THE COURT: Jury may be brought in.

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

MR. TAIKEFF: May it please, Your Honor.

THE COURT: You may proceed.

MR. TAIKEFF: Counsel for the Government and counsel for the defense, Ladies and Gentlemen of the jury: I don't think the Government has an exclusive on recognizing that June 26, 1975 was a tragic day, a day that involved the death {5025} of three young people. We have no quarrel with the extensiveness of the investigation which was conducted in an effort to find those who were responsible for what happened on that particular day. If at any time in the course of these closing remarks you hear anything which sounds like disagreement with what happened, it's disagreement with certain things that were done which are not contemplated by our law, which in our opinion, and that's why we present these arguments to you, represent a serious intrusion upon constitutional rights and undermine, seriously undermine the very notions of freedom which are the fabric of our democracy.

I'd like to give you a very general, very brief outline of what I believe will be covered by these remarks. **As you know the Government presents a first part of its summation and then when I'm concluded it presents its second part.** The defense gets one opportunity to address the jury. As such we have to do three things: number one, we have to answer any of the things which the Government has said which we think we should respond to. Number two, we have to present to you our ideas as to those highlights or those aspects of the evidence which we believe you should pay careful attention to in determining whether or not you should return a guilty verdict or a not guilty verdict in this case. And finally if appropriate we have to anticipate what the Government's going to say in the next installment of its {5026} summation and answer those arguments in advance.

Now, our point of view could probably be summed up with two phrases: First, we believe that if you view all the evidence,

assuming it to be true, that there is not sufficient evidence in this case to warrant the return of a guilty verdict because the evidence, even if you believe every single word of it, is not sufficient for you to find beyond a reasonable doubt the guilt of the defendant. But far more important than that we believe that we will be able to demonstrate for you that there is a substantial lack of integrity, there is a substantial lack of reliability in the critical phases, in the critical portions of the evidence such that we trust and we hope you will have no difficulty after considering these things in the jury room to return a verdict of not guilty.

Now, in the course of making these arguments to you it will be necessary, because that's what the facts necessitate to suggest, that a certain number of agents of the Federal Bureau of Investigation did some very serious things; and I know that it's going to be difficult for you, surely not an easy, natural thing for you to do to make an assumption that it's even possible for an agent of the Federal Bureau of Investigation to do the things which we will argue have been done in this case.

We do not mean to impugn the entire Federal Bureau of {5027} Investigation. There are approximately seven thousand special agents working in the United States. Surely you must believe you're sophisticated enough to believe that amongst seven thousand agents there must be a few who would be willing to do things which are both unethical and illegal in a case as important and as significant as this. We will ask you to find that there are such agents and that they did do such things.

We'd like to point out at this particular time in a very general way, we'll get to specifics as we go along, in fact I suspect that we're going to at least at two points get to so many specifics and so many details that I fear that I will bore you. But I assure you that if I do so it's only because there are two very important analyses which must be done in this summation and there is no way to do it except to go through plodding one step at a time, one item at a time. When those moments come I trust

that you will understand that it is not indifference to the fact that you've sat here silently for a long time and that you have to listen to me. You are sort of a captive audience at the moment. It's quite necessary and I hope that when it's over you'll appreciate whether you agree with the observations I make or not that at least it was necessary to go through it. I trust that you will agree with those observations.

I think as far as general remarks are concerned I {5028} should call your attention to the fact that there was a great deal of evidence in this case which had absolutely nothing to do with the events of June 26, 1975. There was a **lot of window dressing**, there was a lot of evidence concerning things of a prejudicial nature that might incline you to feel that Leonard Peltier is a bad man who does bad things. Perhaps we can persuade you that he doesn't do bad things, that he does what has to be done in an unusual and extreme situation. But don't let those things becloud the real issue in this case.

The real issue in this case is did Leonard Peltier kill either of those two agents or both, or did he have anything to do with their death **other than the fact that he may have been present or around the scene** where their deaths took place.

You've seen a lot of unpleasant and shocking photographs and I wonder whether it was necessary to show them to you again in summation. Were you shown those photographs because they would give you some insight about the facts of this case, or were you shown those photographs because they're shocking and upsetting and to remind you only of the tragedy. But your decision is not made on the basis of emotion or sympathy, either for or against the defendant. It is a difficult job that you face and it must be done in a rational, intelligent, conscientious way, not with the image of people {5029} who are undergoing an autopsy in your mind.

Now, **apropos** of that, and apropos of my general suggestion to you that the Government has tried to use window dressing where they didn't have evidence, let me call one thing to your

attention. I believe that Government Exhibit 59 is the book which contains the autopsy photographs. In the course of examination of Mr. Muldrow Mr. Hultman, in referring to Government's Exhibit 59 suggested to the witness in approximately these words: "I want to have you take a look at those for just a second and ask you whether or not you see anything unusual about the fact that two agents were found in this kind of condition." Key words, "were found in this condition." Now, I'm sure that every one of your realizes that when a pathologist does an autopsy he has to cut the body open. He has to do what would be a very unpleasant task for most people to watch. In posing that question and using the autopsy photographs the Government elicited a certain answer from Mr. Muldrow who obviously was shocked by what he saw. Those agents were not found that way. That is the kind of slight of hand which I call to your attention and I ask you to think carefully about as you evaluate the evidence and the arguments which are designed to get you to look at the evidence in a rational and reasonable way.

There's **one incidental point** which has come up and I suspect will come up in the closing argument. I don't know {5030} whether that's going to be Mr. Hultman's argument, perhaps he could nod to me if that's true so I can refer to him, and he did. It will be Mr. Hultman's argument, It has been suggested that Leonard Peltier escaped from the mobile home in Oregon and that in the process **he fired a handgun**, or a gun at the Oregon State Police, or the policeman and that between him and the policemen were one or more women and children. And this was to demonstrate to you what a callous man he was to do such a thing.

There is in evidence in this case Exhibit 136 of which I'm holding in my hand, a photostatic copy. If you will bother to ask for that exhibit, and the Judge will instruct you, you may have any or all of the exhibits you choose to have, you will find very simply that what happened in that particular instance was not that Leonard Peltier fire a shot, but the person who drove the mobile home away fired that shot from a considerable distance

down the road. And if you will look on that chart 136 you will find the place where that second handgun, that .357 caliber handgun, was found. That handgun was the handgun that fired the single, shot as you will recall from the witness who found that gun and watched the FBI break it open and take the shells, or rather the shell and the cartridges out. That's just another example of the kind of peripheral detail surrounding Leonard Peltier in this case so that you will not pay attention to {5031} what's important. I will try in the course of this closing address to point out to you the things which I think are important.

Apropos of my apologetic statement to you about the possibility of boring you at times, maybe it was presumptuous to think that I'm not boring you every single minute. I do want to point out to you that in the course of the trial there were long cross-examinations. I don't know exactly how many of you have sat on juries before or have experienced as spectators in trials, but when you have a witness who is coming forward to testify for you, as a general rule you sit down with the witness, you ask the witness questions, you find out what the witnesses' answers are going to be and you ask the selected questions known full well in advance what the witnesses are going to be. When you get up to cross-examine the witness, particularly one who doesn't want to tell you some of the things you want to know and which you believe are there that can be uncovered, you have to struggle. Sometimes it's like digging for diamonds. You don't find too many diamonds when you dig for diamonds and when you cross-examine a witness who is intent in not owning up to the facts as the witness knows the facts to exist it takes a long time.

To the extent that the defense prolonged this trial by that process I say to you only it was necessary. It has {5032} been said by a well-recognized scholar of the law that cross-examination is the greatest engine ever invented for the ascertainment of the truth. We hope that that is true, and that what we have brought out on cross-examination which we will now

tie together for you will demonstrate to you what the truth is in this particular case.

One last comment of an apologetic nature. Our system, which is several hundreds of years old, because we adopted it from English jurisprudence, does not allow for either counsel to have a dialogue. If it were permitted I would say to you in turn what's on your mind, what would you like to hear me talk about, but I can't do that so I have to guess what are the things that might be of interest to you, what are the things which are important. It may be that our -- I will cover some things in greater detail than necessary because you've already figured out the punch line. Forgive me, I just have to do it that way because we cannot communicate and I must make sure that I cover with you the things which the defense team has concluded is important for you to know.

You perform a very significant and very important function in our society. We say the word "jury" as you might say the word "kitchen or living room." And sometimes we don't think about what it means. The jury is an institution which grew up in England perhaps six hundred or more years ago and it was revolutionary, as revolutionary as our {5033} revolution a little more than two hundred years ago, maybe even more so It placed in the hands of ordinary citizens who know nothing about the criminal justice system, nothing about the prosecutorial team, nothing about the defense team and nothing about the defendant to come in and be the only institution, the only instrumentality by which a person in the United States may be convicted of a felony unless that person chooses to plead guilty. That's a very strong power that our constitution has given to each and every one of us. It's a very strong protection.

As you all know our Government is divided into three departments, separate departments. In this trial all three departments are represented in one way or another. The defendant is prosecuted under a criminal law that was enacted by Congress. Judge Benson is a member of the judiciary, another branch of the

Government. And the prosecutorial team represents the executive branch of Government. Who are you, Ladies and Gentlemen? You are the people of the United States, the same people that are served by that tripod type government as it sits in Washington. You have been called at various times the conscience of the community, or the voice of the nation and you perform an exceedingly important function. Not only in the life of Leonard Peltier, and I cannot underestimate the significance, the importance of that, but you say to all who have any knowledge at all about {5034} the facts of this case whether they be outside observers or insiders who have some role to play. This we will approve of, or this we will not approve of, and that's exactly what the jury system was designed for originally and that's exactly the function you have to perform in this case.

You may articulate that with the words not guilty or guilty, but that's what you are saying. You are saying as the only representatives of the citizens of the United States just as there are five hundred and thirty-five members of Congress representing all of the people, 215 million. You have a heavier role, a bigger constituency each because the twelve of you who will deliberate this case represent every single American who has any concern whatsoever of the constitution of the United States. {5035}

The government must satisfy you beyond a reasonable doubt. A difficult thing to define even for lawyers and legal scholars and judges. Sometimes that is described as persuading you to a moral certainty. That seems to have a much better ring to it. You have to be morally certain. You have to be certain in such a way that a year from today, five years from today there is a very high probability you'll say to yourself, "I'm satisfied with what I did. I didn't make a mistake one way or the other, guilty or not guilty." That is the degree to which you must be satisfied before you can return a verdict of guilty.

You may not, if you're going to abide by the law of this land, return a guilty verdict unless you are persuaded to a moral

certainty of the guilt of the defendant. Then if you have a doubt or if you're not persuaded to a moral certainty, where does that doubt come from? Well, initially it comes from either the body of evidence or the lack of it, as the case may be. Sometimes a missing link is far more significant than a piece of evidence that you have to evaluate and say, "**Do I believe this or do I not believe it and if I believe it how much do I believe it?**" So you may look at the evidence as it exists and you must also look and see what's not there that you think should be there. And how do you make these judgments? All you do is apply the conscience that you have developed in the course of your life. I daresay by looking {5036} at you and knowing that there will be 12 of you that there may be between you all about 500 years of experience. That's a lot of experience. 12 different points of view and you become and you are a very potent, very intelligent, very competent fact finding body.

The government has the burden, the defense has none. The defense will not supply you with any broad answers. We will not in the course of this summation attempt to paint a comprehensive picture for you, perhaps like a jigsaw puzzle that's only missing certain parts. That's not our job. That's the government's job. We will raise troubling questions. We will not attempt to trick you. We will not attempt to overwhelm you with words. We will try to make it simple and compelling and we think we will raise a number, a substantial number of very serious questions about this case, the evidence and the lack of it.

In the course of doing that and because of the role which I have just defined that is in fact the defenses, on a particular point you may hear me say "Well, consider this possibility," and then I'll turn around and say, "Consider that possibility," with respect to the same fact. Please do not think that I'm playing fast and loose with you. Please do not think that I can't make up my mind. I don't have to make up my mind. I only have to give you a solid reason, a rational {5037} reason for saying "There is something rotten around here." So if a particular fact could be

interpreted from the evidence to possible ways, I may choose to call your attention to those two possibilities, either of which may be favorable to the defendant. It is not because I can't make up my mind as to what the facts are. I wasn't there. I don't know what the facts are. You might be tempted to say to yourself, "Well, Leonard Peltier was there, he knows what the facts are." The law is clear on that and the judge has instructed you more than once. He comes here presumed innocent. He doesn't have anything to do. If he chose to he could sleep throughout the proceedings. It wouldn't be very wise if he did but he could I if he wanted to. He doesn't have to ask any questions, doesn't have to put on any witnesses, doesn't even have to sum up. He could sit back if he were that secure about the situation and literally say to you without saying it, "You look at the evidence and decide whether you think I'm guilty beyond a reasonable doubt."

