VOLUME XXI

{4446}

WEDNESDAY MORNING SESSION

April 13, 1977

Pursuant to adjournment as aforesaid, at 9:07 o'clock, a.m., on Wednesday, April 13, 1977, the Court met, present and presiding as before; and the trial proceeded as follows out of the presence and hearing of the jury, the Defendant being present in person:

THE COURT: Exhibit 88 will not be received.

I have examined the notes of Special Agent Doyle and find nothing exculpatory in those notes which would require disclosure under the doctrine of Brady versus Maryland.

Are counsel ready for the jury?

MR. TAIKEFF: Does your Honor want to proceed with evidence before the jury, or does your Honor wish to proceed with the offer of proof?

THE COURT: Is Myrtle Poor Bear present?

MR. TAIKEFF: Yes, your Honor, she is.

THE COURT: And available?

MR. HULTMAN: Excuse me, your Honor.

The only request I would make, your Honor, is I was left with the impression last night from counsel that we would start with Mr. Zigrossi, and he does have other things that he does need to get to. I know he has made some arrangements.

MR. TAIKEFF: I am reminded by Mr. Hultman, that is {4447} quite true. I think he should be excused as quickly as possible.

THE COURT: Then we will have the jury brought in and proceed with the examination.

MR. TAIKEFF: And then there may be another witness on for a very short period of time, and I assume we may call that witness as well.

THE COURT: Very well.

The jury should be brought in.

(Whereupon, at 9:10 o'clock, a.m., the jury returned to the courtroom; and the following further proceedings were had in the presence and hearing of the jury:)

THE COURT: You may proceed.

MR. TAIKEFF: The defense calls Norman Zigrossi.

NORMAN ZIGROSSI,

being first duly sworn, testified as follows:

MR. TAIKEFF: May I inquire, your Honor.

THE COURT: You may.

DIRECT EXAMINATION

By MR. TAIKEFF:

Q Mr. Zigrossi, would you be kind enough to tell the Court and jury what is your occupation?

A I am Assistant Special Agent in Charge of the Federal Bureau of Investigation.

Q How many Special Agents are there in the United States of {4448} the Federal Bureau of Investigation?

A Approximately 8,000.

Q And how many Assistant Special Agents in Charge are there?

A Approximately 60.

Q So then it would be fair to say that you are a rather important and high-ranking FBI official?

A Thank you, sir.

Q Is that true?

A Yes.

Q Now, when did we meet for the first time?

A Yesterday, I believe.

Q And did we speak about the things that I would ask you on the stand today?

A Yes, we did.

Q And for how long did we speak?

A Approximately five minutes.

Q Now, you had a very special connection, did you not, with the investigation of the deaths of the two agents which occurred on June 26, 1975?

A Yes, I did.

Q Would you summarize the essential aspects of that to the Court and jury?

A Well, essentially I was what you would consider the No. 1 man

handling the investigation.

Q Prior to the time or prior to June 26, 1975, where were {4449} you assigned in the FBI?

A At Washington, D.C.

Q In the headquarters?

A Yes, sir.

Q And either on June 26th or June 27th there was a change in your status or at least in your assignment, is that right?

A Yes, the morning of June 27th.

Q To what office were you then assigned?

A I was then transferred to Rapid City, South Dakota.

Q Was that as the Assistant Special Agent in Charge?

A Yes, it was.

Q You were the No. 2 person in the Rapid City office, but the No. 1 person on this particular investigation, is that a fair summary?

A Well, not exactly. You stated No. 1 person. I did have a superior in Pine Ridge that I worked with in conjunction with the investigation.

Q O.k. Now, during the several days that immediately followed June 26th, approximately how many agents did you have working on the Reservation? {4450}

A Approximately a hundred and seventy-five.

Q And did the agents have periodic meetings and conferences concerning the progress of the case, leads to be followed, important things discovered, et cetera?

A Yes, they did.

Q How frequently did that occur, let's say within the first five days?

A About once a day I'd say.

Q And were there some days when it occurred more than once a day?

A I don't believe so. I believe essentially it was one conference a day.

Q Now, during the four days following the incident was the name Leonard Peltier ever mentioned at any of the conferences?

A Yes, it was. I believe it was.

Q How many times?

A I can't recall the number of times. It would be difficult to say.

Q When we discussed this question yesterday did I put the question to you that I just put to you about mention of Leonard Peltier's name?

A Yes, you did.

Q And at that time what was your answer?

A At that time I didn't recall and I said --

Q Just tell me what your answer was. What did you say to me {4451} in response to my question yesterday afternoon?

A That I didn't recall.

MR. TAIKEFF: I have no further questions.

CROSS-EXAMINATION

BY MR. HULTMAN

Q Mr. Zigrossi, did you respond to counsel in any questions that he asked you yesterday as fairly and honestly as you could?

A Yes, I did.

Q And you could have refused to even talk to him yesterday, could you not?

A Yes, I could have.

Q And you chose to go ahead and visit with him about anything he wanted to talk about; isn't that right?

A Yes, I did.

Q When was it with reference to the four days that counsel has referred to, when was it the first day that you had anything to do with the investigation at all? Do you remember what day that was?

A Yes. It was the 27th, when I arrived at Rapid City.

Q All right. Do you remember about when that was on the 27th?

A Yes. I arrived, I believe I landed at 5:30 P.M.

Q So wouldn't have been until the next evening that you had anything to do with anything, is that a fair conclusion for me --

A Yes, that's correct. I didn't get to Pine Ridge until the next day.

{4452}

Q So any meeting that you would have basically attended of the kind and nature that counsel asked you about, could it have even been the next day which was two days after the event?

A That's correct, yes.

Q All right. During the course of the early days of the investigation, the times that counsel asked you about, what was it that the agents that were working on the case, what was it just in a nutshell that they were doing?

A Well, we were actually gathering any and all information that we could from the citizenry at Pine Ridge and also the thrust of our investigation at that time was to identify the individuals whose names we had through an interview with Angie Long Visitor.

Q All right. When did that interview take place?

A I believe it took place, and I'm not certain either, I think it was probably the day of the 27th. But I'm not certain because as I say I came in late and I wouldn't know for sure.

Q Now, at the time of that interview did she give you, I'm not saying you, I'm talking about whoever it was that she talked to, did she give some names of some people that were there that day of the 26th?

A Yes. As I recall essentially it was a lot of nicknames and first names.

Q All right. So that the information you were going on at that particular time then was primarily what Angie Long Visitor {4453} had given and those were nicknames and first names?

A That's correct.

Q To your knowledge she didn't give any full names of any kind; is that right?

A To my knowledge she did not.

Q Now, of the -- is it fair for me to conclude at that particular time anybody and everybody who generally were in the Pine Ridge or the Jumping Bull area could have been somebody that you were trying to seek any information about?

A That's correct

Q Is it fair for me to conclude that of the approximately one hundred and seventy-five agents that you said ultimately were involved, that included in those were those that were doing the work that had to be done on all the other cases that you had pending on the Pine Ridge and within the jurisdiction of that particular office of the Federal Bureau of

Investigation?

A Yes.

Q And that included areas other than the reservation itself, did it not?

A Yes.

MR. HULTMAN: I have no further questions.

REDIRECT EXAMINATION

BY MR. TAIKEFF

Q I think you said on your cross-examination that immediately after the incident one of the primary things to do was to identify the people who had been in and around that area at the {4454} time of the incident; is that a fair summary of what your testimony was on cross-examination?

A Yes.

Q Now, it is a fact, is it not, that there are hardly any more important things to do when investigating a crime than discovering the identity of the people who are either participants in one way or another or witnesses; is that a fair statement?

A Yes, I think it is.

Q Now, there came a time relatively early in the investigation when someone briefed you on the situation as it then existed; isn't that correct?

A Yes, that's correct.

Q And how many agents did you assign to interview to find and interview a person by the name of Marvin Stoldt, a BIA police officer?

A I don't recall assigning anyone to interview Marvin Stoldt.

I personally do not have any recollection of assigning anyone.

Q Anybody ever discuss Marvin Stoldt with you during this important phase of discovering the names of the people who may have either been there and hence were eyewitnesses or may have been participants? Yes or no.

A Please rephrase your question, or at least repeat it. Are you speaking in terms of the, immediately after the incident or down the line? {4455}

MR. TAIKEFF: May the question be read back, Your Honor?

THE COURT: Question may be read back.

(Question read back: "Question: Anybody ever discuss Marvin Stoldt with you during this important phase of discovering the names of the people

who may have either been there and hence were eyewitnesses or may have been participants? Yes or no.")

A At that particular time I do not recall discussing Marvin Stoldt with anyone.

MR. TAIKEFF: I have no further questions.

MR. HULTMAN: I have no further questions.

THE COURT: You may step down.

MR. TAIKEFF: Your Honor, may the witness be released?

THE COURT: Any objection?

MR. HULTMAN: No, none, Your Honor.

THE COURT: Witness is released.

MR. TAIKEFF: Defense calls Robert Ecoffey.

ROBERT DALE ECOFFEY,

having previously been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TAIKEFF

Q I'm placing before, Mr. Ecoffey, Defendant's Exhibit 87 for identification, and I would first like to ask you whether you realize that the oath you took to tell the truth the last time you appeared still applies to you now?

{4456}

A Yes, I do.

Q Now you previously identified that document as a 302 which contained a copy of a report you wrote on June 26 concerning your activities of June 26th, is that right?

A That's right.

MR. TAIKEFF: I offer it in evidence.

MR.HULTMAN: I object, Your Honor. If he has any questions to ask this witness I have no objection, but I do object to the report itself going in.

MR. TAIKEFF: Your Honor, I originally asked this witness to lay the technical foundation. It was suggested if I want to offer it he should be here so he could answer questions on cross-examination. The record at page --

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

THE COURT: You may.

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

MR. HULTMAN: Your Honor, again here we go, it's the same old procedure, we're going to put a document in which is what this witness has made some memoranda about and I object on the grounds that the best and proper method is to ask whatever questions it is of this witness so I do have a chance to cross-examine on whatever it is the testimony's going to be. What Counsel is trying to do is put a report in. He can then go back to refer to that, point to any one of {4457} ten thousand items in that report I've had no chance to cross-examine.

MR. TAIKEFF: I'll put in one paragraph then.

MR. HULTMAN: You do whatever you want to do with the witness but I'm going to object to anything as far as the report itself because there is no foundation.

MR. TAIKEFF: I just laid the foundation. Page 750 and 751 just reaffirmed the foundation. I made the big business record foundation.

THE COURT: The report will not be received under the business record exception to the hearsay rule.

MR. TAIKEFF: May I question him from the report?

THE COURT: Whose report is it?

MR. TAIKEFF: It's his report.

MR. HULTMAN: His report.

THE COURT: It is his report?

MR. TAIKEFF: Yes, Your Honor.

THE COURT: All right.

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

Q (By Mr. Taikeff) I'll have to stand here so both of us can see this document at the same time.

MR. TAIKEFF: For the record I'm looking at enumerated page 5.

Q (By Mr. Taikeff) Would you tell the jury, sir, whether {4458} you wrote in your report concerning your activities towards the end of the day the following paragraph: "I went back to where Eastman and Glen Little Bird was and advised them and Dave Price of what I found. I also found the red International in which the agents chased into the Jumping

Bull res," r-e-s. "James Eagle was supposed to be in that red International."

Did you write that paragraph?

A Yes, I did.

MR. TAIKEFF: I have no further questions.

CROSS-EXAMINATION

BY MR. HULTMAN:

Q Mr. Ecoffey, other than the bold statement, let me ask you questions about what led you to that particular writing of that statement. Do you remember at an earlier time, either that day or the day before, that you personally had gotten a report that Jimmy Eagle had left in a particular colored vehicle?

A On a night before at Wallace Little's residence, we were there looking for Eagle. They advised that he had left in a red pickup.

Q And in fact you reported that in a 302 that you gave to William Murphy?

MR. TAIKEFF: Objection. Hearsay and competence.

MR. HULTMAN: This is cross-examination and I'm getting at a point of a prior consistent statement, Your Honor.

MR. TAIKEFF: Your Honor, I am basing my objection on the phraseology of the question. He's asking him about the {4459} content of the 302 which he did not write. Same objection the government has made many times in this case.

MR. HULTMAN: I'll change the question.

Q (By Mr. Hultman) Did you have a conversation with an agent William Murphy about the events the night before?

A Yes, I did.

Q And did you in fact tell him what in fact you had learned the night before?

A Yes, I did.

Q Was that the fact that when you had made the inquiry at the Wallace Little residence that the person there replied that Jimmy Eagle had just left in a red pickup?

A Yes.

Q That was a fact, was is not? I mean, the report had been given

to you that night when you asked the question?

A Yes, it was.

Q So that you had this information in your mind the next day and evening when you wrote what Counsel has asked you about, did you not?

A Yes, I did.

Q On that evening of the 26th with that information which you knew, did you have an occasion in the course of walking up the road in the area of Jumping Bull's to observe a vehicle of some kind?

A Yes, I did.

{4460}

Q And would you tell the jury where the vehicle was that you observed?

A It was in line with a bunch of other junk cars.

Q It was in line, one of a series of junk cars, is that right?

A That's right.

Q And did what you had heard the night before and anything else trigger your mind to a conclusion at that point?

A Yes, it did.

Q And would you tell the jury what was the conclusion that was triggered in your mind at that moment.

A Well, earlier in the day someone relayed to me some information that the two agents had chased a red vehicle van or pickup that they weren't sure what type and I was going over the crime scene area and I happened to come to these junked cars and they had parked in line with these cars with the red International pickup. I just assumed this was the one that had been chased in there because it was the only red vehicle around the area at this time.

Q And so you then reported that in your 302, is that right, the part that Counsel just asked you about?

A That's right.

Q It had no other significance other than what you've indicated in here, is that right?

A That's right.

{4461}

Q Anymore significance than any of the number of other items you reported in your 302 at that time?

A That's right.

MR. HULTMAN: I have no further questions.

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

THE COURT: You may.

REDIRECT EXAMINATION

BY MR. TAIKEFF:

Q Now the night before when you received the report that Jimmy Eagle had left a certain residence in a red pickup, were you basing that on what someone told you or on what you saw?

A This is on what someone told me.

Q That was someone at that particular residence?

A Yes, sir.

Q Can you say for us the words that that person said to you?

A We pulled into the residence and asked if Jimmy Eagle was there and she advised, no, that he had just left in a red pickup.

Q That's basically what you were told then?

A Yes.

Q So I gather when you left that particular location, when you left that particular location no one had said to you at that residence a red International, right?

A That's right.

Q Now when you reported that matter to the FBI, you didn't {4462} say to the FBI, "A red International," you said a "red pickup"?

A That's right.

{4463}

Q Now, when you wrote in your report that you found that red International which the agents chased into the Jumping Bull residence, and that James Eagle was supposed to be in that red International, where did you get the idea that James Eagle was supposed to be in the red International?

A Well, I just said sometime in that morning when I came to the Jumping Bull residence, someone had mentioned to me or it came over the radio, or something, that agents had chased a red vehicle, van or pickup into the area; and upon searching the immediate crime scene area, this was the only red vehicle that was in the area there.

Q Now, I note that you said that you were told or heard that the agents chased a red vehicle, van or pickup. Are you saying it that way because you are not sure what you heard on the radio?

A No, I am not sure. I am just --

Q (Interrupting) Why do you say all three words, "vehicle, van, pickup"?

A O.k. Well, they just chased a vehicle in there. I am not sure what kind it was.

Q I show you Defendant's Exhibit 98 in evidence. In the foreground there is a green sedan. Do you see a vehicle in the background?

A Yes, I do.

Q What is that, if you know?

A It is a red vehicle.

{4464}

Q It is a red vehicle. What kind of a vehicle is it?

A It looks like the vehicle that I found.

Q What style vehicle is it, is it a schoolbus?

A No. It is a pickup-like.

Q Do you think "pickup" is a dirty word?

A No, I don't.

Q All right. I am just wondering about that. Now, I show you Defendant's Exhibit 95. What is that?

A That's a red pickup.

Q What kind of a pickup?

A International.

Q Is it any old red International pickup?

A No, it isn't.

Q Is it a special one, a definite one?

A Yes. This is the one that I put in my report as finding.

Q Now, I show you Defendant's Exhibit 93. Is that that same red International pickup?

A Yes, it is.

Q The color is slightly different in that photograph, isn't it, than the one that I just showed you before, that the red came out a little different in the photograph, this red versus that red (indicating)?

A Yes. I would say the same.

Q It looks the same to you?

A Yes.

{4465}

Q It is the same vehicle in both 93 and 95, isn't it?

A Yes, it is.

Q Now, 93 is a photograph taken at what location, can you tell?

A It appears to be the location of Jumping Bull's where the junked cars were.

Q And it looks in that photograph basically the way it did when you first saw it up by those junked cars, didn't it?

A Yes, it did.

Q And the windshield was broken, wasn't it?

MR. HULTMAN: Your Honor, I haven't objected to the clear leading questions that have been going on to this witness. We are on redirect, and I am now going to object to the leading questions. If he wants to ask him to describe what he saw, I have got no objection. I do object to the continually leading questions.

MR. TAIKEFF: Even though I think I am justified, I will not ask leading questions.

THE COURT: Very well.

Q (By Mr. Taikeff) When you first looked at that vehicle, what was the condition of the windshield?

A It was broken out.

Q And did you see any signs whatsoever that that vehicle was capable of being driven?

A I didn't really notice. I didn't look under the hood or {4466} anything, just looked at the vehicle.

Q Did you find any keys for the vehicle?

A No, I didn't.

Q Did you find any indication in its appearance, its general appearance, that it had not been driven for a long time?

A No, I didn't.

MR. TAIKEFF: I have no further questions.

RECROSS EXAMINATION

By MR. HULTMAN:

Q I just have one question, and it is a play on words.

Is this vehicle known in the parlance as an International Scout?

A Yes, it is.

MR. HULTMAN: No further questions.

THE COURT: You may step down.

(Witness excused.)

MR. TAIKEFF: Your Honor, we are now prepared to take up the other matter with the Court.

THE COURT: We are approaching the end of the evidence in this case, and there is a legal question before the Court on which another witness will have to testify in order for the Court to make a ruling on the legal question; and that must be done out of the presence of the jury, so the jury will be excused from the courtroom at this time.

(Whereupon, at 9:42 o'clock, a.m., the Jury left the {4467} courtroom; and the following further proceedings were had out of the presence and hearing of the jury:)

MR. TAIKEFF: May we proceed, your Honor?

THE COURT: You may proceed.

MR. TAIKEFF: Defense calls Agent Skelly.

(Counsel confer.)

EDWARD A. SKELLY, JR.,

having been previously duly sworn, was recalled and testified further as follows:

MR. TAIKEFF: May I proceed, your Honor?

THE COURT: You may proceed.

REDIRECT EXAMINATION

By MR. TAIKEFF:

Q Now, Agent Skelly, you understand, don't you, that your oath continues to apply to this testimony?

A Yes, sir, I do.

Q I am going to place before you certain documents so that we can identify them in connection with this offer of proof. Defendant's Exhibit 118, 119, each of them being a 302; 115, 116 and 117, each of them being an affidavit. Now, taking them one at a time, No. 118, is that a document

you have ever seen before?

A Yes, sir.

Q It is a 302 of an interview, is it not?

A Yes, sir, it is.

{4468}

Q With whom?

A Myrtle Poor Bear.

Q What was the date of the interview?

A On February 24, 1976.

Q Was that the first time you ever met Myrtle Poor Bear?

A Yes, sir, I believe it was.

Q And I can assume, therefore, it was the first time you ever interviewed her, you never spoke to her on the telephone or anything like that?

A Not that I can recall, I never did.

THE COURT: Excuse me. What was the date?

THE WITNESS: February 24th, 1976.

THE COURT: Thank you.

Q (By Mr. Taikeff) Now, take a look at Defendant's Exhibit 119. Did you ever see that document before?

A I believe I probably did, but I can't be certain.

Q On its face it appears to be another 302, an interview of Myrtle Poor Bear apparently conducted by Special Agents William Wood and David Price, is that correct?

A Yes, sir.

Q Now, how about 115, 116 and 117, ever seen those documents before?

A Yes, sir.

Q Generally speaking, what are they?

A Affidavits of Myrtle Poor Bear.

{4469}

Q And the first of those documents, 115, shows that it was sworn to on the 19th day of February, 1976, correct?

A Yes, sir, that's what it shows.

Q And the next one sworn to the 23rd day of February, 1976?

A Yes, sir.

Q And the next one sworn to the 31st day of March, 1976?

A Yes, sir.

Q Do you have any personal knowledge concerning either the signing or the swearing to of these three affidavits?

A The swearing to or the signing of these?

Q Yes. Anything about when and where they were signed, who was present, when they were signed, who signed them, anything about the time and place of the taking of the oath concerning the truthfulness of them, or any of those factors or anything reasonably related to those factors.

A The only thing that -- along those lines that I can recall was that after they were prepared, or the affidavit was prepared, it was turned over to be forwarded to the Canadian authorities.

Q In connection with the extradition proceedings of Mr. Peltier?

A Yes, sir.

Q Can you tell us who authored or wrote -- I am not talking about the typist -- the affidavits?

A I would assume it was Myrtle Poor Bear.

Q What is the basis of that assumption, just a general {4470} assumption?

A The fact that her name appears on it, that she had given the affidavit.

Q Well, I am not disputing with you the fact that it appears that she gave the affidavit; but I am asking you about who arranged the sequence of words, who chose the words, who wrote the content of it?

A I have no firsthand knowledge of who did that.

Q Do you know whether it was an agent of the FBI?

A I would assume so, but I don't know for sure.

Q Do you know the location of the premises where the affidavit was dictated, assuming it was dictated, and then typed?

A In Rapid City, South Dakota, I believe that the -- well, I don't know for sure. I would think at the Federal Building.

Q Now, do you know of any other documents -- I am speaking of 302's, memoranda, notes, affidavits, depositions, transcripts, or any other writing which records statements of Myrtle Poor Bear concerning the events of June 26, 1975 -- I am asking of your own knowledge or in connection

with your official duties?

A Insofar as an interview that I conducted perhaps or --

Q (Interrupting) An interview you conducted, an interview that a fellow agent conducted, another affidavit she may have signed at some particular time that you became aware of in connection with your official duties -- what I am really trying to find out is, are the five documents which are in front of {4471} you the only documents that exist as far as you know concerning the subject of Myrtle Poor Bear and what she may have had to say about June 26, 1975?

A As far as I know right now, yes, sir.

Q That's it?

A As far as I can recall.

Q All right. I would like to call your attention to the fact that you acknowledged that Defendant's Exhibit 115 appears to have been sworn to on the 19th day of February; and that the exhibits 118 and 119, which are 302's of interviews of her, show that the interviews took place on February 24, 1976, and March 31, 1976, respectively.

Now, can you explain the existence of the first affidavit, Defendant's Exhibit 115, and the absence of a 302 that has a date of February 19th or earlier?

MR. HULTMAN: Well, your Honor, I object on the grounds that the documents -- have no objection to what this individual's knowledge may be, but for him to speculate on documents, one, that he did not participate in or doesn't have any knowledge about would be pure speculation, and I enter an objection for the record for that purpose.

THE COURT: The question was whether or not he had any knowledge.

MR. TAIKEFF: That was precisely the point. I was about to ask whether the record could be read back because, {4472} your Honor, it was clear, crystal clear, I asked him if he had any knowledge.

Now Mr. Hultman made a speech and now the witness is presumably informed as to what Mr. Hultman would like him to say.

MR. HULTMAN: I object on the record, your Honor. I have heard this accusation now about six times. I have a right to object, and I am going to continue to object, and I think it is highly improper for counsel to constantly make this reference on the record that there is something

improper on my part, and I want the record to so reflect.

MR. TAIKEFF: In my opinion the way to do that is to make the objection, make the objection on the grounds of competence. That's what the Rules of Evidence require, not a speech from Mr. Hultman to the witness.

THE COURT: The reporter may read back the question, and the witness may answer.

(Question was read by the reporter.)

MR. HULTMAN: I object on the grounds that it gives the clear impression that he knew, your Honor.

MR. TAIKEFF: Your Honor, the question is: Can you explain the apparent absence of a 302?

MR. HULTMAN: I object, that that assumes something that is clearly not a part of this record.

MR. TAIKEFF: I will withdraw the question and lay a {4473} foundation for it.

THE COURT: Very well.

Q (By Mr. Taikeff) When a Special Agent of the Federal Bureau of Investigation interviews a person, and particularly when that person has some information about an incident being investigated, is it not the common practice to write a 302 to record that event and what was said?

A In most cases, yes, sir.

Q And sometimes it happens that after a person is interviewed that person might be asked to sign a statement, perhaps a typed statement, is that not sometimes the case?

A Yes, sir.

Q And sometimes, if necessary, a person may be asked to make that statement under oath in the form of an affidavit, is that correct?

A Yes, sir.

Q And sometimes a person may then be asked to come and testify before a Grand Jury and testify under oath, isn't that correct?

A Yes, sir.

Q Do you know of any practice or regulation of the Federal Bureau of Investigation that says if you decide to put someone's statement in the form of an affidavit, you shouldn't write a 302 about your contact with that person?

