information.

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MR. HULTMAN: That information, Your Honor is in the transcript also from the last trial. So it's not just something that counsel is discussing here, the issue of the reference as to who found the items.

John, I'm not talking about the items that the affidavit now, I'm talking about the fact as to who found the round. That clearly has been known, known by you, was known in the last trial. That is not -- there isn't any dispute about that, is there? Do you have any dispute at all about that?

MR. LOWE: May I make just a simple statement. There is no dispute that at one point or other, including last summer in testimony, that Agent Lodge claimed that he found the .223. But now we have Special Agent Cunningham in a written affidavit under oath claiming he found the .223 and we're not bound by his statement that he made a mistake and we are entitled to probe that the fact that Agent Lodge said he found this doesn't necessarily mean that he found it. As we note with Special Agent Cunningham there is a factual dispute, and that's the reason that we want to find the information that we seek. And I don't want to get into the merits of the argument. I don't want Mr. Hultman to think this way. There certainly is.

THE COURT: Thank you.

MR. CROOKS: Your Honor, there is one other matter which perhaps would be most sufficiently taken up at this time. {2172} The next series of witnesses that will be called will be the Oregon people concerning the Oregon incident. And I understand that counsel wishes that matter, prior to going into the actual facts, that they wish to make some statement on it. And I would assume that as soon as Mr. Gammage is off the stand we will start calling, perhaps it would be best to raise that right now so we don't, aren't all whispering --

MR. TAIKEFF: Your Honor, I will not burden the Court with repeating the argument which has been made to Your Honor on several occasions concerning evidence of other crimes or in the case of relevant material. The determination of the Court was made concerning the counterweight, namely the possible prejudice.

I don't know what the Government intends to offer in connection with Oregon, but we understand from our own investigation and from pretrial discovery proceedings with the Government that it contained certain elements which either are irrelevant or if relevant are in our view prejudicial. And I think that we --

MR. CROOKS: Well, Elliot, so we aren't arguing across, why don't I state first basically what we intend to show so that you know really what to respond to.

THE COURT: Very well.

MR. CROOKS: Your Honor, basically in a nutshell what the Oregon incident is, on November 14th, and there's been some {2173} testimony going to that already but not to the actual facts of the incident, at approximately 10 :00 o'clock P.M. on November 14, 1975 trooper Griffith of the Oregon State Patrol stopped two vehicles. One was the recreational vehicle, Dodge recreational vehicle, the other was a Plymouth station wagon and Officer Kramer assisted him in the stop, although Officer Griffith is the main witness.

Basically they stopped the vehicles because there had been an all-points bulletin out for vehicles described in this manner, and he pulled the vehicle over, pulled up behind the R.V., got out of his vehicle, approached it with considerable caution. He had with him a shotgun, he order the people to get out of the vehicle, one individual got out. He will describe the individual and we assume that the description will be roughly that of the defendant.

Then he asked if there was anybody else in the vehicle. I believe he also asked the name of the individual and was given a Spanish-sounding name. Then he asked if anybody else was in, some women and I believe some children got out. And about that time the recreational vehicle started pulling away from him.

The man who had gotten out first and who generally fits the description of Leonard Peltier then ran for the fence which surrounds or borders the Interstate highway. As the individual was running toward the fence, or crossing the fence, {2174} I'm not sure exactly which way the testimony will be, that individual fired a shot at Officer Griffith. Officer Griffith fired back twice with his shotgun. The individual escaped over the fence and was not seen again.

The other individuals, the women and children, were taken back, or walked back to Officer Kramer's car and then Officer Griffith chased the R.V. down the highway about a half a mile, three-quarters of a mile. He found the R.V. which had been abandoned with the lights on, motor running, doors locked, or doors closed at least, in the center median of the interstate highway.

Other officers arrived. They fired tear gas into the vehicle. They, I believe, fired a couple buckshots rounds into each ends of the vehicle. In any event they opened the vehicle after they got no response, saw there was no one there. The vehicle was impounded, search warrants obtained and both the Plymouth station wagon and the R.V. were then searched.

In the course of the search the officer found, and by this time FBI agents had already been alerted and were there with federal warrants as well to search the two vehicles. Between the state and local officers they found numerous fire arms, many of which had obliterated serial numbers. They also found, and this of course is the most important, they also found Special Agent Coler's service revolver, and this was {2175} in a paper bag. The paper bag was examined and found to contain the prints of Leonard Peltier.

There were also other prints found in the interior of the motor home which were likewise identical to Mr. Peltier's. Mr. Griffith, and I don't know what his testimony will be, but he probably will not be able to identify Mr. Peltier or give a positive identification because it was dark. He had a fleeting observation to observe under very poor conditions.

I believe that the best that he will come up with, if that, is that he was a man appearing to be similar to Mr. Peltier.

The next incident in Oregon, two young people were parked, I assume doing what young people do beside a railroad track, and an individual comes up and wants a ride. And there's a brief exchange. He's looking in the window, both of these young people were rather terrified, and they exited the scene at a high rate of speed.

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MR. CROOKS: They were stopped by a Highway Patrolman for speeding. They told him what happened. They were taken down to the Ontario police department and shown a picture of Leonard Peltier and I think others and identified him as being Leonard Peltier. I believe the photograph identified as the one taken at King County prior to that time.

In any event, a short time later it was discovered that a ranch house had been broken into. The ranch house was owned by an individual named Eagle I believe. However, staying at the ranch house was a nephew named Barker. Mr. Barker's Rancho and a 30-30 rifle were stolen. Mr. Peltier's fingerprints were found at the scene of the burglary.

The Rancho was recovered 100 miles or so from Ontario, Oregon and Mr. Peltier's fingerprints were found on the Rancho.

Then at the time Mr. Peltier was arrested in Canada, the 30-30 rifle was found in his possession with his prints on it. And also among some of the other items found, I might mention, in the station wagon, in the tool box of the station wagon were some shell casings which had been fired by Special Agent Coler's service revolver so that basically in a nutshell is what the series of events will prove. And perhaps I now defer to Mr. Taikeff and I will respond as to our justification if the Court feels any further argument is necessary {2177} as to these specific items.

We feel all of this series of events are entitled to go into evidence, all being relevant to the flight of Mr. Peltier and also to the obvious relevance of the service revolver and also to the fact that he was resisting apprehension using deadly means.

THE COURT: Mr. Taikeff.

MR. TAIKEFF: First on the question of relevance, Your Honor. I assume that the position of the government is that the relevance, is that the evidence will tend to show flight as evidence of guilt, am I correct about that?

MR. CROOKS: This would be one element; yes.

MR. TAIKEFF: Well, with respect to that portion of the testimony which we're concerned about, I don't know whether the government tends to offer into evidence only the .357 magnum which was found in the paper bag or whether it's the intention of the government to offer all of the weapons which were found in both vehicles. If the answer is the latter, then we identify those other weapons as items which have no relevance in this case and have no purpose except an intention on the part of the government to prejudice the jury.

MR. CROOKS: Your Honor, I might just state for Counsel's edification, we do not intend to put in the other firearms as such. {2178}

We do intend and fully intend to put in photographs of the various other weapons that were seized.

There was also some dynamite seized. We have agreed with Counsel we'll not attempt to elicit testimony or put in photographs of that. However, we do full intend to put in photographs which the Court can see, if he wishes, of the other firearms and the shell casings and live rounds which were found in the search of the recreational vehicle and the Plymouth station wagon.

MR. TAIKEFF: May I ask what the relevance of showing all the weapons is, Your Honor?

THE COURT: You may ask.

MR. CROOKS: Well, I'd be happy to respond. I'll respond now. Basically the obvious relevance is that his shows the nature of this man's state of mind and the length to which he will go to avoid apprehension.

We're talking about a vehicle which is literally loaded with deadly weapons, none of which, or most of which have no possible connection with civilian usage whatsoever. We have a large weapon with several banana clips, all fully loaded. It seems to me it's quite obvious that the relevance of that is to show when we're talking about flight to avoid prosecution, we're not talking about somebody hiding under a bed, we're talking about somebody proceeding down the public {2179} highway loaded to the gills with deadly weapons which he does in fact use against the state trooper who attempts to apprehend him. We think this dovetails completely with everything that we have been showing in this case. More particularly, the deadly response that Special Agent Coler and Special Agent Williams received when they attempted to apprehend him, or apprehend the vehicle, the red and white van, at the scene and it seems to me that the relevancy of that evidence is on its face obvious, that is shows the very nature of the flight and the very nature of the extent to which this man would go to avoid prosecution and avoid apprehension. It again fits back to what happened on June 25th as well as what happened in November.

MR. TAIKEFF: Your Honor, I would like to ask whether it it's the position of the government that the weapon depicted in the photographs last referred to is a crime or whether it it's a weapon that is semi-automatic and therefore not a crime to possess?

MR. CROOKS: Well, I don't frankly know and I frankly don't care. The United States is not going to attempt in any way to argue or to produce evidence of any other crime. The pictures speak for themselves.

We have got a bunch of weapons here that quite obviously from looking at them are not civilian weapons, not the type of civilian weapons that are ordinarily used in {2180} sporting activities. We have a series of deadly weapons and they speak for themselves.

I have no intention of calling a firearm expert to elicit testimony that that may or may not have been a crime. I don't think that's material and that is not a point that we intend to press. I think the weapons speak for themselves.

I think we also will indicate, as I did earlier, however, that most of these weapons have obliterated serial numbers which again I think goes to the defendant's state of mind that here

he's carrying around a bunch of weapons which Counsel has been attempting to demonstrate are just nice, ordinary civilian weapons. It seems to be that obliterating the serial numbers speaks something for his intent and his state of mind and I assume that that is a crime, but I do not intend to press that again through any firearms expert.

We're attempting to show state of mind, not proof of crime as such. If Counsel wishes to point out to the jury that the possession of some of these weapons are a crime or argue that, that's fine with me. But I don't --

MR. TAIKEFF: Quite the contrary. Our position is the government may not prove other crimes and that there is utterly no relationship between the presence or absence of serial numbers on the weapons, and any state of mind of the {2181} defendant which is relevant to any issue in this case. We specifically object to the introduction of any evidence concerning the subject of serial numbers.

If, assuming the government is correct, a person arms himself in an effort to flee, and that is a reflection of his state of mind as to his guilt or innocence, that's one thing, but whether the gun has a serial number or not is totally irrelevant to that issue and any other issue in the case.

MR. CROOKS: Well, I think the relevance is obvious in that point, Your Honor. It seems to me that somebody that's going around obliterating serial numbers, the possible reason for obliterating serial numbers on a weapon is so it cannot be traced.

It seems to me that it's the destruction of evidence during the course of the fleeing, that that certainly is obvious. It would be just as obvious as someone carrying evidence away from a crime scene. That certainly speaks to his state of mind and I certainly don't follow Counsel's argument that that does not show anything. It certainly does. What other reason does Counsel have for taking serial numbers off of weapons other than to avoid apprehension?

MR. TAIKEFF: To conceal the source of the weapon. That's the usual reason. And I think by this time Mr. Crooks {2182} should be sufficiently experienced as a prosecutor to realize that. And that has absolutely nothing to do with any issue in this case.

MR. CROOKS: Well, Counsel, are you arguing that the obliteration of the serial number on Special Agent Coler's gun is not relevant? Is that your argument?

MR. TAIKEFF: No. I'm not talking about --

MR. CROOKS: We're talking about a piece of evidence which was taken. Special Agent Coler didn't put that in that RV, we know that. HE was dead.

MR. TAIKEFF: Mr. Crooks is wasting his breath. I am not talking about the .357 magnum, I am talking about any other weapons in the vehicle that may have had obliterated serial numbers.

{2183}

The missing serial numbers on any other vehicles has nothing to do with any issue in this case, even the claim of the Government, that the army of the Defendant was at or present in the proximity of the Defendant and his weapons, is a reflection of his state of mind that he was guilty. The missing serial numbers don't add or detract from the question of his state of mind concerning his belief of guilt or innocence. If anything, it is an attempt to eliminate tracing of

the weapon to its source, and that has nothing whatsoever to do with the carrying of the weapon or the proximity of the weapon. It is prejudicial and it is criminal, and to introduce it is to place in the jury's minds evidence which has nothing to do with any of the issues in this case, including the question of whether or not the Defendant was fleeing out of a sense of guilt; and it is on that basis that we object.

Now, I think that takes care of the first phase of it. The second of the three phases that I think Mr. Crooks addressed himself to is the episode involving the two young people. I am not sure what the relevancy is of two young people watching trains, but I look forward with some interest to that particular testimony.

And as to the third aspect of it, I think the Government -- well, I must take a step back, your Honor. I {2184} just realized something from the pre-trial discovery which was not specifically touched upon by Mr. Crooks although he made indirect reference to it.

There are certain objects in the home, in the mobile home which contain the fingerprints of the Defendant. We do not dispute that the Government has witnesses who can testify -- and they are expert witnesses, I trust -- that the Defendant's fingerprints were found on certain pieces of paper, found within the mobile home. It is the content of those papers which are highly prejudicial because they contain in one instance political literature which has no relevance whatsoever. The only reason the Government offers it, I trust they will say, is that they want to show that his fingerprint was there so that there can be no question but that he was in that vehicle.

Well, we don't dispute that the Government will introduce evidence and has evidence of the fingerprint on the piece of paper. The question is, is it necessary for the jury to read the words that were printed on that piece of paper, before the fingerprint ever could have gone on there, in order to prove that the fingerprint was there; and I think the answer is "no", and we object to that.

Now, there is one -- or possibly there are two other pieces of paper with handwritten notations. The {2185} ostensible purpose, as I understand it, of introducing those latter items of evidence is to show that the Defendant's fingerprint was found there.

Now, we understand that the Government likewise will adduce expert testimony concerning the finding of the fingerprint on that piece of paper or those pieces of paper, as the case may be; but what I am concerned with, what the defense is concerned with is the content of the writings which have nothing to do with the issues in this particular case. They are highly prejudicial, they parade before the jury other matter.

Your Honor has been very stringent with the defense with respect to what areas the defense may go into. I think the time has come for your Honor to recognize that if the Government doesn't have any evidence of the Defendant's guilt on June 26th, it should not be able to prove or get the verdict it wants in this case by proving other things which have nothing to do with those events and nothing to do with any issue which arises out of those events.

Now, if the Government wants to show that there was a piece of paper or two pieces of paper or three different pieces of paper, and on a microphone that was usable with a radio in the mobile home, all of which have the fingerprint on it, we have no objection to the offer of that {2186} evidence. What we do object to is putting in the piece of paper in the guise of showing the jury what piece of paper the fingerprint was on. The jury can't see the fingerprint on the piece of paper anyway. The jury has to rely on the expert. There is no way in the world that the jury

could look at that piece of paper and say, "Oh, well, the expert is wrong. This is not Leonard Peltier's fingerprint."

Now, your Honor won't let the jurors look through the telescopic sight, and every juror in the jury box has two good eyes and could tell whether or not the agent's testimony was accurate, that he could see a person in detail enough to identify him at a half mile distance. Now, I am wondering what possible rationalization could have been offered for letting the jury look at a piece of paper. The only thing that the naked eye could detect is the printing or the handwriting on a piece of paper. The jury cannot see the fingerprint, so there is no reason in the world, unless the jury wants -- unless the Government wants the jury to see the contents of those papers which do not relate to the facts of this case; and we, therefore, object to the introduction of the pieces of paper themselves.

The last item I would like to address myself to before ask your Honor for an opportunity to consult with {2187} Mr. Lowe is that with respect to the last phase of Mr. Crooks' presentation, there is proof there of a burglary; and I think that the Government's proof should be tailored in such a way as to not present to the jury the fact that the Defendant may have committed a burglary because that is proof of another crime. The finding of his fingerprint at another location establishes his presence in that location. It is not necessary for the jury to specifically resent the evidence in such a way as to imply that the Defendant committed a burglary, because that part of it is not necessary.

We understand that the Defendant is alleged to have been in that location. We understand that the Government has a right to prove his presence in a particular location at a particular time; but it is not necessary to dress it up with a criminal accusation, and that's what the Rule concerning proof of other crimes is concerned with.

Now, if I may have a moment to confer with Mr. Lowe, Your Honor, I would like to take that opportunity.

THE COURT: Very well.

MR. TAIKEFF: Thank you.

(Counsel confer.)

MR. TAIKEFF: There are two points that my colleagues urged me to call to your Honor' s attention.

The first is that there is already in the record, or {2188} if it isn't in the record it certainly will be by virtue of the stipulation that has been worked out between the prosecution and the defense, the fact that the Defendant was subject to arrest pursuant to a warrant in connection with another case. As such, his flight may have been as a result of that because that is the basis upon which they offered that evidence to begin with; and so it is confusing the jury to offer this evidence which is chocked full of all sorts of prejudicial elements in an effort to prove his state of mind when in fact they have already entered or proposed to enter into the record proof of the fact that he was already in flight for a year and a half before the June 26th incident; and they seem to want to have it both ways at the same time.

Secondly, your Honor, it has been our position -- and it is spelled out in the trial brief -- but just to make sure that there is no misunderstanding as to those aspects of the evidence which we believe the Government has a legitimate right, once your Honor makes his ruling about

relevancy, to introduce into evidence, we are prepared to enter into any stipulation or concession that the Government thinks is necessary for us to enter into in order that the flow of their proof not be hampered.

We repeat that offer so that the record is clear.

MR. CROOKS: We will rise again very briefly, I trust, {2189} Your Honor.

As I hear counsel, apparently they have backed off basically on 90 percent of the point that they were raising in their pre-trial brief. Apparently now they are arguing about how much of the detail we can put in. Apparently they now concede the obvious relevance of this chain of events.

It seems to me that -- well, one point specifically, counsel raised the question of certain paper. I assume that he is talking about the radio code, and one of the radio codes does have Mr. Peltier's fingerprints on it. The other radio code does not, but this will be offered not only for the print but to show the communication between the two vehicles. They have identical radio codes which are not the usual 10 code which is the standard CB code; but we have a five code which details many things and set out in a code form; and one of these was found in each vehicle, and certainly is relevant to show the -- not only the tie-up between the two vehicles, but the use of radios in avoiding apprehension, and again goes directly to the flight. So on that point I think the obviousness or the relevancy speaks for itself.

With regard to the other specific items, I think that's premature. If counsel is just arguing about details, that certainly could be handled at the bench, {2190} as to whether we use one piece of paper or another piece of paper but it seems to me that counsel has in effect conceded the obvious relevancy of this chain of events and showing the flight part of it. It certainly -- I can't really, I almost can't believe counsel's assertion that the jury might be confused between the flight from Milwaukee and the flight from the scene. No. 1, I don't see the difference, and No. 2, we have got numerous witnesses who have already testified that he was in flight when he left the scene; and this is obviously part of the continued flight. I, for the life of me, can't understand how counsel feels that there is some difference. Flight to avoid prosecution is flight to avoid prosecution. Using a deadly weapon to assault the officer who attempts to apprehend you is vitally relevant to the Defendant's general state of mind, and apparently counsel has pretty much conceded that now.

MR. TAIKEFF: Does your Honor understand what our position is, that we concede on the question of relevance?

THE COURT: I do understand what your position is, not that you concede to the condition of relevance. If the Court should hold the evidence is relevant, certain evidence is relevant, that you are prepared to stipulate?

MR. TAIKEFF: Yes, I understand that.

{2191}

I just wanted to point out to Mr. Crooks for his edification that usually radio codes, to begin with, digit 10 as he alluded to, Indian people have been deprived for so long, they couldn't afford a code that begins with 10, so they use a code that begins with 5.

THE COURT: The Court will rule on that motion prior to the time that the evidence is presented.

The jury may be brought in.

(Counsel confer.)

(Whereupon, at 9:45 o'clock, a.m., the jury returned to the courtroom and the following further proceedings were had in the presence and hearing of the jury:)

THE COURT: The other day I kept the jury waiting 70 minutes. Today I kept you waiting only 45 minutes. I am improving.

The delay again was the result of legal matters that had to be argued out of the presence of the jury.

MICHAEL GAMMAGE,

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

MR. LOWE: May I continue my voir dire, your Honor?

THE COURT: You may,

MR. LOWE: I believe at the close of the day yesterday I may have started to discuss an exhibit. I am going to start at this point rather than take a chance that {2192} something might not have been said, and I will show you what has been marked as Defendant's Exhibit 135, Mr. Gammage, and ask you if you have seen that document before and are familiar with it?

THE WITNESS: (Examining) Yes, I have.

MR. LOWE: And will you tell the jury just generally what the nature of the document is?

THE WITNESS: This is a laboratory report from the Federal Bureau of Investigation to our office in Wichita, Kansas. It specifically mentions four items of evidence that were submitted to the Federal Bureau of Investigation Laboratory for their examination.

MR. LOWE: All right. Now, there are four weapons there which are designated K-39, K-40, K-41 and K-42, and they are listed and described in the document, are they not?

THE WITNESS: Yes, sir, they are.

MR. LOWE: And are those four items which you either personally found or had delivered to you by somebody else at the scene of this explosion on the Kansas turnpike?

THE WITNESS: (Examining) Without referring to my notes, regarding K-41 and K-42, I would say, yes, they are

MR. LOWE: I am not trying to trick you.

Did you personally deliver those four weapons to the {2193} FBI laboratory in Washington, D. C.?

THE WITNESS: I personally delivered the four weapons to our laboratory in Washington, D.C.

MR. LOWE: All right, and did you receive any of those weapons back again from your laboratory or from someone else at a later time?

THE WITNESS: I personally did not.

MR. LOWE: Did your office in Wichita?

THE WITNESS: I believe that -- without referring to my notes, Mr Lowe, I believe only -- we only received K-41 and K-42 back; and according to this it says, the report, K-40 was received in our office. I am sure we got it back. I just don't remember right now.

MR. LOWE: The point I am making though is these weapons that you found at the scene of the explosion are the ones that are referred to in this report, certainly that is true of K-41 and K-42, and you believe it is also true as to K-39 and K-40, is that correct?

THE WITNESS: Yes, sir.

MR. LOWE: I ask you to read down to the result of the examination, and the second full paragraph under that; and ask you if that does not state that none of the ammunition components recovered at the RESMURS scene -- and I don't think it has been brought out what the RESMURS means. Do you know?

{2194}

THE WITNESS: Only by what I have been told.

MR. LOWE: Can we stipulate that RESMURS is an abbreviation used by the FBI to mean Reservation Murder Scene, or some similar description of the area on Exhibit 71?

MR. SIKMA: Yes.

MR. LOWE: This letter states: None of the other ammunition components recovered from the crime scene could be associated with specimens K-40 through K-42 -- that says that in that report, does it not?

THE WITNESS: Words to that effect, yes, sir, it does.

MR. LOWE: All right.

{2195}

MR. LOWE: All right. On the basis of this information, Your Honor, we would renew, or I would state that my objection, which I made yesterday to any questions being asked about K-40, K-41 or K-42 be sustained since this report shows on its face that no ammunition components recovered at the crime scene could be associated with those weapons.

Now, at this point the Government has not laid a foundation for asking any questions about those three weapons beyond what they've already elicited, and that is just a general description of all of the items that were observed at the scene of the explosion. And at this point we believe that there is no proper foundation for having any questions asked or any introduction of K-40. And even if the Government does not offer K-40 or 41 or 42 at this time into evidence, we believe that even asking questions about it would not even be proper.

MR. SIKMA: Your Honor, counsel is referring to a report made on October 31, 1975. However, at the time the questioned item, which is Government Exhibit 34-B --

MR. LOWE: I think you'll find the item is 34-A if you're talking about the weapon.

MR. SIKMA: No, the questioned item. That's a known "K" number, Mr. Lowe.

34-B which is a .223 casing found in the trunk of SA Coler's bureau vehicle has "Q" number, which is not {2196} included in this laboratory report in which the Government will offer to connect up at a later time and show that the examination of that was made with a group of cartridge casings found at a later time. So while as of October 31st this information is true.

The Government will offer proof to show that at a later date when the cartridge casings were tested that it does connect up with Government Exhibit 34-A.

MR. LOWE: Could Mr. Sikma state what later date it was that this was discovered or allegedly found?

