VOLUME XX

{4197}

TUESDAY MORNING SESSION

April 12, 1977

(Whereupon, the following proceedings were had and entered of record on Tuesday morning, April 12, 1977 at 9:00 o'clock, P.M. without the jury being present and the defendant being present in person:)

THE COURT: When we recessed last night there was one witness apparently left on the offer of proof, Agent Wood.

MR. TAIKEFF: Yes. And there would be a verbal offer with respect to the offer of proof concerning the attorney, Marvin Amiotte, Your Honor may recall.

THE COURT: I am wondering if we should interrupt the offer of proof and go on to other matters so that the jury may be brought in.

MR. TAIKEFF: Your Honor, it makes little or no difference to the defense. Whichever schedule Your Honor prefers to follow.

THE COURT: How much time would you anticipate it would take to present the testimony of Special Agent Wood?

MR. TAIKEFF: Trying to maximize my estimate so that I'm not wrong, I'd say about 30 minutes. Probably will be less but I think 30 minutes should be allowed for it.

THE COURT: I think we will interrupt the offer of proof then and go on to other matters this morning and we'll work in the offer of proof perhaps after the jury is excused {4198} for the day or sometime like that.

MR. TAIKEFF: Would Your Honor allow me to bring a few matters to the Court's attention. I think it should be taken up at this time. I won't take very long. Concerning the subject of requested charge.

I would first make inquiry as to whether the government intends to serve and file any reply to our briefs?

MR. HULTMAN: I'm not quite sure to what Counsel is referring, Elliot. Maybe you could indicate which ones and I might be in a little better posture.

MR. TAIKEFF: It's my understanding, I did not handle that portion of the case, it was done by Mr. Engelstein and Mr. Nadler, but the defense has submitted its own requested charge and in addition to which it has

submitted two memoranda, one in support of its proposed jury instructions and one detailing specifically the basis for the opposition to certain government charges.

The reason I raise the request about a government response is because I wanted to ask the Court to set aside some time so that Counsel could be heard and so the Court could make its decision and advise Counsel because I think the final preparation for the summation should reflect Your Honor's ruling with respect to certain key and important instructions to the jury. That's the reason why I bring it up now so that appropriate time can be set aside for whatever has to be done.

{4199}

MR. HULTMAN: In response, we have submitted our request, Your Honor, and we intended to stand on that posture and not respond further.

THE COURT: It is not your intention then to respond to the two memos that defense has filed?

MR. HULTMAN: It is not. It is not, Your Honor.

THE COURT: The Court will allow time for oral argument on the points raised in defense memorandum.

MR. HULTMAN: We would intend to respond at that time, Your Honor.

THE COURT: I would expect that. You do not intend to file a written response?

MR. HULTMAN: Nothing further.

MR. TAIKEFF: I assume Your Honor will make some provision to advise the Counsel of the rulings prior to the time that Counsel has to make its final preparation for summation so that arguments are not made which are inconsistent with the view of the law that the Court will take to the jury?

THE COURT: I will anticipate I would be able to rule immediately following the oral argument.

MR. TAIKEFF: I would assume that Counsel would then be given some time to reflect upon Your Honor's ruling in terms of what has to be adjusted in the closing arguments. That's the reason why I bring it up what may seem to be a somewhat early time,so that there can be that period of {4200} reflection without interfering or delaying the proceedings then.

THE COURT: I recognize the problem. It has always been my practice to get into matters of instruction until all the evidence is in so as far

as Counsel are concerned --

MR. TAIKEFF: We have no objection to that. We wanted to be in a position to make an early comment on the subject. Whatever the Court deems appropriate. As long as we have a reasonable amount of time it is of no concern to us. We didn't want the Court to feel that we brought the matter up in the eleventh hour and 59th minute and thereby interfere with the Court's anticipated schedule.

THE COURT: What do you consider unreasonable time?

MR. TAIKEFF: Overnight would be perfectly adequate, in fact quite adequate.

THE COURT: I can see no problem with that request.

MR. TAIKEFF: Thank you, Your Honor.

I'm wondering whether the government has available for the defense the AR15 which was recovered in Oregon. We intend to make use of that today.

MR. HULTMAN: It is available.

MR. TAIKEFF: I would just indicate that once the jury is brought in it would be appropriate if it could be in the courtroom because we're going to offer it in evidence.

MR. HULTMAN: I would want to indicate on the record {4201} and undoubtedly we're going to have some resistance. We'll have it available but I'm sure we'll have resistance.

MR. TAIKEFF: I certainly didn't mean by the government cooperating by bringing it here had to waive any legal rights.

Your Honor, there is something concerning Defendant's Exhibit 75 which in part is in evidence and in part is merely marked for identification and I wanted to take this opportunity to have a pre-offer ruling so as to eliminate legal argument at the time.

Your Honor, I have one more example of how fortunate we are to have Mr. Hanson watching over us all. Apparently what was originally Defendant's Exhibit 75 for identification, the entire 36 page 302 was modified by removing all pages but pages 1 and 2 which are in evidence. So that should be reflected in the record because I misspoke a moment ago.

MR. HULTMAN: Which 302, Counsel, are you referring to?

MR. TAIKEFF: Referring to the radio transmissions 302.

Your Honor, at this time I would ask for a pre-offer ruling concerning

an entry at 1:26 P.M. which is a transmission according to the entry on page 4 of that 302, Adams to Coward.

{4202}

Now, your Honor may not have the entire document; but I have a copy here and I can hand it up to Mr. Hanson.

(Court examines document.)

THE COURT: You may proceed.

MR. TAIKEFF: In reviewing the transcript in preparation for summation, it is rather apparent that Agent Adams' position on the subject is that, "Yes, he did make a transmission concerning a certain vehicle, but that occurred at 1:30," which he relates to certain events which occurred, namely, somebody coming on the premises and then maybe a short time later, apparently under the watchful eye of the law enforcement officers.

As the record now stands, it could be argued more effectively by the Government than I think they are entitled to argue, that there was only one transmission and that a mistake was made by somebody somewhere, that didn't occur at 12:18 but it occurred at about 1:30.

As a result of our anticipation that that kind of an argument will be made, or at least could be made, we think it appropriate that we introduce into evidence that particular transmission of 1:24 p.m., which is undoubtedly the transmission that Adams speaks of as having been made at approximately 1:30.

However, with both of them in evidence, namely, the 1:24 transmission and the 12:18 transmission, the argument {4203} becomes much easier for the defense to make, and therefore, we would propose to offer that additional transmission; or if the Government feels it appropriate, any additional transmissions that should be offered along with it to supplement our body of evidence for the purposes of making the argument outlined to your Honor.

I think I may have -- because I don't have the document in front of me, your Honor -- I said 1:24, I think the time is 1:26.

THE COURT: 1:26 is the time.

MR. TAIKEFF: Yes, sir.

That clearly, I think, is the transmission which Adams was talking

about when he made reference to the 1:30 p.m. transmission.

MR. HULTMAN: Counsel, is what you are indicating -- might I make inquiry, your Honor -- that the 1:30 testimony of Adams in effect is the 1:26 transmission, is that what you are saying?

MR. TAIKEFF: Yes.

MR. HULTMAN: One and the same?

MR. TAIKEFF: Yes, I believe indeed they are one and the same. There is also additional testimony, as I recall from Adams concerning a person who arrived on the scene, was apparently not a person who was suspect in any way because he wasn't interfered with. He then left the scene {4204} shortly thereafter, and that testimony was said -- or rather those facts were said to have occurred at approximately 1:30.

At a different point in Adams' testimony -- and I believe it was on cross examination -- he explained that he did make a transmission about a pickup, but it wasn't at 12:18, it was at 1:30; and in fact he did, and that is the transmission; but I think it important for the jury to see and for the defense to have an opportunity to argue that there were separate transmissions, and in fact there was one at approximately 1:30 as he stated, but most importantly there was an additional one at 12:18; and if the jury doesn't have before it evidence of the fact that there are two separate recordations, then it leaves the Government in a position that they should not be in to argue that the time was recorded incorrectly, that there was only one transmission and there is a dispute about the time.

MR. HULTMAN: I don't see any problem, your Honor. It is my understanding that it is that one line that you really want in; and if that -- I mean the time and what follows, and if that is true, the Government has no objection to that, your Honor.

I think the rest of the page, as indicated, is not requested; and the Government would concur that that time {4204A} and the info that does follow on that one transmission would be included, we would have no objection.

THE COURT: m at paragraph on Page 4 of what was originally marked Defendant's Exhibit 75 under the time designation of 1:26 p.m., which reads as follows: Adams to Coward, south of Oglala, pickup came in here and he just left, can't get any BIA people on it. We have, can you get on Channel

1 and tell them to turn that tower on? -- will be admitted.

MR. HULTMAN: Your Honor, when I do look at some of the other items now on the page, and because there is another transmission at 1:31 which again includes Adams and goes to some of what counsel is referring, I think it might be wise and the Government would seek the whole page to come in. It might show the sequence a little better.