Now I think I should address myself to the framework I in which this case developed. The people on this jury live l in the southeastern part of the state of North Dakota. I assume from looking at you that each of you is a Caucasian person, that none of you live on an Indian reservation and I strongly urge you not to evaluate the conduct of anyone in connection with this case as if this event unfolded in Fargo or Jamestown {5038} because it did not. For all practical purposes it occurred in a foreign country, in **a foreign country which in certain ways is like a war zone**. And you have to take that into consideration in evaluating every aspect of this particular case.

Let me tell you right now that I am not going to argue to you that was a war zone and Leonard Peltier thought someone was trying to kill him and he ran up and shot something in self-defense. Get that out of your mind. There is no argument like that in store for you. I am talking about the circumstances under which you should make some judgment about the conduct of people because surely if somebody walks through the lobby of your hotel carrying a loaded AR15, you would surely find that unusual and questionable. Where these events took place it is quite

common and indeed necessary. That's what I'm talking about when I say this is not like a situation you'll find in your own back yard.

You must understand, as I'm sure you do to one degree or another, that about 500 years ago there were a large number of people living in the North American continent, all of whom were members of what we call the red race. **And then about 500 years ago Europeans came here**, although more than 500 years there were certainly Europeans who came to this continent from the northern part of Europe but they apparently did not make any settlements here. And that caused great changes to {5039} occur in the lives of these native people, these natural people who have been here for a very long time. Some scientists said 20,000 years ago they crossed the Baron Straits when there was no water there. The net result, as you can see in part by looking at the diagram immediately to your left, is that this country is occupied in the main, although not exclusively, by Europeans and their descendants and certain areas have been set aside, not given to the native American people but recognized by the United States as part of the territory which they used to occupy and which pursuant to certain treaties, the last of which were signed around 1868, those lands were set aside for them and never to be changed, never to be altered. By signing these treaties the United States has recognized in a certain sense that they were dealing with a sovereign, foreign entity.

Since 1870, uphill now, a lot of things have changed in spite of those treaties. Times change is the commonplace expression, and as a result of changing times and perhaps to a certain extent the failure to live up to all the terms of certain treaties, and that matter is not litigated here, I merely make reference to it, the lives of the native people on those so-called reservations began to change and factions started to form. These changes which have occurred in the last 500 years, and in particular in the last 100 years, raised very complicated political, legal and moral questions and they're {5040} not to

your consideration except to understand for the few minutes' worth that I have addressed myself to the question some of the framework, some of the problems.

There remain on these lands a certain number of traditional people who live their lives mostly as their grandparents and great-grandparents and great-great-grandparents did. Of course, they don't hunt the buffalo and instead many of them ride in automobiles, but to a considerable extent they live the same kind of life that was lived there 100 and even 200 years ago.

But they are not the only people on the reservation, and the existence of these different groups and the tensions which result from progress, sometimes progress isn't always progress but we call it progress, have created much of what you've heard about in this case.

These people follow a religion which is in a way strange, primarily because it's unknown to us. They live very close to the land. They view themselves as another form of life like no different than bird, fish, animal which they call the four-legged, and these people have been doing this and their ancestors have been doing it for perhaps 20,000 years or more, and they don't want to give up, they don't want to stop, they don't want to die. They want to continue that wonderful culture and that's the centerpiece of the conflicts which raise on the reservation right up to this very {5042} minute as you sit there and I stand here. The net result is strongly opposed factions carrying guns, corruption of government, failure of government, goon squads, no policeman at the other end of the telephone, if you have a telephone.

Mr. Trimble was the head of the BIA. He was nominally the police chief. He said he couldn't do anything about it. There was a climate of fear. There was a serious problem for these traditional people, many of whom are older people because the older the people are, as you would expect, the more inclined they would be to be traditional because they would have the least influence from modern science. And these traditional people

invited representatives of the certain organization whose purpose it is to advance and promote the ancient native American religion of the sacred pipe and to seek sovereignty and independence as it existed in 1868. They are not very popular because of that. They are not popular on the reservation and they are not popular off the reservation. In a sense they are very conservative. They are the ultimate conservatives. They want to conserve something that's 20,000 years old and there are many forces trying to stop them from doing that and you must understand that to understand something about this case. These people were not hired guns and they're not enforcers, they're spiritual, strong, dedicated people who came there to serve their people. It's true they were heavily armed. There is no question about it. {5043} It was necessary for their survival that they be heavily armed. You've heard enough testimony to know that AIM was not the most popular organization on the reservation.

Mr. Weston said it was common knowledge in the latter part of June, 1975, that there was an impending goon-AIM shoot out. Miss Merrival said that the goons hate AIM. She also pointed out when she was shown one of these AR15s, she said "Goons carry weapons like that."

Well, if you're there to see to it that you're going to protect people from goons who carry weapons like that, **I daresay you must carry weapons like that yourself.** You have no alternative.

A high ranking government official testified, Stanley Doremus, Deputy Secretary of the Interior. What did he say? There was a wide spread perception of a breakdown in law enforcement. Mr. Hultman said to you in his opening address all people, white or Indian, have the same duties, the same responsibilities and same standards of conduct applied to them. I agree with him wholeheartedly and I ask you if the circumstances that you heard about that exist on the reservation, which the government has not said one word about not existing, which you heard from native people, AIM supporters and government officials alike, if those

conditions suddenly started to develop on your hometown, what would you do about it? If you decide that you would do nothing about it {5044} but just get shot up, well, then I'm upside down and you should come back with a guilty verdict. But I don't think that's what you should do. You might regret having to do what you would do but you wouldn't do nothing about it.

The government will undoubtedly argue to you, and here I go with anticipation of what Mr. Hultman will say in his closing, that the reason why Leonard Peltier fled to Canada was because he had it continuously in his mind that he had committed murder and he wanted to.escape. That may be an arguable position but that's not what the evidence shows in this case. The evidence shows in this case, and Mr. Muldrow and Jean Day both testified on the subject, **an invasion on the reservation on June 26th and for a certain period of time thereafter, a military looking invasion,** armored personnel carriers, two agents carrying weapons that looked just like that AR15. But you can't tell from the picture whether it's an AR15 which is a semi-automatic or an M16 which is a machine gun. **Note the agent on the left-hand side of the photograph** if you choose to look at the photograph. He's got two things in his hand. They are not corn beef sandwiches, they are probably 40 banana clips for that weapon on his shoulder. And just in case that isn't enough, you've got a pistol big enough to kill an elephant.

See that picture? That's not a soldier. That picture was not made in Southeast Asia. It was made in South {5045} Dakota. There were between 175 and 200 people like that on that reservation **on and after June 26th.**

You see that helicopter? Where have you seen that picture before you came into this courtroom? It's a picture right out of a war zone. That picture was taken on the Pine Ridge Reservation the week following.

And then there is another photograph of another person. He's not a soldier. He's not a Marine. An FBI agent.

We know that Leonard Peltier was on that reservation at

least until the day after Joe Stuntz' funeral, at least until July 2nd or 3rd.

You heard testimony from Mr.Muldrow that the residence were terrified about this. **Is it possible that Leonard Peltier was on the reservation and was sleeping all day long, that he didn't know what was going on, that he couldn't see what was happening?** And if that were the case, Jean Day and others came to see him and it was clear what would happen. In fact, before that invasion began Leonard Peltier knew what the situation was trying to lead those other people, most of them very young people, some of them 15 years old, out of that tent city area. He said according to the testimony of one of the witness just before they left tent city anyone trying to surrender would probably get shot by the FBI or the police. {5046} That's how cheap life is on the reservation and that's a reflection of how Leonard Peltier felt before the invasion arrived.

What would you do? Would you try to surrender and get shot and killed on the spot? First and foremost he had a substantial responsibility to those people, most of them young people. And then once they found relative safety, don't forget the Rosebud raid on September 5, 1975. 80 agents coming to arrest five people with helicopters, automatic weapons, flak vests, camouflaged gear, and Agent Marr saying if he could he would have called in the eighth Army. I know what Mr. Hultman is going to say. They're such terrible people it was necessary to do that. "Did anybody resist" I asked Mt. Marr. "No." "Did anyone try to run"? "No." "Anyone take a shot at you?" "No." 80 agents. **Today is April 15, income tax day. That's what some of your money goes for: war games in somebody else's back yard. And indeed he did say something which was a rather rough remark. He said, "Anybody panics and I'll shoot that person."** Now you don't think he really would have shot one of those young people. Anyone of you who has seen any military service knows that it is a basic rule in a combat situation that you follow orders and you stay by your post and you do not desert or panic or the officer or noncommissioned

officer in charge then and there has a responsibility to himself and the lives of the {5047} other men and women, if necessary, to kill that person who is panicking.

{5048}

That's what that remark was about. You have to evaluate that remark in the realities of the situation. Remember, that the persons who were frightened for their own safety on the Reservation were not persons who in any way participated in the events of June 26. They were merely residents who had been living there, and they were terrified.

Can you imagine the concern that Leonard Peltier felt? So he attempted to get to Canada, and he got to Canada and he attempted to obtain political asylum there to save his life, He did not succeed, and if you think that I am exaggerating in making this argument, I would like to remind you that with all of that show of force around when Special Agent Heffner -- I think I am pronouncing his name correctly -- he is the man who made the model, I think it is called Government Exhibit 20 -- when he went there to make the measurements after it was all over, everything had quieted down, he was guarded by three SWAT teams. The place was inundated with heavily armed people; and he went there to make some measurements with three SWAT teams. It is no picnic ground over there,

Now, I would like to make a reply to certain specific items which came up in Mr. Crooks' address to you. We will take them one at a time and identify them separately.

The Court will charge you that you may return either {5049} a not guilty verdict or a guilty verdict to murder one, or a guilty verdict to murder two. There is a slight technical difference. It is not my business to tell you. The Court will instruct you at great length tomorrow morning.

Mr. Crooks has argued forcibly that the facts and circumstances of the deaths of the agents makes it crystal clear that there was a murder, and there was murder in the first degree, and that's something else that I agree with the

Government about. Indeed there was.

If you find the direct conscious participation of Leonard Peltier in the deaths of those agents, then you should convict him of murder in the first degree. Don't compromise in order to reach a verdict. If you think he is guilty beyond a reasonable doubt, he should be convicted of murder in the first degree. **If you are not convinced to a moral certainty, do not compromise on murder two.** Do your duty. Be brave about it. If you are not convinced, acquit him, If you are convinced, be brave, convict him. You have nothing to fear. You have a very important function, you should not compromise. You go all the way one way or the other. That I think is where my agreement with the Government ends.

Mr. Crooks says that Norman Charles was in the van. Ostensibly the agents were chasing a van purportedly {5050} the red and white van -- we will get to that in some detail -- and Norman Charles was inside.

Now, earlier before he made that statement, Mr. Crooks said that it is unfortunate that Anderson and **Draper** and **Brown** couldn't be prosecuted, they participated in these murders; but it was necessary to give up the privilege and the experience of protecting them in order to get the leader.

Well, Norman Charles didn't testify for the Government. How come he is not sitting over there with his lawyer? You think that's mere speculation, just a wise guy question. We will get to some details, and you will think seriously about that particular question; and then you will think seriously about whether really that statement by Mr. Crooks is a valid statement, that they gave up the opportunity to prosecute Anderson, Draper and **Brown** in order to prosecute Peltier. You will decide whether that was true in a factual sense or whether it was just an argument being made to persuade you, with no substance to it.

The Government poses the question: How did Leonard get back to Tent City? The Government says, in response, in one or more of the vehicles which went there. Well, you think back about

the time of day when that must have taken place, and then say to yourself, "All right, maybe {5051} he did," but you can't look at one fact without considering its consequences elsewhere. How did Coward see him through a telescopic sight at 3:45 in the afternoon if indeed he did go back in one of those vehicles; and riding in a vehicle, even if unfortunately it happens to be the vehicle of a murdered person, is not murder in the first degree; and it is not aiding and abetting murder in the first degree, it is riding in a vehicle.