MR. SIKMA: It is not, it was found as of the date that Mr. Lodge conducted his --

MR. LOWE: I meant the connection that you allege between the cartridge and the weapon. What date was that allegedly found?

MR. SIKMA: Your Honor, this is in reports given to defense counsel. He's had this material since the beginning of discovery proceedings and it's been pointed out specifically which report it's in as well as it's been pointed out specifically which item it is. I don't have it precisely at hand at this time as to the date of those items.

MR. LOWE: Your Honor, I would point out that in dealing with the evidence which is in, has been admitted by the Court to this point, we have testimony, we have evidence in the affidavit for example of Mr. Cunningham that states {2197} this .223 round we're talking about was delivered to the FBI laboratory in Washington in July of 1975. This report is dated October 31st. It is after they've had that cartridge for some four months, and this report does not refer to any "Q" numbers. It says that none of the ammunition components recovered could be associated with specimens K-40 through K-42.

Now, I think that provides a factual basis right now for the Court finding that at this point in trial there is no foundation. Not that the Court doesn't know whether there's any foundation or not, but the evidence right now is that there is no foundation. And until such time as the Government presents foundation it would be improper for this witness to give any testimony about that weapon. And we are not prepared to accept representations what might be proved later in the trial, not because I don't think perhaps Government counsel thinks that that will happen, but because we don't believe it will happen.

MR. SIKMA: Your Honor, I would submit that the defendant's argument at this point is improper. The defendant is very familiar with the evidence which will be adduced during the course of this trial. He's very familiar with the time sequence. He's very familiar with the items that were presented earlier.

MR. TAIKEFF: Your Honor, I don't know whether Mr. Sikma {2198} misspoke. Did he mean to say that defendant or did he mean to say the defense?

MR. SIKMA: Defense, Your Honor.

MR. TAIKEFF: All right. I trust that Your Honor will instruct the jury concerning that the inappropriateness of any reference to what the defendant may or may not know personally.

THE COURT: Counsel approach the bench.

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

MR. TAIKEFF: Your Honor, our motion is that that may be a comment on on his fifth amendment right.

THE COURT: I'm aware of what you are stating.

This is an argument really that should have been made before the jury was brought in.

MR. SIKMA: Well, that's the point.

THE COURT: It should have been made before the jury was brought in.

MR. SIKMA: That's the point I'm raising, Your Honor. I didn't know what counsel was referring to here. I mean I didn't know that this was the nature of the voir dire that this, that counsel wasn't going to raise with this witness, because he has been aware of those items.

THE COURT: Frankly I'm a little confused here. Now, you, what is there, K-40, 39, 40 and 41 and 42. I have not {2199} seen those exhibits.

MR SIKMA: Okay. The K-40 is the .223 that was found in Wichita, Kansas. That is Exhibit 34-K. That is K-40.

THE COURT: That is what?

MR. SIKMA: K-40.

THE COURT: I got that.

What is that?

MR. SIKMA: It is the way of the FBI laboratory designating --

THE COURT: I know what that is, but what does it represent?

MR. SIKMA: It represents the .223 that was found in Wichita, Kansas.

THE COURT: .223 what?

MR. SIKMA: AR-15.

THE COURT: The rifle or the cartridge?

MR. SIKMA: The rifle, the rifle itself.

MR. LOWE: K-40 is Exhibit 34-A.

MR. SIKMA: Yes.

MR. LOWE: Before it was given an exhibit number. So there's, as a matter of fact I think K-40 is written on there perhaps somewhere.

MR. SIKMA: Yes, it is.

The laboratory, that refers to a known item.

{2200}

THE COURT: What is 41 and 42?

MR. SIKMA: One of them is the .308 which belonged to Coler. I don't know which one.

The others referred to are the weapons that we have not offered into evidence.

THE COURT: It is your intention to offer them?

MR. SIKMA: No, it isn't.

Mr. Lowe brought them up. I didn't raise that.

MR. LOWE: Well, Mr. Gammage mentioned four items and I just --

THE COURT: What about the .308?

MR. SIKMA: The .308 is in evidence, Your Honor, and it's stipulated that that is Special Agent Coler's weapon that he had with him on the 26th.

THE COURT: And that is Mr. Coler's weapon?

MR. SIKMA: Yes, sir.

THE COURT: Well, then what is it that you intend to bring out from this witness's testimony at this time to which Mr. Lowe is objection?

MR. SIKMA: Okay. This witness found the AR-15 and he delivered it to Washington to the firearms laboratory, the FBI.

THE COURT: Is that the .223?

MR. SIKMA: Yes, sir. .223, AR-15. .223 refers to the caliber. AR-15 refers to the designations.

{2201}

We intend to show that the chain of custody of this particular weapon with this witness because he found it and delivered it to the laboratory. Then the laboratory compared the firing pin and bolt of this weapon and the impressions which they would make in the ejector marks with the .223 round found in the trunk of Coler's car, and they matched.

THE COURT: This is the later report that you are talking about?

MR. SIKMA: This is the later report that we're talking about.

Mr. Lowe brought this up. I didn't know he was going to bring this up and he argued it to the jury before I had really an opportunity to object.

I had no idea that -- I don't know if he wasn't aware of the later report. I'm sure that he was aware of the later report. And my objection is to the fact that this is argued in front of the jury. The reason I argued it in rebuttal is because it leaves an unfair inference with the jury, and I think they ought to be instructed as to the fact that these are legal issues and not factual issues which are properly raised at this time.

THE COURT: And you say you are going to tie this up in a later report? Mr. Lowe says of course you will not.

MR. SIKMA: Well, there's no question about it that we will tie it up in a later report. This piece of evidence {2202} which was found in the trunk of Coler's car has a "Q" number which means it is a questioned items.

It has a "Q" number of something like, oh, well over 2,000 which means that the firearms examiner had over 2,000 items to compare with the various firearms that were found or connected with the scene. Since this firearm was not found until September this examination, comparing with this item, did not begin until after September 12th.

So this comparison was not made until I think it was February. Yes, it was in February that this report came out. At least that connected 34-A to 34-B. February of '76, yes, sir.

MR. LOWE: May I respond, Your Honor?

THE COURT: You may.

MR. LOWE: I think Your Honor again, Your Honor, I would like to emphasize in reviewing this evidence frequently with routine evidence that is really just foundation or collateral. The Court will take informal procedures and have representation of counsel to be connected up and allowed into evidence and so forth to expedite matters, but this cartridge and this weapon are the two most important items of evidence in this trial because it is through these that they hope to show Mr. Peltier's connected to the death of the agents.

And I explained about the cartridge in the trunk. This {2203} weapon will purportedly be shown to be the weapon that fired that cartridge. That will be the Government's position and they will offer evidence to try to prove that. That is why it is absolutely critical the court require the most stringent proper legal standards of proof with regard to these including the normal sequence of proof and not taking any shortcuts.

Now, we know that on October 31st that the item just referred to, Exhibit 135, he said that at that point no components found in the crime scene area could be identified with K-40, the other weapons also. But K-40 now by that time, this single .223 cartridge which is Exhibit 34-B had already been in the possession of the FBI for something like four months. We believe that that places a significant fact issue by itself. But Your Honor must be aware of the dispute already raised by Mr. Cunningham that raises some question about how that item was handled.

Now, the Government, and we certainly know by discovery that there is a later report in February of 1976 which purports to show that on some sort of re-examination, I guess they now miraculously discovered that the .223 round in Coler's trunk was fired in this particular weapon four months after the October 31st report at a time when it was obvious that the significance of that round was going to be of paramount importance in the Government's case.

Now, we feel we are entitled to take this in ordinary {2204} sequence in order to first of all, challenge whether there was any testing made at all of that round in support of the February report. We believe that any testimony about this weapon before a proper foundation has been laid would be highly prejudicial and would be improper.

Now, at this point you do have sort of a problem of the chicken and the egg that Your Honor eluded to the other day. That is, at some point you have to introduce an item and at some point you have to prove that tests were run. For the purpose of showing chain of custody this man would obviously have to testify that he found the items and he turned it over to a laboratory in Washington. He has already testified to that on my voir dire. That's not disputed at this point. So that the legitimate purpose of him testifying about this weapon has already been served.

Now until and unless the Government produces evidence that this weapon was actually connected to that .223 round or any other ammunition components at the crime scene it would

be improper for the Government to adduce any further testimony about this weapon in any way. That is our position.

We believe that in the normal sequence that should be required along with the proof. In other words, he's already given testimony about this weapon that the Government legitimately can request right now, and we believe that further {2205} questions on this weapon should be limited until they make a connection. We do not accept offers or stipulations or representation about what they will prove because it will be hotly disputed. That doesn't necessarily mean that Government counsel doesn't believe what they are saying is true. It really means that we do not believe that Government counsel is correct. And we believe that this is part and parcel of this conspiracy to manufacture evidence against Mr. Peltier.

Now, the Government counsel doesn't accept that, and the Court may not accept that, but that is an essential part of our defense in which we are entitled to establish. I've addressed Mr. Sikma's response on the first issue.

The second issue I must mention at this point is that this is so essential to our defense, this is a critical issue in this trial. For Mr. Sikma to make a comment that he made in front of the jury is irreparable, personally irreparable in point. We move for a mistrial, irreparable prejudice on the conduct of the defendant's fifth amendment rights.

THE COURT: Is this the comment that --

MR. LOWE: That the defendant knew.

THE COURT: -- that Mr. Taikeff referred to?

MR. LOWE: Yes, sir.

THE COURT: I don't even recall what the comment was.

MR. SIKMA: I apparently, instead of saying defense, {2206} I said defendant and I --

THE COURT: On that before I, first of all your motion for a mistrial is denied.

Secondly, before I decide whether or not I do instruct the jury on it I would ask that you get, secure some time during recess or noon or sometime from the court reporter the exact wording that counsel made and give me the instruction that you feel should be given to the jury.

MR. LOWE: All right, Your Honor.

THE COURT: Now insofar as .223. In view of the position taken by the defense and the significance that they attach to it, the Court will then require the Government to proceed with the customary foundation before questioning this witness on that matter.

MR. SIKMA: Your Honor, might I ask one further thing of this, however. I would point out that the evidence will show, apparently we're going to have to show this, but this item was mailed with a number of other items to the laboratory during the month of July. It was delivered with Special Agent Cunningham. I would also indicate that there is no other way. We did not intend to offer this at this time, but in order to identify it I believe the Government has a right at this

time, in order to show this witness's inspection of this particular item of evidence, in order to show the chain, and in the normal, ordinary course of chain of custody {2207} of an item which is delivered to our laboratory. I believe we should have an opportunity to ask the witness to identify it fully so that there's no question in the mind of the jury that this was the item that he recognized, what kind of item this was or what kind of weapon this was in delivering it to the laboratory in Washington, D.C.

Another thing, Your Honor, that I think is relevant in connecting it up is the evidence will show that this particular weapon was found right in the same vehicle, in the same explosion, the same incident with a weapon which the defendants have stipulated was owned by Special Agent Coler, or not owned by, was his weapon.

They have also agreed to stipulate that it was with him at the time he met his death on June 26, 1975. I would think that this alone, with what the Government has proffered by way of testimony, that a cartridge casing from his trunk be directly connected up. Whether there are some issue of act with regard to what the defendants have stated here, I would not state that there is no, that we have established extraordinary connection between this item and the items found in the crime scene.

The only link, the only small link in the chain at this point is the testimony of our expert which would come at the end of the trial.

Are then we, before we can ask this witness further {2208} questions about this weapon, required to recall this witness?

THE COURT: I think that would be the problem that you're going to be faced with.

MR. LOWE: Let me just clear the record on one thing, Judge. You said this item was mailed. You were referring to 34-B? You meant the cartridge, not the rifle?

MR. SIKMA: No. That was carried to Washington, D.C.

Does counsel have any objection to my having this fully identified by this witness at this time?

MR. LOWE: We object to any testimony that will go into details and emphasize in the jury's mind that this is an AR-15, that it's a .223, and other elements about that at this point.

This witness has stated that the four items he describe were taken to the laboratory in Washington. At this point that's all the foundation they need in order to do any linking up with their expert who will testify whether or not this weapon was connected with any of the cartridges or not. And we've got that in the record now. To do any more would be to emphasize this weapon in the jury's mind before it becomes an item of evidence, and I would object to that. I would state further --

THE COURT: You'll have to call him back.

MR. HULTMAN: Your Honor, something I want to say before we leave the stand.

{2209}

MR. LOWE: On this item?

MR HULTMAN: Yes, and in general.

There's been all kinds of discussion, Your Honor, about chain of custody and foundations. And I want to put in the record here and now that in pretrial discussions between all the counsel there were specifically only six items for which there was any issue with reference to chain. Those were listed by Mr. Lowe on a document given to me, and I want to read those into the record so if there's any question or any issue --

MR. LOWE: That's fine.

MR. HULTMAN: Exhibit 16, Exhibit 30-A, Exhibit 38-B --

THE COURT: 30-A or 38?

MR. HULTMAN: I'll reread them again, Your Honor. Exhibit 16, Exhibit 30-Able, 30-Able, Exhibit 38-Baker, 38-B, Exhibit 67-Baker, 67-Charley and 67-Dog. The unequivocal understanding of all of the parties, counsel prior to this trial, it's beginning with testimony the jury thinks were the only six exhibit items on the exhibit list, and we've got all kinds of argument back and forth. I want that in the record. If there's any no re issues about exhibits and chain and so forth the record will clearly show what was the clear understanding of counsel.

MR. LOWE: May I make one addition to that? We approached the bench the other day and I advised Your Honor {2210} that in view of information that had come to us, and I was of course referring to the Cunningham affidavit, that we were going to require a proof of chain of the 34-B cartridge. And I wanted to tell counsel before he had witnesses on that, he had lost witnesses or been prejudiced in any way, but I think I stated that we would be willing to accept stipulations to what various witnesses would testify if they were called, we could discuss that, but that we couldn't just make a blanket stipulation.

Now, if the stipulation we made in pretrial was made in good faith on the information we then had, I did not know about the Cunningham affidavit until it was given at 3500 material several days before he testified. And obviously that changes the whole question of stipulation and in an air that I never could have anticipated. I'm not now saying that we are going to stipulate to anything of chain of custody. But merely we want the Government to make a showing to us, if they would, of what the chain is, and we may be able to stipulate the entire chain.

But we feel that was made in good faith and it was discovered later and -- may I just confer a moment?

(Defense counsel conferring.)

MR. LOWE: The other item is this Exhibit 34-A. As I say, because of the Cunningham affidavit it puts things in a different light. We were both making stipulations in order {2211} to try and save a lot of time, and I think we have. We've stipulated on ninety-five percent of the Government's exhibits, I would guess, or ninety percent of them anyway. But as to 34-A and 34-B we simply cannot stipulate to the chain in view of this affidavit which was given to us in 3500 material.

But all other stipulations are in effect and we're not backing off of them. I think also, though, to make Mr. Hultman's statement complete you should understand, Your Honor, that when we say chain of custody we had an agreement that that meant from the finder of the item through any subsequent handling, whether it was testing or into the courtroom or what. But we weren't stipulating to anything else what took place prior to the finder making a finding.

MR. HULTMAN: We wouldn't even discuss that. Be no reason to discuss that, that's right.

MR. LOWE: That the person it was --

MR . HULTMAN: One last comment for the record, Your Honor.

MR. TAIKEFF: It's the next to the last comment, Mr. Hultman.

MR. HULTMAN: I raise this, not raising any question of good faith on the part of either of the parties, I just want the record to show what, so the court would know what the understanding was.

Secondly, I want the record to show that the items {2212} with reference to which counsel has been referring, even though they may not have come to counsel's personal private attention, I can't attest anything there, I don't know, but all of those have been in the possession of counsel at a long time in terms of discovery. That's the only point I'm trying to make.

John, you didn't have to wait until you received a given 302 to make that particular announcement. I'm not saying that you didn't, that's not the point I'm saying.

MR. TAIKEFF: You can't look at all of the papers at the same time.

MR. HULTMAN: I just want it to be known on the record that the material itself, discoverywise, including all of the reports, all of the things that you've been presenting were in the possession of defendant's counsel or their representatives.

MR. LOWE: You are speaking from the last year's trying?

MR. HULTMAN: And this time, John?

MR. LOWE: Wait, wait, wait. But do you mean that we still had them from last year, not that you had given some of these earlier?

MR . HULTMAN: Also in the reports.

MR. TAIKEFF: We just couldn't look at -- We have two and a half file cabinets full.

MR. HULTMAN: My point is not that you viewed it {2213} personally. I'm just saying for the record, so that the record will show that the materials were available to you, you had the opportunity, that's all.

MR. TAIKEFF: That's true. I want to add one thing to Mr. Hultman's earlier observation, not by way of contradicting him, but supplementing it.

We reached the stipulation on dozens of items sometimes as to ultimate facts, in many instances as to chain of custody and foundation. It was predicated to a large extent upon Mr. Hultman's representation that he had a sufficient series of witnesses who could lay in any foundation or fill out any chain. There's no question in our mind that when he made those representations he was certain that in every single instance there wasn't a question or a blemish.

In a case where there are more than a hundred Government exhibits that revelations in the course of the trial will show that one or two items thought not to be in dispute are not disputed. And I will trust that the Court will not think that the defense is going back on a good faith agreement between counsel.

THE COURT: I understand.

MR. LOWE: The only other thing I saw a lot of documents last summer, and I'm sure Mr. Hultman did also, that I have long since forgotten. Whether I saw them or not, and in preparation for this trial, the first time I saw this affidavit {2214} when we got the 3500 material. If we had it in our two and a half file cabinets, we may very well have. I certainly wasn't conscious of it at the time.

THE COURT: Very well.

{2215}

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

THE COURT: We are now ready to proceed with the testimony.

Q (By Mr. Sikma) Mr. Gammage, you indicated in your testimony earlier that along with the weapons that you found, you found an M1 carbine, is that correct?

A Yes. That is correct.

Q Is that a regular M1 or is there some difference between an M1 carbine and another type of M1 rifle?

A There are two rifles designated M1. The M1 carbine is a short weapon. It's the same caliber as the M1. I think the common differentiation between the two rifles is, one is called the M1 Gerand which is a full, is a longer version. It's a 30-06 caliber and the 30 caliber carbine which is a 30 caliber round. The cartridges are much smaller than the Gerand version.

Q I will show you what is marked as Government Exhibit 29A. Can you tell me what kind of weapon this is?

A This is what I recognize as an M1 Gerand rifle.

Q And this is distinguished from the M1 carbine, is that correct?

A Yes, sir. That's correct.

Q Now would the M1 carbine be a smaller or larger weapon?

A Be smaller, lighter weight, different caliber.

MR. SIKMA: I have nothing, further at this time.

{2216}

Your Honor, we may have to recall this witness at a later date, but it will be some time.

THE COURT: It is understood that you will have the right to recall this witness.

MR. LOWE: Your Honor, in view of that I would just not have any cross examination questions now. Some of the questions I might have might be applicable when he comes back and I understand if he doesn't come back at all I will not have any questions to ask but I will at this time have no questions for him.

THE COURT: You may step down.

THE WITNESS: Thank you, sir.

MR. CROOKS: If it please the Court, the United States will call as its next witness Mr. Ken Griffiths.

MR. SIKMA: Your Honor, Government Exhibit 62 has been admitted into evidence. I would request that while we're waiting for the witness we show these to the jury.

THE COURT: That's those pictures?

MR. SIKMA: Yes, Your Honor.

THE COURT: You may.

(Exhibit 62 presented to the jury.)

MR. CROOKS: Your Honor, could Mr. Griffiths now take the stand?

THE COURT: You may take the stand.

{2217}

KEN GRIFFITHS

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CROOKS

Q Mr. Griffiths, could you again give your full name for the record, please.

A Kenneth Thompson Griffiths.

Q Where do you live, Mr. Griffiths?

A Route 2, Box 404 Ontario, Oregon.

Q What's your present occupation?

A I drive for Pacific Intermountain Express.

Q Is that a local truck line in the Ontario, Oregon area?

A No. It's a nationwide common carrier.

Q Generally in what areas do you drive?

A I drive in the northwest.

Q So it would be over the northwest part of the United States covered by Exhibit 70?

A I drive Oregon, Washington.

Q Oregon and Washington principally?

A Yes.

Q Calling your attention back to November 14 of 1975, what was your occupation at that time?

A I worked on the Oregon State Police.

Q And what was your official title at that time?

A I was a trooper.

Q And how long had you been with the Oregon Police in {2218} November of 1975?

A Seven and a half years.

Q When did you resign from the Oregon State Troopers?

A March 15, 1976.

Q So it would be six months or so after November 14?

A That's right.

Q On the 14th day of November, 1975, calling your attention to the late evening hours of that day, what was your duty, what duty were you on?

A I was assigned to traffic and I was operating radar on interstate 80 North, west of Ontario.

Q Were you parked on the highway itself?

A Yes. On the shoulder.

Q And which highway was that again?

A Interstate 80 North.

Q When you say an interstate highway, that is a four laned highway with a divider in the middle, would that be a correct characterization?

A That's right.

Q And approximately where were you located when the events that we're going to go into first started?

A Approximately milepost 374.

Q Now there's a map of northwestern United States which includes the Ontario, Oregon area. I'm pointing out now some {2219} orange dots which are depicting Ontario. Would you take the pointer and indicate where from Ontario it was the milepost that you were posted?

A A short distance northwest of Ontario. Four or five miles.

Q Now you can take your seat again.

When you were posted at that point, what if anything did you observe that has a bearing on what we're now going into?

A I observed two motor homes and a white station wagon proceed east past me, my location.

Q Now at that point when the motor home and the station wagon passed you, did you pay any particular note to them?

A Yes, I did.

Q Why was that?

A A short time earlier I had read a teletype, all points bulletin indicating to watch for these vehicles, vehicles of similar description.

Q When you say a teletype or an all points bulletin, do you know who had disseminated the all points bulletin?

A Federal Bureau of Investigation, Portland.

Q It would have been something that had come in through in the normal transmissions or information that you would have had as a state patrolman received?

A That's right.

{2220}

Q And you then recall the information, as I understand it, when you saw these vehicles go by?

A That's right.

Q Now I will show you what has been marked and not yet received into evidence as Government's Exhibit No. 61 and ask if you can identify the vehicles that are depicted in those photographs?

A Yes, I can.

Q Are those in fact the vehicles that you observed going by?

A Yes, they are.

Q Now with regard to the all points bulletin, do you recall whether or not a license plate on one or both of the vehicles was given?

A I can't recall without referring to notes.

Q In any event, when the vehicles were ultimately stopped by you, I would call your attention to photograph number B and ask if that in fact was the license number of the vehicle you stopped?

A I believe it was; yes.

Q Now insofar as these two vehicles were concerned, you said they went by your position and then you did something. What did you do?

A Well, I left the position I was parked on alongside the road and gradually overtook the vehicles.

{2221}

Q And did you make any radio transmissions then prior to stopping the vehicles?

A Yes, I did.

Q Who was this to or what was the purpose of these transmissions?

A Well, as soon as I got close to, close enough to the vehicles to read the license numbers, I radioed the State Police Office in Ontario, advised them what I had and had them verify as to whether this was the same license number on the teletype.

Q Was that information relayed back to you?

A Yes, it was.

Q And was it the same license number?

A Yes, it was.

Q Then did you ask for any assistance?

A I did.

Q And was there a response to that?

A Yes, there was.

Q Who did your dispatcher indicate would be there to give you assistance?

A Corporal Clayton Kramer.

Q Prior to stopping the vehicle, did you then have radio contact or communication with Corporal Kramer as best you can recall?

A I did.

Q Would you describe the general nature of this. What was {2222} the general subject matter of this discussion with Corporal Kramer?

A Well, Corporal Kramer was in the process of stopping the station wagon which at that time was behind the motor home and we, the stop was made nearly simultaneous, about 150 yards apart.

Q So apparently Corporal Kramer was going to take responsibility for one vehicle and you the other?

A That's right.

Q Is that correct?

Now, prior to stopping the two vehicles, you indicated you pulled up behind them. What position did you take with your police vehicle?

A I stopped at the rear of the motor home, approximately 15 feet to the rear.