(Counsel confer.)

MR. TAIKEFF: May I confer with Mr. Hultman for a moment? We might have a simple mechanical solution.

(Counsel confer.)

MR. HULTMAN: Your Honor, I think now the Government and the defense are willing by stipulation to enter the first four pages, and then everything will be in sequence.

MR. TAIKEFF: We are agreeable, your Honor; and may we suggest, if your Honor approves, that we merely take Pages 3 and 4 and supplement the existing exhibit. The {4205} record reflects, of course, what we are saying so there won't be any confusion in that regard.

THE COURT: Very well. On agreement of counsel Pages 3 and 4 will be added to Pages 1 and 2, and the four pages will represent Exhibit 75.

MR. HULTMAN: Is that all, counsel?

MR. TAIKEFF: There is only one other matter, and That is this, your Honor: Yesterday afternoon your Honor asked counsel to come forward, and your Honor made inquiries about certain witnesses for whom subpoenas had been requested, and I understand from somebody in the defense team, were issued at approximately 11:00 o'clock yesterday morning and then temporarily recalled until your Honor had occasion to speak with counsel.

In reference to one of those two witnesses, not the attorney, I advised your Honor that that person was an alibi witness concerning the whereabouts of Jimmy Eagle during the afternoon of June 26; and because of the events of yesterday, I was not as cognizant of every factor as I should have been, and I said to your Honor in view of your Honor's ruling on the Jimmy Eagle matter, I conceded that it would not be necessary to call that person at this time. However, in reflecting upon yesterday's activities in the evening, I realized that a portion of Jimmy Eagle's testimony was heard by the jury, namely, his specific claim {4206} that he was not there and

that he was at his grandmother's home.

Now, in regard to that, there is a 302 which indicates an interview by J. Gary Adams and Ronald W. Bienner, the gentleman who has been here assisting Government counsel; and they interviewed that person, and that person told them on November 13, 1975, that on June 26, 1975, she was at the residence of Jimmy Eagle's grandmother, Gladys Bisenet, and Jimmy Eagle was at the Bisenet residence all afternoon and that Eagle was there visiting his grandfather.

Now, it seems to me that in view of the fact that Jimmy Eagle has testified that he wasn't there, until and unless we are reasonably certain that the Government isn't going to take a contrary position in argument, we should be allowed to introduce that testimony.

Now, if Mr. Bienner would take the stand or the Government would make a concession or a stipulation concerning this interview, we can avoid the necessity of sending for her on the Reservation; but I think in some way the defense should be made secure that the issue of Jimmy Eagle's presence is not in dispute, and if it is, then I think we should be entitled to call that alibi witness and any other alibi witnesses that we have because that is a matter for the jury's consideration.

{4207}

MR. HULTMAN: Your Honor, we come back to the basic proposition. The Government has not introduced any evidence of any kind concerning Jimmy Eagle. It's only the defense that has, and that evidence has been that he was not there. And the Government does not contend in any way, hasn't, isn't nor will they in the future of the rest of the trial. So a gain it would seem to me that the matter we're now discussing is totally irrelevant in any way.

MR. TAIKEFF: Well, I'm wondering whether there's some method of making that position known to the jury. I think we're entitled to make that known to the jury without making any big fanfare out of it.

THE COURT: Well, as I understand --

MR. HULTMAN: It's not a relevant matter.

THE COURT: As I understand counsel for the Government is not going to argue and not going to contest it in argument that the fact of Jimmy Eagle's presence or nonpresence; is that right?

MR. HULTMAN: That is correct, Your Honor.

THE COURT: That is what I understand him to say.

MR. TAIKEFF: Well, I would ask at the very least if the Government is not prepared to make the statement for the jury that it is just made to the Court, and I understand the clear difference between what one says on oral argument and what one says for purposes of evidence. Perhaps the Government {4208} would stipulate that if called Hazel Shields would testify in accordance with what I read from this 302.

MR. HULTMAN: No. The Government will not because the Government resists, Your Honor, that this has no relevancy. That's the reason why I'm not willing.

THE COURT: I think as far as the Court is concerned we'll resolve this by the Court will receive that exhibit on the offer of proof. I see no reason to make, put it in the put it in the case.

MR. TAIKEFF: But the evidence was heard by the jury, that part of it.

THE COURT: The evidence that the jury heard is the testimony of Jimmy Eagle that he was not there. The Government has just said they're not going to contest that or even argue adverse to that.

MR. TAIKEFF: All right.

THE COURT: This would simply be cumulative.

MR. TAIKEFF: All right. That's acceptable to us, Your Honor. We'll take an appropriate position before the jury on that particular subject.

MR.HULTMAN: Is counsel now completed?

MR. TAIKEFF: Yes.

MR. HULTMAN: I have just one item, Your Honor, and I'm not set to argue it and I don't request time of the Court. I want to save time. {4209}

Yesterday it was brought to my attention that a William Muldrow will be called as one of the names given to me. And so I want to, on the record, place my objection to that testimony, and I think I can do it far quicker by putting it in writing instead of standing up and discussing it, and so that's the purpose. And part of the motion, and as a part of our Motion in Limine.

THE COURT: Defense have a response to --

MR. TAIKEFF; Your Honor, I have not had an opportunity to examine the papers except I can say this in response: That Mr. Muldrow is going to be called for a limited purpose, and that is concerning the events and his observations of condition on the reservation in the days immediately following June 26th. And --

THE COURT: And that is relevant to this case in what respect?

MR. TAIKEFF: That is relevant as rebuttal evidence to the Government's evidence and theory that the defendant's flight from the reservation and his going to Canada was a reflection of his guilty knowledge. And as we've previously indicated to Your Honor there was another reason for his flight which had nothing to do with any guilty knowledge, and this is evidence of what prompted him to leave and go to Canada.

MR. HULTMAN: Your Honor, there is no showing of any kind in this record as to when the defendant did leave. And {4210} if counsel is willing to stipulate that into the record then maybe there's some basis that we would have some argument But as it stands right now there's not any showing in this record as to when this defendant did leave.

We know at a certain time he was in Oregon, but that's, and the record shows, at least it's arguable of course, but there is evidence in the record that shows he was there on the 26th and then he's in Oregon. But there's no showing as to how long a period of time or how long a time he was on the reservation.

But the point I wish to make is I have outlined, I won't argue, is simply what I've said on a page and a half; and the rest of it, Elliot, is the report itself with which I'm sure you are familiar, and that's probably what he's going to testify to. And secondly, his testimony at the last trial which you've had a copy of. So the only parts of this that are new to you is the page and a half that I've set out as my basis for it being relevant.

MR. TAIKEFF: Well, I have to admit that I did a sloppy job on Mr. Muldrow's preparation. I didn't read his testimony from the last trial and I didn't read his report because I interviewed him and planned to call him on one point only, and that is the observations he made and the conditions which existed in the days immediately following June 26th. And I don't intend to go into the other areas which {4211} perhaps are the

areas that the Government objects to.

But to answer the first point that Mr. Hultman made, as a general proposition his point is well taken. What he overlooks is that in the record there is testimony by Jean Day that she met with the defendant in the Pine Ridge area after the funeral of Joe Stuntz, which she thought was on July 2nd. So they met on July 3rd or July 4th. That means, I think by reasonable inference, that he continued to be on the reservation until at least July 4th which is approximately a week after the event, and it is that period of time that Mr. Muldrow is going to testify about.

THE COURT: And I presume from what you have suggested that his testimony will be somewhat cumulative of other testimony that you've put in so far as the number of agents on the reservation, the fact that there was armored personnel carriers on the reservation and helicopters.

MR. TAIKEFF: He's not going to testify to that fact, but he's going to testify to the atmosphere which was in fact created as a result based on his own observations and interviews. Because he went there to make an official government study of the conditions. And as part of that testimony he forges the last link in that chain of evidence as to what was the widespread result and reaction of the community to what was happening. Because we have to show besides his mere presence, although I think we could argue reasonably that his mere {4212} presence would reveal to him much of what was going on, but we have to show, because of other testimony, that people came to speak with Leonard.

Jean Day testified that there were other people present and there was discussion about the advisability of staying and whether he should go and why he should go. Mr. Muldrow will establish, based on his own observations and his own official status there as a government official what the reaction was, what the widespread community reaction was and how the residents responded to what went on.

Now that we have what went on in the record his testimony supplements that. It is not cumulative of that.

MR. HULTMAN: Your Honor, might I just respond with one sentence. It appears to me then what counsel is referring to is the testimony that has to do, or summarized by the inner-office memorandum of July 9th, and is not the one in January, February, nine months later. As to that again,

Your Honor, I would say all of that discussion and those observations are clear hearsay, that they are biased, a one-sided examination and that if the Court will look at that particular exhibit which summarizes what I expect then his testimony to be as indicated I think you can understand the position of the Government with reference to his testimony.

{4213}

THE COURT: It's not my understanding that you were intending to offer any specific reports.

