

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 XVI

Pages 3242-3457

{3242}

WEDNESDAY MORNING SESSION

April 6, 1977

Whereupon, the following proceedings were had and entered of record on Wednesday morning, April 6, 1977 at 9:00 O'Clock, A.M., without the jury being present and the defendant being present in person:

THE COURT: Are counsel ready to proceed?

MR. CROOKS: Your Honor, there is one matter which I should report the Court on. This is the request by defense counsel that we check again on Mr. Hancock's 302 forms. We have done so, we've checked personally with Mr. Hancock as well as the people in Oregon to make sure that

we've turned over all of the 302's. And we find that we have turned over every 302 that Mr. Hancock has made concerning his activities.

Obviously there are some 302's of witnesses, witness interviews, which have not been turned over, but which are not 3500 material. But every 302 that he has made out where he's observed anything himself has been turned over. And some of his interviews of course have also been turned over to Mr. Hanson and Mr. Zeller.

So to that extent even those have been turned over in their 3500 material. But there's nothing else that either the FBI or this office can find.

THE COURT: Is there anything more to be presented before the jury comes in?

{3243}

MR. TAIKEFF: No, Your Honor.

THE COURT: Jury may be brought in.

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

THE COURT: You may proceed.

MR. SIKMA: At this time, Your Honor, with regard to Government Exhibit 34-AA, I would like to read a stipulation. Paragraph 16 of the stipulation with regard to Government Exhibit 34-AA. "Government Exhibit 34-AA look alike gun for Government Exhibit 34-A, AR-15 .223 caliber semiautomatic rifle. It is hereby stipulated and agreed between the parties that Government Exhibit 34-AA is a replica of Government Exhibit, Government's Exhibit 34-A; that Government's Exhibit 34-AA may be introduced into evidence to establish the appearance of Government's Exhibit 34-A prior to its being damaged. Further foundation is waived."

Q (By Mr. Sikma) Mr. Hodge, yesterday I believe we were going over the chart which is behind you, Government's Exhibit 34-1, and with regard to Government's Exhibit 34-H we had just finished talking about 34-G I believe, which were from Williams' car, bullet fragments. Now, with regard to Government Exhibit 34-H we had started to talk about that. What kind of an examination did you make with regard to Government Exhibit 34-H?

A I examined Government's Exhibit 34-H to determine its caliber, to determine the type of rifling in the barrel from which it was {3244} fired and to determine if it had any microscopic marks on its surface from the weapon which fired it. So that I could possibly associate it with, or identify it with a particular firearm.

Q I will show you what is offered into evidence of Government Exhibit 34-H. What were your findings with regard to Government Exhibit 34-H which on the chart is marked as from ground beneath bodies of Williams and Coler?

A I found Government's Exhibit 34-H to be a .22 caliber copper jacket, copper bullet jacket. That it had been fired from a barrel which contained six grooves twisting to the right, and that it

did not have any microscopic marks remaining on its surface which would permit me to identify it with an individual firearm.

Q Could that particular bullet fragment, 34-H, have been fired from Government Exhibit 41-A which is also a .22 caliber rifle?

A No, sir. It could not have been.

Q And why not?

A Well, first of all the ammunition designed to be fired in Government's Exhibit 41-A is .22 Rim Fire ammunition and it uses a different type of bullet.

Secondly, the number of grooves in the barrel of Government's Exhibit 41-A is eight and this bullet was fired from a barrel which contained six grooves.

Q Could it have been fired from any .30 caliber weapon?

A No, sir.

{3245}

Q It would have to be something of the nature of a .22 caliber and center fire; is that correct?

A That's correct, sir.

Q Of those items you've seen on that rack over there; is that correct?

A Yes, sir.

Q Okay. Of those items, those firearms on the rack, which firearms could it have been fired from?

A From Government's Exhibit 34-A.

Q Then also if there, if this gun had been there, and I think we've agreed it's a look alike and not related to this offense in any way, it could have been fired from this gun as well; is that correct?

A That's correct, sir.

{3246}

Q Would you point up on Government's Exhibit 34 the microscopic comparisons that you have there by way of photograph and explain to the jury what they are.

A The two photographs on either side of the chart are photographs which I took through the comparison microscope. They are large microscope photographs.

There is a line running down the middle of the photograph which is difficult to see. Nevertheless, it is there. This impression indicated by the pointer on the left side which is the cartridge case, extractor mark on the cartridge case which I fired in the laboratory (indicating).

Q The configuration of that impression is identical to the configuration of the impression in the rim of Q 353 which is within the group 34C and that is the extractor marking on the rim of that case.

It is my conclusion based upon the microscopic matching and these impressions that Q 353 was loaded into and tracked from the K-40 rifle on 34.

In like manner the same marking appears on Government's Exhibit 34B which was my specimen, Q 2628, and this is an enlargement of the marks representative as I viewed them in the comparison microscope in the laboratory. On one side, the left side is Exhibit 34B and the other side is my test fire cartridge case.

Q Now those are extractor marks, is that correct?

{3247}

A That's correct, sir.

Q Does that positively identify Government Exhibit 43 as having connection, definite connection with Government Exhibit 34A?

A It positively identifies Government's Exhibit 34B as having been loaded into and extracted from Government Exhibit 34A.

Q Now I believe you indicated earlier that you could not make firing pin comparisons because of the damaged nature of Government Exhibit 34, Government Exhibit 34A, is that correct?

A That's correct.

I formed my conclusion as to whether or not the fire pin impression and the breech face marks can be cartridge casings represented by 34C series of exhibits identical with the 34A firing pin and 34A bolt face because of a lack of marks on the bolt face and the condition in which I received it.

Q Now any one of three ways, tell me whether or not it's correct that you can make a positive connection with an exhibit such as 34A in any one of three ways? One would be bullet extractor marks, the other would be breech face marks and the other would be firing pin impressions, is that a correct statement?

A Well, if I may rephrase that, the positive identifications for determining whether a cartridge case has been fired in a gun generally consists of the marks put on the cartridge case {3248} by the fire pin of the weapon or the marks left on the cartridge case as it recoils against the breech of the weapon and from those markings the firearms examiner can conclude that a

cartridge case has been fired in a weapon to the exclusion of all others. The other markings left on the cartridge case by various mechanism parts, one of which is the extractor, can allow the firearms examiner to determine if that cartridge case has ever been in the mechanism. It does not necessarily mean that the cartridge case has been fired in that gun because the markings can be placed on the cartridge case without actually firing that cartridge case. In other words, put the shell in and then throw it out of the gun without pulling the trigger will often leave this type of mark on the cartridge case.

Q Now the types of marks in 34C which consist of 35 cartridge casings, expended cartridge casings, 34D which is one, 34B which is another, 34E which is another and 34F which is another all had the same type of markings, is that correct?

A Yes, sir. That's correct.

Q They were all extractor marks from Government Exhibit 34A?

A Yes, they were.

Q Did you examine 34B to determine what kind of a, where that cartridge casing was made? In other words, the manufacturer of 34B?

A Yes, sir, I did.

{3249}

Q Now is there some place on a cartridge casing which would tell you where a particular cartridge casing comes from as far as the manufacturer is concerned?

A Yes. The manufacturer's name is stamped right into the head of the cartridge case.

Q I will show you Government Exhibit 34B and 34C. Could you show the jury, illustrate to the jury, if you would, where this marking is made.

Q The initials of the manufacturer or an abbreviation of the manufacture's name in almost every cartridge case commercially manufactured in the United States is stamped right in the head of the cartridge case itself surrounding the primer. In this particular case, cartridge case from group 34C, the initials R with a dash and then a P standing for Remington-Peters is stamped up above, then the caliber designation, .223 Remington is stamped down below.

Q and with regard to Government Exhibit 34B, where was that manufactured?

A Government's Exhibit 34B has the same initials as the one I just mentioned. It has an R with a dash and a P and then .223 Remington stamped underneath that. The R dash P stands for Remington-Peters.

Q With regard to Government Exhibit 34C, do you recall the manufacturer, or, Government Exhibit 34D, do you recall the manufacturer of that Government Exhibit 34D?

{3250}

A Government Exhibit 34D has the stamp indicating it was manufactured by Winchester Western.

Q And I have a question with regard to, are you familiar with the AR15 or used in the form of a military M16 as far as the FBI is concerned?

A Yes, sir.

Q Now are you familiar with how the FBI or where the FBI purchases its ammunition for the AR15 or the M16 as it's militarily designated?

{3251}

A The majority of it is military ammunition.

Q And from what company do they purchase ammunition for the M-16?

A I don't know if we get it from the -- it is manufactured militarily by different organizations. The major ammunition companies make it, Winchester and Remington, and also arsenals like Lake City, arsenals manufacture it.

Q What kind of a stamp does Lake City have?

A It has a LC and the year of its manufacture underneath.

Q Does it have the -- how does it have a caliber designation, do you know?

A It does not have a caliber designation.

Q The FBI in purchasing ammunition, or for an AR-15, would purchase ammunition from Lake City and those would have a LC designation?

MR. LOWE: Objection to the form of the question, your Honor. It is quite leading.

THE COURT: Sustained.

(Counsel confer.)

Q (By Mr. Sikma) Would ammunition purchased from Lake City have a designation?

A Yes, sir.

Q And that designation would be what?

A LC.

Q Are you familiar with the -- how rounds are ejected from {3252} an AR-15 or a M-16?

A Yes, sir.

Q Now, would you designate or tell the jury what the difference is between an AR-15 and a M-16, if you know?

A Both the AR-15 and the M-16 is manufactured by Colts Firearms Company in Connecticut. The essential difference is that the M-16 is a military rifle, and it has a full, fully automatic capability of fire through a selector switch on the receiver. There is also a rod on the side of the weapon which allows the bolt to be driven home should the gun become dirty, and that is the essential difference.

In appearance they are almost exactly like with the exception of that rod on the side of the receiver.

Q Where would that be on this Government Exhibit 34-AA?

A It would be right on the right side of the weapon coming out back to here (indicating). The selector switch is identical to this except that it has one more position on it, and that's fully automatic.

Q To your knowledge, or do you have an opinion as to whether or not the automatic rifle designator switch has any effect on the -- on whether or not or how the expended cartridge casings are expelled from the firearm?

A The fully automatic switch adjusts the sear only. It does not interfere with the spring mechanism or the recoil operation of the weapon.

{3253}

Since the parts are interchangeable in the bolt, it would not in my opinion affect the way that the cartridge cases were ejected from the weapon when the weapon is fired in the semi-automatic method of firing.

Q Did you conduct any test to determine general ejection patterns of various random AR-15's?

A Yes, I did.

Q Or M-16's?

A Yes, sir, I did.

Q Would you tell the jury what you did in this regards, what kind of tests you ran?

A I selected five weapons of this type, two were AR-15's, the civilian model, and three M-16's which are the military weapon.

I took them to our training facilities at Quantico, Virginia and fired 20 rounds from each weapon in -- 10 from the shoulder area and 10 from the hip. I used both military and commercial ammunition, and I charted where the cartridge cases were thrown from the gun.

Q What kind of an arc, you know, do the cartridge casings usually take as they leave the firearm?

A In the case of the five weapons that I observed, the cartridge cases, as the weapon was held vertical to the ground, the cartridge cases were thrown practically horizontally out of the gun, flat out. They may have risen an inch or two in some {3254} instances, but that was about all.

Q Did you make any chart of your findings with regard to the ejection patterns for an AR-15 or M-16?

A Yes, I did.

Q I will show you what is marked as Government Exhibit 34-I, and ask you whether or not you recognize it?

A Yes. These are the charts which I made from the shooting of these five weapons, from both the hip and the shoulder position.

Q Now, did you take anything into consideration when you were making those charts as a result of those tests, or what was your purpose of making the tests in the first place?

A I was asked the question, how far and in what direction would a weapon of this type eject a cartridge case, and the purpose for making the chart and running the test was to answer that question.

Q Now, in this regard did you take measurements of a 1972 Chevy Biscayne, of the trunk area, and measurements from the ground?

A Yes, I did.

Q O.k., and what did you find in that regard, what did you do in that regard?

A I found a 1972 Chevrolet Biscayne, and I measured the lip of the trunk, the distance that it was off the ground, the floor.

{3255}

Q And when you made these ejection patterns, would you describe to the jury what you did?

A Well, myself and another agent went down to Quantico, and we took with us 200 rounds of ammunition and five weapons selected from the reference collection of guns in the laboratory.

The other agent fired the weapons, and I charted the location of where the cartridge cases fell; and then I made a notation of where each cartridge case fell and then plotted those on this graph so that I would have a pictorial representation of the general area that these five guns would eject the cartridge cases.

{3256}

Q Did you make a determination whether or not at various distances any or all of the cartridge casings fired as you had them fired from a gun would have cleared the trunk of the 1962 Biscayne?

A The distance would vary considerably because the pattern fell over a very large area. The furthest cartridge case, furthest that any of the cartridges that I fired was thrown was approximately fourteen feet.

And considering the arc that these cartridge cases fell in when the weapon was fired from the horizontal position, I'm sorry, from a vertical position, the cartridge cases travel in the horizontal, that would be approximately thirteen feet away from the weapon that the, that the maximum distance from the test that I conducted.

Q And what was the minimum distance of any of those?

A I didn't attempt to determine a minimum distance. Some of the cartridge cases fell fairly close to the weapon within a foot, two foot, in that area. So that it could have been fairly close.

Q But it varied from a foot to fourteen, thirteen feet as far as clearing the --

A I think the distance is a little further than a foot. Maybe three feet was the closest from the hip position, and approximately three feet from the shoulder position, too, was the closest.

Q And what about the distance that these would have cleared {3257} the trunk? In other words, gone into the trunk?

A On the closer shots?

Q Yes.

A Well, the cartridge case would be falling somewhat steeply at that, so it would be in that area, fairly close.

Q And what about the furthest distance that it would clear the trunk?

A The cartridge cases that I observed went out horizontally and dropped off slowly. And as they lost energy, dropped off quickly so that the arc was in that respect. The 33 inch distance, which is the lowest part of the trunk of a Chevrolet Biscayne that I measured, would need cut off

maybe a foot of the trajectory of the cartridge casing so that from what I observed 13 feet would be in the order, the maximum distance for the guns that I observed.

Q Okay. Now, would you take the, take the Government exhibit and explain to the jury how you coded the various, the charts.

A Should I step down?

MR. SIKMA: Your Honor, at this time I would offer into evidence Government Exhibit 34-I.

MR. LOWE: SubJect to the record, Your Honor.

THE COURT: 34-I is received.

MR. SIKMA: Your Honor, could the witness step down?

THE COURT: Witness may step down.

A In conducting this test I color coded the five weapons that {3258} I used as to the areas where the cartridge cases fell. The blue and the black colors are the A-15's. And you notice that the first AR-15 which I tested, the blue shaded area, that is the area that that cartridge, that weapon threw the cartridges, cartridge cases that I fired.

The number 2 weapon threw them in almost exactly the opposite direction. The blue gun is kind of up and to the right, whereas the second weapon is way back behind the shooter to the right.

The three M-16 weapons, the green, yellow and red tended more, well, the green and the red tended more to throw the cartridge cases directly to the side of the shooter, to the right. Whereas the yellow gun, the middle M-16 threw it again, well, to the rear of the shooter. But those are the areas that I observed and that is from the shoulder position.

The red dots indicate military ammunition which is a full metal jacket bullet, not a soft point hunting load. The blue dots represent commercial ammunition which has a soft point bullet designed for shooting game.

From the hip position the pattern is very similar in general appearance, only just a little bit closer in. We have the edge of our circle going out a little bit beyond nine feet, here we're going out ten feet on the shoulder position. The added height, letting the cartridge cases go a little further before they hit the ground.

{3259}

Q (By Mr. Sikma) I show you with Government Exhibit 34-AA, would you, tell me what, how the gun was held when pointed in that direction. Show the jury how the AR-15's were held when you were conducting this test, and in what two positions.

A On the first part, the shoulder position, the shooter held the weapon in this manner (indicating), right at the shoulder. And in the second test he held it down here (indicating), at the hip.

Q Now, I want to ask you some other question. If the firearm were pointed in a manner down toward the ground would this make some difference in the pattern that would be displayed?

A Well, the height of the ejection port off the ground does affect the distance as we have seen from the hip and the shoulder position. The higher the ejection port is off the ground the further the cartridge cases will travel.

The angle at which the ejection port is held may tend to change the pattern. Now, I did fire a few rounds with the weapon turned sideways.

Q This way (indicating)?

A With the ejection port straight up in the air. And at that time the cartridge cases went about a foot up in the air and then fell back down. So that the angle that the weapon is held at can affect the pattern. And if it is held at an extreme angle, such as straight up in the air, it will tend to shrink the patterns, more of the energy will be dispersed in the cartridge {3260} case going up in the air rather than traveling out.

Of course if it's held straight down, then the cartridge case will be thrown down into the ground quicker.

Q In all cases is, tell me whether or not it's true in all cases the cartridge casings were expended somewhat to the right and either to the front or to the rear somewhere in an arc of about sixty degrees; is that correct?

A The actual arc from the gun, is you take your extreme cartridge cases thrown to the right and forward, and your extreme cartridge cases thrown to the right and backward, that arc is approximately 120 degrees.

It's a rather sweeping arc, but in all cases they went to the right and either straight out or in some direction forward or behind for the five guns.

Q With regard to Government Exhibit 34-H, what kind of jacket was on that round?

A Well, 34-H is a copper bullet jacket. The lead metal core is missing. It's a copper jacket.

Q Is that a hard or soft jacket?

A It is a relatively thin, relatively hard jacket.

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

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

THE COURT: You may.

(Defense counsel conferred.)

{3261}

CROSS-EXAMINATION

BY MR. LOWE

Q Mr. Hodge, my name is John Lowe. We've met before, haven't we?

A Yes, sir.

Q And we have talked about some of the matters that you've testified here today, have we not?

A Yes, we have.

Q In conjunction with your examination of various items in this case did you prepare any 302's, or do you utilize laboratory reports almost exclusively for making reports?

A All of my findings are in laboratory reports.

Q So that there are no 302's which you prepared as such?

A No, sir.

Q In the process of making your examinations as you go along I gather that the procedure is to first receive the item in some way, either personally delivered to you or in the mail or some other form, and when you receive the item I gather that at least in this case there was some kind of note either attached to or inserted in a plastic envelope with the item; is that correct?

A That is correct, for a lot of the items. All of the items did not have a note, but they were contained in such a manner that marked with a number or something so that I could correlate where the item came from with the incoming communication.

Q All right. Would the incoming communication accompany the item?

{3262}

A yes, sir. Would accompany the package.

Q Right. So in other words if you opened up a box you might find like an invoice or an inventory sheet on the top which would give numbers which you could identify to the items that are in the box?

A Yes, sir.

Q And as to some items they may have a piece of paper in an envelope with them; is that correct?

A Yes, sir.

Q And other items might even be marked directly on them, depending upon what type of information or what type of item?

A Yes, sir.

Q When you receive them I gather that one of the first things you do is to assign a number to them, a Q number which identifies it for your purposes in making tests and in making an inventory; is that correct?

A That is correct.

Q And is at least this information in a given investigation, in this case the Resmurs investigation, in theory there would only be one item which is numbered Q254, for example? Is that the hope and theory of it?

A For a given case we have, you could have the same Q number assigned to two different items and two different cases if you follow me.

In other words, if I make an inner comparison between {3263} one case and another case I could be comparing the same Q numbers. But what you say is essentially correct. We try and keep the Q numbers on individual items within an individual case.

Q And to the best of your knowledge and belief in this case, that is the Resmurs investigations and all of the items in evidence, that was followed in the sense that there are no duplicate Q numbers; is that correct?

A Well, I believe there are duplicate Q numbers in the weapons because some of them were compared from different cases.

Q Are you saying weapons or are you talking about K numbers for weapons?

A K numbers.

Q I was asking Q numbers.

A Okay.

Q Is that correct as to Q numbers as far as you know?

A As far as I know.

Q There are some K numbers which would have to be identified to specific laboratory reports because there might be more than one K-1 weapon for example; isn't that true?

A Yes, that's true.

Q But by looking at the particular laboratory report you would find whether K-1 was an AR-15 or a .303 or whatever it might be because it's identified within the report, is it not?

A Yes, sir.

{3264}

Q And when you have other reports identifying a test made or a comparison made between a cartridge and a weapon, if there is a reference to K-1 it certainly should and most normally does refer to K-1 as shown in a particular laboratory report; isn't that correct?

A Yes, sir. If it's different from the one that you are reading at the time.

Q Yes.

A Yes.

Q And after you put your Q number on the item in some way by scratching or writing in ink or some other method you have, and I gather you initial it then if you can; is that correct?

A Yes, sir.

Q So that in the future if you want to look at a cartridge case, let's say, and see if you had ever examined it you hopefully would find a Q number either scratched or written on it and your initials E.H. for Evan Hodge, am I correct?

A You are correct.

Q There after having marked the items you submit it to a series of examinations, perhaps tests, and these may vary from cartridge to cartridge, gun to gun, item to item, depending upon what information is sought or what information is suspected might be available, would that also be fair to say?

A Within certain limits, with weapons there are very few tests that we actually conduct. We generally just make a comparison.

{3265}

Other items of evidence may go to other examiners for additional tests.

Q All right. After you, or during the time that you are making the examination, as you find either information of significance or if you find negative results do you make notations as you go along for purposes of later putting them in a laboratory report?

A Yes.

Q And do you use a structured method of doing this, that is, do you have some sort of laboratory worksheets that you use, or do you simply make them on a yellow pad or something and then assemble them in a file later?

A We have what we call laboratory worksheets and that contains a listing, an inventory of all of the items that we have received in that particular case, and it is from that laboratory worksheet that we compile our final laboratory report in any given case.

Q All right. And I trust that you, to the best of your human possibility, accurately write down the results of your examination on the worksheet and then accurately reflect in your notes the information which you extract from the worksheets at the time you write the report?

A I write it on notes which are attached to the worksheet, yes.

Q Yes. And to the best of your ability the information you write down is an accurate reflection of what you find, and the {3266} ultimate report contains an accurate reflection of what your notes show?

A Yes, sir.

Q Then you submit that report that you prepared to the requesting agency, or the requesting person I presume and perhaps some other distributions to files and various places, would that be correct?

A That's correct.

Q Do you maintain a copy of those laboratory reports in your own files?

A I did in this particular case.

Q All right. Prior to coming here to testify today what have you in the last, let's say, the last two weeks reviewed your laboratory reports in order to prepare for testifying here today?

A Yes, sir.

Q Now, can you give me just a ball park estimate of how many pages of laboratory report you personally authored in this case to give the jury some idea of the amount of paperwork and examinations that we're talking about?

A No, sir. I really can't. I have before me a copy of all the laboratory reports which were issued in this matter.

As to these, these are all the findings from various examiners are included within. As to how much of this is actually my work I really have no idea.

Q All right. Are then you reporting and testifying today in {3267} some instances as to examinations that were made by persons other than yourself?

A No, sir, I don't believe I have.

Q Well, all right. I'm asking you, but you've got those reports, whether they're your reports or ones that somebody else made examinations on, you have in front of you?

A Yes. This includes all of the laboratory reports that were issued in this matter.

Q Okay. What I'm asking is that to try and connect up some people here. What relationship if any do you have with Special Agent Cunningham?

A Special Agent Cunningham is my immediate supervisor.

Q Now, in reviewing your laboratory reports you've reviewed, would it be fair to say that you've reviewed over a hundred pages of laboratory reports regardless of who may have prepared them?

A I, in reviewing, I only reviewed the work which I did.

Q Well, would you say that may be 20 or 30 pages of work that you did at various times?

A Oh, yes, that would be very conservative.

Q I'm just trying to get some sense for the jury as to how many pages.

And in these pages the information, the lists of items by Q numbers or K numbers, the various reports of comparisons and everything are basically typed single spaced on 8-1/2 by 11 {3268} pages, are they not?

A Yes, sir.

{3269}

Q Would it be reasonable for me to assume that you do many other comparisons and examinations other than just in this case?

A Yes, sir.

Q Would it be reasonable for me also to assume that there is no way humanly possible to keep all that information in your head and that's one of the reasons you put it down at the time you find it?

A That's correct.

Q Would it also be true that this is not a case of your looking at a laboratory report to refresh your recollection but really that your recollection was put down on paper at that time and you must rely on the report as to looking at most of that information to tell what you did and what you found?

A In some of the instances that's true and other instances I would remember.

Q But in the main, with all the hundreds of cartridge casings and items you examined, except for some items that maybe stick out in your memory, in general you would have no particular recollection even if you read the report, would you?

A I think that's probably fair statement, at least for half the time.