How did those vehicles get past Anderson and **Brown** who, according to the testimony, were up here in this vicinity (indicating), "NB," Norman **Brown** on guard duty.

Joe Stuntz said, "Go check on the women and the children," but there were no infant children. They were very young female Indian people there, and they are referred to as children; and he said he stayed up there, and he could hear and see, and no vehicles went by. Is Norman **Brown** wrong? Is he lying? I can't tell you what my opinion is as to whether someone is telling the truth or not, except in an indirect way because my personal opinion is of no consequence; but I think you have to go along way to find somebody who is as truthful and sincere as Norman **Brown**. He didn't hear any vehicle. He didn't see any people. He didn't see any vehicle. The Government says -- I don't know whether they argue it or they say it is a fact, if they said it is a fact -- {5052} there is no such evidence that when Leonard Peltier purchased the station wagon in Denver he had Coler's .357 Magnum with him. They may think that must be true if he left the Pine Ridge Reservation with it, and then it was in a mobile home with him in a paper bag which had his thumbprint on it.

Well, then there is a fair inference that he had it with him all the time, but there is no evidence that he had it with him all the time. There is only evidence that it was in a paper bag in a mobile home that had been gone over with a fine tooth comb by the Oregon State Police and the FBI, with one thumbprint. He should not be called Yellow Robe. **He should be called Lennie,**

the Thumb. He is the only person on the North American continent who can pick up a paper bag with a gun in it with just his thumb, no other fingerprint on the other side of the paper bag.

The Government has argued that Anderson said **Peltier, Norman Charles and Stuntz got out and fired** at the agents, referring to the van. There is no such evidence. The Government might argue that that's what happened which is perfectly legitimate, **but to say that Anderson said so, I suggest to you is a factual mistake.**

Likewise, the Government said that Angie Long Visitor testified that she heard a series of firecrackers. That {5053} was just like a single short or a few shots in a row, becoming the fire of automatic weapons.

Everybody who sees those weapons sudden}y remembers that they heard machine gun bursts and when they could have not because those are semi-automatic weapons and can only be fired one shot at a time, not like a machine gun.

By the same token the Government has apparently caught that disease. Angie Long visitor testified that she heard a sound, one shot which sounded to her like a firecracker. The Government has said that Exhibit 34-H, which is a small bullet, something in the .22 caliber range, is clearly -- that the evidence shows clearly that it was a .223 which, of course, would make it something that came out of an AR-15. That's not what the evidence was. Their own experts said that it was something in the .22 range. It could have been from the .223, a .22, a 22-50, an ordinary .22 or an .225.

The Government said that the people in Tent city didn't have anything to do with their time, so they did a little burglary on the side. They robbed the -- burglarized the home of the adjacent neighbor to the south, the Rooks' household. These are people who came there to help in a community that needed a lot of help, got no pay for it. They chopped wood, they helped older {5054} people, they organized community activities, they attended community meetings, they held religious ceremonies, and

what did they get for it? A place to stay and some food, and maybe some gas money, and that's all. They could have gotten anything they wanted by just asking those people. They didn't have to expose themselves to the pettiness of breaking into somebody's house and stealing some things which they didn't need. That's one thing they had plenty of, protection, which they needed. They didn't have to steal a few more guns, right there in the place where they were trying to persuade people that their spiritual and political position should be supported. It is just not within the realm of human experience to believe that they would do so under those circumstances.

Now, I would like to address myself, with the help of Mr. Lowe who is our co-counsel and also has a position which I don't share with him, and that's chief projectionist -- there are a couple of complicated things that have to be gone into to satisfy you that a conscious effort was made to see to it that you did not hear about and see certain evidence. This is one of the two times that I referred to earlier when I will have to hazard the possibility of boring you. There is no other way. We cannot sit down around the table, and then you ask me questions until you are satisfied that you either see it {5055} or don't see it. I have got to go through it with you. Please bear with me, please pay attention.

It is predicated on the Government's claim that there was only one AR-15 at the Jumping Bull compound or community on June 26, 1975 . Their laboratory reports contradict their position. You will have to take it a step at a time.

First, I am going to refer to Defendant's Exhibit 134, and I am going to move this lectern so that I am out of your way. I will look at a copy of the document, and the page will be put on the screen so that you can see it.

Now, on Page 3 -- could I have Page 3 of that document -- listing the Q100 to 105 and 130. I am going to get the pointer if I may.

The documents are in evidence, and you may ask for them,

and I trust that it will be possible for you to reconstruct this argument. I don't know whether I need glasses or Mr. Lowe has it out of focus, probably a combination of both.

Would the jurors nod if they can see it clearly? Thank you.

You will remember that Agent Hughes said he found seven 5.56 millimeter cartridges which is the designation in millimeters of the equivalent in inches, .223. They {5056} are the same cartridge.

{5057}

Do you remember there was some dispute that in the report that it seemed that he only said one plus one which turned out to be seven all together. But that's not the issue before us at this time. There you see Q100 and to 105 which are six of them and Q130 which is one for a total of seven. Now, these cartridges, there was testimony, had sufficient markings on them so that it would be possible to determine by the usual tests whether or not they had been fired from a certain weapon.

You will also recall the testimony that these cartridges were Lake City cartridges, which means they were manufactured in an arsenal which supplies a lot or possibly all of the FBI's ammunition; but which according to Hodge was something that was sold through surplus outlets to the public so the fact that Lake City cartridges would be in the hands of a private citizen was not unusual and was not a reflection of any illegal activity.

I also call your attention to the fact that a number of Lake City cartridges of the same caliber were found in a vehicle in tent city. But now I'm only talking about the center part of Government Exhibit 71. Now, at page 22 in this first lab report, paragraph two it says, and indeed my eyes are showing my age, specimens Q100 through Q105 and Q130 are 5.56 millimeter (.223 Remington caliber cartridge casings which were identified as having been fired in the same {5058} weapon, is the only thing we know, they all came out of the same weapon. The question is, which weapon? However, they were not fired in any weapon listed in the report, meaning in that report. Now, to save time I will

tell you that in that report there is no AR-15 listed. There aren't three, there aren't two, there isn't one. Therefore, quite obviously it is not possible that the cartridge which can be fired only from, or generally speaking only from an AR-15 or an M-16, it's impossible that it would match. And indeed it does not, because there's no such weapon.

Now, we go to Defendant's Exhibit 187. On page 3 you see the same items listed again. This is the second lab and the same items Q100 to 105 and Q130 are listed with the same description. On page 11 of that report the last paragraph says "No identifications between specimens Q100 through 105 and Q130 with any weapons submitted to the laboratory have been effected."

Now, one might say upon examining this report, "Well, that's the same as the last report because there's no AR-15 listed in this report which is Defendant's Exhibit 187 which we're at the same spot." The answer is, no, that's not the case. There is under the report and this one is Defendant's Exhibit 135. And that one lists K-40 which is an AR-15 and which is Government Exhibit 34-A, this (indicating). Now, you remember the first report says those shells do not match {5059} up with any weapon in the report. In this second report, 187, it says does not match up with any weapon submitted to the lab and there you see this AR-15, what's left of it, on which tests were done and can be done had been and was in the lab. So what do we know from that? We know from that that these shells were fired because they had ejector markings on them and because the primer is showed that they were fired and because there was no bullet in the top and there was no powder inside; and we know from the Government's report that they were not fired from this AR-15 which was found in Wichita. What does that mean? If one didn't stand there with the bullet in one hand and a nail in the second hand and a hammer in the third hand and fired them that way they were fired from a AR-15 and where were they found? They were found by Hughes at the crime scene. And there is at least, at least the second AR-15.

Now there's another lab report, defendant's Exhibit 192.

That lists two more cartridge casings. On page 8, Q numbers as you see bracketed and then circled in purple, but the whole thing reads Q2535 to Q2536 which means two indications. On page 16 in the last paragraph --

MR. LOWE: I don't have page 16 on the slide.

MR. TAIKEFF: Beg your pardon?

MR. LOWE: I don't have page 16 on the slide. You'll just have to tell them.

{5060}

MR. TAIKEFF: All right. It says the Q2536 cartridge case was identified as having been loaded into and extracted from the K-40 rifle which is Government's Exhibit 34-A. So there is a cartridge that came out of this damaged AR-15 which was found at that place and in addition this does not support my point. The punch line, if I may refer to it as that, was made a few moments ago. I just want to give you the complete picture so there's no question about total number of cartridges that have been found and identified.

On page 10 you will find the second entry from the top is Q2628 which is Government Exhibit 34-B. You remember that if a weapon is called 34 it gets an "A", the chart which describes it gets a dash one, so the chart for that weapon is 34-1 and every component that's found gets the next letter, B, C, D.

Now, Q2628 which is the lab number in this case is Government Exhibit 34-B. Well, you know already what that means, but I want to show the results and the lab reports so you'll understand why it's called 34-B. That's on page 19, paragraph 3. It says the Q2628 cartridge was identified as having been loaded into and extracted from the K-40 rifle. That's this AR-15. That's the one whose chart is in front of you.

So there were indeed at least on the evidence available from a close examination of a lot of paper, the Government's {5061} own lab reports, an indication that there were at least two, and as we proceed we'll show you I believe that there were three. But that comes at a later time. I think at the moment the

machine can shut down for a while and I will return the lectern to where it was before.

I'm about to move into a somewhat different area than I have been up until now. As you undoubtedly realize I have addressed you in connection with certain background matters which I think are important for your consideration. I have answered or attempted to answer certain arguments made by the Government up to this point I think should be answered, and now I'm about to turn my attention to what this case is really about and what your deliberations are really about and that is the actual evidence that has been adduced.

What does it mean, what part of it can you trust, what part of it can you trust enough to believe it beyond a reasonable doubt? That's what I will occupy the balance of my time in doing, or at least in attempting to do. I ask you to realize that there are a limited number of areas where there is any real evidence from which you could find what was, or what was not the conduct of Leonard Peltier between 11:30 and 12:30 on June 26, 1975. There's an awful lot of evidence, I referred to it before as window dressing. There's a lot of it. But it has nothing really to do with what {5062} happened that day. So I will address myself to the testimony which concerns his presence in certain places, his supposed conduct in certain ways, his being cited, et cetera, which as far as I can tell are the only significant pieces of evidence from which you might conclude what he did that day, although I stand on my original statement.

If you took all the evidence of that time and said I believe it, and then said to yourself now what does it mean, I respectfully submit to you you cannot decide to a moral certainty that he committed murder. But in fact most of that evidence is not trustworthy, most of that evidence is not believable at all, let alone to a moral certainty or beyond a reasonable doubt. And it will be my task from this point to the conclusion of my address to analyze that evidence with you and to put questions to you, hard questions, questions which I respectfully submit to you

you have a sworn duty to answer in a satisfactory way because if you can't answer these questions under the law you cannot return a guilty verdict in this case. I don't think these questions can be answered. I assume that Mr. Hultman will try to answer them. Listen carefully to his answer. Make sure it makes sense, make sure it has some basis and fact that it is logically constructed because I will attempt to put the questions to you on that basis. And I trust that he will attempt to answer them, and I trust that he will answer some {5063} of them, but don't think he will answer all of them. I don't think that he will answer most of them; that's not being presumptuous. He and I, if we changed positions, he'd be saying the same thing to you right now. And so here we go.

The critical period of time is 11:50 A.M. to 12:30 P.M. Now, there have been hints and suggestions both in the course of the taking of the evidence and indeed in the first installment of the Government's closing address that what we have here is a preplanned ambush, if not a preplanned ambush at least one that seems to suddenly develop spontaneously. People do not just go around murdering other people just like that. There has to be some explanation for it. There has to be some rational connection between what happened and what preceded it, but you cannot find that in this particular case. It is not evidence.

It may be that there are things that none of us knows anything about, but that's not what you base your verdict on. You base your verdict on what is before you in the form of evidence and what you can reasonably infer. If a person came walking into this room which has no windows you can see to the outside through and he or she was wearing a raincoat and carrying an umbrella and the raincoat was wet and dripping and the umbrella was likewise, you might conclude that it was raining outside although that's not necessarily so. The person could have been standing in the shower. But {5064} rational thinking would first suggest to you that the person had come in from the outside where it was raining. Well, that's what you have to do with this evidence and

you cannot find a rational picture of what happened you cannot find a rational picture, you cannot find to a moral certainty the guilt of the defendant.