MR. TAIKEFF: Your understanding is correct if Your Honor thinks I'm not going to offer any reports.

MR. HULTMAN: Your Honor, what I'm saying is that report summarizes all that he's going to testify to. These are the things, am I not correct, Counsel, that basically what he says in the interoffice memo is what you're going to elicit from him from the stand and not put the report in but elicit the same thing from him from the stand?

MR. TAIKEFF: I think there is a lot in the report that has nothing to do with the questions I'm going to ask him so I would have to answer your question in the negative. No. I do not intend to elicit those things.

MR. HULTMAN: I'm going to continually object, Your Honor, to any hearsay. What his observations may have been is one thing but if he saw something and that is relevant, then that's one thing but I'm going to continue to object to a line of hearsay that is a kangaroo court session which obviously by the reading of this report, and that's the part to which I'm going to object to.

MR. TAIKEFF: I don't intend to adduce any hearsay and I trust the government will have an adequate opportunity on cross-examination to establish any bias on the part of this witness who is a federal government employee.

{4214}

THE COURT: Well, you will be permitted to put the witness on the stand and I will rule as may be required by the issues that may arise during his testimony.

MR. TAIKEFF: Thank you, Your Honor. Pursuant to Your Honor's earlier suggestion that one page 302 of Messrs. Adams and Biner has been marked Defendant's Exhibit 218 and I'm lodging it with the Clerk as part of the

offer of proof.

THE COURT: Exhibit will be received on that ground.

May we now bring the jury in?

MR. TAIKEFF: Yes, Your Honor.

MR. HULTMAN: Yes, Your Honor.

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

THE COURT: Members of the jury, you have been kept waiting for a considerable period of time yesterday and for a short period of time again this morning and you may have some additional periods this week when you will again be kept waiting but I do want to give you this assurance, that these periods when you have been kept waiting will not result in lengthening the trial.

MR. TAIKEFF: Your Honor, the defense calls William Muldrow.

WILLIAM MULDROW,

being first duly sworn, testified as follows:

MR. TAIKEFF: May I inquire, Your Honor?

{4215}

THE COURT: You may.

DIRECT EXAMINATION

BY MR. TAIKEFF:

Q Mr. Muldrow, where do you reside?

A In Denver. Colorado.

Q Could you possibly move that microphone a little closer to yourself so it can pick up your voice. You don't have to lean over in the direction of the microphone though. By whom are you employed?

A By the United States Commission on Civil Rights.

Q For how long have you been in that particular occupation?

A Three years.

Q What's the total number of years of government service you have had?

A Three years.

Q Just in that job?

A Yes.

Q What's your educational background?

A I have two Bachelor's degrees from the University of Colorado in engineering and business administration. I have a masters degree in sociology from Princeton Seminary, a Masters Degree in theology from Princeton Seminary. I have three years work towards a PhD in social cultural anthropology from Indiana University.

Q Prior to the time that you became an employee of the United States Government, what sort of work did you do?

{4216}

A I worked immediately prior to being employed by the government for the United Presbyterian Church of the U.S.A. in coordination with the government of Ethiopia doing research and community development work in small tribal works in that country.

Q Did you have occasion in 1975 to do any work in your official capacity on the Pine Ridge Reservation?

A Yes, sir. I assisted in an investigation, the commission did, of the election which had occurred the previous year, tribal election on the Pine Ridge Reservation for the presidency of that tribe, a contest between Richard Wilson and Russell Means.

Q Now in the summer of 1975 did you find yourself on that reservation, that's almost two years ago?

A Yes. I was on the reservation during that summer and also a number of occasions in the months prior to the summertime.

Q Are you able to tell us the dates in either June or July, 1975 that you were on the reservation?

A In 1975? I'm sorry, I can't give you the exact date. I don't have that at my fingertips. It was about three days after the shooting of the FBI agents.

Q If I told you that it is an uncontested fact that the agent lied on June 26th, 1975, does that help in any way to pinpoint the date?

A That would have placed me there on June 29th and for the {4217} succeeding three or four days.

Q So that you were there in the early part of the month of July?

A That's correct.

Q Now, first, I want to ask you about observations which you made with your eyes. What places on the reservation did you go to in the days

that you were there beginning on June 29th?

A I visited throughout the reservation area extensively, including the town of Pine Ridge, the tribal offices, the BIA governmental offices there. I visited the site of the shootings where the two FBI agents and the native American man were killed. I visited various families and persons throughout the entire reservation.

Q By the way, other than the clusters of population in the towns or hamlets or villages, are there residential facilities in between these places on the reservation?

A There are individuals who live in very isolated situations yes, remote from the villages on the reservation and little homesteads or individual houses throughout the reservation.

Q As a general rule, though, how would you describe the area in terms of its vastness and how populated it is outside the immediate clusters which are the little villages?

A General impression one gets when visiting the reservation is extreme isolated, barren area. The population is very sparse {4218} in terms of the tremendous size of the reservation. There are clusters of government houses where people do live in close proximity, but by and large the families are scattered very long distances apart throughout the reservation.

Q Now, sir, during the period that you were there beginning June 29th, did you see any people who you believed to be or knew to be agents of the Federal Bureau of Investigation?

A Yes, I did. And I talked with several of them.

Q Generally how were they dressed?

A Most of the ones that I was able to identify were dressed in combat fatigues, camouflaged combat fatigues.

Q What sort of equipment did you observe was being carried, if any?

A Many of them carried rifles, some of which appeared to me to be automatic rifles. There were a great number of military type vehicles, too, in evidence throughout the reservation.

Q What do you mean by military type vehicles?

A Jeeps and other vehicles with military markings on them.

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

Q (By Mr. Taikeff) I place before you Defendant's Exhibit 206 in evidence and ask whether you saw any objects such as the object depicted in that photograph on the reservation in July of 1975?

A This appears to be an armored carrier of some kind, and {4219} it's my recollection that I did at that time see a vehicle similar to this on the reservation.

Q Now I show you Defendant's Exhibit 200, 201 and 204, all in evidence, and I ask you whether the manner of dress of the people in those photographs is consistent or inconsistent with what you observed in connection with the sightings of the FBI personnel?

A Yes. The fatigue uniforms that these men are wearing are not camouflaged; many of the ones that I observed were, did have camouflage markings on them, but there were many others that did not.

Q What would you say was the total number of individuals from the FBI that you personally saw during your stay?

A It would be very difficult for me to estimate a number. all I can say is that they were quite in evidence both in Pine Ridge and other parts of the reservation I visited. I'm not sure how many there would have been but there were quite a number of them.

Q Do any of the photographs which are before you show any kind of shoulder weapons?

A Yes, they do.

Q And I also place before you Defendant's Exhibit 203 in evidence, calling your attention particularly to the person on the right-hand side of the photograph and the object in that person's right hand. Now with respect to that photograph, and I {4220} notice that you separated out these two, am I correct?

A Yes.

Q That would be Exhibits 200 and 201. What relationship, if any, is there between the weapons depicted in those photographs and the weapons you say you saw?

A I couldn't say definitely that these were the specific types of weapons I saw. I do recall at the time that I was rather surprised to see such a number of shoulder weapons being carried and I noted, I remember noting that some of them appeared to be automatic weapons. I can't say

that these particular weapons are the ones that I saw.

Q Now, sir, did you have occasion in the course of your work to speak with residents of the reservation?

MR. HULTMAN: Your Honor, I'm going to object to any further responses in this area on the grounds of clearly hearsay. It's not relevant and there has been proper foundation.

MR. TAIKEFF: Your Honor --

THE COURT: The question that was asked, the objection to the question that was asked is overruled.

Q (By Mr. Taikeff) You may answer, sir.

A Yes. I did speak with quite a few residents of the reservation.

Q Now briefly and without getting to any responses or contents, what connection if any was there between your official {4221} governmental purpose in being there and speaking with residents of the reservation?

Do you understand how I want to limit your answer at this time for legal reasons? I don't want you to tell us anything you heard, I only want you to answer questions about your activity versus your official function.

A I was there under instructions from my supervisor who was responding from the various requests that the Commission had received for them to do, make an inquiry into activities of the FBI on the reservation following the shooting of their two agents at that time. Many of the complaints --

MR. HULTMAN: If it please again, Your Honor, I want this --

MR. TAIKEFF: Don't --

MR. HULTMAN: -- witness to know very-clearly, and he's a learned man, we only want what's responsive to the question and not get into what other people have told him.

MR. TAIKEFF: Let me narrow it down, if I may ask a somewhat leading question.

Q (By Mr. Taikeff) Did you speak with people on the reservation because that was part of what you went there to do?

A Yes, I did.

Q Now as a result of speaking with people, and how many different people did you interview?

A I can't give you an exact number at this moment, but it {4222} probably was between 30 and 40 people.

Q And in which community?

A In several of the communities in Pine Ridge, Oglala, Allen, Porcupine, various communities around the reservation.