Q So at some point you had cone in between the station wagon and the motor home?

A That's right.

Q Upon stopping your vehicle, did you see Corporal Kramer's vehicle in the area at that time?

A I did not.

Q Now his vehicle would have been behind your location, behind the station wagon, presumably, is that correct?

A That's right.

Q When you stopped your vehicle, what was the next thing {2223} that happened?

A Upon stopping the vehicle, the radio transmission was made that the stop had been completed and there were short radio communications with Corporal Kramer at that time to ascertain his location and what he was about to do.

Q All right.

A I got out of the vehicle with my shotgun and approached the motor home from the right rear.

Q Now was there any particular reason now -- ordinarily Oregon State Troopers do not get out when they stop a vehicle with their shotguns, do they?

A No. That's not standard traffic procedure.

Q Why did you do that in this case?

A Well, the teletype indicated there was possible federal fugitives in the vehicle and it indicated extra caution.

Q So you approached the vehicle from what direction?

A From the right rear.

Q And after you got up in the vicinity of the right rear of the vehicle, what happened next?

A I commanded the occupants of the vehicle to exit the door.

Q And did somebody exit?

A Yes.

Q Would you describe that.

A A large Mexican appearing person got out of the vehicle. {2224} He was wearing a red short sleeved pullover type sport shirt.

Q Okay.

A I directed him to an area off the shoulder, told him to lay down.

Q So the picture can be a little clearer in the jury's mind, I don't know if we really went into this, you had pursued the vehicles in a generally eastbound direction, is that correct?

A That's right.

Q So as the highway, as the highway runs here, you have a lane going this way and a lane coming this way (indicating)?

A That's right.

Q In other words, a lane coming toward the bottom of the map and a lane going forward. You would have been pursuing the vehicles on the, as you look at the map, the left lane, is that correct?

A Yes.

Q From your perspective, from your direction in the car would be the right lane of the highway, is that correct?

MR. ELLISON: Your Honor, I'm going to object. Counsel is leading the witness. The witness is perfectly capable of going to the map and showing the directions in which he was traveling and the vehicle in which he was talking about traveling rather than Mr. Crooks giving a narrative.

{2225}

MR. CROOKS: Your Honor, I assume this is a preliminary and not in dispute. If counsel wishes to do it the long way --

THE COURT: Counsel approach the bench.

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

THE COURT: It was my understanding that this trial was going to be conducted by Mr. Lowe and Mr. Taikeff. Mr. Ellison was appointed as an investigator and would be permitted to assist at the counsel table. Now I did not understand that he was going to participate in the trial.

MR. TAIKEFF: Your Honor, there is a Notice of Appearance that's been on file by Mr. Ellison.

THE COURT: I'm aware of that.

MR. TAIKEFF: His appointment as an investigator was in consideration of the fact that he was an attorney but that Your Honor was only appointing two counsel as counsel. Mr. Lowe and I are not going to participate in the examination of this witness. We're abiding by your Honor's ruling of one lawyer.

THE COURT: I'm aware of that, too.

MR. TAIKEFF: To a witness. I thought Your Honor was aware of the fact that he had filed early on a Notice of Appearance as Counsel and has been assisting all the pleadings as Counsel.

{2226}

THE COURT: Well, I will permit him to go forward. But it clearly was my understanding he was, just the two of you were going to be trying the case.

MR. TAIKEFF: In the main that is our intention. We feel in this particular, in light of his full time involvement in the case and the fact he is a practicing lawyer, that we should pay him some professional respect and allow him to handle the witness, Your Honor.

THE COURT: Very well.

MR. TAIKEFF: I just wanted to add one thing. He personally investigated the Oregon scene in the course of the past several weeks and he is particularly capable of making the inquiries because he has in his own mind a vision of what the various places look like and what the relationship is between the different components in those locations.

MR. CROOKS: Your Honor, I would also like to state something in view of this objection. I had understood from Mr. Taikeff, we weren't going to be nit-picking around with this type of objecting to something that clearly is a preliminary matter. We're talking about east and west and right and left and are you now changing your position that we're going to start, so that I have got to go through all of the question and answer? I had understood that wasn't going to be contested.

MR. ELLISON: Your Honor, while this is basically a {2227} preliminary matter, we're beginning to get off the preliminary matters and throughout the trial the government has been conducting its investigation in a leading fashion which has not been objected to. The objection at this point of time, Mr. Crooks would be advised we appreciate it, as he's now beginning to move off, the preliminary matter, that the witness not be --

MR. CROOKS: What I'm asking, Elliott, has your side changed its position?

MR. TAIKEFF: No, we have not.

MR. CROOKS: I'm asking the man if it's right or left.

MR. TAIKEFF: When it comes to a substance, you don't do any leading.

MR. CROOKS: I know that.

MR. TAIKEFF: There is no problem about that.

MR. CROOKS: This is a stupid objection in view of our agreement.

MR. LOWE: I appreciate your saying that so loud the jury can hear you.

THE COURT: Objection will be overruled.

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

MR. CROOKS: I'm not exactly sure of the state of the record at this time. The objection was made.

{2228}

THE COURT: The objection is overruled.

Q (By Mr. Crooks) What I'm simply attempting to do is not put words in your mouth. So the jury can get a perspective, you were proceeding, as you indicated previously, towards Ontario from a point approximately a mile or so north of Ontario, is that correct?

A Well, several miles north.

Q Several miles.

And you were proceeding, your driving position would be the right-hand land of traffic?

A That's right.

Q But from our perspective here would be the left side of the exhibit or left side of the highway as we look at the exhibit, is that correct?

A That's correct.

Q So it's on the innermost side toward the Pacific Ocean by way of reference and direction. If you proceeded then to follow the vehicle down this area toward Ontario, more or less as I'm indicating with the pointer --

A That's right.

Q Now when you indicated that you stopped the vehicle, this was on the right hand shoulder, is this correct?

{2229}

A That's right.

Q And when you approached it, and you indicated that the vehicle was on the right-hand shoulder, this would be on the right-hand shoulder of the eastbound lane?

A That's right.

Q Now then, you indicated the individual got out and you gave a brief description of him. What happened next?

A I directed the male subject to lie down in an area designated near the right-of-way fence which is some 30 feet off the edge of the shoulder; and there was a lot of commotion, yelling and screaming, things of this nature.

Q Where was that coming from?

A That was coming from him.

Q All right, from the individual?

A Yes.

Q All right. Did you ask the individual his name at any point?

A I did.

Q And do you recall whether or not he gave you his name?

A He gave me a name.

Q All right. He gave you a name, and do you recall specifically what it was?

A I do not.

Q All right Do you recall what type of name it was, whether it was an Indian name, Mexican, American name, or what {2230} type of name?

A It was a common Mexican name.

Q So he would have given you a common Mexican sounding name?

A That's right.

Q Now, what happened then, what was the next thing that occurred?

A I asked if there were any other occupants in the vehicle, since none had come out.

Q What was his response to that?

A He said "women and children".

Q And what happened next?

A About that time two female Indian ladies and a young child came out.

Q All right. After these individuals came out, the women and children, what was the next thing that you recall?

A About the time they had exited the vehicle, the back-up lights of the motor home came on. I am standing right to the right rear at this time.

Q All right.

A The motor home backed up several feet and suddenly accelerated east going away from me.

Q All right. When this happened, where was the individual who had gotten out, the male individual?

A Just nearly a simultaneous moment, the male subject was going over the fence, going over the right-of-way fence.

{2231}

Q All right. So when you are talking about that, this would again be on the right-hand fence of the eastbound lane?

A That's right.

Q All right. Now, what happened next?

A Well, at nearly the same time I saw a flash come from the subject going over the fence, and the report of gunfire.

Q All right. Do you recall what was the next thing that happened?

A Well, at that time, as soon as I was -- the range was clear of women and children which were right between us at the time of the flash, I fired two rounds.

Q All right, so the flash was fired -- or what you interpreted to be a shot was fired when the women and children were between you and the subject?

A That's right.

Q O.k., go ahead.

A Just a few seconds later then I returned fire.

Q And what weapon did you return fire with?

A With a 12 gauge shotgun.

Q Do you recall how many rounds you fired?

A Two.

Q All right. When you shot the two shells or two shots, did you observe anything to indicate to you from your own knowledge whether or not you had hit the individual?

A No.

{2332}

Q What was the last you saw of this individual?

A Well, at the time he was going over the fence.

Q Now, we are talking -- I believe you stated around 10:00 o'clock in the evening, is this correct?

A Yes.

Q And was it light or dark at that time?

A It was dark.

Q And did you see the individual again after he went over the fence and disappeared from your view?

A I did not.

Q All right. What did you do next after the exchange of gunfire, what did you do?

A Well, of course, I observed the motor home traveling east from my location. I tried to keep an eye on that. The women and children proceeded up the shoulder in a westerly direction, and at about that time an Ontario city police car pulled up in the vicinity.

Q All right. Had you observed at that time that Officer Kramer was in the area of the Plymouth?

A No.

Q All right, What -- when did you first -- well, let me ask you specifically: What then did you observe, the women and children started up toward the area where the Plymouth was, is that correct?

A That's right, The Ontario police car came in between them.

{2333}

Q An Ontario police car came in between the Plymouth and your position?

A That's right.

Q And the motor home is now gone, is that correct?

A That's right.

Q What then happened?

A Well, as soon as I was certain in my own mind that the Ontario police officer could observe these other people coming towards him, I radioed the office as to what the situation was and proceeded from the location of the stop east on the freeway.

Q All right, so you are then proceeding in the generally same direction as the motor home that has gone?

A That's right.

Q How far did you go before you saw something that caught your attention?

A Approximately a half a mile.

Q All right. When you got a half a mile ahead, what did you see?

A I saw the motor home in the median strip.

Q So the motor home was in the median strip?

MR. ELLISON: I am going to object to the constant repeating by counsel of the answers given by the witness.

THE COURT: Sustained.

Q (By Mr. Crooks) After you made that observation, was there any tie-up between the motor home that you saw in the {2334} median strip and a previous observation of the motor home?

A It was the same motor home.

Q All right. What did you do then?

A Well, at that time I notified the office and stood by, secured the area and awaited assistance.

Q All right. Did you do anything yourself insofar as going into the motor home, entering it or anything?

A Not at that time.

Q What was the condition of the motor home when you found it?

A The lights were on and the engine was running, the door was shut.

Q Did you see any individuals around the motor home?

A No.

Q All right. What was the next thing in sequence that happened?

A Well, the Patrol Sergeant drove up to the scene with several other people, Ontario City Police Officers, and there were several off-duty State Police Officers; and warnings were broadcast on the two-way directing the occupants out.

Q All right, and what happened next?

A There was no response to the verbal direction from the Sergeant, a warning shot was fired over the vehicle by me at his direction, a tear gas round or two was fired into the back window.

{2335}

Q All right. I would like to show you again Exhibit No. 61 specifically the rear of the vehicle shown in Photo B, there is an indication which would appear to be some type of defect in the window. Can you account for that?

A Well, those are holes in the window caused by double aught buckshot and tear gas.

Q There are also defects in the front window. Do you know what those are?

A Those are exiting holes caused by projectiles coming through the window.

Q What was your purpose in firing tear gas into the vehicle?

A I did not fire the tear gas.

Q Well, I am sorry, not you, but whoever did, what was the purpose in doing that?

A Well, the purpose was in having the occupants in the vehicle get out of the vehicle.

Q At that point did you know whether or not there were or were not occupants in the vehicle?

A At which point?

Q At the point when you were trying to -- well, firing the tear gas.

A We had no way of knowing at that time. There was no indication there was anybody inside. We were not certain.

Q Nobody had made any response to you?

A That's right.

{2336}

Q The demands -- what was the next thing in sequence that happened as best you can recall?

A After the gas had been in the vehicle for some time exiting out the open windows and so forth, we approached the motor home from the rear. I approached from the right rear, and shot the right rear-view mirror off to prevent anybody inside from seeing the approach from the rear.

Q That was my question, why, to prevent them looking out?

A That's right.

Q What then happened?

A At that time the Trooper Schmeer and myself entered the motor home to find it empty.

Q You found no one at all?

A That's right.

Q What was the next thing that you recall that you had any participation in concerning either of these vehicles?

A Well, from that point forward I went back to the office, towing was arranged for the vehicles, but not by me.

Q So then basically you went back to the office and really had no further part in the direct examination of the vehicle, would that be a fair summary?

A I was in the area at the time the vehicles were searched, but as far as being directly responsible for the search I was not.

Q You were not the one directly responsible?

{2337}

A That's right.

Q All right. Insofar as the individual who you described as having gotten out of the vehicle, the male, would you give a little further description of him from your recollection at the time this incident happened?

A Well, he was a tall person, approximately six foot, in the neighborhood of 200 pounds, and medium length dark hair.

Q And what -- would you give a little further description of his facial features and things of that nature?

A Well, he was a Mexican-appearing subject.

Q To you he appeared to be of a Mexican type of descent?

A That's what he appeared to be.

Q O.k., and what about facial characteristics, such as facial hair and any sort --

A (Interrupting) I was unable to determine that.

(Counsel confer.)

Q (By Mr. Crooks) One other point, when the motor home backed up, did it touch or strike you in any way?

A No.

Q Were you close enough that you had to move when it backed up?

A I can't recall if I moved when it backed up or not.

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

THE COURT: The Court will recess until 11:25.

(Recess taken.)

{2238}

(Whereupon, the following proceedings were had in the courtroom without the presence of the jury:)

MR. CROOKS: Your Honor, there was one other point that I had forgot to cover with Officer Griffiths and namely whether the vehicle was --

(Defendant entered courtroom.)

MR. CROOKS: As I was saying, Your Honor, there's one other point which I neglected to cover with Officer Griffiths. The fact that the vehicle was actually stopped south of Ontario, I don't

know, whoever pinpointed that. I would ask to reopen to get that in. It would work really better with his direct examination.

MR. ELLISON: Your Honor, we have no objections to that particular question being asked the witness.

THE COURT: Very well.

Mr. Sikma, would you look this over and tell me --

MR. SIKMA: Yes, I have, Your Honor.

This is the jury instruction?

THE COURT: Right.

MR. SIKMA: Yes, Your Honor, I'm in agreement with that.

THE COURT: Do you have any objection to that?

MR. SIKMA: None whatever.

MR. LOWE: I'm confused, Your Honor. I understood that Your Honor took under advisement an objection by the {2239} defense to the introduction of any evidence about the Cortlandt event on the basis of relevancy, but certainly as to certain items which have not been adduced in testimony. Rather than object and call the jury's attention unnecessarily to them we did not say anything because we understood that our record objection was made. But I am confused that the Government would proceed without waiting for Your Honor to give his ruling.

THE COURT: I'm ready to rule on that.

All of the evidence that was discussed will be received, except I believe that Exhibit that was marked 38-H, that may be admissible for rebuttal purposes. But I do not believe it will be admissible at this time.

MR. CROOKS: Was that the document with the typed printing on it, Your Honor?

THE COURT: That's the document relating to political philosophy.

MR. CROOKS: I know which one you are talking about.

MR. TAIKEFF: Your Honor, in light of Your Honor's ruling I'm wondering whether Your Honor would not view the other pieces of paper in the same light, namely those pieces of paper which contain the transmission codes. And we do not mean to inhibit the Government from proving that there was communication capacity or anything that they reasonably think that can be inferred from those pieces of paper.

{2240}

It was not our intention to cut them off from proving what they have a legitimate purpose in proving in the guise of making an objection on some other subject. They said they wanted to prove the capabilities of one vehicle communicating with the other. If in fact there were operable radios in both vehicles, I have no knowledge of it, but if the Government recognizes that that is the fact, then we will so stipulate.

But it's the content of those pieces of paper that we're concerned with and at the same time they can prove by their testimony that fingerprints were found on a piece of paper or several pieces of paper. We're not going to interfere in any way with the proof of that. But we think that the content of those papers is prejudicial on its face and is not in any way connected with anything the Government need prove in this case.

And we offer every facility that the Government might be able to obtain from the defense in getting into evidence any fact or any reasonable inference that they wish to draw, but we don't think it's appropriate to get in the content of those radio codes in the guise of attempting to show that there was radio communication capacity.

THE COURT: A ruling, the reason the Court ruled as it did, the Court views that radio code as being relevant to the showing of flight to avoid prosecution. And it's for that reason that I have not excluded that, and I feel the relevancy {2241} outweighs the prejudice of which you speak.

MR. TAIKEFF: Thank you, Your Honor, for explaining the ruling.

THE COURT: Very well.

Are counsel ready for the jury?

MR. CROOKS: Yes, Your Honor.

MR. ELLISON: Yes, Your Honor.

(Jury brought into courtroom.)

THE COURT: Members of the jury, before we proceed there's just one point that I want to clear up. During the exchange between the lawyers immediately after you were brought in this morning Mr. Sikma said the defendant, he made the statement "the defendant is very familiar with the evidence which will be adduced during the course of this trial." He said, "He's very familiar with the time sequences, very familiar with the items that were presented earlier." You are instructed that in making this statement Mr. Sikma intended to refer to the defense, or to the defense team. Not to the defendant personally.

I tell you this because as I mentioned at the beginning of the trial when we were principally in the process of jury selection that you will be instructed that a defendant in a criminal case comes into court with a presumption of innocence, and this presumption prevails until all of the evidence has been presented, and until after the closing arguments and {2242} you've been instructed on the law. Then in order to overcome that presumption the jury must unanimously

find that a defendant has been proved guilty beyond a reasonable doubt. In other words, for them to over, for a jury to overcome the presumption of innocence.

As a result this presumption of innocence which is given to a defendant in a criminal case, it cannot be assumed at any time that the defendant knows any facts that relate to the charges in the case. Because you will recall in my preliminary instructions I mentioned to you that a defendant does not have to present any evidence at all. That he may, but he's not required to.

I'm just making this to clear up the misstatement which Mr. Sikma made during that interexchange.

MR. CROOKS: Your Honor, if I could be permitted to reopen my redirect examination for one very short series of questions that I overlooked previously.

THE COURT: You may.

REDIRECT EXAMINATION

BY MR. CROOKS

Q Mr. Griffiths, the one thing that I had forgotten to ask you, you had testified earlier that you had first encountered these vehicles northwest of Ontario. Where were they from Ontario when they were stopped?

A Just southeast. Southeast of Ontario, approximately half out of the city limits.

{2243}

Q So the vehicles had moved in a southerly direction along Interstate 90 until they had gone by to the southeast of the city when the stop was actually made?

{2244}

A Interstate 80.

Q Interstate 80. I'm sorry.

At that point would have been fairly close to the Idaho border, would it not? A That's right.

MR. CROOKS: No further questions.

MR. ELLISON: Your Honor, may I approach the witness?

THE COURT: You may.

CROSS EXAMINATION

BY MR. ELLISON:

Q Mr. Griffiths, we have met before, haven't we?

A That's right.

Q In fact, we met before at your home approximately two and a half weeks ago?

A That's right.

Q And one time before that, I believe it was in Cedar Rapids?

A Yes.

Q Mr. Griffiths, on your direct testimony you stated that you have been a police officer for seven and a half years, is that correct?

A I was with the State Police for seven and a half years prior.

Q Was this primarily in the Ontario, Oregon area?

A Primarily; yes.

{2245}

Q You're very familiar with that area?

A I am.

Q Are you very familiar with the area in which you stopped the mobile home originally on the 14th of November, 1975?

A Quite familiar.

Q Would you be able to draw a diagram depicting various land markings in that area as well as a depiction of the highway itself and the vehicles and individuals related to the circumstances surrounding what occurred on the highway?

A I can try.

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

THE COURT: You may.

Q I'm handing an 8 1/2 by 11 inch piece of blank paper to the witness with a blue pen.

Mr. Griffiths, would you please draw the highway area in which you originally stopped the motor home, keeping in mind as far as the fact that there is only one sheet of paper and I'd like you only to draw where the mobile home was stopped originally, where the Plymouth station wagon was stopped and where the mobile home was stopped after it moved, after being stopped originally.

A (Indicating.)

Q I would appreciate your being very careful with regard to directions, although understandably because of the size of the {2246} paper on which the diagram is being drawn I don't expect you to be able to have distances exactly in proportion.

Would you please designate on the diagram which is the eastbound lane and which is the westbound lane of Interstate 80 and please designate the road drawn as Interstate 80.

A (Indicating.)

Q Would you please draw on the diagram a rectangle designating the mobile home at the location in which you first stopped the mobile home and I'd also like you to draw in the Plymouth station wagon as well as the respective police vehicles of yourself and of Officer Kramer, if you know where Officer Kramer's vehicle was parked.

A (Indicating.)

Q And then I'd also like you to draw on the diagram the second location in which the mobile home was stopped at.

A (Indicating.)

Q Please place a "2" in the center of that diagram.

A (Indicating.)

Q Does this diagram represent a fair and accurate representation to the best of your ability as to what is depicted on it concerning the scene and the objects contained and relevant to the incident we have been discussing and which you gave on direct testimony?

A I'd say yes.

MR. ELLISON: Your Honor, I ask this be marked for {2247} identification purposes.

THE COURT: It may be marked.

MR. ELLISON: I'm showing what has been marked as Defendant's Exhibit 136 to the government.

MR. CROOKS: We have no objection to this exhibit, Your Honor.

THE COURT: 136 is received.

MR. LOWE: Your Honor, may we have permission to remove this from the courtroom just long enough to make a Xerox copy across the hall and bring it back?

THE COURT: I assume there is no objection to that.

MR. LOWE: I'll make a copy for Counsel also.

MR. CROOKS: Please, if you would.

Q (By Mr. Ellison) Mr. Griffiths, on November 14, 1975, what time did you begin work that day?

A I can't recall.

Q Were you nearing the end of your shift or --

A Yes, I was.

Q You were near the end of your shift.

How long is your shift?

A Normally eight hours.

A Do you have any recollection what time the shift ended that particular day?

A Well, I can't recall which shift I was on. I was the only one out.

{2248}

Q You mentioned on your direct examination that prior to stopping the mobile home you were in communication by radio with Officer Kramer.

A That's right.

Q And he told you as to his location with respect to the Plymouth station wagon, is that correct, immediately prior to your stopping the mobile home?

A Yes.

Q You were aware that he was, shall I say, covering the Plymouth?

A Yes, he was.

Q And you relied upon his communication to that effect and did not concern yourself with the Plymouth station wagon?

A No. I relied upon the communication.

Q During your direct testimony you stated that the person who exited the vehicle was a Mexican looking person wearing a red shirt, is that correct?

A That's right.

Q And I believe that you stated that he was six feet tall and 200 pounds approximately.

A Yes.

Q Medium length dark hair and Mexican appearance.

A That's right.

Q Are there any Mexican-American people in that area of Oregon?

{2249}

A There are some; yes.

Q Now you went back, after you were on the highway, you went back to your headquarters at Ontario?

A For a short time; yes.

Q And during that short period of time agents of the Federal Bureau of Investigation were present, is that correct?

A I don't think so.

Q When did agents of the FBI arrive in the Ontario area with relation to this incident?

A That was early the following morning.

Q Approximately how long after this incident began?

A I couldn't say exactly.

Q Would you say two to three hours?

A Probably; yes.

Q And you didn't see any agents of the FBI at the Oregon State Police office in Ontario?

A I did the following morning. Yes.

Q Was this two to three hours later?

A Yes.

Q At a much later time?

A Yes.

Q This was the two to three --

A Yes.

Q This was on the very early hours of November 14?

A Yes.

{2250}

Q At that time these agents of the FBI handed you some flyers, wanted flyers, didn't they?

A That's right.

Q For your perusal.

How many flyers were you given?

A I don't recall. There were several.

Q Would a half a dozen be a reasonable estimate?

A Well, I can't say.

Q Do you remember a conversation that we had at your home in which you told me that you had been given approximately a half dozen flyers to look at?

A Well, there may have been. I don't know.

Q Do you recall whether or not these were just photographs or whether they also contained the names of individuals?

A Well, they would be regular wanted flyers, contain both.

Q And they were federal flyers, weren't they?

A Yes.

Q So that isn't it true that on a federal flyer you have in very large print the name of the individual depicted as well as the photographs?