It is stipulated between the Government and defense that death took place at approximately 12:00 o'clock. That doesn't mean we say it took place exactly at 12:00, but around 12:00 o'clock, give or take maybe fifteen minutes each side. We don't have it in the stipulation. We've agreed around 12:00 o'clock. That's why I suggested that at 11:55 A.M. to 12:30 P.M. is the key time period in this case. Everything else is part and parcel of the window dressing.

The first transmission was at 11:50 approximately and it seems that by ten minutes after 12:00, maybe 12:15 at the latest from the radio transmissions the agents, if they were not both dead were in such a condition that for all practical purposes that their death had already occurred.

Now, why do you think you heard evidence about the three young people from tent city who were stopped by the FBI when they went to take a bath or a shower at Pine Ridge or some other nearby community? Undoubtedly the Government either will or when it offered the testimony was hoping to {5065} argue that this confrontation between these three young people and the law enforcement authorities set the stage for some kind of a great anger which resulted in a decision to kill the agents if they ever came around.

Mr. Draper who testified for the prosecution said that when he came back and he told Leonard Peltier what happened and Leonard said, "Did they bother you or hassle you," and Draper said, "Not really." He testified what Leonard's answer was. Leonard said, "Okay, it's all right." You heard testimony from Mr. Weston, the missionary. He claims that after helping some people with a car, a stalled car on June 24th that he got somewhere in that road which is vertical on the chart running into the Jumping Bull area from Highway 18 and then they said, "Stop, you can't go any further. Thanks for your help but stop."

Now, why did you hear that? Because the Government wants you to think that Mr. Weston is a nice guy who helped people whose car is broken down, or was the Government trying to paint a picture of some sinister plot that was going on within this compound that no outsider could come in? The trouble with that piece of testimony, Ladies and Gentlemen, is that the witness clearly said that this event occurred on the 24th. And of course if the Jimmy Eagle matter was something which these people were planning on they certainly must have had a {5066} crystal ball because by keeping this man out on the 24th in connection with a warrant for Jimmy Eagle they knew one day in advance that the warrant was going to be issued. Because Government Exhibit 5 in evidence is the warrant and it is issued June 25, 1975. So you wonder what Mr. Weston was doing here. Well, the Government will say he made a mistake. That's a nice, nice way to get out of it, always a nice way to get out of it. It would be very nice if I could get up and say to you my client made a mistake, forgive the Government for their typographic error and forgive my client for the mistake. It was no mistake at all. Just a little sloppy preparation, that's what it was. They didn't keep that man out because they were plotting any homicide. They kept him out because he was a fervent, hard-working, dedicated young missionary as they were to a certain extent part of their life was spiritual and part of it was political and they were trying to convert people, the very same people this young man was trying to convert. They were competitors. {5067} For the spiritual lives of people on the reservation, with missionaries of God for at least 100 years and perhaps several hundred years which they can do under the First Amendment to our United States constitution. But this was an AIM encampment. They didn't need a Mormon preacher there. You can well understand that. And I'm sure as Christians you would not be offended. That's why he was excluded, not for any sinister reason.

I note, by the way, that Jimmy Eagle was not at this place on June 26th, 1975 and the government will not argue that he was

there. Surely there was no preparation for a warrant that didn't get issued yet in connection with a person who hadn't yet committed the acts which was the result of the warrant. Unless you're going to believe Jimmy Eagle became part of a convoluted plot, unless he and three others got in a fight and they all get charged with federal felonies to get a warrant issued to set up one or more agents. That's a little fantastic. It's a little bit much to swallow.

Is there any evidence which strongly suggests that there was not an ambush? I call your attention to the fact that the government hasn't even argued an ambush but I am mindful of the fact that a competent lawyer by the name of Mr. Hultman is going to get up after me and I can't answer him. So I have to try to anticipate what he might say to you. Therefore, I call your attention to an item of evidence, maybe {5068} two, that strongly contradict the ambush theory if the government will argue it. If not, I've wasted your time and my time. But, as I said before, I have to do my job.

Mr. Draper testified that when they heard shots where they were, they were in tent city. Well, unless you have a cannon with a telescopic site on it and you want to murder an agent or two coming into the Jumping Bull compound, you don't get up at tent city getting ready to eat breakfast or lunch, depending on what you call it if you get up late in the morning.

Everybody except the witness Anderson who will be dealt with separately says everybody was in tent city. Although, there is a question of whether Leonard Peltier was in tent city. But at least all the other people were in tent city. The people, the government said they had to not prosecute in order to get Leonard Peltier. They had to give up their right to prosecute them. Well, they now stand before you and allege an ambush, a preplanned ambush with the people they say are not prosecuting. If those people were in tent city, how could they have been part of the ambush. They weren't part of the ambush. Then the government isn't gratuitously giving up the prosecution then in order to get

Leonard Peltier. And not only were they in tent city, what did Mr. Draper say? He said that when they heard the shooting start, they came running first without guns. Now we know that {5069} life hasn't been terribly good for the native Americans for the past couple centuries but surely, surely if they finally got themselves together to plan an ambush, they would remember to come with their guns when the shooting started. They ran all the way down to the crest without their guns. It's like going on vacation and taking 600 shots without any film in the camera.

They didn't start shooting. They didn't start the shooting. They responded to hearing shots. It is from these aspects of the evidence, from these considerations, this is the method by which a jury is supposed to work and see whether or not they have competence in the evidence. Can you explain if these people were involved in an ambush why they weren't there waiting? Only Anderson was sitting on the roof. Everybody else was back in tent city. The strangest ambush in the history of the Western hemisphere.

Now we take Norman **Brown**. I trust that you find him to be a rather impressive young man in a number of ways. I also hope whether you like guns or not that you are at least impressed with his skill at being able to shoot out tires with a .22 caliber rifle at 200 yards not once but twice and possibly three times. I'm not absolutely certain what the testimony was about how many tires got shot out on Gary Adams' car and the BIA car. Remember, they backed up after they had one or more tires shot out. But surely at least two {5070} tires. Now it must be clear to you all that if murder was the game and the FBI cars could be recognized and the object was to murder either FBI or BIA police, what more, what more could **Norman Brown** ask for? The great spirit would have delivered him exactly what he wanted, one FBI car, one BIA car and that crack shot could have killed both of the people, or maybe three of them, I don't remember how many there were in the two cars, but he shot out the tires. You say once it was a lucky shot, twice it's half a miracle. You cannot conclude that Norman

Brown if he had murder on his mind could not have killed the people in those cars. He did not. That is an example of a member of, as the Government puts it, a blood crazed bunch. Sounds like 18th century rhetoric of people who still do not understand the native American.

What are some of the things that we actually know that we can rely upon because there is corroboration for them. To these things, somewhere between 11:45 and 11:50 A.M. agent Adams testified he heard a radio transmission and he recognized the voice of Special Agent Williams. The transmission, according to Adams, went something like this: "It looks like they're going to get into that pickup." Oh, my God. I just said a dirty word. I didn't say van and I didn't see vehicle, I said "pickup." Why did I say "pickup." I said "pickup," because Gary Adams testified that Williams said on the radio "pickup." And then we had a merry chase for five weeks about {5071} it wasn't a pickup, it was a pickup, it was a van, it was a vehicle. Did you notice the number of witnesses who got on the stand and suddenly couldn't recognize a pickup anymore?

A little after 11:50, according to Agent Hughes, he heard a transmission which went something like this: "Get on high ground." You have a general idea of what the area looks like from that exhibit. You have a constant reminder of it from that chart and from the testimony. We know from the exhibit and from the testimony that there is an elevation change between here and up here that goes up and that the crest of the plateau runs something like this as indicated on the chart and that the high ground in most places is right around here right like that (indicating). We'll address later to the fact that there is something of a depression there that requires some careful analysis of certain testimony.

Now when the transmission came over it came over from Williams and there is no dispute that at that time that two cars were down here on the chart where it says "Coler's car." Of course, you recall there was only one car there when the police

and FBI showed up so if they said "Get on high ground," what can you conclude from that. You get on the high ground to protect us to give us cover, fire down into the area because it's down there with us that we're having the problem. Did I just make that up? No, I did not. Agent {5072} Skelly. Agent Skelly said that he heard a transmission and it went something like this from Agent Williams: "If someone could get to the top of the ridge and give us cover fire we might be able to get out of here." Now I ask you, at that time with their people up on that ridge shooting down on the agents and they were, wouldn't the agents know, and if the agents knew would the agents suggest that their fellow agents come and try to get cover fire for them from the same location? Of course not. Of course not. That's two separate people, Special Agent Hughes, Special Agent Skelly, one more elaborate than the other, but give you the same corroboration. The agents were calling for cover fire from the high ground because there was nobody up there because indeed the people were in tent city.

I ask you, is there any evidence from which you can find to a moral certainty as to who was down there shooting at the agents? There was no red pickup under cover at any time. There was one that disappeared at 12:18. We'll get to that in a moment. Nobody had a red pickup, no one was known to have had a red pickup, no one was known to have borrowed a red pickup.

Agent Williams said, "They are getting into a red pickup."

Does Your Honor wish me to stop at the halfway point?

{5073}

THE COURT: Are you at the halfway point?

MR. TAIKEFF: I have three minutes to go. I'd like to get credit for it.

THE COURT: I was going to recess at 3:00 o'clock.

MR. TAIKEFF: I don't have another topic, a short one I could begin. I would ask Your Honor's permission to stop now and get credit for the three minutes.

THE COURT: The Court is in recess until 3:20.

(Recess taken.)

THE COURT: The jury may be brought in.

MR. ENGELSTEIN: Your Honor, just a half word. That memo we thought we'd be submitting to you, we decided not to. I don't want you to rest --

THE COURT: Thank you.

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

MR. TAIKEFF: May I resume, Your Honor?

THE COURT: You may resume.

MR. TAIKEFF: I have had something called to my attention and I'd like to stand corrected. During the recess Mr. Sikma advised me that when the government Exhibit 59 was shown to Mr. Muldrow, you may recall the book was taken up there by Mr. Hultman and it was not shown to Counsel first. Mr. Sikma advised me that the photographs that showed the actual autopsy procedures were not in there at that time and I did not {5074} know that when I made my somewhat critical comment and I accept his version of the fact and I stand corrected in that regard.

We're continuing with the factual development, from approximately 11:50 on and we have some insight as to the approximate time table. We cannot tell it with great precision but we know that the first transmission that's heard by anybody was said to have been heard at approximately 11:50, as I said before.

There is a recordation in Defendant's Exhibit 75 which you will recall was a compilation of radio transmissions not verbatim but noted as they came in with an effort to make them accurate and complete then I'm sure you realize can't be precise like a tape recording or like it would be if the court reporter were taking it down. However, the Exhibit 75 indicates that at about 11:55 A.M. one of the agents was already hit by some fire and at 12:06 we know that Adams arrived because there was a transmission at that time in which he said that he was under fire and the reasonable inference from that is that he had arrived at the

Jumping Bull area. Then at 12:18 we have a further entry in Defendant's Exhibit 75 and it reads exactly as follows: "SA," meaning special agent, "J. Gary Adams on the scene and he has been receiving heavy fire from vicinity of Jumping Bull Hall and red pickup leaving Jumping Bull Hall area, going north and {5075} Pine Ridge police were instructed to stop this particular pickup."

Now I call your attention to the fact that north is to the left on the chart and it is not in the direction of tent city, it is not in any other direction except out of the area going towards Highway 18.

{5076}

Now, I would like to pose some of the questions which I said at the beginning of the summation I would pose to you for the purpose of having you consider the specific items of evidence.

It may appear to you at this point -- and if that is your impression, it may continue for some time -- that there is not a comprehensive pattern or picture that is emerging. I must repeat, if anyone has that impression at this particular time or perhaps will have that impression when I finish, that first of all we have not offered evidence for the purpose of presenting a picture to you. We have offered what evidence we offered because we believe that it would explain certain circumstances and in certain respects rebut certain claims, certain evidence; but it is not our role or our posture or indeed our responsibility under the law to give you a comprehensive picture. We just don't have to do it, and we have made no effort to do that.

The Judge will instruct you as to our responsibilities under the law, if we have any, and what the Government's responsibility is; and it is your responsibility to make sure that in evaluating the evidence you comply exactly and precisely with what his Honor says is the obligation of the defendant, the obligation of the government, under the law.