Q That's certainly not saying anything more than you're a human being and you have got some limitations as everybody does on what you remember?

{3270}

A Some of the things I remember and some things I don't.

Q Did you review your working papers prior to testifying, coming here to testify today, let's say within the last month?

A Yes, sir.

Q Do you have those with you also?

A Yes, I do.

Q When was the last time you looked at them?

A Well, I may have looked at them yesterday, as early as yesterday.

Q And the last time you looked at your laboratory reports?

A Would be this morning.

Q Now we've talked a lot about a number of different kinds of ammunition components, many of which you examined. I think you only examined their cartridge casings, some of them actually had live rounds, full cartridges either in boxes or loose. Was there any kind of ammunition components, including the .223 ammunition components, you examined which were not available commercially and were not legal to possess?

MR. SIKMA: Your Honor, I would object to that question. It's too broad, calls for a legal conclusion on the part of this witness which he would not be entitled to make. There may be

hundreds of reasons why something might not be legal to possess and I think that the question is too indefinite.

THE COURT: Well, the witness hasn't testified as to {3271} whether or not he knows.

MR. LOWE: I'll rephrase the question, Your Honor. That's no problem.

Q (By Mr. Lowe) Were there any ammunition components, any of the calibers, any of the types of cartridges or any of the cartridges that you observed in this investigation which cannot be purchased commercially?

A The only area which I don't know about commercial availability would be with the .223 ammunition. I do not know if that has been released military, if that has been released for public purchase or not. Otherwise, no.

Q Now are you speaking then of what I think perhaps is usually called 5.56 millimeter ammunition which is actually manufactured for military purposes?

A Yes, sir.

Q You are well aware, I trust, that there are commercial manufacturers who sell .223 ammunition, am I correct about that?

A Oh, yes.

Q And as to all of the weapons that you examined in this case, do you know of any of them which are not commercially available to buy through gun stores or gun order houses or whatever it might be?

A The only weapon which is not commercially available is the M1 rifle. I don't know again as in the case of the ammunition if that were put on the market for public sale like some of the {3272} old 45s through the Director of Civilian Marksmanship.

Q You're not saying that M1 rifles are not sold by commercial gun stores secondhand, for example, or any store that has some M1s that you obtained from some stores, you're not saying that those are not sold in the United States, are you?

A I'm saying I don't know if they are.

Q To your knowledge is there anything illegal about the gun store selling an M1?

A Not --

Q If it has one.

A No. If it's not a stolen weapon, cleared military property, I'm sure it would be perfectly legal.

Q Now you had submitted to you a lot of ammunition components from what I will generally describe as the Jumping Bull area which includes what sometimes has been referred to as the crime scene and tent city and some other immediate adjacent areas. If I refer to the Jumping Bull area, will you just assume that we're talking about that small area right around Oglala, South Dakota, which includes the information shown on Government Exhibit 71 behind you and the environment so we know what --

A I have a lot of items identified as having come from tent city. Would you include that area?

Q Yes. I'd include that area.

{3273}

Now as to all of the components that you received, am I correct in saying that the ones that came from the Jumping Bull area were received -- let me ask you first of all if you have in front of your laboratory report dated August 5, 1975? I believe one of your first ones.

A Yes, sir, I do.

Q I believe that indicates that the specimens were received on July 5, 1975 and they were personally delivered by Special Agent William R. Fluharty, is that correct?

A Yes, sir. They were delivered by both Special Agent William Fluharty and Cortland Cunningham.

Q I believe you also received some other components from Special Agent Brugger, did you not, either directly or through mail or something?

A Those were sent to me by railway express.

Q Were those from Special Agent Brugger?

A Special Agent Brugger it's my understanding prepared the package and communication to submit those to me.

Q Let me ask you, maybe I'm just not understanding, how do you know or do you have any personal knowledge as to who sent them? You say it's your understanding. Is that based on what somebody told you or your own knowledge?

A That's based on what somebody told me. I have no personal knowledge except I received those items from Rapid City by railway express.

{3274}

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

THE COURT: You may.

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

MR. SIKMA: I want to find out here if we're running into some problem with regard to the chain of custody as far as these items which were sent by railway express or if there is some indication that they were not in fact packaged sometime around the 5th of July. I believe we're talking about the .223 that was sent in by railway express.

MR. LOWE: I hadn't intended to raise any such question. We're trying to get a factual basis established.

MR. SIKMA: It would appear that that's the case from the questions, and whether or not he knows that, and it puts us in a position if you're going to raise that we would possibly have to call this other agent.

MR. LOWE: At this point I have no basis for raising that. Just trying to establish what he said.

MR. SIKMA: All right.

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

Q (By Mr. Lowe) Am I correct in saying that all of the cartridges and other ammunition components from the Jumping Bull area that you received were either received in that shipment you received from Special Agent Fluharty or from the shipment {3275} you received by railway express from Special Agent Brugger, is that correct?

A The great majority of them. I cannot think of any items that I examined from the area you described as not having come from there. However, I would hesitate to exclude anything based upon my memory.

Q I'm not trying to trick you. I have no knowledge myself of any other components except in those two shipments. What I'm trying to determine is whether you have any that I just may not be aware of.

Q No. I can't think of anything that didn't come in with those two shipments.

MR. LOWE: May we confer for just a moment, Your Honor?

THE COURT: You may.

(Counsel confer.)

MR. LOWE: Your Honor, Mr. Sikma has agreed with me to stipulate that all components found in what I have described as the Jumping Bull area, in other words, tent city, the crime scene and immediate environment such as the so-called escape route and so forth, some open fields around the area, were submitted for testing by the FBI firearms laboratory either by the shipment or the delivery of Special Agent Cunningham and Special Agent Fluharty or by the railway express shipment of Special Agent Brugger.

{3276}

Did I state that correctly?

MR. SIKMA: Yes, Your Honor.

THE COURT: The record may show the stipulation.

Q (By Mr. Lowe) Now given -- strike that.

You never actually went to the Jumping Bull area, did you?

A No, sir.

Q So you are in a position of receiving items, identifying them as to particular pieces of material you received, making tests and reporting them to somebody else without knowing of your own knowledge where they came from or how they were found?

A That's correct.

Q And what follows from that then, I assume, is that you have no way of knowing whether you saw all of the casings or ammunition components of which were found in the Jumping Bull area but can only testify that you observed the ones that were sent to you by these two different sources?

A Yes, sir.

Q Now you mentioned before FBI ammunition and you were talking about Lake City. Is that an arsenal?

A That is an arsenal; yes, sir.

Q And you indicated it was stamped "LC" on the bottom of the cartridge casings and did not have a .223 designation. I was not clear when you were saying that whether you were testifying that Lake City Arsenal is the only arsenal that {3277} produces .223 or 5.56 millimeter ammunition. Is that what you were testifying?

A No, sir. Only that those cartridges manufactured in the Lake City Arsenal bear the head stamp "LC" and the year they were manufactured.

Q In fact, are there other arsenals that you know of or other sources that produce 5.56 millimeter ammunition and .223 caliber ammunition? Let's say, first of all, for the military.

Q There are other sources other than Lake City Arsenal, yes, sir.

Q Some of those are commercial, are they not?

A Yes.

Q And do I understand your testimony to be that the FBI only buys .223 or 5.56 millimeter ammunition from, or acquires it from the Lake City Arsenal?

A No, sir.

Q So that it is possible that at any given time an FBI agent who has 5.56 millimeter ammunition or .223 caliber ammunition for his M16 might have a commercial brand or Lake City brand or some other arsenal in his possession?

A The ammunition which the Bureau sends out for use in this weapon is military. It is not restricted to Lake City. It could be any military manufactured cartridge.

Q I don't think you understood my question.

{3278}

A Would you rephrase it.

Q I'll say it again.

At any given time an FBI agent in the field who has 5.56 millimeter or .223 caliber ammunition used in the M16 might have in his possession for that purpose commercial ammunition or military ammunition?

A Yes, he could have.

Q And I think we've been saying this, talking around this, but let's pin it down. The M16 and AR15 fire the same ammunition and the bore and everything in those weapons are really the same except for automatic and semi-automatic feature, aren't they?

A That and the attachment on the side of the gun.

Q Yes.

A Yes.

Q Now there has been some testimony about FBI agents firing weapons and BIA police officers in this general Jumping Bull area on June 26th. Did you receive any cartridge casings which either you were told were fired by law enforcement personnel or which you later made a determination on your own were fired by law enforcement personnel?

A Well, only with the exception of the weapons that we have here.

Q All right.

Excepting the five weapons, I believe it was, the {3279} shotgun, the 308 and the pistol of Special Agent Coler and the pistol of Special Agent Williams, I guess that's four weapons, other than those four weapons, did you receive any ammunition components which you subsequently determined or were told came from law enforcement personnel?

A No.

Q So if any such cartridge casings were found, they were removed from the total body of ammunition components prior to them being received by your laboratory?

A I cannot speculate on that. I did not have any weapons to make a comparison with those items, other than the four weapons I received here. I do have a large number of fired cartridge cases which I have not identified with any weapon.

Q All right.

There has been some discussion about the term, "high velocity." First of all, would it be correct for me to say that there is no standardized definition of exactly what is meant by the term "high velocity," in terms of from so many feet per second to so many feet per second and rather it's a judgmental thing and you might have an opinion and another firearms expert might have an opinion and a manufacturer might have a different opinion?

A From my point of view I know of no standardized definition of that; no, sir.

Q You have testified that the AR15 is a high velocity type {3280} weapon, I believe.

A That would fall within my definition of the term; yes, sir.

Q All right.

Would an M1 be a high velocity weapon?

A Yes, sir. It could hit --

Q And would a .303 British Enfield be a high velocity weapon?

A Yes, sir.

Q And could you name other weapons that you would consider a high velocity weapon?

A Yes, I could.

Q Would you do it.

A Well, there are several. Would you like me to restrict it to the items we have here?

Q First of all, yes, restrict them to the weapons we have here.

A Well, the M1 would be considered a high velocity weapon. The 303 British, the AR15, the 30-30 could be considered as high velocity. The others are relatively, the .44 magnum is relatively low velocity, under 2,000 feet per second, so I wouldn't group that in the same class with the more high powered. The same thing with the .45 automatic.

Q I assume other than the weapons we have here there would be a lot of other weapons you could name from your knowledge of weapons that would also be considered high velocity?

{3281}

A Yes, sir.

Q When you said before the .45 automatic, were you speaking of the cartridge or of the characteristics of the weapon, the Commando Mark III weapon as being an automatic weapon?

A In that particular instance I meant the weapon itself.

Q You're saying that the .45, the Commando Mark III, .45 weapon up there is a fully automatic weapon?

A No, sir. A .45 auto being the cartridge designation.

Q That's what I was getting at.

A Okay.

Q We have had some discussions here, as you might expect, about automatic and fully automatic. There is no doubt in your mind that Exhibit, I think it's 37A, the Commando Mark III is a semi-automatic weapon only, isn't it?

A That's correct.

{3282}

Q In addition, you have identified these various weapons that were high velocity. There are changes that can be made with particular ammunition if you load it yourself by loading it with a higher or faster burning powder and doing other things which would raise or lower the velocity of different ammunition components compared to the similar commercial component, isn't that also true?

A Yes.

Q Now, as to your case number here, you said in this case -- am I correct in saying that as to the RESMERS investigations that you made and examinations that you made that you used a single file number to identify all of the components that you actually did identify or report with

regard to RESMERS and that that number was 89-3229, and do you want to check your lab reports?

A No . That's the number which is assigned to this particular case.

Q O.k. Now, I assume your procedure would be, if you get a whole lot of ammunition components and a number of weapons, that you would, first of all, examine the cartridges to see if there are identifiable marks which you know from your experience might relate to a weapon, and that you would in some way make notations and might make some preliminary thoughts as to what kind of weapon fired it; and then we simply go by trial and error in some way with some ammunition components in the weapons {3283} to see if you can bring about similar markings, is that generally what you would do?

A Well, we compare the fired components that we receive, In this case I compared all of the fired cartridge cases that I received with the test cartridge cases that I shot in the laboratory itself.

Now, there is no way to make a gun produce a mark on a cartridge case that -- or change those marks. You fire the gun, the marking is either there or it isn't there, so it isn't anything alterable by the laboratory examination.

Q Take an example, take the M-1, which is 29-A. I gather what you would do would be to take a clean, new M-1 cartridge, 30 aught six cartridge, perhaps preliminarily examine it to make sure there are no scratches or markings on it, you would put it or perhaps a clip of them in the weapon, take it to the range or test firing tank, fire the weapon a number of times, retrieve the ammunition components including the bullets and the cartridge casings, and then examine them to see what marks were made on the cartridge casing, either by the firing pin or the breech or in some weapons an extractor, and see whether you find markings on them that can compare to the ammunition components that you are trying to identify, would that be a general description of what you do?

A Yes, sir.

Q And as to the bullets that you find, the lands and grooves {3284} in the bore of the rifle or pistol, if it has lands and grooves, etch the lead or copper projectile as it goes through and puts some characteristic markings on that which then can be retrieved and compared with fragments, such as 34-H, which is on the chart behind you, to see whether you can match them up, and that's generally true, you do that?

A Yes, sir.

Q And would it be reasonable to say that you do that generally with all of these components and with the various weapons you are given, try different combinations -- in some cases you might have two or three different M-1's, you have to check and see which ones fired which cartridge case, isn't that true?

A Yes.

Q And when you get all done, you would make a report fairly contemporaneous with your test when it is concluded to whoever requested the information, telling them which weapons

compare by your analysis, so that you can say that, first of all, some weapons fired certain cartridges to the exclusion of all other weapons, that's one category of findings?

A Yes.

Q A second category of finding might be that this cartridge case could not have been fired in this weapon, but I have no weapon that I can match it up with, that's a second finding, isn't it?

{3285}

A Yes.

Q A third finding might be that there are insufficient marks to determine whether this weapon is associated with this cartridge case, that's a third finding?

A Yes, sir.

Q And as to the findings, when there are no markings or very slight markings, in some instances you might even have a suspicion that it connects to a weapon but you have no way of determine that as a matter of your scientific examination unless you have sufficient markings to make your identification?

A That's correct.

Q All right. So that if a cartridge casing is found which has no markings on it at all of value that relate to a weapon, and if you have a weapon which makes a peculiar scratch when it ejects, let's say, you can say fairly certainly that this cartridge case was not fired in that weapon, but I don't know what other weapon it might have been fired in, isn't that true?

A That could be true in a particular instance, yes, sir.

Q And as to an ammunition component which has insufficient markings of any kind but has some markings on it, until such time as you are given a weapon which makes similar markings you are unable to say anything except that it apparently was fired in some weapon at some time?

A Yes, sir. I may be able to give a list of weapons that it could have been fired from.

{3286}

Q Fine. As to different weapons, I presume, that in some sort of an organized fashion in your laboratory, whether it is a book by manufacturers or a list that you make over the years, that if you see a particular type of scratch on a round you can by your experience and by your reference materials tell what kinds of weapons might have produced that scratch because you know the characteristics of a particular type of extractor, let's say, isn't that true?

A Well, the incidence of being able to do that is highly limited. The mechanism of a gun is -- in some cases, yes, sir, but I would say it is very limited. We prepare these lists generally from the rifling characteristics on fired bullets rather than from an examination of the cartridge cases.

Q If you have a bullet fragment that has, let's say, six lands and grooves -- and the lands being the raised portion and the grooves being, of course, the grooves, the cut out portions; and if they are within certain tolerances in terms of width, you can look to your reference sources and say what weapons might have fired that; you might give a list of two or ten depending upon what it is, isn't that true?

A Yes, sir.

Q And that would be true in some instances even if you do not have sufficient microscopic markings for comparison to a bullet that is fired from a known weapon because you can still count the lands and grooves or measure them, isn't that true?

{3287}

A Yes, sir.

Q And I presume that you made all of these types of tests we are talking about on the various components and weapons that were submitted to you in an effort to connect up any of these components that you could with any other weapons that you had, to the best of your ability in your laboratory?

A Yes.

Q I realize that as a professional you probably try to take great pains whenever you make an examination, whether it is a big case or a small case; but would it be fair to say that this has been one of the more important cases in terms of your efforts and the efforts of agents you have been associated with in trying to solve the case and in trying to connect up various firearms components, would that be fair?

A From my aspect of this firearms identification specialist's point of view this has been the most voluminous case that I have handled. I know of other cases the Bureau has worked on where similar manpower expenditure has been conducted.

Q And you, of course, were aware, first of all, generally, that the case involved the death of two FBI Agents, I trust?

A Yes, sir.

Q And recognizing that we all want to expend a 100 percent energy in everything we do, there are certain times you work a little harder than others, put a little extra emphasis on it; would it be fair to say in the range of cases you have worked {3288} on, you have worked as hard on this case as any you have ever worked on?

A Yes, sir.

Q We described, I think it was, July 5, was the one batch of ammunition you received. I don't think we got the date on the other. Was it around July 24, 1975, from Brugger, the Railway Express?

A The Railway Express package I received on the 24th of July.

Q That's what I thought.

Now, taking the ammunition components and going down, I have some questions on these various components that you described; and I think the best way for me to do this is to try to get the particular chart up. Are the charts over here?

Let's start out with Chart 29-1. I am just going to put this down. We don't have enough room here. All right.

MR. LOWE: Now, your Honor, we are at a point where you might want to take a recess at some point, and this is a convenient breaking. I am going to get into something else.

THE COURT: We are getting close.

MR. LOWE: I would suggest, your Honor, this is a convenient time for a break for me. I will be getting into somewhat of a longer examination here. If you want to recess now --

{3289}

THE COURT: (Interrupting) The Court will recess until 10:45.

(Recess taken.)

{3290}

(Whereupon, at 10:45 o'clock, a.m., the following further proceedings were had in the courtroom, the Defendant being present in person:)

THE COURT: The jury may be brought in.

(Whereupon, at 10:48 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:)

(Witness resumes witness stand.)

Q (By Mr. Lowe) I believe at the recess we were just beginning to get into Chart No. 29 which is on the board behind you, and I want to ask you some questions about it.

First of all, I want to ask you, in preparing a chart like this do you actually do the artwork, or are there specialists available to you on call at your FBI laboratories who prepare such charts for you?

A Yes. We have specialists who prepare these charts for us.

Q Are they within your section or are they general artists who go wherever they are needed at different times?

A Well, they are within the same administrative breakdown that the laboratory is in, but they are available for use by anybody within the organization who needs them.

Q And when you assemble information you want on a chart, I presume that you sit down with that person and discuss how you want to display or what information it is, and that he would consult with you perhaps with some expertise he has from a {3291} drafting point of view to decide what the best method would be to display it on a chart, is that true?

A Yes, sir. In this particular instance, a chart like this had been used in other cases; and I merely told him I wanted something of the same format.

Q I understand there may be other cases where you had a general outline of a rifle of some kind and general blocks for different components and pictures, but as to this specific instance, let's say 29-A, I presume you would say, "Here are the number of cartridges or the number of exhibits we are going to have here, here are some pictures I would like to display, here are some bullets I want to show," you sit down and work out with him some sort of a display which would be reduced to the art form by the artist?

A Yes, sir, I think that's generally correct.

Q And am I correct in assuming that you are the one who selects the items to go on the chart and you give that to the artist and he puts them on there?

A No, sir. The prosecutor tells me the items that he wants displayed.

Q Was there a particular prosecutor in this case who dealt with you on these charts?

A Mr. Sikma.

Q So do I understand then that Mr. Sikma said, "All right, I want a chart which shows the rifle and certain cartridges and {3292} certain pictures," after he has seen what you have available; and then you would take that general list of items and get with the artists and prepare the chart?

A Mr. Sikma told me the items which he considered important that he wanted on the chart, to be associated with the 29-A rifle.

Q All right. I don't think I actually asked you this in detail. You indicated that you knew that the incident here involved the killing of two FBI Agents. Did you ever get a briefing of any kind to give you a general idea of the Government's theory of what took place insofar as it might aid

you in your detective work, if I can call it that, with tying up various weapons and weapons components?

A After my laboratory reports had been issued, I met with Mr. Sikma and he talked to me about what he wanted displayed and his general idea of what had happened.

Q What I am getting at, for example, did he sit down and explain when you were talking about a M-1, let's say --

MR. SIKMA: (Interrupting) Your Honor, I object to this. It is totally irrelevant. It is within the purview of the prosecutor's work product.

MR. LOWE: Your Honor, I think this has been invited by the introduction of 29-G and 29-F. We objected to it at the time and the Court made a ruling and said we could {3293} go into. I intend to go into in detail.

MR. SIKMA: This has nothing to do with 29-G and 29-F.

MR. LOWE: It most certainly does.

THE COURT: I will permit him to proceed. I think that it is work product, and it is not entirely clear to me that it is relevant but I will permit you to go forward.

MR. LOWE: All right.

Q (By Mr. Lowe) In regard to, let's say, the M-1, did you sit down with Mr. Sikma and did you discuss various places that various cartridge casings or bullet fragments that might be linked up to a weapon were found in order to discuss how it might fit in with the Government's understanding of what took place on June 26th?

A Yes, in the sense that I asked Mr. Sikma is the way that I had these items set out in the laboratory report, sight of recovery, if that is the information that he wanted displayed on the chart.

Q O.k. Now, with regard to 29-G and 29-F, as I understand your testimony, you cannot give testimony that says that 29-G was fired from 29-A, so far am I correct?

A You are correct.

Q And that you cannot say that 29-F was fired from 29-A, am I correct that far?

A That's correct, sir.

Q And in fact, as to those exhibits isn't it true that there {3294} are a number of weapons that might possibly have fired those bullets, based on the various lands and grooves that you identified?

A Yes, sir.

Q Now you have identified one which you obviously believe could have fired 29-G or 29-F, and that is the 30 caliber M-1 which is Exhibit 29-A, so far correct?

A So far.

Q And I ask you whether it isn't true that a 30 caliber M-14 could have fired those bullets?

A Yes.

Q And a 30 caliber Winchester, Model 94?

A Yes, sir, some of the older models could have fired --

Q (Interrupting) And the 30 caliber Winchester, Model 70?

A Yes, sir.

Q And a 30-30 Harrington and Richardson rifle?

A I recall that one, yes, sir.

Q And a 30-40 Krag, U. S. Rifle, Model 1892?

A I also recall that, yes.

Q And a 30 caliber of some models of Browning rifles?

A I believe that's correct. If I may, I did make a list of them so if I could follow that to go along with you --

{3295}

Q Anytime you want to refer to notes -- let me just add that I think you also added 30 caliber Remington rifles; is that correct?

A Yes, sir.

Q And in fact these are not merely wild speculations necessarily since there were no weapons of some of these types found, and I would point, call your attention to your laboratory --

MR. SIKMA: Your Honor, I would state that this is a misstatement of the record. There's only one of those kind of weapons found in relation to this offense as far as I know.

MR. LOWE: That's fine. I didn't mean to communicate anything else, I believe that's correct.

Q (By Mr. Lowe) The M-1, 29-A, is the only one of these kinds of weapons that you found, the weapon; isn't that true?

A I did examine some Winchester Model 94's, but they were all of six right variety rather than the four right.

Q But you of course having not been there either during the incident or after the incident can give no testimony about what weapons may have been fired and carried away by unknown persons, can you?

A No, sir.

Q All right. And I would call your attention, just as an example, to your laboratory report of August 5, 1976 at page 7. Would you turn to that.

Do you have it there? August 5, page 7.

{3296}

Q822 to 861, and I'll ask you what kind of ammunition is shown there?

A 30-40 Krag.

Q So that in this instance for this weapon you actually found in the tent city, I believe is where you found it, ammunition components which could be fired in a 30-40 Krag rifle Model 1892?

A Yes, sir. I received that from, listed as I think, from -- I'm sorry, that was listed as having come from a 1966 Chevrolet Suburban and --

Q I'm sorry. Well, that was in the tent city area, all right. So from the red and white van, the 1966, '66 Chevrolet Suburban; but in any event I gather from what you have said that those cartridge casings fit a rifle which could have fired either 29-G or 29-F?

A That's a possibility, yes, sir.

Q Did you make up any charts outlining the Krag 30-40 rifle, Model 1892 and showing 29-G and 29-F on the chart so show that it possibly could have been fired from that weapon?

A No, I did not.

Q I gather Mr. Sikma didn't ask you to?

A That's correct.

Q And as to some of the other weapons there, there were a whole lot of ammunition components that you were never able to find a weapon for in this general Jumping Bull area, weren't {3297} there?

A Yes, sir.

Q And it would be fair to say that calibers and types ranged from one end of the spectrum to the other and really as to rifles?

A There was a significant variety in the ammunition recovered, yes, sir.

Q All right. So that actually when you put 29-G in 29-F on that chart it is put there to totally indicate in 29A in the hopes that it was associated with 29-A; isn't that true?

