UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

UNITED STATES OF AMERICA

-vs- CASE NO. 83-8

EDGAR JONES, JASON MOORE, GERMAN STUMBO, DREXIL HALL, TEDDY KINNEY, BENNY CAUDILL, KENNETH ROLLAND a/k/a POSTMAN, RANNY BLANKENSHIP, EUGENE TACKETT, HAROLD MOORE, HERMIT NEWSOME, TIM MILAN, MOSE MEAD, DONAHUE HALBERT, AUSTIN "BO" MOORE, PEBO GAYHEART, LINVILLE MOSLEY, RAYMOND HALL, VAN B. PATTON

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TRANSCRIPT OF TRIAL

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BEFORE: THE HONORABLE G. WIX UNTHANK

DATE: FEBRUARY 7, 1984

VOLUME TWENTY-SIX

DALE SOERGEL MOORE SHAW & ASSOCIATES
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BERNARD PAFUNDA, ESQ.

For the Defendant Ranny Blankenship:

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For the Defendants Jason Moore, German Stumbo, Teddy Kinney, Kenneth Rolland and Raymond Hall:

WILLIAM D. KIRKLAND, ESQ.

REPORTER'S NOTE: The Court was convened at 9:02 A.M., on February 7, 1984.

THE MARSHALL OF THE COURT: All rise. The United States District Court for the Eastern District of Kentucky is now in session, the Honorable Judge Unthank presiding. Be seated and come to order.

Your Honor, all parties, all members of the Jury and all counsel are present.

THE COURT: Thank you, sir.

Madam Clerk.

MADAM CLERK: The record may so reflect, Your Honor.

THE COURT: Gentlemen, choose one representative from the prosecution and one from the Defendants and approach the Bench.

REPORTER'S NOTE: At this point Mr. Self and Mr. Harwell approached the Bench; whereupon the following was held.

MR. HARWELL: Good morning, Judge.

THE COURT: I don't want to embarrass the Juror right now, but the Marshall relates that one of the Jurors' boyfriends, you know, beat up on

her last night. He seemed to say that he thought maybe that she was being involved in some extra-curricular activity due to the amount of time she is spending down here, so he beat her.

I don't know. I have no idea what effect it will have on her. I haven't looked over there yet, but I don't want you all - - but there is one of them supposedly - -

MR. HARWELL: (Interrupting) Got what, sir? I didn't hear you. You said one of them got what?

THE COURT: Got a bump knot where he - - where her boyfriend whipped her pretty good. And she told the Marshall she was afraid that he might be coming over here.

Of course, if he comes over here today, it won't be any problem for us.

But on the other hand, if I don't know - - if she's got that much emotional difficulty at this time, I don't know whether she is going to be of much use as a Juror.

MR. HARWELL: Do you know her number, Judge - - which seat?

THE COURT: I believe - -

MR. SELF: Is she an alternate?

THE COURT: Miller, I believe.

MR. SELF: I have no objection to her being excused, Judge.

THE COURT: Well, let's just go on, and then we will have a recess, and then we can notify - -

MR. HARWELL: I think for the purpose of the record that this is something that the Court probably will want to ask each Defendant, if you decide you want to excuse the Juror; otherwise, we would have no problem.

THE COURT: I would like to talk to the Juror on the record back in my chambers just to find out how much emotional problem this is.

MR. SELF: Your Honor, the first witness we have got shouldn't take too much longer.

MR. HARWELL: Jacobsen?

MR. SELF: Yeah. Let me move for a continuance and then at that point we can take it into chambers.

THE COURT: You talk to them, and then I will just take her back into chambers and talk to her.

MR. HARWELL: Okay.

MR. SELF: We can have a brief recess

and then we can do it, rather than making it look like the Court is doing it.

THE COURT: I hate to drop these alternates. I hate to drop any Juror.

MR. SELF: This seems to be the most dedicated panel up here this time of year.

THE COURT: Yeah.

MR. HARWELL: Thank you for telling us, Judge.

THE COURT: But don't - - I mean, we don't want this Juror to think - -

MR. HARWELL: (Interrupting) I won't say a word, Your Honor, until the Court tells me to.

THE COURT: To her it is something traumatic.

MR. SELF: I mean, I wonder if this is the same Juror who at one point when questioned during voir dire about emotional - - about her brother being shot - - I wonder if this is that Juror. You remember we asked about violence.

MR. HARWELL: I would not take up a position until such time as the Court has done the in-chambers review and reported back to counsel.

THE COURT: All right. You talk to them, and then - -

MR. HARWELL: Can I talk to the other lawyers, Judge, and advise them.

THE COURT: At the first recess, why, we will - -

THE HARWELL: All right.

THE COURT: I will just go back in chambers with her and see what the effect - - we will all go back together and, if necessary, we can go back in chambers with her and talk to her with just one representative. I think you will agree it would be better with one representative from the Defendant than having - -

MR. HARWELL: (Interrupting) I have no doubt about that, Judge. That is the way it ought to be handled, Your Honor.

You are better this morning.

THE COURT: I believe my cold is better. And I thank you gentlemen for putting up with me yesterday.

MR. SELF: You just about didn't have me here this morning, Your Honor. I met that parking lot this morning, and it is a hard surface out there.

MR. HARWELL: Thank you, Judge.

REPORTER'S NOTE: At this point the following proceedings were conducted in open Court.

THE COURT: All right, sir. All right, are you ready to proceed? Now, let's see. Were we on cross-examination?

MR. PAFUNDA: I am through.

THE COURT: Mr. Pafunda, you were last.

MR. PAFUNDA: And I am through, Your Honor.

THE COURT: Youhave no more questions.

MR. HARWELL: And I'm next, Your Honor.

THE COURT: All right, sir.

CROSS-EXAMINATION

BY MR. HARWELL:

Q. Mr. Jacobsen, my name is Aubrey Harwell, and I represent Edgar Jones. In that you have been examined and cross-examined by a number of other lawyers, I hope that my questions will be rather brief.

Let me ask you this, sir. In February of 1982, what helicopter or helicopters

were owned by Coal-Mac or Ray-Mac or any affiliated companies?

A. One Long Ranger.

Q. All right, sir. During February of 1982, did any personnel - - employees of any of those companies, to your knowledge, make use of any of the helicopters other than the one that the company owned?

MR. DAUSE: Object to that on relevancy.

THE COURT: Overruled.

A. No.

Q. Just that one?

A. Right.

Q. All right, sir.

You indicated, sir, that you were, and have been for some years, a full-time pilot for Jaco now, and previously one of the other companies; am I right?

A. That's true.

Q. Tell me, if you will, Mr. Jacobsen, by whom were you employed in February of '82? Who cut your check?

A. I believe that was Mack Mining.

Q. Mack Mining. All right,

sir. And was Mack Mining the registered owner of that helicopter?

A. Yes. I believe that is true, too.

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Q. All right, sir. I also understood you to say during the course of your direct testimony or make reference to a part-time pilot. Was there any part-time pilot who was flying for Coal-Mac, Mack Mining, Ray-Mac in February of '82, to your knowledge?

A. No, sir. I don't remember making that statement.

Q. All right, sir. Are you the only employee of Mack Mining, Coal-Mac or Ray-Mac or any affiliated companies who--who has a helicopter license?

A. Yes.

Q. Nobody else out there can fly that helicopter then can they?

A. No, sir.

Q. And, to your knowledge, in February of '82 there was no one who flew that helicopter except you, am I right?

A. That's correct.

Q. All right, sir. Do you log all of your flights?

A. Yes, sir.

Q. And do you log those contemporaneous or near contemporaneous with the time

that you fly?

A. Say that again.

Q. When you log-- When you make entries in your flight log book, flying time log book, do you customarily do that at or about the same time that you do the flying or do you do as some folks do and put it off a day or two or three at a time?

A. Sometimes I put it off, yes.

Q. All right, sir.

A. I keep a note of it. I don't formally journalize it in my log until sometime later.

Q. All right, sir. In the course of preparing to come into this court and testify to these ladies and gentlemen and before His Honor have you reviewed that log book, sir, for February of '82?

A. No, I have not.

Q. Do you have that available?

A. It's available. I don't have it with me right now. I do have it, though.

Q. All right, sir. It's your recollection or so you testified yesterday, sir, that during the week of February 15, and February 15 is a

Monday, that you did not fly the helicopter on Monday, Tuesday or Wednesday by virtue of weather conditions. Do you recall that testimony?

A. Yes, sir, I do.

Q. All right, sir. And you said that you recall the first time that week you flew the helicopter was on Thursday.

A. Yes, sir, that's the statement that I made.

Q. All right, sir. Would that log book bear that out?

A. I don't know. I should have probably checked it.

MR. HARWELL: All right, sir. We would ask, may the Court please, with Your Honor's permission, Mr. Jacobsen bring that log book in in order that he can do as he suggested and check it, Judge. It won't require any additional time. It doesn't have to be done before the jury or anything else, but if he could bring it in, Your Honor.

MR. SELF: I fail to see the relevancy of it, Your Honor.

MR. HARWELL: He said, may the Court please, that he has not checked it and maybe he should have to be precisely sure of his recollections about

which he's testified.

There's no prejudice to it. We just want to be sure, too.

MR. SELF: If they wish to subpoena it I'm sure Mr. Jacobsen will be glad to bring it in.

THE COURT: Let me do this. Mr. Jacobsen, you bring your log book back in to the U.S. Attorney, and you and he can sit down and go over it.

THE WITNESS: Yes, sir, I'll do that.

MR. SELF: When he brings it in I'll advise Mr. Harwell. He can take a look at it, too.

THE COURT: All right. Fine.

MR. HARWELL: We're not asking, Judge, except for that portion of it. Sometimes those log books get right voluminous depending upon how they're made by the manufacturer. We're asking for that portion dealing with February of 1982, not the whole thing, Your Honor.

THE COURT: All right.

Q. All right. Mr. Jacobsen, you testified yesterday that you had taken some weapons to Ray-Mac, up to the Ray-Mac mining site.

A. Yes, sir.

Q. All right, sir. And, if I

recall your testimony, you said that you weren't sure what day you took those weapons.

A. I wasn't sure, and I know it was not before the Thursday of the week of the fifteenth.

Q. Yes, sir. I think you said your best recollection was that it was Thursday or a day or so thereafter, is that right?

A. Yes.

Q. All right, sir. And you took those, if I remember your testimony, by helicopter, is that right?

A. That's correct.

Q. Okay, sir. Where did you get them?

A. At our office.

Q. At your office. And what did you get?

A. What did I get?

Q. Uh-huh. What did you take?

A. I believe I took some Uzis, maybe one or two Uzis, and a shotgun.

Q. All right, sir. Were they in a case or were they-- Were they in gun cases or steel cases or just the weapons themselves?

A. Just the weapons themselves.

Q. All right, sir. And your best recollection is you took a shotgun and one or two Uzis?

A. Yes, sir. I'd say I took two Uzis. I wouldn't think we would have made a trip over there without taking, you know ...

Q. Did you take a case of 9 millimeter ammunition; forty boxes of 9 millimeter ammunition?

A. I don't recall.

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Q. You don't remember that?

A. No, sir, I do not.

Q. Let me see if I can refresh your memory a little bit. Notwithstanding your -- your military service, a case of 9mm ammunition is very heavy and about so big (indicating). There's forty boxes of 9mm. It would be -- It would be a significant burden for a man to carry and put in a helicopter.

Does that refresh your memory?

A. No, sir, it does not.

Q. Do you remember taking any ammunition?

A. No, sir, I don't.

Q. All right, sir. Let me see if I understand you. You're not saying you didn't take or you did take, you're saying you have no recall as to whether you did or not. Is that a fair statement, what you're telling us?

A. That's a fair statement.

Q. All right, sir. Now, when you took that or those guns you landed up there at the Ray-Mac site?

A. Yes, I did.

Q. I would guess that you then took them out and -- and carried them to somebody, did you not?

A. No, sir. I carried them to a box.

Q. You carried them to a box?

A. Where they were locked up.

Q. And you locked them in that box?

A. Yes.

Q. And then you had to advise somebody on site that you brought those in, did you not?

A. That's correct.

Q. And who did you advise?

A. The foreman of the job was there. I didn't -- When I landed he -- It's hard to sneak around with a helicopter. He heard me come and land, and he came out to where I landed.

Q. Did he help you carry the guns?

A. I don't think so because I think I just, you know, was able to carry them

myself.

Q. I see.

A. He had the key though to the -- the locker box where we put them. So, he had to do that.

Q. All right, sir. Did you later pick up those guns and take them back to the Mack Mining/Coal-Mac office?

A. No, sir, not that I remember.

Q. Would it be fair to say then and honest to say that the last time you know that you saw those particular guns was when you landed and locked them in the box up there at Ray-Mac?

A. Yes, sir.

Q. As far as you know?

A. Yes.

MR. HARWELL: All right, sir. Thank you, Your Honor.

THE COURT: Yes, sir. Any redirect?

MR. DAUSE: May we have just a moment, Your Honor?

THE COURT: Yes, sir.

MR. DAUSE: Just one question, Your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. DAUSE:

Q. Mr. Jacobsen, if you know, the guns that you took to the Ray-Mac job site, if you know, were they ever used there?

A. No, sir.

MR. DAUSE: Thank you. That's all I have, Your Honor.

MR. HARWELL: Your Honor, I have some recross based on that one question. It'll be very brief.

THE COURT: I didn't catch that question.

MR. HARWELL: The witness was asked if the guns he took there were used; and he said, no, sir.

THE COURT: All right.

MR. HARWELL: Either I've caught Your Honor's cold or Your Honor's caught my cold.

RECROSS EXAMINATION

BY MR. HARWELL:

Q. Let me ask you this, Mr.

Jacobsen, merely as a matter of clarification. The truth of the matter is that you were not at Ray-Mac consistently but rather in and out. To be totally candid you don't know whether those guns were used or not used up there, do you?

A. Well, let me make a statement that -- that I thought he was asking me.

Q. All right, sir.

A. I know that the guns that I took over there were not taken over there until the last shooting that I know occurred. It might have been used to target practice with, shoot animals with, something like that. But the guns I delivered there were not delivered there until after the last shooting that I know happened.

Q. And if there was, as a matter of fact, another shooting about which you have no knowledge or familiarity then you can't tell these ladies and gentlemen whether those guns were or were not used, can you?

A. No, sir, I couldn't say that if I didn't know there was.

MR. HARWELL: All right, sir. Thank you, sir. Thank you, Judge.

THE COURT: Gentlemen, what about the

excusing of this witness?

MR. DAUSE: We'd ask that he be permanently excused, Your Honor.

MR. HARWELL: Judge, I think he's going to bring his log book in, and I would like to defer judgement until that time.

THE COURT: All right. Mr. Jacobsen, we'll say this, you'll at least be given twenty-four hours notice.

THE WITNESS: All right, sir.

THE COURT: Will that be fine?

THE WITNESS: That'll be fine.

THE COURT: Leave your telephone number with the Marshall. When you got your log book you and the U. S. Attorney go over it first.

THE WITNESS: I can get my log book in just -- it's outside.

THE COURT: All right. We're going to have a recess, and then you and the U. S. Attorney can go over that. But leave your telephone number with him.

THE WITNESS: Yes, sir.

THE COURT: It's not anticipated that you'll be called, and if you are you'll be at least given twenty-four hours notice.

THE WITNESS: Thank you.

THE COURT: Ladies and gentlemen of the jury, you're going to be in recess for twenty minutes. During this recess the not now admonition is in effect. Do you understand?

All right. Is there any objections or corrections to the form of the admonition?

(CONCERTED VOICES: No, Your Honor.)

THE COURT: Please excuse the jury for twenty minutes.

(Reporter's Note: The jury left the courtroom at 9:21 A.M.)

THE MARSHALL: The jury's out of the courtroom.

THE COURT: All right. Please excuse the remainder of the Court for twenty minutes.

MR. HARWELL: May the Court please. Before the jury comes back in and in reference to the matter on which you called counsel to the Bench --

THE COURT: I've already talked to --

MR. HARWELL: Could you reconvene Court without the jury so that we might take that matter up.

THE COURT: Right.

MR. HARWELL: Thank you, Your Honor.

THE MARSHALL OF THE COURT: We'll be in recess.

(Reporter's Note: The Court recessed at 9:22 A.M.)

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THE MARSHALL OF THE COURT: All rise, please. This Court is again in session. Be seated and come to order, please.

THE COURT: Mr. Marshall.

THE MARSHALL OF THE COURT: Yes, Your Honor. All Defendants, attorneys, and jurors are present.

THE COURT: Madam Clerk?

THE CLERK OF THE COURT: The record may so reflect, Your Honor.

THE COURT: All right. What says the United States.

MR. SELF: We are ready to proceed, Your Honor, with our next witness at this point.

THE COURT: All right.

MR. HARWELL: May the Court please, we would like the record to reflect that in so far as the last witness is concerned, that we would ask he be put back on the stand in the presence of the jury at one o'clock with regard to the log, the part of which we have gotten.

THE COURT: All right.

MR. SELF: No objection to that, Your Honor.

THE COURT: All right.

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MR. SELF: Yes, Your Honor. Billy Lykins.

THE MARSHALL OF THE COURT: Raise your right hand and be sworn.

BILLY LYKINS, CALLED on behalf of the United States, being first duly sworn, was examined and testified as follows:

THE MARSHALL OF THE COURT: State your name and address to the Court Reporter.

A. Billy Lykins, Green Meadows, Route 3, Box 661, Pikeville, Kentucky.

DIRECT EXAMINATION

BY MR. SELF:

Q. Sir, would you state your full name for the ladies and gentlemen of the jury?

A. Bill Lykins.

Q. Mr. Lykins, where do you live?

A. Green Meadows, Route 3, Box 661, Pikeville, Kentucky.

Q. And Mr. Lykins, how old are you?

CERTIFIED COPY

A. Sixty-two.

Q. Mr. Lykins, how are you currently employed?

A. By Jaco, Coal-Mac, Incorporated.

Q. And your position?

A. Pardon?

Q. What is your position with them?

A. Director of Public Relations.

Q. And how long have you been employed by Jaco or Coal-Mac?

A. January the 17th, in the afternoon of January 17th, 1982.

Q. January 17th?

A. Yes, sir -- February, February 17th, in the afternoon, '82.

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Q. And do you know what day of the week that is?

A. That was on a Wednesday, the day I was employed.

Q. And by whom were you employed? Who hired you?

A. Frank Justice. Mr. Justice.

Q. And what position - - what position did you hold at that time?

A. Well, really there was not a title at the time attached when Frank hired me.

Q. And prior to that had you had any discussions with Frank Justice or any employees of Coal-Mac or Ray-Mac, Mack Mining?

A. No, sir, not until the 17th.

Q. At what time of the day was it, sir?

A. In the afternoon. I'd say 2:00, 2:30, maybe 3:00 o'clock.

Q. Where did you talk to Mr. Justice at?

A. At the office south of Pikeville.

Q. Mr. Lykins, prior to going

to work for Coal-Mac, how were you employed?

A. I'm in the coal business, leasing coal. I own my own Lykins Coal Company in Elliott County.

Q. Is that just by yourself?

A. Yes, sir.

Q. And how long have you been in the coal business?

A. I started shortly after December the 7th, 1982.

Q. What were you doing on December 6th, 1982?

A. I was a United States Marshall with the Justice Department.

Q. And what is the United States Marshall, Mr. Lykins?

A. Were you - - you mean the duties of the United States Marshall?

Q. Yes.

A. I was responsible for all operations within the Justice Department, which are Federal Courts, Criminal and Civil Summonses. And the only investigative work that we done was escapees from Federal Institutions.

Q. In what area - - physical

area of responsibility did you have, Mr. Lykins?

A. Eastern Kentucky, sixty-three counties.

Q. And how long were you a United States Marshall?

A. From July of '77 until December 7, 1982.

Q. 1982?

A. Yes, sir.

Q. 1981?

A. '82. I came on - - '81.

Q. Okay. You weren't working for Coal-Mac and the Justice Department at the same time, were you?

A. No, sir. Not in '81, no, sir.

Q. Mr. Lykins, before you were a United States Marshall, how were you employed?

A. I was a State Policeman for twenty-seven years.

Q. And where was your last post or duty?

A. Pikeville, Kentucky.

Q. And the rank that you held at Pikeville?

A. Captain.

Q. Is that why people call you Captain Lykins sometime?

A. Yes, sir. I imagine so.

Q. Mr. Lykins, what was the position that you were hired for on December the - - February 17, 1982?

A. Mr. Justice called me up to the office, and he told me they was having some problems on a Ray-Mac job, which I had never been there before. And he said that I had a - - I had had experience with this type of problems for years, and he would like, if I would, to accept the job and try to keep down any violence or anything that might occur up there that he didn't want to have. He didn't want nobody hurt, - - get hurt on either side is the way he said it.

*** *** ***

Q. And on Wednesday, February the 17th, did you go over to the Ray-Mac site?

A. Yes, sir. After we talked, I rode up there with John R. Phillips. That was the first time I ever been on the job, and I just looked it over and came back to the office and told them that I would take the job.

Q. What time did you go over there on Wednesday, Captain Lykins?

A. It was late in the afternoon. We got back to the office just before dark. I don't know what time it gets dark, but we got back just before it got dark.

Q. Did you have an occasion to go back to the Ray-Mac site?

A. Yes, sir, on Thursday morning, the 18th.

Q. On either the 17th or the 18th, Mr. Lykins, did you take any guns or ammunition over to the Ray-Mac site?

A. No, sir. I never did.

Q. Did you have any personal weapons that you took over there?

A. Yes, sir. I had one in my

vehicle.

Q. When was that, both days or on --

A. I carry one in my vehicle about all the time.

Q. What kind of weapon was that, Mr. Lykins?

A. I have a .22 Smith & Wesson target pistol.

Q. A target pistol?

A. Yes, sir.

Q. On Thursday, February the 18th, what time did you go over to the Ray-Mac site?

A. We arrived up there between 6:30 and seven o'clock in the morning. I was there at seven.

Q. And who was with you?

A. John R. Phillips.

Q. And who is John R. Phillips?

A. John R. Phillips is an employee -- an employee of Coal-Mac. And he was here when I came here to the company.

Q. Do you know what his

position with Coal-Mac is?

A. Yes, sir. John R. Phillips runs parts. And at that time, I believe, he was in the leasing -- maybe leasing some coal.

Q. And at the time you arrived at the entrance to the Ray-Mac job site, was there any activity going on there on the highway?

A. No, sir.

Q. Was there anybody there on the highway?

A. No, sir.

Q. What happened? Did you proceed on up to the job site up on the access road?

A. Yes, sir, we did.

Q. Tell the ladies and gentlemen of the jury what happened once you got to the job site.

A. When we arrived upon the job site, I imagine we had been there maybe ten or fifteen minutes; I don't know exactly. And everything was real quiet. The employees were there. The workers were there.

And when they fired up the equipment -- started up some of the equipment getting ready to go to work, the shooting started.

Q. What shooting are you talking about?

A. The shooting from across the highway -- directly across the highway as you travel up John Hall's Branch on the mountain, straight across, from at least two or three different locations.

Then they started shooting at us from the rear in a low gap behind us.

Q. You say they were shooting. What kind of shooting was going on, Mr. Lykins?

A. I'd say around seven, 7:15 it started. And it lasted for forty-five minutes.

Q. And how do you know it lasted that long?

A. I timed it.

Q. Why did you time it?

A. Well, being a State Policeman, I mean, it just come natural for me to do.

Q. And you said that it was fire coming from two or three locations; is that around you or --

A. (Interrupting) Yes, sir, around -- across the highway directly. We were on this switchback, which was just above the highway.

And directly across the highway they started -- the firing started from there first, high on the ridge.

And then they -- it sounded like they started firing lower down. Then after that went on for several minutes, they started firing from behind us.

Q. Okay. Now, the firing that was coming to you from across the John Hall Branch, approximately -- or do you know -- or do you have any estimation of the number of shots that were fired from that direction?

A. No, sir. From the sound and report of the guns, they were larger caliber guns on top of the hill, which sounded like 30.06's.

Q. All right.

A. And lower on down it sounded like -- being in the military and being -- well, I fired a lot of guns. It sounded like a .30 caliber carbine is what it sounded like to me.

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Q. The shots that you heard, Mr. Lykins, could you virtually - - where were you at - - physically, where were you at when the shooting was going on?

A. I was standing behind the bucket on a 992 loader, between the tires and the bucket.

Q. And any of the bullets that were fired hit close to where you were at?

A. Oh, yes, sir. They was hitting all around. Some hit the bucket in front of us. You could hear them hit - - see them hitting in the mud around us, and cutting the twigs out of the trees in front of us and behind us.

Q. Was the shooting that was coming to you from behind you immediately behind you, or were you up against the highway?

A. Well, the shooting behind - - there is a point that comes out there. The first few shots that was fired from behind, there's some twigs that fell out of the trees, and someone - - I don't know who - - made the remark, "They are shooting from behind us."

Then there was several shots fired that went on for some time, and those

bullets, they were bypassing and wasn't hitting the trees in that area where we were standing.

Q. Based on your experience, could you tell the caliber of any of the weapons that were being fired from behind you?

A. I would say it's a 30-30.

Q. Why would you say it is a 30-30, any unique - -

A. From the report of the gun. A 30-30 sounds different than a 30.06. A 30.06 will sound different to a .30 caliber carbine.

Q. Was there any, apparently, fully automatic weapons that were firing at you?

A. No, sir. No, sir.

Q. Tell the ladies and gentlemen of the Jury - - or excuse me. Strike that.

Was this a constant firing for a period of forty-five minutes, Mr. Lykins?

A. Well, they would fire, and there might be two or three moments would pass, then it would start again.

Q. Was there anything said between the people that were at the Ray-Mac site and the people in the hills while this firing was going on?

A. Yes, sir. Someone hollered from across the highway.

Q. Were they close enough that you could hear what they were hollering?

A. "Have you got enough?"

Q. Who - -

A. (Interrupting) "Have you had enough?"

Q. Did the people from Ray-Mac holler back at them?

A. No, sir.

Q. Is that all that was hollered from the people in the hills?

A. Well, there was one hollered right towards the end of the shooting, said, "You SOB, you have hit me."

Q. The people that were there at the Ray-Mac site, Captain Lykins, were they altogether in one location, or were they spread out?

A. They were scattered all around the hill there in that location. The auger was just around the hill, around the bend, a couple bends from us.

Q. Okay. Were the people at the Ray-Mac site firing back?

A. Yes, sir.

Q. And what type of weapons were there at the Ray-Mac site on Thursday morning that you saw, that you were aware of that were firing back?

A. I saw some AR15's, 223 caliber, and also Uzis, nine millimeter.

Q. How many AR15's were you aware that you either saw or were aware were there on Thursday?

A. Really, I don't know. There was two or three there.

Q. And how many Uzis?

A. I'd say five or six. I mean, there could have been some there that I didn't see.

Q. Do you know how it is that the AR15's or the Uzis got to the Ray-Mac site?

A. No, sir. I have no idea.

Q. Were any of these AR15's or Uzis or any other weapons that were fired from the Ray-Mac site that you either saw or were aware of, fully automatic weapons?

A. No, sir, none at all.

Q. Okay. Now, Mr. Lykins,

the firing started - - who shot first?

A. Well, when we started the equipment up, the shooting started up directly across the highway from us.

Q. And did any of the Ray-Mac personnel fire before the shooting started from the hills?

A. No, sir.

Q. And the Ray-Mac personnel, at the time they were firing, were they on the mining site that Ray-Mac was engaged in mining at the time?

A. We were.

Q. And while you - - while the shooting was going on, Mr. Lykins, were there any personnel from the Kentucky State Police there on the mining site?

A. No, sir, not one up on the site; no, sir.

Q. Were there any in the area that you observed?

A. Yes, sir. When we went up that morning, there was a cruiser parked just down below the entrance to where we turned up on the job site.

Q. And when the shooting was going on, did you observe whether that cruiser was still there or not?

A. No, sir. It was so foggy, you couldn't see across the highway. You couldn't - -

Q. Could you see, Captain Lykins, the area and the trees where the shooting was coming from on either direction?

A. No, sir. It was so foggy, you couldn't see.

Q. But the bullets were hitting where you were at?

A. Oh, yes. Yes, sir.

Q. After the shooting stopped, Mr. Lykins, what happened?

A. Well, for some time after the shooting stopped, they started the auger up. The auger - - I'm pretty sure that the auger maybe augered some coal that day after later.

Q. Was there any additional State Police personnel that came in that day?

A. Yes, sir. Later on I came off the mountain, and there was several cruisers up and down the road and in the area.

Q. And was the SRT team called

in on Thursday?

A. Pardon.

Q. Was the Special Response Team, the SRT team, was it called in on Thursday?

A. Yes, sir. Later on after the shooting, they were in the area, yes, sir.

Q. And did you go into the area with the SRT team?

A. Yes, sir, I did.

Q. Would you tell the ladies and gentlemen of the Jury what happened?

A. Later on that afternoon, I was down on Mud Creek next to the John M. Stumbo School. And I don't know, but they got word from somewhere that a vehicle had been spotted which was directly across just below our job, over in another hollow - - a vehicle had been spotted driving up this hollow.

And the Response Team was there. We got in the helicopter with Jake Jacobsen, which is the pilot, and we flew across over there and located the pickup truck.

Q. Where did you first sight the pickup truck?

A. It had come up a little

mud at the end of the drive as far as you could drive up the road, and there was a gate across which was locked, and the vehicle was sitting there at the gate.

Q. And when you spotted the truck, what, if anything, did you do?

A. The Response Team got out and started walking up the hollow. And I was walking along with them, and we walked up the hollow, and then turned and started back.

The hollow forked. And just across the main hollow, just across to the left, there was a small building there - - I didn't go over to it - - which I thought what it was, a meter house - - a small meter house you see on these gas lines.