A No, sir, I don't know of any.

{4474}

Q Now, therefore, if there was an affidavit signed on February 19th, 1976, as a general rule, if you had no knowledge of the subject at all and you were looking at the paperwork here, wouldn't you at least go looking for a 302 that showed an interview on or before February 19, 1976?

A Not necessarily, sir. The fact that the affidavit was taken could very well substitute for the FD-302.

Q I understand the possibility that it might. I am talking about the fact that there is no 302 indicating how it came about, that there was initially any contact between the FBI and Myrtle Poor Bear.

Do you find anywhere in any of those documents any reference to the initial contact with Myrtle Poor Bear?

{4475}

A Well, not having, not having read the whole thing, no. I would say no.

Q Take a look at the two, 302's and in particular the preamble paragraphs of each.

MR. HULTMAN: Now, Your Honor, I object to any further question. This clearly calls for speculation on the part of this witness.

MR. TAIKEFF: I'm not going to ask for any speculation. I asked him to look at the documents. That's not speculation.

THE COURT: I will be allowed in the offer of proof.

MR. TAIKEFF: Thank you, Your Honor.

A Yes, sir, I've looked at both.

MR. TAIKEFF: Excuse me one second, please.

Q (By Mr. Taikeff) Now, your 302 which is Defendant's Exhibit 118 is the one with the earlier interview date; and it reveals in the preamble paragraph that she was contacted at the Rapid City resident agency of the FBI; isn't that correct?

A Yes, sir.

Q Now, at that time was she an employee of the FBI?

A No, sir.

Q How did it come about that you knew that she was there to be interviewed?

A I was requested to conduct the interview.

Q Who made the request?

A Either Special Agent Price or Special Agent Wood.

{4476}

Q Do you know any reason why they did not conduct the interview themselves?

A No, sir, other than that at the time something had come up to prevent them from doing it.

Q Now, the 302 which is Defendant's Exhibit 119 is of an interview by Agents Wood and Price apparently; and it reveals that Myrtle Poor Bear was advised that she would be interviewed concerning the shooting of the two FBI agents near Oglala, South Dakota on June 26, 1975. Could you tell me, sir, whether either of those 302's in any way reveals the date for the occasion of the first contact between the FBI and Myrtle Poor Bear?

A In the preamble or --

Q Anywhere, anywhere.

A I'd have to look at them I suppose.

Q All right.

MR. TAIKEFF: Perhaps to save some time the Government would stipulate that there is no such reference at all.

MR. HULTMAN: I would ask the question why should there be before I stipulate? I don't see any relevance of any kind.

MR. TAIKEFF: Well, unless critical witnesses generally parachute into the FBI office unannounced I would imagine that it's a valid and reasonable question.

MR. HULTMAN: Well, I'll state for the record there's {4477} a fact that that not only is taken and does happen, but has happened with many of the witnesses in this file. They didn't parachute in, but they came in voluntarily on their part. And if it were relevant I'd cite book and page and time and place. Not by parachute, however.

MR. TAIKEFF: I would assume that if they parachuted in they first said Geronimo.

Q (By Mr. Taikeff) In any event you conducted an interview on February 24, 1976; is that correct?

A Yes, sir, it is.

Q And did you have before you the affidavit of February 19, 1976?

A At that time?

Q Yes, sir, At the time you conducted the interview did you either have it in your possession or had you read it or were you aware that it existed?

A I may have been aware that it existed, but I doubt it. The interview was conducted without benefit of the affidavit.

Q Now, as before when you were testifying in front of the jury, I do not intend to restrict you from using the 302, but I would like the record to be clear when you are testifying from your own recollection, when you are looking at the document to refresh your recollection or when if necessary you have to read from the document. Do you understand what it is that I require of you?

{4478}

A Yes, sir. It's all right to read from it now? Has it been entered?

Q Yes, it's in evidence for this special proceeding. The jury is not here, you may read from it. But I'd like to get some idea of the state of your mind.

Do you remember independently, and if not, does looking at the document refresh your recollection, and if not then we can read from the document. Do you understand that?

A Yes, sir.

Q Okay. Now, without using the document if you can do it that way what did Myrtle Poor Bear tell you on February 24, 1976?

A Basically, do you want the contents of the interview?

Q Yes. I'd like the contents of the interview to the extent that you have an independent recollection of it.

A I can -- well, the best I can do off the top of my head without referring to --

Q Yes, I wish you would do that first. No one is challenging you because you don't remember every written word. I just want to find out what your independent recollection is.

A She advised me that she had been living in the Jumping Bull area, in the compound area referred to here (indicating). MR. TAIKEFF: When the witness says "here" he pointed at Government Exhibit 71.

Q (By Mr. Taikeff) Go ahead, sir.

A That she had been living there since May or late May of '75. {4479}

Q With whom?

A Leonard Peltier.

Q All right.

A That on the day of the shooting, June 26th, 1975, she saw a, which she assumed, or what she thought to be an FBI car drive into the area of the Jumping Bull houses.

Leonard Peltier called her outside and was with another individual and he gave her, or he told the other individual to give her a rifle or a gun, which the other individual did.

She stated that she could recall hearing shots, but couldn't remember exactly when the shots were heard. She told me that the next thing that she could recall, she was down in the area by the FBI car and was pounding on Peltier's back and yelling at him to quit.

She stated that she saw him holding a gun, a rifle on one of the agents who was near the car, either on the ground or this part. I can't recall specifically whether she said that he was on the ground, but she did hear the agent state something to the effect that "I surrender."

She said that she saw the body of the agent on the ground jump each time it was hit. That she at that point, I think she said went crazy, couldn't stand it any longer and started to run away.

That she ran away and that Leonard called to her to come back. First of all he had tried to stop her. Basically, {4480} that's all I can recall off the top of my head.

Q All right. Now, with respect to the recollection which you have demonstrated for us, tell us whether you have read the 302 of your interview prior to testifying this morning.

A This morning?

Q Not the reading the morning.

A Prior to my testimony here?

Q Prior to your testimony this morning.

A Yes, sir, I have looked at it.

Q And when did you last read it?

A Yesterday afternoon I believe.

Q And when before that?

A I don't know for sure. It would have been quite some time.

Q Now, it's a common practice to read 302's before you give testimony because that's one of the reasons why you prepare them in the first place; isn't that true?

A Yes, sir, that's true.

Q And is it fair to say that at least to some extent your recollection as you demonstrated it a few moments ago is based upon the fact that you reviewed your 302?

A Yes, sir, I could say that.

Q Okay. Now, when you took this interview was any other Agent working with you or assisting you in any other way?

A On this interview?

Q On this particular interview.

{4481}

A No, sir.

Q Isn't it the general practice of the FBI to have two agents in on an interview particularly with an important witness?

A I would say that it's a general practice for the FBI to have two agents in on an interview of a suspect of subject in a case, but not necessarily and most likely not witnesses.

Q How about the eyewitness to the murder of two agents?

A We at the time that I interviewed her, until we got into the interview, we didn't know that that's what she was going to -- I didn't know that that's what she was going to tell me.

Q Once you heard what it was she was going to tell you did you call for the assistance or companionship of another agent?

A No, sir, I did not.

Q When you heard what she had to say did you consider it important information?

A Yes, sir, I did.

Q And didn't she tell you that she could not describe the gun other than the fact that it was a rifle?

A May I look?

Q If you have to, of course. It's in the third paragraph on page 1 of your 302.

A Yes, sir. Other than that it was a rifle.

Q Now, did you recognize in connection with her statement in that regard that if a certain rifle could be identified as being the one owned or used by Leonard Peltier and she could {4482} identify that rifle that would be a very important piece of corroborative evidence?

A I'm sorry, I didn't hear the first part of your question.

MR. TAIKEFF: May that be read back, Your Honor.

THE COURT: It may be read back.

(Question read back: "Question: Now, did you recognize in connection with her statement in that regard that if a certain rifle could be identified as being the one owned or used by Leonard Peltier and she could identify that rifle that would be a very important piece of corroborative evidence?")

A Yes, sir. I'm sure that that went through my mind at the time.

Q (By Mr. Taikeff) And what if anything did you do to see to it that arrangements were made for her to look at one or more weapons that may have been carried by Leonard Peltier?

A I made no arrangements whatsoever for her to look at them. It was at that point of the interview that she became very distraught and the interview had to be discontinued for three or four minutes or five.

Q Well, apropos of that and before we get to the point where she became distraught, what would you say was her demeanor based on your own personal observations?

A I can't really state now what her demeanor was at the time. She had information to give and I took the notes and asked her questions, and she provided information without questions, just {4483} as in many other interviews.

As far as her demeanor prior to her becoming distraught I don't really think I can state what, how she was.

Q Did she strike you in any particular kind of way? Was she articulate, intelligent, quiet, talkative, calm?

A I would say quiet, not very talkative.

Q Was she sitting or standing?

A Both.

Q When she was sitting can you describe her posture?

A No, sir, I can't recall.

Q I understand that when you interview a witness you write down what you have to write down based on what the witness says, so I'm not looking to criticize your writing, do you know what she said? I want to know, though, in the course of interviewing her did you have any sense at all as to whether or not she was a credible person generally?

A That, that part of it didn't really enter in at that time. We have -- I'm obligated I feel by my occupation to take down the information that I'm given.

It's not for me to judge the information that I take.

Q I thought I had suggested that to you a moment ago, and in fact that is my position, so don't be defensive about it. What I'm asking you, after you executed your job, which no one will quarrel with you about, what were you own personal sense impressions about this person who had told you these things?

{4484}

A She was terribly upset, I do recall that, about having to relive, so to speak, from what she told me.

Q Did she identify the person who according to her upon Leonard's instruction gave her a gun?

A May I look?

Q Yes. Middle of the first paragraph, page 1.

A Yes, sir, she did. Ricky Little Boy.

Q And did she tell you that she herself fired a shot that day?

A Is that the -- sorry, I thought you were going on.

Q No, that was my question.

A Yes, sir She did mention that she had fired a shot at Ricky Little Boy who was pursuing her.

Q Did she tell you that she had some knowledge about a car being hidden under some trees and bushes as part of an advanced plan in which the car would be used as an escape car?

A May I refresh my --

Q Yes, sir. Page 2, end of the preliminary paragraph.

A Yes, sir, that is correct. She did tell me that.

Q Did she tell you that she had overheard Leonard Peltier and others who had been living at or near the Jumping Bull residence planning to kill either BIA officers or FBI agents sometime prior to June 26th, 1975?

A Yes, sir, she did.

Q And did she then tell you that it was her car that had been hidden in the bushes to be used as an escape car?

{4485}

A Yes, sir, she did.

Q Now as a general rule the Federal Bureau of Investigation gets a certain amount of cooperation from other law enforcement agencies and government agencies of the federal government and the state government, as a general rule. You call up, you want some information, you usually get pretty good service, don't you?

A Generally; yes, Sir.

Q If you have a reason to have to know right away who is the registrant of a particular vehicle, you can pick up the phone as a rule and call the appropriate state motor vehicle office, identify yourself as a federal agent and get pretty quick informal information on the telephone about what's the name and address of a registrant, if you gave them a license plate number as an example?

A Yes, Sir.

Q Now this woman said she had a car which was going to be used as an escape car, isn't that correct?

A That's what she told me.

Q And on February 24, 1976, how many years experience did you have as a special agent of the Federal Bureau of Investigation?

A Approximately four.

Q How many different cases have you worked on?

A I would say hundreds.

Q And there is no doubt in your mind that you're an {4486} intelligent human being, is there? Is there?

A No, sir.

Q Did you exercise your intelligence and ask to see her driver's license or car registration to see whether she even owned a car?

A No, sir, I did not.

Q Did she appear to you to be a person of any financial means or did she appear to be a rather poor individual?

A I wouldn't say that she was a person of any financial means. I don't know whether she was poor or not.

Q Did you ask her what was the year and make of that car?

A No, sir, I did not.

Q Did you ask her what was the color of that car?

A No, sir, I did not.

Q Did you ask her for the location where the car had been hidden in the trees and bushes to find out later perhaps someone had seen that car there to corroborate her story?

A No, sir. I didn't ask her. She had furnished a vague description of where the car was by stating that it had been driven all the way around.

Q Now the various things which I just alluded to which you said you didn't do, you think that those are intelligent things for an investigator to do if the investigator wanted to corroborate an important story?

MR. HULTMAN: Well, I object, Your Honor, as this is {4487} is calling for speculation.

MR. TAIKEFF: No, it isn't.

MR. HULTMAN: Let me just finish. Do I have to go to the bench to make my presentation? If it please the Court, I'll do it so I don't get accused of telegraphing again.

MR. TAIKEFF: Do you want me to come too?

THE COURT: Counsel will stay at the counsel table and you may make your objection.

MR. HULTMAN: My objection, Your Honor, is it calls for speculation. I believe that is one of the rules as far as this witness is concerned and for which no proper foundation has been laid.

MR. TAIKEFF: Your Honor, the foundation that has been laid is the agent's experience as a Federal Bureau of Investigation special agent and what I'm asking him for is not speculation but an opinion.

THE COURT: You don't have to cite any rule.

MR. TAIKEFF: Rule 701.

THE COURT: The objection is overruled.

Q (By Mr. Taikeff) Do you remember my question, sir?

MR. HULTMAN: I request it be read back.

THE COURT: The reporter will read the question back.

(Whereupon, the following question was read back: "Now the various things which I just alluded to which you said you didn't do, you think that those are intelligent things for {4488} an investigator to do if the investigator wanted to corroborate an important story?")

A I really don't know how to answer the question other than to state that you asked me if I considered myself an intelligent human being and I stated that I did, or something to that effect. Regardless of the intelligence or not, I'm still a human being and entitled to mistakes and oversights and I believe that that's what occurred.

Q (By Mr. Taikeff) However, sir, you wouldn't contend that as a mature, intelligent human being that you as a general rule neglected to do everything that you could have done, you might forget some things but you don't always forget everything, do you?

MR. HULTMAN: Your Honor, again I object. This line of questioning is clearly speculative and of no probative value.

THE COURT: I am allowing the defense to put in their offer of proof and this is his offer of proof. It will be put in the record.

A Question, sir?

Q (By Mr. Taikeff) The question is, recognizing the fact that you make a certain number of oversights and mistakes like every other human being, is it your contention that you generally overlook everything or mostly everything?

A No, sir.

{4489}

Q All right.

Did you ask for a description of Rickey Little Boy?

A No, sir, I did not.

Q Now isn't it common practice amongst the Federal Bureau of Investigation when interviewing a witness, prospective witness, someone who might have some casual piece of information, to record physical description of that person, social security number if you can get it, place of employment, any kind of identifying information so that you have a very

specific identity of the person you're speaking with and perhaps one or more means of finding that person in the future, isn't that a general practice of the FBI?

A I would say it's more of a general practice to be certain to get this information on subject or suspect interviews rather than witness interviews.

Q If Myrtle Poor Bear was telling you the truth, then Rickey Little Boy may very well have been an eyewitness to the killings and at least to the events leading up to the killings, isn't that true?

A I would assume so; yes, sir.

Q Do you merely have to assume so or is it not very, very obvious?

MR. HULTMAN: Well, I object. This clearly calls for speculation. Improper question.

MR. TAIKEFF: I'm asking for his state of mind.

{4490}

MR. HULTMAN: I just want to put my objection in the record.

THE COURT: The question was answered that he assumed so.

Q (By Mr. Taikeff) I asked whether you merely assume so or whether from what she told you if true it was crystal clear that he was an eyewitness to at least some or possibly all of the events?

A Yes, sir.

Q He was there before it happened and he was there in connection with her effort to leave, right?

A Yes, sir. According to what she told me.

Q Did you ask her for any information concerning how old is he, what color hair does he have, is a native American, does he live on a reservation, where does he live, do you know if he lives with his parents, do you know if he goes to school, do you know if he's an adult, any of those questions or anything like that concerning Rickey Little Boy?

A No, sir, I did not.

Q Did she identify by name any other people who appeared from what she said to have participated in the shooting of the agents?

A Yes, sir, she did.

Q And what were the names of those people?

A Robideau and Butler.

{4491}

Q When you showed her a photograph of Butler, she told you of an incident which she said took place two nights before the shooting, did she not?

A Yes, sir, she did.

Q She told you that incident took place in the absence of Leonard Peltier who apparently had left for the night, am I correct?

A That is what she told me.

Q Ant what did she tell you occurred?

A She stated that she'd been raped.

Q By whom?

A By Jimmy Eagle and about eight other guys.

Q Did you ask her any question concerning the physical description of Jimmy Eagle?

A No, sir.

Q Did you at that time know that Jimmy Eagle was a person who had been indicted along with Peltier, Robideau and Butler for the murder or murders of the FBI agents?

A Yes, sir.

Q Did you ask her for the names of the eight people whom she claimed raped her along with Jimmy Eagle?

A No, sir, I did not.

Q Did you ask her for a physical description of any of those individuals?

A No, sir.

{4492}

Q Did you ask whether they were native American or Caucasian?

A No, sir.

Q Did you have an impression that the event she was talking about occurred on the reservation?

A Yes, sir, I did.

MR. TAIKEFF: May I have one moment, Your Honor.

Q (By Mr. Taikeff) Have you ever heard of Title 18, Section 1153 in connection with your official duties?

MR. HULTMAN: Your Honor, again I object on the grounds this is getting

into matters that are irrelevant and immaterial.

THE COURT: It is. He may answer.

A Yes, sir, I have.

Q (By Mr. Taikeff) That's known as the Major Crimes Act, is it not?

A Yes, sir.

Q And it deals with offenses committed within Indian territory, does it not?

A Yes, sir, it does.

Q And provides that if certain offenses are committed within Indian territory it gives the United States government the jurisdiction of certain offenses?

A You are correct.

Q And if such offenses occur, the organization which is empowered under the law to investigate such things is the {4493} Federal Bureau of Investigation, isn't that right?

A Yes, sir. I

Q Now, sir, you were confronted with a person who apparently was a major witness, an eyewitness to the murder of two FBI agents who had been raped by nine people on an Indian reservation. What did you do in connection with starting an investigation about that rape pursuant to Section 1153 of Title 18?

A I did not initiate any investigation whatsoever. She was bound and determined she was not going to give me any other information.

THE COURT: The Court is in recess for ten minutes until 10:40.

(Recess taken.)

Q (By Mr. Taikeff) Now I think at the time of the recess I was asking you some questions concerning Myrtle Poor Bear's revelation to you about a rape by Jimmy Eagle and eight other guys as she put it. Did she also express to you her thoughts as to why these nine people raped her?

A Yes, sir, she did.

Q And what did she say in that regard?

A She told me that she thought the reason she was raped was to get even with Peltier because she thought that they did not like Peltier.

Q And did she express an opinion as to what aspect of Mr. Peltier's character she thought they didn't like which caused {4494} them, nine in

number, to rape her?

A She said that they thought Peltier was too bossy.

Q And did she identify specifically one of the people she thought had raped her?

A She said she felt she thought that Butler was one of the individuals.

Q Now as of that time Dino Butler was in federal custody, was he not, having been arrested in connection with this case and having been arraigned on this indictment?

A Yes, sir. I believe he was.

Q Did you take any steps to lodge a federal complaint of rape against him?

A No, sir, I did not at the time.

Q Did you either conduct or instigate an investigation --

A I did not.

Q -- into the possibility that he committed that rape?

A No, sir, I did not.

Q Jimmy Eagle was in custody serving a federal sentence at that time, was he not?

A I believe he was. I can't be certain.

Q Without my repeating these specific questions, did you do any of the things that I asked you in connection with Butler with respect to Jimmy Eagle? Did you instigate an investigation, file a complaint, et cetera, concerning the rape?

A Against Eagle?

{4495}

Q Yes.

A No, sir, I did not.

Q Now you did note in your report, did you not, that you thought she was somewhat vague and sketchy in many of the specifics in what happened on the day of the shooting of the agents, did you not?

A Yes, sir. I did state that. Although, she was very vague and sketchy about the interview itself.

Q Now given the state of your experience and your actual personal reaction on February 24, 1976, weren't you suspicious that a person who was vague and sketchy might not be telling the truth?

A I suppose l could have been suspicious. But it's not really for me to say.

Q Well, you said it in writing.

A Vague and sketchy. Yes, sir, I did say that.

Q Well, as a trained investigator you know that it's important if a person who claims to have experienced a certain event can give you not only a description of the event but related details to sort of corroborate his or her presence, isn't that a basic principle of interrogating a possible witness?

A Yes, sir. But in this instance I didn't interrogate her. I took down the information that she furnished to me.

Q Did anyone say anything to you about them wanting to see how well she might or how convincingly she might be able to tell {4496} you this story, was that what you were doing?

A I'm sorry, sir, I don't follow that.

Q Was it your impression you were interviewing a person for the first time or was it your impression that you were a litmus test to see whether she could tell what she had to say convincingly?

A It was my impression that I was interviewing her as she came in because others were unavailable to do it.

Q Did you have any further contact with her or her aspect of this case after February 24, 1976?

A I do recall having seen the affidavits before they were sent to Canadian authorities.

Q Can you tell us something about the surrounding circumstances, what you heard and saw at or about that time?

A Of having seen the affidavits?

Q Yes. You say you recall seeing the affidavits prior to the time it was sent up to the Canadian authorities. I want to know what the general circumstances were, when did you see them, where did you see them, what were you doing when you saw them, who else was around. What I'm putting to you, sir, is the kind of questions that an investigator would put to a witness he was --

MR. HULTMAN: Now I object to that being clearly improper.

THE COURT: The last remark will be disregarded, the {4497} last

remark of interrogative counsel.

Q (By Mr. Taikeff) Tell us the circumstances.

A The circumstances surrounding my having seen those particular affidavits were in connection with other affidavits gathered and sent also to Canadian authorities in the extradition matter of Leonard Peltier.

Q Was it coincidental that you happened to see them or were you performing some official function?

A It was an official function inasmuch as I was the case agent assigned to the Leonard Peltier fugitive case.

Q You were the extradition case agent?

A No, sir. Not the extradition case agent, the case agent assigned to the fugitive matter which Peltier was the subject.

Q Which fugitive matter: the Milwaukee, the thing arising out of the Milwaukee matter?

A Yes. Fugitive matter from Milwaukee. The attempted murder in Milwaukee.

{4498}

Q Now, in that capacity would you have an interest in the extradition matter, and what was going on up there?

A Up in Canada?

Q Yes.

A Insofar as bringing him back to this country to get him out of fugitive status, yes, sir.

Q Did you monitor those proceedings in any way, either at a distance or otherwise?

A In Canada?

Q No, either from the United States or Canada.

A No, sir. I didn't monitor them per se. I would follow through reports, information as it developed.

Q Did you know that the affidavits -- withdrawn.

Did you know that an affidavit of Myrtle Poor Bear was going up there in connection with the extradition proceedings?

A Yes, sir, I did.

Q Did you know how many affidavits were going up there?

A No, sir.

Q Did you know anything about the content of the affidavits?

A I am certain I knew that they contained basically, at least part or all of the information that she had furnished me in my interview.

Q Would you please take a look at the first affidavit, the one that was sworn to on the 19th day of February, 1976?

A Yes, sir.

{4499}

Q Isn't it a fact, sir, that that first affidavit described primarily the so-called planning phase which preceded the actual shootings, including Leonard Peltier's involvement in getting people ready to kill and to escape?

MR. HULTMAN: What was the number of the affidavit we are now talking about?

MR. TAIKEFF: The witness has that affidavit.

MR. HULTMAN: Would you tell me, Mr. Witness, what number we are now discussing?

THE WITNESS: The Defendant's Exhibit 115.

MR. HULTMAN: Thank you.

A Yes, sir, that's basically what the affidavit states.

Q (By Mr, Taikeff) Were you aware of the fact that after stating that, there was a statement under oath by Myrtle Poor Bear, if she signed the affidavit, that she left Jumping Bull Hall at this point and did not return, and that she then met Leonard Peltier again in August of 1975 on the Rosebud Indian Reservation?

A What is your question, sir?

Q Whether you were aware of the fact that following the description of the planning phase, as I called it, there was a statement under oath that said: I, Myrtle Poor Bear, left Jumping Bull Hall at this point and did not return. And then went on to say that the next time she saw Leonard Peltier was during August, 1975, on the Rosebud Reservation?

{4500}

A Yes, sir, I see it here now.

Q Were you aware of it then?

A Was I aware of it?

Q Yes, in connection with your case agent status.

A No, sir, I don't believe that I was. When I stated that I had

seen the affidavits, I had seen numerous affidavits and I didn't read each and every one of them.

Q Now, were you aware of the fact in or about February, 1976, that another affidavit was prepared which is the next affidavit in the sequence of exhibits?

A 116?

Q I believe so. I don't have the numbers in front of me.

A What was the date, sir?

Q February 23, 1976.

A I have it.

Q Now, with respect to that second affidavit which I gather is 116, the first part of it covering the entire first page and the first three lines of the second page are essentially identical, if not actually identical, to the affidavit of February 19th?

A (Examining) Yes, sir, that's correct.