{5077}

So you may find that what I will do is go through certain specific episodes or aspects of the evidence. I might also comment that the evidence itself doesn't present the comprehensive picture. You have little glimpses, little flashes of certain things. This is those things which we can address ourselves to.

So we don't even have a comprehensive picture that we can work with, and we are surely not required to provide some comprehensive picture for you to look at.

No. 1, I offer you no answers in some instances because I don't know that there are answers. I only think that these questions should be carefully considered by you.

According to the evidence, Leonard was carrying an AR-15. He was carrying a weapon which it is said looked like this model which is Government's Exhibit 34-AA and which has been brought here for the purposes of illustration, not because it is claimed that anybody connected with this case ever actually touched that weapon.

That weapon, as you know from the testimony, is a semi-automatic rifle. The bullets go into this clip (indicating), the clip goes into the gun, the gun is activated by pulling this lever back (indicating), it cocks the gun, the first round goes into the chamber as {5078} the bolt goes forward. When you pull the trigger, the hammer falls, the cartridge explodes, out comes the bullet. The gas pressure forces the bolt mechanism back, it ejects one casing. It goes forward again, the next bullet, complete cartridge is in the chamber. The gun is cocked, if you pull the trigger again, it fires again. Now, that is a description of how a semi-automatic rifle works. In fact, the semi-automatic pistol works essentially the same way as well.

The most important characteristic, I think for purposes of this particular point, is that when you fire it, you have no choice but the casing comes out. In theory you could put some sort of a device on it so it would catch whatever comes out; but in its normal mode of operation, out comes the cartridge casing.

Now, testimony has it that Robideau was carrying the Mark .345 semi-automatic which is the thing that is sometimes mistaken for a Thompson submachine gun but which is not a submachine gun. It is a semi-automatic rifle, and that too was designed the same way as you heard, long magazine, one shot at a time every time you pull the trigger, and out comes the casing.

Dino Butler was said to be carrying the M-l Gerand which is the next rifle that Mr. Ellison has just put his hand on. That too was designed in a similar way. {5079} It doesn't have an external magazine. You put a clip into the top of it, and each time it fires, out comes a shell. They are all semi-automatics, and as such and by definition practically, they all eject their casings.

Well, we heard rather elaborate testimony about a very, very careful search that took place around Coler's automobile. If I remember correctly, the diameter of the circle in which a thorough search was conducted was 120 feet, 40 yards; and everything that appeared in any way to be relevant to this case, including an effort to dig in the ground and find, I think, Government Exhibit 34-H -- I may be misquoting the number -- but there was a bullet that was taken out of the ground.

I think that should satisfy you that a very careful search was conducted. With the exception of the one .223 cartridge that was found, I should say casing that was found in the trunk of the car, there was nothing on the ground. There were no .45 caliber casings, and there were no 30-06 casings found down near the cars.

Now, the evidence, the technical evidence from the pathologist is pretty clear-cut. Weapons were fired close to the agents causing the agents' deaths, and yet there are no casings on the ground. Well, you could say maybe the people who fired those weapons, as I think Mr. Crooks may be heard to argue, maybe they picked up {5080} their casings.

Well, I would ask you then to take a look at Defendant's Exhibit 93 which shows our infamous broken down, broken

windshield vehicle, and look at the grass. It gives you some idea of the height of the grass in that area. This is looking towards the rise where the residences are. You may have this photograph if you ask for it, and you would realize that it would be pretty difficult, not using a metal detector, to find every single cartridge that was fired, the casing of every cartridge that was fired in that grass successfully so that when the FBI came and used metal detectors and went over the place literally with a comb, it would find nothing.

Is it possible under the circumstances that one or more people successfully committed the acts which were involved here with semi-automatic weapons, and there are no indications at all, not even one left behind on the ground? How is it possible then that the agents were shot at close range, and there is no cartridge casing on the ground?

Every rifle does not discharge automatically. A lever action rifle does not discharge until you work the lever one more time, and manually pull the mechanism back by lowering the lever, and then it throws out its {5081} cartridge casing. A bolt action rifle does not eject its casing automatically. You must lift the bolt, pull it back; and when you pull it back, the casing flies out.

I suggest to you that there is a very strong possibility that what happened here is that the weapon or weapons employed was not or were not semi-automatic weapons, but were either lever action or bolt action.

Now, I ask you to take a look at Government Exhibit 71, and you will notice how carefully that exhibit and the map to its left have been marked. There is the place in Canada, and the places in Oregon, and the Rosebud Reservation; and Wichita, Kansas, and Coler's car and the "Y" intersection which sometimes has been referred to as Location Z-1, and the various houses up on the crest; and the vehicle, Williams' vehicle, and Tent City; and it is a very impressive job.

But what is missing? Is there something missing? The answer

to that question is there appears to be nothing near the red and tan house, no cartridge cases are shown there, no indication of what weapon or weapons may have been fired there.

Let us take a look at that particular situation to determine whether there might be some reason for that, and again I will have to get the assistance of Mr. Lowe and make reference to some of the lab reports.

{5082}

Now, in this particular instance I will be making some reference to the 3.03 British Lee-Enfield which in the lab reports is known as K-l, which in this trial is Government's Exhibit 69-A, so that all the casings which come from it or are associated with it begin with the numbers, 69, and are followed by a letter, beginning with the letter "B". The chart itself is 69-1.

Now, we will refer first to Defendant's Exhibit 192. We go to Page 9 where we find in the third entry from the top, Q No. 2558 which is described as a 3.03 British caliber, Winchester Western cartridge case. If we then turn in the report -- and these reports are in evidence so you may ask for them and you may look at them and analyze them in any way you think appropriate.

On Page 18 we find a paragraph which makes reference to that item, and it says, Q2558, cartridge case was identified as having been fired in the K-l rifle; and then there are other words which are not pertinent, and that is as you can see from Chart 69-1, Government's Exhibit 69-A.

The testimony concerning that is that it was found near the red house, and there is also testimony that there was only one red house in that area; and it has been referred to here because of the label prepared by the Government as the red and tan house.

{5083}

Now, this is not just a matter of a 3.03 cartridge casing going unnoticed. Government Exhibit 69-A, which is the 3.03 rifle, is Norman Charles' rifle; and there will come a time, not too long I hope,, when it will be fairly apparent what is the

significance for it, possible significance of the oversight of not having any green flags around the red and tan house.

I would point out to you that on Government's Exhibit 69-1 which is the chart, you do not see any reference to that 3.03 casing. That casing is not in evidence. The lab report which reveals its existence is in evidence. It is not on the chart.

Now, we turn to another part of the very same exhibit which is Defendant's Exhibit 192. We start at Page 8. There is an entry in the lower part of the page. The Q numbers are 2543 through 2557. I trust that you will recognize that that constitutes 15 separate objects from 2542 to 2557. None of them is in evidence. The document which reveals their existence is in evidence. That's why I am able to show it to you and read from it.

There is a carry-over to the next page where the 2557, 2555 and 2556 are accounted for, and perhaps Mr. Lowe would point that out.

We had to show you two pages there, Page 8 and Page 9.

{5084}

Now, later on in the report on Page 18 -- I think I may have --

MR. LOWE: (Interrupting) Previous page.

MR. TAIKEFF: I think I may have the wrong page.

MR. LOWE: Page 17.

MR. TAIKEFF: Yes, it is Page 17. You will have to read that one.

{5085}

The paragraph says Q2544 which was the second number in the sequence, you'll perhaps that when I originally projected it it started at 2543 and it went to 2557. Well, the findings in this report show that 2544, that is to say, the second cartridge and the second casing in the sequence through 2555, that's twelve in number as well as 2557 for a total of thirteen cartridges were identified as having been fired at K-15 weapon. K-15, now, what is K-15 to begin with, is a laboratory number. But what is it in this case? It's Exhibit No. 29-A, the M-1 Gerand rifle, the one

that you see the second rifle on that board back there. The chart of course is 29-1, those casings that you see are 30-06 casings fired from the M-1. A rifle it is said that one of the three people who was allegedly down by the cars with Mr. Peltier was using. Yet thirteen rounds fired from that particular M-1 Gerand linked to it by the FBI laboratory are not shown there and they're not shown where they were found at the red and tan house.

Mr. Lowe, I think you retired too soon. There's one more entry from that report. If I could get your assistance.

MR. LOWE: I don't think we have a slide on it.

MR. TAIKEFF: Oh, we don't have a slide, all right.

There is an item in Defendant's Exhibit 192 which is first listed at page 9. It's Q2556. It, too, the object itself is not in evidence. The lab report which makes its {5086} existence known is in evidence and the results are found on page 17 of Defendant's Exhibit 192. And what is that? It's a 30-06 cartridge casing fired from a Springfield bolt-action rifle. The United States military weapon from World War I and for years after that. That weapon is not in evidence. Obviously if it was tested and determined to have come from a specific Springfield bolt-action rifle it's fairly obvious that the FBI laboratory had that particular rifle. That, too, was found in the vicinity of the tan and red house which doesn't have any green flags around it. It, according to the definition of the experts called by the Government, is a possible murder weapon. Why is it a possible murder weapon? Because it's 30 caliber or less, it is 30 caliber, it's 30-06. It's a high velocity cartridge and in particular it doesn't eject unless you open the bolt.

And between the various weapons that have been suggested as murder weapons, given the fact that there were no cartridge casings on the ground it is a very likely candidate. There's nothing about that on that chart. I can only pose the question to you, why not, why was that not suggested as a murder weapon? Perhaps because it didn't fit the Government's version of what happened here, and so there was no sense clouding the record with

additional facts.

The .303 is a weapon which is in evidence and you might recall, but I want to make sure that you do without question, {5087} that's Government Exhibit 69-A. And what is it? A bolt-action rifle which does not eject its shell until and unless you open the bolt and pull it back. Angie Long Visitor testified for the Government. From the comments made by Mr. Crooks I would gather that it is the Government's position, all this I acknowledge, that they have not specifically said so, that Angie Long Visitor told the truth as far as the Government is concerned. Well, let's look at something else that Angie Long Visitor said. She said she saw three people whom she could identify: Joe Stuntz, he was firing a .44 magnum. What did they extract from the body of one of the agents? One of the few identifiable projectiles, a .44 magnum, part of a .44 magnum bullet, but definitely identifiable as a .44 magnum number.

There was a person by the name of Robideau who one should identify as being in the ski mask, but she could recognize him by his physique and perhaps his clothing, I don't recall exactly, and his hair. And then there was a third person, Norman Charles. And what was he firing? He, according to testimony, was firing a .303 bolt-action rifle.

Now, let's take a look at Government Exhibit 71. We now know that there's evidence of a .303 linking to that .303 being fired over here (indicating). We also know from a lot of testimony that Norman Charles was up here shooting {5088} his .303 and indeed we find Government Exhibit 69-E and look over here (indicating), here's Government Exhibit 69-D, another casing fired from that same .303. Position number one, position number two, position number three. I know you can count them in a different sequence but I chose to count them that way because the activity of these young people is undisputedly up here and it's up here. And one or more of them has testified that Leonard and Dino were down here (indicating). It's very interesting. Norman Charles doesn't testify for the Government. We don't know why. A

lawyer has a right to make a judgment about what witnesses a lawyer calls for any number of reasons. He might not like the way a witness combs his hair or for even more substantial reasons. But look what we have. We have Angie Long Visitor who surely has no ax to grind. She is a witness who has no ax to grind, very, very nervous. We don't know why because she's far from home, but otherwise I think showing no signs of having any particular point of view. And she flees as quickly as she can with her husband and children. And she names those three people. She tells us about Joe Stuntz and Norman Charles and the man in the ski mask and they're up there (indicating). And there is an expended casing from Norman Charles' rifle and there's another one down here (indicating).

You might say to yourself but now, or at least saying {5089} to yourself, I'm not finished addressing myself on this, I have to talk to one topic at a time, eventually some of them hooked together I hope, now we got Norman Charles down here (indicating). Unless of course he's got such a tremendous arm that when he pulls the bolt it flies all the way from here over to here, more than a hundred yards, and that's particularly unusual because bolt-action rifles eject their shells to the right. And if he shoots this way you'd expect the shell to go north, not to the south. But here we have a lot of evidence of Norman Charles. Here we have further evidence of Norman Charles right at the edge of the woods. And then we have further evidence of Norman Charles and there is nothing to say in what sequence these bullets were laid down, which was first and which was second and which was third. But one of the possibilities is that that was first up at the residences and second down here, slightly west of the intersection; and thirdly over here. And if that's the case where does he have to pass? Do I know the answer? Of course I don't. Do I have any means of supplying you with the answer? Of course I don't.