A Well, I can't recall. I haven't seen one for quite some time.

Q But the flyers that you were given did contain photographs?

A Yes, they did.

Q And you agree with me that it could have been {2251} approximately half dozen, sir?

A Possibly yes.

Q How many of these flyers would have contained photographs and identifications of Mr. Peltier?

A There may have been two.

Q Or three?

A (No response.)

Q Sir?

A I don't know. There may have been two.

Q Or three?

A Well, I said two.

Q Okay.

Do you remember the names of the other individuals whose flyers were depicted?

A No.

Q Were they all men?

A I believe so.

Q Were they all individuals that had short curly hair?

A I don't recall.

Q Isn't it a fact, Mr. Griffith, that most of those photographs contained people with long hair except for the two photographs that you have identified, the two flyers you have identified that contained pictures of Mr. Peltier?

A No. I couldn't say.

Q Getting back to the highway at this time you testified on {2252} direct examination that it was nighttime when this incident occurred.

A That's right.

Q Approximately 10:00 o'clock?

A Approximately.

Q Was it a clear night or cloudy night?

A I don't know.

Q But there are no street lights on the highway at that point, are there?

A No.

Q So that the visibility was not very good because of the darkness, the lateness of the hour?

A That's right.

Q Now you've described a fence. How far is that fence from the highway at that point, the point where you originally stopped the mobile home?

A Approximately 30 feet.

Q And how high is that fence?

A About five, five and a half feet high.

Q And the lower portion of that fence is a chain link fence, isn't it?

A I don't think so.

Q What type of a fence is it?

A Well, probably be a stock type fence. I could draw a picture, but tell you the exact type, I couldn't.

{2253}

Q All right. Perhaps that might be a good idea.

MR. ELLISON: Excuse me for just a minute, Your Honor.

Q (By Mr. Ellison) Mr. Griffiths, would you please draw on a legal size piece of paper the fence as it exists at the location where you originally stopped the mobile home so the jury may have an idea as to what this fence looked like.

A I could draw you the fence that the highway department used alongside the road. I don't know exactly if this is the exact fence that's along the location here.

Q Why don't you draw that fence and we can talk about it.

MR. CROOKS: Your Honor, I'll interpose an objection here. The witness is giving his best recollection and Counsel is trying to force him to say something that his recollection doesn't recall and I object. This is improper. The witness, the question has been asked and answered.

MR. ELLISON: Your Honor, this witness has stated he is familiar with the standard highway fence. I am familiar with that fence and if there is any discrepancies we can discuss them and perhaps make an accurate diagram.

MR. CROOKS: Your Honor, I will object to this. Counsel is stating what he knows in front of this jury and that's certainly improper.

THE COURT: Members of the jury, you must remember and bear in mind at all times throughout this trial that any {2254} assertions of fact made by Counsel are not evidence and if assertions of fact are made by Counsel which are not supported by evidence, then those assertions must be disregarded.

MR. ELLISON: Yes. I'd appreciate it if Mr. Crooks would let me finish my argument before standing up and making his.

THE COURT: As far as the objection is concerned, I will overrule the objection and permit the witness to draw the fence.

Q (By Mr. Ellison) Would you please draw the fence as you're familiar with it, sir.

A (Indicating.)

There may be two strands of barbed wire, I'm not certain.

Q All right.

MR. ELLISON: I'd like this marked for identification, please.

Q (By Mr. Ellison) Mr. Griffiths, this is to the best of your ability, best of your recollection the appearance of the fence at the location in which you first stopped the mobile home?

A The best of my recollection.

MR. ELLISON: Your Honor, based upon that foundation I would like to offer Defendant's Exhibit 137 into evidence.

MR. CROOKS: Well, we'd object because we don't see it {2255} has any probative value. The witness has described the fence to the best of his recollection. We don't see what this exhibit adds.

MR. ELLISON: I'll represent to the Court that this has a great deal of probative value and we'll connect it shortly.

THE COURT: Well, as I understood the witness' testimony, he testified that he did not specifically remember the fence at that location, is that right?

THE WITNESS: That's right, Your Honor.

{2256}

THE COURT: And you have drawn this as a type of fence used in Oregon?

THE WITNESS: That's right.

THE COURT: It will be received on that basis, that this is the witness' drawing of the type of fence commonly used by the State of Oregon to fence its highway.

MR. CROOKS: We have no objection if that's what it is. That was our understanding of his testimony also.

Q (By Mr. Ellison) Mr. Griffiths, you stated that you were very familiar with that particular area, that general area of Oregon, is that correct?

A I am familiar with the State of Oregon, yes.

Q You are familiar with the highways in that particular area of Oregon?

A Quite familiar, yes.

Q Have you seen other types of fence used by the Highway Department along Interstate 80 in that area other than that which you depicted on Defendant's Exhibit 137?

A Yes, I have.

Q And is this used generally between, say, overpasses, or is the other type of fence used primarily near overpasses?

A Which type of fence is that?

Q A fence different from the one you depicted on Defendant's Exhibit 137.

A Would be areas around the rest area, information center, {2257} rest stop, this type of fence.

Q The area in which you stopped the mobile home originally, was that near any one of these areas?

A There is an area coming into -- or would be on the westbound side, that is an information center, rest area type stop.

Q What about on the eastbound side?

A No.

Q And the area in which you stopped the home was on the eastbound side, wasn't it?

A That's right.

Q And there was barbed wire on the top of that fence, isn't there?

A I believe so, yes.

Q You testified on direct examination that there was a great deal of commotion and yelling and screaming going on as individuals emerged from the mobile home, is that correct?

A That's right.

Q And it was your impression when you stopped the mobile home that there was a very good likelihood, based upon the teletype that you had read, that there were fugitives, possibly dangerous fugitives, I believe the teletype stated, in that mobile home?

A That's right.

Q And this is the reason why you took a shotgun from your {2258} vehicle when you exited that vehicle?

A That's right.

Q Would you say, sir, that you were somewhat nervous when you got out of the vehicle, based on the circumstances?

A It wasn't a very comfortable position to be in, no.

Q And the nearest police officer that you knew of was Officer Kramer?

A That's right.

Q And approximately how far behind you, when you origin-ally stopped the mobile home, was the Plymouth station wagon?

A Approximately 150, 200 feet.

Q Mr. Griffiths, is a copy of the diagram which you just drew, marked Defendant's Exhibit 136?

A It certainly looks like it.

Q You would not have any dispute?

A No.

Q Now, I believe that you mentioned that there was 150 to 200 feet between the mobile home and the Plymouth station wagon?

A Approximately.

Q (Indicating) You stated you were not in a very comfortable position when you exited your police vehicle after stopping the mobile home originally?

A That's right.

Q As the individuals in the mobile home began to exit, and there was a great deal of yelling and screaming and commotion, {2259} would you say there was a great deal of confusion as well?

A Some.

Q Now, I believe it was your testimony that after the Mexican-looking man in the red shirt and several women and children got out of the vehicle, you had them lay on the ground?

A I instructed them to lay on the ground.

Q Had they laid down on the ground before anything else happened?

A No.

Q Was the man with the red shirt laying on the ground?

A Well, he went down once, and he was back up again.

Q And was anyone laying down or were all people standing aside from yourself when the mobile home took off and an individual ran off?

A I was standing also.

Q You were standing. What about the others?

A They were standing.

Q I see, so then everyone was standing?

A That's the way it appeared, yes.

Q All right. Then you saw, and I believe you said almost simultaneously, the back-up lights come on and the mobile home accelerate and the individual with the red shirt running towards the fence, is that correct?

A Well, he was going over the fence.

Q He was going over the fence.

{2260}

I am going to hand you what has been marked as Defendant's Exhibit 136 and ask you to place an "X" at your location where you were standing when all of this occurred; and on the acetate copy o Defendant's Exhibit 136, and I would like you to place a "T" at the location where you next saw the individual running away from the mobile home and a dotted line in between there, please?

MR. CROOKS: Just a moment, your Honor. Where is 136?

MR. ELLISON: 136 is over with the Clerk. This is an acetate copy which the witness is drawing on.

MR. CROOKS: Is that marked as an exhibit?

THE CLERK: No, it is not.

MR. ELLISON: Then do the same on what has actually been marked as Defendant's Exhibit 136, please.

A You wanted a "T" where?

Q (By Mr. Ellison) I would like a "T" at the first location, or I believe you said at the fence area where you saw the individual with the red shirt after the mobile home backed up and then accelerated.

A (Indicating).

Q So that the jury is able to observe, you have marked a "X" at the location where you were standing before the mobile home began to move and before the individual ran, and a "T" at the location where you saw this individual immediately thereafter?

{2261}

A Yes.

Q Did you move at all during the events that occurred at this location?

A Not very much.

Q All right, and as far as the "T", you have not placed a "T" actually on the fence. I believe in your direct testimony you stated that you saw the individual on the fence when you saw the flash, is that correct?

A He was going over or about to go over the fence.

Q You saw the flash simultaneous with his going over, as he was preparing to go over the fence?

A In about that time.

MR. CROOKS: Your Honor, I object to this. It is not what the witness said just two seconds ago.

THE COURT: The jury will recall what the witness said.

Q (By Mr. Ellison) Were you able to see well enough to tell whether this individual was on top of the fence or about to be going over the fence when you saw the flash?

A No.

Q All right. So you assume it was about that time in that location?

A Yes.

Q Now, in the midst of all this confusion, you are absolutely sure that you saw the flash come from the point {2262} which you have marked "T" and not perhaps somewhere near the mobile home?

A Absolutely certain.

Q All right, and the mobile home traveled down the road in an eastward direction?

A That's right.

Q And I believe it is at a point that you have marked with a "2"?

A That's right.

Q All right, and you went down to that vehicle shortly after this particular incident, is that correct?

A Oh, yes, I did.

Q Did you ever find or did you ever hear of any evidence which might lead you to believe that perhaps the shot which was fired came, not from the point which -- or the individual which you have placed at point "T", but from the mobile home?

A I did not.

Q Did you ever hear of a .357 magnum being found on the shoulder of the road near where the mobile home was abandoned?

A I heard of such a find, yes.

Q And who did you hear of such a find from?

A I don't recall.

Q Was it another trooper?

A I can't recall.

Q Did you hear that there was one fired round in that .357 {2263} magnum?

A I didn't hear that.

Q When did you hear that this .357 magnum was found?

A Well, I didn't hear about it until several days afterward.

Q But what did you hear was the date of the finding?

A I did not hear.

Q Or read?

A I have no knowledge of the exact date.

Q Do you have any idea how many people were in the mobile home when it took from the point that you have designated that you originally stopped it?

A At least one.

Q At least one, there could have been more?

A There could have been.

Q Now, you had an opportunity to look at that mobile home, didn't you, both at the scene and later when you observed a search being conducted of those vehicles?

A Yes.

Q How many doors on that mobile home?

A I beg pardon?

Q How many doors?

A Doors?

Q Yes.

A There is one door.

Q And on which side of the vehicle is that door?

{2264}

A The right side.

Q There is no door on the driver's side?

A No.

Q Is there a window which opens on the driver's side?

A Yes, there are opening windows

Q And what about on the passenger side?

A I don't recall.

Q Would it help to refresh your recollection if you looked at what has been marked for identification purposes as Government's Exhibit 61?

A Yes. (Examining) What is the question?

Q The question is, are there windows on the driver's side as well as the passenger side which are capable of being opened?

A Well, this one here (indicating) is capable of being opened for sure.

Q When you say "here", are you designating the left side of the mobile home?

A Yes, the left driver's window.

Q All right, and what about the right driver's window?

A I don't know.

Q And you were present, were you not during the search of that mobile home?

A I was in the area of the search. I did not conduct the search.

{2265}

Q You were present at the location where the search was conducted?

A At times, yes.

Q At times. Do you recall what date?

A Well, it was a day or so later, exactly what date it was I don't recall.

Q Do you recall who was present conducting the search at that time?

A There were a number of people present.

Q Do you recall whether there were agents of the FBI as well as other officers?

A Well, I am sure there were, yes.

Q Do you recall the names of any of the officers and agents that were present?

A Well, Sergeant Bill Zeller, the Oregon State Police, conducted the search. The names of the others, there were many other people.

Q Was Officer Kramer there?

A At times.

Q While you observed Sergeant Zeller conducting the search, did any of the FBI Agents also participate in the search?

A I couldn't say.

Q Were you present when any items were brought out of the mobile home?

A There were items brought out of the mobile home when I {2266} was there, yes.

Q Did you observe these items as they were brought out?

A I did not.

Q You did not observe any of the items brought out?

A I may have seen some of the items. To be cognizant of what they were, no.

Q I would like you to look at Government's Exhibit 61, and see if you see any of the items depicted, which are depicted in these photographs -- did you see any of those items being brought out of the mobile home when you were present?

A I can't say.

Q O.k.

For purposes of clarification, I would just simply like to refer to one point once again, I believe that the jury did not have an opportunity to see.

This is the Point 2 (indicating) which is the second location where the mobile home was stopped?

A That's right.

Q All right, thank you.

Mr. Griffiths, when you fired tear gas into the mobile home as it stood on the highway, you entered that home, is that correct?

A I did not fire tear gas.

Q Or when another officer fired tear gas into the home, you eventually entered that mobile home while it was still on the {2267} highway?

A Yes.

Q And I believe you entered with a Trooper Schmeer?

A That's right.

Q Were you wearing gas masks when you went inside?

A Nope.

Q You went in pretty quick and then came out?

A That's right.

Q Could you see very well inside that mobile home when you went inside?

A Well, we had flashlights, not well, no.

Q Tear gas makes kind of a cloud, doesn't it?

A It irritates the eyes. We couldn't see too well in there.

Q And your purpose in going in was just to see if there were any individuals in there?

A That's right.

Q You weren't concerned about any physical objects in there?

A No.

Q You didn't attach much concern as to those physical objects, your main concern was whether or not there was a person that might be harmful to you, is that correct?

A Will you restate the question, please?

Q When you entered that mobile home, your primary concern was looking for individuals who might cause harm to you or your fellow officers?

{2268}

A That's right.

Q You were not very concerned with any physical evidence, in fact you were not concerned at all with any physical evidence that might be in the mobile home?

A Well, in what respect?

Q In any respect.

A Well, certainly we were concerned.

Q All right. When you entered the mobile home, you didn't take great care so that anything that you may have touched or may have knocked against accidentally, you didn't take great care to see that that didn't happen?

A I entered the mobile home just a short distance, maybe right into the entryway, and that was it.

Q Did you understand my question?

A I understood your question, yes.

Q Did you take any particular care when you were entering the home, or were you even concerned with taking any particular care to make sure that you didn't step on any evidence or push it out of the way or perhaps touch it?

A We took care, but that was not our primary concern.

Q And Trooper Schmeer did the same?

A Certainly.

Q He took great care?

A Yes.

{2269}

Q One final question, Mr. Griffiths. At the time that you went into the mobile home did you observe any physical objects which you later recorded?

A No.

Q Did you observe any physical object which you didn't record?

A No.

Q Your primary concern was just to see whether there were any individuals?

A That's right.

MR. ELLISON: Your Honor, I have no further questions of this witness. However, I would like to offer the transparency which is a copy of 136 into evidence.

MR. CROOKS: We have no objection.

THE COURT: What is the number on that?

MR. CROOKS: Well, he hasn't marked it yet apparently. I assume it would be 136.

MR. ELLISON: It is a copy of 136. Perhaps we could designate it 136-A.

THE COURT: It may be designated 136-A.

REDIRECT EXAMINATION

BY MR. CROOKS

Q Officer, or Mr. Griffiths, I have a couple of additional questions.

With regard to 136 you have indicated a "T" to show the indication, or the portion of the individual who fired at {2270} you at he was either crossing or about to cross the fence; is that correct?

A That's right.

Q And you have marked your position with an "X"?

A That's right.

Q Would you take a red pen and mark the approximate location of the women and children, just put a red "W" at the location approximately where they were when the shot was fired.

A (Indicating.)

Q All right. And you have indicated now a red "W" approximately between your location and that of the individual who was firing upon you?

A That's right.

(Government counsel showing Exhibit 136 to jury.)

Q (By Mr. Crooks) Counsel has asked you several questions about the individual who had fired at you and went in great detail as to your observations. So I at this point would ask you a question which I had not on redirect. Do you see an individual resembling that man who had fired at you in the courtroom?

MR. ELLISON: Objection, Your Honor. Witness has already testified to the best of his ability as to the description of the individual, and this is way beyond the scope of cross-examination.

THE COURT: Overruled.

{2271}

Q (By Mr. Crooks) Well, answer the question if you can recall it.

A What was the question again, I'm sorry.

Q Could you, well I'll just ask you again. Do you see an individual in the courtroom who resembles the individual who fired at you and escaped over the fence?

A Yes, there is.

Q And where is he seated?

A He's the defendant.

Q And that would be the individual who we have seated at counsel table with the black and red shirt on with a buckskin vest; is that correct?

A That's right.

Q Now, are you positive, or can you give a positive identification that was the man?

A I cannot.

Q But your best recollection would be that this appears to be similar to that man?

A Yes.

MR. CROOKS: All right. No further questions.

MR. TAIKEFF: May we have a moment to confer, Your Honor?

THE COURT: You may.

The record may show that 136-A was received.

(Defense counsel conferring.)

{2272}

RE CROSS EXAMINATION

BY MR. ELLISON

Q Mr. Griffiths, you were asked by counsel for the Government if you saw anyone in the courtroom who resembles the person that you saw on November 14, 1975; is that correct?

A That's correct.

Q And you immediately responded "Yes, the defendant"; is that correct?

A Yes.

Q Did you have an opportunity to look around the courtroom?

A I have.

Q After you were asked this question?

And make the observation that nobody in the courtroom resembles the individual that you saw on November 14, 1975? Or did you respond immediately "Yes, the defendant"?

A Yes, I did.

Q And then Mr. Crooks went into an elaborate description of Mr. Peltier; is that correct?

MR. CROOKS: Your Honor, I'm not following this. I didn't give any description at all on my redirect.

THE COURT: Is that an objection?

MR. CROOKS: Yes. I think he's misstating the record If he's referring back to me opening direct examination I did go into a description, but did not go into a description on redirect.

MR. ELLISON: I'll withdraw the question and rephrase {2273} it, Your Honor.

THE COURT: All right.

Q (By Mr. Ellison) Did Mr. Crooks, immediately after your response to that "Yes, the defendant", describe an individual wearing a tan vest and a black shirt?

A Yes, he did.

Q All right. And then you reidentified the defendant as being the person that you saw on November 14, 1975 as being the same person who's sitting in this courtroom, or resembles at person I believe you said?

A That's right.

Q And you are not sure of that identification?

A I'm not positive, no.

Q Isn't it a fact, Mr. Griffiths, that when the FBI handed you fliers they emphasized the fliers, more than one flier of a half a dozen fliers, that had pictures of Mr. Peltier and tried to insinuate, or tried to get you to feel and believe in your mind that the person that you saw was actually Leonard Peltier?

A No, they did not.

Q You don't remember the names of any of those FBI agents? No, I don't. Were these FBI agents who were familiar to you?

A No.

Q How many agents were there?

{2274}

A There was a number of them.

Q Approximately eight?

A I don't know.

Q Do you remember the conversation which we had at your home in which you said there were approximately eight?

A I don't recall.

Q Do you remember that you said that you knew two those eight individuals?

A Yes.

Q All right. So you did know some of those eight individual?

A Not the ones with the fliers.

Q Okay. And these other agents you hadn't seen before?

A That's right.

Q And they arrived two to three hours after your initial radio broadcast that you were stopping the mobile home?

A Approximately.

Q Now, Government counsel has asked you to mark on defense Exhibit 136-A with a "W" as to the location of the women and children in relationship to you and the individual who was at the fence; is that correct?

A That's right.

Q All right. Would you please do the same on defense Exhibit 136-A. I will provide you in a moment with a marker.

(Defense counsel handed witness pen.)

Q (By Mr. Ellison) I'm using a green pen. Please place a {2275} "W" in the same location which you marked "W" on Defense Exhibit 136.

A (Indicating.)

Q Thank you.

And you've placed a "W" approximately in "T" middle, between you and the individual that you've marked as "T"?

A Approximately, yes.

Q And this was the location of the women and children when the shot was fired; is that correct?

A That's right.

Q And the women and children were standing at that time?

A They were.

Q All right. So it's your contention that the individual who fired at you fired in the direction of the women and children in order to hit at you?

A That's right.

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

MR. CROOKS: We have no further questions. We'd ask that the witness be excused.

THE COURT: You may step down. Any objection to this witness being excused?

MR. ELLISON: None, Your Honor.

THE COURT: You are excused.

THE WITNESS: Thank you, Your Honor.

{2276}

THE COURT: We will recess for lunch five minutes early.

Court is in recess until 1:30.

(Recess taken)

{2277}

AFTERNOON SESSION

March 30, 1977

1:30 o'clock, P.M.

(Whereupon, the following proceedings were had and entered of record on Wednesday afternoon, March 30, 1977, at 1:30 o'clock, P.M. without the hearing of the jury, the defendant being present in person:)

THE COURT: The ruling on the Brady motion is that the government would produce the materials requested by the defendant and if there is some reason why they feel it should not be disclosed to the defendant until the Court has ruled, it will be examined in camera.

MR. LOWE: Your Honor, I'm not sure what the effect of your ruling is on the portion of our request for disclosure which was merely to disclose the name of the person who prepared the affidavit. Would Your Honor address that particular point.

THE COURT: Well, this is what the government is to disclose.

MR. LOWE: I see. All right.

THE COURT: That's one of the two points that you raised in response to my inquiry.

MR. LOWE: The reason I raise that, I didn't understand. I thought you were talking about documents. Of course, we would take the position, so Your Honor is clear on what our position is, whatever the name is of the preparer of the {2278} information would be exculpatory in the event it leads to exculpatory information. We would seek the name in any event.

THE COURT: The jury may be brought in.

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

MR. SIKMA: Your Honor.

THE COURT: You may proceed.

MR. SIKMA: At this time the plaintiff and the defendant have agreed to a stipulation that refers to Government Exhibit 34A.

It is stipulated between the plaintiff and the defendant that Government Exhibit 34A which was identified by Special Agent Michael Gammage in the court is the same item which we found near Wichita, Kansas on September 10, 1975;

that Government Exhibit 34A was delivered by him to the firearms laboratory in Washington, D.C. on or about September 12, 1975;

That it is in substantially the same condition today as it was when he delivered it to Washington, D.C. on September 12, 1975.

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

THE COURT: You may.

(Whereupon, the following proceedings were had at the {2279} bench:)

MR. LOWE: The problem I have where in the last sentence is that it's substantially the same condition. Among other things, the thing broke in half, I believe, after he took it in there. I think you can adduce that in testimony from Gammage at some point. I don't want to stipulate that it's in the same condition. I think what you wanted to do and it's perfectly understandable and proper, is to identify that weapon as being Exhibit 34A which Gammage found. I thought, and Mr. Sikma thought when we had Gammage on the stand this morning he had already testified to that last night and Mr. Sikma indicated he would ant to stipulate to something to that effect and I told him I'd be happy to do so. I do not want to stipulate to the last line. Gammage is going to come back anyway and testify to condition.

MR. SIKMA: Special Agent Hodge would be able to testify to that.

MR. LOWE: Fine. Whichever one.

MR. SIKMA: I'll just get it out of him that difference took place.

MR. LOWE: The only thing is I didn't want to stipulate to any condition. That is the general objection and whatever condition --

MR. SIKMA: Fine. Fine.

{2280}

I thought you had an opportunity to look at this.

MR. LOWE: I didn't see that part or I would have mentioned before I got up there.

The main idea is connect that idea, 34A. Also the one Gammage picked off the highway.

THE COURT: Shouldn't the stipulation also indicate what 34 is?

MR. SIKMA: Yes. We'll indicate.

MR. LOWE: What the condition was and is now. What differences there may be can be brought out by testimony.

MR. SIKMA: I thought I would have Hodge indicate what 34A was because I understood the Court's ruling that we weren't allowed to elicit testimony as to what it was.

MR. LOWE: That's fine.

MR. SIKMA: Until after it had been connected up with the crime scene.