Q Now then, in the February 19th affidavit there is a sentence which said: Leonard Peltier told people to get ready to kill them, and he told me to get my car filled with gas to be ready for an escape.

{4501}

The corresponding part of the February 23rd affidavit said basically the same thing except for the addition of three words: Leonard Peltier told people to get ready to kill them, and he told me to get my car filled with gas to be ready for an escape, which I did.

That's a fair rendition?

A Yes.

Q O.k. Now, at that point in the first affidavit, 115, it says: I left Jumping Bull Hall at this point and did not return.

In 116, sworn to February 23rd, it says: I was present the day the Special Agents of the Federal Bureau of Investigation were killed. I saw Leonard Peltier shoot the FBI Agents.

Those two sentences replace the earlier one about her having left at that particular point, namely in the planning phase.

I have given a fair rendition of what is in the affidavits, right?

A Yes, sir.

Q And then the 23rd of February affidavit ends with the information

about having next seen him on the Rosebud Reservation and a conversation which they had.

Were you aware at or about the time it occurred that this change had taken place between the first and the second affidavits?

A Not at that time, no, sir. At a later time.

Q When did you first find out about the change?

{4502}

A I could only guess, that either a few days or a week or so later at the time that the-- all the affidavits were forwarded to Canada.

Q Now, earlier I asked you some questions based on your experience as an agent. I understood at the time that you had no personal knowledge of the subject, and I am going to ask you some questions now on the same basis. Do you understand the basis upon which I am asking you these questions?

A In line with my occupation, is that the basis?

Q Yes, in connection with what you know of the ordinary practices of the FBI, et cetera, not any specific information about any event, you understand what I am going to be doing in a moment?

A Yes, sir.

Q O.k. Now, you have before you two 302's, one by you, one by Agents Wood and Price, and you have three affidavits.

The second affidavit in the chronological sequence is dated February 23rd, and your interview with Myrtle Poor Bear is on February 24.

What is the date on the third affidavit?

A 31st day of March.

Q What is the date on the 302 of Wood and Price?

A 3-31-76.

Q That same date, right?

A Yes, sir.

{4503}

Q Now, given the fact that you had interviewed Myrtle Poor Bear on the 24th of February, and there was already in existence at least the affidavit of February 23rd, and given the fact that she executed an affidavit on March 31st, do you know any rule, regulation or procedure which would require an additional 302 to be made concerning an interview

of her on March 31st?

A No, sir. I know of no rule or regulation that would require it.

Q Now, having observed what we have all observed, the second and the third affidavits correspond to two 302's, would you not believe, based on your experience and knowledge of the practices and procedures of the FBI, that there most likely would be a 302 corresponding to the very first affidavit which undoubtedly was connected with the very first interview of Myrtle Poor Bear?

A I can't state that, sir.

Q I am asking you for your opinion based on your experience, does it not seem strange to you that the affidavit of February 19th apparently exists without the benefit of a 302, and it contains the sentence: I left Jumping Bull Hall at this point and did not return, and says nothing about her eyewitness account; and yet there are two subsequent affidavits basically the same, and as to each of them a detailed, lengthy interview report, namely a 302, which obviously each occurred after she executed her first affidavit?

A I am sorry --

{4504}

MR. HULTMAN: (Interrupting) Could I have the question read back? I am not very sure what the question was. Could the reporter read the question back, please?

THE COURT: The reporter may read the question back.

(Question was read by the reporter.)

MR. HULTMAN: I would object on the grounds that it is a combination statement by counsel, and it would be impossible for anybody to answer that particular question.

THE COURT: Do you understand the question?

THE WITNESS: No, sir, I honestly do not.

MR. TAIKEFF: Then I will rephrase it, if I may, your Honor.

THE COURT: You may.

Q (By Mr. Taikeff) I am not going to repeat the facts, I assume you know the facts that I have just alluded to, right?

A Yes, sir.

Q Based on your professional experience and in your opinion, based

on that experience, doesn't there seem to be something peculiar about there being no 302 that in some way either relates to the affidavit of February 19th or some interview which took place on or before that date, given all the other facts we have just explored together concerning the documents and their dates, et cetera?

A No, sir, I don't. I had explained, I thought, a little earlier that an affidavit could be used as a substitute for a {4505} 302, at least insofar as I am aware.

Q All right. I recall that.

So you are saying, well, maybe the explanation is that the February 19th affidavit was sufficient, right?

A It could have been. I don't really know.

Q Well then, there was another affidavit on February 23rd, but that had a 302 so isn't it a fact --

MR. HULTMAN: (Interrupting) Your Honor, I object to this as being clearly argumentative, and the question has been asked.

THE COURT: It is repetitive. Sustained.

Q (By Mr. Taikeff) Do you know the names of the persons who either prepared or handled these three affidavits -- I am not talking about the typists -- in the FBI, in the United States?

A Yes, sir.

Q May we have those names, please?

A To the best of my knowledge it was Special Agent Wood and Special Agent Price.

MR. TAIKEFF: I have no further questions of this particular witness, your Honor.

MR. HULTMAN: I do have a few, your Honor.

THE COURT: Proceed.

REDIRECT EXAMINATION

By MR. HULTMAN:

Q Agent Skelly, if you were trying to postulate or in some {4506} way make up a case with a given witness that you were in the presence of, is it fair for me to conclude that you might say to that particular witness something to the effect that: Didn't you see somebody with a M-16 in his hands?

A Yes, sir, that sounds like a fair --

Q (Interrupting) And is it also fair for me to conclude that if you were trying to concoct a story out of a witness, that you would at least tie it in to other events that you specifically knew could be proved by somebody else?

MR. TAIKEFF: Objection, on the grounds of competence.

I assume Mr. Hultman would take the position that this witness is incapable of concocting a story, and therefore, couldn't possibly answer that question.

THE COURT: Overruled.

Q (By Mr. Hultman) Is it fair for me to conclude that logically that you would include items that you could prove by other evidence that you might have at that time?

A Yes, sir.

Q And would it be fair for me to conclude that you would exclude all kinds of things like whether or not they parked their car down in the wilderness somewhere, and leave those things out, even if the witness, you know, might have said them?

A Yes, sir, that's a fair statement.

Q And would you ask about rapes or put an allegation of rape in such an interview?

{4507}

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

Q In other words, would it be fair for me to conclude you could come up with a little better story than what that 302 would indicate you were trying to accomplish, some devious purpose of some kind?

A Yes, sir. That also is a fair statement.

Q Now, am I correct that in response to questions that were asked by counsel, that you indicated that you were listening to what she said to you, she was telling you a story, is that right?

A Yes, sir. She was, and that's what I did.

Q The procedure was not as counsel referred to as good investigative interrogation, did you use the technique at the time of this: That you were there and you saw Leonard Peltier shoot these two agents -- did you do anything of that kind of interrogation?

A No, sir, I did not do interrogation of that sort at all.

Q In fact, in all fairness to the witness, you didn't ask questions of the kind and nature that I have just now indicated, is that a fair conclusion for me to draw?

A Yes, sir, it certainly is.

Q So that what you reported is what she in a story told to you, not what you said to her?

A That's exactly right.

Q Is that -- with a witness of this kind and nature, is that {4508} a normal procedure that you take yourself?

A Yes, sir, I do.

Q So that the reason for you not necessarily asking 10,000 questions of the kind and nature that counsel asked, just may have been because at that particular time you were listening to what she had to say, is that a fair conclusion for me to draw?

A Yes, sir, I was.

Q And in fact, didn't you indicate in response to counsel's question, that beyond these things -- and I don't remember the exact words that you used -- but I think you implied the impression that she clammed up and didn't say anything more, or words to that effect?

A Words to that effect, yes, sir. She was bound and determined that she would not furnish any more information.

Q All right. Now, let me ask you, as an investigator, is it fair for me to conclude that there are occasions when on interviewing a person for the first time, that they, one, may tell you nothing?

A Yes, sir, quite often.

Q And is it fair for me to conclude that at other times when you have interviewed the same person, they will tell you something beyond what they told you the first time?

{4509}

A Yes, sir, that also is very true.

Q And is it fair for me to conclude that there are other times when you still interview the same person that they will tell you more and more and more?

A Yes, sir.

Q All right. And is it fair for me to conclude that at a later time it proved to be that all of the total items that were said were possibly true?

A Yes, sir.

Q But is it likewise in many instances when those items have been checked and crosschecked and analyzed that they aren't necessarily any or all of them when compared to other things provable or necessarily true?

A Yes, sir, that happens also.

Q Now, is it your function at the time you do an interview to make that ultimate test, or that ultimate determination as to what Myrtle Poor Bear was saying at that time was true or not true?

A No, sir. My function was to take down the information as she furnished it, or anyone furnishes it.

Q And is that the function that you carry on day in and day out?

A Yes, sir, it is.

Q And are there many times and many occasions when information that somebody tells you doesn't necessary check out to be true?

{4510}

A Yes, sir, quite often.

Q All right. Is it also fair for me to conclude that just because you've done and given interviews at a given time that you are the one from that day forward who is saddled with the total responsibility that forever eternal it is you and you alone that has anything to do as far as that witness is concerned?

A No, sir.

Q In fact isn't it a fair conclusion for me that in most instances it's just the reverse of that?

A That's very true.

Q All right. Now, I ask you did you at the time feel that there was anything dishonest, anything illegal, anything sinister, anything concocted, anything manufactured, anything slipped in or whatever words I might use or somebody else might use as far as you in your interview of this woman on the occasion that counsel's been asking you about?

A In my own opinion, is that what you are asking for?

Q Yes. Did you slip in anything --

A I did nothing of the sort. I took down what she told me.

Q Would it be fair for me to conclude there could have been some things of little more significance than some of the things in here that if somebody was about to do that that might have possibly been done?

A Yes, sir.

{4511}

Q All right. If you are going to put together a story would it be fair for me to conclude we could put together a little bit better than that one?

A Yes, sir.

Q Now, there seems to be something very sinister about the fact that in two affidavits there is one sentence, and I'd like to go to that matter. In one of the affidavits for which there is no 302.

MR. TAIKEFF: We'll stipulate to that, Your Honor.

Q (By Mr. Hultman) And I want to ask you this question: The very sentence, if I am correct, and you correct me, Counsel, if I misstate the point that you were making and the point that you were referring to, is that in an affidavit on the 23rd of February that the words "I was present the day the special agents of the Federal Bureau of Investigation was killed was added to this particular affidavit, I believe that's Defendant's Exhibit 116. Do you get where I'm getting at?

A I have it.

Q Now, I would like to ask you, is there anything about that sentence that is devious, dishonest, manufactured, concocted, slipped in or anything else to your knowledge?

MR. TAIKEFF: Objection, on the ground of competence based on his earlier testimony.

THE COURT: Witness may answer.

A As far as I know there is, no sir.

{4512}

Q (By Mr. Hultman) If there is one conclusion that I could draw from your interview where Myrtle Poor Bear told you a story would it be fair for me to conclude that as a result of your interview that I could honestly and fairly conclude that Myrtle Poor Bear was present the day the special agents of the Federal Bureau of Investigation was killed, would

that be a fair conclusion for me to draw, or for you to draw?

A Based on my 302?

Q Yes, based on your interview that day.

A Yes, sir, I would say so.

Q Do you see anything about that statement that in any way doesn't reflect or reflects something different or sinister, or something dishonest or not factual as to what you learned as far as what she told you on the day that the agents of the Federal Bureau of Investigation were killed? Is there anything about that sentence or that statement?

A No, sir.

Q Do you think it's a statement that may be, if you are going. to put any statements of any kind in any affidavit anywhere concerning Myrtle Poor Bear's testimony to you that maybe that one might well be included?

A Yes, sir. If I were preparing the affidavit I certainly would.

Q In fact that's kind of the basis for everything we're concerned about and talking about; isn't that right?

{4513}

A Yes, sir.

Q It's kind of basic to decide who is where, when they then are going to say something about what it is they saw, they did or they observed, is that a fair conclusion for me to draw?

A I'm sorry.

Q Is it a fair conclusion for me to draw that in an affidavit, in a 302, in any document of any kind that concerns somebody's observations that you first put down one, when was it that I made the observation; is that kind of basic and important?

A Yes, sir.

Q That it wasn't twenty-five years ago but it was the 26th of June when two agents were killed; is that a fair conclusion for me to draw?

A Yes, sir.

Q And then secondly to state or to restate what the general subject of the statement was; is that fair for me to conclude?

A Yes, sir.

Q I just have one other item.

That is, in your 302 did you in all fairness and in all honesty reflect

the observation that you made at the time she was telling the story to you?

A About being vague?

Q No. Did you reflect as honestly as you could what it was the observations that you made, what you heard with your ear and what you saw with your eye?

{4514}

A Yes, sir, I did.

Q And when you stated that she became very distraught and started crying that's something that you observed at that time; is that fair for me to conclude?

A Yes, sir.

Q And you put it down in your 302 did you not?

A Yes, I did.

Q In all honesty and in all fairness?

A That's correct.

Q Now, you didn't sit around, though, and then try and figure out ultimately on all of the things that she told you and not necessarily knowing what the facts are with ten thousand people or that they may have been interviewed whether or not she's telling you the truth; is that fair for me to conclude?

A Yes, sir, it is. I put down what she told me.

Q All right. And that's what you did as fair and as honest a job you could do that day; is that correct?

A That is correct.

MR. HULTMAN: I have no further questions.

MR. TAIKEFF: I think I have just one point to inquire about, Your Honor.

REDIRECT EXAMINATION

By MR. TAIKEFF

Q In connection with Mr. Hultman's inquiry of you as to whether certain things in the affidavits caught your attention being peculiar or questionable I want to ask you this question: {4515} If you had two affidavits by the same person purporting to relate events, certain events at a certain time, and in the first affidavit made under oath the person

says, "I left, I wasn't there. The next time I saw that person was two months later." And in the second affidavit the person says, "I was there, I saw the person do certain things, and in addition I saw him two months later." Would you find that peculiar or questionable in some way? Yes or no.

A No, I don't believe I would.

MR. TAIKEFF: I have no further questions.

MR. HULTMAN: I just have one further question.

RECROSS-EXAMINATION

BY MR. HULTMAN:

Q Because you had done an interview with her and heard the very statements before, had you not?

MR. TAIKEFF: I object, Your Honor. I asked a general hypothetical question.

THE COURT: I think this has been pursued enough.

MR. HULTMAN: Could I have the answer at least to one question on recross?

THE COURT: What is the question?

MR. HULTMAN: Would the reporter read it back. I think the hypothetical left a very unfair status of the record and that's why I asked the last question.

(Question read back: "Question: Because you had done an interview with her and heard the very statements before, {4516} had you not?")

A Yes, sir, I had.

MR. HULTMAN: No further questions.

THE COURT: You may step down.

MR. TAIKEFF: Defense calls Special Agent Price.

Your Honor, at this time for the purposes of the offer of proof, if I have not previously done so I offer those five documents. Does Your Honor wish me to read aloud the numbers?

THE COURT: I have the numbers. 118, 119 115, 116, 117.

MR. TAIKEFF: Yes, Your Honor.

THE COURT: They will be received on the offer of proof.

MR. TAIKEFF: By the way at this time while the clerk is notifying the witness I wish to just state on the record the essence of a conversation

that Mr. Hultman and I had earlier this morning when I identified for him the five documents which Your Honor has just alluded to. And I said it is my understanding that there is no other paperwork concerning this subject or her interviews and he confirmed to me that there was none.

MR. HULTMAN: Well, Counsel, that isn't exactly true. I said that I would take a look. That's what my response to you was.

{4517}

MR. TAIKEFF: I'm sorry.

MR. HULTMAN: Okay.

MR. TAIKEFF: As of this time --

MR. HULTMAN: Secondly, I want to indicate on the record that I feel I have no obligation of any kind to respond further and at this particular time I'm going to so indicate. And that doesn't mean or indicate in any way that there are any additional affidavits or any additional 302's concerning any interviews as such as Myrtle Poor Bear, and that's the posture and the position that I'm taking. That under 3500 and the reasons stated yesterday that there is no obligation on the part of the Government, because I don't want to get Mickey Moused into a situation where because somebody appears and there is no interview as such whether or not there's an obligation a 302 be supplied or a 302 made up on such an occasion, and especially with reference to the category of inquiry that counsel has made alluding to somehow that there is a mysterious 302 of some kind.

THE COURT: You may swear the witness.

DAVID F. PRICE,

being first duly sworn, testified as follows:

MR. TAIKEFF: May I inquire, Your Honor?

THE COURT: You may.

DIRECT EXAMINATION

BY MR. TAIKEFF

Q Mr. Price, you're a special agent with the Federal Bureau {4518} of Investigation, are you not?

A Yes, sir.

Q And how long have you been in that occupation?

A A little over six years.

Q And to which office are you assigned on a regular basis at this

time?

A I'm assigned to the Minneapolis office of the FBI.

Q Have you ever served in the Rapid City office?

A Yes, sir.

Q Was that a regular assignment at the time of the service, or was it a temporary?

A That was a regular assignment.

Q When did you begin that assignment and when did you terminate that assignment?

A I began that assignment during 1973 and terminated during 1977.

Q Were you one of the agents assigned to work on the case involving the deaths of Agents Coler and Williams?

A Yes, sir.

Q When did you get that assignment?

A I began working on it the day it happened.

Q And have you terminated your active participation in that investigation or does that continue? I understand you are here as a witness, I'm excluding that aspect of it.

A If a lead was sent to me, of course I would cover it, sir.

{4519}

Q When you say "a lead was sent to you" what do you mean by that?

A If there was something for me to cover as part of the investigation I would cover it.

Q If you were speaking with a person who said he or she had some knowledge about that incident and identified for you two other people who were present and possible, and possibly were eyewitnesses would you pursue the information concerning those two possible eyewitnesses?

A I believe I'd report it. I'm not sure what we're talking about.

Q Well, you said if you got a lead in connection with this case you'd follow it up, right?

A What I meant about that, well, I'm no longer in the Pine Ridge area so if I got a lead to be sent --

Q Let's assume you are.

A Assume I am. Then what?

Q You got a lead as a possible witness; you'd go see that witness,

right?

A Yes, sir. If I was given a lead to go see someone I'd do it.

Q Okay. Now, you interview that witness and that witness apparently was present during the event and says my two next door neighbors were also there and I think they saw what happened. Wouldn't you question the two next door neighbors?

{4520}

A I might question them, but someone else might question them.

Q You certainly would see to it that someone questioned them, wouldn't you?

A Well, not myself necessarily.

Q No. I said someone.

A I wouldn't necessarily see to it someone questioned them, but I'm sure it would be taken care of.

Q You'd take some steps to attempt to make that happen, wouldn't you?

A Well, I'd, in reporting the results of my interview, I'm certain that the case agent is supposed to take care of things like that.

If I hadn't done them myself I'm sure that the man in charge should.

Q You mean you'd --

A Do you follow what I'm saying?

Q Yes, sir, Are you saying, though, that you would leave it to chance, you wouldn't say, "I think I've discovered two more eyewitnesses, let's get after them and see what they have to say?"

MR. HULTMAN: Your Honor, I object to this as -- excuse me, go ahead, Counsel,

Q (By Mr. Taikeff) Is that what you meant to convey in your answer?

{4521}

A Definitely not. I'm not saying I'd leave it to chance. I'm saying I'd report the results and if I hadn't already covered it myself I'm sure it would be covered.

Q Now, when you say "report the results" are you talking about merely dictating your 302 and putting it in the file or do you mean going to another person and saying, "I think I've discovered the existence of two more eyewitnesses?"

MR. HULTMAN: Your Honor, I'm now going to object. We haven't establish anything at this point. We're only talking about purely speculation and I object for this reason.

MR. TAIKEFF: This is all foundation, Your Honor, to the inquiry which will follow.

THE COURT: I will allow the witness to answer.

A Sir, I would do either or both, and that is rather normal sequence of events. Word of mouth is fast but paper is at least, it's down there in black and white.

Q (By Mr. Taikeff) So if it was a really important prospective witness you might do both?

A Yes, sir.

Q Now, sir, I believe you will find that there are five documents in front of you.

A Yes, sir.

Q Two, 302's and three affidavits, the numbers of which have been previously read into the record several times. Have you ever seen any of those documents before?

{4522}

A Yes, sir. I think I've seen the originals that these were Xeroxes of.

Q One of them is a 302 of an interview of March 31, 1976 of Myrtle Poor Bear by yourself and Agent Wood; is that right?

A Yes, sir.

Q Was March 31, 1976 the first time you spoke with Myrtle Poor Bear?

A No, sir.

Q What was the date of the first time you spoke with her?

A I don't know the exact date.

Q Can you give us an approximate date?

A I would guess it was during the early part of 19 -- no, the first date I talked to Myrtle Poor Bear was probably during 1974 I believe.

Q Was that in connection with a homicide prosecution?

A No, sir.

Q What was it in connection with?

A That was in connection with a shooting in the housing at Allen,

South Dakota.

Q And at that time was she a resident of the housing in South Dakota, Allen, South Dakota?

A Yes, sir.

Q And was she accused of that shooting?

A No, sir.

Q What was her role in connection with that shooting if any?

A Just to ask if she knew anything about the shooting.

{4523}

Q And what did she say? I mean, "Yes, I know something," or, "No, I don't"?

A This is going to stretch my memory. But basically this is a case where shots were fired and I was trying to determine where shots were coming from and where they were going to and I believe she and her sister told me where they were that evening, where they were standing outside and that I was able to pick out a little bit where the shots were not coming from and where lot going to. Do you understand what I'm trying to say?

Q I have an impression from you, a demeanor that perhaps you didn't believe what she said at that time, but if that's the case please state it so there is no ambiguity in the record.

A No, sir.

What I said was I was working a case where I had shots fired where I was not sure where they were coming from, had no bullet, I did not know where they were going to and it was actually an assault on a policeman and she and her sister were outside that evening, and I can't give you the exact location. By where they thought they heard the shots I was able to determine at least some area where they were not coming from and perhaps not going to. In other words, it wouldn't have been able to, you can see what I'm saying.

Q That your opinion at the time was that her information was wrong?

A No, sir. I'm just --

{4524}

Q Or was it accurate?

A As far as I know it was accurate.

Q Isn't that easy.

MR. HULTMAN: Your Honor, I would object. Counsel first of all is indicating, being argumentative with this witness as to stating specific conclusions that Counsel is drawing and then arguing with the witness.

THE COURT: I would ask that Counsel get on with it. He's asking for details on a '74 incident. I don't care --

MR. HULTMAN: It's irrelevant.

MR. TAIKEFF: Was that a ruling by Mr. Hultman?

MR. HULTMAN: No. That's my objection.

THE COURT: Just a moment. Just a moment. Counsel from both sides will restrain themselves and proceed.

MR. TAIKEFF: My actions, Your Honor --

THE COURT: Your comment was uncalled for.

MR. TAIKEFF: Purely responsive, Your Honor.

THE COURT: Proceed.

Q (By Mr. Taikeff) When was the next time you saw Myrtle Poor Bear?

A I'm not sure that whether I saw Myrtle Poor Bear before the first month of 1976. I worked on the reservation a great deal. I may or may not have seen her at various times.

Q May I assume from what you said that you did not speak with her until the early part of 1976?

{4525}

A To the best of my memory; that's correct.

Q Can you give us a date when you first spoke with her in 1976?

A It would seem to me it would have been during January or February of 1976.

Q If I told you that she executed an affidavit in relationship to the facts of this case on February 19, 1976, would that information in any way pinpoint the date for you?

A Well, I realized that I talked to her on another matter before this matter so I'm taking that into effect. I believe it was January or February. It had to be in the early part of February or some part of January.

Q When was the first time in 1976 that you spoke with her about this matter?

A I believe it was one of the dates that the affidavit was taken, or one of the affidavits was taken.

Q Well, the first affidavit was sworn to on the 19th day of February, 1976. May we conclude from that that you spoke with her either on that day or very close to that day?

A Yes, sir.

Q And, of course, I'm speaking only of possibilities before that date.

A Right.

Q It isn't possible that you took the affidavit on the 19th and had, that no one had spoken to her prior to that time, that's {4526} a fair assumption, isn't it?

A As I remember, I had been talking to her about another matter for some time before that affidavit that was taken.

Q Now with respect to the contents of the affidavit of February 19, it is correct, is it not, that someone in the FBI had to speak with her either on February 19th or earlier.

A Yes, sir.

Q Can you tell us whether it was on February 19 or at an earlier time?

A I believe if my memory serves me right it was on February 19 and that she came to Rapid City and swore to the affidavit. The affidavit was made out all in Rapid City on that date.

Q Was there a 302 on that particular interview?

A Not that I know of.

Q Were you the person she spoke with on that day?

A I would have been one of the persons.

Q Who was the other person?

A Well, my partner was normally an agent named Bill Wood and I assumed Bill would have been there for the affidavit.

MR. TAIKEFF: Could I have that last answer read back, Your Honor?

THE COURT: You may.

(Whereupon, the last answer was read back.)

Q (By Mr. Taikeff) Do you make that assumption because it is the general practice whenever feasible to have an agent accompanied {4527} by another agent when an interview is being done?

A Not only that but when there is a female involved, very definitely

you like to have a second person with you.