And there was two fellows - - two men came walking from over in that area, which they talked to one of the troopers.

Q. Did those men have anything in their hands, Captain Lykins?

A. No, sir.

Q. Did they have any weapons?

A. No, sir.

Q. Did you notice any weapons in the truck?

A. No, sir, there wasn't.

Q. And did you talk to those two men?

A. I didn't. The State Police did.

*** *** ***

Q. Mr. Lykins, I would ask you, if you would, do you know -- did you, at the time, know either of those two gentlemen?

A. No, sir, I didn't.

Q. Now, I would ask you, if you would, Captain Lykins, to take a look around the courtroom and see if you see either of those gentlemen in this courtroom at this time?

MR. SELF: Could I ask the back row of the Defendants to please stand, Your Honor?

THE COURT: Would the back row please stand?

(Said Defendants Comply)

A. No. I don't recognize anybody.

MR. SELF: Would the front row please stand?

(Said Defendants Comply)

A. No, sir, I don't.

Q. Did you hear either of the gentlemen identify themselves, Captain Lykins?

A. Yes, sir, they did.

Q. Who did they identify themselves as?

A. Jason Moore. And the other

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fellow, Parsons, an older fellow, which he said he lived just down below where they were at.

Q. Did you hear Mr. Moore make any statements to the State Police at that time?

A. Yes, sir, I did.

Q. What did Mr. Moore say?

A. He said he's up there looking for his dog -- dog or dogs.

Q. And after the statement was made, what, if anything, occurred to Mr. Moore?

A. Nothing. The State Police talked to him, and we left there in the helicopter.

Q. Mr. Lykins, did you call the State Police, the SRT team or the State Police to come in to the Ray-Mac site on Thursday?

A. No, sir, I didn't.

Q. Did you have any communications between the job site and the office or between the job site and the State Police Post in regards to having them come in there?

A. No, sir, I didn't.

Q. Were you in any way responsible for the State Police being there on

Thursday?

A. No, sir. I didn't call no one.

Q. After the helicopter set down there, and you discovered Mr. Moore, what, if anything else, occurred on Thursday, Mr. Lykins?

A. Would you repeat that question?

Q. Did anything else of significance occur on Thursday?

A. After we -- the helicopter set down there?

Q. Yes, sir.

A. No, sir.

Q. Did you remain there at the job site Thursday night?

A. I don't believe I went back to the job site at all that night. I went back over to the John M. Stumbo School and got out of the helicopter. And I believe later on we were around in the area. I can't recall whether I drove back up there or not.

Q. What were you doing around the area?

A. Looking around to see what

we could see.

Q. Were you looking for anything in particular?

A. Yes, sir. We was looking for someone coming out of the hills, to see what we could see or who we could see or --

Q. Did you find anyone?

A. No, sir.

Q. Friday, the next day, Mr. Lykins, did you again go over to the Ray-Mac job site?

A. Yes, sir, I did.

Q. Who were you with?

A. John R. Phillips.

Q. And what, if anything, did you and Mr. Phillips do?

A. Let's see. There was John R. Phillips, Richie Phillips and Ross Anderson.

Q. Who is Richie Phillips?

A. That's John R.'s son. He is an employee with -- at that time with Mack Mining.

Q. And who is Ross Anderson?

A. Ross Anderson is an employee of Mack Mining.

Q. And what, if anything, did you all do?

A. We drove around the area. We was on the job site, and we came down and just drove around.

Everybody was jumping. They was afraid that someone would come in at the back, and we just would drive around the area.

We drove down the John Hall Branch and crossed the mountain down - - which is the Bill Hall Branch down toward McDowell. And we went down to Frasure's Creek and turned left. Took Frasure's Creek, which is approximately a mile and a half, two miles before you turned, and we made a left and went up Hood's Fork. And we traveled up Hood's Fork, and the creek forks up there, and we made a left, which brought us back in behind our job site.

And we drove up in the area there.

MR. SELF: Mr. Marshall, if you would, I would ask that you pass to the witness what has been previously introduced into evidence as Government's Exhibit No. 7.

It is one of the aerial

PLEASE REVIEW FOR CONTENT

photographs, Madam Clerk.

(The Marshall complies)

Q. Mr. Lykins, would you take a moment and examine that photograph?

(The Witness complies)

A. Yes, sir.

Q. Do you recognize the area depicted in it?

A. Part of it I do, yes, sir.

Q. And is there a labeling that is indicated on that other than the exhibit number?

A. Would you repeat that question.

Q. Is there any identifying data that appears on there other than the exhibit sticker?

A. Yes, sir. Here is Hood's Fork.

And also up here on the point, which is back, there is the Ray-Mac site there, from the first switchback where you pull out on the point where we went around the mountain.

Q. Does that photograph depict the area that you drove up into on Friday morning - - one of the areas you drove into?

A. Yes, it is. Yes, sir.

Q. And - -

A. (Interrupting) We drove up the main creek here, and the house - -

Q. (Interrupting) Show the ladies and gentlemen of the Jury.

MR. SELF: Mr. Marshall, would you just place that - - Your Honor, can you place that on the easel?

THE COURT: Give the Marshall a moment.

(The Marshall complies)

MR. SELF: Mr. Marshall, I think you can use the larger clips that are already on top of it.

THE MARSHALL OF THE COURT: Okay.

MR. SELF: Mr. Marshall, back up just a little bit so all the alternate Jurors can also see it.

(The Marshall complies)

Q. Mr. Lykins, would you show us where you proceeded to up Hood's Fork?

A. Yes, sir. We were up here at Sam Bentley's house right here, and it forks here. (Indicating). We turned left and came up the hollow to where you go up the mountain, which would

be directly behind the job site, which would be this area here. (Indicating).

*** *** ***

Q. The area that you're pointing at now appears to be an area where mining has occurred, Mr. Lykins. Do you recognize that specific area as it is depicted in that photograph?

A. Did you say it was a curve?

Q. Apparently somebody has been stip mining up there.

A. Oh, yes, sir.

Q. Do you recognize that area?

A. Yes, sir. This is back around to the left. We were back around to the right. The first switchback would be right here (indicating), this area right here (indicating).

Q. The area that appears on there is a mining area though. Is that an area as it exists now on the Ray-Mac job site?

A. Yes, sir, it appears to be.

Q. Had that area been mined in February of 1982, if you know?

A. I don't know when they mined it. It had been mined when I came with the company. Really, I don't know.

Q. What-- What, if anything, did you discover in the area of the left fork and Hood's Fork, Mr. Lykins?

A. We went up to this house here (indicating) and we made a left and we drove up there. It looked like several vehicles had been up there and turned.

And we walked up some fifty or seventy-five feet. There was tracks in the mud that was leading up towards to the mountain.

We turned and came back where we parked, where these other vehicles had been parked. I looked over in the creek and there was a-- a box of 30-30 ammunition. A Remington box was lying in the creek--branch.

Q. Mr. Lykins, did it appear based upon your observation that that box had been there laying in the creek very long?

A. Well, it was wet. It didn't appear to be there too long. I mean it-- The writing on it, the numbers on it or the lettering on it hadn't faded out from the water.

Q. Where was it that you all found the trucks, Mr. Lykins, and the--in the area on that map? Would you place an X where you found the trucks and the footprints. Can you see the approximate area on that map?

Would you mark an X there.

A. It would be up in this area here (indicating) in this general area.

(Reporter's Note: At this time the witness marked upon the photograh.)

Q. Okay. Would you put your initials B. L. under that X.

A. Yes, sir.

(Reporter's Note: At this time the witness marked upon the photograph.)

MR. SELF: Let the record reflect that he's placed an X on Government's Exhibit No. 7 with a yellow grease pencil; placed his initials B. L. on it.

Q. Did the tire tracks and footprints appear also to be fresh?

A. Oh, yes, sir.

Q. Could you tell--

A. Like a day or so. I mean they-- It was wet and muddy from the water running down the tracks, but there was still fresh tracks.

Q. Where did those tracks appear to be leading to or going from?

A. Would you repeat that.

Q. Could you tell from the tracks where they--which way they were heading? Were

they going up the top of the mountain between the right and left fork and Hood's Fork or going some other direction?

A. They went up the forks here (indicating) and turned left, which is deadend, and went left. There's a small bottom up there-- level spot. They turned around and came back back out.

Q. Were there very many foot-prints there? Could you tell?

A. Well, there was several tracks there. I mean ...

Q. Could you tell what direction those tracks were going in?

A. Oh, on up the hollow towards the top of the hill.

Q. Would you place an arrow from where you found them and the direction they were going in.

A. This area here (indicating).

(Reporter's Note: At this time the witness marked upon the photograph.)

Q. What did you place on the drawing, Mr. Lykins? I can't see it from here.

A. It's-- They come up this

hollow here (indicating). There's a little gap there.

THE COURT: Mr. U.S. Attorney, when someone makes his mark let them initial that.

Q. Would you draw a line, Captain Lykins, from the point you spotted the--the vehicle tracks and tracks, pointing the direction of that spot--the direction the tracks appear to be going.

A. Up the hollow.

Q. Would you draw an arrow where the X is. I assume that's where you found the tracks. Would you place your initials by that yellow mark.

(Reporter's Note: At this time the witness marked upon the document.)

Q. Would you then also circle, Mr. Lykins, with the yellow pencil the area you say the low gap is depicted on there that you're talking about.

A. Yes, sir.

(Reporter's Note: At this time the witness marked upon the document.)

Q. Is that the same low gap that you were talking about the firing had come from the morning before?

A. From behind us, yes, sir.

Q. Can you see that on that photograph?

A. I believe it would be in this area here (indicating). I'm not sure, but I think so.

(Reporter's Note: At this time the witness marked upon the photograph.)

Q. Have you placed a mark on there?

A. Yes, sir.

Q. Place the letter Y, if you would, Mr. Lykins, and also put your initials by it, please.

(Reporter's Note: At this time the witness marked upon the photograph.)

Q. Now, did you walk on up the hollow to the Ray-Mac site from there?

A. Up that hollow to the Ray-Mac site?

Q. Yes.

A. No, sir, I didn't.

Q. Does that hollow lead up to the area overlooking the Ray-Mac site?

A. Yes.

Q. From behind?

A. Yes, sir, it does.

MR. SELF: Thank you. Mr. Lykins, you may resume your seat.

(Reporter's Note: The witness complied.)

Q. Did you find anything else while you were up in the hollow on Friday?

A. No, sir, not to my knowledge.

Q. Did anything else occur on Friday that you are aware of?

A. No, sir.

Q. Saturday?

A. No, sir.

Q. Did you go to the Ray-Mac site on Sunday?

A. Yes, sir. Earlier Sunday morning I was up there, early in the morning; I'd say around ten or eleven o'clock.

Q. All right. When you-- How did you go over there?

A. I drove up there.

Q. Anybody go with you?

A. No. I was by myself.

Q. And when you got to the

Ray-Mac site, what, if anything, did you find?

A. Well, there were several up there on the hill. I mean they had spent the night up there or was there when I arrived up there. It was my understanding that they had spent the night.

MR. SPENCER: Show my objection, Your Honor, to what he understood.

THE COURT: Well, overruled.

Q. Who all-- How many men were up there, Mr. Lykins? Do you remember?

A. Eugene Maynard was there and there was a night watchman up there by the name of Bentley.

Q. Is that Lawrence Bentley?

A. Lawrence Bentley, yes, sir.

Q. Was there anyone else that you recall?

A. There was three or four others around there. I don't remember who they were.

Q. And while you were there did you go around and check the equipment?

A. Yes, sir. I was around the auger.

MR. SELF: Mr. Marshal, if you would, I'd ask you to hand the witness what's previously

been introduced into evidence--just a moment--
Government's Exhibit No. 9.

(Reporter's Note: At this time the Marshal handed the witness an exhibit.)

Q. Mr. Lykins, do you recognize the area depicted in that photograph?

MR. SELF: May the witness examine the photograph up close, Your Honor?

THE COURT: Yes, sir.

MR. SELF: Thank you.

(Reporter's Note: At this time the witness left the stand and approached the easel.)

THE COURT: While he's examining that let me talk to the jury.

How long have we been in this case?

JUROR: A long time.

THE COURT: We've been here what, five weeks, four or five weeks, something like that. Now, I think the jury is getting very familiar with what is hearsay. Am I in error?

Where a witness believes or he understands or-- We're getting it from both sides now. They'll say have you since learned or--or do you know; but you're getting to the point now that

you know this case isn't tried on hearsay. This is tried on evidence.

There's no way we're going to keep out all hearsay. Now, of course, where a witness says he understands or he believes and something is obviously hearsay, you don't consider that. Do you understand that?

We're trying this case on what the witness knows, what the witness sees and what the witness tells you.

Is there any objection or correction to the Court's admonition, gentlemen?

MR. SELF: None, Your Honor.

THE COURT: Fine. Proceed.

Q. Mr. Lykins, do you recognize the area depicted in that photograph?

A. Yes, sir, I do.

Q. And is that the top of John Hall and Bill Hall Branch?

A. Yes, sir. This is the John Hall Branch here (indicating) coming up from the Big Mud Creek side, which is 979.

Q. And is the area right in the center of that photograph where the Ray-Mac mining was going on at the--as of February--

A. Yes, sir.

Q. February of 1982?

A. Yes, sir, it was.

Q. When you went up there on Sunday-- Can you place an X on that exhibit with your initials at approximately where the coal auger was located.

Do you know? Can you even see on there?

A. Really I can't--with this map here I can't tell.

Q. Was it in that area somewhere, Mr. Lykins?

A. Yes, sir. From the switchback here where we turned back here, you know, it was on around--oh, some seven or eight hundred feet.

Q. Where is this switchback you're talking about, Mr. Lykins?

A. As you go up the John Hall Branch--when you get to the top of the mountain you make a left. It leads you back upon the job. Then after you turn off the main highway you come up here (indicating). Then you make a sharp left, which is the first switchback; back to this point here (indicating).

Q. Where's the road leading from the main highway up to the Ray-Mac site depicted on that photograph, Mr. Lykins?

A. It's in this area here (indicating).

Q. The white area appearing--

A. Yes, sir.

Q. --to the left?

A. Up the mountain, yes.

Q. Now, the area that you were depicting coming off-- There appears to be a road coming off the job site down to the road. Do you know what that is? On the point there.

A. This here (indicating)?

Q. On up a little higher. The area devoid of trees that goes from the job site down to the road at that point. Do you-- Do you recognize what that is?

A. Yes, sir, that's the road that leads off the job down to the main highway.

Q. Would you point that out to the ladies and gentlemen of the jury.

A. Right here (indicating).

Q. Is that the road going down to the main highway?

A. Yes, sir.

Q. What's the other road coming up through there, Mr. Lykins? What's that that you have your pencil at right now?

A. This road here (indicating)?

Q. That's previously identified as the intersection of John Hall Branch and the access road. Would you show the ladies and gentlemen of the jury where you believe the access road is that leads from 979 or 680 up to the Ray-Mac site.

A. This right here is the main creek (indicating).

Q. Yes. Is Mud Creek identified on there as to where it's at?

A. Yes, sir, in this area right here (indicating).

Q. Which direction is Mud Creek in, Mr. Lykins?

A. From the job?

Q. On that photograph. Can you tell?

A. Mud Creek will be back down the creek here (indicating) and across from McDowell.

MR. SELF: That's all, Mr. Lykins. Would you have your seat, please.

(Reporter's Note: The witness complied.)

Q. Mr. Lykins, when you were up there on Thursday was it--as a result of the shooting that occurred was any of the equipment damaged?

A. Yes, sir. Some of the equipment was hit.

Q. And what, if anything, damage occurred to it?

A. The 992 was hit at least once, that I know of. The grader--it was hit three times. We had a--a mechanic's truck, which was hit--was hit at least once. And we had a Chevrolet vehicle there that the workers rode back and forth in. It was hit in the seat on the driver's side.

MR. SELF: Madam Clerk, I would ask you, if you would, please, to hand to the witness what's previously been marked for identification only as Government's Exhibits 34, 34A, 35 and 35A.

(Reporter's Note: At this time the Clerk handed the Marshal a group of exhibits.)

THE MARSHAL OF THE COURT: Your Honor, opposing counsel have viewed the exhibits.

THE COURT: Thank you, sir. Please hand them to the witness.

(Reporter's Note: At this time the Marshal handed the witness a group of documents.)

Q. Mr. Lykins, if you would, seated there--

MR. SPENCER: Your Honor, may we approach the Bench?

THE COURT: Yes, sir.

(Reporter's Note: At this time counsel for the United States, Mr. Harwell, Mr. Pafunda, Mr. Moore, Mr. Spencer, Mr. Walbourn and Mr. Adams approached the Bench; whereupon the following was heard:)

MR. SPENCER: Your Honor, I object to him showing the exhibits to the witness, especially the notation to the witness. The exhibits is okay, but these notations--first thing he picks up was a notation. Now, unless he made the notation--that's letting hearsay in on top of hearsay.

If this man made the notation the notation is memory. That's okay. If he's going to read someone else's notation and testify from it; I object.

THE COURT: You can cross-examine him.

MR. SELF: Thank you, Your Honor.

(Reporter's Note: End of conference at the Bench.)

THE COURT: Please proceed, sir.

MR. SELF: Thank you, Your Honor.

Q. Mr. Lykins, while seated

there at the witness stand would you just examine what's been marked for identification as Government's Exhibit 34 and 34A, without stating the contents of them. Just examine them.

Do you have 34 and 34A in front of you?

A. I have 34 and 35.

MR. SELF: Mr. Marshal, would you help him, please.

THE MARSHAL OF THE COURT: He has 34A, 35A and 35.

MR. SELF: Would you hand him Government's Exhibit 34.

THE MARSHAL OF THE COURT: 34A or 34?

THE COURT: 34. Leave those there and also get 34.

THE MARSHAL OF THE COURT: Here's 34 (indicating).

Q. Putting the other exhibits aside for a moment, Mr. Lykins, would you examine, without stating what's on it, Government's Exhibit -- what's been marked for identification purposes as Government's Exhibits 34 and 34A.

A. Yes, sir, I have.

Q. Without stating what they

are, have you seen either of those exhibits before?

A. Yes, sir. It-- It appears to be the same.

Q. The document that-- The exhibit that's marked as 34, where did you first see it?

A. This appears to be a projectile or fragments of a projectile which was given to me by Woody Barker. I gave it to Bob Forsythe--Sgt. Forsythe.

Q. Who is Woody Barker?

A. Woody Barker is--he's field superintendent for the company. Thurman Barker, we call him Woody.

Q. Did you see where Mr. Barker obtained that specific projectile?

A. Well, we were around in the area there when he picked it up. It had hit the end of the--the end of the 992 loader, see, which is curved. It ricocheted around and was lying on the ground near the end of the bucket.

Q. When was this found?

A. On Thursday, February 18.

Q. Do you know where the projectile came from, Mr. Lykins?

A. It came across the highway.

MR. SELF: Your Honor, we at this time we'd move for the introduction of what's previously been marked for identification as Government's Exhibit 34.

THE COURT: Let's see if they have any voir dire questions. Any of you have any voir dire questions you want to ask him?

(No response.)

THE COURT: All right. Any objections?

MR. KIRKLAND: Yes, Your Honor. I think his testimony-- He said it just appears to be. That's not a sufficient basis to introduce it. He's honestly said it--it just looks like it or appears to be.

MR. SELF: May I ask a few additional questions?

THE COURT: Yes, sir, ask additional questions.

Q. Did you in any way mark the fragment that was handed to you by Mr. Willie Barker?

A. No, sir, I didn't.

Q. And did you make any notations on it--on it or anything associated with it when

you gave it to Det. Forsythe?

A. No, sir.

Q. Just handed it--

A. I gave it to Forsythe, yes.

Q. Did you hand him more than one?

A. Yes, sir, I did. I don't remember whether it was the same date or not but-- but I gave Forsythe some others.

Q. And does that appear to be the same or a similar type of bullet fragment as you recovered on February 18?

A. Are you speaking of 34?

Q. Yes.

A. Yes, sir, it does.

Q. Can you say that that is the exact one that you gave to Det. Forsythe?

A. No, sir, I can't.

MR. SELF: Again, I'll renew my motion, Your Honor.

THE COURT: Sustain the objection at this point.

Q. Would you, Mr. Lykins, examine what's now in front of you and marked for

identification as Government's Exhibit 35 and 35A.

A. Yes, sir.

Q. Without stating the contents of either, have you ever seen either of those two items before, either 34--either No. 35 or 35A?

A. Let me ask one question.

Q. Let me ask them. Do you recognize any of the notations on either--on 35? Do you recognize any of the notations on 35A or any of the writing on 35A?

A. Yes, sir, I do.

Q. Do you recognize any of your writing?

A. Yes, sir.

Q. Is that something you wrote yourself?

A. Yes, sir. The name here of RAnsom Prater, Wednesday, the 24th and '82 is definitely my writing.

Q. Do you know when you made that writing?

A. Yes, sir. This would be on the 24th.

Q. Do you know who Ransom Prater is?

A. I know the name. He's employed by Ray-Mac.

Q. And on the 24th-- Is that the 24th of February, 1982?

A. Yes, sir.

Q. Did Mr. Prater give you something?

A. No, sir. Pete Barker gave it to me.

****

Q. And what did Mr. Barker give you?

A. He gave me some fragments of lead, fragments of a projectile.

Q. Did you observe where Mr. Barker obtained those fragments?

A. No, sir.

Q. And what, if anything, did you do with them?

A. I gave them to McCallister.

Q. And does the exhibit that appears as Government's Exhibit marked for identification as 35 appear to be the same type of fragment that you obtained from Mr. Barker and gave to Mr. McCallister?

A. May I open it and look at it?

Q. Yes, sir.

A. Yes, sir, it does.

Q. Mr. Lykins, taking you back again to Sunday the week following the shooting, when you went up to the job site on Sunday, was the auger there?

A. Yes, sir.

Q. How long did you stay

there?

A. I was up there just a short while when I went up there that morning.

Q. Did there appear to be anything --

A. (Interrupting) I imagine I was there fifteen to twenty minutes, maybe thirty.

Q. Did there appear to be anything wrong with the auger at that time?

A. No, sir.

Q. It had not been damaged in any respect that you could observe just by looking at it?

A. No, sir.

Q. It had not been blown up, had it?

A. No, sir.

Q. Did you go back to the job site on Sunday?

A. Yes, sir, later on that afternoon, I did.

Q. And approximately what time did you get there?

A. I would say I arrived there around -- not exactly. I would say around

three, 3:15, maybe 3:30, maybe later, a little later than that.

Q. And when you got there, what did you observe?

A. Well, the auger, the back end of it had been blowed up. It was completely cut in two. I mean the fuel tank, the back of your carriage, the radiator blowed off the engine. The lights blew off the auger.

Q. Was that the way it looked when you last saw it Sunday morning?

A. No, sir.

Q. Any other equipment there near the auger?

A. Yes, sir. There was a dozer parked near the auger and a drill.

Q. Any damage to those?

A. No, sir, not that I could see.

MR. SELF: Madam Clerk, would you show the witness what previously has been introduced as Government's Exhibit No. 33.

THE MARSHALL OF THE COURT: Opposing counsel has seen the exhibit.

Q. Mr. Lykins, if you would,

would you examine the photographs depicted on Government's Exhibit No. 33?

A. Yes, sir.

Q. Have you ever seen the auger depicted in those photographs before?

A. Yes, sir, I have.

Q. When did you see it in the condition that is depicted in those photographs?

A. Would you rephrase it?

Q. When did you first see what is shown in those photographs the way it is in those photographs?

A. Oh, on Sunday afternoon, Sunday, the 21st.

Q. What are those photographs of?

A. It is a picture of the auger.

Q. The way you saw it Sunday morning or the way you saw it Sunday afternoon?

A. No, sir, no, sir.

Q. Which one?

A. In the afternoon, later on when I went down there. Not that morning.

Q. And are those the way the auger appeared after it had been blown up?

A. Yes, sir.

Q. Mr. Lykins, are you aware how long it took to repair that auger?

A. No. It was down for several months. I can't recall just how long.

MR. SELF: Just a moment, please, Your Honor.

No further questions of the witness at this time, Your Honor.

THE COURT: All right. We are going to be in recess for ten minutes. During this recess, the not now admonition is in effect.

Is there any objections or corrections to the form of the admonition?

MR. SELF: None, Your Honor.

THE COURT: All right. Mr. Marshall, please excuse the jury.

THE MARSHALL OF THE COURT: The jury is out of the courtroom.

THE COURT: All right, please excuse the witness for ten minutes.

MR. SELF: Your Honor, we state to the Defendants we don't -- are not aware of any Jencks

Act material that we have.

THE COURT: All right. We will be in recess for ten minutes.

THE MARSHALL OF THE COURT: All rise. This Honorable Court will be in recess for ten minutes.

(Reporter's Note: Whereupon the Court was recessed at 10:55 A.M.)

Reporter's Note: Court was resumed at 11:08 A.M.)

THE MARSHALL OF THE COURT: All rise. The United States District Court is now in session. Be seated and come to order.

Your Honor, all Defendants, counsel, members of the jury are present in the courtroom.

THE COURT: Madam Clerk?

THE CLERK OF THE COURT: The record may so reflect, Your Honor.

THE COURT: All right. Call the witness back to the stand, please.

You may proceed, sir.

MR. SELF: I finished direct examination, Your Honor.

THE COURT: All right. Who is -- Mr. Kirkland?

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

THE COURT: Proceed.

CROSS EXAMINATION

BY MR. KIRKLAND:

Q. Captain Lykins, as you know, my name is Bill Kirkland.

A. Yes, sir.

Q. You and I have known each other for what, fifteen years or something like that?

A. Not over fifteen. We are not that old.

Q. Well, let's see.

A. I would say yes, sir.

Q. I came here as a green prosecutor in 1970, and you were the Post Commander at Pikeville Post at that time. Is that right?

A. Yes, sir.

Q. How long had you been the Post Commander here at Pikeville?

A. Well, I came here in

1956. I was Post Commander along about '70. I was Troop Commander of Pikeville, Hazard, Harlan, Morehead, and Ashland. And later on they made more Captains. Made a Captain of Post Commander. I was Troop Commander to start with.

Q. So you were -- a Troop Commander commanded more posts than one initially. Is that right?

A. Yes, sir, before '70.

Q. And you commanded at one time the Harlan Post as well as the Pikeville Post here?

A. Yes, sir, I did.

Q. Were you the Post Commander at Harlan for a while?

A. Yes, sir, I went there as Post Commander March 17, 1956.

Q. And was that the same time that Honorable Unthank, Judge Unthank was Commonwealth's Attorney there in Harlan County?

THE COURT: No, sir. County Judge.

Q. County Judge.

A. He was Judge, yes, sir.

Q. He was later Commonwealth's Attorney there. Is that right?

A. Yes, sir.

Q. Okay. In fact, was Assistant U. S. Attorney for a while. Were you a policeman when Judge Unthank was a Federal Prosecutor?

A. I don't remember that. Now, I wasn't in Court when he was prosecutor, no, sir.

Q. Okay. Is it safe to say that you have had a long and cordial relationship with the Kentucky State Police?

A. Yes, sir, I did.

Q. And further, in addition to that, is it safe to say that you have had a long and cordial relationship with most of the federal agencies that operated in Eastern Kentucky, the investigative agencies?

A. Yes, sir, I have been around with them, yes, sir, quite a bit.

Q. And that you have appeared and that your men have appeared in this very courtroom probably hundreds of times. Is that right? As witnesses for the Government?

A. Yes, sir, many, many times.

Q. Is it also safe to say that you have never really been on the side of defending people who are accused of crime?

A. Yes, sir, I have been used on both sides.

Q. But generally speaking, throughout your career, you have been a law enforcement officer or a security officer. Is that right?

A. Security officer?

Q. Yes, sir.

A. No, sir, I have never been security. I am in charge at this time of all of the security with the coal company along with many other duties.

Q. Okay. Now, as public relations director, I assume you speak to school children. Is that right?

A. No, sir, I don't.

Q. All right. Do you speak to civic groups?

A. No, sir.

Q. Do you speak publicly to church groups about Ray-Mac and what a good job it is doing?

A. No, sir, I don't.

Q. So you don't have the normal public relation duties, do you?

A. Yes, sir, I do, with different utility companies. May I tell you what I do for the company?

Q. Well, let me ask you about the security duties. Now, what -- you say you cover the security duties as well as your public relations efforts. Is that right?

A. Yes, sir, I am in charge of all security which is contracted out to a security agent.

Q. How long has the security been contracted out?

A. Approximately a year or a little longer.

Q. So back in February of 1982, it was not contracted out; it was handled by the company itself. Is that right?

A. By the jobs, the foremen of the jobs, by the foremans.

Q. And you had various night watchmen and security men on each of the Ray-Mac jobs. Is that right? In early 1982.

A. Yes, sir, the job foremans did.

Q. Was it a part of your duty when you first were hired to see that those company guards were properly armed and trained in the use of those arms?

A. No, sir.

Q. Was there any training ever given to those company armed guards?

A. Not by myself.

Q. Do you know whether any of them were trained by anybody else or whether they received any proper training in the use of those weapons?

A. No, sir, I don't.

Q. Now, do you remember the weather conditions of the week of February 15, 1982, the week that you were hired on to do public relations for Ray-Mac?

A. Rememeber the weather?

Q. Yes, sir.

A. Yes, sir. It was raining -- rain. We had snow, and it was cold.

Q. And was it foggy during most of the week?

A. I don't remember the full week, no, sir, I don't.

Q. On Thursday when you went up to the job, was it foggy when you got there at seven or 7:15 in the morning?

A. Yes, sir, it was.

Q. How far could you see?

A. A short distance. You couldn't -- I would say across the highway from where we were at, straight across by air. Not down the mountain and up, but looking across, I would say you couldn't see over a hundred and fifty feet. Two hundred feet would be stretching it if you could see that far. You couldn't even see the tops of the trees.