THE COURT: That's right. That's right.

MR. LOWE: Either Gammage or Hodge can testify about condition. I just don't want to put any stipulation on it.

THE COURT: I'll just ask you to restate the stipulation.

MR. LOWE: Fine.

MR. SIKMA: All right.

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

{2281}

THE COURT: Counsel will restate the stipulation.

MR. SIKMA: It is stipulated between the plaintiff and the defendant that Government's Exhibit 34A which was identified by Special Agent Michael Gammage is the same item which he found near Wichita, Kansas on September 10, 1975;

that Government Exhibit 34A was delivered by him to the firearms laboratory in Washington, D.C. on or about September 12, 1975.

MR. LOWE: Your Honor, we would enter into that stipulation on the basis of representations from Counsel and from my understanding that the witness has stated subject to any matters that may come out on either direct or cross-examination in the future.

THE COURT: Very well.

And the jury will recall that when both sides stipulate to a fact the jury may consider that fact to have been proven.

MR. CROOKS: If it please the Court, the United States next calls Clayton Kramer.

Your Honor, Mr. Kramer was downstairs just a moment ago. Might I attempt to look for him?

THE COURT: You say you wish to go look for him?

MR. CROOKS: He was downstairs right before we came up. I don't understand why they can't find him.

{2282}

CLAYTON KRAMER,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CROOKS

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

A My name is Clayton Charles Kramer.

Q Where do you live, sir?

A Ontario, Oregon, sir.

Q What is your occupation?

A Oregon state trooper.

Q How long have you been an Oregon state trooper, Mr. Kramer?

A Approximately 11 years. Since 1966.

Q Calling your attention back to November 14, 1975, were you on duty as an Oregon state trooper on that date?

A Yes, sir.

Q And calling your attention specifically to approximately 10:00 o'clock, P.M. of that date, did you have occasion to assist Officer Ken Griffiths?

A Yes, sir, I did, sir.

Q And would you describe how you came on the scene or what, how you first became involved?

A I became involved in it, the Ontario PD which is nine blocks away from the area this took place at, I was lodging a drunk driver at this particular time. Our radio operator called me by {2283} phone and advised me that Griffiths was going to be involved in possibly some fugitives.

Q And then what did you do?

A I immediately got in the patrol car and headed for the freeway, went in service and called Griffiths by radio.

Q Did you talk to Griffiths on the radio?

A Yes, I did, sir.

Q And did he advise you what the situation was? Don't go into details but did he advise you --

A I asked his location. This is what I was wanting to know and what the deal was.

Q What happened then?

A He advised me his location and what the situation was out there on the freeway.

Q Was there a time within a few minutes of that that you had occasion to stop vehicles on the highway?

A Excuse me?

Q Were vehicles then stopped on the highway?

A Yes. They were shortly thereafter. Yes, they were.

Q Would you describe your part of that?

A I stopped a 1970 Plymouth station wagon.

Q And what about any other vehicles that were being stopped?

A There was a motor home stopped by Trooper Griffiths that was ahead of me.

Q I show you Exhibit No.61 and show you the pictures on the {2284} front page and ask if you can identify those vehicles?

A Yes, sir. These are the vehicles.

Q Picture A, B and C are pictures of the motor home, is that correct?

A Yes.

Q Picture D is a picture of the Plymouth?

A Right, sir.

Q And is that --

A Picture of me right there (indicating).

Q You were in that picture. Okay.

So you have no problem identifying that?

A No, sir.

Q After the vehicles were stopped, what happened next that you recall?

A Griffiths and I was talking just immediately prior to these vehicles stopping.

Q Now talking how?

A On the radio.

Q On the radio?

A On the radio.

Q Go ahead.

A He said he was going to stop the motor home and at that time this particular station wagon, every time he moved up on the motor home the station wagon would move up behind. I said, "Okay". I'll take the station wagon and you go ahead, {2285} take care of the motor home. Be careful."

We got out of the car approximately the same time. I was behind him and I could see some figure up there in the headlights.

Q So then what was the next thing that happened that you recall from your involvement?

A What I was involved in, the driver of the vehicle came out of his car and came back to me.

Q You're talking about the Plymouth?

A Plymouth, sir. Yes sir. The name is Mr. Redner. He came back and into the vehicle there and I asked him for identification. He produced a Washington driver's license.

Q Okay.

A I looked at it a few minutes, had a little conversation there with him and went between the two, the Plymouth and the patrol unit I was operating and told him to wait there and stepped off onto the shoulder of the vehicle, the highway, the freeway, I asked Mr. Loud Hawk to step back to the rear seat of the vehicle which he did.

Q Did he do --

A At this time I asked him if he had any identification; he said, "No"; I asked him, "How am I going to know who you are," and approximately this time there was screaming. I heard a report and a whistle of a bullet come down our direction.

{2286}

Q So we're clear again what area we're talking about, the orange dot has previously been identified as Ontario. Where from Ontario were you on the freeway?

A Well, we would be east, kind of southeast as you look there. But we were --

Q So it would be from Ontario towards the bottom of the map?

A Yes, sir.

Q And then after you heard the report and heard a bullet whiz by, what happened then?

A The two subjects that I had stopped, they crouched down behind the station wagon. I went on over to my vehicle and radioed on the radio to our office that we were under fire, that we needed assistance. About this time the motor home pulled out and I was trying to contact Griffiths to ascertain what was going on up there. There was a lot of screaming. After this bullet whiz and stuff, the screaming and yelling, the bullets whizzed by. The two subjects crouched down, then I heard two reports.

Q The two subjects you're referring to by --

A That I had in custody back there.

Q They crouched down?

A Yes.

Q And what was the next thing you saw or heard?

A Well, like I said, there was a lot of screaming going on and then I heard two quick reports of another gun.

{2287}

Q Could you determine or did you determine where these two shots were fired from?

A I just heard the reports and it was in that area where Griffiths was.

Q In the area where Griffiths was?

A Yes.

Q Now with regard to this evening, was it a light evening or dark evening as best you recall?

A This was a dark evening. This was an unlighted area.

Q Was there any particular light around the area --

A No.

Q -- as far as --

A No.

Q -- freeway lights or anything?

A No.

Q When the two shots came from the area where Officer Griffiths was standing, what was the next thing that happened?

A The next thing I did?

Q Yes.

A Well, I was, like I explained earlier, I went to my patrol car during this time and was watching up there. I called our office to advise them we needed assistance, plus also trying to contact Trooper Griffiths.

A short time later Trooper Griffiths come back to his {2288} patrol car and advised me by radio that there was a couple of ladies with some children that was down in, we call it the burro pit which was between the shoulder of the highway and a fence that runs alongside of your freeway. They were down there. We had tumbleweeds and sage brush in this particular area.

{2289}

Q And then what did you do with regard to them, if anything?

A I advised them on the speaker, and I advised him that I wanted them to come back to my car.

Q Did they do so?

A Yes, they did. They come down the fog line. I told him to stand by until they did come down to my area. He went after the motor home.

Q How did he go after the motor home?

A In his patrol unit.

Q Was the motor home seen or apprehended later by either you or Mr. Griffiths?

A Trooper Griffiths radioed again, which is the radio he has in the patrol car, that the motor home was in the median strip in the center of the freeway.

Q How far was that from where the shooting had taken place?

A About a half a mile, I reckon.

Q About a half a mile?

A Yes.

Q When you got to the motor home, would you briefly describe what happened?

A There was myself and Sergeant Ammirado. We went up there and we reported. Trooper Griffiths was on -- would be the westbound lane of traffic, we call that, and we would be on the eastbound traffic lane.

Q All right.

{2290}

A This motor home was down in the burro pit facing probably in a southern direction. The motor was running. You could see this with the exhaust. The headlights were still on.

Q All right. With regard to the area which has been testified about, now, Officer Griffiths prepared a little rough sketch map. I show you Exhibit 136, and ask you if that generally conforms to your understanding as to the positions of the vehicles as well?

A (Examining) Yes, sir.

Q All right. On the map Officer Griffiths has placed a "T" at the location where he said the shot was fired at him.

Now, I would like to ask you a few questions concerning that. Did you at some point have occasion to go into the area to examine the fence along that route?

A I went down there the following day.

Q All right, and what were you looking for?

A Well, I was going down to get the shotgun rounds that was expended down there at this particular scene, plus I wanted to figure just about what distance it was, that just took place between my vehicle and Trooper Griffiths.

Q O.k.

A We was looking at the fence to ascertain if there was any evidence at the scene there of any footprints or something of this nature.

Q All right, and what, if anything, did you find on the {2291} fence or near the fence?

A Well, there are a couple of strands of barbed wire on the top of this particular fence, and there appeared to be some blood on the top, like somebody cut their hand going over the fence.

Q All right. Now, insofar as your examination of the fence and what you -- or what appeared to you to be blood, does that correspond in any way to Officer Griffiths' mark of a "T" with relation to where the vehicles were?

A Yes, sir.

Q And what is the relationship, if any?

A Well, it looks similar. I was going by the rounds, the empty cartridges that was fired at the rear of this motor home. Trooper Griffiths advised me they were laying there still. It would be about the same angle.

Q About the same angle as what Mr. Griffiths testified about previously?

A Yes, sir.

Q Officer Kramer, as a law enforcement officer of the State of Oregon for approximately 11 years, I would like to show you what has been marked as Exhibit 61, third page, bottom paragraph, I would ask you whether or not a weapon such as depicted in that paragraph is one commonly used for deer hunting in the State of Oregon?

A No, sir.

{2292}

Q I would ask you also to take a look at the photographs of various ammunition clips which are shown on Page 4, the reverse side of Page 4 or on Page 4, the middle paragraph, ask you whether or not the clips shown in that photograph are clips of ammunition commonly used for deer hunting in the State of Oregon?

A No, sir.

Q To your knowledge are -- how many rounds can legally be used in big game hunting in Oregon?

A Five.

Q Five rounds?

A Yes, sir.

Q And that would mean --

A (Interrupting) This is no semi-automatic.

Q (Continuing) -- one in the barrel and five in the magazine, would that be correct?

A Right.

Q As far as a banana clip, or what is commonly referred to as a banana clip, that is not a legal sports thing in the State of Oregon, is it?

A No, sir, not if you are hunting deer.

Q What became of the two vehicles after the time that you and Office Griffiths approached them at the place that the vehicle was ultimately abandoned and meeting --

A (Interrupting) You mean eventually towed in? Is that {2293} what you want?

Q Yes.

A They were eventually towed into Art's Service in Ontario.

Q To your knowledge then what happened?

A They were locked up, secured in Art's Service -- advised they would be locked up and secured. The following morning there were search warrants obtained.

Q To your knowledge other than entering the vehicle to search for people that might be on or in them, was there any search made at the scene, if you recall?

A No, sir.

Q And search warrants were then obtained?

A Yes, sir.

Q And as a matter of fact, is it correct that you made out part of the affidavit for one of them?

A Yes, sir.

Q And were the vehicles ultimately searched as a result of the search warrants?

A Yes, sir.

Q And do you recall whether or not Federal FBI authorities also came in, either with you or later searched the vehicles?

A Yes, they did, sir.

Q And do you recall the time sequence upon the arrival of the FBI, if you recall?

A The time exactly?

{2294}

Q No, not the exact time, but whether it would be the --

A (Interrupting) There was some FBI Agents a short time later that met myself and Officer Griffiths at the office in Ontario that morning, sometime about 2:00 or 3:00 in the morning.

Q In early morning hours the Federal Bureau of Investigation came and met with you and Griffiths?

A Yes, sir.

Q And were you present during the actual searches themselves?

A Yes, sir.

Q And did you participate in them directly, or was that done by someone else?

A That was done by somebody else, sir.

Q You were in the area but not necessarily given responsibility for the search?

A I was not involved in it, no sir.

Q Counsel -- my co-counsel advised me that I never did identify the exhibit I was pointing to earlier.

The diagram which I have referred to would be Exhibit 7, is it not, calling your attention to the exhibit tag?

A Yes.

Q And that would be the testimony you have given concerning the approximate location of the shooting?

A Yes, sir.

MR. CROOKS: We have no further questions.

{2295}

MR. TAIKEFF: Your Honor, before we begin the cross, may we approach on a matter that doesn't concern this witness but perhaps your Honor would be interested in hearing about it?

THE COURT: You may.

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

MR. TAIKEFF: Your Honor, I have been informed in installments during the direct testimony of this witness, that a spectator, I believe known as John Trudell, was taken into custody by the Marshals. I thought your Honor should know that somebody is being held in custody.

We of course, are here to represent Mr. Peltier and are not going to get involved in any representation or any representations of anyone present.

Word has gotten to me several times in the last 15 minutes that they are holding him in the office. It has something to do with their refusal to permit him to enter the courtroom, and I just thought your Honor should be apprised of it since your Honor is the only judicial officer in the area.

MR. HULTMAN: Elliot, on the record, just so we get the total record, there was no occurrence here in the courtroom or anything that came to any of our attention or the jury?

{2296}

MR. TAIKEFF: No, absolutely not. I am sure the jury is totally unaware of it. I know very little about the fact myself because when I entered the courtroom I saw Mr. Trudell out there have some discourse in a rather loud voice with the Marshals; and after I entered the courtroom, one of the attorneys said to me, "There is something going on out there, maybe you ought to check. I went out and I spoke to the tallest Marshal -- I think he is the one from Texas or California -- I asked him briefly what the problem was. He said he was having some difficulty with Mr. Trudell.

I thought since the Court was about to begin, the best thing to do was to come into the courtroom. Since that time I heard the reports that I summarized.

I thought his Honor should know about the situation.

MR. HULTMAN: I know nothing, on the record, about anything that has been said. I wanted to establish that I haven't seen anything in the courtroom.

MR. TAIKEFF: I don't think the jury is even aware of it.

THE COURT: It was reported to me just when court started that some spectator had created some problems for the Marshal, and that there had been some difficulty in the corridor, but beyond that I had not heard about it.

MR TAIKEFF: I see.

{2297}

THE COURT: Ralph, do you want to state for the record what you know about this incident?

THE CLERK: Nothing firsthand, Judge, other than I understand an expletive was used to the Marshal and Mr. Trudell was asked to quiet down; and I understood that he was asked to leave the building.

MR. TAIKEFF: Mr. Gilbert just informed me that he was informed that apparently he is going to be booked and charged with something. If that's the case, then of course, it has to go through its ordinary process.

THE COURT: It would have to go through the Magistrate.

MR TAIKEFF: If that was known, that was why I was calling it to your Honor's attention.

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

MR. ELLISON: May I proceed, your Honor?

THE COURT: You may proceed.

MR. ELLISON: Thank you.

CROSS EXAMINATION

BY MR. ELLISON:

Q Corporal Kramer, I am going to show you what has been marked as Defendant's Exhibit 136-A; and I believe you have Defendant's Exhibit 136 in front of you. Would you compare these two documents and state for the record whether you feel {2298} they are identical for all intents and purposes?

A (Examining) Nope.

Q What differences do you see?

A Put 150, 200 feet in there.

Q All right. Perhaps you didn't understand my question. 150 to 200 feet is not written on 136?

A Yeah.

Q O.k. With that exception are the two diagrams the same?

A (Examining) Yes, they appear the same, sir.

Q And the difference, as far as the distance is concerned, is what, approximately how far do you believe the distance was between the mobile home and the Plymouth station wagon which you have described?

A The mobile home and the Plymouth station wagon?

Q Yes, sir.

A What I paced off, that's what I paced off; and I will tell you from what point to what point if that's what you want.

Q If you would, please.

A I paced off the position between my patrol unit and the Plymouth station wagon which are marked with a stick of wood the previous evening, where I had a object before, to the back of the motor home where the shotgun rounds were at; and I figured I took 36 inch strides, I figured 345 feet.

Q And you wouldn't dispute that, a few feet one way or another?

{2299}

A No.

Q Your estimate was that the distance between the Plymouth station wagon and the mobile home was actually greater than what is depicted on Defendant's Exhibit 136-A?

A Like I said, I paced it off, sir.

Q All right, thank you.

Would you please mark on Defendant's Exhibit 136-A with a "K" the location of you when you heard the report and the bullet whizzed by your head?

A (Indicating).

Q The "K" which is placed by the first vehicle marked station wagon was marked in blue by you, is that correct?

A That's the rear fender, yes, sir.

Q And just to reiterate, the "K" is the location in which you were standing?

A That's right, sir.

Q When you heard the report near the mobile home?

A Yes.

Q And where you heard the bullet whiz by your head?

A Right.

Q All right. Now, I would like to ask you some questions about what occurred at that particular time.

Could you tell from exactly where the first report was that you heard?

A It was up there where Griffiths was.

{2300}

Q It was the same general area?

A Yes.

Q You have seen this exhibit, Defendant's Exhibit 136-A, and the point marked "T", is that correct, I believe it was pointed out by Mr. Crooks?

A Yes, sir.

Q Did you see a flash?

A No, sir.

Q By that location?

A No, sir.

Q Did you believe -- now, that's not right by the mobile home, is it?

A No. There was a lot of headlights out there, and I couldn't see where I was at. Like I say, it was quite a distance.

Q All right, I understand that.

Is it your testimony that the first report that you heard did not come from the area where the "T" was, but came from the area of the mobile home?

A It came from where Griffiths was up in that particular area, sir.

Q So then it came from this area (indicating), as opposed to this area (indicating)?

A I said it came from the area that he was involved in, sir.

Q All right. Now, you heard a bullet whiz by your head, is that correct?

{2301}

A That's right.

Q At the approximate same time that you heard the report?

A Yes, sir.

Q The initial report?

A Yes, sir.

Q Now, you responded to questions of Mr. Crooks that you had examined the fence?

A Yes, I did.

Q Would you please look at what has been marked as defense Exhibit 137, and tell the jury if that accurately reflects the fence that you saw?

A (Examining) It had two strands of barbed wire on it, if I recall right and it was a cyclone type fence running angular on the red fence posts in this particular area. This is normally what is used out in the livestock area. This (indicating) is in the town area.

Q So that rather than having one strand of barbed wire, it would have two strands of barbed wire, is that correct?

A As I recollect, yes.

Q And rather than the strands of mesh fence running horizontal and perpendicular with the road, they were at an angle?

A They were similar to the cyclone section.

Q How high would you say that fence is?

A About five feet.

{2302}

Q That includes the barbed wire?

A Yes.

Q Is there any metal bar at the top of that barbed wire which would make it easier to get over?

A No, sir.

{2303}

Q In fact would be fairly difficult to get over that?

A Five feet?

Q Yes, sir.

A If you're in a hurry, no.

Q With barbed wire on the top?

A No.

Q You were shown on direct examination what has been marked as Government's Exhibit 61, and I believe that you looked at various items on page 3; is that correct?

A Yes, sir.

Q And you mentioned that the photograph depicted on the bottom of page 3 is not the normal weapon which is used for deer hunting?

A Yes, sir

Q In Oregon?

A Right.

Q Do you know whether that weapon is legal or not?

A It's illegal?

Q What makes it illegal?

A It's an automatic. Automatic weapons are not legal for deer hunting.

Q They're not legal for deer hunting; but is a semi-automatic weapon legal to possess in the state of Oregon?

A What do you mean "possess"?

Q Can a person without a special license possess a semiautomatic {2304} weapon?

A What type caliber?

Q Do you know what caliber is depicted in that photograph?

A No, sir.

Q What calibers are illegal to possess?

A .22. They have the automatic that the people use for hunting ground squirrels and semiautomatics.

Q Semiautomatic?

A Yes, sir.

Q Officer Kramer, I'm talking just about possession, not for hunting purposes or any particular purpose, but simply is legal, what weapons is it legal for a citizen to possess in a semiautomatic nature? You mentioned calibers.

A I'm not a gun nut, sir, to know what calibers that you are talking about.

All I know is like machine guns and this type of weapon are illegal in Oregon, sir.

Q Is a machine gun a semiautomatic?

A It's an automatic weapon.

Q We're just talking about semiautomatic weapons.

A I believe you can have an M-1 rifle. It's a semiautomatic rifle.

Q And you can legally possess that in the state of Oregon?

A I believe so, sir.

Q Any other types of semiautomatic weapons?

{2305}

A I don't know, sir.

Q If you were to see someone with a semiautomatic weapon of a, say, of a type other than an M-1 or a .22, would you feel that they had violated the law if they were in the state of Oregon?

A An automatic weapon as far as I understand --

Q Semiautomatic, sir.

A What caliber?

Q All right.

A I don't know what you are looking for.

Like I say I don't, I don't know that much about the guns that you're talking about. I'm not a gun nut.

Q But you are an officer of the Oregon State Patrol?

A Yes, sir.

Q Are you familiar with the laws, the criminal laws of the state of Oregon?

A Yes, sir.

Q All right. What semiautomatic weapons, what caliber semiautomatic weapons are illegal to possess by a citizen in the state of Oregon?

A I don't know what you want. I don't know the answer.

Q Do you know what a semiautomatic weapon is?

A Yes. An M-1 is a semiautomatic weapon.

Q There are other weapons that are semiautomatic, aren't there?

A I reckon.

{2306}

Q All right. Is it illegal to possess those other weapons?

A I don't know.

Q And you've been a police officer for eleven years?

A Right.

Q Okay. Now you mentioned on your direct examination that it is illegal to go hunting in the state of Oregon with a clip which is larger than a five round clip?

A I never used clips, sir.

Q Did you understand my question?

A You said it's illegal to go hunting with a clip of five rounds; is that right?

Q I'm asking, right, that was my question.

A It's illegal?

Q It is illegal to go hunting with a round --

A No.

Q No. What makes a clip illegal in use of hunting? Is it the number of rounds loaded in the clip, is it the size of the clip?

A I said semiautomatic weapon. An automatic weapon is illegal at deer hunting, sir.

Q Can you go hunting with an M-1 rifle?

A No, sir.

Q Why not?

A It's a semiautomatic weapon, sir.

Q You cannot hunt with any semiautomatic weapon within the {2307} state of Oregon?

A Right.

Q Are there federal Indian reservations in the state of Oregon?

A I believe some in Klamath Falls and some around McMinnville.

Q So there are federal Indian reservations in the state of Oregon?

A Yes, sir.

Q All right. Isn't it perfectly legal for an enrolled member of the tribe or a guest of an enrolled member of the tribe to hunt with anything which does not violate federal law on these federal Indian reservations within the state of Oregon?

MR. CROOKS: Your Honor, I'll object to this. It's completely immaterial. This incident did not happen on an Indian reservation. No connection or relevancy to this case, and I object to it for that reason.

MR. ELLISON: Your Honor, this was brought up on the direct examination by Mr. Crooks. I feel we are entitled to go into this area so that the jury has a full understanding what is legal and not legal within the boundary lines of the state of Oregon.

THE COURT: Overruled.

Q (By Mr. Ellison) Sir?

A I don't know what they have in a federal reservation, sir. We don't work on them.

{2308}

Q All right. So you're not aware of whether it's legal or illegal to go hunting with any kind of a weapon on the --

A I have no idea what they can do on there, sir.

Q Okay. And by the way when you observed the individuals in a Plymouth or around the mobile home, people were not engaged in hunting, were they?

A No.

Q All right. The photograph which is depicted on Government's Exhibit 61 on page 3, the bottom photograph, you stated that you believed that that weapon was illegal for hunting purposes; that correct?

A I said it was illegal.

Q Illegal for hunting purposes?

A Right.

Q All right. Is that weapon illegal for any other purpose?

A It isn't even legal in Oregon.

Q What makes it illegal?

A It's an automatic.

Q Do you know from your own personal knowledge that it is in fact an automatic weapon?

A No, I don't, sir.

Q Then what leads you to conclude that it is an automatic weapon?

A Just appears like it with a banana clip and et cetera to me.

{2309}

MR. ELLISON: Would the Government be willing to stipulate that the weapon portrayed at the bottom photograph is a semiautomatic weapon and not an automatic weapon?

MR. CROOKS: I have no idea. I won't stipulate. I have no idea what it is. There will be further testimony I assume that could come out.

Q (By Mr. Ellison) I show you what has been marked as Government's Exhibit 37-A. Does this, sir, appear to be an automatic weapon?