Q And is one of the reasons why you have a second person with you the fact that it may sometimes take the testimony of a second person to prove that certain statements were made at a certain time?

A That could be; yes.

Q Do you know of any reason why a 302 was not prepared at or about the time of the first interview in 1976 concerning the facts of this case?

A Sir, we had here an affidavit which a 302 could only have enclosed the affidavit. You understand? It would have been merely a 302 which would have said, "The following affidavit was obtained," This piece of paper which was sworn to by Myrtle Poor Bear in front of the Clerk of Court would function by itself so there was no need for a 302.

Q Is it not a fact that a 302 besides containing the information which may be revealed during the interview contains other important information such as the names of the agents who conducted the interview so that if in the future some testimony about that subject is necessary there is a permanent record of it?

A As you said, a 302 contains other information than an affidavit.

Q Well, was any effort made to make a recordation of that {4528} information concerning the affidavit of February 19, 1976?

A You mean there was no 302 made?

Q Do you know what method would be employed in the FBI or by the FBI in order to check their records and determine who took this affidavit, who was the person who obtained the information that went into the affidavit?

A Well, I can imagine that if we waited enough years people's memories and so forth might, there might be a problem in enough years past.

Q The affidavit in no way reveals the name of any agent who may have interviewed the witness, is that correct?

A That's right. Well, let me check that.

Q Please do.

A I agreed to that before I looked at the affidavit.

Q All right.

A The affidavit itself does not say which agents were present.

Q Do you know of any methodology which was employed in order to

identify the person who would be the possible witness concerning the taking of the information which went into this affidavit?

A Yes, sir. Very simply.

Q Yes?

A This was an, is signed by Myrtle Poor Bear "as subscribed and sworn to me this 19th day of February, 1976, Betty E. Barry, {4529} deputy clerk, United States District Court, District of South Dakota," and I was present when they put Myrtle Poor Bear under oath and so actually the prime witness on this, and that was signed and subscribed to and sworn, would have been the Clerk of Court.

Q But you didn't prepare the affidavit in the presence of the clerk, did you? Yes or no?

A No.

Q You didn't question Myrtle Poor Bear or listen to what she had to say in the presence of Betty Barry, did you? Yes or no?

A I believe the answer the way you're saying it is no, sir.

Q But my question about recording who took the information that went into the makeup of the affidavit was not answered, I believe.

A The information would have been taken by myself and another agent.

Q Where was that recorded in FBI files is my question.

A It would have been recorded in a copy of this affidavit or the original affidavit.

Q Well, the original affidavit went to Canada, right?

A I believe it did. In that case the copy would be all we'd have.

Q That's right. And if I have a photostat of your copy, my {4530} copy should show that, shouldn't it?

A I'm sorry. Should show what?

Q I'm not sorry.

I said to you that if you made an original of the copy and you sent the original to Canada and the information was typed on the copy and if the government gave me a photostat of its copy, why doesn't the photostat show the information which you said should be there.

MR. HULTMAN: I object, Your Honor.

THE COURT: Do you understand the question?

THE WITNESS: I don't understand what information he says that I

said should be there. No, sir, I don't.

Q (By Mr. Taikeff) Let me start at the beginning.

You have before you an affidavit which was sworn to on the 19th day of February, 1976.

A Yes, sir.

Q I assume that a piece of paper like that, a copy of that is somewhere amongst the files of the Federal Bureau of Investigation.

A Yes, sir. I would assume that it is.

Q Now you have.a 302 of an interview on March 31, 1976.

A Yes, sir.

Q If an official of the Federal Bureau of Investigation held that 302 in his or her hand and said, "I wonder whose 302 this is, I want to get some information about it," wouldn't that person {4531} only have to look in the lower left-hand corner of the first page to discover that Special Agents William B. Wood and David F. Price are the people apparently responsible for that 302? Yes or no?

A Yes.

Q Now, sir, tell me what kind of operation, mechanical or mental, would be performed by that same person who then picked up the affidavit of February 19, 1976 and said to himself or herself, "Gee, I wonder who took this information from Myrtle Poor Bear that eventually became this affidavit," how would he discover that fact?

A Well, in actual fact of the matter, it's an affidavit for extradition to Canada and, from Canada, and is drawn up as best as the attorneys wanted it done in the form for Canada and there would be hardly anyway for anyone to forget that it was done. He could simply ask.

Q Ask who? There were 150 agents --

A Ask one of the attorneys.

Q -- on this case at one time.

Ask what attorneys?

A In this case I believe a Mr. Halprin came down from Canada. Could have some of my names mixed up.

Q That is the name of the Canadian attorney, Mr. Halprin.

A He actually gave the form that the affidavits were to be in and the form in the matter of the subscribed to and sworn {4532} before who

and then the certification by the United States District Court judge.

Q Was Myrtle Poor Bear's affidavit taken only for use in the extradition proceeding and not for use as a possible witness in a trial in the United States?

MR. HULTMAN: Well, I object to that, Your Honor, as calling for an opinion and conclusion of the witness to which there is no foundation or he's even qualified.

MR. TAIKEFF: I think the foundation is the statement I the witness just made, Your Honor, in response to my last question.

THE COURT: The witness may answer the question if he knows.

A To the best o£ my knowledge the answer is no.

Q (By Mr. Taikeff) She was to serve both functions, is that correct?

A I don't make prosecution decisions. I merely take what is told.

Q With respect to Mr. Halprin, the Canadian Counsel, did he actually prepare the various extradition affidavits or did he merely provide the form in which they should be done?

A I believe in this matter the rough notes were taken up to the U.S. Attorney's office where I believe Mr. Halprin was present. I did not, I don't remember personally meeting, and the form to put it in was brought back to us. It was approved, {4533} or it was done in the attorney's office.

Q Whose rough notes are you speaking of?

A That would have been probably mine and Agent Woods.

Q Two separate sets?

A No, sir.

Q One set?

A Probably a rough statement which they took apart and put together they thought the way their form should read.

Q Do you know the whereabouts of that set of notes as of this time?

A I'm virtually certain a rough set of notes would have been destroyed. I'd say more than virtually, it would have been destroyed. This would have been, the original would have been the affidavit in the finished form.

Q Is it fair to conclude that your position on how the identity of the agent related to this affidavit would be discovered would be based upon memory rather than any recordation?

A No, sir. I have no way of knowing all the recordations that may or may not be in the file concerning this, or U.S. Attorney's office concerning this, but for me the easiest way is memory.

Q That's for yourself if you did something. I'm asking about if others who were not a witness to the event wanted to locate the person who took this affidavit.

A I don't know.

{4534}

Q Is it your testimony, sir, that an affidavit of being under oath and containing essentially the same information that a 302 would contain is a superior form of writing because it's under oath, whereas a 302 would be somebody else's writing about what took place in terms of its purpose or usefulness as a statement of the witness?

MR. HULTMAN: I object, Your Honor, on the grounds that that calls for a legal conclusion of the witness with no foundation or qualification.

MR. TAIKEFF: I'm asking for his view of it because he explained the absence of the 302 before.

THE COURT: I'll let him answer.

A I think the affidavit was a superior document for the purposes of Canadian extradition because it, excuse me, a 302 was not the form they wished their statements in, the routes of merits, or superior or otherwise I will not say.

Q So from that I get the impression where you're preparing an affidavit for an extradition, that is what you do and it's not necessary to do a 302?

{4535}

A This is the only affidavit or these -- well, this case is the only case where I have helped prepare affidavits for extradition; and I don't know if we have some rules that state otherwise, I just know that we did not prepare 302's, for instance, on this one.

Q Well, there was another affidavit, one of February 23rd, right?

A Yes, sir.

Q And there was a 302 in connection with that, wasn't there?

A Yes, sir, there was. Well, hold on a second. I think I am mixed up here. The 23rd? I don't believe there was.

Q You don't think there was an affidavit of the 23rd of February, 1976?

A There is an affidavit right here for February 23rd, 1976.

Q Now, wasn't there a 302 that corresponded to that?

A Not one that I prepared that I know of.

Q How about one that somebody else prepared?

A Well, you have one here in front of me, Exhibit 118, of Ed Skelly, dated 2-24.

Q Well, sir, if on the 23rd she executed an affidavit in connection with an extradition proceeding, which presumably for those purposes was the superior form of writing, why an interview on the next day with Agent Skelly?

MR. HULTMAN: I have no objection, your Honor, if the witness is not responding on the basis of speculation, but {4536} if he knows.

MR. TAIKEFF: If that wasn't a signal, I never heard one in my life.

THE COURT: Well, I think this witness is intelligent enough to realize that he does not have to answer a question unless he knows.

MR. TAIKEFF: That's why I thought it was a signal, your Honor.

THE COURT: It was a rather dull signal.

A No, I wouldn't know. I would have to make assumptions. My own knowledge, I can't say.

Q (By Mr. Taikeff) Do you have an opinion, based on your experience as an FBI Agent, that you could express for us? "Yes" or "no".

A Give me a minute to read both, please.

Q Yes, sir, please do.

MR. HULTMAN: And could we have the original question whatever it is, read back?

A (Examining).

Q (By Mr. Taikeff) Are you ready, sir?

A You are asking my opinion of why one was done, why the 302 was done, you are asking my opinion, as I understand it?

Q That's basically the question, but it is in light of what you told us before about the superiority of the affidavit which is prepared in connection with an extradition proceeding.

{4537}

MR. HULTMAN: Your Honor, now I do object; and if I am going to be accused of signals, your Honor, I will have to approach the bench to say what it is, the reason for my objection.

THE COURT: You may speak from the counsel table.

MR. HULTMAN: All right, thank you, your Honor.

I object on the grounds, your Honor, that there's an assumption of fact in what counsel has just now said, that there is a relationship between the two, and there is no showing in this record of any kind that there is any association between an affidavit that counsel is now referring to and another 302, neither of which did this witness have necessarily anything to do with. He clearly doesn't have anything to do with the 302 to which counsel is referring to -- it is obvious on the face of it -- and I say that it is an unfair question, that it assumes facts that are not a part of the record, and it is totally misleading.

THE COURT: Sustained.

MR. TAIKEFF: Now, may I say something to that, your Honor?

This witness testified that the reason there was no 302 corresponding to the February 19 affidavit, was because it was an affidavit prepared for extradition, and as such, it was the best form in which that matter could then be {4538} written, there was no need for a 302, it was as good as a 302 or better in any sense of the word. That was his testimony.

I now confront him with the fact that there is a second affidavit on February 23, and there is a 302 which appears to correspond with it except peculiarly it is dated the next day; and I ask him if he can offer us some explanation about that.

MR. HULTMAN: I again renew my objection, your Honor, that there is absolutely no foundation of any kind that this witness has any knowledge about those documents.

THE COURT: Well, I will allow him to answer the question as to whether he can offer an explanation.

MR. TAIKEFF: His opinion.

THE WITNESS: Sir, they are really asking for my opinion on why the 302 was done?

MR. TAIKEFF: That's what I am asking.

THE COURT: I think that is what he is asking for, if you have an

opinion.

A You would have to look at the two and decide one is more detailed than the other, and perhaps that's why it was done.

Q (By Mr. Taikeff) Do you know any reason why a second, or rather a third affidavit was not prepared instead of the 302 of February 24?

A Sir, the affidavits for Canada were a matter of attorneys. {4539} I don't know. I just don't know.

Q Were you aware of the content of the affidavits as they were being prepared?

A Yes, sir.

Q Were you aware of some change and/or addition in the February 23rd affidavit as compared with the February 19 affidavit?

I am referring specifically to Page 2, but before you look at the affidavit, I am asking for you to call upon your memory, do you now recall any change taking place in the substance, in the content between the 19th and the 23rd?

A I have looked at the two, and there is a change.

Q I appreciate the fact that you can see it there on the paper.

I am asking you to take your memory back to February of 1976 and tell us whether then you were aware that any change had taken place?

A Yes, sir.

Q Who took the second affidavit in the sequence?

A I believe I was present when all affidavits were taken, sir.

Q And can you tell us anything about the events between the 19th and the 23rd which relate to the change or addition in the second affidavit?

A Well, at some time between the February 19th and the February 23rd, and I think it would be February 23rd, Myrtle {4540} Poor Bear said that she had not left before the shooting, she was there.

Q Do you know how it came it about that she came forward and made that statement, if she came forward?

A Well, we were meeting Myrtle Poor Bear frequently on another matter which was very serious, and I can't say exactly how it came about, no.

Q One point for clarification: Somebody composed these affidavits. Do you know who composed them after the notes were taken?

A I would believe that they were either composed by the Assistant

U. S. Attorney Boyd or Mr. Halprin -- actually the form and putting them in so --

MR. HULTMAN: He is trying a lawsuit, jury case, somewhere in South Dakota. I hate to have that one interrupted and delayed too.

Q (By Mr. Taikeff) On the occasion of her first appearance, which would be on or about February 19, 1976, how did she get to the Rapid City office?

A I believe on that occasion she was probably driven there by myself and Special Agent Wood.

Q And how did it happen that the two of you drove her there from, I assume, Allen, South Dakota?

A The exact reasons I don't know, nor do I know for sure that it was from Allen, South Dakota.

{4541}

Q Well, it was from some place outside Rapid City, was it not?

A To the best of my knowledge, yes.

Q And you don't recall the event that prompted you to bring her to the office in Rapid City, is that what you are saying?

A At the time Myrtle Poor Bear had been beaten during the first two months of the year, and she was in a great deal of danger due to the information she was furnishing us on another matter; and there were several occasions where Myrtle was placed in a motel room in various small towns or Rapid City for her own protection, and my memory does not serve me which time or which particular -- where we picked her up and so forth.

Q Do you remember the time when she first said anything about knowledge of the events of June 26, 1975?

A To the best of my knowledge, the first time that she would have given us -- that she was knowledgeable about the death of our two agents would have been the day that we got the affidavit. I don't have any other memories that I can help with.

Q I understand then that on the first day, you believe, that she ever mentioned any knowledge of the subject, you went directly to the form of the extradition affidavit and sent that off to Canada?

A Yes, sir.

Q Would you know how many days between January 1, 1976, and February

11, 1976, she was in one form of custody or another, {4542} protective custody or otherwise, that is to say, away from her home?

A There weren't too many, I don't know.

Q Do you recall what time of day you got to the Rapid City office on February 19th?

A I have the impression it would have been in the morning.

Q Now then, there was a third affidavit, that one was sworn to on March 31st, 1976?

A Yes, sir.

Q Can you tell us the reason for the preparation of that affidavit?

A Yes, sir. I believe I remember the reason for the preparation of this affidavit. Quite indirectly, of course, we received word from Mr. Halprin that we had not obtained enough details in our affidavits and that it would have to be redone for the sake of detail, and as you see, it is more detailed.

Q Now, at the time that you participated in the taking or making of the third affidavit, you, of course, were cognizant that the first two affidavits existed, am I correct?

A Yes, sir.

Q And you were cognizant of the existence of Agent Skelly's 302, isn't that correct?

A I think I would have been. I don't remember.

Q Tell us why you prepared a 302 of an interview on March 31, 1976. {4543}

A I am going to have to put in my opinion here, but I think it is because it is more detailed than the affidavit.

MR. HULTMAN: Would counsel stipulate to that fact?

MR. TAIKEFF: I will certainly stipulate that the words are not the same. Without even looking, I would assume that -- in fact, I know there is at least one detail which is in the second one that is not in the first one.

Q (By Mr. Taikeff) Well, sir, you had all there was in the first 302, did you know the nature or kind of additional detail which, if available, you were required to put in the third affidavit, in other words, in simple English --

A (Interrupting) In simple English?

Q (Continuing) -- Did you know what was missing?

A We knew they wanted more details of the actual shooting, of the final killing of the two FBI Agents.

Q Now, when you interviewed her in that connection, was there any reason why you didn't limit your inquiry to the specific subject matter that you believed you were deficient in?

A No, sir. I don't see why I would limit my inquiries to that particular point that we needed in the affidavit there. I am not sure I am answering the question. I am not sure I understand what you are asking either.

Q All right. I will try to rephrase it so that there is not any misunderstanding, if there is.

I understand that by March 30th, 1976, there were two {4544} affidavits and one 302 in existence, and that you received some word in connection with your official duties that the affidavit or affidavits to date, as the case may be, was deficient in a certain regard; and you described that as specific details concerning the shooting of the agents, and so now apparently it was necessary for you to make a further affidavit. So far am I summarizing the picture accurately and fairly?

A Fairly accurately.

Q And fairly and truly?

A Yes, sir.

Q Now, you then interviewed her again in order to get that information which was missing, right?

A Yes, sir.

Q Was there any reason why the interview was not limited to the area or areas that you had to make inquiry about in order to make the affidavit appropriate, as you understood the word "appropriate"?

A Sir, we were getting further details there for the purposes of extradition. We in the process, apparently -- well, we got further details concerning the whole incident. Of course, we recorded those. They were not needed in the affidavit to Canada. They went on a 302, and I think that's really it.

Q What do you mean, "Of course, we recorded those," what did you

mean by "of course"?

A I record things so that they can be used by the prosecutor, {4545} so when you have further details that are not in documents that the prosecutor can read, I would record it in a 302 here.

Q Why didn't you prepare a 302 of the inquiry you made on February 19, 1976?

MR. HULTMAN: Your Honor, I object on the grounds this question has been asked and answered in substance at least six times.

MR. TAIKEFF: But not in light of the last answer, your Honor.

THE COURT: It has been asked and answered, but he may answer it again.

A Basically the affidavit contained all information obtained at that point.

Q (By Mr. Taikeff) Well, didn't the third affidavit contain all the information that you obtained on March 31st?

MR. HULTMAN: I object to that, your Honor. Just a moment ago counsel stipulated that that was not the case, That's a misstatement of the record.

MR. TAIKEFF: That wasn't what I stipulated. I stipulated there was a difference between the 302's. I asked this witness whether or not the affidavit of March 31st contained the information, all the information you had on March 31st?

A No, sir.

{4546}

MR. HULTMAN: Isn't it fair, Counsel, that you stipulated I thought a while ago that 119, which is the interview, contains information and material above and in addition to beyond that which is in the affidavit? Is that a fair conclusion for me to draw?

MR. TAIKEFF: No, it is not, Your Honor. I stipulated that the difference between the two, 302's was apparently because the 302 of March 31st had some things in it which the 302 of February 4th did not have in it.

MR. HULTMAN: I'm asking you for stipulation now. Is it not true that the 302 that you are now questioning this witness about and the basis of your question is a comparison with the particular affidavit specifically that you are referring to, and is it not a fact that as this witness has

previously testified just a few moments ago that there is material in the 302 above and beyond in addition to that which is not in the affidavit? No. 117, Counsel. I'm asking you is that not a fact by way of stipulation?

MR. TAIKEFF: That could not possibly be a fact. It's about twenty-three facts. But in response I will say that I find generally that the 302 of March 31st corresponds to the contents of the affidavit, but not every single thing from the 302 is in the affidavit. And likewise with respect to the 302 of February 24th and the affidavit of February 23rd. I hope that answers Mr. Hultman's question.

{4547}

Q (By Mr. Taikeff) Now, I think you said that you got extra details for the extradition; am I correct, in connection with the interview of March 31st did you say that about two and a half minutes ago?

A Yes, sir.

Q Did you record those extra details in the affidavit of the 31st?

A Sir, as you can see from your copy of the affidavit that we did bring more details of the actual final shooting into the affidavit.

The 302 itself is more detailed than the affidavit at least concerning some other parts of the crime in question.

Q You wrote in your 302 approximately eight paragraphs concerning the so-called escape; is that correct?

A I will have to read the 302 and count the paragraphs.

(Witness examining document.)

A Could you just change your question because the paragraphs are not straight escape or --

Q All right. I'll change the question to make it easier. Are there approximately eight paragraphs in the latter half of of the 302 of the 31st which deal with events which occurred after the shootings?

A Well, as I see it there's four paragraphs on the last page. Poor Bear is telling us that she saw the rifle that Leonard Peltier was holding jump up, saw the FBI agent's body jump into {4548} the air, come face down on the ground.

She stated after this, the paragraph starts, that she broke free, and that's escape as far as I'm concerned from there on out.

Q Now, on March 31st when you interviewed her did you show her a

single photograph of Leonard Peltier?

A Yes, sir. I'm glad you reminded me of that because it was one of the, I believe one of the things that Canada wanted in their affidavit was an identification of Leonard Peltier via single photograph.

Q And you showed her that photo which is attached as an exhibit to the affidavit of March 31, 1976; is that correct?

A Yes, sir.

MR. HULTMAN: Will counsel stipulate that is a photo of him?

MR. TAIKEFF: It's either him or an Italian lookalike. But I think it is him.

Q (By Mr. Taikeff) Now, did she tell you that on the morning of June 26, 1975 just prior to the events which resulted in the deaths of the agents she was in the big house of the Jumping Bull Hall or area and with her in the house was a woman by the name of MaDonna Slow Bear and an old woman whose name she could not recall who was cleaning a gun?

A Yes, sir. She told us that. I could read it to you if you wish. {4549}

Q No, sir. I'm asking you to relate what actually took place because I may want to ask you certain questions about the event. I, too, can read what's in the report.

Now, did you ask her if she ever knew the name of that old woman?

A I would assume that I did, but as you said right in there it's an old woman, name unrecalled.

Q Did you ask her for any other details concerning this person, such as whether the person was a visitor or a resident or for how long she knew the person or the age of the person or whether the person was a Native American or any things like that?

A I don't remember.

(Defense counsel conferred.)

Q (By Mr. Taikeff) Did you ask her anything about Ma Donna Slow Bear?

A Obviously I did because it's, throughout the 302 you see the name MaDonna Slow Bear.

Q I'm talking about the identity, age, physical description, residence, location or any other information that would assist you in

specifically identifying and then finding the person known as MaDonna Slow Bear.

A I don't know exactly whether I asked the -- I don't know the exact questions I asked, but I did know MaDonna Slow Bear from Oglala. {4550}

Q Now, you worked on the reservation for several years, right?

A Yes, sir

Q And you know that it's a fact that Indian people frequently use more than one name; isn't that true?

A Some Indian people use more than one name.

Q Weren't you concerned that the name by which she knew this person might not have been the correct name so that you would get some kind of description of that person?

A I don't remember how I established that MaDonna Slow Bear was Ma Donna Slow Bear. Perhaps in this 302 somewhere I say that she's MaDonna Slow Bear, age such and such. But in my own mind I'm certain who we're talking about.

I wouldn't know her by sight, but I'd know her by name and where she's from.

Q Is it not a general practice and part of your basic investigative technique to get an identification or some other thing besides a name concerning a person whose name comes up for the first time, someone who might be an important prospective witness?

A If this had been an investigation where a person was unknown to us and I needed to find out who that person was, yes.

Q Then what did you ask her about the old woman?

A I don't remember what I asked.

Q Did she tell you that at some point prior to noon Peltier {4551} hollered out to her the words "They're coming"?

A Yes, sir.

Q And did she explain to you that she understood what that meant because of prior planning on the part of Peltier and others with respect to BIA police or the FBI?

A Yes, sir, that's correct. And that's just what's in the 302.

Q Did you ask her anything about on how many occasions she overheard

such planning?

A I don't remember.

Q Did you ask her over how long a period of time she heard discussion of such planning?

A If you will review the affidavits, which again I am reading at this point having not committed them to memory, this is during the last week of May during 1975. She and others, or she and Leonard Peltier came to the Jumping Bull Hall area and Leonard arrived. He gave orders and then about a week after we arrived, about second week of June, Leonard Peltier and others began planning to either kill Bureau of Indian Affairs officers or FBI agents. Leonard was mostly in charge of the planning.

So the planning had been covered in the affidavits. As far as that particular day I don't remember what was asked.

Q Well, then how do you know, how are you able to answer as to the things which you say she said if you don't remember that {4552} day?

A Sir, I can't remember every question I ask during an interview.

Q Well, please accept those questions that I put to you about whether you asked something or something else not to mean I specifically did you ask a question in those exact words, but to mean did you make some inquiry of that nature?

A I'm certain that there would have been some inquiry because the statement is there in the 302. And I do my best to make the 302 as correct and factual as possible.

Q I'd like to divert your attention for one moment to make sure that I establish something of a technical nature with respect to the three affidavits. Were those documents, which as far as you understand them, recorded acts or events and were based on information transmitted by a person with knowledge of that subject?

MR. HULTMAN: Well, I object to that, Your Honor, on the grounds that that calls for a clear opinion and conclusion of the witness.

MR. TAIKEFF: Well, in connection with their preparation I'm asking for what his state of mind was at the time these documents, these affidavits were prepared.

Or may, will Your Honor take judicial of the fact that those three documents are business records within Rule 803 Subdivision (6) of the

Federal Rules of Evidence?

{4553}

THE COURT: No. I do not take judicial notice that they are business records.

MR. TAIKEFF: All right. Then I'd like to pursue this foundation, Your Honor.

THE COURT: I'm not sure that the witness is competent to establish the foundation.

And we are right at the noon hour. So court will recess until 1:30.

(Recess taken.)