Q Now as a result of speaking with these people concerning the events which were then occurring on the reservation, did you gain any impression as to what the reaction to the community at large was to the events which were occurring, Yes or no?

A Yes.

Q Can you summarize for us based on your own observations and your professional standing --

THE COURT: Before he answers --

MR. TAIKEFF: I'm not going to have him answer, I'm just going to put the question.

MR. HULTMAN: Your Honor, I would interpose the objection I interposed just a moment ago.

THE COURT: I understand your objection. I'll let you finish the question.

Q (By Mr. Taikeff) Do you understand, sir, there may be some legal discussion after I asked the question. Don't answer it until I finish the question and until the judge gives you a signal to answer.

A Would you repeat the question.

Q I will. I'll start at the beginning.

{4223}

Based on your observations on the reservation at that time and upon the interviews that you conducted amongst the residents in several locations on the reservation, did you gain an impression as to what was the general community reaction to the events immediately following June 26th, 1975? I'm looking for a yes or no answer.

MR. TAIKEFF: May he answer that question, Your Honor?

{4224}

THE COURT: Yes, but then I am going to require an additional foundation before you get into it.

MR. TAIKEFF: Yes, sir.

Q (By Mr. Taikeff) Would you tell us whether --

A (Interrupting) Yes, I believe I could. I did form some impressions.

MR. HULTMAN: Now, I would interpose my objection, your Honor.

THE COURT: The additional foundation that I would require at this time before ruling on it is -- the witness has testified that he visited 30 or 40 different people -- now, I would like to know what class of people, whether they were officials, whether they were --

MR. TAIKEFF: (Interrupting) I understand, your Honor.

THE COURT: (Continuing) -- natives living out in the sparsely populated areas, or just what the type and groups of people were that he visited with.

Q (By Mr. Taikeff) Do you understand what his Honor is interested in learning from you?

A Yes, I do.

Q Would you be kind enough to tell him and the jury?

A I talked with tribal officials including the tribal president, members of the tribal council. I talked with officials of the Bureau of Investigation, I talked with, as I indicated, {4225} FBI Agents who were standing around in Pine Ridge, I talked with members -- residents of the Reservation in a variety of living situations.

Q Native American people?

A Native American persons. I talked with reporters and photographers from a variety of news media who were present there.

I talked with members of the Bureau of Indian Affairs police. I tried, in other words, to talk with representatives of most segments of the community at that time.

Q Now, the impression which you say you have concerning the general community reaction, is that based upon all of the things I which you heard and learned from speaking to all of those categories of people?

A That's correct, yes.

Q Now, don't answer the next question until his Honor rules on it.

What is your impression of the general community reaction to the events immediately following June 26, 1975?

MR. HULTMAN: Again I renew my objection, your Honor; and furthermore, specifically in addition to the reasons that I have stated, hearsay, foundation, relevancy on the basis that that in no way indicates or in any is relevant to what the Defendant in this case -- posture was with

relationship to that on that day.

{4226}

THE COURT: The objection is overruled. The answer of the witness will be received on the issue of whether or not the Defendant fled the Reservation to avoid prosecution.

MR. TAIKEFF: Or for some possible other reason?

THE COURT: Or for some possible other reason, that is right.

MR. TAIKEFF: Yes, sir.

Now you may answer my question.

A Based upon my observations and conversation with persons at that time, in contrast to previous visits in the months prior to that time, with persons on the Reservation, it was obvious that there was a climate of extreme tension, emotions were running very high, many persons were frightened for their own safety and for the safety of their family. They were concerned as to whether they would be stopped, questioned, in general there was a high level of fear and tension on the Reservation.

MR. TAIKEFF: I have no further questions.

CROSS EXAMINATION

By MR. HULTMAN:

Q I believe I just have two questions, Mr. Muldrow. The first one is: Do you then see anything unusual about law enforcement officers, after there has been a death in which two individuals who are law enforcement officers -- one, you {4227} don't know anything about what happened on that day -- maybe I ought to establish that foundation -- isn't that correct, you weren't there on the 26th?

A I was not there personally.

Q Now, I am going to show you some photographs which have been entered in evidence here as Government's Exhibit 59, and just have you take a look at those for just a second (indicating).

A (Examining).

Q And ask you whether or not you see anything unusual about the fact that if two agents were found in this kind of condition, brutally killed, anything unusual about a manhunt then following to try and find those who had committed the crime?

A I would see nothing unusual in launching a manhunt.

I think the thing that perhaps at the time I felt was highly unusual was the large force of armed men which were present there and the number of vehicles which were in evidence. I think this too was a major concern of the residents of the Reservation.

Q You have gone on beyond my question in your response, but that's fine.

A I am sorry.

Q Have you ever seen, have you ever been placed in that set of circumstances before or since?

A Following a murder, you mean?

Q Yes, a murder, two deaths of this kind and nature.

{4228}

A I have never been in a similar circumstance as that particular one, no.

Q So you wouldn't have any basis to draw any conclusions, then it would be fair, would it not, that there was nothing necessarily unusual about it?

A Well, I just --

Q (Interrupting) Answer my question "yes" or "no" if you can.

A I don't think I can answer "yes" or "no".

Q Give me the best you can then, fairly and squarely.

A It was my impression at the time that I was very surprised and startled at the size of the force.

Q Now, this is after the 26th of June, right?

A That's correct.

Q You are not saying that this force was there on the 26th or before the 26th of June?

A No, sir.

Q All right. Now, I just have one other question: In response to, I believe, the last question of counsel or maybe the next to the last question, you said in response to that question -- and I know the first two words are correct, I am not sure of all that followed -- but you said in contrast you found at the time you were there and the things I have just queried you about, a climate of extreme tension and so forth.

Now, what did you mean by "in contrast", were you comparing {4229} that time to some conditions that you observed prior to that time?

A I had been in close contact with the Reservation for the previous six months actually, and we had been concerned about the rising climate of fear and tension on the Reservation; but during my visit following the June 26th shooting, it was obvious that this climate, this tension and fear, was much greater than it had ever been before in my observation.

MR. HULTMAN: I have no further questions, thank you.

MR. TAIKEFF: No questions. The witness may be excused if the Court please.

THE COURT: You may step down, and you are excused.

THE WITNESS: Thank you.

(Witness excused.)

(Counsel confer.)

MR. TAIKEFF: Defense calls Special Agent Coward.

Your Honor, while the witness is being advised of his appearance, I would like to note for the record that Defendant's Exhibit 75 in evidence, which is a portion of the 302 concerning recordation of certain radio transmissions, or relating to the subject of certain radio transmission, has been expanded by consent of counsel for both sides to now include Pages 3 and 4, so that Defendant's Exhibit 75 consists of the first four pages of Special Agent George O'Clock's 302; and with your Honor's {4230} permission, I would like to read one entry from the fourth page to the jury.

THE COURT: The record may show that the additional two pages have been added to that exhibit, and you may read the entry that you refer to.

MR. HULTMAN: The Government has no objection.

MR. TAIKEFF: Thank you.

The entry reads as follows: 1:26 p.m. Adams to Coward, south of Oglala, pickup came in here and he just left, can't get any BIA people on it. We have, can you get on Channel 1 and tell them to turn that tower on?

That's the end of the entry, your Honor.

FREDERICK COWARD, JR.,

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

MR. TAIKEFF: Your Honor, may the witness be advised that he continues

to be under oath from his earlier appearance?

THE COURT: The witness is so advised.

DIRECT EXAMINATION

By MR. TAIKEFF:

Q Agent Coward, I am placing before you a single sheet of paper which has been marked Defendant's Exhibit 219 for identification. I am also placing next to that piece of paper a pile of documents which I think you will recognize as being {4231} a number of 302's.

Now, sir, in connection with the piece of paper, the single piece of paper -- do you wish to look through those 302's?

A I will wait if you wish.

Q Go ahead and do that. It may be helpful if you do that right away.

A (Examining).

Q Now, you recognize that the pile of 302's concern this case, correct?

A Yes, sir.

Q And they are 302's of yours and three of your colleagues, namely, Adams, Waring and Skelley, is that right?

A Yes, sir.

Q Now, with respect to yourself, there is a copy of your 302 in that pile, is that correct?

A Yes, sir.

Q And that 302 in essence covers the events, or at least your main report concerning the events of June 26th, is that right?

A That's correct.

Q And on the face of that report, it shows that the date of interview, which also means date of event, as June 26th?

A I believe so. (Examining) Yes.

Q And date of dictation, June 30th?

A Yes, sir.

Q And date of transcription or typing, July 3?

{4232}

A That's correct.

Q All 1975?

A All 1975.

Q And the typist apparently was a person with the initials "p.m."?

A Yes, sir.

Q Now, will you look at the marked exhibit and tell me whether that chart lists your name, a fair description of what that 302 generally refers to, and the date of interview, date of dictation, date of transcription and the typist's initials accurately?

A (Examining) Yes, sir, it does.