I point out to you what is objectively before us something that you can have confidence, the underlying fact which I quoted

to you cannot be disputed by the Government. The inference to be drawn from those facts is another question. Can you see yourself on that, are you satisfied as to who was {5090} down there shooting at the agents considering this particular information?

I also call to your attention that Joe Stuntz was found in an FBI jacket. An FBI jacket which came out of the car of one of the agents. Now, this is one of those things that I referred to before when I said some of the evidence comes wrapped up in two different ways and it would be inappropriate for me to not to point out both alternatives to you. They are of course mutually inconsistent, but I don't know which one is true. Can you figure out which one is true? Because if you can't figure out which one is true you better start questioning yourself about what really happened here. Who did what and when.

So we've observed that he was lying there dead, Joe Stuntz, with the FBI jacket on that concededly came from one of the FBI cars. When did he put that jacket on? Was he one of those people with a .44 magnum who went down there? A .44 magnum, if it isn't a bolt-action, will eject. What's good for Peltier is good for Stuntz. If it's a no good argument one way it's no good the other way. It's no good one way, it's good the other way. That's the one identifiable bullet in one of the agents, a 44 magnum. And Joe Stuntz has the jacket on.

There's another possibility, a very real possibility. I'm sorry, I cannot offer you the answer. The testimony is {5091} unequivocal Joe Stuntz was found at the southeast corner of one of the residences up on the ridge, and that's where he was when he was shot and the apparently shooter, one of the BIA officers yelled out, "I got the guy in the white shirt, he just went down." The guy in the white shirt, did you see the photograph of him? The bullet entered his head right over here (indicating). He did not live a millionth of a second beyond the time that bullet penetrated his forehead. He was instantaneously dead. He did not have time to put on the FBI jacket.

How did the jacket get on him? I don't know the answer. I

don't know whether he went there, got the jacket and then got shot and somebody was mistaken about saying the guy in the white shirt, or whether he had the white shirt only and the jacket ended up being on him. The evidence is before you. To determine how secure you are about knowing what did and what did not take place that day you must ponder. You must consider it all.

There is testimony that Joe Stuntz started the day with a .44. Later changed to a 30-30 because his body was discovered. A trooper took a .22 magnum revolver out of a holster and found a 30-30 near him. I just call that fact to your attention. I don't draw any inference from it, I don't suggest any particular inference to you.

Now, there's another question to pose to you. Was {5092} LeRoy Casados there that day? Again it's an unanswerable question. If he was there was he guilty of any criminal act as far as the agents were concerned? Well, he had a .357 magnum in his Scout that belonged to Williams. It was found on the Rosebud at the time of the September 5, 1975 arrest raid. He had .223 ammunition in his Scout and an AR-15 was found at the time and place of that raid. Did he do it? You don't know very much more about Leonard Peltier. In fact upon a careful examination of all of the evidence you might even know less about Leonard Peltier than you do about LeRoy Casados's involvement in certain aspects of this. Are you satisfied beyond a reasonable doubt that LeRoy Casados is guilty? Do you think he might be? If he is, with whom was he? Was he in the red pickup, was he driving a red pickup, why were questions asked about LeRoy Casados, asked about a red pickup and a vehicle? They couldn't have been asking about the Scout for two reasons: He didn't buy the Scout until the end of August and one other reason, if you take a look at the document which is in evidence, the purchase document in connection with LeRoy Casados you will find that the body type is listed as a Travel Top which means it was a vehicle, even if it was a pickup in its design, with a travel top on it. It looks like that red and white van.

Was he there that day? What vehicle was he in? Who {5093} was driving the vehicle? How did he get that .357 magnum? What did he have .223 ammunition? What connection if any did he have with the AR-15 recovered at Rosebud? I do not know and I cannot suggest it to you. The Government has stated rather unequivocally that Government Exhibit 34-H was the fatal bullet in the case of Coler; and they explain not how they come to that conclusion but I want to call this to your attention. If 34-H as the Government claims was the fatal bullet undoubtedly you recognize that in order for it to end up in the ground it had to pass through his body. There was a stipulation entered into entitled "Stipulation regarding Government Exhibit 34-H." And it says, "It is hereby stipulated and agreed between the United States of America and the defendant as follows." Signed by Mr. Lowe and Mr. Hultman. "Government Exhibit 34-H was tested for presence of blood by the Federal Bureau of Investigation laboratory and there was no blood on the bullet fragments."

It's possible that when it went into the ground all the blood came off. I think you are probably aware that it takes only the slightest trace of blood to give a positive test. And if a bullet went through a human body it had to pick up some blood and tissue on the way. Even if it went into the ground it was recovered within twenty-four hours, carefully preserved and tested for blood and it showed none. So I don't know what's the basis of the Government's contention {5094} is that it was the fatal bullet.

Now, there were only three, and I may be wrong with this, the number may be four, I stand corrected if it is in fact four, but I believe that there are only three expended shells near the agents' cars that belonged to the agents. Did the people who were involved in the close-up execution style killings of the agents clean up not only their own shells but the agents as well? Perhaps the Government will make the argument that they did so because they were going to reload them. They wanted to save the brass. In that tall grass, without metal detectors, they managed

to pick up their own casings successfully except for the one in the trunk and all of the agents but three. Why do I say all of the agents but three? There is a possibility, a reasonable, rational possibility that somebody removed some shells. We don't know who because there is a considerable amount of testimony that the agents were seen firing a substantial number of times. One agent with a pump action rifle and the witness testified, demonstrated how he was pumping the slide and firing the gun up at the houses, and the other agent was said to be shooting with a handgun. {5095} Can you reconcile that?

How many known law enforcement people were there that day in that immediate area shooting? Could you say how many? Was it 20? 25? Was it less than 20? Was it 30 or more? Four sides of Williams' car and three sides of Coler's car were pockmarked with holes totally, at least 125. Where were all these people that could shoot from four different directions and inflict damage on four different sides of one vehicle and three sides of the other? Ecoffey testified he shot in a variety of places. For example, he saw and shot at or was shot at by four to five Indian people shooting east of tent city. Now the escape route is this way to the south (indicating). It was said that the people left and went in that direction. People shooting east of tent city would be towards the top of the chart. Who are those people? What was their role in the particular situation? Numerous special agents said that they found people, spotted people, heard gunshots from obviously people in various and sundry locations, people were shot at on the highway from unknown locations.

Adams tells us, J. Gary Adams, that at 1:30 a pickup truck came in driven by one person and left at approximately that time having stopped at the log house and when it left there were three people, two additional people in there. How do they know that? Gary Adams testified to it and in addition {5096} to testifying to it there is reference to it in Defense Exhibit 75. Now Gary Adams insisted when we questioned him about the red pickup there was no red pickup transmission. He said, "I never made any such

transmission." "Did you make a transmission, Mr. Adams, concerning a pickup?" "Oh, yes. That was at 1:30 in the afternoon," and he tied that to the event which I just summarized for you.

Defense Exhibit 75 confirms the fact that at 1:26 P.M. Gary Adams made such a transmission but not at 12:18. This was in addition to the 12:18 transmission which I read to you earlier. At 1:26 P.M. it says here, "Adams to Coward, south of Oglala. Pickup came in here and he just left. Can't get any BIA people on it." And then there are other things which do not specifically refer to that vehicle or anything relating to it directly. That transmission he surely made just as he surely made the 12:18.

The significance of that is that two people were taken out of that place in the vicinity of the log house. Who were those two people? What were they doing there? They left at 1:30. When did they arrive? What if anything did they have to do with the deaths of the agents?

There was a 223 casing which was found up near that house, Government Exhibit 34E, which means that it was fired from the AR15, the one that was damaged. Is there any connection between those two people who left in that pickup and {5097} the firing of that weapon?

Agent Hughes testified that there was heavy fire during the assault on the green house, at least one such incident of heavy fire. I'm not entirely certain about the evidence but I think there was more than one but surely there was one. They assault the house, they were stopped in their tracks by the heavy fire. When they got there they arrested nobody and there they were up on the crest so that if people had run off in the direction of tent city they would have seen them. Didn't see anybody. Where was that firing coming from? Who were those people? And furthermore, that occurred late in the afternoon. I think the time was 4:50, it might have been 5:50, but I'll settle for 4:50 which was the earlier time. I'm not certain at the moment. Your recollection will have to govern. Could those people who made

that heavy fire happen have been Leonard or any of the people from tent city? No. Why not? Because at approximately 3:00 o'clock in the afternoon Leonard and the people from tent city were on their way out of tent city.

I know that there was testimony that said that people were seen going up a hill at 6:00 o'clock. Put that aside for a moment. How do we know that Leonard left at approximately 3:00 o'clock with the others heading in a southerly direction? Because there was testimony that they got together. At first they were going to drive out, then they decided not to drive out, {5098} that they would walk out and they realized that amongst them there was one very young person, a native American boy with a name that doesn't sound very native American, but his name is Jimmy Zimmerman, approximately 12 years old. Although there was some concern what would happen to him, apparently the consensus was to let him go out and surrender himself instead of trying to make the trek with them which is further proof of how dangerous they thought it was at that particular time.

How do we know that Jimmy Zimmerman marched out going north at approximately 3:00 o'clock? Because Gary Adams told us so. He was in his car and he got a transmission on the radio and said something to the effect, "Hey, there's a kid up there." And he looked and in that area just to the left on the chart of those green flags which in turn are to the left of tent city he saw this young boy and it was 3:00 o'clock in the afternoon. And you've heard testimony from at least one witness and possibly several witnesses that the group went south and Jimmy Zimmerman went out in the opposite direction to seek safety at 3:00 o'clock in the afternoon. And it was corroborated by Gary Adams' observation which in turn is corroborated by a radio report that he got so who was doing the shooting? Who was doing that heavy shooting when they tried to assault that house? Do you know? I can't suggest to you who it was. Maybe you can figure it out. Who {5099} fired the two .22s, the 22-250s, three different kinds of 30-06s, because they came from three different rifles firing that

cartridge, and according to the evidence, the government's evidence, those two .22s, 22-250s and three different kinds of 30-06s, maybe just two of the three, I don't want to misstate the evidence, don't match any of the guns that were found. Does that mean the FBI didn't look or does that mean the guns weren't there? If the guns weren't there did someone carry them away and if so who? What are the names of those people? What were they doing there? What role did they play in the deaths of the agents?

Hodge testified "I do have a large number of fired cartridge cases which I have not identified with any weapon," and the government recovered a lot of weapons from that location and there were a lot of cartridge cases that were new and shiny when they were found that could not be identified with any weapon that was recovered. Who was doing all the shooting from 3:00 o'clock until 6:00 o'clock. There was shooting going on all afternoon in different locations. The BIA and the State Troopers and the FBI were kept pretty busy running around. Who was doing all that shooting? Not the people who it is said are the group from tent city that went up the hill south of tent city at about 6:00 o'clock. They couldn't be in all those places at the same time.

If you think that that question is a reasonable and {5100} valid question, then I put this to you: Why was Gary Adams so insistent that the shooting did not last beyond the early part of the afternoon when every other witness said clearly, unequivocally there was a lot of shooting and it wasn't continuous in the sense there wasn't one moment there wasn't a shot but it went all afternoon long? What was Gary Adams doing that he didn't remember, that he didn't hear it?

I don't want to dwell too long on the question of the red pickup. If the government thinks clearly that our position was that that International Scout from amongst the junked vehicles was the vehicle referred to in the transmission of Agent Williams when he said "They are getting into a red pickup," then the government totally misconceives what was going on in that respect during the five weeks we're on trial. It was clear that was a

junked vehicle. There was no question about that. The FBI didn't recognize it as a junked vehicle. They took it into custody. Why do you think they took it into custody for? Certainly not for its scrap value. Not only that, they had Lodge dust it for fingerprints. So they must have attached some significance to it.