MR. SIKMA: Your Honor, I'd object to this totally improper question. Counsel knows it's an objectionable question.

THE COURT: The objection is sustained.

Q (By Mr. Lowe) 29-G and 29-F are not connected to 29-A in any way by your tests, are they, as far as making an identification?

MR. SIKMA: I would object to that, Your Honor. The witness has testified that there's a connection by way of possibility.

THE COURT: Well, the witness may answer that question.

A The only connection between the bullet fragments on the rifle 29-A is in the rifling class characteristics.

Q (By Mr. Lowe) All right. So if you really wanted to be fair you should have had a chart with every one of those weapons that identified and then 29-G and 29-F on it?

{3298}

MR. SIKMA: Your Honor, I object to this. Counsel knows again this is an improper question.

THE COURT: Sustained.

MR. LOWE: Your Honor --

Q (By Mr. Lowe) You made no charts, did you?

THE COURT: I sustained that objection to the form of the question.

MR. LOWE: I understand that, Your Honor.

THE COURT: Very well.

Q (By Mr. Lowe) I'm asking, you made no charts similar to the chart 29-1 or any weapon on this list except the M-1, did you?

A That's correct, I did not.

Q In fact 29-G or 29-F could have been fired in a .308 Winchester rifle also, could they not?

A .308 Winchester is a caliber, sir. Now, there are Winchester rifles that have that rifling model 54 and a model 70. Those models in caliber .308 could possibly have that rifling in it.

Q You are saying that they could possibly?

A I do not have any specific listing for the .308 caliber. I cannot exclude that since it is a Winchester caliber and there are Winchester rifles that have its rifling.

Q Did you testify in another proceeding in this matter?

A Yes, I did.

{3299}

Q Did you testify under oath?

A Yes, I did.

Q Did you testify truthfully?

A Yes, sir.

MR. LOWE: If Mr. Hultman wants to refer to page 1528 of the transcript.

MR. HULTMAN: It's not my witness, Your Honor. I'm not referring to anything.

MR. LOWE: Well, as a courtesy, if you wanted to follow.

MR. HULTMAN: Mr Sikma is the one.

MR. LOWE: Well, if Mr. Sikma wants to look.

Q (By Mr. Lowe) Discussing Exhibit 29-G and F, starting at line 11:

"Question: In other words, if there were other firearms with similar rifling they could have all been fired from those firearms?"

"Answer: Other firearms that would accommodate the type of bullet represented by 29-G and 29-F; in other words, a .30 carbine -- " I assume that's a 30 caliber carbine -- "wouldn't do it, but a .308 Winchester might, or another similar caliber to a .308 that had the same type of rifling."

Q (By Mr. Lowe) Does that refresh your recollection as to testimony you gave on an earlier occasion?

A Yes, sir. I said "might". My testimony has not changed in {3300} this particular instance.

Q All right. Would you state what weapons fire a 30 aught 6 shell, first of all limiting yourself to the weapons that are already in evidence here involved. We know of the M-1. Are there any other weapons that fire the 30 aught 6 shell?

A Not of the weapons that are on that board, no, sir.

Q Are there any other commonly used weapons or weapon commonly known to you in gun Stores in the United States that fire a 30 aught 6?

A Many.

Q All right. Now, you have up there Exhibits 29-B, 29-E, 29-A, but the ammunition components, the only ones that you've testified to have been 29-B and E. You actually identified other ammunition components to that weapon, did you not, from the crime scene area?

A Yes, sir. If you include tent city in that.

Q Only if you include tent city. Is that your testimony?

A To the best of my recollection, at the moment I don't know of anything, well, yes, I'm sorry, we have an area blocked off there.

Q You found some weapons, some cartridge cases that match up to that weapon at the Wanda Siers house which has been referred to as the tan and red house on Exhibit 71?

A I didn't find them. I received them as having come from there, and I didn't identify them with Exhibit 29-A.

{3301}

Q And they're not on that chart anywhere, are they?

A No, they're masked off.

Q May I assume then that those weapons linked up in the same way that 29-B and 29-E did in the sense that you had positive markings with which you could identify them?

A Yes, 29, yes.

Q I now put up chart 30-1 which is the .308 Winchester. And you have identified on that chart Exhibit 30-B, which is a cartridge case found by somebody reportedly at the rear of Coler's car, and you identified that positively with 30-A, did you not?

A Yes, sir.

Q And you had no weapon, no other weapons submitted to you which were identified to that weapon?

A I don't understand the question, sir.

Q You had no other cartridge casings submitted to you which were identified to that weapon?

A No, sir, none.

Q Now, going back for a moment, because I was going to ask you one other thing, I would call your attention to your laboratory report dated February 10, 1976. If you could turn to that, and on page 17 and ask you if there is a Q number 2556 identified somewhere on that page as being a 30 aught 6 shot, or cartridge?

A Well, 2556 is mentioned. It is not identified as to caliber.

{3302}

Q If there's another place that it's mentioned between the two places, normally in your reports you list all the items first and then you discuss the comparisons?

A Yes, sir.

Q Would you verify for me that your report dated February 10, 1976 shows that Q2556 was a 30 aught 6 cartridge which was found near the Siers house, the red and white, or the tan and red house that we've just discussed earlier, and that it was identified positively as having been fired from the weapon identified as K2?

A That's correct.

Q What is weapon K2 as referred to in that report, if you know?

A It is a 30 aught 6 rifle which I received in another case. A case not related to the Resmurs case.

Q So this was not a rifle found in the Jumping Bull area?

A I don't recall where it was found, sir.

Q It was related to another case?

A It was Sent in on another case, yes, sir.

Q All right. What I'm getting at, it was not sent in under this Resmurs case for identification, it was received independently?

A That's correct, yes, sir.

Q While you mentioned that, is it true that when you get different weapons from many parts of the country that fit the general category of cartridge casings, let's say that you were {3303} trying to identify this case, do you have some sort of cross-referencing so that when a 30 aught 6 comes in you can check to see if any 30 aught 6 cartridges which are unidentified might match up with it?

A Not as a general rule, no, sir.

Q In this case did you do that?

A In this case I did that because it was I believe requested of me to do it.

Q All right. So that you can state from your examination as shown in your report that this 30 aught 6 rifle which you received from some other case fired the cartridge Q2556 which was reported to you as having been found by the Wanda Siers residence?

A Yes.

Q I now show you Chart 31-1 and as I understand your testimony you identified two cartridges, 31-D -- excuse me, 31-D is six cartridges which were found at Al Runnings which is on the Rosebud Reservation, and that's 31-D.

You also identified one .38 Special cartridge, 31-E which was found near Coler's car in the area. And those are the only ammunition components; am I correct, that you identified to weapon 31-A?

A Yes, sir.

Q I would invite your attention to your report August 5, 1975 on page 4 and ask you whether under the general heading of Special {3304} Agent Williams' personal effects there were any ammunition components found, and if so would you state what was found.

A Ammunition components listed in that area include six .357 magnum cartridges which were in a cartridge pouch. And thirteen .357 magnum cartridges.

Q And those are respectively Q281 through 286 and Q276 through 299, are they not?

A Yes, sir.

Q And the item preceding that Q281 was the cartridge pouch itself?

A Yes, sir.

Q Do you know that of your own knowledge that that was a cartridge pouch taken from Special Agent Williams' body?

A I do not know that, sir.

MR. LOWE: Can we stipulate?

MR. SIKMA: Would you give me the Q number?

MR. LOWE: Yes. Q280 was the cartridge pouch, and Q281 through 299 were the nineteen .357 magnum cartridges which are shown in two lots.

MR. SIKMA: If you'll give me just a second.

Q (By Mr. Lowe) While Mr. Sikma is looking there, would you turn to your report dated December 4, 1975 for a moment.

MR. SIKMA: Yes, we'll stipulate to that.

MR. LOWE: All right. While he's looking through that, Your Honor, the Government has agreed to stipulate that {3305} the pouch and the nineteen .357 magnum cartridges which were taken from the body of Special Agent Williams and listed as part of his personal effects.

THE COURT: The record may show the stipulation.

MR. SIKMA: Your Honor, I would like if we could to add to the stipulation that those were live, unfired rounds.

MR. LOWE: I intended to say that. If I didn't, when I say cartridges, that's what I mean if I said cartridge casings. That's fine to clarify that. I have no objection.

Q (By Mr. Lowe) Do you have your report of December 4th?

A Yes, sir, I do.

Q Referring you to Exhibit 31-D which is Q2126 through 2131 I'll ask you whether your report indicates whether these cartridges were found in the same bag or container as certain other cartridges, cartridge casings, excuse me?

A Yes, sir. They were contained in a bag with several other items.

Q And among those other items, am I correct, are -- I'll get the Q number -- Q2124, 2125 and 2136 through 2139?

A Yes, sir. They're all in that group.

Q Do you know whether, let me show it to you, that's the best way.

I ask you, I show you Exhibit 35-1 and ask you whether those cartridge Q numbers relate to Government Exhibit 35-E?

A Yes, they do.

{3306}

Q So that the cartridge casings we're talking about right now, which are 31-D from Special Agent Williams .357 were contained in a bag which also contained six cartridge casings from Special Agent Coler's .357, correct?

A Yes, sir. They were all located in --

Q And they were all found at the Al Running property on Rosebud?

A That's the information that I received, yes.

{3307}

Q I now show you chart 32-1 and I believe you testified that these six cartridge casings were identified by you as having been fired from chart 32A, am I stating that correctly?

A Yes, sir. Essentially.

Q Now I call your attention to your laboratory report, August 5, 1975, again, and ask you to turn first to page 3 and look at Q 131-170 and I ask you if those Q numbers refer to certain 30-30 rounds, or cartridge casings I should say.

A Yes, sir, they do.

Q And now I ask you to turn to page 32 -- first of all, those cartridge casings, is identified there as to who found them. Is that shown?

A Yes, it is.

Q Who found them, according to your report?

A Dean Hughes.

Q Special Agent Hughes?

A Yes.

Q Turn now to page 23, please. As to Q 131 through 134, 148-151, 152 through 162, 169 and 170, were you able to make an identification of all of those cartridge casings being fired from the same weapon?

A No, sir. I don't think I was. What I have there is extractor markings.

Q Let me rephrase the question.

Were you able to determine by comparison that all of {3308} those cartridge casings were extracted at some time by the same weapon?

A Yes, sir.

Q And did you also determine that those cartridge casings were not extracted from weapon 32A?

A Yes, sir. The connection, the extractor in 32A did not produce those markings.

Q And back on page 3 I asked, you said it was found by Special Agent Hughes. Does it indicate where he reported he found those rounds, cartridge casings?

A Just at the scene.

Q The crime scene, doesn't it say that?

A Well, what I have listed is "recovered" at the scene.

Q Just "scene"?

A Yes.

Q But your examination showed that Exhibit 32A did not fire those cartridge casings, although you did not have given to you a weapon which did extract them, isn't that correct?

A Well, I don't really know as to that. The 131 through 170, I do know that they had extractor markings from this paragraph that were not produced by K15, Exhibit 32A. Now the paragraph

doesn't tell me any further than that and I'd have to go back and find some other area in the report. I don't recall those particular cartridge casings.

Q As to Exhibits 32B and 32C, you did find markings sufficient {3309} to positively identify them with Exhibit 32A, however, as you show on your chart, isn't that correct?

A 32B and 32G; yes.

Q Is it G or C?

A C.

Q I think it was marked G and changed to a C.

MR. SIKMA: Yes, Your Honor. We changed the numbers from another proceeding and as a result of that it has been changed to a C. I think I may have referred to it also yesterday as 32G inadvertently.

THE COURT: The clerk caught that discrepancy yesterday.

Q (By Mr. Lowe) Let me rephrase my question to be more inclusive. I am correct, am I not, that you did find markings on Exhibit 32B and 32C which are depicted on chart 32-1 which enable you positively to state that they were fired from Exhibit 32A to the exclusion of all other weapons?

A Yes, sir.

Q Now I call your attention to the laboratory report, January 13, 1976, and ask you to look at page 8 of that report.

All right. And referring to K12, a Savage 30-30 rifle, is that shown on there?

A Not on page 8.

Q On page 8 it does not?

A Page 9.

{3310}

Q Or does it make a reference to it?

A Page 9, sir.

Q Maybe I have the wrong page.

In any event, in that report is there identified a weapon K12 which is a Savage 30-30 rifle?

A Yes, sir.

Q And does it show where it was found?

A Yes, it does.

Q State where it was found according to that report.

A 1967 Chevrolet.

Q It doesn't say where the vehicle was?

A It just says, "Obtained from a 1967 Chevrolet, South Dakota license 2-17817."

MR. LOWE: Can we stipulate, I believe that's the red and white van, is it not?

MR. SIKMA: Yes, it is.

MR. LOWE: The different places it's referred to as a 1966 Chevrolet Suburban and sometimes by a license number. But that is the red and white van?

MR. SIKMA: It's a '66, I thought I said.

Q (By Mr. Lowe) Does it say '66 or '67?

A I have it listed as '67.

MR. LOWE: There is no 1967 Chevrolet, is there?

MR. SIKMA: That's correct. That's correct.

MR. LOWE: Okay.

{3311}

Q (By Mr. Lowe) Let me ask you if on this board there is displayed that weapon, K12?

A No, sir.

Q There is a board behind it.

MR. LOWE: Can we stipulate it's not displayed on that board either? I believe that's the Canadian weapon.

MR. SIKMA; That's correct.

MR. LOWE: And I think rather than state what is in evidence and not, can we state that K12 is not presently in evidence?

MR. SIKMA: That's correct.

Q (By Mr. Lowe) I now show you Government Exhibit 33-1. As I understand your testimony, this weapon was the Rugger .44 carbine found at Al Runnings and that you linked up the various cartridge casings shown on this chart positively to this weapon by various microscopic markings or scratches, is that correct?

A That's correct.

Q Now in addition to that you identified the copper jacket Q 1 which is Exhibit 33C and you made a positive identification of that?

A Yes, sir.

Q And also on 33F there were two bullet fragments which you made a positive identification on?

A Yeah. I identified 33F, yes. It had been fired from 33A.

{3312}

Q And as to 33J and 33K, down on the bottom of the chart, once again we have two bullet fragments that you cannot state were fired from 33A, can you?

A That's correct.

Q I assume, though you haven't said this, that you did not determine what exhibit numbers would be assigned to various items you examined or only assigned Q numbers or K numbers, is that correct?

A Those are the only numbers I assigned; yes.

Q And again did Mr. Sikma tell you to put 33K and 33J on this chart?

A Yes, he did.

Q And as to those fragments, I believe you said that they had 12 grooves, am I correct in remembering that?

A Yes, sir.

Q And as to those two exhibits, I trust that the only thing you can really say is that a 12 groove weapon of .44 caliber fired those fragments?

A Yes, sir.

Q Have you ever examined any statistics on all these various types of weapons to give any kind of an idea to the jury how many .44 Rugger carbines were produced by that manufacturer, for example, in order of magnitude?

A No, sir. I have no idea. But the number is very large.

Q And the same would be true of virtually all these other {3313} weapons, they're commercially produced in large numbers, whatever that number might be?

A Yes, sir.

Q I now show you chart 31-1 -- excuse me, 34-1. Now this is the chart of the AR15 which is on the table right now which is Exhibit 34AA. This is a look alike for an AR15 component which is identified as Exhibit 34A, is that correct?

A Yes, sir.

Q First of all on 34C, on the chart, and on 34H on the chart, we have a similar situation that we did with 29 and 33, don't we, and that is you cannot link, you cannot say that those bullets were fired from 34A, can you?

A No, sir, I cannot.

Q And in fact there are a number of different weapons that might have fired that. First of all an M16, a 5.56 millimeter could have fired that, couldn't it?

A Yes, sir.

Q And, of course, then we have the .223 caliber AR15 could have fired those two bullets?

A Yes, sir.

Q And again the AR15 I presume you understand was manufactured in large numbers?

A Yes. I believe it has been.

Q And a .222 caliber Remington rifle could fire those two bullets, couldn't it?

{3314}

A Yes, sir.

Q And a .222 caliber Savage rifle could have fired them?

A It's fairly common rifling. I believe it could have, yes, sir.

Q And a 22-250 caliber Remington rifle could have?

A Yes, sir.

Q And a .225 caliber Winchester rifle could have?

A Yes, sir.

Q And there are a whole variety of center fire .22 caliber rifles that could have fired them also, isn't that true?

A Yes.

Q Did you prepare any chart of any of these weapons other than an AR15 to display Exhibit 34G and 34H for comparison or for display?

A No, sir.

Q Now as to these weapons, the only one that was actually identified in weapons that we have in evidence are, first of all, .223 we have, Exhibit 34A, and there is, I believe there are two .22 caliber weapons, is that correct, that you examined in this that are in exhibits now?

A That are in exhibits. There is only one.

Q I think Exhibit 41 is only one actually in.

A I think that's true.

Q As to other ones there, there were ammunition components covered and reported to you which you identified from various {3315} places in the Jumping Bull area which would have been able to have been fired in virtually any of these weapons, isn't that true?

A There was some .222s that I recall and there was some 22-250s; yes, sir.

Q Do you remember any .225s?

A I don't remember any 225s.

Q I don't recall seeing any.

There was a lot of .22 ammunition, wasn't there?

A I believe there was.

Q And obviously a lot of .223. So that it's not just idle speculation or guessing to say that it's possible that one of these weapons fire those bullets in the sense there are ammunition components that could have been used in a weapon and that weapon could have fired those bullets so there is more nexus than speculating that some hypothetical weapon could have fired those bullets, isn't there?

A I don't know that I understand your question.

Q What I'm getting at, if we just said you could have had a Winchester weapon fire those bullets, we don't have anything to suggest there was ever a Winchester .225 rifle in the Jumping Bull area that you're aware?

A No, sir. There was no ammunition that I remember recovered of that caliber.

Q That's not true of a 22-250 Remington rifle insofar as {3316} there was ammunition components and ammunition component, or more than one found in the Jumping Bull area which would be used in a Remington rifle?

A Yes, sir.

Q Now as to the 34G, am I correct that 34G and 34H could have been fired from the same weapon?

A They could have been; yes.

Q But you did not determine that they had been. It could have been they were also fired from separate weapons, isn't that true?

A That could be; yes.

Q And I believe the identification generally that you gave was that the bullets appeared to come from a .22 center fire rifle with six grooves with a right hand twist, am I correct?

A Yes, sir.

Q Now you indicated that, I believe, one or both of these was copper jacketed, am I correct about that?

A Yes.

Q And I think you alluded to the fact that .22 ammunition, you either said is not normally or normally is not copper jacketed and let me ask you this: is any .22 caliber long rifle ammunition copper jacketed sold commercially?

A Not sold commercially. There are some military but it's {3317} open based type of copper nose on it. I believe that may even be a collector's item now.

Q I believe your report shows, I think there has been testimony that Exhibit 34H was recovered from the ground, that is, dug out of the surface of the ground, the earth, and I think that shows there, "from ground beneath bodies of Williams and Coler," and I will ask you whether you and under your supervision someone else tested those bullet fragments for the presence of blood.

A I do not recall if we did or not.

Q Do you recall whether you testified in an earlier proceeding in that regard?

A No. I do not.

Q All right. I'll try and find a reference for you later. I'm not going to take the time now.

I think you indicated that on the basis of your tests with the bolt and extractor from 34A which you inserted into another AR15, you determined that by hand extracting the cartridges you put extractor marks on which matched up with 34C, 34D and so forth, am I correct in how you did that?

A No. I never conducted that test. I did not attempt to see whether or not I could reproduce those extractor marks by hand. It is theoretically possible for them to be regrooved by hand.

Q Perhaps I misunderstood how you associated, let's say, {3318} the cartridges in 34C with Exhibit 34A. Just pick that for an example. I thought you --

A Maybe I misunderstood your question. I thought you asked me if I had performed tests by trying to produce extractor marks by hand. I did not.

Q You did it by firing?

A By firing.

{3319}

Q All right. Then maybe I misunderstood you. That's what I was trying to clear up.

The extracting marks you produced were produced by firing. Your testimony, I gather, is that if a .223 cartridge had been fired in Exhibit 34-A, it would have produced this kind of extractor mark or this identical extractor mark?

A Yes, sir, that's my finding.

Q That's what I wanted to be sure of. Now, as to Government Exhibit 34-B which is Q2628, will you check your laboratory report dated August 5, 1975, and tell me whether that cartridge casing is listed in there?

A (Examining) That 34-B would not be listed in the August 5 report, no, sir.

Q That was actually received by you on August 24, 1975, I believe you either testified, or it was the other batch?

A Yes.

Q And I ask you to look at your report, January 13, 1976, and first of all, turn to Page 3 of that report; and I call your attention to Q100 through 105 and Q130; and I ask you if those are not .223 caliber casings which were found by Special Agent Hughes?

A Yes, sir.

Q Does it indicate where he reported finding them?

A Again in that group, I have it listed only "at scene", recovered at scene.

{3320}

Q All right, and did you examine those seven .223 cartridge casings as a part of your examination?

A Yes, I did.

Q Were you able to associate it in any way or disassociate it in any way with Exhibit 34-A?

A I was able to disassociate it with Exhibit 34-A.

Q In other words, your test or your examination disclosed to you that those seven .223 cartridge casings could not have been fired from Exhibit 34-A, I gather?

A That's correct.

Q Did you ever -- when you received those cartridge casings -- let's use them as an example to bring something else out here -- when you got those, I gather you got them with a lot of other cartridge casings and perhaps some other items?

A Yes, sir.

Q Is there any rhyme or reason as to how you assigned Q numbers, as you pick them out of the box you just start sequentially numbering and listed them, or you do it in the order they are listed, for example, in the covering document?

A We try to keep it as logical as possible. Group together items recovered together in a particular area, as much information as is given us.

In this particular case there was many submissions recovered from different areas by different people, in that one red trunk that I received from Cunningham, so that I just {3321} went through them as best I could trying to keep everything together as best I could, and listed them as the information was received with the items.

Q And I gather that typically you would get those cartridge casings in a plastic bag of some sort with some piece of paper giving information as to where they were found, by whom, and with perhaps some initials of various people on them?

A Yes.

Q Do you know that was uniformly the practice that was followed with regard to Cartridge casings that you examined in this case that you received?

A Sometimes there would be a slip of paper, sometimes there would be a copy of a green sheet setting out the items in this submission -- varied in the way they did it.

Q In any event, where it was a piece of paper in the envelope with nine items, or whether it was a green sheet, I gather that as far as you are aware the document which identified the cartridge casing was prepared by the finder, is that your understanding?

A That's my understanding.

Q And in either event, the Special Agent who purported to be the finder would either sign or initial the green sheet, or would initial the piece of paper that was in the pouch with the cartridges?

A Yes, sir, I think that's true in every instance here.

{3322}

Q And would that have been the basis upon your listing then in your report as having been found by Special Agent Hughes at the scene?

A Yes, sir, it did have his name on it.

Q All right, and as far as you would be aware you have to rely on what Special Agent Hughes puts on that piece of paper when you write that report, you have no independent knowledge of where it was found?

A I rely on the piece of paper as far as the location of where they were recovered and who recovered it, yes, sir.

Q All right. You say "and who recovered it"?

A Yes.

Q Yes. Do your notes indicate when you received either those notes or the report, or any of your worksheets or anything that you have with you indicate whether you received those cartridge casings with a green sheet as opposed to a piece of paper in the envelope, is there any way you have of determining that now as you sit there?

A No, sir, not to the best of my recollection.

Q All right. Now, I call your attention to your report of -- excuse me.

MR. LOWE: Before I move off on that, could I have a moment, your Honor?

(Counsel confer.)

Q (By Mr. Lowe) I show you what has been marked but not {3323} admitted into evidence yet as Plaintiff's Exhibit 177, and ask you if you are familiar with that document, and if you will just state what it is?

A Yes, sir. This is a copy of one of the Bureau green sheets, and this is the -- these are the Q numbers which I wrote on the outside as I received the evidence and inventoried it.

Q And who prepared that green sheet?

A It bears the name, Dean Howard Hughes.

Q Are those Q numbers, can you identify your own handwriting, did you put them on?

A Either myself or my assistant put those on.

Q Can you state the item numbers for Q100 through 105 and Q130?

A Yes, sir. 100 through 105 is Item 13 and Q130 is Item 17.

Q Now, on Item 13, you have Q100 through 105; and am I reading correctly that Item 13 says: 5.56 millimeter Lake City cartridge case?

A That's what it says, yes, sir.

MR. LOWE: Thank you. Excuse me a moment.

(Counsel confer.)