Q O.k. Now, you find entries, do you not, for Gary Adams, Fred Coward -- you are Fred Coward -- Gerard Waring and Edward Skelley?

A Yes, I do.

Q And you have six additional 302's other than the one which is your own 302, about the events of June 26th. Would you check them to see that the corresponding entries on the marked exhibit are accurate?

A Well, there is five to begin with that I have here in front of me other than mine.

Q Other than yours?

A Yes, sir.

Q You have two of them for Gary Adams?

{4233}

A (Examining) Two of Gary Adams'.

Q All right. Would you check the information on those against the entries on the marked Exhibit, please?

A (Examining).

Q May I conclude from the nod of your head that you find those entries to be accurate?

A Yes, they are.

Q O.k. Now, do you find -- by the way, before we go -- well, I don't mean to retard your looking in any way.

The next person is Waring, do you find two 302's relative to Waring's activities?

A Well, I can see one, and then here is another one where he is combined.

Q Yes, where he is combined with other agents, a so-called crime scene examination is what I am talking about.

A O.k.

Q All right. Would you check the entries on the marked exhibit with respect to Agent Waring for the particular category of information I have mentioned?

A (Examining).

MR. SIKMA: Your Honor, may I inquire, is counsel talking about the particular information concerning the dates or all of the information in all of these various 302's?

MR. TAIKEFF: No. The piece of paper which is before {4234} the witness, your Honor, lists -- the document is broken down into four categories by name of agent, and then describes in the most general terms the subject matter, the overall subject matter, the date of interview, the date of dictation, the date of transcription and the typist; and the witness has thus far said that the entries are fair representations of what the reports show, and I am almost finished going through the chart with him.

THE COURT: Very well.

A (Examining) O.k., as far as Waring they appear to be like you have it on the sheet.

Q (By Mr. Taikeff) O.k. Now, Waring's crime scene, 302, which is the second one listed for him, other than the exhibits which are attached, is a four page, single-spaced report, is that correct, or 302, if you prefer?

A Which one are you saying again, please?

Q That's the Waring, so-called crime scene, 302.

A Crime scene, o.k. (Examining) I understand, how many pages is it?

{4235}

Q It's a four page single-spaced plus exhibits which are attached?

A Plus exhibits, yes, sir.

Q Okay. Now, that leaves only Agent Skelly and you should ave two, 302's relating to Skelly's activities?

A Two? I have one

Q All right. Is that a multipage report or a single page report?

A Well, the one that I have in front of me -- oh, here's another one. It's two.

Q Right. Now, will you check those entries.

A Yes, sir.

Q Accurate on Defense Exhibit 219 for identification as to the information shown?

A Yes, sir.

Q Thank you Now, sir, I would like to have you direct your attention to the subject of the sightings made at a distance from near Highway 35. Do you recall that involves one way or another with you and a BIA officer by the name of Stoldt?

A Yes, sir.

Q Now I'm showing you Defendant's Exhibit 195 for identification which is a one-page 302 which reports in substance Stoldt telling you that he saw Jimmy Eagle.

A That's correct.

Q And that's the report that you testified earlier, although {4236} it says date of interview June 28th, it was really June 26th?

A That's what I remembered.

MR. SIKMA: Your Honor, I would object to this line of questioning as having been gone into extensively on cross-examination of this witness.

MR. TAIKEFF: That was a foundation question, Your Honor.

MR. SIKMA: Case in chief and notwithstanding the fact that it's a foundation question it's the same area of inquiry.

MR. TAIKEFF: I don't think that's in dispute, those facts. I was just laying the foundation so that the subject matter would be clear to the jury.

THE COURT: Proceed.

MR. TAIKEFF: Thank you.

Q (By Mr. Taikeff) Now, are you certain that you obtained that information from BIA Officer Stoldt when you were talking informally in an automobile in which you were riding together in the latter part of the day?

A Well, as I've stated before that the information contained in this 302 was a result of a brief conversation that Marvin Stoldt and I had along with Vincent Breci on our way back to the Harry Jumping Bull residence after, you know, our situation that day.

Q Okay. Everything that you say is clear except the one thing {4237}

you didn't specifically confirm which is the thing I was asking you about, is: Was it in a car that you were all together?

A Oh, yes. Yes, absolutely. And you are sure of that, as sure as you can be from your memory?

A As sure as I can be from my memory.

Q Okay. That's what I wanted to find out. Now, sir, I'm going to place before you Defendant's Exhibit 194, part of which is in evidence now and can be referred to by reading aloud if necessary. However, I wish to caution you that the part of it which is in evidence begins here (indicating) next to that little blue dot at the bottom of page 3, and continues down to this blue dot (indicating) near the bottom of page 4, and only those three paragraphs are in evidence.

A Do you want me to read those?

Q You can look at them to refresh your recollection concerning that report. I would like to just make sure that the jury understands that this is a report of an interview you conducted of Marvin Stoldt on or about September 4, 1975. And that, by the way, was the second time that you ever spoke to him in your life?

A Oh, that's not true.

Q On the subject of identifications?

A On the subject of identifications, yeah.

Q Okay. Good. Just so the jury knows which report we're {4238} referring to.

A Okay.

Q Now, sir, on page 4 of that exhibit the first full paragraph, the first sentence says: "Stoldt stated that during the first statement he had given to the FBI a few days after the shooting of the agents he told the agents then, one of the agents being Agent Coward, that he saw Jimmy Eagle in the group that he had just identified but was not absolutely positive during the interview."

You dictated those words, did you not, to the stenographer who eventually typed this report?

A I did.

Q And presumably he or she typed what you dictated?

A Yes, sir.

Q And then you initialed the report as being accurate as far as you could tell at that particular time?

A To the best of my knowledge, yes.

Q Yes. Well, can you offer us some explanation as to why your report in September makes reference to a statement Stoldt purportedly gave to the agents, including you, "a few days after the shooting".

MR. SIKMA: Your Honor, I believe this matter was covered in cross-examination of this witness at length. I think it was in pages of the transcript from 1209 to 1369. This witness was cross-examined at length about this. It's {4239} totally repetitious and irrelevant.

MR. TAIKEFF: Your Honor, this is the first time I've been able to read to the jury because it's the first time we've had in evidence the actual text of that paragraph. And now we've had the testimony of Marvin Stoldt, and under the circumstances I think it appropriate for this question to be put to this witness at this time.

THE COURT: I will allow this question, but I'm not going to allow you to go through the same material that we went through --

MR. TAIKEFF: I have no intention of doing that, Your Honor.

THE COURT: Very well.

A Well, the only answer in reading this that I can give is that it's a mistake that I made based on what I'm reading here, and the only explanation that I can give is that when I prepared this 302 I would have gone back to the other 302 that was dictated the 28th and used it for purposes of putting down the information on the paper.

Now, as I sit here and tell you the only two times that I ever discussed this type of situation with Marvin Stoldt was on the day that we drove back from the Jumping Bull's and the day that he came in the office.

Q (By Mr. Taikeff) So if I understand what you are saying you had reference to the earlier 302 which is Defendant's {4240} Exhibit 195 for identification and that sort of mislead you into what went into the second 302 because of the error which is in the lower left-hand corner of that exhibit, am I right about that?

A Well, what I'm saying is that to refresh my memory, you know, of a particular time we discussed there's so many things happened, you know, different times that we're talking to people and that I would have

gone to the file and used it as a reference, yes.

Q Well, as a general rule would you say that if you experience something that your memory as a general rule is better close to that event than further from that event?

A Well, it depends. It depends --

Q But generally speaking, is that not your experience with your own memory?

A With my memory, it is, yes, sir.

Q All right. I think we probably all have the same experience, don't you?

A Yes.

Q Now, when you were talking with Stoldt in September, that was a little more than two months after the event, if you made any reference to your 302, explain why you did not recognize the error of the June 28th, only two months later, considering the fact that in this courtroom you instantly recognized that fact and said, "Oh, that date is wrong, that couldn't be the 28th".

{4241}

A Well, the only way that I recognized that is because of the fact that some things, some impulsive thing that you asked me a few weeks ago about this, you know, it triggered my memory, it refreshed it.

But to say that I would have had the same response, or the same feelings the day I interviewed him I couldn't say that. I mean, certain things will trigger it.

But as I sit here and tell you now the only two times I've discussed this with Marvin Stoldt was on the day we came back and the day that he came in, and that's the truth.

Q This second sentence of that paragraph which concludes the paragraph says: "Stoldt continued and stated, but since then I have continually thought about what happened on June 26, 1975 and at this time and during this interview he was positive in his own mind that Jimmy Eagle was the individual that was running behind the person who appeared to be Leonard Peltier."

Now, what I want to know is, is there any kind of administrative or typographical error here or did Marvin Stoldt on September 4, 1975 tell

you in words or in substance that he was positive in his own mind that Jimmy Eagle was the person he sighted?

A Well, I asked him that question and he said he was positive.