{4554}

AFTERNOON SESSION

1:30 o'clock

(Whereupon, the following proceedings were had and entered of record on Wednesday afternoon, April 13, 1977, at 1:30 o'clock, P.M. without the hearing and presence of the jury and the defendant being present in person:)

MR. TAIKEFF: Your Honor, may I address the Court before I resume questioning?

THE COURT: You may.

MR. TAIKEFF: This morning there was some inquiry by defense counsel concerning the existence of other 302s. I would ask that either government be required to reveal the existence, if there is any such 302, by giving basic information such as the date of interview and who conducted the interview or in the alternative that the government allow the Court to see, mark and seal any additional 302s so that the record is complete as to the nature of the documentation which exists at this particular time.

MR. HULTMAN: Your Honor, I stand on my resistance I earlier and my reason is that I get a little tired and a little bit sick and a little bit concerned about the posture that Counsel continually puts first the agents in and then secondly at this time, we're talking specifically now about the United States Attorney, where he is on the record asked to state whether or not there is some document in existence somewhere and then turns around and then uses that fact going {4555} beyond the knowledge of the individual at this particular time that somewhere, someday, somehow and maybe in the possession of defendants right now they have such a document

that I have no knowledge of. It's for this basic reason, Your Honor, that I am not going to be placed in that posture because I've seen too much of it already and continually am placed in that posture.

I also on the record show my legal basis in addition and that is point blank, straight out, flat out that this government has given literally practically every shred of evidence of any kind and any pieces of paper other than those that may have been tossed away at the time they reflect exactly the document, the info they go on and there is something else, kind of all the time it's brought out that there is something dishonest, the fact you have had a piece of paper on a given time on which you have written a note when you have transcribed that note to an official document that becomes a record. If you have thrown away that piece of paper you have done something dishonest or by way of a coverup to hide something.

So for all of these reasons and primarily for the reason that under any of the rules and any of the case law that I am not in any way committed to respond to that particular request other than that way in which I have responded.

I would indicate, though, to the Court on the record that I would be very glad for the Court to examine anything and {4556} everything in camera and I also would put on the record that as to the period of time that counsel has been questioning about here that to my knowledge I have never seen, I have never heard, I have no concept of even a dream, Counsel, that there is another 302 that exists during this time.

Now that representation I will make on the record, Your Honor, but I am still going to resist for the reasons that I have because it is very obvious that at some times and places somebody may have appeared and somebody may have even had a conversation like "hello" and "good-bye" and a 302 not written concerning that event and, thus, Counsel then later says, "Oh, ho, wait a minute here, there was a time when somebody did see somebody" and in their mind an interview did take place and no 302 was either made or was made about that simple occasion. I say to this Court I'm not going to be placed in that kind of a posture anymore and I'm making it very clear and definite on the record right now. Why? Because there are many times and many places that individual agents of the FBI see somebody, have a conversation of some kind like maybe with me this noon in walking down

the street and decide in their mind as a matter of Judgment that they don't have to go make a 302 because they walked down the street with me and said "hello" to me. That is the additional basis for which I make the resistance.

But I will be very glad in camera to have the Court {4557} inspect anything and everything concerning any of the files of the United States Government.

THE COURT: Specifically, Mr. Taikeff, what 302s are you talking about?

MR. TAIKEFF: Interviews of Myrtle Poor Bear or any 302s that reflect efforts to pursue any investigative leads based on statements she made. In other words, I'm concerned only with the Poor Bear aspect of it and interviews with her primarily.

THE COURT: That would then be Skelly, Wood or Price.

MR. TAIKEFF: I assume it's only possibly those three but I have no personal knowledge.

By the way, I was not asking the government to make an absolute, ironclad representation that no where is there some piece of paper that might be interpreted as falling within the scope of my request. I meant to say that I was asking Mr. Hultman to produce for the Court or for Counsel, as the case may be, what he has in his possession, what he knows exists.

MR. HULTMAN: Your Honor, I would in the light of the posture that it is in, I would like in camera and I would request that opportunity of the Court, and I have reason that I would like to request that opportunity.

THE COURT: I don't understand your request.

MR. HULTMAN: Well, the request is that of Counsel that {4558} somehow, somewhere I have something that I am hiding or words to that effect.

THE COURT: What's the in camera situation?

MR. HULTMAN: The point is Your Honor, I would like to show the Court my file so that the Court can examine and if the Court determines that there is something under the rule, under the case law that ought to be handed over I want that opportunity. It wouldn't take but five minutes, Your Honor, at the most and I would like it because I don't want to be placed in the posture of being accused a week from now or a month from now or a year from now as has been the history of these kinds of cases and these proceedings that somehow the government is holding out something

to which the defense is entitled. I make the specific request of the Court at this time.

THE COURT: Well, as the Court interprets the statutes, there is nothing in 18 United States Code 3500 which requires the production of any 302s relating to witnesses not put on the stand by the government in the presentations of its case.

MR. HULTMAN: That is my posture, Your Honor.

But even go further than that, I would like to show the Court a file which is about, has got maybe a total of a dozen pieces of paper in it so that the Court will be able to pursue those pieces of paper because I don't want to be accused later that because somebody accidentally ran into {4559} somebody or because a warrant was served and a 302 may be made or not made because an event that took place because Counsel said there is an obligation on the FBI, first, to make one and, secondly, they're indicating here that there is something on the part of the government that if I would not turn over such an entry, if there is such an entry, to them then I have in someway withheld or put them in a posture as far as the proceeding, one which is unfair, prejudicial and so forth. It's just for that reason, Your Honor, that I'm indicating that if the Court would so desire I would be very pleased to indicate my file to the Court in camera.

THE COURT: I'm not going to take time at this time to look at your file.

I'm going to ask Counsel how long they would anticipate this offer of proof would continue? I understand you have some additional witnesses.

MR. TAIKEFF: Yes, we have a number of additional witnesses, Your Honor.

THE COURT: Very well.

MR. TAIKEFF: I cannot say with any certainty. I don't know whether Your Honor is inquiring because of the posture of the jury or out of general inquiry?

THE COURT: I am inquiring because I am not going to keep that jury boxed up in those small jury lounge rooms for the afternoon and then send them home at 5:00 o'clock just {4560} having sat in that room.

MR. TAIKEFF: Your Honor, I think there is a high probability that the offer of proof will go through the afternoon, if that's the point that

Your Honor is concerned with.

THE COURT: The jury may be taken back to their hotel.

MR. TAIKEFF: Your Honor, I think there was a suggestion in what Mr. Hultman said that I'd like to make a representation on and that is that all of the papers concerning Myrtle Poor Bear and affidavits and interviews are presently marked for identification. There are no other documents which we're concealing intentionally or otherwise.

Your Honor, I have one other application to make to the Court. I make it at this time because if Your Honor grants the application it will take a certain amount of time to make the necessary preparations. This afternoon we will call to the stand Myrtle Poor Bear in connection with this offer of proof. We believe, Your Honor, that one of the most important aspects of her testimony in addition to the substance of what she has to say is her appearance and her demeanor and her mannerisms and we will also adduce evidence that her present appearances in those respects have been for a long time her general appearances and mannerisms.

It is very difficult for an appellate court to make {4561} a review if there is ever a necessity of such a review because they just can't see from the cold record exactly what the state of affairs is.

Happily electronic technology makes it possible for an appellate court to see exactly what was the manner and quality of her testimony and we have made arrangements for the availability of video equipment to permanently record her demeanor on the stand and we make application at this time to make a videotape of her testimony which would then be a court exhibit.

THE COURT: What is the position of the United States on that request.

MR. HULTMAN: Your Honor, the government resists. Government resists for the reason that to do this again and not to do the very same thing as to all other witnesses that appear in this trial puts that particular piece of testimony in a totally different light and in a condition unfair and I believe within the rules themselves, Your Honor, that this lies with a matter purely within the discretion of the Court itself to determine. The government would resist and resist ultimately and primarily on the grounds of relevancy.

THE COURT: The application is denied. Further reasons for denying

the application is that it's entirely possible the demeanor of the witness, knowing that she is being photographed by television camera while she's testifying could {4562} change her demeanor entirely from what it might have been had she hadn't been subjected to that type of exposure.

MR. TAIKEFF: I would just like to indicate to Your Honor that I interviewed her last night after she arrived in Fargo and I found her manner to be sufficiently unusual as to warrant some form of recordation. And, of course, at that time she was not in front of any camera.

MR. HULTMAN: Might I inquire, Your Honor, of Counsel, is the purpose and the object that Counsel is indicating here that her demeanor and so forth indicates that she is insane or that she is unreliable? What is the purpose, I inquire, of showing?

MR. TAIKEFF: So that a determination may be made. If Your Honor refuses to permit us to put on this offer of proof before the jury by an appellate court as to the relevance of all of the testimony, including her testimony under all of the circumstances, and it is my opinion that in her case it would be relevant given all of the facts and circumstances for her to be seen by the jury. That that in and of itself would be an aspect of determining her credibility because it is traditionally said that you judge a person's credibility not only by what that person says but how they act and what their mannerisms are, et cetera. I'm sure Mr. Hultman knows that basic principle of judging somebody's credibility and one of the issues here is whether or not the agents in {4563} interviewing her should have under the circumstances taken any of the actions they took given her demeanor at the time she made her statement.

MR. HULTMAN: I object on the further grounds other than relevancy. Your Honor, that in no way would it in any way be a foundation that could be established that how she appeared on the television camera at this time is any way reflective of how she appeared at the times and places that she was in the presence of the agents. That would be the additional grounds for my objection.

THE COURT: You may proceed with the interrogation.

MR. TAIKEFF: Thank you, Your Honor.

DAVID F. PRICE

being previously sworn, testified further as follows:

DIRECT EXAMINATION (Continued)

BY MR. TAIKEFF:

Q I think, Mr. Price, at the time of the recess I was asking you some questions concerning either what you did or what inquiries you made concerning information you received from Myrtle Poor Bear on March 31, 1976 about some prior planning on the part of Peltier and others. Do you recall that?

A Yes, sir. I told you that she had stated there was prior planning.

Q Now she had earlier said something on that subject, had she not?

By the way, is it possible for you to testify without {4564} looking at the 302s?

A It's possible, but what's going to happen is I'm going to run details together on which dates I was told what.

Q You would prefer to refresh your recollection from the 302s?

A Yes. You're asking date questions and I do get --

Q I just want the record to reflect the manner in which the documents are being used or not used as the case may be.

Do you recall the question?

A No.

Q The question is whether or not on an earlier occasion she had told you about this prior planning?

A Yes, sir, she had.

Q Did you make any inquiry of her at that time to get the identity of the other people, if she knew it with whom the planning was going on?

A I'm sure that I would have. I don't remember it.

Q Is it reflected in your 302?

A I don't have a 302. I have an affidavit.

Q I'm talking about your March 31, 1976 302 which was long after the first time she told you about the subject of prior planning between Peltier and others.

Did you question her about the others, the identity of the others and the time and place of such planning when you {4565} interviewed her on March 31, 1976?

A I may have but it is not reflected in the 302.

Q Continuing to inquire about the interview of March 31, 1976, she

told you that she went outside the house they had been in with Peltier and he went over and talked with three or four other Indian males, correct?

A Yes, sir.

Q Did you ascertain the names of those other Indian males?

A They are not listed in the 302. I don't believe she gave them to us.

Q Did you ask her about them?

A I'm sure I would have.

Q Did you ask for their identity in some way if not by name?

A I'm sure I would have.

Q But was it put down in the 302?

A There are no names in the 302.

Q Why is that, sir?

A Probably because she did not give them to me.

Q Why didn't you record the fact that you asked her and that she either could not or refused to give you the information?

A Sir, I recorded the information as best I could in a 302 which is a narrative type form and I don't record usually my questions and answers as a question-answer type sequence.

{4566}

Q You say it is generally your practice not to put down what you say and what the witness says in response?

A Generally, sir, unless -- generally, sir, it is a narrative of what the witness says, not a narrative of what I say.

Q Well, you say you probably asked her for certain information. Did you get an answer? Concerning identity, as an example, you said you probably asked her. Did you get an answer?

A Apparently I got the answer that I have here, that three or four Indian men were with Peltier and --

Q (Interrupting) I am sorry. I didn't intend to interrupt.

A The exact question and answer I don't remember.

Q Now, my question concerns, did you give her a follow-through question concerning the identity of those Indian males?

A I don't know. I would assume I would have.

Q And why did you not then record her response without your question,

whatever her response may have been?

A Again this is a narrative type statement. You talk to a person and you take notes on what they are saying. Whether you ask -- whether I specifically asked a specific question and got or didn't get an answer that didn't add to the information is something I can't recall.

Q But the 302 makes no mention of any kind of inability or reluctance on her part to give you that information, isn't that correct?
{4567}

A There is one statement, and I am going to read it. It is in the last paragraph of it.

Poor Bear advised she was hesitant about furnishing the above information, also about testifying concerning the above. She was hesitant because of her association with the above- named individuals and the people these people associated with. She thought they were violent, and she thought they might kill her.

So there was hesitation on her part.

Q But you did elicit from her the fact that she saw Leonard Peltier shoot one of the agents, right?

A Yes, sir.

Q Now, did it occur to you that if she was willing to tell you that Leonard Peltier had shot the agents, she would be unwilling to identify the four males that he talked to?

A I am not sure what question you are asking.

Q Well, you just read to us from a portion of your 302.

A You are asking me --

Q (Interrupting) Let me finish my question.

You just read us a portion of your 302 which indicated that she was apparently frightened, as a reason why you didn't get any answer from her about the identity of the four Indian males; and I put to you the following question:

If she told you that Leonard Peltier killed an agent, that surely, was far more significant than identifying four males. {4568} Can you tell us why you didn't ask her or didn't get an answer about the four males but you got an answer about Leonard Peltier killing an agent?

A First, I can't remember what questions I did or did not ask, whether

I asked for the identity of the three or four males.

Also, she said that she was afraid of not just Peltier, but the people he associates with, those three or four males. Whether or not I asked her about the three or four males and their identities, I don't know, so I am stretching myself beyond what I remember.

Q By the way, did she ever tell you that she was raped on that Reservation?

A Yes, sir -- well, I am not sure if I got -- yes, sir, I believe she did.

Q Is your confusion over the fact that she may have told you about two different rapes?

A My confusion is over the fact she ended up in the hospital a number of times due to causes of that Reservation, sir; and yes, she had alleged she was raped, and part of it is I am not sure if it was on or off the Reservation or where.

Q Did she ever tell you she had been raped by Jimmy Eagle and eight other people?

A I don't believe she ever told me, sir.

Q Did she ever tell you that she was raped by a person by the name of Dick Marshall and several of his friends?

{4569}

A Yes, sir.

Q Now, returning to that point in the interview where she told you that Peltier talked with three or four other Indian males, did she then tell you they were standing near a bright-colored truck type vehicle?

A Yes, sir.

Q Did she also tell you that this vehicle had windows on the sides?

A Yes, sir.

Q I am bringing over to you, sir, Government Exhibit 55, the so-called Tent City photographs, and I show you the photograph which is on Page 33 and the photograph on Page 34.

MR. HULTMAN: Could I hear the question then, counsel I would like to possibly interpose an objection.

MR. TAIKEFF: Certainly, as soon as I frame it and speak it, you will hear it.

A (Examining).

Q (By Mr. Taikeff) Have you seen those two photographs?

A I can see them.

Q On March 31, 1976, were you aware of the existence of the two photographs I just showed you?

A Of those particular photographs, I doubt it.

Q Were you aware of the existence, relevant to this case, of the vehicle depicted in those photographs?

A Yes, sir, I would have been.

{4570}

Q Why would you have been?

A If that's the vehicle that appears to be, it was in the area you are calling Tent City at least the day after the killing of the two FBI Agents, and it was loaded with items and apparently in condition to be driven away, if it is the vehicle I am thinking of.

Q That in fact is the vehicle?

A Yes, sir, I saw it there.

Q And so did you also know that it was reputedly a vehicle driven by Leonard Peltier?

A I am a little confused whether that was the vehicle that had -- that was actually owned by him, but I knew that he was associated with it.

Q Now, would you say that the vehicle whose photograph I just showed you would be described at least in part by saying that it was a bright-colored truck type vehicle with windows on the sides?

MR. HULTMAN: Now, here I enter the objection, you Honor, that it is an unfair question. Evidently this witness at this time is to be clairvoyant and go into the mind of the individual who is making the statement.

MR. TAIKEFF: No, your Honor, that's not the purpose.

MR. HULTMAN: Let me just conclude, please, counsel. There is no jury here so we don't need to worry about anything before the jury.

{4571}

MR. TAIKEFF: I don't make speeches for the jury.

MR. HULTMAN: I object on the grounds that it assumes facts that are not necessarily in the record or even known to either of the individuals.

Here a party to the conversation is being inquired about, and it calls for pure speculation for this witness to go into the mind of another person and then try to decide whether or not the individual is talking about an exhibit that the person has never ever even seen; and it is for these reasons, your Honor, that I object to the question.

MR. TAIKEFF: I am talking about his state of mind, Your Honor. Mr. Hultman completely misunderstood what I asked. I only wanted to know of his state of mind.

MR. HULTMAN: And the question goes to his state of mind interpreting what the state of mind of somebody else at that point is.

MR. TAIKEFF: No, your Honor, that is not what I am inquiring about.

THE COURT: Now that counsel have concluded, will the court reporter please read the question back?

(Question was read by the reporter.)

THE COURT: The question is indefinite and vague, and I will sustain the objection on that basis. It does not state or describe by whom.

Q (By Mr. Taikeff) When Myrtle Poor Bear said to you that {4572} Peltier and the other four Indian males were standing near a bright-colored truck type vehicle which had windows on the sides, did the vehicle whose photographs I just showed you come to mind as possibility that that was the vehicle she was talking about?

A I don't know. I can't remember what came to mind.

Q You were aware at that time of the significance of that red and white van and Mr. Peltier's association with it, weren't you?

A I am not totally aware of the significance of that van yet. I only put down what Myrtle Poor Bear told me, and looking at the notes, I would guess that it took me two questions to get a description of the vehicle from her.

Q Did you ask her what color it was?

A I would assume I did, and I would think that I probably got an answer, "Well, it was bright-colored."

Q Were you satisfied at that point, or did you ask her a question about what kind of color it was besides being bright?

A That is -- I can't tell you.

Q You would concede, would you not, that the actual color of the

vehicle, if a witness knew it, would be an important corroborative fact, wouldn't it, under the circumstances?

A Sir, colors are identifiable, yes.

Q But that's not the question I asked you.

A Yes, sir, colors help to identify things.

{4573}

MR. HULTMAN: Your Honor, I interpose an objection at this time for the record, that I object on the record to any further discussion as to relevancy, repetitious.

MR. TAIKEFF: I am afraid I can't respond to the Government's objection because frankly, although the words were in English, I do not know what was said.

THE COURT: He says that your interrogation is irrelevant.

MR. HULTMAN: That's the gist of it.

MR. TAIKEFF: I am making an offer of proof.

THE COURT: I understand. I am overruling the objection although not necessarily disagreeing with counsel.

MR. TAIKEFF: I understand, your Honor, and I appreciate the opportunity to make the record that your Honor is affording counsel.

THE COURT: Very well.

MR. TAIKEFF: I mean that quite seriously.

Q (By Mr. Taikeff) Now, in the interview on the 31st, she told you the colors of the cars of the two agents, did she not?

A (Examining) As I see it here in my interview, stated that she was -- she observed two cars which she believed to be FBI cars. One of these cars was either yellow or gold with a white top, and the other car was green.

Q In fact were those the colors of the Coler and Williams' cars?

{4574}

A Yes, sir. I would describe them that way, with the colors probably better described as gold, depending on your taste on color.

Q Now, she then told you that she and Madonna Slow Bear approached those cars, and that she observed Peltier, Jimmy Eagle, Robert Robideau and one other unrecalled Indian male standing there?

A Yes, sir.

Q And that she then observed one of the agents throw a handgun to the side and heard him say something to the effect that he surrendered, is that right?

A Yes, sir.

Q And that she also saw another person whom she believed to be a FBI Agent lying face down on the ground by the car, and that she could see blood coming from underneath the agent on the ground?

A Yes, sir.

Q And further, that she saw Peltier standing in front of the agent who was leaning against the car, and he was pointing a rifle at the agent, is that correct?

A Yes, sir. The agent leaning against the car was holding his left shoulder, and Peltier was pointing a rifle at his head.

Q And she proceeded to begin to run from the area, but Madonna Slow Bear grabbed her by the hair and kept her from running away?

{4575}

A That's what she told us, sir.

Q And that she was turned around, against her will, so that she would be facing Peltier and the others; and she saw Peltier's rifle jump up after she heard a shot and saw the agent's body jump into the air and come face down on the ground?

A That's what she told us, sir.

Q And that after that she broke away from Madonna Slow Bear, ran up to Leonard Peltier and pounded him on the back?

A Yes, sir.

Q And that she then turned and ran, leaving the area?

A After Peltier said something to her.

Q And that as she was leaving the area, she heard more shots coming from that place where she had just been?

A That's right.

Q She ran to the creekbottom where Ricky Little Boy was in charge of the horses which were to be used in the escape after the shooting?

A Yes, sir.

{4576}

A Yes, sir.

Q Did you question her about the sudden change in plan from car to horses?

A If you'll excuse me, I don't see a sudden change in plan.

Q Didn't she previously advise you that the plan was for her car to be gassed up and hidden in the trees and bushes and to be used as the escape car?

A She previously advised us that her car would be used in the escape. However, in no way did that limit the escape to one vehicle. So I don't see the --

Q My question was: Did she not previously tell you specifically that it was her car that was to be used, it was gassed up for that purpose and it was hidden away somewhere in the trees or bushes to be used as the escape car?

MR. HULTMAN: Is that in the 302 that you just -- where is that, Counsel?

MR. TAIKEFF: The earlier documentation.

MR. HULTMAN: No. Is it in the 302 that you are asking this witness about?

MR. TAIKEFF: It's in the affidavit.

MR. HULTMAN: Which affidavit?

MR. TAIKEFF: The middle one.

MR. HULTMAN: I just wanted to make sure that if you are asking about what's in a 302 that's one thing. If you are now asking him about what's in the affidavit, that's {4577} something else. And I understand you were reading continually here from the affidavit.

MR. TAIKEFF: Actually in fact I was reading from nothing and I wasn't asking about a document. I was asking him about an event which he might have within his memory.

Q (By Mr. Taikeff) And my question, sir, didn't she previously tell you about her car?

A Yes, sir. She told me that Leonard had told her to get a car filled with gas to be ready for the escape which she did. That's what she had previously told us in the affidavit dated February 23rd.

Q Now, when she said on March 31st something about Ricky Little Boy being in charge of the horses which were to be used in the escape after

the shooting, did you ask her any questions about "What about the car, was this in addition to the car? Were you mistaken about the car," or anything like that?

A As I said I can't remember my exact questions, but I'm inclined to think that I forgot to ask that I'm not sure.

Q Did she then tell you that she forced Little Boy to give her a horse and even threatened to shoot him if he did not allow her to escape and that she used the horse to escape the area to get to her car?

A Yes, sir, she did.

Q Did you ask her about her earlier statement that she had actually shot at Little Boy and that he had ducked and therefore {4578} was missed? Just tell me whether you remember asking her before you look at the paperwork.

A I don't remember her saying that she shot at Little Boy and ducked and missed. It's not -- perhaps in Mr. Skelly's 302 but --

Q You say you were aware of that 302 on March 31, 1976, were you not?

A I may have been aware of Mr. Skelly's 302, but as far as having that 302 impressed in my memory that would be an entirely different thing.

(Defense counsel conferred.)

MR. TAIKEFF: I just have one other point of inquiry of this witness.

Q (By Mr. Taikeff) Did you have an immediate superior in the months of January, February and March, 1976?

A I believe my immediate superior probably was Tom Green.

Q And was it a matter or routine or practice for him to read all 302's that you prepared?

A No, sir.

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

MR. HULTMAN: I have no questions, Your Honor, for the first reason that that would invite redirect.

THE COURT: You may step down.

MR. TAIKEFF: MeDonna Slow Bear.

{4579}

MeDONNA SLOW BEAR EDER,

being first duly sworn on the sacred pipe, testified as follows:

DIRECT EXAMINATION

BY MR. TAIKEFF:

Q Where do you live, Miss Slow Bear?

A Denver.

Q Could you lower the microphone and then pull it closer to you so you can sit back comfortably.

Denver, Colorado?

A Yeah.

Q Did you receive a subpoena to appear here?

A Yes.

Q And when did you arrive in Fargo?

A 12:00 last night.

Q At midnight last night?

A Yeah.

MR. TAIKEFF: Your Honor, I'm wondering whether it would be permissible to have Mr. Ellison bring a person into the well of the court for the purposes of an identification being made?

THE COURT: I see no objection to that.

MR. TAIKEFF: Thank you, Your Honor.

Would you come forward, please, and stand right over here, please.

(Myrtle Poor Bear entered courtroom.)

Q (By Mr. Taikeff) Would you please look at the person who {4580} just entered the courtroom.

A Yeah.

MR. TAIKEFF: Mr. Ellison, would you take her outside for a moment, please.