Q (By Mr. Lowe) Now, I call your attention to your February 10, 1976, laboratory report, and ask you to look at, first of all, Page 7 and look at Q2513 through 2519; and I ask you if that does not relate to seven .223 caliber cartridge {3324} casings?

A Yes, it does.

Q And I ask you now to turn to Page 15 of that same report and ask you if you were not able to examine those and determine that they were not ejected from Government Exhibit 34-A?

A (Examining).

Q Is that correct -- I believe it is on Page 15 that you determined that those cartridge casings, 2513 through 2519, were not ejected from 34-A?

A That's correct.

Q And that was not to say that there were insufficient markings -- I think some of your other identification say insufficient markings, but you actually could specifically eliminate those from 34-A, couldn't you?

A Yes, I could.

Q And those all have the same markings within themselves, so that they were all fired by the same or ejected by the same weapon, weren't they?

A That I don't know. I don't list that. I did not state that they didn't have any marks of value on them so --

Q All right, fine; but in any event, the markings they had on them showed you they were not ejected from 34-A?

A Yes, sir.

Q You said that only the AR-15 and the M-16 fired .223 caliber ammunition; and I ask you whether you have ever heard {3325} of a weapon that might be called the Maxi-14?

A I don't recall ever saying, sir, that only the AR-15 and M-16 fired .223 ammunition.

Q Maybe I misunderstood you.

Let me ask you what weapons other than the M-16 and AR-15 fire .223 caliber?

A Remington makes a bolt action rifle which fires that caliber ammunition. Ruger makes the Mini-14 which fires that ammunition and there may be others.

Q Mini-14 is it called?

A Mini -- (spelling) M-i-n-i.

Q I must have it backwards, Mini and Maxi.

And is there -- well, that answers my question.

If you reload a .22 caliber long rifle cartridge case, let's say, is it possible to reload a .22 long rifle cartridge case with a bullet that is designed to be reloaded in a .223 cartridge case?

A I have never heard of anybody reloading a .22 long rifle cartridge case because of the priming problem. Priming is put in in a moist condition and the cartridge case is spun to get the priming into the rim, and this is not a technique available or readily adapted to individual reproduction.

Q Fine. Now, I want to talk a little bit with you about your ejection test that you described. Do you have that Exhibit 34-I, have 34-I, the ejection pattern up there?

{3326}

A Yes, sir, I do.

Q May I just see it?

Now, as I understand Exhibit 34-I, you made the test in two different ways: First you took the AR-15 and you fired at your shoulder, something similar to this (indicating), with the weapon roughly parallel to the ground and with the axis of the weapon roughly vertical, that is, it wasn't turned like this (indicating) or something like that, for most of your ejection pattern test, am I correct on that?

A Yes.

Q The other way you did it was at the hip firing where it was fired again parallel to the ground and approximately in the vertical plane and made tests on that basis?

A Yes, sir.

Q And you did this with two AR-15's?

A With --

Q (Interrupting) And with three M-16's?

A Yes, sir.

Q And you used commercial and military ammunition?

A Yes.

Q And as I understand, you made no tests in which you fired the weapon down, anywhere from 10 degrees to 45 degrees from the horizontal, am I correct about that?

A That's correct.

Q And similarly you didn't fire up, you were all at parallel -- {3327} or at horizontal, I should say?

A Yes.

Q All right. Now, in doing that, first of all, did you actually do the firing -- I think you said an assistant did the firing?

A I had an assistant do the firing, and I watched the cartridge cases.

Q Now, as the cartridges go out of this weapon, you have got a little door here that springs open, and I believe stays open until you close it manually, is that correct?

A That's correct.

Q That's this little door right here (indicating), that flaps open, and the bolt, I think, opens it the first time when you fire?

A Yes. To load the cartridge into the chamber, you have to pull back on that lever which is held back by the plastic tape, and that will open the ejection port.

Q And as the weapon fires, it ejects them; and I believe you said that they come out approximately horizontally and then drop off by gravity pull?

A Yes, sir, very little rise to them.

Q And as you get a given force, let's say a force of a certain "X" pounds per square foot or whatever it might be, that cartridge will go out and land at a certain distance away in some direction or another, depending on how high the weapon {3328} is; if I hold the weapon up here (indicating), obviously it has greater distance for the trajectory to go, it would land farther away?

A Yes.

Q If I held it right down to the ground, you would expect the impact much further in?

A Yes.

Q So the height of the person firing the weapon from the shoulder would determine to a certain extent how far those cartridges went?

A Yes.

Q Not only the person, but the height at which he held it when he shot it would make a difference how far the cartridges went, would that be correct?

A A slight difference, yes.

Q All right. In addition, in making a test, are you willing to stipulate that I am not an artist?

A Yes, sir.

Q I am willing to stipulate that, and I think that's there for everybody to see. We don't need an expert for that.

If you fire on the horizontal and the cartridges come a certain distance, if you fired down some of those cartridges might loop up slightly because of the fact, if they are coming out to the back, that they are actually being aimed up a little bit when your rifle is pointing down, isn't that true; those {3329} cartridges that might be thrown rearward?

A Yes. Cartridges thrown to the back would be.

Q A little farther?

A More up in the air, yes, sir.

Q And similarly, if you rotate the gun on its axis, that is to say, instead of being exactly vertical, if somebody were firing at a slight angle like that (indicating), they would loft a little bit and they might go a little farther then also?

A They would go a little bit further also, I would assume, as long as you didn't get it past the optimum angle at which they would go short.

Q So when you really analyze what we are talking about here in terms of a car trunk -- and I presume that's what your testimony is aimed toward -- if we use this as the depiction of an automobile with the two headlights at the front -- this being further evidence that I am not an artist -- that you determined or tried to determine a pattern in which these cartridges might fall, to try and determine where a person standing and firing that weapon might be when a cartridge landed in the trunk, isn't that essentially what you were aiming at with your evidence?

A I think that would be a very general statement. I was actually trying to determine how far this particular type of weapon in general would eject a cartridge case.

Q And in fact on Exhibit 31 -- this being a copy of it, I {3330} represent this is a slide copy of that, correctly -- this being on the shoulder form, you came up with a pattern of various rounds which ranged from forward to backwards, to the side and in close and out far, but which had

one common characteristic, didn't they, and that was that you were able to project approximately a 120 degree angle in which all of your rounds on those five weapons fired?

A Yes, sir.

Q And you have no way of knowing whether another AR-15 might fire rounds down in or expend cartridges down in this area (indicating), or up in this area (indicating), until you actually test the AR-15, isn't that correct?

A I would assume that there would be other AR-15's which would leave that pattern to a certain extent, with the small variations, yes, sir.

Q All right, and you had a similar pattern -- not similar pattern, but you ran a similar test and made a pattern of the hip position and came up with a similar kind of a pattern which again was about 120 degrees, interior angle in here (indicating), didn't you?

A Yes, sir.

{3331}

Q But as to the actual location of these rounds landing, one weapon -- I'll give you your exhibit so you can refer to it in case you don't recognize right on it, one weapon fired all of its rounds and expended the cartridges out on the right and to the front which I have marked in blue, didn't it?

A The number 1 weapon, all right. Now, we're talking about the hip position?

Q Yes.

A Yes. Well, the area, no, because some of those weapons, some of those cases were ejected backward, too. That is a blue area there.

Q So in other words that one weapon ejected in two places, forward and to the right, and rear to the left and slightly to the rear and to the left?

A Yes. Threw some ahead and some behind.

Q And other weapon ejected in what I have marked as red; is that, am I correct that that's one weapon?

A Yes, sir. That's the number 2 weapon.

Q And as to any given AR-15, including AR-15 designated Exhibit 34-A, I would be fair in stating that you have no idea where it might land in relation to any of these shots or in other places except that it would be generally to the right of that weapon since the portal is on the right side; isn't that really true?

A I would expect it to throw the cartridges cases to the right.

{3332}

I would not expect it to exceed in distance greatly any of the distances, maximum distances that I fired in, or observed from firing the five other weapons.

Q And these patterns that you've shown here are based on all of the givens that we've discussed; and if you were aiming it down or turning it sideways or if ammunition were hand loaded or any number of variables you might even get with these weapons, you might get a --

A You might add or take off a foot or two on the maximum distance, yes, sir.

Q And in fact on this weapon, which I think you said in number 1 which I've marked in blue, how many shots did you fire?

A On the number 1 weapon I fired twenty shots.

Q If you had fired eighty more and made a hundred, you have no way of knowing whether they might have landed in this area in here or up here or up here or out here, or where they might have landed, do you?

A I'm sure that the pattern would be expanded to some extent just by the random nature of the pattern that we have here.

Q So would it be fair to summarize your testimony by what you just said that the AR-15's that you tested ejected rounds in a random manner without any substantial pattern that you would identify with certainty?

A Well, I couldn't identify -- this is not what I would consider an identifiable property as to where the gun ejects a particular {3333} cartridge case.

Again in general my findings were that they, different guns would eject it and sometimes fore and some aft. It was quite a variation. I would expect another AR-15 to have a similar property in that it would eject it somewhere within a twenty foot area and within the 120 degree angle. But it may vary a few degrees one way or another, or a few feet one way or another.

Q Now, looking at your chart, let's take first of all your hip chart. I portrayed a car here and I've outlined in purple an approximate area of the trunk of the car. And I've got here another exhibition of my lack of artistic ability which depicts a rifle and I've tried to show which end is the butt and which end is the muzzle. So that's the muzzle end (indicating), and this is the stock end back here, and I've drawn, by superimposing this sketch on your sketch, I've drawn the red lines to coincide with the 120 degree sector that you have found in your experiments so that that would represent the sector to the right of the gun from in which you experienced some cartridge cases falling when they were ejected. And I will ask you, based on your results, and I will let you look there for specific rounds, were there rounds fired which would enable a person to be standing to the rear and somewhat to the right of this automobile and still have a round eject from this AR-15 into the trunk of the car?

{3334}

A Yes, sir.

Q And would there be some rounds shown which would enable somebody to be standing to the rear and to the left of the car and to fire that weapon and have it eject the cartridge to the rear and drop in the trunk?

A Yes.

Q And that would be with the weapon there shooting away from the car, wouldn't it, in that instance?

A In that instance, yes.

Q And in fact you could put this in an almost infinite variety of positions: To the rear of the car, to the right of car, to the left of the car firing away from the car and in other places where it's conceivable that a round ejected would have fallen into the trunk of Coler's automobile?

A Yes, sir.

Q And the only thing you can say is that based on the twenty shots you fired from each of five weapons in each position that your experiments showed that those particular combinations were possible, and that you don't know what other combinations might have been possible?

A Well, I can think, I can testify confidently that it does not throw the cartridge case to the left of the gun.

Q I'll stipulate to that.

A And that my experiment again is generally, only in that we have these limits set up under my observation, and that again {3335} there could be minor variations on these, yes, sir.

Q Now, without going into all of the details or looking at all of the pages in your reports, am I correct in saying that in various parts of Jumping Bull area you had other cartridge casings of .223 caliber or 5.56 millimeter submitted to you which you were able to link up as positively having been extracted from Exhibit 34-A?

A Yes.

Q In other words, you didn't even attempt to depict all of the other cartridge casings which were found to have been extracted from there, but rather only those that Mr. Sikma asked you depict?

A That's correct.

Q And many of these, a lot of them were found in the Tent City area, weren't they, according to the reports you received?

A Yes, sir.

Q And weren't there also a lot of .223 and 5.56 millimeter cartridge casings for which there were insufficient marks for you to make an identification to weapon 34-A or any other weapon?

A There were not a lot. There were some.

Q All right. And as to the materials that were submitted to you, based on the seizures at Al Running's, and I believe you've already identified on a number of these charts cartridge casings and components which came from Al Running's. Referring {3336} specifically to your report of 12, that is, December 4, 1975, there were a number of .223 cartridge casings found at Al Running's, weren't there?

A I'll have to check that report, sir.

Q All right. You can just look.

A I don't remember.

Q Just generally, I think you'll find that if you look at that report, I can give you some Q numbers, but you can probably spot it very quickly that there were .223 cartridge casings found.

A Are we talking about unfired or fired here?

Q I'm talking about first of all there were a lot of unfired cartridges there, weren't there, .223?

A As I recall the significant part of that submission was unfired.

Q Okay. Now --

A Q707 through Q17 -- I 'm sorry, 979, those are .223. But they are all unfired.

Q Right, okay. I think I already said this, but if I didn't, 34-G and 34-H are similar to the other charts in that you cannot identify them to 34-A, did you say that?

A Yes, sir.

Q All right. I now show you chart 35-1. I believe your testimony was that this weapon which is identifiable as Special Agent Coler's was positively identified to two .38 Special {3337} cartridge cases, 35-B and 35-G found on the front seat of Coler's car and identified on the chart; is that correct?

A Yes, sir.

Q And there were also six cartridge casings found at Al Running's, and you previously identified those as having been found in the same bag as six cartridge casings from Exhibit 31-A if I have the numbers right. That is from Williams' .357?

A Yes.

Q Does your report indicate the name of the finder of any of these items, or do you simply have who sent them to you in your report now?

A I don't believe it does indicate the name of the finder, sir, no.

Q Okay. And these are the only .38 Special cartridge casings which you were able to identify to Exhibit 35 -- excuse me, I may have missed 35-F, which were six that were found in a Plymouth station wagon in Oregon. That's on the bottom of your chart.

A Yes.

Q Now, would these thirteen -- excuse me, fourteen cartridge casings the only ones that you were able to identify with Exhibit 35-A?

A Yes, sir.

Q You identified Exhibit 36-1 and gave some testimony about the Remington 870 shotgun. It's a 12 gauge shotgun which was {3338} property of Special Agent Coler and you identified on cartridge casing that was expended. Were you able to determine from the various ammunition components you examined what kind of shotgun shell load were contained in the shotgun shells that are associated with that weapon on June 26th?

A I don't recall. If I can answer that question by referring to my notes.

Q Well, this is Q342 in your August 5th report. I don't know if you have some notes other than that.

A Yes. I have that information with me.

Q Could you check your notes.

A Yes. Q342 is double aught buck load shell shot.

Q Did you receive any other ammunition components, that is, unexpended live rounds relating to the Jumping Bull area as a part of your investigation in this case?

A Shot shell?

Q Yes. Shotgun shells.

A I believe I did, yes.

Q Do you know what they were? Were they also double aught buckshot?

A There was a Q348 which was a double aught buck load which had been fired into those. It was ruptured. That was another.

Q Well, let me ask you this: Is that a fairly standard type of shotgun load for an FBI agent to use in a shotgun?

A Yes, sir.

{3339}

Q That's all I need on that.

I show you Exhibit 41-1 and I believe you testified that this was a .22 caliber rifle which was associated with 41-B which was found near the white house, and I ask you whether there was not another cartridge casing which you also associated with that weapon, namely Q2537 from your February 10, 1976 laboratory report?

A Yes, sir.

Q And does your report show where that was reportedly found?

A From near this log house.

Q Let's talk about .22 for the moment. You made a statement yesterday that the diameter of a .22 bullet -- do you remember being asked about that, and I believe you said that the diameter of a bullet, of a .22 bullet is from .221 to .224 thousandths of an inch. Isn't that what you said?

A Yes, sir. That's the general range for a .22 caliber bullet, sir.

Q I'm not trying to pick up or nit-pick with you, but I don't want to confuse anybody. What you really mean is that it is from .221 inches to .224 inches, or from 222 thousandths to 224 thousandths of an inch; isn't that correct?

A Correct, yes, sir.

Q All right. I now show you Exhibit 69-1 and I believe you testified that this was a .303 British rifle and that you had made a positive identification with Exhibit 69-B, C, D and {3340} E and excluded those as being fired from that weapon and none other; am I correct about that?

A Yes, sir.

Q Call your attention to your laboratory report, February 10, 1976. If you'll look at page 9 first of all, and I ask you to look at Q2558 and tell us whether that is a .303 cartridge casing?

A Yes, it is.

Q And does your report indicate where it was found?

A It indicates that 2558 was, well, it's on another page, I'm not sure if it's a continuation of the heading. It indicates that it was found from residence believed to be that of Joanne LeDou.

MR. LOWE: Can we stipulate as to which residence that's referred to?

MR. SIKMA: Yes.

MR. LOWE: The tan and red house.

MR. SIKMA: The tan and red house.

Q (By Mr. Lowe) All right. And I call your attention to page 18 of that report. If you'll look at that and see whether it does not reflect that you were able to make a comparison between Q2558 and a weapon?

A Yes, sir.

Q And which weapon did you positively link it to?

A 69-A.

{3341}

Q And it doesn't show on the chart, though, does it?

A No, sir, it does not.

Q And I assume Mr. Sikma did not ask you to put it on that chart?

A No, he did not.

Q Now I call your attention to your January 13, 1976 report, if you'll look at that at page 9. I ask you if there is a weapon listed there K6 which is a .303 rifle, SMLE British?

A Yes, sir.

Q Now that is not 69A, is it?

A No, sir, it is not.

Q It's a different weapon. Where does it reflect that weapon was found?

A Tent city.

Q And that would fire a .303 ammunition similar to the ammunition fired in 69A, would it not?

A Yes, sir.

MR. LOWE: Excuse me, Your Honor.

Q (By Mr. Lowe) I show you Defendant's Exhibit 135 which has been previously discussed and identified. I don't believe it's in evidence yet, am I correct, Mr. Clerk?

THE CLERK: 135 is not in evidence.

Q (By Mr. Lowe) And ask you if that is a document which you {3342} can identify?

A Yes, sir.

Q What is the document?

A It is laboratory reports which I issued.

Q What date?

A On the 31st of October, 1975.

Q And does that refer to K40 which is known as Exhibit 34A in this proceeding?

A Yes, it does.

Q I show you what has been marked for identification as Defendant's Exhibit 182 and ask if this is a document which you're familiar with and can identify?

A Yes, sir.

Q Would you just state generally what it purports to be, what it is?

A This is a laboratory report on the results of hair and fiber examination conducted by Special Agent Byron D. Schulberg.

Q Is that a report which is issued from your laboratory?

A Yes, sir.

Q Is that a report which is kept in the ordinary course of business as part of the laboratory --

A Yes, sir.

Q I gather you're familiar with this document, you've seen it before?

A I'm the one that issued it out of the laboratory.

{3343}

Q Do you know from your recollection or can you tell from your notes what K74 is, the item that was tested or from which the hair samples were obtained?

A Well, this K --

Q K74 is a hair sample itself or was that the item from which the hair sample was taken?

A It looks like a non-head hair sample taken from the individual.

Q Thank you.

In connection with extradition proceedings in Canada through which the federal government was trying to extradite Leonard Peltier, did there come a time when you made out or signed, I should say, an affidavit with regard to some of the findings that you made in this examination?

A Twice.

Q Twice.

And I gather you signed one affidavit and then at a later time signed another affidavit?

A Yes, sir.

Q And I gather there were some differences between the two and that was one reason why --

A I don't know.

Q Now as to all of your reports that you did in conjunction with this test or this examination, and I want to make specific reference to several of them, I referred to the August 5, 1975 {3344} report and referred to the October 31, 1970 report which is marked as Defendant's Exhibit 135 and as to the December 4, 1975 report, the January 13, 1976 report, the January 16, 1976 report, the February 4, 1976 report and the February 10, 1976 report. Were these all prepared either by you or under your direct supervision and issued under your authority out of

the firearms laboratory in conjunction with reporting findings that you had made as a part of your examination in this case?

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

THE COURT: Have you answered the question?

MR. LOWE: Is there an objection to that question?

MR. SIKMA: Yes, Your Honor. I'd object. It's totally irrelevant.

THE COURT: You may approach the bench.

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

MR. LOWE: I have a suggestion. We're getting close to lunch.

MR. SIKMA: I want to go on. We have got this witness on the stand and he's got other cases to do in Washington, D.C.

MR. LOWE: Why don't you let me finish my sentence.

We have got six minutes to lunch. What I'm doing by this, as I'm sure Your Honor knows, and Mr. Sikma knows, I'm {3345} going to lay full, thorough, proper legal foundation for introducing these reports.

Now obviously I must ask certain foundation questions in order to, and in order to make my record. It may be best if Your Honor wants to go ahead and excuse the jury five minutes early for lunch for us to do this in voir dire type of fashion to make any record and to convince Your Honor that they should be admitted properly rather than hold the jury here and try and do it at side bar.

There is going to be a lot of discussion, there are a lot of reports. It's not a convenient place for Counsel to refer to these reports and perhaps you'd like to look at some of them.

I am at that point where I want to do that. Within the next five minutes or so I will be offering them and I'm sure there will be objections, we know, from history on this case.

MR. SIKMA: I would submit, Your Honor, under no circumstances would these reports in their totality be admissible. They would be meaningless to the jury. They would be completely confusing. They refer to approximately 3,000 items examined by this witness and others in the laboratory and they're kept for the purpose of discovery of relevant information for the government and they have been provided to the defense. But that does not make them {3346} admissible.

All of these items have not been discussed on direct examination. Only those items which have been discussed on direct examination or which are of impeaching nature would be admissible in this case and I would say that establishing a foundation because of the intent to introduce them apparently not to impeach, apparently to be used simply to confuse the jury. They could not be

used as suggestions of evidence presented in proper testimony, I believe, as Your Honor ruled yesterday. Therefore, I would vigorously object to even wasting the time of going through, laying the foundation for these items if they are going to be offered into evidence in their totality.

I would submit that it would take hours of time of careful instructions to teach the jury to understand what these mean.

I will say further that they would be totally irrelevant to the issues in this case.

THE COURT: For what purpose --

MR. LOWE: All I would like is an opportunity to lay foundation upon which I can base a proper argument to Your Honor. I don't have enough right now to do that, that's why I think at this point it's difficult to particularly do that at side bar without the documents to actually look at.

We have got about four minutes to lunchtime. I {3347} suggest we discuss it at lunch now or when we come back from lunch take the matter up out of the presence of the jury. This is an important aspect of our case. Obviously, we're talking about the identification of rounds which the government will argue tends to show Mr. Peltier was involved and they're entitled to two things in general, Your Honor. I'll leave it at that for the moment. One, to show what weapons and weapon components give rise to reasonable hypothetical of innocence of Mr. Peltier. That is, they show the presence of other weapons and other persons who could have been the persons who killed the agents and we have a number of such components which have already been testified to and I want, I have other questions to ask before I finish with this witness to show the presence of other such components.

The second is to show there are components here which have not been identified to Mr. Peltier and which are specifically excluded from weapons he purportedly had in his possession.

I would also want to show the exhaustiveness of the examination conducted by the FBI and by the firearms people so that there can be no thought on the jurors' part that this was somehow just a reasonably good effort but not a real exhaustive effort because there are some significant items of evidence which are not present in this case which have {3348} never purportedly been found as far as we have disclosed which we think we're satisfied to argue inferences from.

There was an absence of evidence in a document. As a matter of fact, it specifically recognized in Rule 803 that a document can be shown, a business record can be introduced for the purpose of showing the nonrecording of information. That's a specific separate item and we want to introduce these laboratory reports in some instances to show the nonrecording of evidence.

I would want to have the opportunity to lay a more proper foundation before making specific argument. Of course, I could make an offer of proof but I think I should not be interrupted at this point when I'm making proper questions, proper foundation regarding these documents.

MR. SIKMA: I would say it would be another thing, Counsel I think is very deceitful in this respect. He's left out the report which refers to Government Exhibit 34B. He goes up, takes all the reports up to that date and then carefully leaves out the report where 34B is identified.

MR. LOWE: I don't think that's true. I think it may be identified in more than one report but I believe it's identified in one of the reports I listed. It is identified as having been sent to Washington in an earlier report. But it is not the only report of its examination and on February,

I think it's February, subsequent to February 14. I think {3349} it's February 10, isn't it? That's when I thought it was. I'm not trying to eliminate that.

MR. SIKMA: February 14 I think.

But at any rate I would state this is a total waste of time. We would if Counsel wants to bring out something, perhaps we can stipulate to it, that there were a lot of other items which were examined which weren't connected with this defendant. We agreed to that. But just to take time to establish a foundation which I assume is a similar foundation to all of the laboratory examinations, finders of items, would be meaningless for the jury to examine these items and we vigorously oppose it.

MR. LOWE: Judge, as I understand the objection right now is to my asking questions, not to introducing the exhibits. I have been stopped at this point from asking perfectly proper questions and secondarily to that for laying a foundation for introducing, for example --

THE COURT: You haven't been stopped.

MR. LOWE: I mean I have been interrupted.

THE COURT: Very well.

MR. LOWE: The pending question is whether I will be stopped.

THE COURT: We'll go into this out of the presence of the jury at 1:30.

{3350}

MR. LOWE: Thank you, Your Honor.

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

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

(Recess taken.)