Q You previously told us, and in reference to Defendant's Exhibit 92 for identification, that you signed an affidavit concerning the sighting. Do you recall that?

{4242}

A Yes, sir, I did.

Q Did you have anything to do with preparing Defendant's Exhibit 109, a similar type affidavit on the same subject signed by Marvin Stoldt?

A None whatsoever.

Q Do you know anything about the preparation or the existence of that second affidavit, Defendant's Exhibit 109?

A I only know it because of what you mentioned last week.

Q Now, you were in the --

MR. SIKMA: Your Honor, I would object to this line of questioning. It's clearly repetitious. This is the same thing we went over the last time this witness was on the witness stand. He's just stated in his foundation that he knows nothing about it I object to any further questions along this line.

MR. TAIKEFF: Your Honor, I have to lay some foundation so as I cover each point the jury has some idea of what the subject matter of my inquiry is. That's the only reason I do this. I acknowledge in answering --

MR. SIKMA: I would appreciate being able to go to the bench at this time.

MR. TAIKEFF: After the Government makes its objection then my statements have to be at the sidebar.

MR. SIKMA: Your Honor, I object to this.

MR. TAIKEFF: Your Honor, I acknowledge, when I ask my {4243} questions that we had gone over it before, only to set the stage for the inquiry. And I think that's appropriate so the jury will know what I'm talking about.

MR. SIKMA: Your Honor, my request to go to the bench?

THE COURT: You may come to the bench.

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

MR. SIKMA: My objection is, Your Honor, that this witness now has

waited around for about two weeks to cover the same ground that we've covered on direct examination. He's indicated he knows nothing about this other affidavit. He filed an affidavit earlier, but this matter was gone into in an area of about fifty pages in the transcript.

We object to certain things that he's already covered which were not only to the case in chief, but this is far beyond that and right back into the area of which has already been covered.

MR. TAIKEFF: Your Honor, if he waited two weeks it wasn't just to testify about this. It was to testify about the Jimmy Eagle aspect of the case.

THE COURT: Well, I'm not concerned about the length of the time that he waited. I'm interested in knowing what it is that you are seeking to bring out that wasn't brought out when you cross-examined him before.
{4244}

MR. TAIKEFF: I think Your Honor should recognize that I am not pursuing this witness concerning his own observations or his earlier testimony; and I am limiting myself now, and I'm almost finished in fact to clarifying certain conflicts, factual conflicts, which arose during the testimony of Marvin Stoldt.

I have not questioned him about his sighting or his particular activity on that day. That matter is thoroughly reviewed. I'm only touching on the two or three points brought out on Marvin Stoldt's testimony I need that clarification on this and he was with Marvin Stoldt and he was a witness of what he was doing and that's the only thing I'm questioning the witness about.

MR. SIKMA: He's now brought up however an affidavit of Marvin Stoldt. I object to this completely Marvin Stoldt isn't on the witness stand and he didn't even ask Marvin Stoldt about that.

MR. TAIKEFF: Are you denying that he signed the affidavit?

MR. SIKMA: No, I'm not denying that he signed that affidavit, but in order for an affidavit to be used or a prior inconsistent statement the witness has to be on the witness stand and be given an opportunity to explain it. Otherwise it cannot be brought into it. He knows that he can't get it in evidence here because of the rule.
{4245}

This witness doesn't know anything about it. Now, I think that it's improper to put that affidavit of Marvin Stoldt's before this witness and ask him questions relating to it.

MR. TAIKEFF: But he might have prepared the affidavit and that's all I asked him, whether he had anything to do with its preparation.

MR. SIKMA: He indicated that he has none and that's why.

MR. TAIKEFF: That was the end of the inquiry.

THE COURT: Then it's closed.

MR. TAIKEFF: Yes.

MR. SIKMA: Okay.

{4246}

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

Q (By Mr. Taikeff) Mr. Coward, I want to ask you about one last point, it concerns some testimony that was given in your absence. You were with Marvin Stoldt at or about the time the sightings were made, is that correct?

A That's correct, sir.

Q And he was near one window and you were near another window, is that correct?

A That's correct.

Q Were there any other people in your immediate proximity that in any way were participating in the activities which I will loosely describe as the sighting?

A Well, there were people in the house. You know, we were all in the house and outside of the house at different times.

Q I'm talking about during those few minutes or few seconds, as the case may be, at approximately 3:45 in the afternoon when, and I'm going to use abbreviation so we don't go over any ground unnecessarily, when you and he made some sightings at a distance first with the naked eye then with certain instruments. Now at that time he was at one window, you were at another window. That was the side of the house that was facing east. I want to know if you recall anybody being in your immediate proximity and in someway participating in that sighting activity?

A Well, I don't know if they were participating in a sighting, {4247}

but there were other people in the house at the time and, you know, I went over to the window because he called me to it, and there are other people around milling. Now whether they were -- because I was looking out myself, I couldn't tell who was behind me. But I do recall there were other people milling around and moving. Now whether they were actually in the, you know, looking themselves, I don't know.

Q Now the total time from his first alerting you until the last observation was made was probably just a matter of a few seconds, wasn't it, ten, fifteen seconds at most?

A His or mine?

Q Or maybe less.

Well, from the time he first got to you and said, "Hey, take a look up there," and until there was nothing more to see up there.

A Seconds; yes.

Q Seconds. Was there a third person involved in any particular way?

A Well, like I said, there were people around going, you know, in and out of the building and possibly while I was down there there possibly would have been somebody there. I can't say because I wasn't watching behind me, you know.

Q Did Marvin Stoldt look through your telescopic sight?

A No, sir.

Q Did he look through any telescopic sight?

{4248}

A Not that I know of. It's possible.

Q Did he look through anything else that you know of?

A The only thing I can say is when he called me over there because I was, you know, I was positioned in such a way I had seen it before but when he called me over there he had binoculars

Q He had binoculars?

A Yeah. He was standing up.

Q Was there some person next to him from whom he borrowed binoculars or did he have them on?

A The only thing I recall is he called me and I came over there, he had them in his hands. Now whether he had them on or whether he got them, I don't know.

Q You're pretty sure of that?

A The best I --

Q Your memory serves you --

A As best I can tell you.

Q Then I would have one final inquiry of you, sir.

At page 1314 in the transcript, tell me whether you recall being asked these two questions and giving the corresponding answers and then I'll put my final question to you. Question: "Now do you know whether a similar sighting was made by Officer Stoldt of that group in which he identified amongst others possibly James Eagle"? Answer: "Yes, sir." Question "And do you know what Officer Stoldt used to make his sighting?" Answer "I later found out they were binoculars."

{4249}

First of all, were you asked those two questions in this case and did you give those two answers?

A You made it. I mean, you asked it and I made it; yes.

Q You understand we have to go through certain formalities sometimes, don't you?

A I realize that.

Q Now, sir, if you tell us now in April of 1977 that your memory is clear that he was wearing binoculars, explain, please, if you can, why you said that you later found out that he used binoculars.

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

Q Anything else you'd like to say on that subject?

A No. That's it.

MR. TAIKEFF: The defense offers Defendant's Exhibit 219 which is the summary of the information from that group of reports.

MR. SIKMA: Your Honor, I'd object to this as {4250} irrelevant, immaterial and not the best evidence.

MR. TAIKEFF: What would Mr. Sikma suggest is the best evidence? I'll offer the best evidence.

MR. SIKMA: Testimony of the witness, Your Honor.

MR. TAIKEFF: This witness has testified from the government documents and said that that summary is accurate.

MR. SIKMA: Your Honor, there are items on there, there are matters on here the type that's a lot of material which is totally irrelevant. I've never seen this before

THE COURT: I'll have to reserve ruling because I have not seen the document.

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

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

THE COURT: The Court is in recess until 11:00.

MR. SIKMA: Your Honor, pardon me. I beg the Court's pardon. Is this witness excused now?

MR. TAIKEFF: As far as we're concerned he is, Your Honor.

THE COURT: You may step down and you are excused.

THE WITNESS: Thank you, Your Honor.

THE COURT: Court is in recess until 11:00 o'clock.

(Recess taken.)

{4251}

(Whereupon, the following proceedings were had without the hearing and presence of the jury:)

THE COURT: Ready for the jury?

MR. TAIKEFF: Yes, Your Honor.

THE COURT: The jury may be brought in.

MR. TAIKEFF: Is Your Honor going to rule on that offer?

THE COURT: I am not prepared to rule on that offer. I want to give some reconsideration to it.

MR. TAIKEFF: Does Your Honor want me to hand to the Clerk the documents which the witness looked at before?

THE COURT: Yes. You can do that. I could rule on it by this afternoon though if I see these documents.

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

MR. TAIKEFF: Your Honor, the defendant calls Agent Harvey.

OLEN VICTOR HARVEY,

being first duly sworn, testified as follows:

MR. TAIKEFF: May I proceed, Your Honor?

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. TAIKEFF

Q Mr. Harvey, have we ever met?

A No, sir.

{4252}

Q Have we ever spoken?