Q. And that was the same foggy condition that existed throughout this forty-five minute period that shells were fired on both sides?

A. Yes, sir, until later that afternoon around two or -- around two o'clock the fog lifted.

Q. Have you been allowed to purchased a part of the company so you are now a part owner?

A. No, sir, I am not. Just an employee.

Q. Have you ever been a part owner in the company?

A. No, sir.

Q. In none of these companies?

A. Not of Coal-Mac, no, sir.

Q. Well, what about Jaco?

A. No, sir.

Q. Which one have you bought into?

A. I haven't. I am just employed by the company.

Q. Well, any of this group of companies - do you own an interest in them?

A. No, sir, I don't.

Q. Okay. And I believe you stated that nobody was struck by any of these bullets, and nobody was hurt. Is that right?

A. No, sir.

Q. Now, you further said that you were over on Little Mud Creek. Now, that is a total different watershed from either Bill Hall Branch or John Hall Branch, isn't it?

A. Yes, sir, from the dividing line to the top of the mountain. It would divide the flow both ways, yes, sir.

Q. How far would the dividing line between Little Mud Creek and where you were located on the Ray-Mac job be? How far away would that be?

A. If you would drive, it would be I would say fourteen or fifteen miles if you would drive. But by air it would be closer.

Q. All right. How far would it be by air?

A. Air mileage?

Q. Yes, sir.

A. Two, two and a half miles.

Q. All right.

A. Maybe less, or maybe a little more.

Q. Could it be something in the range of three-quarters of a mile to a mile?

A. I don't believe it would be that close, no, sir, I don't.

Q. Okay. Now, I realize it was foggy and you couldn't see but a couple of hundred feet. But in your judgement, could some of

those shots have been fired from the dividing ridge between Little Mud and the John Hall Branch?

A. No, sir, Little Mud is too -- well, the ridge leads down that direction. No, sir. Up from Little Mud, it would be -- no, the distance would be too far.

Q. Too far?

A. Yes, sir.

Q. And what did you use to base your opinion as to the distance on?

A. To Little Mud Creek.

Q. No, what -- you say it was too far for the shots to have been fired from the ridge that separates Little Mud from John Hall Branch. Now, what facts do you base that opinion on that it was too far?

A. The lay of the area there and the roads and the mountains.

Q. All right. It is safe to say that you couldn't see the dividing ridge between Little Mud and John Hall Branch when you say you were being fired on. Is that right?

A. No, sir.

Q. So in all likelihood, you couldn't tell whether you were being fired on from

that area or not then, could you?

A. Directly across the highway -- I didn't say we was far from Little Mud Creek area.

Q. Okay.

A. I didn't say that.

Q. Well, that is what I was asking.

A. No.

Q. You say you were not?

A. We were not.

Q. Okay.

A. Was on the mountain directly across the highway.

Q. Directly across the highway?

A. Yes, sir.

Q. Now, how far would that be directly across the highway?

A. Since it is clearedup looking at the ridge, I would say it would be four hundred and fifty -- five hundred yards from where we were at at the top of that mountain.

Q. All right.

A. Maybe not quite that far.

Q. All right. Now, you also said you were fired on or you thought you were fired on in the opposite direction. Is that right?

A. We were. We were fired on in the opposite direction.

Q. All right. How far away did that shooting take place?

A. By air, three or four hundred yards.

Q. All right.

A. Maybe a little less.

MR. KIRKLAND: Your Honor, I have a topo sheet that I have previously discussed with the Government. I would like to have this marked for identification and then passed to the witness. And in fact, put on the board up there so the jury can see it. It is a topo sheet of the McDowell area.

MR. SELF: I object to him examining it. Your Honor, I haven't seen it before.

THE COURT: Let it be marked first, and then we will show it to the attorneys. After it has been so shown, present it to the witness, and let's get it into evidence. Then we can put it on the board.

THE CLERK OF THE COURT: Your Honor, the exhibit which has not been previously marked for identification has been identified as NPM1 for Defendants Stumbo, Kinney, Jason Moore and Raymond Hall and Kenneth Rolland, and has now been marked as Defendants' Trial Exhibit No. 1 for the Defendants Stumbo, Ted Kinney, Jason Moore, Raymond Hall and Kenneth Rolland.

It will be Trial Exhibit No. 1, Your Honor.

THE COURT: Yes, Ma'am.

MR. KIRKLAND: I will ask that that be - - well, after the Government sees it.

MR. SELF: We've seen it, Your Honor.

THE MARSHALL OF THE COURT: Your Honor, both counsel and the prosecution and the Defendants have seen the exhibit.

THE COURT: All right, sir.

No, sir. It has got to be in evidence before it is put on the board.

MR. KIRKLAND: I will ask that he be shown this McDowell topo sheet.

(The Marshall complies)

Q. Mr. Lykins, - - do you have to get your glasses out?

A. Yes, sir.

Q. Okay. Do you recognize that as being a USGS, Geological Survey Topo Sheet of the McDowell quadrangle, manufactured by the United States Government?

A. Yes, sir, I do.

MR. KIRKLAND: Your Honor, I would move to introduce it. It is self-authenticating.

MR. SELF: No objection, Your Honor.

THE COURT: Let that which has been previously marked as Collective Exhibit of the Defendants Stumbo, et al, which has finally been admitted into evidence as Defendants' Collective Trial Exhibit No. 1.

Please place it on the board, Mr. Marshall.

(The Marshall complies)

MR. KIRKLAND: I would ask this witness be allowed to step down to draw certain things on this map.

THE COURT: Yes, sir.

Q. Before you step down, Captain Lykins. Since you have been in the leasing and coal business now for some time, would you tell the Jury whether or not topo sheets are a common,

everyday piece of equipment that has to be used in the coal business?

A. Yes, sir, they are.

Q. And you use these commonly, and have used them for years in the leasing of coal?

A. Not for years, no, sir.

Q. Well, a couple years?

A. I did for some two or three months.

Q. All right.

A. Because, see, I have nothing to do with the leasing at this time.

Q. All right. So, you then have known what topo sheets were for some time or not?

A. Yes, sir, I do.

Q. All right. With that familiarity, would you step down to the map and show the Jurors where the Ray-Mac access road intersects Kentucky 680.

(Witness complies)

Q. And then take a red pencil, if you would - - there's probably one there - - what is that, a yellow pencil that you have?

A. Yes, it is.

Q. I believe the red will show

up better. Mark a circle with your initials at the intersection of the access road and Kentucky 680.

A. (No response)

MR. SELF: Your Honor, let me enter an objection at this point. It appears that the witness is unfamiliar with this map and unfamiliar with the topographical location appearing thereon.

I object to him trying to mark on that map.

THE COURT: If the witness is unfamiliar with it, he will say so, Mr. Self.

THE WITNESS: There are places here I can identify. The 979, I haven't spotted that.

THE COURT: Sir, when you speak, Mr. Lykins, turn around so that we can get it on the record.

THE WITNESS: This map here of 979, I can't locate that, which I know it is on there.

And 680, I'm not for sure. I believe it is John Hall Branch. This map, I am not familiar with it.

Q. All right. Let me ask you just two other questions. If you can't pinpoint it, that's fine.

Put a circle where you say

the gunfire was coming from across 680. And then put a circle where you say the gunfire was coming from behind you, if you are able to do that.

A. On this map, I can't.

Q. You can't identify where you were or where the gunfire came from?

A. No, sir, not with this map.

MR. KIRKLAND: All right, sir. Your Honor, I ask that he be allowed to sit back at his seat.

THE COURT: Take the stand.

THE WITNESS: All right. Thank you.

Q. Captain Lykins, have you been in any other organized racketeering cases before?

MR. SELF: Objection, Your Honor, irrelevant. There is no charge of racketeering in this case.

MR. KEHRLI: It is also prejudicial, Your Honor, beyond any probative value whatsoever.

THE COURT: Well, I can't see where it is prejudicial or beneficial at this point.

What is the purpose of the question?

MR. KIRKLAND: I want to know the scope

of his investigatory background and some other things of that sort.

THE COURT: Well, you may ask him.

Q. I'm not sure, Captain Lykins, whether there is a state equivalence of the Hobbs Act, a racketeering-type crime; is there, or do you recall?

MR. KEHRLI: Your Honor, we object on the characterization of the Hobbs Act being a racketeering-type of crime, and cite the United States versus Culbert. It is not a racketeering-type crime. And racketeering is not an element of the statute.

MR. KIRKLAND: That's what the cases say that I read, Your Honor.

THE COURT: All right. Go ahead.

Q. Is there such an equivalent state crime that you know of?

THE COURT: Let me do this. You remember the first thing I told you when you started. What the attorneys say isn't evidence. What this gentleman says is evidence. Listen to him. Go ahead.

Q. Do you know whether there was, say, in February of 1982, an equivalent state Hobbs Act?

MR. SELF: Your Honor, I object.

Whether it is a State or Federal, or a California or a Maine has nothing to do with this case. It is totally irrelevant.

MR. KIRKLAND: Your Honor, I withdraw the question. I will just make it easy.

THE COURT: Thank you.

Q. Captain Lykins, in February of 1982, was there a State crime against shooting the people?

A. Yes sir, there was.

Q. And was there a State crime against tearing up stuff?

A. There was.

MR. SELF: Your Honor, same objection.

THE COURT: Overruled. Go ahead.

Q. Were some of these charges brought in State Court in Floyd County, shooting and tearing up stuff?

A. You are speaking of criminal charges?

Q. Yes, sir.

A. Not to my knowledge.

Q. Do you know why they weren't?

A. No, sir, I don't.

Q. Could have been, right?

A. (No response)

Q. You can go take a warrant down at Prestonsburg, if you want to, can't you?

MR. SELF: Objection.

THE COURT: Sustained.

MR. SELF: And ask for an admonition, Your Honor.

THE COURT: Sustain the objection. This Jury has been told that it doesn't make any difference what civil cases have been filed in Floyd County, what criminal cases have been filed in Floyd County; whether they have been or whether they haven't been. It has nothing to do with the evidence. It has nothing to do with this case.

This case is tried on the evidence here. Do all of you understand that? You are trying this case on this, the evidence which is here. We are not speculating about something outside of the Courtroom.

Q. Captain Lykins, was there a feeling on the part of you Ray-Mac officials that you would not get as severe a treatment in Floyd Circuit Court as you would get in Federal Court?

A. No, sir. I never heard that mentioned.

Q. Well, let me ask you this. In your years in Eastern Kentucky in the coal fields, particularly, have you been involved in strike situations before?

A. Yes, sir, I have.

Q. Several times; is that - -

A. (Interrupting) Under different circumstances than this was.

Q. But you have been involved in several strikes; is that right?

A. Yes, sir, I have.

Q. That go on prolonged, some lasting for weeks?

A. Yes, sir.

Q. Based on that prior experience as a policeman, is there usually some violence that goes along with such strikes?

MR. SELF: Objection, Your Honor, irrelevancy.

THE COURT: Sustain the objection.

Q. Based on your prior experience, Captain Lykins, is it a typical reaction of both sides in a strike situation to do what was done

here; that is one side shoots, and the other side shoots back.

MR. SELF: Objection, Your Honor, relevancy.

THE COURT: Sustain the objection.

MR. SELF: Admonition.

THE COURT: The Jury will not consider that.

Q. Do you recall how long it was that the Ray-Mac Company officials decided to take the auger down off of the job?

A. No, sir, I don't. It was - - it was a few months after it was repaired that they moved it to another job.

Q. All right. We understood earlier that it was actually repaired on the job; is that right?

A. Yes, sir, it was.

Q. Then it was taken down from the job and moved down to McDowell some time later to go to another job.

A. Yes, sir, down below McDowell, to an HJ&R job.

Q. Without attempting to do anything demeaning or improper, do you think that

it is safe to say that you were hired by Ray-Mac as a hired gun?

A. Definitely not. Definitely not.

Q. Do you think that the fact that you had such widespread - - widespread influence with the Federal Investigative Agencies had anything to do with your employment with Ray-Mac?

A. No, sir. No, sir.

Q. Did not have anything to do with it?

A. I don't think so, no, sir.

Q. Is it safe to say that the Ray-Mac officials sought you out to employ you to help them when this matter erupted at McDowell?

A. Yes, sir. Frank Justice, when he hired me, told me he would like for me to try to prevent violence; that he didn't want nobody hurt.

Q. And that's why he hired you to go to the Ray-Mac job to prevent violence?

A. I was on all the jobs. We had several jobs. I wasn't just on the Ray-Mac job. I was on all the jobs.

Q. Do you have any personal

knowledge about that auger up there, how well it was working. There's been some testimony that it would work for a while, and then was down, and then it was not functioning properly. Do you know anything about that?

A. Yes, sir. I know a little bit about an auger. I used to contract an auger.

Q. Was the auger working at top efficiency in top optimum production prior to that famous - - or infamous Sunday when it was damaged by a bomb?

A. You have asked me - - I wasn't with the company then. See, I was up there, and they run it a couple of days or day and a half or something. And it - - really, I wasn't around the auger that much until after it was blowed up, and then later was around it.

Q. All right. Did you know Danny Blanton?

A. Not until I started working over there.

Q. All right.

A. No, sir, I didn't.

Q. Did you ever discuss with him - - his testimony was that essentially it didn't

work right before the explosion. Did you ever have a discussion with Danny Blanton about - -

MR. SELF: (Interrupting) Objection, Your Honor. That was not the testimony of Mr. Blanton.

THE COURT: Well, the Jury has heard the evidence. They know what the evidence is. I think they are instructed that if their opinion of the evidence is different from the statement of the attorney that they will ignore what the attorney says and accept their own version of what the evidence is.

Continue.

MR. KIRKLAND: Your Honor, that's all the questions I have.

THE COURT: All right. Now, let me state to the members of the Jury.

You remember when we first started this case that you took an oath to try this case upon the indictment herein, against the Defendants who are named therein, and upon the alleged charges contained in the indictment.

You would be violating your oath if you consider anything else other than that.

Now, you don't live in a vacuum. We have lived here in this part of the state. We live in what is called a labor area. Now, we know that there has been labor difficulties before, but what went on at those times were those times. The only thing we are concerned with is this indictment and these Defendants and these alleged charges.

Do you all understand that? We try this on the oath. From time to time there's references being in there. You may ignore those references. And I don't want you to attach any significance to those references one way or the other.

It would be unfair if you considered those references as evidence either for or against the Defendant, because it is - - you took the oath. And it would be unfair to consider as evidence for or against the United States.

It would just be unfair. You took an oath to try this on the evidence herein. Let's do that.

Gentlemen, let's please refrain from mentioning something that we know isn't evidence. All right.

MR. SELF: No objection to the admonition.

THE COURT: Who is next?

CROSS EXAMINATION

BY MR. ADAMS:

Q. Sergeant Lykins, my name is Eldred Adams. I'm from Louisa, Kentucky. If you have any trouble understanding me just let me know, all right, sir?

A. Thank you, sir.

Q. Can you hear me all right, sir?

A. Yes, sir, I can.

Q. Sergeant -- I don't want to demote you. Captain Lykins, when you arrived at the job site Thursday morning did they appear to have a full crew of men?

A. Yes, sir.

Q. And when these shots were fired were they over a fairly wide area?

A. You mean where the shots was coming from --

Q. Yes.

A. -- or where the employees were at?

Q. The area where you were working. Was it a fairly wide area where the shots impacted?

A. Yes, sir, it was.

Q. Now, the AR15's, doesn't that shoot a 7.62 rounds?

A. It's a 223. AR15's are 223. Now, you might -- I note it by 223, the caliber.

Q. Isn't the AR15 a military rifle?

A. No, sir. An AR15 is a version of an M16. An AR15 is a semiautomatic, where your M16's are fully automatic.

Q. It's a version of the military rifle?

A. Right, yes, sir.

Q. I believe the Uzi is a 9 millimeter?

A. 9 millimeter, yes, sir.

Q. And I believe that that is a fairly large shell, isn't it?

A. No. It's not a large shell at all.

Q. All right. The 9 millimeter shell?

A. No, sir.

Q. Now --

A. It's a shade smaller than a caliber .38.

Q. But it's still a pretty good sized shell?

A. Oh, yes, sir.

MR. ADAMS: Thank you.

THE COURT: You're going to be in recess until one o'clock for lunch. During recess the not now admonition is in effect.

Gentlemen, are there any objections or corrections to the form of the admonition?

MR. ROWLAND: No, sir.

MR. SELF: Thank you, Your Honor.

THE COURT: Please excuse the jury until one o'clock.

(Reporter's Note: The jury left the courtroom at 11:45 A.M.)

THE MARSHALL: The jury is out of the courtroom, Your Honor.

(Reporter's Note: At the Court's direction the remaining portion of the morning proceedings were placed under seal by Judge Unthank.)

(Court adjourned at approximately 11:58 A.M.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

UNITED STATES OF AMERICA

-vs- CASE NO. 83-8

EDGAR JONES, JASON MOORE, GERMAN STUMBO, DREXIL HALL, TEDDY KINNEY, BENNY CAUDILL, KENNETH ROLLAND a/k/a POSTMAN, RANNY BLANKENSHIP, EUGENE TACKETT, HAROLD MOORE, HERMIT NEWSOME, TIM MILAN, MOSE MEAD, DONAHUE HALBERT, AUSTIN "BO" MOORE, PEBO GAYHEART, LINVILLE MOSLEY, RAYMOND HALL, VAN B. PATTON

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TRANSCRIPT OF TRIAL

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BEFORE: THE HONORABLE G. WIX UNTHANK

DATE: FEBRUARY 7, 1984

VOLUME TWENTY-SEVEN

DALE SOERGEL MOORE SHAW & ASSOCIATES
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For the Defendant Drexil Hall and Austin "Bo" Moore:

BERNARD PAFUNDA, ESQ.

For the Defendant Ranny Blankenship:

ELDRED E. ADAMS, JR., ESQ.

For the Defendants Jason Moore, German Stumbo, Teddy Kinney, Kenneth Rolland and Raymond Hall:

WILLIAM D. KIRKLAND, ESQ.

REPORTER'S NOTE: The Court reconvened at 1:04 P.M., E.S.T.

REPORTER'S NOTE: Whereupon the following was heard outside the presence of the Jurors.

THE MARSHALL OF THE COURT: All rise, please. This Honorable Court is in session.

Your Honor, the Defendants and all Attorneys are present. The Jury is out, and there are no spectators present.

THE COURT: Madam Clerk, if you will, please relate to the attorneys the message that you received with regard to Mr. Strong.

THE CLERK OF THE COURT: Yes, Your Honor.

Just before the noon recess or lunch recess, Mrs. Slone, William D. Slone's wife, called and asked the Clerk's office to give him a message and to return her call during his lunch recess, which we did give Mr. Slone the message.

And after calling his wife, Mr. Slone informed us that she had been taken to the hospital. And he then related to me, Your Honor, that he had to take her to the emergency

room last night, and she does have some appointment in the Lexington Clinic for next week. But that the pain had gotten severe last night, and he had to take her to the emergency room.

And she is being admitted to Highlands Medical Hospital. And it is his understanding that she will then, as soon as possible, be transferred to St. Joseph's in Lexington.

THE COURT: He said last night that she was having pain. So, this morning when he came in, he just left her off at the emergency room at the hospital and came on to Court.

He got the call, and she is going to have to go to St. Joseph's next week.

He says he is the only one that will be there with her, gentlemen. So, it looks like that Mr. Slone is in a position that he is not going to be able to sit in this case.

MR. HARWELL: If the Court please, do we know what the medical problem or the symptoms of that problem are of Mrs. Slone.

THE COURT: Liver.

MR. HARWELL: You don't know what the - - prior surgery, Judge, or medication or any of the details, whether she should be hospitalized?

THE COURT: No.

THE CLERK OF THE COURT: Mr. Slone related to me, Mr. Harwell, that the Doctors had not made a definite diagnosis; that they weren't sure of what the problem is.

THE COURT: Mr. Marshall, bring Mr. Slone up here.

THE MARSHALL OF THE COURT: Yes, sir. William Slone, isn't it?

MR. HARWELL: William D., Your Honor.

(The Marshall complies)

THE COURT: Gentlemen, I don't think any of you could sit on the Jury under the circumstances and devote your attention to the evidence if you know that your wife is - -

MR. HARWELL: (Interrupting) Judge, I would respectfully suggest that the Court question this gentleman as to the medical situation and his feelings about it.

THE COURT: I talked to him before in chambers, and it is on the record. But I just assume - - I would just tell him to - - tell you gentlemen what he told me back in chambers.

MR. HARWELL: All right, sir.

MR. SELF: The attorneys more or less

know this, but just for the benefit of the Defendants. Such an in camera investigation is to stay in camera, and is not a matter to be discussed out in the public with regard to Mr. Slone's condition or his wife's condition.

THE COURT: That's family.

MR. SELF: The attorneys know that. I don't know if the Defendants do or not, Your Honor.

THE COURT: That's family stuff, and I don't think - - I don't think they would want somebody talking about the conditions of some of the members of their families.

These don't - -

Mr. Slone, just sit up here.

MR. SLONE: Okay, sir.

THE COURT: I don't want to embarrass you, sir, but you understand this. Before I do something, they have to be aware of it. So you just tell them what you told me back there about the condition of your wife starting last night and bring it up to date.

MR. SLONE: Yes, sir.

THE COURT: All right. Now, let me state this. These gentlemen are married, and what

you tell them is going to be in confidence. They aren't going to go out and tell family medical problems or - - you just tell them.

MR. SLONE: Yes, sir. Last night - - we have had this problem for several weeks now, and we have been working on it. And last night about - - well, she was sick all night, but at 4:00 o'clock this morning, she woke up in horrible pain.

And I took her on to the emergency room this morning as I came to Court this morning, and left her there, and made arrangements for her Doctor to see her there at the hospital.

And about 11:00 o'clock, or the last break we had before lunch, I got a message from home stating that call home, that she is going to be admitted to the hospital.

I called, and they are going to admit her to Highland Regional until they can get her to St. Joe's in Lexington.

It had something to do with a liver problem. And she is trying to get in and see a specialist down there. I don't know what will become of it as of yet.

THE COURT: Mr. Slone, back there did

you state that it would be very difficult for you - -

Well, first, you have no one else other than yourself that can look after your wife; is that correct?

MR. SLONE: Yes, sir. I have two small children, and they have to be taken care of by their grandparents.

THE COURT: But it would be very difficult under those circumstances - - will it be very difficult under those circumstances for you to sit here continuously as a Juror and worry about your wife and your children.

MR. SLONE: Yes, it would. Yes, it would.

THE COURT: All right. Does anybody have any questions they want to ask Mr. Slone?

(Silence)

THE COURT: All right. Mr. Slone, I am going to excuse you. I think that is sufficient grounds to excuse you.

Madam Clerk, who is the next alternate. Who is the first alternate?

THE CLERK OF THE COURT: The first alternate, Your Honor, is Juror 192, Sharon Tackett.

THE COURT: All right.

MR. HARWELL: May the Court please. Is your procedure such that Ms. Sharon Tackett will take the same seat Mr. Slone has had?

You don't progressively move the Jury around, do you? You just put her in that seat?

THE COURT: That's right.

MR. HARWELL: All right, sir. Thank you, Judge.

THE COURT: And I think, if you don't mind, I would just tell the other members of the Jury that there is just a medical emergency, and you have to be excused.

MR. PAFUNDA: Your Honor, if it please the Court. I think on behalf of all the attorneys that are present here today, maybe the Court could possibly express our sympathy for Mr. Slone and our appreciation.

THE COURT: You heard it.

MR. SLONE: Thank you. I appreciate it.

MR. PAFUNDA: Thank you, Mr. Slone.

THE COURT: And, Mr. Slone, you are excused.

Madam Clerk, is there

anything you need to take up with Mr. Slone.

THE CLERK OF THE COURT: No. We have him checked in for today, and he will be paid for today's services. And we have his parking taken care of. And we will notify you for your next service by mail, Mr. Slone.

MR. SLONE: Okay. Thank you very much.

THE COURT: Thank you, sir. You are excused.

MR. SELF: Your Honor, this is something you may want to tell him. If this situation occurs in the future when he is called, just communicate with the Clerk's office and advise them. If he gets called for another case some time soon, and the same situation is going on, he can communicate that with the Clerk's office and let them know.

THE COURT: Yes. If you have the same problem, you let her know.

MR. SLONE: Okay, sir.

THE COURT: If it is a problem, just to the extent it affects your ability to permanently serve as a Juror, let us know, and we will consider it on that basis.

MR. SLONE: Okay, sir. Thank you. I appreciate it.

MR. THOMAS: Please let us know how things go.

MR. SLONE: Yes, sir.

THE COURT: Are we ready to have the Jury brought up?

*** *** ***

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MR. SELF: Yes, Your Honor.

MR. PAFUNDA: Your Honor, I have a motion to take up before the Court on another matter.

THE COURT: Yes, sir.

MR. PAFUNDA: Would it be better to do it at the end of the day?

THE COURT: I don't know.

MR. PAFUNDA: I'll do it at the end of the day.

THE COURT: Well, what's the--

MR. PAFUNDA: I'll just do it at the end of the day, I think. I've got one thing--

THE COURT: No, we've got this. While we're into it let's get it over with.

MR. PAFUNDA: Your Honor, I've got a matter. Last night I was handed grand jury testimony of Dennis McCallister. In that grand jury testimony he speaks about my client, Drexil Hall. And, in essence, he indicates--he states flatly after his thorough investigation in this matter that Drexil Hall's only involvement was that he fired into a leading coal truck, and that Drexil Hall--quote, "To our knowledge, Drexil Hall--that was the extent of his involvement." He wasn't involved in any shootings. He wasn't involved in any arsons. He wasn't involved in any bombings.

My point is, Your Honor -- and this was Agt. McCallister's testimony before the grand jury on October 4, 1982 on page 12 of that--of that transcription of that testimony.

My point is that that's clearly Brady material that was not supplied to me at the beginning of this trial. It was supplied to me yesterday.

At this time, Your Honor, I'd move to dismiss this matter on the basis of the prosecution's failure to give me this material.

Mr. Self was present when this grand jury testimony was elicited from Agt. McCallister. Agt. McCallister has been present throughout the entire course of the trial. In addition to that, I'd couple that with the statement of Danny Blanton that he had given a statement to the Kentucky State Police, and yesterday they--the attorneys for the Government indicated that that statement had been mislaid but they finally were able to locate it on the following morning when Mr. Blanton was held over for testimony.

It appears under Brady v. Maryland that whether it's a question of bad faith or good faith is irrelevant. The question is

Drexil Hall's right to due process under the Fourteenth Amendment.

It appears that the Government has known of this for some time. I assume since they were present during the grand jury testimony they were well aware of Drexil Hall's lack of involvement in this matter and failed to do this.

THE COURT: What would you have done differently if you had had that?

MR. PAFUNDA: If I had had it, Your Honor?

THE COURT: Yes.

MR. PAFUNDA: I think, number one, if I would have had it what I would have done differently in regards to Agt. McCallister--

THE COURT: In preparing your case for Drexil Hall.

MR. PAFUNDA: First of all, I don't think that's the crux of the situation.

THE COURT: Just answer my question and then you can give me argument.

MR. PAFUNDA: I wouldn't have altered my defense. Essentially that has been my defense.

THE COURT: It wouldn't alter your defense at all?

MR. PAFUNDA: That has been my defense

since the outset, since my opening statement.

THE COURT: Okay. Go ahead.

MR. PAFUNDA: But that is not the crux of the Brady matter nor his Fourteenth Amendment due process right. The crux of it is is whether this material should have been revealed, and if it is not revealed and not timely revealed--

THE COURT: Yes.

MR. PAFUNDA: --then what is the particular remedy. The particular remedy is a dismissal of the charges.

If we take away the remedy available to one who's accused of a crime and then he's--he's belated given this material, or it's not given at all, or it's untimely given; then what remedy does Drexil Hall have? He has none.

The purpose of the remedy is to insure that these things do not occur or occur again.

The reason I bring it up at this time and I bring it up in a hasty manner is because I know everybody is ready to get on with this trial. Several things have occurred over the course of the last several months that I find disturbing.

I've been accused on

occasion and occasion again of unethical conduct off-handedly with no factual basis for that, and I have received an apology on each occasion. However, now what sort of peaks my anger is that this is not only-- this isn't a situation aimed at me, this is a situation aimed at Drexil Hall. He's been under the cloud of this indictment. He's been under the presence of this trial since the beginning of January.

What effect has it had on Drexil Hall? And what remedy is Drexil Hall entitled to? I think he's entitled to a dismissal of the charges against him.

We have here not only a statement of an investigator or a federal agent before the grand jury, but a federal agent who began his investigation of the charges contained in this indictment, and the Government's provided us with a summary of his investigation. This starts back in February of 1982. Then in October of 1982 he makes this statement.

This is clearly and unquestionably Brady material. It's not only Brady material with regard to Drexil Hall's involvement but-- Here's a following question: "Was Mr. Hall involved in the initial meeting of February 15?"

Answer by Agt. McCallister: "Yes, the second meeting. I believe Drexil Hall was called down in his capacity as an official of the local union."

That's consistent with the defense that's been raised at the outset since the indictment was handed down and since the arraignment, the Enmons defense.

I think the question to be posed to the Government is, is this Brady material in their opinion; and the answer has to be yes.

****

The next question is why wasn't it given to Mr. Pafunda earlier. And if -- Somebody just said that -- it's because they don't like me. That's --

MR. SELF: That's not true, Your Honor. That's not true.

MR. PAFUNDA: That's not a sufficient answer. The point here is, and I think it's -- it's a significant point, you stand up and you raise this question. You say, well, you've got it; Bernie, you wouldn't have changed your defense if you had it three months ago. That's not the point.