{3351}

AFTERNOON SESSION

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

MR. LOWE: Your Honor, before we recessed for lunch we were discussing an intended offer and a series of questions which would precede the offer in regard to this witness; and do I

understand you would like me to make an offer of proof or to disclose to the Court what my intention is so we can discuss it before the jury comes back in?

THE COURT: Yes.

MR. LOWE: Basically, your Honor, I would lay a foundation by questions of this witness in order to introduce into evidence laboratory reports which were issued by this witness in conjunction with examinations which were made on ammunition components and weapons in this case.

The starting point with Rule 401 which your Honor has cited many times, that the relevant evidence is anything which tends to prove or render more probable the occurrence or existence of an event and so forth. Your Honor is familiar with the Rule.

We think that of all the evidence that has been {3352} introduced into this case, with all this guncase full of weapons, with all of the envelopes full of cartridges, with all of the other matter that has been introduced as physical evidence, that the reports that are issued in this case are at least relevant, at least as probative of the contents contained therein, as any other item that the Court has already introduced evidence; but that's not sufficient by itself for our grounds, although I think that is enough because of the various Rules.

I would like to cite specific Rules that I would propose to show through this witness, beginning with Rule 612 -- this witness has said candidly and certainly to no one's surprise, I trust, that he reviewed before testifying, and in fact while he has been testifying, laboratory reports, and indeed he reviewed notes and work papers, but specifically laboratory reports prior to testifying here, Rule 612, and he indicated that he couldn't possibly remember all of that stuff contained in there without the use of reports; and again that's saying nothing that we don't all know as a matter of human experience.

Rule 612 indicates that if a witness uses a writing to refresh his memory -- and in this case it wasn't just refreshing his memory, he was relying on the information in the document, whether it refreshed his memory or not, and properly so -- for the purpose of testifying either {3353} while testifying or before testifying, that we are entitled not only to cross examine the witness thereon but to introduce into evidence those portions which related to testimony of the witness.

Now, under Rule 803 which relates to hearsay exceptions, where the availability of the declarant is immaterial, so the fact that this witness is here has no relationship -- first of all, these reports reflect a presence impression which this witness recorded at the time he made his examination. He recorded what the impression was he had, what the condition was that he observed when he received these items as to markings and identifications, as to where they came from and so forth, and immediately thereafter. He also includes the recording of the events which were the testing, the comparison, the firings, the recovery of components from fired weapons and the comparison that he made of them to other components which were discovered at the various locations he has testified about.

In addition, under Rule 803-5 -- that is 803(5) -- this is a recorded recollection, a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly.

{3354}

Obviously this witness has already testified substantially to that, and again to no one's surprise. We all realize that this is the case with an expert of this type.

Under Paragraph 6 of Rule 803 he has already identified as to some of the documents, and I would offer my offer of proof that I will elicit from him testimony as to the others that I offer, that these are records, they are memorandum, reports, records of either acts, opinions, diagnoses made at or near the time, or information transmitted by a person of knowledge; that they are kept in the regular course of business activities that's involved in at the laboratory, and that it is a regular practice of his activity, his laboratory to make such report to show the information contained therein.

Under Paragraph 7 of Rule 803 we are entitled to show that evidence, that a matter is not included in the memorandum, report, records or data, is admissible to prove the non-concurrence or non-existence of the matter; and I might add a footnote, that therein lies the misunderstanding that Mr. Sikma has about these documents and many others, and that is that it is not necessary to point to specific things in the document that we want to prove, but as is clearly and explicitly recognized by the Federal Rules of Evidence, Rule 803, Paragraph 7, that we {3355} are entitled to introduce the entire document whether there is stuff in there that is irrelevant or not, in order to show the non-recording of certain information, the non-receipt of certain items, the non-connection of certain ammunition components with certain weapons; and that is clearly contemplated under Rule 803(7), and I add by emphasis that this is an exception where the witness' availability is immaterial.

Now, the Government has gotten to a sing-song in this trial of saying it is not the best evidence. They clearly don't understand the best evidence rule because the best evidence in this case is clearly the written document by the testimony of this witness. It is the best evidence because it was made when he knew the information, as he was drawing it out on the various examinations and recorded accurately at that time. He does not have that recollection now. It would be admissible under the best evidence rule even if he had that recollection now as a recording of this to show the non-recording of certain information; but even under the other exceptions, the fact that this witness is available does not mean that under some conception of the best evidence rule it is not admissible.

The fact that it is documentary -- the Government seems to think somehow that it is wrong to introduce {3356} documentary evidence, at least that's been the thread of some of its argument. --

Mr. Crooks particularly constantly says throughout this trial the defense has been trying to introduce documentary evidence, as though that were wrong in some way. These exceptions specifically enumerated in the Federal Rules of Evidence make it clear that this is the very evidence which is contemplated, documentary evidence. In some cases it may be oral, but clearly documentary evidence is intended to be included. Under all of these Rules we would have a basis for introducing this evidence.

Now, as to the specific information, I certainly don't want to go over each item and say exactly why each item is relevant; but I can tell your Honor that the Government last year made the argument -- and I presume that they will make some allusion, or I suspect that they will in their closing argument, to the possibility that various people in the Jumping Bull area on June 26 were picking up cartridge cases as a way of explaining why there are no cartridge casings to match certain alleged sighting of shootings or in the immediate area of the cars, for example, where there were three shots fired and there is only at the very most, by the best evidence the Government has produced, the one cartridge case, the .223, which might be conceivably linked to all shots that were shot. {3357} We know all three shots didn't come out of the one cartridge case. They attempt to explain this by saying people may have been picking up the brass

cartridge cases either to avoid detection or because they needed to reload them or for some unspecified reason.

If the Government is permitted to argue that -- and I certainly think that -- I can't think of a reason why they shouldn't at least be permitted to argue that although it sounds pretty unreasonable in the middle of a gunfight, nonetheless we are certainly entitled to argue on the other side that the fact that there are no cartridge cases fitting certain other weapons which were reported in these laboratory reports, for which components were found in Tent City, might indicate that those people were picking up cartridge cases. For example, we have had testimony here about a 30-40 Krag cartridge casing. We have also had testimony that the 29 -- I think it is 29-G fragment could have been fired from a Krag, Model 1892 rifle, the cartridge casing in the Tent City area -- it is very unlikely that somebody fired from there and it resulted in the bullet being in the agent's car and nobody would argue that; but on the theory that the Government has, that people might have been picking up cartridge casings, we are certainly entitled to show the finding of any relevant cartridge case, caliber or type, in order to {3358} allow for the argument that if people were picking up cartridge casings, then why couldn't they have been picking up cartridge casings for some weapons which were never recovered, as well as the weapons recovered?

In order to show a foundation for the fact that such might possibly have been the case, in order to attempt to raise that assertion to a level of reasonable doubt and not just remote doubt, we are entitled to show what kinds of cartridge components were found in the Tent City area, for example.

Now, I don't have to read every single item on the list in order to do that. First of all, that would be doing by indirection what your Honor would theoretically be ruling I couldn't do by direct action, if you did not allow the introduction of this document. There is no lawful or utilitarian purpose in letting me read the entire document and then not allowing it to be introduced into evidence. The law is certainly founded on reason and not on mere form. That would be only a matter of form.

In addition, there are weapons which are referred to in these reports, some of which we have alluded to with the witness, but not all of them. These are weapons in many cases which have not been introduced into evidence. They are weapons from which cartridge components in the Tent City area could have been fired in these weapons. {3359} These weapons give rise to questions about whether people had been using them and firing them in the immediate area of the residences and the red and tan house because I called your Honor's attention that at least one weapon in evidence which is No. 41-A was found in the Tent City area, I believe on the hood of the 1967 Ford, which shows that at least one of the shooters took his weapon back with him and left it in the Tent City area. Therefore, any other weapons that are found in the Tent City area might equally have been carried by a shooter and left there in the haste of escape.

We have evidence already in this trial of a number of people who were shooting from places and at times which are inconsistent with them being a part of this group that escaped with Norman Brown and Mr. Peltier and so forth; and we know at least several people that did escape by other routes, for example, the Long Visitors. There were sightings from time to time by different people of fire coming from different places which could not have been the people in the escape route. At least we are entitled to argue that from the evidence, and they must have had guns of some kind, and if they aren't guns that were recovered, then they must have had guns that were not recovered. If that be the case, we should be entitled to show that some of the ammunition components discovered in this examination {3360} fit different kinds of weapons which might be consistent with the physical evidence, particularly down at Coler's car.

We have testimony about high-powered or high velocity shots having killed those two agents. We have already by my count four or five different high velocity weapons that have been

identified by type. Some of them have been introduced in evidence. Others that were found were not introduced into evidence. Others were never found, but ammunition components to match them were found in the tent area and in the general Jumping Bull area.

These are all matters that are relevant to our case. In addition, we believe that it is quite relevant that there were no more ammunition components found in the agents' guns. There has been testimony to indicate that more than three or four shots were fired by the agents. Now, I would not say that as a matter of law your Honor would rule that's the case, but certainly the testimony of Norman Brown and Mike Anderson and perhaps other testimony in evidence would indicate that many more shots than four were fired, and yet only four cartridge cases were found and attributed by the FBI, at the Coler car area, to these weapons.

We believe that we are entitled to argue the significance of that and to point to the significance that in {3361} none of these reports were other rounds or other cartridges found or to point to the ones that were found, and to point out that these are the only other ones that were found, and to make reasonable arguments and ask the jury to draw reasonable inferences from that information.

Now, in addition to all of that, there are conclusions stated, findings which are official findings of an expert recorded at the time he made them, in a manner which brings it into the clear exceptions to the hearsay rule enumerated in Rule 803; and we are entitled to have those findings in evidence specifically. There are cases where specific cartridges are found to have been fired from a specific weapon. Those cartridges in many cases have not been introduced by the Government. We have already alluded to a number of them with the witness. There are many more from Tent City, for example, that relate to the AR-15 or the M-1 or the 30-30 which were not introduced.

Perhaps in some of those instances Government counsel thought that it was not important because they were in Tent City; but we are entitled to show the presence and to draw reasonable inferences from them.

In addition to showing that, we believe that we are entitled to the information which shows that certain weapons could not have fired some of the cartridge casings found because that gives rise not only to an inference but {3362} to an actual fact that there must have been another weapon at some time in the history of that cartridge that fired that cartridge.

To show there were some other weapons, at what time or what date or what place, is a matter of argument based on all of the evidence taken as a whole; but we are clearly entitled to show the non-association of those cartridge components with the weapons that are in evidence.

In addition, there many ammunition components for which insufficient markings were found to link them to a weapon or to exclude them from having been fired or extracted from that weapon. In those instances, there is a lot of room for argument as to whether they might have been associated with that weapon inferentially, if not by their markings, or might have been shown there were even other weapons not identifiable.

We are entitled to have that information contained in these laboratory reports. There is undoubtedly some information -- there are undoubtedly a few items in here -- I remember one or two that don't relate to the ammunition components, for example, which do not directly relate to this witness' testimony but which are clearly relevant in that they were found in the area of the crime scene. The mere fact that there are a few items in a large document which do

not directly relate to a witness' testimony does {3363} not mean that the entire document must be kept out of the record, particularly where there is no prejudice shown.

The Government has not even attempted to argue any prejudice except the vague prejudice that it would confuse the jury; and I suggest, your Honor, that all the evidence that the Government has put in would confuse the jury. I suggest that's one of the reasons why we have summations for counsel to take this unintelligible information that may not be related in any way during the course of the introduction of evidence and testimony and tie it together and explain it to the jury, what this does mean and why these pieces of evidence are relevant and what they do tend to show, and to eliminate that confusion; and with the introduction of these laboratory reports, of course, in summation we are going to point to specific parts or to specific omissions, and explain to the jury what we believe those mean and to let the jury draw their conclusions and draw their inferences, and Government counsel can do the same thing.

I have got a lot of faith in juries. In my experience juries don't confuse very easily. They have got a lot of common sense. Those people have a lot of ability to sort out the chaff from the wheat, probably a lot more than lawyers and Judges do. I believe they will go to the heart of the matter when they get back in the jury room. They {3364} will not be confused by a lot of items on the laboratory reports we are seeking to introduce that are not of great importance. They will remember or find what they believe to be of importance, I have confidence in that.

{3365}

MR. LOWE: In any event that's for a matter of argument. We can talk about pictures, talk about wanting to confuse the jury. The Government, oh, I might point out, argued fervently at the beginning of this trial that they would be entitled to introduce these terrible post mortem photographs. We offered to stipulate, the Government rejected. We offered the fact that the evidence could be testified to by the expert without the necessity of looking at the photographs. They argued that the expert could do a better job, or the jury could get more information.

I suggested that there's a lot of extraneous information in those photographs that does not actually relate directly to the fact finding the jury would have to make in order to find a death by the agent, and that it was fired by a gun shot or whatever it might be. But Your Honor let that in on the theory this is a serious case, that the evidence was probative in nature, and there was no best evidence. There wasn't. The best evidence was the expert. As a matter of fact they argued that the best evidence was the photographs.

And we are in the same position now. We have photographs, although they are photographs of laboratory reports, and they are nonetheless photocopies of laboratory reports which are just as instructive for the jury as those post mortem photographs. They are no more likely to confuse the jury than those post mortem photographs are. Those post mortem photographs are not {3366} likely to, but are also highly inflammatory. The laboratory reports are at least not highly inflammatory and with proper handling by both counsel the laboratory reports are important pieces of evidence in this case.

Finally, I think that where we have a body of evidence the size of the laboratory reports in this case, the number of items that are listed, it is a denial of due process to require that no written list of these things be made available to the jury so that they can refresh what they heard during trial by referring to properly introduced documents. To say that we should have the witness read off all of these items for the jury and then give them nothing to take to the jury room with a listing of these items would be the most fundamental denial of due process conceivable. That is one of the reasons why we have these exceptions to the hearsay rule for records kept in the ordinary course of business and for the other ones is because when you

have a long list of things like this no jury could humanly remember the numbers and keep this straight.

If they are given a document which has them listed in an orderly fashion, which these purport to do, then we would be able, the jury would be able to refresh its recollection and to associate its recollection with the physical evidence.

For all of these reason, Your Honor, we would ask that these reports, which I will name now, be introduced into {3367} evidence. I'm having some copies made. Apparently they're still in the process of Xeroxing some. But I will identify them for the record at least and then I will tender them as soon as they come into the room.

I'm speaking of, and I'll just list the dates. These are laboratory reports, and the dates I list will be with slashes.

8/5/75, which has already been identified as Defendant's Exhibit 134 and I might add it was also identified as Defendant's Exhibit 175. Mr. Taikeff didn't realize it had already been earlier marked. I will use the 134 designation since it's the first one.

10/16/75, 10/31/75, which has been previously identified as Defendant's Exhibit 135.

12/4/75, 1/13/75, 1/16/75, 2/4/75, 2/10/75.

In addition, Your Honor, while I'm on the subject of introducing evidence I would move the admission into evidence of Government's Exhibit 177 which is the photocopy of the green sheet of Special Agent Hughes which are handwritten notations of this witness made in the margin. I believe now we have a proper foundation for introducing that. It's quite relevant. I would explain to Your Honor at the bar out of the hearing if necessary to go into any relevance on that, but I think Your Honor may know it already.

In addition, while the witness was testifying, I showed {3368} him a list of weapons which could have fired 29-G or F, and which could have fired 34-G and H. The weapons that were listed for 29-G or F is Defendant's Exhibit 185. For 34-G or H it's Defendant's Exhibit 186. And I would also offer them into evidence at this time.

And finally when we were at the sidebar and I listed the laboratory reports that I wanted to introduce into evidence, and I believe I listed the ones I did dare with on addition, I think I picked up one in October 16 of 1975 I had left off my list. But I clearly had February 10, 1975 there -- excuse me, February 19, 1976. Mr. Sikma said that I was playing fast and loose with the Court and I think were words to that effect because I was not introducing the laboratory report relating to Exhibit 34-B to show that it had been fired from 34-A. I expressed my resentment and insult at that time at being, having that said. I told him that it was in Exhibit -- February 10, 1975. He vehemently asserted that that was wrong. I call upon him for an apology, as if he would read February 10, 1975 he would see that it is most certainly included in that report on page 10 and page 19 as I represented to the Court.

MR. SIKMA: Your Honor, I don't, I'm not going to make an apology at this time to Mr. Lowe or for that matter any other time, anything that I've said at the bench. I don't recall his mentioning that. If he has, why it's my {3369} mistake if it's a matter of record. I understood this was going to be a period of time when there was going to be an offer of proof. All counsel did during

this time is make, repeat legal arguments that he's made in the past on precisely the same, on precisely the same issues.

One thing I would state that confusion of the jury is not a small matter. We would say that counsel could argue all the things that he's argued before the jury without putting in about five hundred pages of technical laboratory reports before the jury. I would state that this matter comes under Rule 401 and -- or rather Rule 403 which excludes this type of, this type of evidence because it, well, while it may be relevant in portions that it is clearly confusing and the prejudicial value of it outweighs its probative value.

I would state that while counsel frequently refers to present impressions I think from the notes that were made, or the explanation in the rules with regard to present impression exception, that this was clearly a replacement of the old *res gestae* rule; and laboratory reports are not present impressions that fall within that category.

Now, counsel says you can prove by showing these laboratory reports, you can prove nonrecording of certain facts. Well, it doesn't record a lot of facts because there's no evidence concerning those facts. If counsel has some specific items which he wants to refer to, that's one thing. {3370} If the laboratory let something out of their report that they should have included, that would be something where you would have an instance of nonrecording as proof of certain facts occurring. But to attempt to use what has been recorded by the laboratory and to use that to prove some other aspects of the case, as I understood counsel was saying that suppose someone else could have come in and fired some shots at the agents or actually murdered the agents, picked up all the items and left without leaving a trace, I suppose that that wouldn't be recorded in these laboratory reports either. But it doesn't make the laboratory reports admissible.

I would say that we have argued this question a number of times and the Court has ruled on it. Counsel indicated one other matter about casings being removed from the crime scene, or that the agents only fired a couple of rounds. I would submit that there are twelve rounds, six from Coler's gun, six from Williams' gun that were found in the cabin where Butler was arrested. In addition to this, six spent cartridge casings from Coler's gun were found in Ontario, Oregon. I would say this might be some evidence that would be relevant to the question that shows people removed items from the scene which would not require putting into evidence these several hundred pages of reports. They are technical in nature, while the jury may be able to understand them, I don't think that it's clear that they have any probative {3371} value.

And I do not think that regardless of what the exceptions that were cited, they must have some probative value. If the Government, for example, tried to offer into evidence all of the evidence found in relation to this case, clearly it could be excluded as not being relevant as far as this case or this defendant is concerned.

With regard to, I think it's Defendant's Exhibit 186 and 185. These items are nothing more than things that counsel has, counsel has written up. Apparently the witnesses testified to. I really have, would not say that they are reports that are admissible concerning this witness's testimony as such.

Other than that, Your Honor, I would also state that counsel keep referring to Rule 612. It seems to me that Rule 612 clearly states that if the witness hasn't testified about that, about certain items, it says, speaks of introduction in evidence those portions which relate to the testimony of the witness, and it also offers the Court in certain instances to exclude those items which the witness has not testified.

Counsel keeps mentioning the fact that, has mentioned the fact that at sidebar I took some sort of swipe at his character. I would comment to the fact that counsel, by making constant references to witnesses about what is on Government {3372} exhibits, is trying to leave an impression that I have somehow dishonestly prepared these items of evidence. My job as an advocate is to bring out those items of evidence which I believe are relevant to the case at bar. And counsel knows that he has an opportunity to bring out other items which are relevant to this case when he's presenting his case.

And I would equally resent his constant reference to the fact that in a form that would leave an impression that what I am doing as counsel in this case is in any manner improper.

I would state to the Court that what has been done here is completely appropriate and if apologies are to be made in that regard I think counsel for the defendant has one to make. Other than this, Your Honor, I would simply object to the items which the defense counsel has offered here as falling within the category of 403 and being completely worthless as to this cause of action.

MR. LOWE: Very briefly, Your Honor. Mr. Sikma completely misreads Rule 803, paragraph 1 and paragraph 2. As I understand the law as it was before these rules, that res gestae was the excited utterance provision down below in 2. Paragraph 1 clearly anticipates not only observations made while perceiving the event, but also statements describing the event immediately thereafter.

I don't think that there's any question that that is {3373} what is intended when somebody makes a report such as Ann Johnson's writing radio notes, such as this witness when he makes notes. But be that as it may, that's only one of the basis. He clearly misreads Rule 612, or misunderstands the nature of cross-examination. Cross-examination is also testimony. Cross-examination, where proper questions not objected to, elicit information; means that that information becomes testimony and is a proper basis for introducing documents under Rule 612. I asked a number of questions about the all-inclusive nature of the items found in the Jumping Bull area, and whether they were included in these reports. And obviously they are, and that's what the witness said. That by itself provides a basis for showing the various items that were found in the Jumping Bull area.

There were repeated questions about whether there weren't a lot of items which could be matched up or could be excluded, and others which simply were unable to be identified because there were no weapons, or because there were insufficient markings; and the witness identified them as being the substance of much of what is contained in these reports.

There's clearly enough basis under Rule 612. It's not necessary that it be brought out on direct examination but simply during testimony. Mr. Sikma is asking the Court, and I trust he'll ask the jury, to take flights of fancy with {3374} regard to the cartridge casings found at Al Running's and found at Ontario, Oregon which have been linked with the handguns of the agents. There's no question that they were linked to the handguns. But I think that 99.99 per cent certainty as to how those cartridges got there is that somebody was shooting that gun at Al Running's, or shooting the gun at Ontario, Oregon, or somewhere along the road. And then when they emptied the gun they took out the six empties and put in six more. They thought that somebody would have fired those guns in the area of Coler's car and then exactly multiplies the number of chambers of the gun and carried them off and left others there and carried them to Al Running's into Oregon simply boggles the mind.

That I think is going to be interesting to hear in Oregon. Now, I did make one erroneous statement. I indicated it on one exhibit. I want to make sure the record is clear that the exhibit I'm introducing, 113 is '76, not '75.

1/6/76, 2/4/76 and 2/10/76. The Clerk is trying desperately to sort these so I can formally offer them by number. And they are done, so I will read the numbers if I might into the record, Your Honor.

THE COURT: Are these the --

MR. LOWE: These are the documents that are being offered, Judge.

THE COURT: The laboratory reports.

{3375}

MR. LOWE: Yes, sir, the laboratory reports.

THE COURT: All right.

MR. LOWE: Couple of them here I've already mentioned. I mentioned 134 and 135. The October 16, 1970 report is Defendant's Exhibit 188. The December 4th, 1975 report is Defendant's Exhibit 189. The January 13th, 1976 report is Defendant's Exhibit 187. The January 16th, 1976 report is 190. The February 4, 1976 report is Defendant's Exhibit 191. The February 10th, 1976 report is Defendant's Exhibit 192.

Now, I offer these and I would also state to Your Honor that I found one or two markings on these reports that were photocopied onto the report also. And what I would suggest is that we get, counsel and I get together, or the Clerk and I get together and go through page by page and just make sure that there are no markings of any kind in here. I do not believe that there are any, but I am hesitant with these many pages to make a representation until I have checked it independently.

May I ask the Clerk to hold them in a stack and go over them and make sure there are no handwritten notations that have come through that I was not aware of that are not on the original reports?

I also at this time will tender 185 and 186, and I believe Mr. Sikma still has Government Exhibit 177. And the Clerk just asked me where it was, and I think the Clerk wants {3376} it since it has been offered now. May I give that to the Clerk so that he has it? Thank you.

MR. HULTMAN: Your Honor, I might just make a request for the record, in the future, we've done our best because the defendant's case is now about to come on, we've been running into this every time we turn around. But I would hope in the future that the Government will be supplied with a copy of whatever exhibits it has that we're going to discuss and take up prior to that particular time.

And I just make this request at this time so that we won't be placed in the posture of having to --

MR. LOWE: That's a very reasonable request, Your Honor. The only two items the Government does not already have are the two lists which I showed on the screen which I did show to Mr. Sikma before we began our proceedings here and he handed it back to me. All of the other reports were reports given to us by the Government.

Mr. Sikma has a complete file of them as I understand, and Mr. Hodge has a complete file of them. So whether Mr. Hultman has them in front of him or not, if you'll consult with Mr. Sikma I'm sure he'll find they're all there.

{3377}

MR. HULTMAN: Your Honor, the reason for my request I think is the voluminous materials. That's why Counsel continually asks us to give them a copy of this one page out of the 285 page report so we know what we're talking about. I think it's only fair and only customary and within the Rules that whether or not the government was the one who originally gave it or not, so we might orderly proceed, that at any time that a given exhibit is going to be marked as an exhibit that the government be given a copy of it prior to that time so we will be able to at that point not have to go to another office or somewhere or search a file but to have the copy of a specific exhibit that's not going to be used in the presence of the Counsel. That's the request I am making and I would hope it will be complied with as the trial goes along.