A I think I may have bumped into you walking into the building this morning.

Q Have we ever spoken about your testimony?

A Oh, no, sir.

Q Your occupation, sir?

A I'm a special agent with the Federal Bureau of Investigation.

Q And did you work in your official capacity on this case?

A Yes, sir.

Q When did you begin working on this case, the incident of course having occurred on June 26th, 1975?

A On that date, sir.

Q On that date where were you assigned as a regular matter?

A In Omaha.

Q And then I gather you were transferred temporarily to the Rapid City office?

A Yes, sir.

Q And for how long did you continue working on one aspect or another of this case?

A Until approximately Christmas.

Q Christmas of 1975?

A That is correct.

Q Then I assume other than appearances as a prospective {4253} witness or consultations as a prospective witness you haven't really done any work on this case?

A Since that date.

Q Since December of '75?

A Yes, sir. That's correct.

Q And I assume you were transferred back to your regular home base?

A Yes, sir.

Q Did you work with any of the agents from the Rapid City office, ant let me qualify that question this way: we know that you were all working together in the sense you were all investigating the case, but I mean on a personal basis with one or two other agents going out and executing assignments together?

A We generally worked with more than one individual. Is that what you mean?

Q Yes. You worked in pairs at least as a rule?

A Yes, sir. As a rule; yes, sir.

Q Now with respect to this pairing up in connection with the investigation of this case, did you work with any agents, paired with any agents from the Rapid City office?

A I did on different occasions work with different agents from Rapid and elsewhere, but specifically pairing, no, sir. If I understand exactly what you mean.

Q Let me ask you specifically, do you know J. Gary Adams?

{4254}

A Yes, sir.

Q Have you ever worked with him as a team of two?

A Yes, sir.

Q In connection with this case?

A Yes, sir.

Q On how many separate occasions? If you don't know exactly you can say so and give us an approximation.

A Well, in the period we mentioned, I probably worked with Gary five or six, seven times.

Q As you view it, was there any special or unique characteristic to those five or six assignments that you had now that you can look at it in retrospect?

A No, sir.

Q How many of those five or six assignments had to do with interviewing witnesses, prospective witnesses?

A In the course of six months I must have interviewed 100 people.

Q But I'm talking about things that you did with J. Gary Adams as a team of two.

A I did interview people with Mr. Adams.

Q How many people, if you can tell us?

A Five, six, seven, something like that.

Q You're familiar with the names Michael Anderson, Wish Draper, are you not?

A Yes, sir.

{4255}

Q You know that they are two of the young native American people who lived in and around the Jumping Bull area in the spring of 1975, don't you?

A With reference to Mike Anderson, yes, sir; with Wish Draper, I'm not at all sure.

Q Did you ever interview --

A What the particulars are.

Q I'm sorry. I didn't mean to cut you off.

Did you ever interview Mike Anderson?

A Yes, sir.

Q How many times?

A One time, sir.

Q How long did that interview last?

A On and off a couple hours. Two or three hours.

Q Who was with you on that occasion?

A Mr. Adams.

Q Did you ever interview Norman Brown?

A Yes, sir.

Q He was another young Native American person who had spent sometime at the Jumping Bull area, isn't that correct?

A Yes, sir.

Q How long did your interview of Norman Brown last?

A Probably two hours approximately.

Q Who was with you?

A Who was present at the interview?

{4256}

Q Special agents I'm talking about.

A Mr. Anderson and another agent from the reservation was in the immediate vicinity outside the room but I don't remember what his name is.

Q

A BIA officer or special agent of the FBI?

A No. He's an FBI.

Q Did you have occasion to interview any other young native American people with J. Gary Adams who it was believed or in fact resided for sometime at the Jumping Bull community?

A I may have, sir. Like I say, I interviewed so many people and specifically which ones were with Mr. Adams, I really don't recall.

Q Do you recall the date on which you interviewed Michael Anderson on the one occasion that you interviewed him?

A It was September.

Q 1975?

A Yes.

Q Can you recall the exact date?

A No, sir. Not right now.

Q If I say to you the date September 11, 1975, does that in any way trigger your memory? If it doesn't just say so.

A Well, like, that interview occurred in early September and as far as specific date and everything, it was written up at the time.

Q So that you can't remember it but if you saw a document {4257} you might be satisfied as to what the date was, is that a fair inference?

A Yes, sir.

Q Then I'll show you Defendant's Exhibit 89 for identification and ask you to look in the lower left-hand corner and state whether you'd be willing now to state with some degree of assurance as to the date of the interview of Michael Anderson in September, 1975?

A Yes, sir. That interview occurred on the 11th.

Q And the document I just showed you is an eight page 302 which

you and Mr. Adams wrote or in some way were responsible for?

A Yes, sir.

Q This interview took place where?

A In Wichita, Kansas.

Q And do you recall the location in Wichita?

A Yes, sir. It was the federal building. Whether there's more than one, I don't recall.

Q Any particular office in the federal building?

A Yes, sir. It was probably the marshal's office, United States Marshal's office.

Q Now at that time was Michael Anderson in federal custody?

A Yes, sir.

Q What was he charged with?

A I don't recall the specific violations but something {4258} probably to do with violations of one or more firearms statutes maybe more. I don't recall specifically.

Q When you went to see him, did you make any check prior to that time concerning whether he had any criminal charges pending anywhere?

A As I recall at that time we were not exactly sure who Mr. Anderson was so obviously we couldn't make criminal, the criminal checks, if I follow your question.

Q I understand your answer.

Sometime afterward, in your official capacity, did you have occasion to check on whether or not he was facing criminal charges in a jurisdiction outside of Wichita or Kansas?

A If you're asking me did I specifically make that check, no, sir.

Q Do you know whether that check was made?

A No, sir.

Q Do you know whether Michael Anderson was ever convicted of a burglary charge in Arizona?

{4259}

Q Now, was Mr. Adams with you throughout the questioning of Michael Anderson on September 11, 1975?

A Yes, sir, with maybe one or two exceptions, It has been almost two years, and at least for the majority of the time we were together.

Q Which of you, if it was only one of you, spoke with him first?

A I have no way I could remember.

Q Putting aside who spoke with him first, could you summarize what was the nature of the conversation before he got to any facts concerning the events of June 26, 1975?

A That entire interview was recorded on the appropriate communication, sir, which I don't have in front of me; and I would almost need that to respond to your question.

Q Would placing the 302 before you help in any way?

A Yes, sir.

MR. TAIKEFF: I would be happy to do that.

I am placing before the witness, your Honor, Defendant's Exhibit 89 for identification. I assume the Government has a copy available for itself.

(Witness examines document.)

Q (By Mr. Taikeff) What I am referring to specifically is any possible reluctance on his part to speak with either or both of you and any conversation that you may have had with him to persuade him that it would be in his best interests, assuming {4260} there was such a persuasion, to speak with you, you understand the subject that I am focusing my attention on?

A Yes, sir, I think I do. I am not quite sure of the question you are directing to me.

Q I want to know what was said to Anderson -- he did eventually in the course of that interview give you a substantial amount of information about June 26th, didn't he?

A Yes, sir.

Q And initially he even pretended to be somebody else, not Michael Anderson, right?

A That's correct.

Q Well, somewhere between his pretense and his cooperation, I assume you had some sort of conversation with him, and if you did, I would like you to tell the Court and jury about that.

A All right. To the best of my recollection of this incident, we introduced ourselves, despite our credentials and told Mr. Anderson that

we were investigating the events surrounding the June 26th murder of the two agents. We told him that we had information indicative of the fact that he was there, and we were interviewing him as a witness to that event; and from other than that specifics, I cannot recall anything further.

Q All right. Now, am I correct that when you say to someone, "I am interviewing you as a witness," that is one way of communicating the fact that this is a mere witness, not a possible Defendant in the interview, is that correct?

{4261}

A The purpose of the interview was to get Mr. Anderson's observations relating to the murders. At that time this was all we were trying to get from him, and that --

Q (Interrupting) I understand that. I am just reviewing with you the facts surrounding his willingness.

A O.k.

Q His apparent willingness to give you information.

Did you elaborate in any way when you said, "We are interviewing you as a witness," as to any special significance that the phrase "as a witness" might have to somebody, did you qualify it in any way and say, "Look, you are not a suspect, you are only a witness," or anything like that?

A I just really don't recall the exact terminology used other than to convey the message you just gave.

Q By the way, with respect to your use of that exhibit, I have no objection if it is necessary for you to use it; but so the record is clear, if I ask you a question that you are unable to answer, and you look at the report, I certainly won't interfere with your looking at it but would you say so?

A All right.

Q Thank you. Now, if as an agent of the Federal Bureau of Investigation you have occasion to warn someone of his constitutional rights, such as the right to remain silent, the right to seek assistance of counsel, et cetera, the so-called Miranda warnings, do you normally make a note of that fact in {4262} your 302 in case some question should come up in the future about the propriety of your conduct, the legal propriety of your

conduct?