A I told you I'm not a gun nut, sir. I don't know that much about guns.

Q But you are a law enforcement officer?

A Right.

Q All right. If you were to see this weapon --

A I'd assume that's an automatic weapon, sir.

Q You would assume that that is an automatic weapon?

A Yes, sir.

Q Thank you.

You testified on direct examination that you and Officer Griffiths were, I believe at the Ontario office of the Oregon State Patrol with several FBI agents the morning after this incident?

A Yes, sir.

Q All right. Do you know how many FBI agents were present at that time?

{2310}

A There was two that arrived there first, sir.

Q All right. How many arrived after those two?

A A number of them, sir.

Q All right. Did you know who the first FBI agents were?

A Jacobs was one out of --

Q What was the name of the other individual?

A I don't recall.

Q All right. Now, you mentioned that several other individuals arrived?

A Yes, sir.

Q How many other individuals?

A I don't know.

Q More than ten?

A Yes. There may have been more than ten. I didn't count them, I didn't count them.

Q Did you know any of those FBI agents?

A No, I didn't.

Q How shortly, how soon after the incident did the first two FBI agents arrive?

A I told you that I thought it was probably around two or three. It was a few hours afterwards.

Q How long was it before the other FBI agents arrived?

A I don't have any idea. It was in the morning I suppose.

Q How many hours approximately after the first two agents arrived?

{2311}

A I don't really know. They didn't check in with me.

Q All right. Now, you stated that you knew the name of Agent Jacobs?

A I've met him once or twice. He's been up to our office, yes.

Q You don't know him personally?

A No, sir.

Q You were present at the search of the mobile home; is that correct?

A I was in the building.

Q All right. Were you on the building when the search was conducted on November 15, 1975?

A On the building? In the building?

Q Were you in the building where the mobile home was examined on November 15, 1975?

A Yes, I was in the building.

Q Who else was present during that examination, either in the van conducting the examination or outside of the mobile home within the building.

A Sergeant Zeller from our department was conducting the search of the mobile home.

A Was Officer Hansen present?

Q Yes, he was, sir.

Q Was he inside the mobile home with --

A I don't recall. He was in the area.

{2312}

Mr. Zeller was the one that was handling the search.

A We were just in the building.

Q All right. And there were FBI agents present on the 15th of November?

A Yes, sir, there was.

Q And do you know their names?

A I believe Agent Hancock was there and --

Q Was Agent Jacobs there?

A Yes, he was there, too.

Q All right. Any other FBI agents who were present whether or not you knew their names?

A There may be one or two more in there that came in periodically, yes.

Q All right. Do you know their names?

A No, I don't recall them, sir.

Q You don't recall them or you didn't know them?

A I just didn't know them.

Q All right. These were agents that you had never seen before?

A Yes, sir.

Q Okay. Were you present when any evidence was brought out the mobile home on the 15th day of November?

A There was evidence brought out, yes.

Q Did you see any of that evidence when it was brought out?

A I saw stuff brought out. I didn't pay that much attention {2313} to it. It was being handled by the investigators.

Q Did you see any of the objects portrayed on page 3 on Government's Exhibit 61 brought out on November 15, 1975 when you were present?

A Yes. I had seen a few of these items here.

Q Were they in the top photograph, the middle photograph or the lower photograph?

A This one right here (indicating).

Q All right.

MR. ELLISON: Let the record reflect that the witness pointed to the middle photograph on page 3.

Q (By Mr. Ellison) Is that correct, sir?

A Yes, sir.

Q Were there any weapons portrayed in that middle photograph on page 3 of Government's Exhibit 61 which are not reflected by that photograph?

A I don't understand what you mean.

Q You didn't understand the question?

A Right.

Q Are there any weapons which are portrayed or not portrayed on that middle photograph which you saw being brought out of the mobile home on November 15, 1975?

A The ones that I recall is the ones I pointed up to here in the corner, sir.

Q You didn't see any other weapons?

{2314}

A There was other weapons brought out, but those two I happen to recall.

Q Weapons no portrayed in that photograph?

A These weapons portrayed in this photograph?

Q Yes, sir.

A That's what I pointed to.

Q But are there weapons which were brought out of the mobile home on November 15, 1975 which are not portrayed in that photograph that you saw?

A There could be. I don't know.

Q All right. Did you see a weapon such as this brought out of the mobile home on November 15, 1975? This is marked Government's Exhibit 34-AA.

A I don't recall, sir.

Q You don't recall?

A I pointed to the two that I remember.

Q Were you present on November 16th when that Mobile home was examined?

A I believe I was there also.

Q All right. Were there weapons such as this brought out of the mobile home on November 16th?

A I don't recall. What I pointed to here was the ones that I happen to remember, sir.

Q All right. By the way, Officer Kramer, do you know what type of weapon this is (indicating)?

{2315}

A No, sir.

Q You've never seen this weapon before?

A I've seen it before, but I don't know what type of weapon it is, sir.

Q Is this a legal -- or is this an automatic, semi or semi- automatic weapon?

A I told you, I don't know what type of weapon it is, sir.

Q Were you present at any time in which the FBI conducted a search of the mobile home?

A I don't recall that I was there, no, sir.

Q Were you there on any day --

A They were, like I said, them agents that I told you about.

Q On the 15th and 16th?

A Yes, sir.

Q Did you see them conducting any investigation on those days?

A They're in the area. They were with us, but the one that was conducting the search of the mobile home was Sergeant Zeller.

Q Did you see any FBI agents enter the mobile home on the 15th and 16th?

A No. Not while he was in there conducting the search.

Q When he was not in the mobile home on the 15th and 16th did you see any FBI agents enter then mobile home?

A No, I didn't.

Q Were you present on the 15th and 16th throughout the total {2316} period of time at the vehicles were being searched by Sergeant Zeller?

A The total time?

Q Yes.

A No.

Q You left the building at some time?

A Yes.

Q So you have no way of knowing whether in your absence FBI agents may have gone into the mobile home?

A That's right.

MR. ELLISON: I have no further questions of this witness at this time.

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

THE COURT: You may step down.

MR. CROOKS: Your Honor, the next witness I'd propose to call, Mr. Biner has gone to see if he was not here earlier, if he is here, otherwise he would bring up another witness, Your Honor, and I will announce that at that time.

Next witness will be either Mr. Holmes or Miss Wrinkle.

THE COURT: Very well.

{2317}

MARIE ELSIE WRINKLE,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CROOKS:

Q Would you state your full name again for the record, please.

A Marie Elsie Wrinkle.

Q Marie, calling your attention -- well, first of all, where do you live?

A Ontario, Oregon.

Q Have you lived there all your life or most of your life?

A Not right in Ontario but northern.

MR. ELLISON: Can the witness be instructed to speak into the microphone because it 's --

Q (By Mr. Crooks) Calling your attention back to November 14 of 1975, did you know an individual named Clyde Holmes?

A Yes.

Q And was he your boyfriend at that particular period of time?

A Yes.

Q And calling our attention to approximately 11:30 of that day, 11:30 P.M., were you with Clyde Holmes?

A Yes.

Q And where were you?

A Out by the railroad tracks out past Ontario.

{2318}

Q Let me show you what's behind you marked as Exhibit No. 70 which is a large map with orange dots representing Ontario. Where were you by the railroad tracks with reference to Ontario itself, north, south, east, west, whereabouts from Ontario, the city of Ontario?

A South.

Q And about how far was it south of Ontario approximately?

A Two or three miles.

Q Two or three miles south.

Q Did you later learn of an incident that was supposed to have taken place on Highway 80?

A Yes.

Q And where were you from that, where you understood that incident occurred?

A North. About three miles I suppose.

Q So it was a little bit north. Was it straight north or was it east or west, if you recall?

A I don't know really.

Q So it was a ways away from that area?

A Uh-huh.

Q As you were parked in that area by the railroad tracks with Mr. Holmes, did someone come to your car?

A Yes.

Q And would you describe what happened.

A We were sitting there and all of a sudden somebody knocks {2319} on the driver's window so Clyde rolled down the window a little bit and asked him what he wanted. He said he wanted a ride and he said, "Where to," and said, "Down the road a few miles," and so Clyde told him, "Did you run out of gas?" And he goes, "Yeah" and he asked to give him a ride again and kept saying he wouldn't hurt us.

Q All right.

And how long do you suppose that Clyde talked to him, if you recall?

A 15 minutes maybe.

Q It was a few minutes that Clyde was talking to the individual through the window?

A Yes.

Q And then did you see the individual yourself, you know, what he looked like?

A I looked at him.

Q And could you describe him from your recollection at the time that you saw him what did you recall about him, his facial features, facial hair, whatever?

A His hair was kind of curly and a little bit bushy.

Q What else?

A That's about it really.

Q Do you recall if he had a moustache or whether or not he was shaved, clean shaven?

A No, I don't. I don't remember.

{2320}

Q Do you recall from his facial features what was your impression as to whether he was a white individual, a black, Indian, Mexican or what, or did you have any impression?

A Well, I presumed he was Mexican because we have a lot of Mexicans around there.

Q So your impression was that he was a Mexican looking individual as opposed to a white individual?

A Yes.

Q Caucasian individual.

A Yes.

Q What happened after Clyde had talked to him for a few minutes, what happened next?

A He asked him to walk away from the car and we had the car running and he just put it in gear and we drove off.

Q Do you know why Clyde did that?

A He didn't want to give him a ride.

Q And what happened next?

A Well, we got out on the road and we started going and the car started following us. Clyde got scared and started going faster and come to find out it was a policeman and he stopped us.

Q Clyde got frightened. Were you frightened of something else?

A Yeah.

Q And what was that?

{2321}

A What had happened.

Q After the policeman had stopped you, then what happened?

A Well, we told him what happened and so on and he told us that they were looking for somebody and he sent us to the police station.

Q So he took you to the police station?

A No. He sent us. He went back.

Q Sent you to the police station. What happened there?

A I didn't go in. Clyde went in and they talked to him for awhile and wanted to know who we were and that kind of thing.

Q So you and Clyde apparently, or at least Clyde had talked to the police. Did you talk to the police and give them your version also?

A Not at the time.

A few days later I talked to an FBI man.

Q You visited with the FBI a couple days later?

A Yes.

MR. CROOKS: We have no further questions.

CROSS EXAMINATION

BY MR. ELLISON:

Q Miss Wrinkle, I believe you stated this was about 11:30 at night.

A Somewhere around there.

Q On the 14th of November?

A Yes.

Q Were you in the front seat or the back seat?

{2322}

A Front.

Q You were in the front seat. Were you on the passenger side or the driver's side?

A Passenger.

Q Now is this vehicle that you're in, is it a convertible?

A No. It was Mustang.

Q You can't see through the roof at all?

A No.

Q And from the passenger side you were able to see the individual who came to the window?

A Yes.

Q He came on the driver's side?

A Yes.

Q And this individual told you after asking for a ride, "I'm not going to hurt you, I'm out of gas"?

A He kept saying over and over he wasn't going to hurt us, he just wanted a ride.

Q And you didn't give him a ride?

A No.

Q And you stated that there are many Mexican people in the area and you thought he might be of Mexican descent because of that?

A Yes.

Q Because of his general appearance?

A Yes.

{2323}

Q Is it unusual to see people or did you expect -- withdrawn.

Did you expect to see anyone at 11:30 P.M. by the railroad tracks?

A No.

Q You went there to be kind of alone?

A We were just driving around.

Q Did the person who knocked on the door or on the window of your vehicle by the driver's side interrupt you in any way?

A He just scared me.

Q But did he interrupt you in any way?

A No.

Q Any talking or having some kind of conversation?

A We were talking.

MR. ELLISON: I have no further questions.

MR. CROOKS: We have no redirect, Your Honor.

THE COURT: You may step down.

MR. CROOKS: Call Steve Barker.

STEVEN BARKER,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CROOKS:

Q Mr. Barker, could you state your full name again for the record, please.

A Steven Keasle Barker.

Q Where do you live, Steve?

A Ontario, Oregon.

{2324}

Q And have you lived there most of your life or in that area most of your life?

A No. I was living in California for most of my life.

Q Calling your attention back to November of 1975, where were you living at that time?

A On the K.S. & D ranch.

Q In Ontario?

A Eight miles south of Ontario.

Q Is there another town that actually is a little closer to where your ranch is?

A Yeah. This is four miles south.

Q And what's the name of that town?

A Nyssa.

Q And showing you the second orange dot where the word, "Nyssa," is, that would be the town that your ranch is more close to, is that correct?

A Yes, sir.

Q Calling your attention back to approximately the 14th of November, 1975, or shortly thereafter -- first of all, were you in residence at the ranch on the 14th?

A No, sir.

Q Where were you?

A Oakland, California.

Q And did you receive information concerning your ranch which concerned your residence?

{2325}

A Yeah.

Q Shortly thereafter.

Do you recall when you received that information?

A Uh-huh.

Q Approximately when was it?

A I think it was about the 16th or the 17th.

Q And insofar as your ranch or residence was concerned, would you briefly describe what type of residence it is?

A It's basically a four room tinder block house.

Q It's a small house located on the ranch?

A Uh-huh.

Q Did you have any of your personal effects in that area on the 14th of November of 1975?

A Uh-huh.

Q And what about an automobile of any type or any kind?

A I left my '71 Ford Ranchero out in front.

Q And how did you get to California then?

A My Volkswagen.

Q So your second vehicle was parked in front of the house presumably to remain there until you returned?

A Right, sir.

Q Did you own a 30-30 rifle during that period of time?

A Yes, sir.

Q I first hand you what has been marked as 67E and ask if that's a document you can identify?

{2326}

A Yes.

Q And what it?

A It's a form I signed when I bought the gun at the Lock, Stock and Barrel GunStore.

Q That's a form you signed and are familiar with?

A Yes.

Q And the original of this, of course, would be the records of the Lock, Stock and Barrel?

A Uh-huh.

Q As indicated by the stamp?

A Yeah.

Q You recognize your signature on it?

A Uh-huh.

MR. CROOKS: Offer 67E.

MR. ELLISON: No objection.

THE COURT: 67E is received.

Q (By Mr. Crooks) I now show you what has been marked as 67A and ask if that's something you can identify?

A Yes, sir.

Q What is that?

A My 30-30 rifle.

Q And would you compare, just so we're clear, the serial number of that as opposed to the serial number on 67E?

A Yeah.

Q And they are the same, are they not?

{2327}

A Yes.

Q Where was that rifle left on November 14 in 1975?

A In the closet.

Q And would this be in the same block house that you've talked about earlier?

A Uh-huh.

Q And with regard to that rifle, did you give anybody permission to use that in your absence?

A No, sir.

Q Did you give anybody permission to take that out of your house for any purpose during your absence?

A No.

Q You'll have to answer yes or no.

A No.

Q With regard to that rifle, when you returned to your residence was it there?

A No, sir.

Q And when was the next time that you saw that rifle from November 14 to the present?

A Right now.

Q And so the rifle had disappeared on or about the time you were in California?

A Yes, sir.

Q With regard to your automobile, did you receive some information concerning that?

{2328}

A Yes, sir.

Q And what was the nature of the information you received?

A Well, first my uncle called and said it was stolen, then I got word from, I believe it was the FBI that it was in Umatilla.

MR. ELLISON: Didn't hear the response.

THE WITNESS: First thing I heard my uncle called that my Ranchero was gone. Then the FBI informed me that they recovered it in Umatilla.

Q (By Mr. Crooks) Now would you take the pointer which you have behind you and point out on the map where Umatilla is.

A (Indicating.)

Q That would be the third orange dot in Oregon, is that correct?

A (Witness nods affirmatively.)

Q That would be almost on the Washington-Oregon border?

A Yeah. It's right on the border.

Q Approximately how far do you suppose that is, Steve, from Nyssa?

A It's 175, 200 miles. In that neighborhood.

Q And when did you next see your vehicle?

A It was about ten days later.

Q And where did you next see it?

A In the garage there at Umatilla.

Q And whose garage was it?

{2329}

A Oh, I can't remember the name of it. The garage was right there on the main street.

Q Let me ask you whose custody it was in?

A Custody of the garage as far as I know.

Q Were there any law enforcement officers that you dealt with in getting the vehicle returned?

A Just on the telephone. They had it all figured up before I got there because the time I was getting there I had to deal with the owner of the garage.

Q But you had dealt with the law enforcement officials in that area to get authorization to return your vehicle?

A Yes, sir.

Q Did you go and recover it?

A Oh, yeah.

Q When you returned to your residence, did you discover anything was missing other than your 30-30 rifle and your pickup?

A Yes, sir.

Q And what, as you best recall now, what other items were missing?

A Several items of clothing and some gas cans and a jack were the main items.

Q And was there any change in the physical doors, windows of the residence?

A Front window was broken on the door.

{2330}

MR. ELLISON: I didn't hear you.

THE WITNESS: Front door window was broken.

MR. ELLISON: Thank you.

Q (By Mr. Crooks) I would call your attention to the man sitting here at defense table with the black shirt and the vest type of thing at the very end. Do you know that man?

A No, sir.

Q Have you ever authorized that man to take your 30-30 rifle or your Ford automobile?

A No, sir.

MR. ELLISON: Objection, Your Honor. There has been no evidence presented in this courtroom that Mr. Peltier took that rifle or took the Ranchero.

MR. CROOKS: Your Honor --

THE COURT: Sustained.

MR. CROOKS: I can assure the Court they will be connected.

Q (By Mr. Crooks) Insofar as the Rancho is concerned, was there anything missing from the Rancho itself that you recall?

A No, sir.

Q Nothing that comes to mind?

A Nothing that was in the vehicle that I left there.

MR. CROOKS: We have nothing further.

{2331}

CROSS EXAMINATION

BY MR. ELLISON:

Q Mr. Barker were there any valuables in your home when you went to California?

A Yes, sir.

Q Were any of these valuables missing on your return to your home?

A Some possessions of mine were missing; yes.

Q Were they valuable?

THE COURT: Speak a little closer to the microphone.

Q (By Mr. Ellison) What would you describe as a valuable, sir, that was in your home?

{2332}

A The only thing I possessed was with me.

Q Do you have a TV in your home?

A Yes, sir

Q Did you have any money in your home?

A No, sir.

Q Did you have any jewelry in your home at any time?

A Not really.

Q Did you have anything that had any special significance to you other than the fact that it was a possession of yours?

A Just a few articles of clothing that I had.

Q Were these special articles of clothing?

A Yes. We, they had value to me, other than just the value of the clothing.

Q All right but aside from the value to you, did they have any special value?

A I guess not.

Q All right Were items of, say, high value or valuable other than the fact that they were personal possessions of yours, were they missing from your home?

A Not that I believe, no.

MR. ELLISON: Thank you. I have no further questions Your Honor.

MR. CROOKS: We have nothing further.

THE COURT: You may step down.

(Witness excused.)

{2333}

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

MR. ELLISON: Your Honor, there was some discussion at the bench when I heard your ruling on my objection, and I believe that you sustained my objection. I also moved to strike, and I was not sure whether the Court granted my motion.

THE COURT: I did not hear your motion to strike.

MR. ELLISON: All right. Let it go. Thank you.

THE COURT: Just a moment.

MR. ELLISON: I would like to move to strike.

THE COURT: Very well.

MR. ELLISON: And instruct the jury to disregard the statement and answer.

MR. CROOKS: I resist the motion to strike. One, it was passed up, but No. 2, this will be connected up. His fingerprints were all over the various items, and the two in specific that I noticed, and I don't think there is any question but we would tie it up with later testimony.

MR. ELLISON: But the fact remains that there is no evidence in the record at this time to support the question that was asked which would be stricken from the record and the answer stricken.

MR. CROOKS: I simply asked him if he authorized the guy to take the gun and we will show he did take the gun.

{2334}

His fingerprints were on the gun and on the car.

THE COURT: That is all.

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

THE COURT: The last question that was asked by counsel for the Government to which an objection was made will be sustained, The objection to that question was sustained on the grounds that there was no foundation for the question, and the motion has been made that the question and answer be stricken; and I have granted the motion, the question and answer is stricken.

MR. CROOKS: The Government next calls Mr. Eldon Olson.

ELDON OLSON,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. CROOKS:

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

A Eldon Olson.

Q And where do you live, sir?

A Umatilla, Oregon.

Q What is your present occupation?

A I am police chief of the City of Umatilla.

Q And calling your attention back to November, period of {2335} November 14th, 15th, 16th and 17th, what was your occupation at that time?

A The same, a police chief in the city.

Q All right. Could you point out, turn behind you, Mr. Olson, take the pointer and point out where on that map Umatilla, Oregon appears?

A (Indicating) Right here.

Q All right. How long have you been the police chief of that city?

A Two years.

Q All right. Calling your attention back to November, the same period, November 14th through 17th, did you have occasion to make an investigation into Ford Ranchero vehicle?

A Yes, I did.

Q And what day did that occur?

A On the 17th.

Q All right, on the 17th. Would you describe in general or rough terms what your involvement was with regard to the Ranchero?

A It was discovered, the Ranchero, at the edge of the city, early that morning on the 17th.

Q And then what happened?

A We checked to see if it was a stolen vehicle. We got no answer back that it was a stolen vehicle at that time.

Q You said you checked to see if it was a stolen vehicle. {2336} How did you check that?

A We had a dispatcher run an NCIC check through the computer.

Q What you are referring to as the NCIC is the National Crime Information Center, is that correct?

A That's correct.

Q This is hooked into a centralized computer wherein various items of stolen property, fugitives and that sort of thing, are readily available to local police officers, is this correct?

A That's correct.

Q All right. With regard to the first NCIC check, what was the result?

A There was negative result on it.

Q And then at a later time did you have occasion to make a further check?

A Yes, I did.

Q And what was the result of that?

A We got positive results, it was a stolen vehicle.

Q Was this still on the 17th?

A Yes, it was.

Q And approximately what time of the day was that?

A 10:00 p.m.

Q All right, and then what did you do after you got a positive result?

A We secured the area of the vehicle and waited for the {2337} state police to arrive.

Q All right, and then what happened to the vehicle?

A It was towed back into the city and secured in the inside storage area.

Q All right. Did you ascertain who the owner of that vehicle was, the registered owner?

A Yes, we did.

Q And who did that turn out to be?

A A Mr. Steven Barker.

Q Was he contacted or attempted to be contacted concerning the whereabouts of the vehicle?

A I have no knowledge whether he was or wasn't.

Q You didn't do that yourself?

A No.

Q All right. In any event, at some later time was the vehicle released to Mr. Barker to your knowledge?

A Not to my knowledge, no.

Q So you have no actual knowledge of whether he came and got it or not?

A No, I don't.

Q In any event, was the vehicle secured in a secure area?

A Yes, it was.

Q And where was that?

A It was at Umatilla Automotive, directly across the street from the police station.

{2338}

Q And what happened to the vehicle next, if you know?

A We turned it over to Sergeant Zeller of the Oregon State Police for processing.

Q And to your knowledge did Lieutenant Zeller make some processing and investigative examinations of the vehicle?

A Yes, he did.

Q All right, and then do you know what happened to the vehicle after that?

A No, I don't.

MR. CROOKS: All right, no further questions.

MR. ELLISON: We have no questions of this witness, your Honor.

THE COURT: You may step down.

(Witness excused.)

THE COURT: The Court is in recess until 3:25.

(Recess taken.)

{2339}

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

MR. TAIKEFF: Excuse us, your Honor.

THE COURT: Mr. Taikeff, will you approach the bench on the visitation matter you mentioned?

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

THE COURT: The Marshal has informed me that he has made arrangements for you to have visitation from 7:00 to 8:30 tonight, tomorrow night and Friday night.

MR. TAIKEFF: Thank you, your Honor.

THE COURT: For one attorney and one non-attorney.

MR. TAIKEFF: Yes, your Honor.

THE COURT: And the Sheriff has asked that because of the personnel problems that the Sheriff has, he asked that a Deputy Marshal be provided; and Mr. Warren informed me that he is providing a Deputy Marshal.

MR. TAIKEFF: To stand guard outside, not to be in the room, I assume?

THE COURT: Not to be in the room.

MR. TAIKEFF: Thank you, your Honor.

MR. LOWE: Thank you, Judge.