MR. LOWE: As I said, if Mr. Hultman will look 14 inches to his left, during the morning and now, Mr. Sikma has in front of him a stack of all these reports, copies of which the government gave to us. I don't think I ought to be asked to copy whatever number pages that is and hand them back to him when Mr. Sikma has them in front of him on the table.

THE COURT: Did you have some additional voir dire of this witness?

MR. LOWE: I've got more questions but I want in my {3378} offer of proof I think Your Honor understands I first of all made the offer of what the proof was that would be shown here and also I would lay the additional foundation that's not already laid under these various provisions. I was about to ask him some questions about whether they're kept in the ordinary course of business or something as to all of these reports. I only asked him about that, I think, with regard to one or maybe two reports earlier. That's what I will do if the Court does not prevent me from it.

THE COURT: You may do it right now.

MR. LOWE: Well, all right.

As to these reports that we've identified, and I'm sure with all your other reports, are they documents which are prepared in the ordinary course of your laboratory activities pursuant to procedures which are regular procedures of your laboratory?

THE WITNESS: Yes, sir. I'm not sure exactly which report you're referring to.

MR. LOWE: All right.

May the witness see the reports.

I hand you a stack of the reports which were just read into the record and you can read the numbers on them if you care to but, the reports which have been offered. Are those all prepared in the ordinary course of your laboratory {3379} activities pursuant to your normal procedures?

THE WITNESS: Yes, sir. The laboratory reports are contained in here.

MR. LOWE: Yes. And do you keep copies of those as a part of your laboratory permanent records as well as dispensing copies to appropriate agencies or persons?

THE WITNESS: Yes, we do.

MR. LOWE: And as to the information contained in there, would it be fair for me to say that the information is information which you at one time knew as you were doing the examinations and comparison but you do not presently have a direct recollection of?

THE WITNESS: Well, for the most part there are some things which I do have a direct recollection of. However, obviously, for the most part of it I do not.

MR. LOWE: And is it a fact that these reports are among those which you indicated that you read preparatory to your giving testimony in this case?

THE WITNESS: Yes, sir. Those would be some of the reports.

MR. LOWE: And in fact you referred to a number of them while you were testifying, did you not?

THE WITNESS: Yes, I did.

MR. LOWE: And I believe you said that when you received items, made comparisons and tests, you reported them {3380} in these laboratory reports as to items that you found in the Jumping Bull area and sent them out as you received the items and made the tests so that these reports cumulatively would have that information therein?

THE WITNESS: I don't think I understand, sir.

MR. LOWE: Let me rephrase the question.

THE WITNESS: Please.

MR. LOWE: It got a little complicated, I realize.

Information that you obtained by comparing cartridges, bullets, weapons and other items in the pursuance of the investigation of this case as a result of items that you received in your laboratory is recorded in these reports both as to positive information and in some cases as to negative information and in some cases that there is insufficient evidence upon which to base a finding, am I correct in that?

THE WITNESS: Yes.

MR. LOWE: At the time you made the reports, they contained, the information contained in them was as accurate as you knew and believed was possible to obtain at that time, am I correct on that?

THE WITNESS: Yes. The reports also contained findings of other specialists within the laboratory.

MR. LOWE: Right.

And as to those reports, they were, I believe you {3381} said that you issued the reports and you believed at the time and based on your investigation the information you put in the report was accurate as to their findings as well?

THE WITNESS: As to what information they gave me; yes, sir.

MR. LOWE: And again those reports were prepared pursuant to a laboratory policy and procedure which enables you to issue reports based not only on your own findings but those of your subordinates and your colleagues in the manner that you have done here?

THE WITNESS: Yes.

MR. LOWE: Your Honor, based on the witness' statements in evidence here we would offer these exhibits for all of the reasons that I stated earlier without going into them in detail at this time.

THE COURT: As I understand it then you are offering 134, 135, 177, 185, 186, 187, 188, 189, 190, 191 and 192?

MR. LOWE: Yes, sir. Those are the numbers I read off.

THE COURT: I'm obviously going to want to look at those reports before I rule on this offer.

MR. LOWE: I have no objection, Your Honor, to holding that offer. I can finish with this witness as long as the Court has it under advisement. I don't ask the Court rule before I proceed any further. I would be willing to go ahead and finish my examination. {3382}

THE COURT: Very well.

Are Counsel then ready for the jury?

MR. LOWE: I am.

MR. SIKMA: Yes, Your Honor.

THE COURT: Jury may be brought in.

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

THE COURT: I will advise the jury that your return to the courtroom was delayed by a continuation of the discussion that commence just before the noon recess.

You may proceed.

MR. LOWE: Your Honor, I would like to ask some questions without introducing these just in a general way about them and I will just identify them for the witness.

Q (By Mr. Lowe) I place before you Defendant's Exhibit 134, 135, 187, 188, 189, 190, 191 and 192 and I ask you whether those are laboratory reports which were prepared by you based on information that you and your colleagues had in your laboratory on the basis of examining items involved in this investigation?

A Yes, sir. These are all copies of laboratory reports which were issued with my findings and findings of other agents.

Q And I presume that with the volume of information such as that that you do not have an independent recollection of {3383} more than perhaps some particular items but that in general you rely on the recordings you made and reports you wrote when it was fresh in your mind after making the various examinations and comparisons?

A Yes.

I cannot recall everything in these laboratory reports.

Q But at the time you made those reports they were as accurate and correct as you could humanly make them consistent with your own examinations and the reports of examinations you received --

MR. SIKMA: Your Honor, I would object to this as having been asked and answered earlier in the presence of the jury as well as in addition --

THE COURT: It is repetitious.

MR. LOWE: I don't think I asked him as to all of these. I would want the record to be complete. I don't see what harm there would be unless there is a contention this witness was not accurate.

MR. SIKMA: We'll just object because it is repetitious. He was referring to all laboratory reports that he wrote at the time the questions were answered.

MR. LOWE: I would like to have my record with these numbers so there is no question, Judge. I don't think there is any harm or prejudice from asking this.

{3384}

THE COURT: You may make your record on the numbers.

Q (By Mr. Lowe) As to the exhibits before you at this time, when you made the reports, prepared them, were they accurate and correct as you could humanly make them based on your careful preparation, on your own examination and on information given to you by your fellow workers?

A Yes, sir. In that these reports are continuing series of examinations of items and each one is as accurate as I could be as far as I went at that time.

MR. LOWE: Thank you. That's all the questions I have, Your Honor.

REDIRECT EXAMINATION

BY MR. SIKMA:

Q I would direct your attention to Government Exhibit 29-1. You testified that Government Exhibit 29C, in Coler's car, 29F from Williams' car, could have been fired from a number of different weapons, is that a correct statement?

A Yes, sir.

Q Now is there any question at all in your mind that they also could have been fired from Government Exhibit 29A?

A No.

Q During the course of your examination in these matters, you referred to -- do you have 177?

Do you have Plaintiff's Exhibit 177 there?

Plaintiff's Exhibit 177 for identification. I direct your attention to numbers on there. No. 13 and No. 17.

{3385}

Do you recognize those particular notations and handwriting alongside of those items?

A Yes, sir.

Q And those are Q numbers. What Q numbers do those refer to?

A Q 100 to 105 and Q 130.

Q Now do you know or do you remember where those particular 5.56 millimeter cartridge casings were manufactured?

A Yes, sir. They bear the Lake City Arsenal head stamp.

Q Now do you know whether or not the Federal Bureau of Investigation gets its ammunition from Lake City Arsenal?

A Not directly, sir. We get it from the Department of Defense.

Q Now Lake City Arsenal, what kind of a company is that?

A It's a governmental run ammunition manufacturing plant.

Q Are you familiar with any, with what kind of, or where the FBI agents get ammunition to be fired specifically from the AR15 or M16 as its militarily --

MR. LOWE: Objection, Your Honor. It's been asked and answered. Asked on direct examination.

MR. SIKMA: Counsel went into it on cross-examination.

MR. LOWE: It doesn't change the fact that the question has been asked and answered.

THE COURT: I don't recall. You concede it has been asked and answered?

{3386}

MR. SIKMA: Not precisely; no, Your Honor. I would state, Your Honor, that the exact question has not been asked and answered. I asked him a general question, now I'm referring to specific items.

THE COURT: You may answer the question.

A The ammunition is sent out from the FBI headquarters to the various field offices. That is where the field offices get the ammunition from.

Q (By Mr. Sikma) And where does that ammunition come from?

A The headquarters gets it from the Department of Defense for the AR, the M16.

Q And are there any instructions that go with that issue of that kind of ammunition?

A The agents are instructed in the use of the M16 rifle.

Q Are they instructed as to what kind of ammunition to use under normal circumstances?

A Yes, sir.

Q And what kind is that?

A The military full jacketed 55 grain bullet cartridge.

Q Now with regard to Government Exhibit 177, that lists a number of items. Who found those ticket items, if you can tell from Government Exhibit 177?

A The exhibit has the name Dean Howard Hughes, SA Dean Howard Hughes as the recovering agent.

Q And how many rounds did you find when you received those {3387} rounds in the items that you received?

A Are you referring to items 13 and 17 or the whole list?

Q What's that?

A Are you referring to items 13 and 17 or the whole list?

Q Yes. 13 and 17.

A That consists of seven rounds, I believe.

MR. SIKMA: Do you have 185 and 186 for identification?

THE CLERK: That should be up there, too.

{3388}

Q Now, I would direct your attention to Government Exhibit 34-1, and particularly to 34-B, from the trunk of Coler's car, do you remember when it was approximately that you began to examine that particular item along with other items in the shipment of items with which it came to Washington?

A Yes. It was about the end of 1975, beginning of 1976; January, December, in that area.

Q December or January, somewhere in that area?

A In that area.

Q Now, prior to that time had you assigned

Q numbers to those items?

A Yes, sir. The items had been inventoried, but I had not begun an examination.

Q During the course of your examination did you examine any .222 caliber Remington rifles in relation to this case?

A No, I did not.

Q How about .222 caliber Savage rifle?

A No, sir.

Q How about 22-250 Remington rifle?

A No.

Q Did you examine any .225 caliber Winchester rifles?

A No, I did not.

Q Now, with regard to Government Exhibits 34-G and 34.H, could they have been fired from Government Exhibit 41-A?

A No, sir, they could not have been.

{3389}

Q There is no question about that in your mind?

A No, none.

Q Could they have been fired -- is there any question in your mind as to whether or not they could have been fired from Government Exhibit 34-A?

A No, sir. They could have been fired from that weapon.

MR. SIKMA: I have no further questions.

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

THE COURT: You may.

RE CROSS EXAMINATION

By MR. LOWE:

Q Do you have the January 13 report there in front of you? I don't know what the exhibit number on that is.

187. Now, I show you Defendant's Exhibit 187 which is a laboratory report dated January 13, 1976, approximately six and a half months after this incident; and I call your attention to Page 3 whereon is shown Q100 to 105 which is listed as six 5.56 millimeter cartridge cases, and Q130 which lists a 5.56 millimeter cartridge case, which Mr. Sikma asked you about and you indicated they were Lake City Arsenal cases.

Do you find this anywhere in that report that these were Lake City Arsenal casings?

You can take a moment and look. I don't mean to have you answer off the top of your head.

A I think for these items I would have to refer to the report {3390} of August 5.

Q Refer to any report you want. I didn't mean to limit you to any one.

Can you find any report that says that they are Lake City Arsenal casings?

A Let me check and see whether I did set that out in a report or not. (Examining) I did not mention in the report the manufacturer of those items.

Q Back in 1975, let's say from June of 1975 and later, did you know this information that you have just imparted to us, that Lake City Arsenal casings are military casings; and that then you, I assume, associated those with military or FBI use?

A Did I? Yes, sir, I believe.

Q You knew that fact then?

A I don't think I understand. I knew that Lake City Arsenal made cartridges for the military.

Q Well, if you receive a .223 cartridge then in the process of going through a whole lot of cartridge casings, I gather from what you say as an expert it calls your attention to the probability that that was not fired by a civilian, is that the substance of what you would say?

A I don't think I would give it that much credibility, as to whether it was fired by a civilian or not, as this ammunition is not all that restricted as far as I know. I mean, I didn't pay that much attention to it.

{3391}

Q Do you know of any arsenals that sell to civilians?

A No, I do not.

Q In your experience isn't it true that arsenals don't sell to civilians?

A Yes. However surplus ammunition is at times put on the commercial market so -- I don't give it that much weight or credibility.

Q So you didn't even make a notation that this might be Government issue or might relate to FBI weapons fired at the time or anything to even raise that question in any of your reports, as far as you remember?

A I did not specifically mention that, no, sir.

Q Now, I am looking at Government Exhibit 177, and Item 13 contains a handwritten notation, Q100-105, with an arrow which I understand you identify as being made either by you or by one of your associates?

A Yes, sir, we marked that.

Q Did you carefully read the items on here to see whether they matched up with the items that you were receiving along with the green sheet at the time you received them?

A Yes. To the best of our ability we correlated all the items.

Q And in any instance when you do not find all of the items listed or if you find an excess of items, do you make a report or a notation of some sort to the effect that the transmitting {3392} document was not accurate?

A It depends on the nature of the mistake. If it is -- if I find more items than I supposed to, generally I don't get too alarmed about it. It is when I am missing items, then I will start to wonder what is going on.

Q So you wouldn't find it unusual that an FBI Agent, trained in evidence collection, would say "5.56 millimeter Lake City cartridge case -- singular -- and that you would find six cartridge cases to associate with that item?

A I don't find it unusual in the sense that it could just be a typographical error, in that the steno left off the "s" on the end of "case".

Q I ask you to look at the other items on there. In every case where there was more than one case, whether or not it states in the first word of the description the number of cartridge cases, two cartridge cases, five cartridge cases?

A (Examining).

Q Isn't that the general pattern there?

A Yes.

Q This stenographer not only forgot the "s" but also forgot to put the word "six" in in order for that to be a stenographic error?

A If the agent had it written in there, yes, sir.

MR. LOWE: No further questions, your Honor.

Could we approach the bench for a moment?

{3393}

THE COURT: You may.

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

MR. LOWE: If your Honor rules against the admission of those documents there are certainly parts of them that at the very least or perhaps substantially all of -- some of them that I would want to read to the witness or have the witness's read or in some way introduce testimony. That would be excruciatingly time consuming, but it would be important. That's one of the reasons we feel the document would be admissible.

As I stated I would not want to do that unnecessarily What I would like to do is conclude my cross examination subject to recall if it becomes necessary because the Court rules those documents are not admissible. Otherwise I would be forced to simply proceed at this time, and I would rather not do that. It would be quite time-consuming.

MR. SIKMA: Your Honor, I use the word cautiously, but I think they are using that as blackmail when they say we will have to go into these or we will have to hold up this Government witness. I think that the Defendants have had available an expert who examined absolutely every question that the Government had presented to the Defendant is in discovery. Every single item that this witness examined was examined by a man who is a firearms expert, who worked {3394} for the Defendant, and apparently they could call him and make the same questions, same examinations; and I think that would be a fair way to approach it rather than to require this witness to stay around.

If the Court allows these documents in and if counsel wants certain particular items in, that's another question; but to say that if they all dolt get in, at this time this witness should be held up. I would say that's totally unfair to the Government and to this witness in addition.

MR. LOWE: Judge, that's not what I am saying. Let me clear up the record. Mr. Sikma once again is having flashbacks to last summer. There was a witness whose name was Dr. Nichol -- (spelling) N-i-c-h-o-l -- I am not positive, I didn't deal with him myself very much. He was a witness. He was called as a defense expert. He did some examinations. He is not available to us this year, and in fact I have it on good information that there was some mix-up on his CJA. He never got paid or was paid very, very, very little for what he did. He was quite upset, and I believe he has refused to have any further dealings with us because of that. That is irrelevant, because the question here is we are not asking for expert opinion based on something he would look at now, it is to recall testimony about test that he already made back then when he had these items.

{3395}

That is nothing that an independent expert can give. This is asking him for his knowledge and procedures.

Now, I am not saying that if the Court doesn't admit those, we will hold up the witness and use him.

What I am saying, in the course of this trial I would have to ask him an awful lot of questions if the only way I could get this information in the record was excluded by the Government not allowing -- or the Court not allowing us to introduce those documents.

What I am saying is that I would not want to inconvenience this witness and clutter up the record by going through this if the Court is going to properly allow us to introduce them in evidence and we can use the exhibits themselves. That's one of the reasons why exhibits are introduced, so you don't have to read the whole thing verbatim to the jury. I am not trying to blackmail anybody. I am just suggesting that he stand by or be subject to recall so that when your Honor rules we will know whether we do or not.

THE COURT: It would be my suggestion that if you have any more evidence that you desire to get from this witness, that you do it now.

MR. LOWE: Well, the evidence that I want is in the documents.

THE COURT: I understand.

{3396}

MR. LOWE: Do I understand that, your Honor, if I have to assume that I must protect myself against nonadmission, that the only alternative I have now is to read the documents to the witness; and I mean that's the essence of what I have said about the documents, is that I would want the jury to know all of the items that are listed in order to prove the non-inclusion of some very important information. I hesitate to start reading all those documents to the jury unless your Honor rules that I may not.

MR. SIKMA: Your Honor, I would submit that the fact that some items may not have been found, some items of evidence have not been found, someone successfully concealed them, the fact that if they are important matters of evidence that we haven't introduced them, the Defendant can simply argue that as to where they are, question where they are. They are not here. It may be that on a lot of these items the defense is merely speculating that they exist.

Now, that doesn't mean that the counsel is entitled to go through 3,000 items and say, "Did you find, did you examine a given item, and were you able to connect it with any of the firearms in this case?" And he would say "No."

That doesn't mean, No. 1, that they couldn't necessarily be connected in a lot of cases because sometimes there are {3397} just insufficient markings to show that, sometimes a weapon may leave no markings at all, sometimes the items may just not have been found.

The FBI worked in this crime scene area for a couple of days, but the grass, foliage is high; and it is possible there are items that are still out there that have never been found, you know.

I don't think it logically follows that every item that's in this report that did not prove something or items that were never found and are consequently not on this report, make these reports admissible -- it just does not.

THE COURT: I am not ruling at this point whether they are admissible or not admissible I am just saying it seems to me if there are some more questions to ask of this witness, this is the time.

MR. LOWE: To summarize my position, my position is, No. 1, I think I am entitled to have a ruling on the admissibility of those documents before we release this witness from all cross examination because I may want to offer modifications if there are specific items in the document that you feel are not admissible, other parts would be.

No. 2, I think it would be very prejudicial if I had to read extensive portions, many pages of single-spaced {3398} items to the jury. I think they could get aggravated. I think they could get upset. They are sequestered, and it is taking so long. If it is unnecessary because the Court admits all or portions of those documents, requiring me to do that to protect my record prior to your Honor ruling is prejudicial to the defense. I would decline to ask any further questions as to those documents, that's all I would have left to ask is what is contained in those exhibits. I would decline to ask any more questions about the exhibits until your Honor rules, and ask the witness not be released; because if your Honor admits these, I have no further questions.

I am sure this witness has a lot of important things to do, but they have to yield in this case, I suspect, to the convenience of the Court.

THE COURT: There is no way I can give fair consideration to those documents without taking the time to look them over.

MR. LOWE: I agree.

THE COURT: It appears to me that you are just about done --

MR. SIKMA: (Interrupting) One more witness.

THE COURT: (Continuing) -- with the Plaintiff's case

So where does that leave us then as far as the time frame is concerned?

{3399}

MR. SIKMA: I suppose the defense can call this witness if they need to.

THE COURT: The only reason I am hesitating is because you made some comment yesterday that this witness is needed somewhere else.

MR. SIKMA: He is, your Honor. He has, I believe, a number of things piling up.

MR. LOWE: I will stipulate that everybody involved in this case has things piling up.

MR. SIKMA: He has court appearances piling up, so his availability might be somewhat hampered. We wouldn't be able to get him at a moment's notice.

MR. LOWE: I would be willing to do this, your Honor, I would be willing to allow or to agree that he would be released in the sense of not keeping him available here, subject to additional cross examination at some point; in other words, the difference I am pointing out is the difference between some limitations on counsel in direct examination rather than cross examination, but to take him in turn during the defense case. I am not objecting to that.

I think your Honor ought to have a chance carefully to consider those exhibits; and that, it would seem to me, would sort of meet everybody's needs at this point; and let your Honor take that under advisement with the {3400} understanding that if you rule against the admissibility, that we would be allowed additional cross examination of this witness during the defense case. I think that's fair, or maybe we could stipulate something too?

MR. SIKMA: Perhaps we can, if you are just going to read them and say, "Is this in your report?"

MR. LOWE: That's part of what I might have to do to get the evidence in.

MR. SIKMA: If counsel would allow counsel to do that, we would not want to waive our objection to the questions asked; but if the Court ruled, "Yes, he could ask those questions in that manner," we would allow him. We could stipulate.

THE COURT: That sounds reasonable.

MR. LOWE:

A reasonable compromise.

THE COURT: Very well.

{3401}

MR. SIKMA: I have nothing further, Your Honor.

MR. LOWE: I have nothing further of this witness on the record, Your Honor.

THE COURT: You may step down.

MR. SIKMA: Your Honor, at this time the Government has certain stipulations to read with regard to items of evidence Government Exhibit, this refers to the written stipulation signed by both parties, Government Exhibit 18-B "Auto inspection form pertaining to Bureau automobiles of Ronald A. Williams. It is here by stipulated and agreed -- "

THE COURT: Mr. Sikma, give the marshals and the bailiff time to move the case.

MR. SIKMA: Thank you, Your Honor.

THE COURT: You may now proceed.

MR. SIKMA: "Government Exhibit 18-A, Auto usage records pertaining to Agent Ronald A. Williams bureau car and description of said automobile. Government Exhibit 18-B, Auto inspection form pertaining to the bureau automobile of Ronald A. Williams. It is hereby stipulated and agreed by the parties that if the custodian or other qualified witness were called he would testify that said exhibit was kept in the course of the regularly conducted business activity, and that it was the regular practice of that activity to make such a record. Further foundation is waived."

"It is further stipulated and agreed that the bureau {3402} car of Ronald A. Williams was free of bullet holes prior to January 26, 1975."

Government would offer into evidence with that, Government Exhibit 18-A and 18-B.

MR. LOWE: No objection, Your Honor.

THE COURT: 18-A and 18-B are received.

MR. SIKMA: "Government Exhibit 19-A, Documents assigning bureau automobile to Jack R. Coler, description of automobile. Government Exhibit 19-B, monthly automobile inspection report pertaining to Jack R Coler, Coler's bureau automobile. Colorado license number KE1194, dated 4/30/75. Government Exhibit 19-C, worksheet from Doug Borman Chevrolet pertaining to repair of Jack R. Coler's automobile."

It is here by stipulated and agreed by the parties that the above documents and exhibits are authentic and if the custodian or other qualified witness were called they would state that said documents are kept in the course of the regularly conducted business activity. And it was the regular course of that business activity to make such records. Further foundation is waived."

"It is further stipulated and agreed that the bureau car, bureau automobile of Jack R. Coler was free of bullet holes prior to June 26, 1975."

At this time, Your Honor, I would offer into evidence Government Exhibit 19-A, 19-B and 19-C pursuant to the {3403} stipulation.

MR. LOWE: No objection, Your Honor

THE COURT: 19-A, B and C are received.

MR. CROOKS: If it please the Court, the United States would call Mr. Chuck Tweedy.

CORPORAL R. C. TWEEDY,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CROOKS

Q Corporal Tweedy, would you give your full name again for record, please.

A Ralph Charles Tweedy.

Q And where do you live, Mr. Tweedy?

A In the city of Edmonton, the province of Alberta, Canada.

Q And what is your employment, sir?

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

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

A Fourteen years, sir.

Q And how long have you been stationed in the Edmonton, Alberta area?

A In the area -- most of my service in Edmonton. It's about six years, sir.

Q All right. Calling your attention back to the first part of February, 1976. Did you have occasion to participate in the arrest of an individual who was involved in this case that we're {3404} trying here?

A Yes, I did, sir.

Q And what was the individual's name?

A Leonard Peltier.

Q And do you see that individual in the courtroom today?

A Yes, I do, sir.

Q And where is he seated?

A He's seated at the end of the court table.

MR. TAIKEFF: Identification is conceded, Your Honor.

THE COURT: Very well.

Q (By Mr. Crooks) All right Corporal Tweedy, during the course of the arrest of Mr. Peltier were you present with the arresting group of officers at the camp?