And Ecoffey, the BIA officer, he worked close to Hughes who was a case agent and I'm sure they exchanged some comments in the course of the day. Even after the shooting was over and in Ecoffey's report there is talk about this red International in which Jimmy Eagle was supposed to be located. {5101} An interesting little twist. We've got the junked vehicle that doesn't run which is apparently occupied by a person who wasn't there. And why at this trial did Gary Adams deny very vehemently the existence of his 12:18 P.M. transmission that he saw a red pickup going out of the place and the State Trooper should try to stop it? Is that because it was inconsistent with the theory that the vehicle in question was Leonard Peltier's sometime driven red and white van. Is there any other explanation except that it was a conscious effort on the part of Adams not to tell the truth as he knew it. Is he here to get a conviction or is here to tell the truth and let the 12 of you decide "Will there be a conviction or will there be an acquittal"? Is that what our system of justice is about, that witnesses come here and decide in advance which side is to prevail and adjust their testimony accordingly?

Well, it might be argued, "Look, a lot of things have happened since then. A lot of business was done that day. He forgot." I say to you he didn't forget because as he admitted here in the trial last summer in Cedar Rapids, he was asked whether or not he made that transmission and he said, "Yes, I did," and all of a sudden here it's no longer appropriate for him to admit that he made that transmission.

Now you remember Ecoffey, the BIA officer, was recalled in the defense case to answer some additional questions. When {5102} he was asked about what prompted him to write that paragraph in his report which apparently described the red International which

is in the photographs, he said in part, "It came over the radio or something that Agents had chased a red vehicle, van or pickup into the area." Finally the case, this case has developed to a point that any reference to any vehicle that could possibly be a pickup was now referred to as a red vehicle, van or pickup. Why the great sensitivity about the red pickup? Did that red pickup carry away the people who killed the agents? Did that red pickup carry away people who were directly involved? They went out at 12:18. That is a very significant fact because that is within minutes, just a few minutes of the time by which it is fairly certain that both agents had died. Is that why there has been this evasiveness about that red pickup from a number of people, people whom the government would like you to believe for whatever they have to say? Well, in your ordinary experience do you believe people who sometimes tell you the truth and sometimes don't tell you the truth or do you believe people who virtually always tell you the truth?

If you recall, and it's perhaps a very subtle point, why did Mr. Sikma keep asking these witnesses questions which used the word "vehicle" in spite of the fact they kept answering him with the word "pickup"?

Agent Hughes as an example when shown the photograph {5103} of the International Scout, the junked vehicle, said the International was a Scout which is quite a bit different from a pickup.

Anderson was on the stand. Anderson who was on the roof of Wanda Sears' residence, the tan and red residence, Mr. Hultman was questioning him. Mr. Hultman said, "What if anything then happened?" Answer: Well, I guess they seen the orange pickup going down that way and they followed it." The "they" I assume refers to the agent. Let me read that again. "Well, I guess they seen the orange pickup going down that way and they followed it." Next question by Mr. Hultman: "Now when you say orange pickup, is that the red and white van?" What kind of a question is that? When someone says orange pickup they mean orange pickup, they

don't mean red and white van.

Now you could understand Mr. Hultman's concern, after all when you're a lawyer and you have a particular factual pattern you want to present, you want to make sure that your witnesses are answering the questions in terms of your expectations. That's perfectly all right. This is not a criticism of Mr. Hultman. But the question is why did Mr. Anderson refer to it as the orange pickup? How did he convert on the stand a red and white van into an orange pickup? Does that suggest to you why Gary Adams was dodging, why Hughes was evasive? After that question was put there was some {5104} discussion between Counsel and the Court. There were no additional questions put to the witness. A few words came out and then he answered, "The orange and white and red and white van that was going down the hill." So now it was both orange and red and white and it was a van all in a few seconds. The conversion was made right here in the courtroom.

Let's take a look at the question of Mr. Eagle. The government will not only refrain from arguing that he's guilty, they won't even argue that he was present. Yet, according to his testimony, he was charged with the murders and has never had a trial. According to his testimony he was never closer than 15 miles to the area shown on Government Exhibit 71.

Mr. Zigrossi who is a high ranking official, there are only seven people holding comparable positions in the FBI, said that a key thing after the commission of a crime, particularly something like this, is to find eyewitnesses and possible participants and yet he remembers no discussion with or about Marvin Stoldt.

{5105}

There are only two people who made any identifications that day if you believe the Government's evidence. One agent said he saw Peltier, and Marvin Stoldt said he saw Jimmy Eagle. Could it be that by the third or the fourth day after the fact with the agent and Stoldt having ridden back together in the car, that word would not yet have reached the No. 1 man on the investigation that two people had been identified by name? Can

you think of anything more important in terms of the investigation? Can you explain in light of that Ecoffey's report which is dated June 26 which says: I also found the red International and which the agents chased into the Jumping Bull residence. James Eagle was supposed to be in that red International. Bob Ecoffey of the BIA knew about Jimmy Eagle supposedly being in that red International and recorded it in a report dated June 26, and Mr. Zigrossi hadn't heard about it for four days. Doesn't that mean something to you? Doesn't that tell you that there is something terribly wrong with this case?

Anderson, when interviewed by the agent, according to the agent who is working from the report, basically he relies on this report, "Yes, this happened, he said this," et cetera. One wonders whether the report is written independently of the interview, or how it is done; {5106} but the agent tells us who witnessed that and who was familiar with the 302, that Anderson, when shown a photograph of Jimmy Eagle, said, "Yes, he was there with his girlfriend, Wilma, who was cooking." So not only does Anderson by some magical process place Jimmy Eagle at Tent city, but he is there with a girlfriend by the name of Wilma and she is cooking that late morning meal. How come nobody mentioned Wilma? Does that make you wonder?

Norman **Brown**, Michael Anderson on the stand in this case, Draper, nobody mentioned Wilma, the provider of the food. Strange, isn't it? What was going on at that interview? How did that report get written that way?

And then again -- and this is one of those things where I offer you an alternative just to show you how unusual the circumstances are -- if Anderson, when he was interviewed, was in a position to say who was in Tent City preparing breakfast, because that's where everybody was when the shooting broke out, then how could he be on Wanda Siers' roof unless he has the capacity to fly which he does not? He might have the capacity to lie, but he doesn't have the capacity to fly.

Can you explain except by saying there is something

terribly wrong here? You are asked to do a very, very serious task. Either way, just to return a verdict in this case, is a monumental act. Can you do so with {5107} comfort and assurance? Can you do so without extreme doubt about what was going on here? Why is the evidence in this state? What happened? How can we tell?

Stoldt sighting Eagle at a half mile on a summer's day over terrain that has foliage growing on it. The more moisture that is coming up, the more you get the mirage effect. If you don't hold the rifle absolutely still at such a distance, you have problems seeing, so even if you hold it still, if the target is moving at a half a mile -- we put a man on as a witness who has no position, he doesn't care one way or the other what happens in this case.

He went with a person whom he knew, so he knew when he put his eye to that telescope, he expected to see the man he knew at the other end. Now, you know as well as I do, that's not really an objective test. If he had recognized that man at the other end, it may very well be partly a result of knowing who was there; and he looked, and he couldn't tell; and he was looking over gravel to minimize the mirage effect.

So a lot of questioning was done of a number of witnesses about this: Tell us what happened, we want to know the truth, you are under oath, a man is on trial here on a very, very serious case with long-range consequences and we have heard things about a telescopic {5108} sight. I borrowed the guy's gun next to me. There were a bunch of people. I didn't have the binoculars. The fellow next to me had the binoculars. He loaned me the binoculars. It is like binoculars, binoculars, who has the binoculars?

And then the question was put to special Agent Coward: Mr. Coward, when you were originally on the stand in the Government's case and you were under cross examination, and you were asked how the sighting was made, you said to us, Mr. Coward, "I later found out they were binoculars." Mr. Coward, what do you mean, you

later found out, if you were standing right next to the man and the man either had binoculars or borrowed the binoculars from a person standing next to him? What do you mean you later found out in the answer? An example of clarity, solves the entire question.

Well, again the only thing I can think of is, you know, I think at the time that you were asking those questions to me earlier is when we were referring to when he came in and gave me the statement. Now, whether that -- well, that's what I recall; and I think basically when I made that statement, it would have to be because that's what he told; and with the two, that would have to be my observation. That's my answer. That's the only way I could make such a statement.

{5109}

Well, indeed that's the only you could make such a statement, double-talk, no explanation, double-talk.

Does that worry you? Does that concern you that agents of the FBI take an oath, come here to testify on this solemn occasion and give answers like that?

Adams, the first witness for the Government, testified the official investigation revealed nothing to indicate that Eagle was present on 6-26. Then how does it happen that Eagle is spotted through a telescope at a half mile? How does it happen that a witness who testified here that he saw Leonard Peltier down by the cars with two others, and Michael Anderson says that Jimmy Eagle was in Tent City with a woman named Wilma? How do those things happen?

Do you think something similar is happening to Leonard Peltier that happened to Jimmy Eagle, or do you think not; and if you think not, are you really sure, sure enough to come back and say "guilty of murder one"?

If, as I will argue with respect to certain aspects of the evidence, there was tampering of one kind or another, there was manipulation of one kind or another, it is no answer for Mr. Hultman to stand up and say, "Wait a second. If they were going to tamper, they would have really done a job. They would have

come up with an eyewitness who would have said, `I was standing there, and I saw him do it.'"

{5110}

Well, the fact that they just couldn't find such a patsy, or maybe were just incompetent about it, is no argument, none at all. What was done was terrible, and let's review what was done.

First of all, June 30th was a very important day in the life or certain agents. There is a chart in evidence, it is Defendant's Exhibit 219 (indicating). It shows some facts concerning writings of certain agents, Gary Adams, Gerard Waring, Frederick Coward, Edward Skelly. Look at it. It is available to you. You will see that every single report concerning the events, the major events of June 26, was dictated on June 30th, the same day that Skelly said was the day for reviewing the evidence found ln Williams' car.

What was going on in that FBI office between those four agents? What kind of reviewing. Agent Waring's report -- oh, by the way, I want to call your attention to the fact that in case the Government argues, "Well, they couldn't do it until the 30th because there was a shortage of stenographers, or they were busy," I remind you they didn't take notes. They had to get it down on paper fast to make it accurate. Those are pretty lengthy reports as you observed from the questioning, The typist's initials are to be found in the last column. These four agents had access to a lot of typists. Also, they wrote {5111} other reports of not such great consequence. They were dictated, one of them on June 28th -- I am sorry -- yes, June 28th, another one on June 29th. So they obviously had facilities or they couldn't have done those other two reports.

And then of course, there is that very special problem which I will allude to in a moment; but I wanted to comment on Agent Waring's report. He is the only person who heard Agent Williams transmit over the radio the chase of a red and white vehicle.

Now, everybody else heard "pickup" who heard anything. He

heard red and white vehicle. He had a special channel on his radio. It looked into the future. He is the only one who heard Williams say, "They are shooting at us from above." Everyone else who commented on the subject said that the transmission was, "Get up above and give us some cover fire."

Of course, when he wrote his report on June 30th, he already knew there were people up there later on in the early part of that afternoon. He, of course, is the person who used two stenos because there was a shortage of stenos; and the first part of which deals with events up to 12:30, and the second part of which deals with events beginning at or about 12:30; and he is the person who could not detect the fact that the first {5112} part of the report and the second part of the report were typed with different type styles although Wayne Curry who is a local resident and has no concern about the outcome of this case, he said he just looked at it and knew right away; and of course, that's the report that was dictated on June 30th and typed on June 26th, another miraculous feat, or did someone rewrite the first half of a report which had originally been done on the 26th and the typist knew that she had gotten her latest instructions on the 30th, so she wrote down, date of dictation, the 30th, and in copying it copied off the 26th? Is that impossible? Far from impossible.

I don't think I have to address myself at any great length about the sighting of Leonard Peltier. The problems in sighting Leonard Peltier are the same as Stoldt sighting Jimmy Eagle. Stoldt told Coward that he saw Eagle, Coward saw Leonard, Coward spoke to Skelly. We don't know whether he told Skelly only that he saw Leonard or whether he also told him, as he may very well have, "Stoldt told me he saw Eagle." Coward agreed that Stoldt was there was a witness or a possible defendant, and it was a most important fact to learn as any law enforcement would, as any sensible person would understand.

Both Skelly and Waring say that at the meetings during the first few days, first three, four, five days after {5113} the

event, there is no mention of Peltier's name at the agents' meetings attended by 50 or more agents.