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

{2340}

MR. ELLISON: Your Honor, before the Jury is brought in, may I approach the bench?

THE COURT: If it is on the initial witness, why don't you just speak from counsel table?

MR. ELLISON: Your Honor, defense counsel is convinced that the Government through the testimony of Mr. Zeller will intend to introduce a 357 magnum which I believe they will contend belonged to Special Agent Coler at the time of his death.

We believe that it will be impossible for the Government to show the proper chain of custody for this particular item; and we would, therefore, ask for voir dire outside of the presence of the jury to this effect before there is any mention at all of this particular .357 magnum to the jury.

MR. CROOKS: Well, No. 1, counsel has already stipulated, No. 1, that this was Coler's weapon; and No. 2, they have never indicated to us that there was a chain problem on this weapon; and No. 3, there is no chain problem because this weapon was found by Mr. Zeller and it was examined by him, and he can identify it as the weapon he found. It really has to go no further than that.

I assume you are talking about the same one I am. It was found by him in a paper sack and he could identify the object. I don't follow counsel's --

{2341}

THE COURT: (Interrupting) My notes indicate that was the subject of stipulation between the counsel.

MR. CROOKS: Yes, it was, your Honor. That has been in the file, stipulated that's Coler's weapon. I don't follow what Mr. Ellison's point is.

MR. ELLISON: Your Honor, we have just again checked our records, and Mr. Crooks is correct. There is the stipulation that it was -- the .357 magnum was the one that belonged to Special Agent Coler.

THE COURT: Very well. The jury may be brought in.

MR. CROOKS: While we are waiting for the jury, our next witness will be Mr. Zeller and I believe he is right outside in the hall.

THE COURT: Wait until the jury comes in.

(Whereupon, at 3 :30 o'clock, p.m., the jury returned to the courtroom, and the following further proceedings were had in the presence and hearing of the jury:)

THE COURT: You may call your next witness.

MR. CROOKS: Call William Zeller.

WILLIAM PORTER ZELLER,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CROOKS:

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

{2342}

A William Porter Zeller.

Q And where do you live, sir?

A In Salem, Oregon.

Q And what is your employment?

A I am an Oregon State Policeman, employed at the Oregon State Bureau of Identification in Salem.

Q And how long have you been with the Oregon State Police in total?

A Been employed since 1953, would be about 24 years.

Q And how long have you been attached principally to the Identification Division?

A Since 1963.

Q What are your principal duties with the Identification Division?

A At the present time I am the Supervising Sergeant of the Latent Fingerprint Section of the Identification Bureau. I go to crime scenes and process crime scenes for fingerprints. We compare the fingerprints with suspects and elimination of persons in those cases, and make court appearances on fingerprint cases.

Q All right. With regard to the events of November 14th, 1975, did you have occasion to become involved in the search of certain vehicles?

A Yes, I did.

Q Now, Mr. Zeller, I would like to hand you what has been {2343} marked but no yet introduced into evidence as Exhibit No. 61, calling your attention to the first page, and ask whether or not you can identify the vehicles depicted therein?

A (Examining) Yes, I can.

Q All right, and what are those vehicles, and explain how you became involved in the investigation of them?

A The pictures lettered A, B, and C, are all pictures of a recreational vehicle which was in a place in Ontario called Art's Service. I became involved in that I processed this vehicle for fingerprints.

The photograph marked "D", is a stationwagon which I processed immediately after I processed the recreational vehicle, also for fingerprints.

Q All right. Now, with regard to those vehicles at the time that you entered the vehicles, were you acting pursuant to any written authority, and if so, what?

A I am not sure. There is probably a search warrant, but I don't know. I don't remember.

Q You were in the company of other officers, were you not?

A I was.

Q For the State of Oregon?

A I was.

Q All right. At the time that you examined the vehicles, would you give the approximate time that your examination was started or commenced?

{2344}

A It was approximately 4:00 o'clock on the afternoon of November 15th.

Q All right During the course of your examination did you in fact develop certain latent fingerprints from the interior or objects contained within those vehicles?

A Yes.

{2345}

Q I hand you what has been first marked as Exhibit 38-B and ask you if you can identify that?

A Yes, I can

Q And what is it?

A This is a paper sack which I removed from the recreational vehicle. It was located under the passenger seat at the front of the vehicle.

It contained a revolver and a knife.

Q All right. I now hand you 35-A. Ask if you can identify that?

A Yes, I can

Q And what is that?

A This is the revolver that I removed from State's Exhibit 38-B, the paper sack.

Q All right. From your examination of that revolver what type of revolver is it?

A This is a Smith and Wesson .357 magnum.

Q And this was in the bag which is Exhibit 38-B at the time you found the bag?

A Yes.

Q All right. And these items were found, 38-A and 38 -- excuse me, 38-B and 35-A were found by yourself?

A Yes, they were.

Q All right.

MR. CROOKS: United States will offer 35-A and 38-B.

{2346}

MR ELLISON: Your Honor, we have no objections to these, of the exhibits, and we've already stipulated that the pistol is that of Special Agent Coler.

THE COURT: 38-B and 35-A are received.

MR. CROOKS: Your Honor, so the record is clear, I would like to at this time read part of the filed stipulation particularly Exhibit No. 30, or paragraph number 30. "It is hereby stipulated and agreed that the following firearms were in the possession of respective FBI agents on June 26, 1975 when they entered the Jumping Bull area shortly before noon and prior to their death. Particular one here, Exhibit 35-A, Smith and Wesson 19, .357 magnum -- .357 magnum, four

inch barrel revolver, serial number K-62Z056, and that this weapon was in the possession of Special Agent Jack Coler."

Q (By Mr. Crooks) With regard to 38-A -- or 35-A and 38-B, were fingerprints developed on either of these two items by yourself?

A Yes. I developed fingerprint on the Government's Exhibit 38-B.

Q I now hand you 38-E, ask if that is something you could identify?

A Yes it is.

Q What is it?

A This is a photographic negative of the fingerprint that was developed on Government's Exhibit 38-B, the paper sack.

{2347}

Q And with regard to that fingerprint, since this is the first one, would you develop, or relate very briefly the process by which that negative was developed. I mean, how is the print raised from the sack and come to be in the negative?

A The process used to develop this particular fingerprint is a chemical process. We use a chemical called nynhydrin. Mix it with liquid acetone and a six per cent solution.

In this particular case I dipped this sack in the nynhydrin solution. I let it dry and then heated it. The nynhydrin reacts to the amino acids, or the proteins in the perspiration from a person's hand, and the fingerprint that resulted here was developed in a purple color after the heat was applied to the paper sack.

Q All right. In the negative that you have before you marked as Exhibit 38-E is in fact the fingerprint which is contained on the paper sack; is that correct?

A It is.

Q And where is that fingerprint located on the sack, is there some indication?

A Yes. It is near the top of the sack. I have circled the fingerprint in black and have written my case number and initials underneath the fingerprint.

Q And is that same indication made on the negative itself?

A It is.

MR. CROOKS: United States offers 38-E.

{2348}

MR. ELLISON: We have no objection.

THE COURT: 38-E is received.

Q (By Mr. Crooks) In your inspection of the vehicle, particularly the recreational vehicle, did you examine the microphone or a microphone of that vehicle?

A Yes, I did.

Q And what type of microphone that you examined?

A It is a microphone to a small radio. Appeared to be a 2-way radio located behind the driver's seat.

Q And would this what's commonly referred to now as a citizens band radio or a CB radio as best you can recall?

A Yes. As much as I could tell from it. I don't know much about C.B. radios. I don't own one, but it appeared to be that type of radio.

Q Did you examine the microphone of that radio to ascertain whether or not you could develop a fingerprint?

A Yes, I did.

Q I now hand you 38-F, ask if you can identify that?

A Yes, I can.

Q What is that?

A This is the photographic negative of a fingerprint which I developed from the microphone from that radio.

Q And what process was used to develop this fingerprint?

A This was a dusting process in which I took a fine-haired brush, dipped it in some grey-colored powder and brushed over {2349} the surface of this microphone.

The grey powder adhered to the perspiration left on the microphone from the ridges of the finger that the person touched to it, leaving the outline of the finger in a grey color.

Q All right. And does 38-F fairly and accurately represent the fingerprint that you did develop?

A Yes.

MR. CROOKS: Offer 38-F.

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

THE COURT: 38-F is received.

Q (By Mr. Crooks) Now, again, so we're clear, this was developed on the recreational vehicle also?

A That's right.

Q All right. In examining for fingerprints I hand you Exhibit 40-A. Ask if that's something you've seen before?

A Yes, it is.

Q And where was that found?

A This was found in the Plymouth station wagon.

Q And were you able to develop a fingerprint on that?

A Yes, I was.

Q I hand you what has been marked as 40-D, ask if you can identify that?

A Yes, I can.

Q What is that?

{2350}

A This is a photographic negative of the fingerprint on the Government's Exhibit 40-A. In particular the fingerprint on top of the frame.

Q And again these items, or the revolver found in the Plymouth as opposed to the recreational vehicle?

A That's right. In the Plymouth station wagon.

Q All right.

And that was a print, or 38-D is a print that you can identify a having been reproduced from examination of 40-A?

A Yes, it is.

MR. CROOKS: United States will offer 40-A and D.

MR. ELLISON: We have no objection.

THE COURT: 40-A and 40-D are received.

Q (By Mr. Crooks) Mr. Zeller, during the course of your investigation of this entire matter were you called upon to make a photograph or a fingerprint examination of any areas other than the station wagon or the recreational vehicle?

A Yes, I was.

Q And where did you go to make further identifications or examinations?

A Well, in Ontario I went out of town to a farm house which I believe was owned by Steve, I can't remember the last name. Anyway it was a farm house outside of town which had been apparently burglarized.

Q And when you arrived at that farm house what basically, {2351} would you describe what you saw and did.

A As we observed that the farmhouse had been broken into, I followed the investigator through the house. We looked it over and I then processed the farmhouse for fingerprints.

Q And did you find identifiable fingerprints at any particular location?

A Yes. I found one fingerprint in the farmhouse which was identifiable.

Q And where did you find that?

A That was on the door to the refrigerator on the outside.

Q Can you state what that fingerprint appeared to be? I mean, what type of print was it as you observed it?

A A refrigerator print.

Q Maybe --

A Nothing special about it that I --

Q Let me show you first Exhibit No. 63-B and ask if you can identify that?

A Yes, I can.

Q All right. With regard to that would you state how that fingerprint was developed?

A This is a fingerprint developed in black fingerprint powder, similar to the manner in which I developed a finger on the revolver, excepting the color of the fingerprint powder was black rather than grey.

Q All right. What time, was trying to get at, did you see {2352} anything on the door of the refrigerator that was visible immediately when you observed it, and if so what?

A I could observe some blood on the refrigerator door. However, the fingerprint itself was not in blood.

Q Okay. Apparently missignaled.

The fingerprint itself was not a bloody fingerprint?

A It was not.

Q All right. But there was blood that you observed in the refrigerator door?

A Yes.

MR. ELLISON: Your Honor, I would object to Mr. Crooks repeating the witness's answers.

THE COURT: Sustained.

MR. CROOKS: United States will offer Exhibit 63-B.

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

THE COURT: 63-Baker, B?

MR. CROOKS: B as in Baker, Your Honor.

THE COURT: Thank you.

63-B is received.

{2353}

Q During the course of your investigation, were you called to any other location?

A Yes, I was.

Q Where was that?

A I was in Hermiston, Oregon. Excuse me. Umatilla, Oregon.

Q What were you called to examine there?

A I was called to examine a Ford Ranchero pickup.

Q And did you do so?

A Yes I did.

Q And where is this Ford Ranchero pickup located in Oregon, if you recall?

A It was at Umatilla and I believe the name of the garage was Umatilla Auto.

Q When you arrived, who admitted you to the garage area and pointed out the vehicle, or however that was done?

A I arrived with another state police officer. The owner arrived there. The owner of the garage arrived approximately the same time we did. He unlocked the garage and let us in and indicated the pickup that had been brought in previously.

Q Did you examine the pickup for fingerprints?

A Yes, I did.

Q I hand you Exhibit No. 63A and ask if you can identify that.

A Yes, I can.

Q What is it?

{2354}

A This is the photographic negative of a fingerprint which I developed on the window of the driver's side of the vehicle, on the inside of the window.

Q On the inside of the window?

A Yes. The side of the window.

Q And was this process that you used there the same as you described earlier on the gun and the microphone?

A Same process.

Q And does 63A fairly and accurately represent the finger- prints which you did develop?

A Yes, it does.

MR. CROOKS: Offer 53A.

MR. ELLISON: I have no objection Your Honor.

THE COURT: 63A is received.

MR. CROOKS: We have no further questions.

CROSS EXAMINATION

BY MR. ELLISON:

Q Officer Zeller -- by the way, are you a sergeant still?

A I am a sergeant.

Q Still sergeant.

Sergeant Zeller, you stated some of your experience with law enforcement in general and your fingerprint work particularly and I would just like to review it a little bit so that the jury can have an understanding as to how qualified and expert you are. I believe you stated that you are now the supervising sergeant with the Latent Fingerprint Bureau of {2355} the Oregon State Police?

A The Latent Fingerprint Section of the Identification Bureau run by the Oregon State Police.

Q You are in supervisory capacity?

A I am.

Q Yet you also conduct investigations yourself?

A Yes.

Q And these investigations include your going to the scene, lifting any prints that may be available or retrieving evidence to lift prints perhaps at another location or more suitable location as well as taking comparisons on prints and testifying in court, is that correct?

A Yes.

Q And you've been with the fingerprint section since 1963?

A Yes, sir.

Q Approximately 14 years?

A Yes.

Q Now one thing I was a little curious about during your direct examination, Sergeant Zeller, was that you would be handed a fingerprint negative by Mr. Crooks and you would hold it up to the light and you would know where you received a fingerprint from and I would like you to look at the fingerprint and ask you, aside from looking at the identification number is there any way that you can tell where that fingerprint was lifted?

{2356}

A Yes.

Q Would you please tell the jury how?

A There is a image in dark on the negative which has a number written on it, 29015Z-11. The number 29015 would indicate that the fingerprint came from the particular case that I was working on. The letter Z is in my initial so I can distinguish fingerprints from those that other people in the Latent Fingerprint Section have developed. The number 1 is the number of the individual fingerprint that I developed in rotation starting from one on through.

Q And number 11 is what? Where was this print taken from?

A This particular fingerprint was taken from the radio microphone in the recreational vehicle.

Q Where was fingerprint number 13 taken from?

A I'll have to refer to my notes. May I do that?

Q In other words, without referring to your notes you cannot identify a fingerprint other than those which Mr. Crooks showed you?

A Some of then I can; some of them I cannot.

Q No. It won't be necessary for you to refer to your notes. Thank you.

Just for purposes of clarification, before I really get into my cross-examination, it's your testimony you found eight fingerprints on the paper sack, is that correct, that contained the .357 magnum?

{2357}

A I found one fingerprint which contained a sufficient amount of detail for identification purposes.

Q Was this the only fingerprint you found on that sack?

A It was the only one I remember. I don't keep any record of the fingerprints that I feel are not valuable for identification purposes.

Q You feel there was only one print of value on that paper bag?

A Yes.

Q So you found one print on the paper bag.

A I believe you said you found one print on the microphone.

A I believe there was just one print on the microphone.

Q And you found one print on the .44 Ruger?

A No. I found more than one fingerprint on the .44 Ruger.

Q How many prints did you find on the .44 Ruger?

A I believe there are three fingerprints on the Ruger.

Q Did you in your position as a supervising sergeant in the Latent Fingerprint Section, you understand the great care and accuracy which must be, which must accompany your work, is that correct?

A I'm aware that you have to be accurate, handle evidence carefully.

Q And this is the manner in which you perform your duties?

A That's the manner in which I try, certainly.

{2358}

Q You feel you live up to your expectations?

A I think so.

Q And you understand that the matter which you're now testifying is a very serious matter, don't you?

A I certainly do.

Q And you understand that as far as what work you did on November 15th and thereafter, as well as the work that you have done in testifying in this case, that is very important?

A Yes. I believe it is.

Q And you've given testimony and your statements on this incident a number of times, haven't you?

A I have.

Q And you have been very careful and very truthful with each one of those instances?

A I have testified to the best of my recollection at all times.

Q I'd like to begin with your examination of the mobile home on November 15, 1975. You testified, I believe on direct that you conducted an examination of the mobile home at that time.

A I did conduct the examination.

Q And I believe you arrived at approximately 4:00 o'clock.

A That's an approximate figure but it's the best I can remember.

Q And this was at Art's Garage?

{2359}

A I believe it's called Art's Service.

Q This is a garage now?

A It is a garage.

Q Was it a garage, a commercial establishment?

A Certainly. Yes.

Q Was it in commercial operation at the time in which you made your examination of the vehicle?

A The garage was locked.

Q It is not a type of garage in which there were mechanics working around the time?

A It was locked and we were the only ones there.

Q When you say, "we," who else was with you on November 15 at approximately 4:00 o'clock when you went to examine the mobile home?

A I can't remember everyone's name. However, there were a couple state police officers and I think one or two FBI agents.

Q Do you recall the names of the Oregon state police officers?

A I believe Ed Hanson was there, probably Corporal Kramer.

Q Does Officer Hanson work also for the fingerprint section?

A He does not.

Q Okay.

He's a regular patrol officer.

A No. I believe he's an investigator.

Q And you recall the names of any of the FBI agents? I {2360} believe you said one or two were present.

A I believe Steve Hancock was there. I don't remember the names of any of the other FBI people that might have been there.

Q Does Agent Jacob refresh your recollection?

A Could be, but I'm not sure.

Q Do you know who Agent Jacob is?

A I might know him if I saw him. I don't recall.

Q When you arrived at the garage, was there anyone there?

A No.

Q The garage was locked?

A It was.

Q And who let you into the garage?

A I believe Officer Hanson had a key as I recollect.

Q Did you have any indication that anyone was standing guard or watch over the vehicle or was it simply locked in a garage?

A As I remember it was just locked.

Q And this was 4:00 P.M. on November 15?

A Approximately.

Q Do you know what time that vehicle entered that garage?

A No.

Q You have no idea how many hours it may have been there in the lock garage but unattended?

A I don't know.

Q Were you the first person who entered the mobile home for {2361} examination?

A When we entered the locked garage, I was the first person that went into it.

Q And to your knowledge were you the first person of any law enforcement agency to enter that mobile home?

A I was after we got into it while I was there; yes.

Q Do you have any knowledge as to whether any other law enforcement officer may have entered that home prior to your arrival?

A I have heard from other sources that it was checked on the highway before it was towed into the garage.

Q You have no way of knowing whether or not anybody went into that mobile home prior to your getting into it?

A No, I don't.

Q Now you found several items in that mobile home, did you not, some of which you testified to today on direct?

A Yes.

Q And one of these items was the .357 magnum which the defense has stipulated was the weapon belonging to Agent Coler, the one which is before you now?

A Yes.

Q Did you test that firearm for fingerprints?

A Yes, I did.

Q Where did you test for fingerprints?

A I tested the complete outside of the revolver.

{2362}

Q At what location?

A There in the recreational vehicle.

Q Did you test the paper bag in the recreational vehicle?

A No, I didn't.

Q But you tested this particular revolver there?

A Yes.

Q And you didn't find any fingerprints of value on that revolver, did you?

A I did not.

{2363}

Q Did you find any other paperbags in the mobile home?

A Yes.

Q And did you test these paperbags for fingerprints?

A I did.

Q Did you test these paperbags at the scene, or did you also remove them from the mobile home?

A I removed them also.

Q So there was nothing special about this particular bag as opposed to the other bags?

A I could certainly distinguish this bag from the other bags.

Q In that there was a revolver found in this one?

A Yes. Also the other bags were double bags, or one bag inserted, one bag in the other bag. There were two such bags, that had two bags apiece.

Q Is it a standard practice to remove paperbags from the location in which you are examining in order to do the nynhydrin test?

A Yes, it is.

Q Do you do this with all paper objects, or is it just paperbags?

A In general all paper objects. However, there are certain exceptions.

Q All right. Were any of these exceptions with the items that you examined on November 15th?

A Yes.

{2364}

Q And which items were these?

A Some items -- maybe I better ask you just -- I think I am confused by the question, excuse me.

Q O.k. Were there any other paper objects which you recovered from the mobile home on your examination on the 15th that you tested at the scene perhaps and did not take in an for a nynhydrin test to the laboratory?

A Yes.

Q Would you please tell us which items these were?

A I believe that there were items removed from the cupboard, such as cereal boxes in general, boxes which had a smooth, slick finish, that are of paper or cardboard material, that I tested at the scene and either did or did not remove for evidence.

Q Now, you removed this paperbag.

Did you do any special procedure in order to remove this bag without adding any fingerprints to it?

A I removed it by placing my hand inside the bag, and removing it from the vehicle, placing it in a special location where I put all the evidence that I was to remove back to the Bureau.

Q Now, when you left the mobile home that day, where did you take the evidence that you seized on that particular day?

A I took it to the Ontario State Police Office, to the evidence room.

{2365}

Q And what time approximately did you arrive?

A I am not sure what the time was. It was after dark.

Q Approximately 9:30?

A It could have been around 9:30, I am not sure.

Q These items which you took to the evidence room, they were items which were in your custody?

A Yes.

Q And were you working at this time out of the Ontario office, or were you working out of Salem?

A My headquarters is out of the Salem office. However, I had gone down to Ontario, and I had stayed there overnight.

Q You were called there particularly for this particular instance or this particular investigation?

A Yes.

Q All right. Did you have a key to this evidence room?

A I did not have a key. However, I could obtain one on request.

Q All right. So you deposited evidence that was in your custody in an evidence room which was locked, to which you didn't have a key?

A Yes.

Q Who had a key to this room?

A I believe that Officer Hansen had a key.

Q Are you aware that other persons also had keys to this room?

{2366}

A I believe the supervisor of the station also had a key.

Q And when was the next time that you returned to this evidence room after depositing the items that you had seized on November 15th, 1975?

A I am not sure, but I believe that it was next day.

Q It was about 24 hours later?

A It is possible that I might have gone there the next morning, but I just really don't recollect.

Q You testified in another matter concerning this incident?

A Yes, I have.

Q And was that matter in the extradition proceedings for Mr. Peltier in Canada?

A I did testify there.

MR. ELLISON: May I approach the witness, your Honor?

THE COURT: You may.

Q (By Mr. Ellison) I ask you to read these two pages. I ask the witness to read the two pages which are pages 659 and 660 of Volume 3 of the extradition proceedings, dated May 11th, and see if that refreshes your recollection.

A (Examining).

MR. CROOKS: Which pages are you referring to?

MR. ELLISON: 659 and 660.

A (Examining) I have read the pages.

Q (By Mr. Ellison) All right. Does that refresh your recollection?

{2367}

A Yes. I still don't remember for sure, but I probably had memory at that time and it does say that I did go back to the evidence room approximately 24 hours later.

Q Did you have any idea how many individuals and perhaps how many times those individuals went into and out of that evidence room during that 24 hour period?

A I don't know.

Q So you deposited the paperbag in which you found the .357 magnum in that evidence room on November 15th?

A Yes.

Q Did you also place that .357 magnum which has been identified, I believe, as Government's Exhibit 35-A in the evidence room the same time?

A At the time that this came in, it was in the joint custody of Officer Hansen and myself. I believe that he probably put it in some particular spot.

Q You did not see it deposited then in the evidence room?

A I think I saw it deposited.

Q Was the time that that .357 magnum was deposited in the evidence room, that was on November 15th, is that correct?

A Yes.

Q When was the next time you saw that .357?

A I am not sure.

Q Did you take that .357 magnum to the laboratory with you in Salem?

{2368}

A No.

Q So far as you knew, say as of November 17th, 1975, it was still in the evidence room in Oregon, Ontario, Oregon?

A Yes.

Q I believe your testimony on direct was that you dusted the radio microphone in the mobile home which was behind the driver's seat, and that you found a latent print, is that correct?

A I think that's right.

Q Did you find just a single print?

A I found only one fingerprint which was in my opinion identifiable.

Q And this print was taken to the Oregon State Police Office in Ontario, Oregon; the actual radio microphone was taken to the State Police Office in Ontario?