A Yes, I was, sir.

Q And did you accompany Mr. Peltier at a later time in connection with taking him into Canadian custody?

A I did, sir, the following day.

Q And would you describe the circumstances under which you were assigned with or he was assigned to your custody the following day.

A Yes. Constable Parlane and myself escorted Mr. Peltier from the town of Hinton to the city of Edmonton the following day after the arrest.

Constable Parlane drove the vehicle. It was an ordinal unmarked police car. I rode in the back seat with the prisoner.

{3405}

Q All right. During the course of the trip did you have occasion to ask Mr. Peltier any questions?

A Yes, I did, sir.

Q And prior to asking him questions what procedures if any did you follow?

A Well, when I first got into the police car with Mr. Peltier I gave him the secondary police warning which is customary under these circumstances.

Q And without going into it in detail would be the same warning that's been referred to earlier by other witnesses as basically warning that he has the right to remain silent and so forth?

A That is correct, sir.

Q All right. During the course of the trip to Edmonton did you ask him questions concerning the matter that he was being arrested for, or wanted for by the United States Government?

A I did, sir.

Q And what specifically did you ask him concerning the murders that he was wanted for?

A I asked Mr. Peltier if he would tell me about the two killings that he was allegedly involved with

Q And what response if any did he give?

A Mr. Peltier advised me that the two FBI agents were shot when they came to a house to serve a warrant on him.

Q On him?

{3406}

A That is correct, sir.

Q All right. Did you then ask him what the warrant had been for, or what he understood the warrant had been for?

MR. TAIKEFF: Objection.

THE COURT: Are you objecting to it on what basis?

MR. TAIKEFF: I would like to come to the sidebar, Your Honor.

THE COURT: You may.

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

MR. TAIKEFF: Your Honor, the reason I said objection was in order to get at the sidebar so that I could make sure that Mr. Crooks understands there this is some information contained within the purported statement which is not to be admitted.

MR. CROOKS: Why don't you specifically state it. I think I see what your problem is.

MR. TAIKEFF: According to the --

MR. CROOKS: Which part would you like deleted, or what are you talking about specifically?

MR. TAIKEFF: I'm talking about words "of an off-duty cop".

MR. CROOKS: All right.

MR. TAIKEFF: And then any further reference.

MR. CROOKS: All right. I will word the question and {3407} attempt as best I can, if counsel will allow me a leading question, so that he does not give the identity or status of the individual involved. But I think --

MR. TAIKEFF: I think you do it on your own peril. I'm not going to take the responsibility. That's why I came up here and forewarned you about that.

THE COURT: I assume this relates to the Wisconsin incident?

MR. CROOKS: Yes.

MR. TAIKEFF: That's correct. Perhaps Your Honor would like to see the purported quote

THE COURT: Yes.

MR. CROOKS: Well, my position is, I will attempt to avoid getting into that. I don't think there's anything improper if it comes out because that was the statement. But I will attempt to --

MR. TAIKEFF: There's a stipulation there.

THE COURT: It seems to me that perhaps the way to resolve this matter is to ask the witness to step down and confer with him at the counsel table.

MR. TAIKEFF: May I make an alternate suggestion along the lines of Mr. Crooks' earlier suggestion. Suppose you ask him a leading question and ask him whether or not he indicated to you that this was a charge of attempted murder in Milwaukee, and just take a yes or no from him.

{3408}

MR. CROOKS: Yes. If counsel is willing to do that, I will do it that way.

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

MR. TAIKEFF: I'll withdraw the objection, Your Honor.

THE COURT: Very well

Q (By Mr. Crooks) All right. With counsel's permission I will ask the question as a leading question and I would ask him to answer simply yes or no. Did you then, well, I believe you already stated that you then asked him what the warrant was for and my next question, did he state words in substance that he had been charged with attempted murder in Milwaukee?

A Yes, he did, sir.

MR. CROOKS: All the questions I have, Your Honor.

MR. TAIKEFF: May I inquire, Your Honor?

THE COURT: You may.

MR. TAIKEFF: Your Honor, I'm going to remain seated if Your Honor' doesn't mind.

THE COURT: That is permissible

MR. TAIKEFF: I hadn't done it before so I just wanted to indicate the change.

CROSS-EXAMINATION

BY MR. TAIKEFF

Q Do you recall of your own independent recollection the conversation or conversations you had with Mr. Peltier on February 6th and February 7th, 1976?

{3409}

A I had very little on February the 6th. On the 7th I recall parts of the conversation, sir.

Q Did you have any conversation on the 6th?

A Not that I can recall, sir.

Q Mr. Peltier say anything about not being turned over to the FBI?

A He made those comments, but not to me, sir.

Q But you overheard them?

A Yes, I did.

Q What did he say in that regard?

A He said just that, not, that he would -- I don't recall the words he used, sir. He asked not to be turned over to the U.S authorities.

Q Did you write a report in connection with your conversation or conversations with him?

A Yes, I did, sir

Q And as far as you know was that report accurate?

A Yes, it was, sir.

Q And was it written shortly after February 6th or February 7th?

A It was.

Q Did you write in your report that Peltier asked not to be turned over to the FBI?

A I believe I did, sir.

Q Is it fair then to assume that if you wrote that in your report that he said that, that you just didn't write it?

{3410}

A No, he said that, sir.

Q Now, prior to the time that you found yourself in Mr. Peltier's presence had you had any contact with any United States official, whether from the FBI or otherwise concerning Mr. Peltier?

A No, sir.

Q Had you had any conversation with anyone concerning the charges against Mr. Peltier?

A I don't understand the question, sir.

Q Well, you knew you were going out to arrest somebody?

A Yes.

Q Who was wanted by the United States authorities; is that correct?

A That's correct, sir.

Q Did you have any specific details about that case?

A No, sir.

Q You only knew that he was wanted?

A Wanted for the murder of two FBI agents was the information I had, sir

Q Is that all?

A That's all I can recall at this time, sir. I believe it is.

Q From whom did you learn that, that little bit which you say you knew?

A That would have been a verbal communication from the member {3411} of our force who detailed for us to go out to this location.

Q Now, as of this time, given the present state of your memory, have you told us all that you believe you knew about the purported details of Mr. Peltier's case?

A I would have to review my notes, sir, to -- that's all I can recall at this time without reviewing my report.

Q On February 7, 1976 did you ask Mr. Peltier whether he shot the two FBI agents?

MR. CROOKS: Your Honor, before this question is asked may we approach the bench? I have something I wish to make a record on.

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

MR. CROOKS: Well, at the bench, Your Honor, first of all this is self-serving. But I'm not sure I'm really objecting to it. But I do object to counsel going into this because the part of the statement which counsel is going to elicit is basically going to be he stated he did not. But that was not all of the conversation. The conversation was followed by a further question, "Well, were you part of a conspiracy"?

MR. TAIKEFF: Mr. Crooks, I interrupt you only to assure you I would cover both parts. So that wouldn't --

MR. CROOKS: This is why, if counsel will elicit all of it, then I have no objection.

{3412}

MR. TAIKEFF: I will.

MR. CROOKS: Because I did not feel I could go into all of this because of constitutional problems of talking about silence. But I don't want half the conversation to come in.

If counsel will represent to me that he will --

MR. TAIKEFF: Not only that, I will show you my own notations here that I distinctly intended to bring out both parts.

MR. CROOKS: Well, including the shrug of noncommittal

MR. TAIKEFF: I will do so.

MR. CROOKS: If counsel will do that I will have no objection. But I did not want us to get into a constitutional problem where in effect we're having to bring out what could then be construed to be a comment on silence. And I do not feel it's fair to bring out one part of the conversation without the other because it was all in context. If counsel will go into the whole thing we will have no objection.

MR. TAIKEFF: I intended to all the time, Your Honor.

THE COURT: Very well.

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

Q (By Mr Taikeff) I believe, Corporal Tweedy, that the question I put to you before we just went to the sidebar was: Whether or not you asked Mr. Peltier if in fact he had shot the {3413} agents. Did you ask him that question?

A I did, sir.

Q And did he answer you?

A Yes, he did.

Q And what did he say?

A He said, "No, but I know who did."

{3414}

Q And did you then ask him a further question?

A I did, sir.

Q And did you ask him whether he was part of the conspiracy?

A Yes, I did.

Q To kill these men.

And did he make arrangements for it, I assume the killing, to happen so he could get away? Did you ask him those two questions or that one question in two parts?

A Yes, I did, sir.

Q And did he give you any answer?

A No, he did not.

Q What did he do?

A He shrugged his shoulders.

Q Now, sir, tell us what was the basis of asking him whether he was involved in a conspiracy if in fact you had no other information about this case before you confronted him on February 6th?

A Well, he had told me already, sir, that he had wanted or had felt that his arrest was imminent.

Q You didn't record that in your report, did you? Yes or no?

A No, sir.

Q Go on.

A And I felt if he had answered me in the negative respecting the shooting, it's then that this may have been the case in {3415} order to allow him to leave without being arrested, that is why I asked that question.

Q Well, you know that the word conspiracy implies criminal conduct by two or more people to give the simplest possible definition, isn't that correct?

A Yes, sir.

Q Where did you get any information that there may have been some other people involved in the incident?

A I don't know that there was, sir.

Q So you just happened to ask him that question, is that what you say?

A Yes, I did, sir.

MR. TAIKEFF: I have no further questions.

MR. CROOKS: We have nothing further.

THE COURT: You may step down.

MR. HULTMAN: Your Honor, the government has, and Counsel for the defendant has entered into further stipulations which I would like to read at this particular time.

With reference to stipulation of evidence, paragraph 1 of that major stipulation, "Government Exhibit 1, document appointing Ronald A. Williams and Jack R. Coler as special FBI agents and the authority for Williams to carry a personally owned firearm, a Smith and Weston model 19, .357 caliber revolver, serial number 3K10439, the parties hereby stipulate and agree that said documents are genuine and further authentication and foundation is not required. That pursuant to Federal Rules of Evidence 803 (6). If the custodian or other qualified witness of these documents were called he would testify that they were kept in the course of a regularly conducted business activity and it was the regular practice of that business activity to make such documents."

Therein I would submit into evidence and offer at this time Government's Exhibit No. 1. That exhibit is from the chief of the record section of the Federal Bureau of Investigation, three documents and the covering letter of those particular documents, and I would offer them into evidence now with the understanding that since they are under seal and they are in six copies that the clerk would withdraw five of each of the three copies. I have not withdrawn them because they are under seal and I would make that offer at this particular time.

MR. TAIKEFF: Can we have one of the copies?

MR. HULTMAN: Yes.

MR. LOWE: No objection, Your Honor.

THE COURT: Exhibit 1 is received.

MR. HULTMAN: Then I have just received from the Clerk a copy of a stipulation which has been agreed to herein and I will read it at this time. "Previous stipulation that it is hereby stipulated and agreed between the United States of America and Defendant Leonard Peltier and his counsel that {3417} on June 26, 1975 Ronald A. Williams and Jack R. Coler were employees of the Federal Bureau of Investigation, department of justice and were at the time of their deaths on said date engaged in the performance of their official duties."

And lastly, "It is hereby stipulated and agreed between the United States of America and the Defendant Leonard Peltier and his Counsel, one, that on November 22, 1972 Leonard Peltier was charged with attempted murder in Milwaukee, Wisconsin. He was served with an arrest warrant concerning said charge on or about November 22, 1972, was arraigned, pleaded not guilty and was released on the bond;

two, on or about July 29, 1974 Leonard Peltier failed to appear for trial on said charge pursuant to the terms of his bond and his bond was forfeited and a bench warrant issued for his arrest;

three, on August 9, 1974 a warrant was issued from the United States District Court in the eastern district of Wisconsin charging Leonard Peltier with unlawful flight to avoid prosecution concerning his failure to appear on the charge mentioned in one above. However, there is no evidence that Leonard Peltier was aware of the existence of this warrant on June 26, 1975;

four, on June 26, 1975 Leonard Peltier was aware that a warrant was outstanding for his arrest concerning the attempted murder charge in Milwaukee. He knew if he were taken {3418} into

custody by law enforcement officers he would be returned to Milwaukee to stand trial on the aforesaid charges." Signed by Evan L. Hultman, Elliot Taikeff, John C. Lowe and Leonard Peltier.

With those, Your Honor, and those submissions the government rests.

THE COURT: Is it the intention of the defense to present evidence?

MR. TAIKEFF: Yes, Your Honor.

THE COURT: We have reached the point of the trial, members of the jury, where the defendant now had the opportunity to present evidence.

Would you approach the bench.

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

THE COURT: This morning I was given a copy of an instruction you wanted me to give with reference to calling witnesses and I had it here this morning. It seems to have disappeared.

MR. TAIKEFF: I have a duplicate. However, if the government doesn't have its copy, I can get it.

I did want to ask Your Honor whether Your Honor would hear us under Rule 29 for a directed verdict of acquittal.

THE COURT: Oh, yes.

{3419}

MR. HULTMAN: Then, Your Honor, I have some things, too, that I would like to take up out of the presence of the jury that have to do with matters oncoming that I think ought to be resolved.

MR. LOWE: Matters of what?

MR. HULTMAN: Has to do with witnesses or prospective witnesses.

THE COURT: I guess we're approaching fairly close to the recess. I will excuse the jury and we'll go on into these other matters now at this time.

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

THE COURT: The United States having rested, there are some legal matters which the Court must hear from Counsel and so the jury will be excused from the courtroom at this time for your afternoon recess.

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

THE COURT: Mr. Taikeff, you indicated you had a motion.

MR. TAIKEFF: Yes, Your Honor. I would move at this time on behalf of the defendant pursuant to Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal by the Court. The basis of that motion, Your Honor, is that {3420} the government has failed to offer sufficient proof to either show that the defendant committed the crime charged or in the alternative has offered insufficient proof to warrant sending the case to the jury in such a state that the jury could make a rational decision without speculating and guessing.

The evidence viewed in a light most favorable to the government, as I think the Court must at this particular juncture, shows at worst that the defendant was shooting the firearm, the AR15, from a distance of approximately 200 feet or more. Perhaps I'm wrong about that. Perhaps it's 200 yards.

I refer to that area which has been marked at different times "P1" and "Z1." I think we all recognize that as the Y intersection in the road leading to tent city.

The only other connection between Mr. Peltier and the particular event which we're concerned, namely the shooting of the agent, is that a witness testified that at some time in the course of the day he saw Leonard Peltier in the vicinity of the agents' cars, did not testify that Peltier was shooting, did not testify that at that time he saw the agents alive or immediately prior to that time he had seen the agents alive. The proof is insufficient.

I realize after a three and a half week trial with several thousand pages of testimony and hundreds of exhibits {3421} it may seem difficult to make such a statement, but in fact, Your Honor, there is no testimony in any form from which a jury could rationally find. They do toss a coin and decide, yes he did it as opposed to no he didn't. But there is not sufficient proof to warrant the submission of the case to the jury because there is no proof that gets Leonard Peltier shooting a gun any closer than 200 yards and the only proof of him being in the vicinity, the immediate vicinity is that he was standing there with other people. But he wasn't the only person who was standing there that day. A person by the name of Bear Runner was there. Agents were there. Obviously they're not accused of the killing. So the mere presence at the place where the agents had been killed is certainly not sufficient proof to ask a jury to consider whether he may have killed the agents.

There is no other proof that would place him in a posture or in a position which would warrant a rational jury returning a verdict of guilty of the crimes charged in the indictment.

Now one might argue in response to what I have said that being at the Y intersection, you have to assume that fact is true on the United States case at this juncture in their case. Assuming it was true that from 200 yards he was firing his rifle, that in and of itself does not constitute a basis for finding he committed the murders which have been proven in {3422} this case. The murders which have been proven in this case have been shown to be killings that took place at very close range. They were execution style murders and shooting from that distance could not constitute committing that act.

Well, the alternative argument in response to the defendant's position would be that that constituted aiding and abetting those who committed those murders.

Perhaps now it is clear to Your Honor why at the beginning of this case through an application for a Bill of Particulars we required the government to take some posture on the subject. They said in resisting that application that they didn't know how the testimony was going to go and perhaps they did not. {3423} But now the testimony is in the record and there is nothing that would show any joint venture, any conspiracy, any scienter on the part of the defendant from which a jury could rationally find that his conduct if believed, and I think we have to treat it as a fact at this point, his conduct is being at the intersection firing his rifle constituted aiding and abetting those who committed the murders. So we have no proof that he himself committed the murders and no proof or any knowledge or participation on his behalf in helping those consciously, specifically helping those whose purpose and intent it was to commit first degree murder. As such, Your Honor, the proof fails. It fails absolutely and in the alternative it fails as being sufficient to submit the case to the jury in such a way as to prevent them from making an irrational decision which is the only decision they can make on the state of this record.

MR. HULTMAN: Your Honor, might I be heard just with a sentence or two, since Counsel has anticipated a part of what the argument will already be.

I submit to the Court that in this case as in most instances of murder there is rarely, if ever, an eyewitness to the event itself, because two of the eyewitnesses here are dead. They are the agents.

I would submit that the evidence but for an eyewitness saying that I saw the defendant pull the trigger and do the {3424} things that the rounds very obviously from the evidence in here did do resulting in the death of the two agents, but for just that one single item everything else in terms of a circumstantial case has been presented in this case and is a part of the evidence. And I would say that the government resists only with that discussion to the Court.

MR. TAIKEFF: Your Honor, I would just like a moment to respond to that.

It is a big but for that Mr. Hultman comments upon. But for a few minor chromosomes I could be the Queen of England. The fact of the matter is I don't have those chromosomes and here I am court appointed counsel in this lovely city of Fargo. It is a critical but for.

The fact of the matter is there is no question but that these agents were killed and undoubtedly killed in such a way so that those who did the killing or the person who did the killing, person or persons, I should say, committed murder in the first degree. But the question is whether or not the government has offered any proof from which a rational decision could be made on the part of the fact finder. Juries are not permitted to speculate, they are not permitted to make decisions on hunches. They have to have something in particular to go on.

By Mr. Hultman's own arguments it is clearly a case of circumstantial evidence, it is clearly a case of {3425} circumstantial evidence. The law is clear with respect to circumstantial evidence. If the circumstantial evidence is equally consistent with innocence as it is with guilt, then there must be an acquittal.

Our position is that as a matter of law the evidence is such that it is equally consistent with his innocence as it is with his guilt. There is no dispute of fact which could change that. If there were some disputed fact or some disputed facts, then there's a question for the jury. But there are no disputed facts.

We take the position as we must on this motion that, let us assume he was firing. Let us assume that on some subsequent time that afternoon he was in the vicinity of the cars. That's all there is. In order to fill in the blank spaces you must guess, you must hypothesize. You

cannot find some piece of evidence somewhere that would be a link in the chain that would lead you to the conclusion in a rational, reasonable way that he was there shooting and that's why the proof fails totally, or in the alternative fails in such a way as to warrant not sending the case to the jury because there are cases, as the circuit courts have enunciated in the past several years, I'm thinking of the second circuit case, United States against Taylor, I regret I don't know the eighth circuit case. That circuit case was modeled after a D.C. circuit case and apparently it is the view at this time that {3426} there are cases that even technically are prima facie that won't go to the jury because the deficiencies are such that there is no rational way to fill in the blank spaces. It has to be done purely on guess work and speculation.

{3427}

We take the position first and foremost that there isn't even a prima facie case here; but secondarily, if there is, it is in that special category of cases in which the Government has made prima facie proof that does not warrant the case being sent to the jury.

THE COURT: Without discussing or detailing the reasons why, I am denying the motion.

Is there anything more to be presented?

MR. HULTMAN: Yes, your Honor, the Government has items that they would like to take up with the Court and counsel presently; and I would give to counsel the first item, and to the Court.

This is a request, your Honor, and it may be in one sense premature in normalcy, but in line of the way things have progressed to this point and observations have been made, I do not think it is really premature; and that is, we are now going to point out where we are going to be dealing with witnesses as counsel has indicated for the defense and certain of those witnesses are Government employees, and the first one I am concerned with, which is the subject of the matters which I have just now presented, is that counsel has indicated -- and I trust that the time has come when at least we can at least make some determinations, at least, that Mr. Kelly, the Director of the Federal Bureau of Investigation, may possibly be called, {3428} and we agree to a sequence of events.

I am now presenting this at this particular time because, one, I believe that there is no relevant matters, based upon the items which I have shown; and I would like to get this issue at least on the move because, as I have indicated to counsel, if he is going to be requested, it is my understanding that such a request will be made and a showing in camera to the Court, that an opportunity on the part of the Government to quash on behalf of the witness, to quash any possible subpoena that would result from that, and then the problem of getting the schedule worked out of the named individual.

I have made inquiry, based upon the observation that counsel indicated that he might be called, so that we did not have a problem; and I have found that -- and I would report to the Court in no way do I want to indicate that this is in any way a change in resistance because the Government strongly will resist at all steps -- but in the event that it should come to pass that this individual be called as a witness, that next Tuesday would be the most appropriate time because of problems in scheduling and so forth that he has; and I indicated to counsel I would so indicate after inquiry as to what those possibilities were.

I am not asking here that a determination be made at this time in any way. I just wanted to bring this matter {3429} to its present posture and indicate to counsel and the Court what I have done up to this particular point.

The second item, your Honor, that I would like to bring to the Court's attention has to do with other possible witnesses that may be called in this particular case (handing); and again the Court may well feel this is premature, but I think it is an appropriate time that at least the Government place some things specifically on the record for the reasons which I am going to enumerate.

Cross examination has led me to believe -- and I don't think erroneously -- that certain witnesses will be called for the reason to go into some specific events; and it is the feeling of the Government, so that there can be no prejudice of any kind to this jury, by even preliminary questions to specific witnesses that on specific events and specific witnesses there be a determination prior to anything going before this jury.

For example, on cross examination it has become apparent to me by counsel referring out of a group of witnesses or people that were in a group, questions as to just one individual that was in that group and repeated on more than one occasion; and I am specifically referring to the example of another death which in the posture of the Government is a totally unrelated and in no way a material matter to this particular case,, and I submit in {3430} that instance that no other death on Pine Ridge specifically has any more relevancy -- unless it has been shown first by an offer of proof -- than if, for example, we were here at the present time concerning ourselves with the murder here in Fargo, North Dakota, and there was another death somewhere in Fargo or in the general Fargo area.

Likewise it seems to me the allegation that other crimes or other alleged crimes, for example, someone attempting to sneak into someone's tepee, just to use an illustration, has no more relevance than again if we were here in Fargo and there was some other unrelated events of this kind, that any one of those would be highly prejudicial; and were the Government on the one hand in any way to attempt to introduce any evidence of that kind, even the very mention of it, I am sure counsel would be on their feet and asking for a mistrial and probably would be grounds for same.

And so it is the position of the Government at this time, your Honor, that there are certain matters which I think are known to all, and by the questioning that has taken place on cross examination, that in the Government's belief are, one, highly prejudicial, and two, have no relevance; and I seek to make sure at this juncture, your Honor, that we not get into matters of that kind so that the Government will not be accused, as we already have been, {3431} of using too many objections or objecting every time counsel is about to ask a question because I want to place it on the record here now, that if we are going to get into matters of that type, I am almost going to be objecting before the question is even asked. I know that is not exactly the normal posture for counsel on either side to be placed in, but because the very mention, for example, of an unrelated death, that statement alone is so prejudicial to this jury I want to do everything to insure, your Honor, at this time within the Rules and the specific Rules that we go under and we exercise examinations under, that those events do not happen.

In addition, your Honor, it would indicate to me -- cross examination has indicated that a witness may well be called, because there has been cross examination in quite detail about this given possible witness because of the testimony that has been elicited, that this witness somehow will be set up as a straw man or in this case a straw woman, and then whatever statements she does make then will be attacked, accordingly her credibility from the beginning;

and I indicate again, your Honor, that I think this one is an improper matter and way in which to proceed.

And again I want to go on the record at this particular time because I believe likewise that particular subject {3432} matter in that way is something that should not appear before this jury in a hostile way or in a way which would prejudice this jury. I am specifically referring to remarks of counsel who has indicated that the competency of this woman on many occasions, words to the effect that she is mentally imbalanced, that she has been institutionalized, in fact she has seen snakes, to use some of the phraseology that has been used by counsel in the past in referring specifically to this particular witness.