The point is, a Defendant's particular right to due process of law. When that has, in effect, been violated, whether in good faith or in bad faith, which is irrelevant, what remedy is available to that particular Defendant. Brady versus Maryland, the strongest remedy possible; and I ask for that this afternoon, dismissal of these charges against Drexil Hall.

THE COURT: All right. Let it be noted and overruled.

MR. PAFUNDA: Your Honor, if it's overruled then I ask the Court to fashion a sanction with regard to this material. And the sanction that

I would ask for is that the Government be required when Agent McCallister is on the stand to ask him the questions and to elicit the remarks that Drexil Hall had no involvement in this, just as he did before the Grand Jury. I think the Court has that power to fashion that sanction.

THE COURT: You can ask him when he takes the stand if he didn't state that before the Grand Jury.

MR. PAFUNDA: I will.

THE COURT: All right. Bring the jury up.

(Reporter's Note: The jury returned at 1.20 P.M.)

THE COURT: All right. Miss Tackett.

JUROR TACKETT: Right here.

THE COURT: Where's -- Who's the alternate that's taking his place, ma'am?

THE MARSHALL OF THE COURT: This is she, Your Honor.

THE COURT: All right.

THE MARSHALL OF THE COURT: Take that seat.

(Reporter's Note: Miss Tackett took the seat that was vacated by Mr. Slone.)

THE COURT: All right. Who is the next alternate? Step up in that seat.

THE MARSHALL OF THE COURT: That would be Mr. Clark, Your Honor.

THE COURT: Mr. Clark, you can move up in her seat.

JUROR CLARK: I thought I was number four.

(Reporter's Note: Mr. Clark took the seat that was vacated by Ms. Tackett.)

THE COURT: Mr. Slone -- Let me explain this. Mr. Slone's wife has taken a turn for the worse. We had to excuse him.

He's being replaced in this type of thing. I think it's safe in saying that she's in the hospital here and they're making plans to take her to the hospital in Lexington. Under those circumstances it wouldn't be fair to Mr. Slone nor to the parties herein; so, he was excused.

The first alternate, accordingly, steps up and takes his place. So, ma'am, you have that seat from now on.

JUROR TACKETT: Okay.

THE COURT: Well, it's brought to the attention of the Court that two of the jurors are

riding with Mr. Slone. We're going to have to -- you're going to have to find out some way or the other to get them here.

How much are they paid a mile, Madam Clerk?

THE CLERK OF THE COURT: Twenty and a half cents a mile.

THE COURT: I think he said it's what, fifty miles? I think that's what he told me. I don't know. I just don't know how -- how you're going to work it, how you're going to get out tonight.

Does anyone else on the jury live in that direction? This is Paintsville.

JUROR TACKETT: Paintsville.

THE COURT: Anyone -- Anyone else on the jury from Paintsville?

MR. THOMAS: Your Honor, there is a bus that leaves around seven o'clock that goes that way, I think. That's the best I know.

THE COURT: I don't know, gentlemen. I just don't know.

(Reporter's Note: The Clerk approached the Bench at this time.)

THE COURT: The Clerk said she'll talk to a taxi or something.

You understand if it takes the amount that you get for transportation to arrange for your transportation back and forth -- that's it. The Clerk will see.

All right, gentlemen, are we ready to proceed?

MR. SELF: Yes, Your Honor.

THE COURT: You may proceed.

****

CROSS-EXAMINATION

BY MR. WALBOURN:

Q. Mr. Lykins, how are you today?

A. Fine, thank you. How are you?

Q. I'm fine. My name is E. J. Walbourn. I want to ask you just a few questions. As I have told other witnesses, Mr. Lykins, if you don't understand a question, if you can't hear me, or you think my question is unfair, please feel free to stop me. Okay?

A. Yes, sir.

Q. I guess first of all to clarify a matter, you were the U.S. Marshall. Is that correct?

A. Yes, sir, I was.

Q. That is the Presidential appointee?

A. Yes, sir.

Q. And you - - you went out of that job as we had a change in the office of the President, and a person of the other party replaced you. Is that correct?

A. Yes, sir, a change of

administration.

Q. When you were picked up in the helicopter with the Special Response Team, do you recall which troopers were present at that time?

A. Yes, sir. There was Sergeant Bob Forsythe, Joel Newsome, Bower Sock and Keith Scott. And there might have been another one. I don't remember.

Q. Okay.

A. I remember those.

Q. So there were at least four troopers, yourself, and the pilot. Is that correct?

A. Yes, sir.

Q. All right. There may have been a fifth trooper?

A. I believe that was all of them.

Q. All right. Now, had any of these troopers that were on the Special Response Team, had they been at the barricks or the post when you were commander of that post?

A. Yes, sir.

Q. Which ones, please, sir?

A. Sgt. Forsythe was assigned to me. Also Joel Newsome worked Magoffin County. And Keith Scott worked Johnson County.

Q. Now, Mr. Lykins, when you were captain, that meant you were commander of the Post 9 here at Pikeville. Is that correct?

A. Post commander, yes, sir.

Q. And, sir, would you tell the jury which counties this post has jurisdiction or supervision over?

A. The post area covers Pike, Floyd, Johnson, Magoffin, and Martin, five counties.

Q. Okay. Now, what I am about to say, Mr. Lykins, is what I recall a witness said. Is Frank Justice your boss today?

A. No, sir.

Q. Okay. Was Frank Justice your boss when you were hired back in February of 1982?

A. Frank Justice was one of the owners of the company.

Q. All right. Now, I have some recollection; and again, what I say is not evidence that you were one of those fortunate people that happened to draw two paychecks when you were first

employed. Is that correct?

A. Yes, sir, I did.

Q. All right. And who were those paychecks from, please.

A. From Mack Mining and also Coal-Mac Sales, Inc.

Q. All right, two separate entities?

A. Yes, sir, I did.

MR. WALBOURN: Okay. Thank you very much, sir.

THE COURT: Anyone else, gentlemen?

MR. HARWELL: I have no questions of Mr. Lykins, if the Court please.

MR. SELF: May it please the Court.

THE COURT: Yes, sir.

REDIRECT EXAMINATION

BY MR. SELF:

Q. Captain Lykins, while you were a United States Marshal, where did you live?

A. Just out of Lexington at Sycamore Estates.

Q. Did you also maintain a house here in Pikeville?

A. Yes, sir, I did. I own a home.

Q. How long have you lived in the Pikeville area?

A. I moved here March 17, 1957.

Q. Are you originally from this area?

A. No, sir.

Q. Where are you from?

A. Sandy Hook, Elliott County.

Q. Is that flat down there, or does that still got some mountains to it?

A. We have some hills rolling.

Q. How long had you known Frank Justice prior to the time you were hired by him, Mr. Lykins?

A. Well, I have known Frank Justice for years. As far as being personally acquainted with Frank Justice, I wasn't. He owned Jerry's Drive-In up there and I used to go in there occasionally. Maybe just speak to him. No conversations.

Q. Okay. You worked for one of his companies continuously since February, 1982, have you not?

A. Pardon?

Q. You worked for one of his companies continuously since February, 1982, or one that he is associated with?

A. Yes, sir.

Q. Now, the fact that you are employed by his company today, does that have any bearing on your testimony?

A. No, sir, not one bit.

Q. Captain Lykins, you were asked the question but weren't allowed to answer it. What do you do in your job today? What is your job?

A. Well, my title is public relations director. I do many different things.

MR. KIRKLAND: If he has got a paper, I move that he introduce the paper.

THE COURT: Overruled.

A. I answer all complaints that are received by the companies; believe me, a coal company gets them.

I negotiate with all utility companies such as the gas company more so, and relocation of gas lines where they cross our job and has to be moved or have to work out something with the gas company, settle with the prices, cost per foot.

To get them to shut the gas wells in so we can get across to work something out.

****

I also work with reclamation on a lot of our jobs which people with coal companies knows what I am talking about.

I also work with the labs. All water that is monitored from our silt ponds which we have to see that water samples is run through twice a month, two different times for each silt pond. That is on our strip shops and deep mines.

Also I have licensed several operations and have permitted -- worked on permits for the company.

And I am in charge of all security which is contracted out to Collins Security Agency in Prestonsburg.

Also a lot of times coal buyers will come around, and I will take them around to different sites and show them the type of coal that we produce from deep mines and strip mines, and also our processing plants - how we process coal.

And if I haven't got nothing else to do around in the area, if they call a job, we have a breakdown or something and they need parts, if I am the closest to get the part to the job and get the operation going again, I will

pick up parts and deliver parts on different jobs.

Q. You spoke that you worked with Collins Security out of Prestonsburg. In February of '82, was the Collins Security working for any of the Coal-Mac Companies?

A. No, sir, they wasn't.

Q. Do you know when they were hired or employed?

A. It was some -- they -- close to a year I would say. See, security prior to this was taken care of on the job by the job foreman which they were there when I came with the company. And so after I took over security, for money reasons, I abolished the position of security on the jobs and contracted it out.

Q. Now, Captain Lykins, calling your attention to Thursday morning, the week of February the 15th, 1982, you testified on cross examination that it was foggy on Thursday, and you couldn't see across the highway. Could you see all the way across or just partially, or did it depend on how high up the hill you looked?

A. You couldn't even see the embankments in the hill across the highway.

Q. Could you see --

A. (Interrupting) It was a short distance there. You just couldn't see.

Q. Could you see where the shots were coming from that were fired either in front of you or behind you?

A. No, sir, I couldn't see them. Only hear them.

Q. You could hear?

A. Yes, sir.

Q. Now, when did you state that the firing first started that morning?

A. Around seven, in the morning around 7:15 on the 18th.

Q. Was there anything that occurred just before the firing started?

A. Yes, sir. They started the equipment up, the end loader, the auger.

Q. What kind of equipment did they start up?

A. They started a 992. And about the time it hit --

MR. ROWLAND: (Interrupting) I object. I believe he has already testified to this on direct.

THE COURT: Sustained.

Q. Is a 992 a loud piece of equipment?

A. Yes, sir.

MR. ROWLAND: Object.

THE COURT: Overruled.

Q. When you are standing next to it, can you carry on a conversation in a normal tone of voice?

A. Right up next to it, I mean if you are sitting there idling, yes; but if it is in operation like moving out, it would be -- you could still carry on a conversation, but it would be I would say on a low tone.

Q. My question --

A. (Interrupting) I mean that you could hear.

Q. I'm sorry. Mr. Lykins, can you hear a 992 through fog?

A. Why, yes, sir.

Q. Can you hear a rock truck through fog?

A. Yes, sir.

Q. Can you hear an auger through fog?

A. Yes, sir. You can hear

sounds through fog.

Q. Can you tell where it is at if you were looking through fog to where it is at?

A. It would give you the directions it was coming from.

Q. And was that equipment being operated when the shooting started?

A. Pardon?

Q. That equipment was being operated when the shooting started, wasn't it?

A. Yes, sir. When the equipment started up, the shooting started.

Q. Would it be a fair statement to say, Captain Lykins, that the sound of the equipment from your operation was what was keyed into on whoever was firing at you?

MR. THOMAS: Objection to the leading, Your Honor.

MR. ADAMS: That is pure speculation.

THE COURT: Sustained.

Q. The shots that were coming in on Thursday, the incoming rounds, could you tell how far away they were?

A. Well, they were -- you

could tell they were a good distance. They wasn't right up on us. They was some distance between us like the other --

Q. (Interrupting) Now, you testified something to the effect it was four hundred and fifty to five hundred yards from where we were at to the top of the mountain. Did you mean there was four hundred and fifty to five hundred yards to where the shooters were?

A. From where the sound sounded like it was coming from.

Q. They were that far away?

A. Yes, sir.

Q. The HJ&R job that you talked about below McDowell - do you know how long that has been in operation?

A. No, sir, I don't.

Q. Was it in operation when you first came there?

A. Yes, sir, it was.

Q. And to your knowledge, Captain Lykins, has there been any attempts to organize that operation by the United Mine Workers of America?

A. I wasn't there, but --

Q. (Interrupting) Since you came to work for Coal-Mac?

A. No, sir, since I have been with them, there has been nothing.

Q. And that job is still in operation?

A. It is now, yes, sir.

Q. And that is in the McDowell area?

A. Yes, sir.

Q. Captain Lykins, what -- at the time of the incidents when you became working for Ray-Mac, what, if any calls did you make to the State Police to get them to come over and investigate this matter?

A. I never made a call to the State Police, not one time.

Q. Did you ask anybody to call the State Police on your behalf?

A. No, sir, I didn't.

Q. What if any calls did you make to the Bureau of Alcohol, Tobacco, and Firearms or any of its agents to get them to come and investigate this matter?

A. No, sir, I didn't.

Q. Did anyone -- did you ask anyone to make a call on your behalf?

A. I didn't.

Q. What if any calls did you make to the United States Attorney or the United States Attorney's office to get the United States involved in this investigation?

A. I never did.

Q. Did you ask anybody to make a call on your behalf?

A. No, sir, I didn't.

Q. Did you make any contact to try to get federal authorities involved in either the investigation or to encourage them in the prosecution of this case?

A. No, sir.

Q. Any?

A. No, sir.

Q. Were you ever told by anyone that the reason you were hired was to get the federals involved in the investigation of this case?

A. No, sir.

Q. Captain Lykins, you were asked by Mr. Adams with regard to various weapons as far as a AR15 and an Uzi.

Mr. Marshall, would you hand the following exhibit to the Clerk for identification, please? Mr. Marshall, here.

THE MARSHALL OF THE COURT: Do you want the last two as one exhibit?

MR. SELF: All three of them separate exhibits, please.

MR. WALBOURN: Your Honor, may I inquire as to the identification numbers from the pretrial?

MR. SELF: These have not been previously marked for identification, Your Honor.

THE COURT: While she is doing that, let me inquire of the jury, who are the two ladies that rode with Mr. Slone?

JUROR CASTLE: 131, Lorraine Castle.

JUROR TACKETT: And 192, Sharon Tackett.

THE COURT: You go through Prestonsburg to get to Paintsville?

JUROR CASTLE: Right.

THE COURT: Who on the jury is from Prestonsburg? No one from that area down through there? What about Magoffin County?

JUROR SCOTT: I do, but I ride with someone else.

THE COURT: Who do you ride with, ma'am?

JUROR SCOTT: (Miss Scott pointing to Mr. Flinchum.)

THE COURT: Have you got a pickup or a car or what?

JUROR FLINCHUM: I have got a car today.

JUROR CASTLE: We will make it home, Your Honor.

THE COURT: Well, I am concerned.

MR. SELF: Your Honor, perhaps at a break, they can call and make arrangements for someone to pick them up if they can do that.

THE COURT: Ma'am.

JUROR TACKETT: We can call and have someone to come after us.

THE COURT: Well, we will work it out. I don't want you sitting there worrying about how to get home.

JUROR TACKETT: No.

THE CLERK OF THE COURT: Mr. Self, what is the identifying description, sir?

MR. SELF: That is a 9 millimeter cartridge.

THE CLERK OF THE COURT: 9 millimeter?

MR. SELF: 9 millimeter cartridge. May I approach the Bench, Your Honor, to assist the Clerk?

THE COURT: Yes, sir.

THE CLERK OF THE COURT: Your Honor, the cartridge handed me is a 9 millimeter cartridge not previously identified has been identified as NPM-7 has now been marked for purposes of trial as Government Trial Exhibit No. 40.

The No. 223 Remington not previously identified has now been identified as NPM-8, and has now been marked for purposes of trial as Government Exhibit No. 41.

The 30.06 Springfield cartridge has been marked for identification as NPM-9 has now been identified for purposes of trial as Government's Exhibit No. 42.

THE COURT: What is your name and number?

JUROR CASTLE: Pardon?

THE COURT: Your name and number.

JUROR CASTLE: Lorraine Castle, 131.

THE COURT: Thank you. Miss Castle, you and Miss Tackett come up here just a moment, will you?

Gentlemen, I am working on the transportation.

MR. HARWELL: We very much approve of that, Your Honor.

MR. WALBOURN: Your Honor, may we approach the Bench just a moment?

THE COURT: Yes, sir.

****

REPORTER'S NOTE: At this point all counsel approached the Bench for a Conference.

THE COURT: They have transportation. They just rode with him today.

MR. KIRKLAND: Good.

THE COURT: They had transportation. They just rode with Mr. Slone today. And they said they can even arrange it to get back tonight, so that will resolve that.

MR. SELF: We knew we had Dan volunteered, but - -

THE COURT: (Interrupting) Ed Spencer apologized because he couldn't take them back, because he knew nobody would approve of him taking them back.

MR. WALBOURN: I have no doubt that he could do it.

THE COURT: All right, gentlemen.

MR. HARWELL: Judge, while we are up here, if I may, I would like to enter an objection to the last three exhibits.

THE COURT: What?

MR. HARWELL: If I may, I would like to enter an objection to the last three exhibits, may

the Court please. I don't remember the numbers, but two of those slugs that are hollow points, if anyone on the Jury is knowledgeable about hollow points versus solid points, then I think that is potentially prejudicial.

MR. WALBOURN: Your Honor, the reason I requested the Bench Conference was to have Mr. Self represent the relevancy of them and where did he obtain them. Where did he get these bullets.

THE COURT: What do you have, a 9 millimeter and - -

MR. SELF: (Interrupting) One that an Uzi shoots, and one that an AR15 shoots, and one that a 30.06 shoots.

MR. WALBOURN: Where did he get them?

MR. SELF: The back of Danny McCallister's car. They are not related to this case that I am aware of.

MR. WALBOURN: Well, if they are not related to this case, then they are irrelevant.

THE COURT: Just to show the difference of size?

MR. SELF: Mr. Rowland up on cross-examination, Your Honor.

MR. HOLLON: I object. I never brought

them up on cross-examination. If they go into evidence, they go into evidence against him.

THE COURT: Now, so far that's going to be related to size, but now it looks like he says he - - you have got an armor piercing, hollow point, dumdums - -

MR. HARWELL: Devastators.

THE COURT: That can kind of infer that is being used there.

MR. SELF: I don't intend that. We have ammunition that we can show that was used by the Defendants as part of our case. I am not inferring that these were used by anyone. I am attempting to show this to clarify the size of the bullets as raised on cross-examination by Mr. Adams, not to show hollow points or lead jackets or make any issue about that.

THE COURT: Why can't you get some that are just exactly - -

MR. PAFUNDA: (Interrupting) Why not just describe them verbally.

THE COURT: Why don't you get some plain nose.

MR. SELF: I have got some downstairs.

THE COURT: Okay, get those.

MR. SELF: May I have a recess to get them?

THE COURT: Yes.

MR. KIRKLAND: Had Mr. Walbourn not asked for a Bench Conference, I would have, not only in relation to the last three bullets passed around in the same fashion as the inflammatory materials yesterday that were passed to the defense counsel, and they look at them, and the Jury watches the lawyers look at them, and then they see them being looked at for maybe ten minutes; and then they are passed to the witness, typically, the objects in total view, and the Government has no idea whether or not they are going to be admissible.

THE COURT: All right.

MR. KIRKLAND: And in most instances not admitted because of improper foundation, and yet the Jury has seen these objects of an inflammatory purpose, even though that object has not been introduced, and that is highly improper; and I ask for an order in limine directing the United States to show the Court and defense counsel before any of these objects come to the attention of the Jury what it is he proposes to introduce and to represent the basis for its introduction.

He has flaunted various shells, slugs, spent cartridges that he knew would not be introduced.

Mr. Lykins is about four or five feet from the edge of the Jury box, and he fumbled with these items up in total view of the Jury when the United States knew full well at that very time they could not introduce those items.

They have had a prejudicial and inflammatory effect on this Jury to my clients, and I ask the Court to direct him not to do that anymore.

THE COURT: What was the fellow's name, Cultenbourn? He said, "There's bad news tonight".

MR. HARWELL: That's World War II.

MR. SPENCER: I join in Mr. Kirkland's comment.

THE COURT: Mr. Kirkland can make that sound really ominous. Mr. Kirkland, as the record will reflect what you said, but the Court is not of the opinion that it is that bad.

I think that the procedure requires that the Defendants be permitted to examine the exhibit before it is introduced, and the Court hasn't observed anything that has been prejudicial.

So, let it be noted in the record and overruled.

MR. PAFUNDA: Your Honor, I join in Mr. Kirkland's remarks as well as Mr. Walbourn, and ask the Court to tell the Jury that this does not apply to Drexil Hall and Austin Moore.

THE COURT: Okay, that - - let it be known it is overruled, gentlemen.

MR. HARWELL: If I understand, Your Honor, you are going to let these cartridges come in for the purpose of Mr. Self.

THE COURT: Just comparison as to size.

MR. SELF: That's all, Your Honor.

THE COURT: Because Mr. Adams - -

MR. HARWELL: (Interrupting) Your Honor, we would ask you admonish the Jury when that comes in as to the purpose of that, if it is not clear, please.

MR. WALBOURN: Mr. Self is going to substitute the hollow points with other ones.

MR. SPENCER: If they want to introduce any live rounds or rounds for the purposes of size just to show, why, they can introduce them. They are going to introduce - - they will see some more anyway so what is the use of introducing some that's not even relevant or material to the case?

THE COURT: Okay. Overruled.

MR. SPENCER: I figured.

MR. SELF: We have those now if you want to wait a minute. If you want to give them to the Clerk, so she can substitute them.

THE COURT: He has them here now, and he is going to substitute them.

MR. SELF: Here they are. I am asking these be introduced as Government's Exhibits forty and forty-one, previously handed to the Clerk.

THE COURT: Okay. Let it be noted in the record they are being substituted.

REPORTER'S NOTE: At this point the following proceedings were conducted in open Court.

THE MARSHALL OF THE COURT: Your Honor, all Counsel have had an opportunity to view the Government's Exhibits No. 40, 41 and 42, and I am handing them to the witness.

THE COURT: Okay.

MR. SELF: May I proceed, Your Honor.

THE COURT: Yes, sir.

Q. Captain Lykins, would you examine the contents of the envelope marked as Government's Exhibit - - marked for identification as

Government's Exhibit No. 40.

A. (Witness complies)

Q. Do you recognize what that is, Captain Lykins?

A. Yes, sir, I do.

Q. What is that?

A. That is a 9 millimeter shell with a solid jacket.

Q. Is that the same type shell that is used in an Uzi?

A. Yes, sir, it is.

MR. SELF: Your Honor, at this time I move for the introduction of what has been previously marked for identification as Government's Exhibit No. 40.

THE COURT: Any objection, gentlemen?

MR. HARWELL: Judge, I think this is for comparative purposes, and I would object at this time in that since it is comparative that I think it should be admitted in one fell swoop and not one at a time.

I am not trying to be picky, Judge, but if Mr. Self wants to admit them all, I withdraw my objection.

MR. SELF: I will move them all in

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at one time, Your Honor.

THE COURT: All right.

REPORTER'S NOTE: Whereupon Government's Exhibit No. 40 was introduced into the record.

Q. Mr. Lykins, the object is, in one of the envelopes that is marked Government's Exhibit No. 41 for identification, do you know what that is?

A. That is a .223 AR15 round that you shoot in an AR15 or a Mini 14.

Q. And that - - is that a solid point as opposed to what is called a hollow point?

A. That is a solid nose - - solid.

Q. And the other shell that you have that is marked for identification as Government's Exhibit No. 42.

A. That is a 30.06 with a core - - what you call a core lock projectile.

Q. What is a core lock projectile?

A. It is these splits here where the lead nose protrudes out through the copper jacket here.

REPORTER'S NOTE: Whereupon Government's Exhibit No. 41 and 42 were introduced into the record.

Q. Is that normal?

A. I guess I would say "corrugated" or, what, got those little slits in it there.

Q. The Government's Exhibit No. 41, is that the type of bullet that was used in the AR15's that were on the Ray-Mac site on Thursday?

A. 41.

Q. .223's?

A. Yes, sir.

Q. All right, sir. And is No. 42 a 30.06, which you have previously indicated was what you thought was some of the rifles being fired at you on Thursday?

A. It appears to be the same, yes, sir.

MR. SELF: Your Honor, at this time I move for the introduction of what has been previously marked for identification as Government's Exhibits Nos. 40, 41 and 42.

THE COURT: All right. Let the objections first noted by counsel be overruled.

That which has been marked as Government's Exhibits - - Trial Exhibits 40, 41 and 42 are finally admitted into evidence.

Now, these are not any ammunition that was used in this matter on trial; so you understand that?

These are introduced for comparison purposes. Now, they can - - one of the attorneys -- I believe Mr. Adams - - was asking about the 9 millimeter, and I think he said a 9 millimeter was slightly less than a .38 caliber; isn't that correct?

THE WITNESS: Yes, Your Honor.

THE COURT: All right. What was brought in here was the size of a 9 millimeter or size of a .223 or the size of a 30-30, 30.06, these are only in here for comparison purposes of those sizes, when they speak of the size as it being the - - just giving you some idea what the size is.

Now, this is not evidence of what anyone on any side is using. As I say, this is just merely for comparison purposes.

Do all of you understand that?

(Silence)

THE COURT: I take it by the nods of your heads that you understand that. Is there any objections or corrections to the Court's admonition?

MR. SELF: None, Your Honor.

MR. HARWELL: (Shaking head negative)

*** *** ***

Q. Captain Lykins, would you sit those three shells up there in front of you up on top of the witness bench?

A. (The witness complies.)

Q. Captain Lykins, the first one that is immediately in front of you, would you tell the ladies and gentlemen of the jury what that is?

A. In the center is the 30.06.

Q. The center is the 30.06?

A. Yes, sir.

Q. And the one -- what are the two beside it? Just describe it.

A. To the right here is -- that is an AR15, 223. That's a 223 caliber shell. This here is a 9 millimeter. (indicating)

Q. The 223 caliber, is that the same as a 7.62 military?

A. You have asked me something I can't answer. I don't know.

Q. Those two-sized bullets that you have that are -- that were -- are the size that were used in two of the weapons that were

up there at the Ray-Mac site, correct?

A. Yes, sir. The two outer ones, the mini 14, and the AR15.

Q. And there is a substantial difference between each one of those and the 30.06, for the purposes of the record?

A. Pardon?

Q. There is a substantial size difference between those two and the 30.06?

A. Oh, yes, sir.

Q. And also in comparison, Captain Lykins, is a 30-30 similar to any of those three?

A. It's smaller.

Q. It is smaller than what?

A. Your 30-30 projectile, there's not too much difference in the size there, but your shell is much -- your 30-30 is shorter.

Q. Shorter than what?

A. Than a 30.06.

Q. What about a .35 caliber?

A. A .35 is a short, heavy shell -- shorter.

Q. What about a .44 Magnum?

A. A .44 Magnum is bigger in

diameter and shorter than any of these here, and longer than this one here. (indicating)

Q. What about a .30 caliber?

A. A .30 caliber?

Q. Yes.

A. It looks about like this here.

Q. About like the AR -- the .223?

A. Your cartridge case here, but it is shorter. It is shorter than this.

Q. What about a .22 caliber what you had with you?

A. Oh, it is small.

MR. SELF: No further questions, Your Honor.

THE COURT: Are there any additional questions, gentlemen, of this witness?

MR. WALBOURN: I have just a couple, Your Honor.

THE COURT: Yes, sir.

RECROSS EXAMINATION

BY MR. WALBOURN:

Q. Mr. Lykins, are you

familiar with what is known as a shotgun slug that is used in deer hunting?

A. Yes, sir. I have used them.

Q. How big are those?

A. Well, you have got different sizes, depending on what size shotgun you have got -- a 14 gauge, a 16 gauge, a 12 gauge, or whatever gauge shotgun that you would have.

Q. Starting with those three that you have mentioned, how big would the ball on those be -- on the slugs.

A. This here?

Q. The slugs that you just described.

A. Well, just like I said, a 12 guage slug would be larger than a 16.

Q. Okay.

A. Quite a bit of difference than any of these here.

It could be larger, much larger.

Q. Much larger than any of those; is that correct?

A. Yes, sir.

MR. WALBOURN: Okay. Thank you.

THE COURT: Anything further of this witness?

CROSS EXAMINATION

BY MR. PAFUNDA:

Q. Captain Lykins, I have just a few questions with regard to the comparison and size of those bullets.

You would agree with me with regard to the 30.06 shell that you have there that is placed in the middle, correct?

A. Yes, sir.

Q. All right. That shell does not have the same effective range, does it, as the .223 shell?

A. (No response).

Q. In other words, the heavier bullet doesn't have the same flat trajectory as the shell from the AR15, does it, sir?

A. Both of them are effective up to around five hundred yards. Your .223 there has got more muscle velocity than your 30.06.

Q. Right.

A. A 30.06-twenty-seven hundred feet per second, and an AR15 is about forty-two or forty-three hundred feet per second.

Q. In other words, the shell that is a 30-06, you have to hold that at a higher angle, say, a forty-five degree angle at the same five hundred yard range, and the AR15 at a lesser angle, correct, sir?

A. You have to have your elevation and windage set right, yes, sir, on both of them.

Q. You would agree with me on that, would you not, sir?

A. It is as long a range effective as a .223. It is.

Q. But it doesn't have the same trajectory, does it, sir?

A. No, sir. It hasn't got the muzzle velocity.

Q. So, the size of the bullet, in a sense, is misleading, is it not?

A. (No response)

Q. Let me put it to you this way.

A. The heavier your bullet,

the harder it would be to get the combustion in your chamber and your barrel to force it out. The heavier the bullet, it would take more powder or whatever.

Q. And the range of a .22 long rifle is over a mile, is it not, sir?

A. Suspective a mile - - a .22 rifle - - the longer your barrel on a .22 rifle would be more effective than a pistol - -.22.

Q. And that is the smaller of the shells you have up there.

A. It says on the box, "dangerous up to one mile".

Q. In the range of a .22-long rifle shell - - bullet is over a mile, correct?

A. It says, "danger within one mile".

MR. PAFUNDA: Thank you, sir.