Q (By Mr. Taikeff) Do you now know the person, the name of the person, the female person who just entered the courtroom with Mr. Ellison?

A Yes, I do.

Q Now, I'm going to ask you to pick the microphone up a little bit so you can speak right into it.

A Yes, I do.

Q What do you know her name to be?

A Myrtle Poor Bear.

Q When was the first time in your life you ever saw that person?

A When she got on a plane last night in Rapid.

MR. TAIKEFF: I have no further questions.

Q (By Mr. Taikeff) When you said "Rapid" you mean Rapid City?

A Rapid City, yeah.

MR. TAIKEFF: No further questions.

CROSS EXAMINATION

BY MR. CROOKS

Q Mrs. Slow Bear, you were subpoenaed originally as a Government witness were you not?

A Yes.

Q And you've talked to me in my office, have you not?

{4581}

A Yes.

Q With your husband?

A Yes.

Q Me Donna, when you appeared here for the first time you indicated to me that you would not tell me or the FBI or anyone else anything until you were put on the witness stand; is that substantially correct?

A Yes, that's true.

Q Prior to your having been appeared, or having appeared as a witness, you had never spoken to the FBI?

A No.

Q About anything concerning June 26th; isn't that correct?

A No, I didn't.

Q And as a matter of fact the first time that the FBI had located you was shortly before the trial; isn't that correct, when they came to serve a subpoena on you?

A Would you please repeat yourself.

Q Isn't the first time that the FBI ever attempted or got within distance of contacting you was when they came to serve the subpoena on you to come to trial here?

A Yes, that's correct.

Q And they asked to talk to you and interview you at that time, didn't they?

A Yeah.

Q And you refused to talk to them, didn't you?

{4582}

A True.

Q And during the course of the time that you were at this trial on several occasions I asked if you were willing to talk to me, did I not?

A Yes.

Q And didn't I tell you at the very outset that if you were not at the Jumping Bull Compound on June 26th that I'd let you go back to Denver and that would be the end of it?

A Yes.

Q And you didn't tell me anything, did you?

A No.

Q Not even that?

A No.

Q Why was that?

A Because I talked to a lawyer before I came up when I first got the subpoena and he said I don't have to talk to nobody and if I don't want to and can get on the stand and talk.

Q So someone, some lawyer had advised you that you didn't have to talk to anybody?

A That's true.

Q And on several occasions you came to our secretaries, did you not, and asked when you could be released; isn't that true?

A Yes.

Q And didn't I again tell you that you could be released if you would tell me whether or not you were there on June 26th? {4583} Didn't I tell you that in the hall?

A Yes.

Q

A couple of times?

A Yes.

Q And you refused to make any statement to me at all concerning June 26th; isn't that a fact?

A That's true.

MR. CROOKS: I have no further questions.

REDIRECT EXAMINATION

BY MR. TAIKEFF

Q You said that you now live in Denver. Where did you live before you lived in Denver?

A Before we went to Denver we lived in Oglala.

Q On the Pine Ridge Reservation?

A Yes

Q And --

MR. TAIKEFF: Your Honor, I believe that Agent Price is just at the door. May he come in for the purpose of looking at the witness who's now on the stand?

THE COURT He is in.

MR. TAIKEFF: Thank you, Your Honor.

And may I have the privilege of asking him if he recognizes this person and what is her name?

THE COURT: Any objection from the Government?

MR. CROOKS: No.

THE COURT: Go ahead, proceed.

{4584}

MR. CROOKS: Your offer of proof, Counsel.

DAVID F. PRICE: I don't recognize you.

MR. TAIKEFF: Thank you, Your Honor.

Q (By Mr. Taikeff) Did an FBI agent ever approach you and say anything to you about the possibility of your having been at the Jumping Bull area at the time of the shootings?

A No.

MR. TAIKEFF: No further questions.

MR. CROOKS: We have nothing further.

MR. TAIKEFF: Witness may step down, Your Honor?

THE COURT: You may step down.

MR. TAIKEFF: Myrtle Poor Bear.

MYRTLE POOR BEAR,

being first duly sworn on the sacred pipe, testified as follows:

MR. TAIKEFF: May I inquire, Your Honor?

THE COURT: You may inquire.

DIRECT EXAMINATION

BY MR. TAIKEFF

Q What is your name?

A My name is Myrtle Poor Bear.

Q Do you know who is the person sitting on the bench, the man with the gray hair to your left up there?

A The judge.

Q And you know that you are in court?

A Yes.

Q Do you know what court you are in?

{4585}

A Yes.

Q What court?

A Federal Court.

Q Are you nervous?

A Not exactly.

Q Are you frightened?

A Yes, I am.

Q What are you frightened of?

A I don't know.

Q Did you ever meet me before just now when you walked in the courtroom?

A No.

Q How about last night when you got off of the airplane, did someone come to get you at the airport?

A Yes.

Q Who was that?

A You.

Q Okay. Did we speak with each other last night?

A Yes, we did.

Q For about how long?

A It's about fifteen to twenty minutes.

Q Do you know an agent of the FBI by the name of Mr. Price?

A Yes, I do.

Q And do you know an agent by the name of Mr. Wood?

A Yes, I do.

{4586}

Q And did they ever have a conversation with you about June 26, 1975?

A Yes, they did.

Q Do you know a person by the name of Leonard Peltier?

A No.

Q Would you look to your left and there is a distinguished young man there with gray hair and next to him there is another man. Do you know the other man, the one with the dark hair and the moustache?

A Yes.

Q Do you know him personally or do you know who he is?

A I know who he is.

Q Who is he?

A It's Leonard.

Q How do you know it's Leonard?

A I don't know.

Q Is it because he's sitting there and he doesn't look like a lawyer?

A Probably.

Q Did you ever see him in your life?

A No.

Q Before just now?

A No.

Q Do you remember the first time that either Agent Price or Agent Wood came to talk to you about June 26, 1975?

{4587}

A You mean the first time?

Q Go ahead. Do you want me to ask more questions or do you want me to repeat my question?

A Repeat it.

Q You said either Agent Price or Agent Wood or maybe both of them came to see you about June 26, 1975 about what happened on June 26, 1975. I want you to tell us what happened the first time either Wood or Price or both of them came to see you about June 26.

A You mean what happened at Oglala? I don't understand.

Q Okay. Let me start at another point.

Would you turn around and look at that big chart behind you which we call Government Exhibit 71. Do you recognize that in any way?

A No, I don't.

Q Were you ever shown anything that looked like that by the FBI?

A Yes.

Q Where was that?

A Federal building in Rapid City.

Q Do you remember when that was?

A No, I don't remember.

Q From where you are sitting can you see that model in the far left-hand corner from where you are sitting now?

{4588}

A Yes.

Q Did you ever see that before?

A I think I did.

Q Where did you see that?

A In Rapid.

Q You say "Rapid," you mean Rapid City, right?

A Right.

Q Did Agent Price or Agent Wood ever tell you that they heard that you were at Jumping Bull's when the agents were killed?

MR. CROOKS: Your Honor, before this question is answered I'll interpose an objection that this is clearly a leading question even in an offer of proof it is not proper on cross-examination.

THE COURT: Sustained.

MR. TAIKEFF: All right.

Q (By Mr. Taikeff) Were you ever at the Jumping Bull area on the Pine Ridge Reservation?

A No.

Q Did you ever live with Leonard Peltier?

A No.

Q Did you see the woman who was sitting in the witness seat when you came in with Mr. Ellison about four minutes ago?

A Yes.

Q Do you know her name?

A Yes. I just met her last night.

{4589}

Q Where did you meet her?

A Where did I meet her?

Q Yes. Where?

A On the plane.

Q Did you speak with her on the plane?

A Yes.

Q And why did you speak with her on the plane?

A I wanted to know who she was.

Q Was that the first time in your life you had ever seen her?

A Yes.

Q Now I want you to try to remember signing some papers for the FBI. Do you remember signing some papers for the FBI?

A Yes, I do.

Q Do you remember the month and the year?

A No, I don't.

Q Do you remember how long ago it was?

A It was about a year.

Q About a year did you say?

A Yeah. I don't really remember.

Q Who took care of those papers?

A The FBI.

Q What were the names of the people who took care of the papers for the FBI?

A The two FBI agents.

{4590}

Q I beg your pardon?

A The two FBI agents.

Q Which two?

A Bill Wood and Dave Price.

Q And did they ever tell you anything about June 26th, 1975?

A Yes, they did.

Q What did they tell you?

A They just asked me if I was there and telling me stuff about the killings.

Q And what did you say to them?

A I told them I didn't know much about it.

Q Do you know a person by the name of Jimmy Eagle?

A Yes, I do.

Q Where does he live?

A I don't know where he lives now. He used to live in Pine Ridge.

Q Do you know anything about guns?

A No, I don't.

Q Did anybody ever tell you anything that you supposedly did at Jumping Bull's on June 26th, 1975?

A No, I don't remember.

Q I want to show you three pieces of paper that we've put numbers on, 115, 116 and 117. I want you to take a look at that first piece of paper. It's got two separate pages. First {4591} look at the first page. Have you ever seen that piece of paper before or anything that looked like it?

A Yes, I did.

Q Do you remember when you saw it for the first time?

A No. I don't remember.

Q Do you remember approximately how long ago you saw it for the first time?

A About a year and a half.

Q Now I'm going to show you the second page. Did you ever see that page before?

A Yes.

Q There's a typewritten name here that says, can you read that typewritten name?

A Right.

Q What does it say?

A Myrtle.

Q What does that say?

A Poor Bear.

Q And is there a signature above that name?

A Yes, there is.

Q Is that your signature?

A I don't think so.

Q Did you ever go into the courthouse in Rapid City and sign a piece of paper in front of a woman clerk?

A Yes. I think I did.

{4592}

Q Okay.

Let me just move the microphone so it can pick up your voice.

How many different pieces of paper did you sign or how many different times did you go into that courthouse and sign a piece of paper in front of the woman clerk?

A About two times.

Q Two times?

A Uh-huh.

Q Could it possibly have been three times?

A No.

Q Did you read the piece of paper that you signed before you signed it?

A No.

Q Did anyone read it to you?

A No.

Q Did anybody tell you what was in the piece of paper?

A No.

Q What did you think you were signing when you signed it?

A I don't know.

Q Why did you sign it?

A Because they told me to.

Q Who told you to?

A The agents.

Q Which agents?

{4593}

A Bill and Dave.

Q Do you know what it says in this piece of paper that has the number 115 on it?

A Yes.

Q What does it say? Without looking at it. I'll let you look at it but I want to know whether you know what's in it before you look at it.

A I don't.

Q Would you read it to yourself, please. Take all the time you need and when you're finished let me know.

Did you finish reading it?

A Yes, I did.

Q Is that the first time in your life you ever read that piece of paper?

A I don't know. I can't remember.

Q Did you understand what it said?

A Yes.

Q Is it true what it says in there?

A No.

Q Do you want to take a little rest from the questioning?

A Yes. I'd like to.

Q All right. Do you want to stay here in the courtroom?

A No.

MR. TAIKEFF: Your Honor.

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

{4594}

THE COURT: You may.

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

MR. CROOKS: Your Honor, the United States would object to this witness being excused from the courtroom. If Counsel wishes to take a short period to let her nerves calm down, that's fine but we object to having this witness taken out of the courtroom.

MR. HULTMAN: Especially under the nursing care of Mr. Ellison.

MR. TAIKEFF: I'm not even going to give dignity to that by responding to it.

THE COURT: Well, the objection is sustained. We will stand at ease and give her a chance to recover her composure but she will not be taken out of the courtroom.

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

THE COURT: The Court will stand at ease for a few moments.

(Recess taken.)

THE COURT: The Court will come to order.

MR. TAIKEFF: Should I resume the questioning, Your Honor?

THE COURT: You may resume the questioning.

Q (By Mr. Taikeff) Miss Poor Bear, now I'm putting another {4595} piece of paper in front of you which is No. 116. As you can see, it looks a lot like No. 115 but it is a different piece of paper. Can I turn to the second page?

A (Witness nods affirmatively.)

Q Where it says Myrtle Poor Bear with typing there is a handwriting above that. Is that your signature?

A I don't think so.

Q Would you take a look at what it says in this piece of paper, this affidavit, and then I'll ask you a question or two.

Did you ever see that piece of paper before?

A I can't remember.

Q Is it true what it says in that piece of paper?

A No.

Q Now I'm going to show you another affidavit. This is the last one I'm going to show to you. This one's numbered 117. It's also two pages long. Would you tell me whether you ever saw this before?

A I don't think so.

THE COURT: What was her answer?

MR. TAIKEFF: I don't think so, Your Honor.

Q (By Mr. Taikeff) Do you see where it says in typewritten words Myrtle Poor Bear?

A Uh-huh.

Q Do you see some handwriting above that?

{4596}

A Yes, I do.

Q Is that your signature?

A I don't think so.

Q Now one more time. This is the last time. Would you read this affidavit to yourself and then I'll ask you a question about it. {4597}

Q Did you ever read that affidavit before?

A I don't remember.

Q The third page of the affidavit is a copy of a picture of a person. Did you ever see that picture before just now?

A It is now.

Q Before that, had you ever seen that picture before, some other time?

A Yes.

Q Where did you see that picture?

A Federal Building in Rapid.

Q And who showed it to you?

A The FBI Agents.

Q Did anyone say anything at the time they showed it to you?

A They said that was Leonard Peltier.

Q They said that was Leonard Peltier?

A Yes.

Q Did they ask you if that was Leonard Peltier?

A No, they just told me.

Q How many times did you talk to Agent Price about June 26, 1975?

A I don't remember.

Q Can you tell us approximately how many times?

A A lot of times.

Q I am going to stand over here so you can turn a little bit towards the microphone, so the Judge can see you when you are {4598} testifying.

You said a lot of times. Can you tell us more than 10, less than 10?

A More than 10.

Q More than 20, less than 20?

A I would say less than 20.

Q Can you say how many hours you spent with them altogether?

A A lot.

Q What did they tell you about June 26th?

A They told me about the shooting.

Q What else?

A I don't know.

Q Do you know how the agents were killed?

A No, I don't.

Q Did anyone ever tell you how the agents were killed?

A No.

Q Did you ever hear the name Aaron Yellow Robe?

A Yes, I did.

Q Where did you hear it?

A From the agents.

Q When?

A I don't remember when.

Q Do you want to take a drink of water?

A No, I don't.

Q Are you feeling all right?

{4599}

A Yes, I am.

Q Last night did you tell me you were frightened?

A Yes, I did.

Q What were you frightened of?

A I don't know. I am scared of the Government.

THE COURT: What was her answer?

MR. TAIKEFF: I don't know. I am scared of the Government.

Q (By Mr. Taikeff) Did anyone from the Government ever say anything to you to make you afraid?

A The agents are always talking about Anna Mae.

Q What did they say about Anna Mae?

A Oh, they just would talk about that time she died.

Q What did they say about it? You can tell the Judge, it is all right.

(Counsel confer.)

MR. TAIKEFF: May counsel approach your Honor?

THE COURT: You may.

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

MR. TAIKEFF: Your Honor, I would ask that your Honor briefly advise her that she is under oath and that you want to hear what she has to say providing it is the truth, and that she has nothing to fear by telling the truth.

She is very frightened, your Honor. She told me last {4600} night she is afraid that she is going to be killed, and that's why she is so upset at this particular moment.

MR. CROOKS: Yes, I suspect that she is afraid she is going to be killed. It sure isn't from the FBI.

Your Honor, I would object at the bench to going into anything concerning Anna Mae Aquash for the reasons -- even on the offer of proof -- it has no relevance or bearing to this matter whatsoever. I have no idea what she is going to say, but I think it is completely immaterial and I don't see that there is any justification for going into that in any shape or form.

MR. TAIKEFF: Well, it influenced her conduct in the past in connection with this matter. I think it is highly relevant.

MR. LOWE: The FBI used it as a direct threat to her.

MR. CROOKS: I would ask counsel to state, first of all, what they intend to elicit on that. They certainly know what she is going to say.

MR. TAIKEFF: I will tell you what she told me last night. At first she refused to speak to me on the way back from the airport. Mr. Engelstein was a witness to all that went on, and finally she told me that the reason she didn't want to talk is that she was afraid she was going to be killed; and I asked her, "Who are you afraid of?" and she said, "The agents," and I said, "Why are you afraid of the {4601} agents?" and she said that they told her that they were going to do the same thing to her that happened to Anna Mae Aquash.

MR. CROOKS: This is so preposterous, your Honor, This is the same statement that counsel made in court two or three days ago that was supposed to have been made by the witness, and now he tells us it was said last night.

MR. TAIKEFF: That was based on what her sister told us. Her sister told us she was hiding away and that she was petrified, afraid of the agents.

MR. CROOKS: Your Honor, this is why the United States has been

objecting to this matter going before the jury in any manner, shape or form.

This witness, as the Court well knows, was a prospective Government witness. There is no question that we had considered calling her as a witness. We did not for various reasons, including the garbage that is coming out now.

But what this witness told me in preparing for trial is that she was extremely frightened, that people had been hounding her for a year and a half to change her testimony; and now we come along and we have got a new thing now, apparently she is afraid of the FBI. I specifically asked her when I interviewed her whether or not she was -- the FBI had done anything to her, harmed her in any way, {4602} threatened her in any way. She stated unequivocally "no". As a matter of fact, she spoke very highly of the two agents Price and Wood.

This is exactly what the United States has objected to from the start, that here we are creating a straw man that they are attempting to set up. We are going to get into all sorts of testimony about the supposed threats. Then the Government has to respond, prove that it is pure garbage; and counsel expects that to go to the jury, to prove nothing, to prove absolutely nothing.

MR. TAIKEFF: Aren't we in the same position with respect to the evidence adduced against our client, and we are here on trial, aren't we?

MR. CROOKS: We did not offer this witness' testimony in any manner, shape or form against your client.

Counsel seems to be going to the old conspiracy, and now apparently the Deputy Clerk of Court in Rapid City is also part of the grand conspiracy to create false evidence.

They have elicited from this witness that the Deputy Clerk of Court, when she swore her as a witness, did not swear the witness, in effect accusing the Deputy Clerk of Court of misfeasance in office.

MR. TAIKEFF: I never elicited that testimony.

MR. CROOKS: That's exactly what you elicited.

{4603}

Your Honor, are we now to get the Deputy Clerk of Court from Sioux Falls in to say that she did her job when she swore the witness, she swore

the witness and the witness affirmed the affidavit?

MR. TAIKEFF: I never elicited that testimony. You weren't paying attention.

MR. CROOKS: You weren't listening to the answers.

MR. TAIKEFF: She wasn't sure that was her signature. She remembers going to the court and appearing before a female Clerk on several occasions.

MR. CROOKS: She never remembered signing the affidavit and --

MR. TAIKEFF: (Interrupting) She did not say the former, you are fantasizing.

THE COURT: Did you wish to say something?

MR. SIKMA: I spoke with this witness about a year ago in preparation for this trial, and in addition prior to the trial in preparation for the first trial.

This witness advised me at that time that a number of people from her own -- she was afraid to go back to her home because the people from the Wounded Knee Defense-Offense Committee had been hounding her ever since she made a statement.

She testified in another case they had threatened to take her life on a number of occasions. She was afraid {4604} to go back and said that the only way that she would be able to ever go back is if she would agree to say that the FBI had forced her to say what she said.

MR. TAIKEFF: Why don't you indict those people instead of just talking about it? That's a serious violation of Federal criminal law.

MR. CROOKS: Counsel, if I can find the evidence, rest assured that our job and duty will be performed in this District.

MR. TAIKEFF: Did you convene a Grand Jury to investigate that allegation, instead of making these assertions, when you have the power to indict the responsible parties, if such a thing ever took place?

THE COURT: Just a moment. You have made one assertion as to her statement to you, as to her reason for her fears and counsel for the Government has now made a statement as to her statement to them, as to her reason for the fears.

MR. TAIKEFF: I don't deny that the statement was made. I am asking whether he took action upon it.

MR. SIKMA: I wasn't a U. S. Attorney in that District; I was a Special

Assistant assigned to this case.

MR. CROOKS: Your Honor, we are getting way off of what we came up here for.

THE COURT: That was the point I was about to make.

MR. CROOKS: As far as I am concerned, the Anna Mae {4605} Aquash matter should not be inquired into in any manner, shape or form, it had nothing to do with this case or even these proceedings; and I think it is grossly prejudicial. I would assume that counsel is speaking for the galleries, not for the Court, because it has no relevance to even these proceedings.

MR. TAIKEFF: You can make that assumption. I am telling you that. According to what she has to say, that is what in part influenced her earlier conduct in connection with this matter. She volunteered that fact to me.

MR. HULTMAN: Could I address one issue, and that is, your Honor, that the position of -- my position is that I made a decision based upon everything -- the analysis I could make was that she was not a competent witness. That is the reason I did not call her, and I put it on the record right now; and I think it is fairly obvious.

Mr. Lowe in his opening statement put it even more bluntly than I have just put it right now. Counsel has indicated that on numerous other occasions, and that is the specific reason why I did not call her. I want the record very clear.

MR. TAIKEFF: That's exactly our position.

MR. LOWE: This is an offer of proof.

MR. HULTMAN: This is my one time.

MR. TAIKEFF: One lawyer conduct it on this side, and {4606} one lawyer on that side.

MR. HULTMAN: I have a right to make that determination at this time, and that is the determination I made.

That has nothing to do with what she had stated, and the things that I have knowledge of -- the things that were stated in the records, the affidavit, et cetera, is a basis in which she could have been and might well be a material witness, without any question; but I made an analysis, not back in 1967, I made an analysis in preparation for this trial. Even after counsel here had spoken to her and the responses that she gave to

him and the story she told him was exactly the story she had told before as far as the 302's and as far as the affidavits. I still made a determination based upon everything I had, and I have a right to make that determination; and I want the record to show what that determination was, and I think it is within my responsibilities as a lawyer that were I to bring that witness on this witness stand, who in my judgment at this time I didn't feel was a competent witness, then I would be doing something other than being responsive as to the person. That is why I did not call her. That has nothing to say as to what her posture was at any time in the past or that I served any conclusions as to what her posture was in the past. I made that determination in preparation here, and that is the reason {4607} and that is why I say it is not relevant.

MR. TAIKEFF: Your Honor, our very point is that what your Honor sees and hears today is precisely the kind of response and reaction that this person was capable of a year and two months ago, and that's going to be part of our proof on the offer of proof, and the actions of the FBI in connection with her and in connection with taking her affidavit and having her sign the affidavit is what we are trying to prove to your Honor.

THE COURT: Well, you may continue the interrogation.

MR. TAIKEFF: Thank you, your Honor.

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

Q (By Mr. Taikeff) I want to go back to the name, Aaron Yellow Robe. You said a few minutes ago that the agents told you that name, am I right about that?

A Yes.

Q What did they tell you about that name?

A Told me Leonard had gotten him.

Q Did they tell you anything else about him?

A No.

Q Did you ever go to the Jumping Bull area with the agents?

A Yes, I did.

Q How many times?

A About two times.

{4608}

MR. TAIKEFF: Now, may the witness step down for the purpose of

approaching the model, your Honor?

COURT: She may.

Q (By Mr. Taikeff) Would you be kind enough to walk over there to that model?

Would you take a good look at it, please?

A (Examining).

Q Would you now go back to the witness seat?

{4609}

Q Now, I think you told us that you saw that model in Rapid City; is that right?

A Right.

Q Did you ever see the place that that model looks like?

A No.

Q When you went to the Jumping Bull's with the agents how did you know it was the Jumping Bull's?

A They told me.

Q And how much time did you spend there?

A About fifteen minutes.

Q And what did you do while you were there?

A They were showing me around.

Q What did they show you?

A They showed me where the corral and stuff were at.

Q I'm sorry, I couldn't hear you.

A They showed me where the corral and stuff were at.

MR. TAIKEFF: Could I have that answer read back?

THE COURT: Showed her where the corral and stuff were at.

MR. TAIKEFF: I see.

Q (By Mr. Taikeff) Did they show you anything else?

A The houses.

Q Were they saying anything to you when they showed you these things? Did they say any words?

A They told me it was the Jumping Bull's lived in that white {4610} house.

Q Anything else?

A No.

Q Did anybody ever say anything to you about having to remember certain things?

A Yes.

Q Who?

A The agents.

Q What did they say about having to have to remember certain things?

A They told me to remember where Harry Jumping Bull lives.

Q Did they tell you why you had to remember that?

A No.

Q Did you ever hear any discussion about anybody, any talk about anybody about planning to kill FBI agents?

A No.

Q Do you know somebody named Dino Butler?

A No.

Q Did you ever hear that name before?

A Yes, I did.

Q When did you hear it?

A Last year.

Q Where did you hear it?

A The FBI's told me.

Q Where were you?

{4611}

A In Rapid.

Q Did you ever hear the name Bob Robideau?

A Yes, I did.

Q Where did you hear that name?

A The agents.

Q When?

A Last year.

Q What did they say to you, if anything, about Dino Butler?

A They asked me if you knewed him.

Q And what did you say?

A I told them I didn't know him.

Q And did they say anything else?

A No.

Q What did they say to you about Bob Robideau?