Zigrossi, when interviewed briefly on Tuesday by myself -- and he admitted this on the stand -- was asked, "Was Peltier's name mentioned at any of the meetings during the first few days?" He said, "I don't recall that it was." The next day the same question was put to him, and he suddenly recalled. No explanation, no offer by the Government to have him explain. You wouldn't expect me to ask him because he is obviously well prepared with an answer, but they didn't ask him either; but he stated that the day before he had no recollection of Peltier's name being mentioned; and then I asked him the key question, the key question: Had he ever heard of Stoldt during that period of time, and did he do anything about him in any way as the No. 1 law enforcement officer on the case? And he said, "No."

{5114}

There's nothing about Stoldt. Now, you've heard testimony from certain witnesses that Leonard Peltier was firing from position Z-1 over here (indicating). And it is said that he was firing a weapon that looked like Government's Exhibit 34-AA. That would be an AR-15. Well, I show you Defendant's Exhibit 221. That looks like it too. That was the one recovered in Oregon. Was he firing that one, or was he firing this one, Government 34-A? When this one wasn't burned it looked just like 34-AA. Do you think someone looking at him from a hundred and fifty yards away could tell the difference between 34-A when it was in good shape from 221? Not possible.

There's something else not possible. How could he be firing from position Z-1 and there were no .223 casings to be found there? I would suspect that Mr. Hultman might say he cleaned up his brass. He wanted to reload. Remember his fingerprint was found on the reloader's manual. Take a look at that photograph and look at the heighth of the grass in that particular area. He was firing, lying down, getting up firing, lying down, getting up firing. Those casings come out to the right five feet, ten feet,

fifteen feet. In the middle of all of that he stopped and found every single round so there was none left for the FBI to find? And then I ask you if that is so how did they find ten 30-06 casings in the same area where they said Dino Butler or Robideau, {5115} I don't remember which one, was also firing, and firing the M-1? Now, an M-1, 30-06 casing is about that big (indicating). Maybe three and a half inches long. And a .223 is much smaller, noticeably smaller, You cannot miss them. Are we to believe that both of those men were there firing one, the M-1, one, the .223, one went around and picked up his brass and the other guy didn't, he didn't want to reload? And Leonard said, "Well, it's your brass, I'm not picking up your brass." It's just not possible, it is impossible.

How could you believe that it happened that way beyond a reasonable doubt. You must believe that it couldn't have happened to a mathematical certainty. It just couldn't have happened.

The Government said it found a .223 in the trunk. Let's assume it was in the trunk, let's assume that the Government found it in there. To what weapon did it belong? lt belonged to this weapon, 34-A. Found where? In Wichita. Who wasn't in Wichita? Leonard Peltier was not in Wichita.

Well, that's kind of rough business if Leonard Peltier wasn't in Wichita. Maybe that wasn't his favorite rifle. Well, then again Indian people, particularly those who live together, under circumstances like that they sometimes let each other use their property, each others property. You heard a witness say that.

Well, maybe he got tired of that AR-15. Maybe every- {5116} body just thought it was his favorite weapon, but it really wasn't. So maybe he let the people who went to Wichita take it along. No. We know that that's not true because in Oregon in the mobile home they found this weapon, 221 in evidence, that's his AR-15. Not only is that his AR-15 but there was quite an effort to make sure that we didn't find out about that AR-15.

Photographs were made, the AR-15 was the weapon not in the

photograph. Even if it was found later as Agent Hancock claimed, even if it was found late after all of that elaborate preparation to make photographs, very pretty photographs too, everything laid out very nicely, good color, very sharp focus, surely if you find another rifle all of that work, take a picture of it, too. Spread out on a nice yellow plastic on the floor, everything parallel, all the guns of the same kind next to each other, two of one kind on the left, two of another kind on the right, all the boxes of ammunition really pretty. You could use that for a catalog. Then let's assume that you find the AR-15 later. Take a picture of it, too, for your catalog.

The Government says that the .223 in the trunk absolutely, definitely, positively matches 34-A. Perhaps it does. I have no quarrel with it. It does not match 221.

Because of the pressure of time I have to turn to the last area that I have time to cover. It is the most serious {5117} area in terms of the body of evidence, in terms of the conduct which has gone undisputed in this case. I speak to you of Agent J. Gary Adams who apparently was assigned the task of handling all the young Indian people, the young men, ranging in age from fifteen to seventeen or eighteen. One of them lived in the state of Washington, one from Arizona. When another one was in Wichita Gary Adams showed up. Another one in New Mexico, wherever any of these young people were there was Gary Adams. In fact, as you may recall from his testimony he was the first witness, it's a long time ago, a lot of words have been spoken, he went all the way to the state of Washington to serve a subpoena as if there isn't a United States marshal in the state of Washington who could serve such a subpoena.

And he said, Adams himself said from the stand it's very important to get a conviction because he feels that he didn't do enough to help his friends on June 26th. Let's see what some of the tactics were of Mr. Adams.

May I have just one moment to confer with the Clerk?

(Mr. Taikeff and Clerk of Court conferred.)

MR. TAIKEFF: When he was present with Anderson, a young man who asked for an attorney, no attorney. I'm referring to Mr. Anderson's testimony. He said, Mr. Anderson did on cross-examination, that Gary Adams said to him "If you don't talk I'll beat you up in your cell." Nice way, real nice way {5118} for FBI agents to act, especially towards young people. Really nice.

What was his understanding of the situation? He would get beat up if he didn't give him, Gary Adams, the answers that Adams wanted. And so he gave Adams the answers that he wanted. And he was the witness who testified that he saw Leonard Peltier down by the agents' cars.

Now, how about young Draper. Approximately the same age. What did Draper tell us? "They put me in a chair and handcuffed me and tied me to the chair." And they talked to him that way for three hours. That was in the United States of America, that was not in Berlin. That was in 1975, that was not in 1938. That was done by the FBI, not by the Gestapo.

How did he learn the names of the weapons? He got them from either the FBI or Mr. Sikma he testified. Now, he was clear about one thing when the shooting started because he was not particularly attracted to weapons, didn't like them, didn't know how to handle one. He went into the woods and stayed there and that was undoubtedly the truth. He probably knew very little of what went on. But that didn't, that didn't alter in any way the treatment that he got.

Michael Anderson had an initial interview with Agent Adams, and you may recall that Agent Harvey was called in that connection. And according to Agent Harvey, as far as he could {5119} tell, Anderson had every reason to be calm, assured, he was told he was only going to be a witness, not to worry, but every reason to be truthful, completely honest and if he had any thoughts in his mind that he might be guilty or anything of that sort he was certainly put at ease, had no reason to lie to protect anybody. And what did he say on that interview? At 11:30

in the morning he was in tent city. He saw a photograph of Leonard Peltier, identified him. He didn't say, "I don't know that person." He didn't say, "I'm not sure." He answered straight away "That's Leonard Peltier." And what did he say of him concerning that particular day? He said, "Peltier was at the Jumping Bull residence on the 26th, the day of the shooting." That's it, that's all he said about him on the first interview. That when he looked down for the first time and saw the cars the agents were prone, they looked dead.

Then you take a look at the second interview. The interview in which Adams is present again. And at 10:30 in the morning he refuses to talk. By the way, Anderson is the fellow who said he was not convicted and yet he was arrested by the FBI on a probation violation which means he had to be a convicted person. 10:30 in the morning he says, "I don't want to talk to you." 1:40 in the afternoon he gives a complete statement. And what does he say when he comes here? He says that Leonard Peltier was down by the cars with Dino and Bob.

{5120}

By the way, before I pointed out to you the impossibility of Leonard Peltier being here (indicating) shooting an AR-15. There's another reason why he couldn't have been there shooting at the agents' cars. Do you remember that an FBI agent had to climb a tree in order to see the agents' cars through his telescopic sight, Agent Waring? Agent Waring was right up there (indicating) and because of the terrain he, from that point, could not see the cars. It's quite a distance to begin with. It's about a hundred and seventy to a hundred and eighty feet. And because of the nature of the terrain he had to climb a tree and look through his telescopic sight to see the cars. And yet the Government would have you believe that Leonard Peltier was there shooting at the cars, or at the agents in the cars.

Now, if Mr. Waring was wrong, if he climbed a tree when it wasn't necessary the Government could have solved that very simply. Could have sent an agent down there just as we did a test

to the telescopic sight, have the agent stand there, take a look. He could see the spot. He comes back under oath and testifies. And the conclusion would be Waring was wrong, he just climbed a tree unnecessarily. You heard no rebuttal evidence to that. Not one word.

In his second interview Anderson changes. Now, he's at 10:00 o'clock in tent city because he has to leave himself room to get up on Wanda Sears' roof. Anderson, when first {5121} asked, says Robideau was the tent city leader.

And finally we come to Norman **Brown**. Now, surely you must realize that when you get served with a subpoena to come to Court you go on your own steam. You get in a car, you get in a plane, you get on a train, you get in a bus. They don't say, "Get in the car, here's your subpoena, you're not under arrest, get in the car." And then you get taken a long distance with your pregnant wife left behind. This is a young man, very young man. Taken to Pierre, put in a private FBI plane, flown up here, taken to a hotel, twice or three times asking for a lawyer, no lawyer. Threats to him, threats to his mother, she sat there crying throughout the entire interview. You could just imagine what was going on in her head when that episode was unfolding.

Is it any wonder that **he went** before the grand jury and said, "I saw Leonard and Bob and Dino down by the cars." That would make two people who saw him down by the cars, neither of which was ever asked what did you see, what were they doing. It's enough fellows if you just say you saw him down by the cars, that's it. We'll be happy. One of those two people must have seen something down by the cars.

Ladies and Gentlemen, I have a few minutes left. I must strongly, as strongly as I can urge you to recognize that in order for you to find any actual conduct on the part of Leonard Peltier that could possibly mean criminal liability {5122} for him under this indictment you'd have to speculate. You'd just have to weave a fantasy in your mind.

It is required in this country that the twelve of you

cannot unanimously return a verdict of guilty unless the evidence was so convincing, was so believable, unless there was absent serious questions so that you were convinced to a moral certainty. Otherwise you cannot return a guilty verdict. Perhaps the Government will argue in its final summation, "Well, he was shooting at a distance." If he was shooting at a distance the only way you can conclude he was shooting at a distance is to find that he was shooting at a distance from that "Y" intersection, and from there he couldn't see the agents' cars. So even if he was, he wasn't shooting at the agents' cars because he couldn't see them.

You have to fantasize, you'd have to speculate something that was physically impossible that required the agent to climb up in the tree in order to see the cars. The Government might argue "Well, by being there with a gun in his hand he helped some, some phantoms do what was done, and as a result he was aiding and abetting." Being someplace when a crime is committed and even doing certain things doesn't constitute aiding and abetting unless you are consciously and willingly a participant knowing what the goal is or at least being in a position where you could anticipate what the outcome would be.

{5123}

To knowingly and willfully participate and involve yourself in such a thing and help somebody else get it done knowing that that's what's going on, that's aiding and abetting. Not possibly shooting a gun on the Pine Ridge Reservation when there's shooting going on all around you that nobody knows who's shooting at whom.

The Government says you must find Leonard guilty because he's responsible for everything that happened that day. I suppose they would even say he's responsible for the death of Joe Stuntz because he was the leader of the group. They call him the leader because they want to argue to you that you should hold him responsible for the conduct of God knows how many people.

The tragedy of June 26, 1975 is sufficient. We do not have

to add to that tragedy two more factors: the conviction of Leonard Peltier and the corruption of our system of criminal justice. And in that regard I was contemplating what I might say to you specifically; and one of my colleagues suggested to me that there was already in existence all the words that one might want to say on that subject by a far more eloquent person than I. {5124} In closing I read those words to you and ask you to seriously consider them in light of what you have seen unrebutted, uncontested in this particular case. Speaking about litigation. "Decency, security and liberty alike demand that government officials shall be subject to the same rules of conduct that are commands to the citizen. In a government of laws existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker it breeds contempt for law, it invites every man to become a law unto himself, it invites anarchy. To declare that in the administration of the criminal law the end justifies the means, to declare that the government may commit crimes in order to secure its conviction of a private criminal would bring terrible retribution."

Ladies and gentlemen, if you bring in a guilty verdict in this case, you will deliver terrible retribution. Thank you.

THE COURT: The Court will recess until 5:10.

(Recess taken.)