A Yes.

Q Did you ever take that microphone to the lab in Salem?

A Yes.

Q When did you do that?

A When I returned, I believe it was on the 17th.

Q And the .44 Ruger which you found, I believe, in the Plymouth stationwagon?

A Yes.

Q Did you dust it for prints while it was in around this Plymouth stationwagon?

{2369}

A Yes.

Q Tell me Sergeant Zeller, is it difficult very often to take fingerprints from the metal of a weapon because of the gun oil which is usually surrounding the metal?

A For some reason or other if the metal is oily, it is extremely difficult to dust for fingerprints. It can be observed at times. However, not all weapons are oily. I might say we have a poorer ratio of success on weapons.

Q You have a poorer ratio of success?

A Yes.

Q You did manage to find several fingerprints on the .44 Ruger?

A Yes.

Q And one fingerprint on the paperbag, as well as other items?

A Yes.

Q What was the length of time that you spent on November 15th, 1975, in examining the mobile home?

A Well, it would be approximately from 4:00 o'clock until after dark, and I am just not sure what hour we left the garage.

Q All right. Did you finish your examination of the mobile home that night?

A I did not.

Q You had to return the next day?

{2370}

A Yes.

Q How is the garage secured upon your leaving?

A It was locked.

Q All right. Was there anyone posting guard?

A Not that I know of.

Q Were there other items in the mobile home which you had not had an opportunity to examine yet?

A There were.

Q And did you stay in the mobile home the entire four to five hours, or did you have to leave from time to time?

A I had to leave from time to time.

Q Why was this?

A The mobil home had been shot with the tear gas gun, and it caused my eyes to burn, and I had to leave to relieve the stress on my eyes.

Q Did this hamper your work at all?

A Yes, it made me leave from time to time.

Q Didn't hamper your observations at all within the mobile home?

A When it hampered my observations, I left and came back when I could see better.

Q Did you see a number of firearms in the mobile home aside from the .357 magnum?

A Yes.

Q Sergeant Zeller, do you know what this is, marked as {2371} Government's Exhibit 34-AA?

A It appears to be an automatic weapon.

Q After examining the weapon, do you still feel it is an automatic weapon?

A (Examining) Yes.

Q Did you see a weapon such as this in the mobile home?

A I believe that I did.

Q This is an AR-15?

A I see a tag on it that says AR-15. I am not really familiar with AR-15's

(Counsel confer.)

Q (By Mr. Ellison) Sergeant Zeller, when I showed you the AR-15, you remarked that it was an automatic weapon. What prompted you to say that it was an automatic weapon?

A It just looked like an automatic weapon to me.

Q Looked similar to a M-16?

A Now, I've probably seen a M-16. I just don't recall what it looks like.

Q All right. Prior to your examination of the mobile home on the 15th of November, did you have an occasion to examine another .357 magnum?

A Yes.

Q And do you know where that .357 magnum was found?

A Not of my own knowledge.

Q But do you know where that .357 magnum was found?

{2372}

A No, I don't know.

Q I would like to show you this report and see if that refreshes your recollection (indicating) at all as to where that .357 magnum was found.

A (Examining).

Q Use this copy. I place before the witness what has been marked as Defendant's Exhibit 139 for identification. That's the same as this (indicating).

A Yes. I see on somebody's report, I don't know whose report, that --

MR. CROOKS: (Interrupting) Excuse me, Bill.

Your Honor, I will object to this. If the witness knows or if his memory is refreshed, I have no objection, but if he is simply reading somebody else's report, then I do object. It is not in evidence, and it is not the proper way to introduce this evidence.

{2373}

THE COURT: Sustained.

MR. ELLISON: Yes, Your Honor, I did not ask to read the report, I simply asked him to refresh his recollection.

Q (By. Mr. Ellison) Is your recollection refreshed by that document?

A It is not.

Q Do you know a man by the name of Jim James?

A I know who he is.

Q All right. Did Jim James give you a .357 magnum?

A No, he did not.

Q Did you receive a .357 which you learned at sometime later was found by a man by the name of Jim James?

A I was told that he had found a .357 magnum.

Q And were you told where he found it?

MR. CROOKS: Your Honor, I object to this as hearsay. This man states that he has no personal knowledge where any .357 was found.

I object to going into recitation as to what Mr. James may or may not have told somebody who told this witness.

THE COURT: Sustained.

Q (By Mr. Ellison) You examined that .357 magnum. Were you, did you check to see if the weapon was loaded?

A Are you referring to Government's Exhibit 35-A?

Q No. The weapons found by Jim James which you examined prior to examining the mobile home on November 15, 1975

{2374}

A Indeed it was found by him. I did examine a .357.

Q All right. Did you examine to see if it was loaded?

A I'm sure that I did.

Q Isn't it a fact, sir, that one round of that .357 magnum had been fired?

MR. CROOKS: Your Honor, I'll object to this. Counsel is testifying. If he wishes to ask the witness whether one round is fired, he's stating something into the record which is the improper way to do it.

MR. ELLISON: Your Honor, I believe I did just ask the witness if one round was fired.

THE COURT: The objection is sustained.

The jury will recall that what I previously told you today that when an attorney makes an assertion that is not supported by evidence it should be disregarded.

Q (By. Mr. Ellison) All right, sir. On November 16th of 1975 I believe you stated a few moments ago that you went back to examine the mobile home because you did not finish your examination on the 15th of November; is that correct?

A Yes.

Q What time did you return to the mobile home?

A I'm not sure. It was either late morning or early afternoon.

Q And how long did you stay during that examination?

A I would say approximately, until 8:00 o'clock or so in the {2375} evening. That's an approximate figure. I don't really remember exactly.

Q So from your memory you spent the day examining the mobile home?

A Not the entire day.

Q Did you examine anything else on that day?

A Yes. That was the day that I went to the Steven Barker residence and examined his home in regard to the burglary.

Q All right. Did you talk to, or were you interviewed by any FBI agents on that day?

A I'm certain that I talked to several FBI agents. I don't think that I was interviewed by them as such.

Q All right. Are you aware that FBI agents wrote 302's interview forms pertaining to such discussions?

A I'm not familiar with FBI form 302's.

Q And the FBI was present with you when you conducted all of your examinations?

A They weren't right close with me. However, they were in the same area.

Q Were they observing your activities?

A They might have observed them partially. They were not in the, for instance, they were not in the recreational vehicle with me. They were outside someplace.

Q On November 16th did you make any comparisons of the fingerprints which you had found at the ranch home?

{2376}

A Yes.

Q And did you make any identifications on the 16th of November?

A I did.

Q And was this for other items other than those found in that ranch? For example, did it include items found in the mobile home?

A No.

Q Did you, up to November 16th, make any identifications of any of the fingerprints that you had found in the mobile home?

A No.

Q When was the first date that you made any identifications of those materials or those items?

A As I recall it was November the 16th.

Q From the mobile home?

A Oh, no, from the Barker residence.

Q All right. From the mobile home, when was the first time that you made an identification?

A I don't remember the exact date. I believe that it was just previous to the extradition hearings in Canada.

Q Okay. Were you ever asked to make any fingerprint comparisons with cards bearing the fingerprints identified as Leonard Peltier up to and through November 16th on any items in the mobile home?

A Through November 16th?

{2377}

Q Yes.

A Yes, I did on that date compare fingerprints of Leonard Peltier with the -- no, not on the mobile home, just on the burglary .

Q Please listen to my questions.

Now, when you obtained print comparison cards of the prints allegedly containing Mr. Peltier were these furnished to you by the FBI?

A I don't recall.

Q Well, you had some print comparison card to work with, didn't you, on November 16th?

A I had a machine copy of fingerprint cards.

Q Who furnished you that machine copy?

A I don't recall, but it was through the members of the Ontario State Police office, or whether it was through the FBI.

Q Do you remember telling any FBI agents that you had made any comparisons or any identifications on November 16th of any prints of Leonard Peltier?

A I'm sure that I let it be known that I had found one fingerprint which I had identified as Mr. Peltier's. And I'm sure that the FBI agents were present.

Q All right. On November 17th you went to Salem, Oregon, didn't you?

A Yes.

{2378}

Q And you took various paper bags, you took the paper bag I believe and several other items?

A Yes.

Q What other items did you take to Salem?

A I'll have to refer to my report where I listed them.

(Witness referring to his report.)

Q There were a total of five paper sacks, there were three sheets of paper, one box of breakfast cereal, one ignition testing tool, one radio mike, one jar of honey, one sugar container, one bowl, one tobacco box and one pair of sunglasses. These were the items removed from the recreational vehicle.

Q And you also took the .357 magnum which was recovered from the shooting scene I believe?

A I took a .357 revolver which was displayed to me at the Ontario patrol office.

Q And I believe you also took the .44 Ruger.?

A Yes. That did not come from the recreational vehicle.

Q Sir, I notice that you refer to notes, and I wonder if you would look at Defendant's Exhibit 142 and see if what is contained in your notes corresponds exactly to what is contained on Defendant's Exhibit 142.

(Witness comparing Defendant's Exhibit 142 with his notes.)

A It contains the same items removed from the recreational vehicle. There is slightly different wording to describe the {2379} items.

Q Okay. And what about on page 2 of Defendant's Exhibit 142, does that compare, correspond to your own notes?

A These would be the items removed from the Plymouth station wagon?

Q Yes.

A Rather than the recreational vehicle?

These would describe the same items. However, in possibly different wording.

Q All right. But would you agree that what is contained within your report is what is contained within what has been marked as Defendant's Exhibit 142? Would you agree that the same information is contained therein, although perhaps the wording might be slightly different?

A Same information in addition to which the revolver which I checked at the Ontario station was also included on my report.

Q Okay. Did you review your report which compares to Defendant's Exhibit 142 prior to your testifying today?

A Yes.

Q And did that refresh your recollection?

A It refreshed it; however, I didn't remember word by word everything that's in it.

Q So there were items that you did not remember prior to your reviewing the document which you are testifying to today?

{2380}

A Please rephrase, please ask me the question again.

Q There are items which you've testified to today which were refreshed by your looking at these documents?

A Yes.

Q All right. And was the document that you prepared in the course of your business as an officer of the Oregon State Police?

A Yes.

Q And was this document filed in a manner which is, which such documents are normally filed in connection with your work?

A Yes.

MR. ELLISON: Your Honor, we would ask too, we would offer Defendant's Exhibit 142 into evidence, although it is not an exact copy it is actually a 302. It does contain the same information which is contained within Sergeant Zeller's report.

And I'd also like to point out, Your Honor, that we never received a copy of Sergeant Zeller's report, and I believe we are clearly entitled to it under the Jenx Act, number, Rule 16.

MR. CROOKS: Your Honor, the United States objects to 142. If they wish to make a copy, I understand that they had gotten a copy of this as part of his lab report. If they have not, we'll be more than happy to run him a copy of Mr. Zeller's report.

{2381}

142 is a 302 interview with the FBI, and this is not what he's used to refresh his memory. We certainly object to this at this point being completely irrelevant.

If counsel wishes, we'll certainly run him a copy of Mr. Zeller's notes that he's referred to and attempt, if he wishes then to put those in and I take no position on that. But certainly 142 is not --

MR. ELLISON: Your Honor, I submit that Defendant's Exhibit 142 is simply a copy, although a few words may have been changed, and Sergeant Zeller has stated that the content is no different between the two reports, and that is in fact a report of Sergeant Zeller's which was transferred onto a 302 of Special Agent Hancock.

THE COURT: The objection is sustained.

Q (By Mr. Ellison) On November 18th did you have occasion to examine the Ford Ranchero? Without looking at your notes, please, sir, at first.

A I don't believe it was on the 18th.

Q Would checking your notes help to refresh your recollection?

A Yes.

Q All right. Would you please check your notes.

(Witness checking his notes.)

A It was not on the 18th.

Q What day was it on?

A It was on the 19th.

{2382}

MR. CROOKS: I'm sorry, I didn't hear the last answer.

THE WITNESS: It was on the 19th.

MR. CROOKS: The 19th, okay.

Q (By Mr. Ellison) Do you recall on the 18th of November having an interview with Special Agent Jacobs?

A I don't recall.

{2383}

Q I show you Defendant's Exhibit 143 for identification. See if that refreshes your recollection. I believe in the lower left-hand corner it states date interviewed.

A I haven't seen this report before. I observed the document.

Q Does this refresh your recollection that on November 13 of 1975 you had an interview with Special Agent Jacobs?

A It does not.

Q Would you dispute the contents that are contained within Defendant's Exhibit 143 as being an incorrect statement of interview with you by Special Agent Jacobs?

MR. CROOKS: Your Honor, I'll object.

THE COURT: The objection to that question is sustained. It's an improper question. He indicated he had never seen it before, he doesn't recall having an interview and Counsel will refrain from asking questions he knows to be improper.

Q (By Mr. Ellison) Did you ever have an interview with Special Agent Jacobs?

A I may have. I don't really recall.

Q And Defendant's Exhibit 143 which I just showed you doesn't refresh your recollection as to any interview with Special Agent Jacobs?

A I don't recall it. I talked with many FBI agents. I don't recall Agent Jacobs. I talked, I don't recall the {2384} incident.

Q Did you talk to any special agents about the content what is contained in Defendant's Exhibit 143?

A I'd say I probably did.

Q But you're not sure?

A I'm just not sure.

Q Now on November 24 you provided certain items to the FBI, is that correct? Sir can you testify first without your notes and then if you can't remember --

A I believe the date is correct. I'm not sure of the date. I believe it's the 24th.

Q Rather than looking at your notes, I hand you Defendant's Exhibit 144 an ask if that refreshes your recollection.

MR. CROOKS: May I ask a question in voir dire, Your Honor?

THE COURT: You may.

MR ELLISON: Your Honor, I don't believe there is any question to the witness pending.

MR. CROOKS: Is that a document you have seen before Counsel's just handed it to you?

THE WITNESS: I just saw it when he handed it to me the previous time. This is nothing I had seen before I came to the courtroom today.

MR. CROOKS: By examining your own notes could you refresh you memory?

{2385}

THE WITNESS: Yes.

MR. CROOKS: Your Honor, we'll object to handing this witness a document which he has not seen before. He has testified repeatedly he's not seen it before. He indicates he wishes to consult his own notes and we would expect his wish be honored and we object to keep going into these 302s which this witness has said he has not seen, he has no knowledge of.

THE COURT: The objection is sustained.

Q (By Mr. Ellison) Sergeant Zeller, on November 24th, you can look at your notes if you'd like, did you hand several items to Special Agent Hancock?

A Yes.

Q I'd like you to compare Defendant's Exhibit 144 with your notes and see if those are the same items which you handed to Special Agent Hancock on November 24, 1975?

A Yes. These are a part of the items I handed to him.

Q And all of the items listed on the FBI 302 are listed on your own notes as being handed to Special Agent Hancock, on the 24th?

A Yes.

Q By November 24, 1975, had you conducted any comparisons with the known fingerprints of Leonard Peltier with any of the items listed on your notes which are comparable to Defendant's Exhibit 144?

{2386}

A No.

Q You never examined the .44 magnum and compared prints found on there the .44?

A I did not.

Q The same thing, we'll refer to as the other .357 rather than Government's Exhibit 35A?

A I did not compare them.

Q What about the radio microphone found in the mobile home?

A I did not compare it.

Q Now I'll hand you what is marked as Defendant's Exhibit 145 for identification. Would you please study this document.

Do you recognize this document, sir?

A I recognize the pages I'm reading now.

Q Do you need more time to look at it?

A Yes sir.

Q Please take whatever time you need to make sure you recognize this document.

All right. You've read the document?

A I have.

Q And you read it rather carefully didn't you?

A Yes, I did.

Q Have you ever seen this document before?

A I have seen the original which was apparently, which this is apparently a copy.

{2387}

Q This was an affidavit of yours which you signed on April 14, 1976, is that correct?

A Yes.

Q When you say you "signed this affidavit," did you look it over with the same care which you looked it over today?

A Yes, I did.

Q You understood the importance of this affidavit?

A Yes.

Q In fact, you knew that this was an affidavit which was going to be used in the extradition proceedings of Mr. Peltier?

A Yes, sir.

Q And so you made sure that everything that was contained within that affidavit was in fact true?

A To the best of my ability.

Q You signed this affidavit?

A Yes.

Q And this is in fact a true copy of the affidavit which you signed?

A Certainly appears to be.

MR. ELLISON: Your Honor, I show Defendant's Exhibit 145 to the government and ask that it be admitted into evidence.

MR. CROOKS: At this point we object. There's absolutely no foundation to show any relevance to this case. Counsel wishes to make such a showing at the side bar, I'd be {2388} happy to listen but all he's done is shown him an affidavit.

MR. ELLISON: An affidavit, Your Honor, prepared from the extradition of Mr. Peltier pertaining to his study and items he found. He's identified this affidavit as his own.

MR. CROOKS: Your Honor, so what. Our objection is that there is no foundation to show this proves anything.

MR. ELLISON: It will prove a great deal, Your Honor.

THE COURT: Well, the Court will reserve ruling until I have had an opportunity to see the document.

Q (By Mr. Ellison) I return Defendant's Exhibit 145 to you and ask you to look at paragraph 10. Please read paragraph 10 to yourself so you are fully aware of its contents.

Paragraph 10 refers to the .357 magnum which is marked as Government's Exhibit 35A, is that correct?

A Yes.

Q Tell me, Sergeant Zeller, did you prepare the affidavit yourself or did someone hand you the affidavit for your signature?

A This was handed to me.

Q Who was the person who handed it to you?

A I believe I received it in the U.S. mail.

Q Did you receive it from an agent of the Federal Bureau of Investigation?

{2389}

A I'm not sure whether I did or whether I received it from a representative from the Canadian government.

Q You read this affidavit and signed it for submission in the extradition proceeding?

A I did.

Q Now this paragraph pertains to the .357 magnum which has been identified as the .357 magnum of Agent Coler. I believe you testified on direct examination and on cross-examination that the last time you saw this revolver was on the 17th of November 1975.

A I think that's true.

Q At sometime you became aware that that .357 magnum was handed over to the FBI.

A I became aware of it by reading another officer's report, as I recall the incident.

Q Do you remember whose report you read?

A I'm not sure but I believe that it was Officer Hanson's.

Q And when was that .357 magnum given to the FBI based upon the report which you read?

A Based on this report, it was November the 18th.

Q 1975?

A 1975.

Q So that what is contained in paragraph 10 of your affidavit dated April 4, 1976 is true, is that correct?

A This is true to the best of my knowledge, taking into {2390} consideration I read it from another person's report

Q Do you know a special agent by the name of David Malam?

A No.

Q Is this the only affidavit which you completed in connection with the Canadian extradition proceedings of Mr. Peltier?

A No.

Q I will show you what has been marked as Defendant's Exhibit 147 and ask you to look at paragraph 10 of that affidavit as well as to examine the entire affidavit to see whether or not you recognize it.

{2391}

A (Examining.)

(Counsel confer.)

Q (By Mr. Ellison) For purposes of expediency, I would request that you look at the signature on Page 3 and the date, and then look at Paragraph 10 tell whether or not this is the same affidavit which you signed on March 4th, 1976?

A I signed this on March the 4th, 1976.

Q And Paragraph 10, as with the former affidavit, deals with the same .357 magnum, Coler .357 magnum, is that correct?

A This paragraph deals with the same weapon.

Q All right and when you -- by the way, who gave you this affidavit?

A I received this affidavit in the mail.

Q All right. You received it from the FBI, didn't you?

A I don't know whether I received this from the FBI or from the Canadian authorities.

Q And when you received this affidavit in the mail, you read it very carefully, didn't you?

A I did.

Q And you checked it for its accuracy before signing it because you recognized the importance of this document?

A I checked it for its accuracy to the best of my recollection.

Q O.k. You knew that this affidavit was going to be used in extradition proceedings of Mr. Peltier?

{2392}

A I did.

Q This affidavit is different with regard to Paragraph 10, isn't it, from the April 4th affidavit?

A Yes, it is.

Q In fact, the April 4th affidavit states that you learned that on November 18th Officer Hansen handed Coler's .357 magnum to Special Agent Hancock, is that true?

A Yes, it is

Q And didn't you sign this affidavit on March 4th for the extradition proceedings of Mr. Peltier, in which you stated that on November 17th, 1975, I -- meaning you -- handed the .357 magnum to David Milam?

A I signed the statement.

Q And this statement was false, wasn't it?

A I am afraid that it was. It was false in that I was unaware of what actually happened, yes, sir.

Q You signed an affidavit under oath for which the penalties of perjury accrue without checking it to see whether in fact it was true, you believed it to be true, didn't you?

A To the best of my knowledge at that time that was the way that it had occurred.

Q It wasn't true?

A It was not true.

Q Did you contact the people who sent you this affidavit to tell them that it wasn't true?

{2393}

A I contacted them at a later date, yes.

Q But you signed this affidavit at that time?

A I did.

Q When was it decided that your March affidavit would have to be changed?

A I don't recall the date.

Q But suddenly another affidavit mysteriously appeared in the mail for you to sign?

MR. CROOKS: Your Honor, I will object to this as argumentative.

THE COURT: Sustained. There is nothing to show that it was mysterious.

Q (By Mr. Ellison) Also contained within both affidavits is the statement that you found a fingerprint of Leonard Peltier's on the microphone in the mobile home, is that correct?

A Yes.

Q Isn't it a fact that back in November you made a comparison of the prints of Leonard Peltier with the prints that you took off that microphone and found that there were no prints of Leonard Peltier's?

A No.

Q Isn't it a fact that you compared the prints found on the .44 magnum with the print comparisons that you had of Leonard Peltier's and found that there were no comparisons?

A No, that is not a fact.

{2394}

Q Didn't you tell Special Agent Hancock on November 17th that this was in fact the case?

A No.

Q I refer you to Defendant's Exhibit 142 for identification, and ask you to look at Page 2?

A (Examining).

Q The last paragraph on that page.

A (Examining).

(Counsel confer.)

Q (By Mr. Ellison) Did you ever tell an agent of the Federal Bureau of Investigation in either words or substance what is contained in that last paragraph to Special Agent Hancock's 302 interview with you on November 17th, 1975?

A I don't recall that I did.

Q Even after looking at this paragraph, it doesn't refresh your recollection?

A After looking at it, I began to wonder whether I did or not. However, don't recall the incident.

Q Do you deny that you told Agent Hancock this, what is contained in that paragraph?

A I do not deny it. I say to the best of my recollection I don't recall it.

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

MR. CROOKS: Your Honor, I just have one question {2395} to ask the witness.

REDIRECT EXAMINATION

By MR. CROOKS:

Q Just one question: If I understand your previous testimony when counsel was handing you affidavits, you had an affidavit which was incorrect and you later corrected it, is that correct?

A Yes.

Q All right. So that the correct information was what was furnished to Canada?

A Pardon?

Q The correct information is what was furnished to Canada to the best of your knowledge?

A Yes.

MR. ELLISON: Objection, as leading.

THE COURT: Sustained.

Q (By Mr. Crooks) I will have you look at again Exhibit No. 38-B, and ask you again whether or not 35-A was found in 38-B?

A Yes, it was.

MR. LOWE: Your Honor, that is repetitive. It has already been asked and answered.

MR. CROOKS: Your Honor, I thought there was one counsel to one witness.

MR. LOWE: Mr. Ellison was busy at the time and did {2396} not hear the question.

THE COURT: The objection is overruled anyhow.

MR. CROOKS: I am sorry, I didn't hear. Was the answer given, your Honor?

THE COURT: Yes, he did answer.

Q (By Mr. Crooks) Is there any doubt in your mind that this is the same bag that you picked up and took this revolver out of?

A No doubt.

MR. CROOKS: No further questions.

MR. ELLISON: We have no further questions of this witness, Your Honor.

THE COURT: You may step down.

(Witness excused.)

THE COURT: I do not know how counsel managed to finish right exactly at 5:00 o'clock; but the Court is in recess until 9:00 o'clock tomorrow morning.

(Whereupon, at 5:00 o'clock, p.m., the trial of the within cause was adjourned until 9:00 o'clock, a.m., on Thursday, March 31, 1977.)