A They asked me if I knew him.

Q And what did you say?

A I told them no.

Q Did they say anything to you after that?

A No.

Q Do you know any other FBI agents besides Price and Wood?

A Yes, I do.

Q Do you know the name of any other FBI agent?

A Mr. Skelly.

Q How do you know Mr. Skelly?

A I met him one time at the FBI office.

{4612}

Q And did anything happen between yourself and Mr. Skelly?

A No, I don't remember.

Q Did you ever go to Cedar Rapids, Iowa?

A Yes, I did.

Q When did you go there?

A Last year.

Q Was it in the winter or the summer?

A I think it was beginning of summer.

Q How did you get there?

A The FBI's took me up.

Q In a car or a plane?

A No, in a plane.

Q Was that Price and Wood?

A Right.

Q Before you went to Iowa did they take you anyplace?

A No.

Q How old is Ricky Little Boy?

A I don't know.

Q Do you know anyone named Ricky Little Boy?

A I heard of his name, but I never saw him before.

Q Where did you hear that name?

A From Bill and Dave.

Q From where?

A Bill and Dave.

Q Bill and Dave?

{4613}

A Right.

Q I want to show you something. I'm holding Government Exhibit 34-AA in my hand. Can you see it?

A Yes, I can.

Q Have you ever seen it before?

A No.

Q Have you ever seen anything that looked like this before?

A No.

MR. TAIKEFF: May the record reflect that I'm carrying Government Exhibit 37-A.

Q (By Mr. Taikeff) Can you see what I'm holding?

A Yes, I can.

Q Have you ever seen that before?

A No.

Q Or anything that looked like it?

A No.

Q Did you ever hear the name M-16?

A No, I never did.

Q Do you remember June 26, 1975?

A Yes, I can.

Q Did you see anybody killed that day?

A No.

Q Before you went to Cedar Rapids, Iowa, did anybody talk to you about testifying there?

A I don't remember.

{4614}

Q Did anybody ever tell you that you had to testify in Cedar Rapids, Iowa?

A Yes.

Q When was that?

A Last year.

Q Do you know who that was?

A The agents.

Q Do you know which one?

A Dave and Bill.

Q Are you afraid of Agent Price?

A I don't know.

Q Are you afraid of Agent Wood?

A I don't know.

Q Did the FBI ever give you any money?

A Yes, they did.

Q How much and when?

A I don't remember, That time I was going to Iowa.

Q That was for your travel expenses?

A Right.

Q Did they ever offer you any other money?

A No.

Q Did they ever offer you anything else?

A Yes, they did.

Q What did they offer you?

A They said they would give me a new name.

{4615}

Q Anything else?

A Yeah. They were going to send me to a different state.

Q To a different what?

A City, or state.

Q Did the agents ever talk to you about the possibility of your going to jail?

A Yes, they did.

Q What did they say about that?

A (No response.)

Q Please tell the judge what they said about that.

A They said that I could go to jail for court conspiracy.

Q Did they say what kind of conspiracy?

A No, they didn't.

Q Did they say how long you could go to jail for?

A About fifteen years.

Q Anybody from the FBI ever talk to you about AIM or the American Indian Movement?

A Yes. The agents did.

Q What did they tell you about the American Indian Movement?

A They told me that they were going to kill me.

Q Did Mr. Wood ever say anything about the subject of getting away with killing people?

A I think he did.

Q Do you recall what he said?

A He said that they could get away with killing because they {4616} were agents.

Q Did this have anything to do with signing the papers?

A I don't know.

Q I didn't hear you, I'm sorry.

A I don't know.

Q When you went to the court in Rapid City and you went before the woman clerk did you spend a lot of time there?

A No.

Q Did anybody say anything to you about why you were not spending a lot of time?

A No, I don't remember.

Q Do you remember how long you were in front of the clerk or in the room with the clerk?

A No, I don't.

Q Do you know the man in the blue suit sitting at the Government table?

A Yes, I do.

Q What's his name?

A Bob, Bob Sikma.

Q Did you ever speak with him?

A Yes, I did.

Q Where?

A In Iowa.

Q When you talked with him did he ever show you those pieces of

paper that we have put the numbers on which are still in {4617} front of you, 1l5, 116, and 117?

A I don't remember

Q Did you tell him anything about whether you were going to testify?

A I don't remember.

Q Did you tell him you weren't going to testify?

MR. CROOKS: Your Honor, I'll object to this. Counsel didn't get the answer he thought he was going to get and then he restates it as a leading question and I object to it.

THE COURT: Sustained.

MR. TAIKEFF: Your Honor, I asked that question pursuant to Rule 611 (C) of the Federal Rules of Evidence.

THE COURT: It was not necessary to ask that question to develop the testimony. She had already given her answer. Rule is not applicable.

Q (By Mr. Taikeff) What did Mr. Sikma say to you when you spoke to him?

MR. CROOKS: That's been asked and answered, Your Honor. The witness said she didn't recall.

THE COURT: Sustained.

MR. TAIKEFF: Then perhaps I can refresh her recollection, Your Honor.

MR. CROOKS: With what, your testimony, Counsel?

MR. TAIKEFF: No.

THE COURT: You may refresh her recollection if you {4618} have something appropriate to do it with.

MR. TAIKEFF: I have a good faith basis for doing it.

THE COURT: You will not refresh her recollection by making an assertion of fact to her or an assertion of the answer. I'm interested in this witness's testimony, not yours.

MR. TAIKEFF: I understand that, Your Honor. But the law says that in order to refresh a person's recollection you may do anything that might trigger the recollection.

THE COURT: I have ruled.

Do you have an appropriate document to refresh her recollection? It may be used.

Q (By Mr. Taikeff) Did you testify last summer?

A No, I didn't.

Q Why not?

A I don't know.

Q Do you know whose decision that was?

MR. CROOKS: Your Honor --

MR. TAIKEFF: I asked if she knew.

THE COURT: She may answer the question.

A The agents.

Q (By Mr. Taikeff) Do you see the man who's sitting at the the end of the Government table, the man wearing the glasses?

A Yes.

Q Do you know his name?

{4619}

A No, I don't, but I met him before.

Q Where?

A Here.

Q When you say "here" you mean in Fargo?

A Right.

Q Did you have any conversation with him?

A Yes, I did.

Q What was that conversation about?

A He told me that the trial was going all right and that he wasn't going to use me.

Q Did you ever see Mr. Crooks, the man in the dark glasses, in another city other than Fargo, North Dakota?

A Yes. In Rapid City.

Q When was that?

A That wasn't too long ago.

Q Couple of months ago, one month ago, could you tell us?

A About a month ago.

Q Was anybody else there when you talked to Mr. Crooks?

A I think his wife was.

Q Who was?

A His wife.

Q There was a woman in the room?

A Right.

Q Anybody else?

A Bill, but he left.

{4620}

Q Who was that person?

A Bill Wood. He's an FBI agent.

MR. TAIKEFF: Could I have a moment to confer with Mr. Crooks, Your Honor?

THE COURT: You may.

(Mr. Taikeff and Mr. Crooks conferred.)

Q (By Mr. Taikeff) Was that woman doing anything in that room?

A No. She was just sittin' in there.

Q She writing anything?

A No.

Q Were you ever under the Witness Protection Program of the United States Marshal Service?

A Yes, I was.

Q Did you ask for that protection?

A The second time and not the first time.

Q Do you know how you got it the first time if you didn't ask for it?

A I don't understand.

Q Why did you get the protection service the first time?

A First time? The first time I got it was, I think it was last year.

Q Do you know who got it for you?

A The agents.

Q Do you know where the marshal's office is on this floor?

{4621}

A Yes, I do.

Q Do you remember one time you were in that office and this man here (indicating), Mr. Lowe, and I came into that office and you were sitting on the couch?

A Yes, I do

Q Did anybody tell you anything before we came in?

A The U. S. marshal said that I didn't have to talk to you guys

if I didn't want to.

{4622}

Q How many times did you go to the Rapid City office of the FBI?

A I don't remember. Could be about four times.

Q Do you remember whether anybody was writing anything down when you were there?

A I don't remember.

Q You talked to Agent Skelly one time, didn't you?

A I don't remember.

Q Did you tell him that you were living in the big house?

MR. CROOKS: Your Honor --

THE COURT: Sustained. She said she didn't remember that she talked to him.

MR. TAIKEFF: That's precisely what I'm doing, attempting to refresh her recollection from the government 302.

MR. CROOKS: Your Honor, there has been no proper foundation for refreshing her memory with anything.

MR. TAIKEFF: She says she can't remember and I have a government document which purports to relate what occurred that day. What could be a better way to refresh a witness' recollection.

THE COURT: Very well. On that basis I will let him ask the question.

MR. CROOKS: Your Honor, it seems to me the proper foundation is ask her if she's seen the statement, if the {4623} statement refreshes her memory. I assume Counsel didn't just get out of law school. That's the ordinary way to refresh somebody's recollection with a document, not read it to her.

MR. TAIKEFF: I'm greatly complimented, Your Honor, Mr. Crooks doesn't think I just got out of law school. Perhaps if I ask one question it might refresh her recollection about --

THE COURT: You may if it's not a leading question. If you do not assert the answer you want.

MR. TAIKEFF: I'm going to take it right out of the government document and ask whether she said that.

THE COURT: The government is correct insofar as the proper way to refresh her recollection. You may show her the document and ask her to

read it and ask her if that refreshes her recollection.

MR. TAIKEFF: All right.

Q (By Mr. Taikeff) I'm holding a piece of paper that's been marked No. 118. I want you to start here and read the first sentence up to the date May, 1975 to yourself, then I want to ask you a question about it.

Did you ever say that to Agent Skelly or anything like that?

A No.

MR. CROOKS: Your Honor, I had understood he was going to be showing her a document to refresh her recollection. I {4624} don't quite understand what the procedure is. He's holding up the document and asking her to read it and then asking her if she saw it.

MR. TAIKEFF: I'm following --

MR. CROOKS: I assume he can ask her whether or not she spoke to Agent Skelly and if so what she said.

MR. TAIKEFF: I'm following the procedure suggested by the government which I objected to but I'm doing it nevertheless.

THE COURT: The question was asked and answered.

MR. TAIKEFF: Yes. I want to proceed but there was apparently an objection to my proceeding.

THE COURT: You may proceed.

MR. TAIKEFF: Thank you, Your Honor.

Q (By Mr. Taikeff) I want you to read the next two sentences down to the word "area."

Did you ever see either of those two things to Agent Skelly?

A No.

Q Read the rest of the paragraph to yourself down to the words "I surrender."

Did you ever say any of those things to Agent Skelly?

A No.

Q As far as you know did any of the things that are in that paragraph, did they ever happen?

{4625}

A No.

Q Now read the next little paragraph which ends with the words "that day" to yourself.

Did you ever tell any of that --

A No.

Q -- to Mr. Skelly?

Now read the rest of the report to yourself. Not out loud.

Did you finish reading the document with the No. 118 on it?

A Yes.

Q Did you tell any of that to Agent Skelly?

A No.

Q Do you know of your own personal knowledge whether anything in that report, No. 118, is true or not?

A No. It's not true.

Q Now I have another report. This one has No. 119 on it. Do you remember if you ever talked in the Rapid City office with Agents Wood and Price when somebody was taking down notes?

A No. I don't remember.

Q Do you remember being in the Rapid City office on, at the end of March, in fact, March 31 of last year, with Agents Wood and Price?

A I don't remember.

Q I would like you to read to yourself this report which is {4626} No. 119 and after I'll ask you a few questions.

Did you say anything about Madonna Slow Bear to Agents Wood or Price?

A No. They mentioned her first.

Q They mentioned her name to you?

A Right.

Q Did you ever mention Jimmy Eagle to them?

A No.

Q Did you ever mention Rickey Little Boy to them?

A No.

Q Would you then read to yourself the report which is No. 119 and then I'll ask you a few questions afterwards.

Are you finished?

A Yes, I am.

Q Did you ever say any of the things that are in that report, No. 119, to either Agent Wood or Agent Price or both of them?

A No.

Q Do you know whether anything in that report of your own personal knowledge is true?

A No. It's not true.

Q Sometimes when you were giving your testimony you said Dave and Bill. Who were you talking about?

A The FBI agents.

Q Do you know why the FBI agents came to see you about the June 26 matter?

{4627}

A No, I don't.

MR. TAIKEFF: Could I have a moment to confer with Mr. Lowe, Your Honor?

THE COURT: You may.

{4628}

MR. TAIKEFF: I would have three points to cover, your Honor.

Q (By Mr. Taikeff) You told us a little while ago, Miss Poor Bear -- can you hear me?

A Yes, I can.

Q You told us a little while ago that someone said something about charging you with conspiracy, do you remember that?

A Yes, I do.

Q Do you know what the word, "conspiracy", means?

A I know, but I don't know how to explain it.

Q Well, try your best. Were you talking about any special kind of conspiracy?

A No.

Q Were you talking about a conspiracy that had anything to do with June 26th?

A I don't know.

Q Where did you hear that word, "conspiracy", for the first time?

A From the agents.

Q Did anybody ever tell you that you, you killed the agents?

A They asked me if I was there.

Q What did you say?

A I said "no".

Q Are you afraid at this moment of anything?

A Yes, I am -- excuse me -- yes, I am.

{4629}

Q What are you afraid of?

A I am afraid of the FBI's.

MR. TAIKEFF: I have no further questions.

THE COURT: The Court will recess until 4:10.

(Recess taken,)

(Whereupon, the following proceedings were had in the courtroom, the Defendant being present in person:)

THE COURT: Will there be cross examination?

MR. CROOKS: Yes, there will be, your Honor.

MR. TAIKEFF: I believe the Marshal went out to get the witness, your Honor.

(Witness returns to the witness stand.)

MR. CROOKS: May I proceed, your Honor?

THE COURT: You may proceed.

CROSS EXAMINATION

By MR. CROOKS:

Q Myrtle, I would like to hand you back a series of documents which counsel had you look at before, and these are the same ones that he was showing you earlier, is that right? Look through them if you would, just to see if they are the same ones.

A (Examining).

Q Are those the same ones that Mr. Taikeff handed you before?

A Yes, they are.

Q Now, you said earlier that you have talked to me on two {4630} occasions, is that right?

A Right.

Q And one of them is in Rapid City?

A Right.

Q And that was about a month ago or so, a little over a month ago, and the other one was here in the Marshal's office in court?

A Right.

Q Is that right -- now, have I seen you since you left the Marshal's

office that time?

A No.

Q So I haven't seen you since you have come back?

A Right.

Q All right, now when we talked in the Marshal's office, there was another attorney that was there with me, wasn't there?

A Yes, there was.

Q And is he the man in the gray suit behind Mr. Hultman, right against the railing, if you recognize him?

A Yes.

Q That appears to be the same man, Mr. Vosepka?

A Yes.

Q All right. Now, when we talked, I told you that the Government wasn't going to use you as a witness, isn't that right?

A Right.

{4631}

Q And I told you that the reason was that the case was, I believe you stated earlier, that the case was going pretty good, and we didn't think we would need you, isn't that what I told you?

A Right.

Q Now, did I ask you whether or not you wanted to be a witness?

A I don't remember.

Q Well, do you recall having told me at that time that you preferred not to be a witness?

A I don't remember.

Q You don't recall that?

A No, I don't.

Q All right. Going back to your appearance here, from the time that you left the Marshal's custody when you were here before on our subpoena, where did you go?

A I went home.

Q And that's back to Allen?

A Right,

Q And did you live in your family home there, I mean your regular home?

A Yes.

Q All right, and from that time until the present time did anybody talk to you about your testimony?

A No.

{4632}

Q Nobody did at all?

A No.

Q All right. When was the first time that you talked to anybody again about your testimony after you talked to me?

A I don't remember.

Q Well, what about last night, you talked to Mr. Taikeff, didn't you?

A Oh, yes, I did.

Q All right. You also talked to Mr. Ellison?

A Yes.

Q And what time, do you remember what time you got in on the plane?

A Got in at 12:00 last night.

Q Around 12:00?

A Right.

Q Mr. Taikeff was there to pick you up?

A Right.

Q Was Mr. Ellison with him?

A Yes.

Q And they talked to you then for --

MR. TAIKEFF: (Interrupting) May I confer with Mr. Crooks for a moment, please?

THE COURT: You may.

(Counsel confer.)

Q (By Mr. Crooks) Well, whoever it was, one of the other {4633} defense lawyers?

A Yes.

Q Well, just so we aren't designating the wrong person, would you point out which one of them that was?

A The one with the glasses.

Q So it was Mr. Engelstein, not Mr. Ellison that met you at the

airport?

A Right.

Q What about the individual with the ponytail sitting in the blue suit, did you see last night?

A No.

Q Did you see him at all last night?

A No.

Q Did you see him today?

A Right, this morning.

Q O.k. When you got in from the airport, where did you go?

A I went to a hotel.

Q Whereabouts?

A Here in town.

Q Do you recall which one it was?

A No.

Q O.k. Did you go anywhere else?

A No.

Q How long did you talk to Mr. Taikeff last night?

A 15 or 20 minutes.

{4634}

Q 15 or 20 minutes?

A Right.

Q And did you tell him all that you told us here in court today in that 15 minutes?

A No.

Q Where did he get the information that he had asked you about, did you talk to somebody else?

A No.

Q All right. Myrtle, when you were home in Allen, did members of your family talk to you about this?

A No.

Q O.k. Now, you were talking about two agents and you said it was Bill and Dave, is that right?

A Right.

Q And this is Bill Wood and Dave Price?

A Right.

Q All right. When you talked to me in Rapid City, Bill Wood was there for part of the time, wasn't he?

A Right.

Q All right. Do you recall me asking you if any agents had threatened you or mistreated you in any way at Rapid City?

A No, I don't remember.

Q Well, didn't I ask you when we first started talking if any of the agents had ever threatened you or mistreated you?

A No, I don't remember.

{4635}

Q You don't recall that?

A No.

Q And did I ask you about Bill Wood?

A I don't remember.

Q Well, didn't you tell me that Bill Wood was your friend?

A No, I don't remember.

Q You don't recall having told me that?

A No.

Q Didn't you also say that Dave Price was your friend?

A I don't remember.

Q You don't remember having told me that?

A No.

Q All right. What about the interview that I had with you in Rapid City, didn't you tell me that Leonard Peltier was standing over the bodies and he was pointing the gun toward the agent who had just fallen?

A I don't remember.

Q Well, are you saying you don't remember or that you didn't tell me that?

A I don't know.

Q Well, did you tell me something like that?

A I don't remember at all.

Q Well, do you recall telling me when you were in Rapid City that Madonna Slow Bear was there?

A No, I don't. I don't remember.

{4636}

Q Well, didn't you tell me when you were in Rapid City that Madonna Slow Bear was there with you when you escaped and got on a horse and then went to get your car?

A I don't.

Q You don't remember telling me that?

A No.

Q What about Madonna Slow Bear, you said today that you had never seen her before last night on the plane, is that your testimony?

A I don't understand.

Q Well, didn't you testify earlier that you had never seen Madonna Slow Bear before?

A No, I never did.

Q Well, when did you first meet Madonna Slow Bear?

A Last night.

Q Last night. Do you recall telling me in Rapid City that you had seen Madonna Slow Bear a couple of weeks before I talked to you?

A No.

Q Do you recall telling me that Madonna Slow Bear had told you that if you were willing to be a witness, that she would too?

A No, I don't remember.

Q Do you recall telling us or me where we could find Madonna Slow Bear?

A No, I don't remember.

{4637}

Q Do you recall my having told you that we had never been able to find Madonna Slow Bear?

A No.

Q And you never told me anything about Madonna Slow Bear?

A I don't remember.

Q You don't remember.

A No.

Q Well, do you remember having told me anything about June 26th when we were down in Rapid City?

A I don't remember.

Q You don't remember telling me anything about June 26th?

A No.

Q And what were we talking about?

A I don't know.

Q Well, we were talking about something for about an hour and a half or two hours, weren't we? What were we talking about?

A I don't know.

Q Well, was there somebody else with me?

A There was a lady with you.

Q And did I introduce you to that lady?

A I don't remember.

Q Well, did I tell you who she was?

A No, I don't remember.

Q Did I tell you why she was there?

A No.

{4638}

Q Was Bill Wood in the room?

A No.

Q Was Bill Wood in the room at any time when we were talking in Rapid?

A No.

Q Never was?

A I don't remember.

Q Well, were there any other agents there?

A I don't know.

Q Where were we talking?

A In the Federal Building.

Q And we were in the FBI office, weren't we?

A Um-hum.

Q And when we were sitting there talking, did I tell you why I had come to Rapid City?

A I don't know.

Q Didn't I tell you I had come there because of what you had told us before, and that you were a prospective witness?

A I don't remember.

Q Well, do you remember anything that we said in Rapid City?

A I don't think so.

Q Well, Bill Wood brought you into the office, didn't he?

A Um-hum.

Q And you had been staying in a hotel, and he went and got you, didn't he?

{4639}

A Um-hum.

Q And he brought you back, and as a matter of fact, Bill Wood was the one that introduced you to me, isn't that right?

A Um-hum.

Q Did Bill Wood threaten you or beat you to get you to come in to see me?

Can you answer the question?

A No.

Q Bill Wood has never beaten you or threatened you at any time, has he?

Can you answer that question?

A No.

Q David Price hasn't beaten you or threatened you at any time either, has he?

Can you answer that, Myrtle?

A No.

{4640}

Q As a matter of fact, Mr. Price has investigated a lot of things that you have gone to him about such as being beaten up by people and raped by people?

A He never did.

MR. TAIKEFF: I didn't hear.

Q (By Mr. Crooks) He never investigated things for you?

A No.

Q Haven't you made complaints about things that have happened to you and Dave Price went and investigated them for you?

A No.

Q How about Bill Wood?

A No.

Q Never made any complaints to the FBI?

A No.

Q When we talked in the marshal's office when I released you as a government witness, didn't you tell me that some people in your home area had threatened you if you were a government witness, threatened bodily harm to you if you would testify? Didn't you tell me that in the marshal's office?

A When was that? The last time?

Q Yes.

A I don't know.

Q Didn't you tell me when I talked to you at Rapid City that some people from your home area had threatened to do harm to you if you testified to the government?

{4641}

A If I did I don't remember.

Q Didn't I ask you at the end of the interview if you would like to go back into protective custody and didn't you say yes, you would, you would like to go to California to visit your brother?

A I don't remember.

Q Didn't you go to California to visit your brother?

A Uh-huh.

Q And the government paid for the ticket, didn't they?

A Uh-huh.

Q And that was set up at your request, wasn't it?

A Uh-huh.

Q And when you went out to California, nobody forced you to go to California, did they?

A No.

Q And when you went to California, it was because you wanted to go and asked me to set it up for you, isn't that right?

A I don't remember.

Q Do you remember how long we talked in Rapid City?

A No.

Q After I left you talked to Bill Wood then, didn't you, for awhile?

A I don't know.

Q Didn't Bill Wood after I'd talked to Bill and you had requested to go to California, didn't he then come in and make {4642} arrangements to help you go into the marshal's program, protection program and go to California?

A Uh-huh.

Q And that's what you wanted to do, wasn't it?

A I don't know.

Well, it wasn't my idea that you go to California, was it? I didn't even know you had a brother in California, did I?

A I don't know.

Q Neither did Bill. We had to make some calls down to the reservation even to find out where your brother lived, didn't we?

A Uh-huh.

Q When you came to Fargo I never told you at any time that you shouldn't talk to the defense lawyers, did I? Didn't I say that that was your choice on whether you wanted to talk to them or not?

A Yes.

Q And you told me you didn't want to talk to them, didn't you?

A Yes.

Q And didn't you tell me that the reason you didn't want to talk to them was because they were the people that were harassing you?

A I don't remember.

Q Now you said earlier you didn't know Leonard Peltier before {4643} walking into the courtroom, isn't that right?

A Right.

Q Myrtle, why was it when you walked into the courtroom that you gave Leonard Peltier a big smile?

A I don't know.

Q You just picked him out as a person you wanted to smile at?

A Probably.

Q Has anybody threatened to do something to you if you did not change your story?

A No.

Q Nobody has even talked to you?

A No.

Q Nobody even suggested it?

A No.

Q So from 15 minutes of talking to Mr. Taikeff you decided to change your story entirely, is that right?

A I don't know.

Q Myrtle, when you made out these affidavits to the woman that signed here, Betty B. Barry, she's a clerk of the United States District Court, isn't she?

A I don't know.

MR. TAIKEFF: I have to object to the form of the question, Your Honor, because of the assumption of fact which is not in evidence. {4644}

THE COURT: Sustained.

MR. CROOKS: Well, Your Honor, I'll then state for the record I'm reading from Exhibit 115 and I'm pointing to the signature line, "Betty B. Barry, deputy clerk of the United States District Court, district of South Dakota."

Q (By Mr. Crooks) That's a name that appears there, isn't it?

A Uh-huh.

Q And that's the person you signed that affidavit before, isn't it?

A I don't know.

Q You don't even remember signing that, do you?

A No.

Q Do you remember a woman in the federal building in the courthouse, in the federal building asking you to raise your hand and swear to tell the truth?