THE COURT: Is there anything else, gentlemen, of this witness?

(Silence)

MR. SELF: I ask that this witness be excused, Your Honor.

THE COURT: All right. What is the status of the excusal, permanently?

MR. SELF: Permanently excused, Your Honor.

I ask that the exhibits be passed to the Jury at this time, Your Honor.

THE COURT: You are permanently excused.

THE WITNESS: Thank you.

THE COURT: You may hand the exhibits to the members of the Jury.

(The Marshall complies)

THE COURT: Call your next witness.

MR. HARWELL: If the Court please. Your Honor, if you will remember, the gentleman this morning, the helicopter pilot, he was going to come back in with the log that he had and we ask that if it is agreeable with Your Honor that I be allowed to examine him. He is downstairs, I am told.

MR. KEHRLI: He is ready, Your Honor.

THE COURT: Let him come up.

MR. HARWELL: Marshall, would you ask him to bring his log with him.

Judge, may I approach the podium?

THE COURT: Yes, sir.

ALLEN JACOBSEN, having been previously duly sworn, was further examined and testified as follows:

FURTHER CROSS-EXAMINATION

BY MR. HARWELL:

Q. This is Mr. Allen Jacobsen, is it not?

A. Yes, sir.

Q. Mr. Jacobsen, again, for the purposes of the record, I reintroduce myself. I am Aubrey Harwell. You have returned this afternoon following your testimony this morning; is that right?

A. That's correct.

Q. And you recognize, sir, even though you weren't given the oath, the oath you gave this morning is continuing; do you not?

A. That is right, sir.

Q. All right. Mr. Jacobsen, during the course of this morning, I asked you to direct your attention to Monday, Tuesday and Wednesday, February 15, 16 and 17, 1982. And you told me that you had not flown because of weather, the best of your recollection, on those three days.

I then asked you if you would get your logs in order that we might see what they show. And I think that you showed me those logs in the United States Attorney's Office during the noon break today; is that right?

A. That's correct.

Q. Do you have your logs with you today?

A. Yes, sir, I do.

Q. I would ask you, sir, to turn to that entry in the logbook reflecting February, the period ending February 24th, 1982. I can't refer you to a page number, but it is the same one I looked at downstairs.

Do you have it with you?

A. I have it.

Q. All right, sir. Mr. Jacobsen, let me, before we get into the specific details, just so the Jury will understand, get you to respond to some of my questions as to what information is reflected.

Up at the top it says, "This page begins on", and there is a date, is it not?

A. Yes, sir.

Q. What is that date?

A. That is the 4th of February.

Q. All right, sir. And it ends on 24, February, 1982?

A. Yes, sir.

Q. All right, sir. And the name of airlines reflected is Mack Mining Company, isn't it?

A. Yes, sir, it is.

Q. All right, sir. And then there are a number of columns, are there not, Mr. Jacobsen?

A. Yes, sir.

Q. The first column is the date where you fill in the date?

A. Yes, sir.

Q. And the second column is the flight number, and you don't fill that in on this log, do you?

A. No, sir.

Q. And the third column is a "From" column; is that right?

A. Yes, sir.

Q. And the next log is a "To" column; is that right?

A. Yes, sir.

Q. And since the helicopter is based in Pike County, those are filled in as to these pages of the log Pike County on the "From", and Pike County on the "To" column; is that right?

A. Yes, sir.

Q. All right. And the next column, sir, is "aircraft make and model", isn't it?

A. Yes, sir.

Q. And that reflects the Bell 206L1.

A. Right.

Q. All right, sir. And the next number is "aircraft certificate number"; is that correct?

A. Correct.

*** *** ***

MILLERS FALLS EZERASE COTTON CONTENT

Q. The next column, Mr. Jacobsen, has noted at the top miles flown. I believe you told me downstairs that it is in that column you list the number of landings on a given date, and this is a helicopter--

A. That's correct.

Q. --and not the miles flown, is that right?

A. That's correct.

Q. Okay. The next number shows duration of flight. And there are two separate columns there, is that right, sir?

A. Yes, there is.

Q. All right. Now, there are then some additional columns where you have an option to put down whatever information that you've, the pilot, logging the hours wants to put down, am I right?

A. That's correct.

Q. Okay. Mr. Jacobsen, let me get you, sir, to look about halfway down the page. But before I do that let me ask you another question. Are all the entries on that page, the handwritten non-printed entries, were they filled in by you?

A. Yes, they were.

Q. So everything on the page short of the printing represents your writing, is that right, sir?

A. Yes, it does.

Q. Okay. Now getting to the question I was about to pose. Look about halfway down the page and you will see that there is an entry of 15 February, is that right?

A. Right.

Q. And that shows from Pike County to Pike County written in, is that correct?

A. Right.

Q. All right, sir. It also reflects the standard aircraft entry number, Bell 2061, does it not?

A. Right.

Q. And also the certificate mark?

A. Right.

Q. Under the miles flown column, which you have told us really indicates of landings, you have written in sixteen, have you not?

A. Yes, I have.

Q. And, if I understand your

testimony, that means on Monday, February 15 you had sixteen landings in that helicopter.

A. That's correct.

Q. All right, sir. And then you go on across, sir, to a column on the far right.

A. Uh-huh.

Q. That column on the far right is a remarks column.

A. Right.

Q. Now, if I understand that which you told me downstairs, you have a code which you use for the sake of simplicity, a shorthand method if you will.

A. Yes, I do.

Q. For listing various places that you landed on that date, February 15, am I right?

A. Right.

Q. All right, sir. And, as a matter of fact, you also told me, did you not, that the code for the Ray-Mac job site was six, is that right?

A. Yes, it is.

Q. And you're looking at a code book, which you showed me downstairs, to be sure that six is the code for the Ray-Mac job site over in

Floyd County, are you not?

A. That is correct.

Q. All right, sir. Look at that last column under remarks, sir, and tell me if I have counted correctly in that there are one, two, three--there are four code six entries for that date, Monday, February 15, 1982.

A. Right.

Q. And that indicates that you landed that helicopter at that Ray-Mac job site four times on that date, does it not, sir?

A. Yes, it does.

Q. All right, sir. Now, let me ask you this. Having looked at the aircraft log and having reflected on this matter since the questioning this morning, is your memory refreshed in regard to who went with you, if anyone, on those four landings at Ray-Mac?

A. Not particularly, no. I don't recall any specific passengers.

Q. All right, sir. Do you recall any specific cargo?

A. No, I do not.

Q. You do not, all right, sir. Mr. Jacobsen, this book,

this log book that you have referred to, is part of the corporate records of Coal-Mac or Jaco, am I right?

A. I wasn't aware that it was. It's part of my personal records.

Q. Part of your personal records, all right, sir. But you made all the entries in here, as I think you said, correct?

A. Yes, I did.

MR. HARWELL: May the Court please, I understand the problems with the pilot surrendering his log book. I have obtained downstairs a xerox copy of the two pages, and I would like to have those passed to the Clerk, marked as exhibits and admitted into evidence.

THE COURT: Let it be passed to the Clerk for marking.

MR. DAUSE: We have no objection to their admission, Your Honor.

THE COURT: All right. Let her mark them.

(Reporter's Note: At this time the Marshal handed the Clerk a group of documents.)

MR. HARWELL: There's two pages, may the Court please.

MR. DAUSE: Your Honor, if I perceived

it correctly when they were passed, it appeared there were some colorings on that particular copy. I'm wondering if a clean copy should not be introduced.

MR. HARWELL: Judge, that's the only copy I've got. I'm happy to--I think it would be more appropriate, Your Honor, if I could use a clean copy. That one has no writings on it but it's highlighted, given the fact that my eyes are not very good and it's not a real good xerox.

THE COURT: All right. That will be fine.

MR. HARWELL: Makes no difference to me, Judge.

THE COURT: Well, let me see it.

MR. HARWELL: There's nothing written on it. There are no notes on it other than those which Mr. Jacobsen put down.

(Reporter's Note: At this time the Clerk handed the Court a group of documents.)

MR. HARWELL: There's red on the right-hand column, Judge, and yellow all the way across.

THE COURT: All right.

MR. HARWELL: May I inquire, Madam Clerk, is that Defendant Edgar Jones' No. 5 exhibit?

THE CLERK OF THE COURT: You want these

marked as one exhibit?

MR. HARWELL: Yes, ma'am.

THE CLERK OF THE COURT: The next exhibit would be no. 6.

MR. HARWELL: Number 6. I would ask, with the Court's permission, to tape that together since those pages are columar and have that admitted as Defendant Edgar Jones' Exhibit No. 6.

THE COURT: That's Trial Exhibit 6, Madam Clerk?

THE CLERK OF THE COURT: Yes, Your Honor.

THE COURT: All right. Let it be shown to the other defense counsel first. Make a statement for the purpose of the record to that effect.

THE CLERK OF THE COURT: Yes, Your Honor. These are two pages not previously marked for identification, and they will be identified as NPM Jones' Exhibit No. 4 and Trial Exhibit No. 6 for Defendant Jones.

I think Mr. Harwell's request--he wanted them taped together in this fashion, is that correct?

MR. HARWELL: With the big column, ma'am, on the right. The handwritten-- Judge, may I

approach the Clerk?

THE COURT: Yes.

(Reporter's Note: At this time Mr. Harwell approached the Clerk.)

THE CLERK OF THE COURT: Your Honor, the exhibit now has been made into one exhibit.

THE COURT: All right.

THE CLERK OF THE COURT: This has been marked for purposes of trial as Defendant Jones' Trial Exhibit No. 6.

THE MARSHAL OF THE COURT: Everyone has had an opportunity to see these exhibits.

(Reporter's Note: At this time the Marshal handed the witness an exhibit.)

MR. HARWELL: May I proceed, Your Honor?

THE COURT: Please do.

Q. Mr. Jacobsen, looking at Exhibit 6, which has been admitted and now before you, you will agree with me, will you not, sir, earlier today when you said that you didn't fly on Monday, the fifteenth, you were mistaken, were you not?

A. I said that I didn't remember having flown on Monday, that is correct.

Q. I see. That is an accurate

15th of February I can tell what I did. And for the last many years of flying with the company I can tell from what I'd entered there that it was a normal day of flying for me and delivering parts.

Q. Yes, sir. I'm not making myself clear, Mr. Jacobsen.

I'm asking if you have any recollection of what you did that day or if you are assuming because of the listings that it was a normal day. Which of the two?

A. I don't remember what I picked up for that, that's correct.

Q. All right, sir.

A. I don't specifically remember that date in my life, no.

Q. But, if I understood your testimony, flying parts is a normal part of your function as a pilot for the company, is that right?

A. That's correct.

Q. All right, sir. Would it be fair to say that you are less likely to remember normal everyday activities than you are special events, different activities?

A. I'd say that's a fair assumption.

Q. All right, sir. And is delivering weapons, such as Uzis or AR15, normal?

A. No, sir, it's not.

Q. It's not normal?

A. No, sir, it's not.

Q. I see. That's exceptional, extraordinary, is that right?

A. Yes.

Q. But you have no recollection of when it was that you took those?

A. Yes, sir. I have admitted that I did, but I don't recall exactly when it was.

Q. You don't recall the date, do you?

A. I don't recall the -- I can tell from my log that it was after -- the next time I took off in the plane was after the shooting on Thursday, which I testified to.

Q. Yes, sir. Is there anything on that log or any other documents to which you may refer where you would be able, in your opinion, to refresh your memory and pin down to a precise day that time that those weapons were delivered?

A. No, sir, there is not.

MR. HARWELL: All right, sir. Thank you.

THE COURT: Are we through with this witness?

MR. DAUSE: Yes. We ask that he be excused, Your Honor, permanently.

THE COURT: You may be permanently excused, sir.

(Witness excused.)

MR. HARWELL: Judge, if the Government has no objection to the highlighting I'd ask that Exhibit 6 of Edgar Jones be passed to the Jury. They said they didn't object.

The truth is that it's easier to read highlighted evidence.

THE COURT: Well, let's see what objections we have to the highlighting.

MR. SELF: Your Honor, we have no objection. If it makes it easier, fine, refer to it.

THE COURT: Fine. Call your next witness while they're looking at that.

MR. KEHRLI: Your Honor, the United States calls James Stephens.

(Reporter's Note: The Marshall handed the Jurors a document at the time.)

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JAMES STEPHENS, a witness herein, being called by counsel for the United States, after having been first duly sworn, was examined and testifed as follows:

THE MARSHAL OF THE COURT: State your name and address to this lady.

THE WITNESS: James Stephens, Prestonsburg, Star Route 5.

THE COURT: Just a moment, sir. We'll give the jury a chance to ...

MR. KEHRLI: May I approach the Clerk?

THE COURT: Yes, sir.

(Reporter's Note: At this time Mr. Kehrli approached the Clerk.)

THE COURT: You ladies on the back row look at this, also.

DIRECT EXAMINATION

BY MR. KEHRLI:

Q. Mr. Stephens, my name is Randy Kehrli and I'm representing the United States in this matter. This afternoon I'll be asking you some questions. If you have any difficulty hearing me please ask me to repeat the question.

I'd also ask you to keep

your voice up so that the members of the jury and also the people in the courtroom can hear your answers to the questions.

Would you state your full name for the record, please, sir.

A. My name is James Stephens.

Q. And what is your occupation?

A. I'm a trooper for the Kentucky State Police.

Q. Trooper Stephens, how long have you been employed by the Kentucky State Police?

A. Since May of '72.

Q. To what post are you currently assigned, sir?

A. Work out of and assigned to Post 9, Pikeville.

Q. How long have you been assigned to that post?

A. Since '72.

Q. Trooper Stephens, I'm-- I would like to direct your attention to Tuesday, February 16, 1982. Do you recall what your assignment was on that date?

A. Tuesday, the sixteenth?

Q. Yes, sir. Excuse me, I'm sorry, Thursday, February 18, 1982. I've got the wrong date.

A. Yes, sir, I do.

Q. All right. What was your assignment on Thursday, February 18?

A. I was assigned to patrol an area in Floyd County along Kentucky 680, known as the John Hall Branch and Bill Hall Branch area. Due to recent labor problems in the area I was assigned to work that in the morning starting around six o'clock, to be at--in the area.

Q. All right. At any time during that day did any acts of violence come to your attention?

A. Yes, they did.

Q. Would you tell the members of the jury when that was.

A. It was approximately--around 8:25, 8:30 a.m. in the morning. I heard gun-shots being fired.

Q. All right. Trooper Stephens, where were you at that time?

A. I was on the--what's referred to as the Bill Hall Branch side of the mountain.

there.

Q. Were you on foot or were you in a vehicle?

A. I was in a vehicle.

Q. And what vehicle was that, sir?

A. The state police cruiser.

Q. And was anyone else with you?

A. Yes, Trooper Danny Williamson.

Q. Who was driving the unit?

A. Trooper Williamson was.

MR. KEHRLI: All right. Your Honor, if the Marshal could hand the witness what has been introduced into evidence as Defendant's Exhibits 3 and 4 and Government's Exhibits 9 and 10.

(Reporter's Note: At this time the Marshal handed the witness a group of exhibits.)

Q. Trooper Stephens, I'd like you to take your time and examine those photographs. I'd like to ask you if any of those photographs depict the location where your unit was when you-- when the gunfire started on Thursday morning, the eighteenth of February.

A. Yes, they do.

Q. All right. Which exhibit are you talking about?

A. Exhibit 3.

Q. Defendant's Exhibit 3?

A. Yes.

MR. KEHRLI: All right. Would the Marshal please post that exhibit on the easel.

(Reporter's Note: The Marshal complied.)

MR. KEHRLI: Your Honor, may the witness approach the easel?

THE COURT: Yes, sir.

Q. Would you step down off the witness stand and show the members of the jury where your unit was when the gunfire started.

(Reporter's Note: The witness complied.)

A. I cannot show you here where the unit was when the gunfire started. We were on the bottom of the hill on this one.

Q. All right.

A. When the gunfire started we went to the scene.

Q. I see. In other words, I've been misspeaking then.

You arrived at the scene

after the gunfire started?

A. Yes. We were approximately five-tenths of a mile off when it started.

Q. All right. Where did you proceed when you went to the scene on that photograph?

A. We stopped and--in this area right about there (indicating). This is the entrance to the mine site (indicating). This is Kentucky 680 (indicating). We were around--close to where this access road to the mine is, about there (indicating).

Q. All right. Was your unit on the highway or did you pull off the road?

A. No, sir. It was right in the highway on the blacktop.

Q. All right. What did you do when your unit arrived at that point, sir?

A. We exited our cruiser to see if we could see anything or where the fire was coming from.

Q. All right. Would you resume the witness stand, please.

(Reporter's Note: The witness complied.)

Q. Would you tell the members of the jury at that point what you saw and what you

heard.

A. That morning it was hard to see due to the fog covering the mountaintops, hilltops there. I did not see anyone.

I did hear gunfire. It appeared to me the gunfire was coming from two positions on either side of the roadway, one on each side of that particular rockcut there.

The road goes through a rockcut. Apparently the gunfire was from each side of that rockcut.

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entry insofar as the date and the landings and the time?

A. Yes, it is.

MR. HARWELL: All right, sir. Thank you.

THE COURT: You move for the introduction?

MR. HARWELL: Yes, sir. I move the introduction, Your Honor.

THE COURT: All right.

MR. HARWELL: Is it admitted, Judge?

THE COURT: Any objections?

MR. WALBOURN: No objection, Your Honor.

MR. THOMAS: None.

THE COURT: Being no objections, let it be finally admitted into evidence as Edgar Jones' Trial Exhibit 6, and you're given permission to withdraw this exhibit and substitute a plain copy in the place thereof.

MR. HARWELL: Thank you, Judge.

THE COURT: All right. Anything further of this witness?

MR. DAUSE: Redirect briefly, Your Honor.

THE COURT: Yes, sir.

REDIRECT EXAMINATION

BY MR. DAUSE:

Q. Mr. Jacobsen, you have before you Defendant Jones' Exhibit 6, which is a copy of your log book, correct?

A. That's correct.

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Q. Now, the log entry that you testified about is relative to February 15, the line entry in your log book which you use as your shorthand description of where you've been and what you've done contains a lot of numbers in addition to the number six, is that correct?

A. That's correct.

Q. Would you tell the Court and the Jury what numbers are contained and what the meaning of the sequential order of those numbers are, and, if you know, what the other landing locations were.

A. Yes, sir. I had -- In one column I made 16 -- I've mentioned that I had the number 16 in, and the number of landings, which is in the remarks column, is also 16.

My first landing was in the -- the code was O-F-F, which was office. From there I went to number 7, which is the Mac-Elkhorn job. From number 7 I went to number 6, which is Ray-Mac's job. From there I went back to the office.

From the office I went to Wayne Supply, which is where I keep my fuel. Then I went back to the office. From the office I also went back to Wayne's Supply the next trip.

From Wayne's Supply I went to number 7, which is Mac-Elkhorn -- excuse me, Mac-Island; number 6 which is Ray-Mac; back to the office.

From there back to Wayne's Supply; number 7, which is Mac-Island; to number 6, which was Ray-Mac; back to the office. Then to number 6, which is Ray-Mac; and to the airport.

The Wayne Supply with one instance was parts deliveries. We have Caterpillar equipment, and that's our parts pickup.

The one entry from the office directly to Ray-Mac -- there are a lot of parts places. We buy parts from places that don't have facilities for landing the helicopter at. We have runners that go to Industrial Rubber, Big Sandy Electric to pick the parts up; we turn them to the office where we take them out to the jobs by helicopters.

That was just a normal day's flying.

Q. Delivering parts to -- to the job sites, part of your normal activity?

A. Yes, sir, it is.

Q. To the best of your memory and knowledge were you doing anything on Monday while

you were flying that helicopter, other than conducting your normal business?

A. No, sir.

Q. Now, the log also shows -- What is the next entry after the entry for February 15, as shown on Defendant's Exhibit 6?

A. The next one is the 18th of February.

Q. All right. Now, what happened to February 16 and February 17, why aren't they noted in there?

A. The weather didn't allow us to fly.

Q. After having reviewed your log and your key to it, has that led you to believe that you have forgotten anything other than the fact that you flew for normal business on that Monday?

A. No, sir, it didn't. I just -- Nothing had changed. The first day that I had flew since the trouble started was on the 18th, as I had testified.

Q. And having reviewed the logs and your key to it, has that caused you to believe that -- that you were -- that your memory was mistaken to the testimony you've given these ladies

and gentlemen today in any other respect?

A. No, sir, it hasn't.

MR. DAUSE: Thank you.

MR. HARWELL: One or two questions, Judge.

RECROSS EXAMINATION

MR. HARWELL:

Q. Mr. Jacobsen, I'm a bit perplexed. Are you telling this Jury and this Court that you remember that Monday, February 15, or are you saying that when you look at that log that would appear to be a typical delivery sort of day?

A. That's what I'm saying, when I look at the log I can tell that it was.

Q. And you have no recollection specifically of your activities on Monday, February 15, 1982, did you, sir?

A. I can look at the log and tell exactly what I did.

Q. Oh, you now have used the log to refresh your memory, is that what you're telling us?

A. I'm saying by looking at the

Q. Sir, could you tell from the sound what type of gunfire it was?

A. Well, it sounded to me, from my experience with weapons, we have issued a Ruger mini 14 with .223 ammo. It sounded something in that line of caliber, .223, .38, something along that line.

Q. All right. What did you do when you arrived at the scene and you heard the gunfire?

A. We called for assistance and then exited the cruiser immediately.

Q. Where did you go after you exited the cruiser?

A. We were trying to find cover at this point, trying to get far away from the shooting without being in any line of fire. And we just moved down the road a little bit from our cruiser.

Q. All right. Did you -- did you take cover under any particular obstacle or at some point in the road?

A. After we were there for about fifteen minutes, we did.

Q. All right. Why did you

take cover, sir?

A. There was a third position of gunfire opened up in behind us. And at that time, we were in danger. We could hear the bullets ricocheting very close to us. And we moved away from the cruiser and took cover behind an earth embankment that was piled up on the side of the road there.

Q. All right. Were the bullets that were ricocheting, were they coming close to you?

A. Yes, sir, they sounded very close, within just a few feet of us.

Q. And were they striking a particular object?

A. We could hear them hitting off the rocks, the rock walls behind us and the blacktop.

Q. Could you tell what direction those bullets were coming from?

A. No, sir, not really.

Q. All right. How long did you assume this cover that you were taking at that point?

A. Approximately fifteen

minutes until the firing ceased, fifteen or twenty minutes.

Q. All right. At this time, what was going through your mind, Trooper Stephens?

A. I was in fear for my life, possibly of getting injured or maybe killed with some of those ricocheting bullets.

Q. Were you -- strike that.

Did you have any conversations with Trooper Williamson at that point?

A. Yes, I did.

Q. And what did you say to him?

A. Something along the line of we should take cover. They are getting pretty close. Maybe we will get hit.

Along that line.

Q. How long in total did the shooting last, Trooper Stephens?

A. Approximately thirty-five, forty minutes.

Q. Could you see anyone who doing the firing from your location?

A. No, sir, I could not, from

any location.

Q. All right. After the shooting stopped, what did you do?

A. At that particular time, we had four or five people I think probably had arrived by then. We had supervisors on the scene, and they took charge of it.

Q. All right. Did you do any further investigation of the incident?

A. I went -- Trooper Williamson and I did patrol some of these hollows. I think one of the names is Royal Hollow near the area there that possibly if men were coming off the hill, they could come in this area. We just observed people coming off the hill.

Q. Did you see any people come off the hill?

A. No, we did not.

Q. Why did you go to those particular positions to make those observations?

A. Well, in trying to determine where they could have come off the hill by being on a ridge there, we went in those hollows we thought possibly they could come off.

Q. All right. Did any other

personnel from the Kentucky State Police arrive at the scene?

A. Yes, they did.

Q. Who was that?

A. Sergeant Stanley Farley.

Q. Any other personnel?

A. Sergeant Eugene Hutchison.

Q. Anyone else?

A. Detective Jim Rederick and Trooper Terry Hall.

Q. All right. Do you know who called those people?

A. Post 9 dispatcher apparently dispatched them up there.

Q. Was that a result of your contact?

A. Of our request for assistance, yes, sir.

MR. KEHRLI: One last question, Trooper Stephens.

Your Honor, may the witness approach the easel?

THE COURT: Yes, sir.

Q. Trooper Stephens, would you please indicate to the jury as best you can what

direction -- again, first of all, where your unit was in what direction, as best you could determine at the time, the gunfire was coming from?

A. At that time we were here. The cruiser was parked right in this area here where the entrance of the mine is. The firing that we heard was coming from the area up in the hills on this side of the road. And then up on this side of the road, the other side, two positions. Then possibly fifteen minutes later, a position opened up which would be way back over in this area here.

Q. That is the third position?

A. Third position.

Q. And that is well off the photograph?

A. (No response from witness).

Q. That is off the photograph?

A. Yes, it is.

Q. All right. Did you return fire at any time, Trooper Stephens?

A. No, sir, I did not.

Q. Why not?

A. I could not see anything

to fire at.

MR. KEHRLI: All right. Your Honor, at this time, I have no further questions of the witness.

THE COURT: Let's start at this end, gentlemen, and give them a break.

MR. PAFUNDA: Your Honor, may I just approach the Bench for a moment?

THE COURT: Yes, sir.

Reporter's Note: Whereupon a Bench conference was held where the following was heard:

MR. PAFUNDA: I would ask for the officer's arresting notes or investigative report made during the course of this investigation.

MR. KEHRLI: Your Honor, we have provided the investigative report.

MR. PAFUNDA: That is all he has is just that one sheet?

MR. KEHRLI: That is the only statement of this witness that we have that is Jencks, yes.

MR. PAFUNDA: Not only Jencks Act material. I am asking for investigative notes of the situation if he has any. Nothing? That is just that one sheet?

MR. KEHRLI: Your Honor, the Government

has provided all that is required to be provided in the Jencks Act.

THE COURT: Okay.

(Reporter's Note: Whereupon the Bench conference was concluded.)

THE COURT: Do you want to go on with this or break? All that wants a break, raise your hand. All right. It doesn't apply to attorneys.

We will be in recess fifteen minutes. During this recess, you understand the not now admonition is in effect? Do you understand? I take it by nodding your head that you do.

Any objections or corrections to the Court's admonitions?

MR. SELF: No, Your Honor.

MR. PAFUNDA: No, sir.

THE COURT: The jury will be in recess for fifteen minutes.

THE MARSHALL OF THE COURT: The jury is out of the courtroom.

THE COURT: Please excuse the witness and the remainder of the courtroom.

THE MARSHALL OF THE COURT: This Honorable Court is now in recess for fifteen minutes.

THE COURT: That is three o'clock.

THE MARSHALL OF THE COURT: Yes, Your Honor. Twelve minutes.

(Reporter's Note: Whereupon the Court was recessed at 2:48 P.M.)

(Reporter's Note: Whereupon the Court was resumed at 3:02 P.M.)

THE MARSHALL OF THE COURT: All rise. This Court is again in session. Be seated and come to order.

Your Honor, all Defendants, all counsel, and all members of the jury are present.

THE COURT: All right. Are we ready to proceed?

MR. PAFUNDA: We are ready, Your Honor.

THE COURT: Will the witness please return to the stand?

MR. PAFUNDA: Your Honor, while the witness is on his way to the stand, I would ask the Marshall to hand this to the Clerk. And I have already discussed this with counsel for the Government. And we have agreed to mark it as Drexil Hall and Austin Moore Exhibit No. 1. It has not been previously marked.

THE COURT: All right.

MR. PAFUNDA: And we have also agreed to cut through or eliminate the perfunctory questions with regard to accuracy and so on if that is all right with the Court.

THE COURT: Let me get this. You are going to identify it; and other than that, you have agreed as to the foundation.

MR. PAFUNDA: That is correct, Your Honor.

THE COURT: All right.

MR. PAFUNDA: And I would just to save time, move to introduce it as Drexil --

THE COURT: (Interrupting) Let's get it marked. If they want to waive seeing it, fine. But let's get it on the record.

MR. SELF: We have seen it, Your Honor.

MR. HARWELL: We have seen it, may the Court please.

MR. HOLLON: We have seen it, Your Honor.

THE COURT: All right. Let the record so reflect.

THE CLERK OF THE COURT: Your Honor, the

photograph that has been previously marked for identification has been identified as NPM Defendants Austin Moore and Drexil Hall No. 1 now has been marked for purposes of trial as Austin Moore and Drexil Hall Trial Exhibit No. 1.

MR. PAFUNDA: And Your Honor, in an effort to save further time, I will make the statement for the record that that is a recent photograph taken in February, 1984.

THE COURT: Of what?

MR. PAFUNDA: Of the area that the Trooper was referring to up there.

THE COURT: All right.

MR. PAFUNDA: And at this time, we move to introduce it.

THE COURT: There is no objection?

MR. SELF: No objection, Your Honor.

THE COURT: Being no objection, I let that which has been marked as Moore-Hall Trial Exhibit 1 finally be admitted into evidence as Moore-Hall Trial Exhibit 1.

THE MARSHALL OF THE COURT: The exhibit evidence has been handed to the witness.

THE COURT: Thank you, sir.

MR. PAFUNDA: I would ask the witness or the Marshall to place it on the easel for the jury to view.

CROSS EXAMINATION

BY MR. PAFUNDA:

Q. Trooper Stephens, will you look at that photograph? That is the photograph of the -- of the area of the Ray-Mac site. And in the lower right hand corner, as you face it, that is the road coming from Mud Creek. Correct, sir?

A. Yes, that is correct.

Q. All right. And you came from the McDowell side that morning. Is that correct, sir?

A. That is correct.

Q. All right. If you will, sir, with the Court's permission, take a -- I guess a red grease pencil -- is there one there, sir -- and please mark where your car came to stop that morning, and put your --

THE COURT: (Interrupting) Put your initials.