I would also note, your Honor, that at this juncture there are certain reports -- I put that in parenthesis, quote, unquote, of certain hearings and certain studies; and I raise this because I find myself in the posture of seeing things and observing things and events that are almost exactly repetitious of things I have seen and observed before; and I want to make certain again that if we are going to be dealing with alleged reports of alleged fact-finding groups, that again the relevancy of that particular testimony first be tested by some showing of some kind to this Court before it becomes a matter within the hearing of this jury because I think that it will not meet the test ultimately if those things are to be introduced, the tests of relevancy as far as when you test the -- as the Court has made a judgment on other matters earlier in this trial, when you test first whether or not the items {3433} are relevant under the test of relevancy; but secondly, even if the test then is met of relevancy, that under 404 the prejudicial impact of it is so great that it is not testimony or evidence that should be allowed before this jury.

So I wanted at this time, your Honor, to bring this matters up out of the presence of the jury, and in anticipation -- and in some anticipation maybe I will be wrong, I can only confess I can only do those things that I had analyzed or viewed or seen or believed from what has been taking place up to this point in the course of this trial as to matters that may well be and probably will be matters of possible testimony or possible documentary evidence in this trial.

The last thing of which I am concerned at this moment is that counsel has furnished me with a list of witnesses; and I believe under the Rules in all good faith and what our understanding has been, in order that this trial progress in an orderly way, that I have been provided with a list at this time of two, four, six agents, and one former governmental employee, a total of seven that may well be called or probably will be called as witnesses in this trial; and I would ask that reciprocity, as I believe was the understanding because we have furnished prior to trial a list of all possible witnesses {3434} that the Government would call, and then to the best of our ability have indicated who the next witness is that is going to be called, that the same reciprocity be given within the degree of possibility; and I understand there are times when a witness for one reason or another maybe is not available; but at least reciprocity under the Rules, the Government be given this in order that we may properly be prepared and so that we will not have to ask the Court for any time that we might be able to see documents or prepare something in order to proceed accordingly.

Lastly, with reference then, in addition to witnesses -- and I make this as far as the future -- and counsel, when I made this motion awhile ago informally, I was not referring to anything in the past, I am referring to anything in the future -- that I think the only right and fair, and within the Rules, that if there is going to be any documents of any kind that are going to be used in the course of the Defendant's case, that the Government be supplied with a copy of that in order again to save time, that I might be able, or counsel for the Government, to read it, to look at it, to analyze it, in order to properly then be prepared to make any objections that we might have or to be used in whatever the proper methods are.

I have raised these matters at this time because I think it is an appropriate time for them to be raised.

{3435}

MR. TAIKEFF: Your Honor, I have both listened to Mr. Hultman and read his brief and argument for excluding collateral matters; and I think I have made a list of all the things he is interested in including some things he didn't mention but which are in his brief.

I would like to just quickly tick them off, and if I have them all, you can respond that I do.

Question of Mr. Kelly's appearance, a witness list, copy of documents that the defense might offer, Myrtle Poor Bear, Anna Mae Aquash, the number of deaths which have occurred on the Pine Ridge Reservation, and testimony concerning state of mind of the Defendant, particularly with reference to the question of first degree murder.

I would like to know of Mr. Hultman if I have touched or mentioned every topic which he has brought up either in writing or orally.

MR. HULTMAN: No, I don't believe you have. There have been some others like an individual who may have lost an eye at some time or some place, or a child, something may have happened -- I am talking about any specific events, I have tried to indicate that as not being relevant.

MR. TAIKEFF: I am sure that that latter point doesn't appear in the brief, and I am fairly certainly, in spite of my somewhat debilitated condition right now, that Mr. Hultman did not say anything about that a few moments ago but I will add that to the list.

{3436}

MR. TAIKEFF: Perhaps it would be fair for simplicity sake to say what Mr. Hultman was referring to generally is the existence and past existence, particularly in 1975, of violence on the reservation. May I ask whether that's the topic that he has in mind?

MR. HULTMAN: I'm referring to specific isolated instances and whatever those might be. That's specifically what I'm referring to. The isolated instances.

MR. TAIKEFF: All right. If I may proceed, Your Honor --

MR. HULTMAN: Because of any relevancy to this particular matter.

MR. TAIKEFF: First of all, with respect to Clarence Kelly. I thought that a mutually agreeable program had been worked out with respect to certification to the Court, and then if the Court granted the subpoena and opportunity for the Government to act. And I see no reason to deviate from what had apparently been our mutual understanding.

Counsel cannot at this time certify to the Court the need for Mr. Kelly, and we will take into consideration the fact that the best day for him would be next Tuesday. I don't think our case will last so long that there would be many other days on which we could possibly want him. So that if we want him it would be next Tuesday if the Court agrees, and if at the same time denies

the Government's application to {3437} quash the subpoena. I trust that for the moment that takes care of the matter.

MR. HULTMAN: Yes.

MR. TAIKEFF: Now, secondly, with respect to a witness list, we will, although I don't think we're obligated to do so under any of the rules of criminal procedure or under any of the case law, supply the Government with a witness list in this form. As we have arranged right now there are approximately five witnesses whom I have interviewed, and whom I have determined are to be called to the witness stand. I believe that in fact they will be called to the stand.

I would happily give Mr. Hultman that information right now. Jean Day, Francis He Crow, Russel Loudhawk, Ethyl Merrival and Jimmy Eagle. Those are the only people that we have thus far determined that we will call to the stand other than the FBI agents in the first category of the two categories on the list that I gave to Mr. Hultman, either yesterday or the day before yesterday. As to those people, which includes Marvin Stoldt, the BIA employee, former BIA employee I am told, there is no doubt that we will call him to the stand. That's not speculation.

MR. HULTMAN: And they are and will be available by tonight, or I'm not sure all of them are here yet, but they will be tonight. So they'll be ready for tomorrow.

MR. TAIKEFF: There are additional names in the second {3438} category. I believe Your Honor has been previously informed that we do not require their presence. We only require that a reasonable opportunity be given to us to get them here, and I understand that except in some presently unanticipated cases, twenty-four hours would be sufficient. So I think we have that under control.

As to the additional witnesses that we interview and determine that we will put on the stand, we will voluntarily notify the Government as we certify them; and we will do so in the same spirit in which the pretrial discovery was done. They won't be any holding back and there won't be any game play. As soon as we know somebody's going to be a witness we'll notify the Government.

Now, I think in spite of the fact that Mr. Hultman would not join me in a general description which would cover a number of specific items that he talked about, I want to address myself to the question of violence on the reservation and the relevance that it has to this case. Quite simply the Government has adduced rather substantial amount of evidence of the presence of weapons in the tent city area in the possession of the defendant and others with whom he was working or associating, and in fact we have objected to some of that because we felt it was attenuated, it showed events at other locations at other times, and the Government has said it's relevant because it shows armed flight. And that {3439} in turn is a sign of consciousness of guilt.

Now, in fact there are other reasons why the defendant and his colleagues carried weapons and had weapons, and we're going to offer proof by way of explanation. So I think given the fact that we've had an arsenal on display in this trial and that an examination of a record which is well in excess of two thousand pages will show that at virtually every moment during the course of the last three and a half weeks there was either a gun or bullet or a casing on display while a witness was testifying, that surely we have an opportunity to offer testimony as to why the defendant and his colleagues went armed. That covers the topic generally. There will be one specific matter that I will refer to in a moment.

With respect to copies of documents, we certainly do not intend to try the kind of case that would cause delay or would in any way be unfair; and we're not going to come up with

documents on a surprise basis, and not provide the Government with some advance insight as to what's coming.

Now, there are certain exceptions to that, and I trust that until such time as the Court finds that counsel for the defense do not act in a sensible, professional way that Your Honor will allow us to proceed on our representation that we will act properly and in good faith. These exceptions are, for example, if we have received a document from the Government {3440} and we, in the middle of an examination, find the need to present that document to the witness, our office is across the hall, the Government's office is a comparable distance away, I think that the Government should have the same obligation that we had, and that is to keep everything at their fingertips so that when a document comes up they have the same access to it that we have. And I speak primarily, if not exclusively, of documents of which the Government has supplied to us. So the authenticity of such document is certainly no dispute, and the Government's constructive knowledge of the content of the document certainly isn't in dispute.

Another possible exception, Your Honor, is the fact that we will call to the stand certain witnesses whom we believe will not be friendly in any sense of the word, such as the special agents of the FBI. Now, there are times when one is either cross-examining an adversary's witness or one is examining on direct examination a hostile witness that one does not want to telegraph one's punches. And I think in those appropriate situations counsel should be given leave without any unnecessary noise being made by the Government not to reveal the contents of a document.

I think the record will show, and Mr. Hultman's memory should be consistent with it on most occasions, if not virtually all occasions, voluntarily shown to counsel before I offered {3441} something in evidence a document so he would know what document I was using. There have been exceptions to that, and in fact even upon his request I have indicated my unwillingness because I felt that as an adversary I did not want to give him an advantage that he had known it if I showed it to him. So except for those special cases where I felt justified in doing it I have not played the game in such a way that I've refused to show documentation.

If we come up with any documents of our own that the Government did not supply we will most assuredly make copies available to the Government the moment we decide to use such a document. I trust that that offer of cooperation, subject to our not performing, is acceptable to Mr. Hultman.

Now, Your Honor, there are a number of items of somewhat greater substance and greater significance. Perhaps the least of those four is the question of the number of deaths on the Pine Ridge Reservation. The proof will show, the proof offered by the defense in connection what those people from the American Indian Movement were doing in tent city, that they were providing protection to traditional full-blooded native Americans living in the White Clay District at the request of the traditional tribal council, at the request of the chiefs. And in fact we have a document concerning that subject, and we will make a copy of it and turn over a copy of that within the next fifteen minutes, document dated June 1, {3442} 1975; although the events which we will prove predate June 1, 1975. There were times, and the period of March, 1975 to the end of June, 1975 is included amongst those times when members of the American Indian Movement were called to the Pine Ridge Reservation by the traditional people, or their chiefs to help them, to protect them, to protect them from violence, to protect them from murders, to protect them from shootings, to protect them from beatings; and in order to do so, weaponry was necessary.

And it is not possible for us to have a fair opportunity to show to the jury why these people had the number and kind of weapons they had without showing the circumstances under which they were invited. Part of the fear felt by the traditional native Americans living in the White Clay District was the fact that people are murdered with regularity, people die violent deaths at a

rate, and I don't make this as a representation, but it is a qualitative statement to give Your Honor some idea of order of magnitude, the equivalent violent death rate in the Fargo-Moorhead area would have to be something like 600 or 700 deaths a year to equate to what goes on on the Pine Ridge Reservation, what went on in 1975 and what prompted the traditional leaders to call in the American Indian Movement.

So I don't see how it's possible for us to prove that which is necessary to rebut directly, rebut a portion of the {3443} Government's case without alluding to these things. We're not doing this in an effort to create sympathy or make any statement for the press, for the spectators or for anybody else. That is not relevant and appropriate to this particular case and its surrounding facts. That leaves me with three items: There is the question of Anna Mae Aquash. Now, there are two aspects of that. First I must briefly summarize the situation for Your Honor. Anna Mae Aquash was an AIM activist. As I understand it she was a member of AIM. She was found dead in the early part of 1976 wrapped in a blanket about a hundred feet off of a road on the reservation. Her body was not taken to Rapid City where bodies are taken for autopsies, but to Nebraska. A curious fact in itself. She was known to certain agents of the FBI, personally known, at least one of those agents viewed her dead body, and yet she went unidentified for a long time.

In addition to going unidentified when it appears she should not have gone unidentified she was said to have died of exposure, her body being found in the wintertime. And this was as a result of an autopsy, not speculation, that was to say the Nebraska autopsy. After her family went to the Wounded Knee legal defense-offense office in Rapid City an action was taken by one or more attorneys working on that committee. Her body was exhumed. My understanding is that the FBI exhumed her body voluntarily, that is to say they didn't {3444} have a court order but the pressure was building.

There was then an autopsy performed by a doctor, I will characterize as being more competent, and they managed to find a hole in the back of her head which apparently was the portal through which a .38 slug had killed her. And the bullet was still in her head. That's just a barest outline of the situation.

Now, I tell Your Honor so that Your Honor will understand, maybe I should add one thing. Sometime before her death she was interviewed, I have no direct knowledge of it, I believe for a radio broadcast, and she asserted at that time, and I do not claim that at this time that it would be possible to produce that evidence, I just tell Your Honor for background she asserted at that time that she was afraid of the FBI; she was fearful they were going to kill her. And then of course she died and somehow or other the FBI couldn't identify her.

And then the doctor couldn't properly determine the most obvious cause of death, and the question is what relevance does that event have to any aspect of this case. Well, there is at least one witness that I have personally interviewed who will testify for the defense that he or she testified falsely under fear of the FBI because of things which had been said to that person by the FBI, threats that had been made to that person by the FBI, and that amongst the several specific {3445} factual considerations which prompted that witness to lie under oath and give false testimony that favored the Government's position or posture in this case was what happened to Anna Mae Aquash.

{3446}

Now I think that for that person to testify as to his state of mind based on what happened to somebody else, I'm not talking about the entire set of circumstances, I merely told those to Your Honor so Your Honor would see the entire thing in context. For that person to testify as to his state of mind as a result of his confrontations with the FBI seems to be highly appropriate

because part of our case will be to show the misconduct of the FBI in creating false and fictitious and perjurious evidence.

Now as to whether or not it will ever become relevant to attempt to prove the entire history of this event from the time Anna Mae Aquash was found dead, I cannot in good faith say to Your Honor that there is now a basis upon which I can assert that it is relevant. Some of my colleagues feel that it is relevant. We have had some debate on the subject. At the moment the question is unresolved in the defense team and my individual, professional belief is that we do not yet have sufficient evidence to warrant making the assertion that it's relevant. So to that extent I at this time have to agree with Mr. Hultman that to spell out the entire episode and the FBI's involvement at this particular time, I do not make the assertion that it's relevant and that we should offer to prove it. Of course, if we do change our position, we will naturally notify Mr. Hultman and the Court so that we do not spring any surprise witnesses on the {3447} government.

The next to the last item which was not alluded to in Mr. Hultman's oral presentation, but I assume he stands on his brief -- may I make that assumption?

MR. HULTMAN: I'm not sure which one, Counsel, you're now referring to.

MR. TAIKEFF: There's a question of proof of state of mind.

MR. HULTMAN: All right.

MR. TAIKEFF: Which was not alluded to orally.

MR. HULTMAN: No. I do not. Right. Right.

MR. TAIKEFF: I'm in a somewhat difficult position as a lawyer because the government, as I said, in the course of arguing the Rule 29 motion has to this moment not taken a position as to what their theory is of this particular case.

Now it seems to me that there are two possibilities, two realistic possibilities: either the government will ask the jury to believe that the defendant participated in the sense that he was in the proximity and either directly shot the agents or in some way at that location participated in the shooting of the agents which is perhaps two alternatives. But I see them in the terms of the distance between the defendant and the decedents as one alternative. That is to say, he was there and he either directly or by aiding and abetting then and there within ten or twelve or fifteen feet {3448} participated in the killing. That's one possible theory that the government could go to the jury on.

The other is that if the jury believes that he was shooting that afternoon, that because there was an ambush or some plan or perhaps at the last moment some decision to collectively assault these agents which resulted in their death and that the defendant did not come any closer while the significant shooting was going on at 200 yards, then it would seem to me the alternative argument to the jury is that they should find him guilty for aiding and abetting at a distance.

Now those cases are significantly different cases, and as lawyers know, perhaps laymen don't, out of the same body of evidence it's possible to take either of those positions. But it seems to me if the government is moving in limine, which is the way I interpret Mr. Hultman's presentation, and since the complaint that they had at the beginning of the case that they were

uncertain of where their evidence would go, that there is no longer any need for the government to be uncertain. The evidence is in; they have rested. They are not permitted to put in any more evidence unless and until we put in evidence and then only to specifically rebutt the evidence we put in. So I think it's appropriate before I can respond on the state of mind issue, the government to finally make their choice: is he up close or {3449} is he at a distance, is he a principal or is he an aider and abettor, and I think that perhaps I should give Mr. Hultman a moment to make a response to that because we have to deal with every permutation and combination.

MR. HULTMAN: My only response, Your Honor, is that the proof indicates that both of those very conclusions by the proof so indicate and that's been our position from the beginning. One, not knowing specifically what the proof would show and now believing that's what the proof does show.

MR. TAIKEFF: But it can't be both. We asked the jury to find as a fact, we asked them to come to a conclusion. The government finally has to take a position: what happened here. They don't have to take a position on the basis that they know what happened. They have to take a position that they want to restrict us with a motion in limine as to a choice. They may not make the right choice but they have to make a choice because otherwise it is impossible for Your Honor to rule or for us to respond to the application which they made. They want to have it every way for themselves and no ways for us.

THE COURT: It seems to me the government's response was to present all of the available relevant evidence and it's up to the jury to make the determination on the basis of that evidence whether one or either of these situations --

{3450}

MR. TAIKEFF: Then, Your Honor, it's clear if one of the possibilities is that Leonard Peltier was firing from 200 yards we should be permitted to show the justification for firing from 200 yards and their state of mind and the matter is resolved.

I don't mean to be presumptuous, but it seems to be crystal clear. If a man were on the corner of Broadway and First Avenue North firing an AR15, any juror would want some explanation as to why was he there and why was he doing that. Well, it's not quite Broadway and First Avenue North at that Y intersection, but we have an explanation and that's the subject matter that the government says we shouldn't be permitted to prove. It seems to me obvious that their application must be denied on the basis of the very position he took in their original argument.

And that, Your Honor, brings me to the last point. That's the matter of Myrtle Poor Bear. Now I think that Mr. Hultman characterized that as a case of a straw woman we want to set up in order to knock down and if in fact that's what we intended to do, I would certainly understand his objecting to it. I would understand Your Honor's supporting his position. We don't intend to show that Myrtle Poor Bear said things and then turn around to prove that they're not true. That's only part of what we're going to show.

We're going to show that the things she said not only {3451} were not true but she could not possible have known those things and that the FBI took advantage of a poor, unfortunate human being whom they could manipulate and cause to do their bidding because of her inability to assert herself and perhaps at times to act in a competent manner and they solicited and suborn her testimony; that they made her sign affidavits alleging that she was standing there and she watched Leonard Peltier and others machine gun the agents to death and these affidavits were then sent to Canada and they were, and we will produce expert testimony they

were the single most significant fact in complying with the requirements of extradition law in getting Mr. Peltier to this country.

I'm reminded by Mr. Lowe that I may have misstated a fact and I want to correct myself. It was another episode that involved the alleged machine gunning with somebody else. That will be another phase of our defense. Apparently my memory is incorrect in that regard. Myrtle Poor Bear said that individual single shots, one or more, were employed in shooting, killing the agents and then in shooting them after they were apparently dead.

Now is true along with the other evidence which we will offer of gross criminal misconduct on the part of the FBI, then it is surely relevant. It is surely noteworthy in connection with all the testimony given by FBI agents, all the testimony given by the witnesses who came under the {3452} influence of the FBI, at least one woman will testify as to the methods employed by the FBI to coerce that perjurous testimony and this is just another episode of what they did in an effort to convict in this case, not in some other case with some other defendant but what they did in connection with this defendant in this case.

Furthermore, Your Honor, our independent investigation confirmed the information communicated to us by the government and I think it may have been Mr. Hultman himself who communicated that information in open court that the affidavits prepared in connection with the extradition proceedings were prepared by a Canadian governmental attorney by the name of Halprin. I don't remember specifically whether he did so in Rapid City, whether he did so in Canada or did so by working in two or more locations. But that's the gentleman's name. It just so happens that our investigation shows that Mr. Halprin did not prepare the Myrtle Poor Bear affidavit. Of all the affidavits that were filed in the Canadian extradition proceedings, he did everything except the Myrtle Poor Bear affidavit. Curious fact. Interesting exception to the pattern.

Myrtle Poor Bear we trust, although she has refused to speak with us, when finally in this courtroom under oath will tell the truth about how she came to tell the FBI under oath that she stood there and watched Leonard Peltier shoot the {3453} agents. Now I don't think that's a straw woman operation at all. I think that very clearly shows the attitude of certain agents of the Federal Bureau of Investigation toward this particular defendant in this particular case and what lengths they will go to to successfully prosecute him. And I might add as an addendum this particular time that we called upon the government under Brady against Maryland to advise us of the names of the two FBI agents. We have learned through our investigation that there are two who in the stead of Mr. Halprin prepared the Myrtle Poor Bear affidavit and if they are not already on the list of names of FBI agents, we've asked the government to make available to us to call as defense witnesses. Then we further ask that they be produced because we wish to call them as defense witnesses in this case.

Now I believe, Your Honor, I've addressed myself to each of the separate subjects which Mr. Hultman has raised with the Court.

MR. HULTMAN: Your Honor, could I respond very briefly. I don't want to go into -- I think the discussion, first of all, in re: Anna Mae Aquash. Counsel's own remarks indicates the position of the government with reference to relevancy and I won't deal any further.

With reference to certain allegations about it, I am very much in dispute. I think the facts will show something's {3454} different as to the allegations that he's made with reference to it and I'm not going to argue those except to make a general statement. With reference to the last discussion, I find it absolutely astonishing, and this has been the course of this trial that Counsel will set up a given straw man and when the government knocks that straw man down or plugs

that hole, then a new theory comes and I see no better or worse example than Myrtle Poor Bear.

I want to relate, Your Honor, to words that Counsel in opening statement told that jury and compare that statement with the comments of Counsel just now. On page 47 of the transcript of Counsel's opening remarks to the jury, and this is what the jury is sitting on right now, if they believe what Counsel was saying, believe this about Myrtle Poor Bear. Second paragraph: "And finally we believe that you will find a witness, at least one witness whose mental imbalance is so gross as to render her testimony unbelievable." Now I don't think there is any doubt in anybody's mind as to whom Counsel was referring to at that particular time.

Now if we accept that as a posture that Counsel has indicated to the jury, now we're to accept a total and new posture. Now this witness is so competent that she's now going to be able to come in and do all of the things that Counsel says now she is competent to come in and testify about and with that, Your Honor, I will make no further response on any other item.

{3455}

MR. TAIKEFF: Your Honor, I want to address myself only to Mr. Hultman's interpretation of our position.

We do not suddenly certify that she is a sterling individual with all of her marbles in place, quite the contrary. Merely producing her in this courtroom will demonstrate that no sane, honest FBI agent would accept a story from her and proceed to reduce it to affidavit form and file it in a judicial proceeding without having her mentally examined.

We don't change our position about the unfortunate nature of her life, although I don't think she is incompetent in the true sense or the legal sense of that word; but anyone who sees her, anyone who has the slightest opportunity to converse with her just one sentence must find, by employing common sense, that there has got to be something wrong with any Agent of the Federal Bureau of Investigation who hears the most startling revelation out of the mouth of such an unfortunate soul in such a serious case as this and then proceeds to see to it that that person files an affidavit, that her story is unbelievable on its face; and when one has an opportunity to judge her manner and demeanor, one must come away from that experience knowing that the FBI found some unfortunate soul who is willing to do anything to have a little excitement in her life, and they took advantage of her.

{3456}

In the extradition proceeding it was not necessary for her to be there. Indeed, your Honor -- and I certainly do not ascribe any wrongdoing to Government counsel -- I only want to point out how effective was the FBI's course. She didn't have to appear in Canada because as your Honor undoubtedly knows, that's just a case of filing all the right papers that make all the correct allegations. Extradition proceedings are really not a fact finding process. They are basically comparable to common law pleading, where if you say all the right things, you get what you want; and if you don't, you are out of court.

The Government itself didn't know whom they were dealing with. They only had the paperwork, just as his Honor in Canada had only the paperwork and put her on the Government's witness list at the last trial, and then quickly took her off after they interviewed her.

That shows the nature and the quality of the conduct of the FBI in connection with our client, that the Government itself from the face of the papers took this very seriously, this was the hottest witness on the list until somebody spoke with her and they promptly eliminated her from the witness list.

It is that aspect of it, it is the use, the knowing, willful use of this witness who is willing to put her signature on a sworn document, knowing full well as any {3457} ordinary person would and surely a trained FBI Agent would, that she couldn't be telling the truth and that, we think, is highly relevant because we have and we will continue to attack the integrity or the veracity of the FBI in connection with this case.

We don't want to try Watergate over again. We are not going to bring up the fact that the FBI burglarized the psychiatrist's office in connection with another criminal case. That's sad history.

We are going to talk about the events that pertain to this particular Defendant in this particular case.

MR. LOWE: Do you need a motion to bring that about, Judge?

THE COURT: I am just wondering whether we should bring the jury back or whether we should recess?

MR. TAIKEFF: Your Honor, I will make it easier for all. In view of my physical condition, I would request on a personal basis that there be an early recess today.

THE COURT: Very well. We will recess today then until 9:00 o'clock tomorrow morning.

(Whereupon, at 4:23 o'clock, p.m., the trial of the within cause was adjourned until 9:00 o'clock, a.m., on Thursday, April 7, 1977.)