A No.

Q You don't recall that ever happening?

A No.

Q Is the same thing true with everyone of these affidavits, all three of them, do you remember signing any of those?

A I remember signing only two.

Q Well, how did that happen when you signed those two? How did it

happen that you got your name on there and the deputy clerk of court put her name on there with her seal?

A I don't know.

{4645}

Q Didn't she ask you to be sworn to tell the truth and the whole truth and nothing but the truth or words to that effect?

A No. I don't remember.

Q Didn't she have you raise your right hand and swear to tell the truth?

A I don't remember.

Q Well, it wasn't Mr. Wood or Mr. Price that signed that paper, was it?

A I don't know.

Q Well, would you look at it. Do you see their names there? Do you see their name on any of those affidavits?

A No.

Q It was the deputy clerk of court that signed it, wasn't it?

A I don't know.

Q You said you remembered signing two of these affidavits. How was that done?

A The agent asked me to sign them.

Q The agent asked you to sign them?

A Right.

Q And they were the only ones there when you signed them?

A I don't remember.

Q Do you remember the deputy clerk of court being there at all?

{4646}

A No.

Q Didn't somebody have you read those affidavits, swear to tell the truth and then you signed them, isn't that the way it worked?

A No.

Q How did it work?

A I don't know.

Q Why were you signing these affidavits?

A I don't know.

Q Well, did Bill Wood threaten to harm you or hurt you if you didn't sign?

(No response.)

Q Can you answer that question?

MR. TAIKEFF: Your Honor, I'd like the record to reflect a 45 second pause measured by the courtroom clock between the last question and the following question.

Q (By Mr. Crooks) Can you answer the question, Myrtle?

A I was forced to sign both of these papers.

Q By whom?

A By the agents.

Q By which agents?

A They said one of my family members was going to be hurt if I didn't do it. By Dave Price and Bill Wood.

Q Dave Price and Bill Wood?

A Right.

{4647}

Q And is this the same Bill Wood that you told me in Rapid City was a good friend of yours?

A Right.

Q The same guy you said was a good friend?

A He's not a good friend.

Q You didn't consider Bill Wood a friend?

A No.

Q Do you consider him a friend now?

A No.

Q Did you ever consider him a friend?

A No.

Q Didn't you tell me in Rapid City that you did?

A I don't remember.

Q When did they tell you that they were going to harm you or your family by signing that if you didn't sign it?

A That wasn't too long ago. I don't know. Probably last year sometime.

Q And where were they when they said that?

A They came down the house.

Q Came down to the house?

A Right.

Q And they had the papers with you there?

A Yeah, they did.

Q And then did you sign it in front of them after?

A I don't remember.

{4648}

Q Well, you said that they threatened to harm you or your family if you signed it and I'm asking you, did you sign it then?

A Yes, I did.

Q You signed it right there on the spot down at your house?

A Right.

Q Then when did this lady put her name on it?

A I don't know.

Q That would have been sometime later or was that already on there?

A I don't know.

Q Was there any other name on there when you signed it?

A I don't remember.

MR. CROOKS: We have no further questions.

REDIRECT EXAMINATION

BY MR. TAIKEFF:

Q Miss Poor Bear, you said you signed something at home. Was it one of these affidavits that you signed at home?

A I don't remember.

Q Could you say whether it was any one of them?

A No. I don't know, remember which one.

Q Do you remember Mr. Crooks, that's the man with the dark glasses, asked you a couple of times this afternoon about whether you ever were threatened by Agent Price or Agent Wood. Do you remember him asking you those questions?

A Which one?

Q The man with the glasses.

{4649}

Do you remember he said to you did Agent Price ever threaten you?

A Yes, I remember.

Q Do you remember that when he asked you that question you remained silent for a very long time every time he asked you that question?

A Yes.

Q Why did you remain silent and not answer his question?

A Because they did threaten me.

MR. CROOKS: I'd like the answer to reflect she also answered no to each of those questions.

MR. TAIKEFF: Your Honor, the record clearly reflects he interjected the question, "Can you answer that," and it was to the last question she said no on each instance.

MR. CROOKS: That's the point --

MR. TAIKEFF: Not to the original question but after the lengthy pause he said, "Can you answer that," and she said, "No."

Q (By Mr. Taikeff) Why couldn't you answer these questions? Tell everybody why you were unable to answer that question.

MR. CROOKS: Your Honor, Your Honor. I'll object to the colloquy of Counsel. He's supposed to be on redirect, not cross-examination.

MR. TAIKEFF: I'd like to have the original questions of Mr. Crooks read at this time, Your Honor, so that I do not {4650} improperly and without sufficient foundation pursue any further questioning, if I may.

THE COURT: The Court recalls the question and answer was as Mr. Taikeff indicated. If Mr. Crooks wants the question read back I'll be glad to have the court reporter read it back.

Q (By Mr. Taikeff) Miss Poor Bear, will you please tell us whether Agent Price ever threatened you.

A Yes, he did.

Q What did he say to you?

A He told me that they were going to plan everything out and if I didn't do it I was going to get hurt.

Q Did anybody else ever say that to you from the FBI?

A Bill Wood.

Q Where were you for the last week?

A I was at home.

Q Where in your house? Any special part of your house?

{4651}

A No, no.

Q Did you know that there was a subpoena for you that you were supposed to come here?

A Yes, I did.

Q Were you hiding from that subpoena?

A No.

MR. TAIKEFF: No further questions.

MR. CROOKS: We have no redirect, Your Honor.

THE COURT: You may step down.

THE CLERK: Counsel, you have 118 and 119.

MR. TAIKEFF: Yes, we do, sir.

Your Honor, that's our offer of proof.

THE COURT: And as I understand it you are offering that as proof for the purpose of impeaching the entire Government case, not impeaching any particular witness, not impeaching any particular exhibit that was offered?

MR. TAIKEFF: As I said in response to that question yesterday, Your Honor, that is not a correct statement of our position.

THE COURT: All right. You may restate your position.

MR. TAIKEFF: It is offered for both purposes, it is offered to show a pattern of conduct as represents certain unique and special items of evidence which have been introduced by and through certain witnesses. There is a coincidence between, and I don't mean that in the sense of accident, but I {4652} mean it in the actual sense of the word. There is a coincidence between certain pieces of evidence that have come in through certain witnesses and certain elements in what it is that the FBI says Myrtle Poor Bear said she saw.

There is a certain theme here that one would expect to find if a certain number of people were at the same place at the same time making normal observations. But the funny and perhaps tragic part of this continuum is that there are a number of serious defects in it. One witness has already testified before Your Honor that none of it was known to her, she didn't know the defendant, she was never at the scene on June 26th or otherwise; but got to sign affidavits which claimed on their face that she was privy to those particular items of evidence.

Tomorrow morning we will call a witness who will say that he was threatened to give a certain piece of evidence which fits right in. It's a duplicate of a major facet of that testimony that was purportedly available for Myrtle Poor Bear and which she denies any knowledge of and knows anything about.

Jimmy Eagle was a person who purportedly confessed in the presence of a number of people on three different occasions; and on each occasion, according to the people to whom he purportedly confessed, he was saying the very same thing. That would have been the fact had Myrtle Poor Bear really been {4653} there, really seen those things and really reported them to the FBI. And in this very case we have Michael Anderson testifying to some of those facts.

Now, that can't be a coincidence, Your Honor. That has got to be a result of the efforts of a limited number of people who have made a conscious decision that Leonard Peltier is really guilty and it doesn't matter, we have the evidence to prove it, we believe he's guilty, we'll make sure that we have the evidence to prove it. So we rebut by circumstantial evidence certain specific key pieces of evidence which have been introduced against Leonard Peltier and we also offer it to show a pattern of conduct on the part of certain agents of the FBI so that the jury may consider whether they are prepared to find to a moral certainty that another human being should spend the rest of his life in a prison under these circumstances.

THE COURT: Mr. Crooks?

MR. CROOKS: Your Honor, in the hundreds of lawsuits that I've ever tried that has got to be the most absurd argument that I have ever heard in my life. Counsel is attempting to do exactly what the United States said at the outset of this offer of proof. They are attempting to set up a strawman and knock the strawman down and suppose to, and argue then that that proves something. Proves absolutely nothing, except that this poor witness has been hounded close, {4654} and indeed probably in fact to committing perjury.

Her testimony on the stand indicates the influence that someone has had on her. When that woman can talk to Government counsel for two hours in a comfortable interview and have no recollection of the conference by

an attorney who is not completely inexperienced at interviewing prospective witnesses, I'm not sure what more I can say about her testimony.

But, Your Honor, this is nothing more than an attempt to put the FBI in general on trial for some supposed misdeeds that the paranoid defense team has thought up.

Your Honor, we have faced these allegations again and again and again in this trial without any substantiation, and frankly I'm a little shocked that attorneys would participate in it.

MR. TAIKEFF: Your Honor, I just want to note one thing. It is true that the FBI has faced allegations of this kind again and again and again and they've been proven every single time eventually.

MR. HULTMAN: Oh, come now, Elliot, come now. Every single case?

THE COURT: When counsel were at the bench during this witness's testimony Mr. Crooks made the statement that this was the witness that Mr. Lowe in his opening statement referred to as being of mental imbalance. During the recess I looked up the statement that Mr. Lowe made and I'll quote {4655} it. "And finally we believe that you will find the witness, at least one witness, whose mental imbalance is so gross as to render her testimony unbelievable."

Now, I'll ask, Mr. Lowe, were you referring to this witness?

MR. LOWE: Your Honor, I will state very clearly that as is the case in all opening statements I was stating the testimony that I at that point expected would come in concerning Myrtle Poor Bear. And I had, of course, at that point not talked with Myrtle Poor Bear. We had never been able to have an interview.

I made that as a good faith statement, I believed that that was what the evidence would be, and at this point we now have the witness herself. And sometimes opening statements turn out to be accurate and sometimes they don't. But that statement was in good faith and it was made without Myrtle Poor Bear. It was not testimony obviously.

And she was also expected to be a Government witness. She at one time was on the Government witness list. At some point they took her off. It may have been before that or after that, but we fully expected, particularly if the Government's case did not gel as to some of the witnesses that had early on, that we would see Myrtle Poor Bear.

And she was a Government witness last year, never called, but was on the witness list. She was a Government witness {4656} this year on the witness list, and while she was not called at that stage in the trial we had every expectation that she would be called because we believed that the Government would not be able to place the defendant at the scene by any other witness.

We had not had an interview with Mike Anderson at that point. We didn't know his expected testimony. The person was referred to Myrtle Poor Bear.

THE COURT: Now, under the Criminal Justice Act you have had two attorneys plus two additional attorneys plus two additional investigators and you've had them for some considerable period of time, have you not, available to you?

MR. TAIKEFF: Since the time of their appointment as appointees and in the case of most of them, if not all of them even prior to that time, they worked on a voluntary basis.

THE COURT: And, Mr. Lowe, you have been through all of the evidence in this case, and you have been through a trial that last six weeks a year ago this summer, a year ago next summer.

MR. LOWE: That is not accurate, Your Honor. I was through some of the evidence last summer, perhaps a large amount of it, but for example Mike Anderson never testified last summer. Some of the other testimony this year has been different because it's more, or because the details were {4657} different.

But I certainly was familiar generally with the case. I was familiar generally with the documents concerning Myrtle Poor Bear because we had them last year. In fact, Your Honor, the Government delivered those documents to us as 3500 material last year showing not only that she was on the witness list but at one point they expected to call her.

THE COURT: The Court noticed that this witness was under obvious great mental stress. She, her testimony was interrupted at least three times by an emotional reaction of some kind.

The Court is also aware of the extreme difficulty that was encountered in attempting to bring her back into the court at the request of the defendant.

The Court observed that she had a complete lapse of memory on cross-examination relating to recent events.

The Court also is taking into consideration the fact that this witness was not used in the presentation of the Government's case which defense seeks to impeach by her testimony the three FBI agents who interviewed her were not used in the presentation of the Government's case: Mr. Wood, Mr. Skelly and Mr. Price.

And the Court concludes that credibility of this witness for any purpose is so suspect that to permit her testimony to go to the jury would be confusing the issues, {4658} may mislead the jury and could be highly prejudicial.

MR. TAIKEFF: Your Honor, in light of Your Honor's --

THE COURT: The offer of proof is denied.

MR. TAIKEFF: Your Honor, in light of the Court's findings I would like to point out to the Court that at the inception of this matter I said that one of the positions that the defense would take in this case is that the use by the FBI of this person to sign the affidavits in question, because of the observations which Your Honor has made and because her condition has been that way essentially throughout her adult lifetime, and that's why I asked Your Honor for the video tape of her demeanor in this courtroom. {4659}

I originally said to your Honor that the very act of using this witness to sign those affidavits constituted, even if she came forward on her own, put aside the question of whether she was threatened or coerced, that the very act of taking this witness' version, putting into an affidavit and submitting that affidavit, knowing it was going to be used in a judicial proceeding, constituted misconduct on the part of the FBI in connection with this particular Defendant.

THE COURT: I am concerned that much of her mental imbalance may arise from fear.

MR. TAIKEFF: She says fear of the FBI, your Honor, not anybody else.

THE COURT: I am concerned that much of her mental imbalance may arise from fear. I think the record is not at all clear as to where that fear arises from.

MR. TAIKEFF: That's a matter for the jury, your Honor, and a matter

for the Government's rebuttal.

THE COURT: It is a matter for the jury if it were otherwise relevant; but under the Rules of Evidence, this evidence would not otherwise be relevant.

MR. TAIKEFF: I would like your Honor to consider for a moment the testimony that was adduced from the FBI Agents.

Now, I know that there is a presumption that Agents of the FBI act in accordance with law; but surely your Honor {4660} would not take the position that they never do any wrong.

THE COURT: That is not the position that I took. The position that I stated is that it is my observations -- and you will find out after this case is over what part of those observations are based on because I will make a record of it -- my observation is that this witness is under great fear, and I think the record is totally unclear as to the source of that fear.

MR. TAIKEFF: She was absolutely clear on that particular subject. The only hesitation of any kind that was reflected and which I tried to note, if possible, on the record, was when she was asked specifically about threats from Price and Wood. On a number of occasions she paused between 15 and 30 or more seconds.

But let me ask Your Honor to please consider the testimony from the FBI agents. Your Honor has heard a great deal in this case about 302's and FBI procedure; and if your Honor had never presided over any other criminal case involving the FBI, I would assume that by this point your Honor was inundated and saturated by that information.

Now, consider what the testimony was. There were three affidavits. There were dated February 19th, February 23 and March 31. There is no 302 for the February 19 affidavit. There is a 302 which appears in some way to correspond to the February 23rd affidavit, except {4661} interestingly enough, it shows an interview of February 24, and then there is a 302 which corresponds to the third affidavit, both documents being dated March 31.

Where did Myrtle Poor Bear come from? Can you imagine with what your Honor has heard so far about the practices and procedures of the FBI that a witness such as Myrtle Poor Bear, who was not only an eyewitness to the killings according to those documents, but was privy to the planning, the

advance planning, would suddenly walk in or appear in the life of the FBI and give an affidavit directly and immediately to be sent to Canada, and there would not be a 302 as thick as I am tall detailing everything she could remember about anything since the day she was three years old?

I wish that I were talking to an individual at this moment who was not a United States District Judge, so that I could fully express how ludicrous it is to believe that that event could have occurred that way. It is not possible. It is not within the realm of human experience that that could have happened. There must be a 302. There must be some explanation of where she came from. There must be an explanation of why they say there is no 302.

Ah, yes, I am reminded of something in the affidavit of February 19th which perhaps suggest why there is no 302. On Page 2 of that affidavit it merely says that she {4662} was a witness to the planning, that she left immediately after the planning and didn't see the Defendant again until August of 1975 when she saw him on the Rosebud Reservation. No wonder there is no 302 any longer in existence, your Honor, because that 302 was prepared like every other document in connection with Myrtle Poor Bear and had to be gotten rid of because it was something they couldn't live with.

Now they come along and they manage by some magical process to come up with the contents of the affidavit of February 23, no 302, no explanation.

Your Honor talks about Myrtle Poor Bear's lack of memory. How about Agent Price's lack of memory.

I once said at the beginning of this case that my experience shows that from time to time law enforcement officers have convenient lapses of memory, and your Honor became somewhat incensed that I made such a rash statement. Well --

THE COURT: (Interrupting) Mr. Taikeff, you are misstating the record.

MR. TAIKEFF: Your Honor thought my statement was inappropriate, that I suggested that officers of the law --

THE COURT: (Interrupting) I have suggested from time to time that you have made inappropriate statements, but your statement in that respect was a misstatement of the {4663} record.

MR. TAIKEFF: That is my best recollection, and I say it in good

faith.

THE COURT: I know you are saying it in good faith. I am telling you it is a misstatement of the record.

MR. TAIKEFF: You and I again have a factual disagreement. I expect that your Honor's statement is valid, and is more valid than mine.

THE COURT: I have ruled.

MR. TAIKEFF: I understand, sir. I am calling your attention to the area of the testimony to which your Honor did not address himself. Your Honor said absolutely nothing about the documentation and what it suggests; and then if I may just complete my argument with respect to the documentation:

Mysteriously and without any explanation we have a 302 the next day.

Now, we have had an explanation from Price. When it suits him, he gives one explanation; when that explanation and its implications are called to his attention because of an apparent contradiction, he suddenly doesn't know anything, obviously the sign of a truth teller.

Why was there an affidavit on February 19th -- and he was asked -- and no 302? It was because of the extradition. Affidavits are better than 302's. Why settle for {4664} a Cadillac when you can get a Mercedes Benz?

Then again on February 23 there is another affidavit without a 302, ostensibly the same explanation; and then the next day when they didn't one, they had a 302. Wonder of all wonders.

Now, by the time they get the third affidavit -- maybe the rules change every day at the FBI -- they get the third affidavit, they have another 302.

Your Honor, that alone should make your Honor suspicious, that alone should make your Honor feel conscience stricken that the jury isn't going to get a chance to consider that.

I would like to ask your Honor for a ruling as to whether her testimony or the entire episode, however your Honor views it, would be irrelevant even if she were a believable witness.

THE COURT: The Court has ruled.

MR. LOWE: Your Honor, may I just expand on that one moment with the indulgence of the Court?

In doing an appellate record, if that should ever come to pass in

this case, it is going to be extremely important for the Appellate Court to know whether you are ruling simply she is not a believable witness as a matter of law. Even if she is a believable witness, it would be irrelevant. It may, among others, affect what belief would be given on the appellate record, whether it would be harmless error or not.

{4665}

And I would respectfully urge Your Honor to clearly, I thought Your Honor said it was irrelevant anyway. If that was Your Honor's ruling I would think this should be clear on the record you were ruling that.

THE COURT: I think you stated it correctly. The Court rules, number one, that it was irrelevant and, number two, that the witness was not a believable witness.

MR. LOWE: Thank you, Your Honor.

THE COURT: That is related to a collateral matter.

MR. LOWE: Yes.

THE COURT: Are there any other matters that should be brought before the Court out of the presence of the jury?

MR. LOWE: Yes, Your Honor. I have one I'd like to approach the bench on.

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

{4666}

Pages 4666 through 4672

SEALED AND FILED WITH CLERK UPON ORDER OF THE COURT

{4673}

MR. LOWE There is one other thing I want to clear up. First of all, we have the laboratory reports and Your Honor has not yet told --

THE COURT: I have not yet ruled on those. I will rule on those in the morning.

MR. LOWE: I want to remind Your Honor we still have Defendant's Exhibit 177 you're considering also. I hope we could --

THE COURT: Which one?

MR. LOWE: The one with Q numbers on hand on the margin on the green sheet. It's a white sheet, but it's a photocopy. You indicated you would

reserve that ruling. I just remind you it's still outstanding.

There are a couple of offers of proof or just statements of fact which I would like to make on the record to clear up some of the issues you already ruled on. I think we can take care of that in the morning.

I ask the government counsel if they would make available to us a copy of Mr. Peltier's rap sheet, if they have it, and I have no reason to think --

MR. SIKMA: I think at sometime we probably have but --

MR. LOWE: I'll check. WE couldn't find it.

MR. SIKMA: I'm sure we must have a copy of that.

MR. LOWE: Can we just enter into a stipulation? I think it's clear from my understanding he has no convictions {4674} of any kind.

MR. SIKMA: I don't think that's true.

MR. LOWE That's why I wanted to see it because I didn't want to make any representations if that's my understanding. I'll get together with him if we can't find it. At some point Mr. Hultman and I talked about the desirability, I don't think there is any confusion, but to just simply have one of the counsel or the other state that all counsel agree that at this point there has only been reference to one white house, one green house, one log house and one red house in the event, as a matter of fact, I think there are only four houses up there.

MR. HULTMAN: I would not agree to that, John, under any circumstances because there is testimony in this record that would leave that issue open. I would not agree to that as a stipulation at all. The testimony refers to red house, the red house or green house, because there is some testimony that doesn't come out that clear.

MR. LOWE: Well, at one time you and I talked about this.

MR. HULTMAN: There has been testimony now, it's come clearly in my judgment that doesn't indicate that.

MR. LOWE: I just want, at one time I thought you indicated that. I thought it would be helpful. Let me just ask.

{4675}

MR. SIKMA: We have a stipulation --

MR. LOWE: Stipulation on blood. On Exhibit 34H. We have entered into a written stipulation. I have it. I'll give it to the Court in the

morning and read it at some appropriate time that we have entered into a stipulation on that.

This is that stipulation, Judge, and it's been signed by both Counsel.

I may want to delete, there was an omission, just an inadvertence. That's essentially what I gave them. I know you said you were going to oppose it. I raise it to the judge now. He may want to think about it overnight. That was a typographical error and it didn't make any sense in there without those words.

MR. SIKMA: That's what I thought.

MR. LOWE: I'll read that at some point.

Judge, this is something you said at one point you would give an instruction on those charts and, remember, the bullets that were not connected directly, that is, the witness could not say they were fired from those weapons. This is what we propose. I understand Mr. Sikma is going to oppose the particular wording and I just wanted to give you a copy so you could think about it if you wanted to have your clerks look at it or anything. I would want to try to take that up at some point tomorrow so we could work out whatever instruction you {4676} would give them before the end of the defense case and I don't mean to ask for a ruling right this moment unless you want to discuss it now.

MR. SIKMA: Your Honor, basically the reason for the government's resistance to this is it says that there has been no evidence to connect both fragments, government's Exhibit 29G and Government Exhibit 29F with the M1 rifle, Government Exhibit 29A. Then there is a similar statement with regard to 34F, 34H with relationship to 34A. We would say there is substantial circumstantial evidence connecting these and since the law does not distinguish between weight to be given circumstantial evidence and direct testimony, or direct evidence, we would say that this instruction would be highly inappropriate.

THE COURT: Well, the instruction I was thinking of that I had in mind when the matter came up was something to the effect that just the marking of an exhibit 34A, 34B, 34C does not give any indication that there is any connection between it unless there is evidence in the record to show.

MR. LOWE: You would be only referring to the last sentence basically,

or, I don't know if there is anything specific in the last sentence. It sounds to me that that's --

THE COURT: That is in a very general way the type of instruction I had in mind. Simply marking something 34A, B, {4677} C does not give rise to any inference of any connection unless there is evidence to show a connection.

MR. LOWE: May I do this then, Judge: May I lodge that with you as an offer. You can make a ruling on it tomorrow. I would still press it but I will try and draft one in the manner that you have just suggested as an alternate in the event you refused that particular one.

THE COURT: Very well.

MR. LOWE: I don't know, would you mark that with an exhibit or have another way of identifying it for the record.

MR. SIKMA: It would be filed.

THE COURT: The clerk will just treat it as a requested instruction.

MR. LOWE: All right. Fine. And then tomorrow when you rule on it either right, or whatever you normally do to note that the action taken and if there is an alternate I'll have an alternate.

{4678}

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

THE COURT: So that some plan can be made do counsel now have an estimate as to how much more time is going to be required to get the evidence in in this case?

MR. LOWE: Your Honor, I didn't know you were going to ask that particular question, but I'll give you my best answer and what I understand to be the case. The offers of proof have been made based upon Your Honor's ruling. I believe we only have one more witness and that is Norman Brown; and then I would anticipate that he would be the first witness we would call in the morning after taking up whatever matters should be taken up.

There is one other potential, I am told, witness, but would not be one that I would think would take very long. And at this point there is no plan. I'm only advised there is a potential possibility. But Norman Brown is the one that I think we've advised the Government of and to my knowledge is the only one we're going to call. If there's any change

overnight I'll notify you, but I think generally that's where we are on that.

MR. HULTMAN: Your Honor, I would think that my earlier estimate of two hours I would now cut in half to an hour of rebuttal.

THE COURT: Very well.

{4679}

Are there any other matters then to be taken up at this time?

MR. HULTMAN: Plaintiff has none, Your Honor.

MR. LOWE: Defense has none, Your Honor.

THE COURT: Court is in recess until 9:00 o'clock tomorrow morning.

(Whereupon, at 5:25 o'clock, P.M. on April 13, 1977 the court recessed; to reconvene at 9:00 o'clock A.M. on April 14, 1977.)