Q. I was just going to say that. And if you would, is there a pointer up there?

That would be fine. Please point to where your car came to stop.

A. I would say right there.

Q. Almost directly across from the access road leading to the Ray-Mac job site. Is that correct, sir?

A. Yes, very close to it.

Q. All right. If you will, please resume the witness stand.

Now, if I understand your testimony correctly, at approximately 8:30 that morning, as you were coming from the McDowell side and at approximately a half mile from the mining site -- and by that you mean the access road, do you not?

A. Yes, that is what I mean.

Q. All right. You first heard semiautomatic gunfire. Is that correct?

A. Yes, I heard gunfire.

Q. You heard semiautomatic gunfire. Is that correct?

A. Yes.

Q. Those were the first sounds that you heard that morning, gun sounds?

A. Yes, they were.

Q. And then you traveled on up to the access road and stopped. Is that correct?

A. Yes, we stopped on Kentucky 680 near the access road.

Q. Which is the main highway leading from McDowell to the Ray-Mac site. Right?

A. That is correct.

Q. Then when you arrived and stopped, more gunshots occurred. Correct?

A. Yes, it continued.

Q. All right, sir. Would you mark on there, please, sir -- and I believe you mentioned three positions that you were able to discern gunshot fire coming from. Is that correct?

A. That is correct.

Q. All right. Would you mark the positions. And you may mark them in order if you wish.

A. In order?

Q. That you heard them.

THE COURT: A good suggestion, sir, where you heard the first sound from, put one; where you heard the second sound, put two; three. Do you understand what I am talking about?

THE WITNESS: Yes. The two positions

were simultaneous. Two positions were going at one time.

Q. All right. If you will then just mark indicating the two positions that were simultaneous.

And the final position was the last area that you heard fire from. Is that correct?

A. Yes.

Q. All right. And the last position was located where, sir?

A. It is not on this map.

Q. All right. It is not even on that photograph. Correct?

A. (Witness shaking head in the negative.)

Q. But it is on the Ray-Mac side of the highway. Correct, sir?

A. Yes, it is.

Q. All right. Thank you, sir.

Now, returning to the two positions from which you heard simultaneous gunfire, the position on the Ray-Mac side, was that again semiautomatic gunfire?

A. Yes, it appeared to be, yes.

Q. All right. Now, after the exchange of gunfire, did you go up on the job and talk to the man who is running the job, Raymond Pete Barker?

A. No, I did not.

Q. All right. Did you speak with him at all, sir?

A. I spoke with an individual that morning that I don't recall his name from the mining company.

Q. All right. Did you know that morning that Ray-Mac employees had semiautomatic weapons?

A. No, sir, I did not know. Before I went there, or --

Q. (Interrupting) That morning after the exchange of gunfire.

A. I did not see any weapons.

Q. All right. You did not see any AR15's or any Uzis. Correct?

A. That is correct.

Q. But from your recollection, it was the semiautomatic gunfire that you heard first.

Correct?

A. Yes.

Q. The initiating gunfire. Correct? To the best of your recollection of what you heard or observed.

A. Explain initiating.

Q. That is the first gunfire you heard?

A. The first I heard was semiautomatic, yes, sir.

Q. But you did not go up on that hill to see what weapons those men from Ray-Mac, did you?

A. No, sir.

MR. PAFUNDA: Thank you very much, sir.

THE COURT: Anything further?

CROSS EXAMINATION

BY MR. ROWLAND:

Q. Good afternoon, Jim.

A. Good afternoon.

Q. My name is Dan Rowland for the record, and I represent Tim Milan. Can you hear me?

A. Yes, very well.

Q. Just what is your job at Kentucky State Police?

A. I am what we call a road unit. I patrol the roads assigned to Floyd County.

Q. And what does your job consist of?

A. It consists of what we say a total policing for a uniformed trooper. I investigate criminal cases. I work automobile accidents. I answer complaints. I take care of speeding and things like that.

Q. You enforce Kentucky law?

A. Yes, as a whole.

Q. Have you always worked at the Pikeville Post?

A. Yes, I have been assigned here.

Q. I have got a cold. It keeps bouncing around the courtroom. I thought I was through with it today.

During the time that you were assigned to Pikeville, was Billie Lykins ever your commander?

A. Yes, sir, he was.

Q. And I believe when you started your testimony, there was some reference to the 16th day of February, 1982; and that turned out to be the wrong day. Is that right?

A. Yes.

Q. Have you refreshed your memory as to the events of the 18th by looking at some document?

A. Yes, I have.

Q. And would that document be your investigation report?

A. Yes, sir, the report I wrote up.

Q. Do you have a copy of that with you?

A. Yes, I do.

Q. Would you like to take a look at that now to refresh your memory as to the title of investigation and tell me what the title of investigation is on that sheet?

MR. SELF: Your Honor, objection to relevancy.

THE COURT: Well, let me see it.

MR. KEHRLI: Your Honor, that document

is also hearsay. I have no objection to counsel asking to refresh his recollection from the document; but as to reading from it or any other way --

MR. ROWLAND: (Interrupting) That is all I wanted to do.

THE COURT: All right. Let him answer.

Q. You have had a chance to look at it, haven't you?

A. Yes.

Q. And what did it say as to title of investigation?

A. Wanton endangerment, first degree. Is that a Kentucky State offense?

A. Yes, it is.

Q. It is not a federal offense, is it?

A. Not to my knowledge.

Q. Okay. Now, you said that you heard shots coming from how many locations, Jim?

A. All together, three.

Q. And did you determine that one of those locations was the Ray-Mac site itself?

A. Yes, on the side of the hill Ray-Mac Mining Company is located.

Q. So there were shots coming from the location where the Ray-Mac employees were. Is that right?

A. Yes, that is correct.

Q. Did you see any of the guns that they were using? Do you remember the kinds of guns that they had?

A. No, sir, I didn't see any weapons.

MR. ROWLAND: Thank you, sir.

THE COURT: Now, they said wanton endangerment, first degree. That is referring to a State charge. You understand that a State charge doesn't have anything to do with this. There may be a State charge and not be a federal charge, or there may be a State charge and may be a federal charge. But one doesn't depend upon the other. We are only concerned with the federal charge. And if there had been a State charge, the evidence would be well, this is taken care by the State; so you don't consider it in the federal. We aren't concerned with that at all. What we are concerned with is the federal charge. The State matter has nothing to do with it.

Do all of you understand that?

Let the Court state to you this: A jury in considering the evidence you are told -- you are given the Rules with regard to credibility. That is the witness and how the witness presents the evidence all goes to credibility. There is another thing which sometimes comes in to it called packaging. A good illustration of this is a gentleman that is say selling stereos. If he has someone there to listen to his stereo and buy his stereo, he looks at them and sees they are of Italian descent, and he plays Ole Solo Mio over the stereo so that he can hear it playing. If someone comes in of German descent he plays some German songs. That is what you call -- we are concerned in this thing not in the packaging. We are concerned with the evidence. You keep your eye upon the evidence. Will you do that?

Is there any objection or corrections to the Court's admonition?

MR. KEHRLI: No objection, Your Honor.

****

THE COURT: Let's proceed.

MR. KEHRLI: Your Honor, is there any more cross-examination?

MR. WALBOURN: I have none, Your Honor.

MR. SPENCER: I have none, Your Honor.

THE COURT: Any redirect?

MR. KEHRLI: Yes, sir.

For the purposes of re-direct, Your Honor, I would like to have the Marshall, if you would, please, to obtain Government Exhibit No. 4 in the first - -

THE COURT: (Interrupting) Let me get back further on this packaging.

Now, it can be packaging so this can be a prejudicial effect, or it can be packaging to be a good effect; do you understand that?

(Silence)

THE COURT: The main thing I am telling you is consider the evidence. Look at it. Don't be misled, prejudiced or placed any sympathy just by reason of the package.

All right.

MR. KEHRLI: Mr. Marshall, could I first see it, please?

(The Marshall complies)

MR. KEHRLI: Mr. Marshall, if you would, defense counsel would like to see this before you hand it to the witness.

MR. WALBOURN: We have seen it, Your Honor.

MR. KEHRLI: All right.

(The Marshall passing document to witness)

FURTHER DIRECT EXAMINATION

BY MR. KEHRLI:

Q. Trooper Stephens, the Marshall has handed you what has been introduced into evidence as Government's Trial Exhibit No. 4, which is a photograph.

I would ask you to examine that photograph and to - - would you tell me whether or not you recognize what is in it?

A. Yes, I do.

Q. All right. What is it, sir?

A. This is an aerial photograph of Kentucky 680 across John Hall and Bill Hall Branch.

MR. KEHRLI: All right.

MR. PAFUNDA: Your Honor, if it is okay, Mr. Kehrli doesn't have to go through that. He

extended me the courtesy, and I am extending him the same benefits.

MR. KEHRLI: Thank you, Mr. Pafunda. I was going to dispense with it with this question.

Q. Trooper Stephens, are all three locations that you testified about concerning where the fire was originating from, can you locate them on that exhibit?

A. Yes.

MR. KEHRLI: All right. Your Honor, I would ask the Marshall post that exhibit on the easel, please.

And if the Court would permit, I would request that the witness be allowed to approach the exhibit with a red marking pencil, and please mark those locations with a one, two and three; and put your initials by those marks, would you, Trooper Stephens?

A. Yes, sir.

(The Witness complies)

Q. Trooper Stephens, have you marked as I indicated?

A. Yes, I have.

Q. Would you please take the pointer and explain to the ladies and gentlemen of

the Jury, and while you are indicating on that exhibit, what locations you marked and what they represent.

A. This is Kentucky 680 coming from the Mud Creek side - -

THE COURT: (Interrupting) Speak louder, sir.

A. (Continuing) This is the Mud Creek side of Kentucky 680, and this is the left Beaver side or McDowell side of Kentucky of 680. (Indicating).

This is the point near the top of the hill there in the roadway. I have a "1" right here on the right side indicating one firing position.

On the other side of the roadway, I have "2", which is another firing position. These were the two firing positions that were occurring when I first arrived.

I have a "3" marked back over here where a third position opened up approximately fifteen minutes after I arrived.

Q. All right. Trooper Stephens, could you tell which of those positions, if any, the ricochets were coming from that came close to you

and Trooper Williams?

A. The best of my knowledge, there were no ricochets until this third position opened up here, and then the ricochets started.

Q. The ricochets came from position number three?

A. Yes.

MR. KEHRLI: All right. Trooper Stephens you may resume the stand.

(The Witness complies)

Q. You indicated during cross-examination by Mr. Pafunda that the initial fire you heard was a semi-automatic fire.

Were you using that term to distinguish that fire from full automatic fire?

A. Yes. It is a - -

Q. (Interrupting) All right. Can you distinguish semi-automatic fire from rapid single fire?

A. Yes, I believe I can.

Q. You can. What is the difference?

A. Well, single fire has a longer pause in between, where semi-automatic, if you hold it down, it is just continuous, but not

like automatic. It is not as rapid as automatic.

Q. And what if you have a number of single fire guns shooting at once; could you distinguish that from semi-automatic fire, or shooting in rapid proximity? Could you make that distinction at that time?

A. It depends on the period of time. It would be hard to do for just a brief period. But over a long period, you could probably distinguish.

Q. Based on what you heard that day, could you distinguish between whether or not it was semi-automatic fire or a number of single fire weapons firing in rapid succession?

A. I believe - - am convinced very much that it was semi-automatic fire.

Q. All right. Was semi-automatic fire coming from all three locations?

A. Yes, sir.

MR. KEHRLI: Your Honor, I have no further redirect.

THE COURT: Anything further of this witness.

MR. PAFUNDA: Just two questions, Your Honor.

THE COURT: All right.

FURTHER CROSS-EXAMINATION

BY MR. PAFUNDA:

Q. Mr. Stephens, with regard to position number three - - and I can't see it from here because of the glare and glasses - - but with regard to position number three, how far was that from your vehicle, sir? Would it be safe to say five hundred yards?

A. Yes.

Q. All right. Or even a greater distance?

A. Even greater possibly.

Q. All right. And positions one and two, the third two you indicated where you heard the simultaneous fire, would it be fair to say that those were approximately four hundred yards apart?

A. The two positions apart?

Q. Yes, sir, the first two you mentioned.

A. Possibly four hundred yards.

Q. Three hundred yards?

A. Yes, somewhere in that area.

MR. PAFUNDA: All right. Thank you very much, sir.

THE WITNESS: Yes, sir.

THE COURT: Anything further of this witness?

MR. KEHRLI: One question.

FURTHER RE-DIRECT EXAMINATION

BY MR. KEHRLI:

Q. Did your unit have its blue light on at any time?

A. Yes. All the time we were there we had the blue light on.

MR. KEHRLI: Thank you.

THE COURT: Anything further?

FURTHER RECROSS-EXAMINATION

BY MR. PAFUNDA:

Q. Your unit was not hit, was it, sir?

A. No, sir, it was not.

MR. PAFUNDA: Thank you, sir.

THE COURT: Thank you, sir. You may step down.

Do we need him on call, gentlemen?

MR. PAFUNDA: (Shaking head negatively)

THE COURT: You are finally excused.

Call your next witness.

MR. THOMAS: Your Honor, may I approach the Bench.

THE COURT: Yes, sir.

REPORTER'S NOTE: At this point Mr. Harwell, Mr. Thomas, Mr. Walbourn, Mr. Self and Mr. Kehrli, approached the Bench, and the following proceedings were conducted.

MR. THOMAS: Your Honor, I am going to object to the admonition given as a packaging admonition. And the reason I waited until now is because I didn't want to do it in front of the Jury.

The reason I say this is because, first of all, this admonition, or something similar to it, has been given out four times today, each time after the defense has finished cross-examination.

The problem is that the admonition is beyond curing the problem, which really is no problem at all, and goes to create impasses

by the fact that it is labeled as a packaging admonition.

And it more or less creates an inference that we are - - that the Federal indictment is supported by the evidence and that the state charge has nothing to do with it.

Furthermore, the word "packaging", in itself, could create an inference that defense counsel has nothing and are merely trying to make this a State Court case.

I think that the admonition has been given too many times and can be cured by something less than what has been given.

THE COURT: Now, let me state this. There have been numerous and numerous references to state proceedings - - civil suits which are filed in the State Court, criminal cases which are filed in the State Court - - and this Jury has been told time and time again that these State proceedings have nothing to do with it.

And the only reason these cumulative admonitions are being given is because of the accumulative evidence which is coming in. And that, in itself, is prejudicial.

And the reason the Court

keeps giving the admonition is to offset any accumulative effect.

This Jury could very well say, well, this is being handled in the State Court, sowe don't have to worry about it. Hey, it shouldn't be here anyway. It is being handled in the State Court and, you know, it has nothing to do with this case.

MR. THOMAS: Precisely. And that is the reason I am making the motion on behalf of Eugene Tackett. I have not once brought up the statement of the matter.

THE COURT: I agree, you haven't.

MR. THOMAS: And it is prejudicial to my client.

MR. KEHRLI: It is antagonistic to the Defendants in this case.

THE COURT: That is the reason it is done. But when I gave the admonition, I told them that evidence can be couched in such a manner as to create a prejudicial effect as well as it can be couched in such a manner as to have a favorable impression.

But I have told them to keep their eye open on the evidence.

MR. THOMAS: Yes, sir.

MR. WALBOURN: I just came up because I never get a good position at a Bench Conference, and I thought this was my chance.

MR. KEHRLI: Your Honor, the next one or two witnesses that are going to be brought in are coming in for the limited purpose of showing what certain exhibits or documents are custodian records.

THE COURT: All right. Are we going to need to have fifteen or twenty minutes before we let the Jury go for anything outside?

If we are not, we can go up to 5:00 o'clock.

MR. SELF: I don't know of anything the United States has.

THE COURT: Okay.

MR. WALBOURN: Your Honor, may I inquire.

THE COURT: You fellows lean up here. I want to tell you something which was called to my attention.

It has been called to my attention that either Ms. Miller has gone to get a warrant for her exhusband, and she inquired of one of the Marshalls if he could serve that warrant.

MR. SELF: I think I would object

strenuously.

THE COURT: I'm just bringing this up here, gentlemen, as something we can consider later.

MR. WALBOURN: I think that is why we have the State process as we do. I think that is why we have warrants and charges.

MR. THOMAS: My wife may be after me pretty soon.

MR. WALBOURN: I would inquire as to whether the Government intends to offer any of these other police officers. This last trooper testified as to his state of mind, and his state of mind is irrelevant to the prosecution.

I didn't object at the time, because I kept thinking they were going somewhere with it.

THE COURT: That is a good objection.

MR. WALBOURN: I would move to strike that testimony, but I think that would serve to enhance it at this point.

But for any other future witnesses, I certainly hope that they bear that in mind.

THE COURT: You are not going to go to the state of mind of the custodian of the records,

are you?

REPORTER'S NOTE: At this point the following proceedings were conducted in open Court.

THE COURT: All right. Mr. Self, call Mr. Sizemore.

STEPHEN TERRY SIZEMORE, having been called as a witness, on behalf of the Government, after having been first duly sworn, was examined and testified as follows:

MR. SELF: May I proceed, Your Honor.

THE COURT: Yes, sir. Please so.

DIRECT EXAMINATION

BY MR. SELF:

Q Mr. Sizemore, my name is Tom Self. I am one of the prosecutors in this case. If I confuse you in my questions, just ask me to repeat it.

Would you state your full name for the ladies and gentlemen of the Jury, please?

A. Stephen Terry Sizemore.

Q. Mr. Sizemore, where do you live?

A. I live in Martin.

Q. And how are you currently employed?

A. I work for the First Guaranty Bank.

Q. And where do you work at for the First Guaranty Bank?

A. Well, I don't.

Q. At the Martin office or - -

A. Oh, yes. I'm sorry.

Q. Mr. Sizemore, what position do you hold with First Guaranty Bank?

A. I am a teller.

Q. And as a teller, are you a custodian of the records of that bank?

A. In certain aspects.

MR. SELF: Mr. Marshall, if you would, I would ask you to hand the witness what has previously been marked for identification as Government's Exhibit Five XS and Five XT. Mr. Marshall.

(The Marshall complies)

THE CLERK OF THE COURT: Your Honor, the

Government exhibit which was previously identified as 5XS has now been marked for purposes of trial as Government Trial Exhibit No. 43.

And Government's Exhibit previously marked for identification as 5XT has now been marked for purposes of trial as Government's Trial Exhibit No. 44.

MR. WALBOURN: I'm sorry, Madam Clerk. I didn't get the numbers.

THE CLERK OF THE COURT: 5XS is marked as Trial Exhibit No. 43, and 5XT has been marked for Government's Trial Exhibit No. 44.

MR. WALBOURN: Thank you.

(Defense counsel examining said exhibits)

THE MARSHALL OF THE COURT: Your Honor, opposing counsel have examined the exhibits.

THE COURT: Thank you, sir.

Please hand them to the witness.

(The Marshall complies)

Q Mr. Sizemore, would you examine the two sets of documents that have just been handed you? And I ask you with regard to the documents in the larger envelopes, if you have ever

seen those before?

A. Some of the documents, I have.

Q. Some of them, you have.

A. Pardon me?

Q. You have seen all of them before.

A. No, sir, not all.

Q. Mr. Sizemore did you bring some documents to this Court on December the 15th, sir - -

A. (Interrupting) Yes, sir.

Q. (Continuing) - - Pursuant to a subpoena duces tecum that was issued to you by the United States Attorney's office.

A. Yes, sir.

Q. Are those the documents that you brought?

A. Yes, sir.

Q. Are those the documents reflecting banking transactions that occurred at the First Guaranty Bank in Martin?

A. Yes, sir.

Q. And are those copies of the official records of the First Guaranty Bank of

Martin?

A. Yes, they are.

Q. Are those not, in fact, photocopies of microfilm records of the bank?

A. Pardon me.

Q. Are those not, in fact, copies of the microfilm records of the bank with regard to specific transactions?

A. That is correct.

Q. And is the bank, in making those, making those records in the normal course of business?

A. Yes, sir.

Q. And do you maintain the microfilm in the normal course of the business of the bank?

A. Yes, sir.

Q. Mr. Sizemore, the documents that are marked, both of those together, are those photographic copies of certain canceled checks of a customer of the bank?

A. Yes, they are.

Q. And what is the name of the customer?

A. The Local Union 59. I

can't - - I can't make out that last number.
Is it 87?

Q. Would you examine the other ones and see if you can find it better?

A. Those are not very clear. 5967. I'm sorry.

Q. And the address of that customer?

A. East McDowell, Kentucky.

Q. Are you familiar in any way with that account?

A. Only in the aspect that they are depositors at our bank.

Q. Personally, are you aware - -

A. (Interrupting) No, sir.

Q. (Continuing) Of the people conducting the transactions in the business of that account?

A. No, sir.

Q. The copies that you have were made by your machines, correct?

A. Right.

Q. And that's the best copies you could get from your machine, is it not?

A. Yes, sir, it is.

Q. Specifically calling your attention to the documents which have been marked for identification as 5XT, now marked as Government's Exhibit No. 44, - -

A. (Interrupting) Yes, sir.

Q. (Continuing) - - Is that - - calling your attention to the document - - the lower half of those two, were those two made together? Is that why there are two documents together, Mr. Sizemore?

A. Actually, the reason for this particular two individual checks is that it shows on this copies are that they were - - appeared upon our microfilm at the same particular instance and, therefore, we just made them on one - - one copy rather than run individual copies of each and every check.

Q. What would cause two checks to appear in your microfilm in the same instance, if you know, Mr. Sizemore?

A. There are possibilities that those were presented at our bank for payment on that same particular day.

Q. Calling your attention to those two specific documents that you have in front

of you, are those true and accurate copies of the records of the First Guaranty Bank of Martin?

A. Yes, sir.

Q. Do they reflect records that you have there in the bank?

A. Yes, they do.

Q. In regard to Local Union 5967 of East McDowell, Kentucky?

A. Right.

*** *** ***

MR. SELF: Your Honor, at this time I'd move the introduction of what's previously been marked for identification as Government's Exhibit 5xT, now marked for trial as Government's Exhibit No. 44.

MR. WALBOURN: Objection, Your Honor.

MR. KIRKLAND: Your Honor, he hasn't shown any relevancy whatsoever.

MR. SELF: I'd submit to the Court the condition of relevancy may develop by other witnesses, YOur Honor.

MR. KIRKLAND: This is not the time to introduce it then.

THE COURT: All right. Then we-- Let's do it this way. Let's do in steps.

Is there any objections as to foundation and that these are the regular course of business records?

MR. KIRKLAND: Not at all, Your Honor.

MR. WALBOURN: No.

THE COURT: Okay. The foundation and regular course of business has been laid, and until relevance has been established the motion is sustained.

Q. Mr. Sizemore, would you tell us who the check that you have that's marked-- the number 1390 is made to?

MR. PAFUNDA: Your Honor, I'm going to object. May I approach the Bench, please?

THE COURT: Yes, sir.

(Reporter's Note: At this time Mr. Pafunda, Mr. Self, Mr. Kehrli and Mr. Thomas approached the Bench; whereupon the following was heard:)

MR. PAFUNDA: Judge, if the Court would please look at the exhibit marked by the Government-- I have no objection to their foundation. As to the--

MR. SELF: The microphone's on.

THE COURT: No, it's not.

MR. PAFUNDA: He's got a check on-- He's got a check there that's made out to Drexil Hall for the amount of ninety-four dollars for a committee. That check is not relevant or material to the prosecution of this particular case.

MR. SELF: It may be now.

MR. PAFUNDA: On what basis, innuendo? He can't make it relevant. He can't make it relevant through this witness, any way, shape or form.

Now, those--these two checks need to be divided.

MR. SELF: The witness has testified they came in the same day.

THE COURT: He's entitled to-- On the

relevance he's entitled to question whom the checks are made payable to and by whom they're signed.

MR. SELF: Right.

MR. PAFUNDA: You've got a three thousand dollar check for a strike fund and on top of that a ninety-four dollar check to Drexil Hall. How do I cure that defect? There's no way to do it.

It's the same as with the gun.

MR. SELF: What defect are you talking about, Mr. Pafunda?

THE COURT: That's right.

MR. PAFUNDA: If the man's made--he performed those services a month prior to February and got paid by a local union, which is the custom and practice to do that that way. He's saying--

THE COURT: To whom it's paid-- What's the date of it?

MR. PAFUNDA: The two dates are the same.

MR. SELF: No, they're not.

MR. PAFUNDA: They're issued by the same local union. What's his point?

THE COURT: I don't know. I don't know the point.

MR. PAFUNDA: He can't make it relevant,

Your Honor.

THE COURT: Let's see.

MR. SELF: The document-- The second document is relevant on its face.

MR. PAFUNDA: All right.

MR. SELF: The first document is relevant because it's the same day.

MR. PAFUNDA: That means I can walk in the same day as a bank robber walks in the bank?

MR. SELF: Explain that in cross-examination. This witness--

MR. PAFUNDA: Then it's too late. That's what it's tendered for. It intended for that specific prejudicial purpose. It's impossible to make it relevant. It's impossible to cure it on cross-examination.

THE COURT: Well--

MR. SELF: If we have the originals it would be a whole lot better, Your Honor.

THE COURT: Let the objection be noted and at this point overruled.

MR. THOMAS: I also join in the objection. Also, he's mentioned personal knowledge as to what's contained in those things, and that's one of the requirements of foundation.

We do not stipulate that this man had personal knowledge of those facts.

THE COURT: What man?

MR. THOMAS: This man here, who is not the custodian of these things. I object to the foundation.

MR. SELF: Mr. Thomas, a check is admissible on its face in the state of Kentucky.

MR. THOMAS: Federal Rules. He still has to have personal knowledge of it.

Note my objection.

THE COURT: Okay. Let the objection be noted.

MR. PAFUNDA: That's another thing. He's already indicated that the reason those two checks were xeroxed off together--he's indicated a possibility of things. It could include a mechanical error on microfilm or they happen to have the same date. It doesn't mean they were presented at the bank at the same time.

THE COURT: You can show that on cross-examination.

MR. SELF: Thank you, Your Honor.

MR. PAFUNDA: Thank you, Your Honor.

THE COURT: Okay. And, Mr. Pafunda--

MR. PAFUNDA: Yes.

THE COURT: --if it's erroneous then you ask that it be sustained and you ask that the jury be admonished, and I'll consider that.

MR. PAFUNDA: Your Honor, at this point in time in the trial-- The trial's gone on for many weeks.

THE COURT: Right.

MR. PAFUNDA: --and an admonishment can't cure that particular defect. We've had a gun passed around in front of them. Drexil Hall was mentioned another time--many times. The-- At this point in time in the trial the cumulative effect of even just a remark in that regard is prejudicial. I don't know if it can be cured by an admonishment.

THE COURT: Well--

MR. PAFUNDA: I think it goes to the good faith of this particular prosecution.

THE COURT: Let's see. If I-- If I am at any time leery of a person's good faith I'll bring it to the attention of a jury.

MR. PAFUNDA: All right. Thank you, YOur Honor.

THE COURT: Okay.

MR. SELF: Thank you, Your Honor.

(Reporter's Note: End of conference at the Bench.)

Q. Mr. Sizemore, the check on the lower half of what now has been marked as Government's Exhibit 44, what is the number on that check?

A. 1390.

Q. It was drawn on Union Local 5967 East McDowell. Is that the way the customer's name appears on it?

A. Yes.

Q. And what is the date of that check?

A. February 17, 1982.

THE COURT: What's that now?

MR. SELF: I'm sorry, Your Honor.

THE COURT: What's the date of it?

THE WITNESS: February 17, 1982.

THE COURT: All right.

Q. And to whom is that check made payable?

A. First Guarantee Bank.

Q. And is that your bank you work for?

A. Yes, sir.

Q. And the amount?

A. Three thousand dollars.

Q. And by whom is the check signed on the face of it? I don't know what the banking terminology is. Who wrote the check?

A. It was signed by Lowe Hinckley, is that correct, and Teddy Kinney.

Q. Mr. Sizemore, is there any additional markings on the face of that--face of that check which would enable you to determine how that check was negotiated?

A. Yes, sir.

Q. What is that?

A. That is the teller's stamp that we use when checks are presented for cash payment at--at various windows. They are stamped on the face by the individual teller.

Q. Does that bear a teller's stamp.

A. Yes, sir, it does.

Q. What stamp is that?

A. That's Teller No. 13.

Q. Are those numbers assigned to windows or people?

A. Those are assigned to

particular windows.

Q. Does that check bear on the back of it or the face of it another endorsement by any individual?

A. No, sir. I cannot tell from this copy that it has any other endorsement or anything of that nature on it.

Q. Based upon your experience as a teller, Mr. Sizemore, can you--in the banking practices of the First Guarantee Bank, can you tell how that check was negotiated at your bank?

A. Just as I have spoken, we handled it as--to be cashed. This check was to be-- It indicates on the check that it was--on the "for" line it says, for cash. When our--when a check is presented for payment at a window that is what the normal procedure is.

Q. Just stamped and put into the check bin, right?

A. Yes.

MR. SELF: Just a moment, please.

Q. The check that appears also on that date, Mr. Sizemore, can you tell--who's that check payable to? Give me the specifics on it, please.

A. Are you speaking of the check at the top?

Q. Yes.

A. That is Check 1380, drawn on Local Union 5967 of East McDowell; payable to the order of Drexil Hall for ninety-four dollars. It indicates for--says for committee work. It's signed by Lowe Denny Hinckley and Teddy Kinney.

Q. All right.

A. It also has the teller marking of First Guarantee Bank of No. 2.

Q. What number?

A. Number 2.

Q. Can you tell what date the check was negotiated in your bank, Mr. Sizemore?

A. From this copy I'm not able to determine that. There are markings on the back of each particular check.

When this check was run through our photographer there is a date of--which is very--this copy is very dim. It could-- I can't tell from the back of this copy.

Q. In regard to the first check, the Check No. 1390, does it indicate what that-- In the far bottom of that does it indicate what that

money was for?

A. It says cash.

Q. Cash?

A. That's all it has.

MR. SELF: Your Honor, at this time I'd renew my motion for the introduction of what's previously been marked fori dentification as Government's Exhibit No. 44.

MR. WALBOURN: Objection, Your Honor.

MR. PAFUNDA: Same objection, Your Honor.

THE COURT: All right. Let the objections be noted and overruled. Let that which was previously marked for identification as Government's Exhibit 5S is finally admitted into evidence as Government's Trial Exhibit No. 43.

And that which was marked for identification as 5T has finally admitted into evidence as Government's Trial Exhibit No. 44.

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

Let me resume the stand for a moment, Your Honor.

At this time, Your Honor, I haven't moved Government's Exhibit No. 43 in yet, just 44.

THE COURT: What?

MR. SELF: I haven't moved forty-three in yet. For the record let me do it. I think the Court misunderstood my motion.

THE COURT: I did misunderstand your motion.

MR. SELF: My motion went only to Government's Exhibit 44.

THE COURT: So, let the Court sustain as to a motion for introduction of Trial Exhibit 44 as erroneous.

MR. SELF: No. I'm moving 44 in, Your Honor, not 43.

MR. PAFUNDA: And I'm objecting to 43, Your Honor, not 44.

THE COURT: Well, now I'm-- 1390 is what?

MR. SELF: That is contained in what's previously been marked as Government's Exhibit No. 44, Your Honor.

THE COURT: All right. 1380 is what?

MR. SELF: They're both contained on one sheet, Your Honor.

I'm moving for the introduction of those--those two documents. I'm not moving

for the introduction of the larger package of documents, Your Honor, at this time.

THE COURT: Which is 43.

MR. SELF: I'm not moving the big envelope in, Your Honor, just the two checks.

THE COURT: All right. Let any reference to that which has been marked as Government's Exhibits for identification 5S and Trial Exhibit 43 be stricken. Let the objections which are noted as to 43 to be noted of record, overruled; and that's finally admitted into evidence as Government's Trial Exhibit No. 44.

MR. SELF: Your Honor, I--43, I have not attempted to establish relevancy on, and I'd ask the Court not to strike it. The witness has properly authenticated--

THE COURT: I thought I--that's just what I did, Mr. Self. Wasn't that--

MR. SELF: I thought the Court was striking his testimony, Your Honor.

THE COURT: Just a moment.

MR. SELF: I'm sorry, Your Honor.

THE COURT: Madam Reporter, I direct you to enter into the record that any references to 43 and 5S be stricken.

(Reporter's Note: The reporter responded by nodding her head in the affirmative.)

THE COURT: It was stricken.

MR. SELF: May we approach the Bench, Your Honor.

THE COURT: Yes, sir.

MR. SELF: There's a communications problem.

(Reporter's Note: At this time Mr. Self and Mr. Pafunda approached the Bench; whereupon the following was heard:)

MR. SELF: This group of documents contains copies of many other checks.

THE COURT: But that's 43.

MR. SELF: I'm not moving it into evidence.

THE COURT: I know. I erroneously admitted it into evidence. I told her to strike that from the record.

MR. SELF: I thought you were striking his testimony in regard to 43.

THE CLERK OF THE COURT: No.

MR. SELF: I understand.

MR. PAFUNDA: I'm objecting to 44.

THE COURT: Right.

MR. PAFUNDA: 44 is what I'm objecting to

on the record.

THE COURT: That's right. Now you can cross-examine on the 44.

MR. PAFUNDA: Thank you.

MR. SELF: Thank you. I'm sorry, I misunderstood you.

THE COURT: That's all right.

(Reporter's Note: End of conference at the Bench.)

THE COURT: Mr. Pafunda, you have some questions you want to ask this witness?

MR. PAFUNDA: With the Court's permission, may I look at Exhibit No. 44?

THE COURT: Would you please hand him, Mr. Pafunda, Exhibit 44, Mr. Marshal?

(Reporter's Note: At this time the Marshal handed Mr. Pafunda an exhibit.)

MR. PAFUNDA: I wanted 44.

(Reporter's Note: At this time the Marshal handed Mr. Pafunda an exhibit.)

CROSS-EXAMINATION

BY MR. PAFUNDA:

Q. Mr. Sizemore, if I--if I understand you correctly, the reason that those two

checks are together is that they appeared on the microfilm together, is that correct, sir?

A. That is correct.

Q. All right, sir. And there are a number of reasons that that could have happened, is that correct, sir?

A. Yes, sir.

Q. All right. You listed that one of those reasons is that they could have been presented the same day, correct?

A. That is possible.

Q. All right. What are the other reasons, sir?

A. Could be one of those particular checks were taken at the end of the day.

Q. All right.

A. The other one could be--

Q. Now, when you say the end of the day, that's the end of the business day for banking, is tha t correct?

A. That's correct, sir.

Q. All right. Another reason, please?

A. Just-- Well, I really don't know.

Q. All right. But there are other reasons?

A. There is a possibility.

Q. All right. And those checks just happened to come out of the little machine in the same time and get xeroxed together at the same time, is that correct?

A. Yes, sir.

Q. And with regard to the check that's made to Drexil Hall, that says for committee work, does it not, sir?

A. Yes, sir, it does.

Q. All right. Did you know that in local unions a person can do committee work and he's paid later on for that work?

A. No, sir, I do not.

MR. SELF: Motion to strike the question, Your Honor.

THE COURT: Overruled.

MR. PAFUNDA: Thank you, sir. Your Honor, at this time I'd again renew my objections and move to strike--

THE COURT: All right.

MR. PAFUNDA: --and separate those checks.

THE COURT: Let it be noted and be

overruled.

Anything else, gentlemen?

(SILENCE)

THE COURT: All right, sir, you may stand down, sir.

MR. SELF: May we approach the Bench just a minute with regard to the next witness?

(Reporter's Note: At this time all counsel approached the Bench; whereupon the follow- was heard:)

MR. SELF: If you want to move the jury out that's fine, this may take a few minutes.

I want to all Mr. McCallister at this time for the limited purpose as an agent for the grand jury to put in certain check stubs that Mr.--the defendant Jason Moore brought to the grand jury as a records custodian for the local union, and I'm calling him for that purpose and only that purpose.

THE COURT: You think we ought to do this in limine?

MR. SELF: I'm going to advise the defendants that if they've got some objections to my procedures in calling Mr. McCallister as an agent of the grand jury then I can go through the formality of putting the court reporter on. Let's, you know,

find it out before--don't stumble halfway through the witness.

THE COURT: Let's see what they want to do.

MR. KIRKLAND: I would like to know the legal authority which agents are made agents of the grand jury. I'd like to know the statutory rule of making a law enforcement agent an agent for the grand jury.

MR. SELF: Rule 6(e).

MR. KIRKLAND: 6(e)?

MR. SELF: Rules of Federal Procedure.

MR. KIRKLAND: Specifically for that?

THE COURT: All right.

MR. SELF: Yes, it does.

MR. KIRKLAND: That's been a routine practice.

MR. PAFUNDA: If he calls him for an agent for the grand jury I want to read him that testimony I read earlier as an agent of the grand jury.

(Reporter's Note: End of conference at the Bench.)

THE COURT: Mr. Marshal, take the members of the jury to the jury room. While you're in the jury room the not now admonition is in effect.

(Reporter's Note: The jury left the courtroom at 4:07 p.m.)

THE MARSHAL OF THE COURT: All jurors are out of the courtroom.

THE COURT: All right. You may proceed.

MR. SELF: Your Honor, what I propose is--is I indicated, is to put Mr. Dennis McCallister on--

THE COURT: Come around, Mr. McCallister.

MR. SELF: --for the limited purpose of introducing what's previously been marked for identification as Government's Exhibit CC; for no other purpose, Your Honor, but reserve the right to call him later on as a witness in this case. I don't intend to go into other additional testimony other than to put this specific exhibit on, which was-- It is the position of the United States it was produced by the defendant Jason Moore, pursuant to a subpoena duces tecum for Local 5967, the custodian of the records.

I can't very well subpoena Mr. Moore as custodian of the records at this time.

THE COURT: No, sir you can't.

MR. SELF: No, I'm putting Mr. McCallister on, who is an agent of the grand jury, and who received this material from the grand jury.

THE COURT: Madam Clerk, let me have your rule book.

What's the rule you are doing this under?

MR. SELF: Mr. Kirkland said I had no authority to make him an agent of the grand jury, Your Honor. I cited to him Rule 6(e) of the Federal Rules of Criminal Procedure.

(Reporter's Note: At this time the Clerk handed the Court a book.)

MR. KIRKLAND: I stand on my objection, Your Honor.

THE COURT: All right.

MR. SELF: I fail to see what that has to do with anything, Your Honor, as far as his objection. If he's got an objection to the procedures let him note that. If he has an objection to that I'll be glad to call in the three or four other witnesses.

The chain of custody of this document, Your Honor, we've stipulated it too at the pretrial, by Mr. Kirkland and by the other defense counsel. Your Honor, I'll be glad to back up and call the foreman of the grand jury, the court reporter, and then Mr. McCallister.

THE COURT: I don't believe the foreman-- I believe the only person necessary would be the court reporter, wouldn't it?

MR. SELF: Well, I'm not putting in Mr.--Mr. Jason Moore's testimony, Your Honor. I'm not attempting to.

THE COURT: Weren't those exhibits a part of this testimony?

MR. SELF: They were produced as a custodian of records, Your Honor, for the local union.

THE COURT: Right. But they were given to the grand jury?

MR. SELF: Yes, Your Honor.

THE COURT: The grand jury speaks through its records.

MR. SELF: Yes, Your Honor.

THE COURT: Mr. McCallister can't testify from the records. Now, he might testify that he had chain of custody. I believe you're going to have to use the court reporter.

MR. SELF: Yes, sir. I think he can testify, Your Honor, that these records were turned over to him pursuant to the--by the grand jury as an agent of the grand jury following the testimony of

Mr. Jason Moore; and that a subpoena was issued for Mr. Moore to bring these records in. This is what-- After his testimony these were turned over to him by the grand jury.

THE COURT: I'm not of that opinion. The grand jury only speaks through its records. The grand jury may show it turned it over to him. He can't establish through his testimony what the grand jury did.

MR. SELF: He was present when these records were turned over, Your Honor. He was given these records-- We'll go through the loops.

THE COURT: Okay.

MR. KIRKLAND: Your Honor, my objection is that 6(e) does not provide any means or mechanism by which the agent--the ATF agent may become the agent of the grand jury. In addition to that, there's a procedure set out here, which this Court may follow if it elects to do so, in disclosing some of these materials to the grand jury.

To my knowledge, this Court was not consulted about how these materials were handed, whether they were disclosed to anybody or how they were used. There's just been this routine procedure that anybody that walked in--we're going to make them

an agent of the grand jury. In this case it's a case agent who walked in, and they say, Mr. Foreman, is it all right to make this fellow an agent of the grand jury.

The foreman doesn't have any idea whether he has authority to hire an agent, appoint an agent or not. It's done solely at the behest of the Government without observing the requirements of Rule 6, which were clearly not observed in this instance, Your Honor. Now, there are other ways--

THE COURT: What part of the Rules weren't observed?

MR. KIRKLAND: Well, under exceptions, you would have to assume that if everything is secret that goes on in the Grand Jury Room, there would have to be exceptions to that secrecy.

Under C, disclosure otherwise is prohibited by this Rule of matters occurring before the Grand Jury, which this was apparently or at least purportedly, may also be made when so directed by a court preliminarily.

THE COURT: We don't know whether anyone is at fault or not until we read the record of the Grand Jury, do we?

MR. KIRKLAND: But this Court has not made a preliminary order directing that it be disclosed.

THE COURT: Let's see what the -- what the Grand Jury said.

MR. KIRKLAND: I have no objection to that, Your Honor. I think the procedure has tainted the evidence. The evidence might well have-- since it came purportedly from Jason Moore, there are other ways of getting it in. But they went to the Grand Jury and obtained it, Your Honor. They

have not provided the secrecy provisions. And that secrecy protects the Grand Juries and all that they do and all the materials that they produce. They are using the Grand Jury as a tool for gathering evidence here. And that is not -- that was not ever the design of the Grand Jury. They are using -- in this particular case, they call all these people in. They say bring your records and drop them off here, dump them in here. And then they send them home. Then they give them to Mr. McCallister. He gathers them up. That is not provided for under Rule 6 or any other Rule, Your Honor. There's no provision in Rule 6 that says that the Grand Jury may, at the suggestion of the United States, appoint Mr. McCallister as agent to hold these materials. There is no provision for that. The secrecy of the Grand Jury has been breached. And it has been breached without an order of this Court.

MR. SELF: Your Honor, if Mr. Kirkland would kindly read, if he has time, Rule --

MR. KIRKLAND: (Interrupting) I will make time if it is necessary.

MR. SELF: Rule 6E3A2 which talks about the procedures, Your Honor. It specifically says Government personnel --

THE COURT: (Interrupting) 3A2.

MR. KIRKLAND: Well, who determines what personnel are necessary? The United States?

MR. SELF: That is what the Rule provides, Mr. Kirkland.

MR. KIRKLAND: Or the Court?

MR. SELF: The Rule provides that such Government personnel that are deemed necessary by the attorney for the Government. I didn't write it, Mr. Kirkland.

MR. KIRKLAND: I am sure of that.

MR. SELF: And I didn't know you were around when Grand Juries were instigated, either.

THE COURT: All right, all right. Enough of this, now. As I say, the Grand Jury speaks through its records.

MR. SELF: We have the records, Your Honor, of Mr. Moore's appearance before the Grand Jury when they testified. And we will be glad to put those on through the witness, and call the custodian or the court reporter to come in and read Mr. Moore's testimony to the Grand Jury.

THE COURT: Well, --

MR. SELF: (Interrupting) I don't think Mr. Kirkland wants that, Your Honor.

THE COURT: Well, the only thing that is in issue is this right here. And I am sure the Grand Jury record will reflect that Mr. Moore came in pursuant to a subpoena and delivered over --

MR. SELF: (Interrupting) Delivered over the records and told what they were and this is all he had, Your Honor.

THE COURT: What?

MR. SELF: He delivered these records to the Grand Jury and said this is all he had as the custodian of records and not subpoenaed as an individual. But as a custodian of the records for that local union as the treasurer, Your Honor. And that is what he brought.

THE COURT: All right, does the Grand Jury reflect that they requested that you issue those subpoenas?

MR. SELF: Yes, Your Honor. The records -- those are standing --

THE COURT: (Interrupting) Does it reflect pursuant to those subpoenas that he brought those in and delivered them to the Grand Jury?

MR. SELF: That is it -- I will be glad to let the Court examine the transcript if he wants to of his testimony, Your Honor.

THE COURT: Okay. Like I say, a Grand Jury speaks through its records. You can't speak for the Grand Jury. Mr. McCallister can't speak for the Grand Jury. No one can speak for the Grand Jury. It is like this Court. This Court speaks through its orders or its judgements.

MR. HARWELL: Judge, may I be excused for just about thirty seconds?

THE COURT: Yes, sir.

MR. HARWELL: Thank you.

THE COURT: I think this is well for laying a foundation to it. Now, of course, you have got to authenticate that.

MR. SELF: I think it may be self-authenticating, Your Honor.

THE COURT: Well, if it is self-authenticating, then that is fine.

MR. KIRKLAND: Your Honor, under the authority that this Court has under Rule 6, I would ask that that Grand Jury proceeding be disclosed to me.

THE COURT: Let him have it.

MR. SELF: I think he got it a long time ago, Your Honor.

MR. KIRKLAND: How would I know that?

I was just seeing a piece of paper at some distance, Your Honor.

MR. SELF: It was provided to him pursuant to Rule 16, Your Honor, early in discovery. And I asked him to stipulate his chain of custody if I give it to him, Your Honor.

MR. KIRKLAND: Chain of custody of what? This paper?

THE COURT: Go ahead, gentlemen. I think the record can reflect, Mr. Harwell, while you were out, Mr. Patton and Mr. Moore were here.

MR. HARWELL: Thank you, sir. I appreciate your letting me go, Judge. Did they do something good I ought to know about?

THE COURT: They have the record of the transcript of Mr. Moore appearing before the Grand Jury stating that it was pursuant to a subpoena duces tecum, and what he did and etcetera.

MR. WALBOURN: What is the self-authenticating?

MR. SELF: 902, Your Honor, 9028 talks about acknowledged documents, documents accompanied by a certificate of acknowledgement executed in a manner provided by law, by notary public or other officer authorized by law to take --

acknowledged documents, Rule 9028 provides that documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law are self-authenticating, and that extrinsic evidence of authenticity is not required with regard to such documents.

THE COURT: Come up, Mr. McCallister, please. Let that be marked, let the statement be marked for identification.

THE CLERK OF THE COURT: Your Honor, Mr. McCallister has been previously sworn. Do you recognize yourself as still being under the same oath?

MR. McCALLISTER: Yes, ma'am.

THE CLERK OF THE COURT: Do you want this marked as a Government exhibit, Your Honor?

THE COURT: Yes, ma'am.

THE CLERK OF THE COURT: Your Honor, what has been previously marked and was identified as NPM No. 10 by the Government is also being marked for purposes of trial as Government Trial Exhibit No. 45.

THE COURT: All right.

THE MARSHALL OF THE COURT: Your Honor,

this exhibit has been viewed by opposing counsel.

THE COURT: All right, sir.

MR. SELF: Your Honor, to be quite frank with you, I don't know where we are going right now. I want to introduce document CC into evidence through this witness in front of the jury. And the objection was made that this Grand Jury doesn't exist or something like that by Mr. Kirkland.

THE COURT: Mr. Kirkland was correct in part. I think first you better take and establish that this Grand Jury thing is self-authenticated. That is a record of a proceeding before the Grand Jury. That the Grand Jury -- I think that reflects that the Grand Jury issued a subpoena duces tecum for these records. Pursuant to that, he brought them and turned them over to the Grand Jury. And I think further, you are going to have to get that into evidence. He is going to have to identify those things -- the chain of custody -- he has had them since that time.

MR. SELF: No, Your Honor. I take exception to the Court. They stipulated chain of custody on these documents.

THE COURT: Now, I think when you do get this into evidence, I think you are going to

ask the Court for an order permitting those to be used in this proceeding.

MR. SELF: I so move at this time, Your Honor.

THE COURT: All right. You are requesting an order of the Court for disclosure of matters which occurred before the Grand Jury.

MR. SELF: Your Honor, I don't think in a judicial proceeding with the witness on the stand, unless the matters are uniquely to the Grand Jury, I can't ask the Court for an order to ask a witness that has already testified before the Grand Jury to testify.

THE COURT: We are not doing that. We are just trying to lay the basis for those documents which you have which you want to get into evidence as exhibits in this proceeding.

MR. SELF: Let me move the Court then at this time to allow under Rule 6E3C that Mr. McCallister be allowed to read that Grand Jury transcript testimony of Jason Moore as he appeared before the Grand Jury.

THE COURT: First authenticate it as being a transcript of that proceeding.

MR. SPENCER: Your Honor, may I object

here because talking between the Government attorney and the Court -- the Government attorney is practicing his case. And I want to --And let him get it in the way he can. And I don't think the Court talking back and forth with him -- I just don't feel comfortable with it. If it was me, I know the Court wouldn't help me.

THE COURT: Mr. Spencer, I have helped you.

MR. SPENCER: Not in something like this you haven't. I don't think you have in something like this. I can't ever remember trying something like this in front of you.

THE COURT: Let me state this. You have helped me, too, Mr. Spencer.

MR. SPENCER: But I want to object.

THE COURT: All right. Let your objection be noted and overruled.

MR. SELF: May I take the witness then as if on voir dire?

THE COURT: Yes, sir. Please proceed.

Gentlemen, this is out of the presence of the jury.

DIRECT VOIR DIRE EXAMINATION

BY MR. SELF:

Q. State your name, please.

A. Dennis L. McCallister.

Q. Mr. McCallister, are you a special agent of the Bureau of Alcohol, Tobacco and Firearms assigned in Washington, D.C.?

A. Yes, sir.

Q. And during the period of the fall of 1982, were you in any way connected with the investigation going on at Ray-Mac?

A. Yes, sir. I was the case agent.

Q. And were you also later on in other respects in any way connected with the Federal Grand Jury sitting in Pikeville?

A. Yes, sir.

Q. And how were you connected with that Grand Jury?

A. I was sworn by the foreman of the Grand Jury as an agent of that Grand Jury.

Q. And Mr. McCallister, as an agent of the Grand Jury, did you receive in your custody certain of the exhibits that were turned over by people who were subpoenaed to the Grand Jury.

A. Yes, I did.

Q. Mr. McCallister, are you familiar with a day that came -- I forget the exact date, Your Honor. When Jason Moore -- a Defendant in this case appeared before the Grand Jury?

A. Yes, sir. November 1st, 1982.

Q. Were you present at that time?

A. Yes, sir.

Q. Were you present in the Grand Jury room?

A. No, I was not.

Q. And do you have in front of you what has been marked for identification as Government's Exhibit 49 -- or 45 which purports to be an official transcript of the proceedings of November the 1st, 1982, regarding the transcript of testimony of Jason Moore?

A. Yes, sir.

Q. And would you read the last page of that?

A. It -- State of Kentucky, County of Pike. I, Shirley S. Hensley, Notary Public in and for the State of Kentucky at Large, do hereby

certify that the foregoing fourteen pages is a true and correct transcript of the proceedings had in this matter as herein above set forth. That I have no interest of any nature whatsoever in the ultimate disposition of this investigation. I further certify that all matters pertaining to this investigation will be kept secret by me and that delivery of this transcript will be discreetly made to the United States Attorney this 2nd day of November, 1982. Signed Shirley S. Hensley, Notary Public, State of Kentucky at Large. My commission expires March 25, 1985.

Q. And is there a seal on that, Mr. McCallister?

A. I don't see a seal other than the signature.

Q. The signature appears to be the signature of whom?

A. It says Shirley S. Hensley, Notary Public. And it is an original signature.

Q. Were you there when the individual identified as Jason Moore testified?

A. Yes, I was present not in the Grand Jury Room, but I was present here in

the courthouse during that Grand Jury.

Q. Do you know if Mr. Moore, prior to his testimony, was served a subpoena, Mr. McCallister?

A. Yes, Mr. Moore was served a subpoena duces tecum.

Q. Do you know what the contents of that subpoena duces tecum was?

A. He was to bring any and all records pertaining to the U.M.W. local 5967 that was in his custody as the financial secretary.

Q. And following Mr. Moore's-- did he appear before the Grand Jury on November the lst?

A. Yes, sir.

Q. Following his testimony, were you -- was anything turned over to you by the Grand Jury?

A. Yes, sir, the records that he brought in response to that subpoena were turned over to me by the foreman of the Grand Jury.

MR. SELF: Mr. Marshall, if you would, I would ask you to hand the witness what has previously been marked for identification as Government's Exhibit CC.

THE CLERK OF THE COURT: Your Honor, the exhibit which has been previously marked for identification by two letters of the alphabet C has now been marked for purposes of trial as Government Exhibit No. 46.

MR. PAFUNDA: Your Honor, if it please the Court, I am just sort of curious about this. But Mr. McCallister may need a lawyer. I don't know if there is a Court Order or if the Court was notified that Mr. McCallister was an agent of the Grand Jury. If he was an agent of the Grand Jury, he is sworn to the same secrecy as the Grand Jury. And looking through this Rule which I have just read today for the first time, Mac may need a lawyer if he has spoken about those records to anybody outside that Grand Jury Room. It seems they have got some stuff in Lexington about the same thing. I don't know. I just thought I would help you out, Mac.

MR. McCALLISTER: I appreciate it.

MR. ADAMS: For the record, I still don't see where it is a self-authenticating document under the Rule.

MR. SELF: Did you read 9028, Mr. Adams?

MR. ADAMS: Yes, sir, I sure did. And

I still don't see where it is a self-authenticating document. It is not an acknowledged document. It is not a certificate of the Grand Jury.

MR. SELF: I will be glad to call Miss Hensley in here and have her read --

THE COURT: (Interrupting) Let me see this.

MR. SELF: I will be glad to, Your Honor. I will be glad to call the foreman in here and testify that Miss Hensley was the Clerk, too.

THE COURT: Let me ask you this, gentlemen. It's been a long day. This is 45 -- has 45 been admitted into evidence?

MR. SELF: No, Your Honor.

THE COURT: Has a motion been made to the Court asking for disclosure in a pending judicial proceeding?

MR. SELF: Yes, Your Honor, I made it orally just a few minutes ago.

MR. PAFUNDA: I am just thinking of Mr. McCallister.

THE COURT: I don't -- I don't know whether Mr. McCallister was testifying from this record or whether he was testifying from his own knowledge of something.

MR. SELF: As to what aspect. He read the certificate, Your Honor, is the only thing he testified from that document.

THE COURT: Then he read the certificate. But this needs to be -- I think you need to get an order from the Court authorizing this to be disclosed pending judicial proceedings.

MR. SELF: I so move at this time, Your Honor.

THE COURT: All right. Now, that will be sustained.

Now, after it is there, then this will be admitted into evidence, and he can read what has been done. We are wasting time, gentlemen.

MR. SELF: I totally agree, Your Honor.

MR. KIRKLAND: Your Honor, if the Court please, the Rule goes on, and I assume that I will have an opportunity to voir dire this witness. But it requires -- this is mandatory with respect to such Government personnel that are assisting the attorney for the Government. It says any person to whom matters are disclosed under Subparagraph A2 which Mr. McCallister would be, under this paragraph,

shall not utilize Grand Jury material for any purpose other than assisting the attorney for the Government in the performance of such attorney's duty to enforce Federal Criminal Law. And attorney for the Government shall promptly provide the District Court the afore which was impaneled to the Grand Jury whose material has been so disclosed with the names of the persons to whom such disclosure has been made.

Now, that, to my knowledge, has never been done, Your Honor.

THE COURT: You don't know whether it has or not.

Let's let you gentlemen voir dire. We are getting in three with a bunch of arguments. Let's let it go through like I am telling you to. And you can come back and ask questions. And then we can get down to the arguments. And then I can make a ruling. We are getting into arguments and interpretations of Rules. We are getting which I'm trying to get done which from lack of communication isn't being done. Let's get on with it like I am doing it, gentlemen. I think we will save time and save everyone's objections into the records may we, please?

MR. KIRKLAND: Yes, Your Honor. I just noticed the Government went on to these check stubs before we got to the question of whether they were admissible at all or not.

THE COURT: Right. And we don't have the jury in here. So there isn't any prejudice with regard to the jury.

MR. KIRKLAND: Yes, Your Honor.

THE COURT: Let's back up and go over this. We have got forty-five minutes, gentlemen, before -- I know. Bring the jury in, and I will let them go. Bring the jury up, and let me excuse them.

MR. ROWLAND: Judge, while that is being done, can I go?

THE COURT: Yes.

MR. ROWLAND: Thank you.

MR. SELF: Mr. McCallister, have a seat back there.

THE MARSHALL OF THE COURT: The jury is back in the courtroom.

THE COURT: We are going to be in adjournment until tomorrow morning at nine o'clock. During this adjournment, you understand the not now admonition is in effect. Do not discuss the case among yourselves nor discuss the case with anyone

other than persons on the jury or permit anyone to discuss the case with you. You are not to finally make up your mind upon the issues of this trial until you have heard all the evidence together with the Court's instructions. No radio, no television, no newspapers. All of you understand that?

Any objections or corrections to the Court's admonition?

MR. SELF: None, Your Honor.

MR. SPENCER: No, Your Honor.

THE COURT: Mr. Marshall, please excuse the jury until nine o'clock tomorrow morning.

THE MARSHALL OF THE COURT: The jurors are excused until nine A.M. tomorrow.

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THE COURT: All right, Mr. Self, let's go back over it again.

MR. SELF: Mr. McCallister, get back up on the stand, please.

Your Honor, it may be simplier if I just call the Court Reporter here tomorrow and have her come and read it. It may save a whole lot of - -

THE COURT: (Interrupting) The Clerk can certify who was the Court Reporter at the trial. I think she swore her in.

MR. SELF: I know she did.

THE COURT: Anybody questions that - -

MR. SELF: (Interrupting) You may have to get somebody to swear who swore Brenda in. I may have to keep going back. I don't know.

THE COURT: Let's everybody just listen. Let's do what I am saying now.

Is there any question that Shirley S. Hensley is the Court Reporter - - the official Court Reporter?

MR. KIRKLAND: I make no objection. I don't know whether she is or not.

THE COURT: Okay. Madam Clerk, come around and step down.

MR. KIRKLAND: Your Honor, - -

THE COURT: (Interrupting) Come around. Come around and step down. Come up, Madam Clerk.

(The Clerk complies)

BRENDA ENGLAND, called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

THE COURT: Go ahead.

DIRECT EXAMINATION

BY MR. SELF:

Q. Ma'am, would you state your name for the record, please?

A. Brenda England.

Q. Ms. England, you are the chief deputy clerk of the United States District Court for the Eastern District of Kentucky, the Clerk's Office in Pikeville, are you not?

A. Yes, sir.

Q. How long have you held that position?

A. Approximately - - it will be six years in this coming July.

Q. Ms. England, do you know an individual by the name of Shirley S. Hensley?

A. Yes, sir.

Q. And who is Ms. Hensley?

A. Ms. Hensley is the Court Reporter for the Grand Jury proceedings for the Pikeville Court.

Q. And how did she obtain that position?

A. I think when the Grand Jury first began - - when the sessions first began, we had a series of temporary reporters to begin with, and Ms. Hensley was one of those temporary reporters.

And then she was finally the permanent Court Reporter for the Grand Jury. She became.

Q. And prior to her assuming - - or her taking any testimony before the Grand Jury, did you administer the oath to her as a Court Reporter for the Grand Jury?

A. Yes, sir.

Q. Pursuant to Rule 6E?

A. Yes, sir.

Q. And do you recognize as her signature on the document that has been marked for identification as Government's Exhibit 45?

A. Yes, sir.

Q. And was she the official Court Reporter for the United States Grand Jury for the Eastern District of Kentucky sitting on November the 1st, 1982?

A. Yes, she was.

Q. Do you recognize that as her authentication on that document?

A. That is Ms. Hensley's.

Q. And are Court Reporters for the Federal Grand Jury required to be Notary Publics?

A. Yes, sir.

Q. Under the laws of the State of Kentucky?

A. Yes, sir.

Q. And is it not a requirement that they authenticate under the laws of the State of Kentucky transcripts they make before that Grand Jury?

A. Yes, sir.

MR. SELF: No further questions, Your Honor.

THE COURT: Any questions.

MR. KIRKLAND: Yes, Your Honor. May I ask my questions from here.

THE COURT: Ask them right there. That will be fine.

MR. KIRKLAND: All right.

CROSS-EXAMINATION

BY MR. KIRKLAND:

Q. Ms. England, when Grand Jury subpoenas are issued, are they issued in blank to the U.S. Attorney's office?

A. Yes, sir.

Q. Have you ever seen an instance in which the Grand Jury votes on the issuance of a subpoena?

A. I am not privileged to any Grand Jury proceedings.

Q. You have never been in the Grand Jury?

A. No, sir.

Q. They are issued blank. And as far as you know, the Government can issue them to whomever they want to for whatever documents or records they choose to subpoena; is that right?

A. Yes, sir.

Q. Now, with respect to this Grand Jury, either in the official record of this case, which I think is 83-8, or in any records which have been sealed by the Judge of this Court, has the name of Dennis McCallister ever been delivered to the Judge of this Court as being a person to whom disclosure was made of Grand Jury materials.

MR. SELF: I would have to object based on Rule 6-C. Without a Court Order, she would be violating 6-C, unless according to Mr. Kirkland's interpretation, by answering such a question.

THE COURT: She said she doesn't know what went on in the Grand Jury.

MR. KIRKLAND: I am just asking, Your Honor, with respect to her official records whether those records reflect - -

MS. ENGLAND: (Interrupting) That would be under seal, Mr. Kirkland.

Q. All right. So, you would have no way of answering one way or the other whether the attorney for the Government promptly provided the District Court of names of persons to whom such disclosures has been made, and you could not testify to that; is that correct?

A. That would be under seal.

MR. KIRKLAND: All right. That's all the questions I have, Your Honor.

THE COURT: Thank you. You may step down.

(The Witness complies)

THE COURT: Now, do you want to read this record with those relevant questions? Or do you want Mr. McCallister to read those?

You first want an order from the Court permitting this to be disclosed - -

MR. SELF: (Interrupting) Disclosed to the Jury.

THE COURT: (Interrupting) Disclosed pending this judicial proceeding.

MR. SELF: Yes, Your Honor.

THE COURT: All right. I will sustain that.

MR. SELF: I would ask for permission for Mr. McCallister to read those.

THE COURT: Yes, sir. Let him read them for the record, because we are doing this out of the presence of the Jury. And then there again, we are going to reconsider the whole thing before it is concluded.

Come up, Mr. McCallister.

(Mr. McCallister complies)

THE COURT: Proceed.

DENNIS McCALLISTER, having been called as a witness on behalf of the Government, and after having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SELF:

Q. Mr. McCallister, you are the same Dennis McCallister as has been previously placed under oath in these proceedings, are you not?

A. Yes, sir.

Q. Do you recognize yourself as being under the same oath?

A. Yes, sir.

Q. You have in front of you what has been previously marked for identification as Government's Exhibit No. 45, do you not?

A. Yes, sir.

Q. Mr. McCallister, would you read that to the Defendants and their counsel, please?

A. The heading page is:

"U.S. District Court, Eastern District of Kentucky, Pikeville."

"The Court Reporter's official transcript of Grand Jury Proceedings. Testimony of Jason Moore. Federal Courthouse, Pikeville, Kentucky, November 1st, 1982."

"Shirley S. Hensley, Reporter, Post Office Box 103, Raccoon, Kentucky."

"The witness, Jason Moore, after being first duly sworn, states as follows:"

"Mr. Self: Question 1, Would you state your full name, please?"

"Answer: Jason Moore."

"Question No. 2, Mr. Moore, before you testify, I want to advise you of certain things. This Grand Jury is conducting an investigation" - -

THE COURT: (Interrupting) Just a moment. We have got Mr. Rowland.

MR. ROWLAND: Is he going to read all of that, Your Honor?

THE COURT: Yes, sir.

MR. ROWLAND: The whole thing?

THE COURT: Yes, sir.

A. " - - Of possible

violations of Federal Criminal Laws involving possible violations of the Hobbs Act, violations of the Reco Statute, and various violations of Title 18 and Title 26 involving the use of explosives."

"As any witness that appears before this Grand Jury, you have the Fifth Amendment right. You may refuse to answer any question, if a truthful answer to the question would tend to incriminate you."

THE COURT: (Interrupting) Let's do this. I think whatMr. Rowland is pointing up. Let's only read those which pertains to the subpoena duces tecum. Are there any objections to that, gentlemen?

MR. KIRKLAND: No, Your Honor.

THE COURT: All right.

MR. KIRKLAND: Your Honor, if I might suggest, I think this Court can take judicial notice of this record. This is part of this Court's record, and the Court can look at it and take judicial notice of it - -

THE COURT: (Interrupting) That's right.

MR. KIRKLAND: (Continuing) - - Obviating the necessity of reading it.

Obviously, that doesn't go to my objection at all.

THE COURT: Well, let's get it in this way. Of course, I can take judicial notice of something, but that doesn't mean the Jury has to take judicial notice of it.

MR. KIRKLAND: This is nothing that would be read to the Jury anyway, Your Honor.

THE COURT: I know. I understand.

MR. SELF: It most certainly would, I assume. I present that it would be read to the Jury based on the objections that counsel made.

THE COURT: Well, just - - Mr. McCallister, read just what pertains to the subpoena duces tecum.

MR. McCALLISTER: Yes, sir.

THE COURT: About the issue what he delivered.

MR. McCALLISTER: Yes, sir.

THE COURT: All right.

THE WITNESS: That's question number seven.

"Mr. Moore, you are appearing here pursuant to a subpoena duces tecum that was issued to Jason Moore, Post Office Box 3490,

McDowell, Kentucky, or authorized custodian of records of the United Mine Workers Local 5967. Are you the authorized custodian of the records for UMW Local 5967?"

"Answer: Yes, sir."

"Question No. 8. The subpoena requires that you produce before this Grand Jury on this date any and all financial records of the United Mine Workers Local 5967, for the period December 1, 1981 to October 1, 1982, including, but not limited to, all canceled checks, check registers, bank statements, invoices, receipts, bills, financial reports, etcetera for said period of time."

"And you were served with a subpoena; is that correct, Mr. Moore?"

"Answer: Yes, sir."

"Question No. 9. And your position with the Local Union is what?"

"Answer: Financial secretary."

"Question 10. Mr. Moore, would you tell the ladies and gentlemen of the Grand Jury what records you have produced in response to this subpoena?"

"Answer: Well, the only thing we have is this checkbook - - canceled checks. When they come back, we normally go through the book and check them out and dispose of them. But we do have a ledger on here what the checks are wrote to and who they are wrote to."

"And that's been a practice with us all the time. That is a bookkeeping practice."

"I mean, we ain't no college people, and we do it the best of our ability, I guess. But it's been a practice with this particular Local Union on this particular bookkeeping system, and that's all we have."

"Of course, all this stuff could be obtained from the bank. I'm sure they keep a copy of the canceled checks, which I didn't think was that important, since I did have the checks that was wrote, who they are wrote to and what they are wrote for."

"Question 11. Mr. Moore, could I see the book that you are - - that you brought with you, please? I would like to mark this on the front. It has a large check register book with a tape on the front of it that say checkbook 5967, UMWA."

"Inside it, let the record reflect, that the first check stub starts with December check stub 1314, dated 12/12/81."

"The last completed check in the checkbook is check number 1528, dated October 11th, 1982."

"The next check, 1529, has not been completed, and still remains in this checkbook."

"Mr. Moore, is this the checkbook the Union uses on a day to day basis?"

"Answer: Yes, sir, it is."

"Question 12. Is it necessary that this checkbook be retained by the Union?"

"Answer: Yes, sir, it is."

"Question 13. Mr. Moore, with your permission I request that the check stubs that the Grand Jury obtained and provide you copy of check stubs from 1314 thru 1426 to be retained as part of a Grand Jury Exhibit, and let you retain the checkbook itself so that the Union may continue to write checks on it."

"Do you have any objections to that, Mr. Moore?"

"Answer: No, sir, I don't."

"Question 14. Let the record reflect that I have removed from said checkbook and handed the checkbook back to Mr. Moore, check stubs beginning at 1314 and continuing through 1526."

"Mr. Moore, I'd ask if you would examine those, please, and determine that they are all there." "That is a continuous listing of the check stubs."

"Answer: You mean from the front to the finish, right?"

"Question: Yes, sir, please."

"Answer: You want me to look at all of them."

"Question 16: Well, I'll ask you. Are those all the check stubs that were written by United Mine Workers Local 5967 for the period in question?"

"Answer: Yes, sir, that is all."

"Question 17: Mr. Moore, do you have in your possession, or does any member of the Union have any of the original checks from these stubs?"

"Answer: There might be some. The man I took the job from before did not turn over to me any canceled checks. That would have been Lowell Hinkle. He was the treasurer at that time."

"Question 18: When would that have been?"

"Answer: That was, I think, some time in March, I'm sure."

"Question 19: Let me repeat again my admonition as to the questions, and will again repeat to you before I get any further."

"As you know, and I advised you before, you are a target of this Grand Jury's investigation. I am not asking you about anything concerning yourself, but you have the right to refuse to answer any question. And I caution you specifically that you do not have to answer any question that I ask you if you feel that a truthful answer to that would incriminate you."

"As being a target of this Grand Jury's investigation, I urge you to think about any question that I ask you with your Fifth Amendment rights in mind before you answer that question; do you understand that?"

"Answer: Yes, sir."

"Question 20: When did you take over for Mr. Hinkle?"

"Answer: I think it would be recorded in the minute book. It was in March this past year - - some time in March. I don't know the particular date, but it was in March of 1982."

"Question 21: March of 1982?"

"Answer: Yes, sir."

"Question 22: Now, do you have any bank statements from that checking account?"

"Answer: Not to my know-ledge."

"Question 23: Let me have the checkbook back just a moment, please. Let the record reflect that the checks in question are styled Local Union 5967, East McDowell, Kentucky, 41623. They are on the First Guaranty Bank, Martin, Kentucky, and the account number is 117897."

"And during the period December 1, 1981 to October 1, 1982, did the Local Union maintain a checking account with any other bank?"

"Answer: No, sir."

"Question 24: Have they maintained any other financial accounts with any other bank?"

"Answer: No, sir, not to my knowledge."

THE COURT: Are we getting beyond the scope of what we are on here, gentlemen?

MR. SELF: I don't think we are, Your Honor.

THE COURT: Pardon?

MR. SELF: I don't think we are, Your Honor.

THE COURT: Let me see it a minute.

(The Witness complies)

(The Court examining said transcript)

THE COURT: All right, sir, read the questions which we were - - which I think you were getting into, Mr. Self, was the specifics of why each of these checks were written, and the reasons for it and such as that; is that correct?

MR. SELF: Your Honor, it's been so long since I have looked at that, I'm not sure what follows after that.

THE COURT: Wasn't that what it was, Mr. McCallister, you were getting into?

MR. McCALLISTER: Question 24 was the last one.

THE COURT: All right, sir, seven and eight. We stopped there, and you go to the - - the last page. Finish reading seven and eight. Go to the last page, and maybe we will proceed from there.

A. (Continuing) "Question 24. Have they maintained any other financial accounts with any other bank?"

"Answer: No, sir, not to my knowledge."

"Question 25: Do you have any invoices that were submitted to the Union for payment of bills that reflect in these checks?"

"Answer: No, sir, I don't.

"Question 26: Have you had any?"

"Answer: No, sir."

"Question 27: Since receipt of this subpoena, Mr. Moore, have you destroyed any records belonging to United Mine Workers Local 5967?"

"Answer: No, sir."

"Question 28: Do you have any financial reports that have been filed by the Union for the December 1, 1981 to October 1, 1982?"

"Answer: What would you mean financial statements?"

"Question 29: Financial reports that have been required to be filed with any Federal institution or State institution or Department reflecting disposition of funds?"

"Answer: Yes, I do."

"Question 30: And do you have those for production at this time?"

"Answer: I didn't bring them with me. No. Like I say, I thought this was the only thing required."

"Question 31: What kind of financial reports have you filed, Mr. Moore?"

"Answer: Unemployment people and Internal Revenue."

"Question 32: Is there any reports required to be filed reflecting the payment of checks and who they would have been to and what they would have been for?"

"Answer: Well, on - - I don't think Internal Revenue requires you to list individually now, but they did at one time. You had to list each man you paid salary, employee, and who you paid money out to. But I think now they just want

the total of what you paid out."

"Question 33: Mr. Moore, I'm handing you a stub from three different checks, No. 1390, 1391, and 1389, and ask you to look at check No. 1390. Who is that payable to?"

"Answer: Teddy Kinney."

THE COURT: Well, let's go from there to the last page.

MR. SELF: Do you want to ship that question, Your Honor.

THE COURT: Yes, sir, I want to skip that question.

THE WITNESS: This is on page fourteen. This starts out, "Grand Jurors: Yes."

"Mr. Self, do you all have any further questions of Mr. Moore?"

"Question 79: You are telling the ladies and gentlemen of the Grand Jury that in response to this subpoena these are the only records that you have?"

"Answer: Yes, sir."

"Mr. Self: Let the record reflect that the entries appear to be - - all the check stubs appear to be here from 1314 thru 1526, and these are maintained as Grand Jury Exhibits,

with the original checks returned to Mr. Moore at this time."

"Mr. Moore, I have no further questions of you at this time. You are excused."

"Mr. Self: Mr. Foreman, with your permission, I think we have an agent of the Grand Jury, Mr. McCallister, Bureau of Alcohol, Tobacco and Firearms, made an agent of this Grand Jury for the purpose of retention of these records."

"Conclusion."

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MR. SELF: Your Honor, I'd ask for permission for him to read questions 1 through -- I'm not sure, 17 or 18.

THE COURT: I've got two things I'd like to get something on by tomorrow morning. Now, one is Mr. Kirkland's statement that -- which is part of the Rule, that an attorney for the Government shall properly provide the District Court before which was impaneled a Grand Jury -- and so disclosed were the names of the persons to whom such disclosure has been made.

Now, I think he's raising the point of whether or not the District Court was advised that disclosure was made to Mr. McCallister.

MR. SELF: May I respond?

THE COURT: Yes, sir.

MR. SELF: Your Honor, that matter is sealed and under seal. This Court -- Your Honor has signed an Order authorizing such a disclosure. It's under seal with this Court.

THE COURT: Fine. That's -- That takes care of that.

Now, the second thing is whether -- a matter of utilizing the Grand Jury report. I assume it would be an admission against

the interest of Mr. Moore, as to whom they were written, purpose.

MR. SELF: I realize there's a -- not a Brady but a -- Bruton problem with that, Your Honor.

THE COURT: Yes, sir.

MR. SELF: At this point in time I don't want to go into that with this witness, at this time.

THE COURT Okay.

MR. SELF: Not -- I'd like to, Your Honor --

THE COURT: This is only dealing with the foundation of these exhibits, that's all.

MR. SELF: These exhibits right here (indicating), Your Honor, is all. And I'll ask the witness after that to --

THE COURT: Ask those questions. We'll see if they're in substantially the same condition as when they were handed to him.

MR. KIRKLAND: May I voir dire this witness? It doesn't have to be now.

THE COURT: Well, after he finishes you can.

MR. KIRKLAND: Yes, Your Honor.

THE MARSHALL OF THE COURT: Your Honor, these exhibits have been shown to all defense counsel.

THE COURT: All right.

(Reporter's Note: The witness was handed an exhibit at this time.)

CONTINUED DIRECT VOIR DIRE EXAMINATION

BY MR. SELF:

Q. Mr. McCallister, you've been handed what's previously been marked as Government's Exhibit CC, and now marked for identification as Government's EXhibit 46. When did you fifst obtain that?

A. I obtained this from the foreman of the Grand Jury on November 1st, 1982.

Q. And are those the same check stubs that you've just talked about and read from the transcript of Jason Moore about?

A. Yes, sir.

Q. Check stubs beginning on-- with No. 15 -- 1341 and going through 1528?

A. They're through 15 -- through 1526; beginning with 1314.

Q. Are those the originals?

Did you receive anything else from the Grand Jury following the testimony of Mr. Jason Moore that he produced to the Grand Jury?

A. Not that he produced, no, sir.

Q. You maintained those in your custody and control as an agent of the Grand Jury, have you not?

A. Yes, I have.

Q. That's the one he brought?

A. Yes, sir.

MR. SELF: No further questions, Your Honor.

THE COURT: You move for the introduction?

MR. SELF: I move the introduction of what's previously been marked for identification as Government's Exhibits 45 and 46.

THE COURT: All right. Let Mr. Kirkland or anyone else that wants to voir dire the witness.

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MR. PAFUNDA: Judge, I'm on probation. I've got to be at traffic school at 6:15 in Prestonsburg. I'm serious. I hate to miss this.

They tried to get me once, and this is their second go-around at me.

MR. THOMAS: And they'll get him on the way, Judge.

THE COURT: Well--

MR. KIRKLAND: Your Honor, I'll make a deal with Mr. Pafunda. If he'll limit his cross-examination in the future I'll limit my cross-examination today.

MR. PAFUNDA: He's got a deal.

THE COURT: Do we want to meet here at eight-thirty in the morning?

MR. SELF: I need to know whether I have to have a court reporter here at eight-thirty.

MR. KIRKLAND: I just have about five questions, Your Honor.

THE COURT: Okay. Can you stand five questions?

MR. PAFUNDA: Yes, sir.

THE COURT: Okay.

MR. SELF: Your Honor, we have one other matter we need to go into after this.

THE COURT: Mr. Pafunda can't be here. He's got problems.

MR. SPENCER: It only takes about a half an hour to drive to Prestonsburg.

THE COURT: I think that's the reason he's up there in Prestonsburg now.

MR. SPENCER: I drive it every day.

THE COURT: Go ahead, Mr. Kirkland.

CROSS VOIR DIRE EXAMINATION

BY MR. KIRKLAND:

Q. Mr. McCallister, at the time and place that's been discussed here today with respect to the grand jury, were you acting as a government personnel deemed necessary by the attorney for the Government to assist him in the performance of his duties?

A. Yes.

Q. Now, are you also telling us, I assume by the reading of this transcript, that in addition to being the attorney assisting the Government lawyer--

MR. SELF: Objection, Your Honor. He's not an attorney, he's an agent assisting the United States Attorney.

MR. KIRKLAND: Government personnel, excuse me.

THE COURT: Okay.

Q. And in addition to being a Government personnel assisting the Government attorney, that you deemed yourself to be an agent for the grand jury as well, is that right?

A. No, sir. The foreman of the grand jury swore me as an agent of the grand jury.

Q. So, then is it your testimony here today that you have a dual role or a dual function with that grand jury; that is assisting Mr. Self and also being an agent of the grand jury?

A. Yes, sir.

Q. Now, I know you're not a lawyer but do you know of any legal authority for making you an agent of the grand jury?

A. No, sir. I was sworn by the foreman of the grand jury. I assumed he had the legal authority to do that.

Q. You assumed that because Mr. Self said that--go swear him, is that right?

A. Well, it's been a common practice throughout my career with the Treasury

Department.

Q. But you don't know of any authority for it, is that right?

A. No, I don't.

Q. Now, were you present at any time when the grand jury voted on the issuance of the subpoena which is the subject of this hearing?

A. No, sir.

Q. Is it a usual practice of the grand jury to vote on the subpoenas or are they made up totally in the U.S. Attorney's Office at the discretion of the U.S. Attorney or his staff?

MR. SELF: I have to object. I don't think he's testified he's been present when the subpoenas were voted on by the grand jury.

THE COURT: Sustained.

MR. SELF: If he wants to put me on next I'll be glad to.

THE COURT: Mr. Pafunda can't stay for that.

MR. PAFUNDA: It would be worth my license.

Q. Mr. McCallister--

THE COURT: Listen, I-- All joking aside, if you need to go right now we'll adjourn right now.

MR. PAFUNDA: I'll wait until ten after.

THE COURT: Do you need to go right now? Say so and we'll adjourn.

MR. PAFUNDA: No, I don't want to adjourn. Mr. Kirkland will be quick.

Q. Mr. McCallister, could you have gone to Jason Moore over in Floyd County, wherever he lives, and ask him for the same records?

A. Yes, sir, I suppose I could have.

Q. And if he had refused to give you those records and if you had probable cause could you have gotten a search warrant to go search his home and get the same records?

A. If I had probable cause, yes.

MR. SELF: What relevance is there. He could have gotten a sledge hammer and beat his door down, Your Honor.

THE COURT: Well, he's getting to the proposition that the grand jury is being used as an investigative tool for the United States rather than being a--a grand jury. I think that's what he's-- Is that what you're getting into?

MR. KIRKLAND: I am just following the case

law, Your Honor.

THE COURT: Go ahead.

MR. KIRKLAND: That's all the questions I have for this witness.

MR. KEHRLI: Your Honor, for the record, may we inquire of Mr. Kirkland what case law he's following?

MR. KIRKLAND: Yes, sir. It's in the rule book, Your Honor.

MR. KEHRLI: The rule that you read, Mr. Kirkland, is that what you said you were following?

MR. KIRKLAND: Page 23.

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THE COURT: We can adjourn so we can get Mr. Pafunda on the road.

MR. SELF: Your Honor, with regards to this, I'd ask the Court for permission to read those -- for Mr. McCallister to read those portions of the Grand Jury testimony. Again, I renew my motion to move those.

I won't -- I don't know whether you want the Grand Jury testimony in or not. I don't think it should be properly an exhibit before the Grand Jury, but I think it's appropriate that he read it to them.

THE COURT: Well, let me ask you this. The Court is going to overrule the objection and permit. Let's see, what's the --

MR. SELF: The checks are 46, Your Honor.

THE COURT: All right. What's the Grand Jury?

MR. SELF: 45.

THE COURT: All right. That which is marked as Government's Trial Exhibit 45 and 46 are finally admitted into evidence as Government's Trial Exhibits 45 and 46.

I can't see anything to

gained by reading 45 to the Grand Jury -- I mean to the pending jury.

MR. SELF: Your Honor, I think portions are very relevant. I'm not talking about portions that talk about anyone else, but that he is the custodian. These are all he's got.

The jury is going to say where are the good checks at. How else am I to put that before the jury, Your Honor. The cruddy checks the bank's brought in is all we've got.

THE COURT: Well --

MR. SELF: I'd ask for permission to read those, and I'm not talking about -- permission where he was advised of his rights, Your Honor, and questions pertaining to these specific documents.

THE COURT: The only thing -- I'll do this, I'll permit you to say that the Grand Jury issued a subpoena duces tecum; pursuant to that they were delivered to the Grand Jury; and the Grand Jury turned them over to him. That's all.

MR. KIRKLAND: Your Honor, if I have not made my motion clear, I'm moving to suppress all evidence that's been handled in this procedure by these purported agents of the Grand Jury, and for reason of violation of Rule 6. They were improperly

handled. There is no authority for the Grand Jury to name an agent. That's done strictly out of policy of the U.S. Attorney's office.

THE COURT: Okay.

MR. KIRKLAND: Your Honor, I'd urge the Court to look at the annotations on Rule 23 of the new rule book, which points out that the Court should determine whether this Grand Jury procedure was used as a subterfuge for getting evidence that they could have gogten some other way.

Mr. McCallister has said they could have gotten it two other ways, and they elected not to do it.

THE COURT: Okay.

MR. WALBOURN: May I have an objection as to relevancy on Government's Exhibit 46.

THE COURT: Yes, sir.

MR. SELF: Your Honor, in regard to the testimony I submit that the testimony of Mr. Jason Moore -- his entire testimony as it only relates to him is admissible. It's admissible as an admission by him.

We're getting in now as parts of chain of custody, but it's admissible. If I, you know, wait and put Mr. McCallister back on

as to what he said or the court reporter back on -- it's trying to save time.

I don't want to get into matters that concern other Defendants, Your Honor.

THE COURT: Gentlemen, I think everybody is trying to save time, you know. Einstein says it.

MR. SELF: If the Court's ruling not-- not at this time --

THE COURT: I'm ruling not at this time.

MR. SELF: Thank you.

THE COURT: The only thing that I'm allowing at this time are these documents, that's all.

MR. SELF: May I ask the Clerk for permission to copy 46 so that I can go through it and number the questions that he reads to the jury, just to those that pertain to these documents?

THE COURT: Yes, sir.

MR. SELF: And I'll make those available before I ask them so I don't run in front of the Court's Order?

THE COURT: Right. The only thing I'm -- Bring him up here for those documents, that's

MR. SELF: And I move in limine, Your Honor, that cross examination be confined exclusively to these. Mr. McCallister is going to be on the stand again if they want to take potshots at him. Let's just try to get on with it.

MR. SPENCER: If I may inquire. The way they're putting this in -- I shouldn't say this-- Mr. Self could have went through the bank and got them in his business records, had copies of them made. He --

MR. SELF: Mr. Spencer, that's just what I did with the previous witness.

MR. SPENCER: What about these right here, these are not the same checks, are they?

MR. SELF: They're the stubs.

MR. SPENCER: Okay. Why do you want the stubs in if you've got the checks in?

THE COURT: He'll lay that on you when the evidence comes in.

MR. ROWLAND: Are we through with this matter?

THE COURT: Yes.

MR. ROWLAND: I have something I need to say. I don't want to object to the length of this proceeding, but my family, my clients and my

creditors are. I've been here since January the 9th, and they want to know when I'm coming home.

THE COURT: I can understand that.

MR. THOMAS: I join in that.

THE COURT: I understand that. I think you know the Court --

MR. ROWLAND: I understand you sympathize.

THE COURT: Let's push it along, gentlemen. Under the Rules you can dot every I and cross every T. They want it done. It'll have to be done.

MR. ROWLAND: This is getting to be a really serious problem with me.

THE COURT: I can understand that, sir. I'm sure it's getting serious with you, Mr. Thomas, Mr. Spencer and -- and Adams, Hollon, Bransen; all of you gentlemen.

We're going to have to fight with the Sixth Circuit, Judge Lively, to get him to allow additional compensation for you gentlemen in this case. Next week while I'm up in Cincinnati, I'm going to talk to Judge Lively about that.

Mr. Walbourn and Mr.

Kirkland and Mr. Pafunda -- they have received funds but, like in anything, you know, you sit down and you say; well, this is going to take so much time. You set a fee. Then when you've come back and -- and after it's gone through that about a hundred percent of the time then you figure, man, I -- I'd sure like to go back and take second guesses at this, but they can't do it.

Gentlemen, listen. This slow pace -- I can't say, Mr. Self, it's your fault. It's everyone's fault, and I guess it's my fault, too. It's slow because, like Mr. Spencer said, Judge, you're helping him practice law. I guess in some sense I am. I'm trying to speed this thing on and get this thing over with. Let's get on something else.

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MR. SELF: One more thing, Your Honor.

THE COURT: Yes, sir.

MR. SELF: I'd like to again renew my motion to the Court to strike for cause the Juror Vivian Miller, based on what the Court said this afternoon.

THE COURT: All right. What I said was this, gentlemen. I've been advised by the Marshall that Mrs. Miller has asked the Marshall if he would serve a State Warrant for her which she obtained for her exhusband. I told the Marshall to tell her that he's a federal man.

I'm just hoping this isn't a running battle.

MR. SELF: Your Honor, based on that, I'm renewing my motion to strike her for cause. We don't need somebody on the Jury in a case of this magnitude that's worried about whether her husband's behind the door or whether he's going to come and get her.

MR. ROWLAND: I object.

THE COURT: Well, we still got it under advisement. Gentlemen, that's all. Let's see what we come to. We'll see.

We'll be in adjournment until tomorrow morning at 9:00 o'clock.

THE MARSHALL OF THE COURT: This Court will be in recess until 9:00 o'clock tomorrow morning.

REPORTER'S NOTE: The Court adjourned at 5:22 P.M., E.S.T.

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STATE OF KENTUCKY)
)
) SS.
COUNTY OF JEFFERSON)

We, WILLIAM J. KALBFLEISCH, RICHARD L. COULTER & GEORGE R. CAMERON, Notary Publics, within and for the State at Large, do hereby certify that the foregoing proceedings were taken before us at the time and place and for the purpose in the caption stated; that the witnesses were first duly sworn to tell the truth, the whole truth, and nothing but the truth; that the proceedings were reduced to shorthand writing by us in the presence of the Court; that the foregoing is a full, true and correct transcript of the said proceeding so given; that the appearances were as stated in the caption.

We further certify that we are neither of counsel nor of kin to either of the parties to this action, and are in no wise interested in the outcome of said action.

WITNESS OUR SIGNATURES this 7th day of February, 1984.

George R. Cameron
Notary Public

Richard L. Coulter
Notary Public

William J. Kalbfleisch
Notary Public

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