A Yes, sir. That fact, of course, is recorded in the appropriate document.

Q Now, did you tell Michael Anderson that there was a possibility that what he said might result in him being prosecuted as an accessory to murder, if not murder himself, before he gave you the information?

A No, sir.

Q Was there any conversation between the agents on the one side and Michael Anderson on the other side concerning possible involvement in this case as a Defendant?

A I am sure somewhere down the line his -- he requested as to what would happen to him or the possible consequences of his action, and Mr. Adams and I reiterated that we were interviewing him as a witness.

Q So that when you use the phrase, "as a witness," it does have a special meaning?

A Yes, sir.

Q And it means that you might be called to testify, but as of this time we are not seeking to charge you with a crime or crimes, is that a fair summary?

A And that we want your observations, yes, sir.

Q Now, that you look back on that incident, do you have any {4263} reason to believe that Michael Anderson did not believe that you had a friendly disposition towards him as far as whether he was going to be a mere witness or whether he was going to be a possible Defendant?

A I am afraid I don't understand exactly the question.

Q I am trying to get some information concerning his demeanor, how he was reacting to what was happening. Based on your observations of how he was reacting, would you say that he seemed to be evasive or that he seemed to accept your relatively speaking friendly approach to him?

A Well, initially he was somewhat reluctant; and after we talked to him awhile, he became less reluctant and furnished information in the usual interview type form.

Q And so is it fair to say that you persuaded him that you were there just to get some information he had, nothing to worry about, and that it would be in his best interests if he told you everything he knew

about the subject?

A Yes, sir.

Q And as far as your own observation is concerned, you were persuaded that he seemed to react favorably and positively to your gesture or offer of what the circumstances were?

A Yes, sir. He did respond supplying us the information.

Q Now, isn't it a fact, sir, that he told you that at approximately 11:30 in the morning he was in Tent City preparing to eat a meal?
{4264}

Now, once again you are free to use that, but I would like you to say when you cannot answer from memory, that you have to look at the report, and you may then look at it.

A All right, I am looking at the report.

Q All right. May I then help you by suggesting that you look on Page 2 in the second paragraph?

A Yes, sir. I am sorry, are you waiting on a response from me?

Q Yes, sir. The question was, did he say certain things to you; and I think you were looking to refresh your recollection to find out whether he did or not?

A Yes, sir. He did indicate that at approximately 11:30 a.m. of that date he was in Tent City.

Q Preparing to eat?

A Yes, sir.

Q Now, did he, in describing the events once the shooting began, indicate that there were other people there shooting besides himself?

A Yes, sir.

Q Did he at any time speak of such people collectively without naming them, and if so, did you ask him for the names of those people?

A I am quite certain that during the interview he would have made statements indicating more than one. We would, of course, ask him to qualify exactly who he was speaking of.
{4265}

Q Now, for instance, in Paragraph 2 of Page 2, there is one sentence which says: At this point Anderson stated there were other individuals shooting. However, Anderson did not identify these individuals.

Now, with respect to that sentence which summarizes what may have taken minutes, what was happening between you and Adams on the one side and Anderson on the other side in connection with this not identifying these individuals, can you tell us about that?

MR. HULTMAN: Your Honor, I object on the grounds that it is an unfair and misleading question. One, counsel or the witness has indicated he is relying upon the 302, and without counsel reading the immediate sentence preceding the one he has just read, I object on the grounds that it is misleading and leaves a thought with the jury which is misleading.

MR. TAIKEFF: Your Honor, I will read that additional sentence and then put the question.

So now I read to you those two consecutive sentences.

THE COURT: Very well.

MR. TAIKEFF: Upon arrival at the residence, he observed two Indian males he knows as Norman Charles and Joe Stuntz firing down into the creekbed area with shoulder weapons. At this point Anderson stated there were other individuals shooting. However, Anderson did not identify {4266} these individuals.

Q (By Mr. Taikeff) Now, in case I did not articulate my question correctly before, let me restate it.

He did tell you that he and certain other people were shooting, and then apparently told you about others who were unidentified.

Can you tell us what the conversation was between the agents on the one hand and Anderson on the other concerning these unidentified few?

A Once again, as best I recall, that phase of the interview from maybe this one or two sentences, I think I recall Anderson to say simply that there were other people shooting and he for some reason didn't want to identify them, if that answers your question.

Q All right. Now, if a witness whom you are interviewing such as Anderson, who was so closely personally connected with the events, refuses to identify a person for you, would you not, as a normal matter make a specific note of that, that he refused, as opposed to as "was unable", "couldn't remember", or something of that sort?

A Why, I think I did make a specific note of that. I said Anderson did not identify these other individuals.

Q Yes, but I am talking about the reason, whether articulated by the witness or your own subjective impression, if you thought somebody was being evasive as opposed to someone not remembering, {4267} wouldn't you make some note of that so that you would recall what his conduct was on that particular, apparently important aspect of the case?

A If I understand the question correctly, no, I would not put down my subjective impression of what somebody was telling me simply because I wouldn't feel qualified to address myself to that problem. He just said he did not want to identify these people, and I recorded that.

Q I beg your pardon, and you what?

A And I recorded it.

Q No, no. I think you just said that he said he did not want to identify the people. The report says that: Anderson did not doesn't say he said he would not. It says he did not, isn't that true?

A Well, once again, specifically he said other people were shooting. We said, "Who were they?" and he said -- and I don't recall his exact words, but he gave the impression he didn't want to identify them, and that's --

Q (Interrupting) All right. Let me put it to you this way: Other than the sentence or portion of the sentence which says: However, Anderson did not identify these individuals -- can you tell me if anywhere in this report there is any indication of his unwillingness to identify someone?

A You mean other than this particular sentence?

Q Other than the fact that he did not identify these {4268} individuals, is there anywhere recorded in this report anything about his unwillingness or refusal?

A Sir, I would have to read this again in its entirety to answer that question fairly.

Q Perhaps we can save the time at this particular moment and allow you to do that at a more convenient time.

In any event, is it not a fact that you showed him a large number of photographs of various people?

A Yes, sir, that is correct.

Q Maybe almost three dozen different photographs?

A We showed him a large number of photographs, yes, sir.

Q And didn't he identify virtually all of the people who subsequent

investigation shows were in fact at Jumping Bull's, whose photographs you showed him?

A (Examining) With -- if I understand the question, with reference to these photographs we showed him a large number of photographs and then recorded his observation with reference to each.

Q All right. Now, in fairness to the complete picture, about a little more than half, maybe 65 percent of the photographs he identified as people who had been at the Jumping Bull community, and the remaining photographs were of people he said he didn't know, and he could not identify them as having been there, is that a fair, general summary?

MR. HULTMAN: Well, I object to that as not being a {4269} fair summary, your Honor. If he wants to ask as to what idents were made, I have no objection. There were all kinds of idents made of certain other people he knew and certain other people he didn't know. I think a summary by counsel is unfair at this time.

MR. TAIKEFF: I will modify my questioning on that.

Q (By Mr. Taikeff) I ask you to draw your attention to Page 6.

A Yes, sir.

Q There is recorded on that page approximately 15 names of the people whose photographs he looked at and couldn't tell you anything, right?

A Yes, sir.

Q Do you know if subsequent investigation indicated that any of those people were at the Jumping Bull compound on June 26?

A (Examining).

MR. HULTMAN: Your Honor, I have no objection to this to the extent that the witness does have knowledge, but that --

MR. TAIKEFF: (Interrupting) Yes, of course, subject only to his own knowledge, naturally.

A Going through the indicated names, and like you say, approximately 15, I myself do not have personal knowledge that any of these people were in the Jumping Bull area on the 26th. Is that --

{4270}

Q (By Mr. Taikeff) Yes, that's what I am asking about.

A All right. No, sir, I did not.

Q Now, you showed him photographs, and he gave you some information

concerning Leonard Peltier you can go back to Page 4 now.

A All right. (Examining). All right, I am on Page 4. Is there a specific portion?

Q I want to know whether you showed him a photograph and he gave you some information about Leonard Peltier and identified the photograph?

A (Examining) Yes, sir. We did supply him with a photograph of Leonard Peltier, and his observations, of course, are recorded here.

Q O.k. Jean Marie Bordeau photograph shown, identification made? {4271}

A Are you still on page 4, sir?

Q I'm onto 5 now, sir

A Yes, sir.

Q And --

MR. HULTMAN: Your Honor, again, Counsel, I just want to make sure that there's no impression left as to whether or not he identifies people because he's seen them sometime or whether they were there day.

MR. TAIKEFF: All right.

MR. HULTMAN: And in the first instance he identified the person as being there and the second case he just says that somebody that he's known.

MR. TAIKEFF: I understand.

MR. HULTMAN: I just want to make sure --

MR. TAIKEFF: Yes. I'm covering certain aspects of it and I just want to make sure that we have some indication about his ability to identify and his willingness to identify certain people.

Q (By Mr. Taikeff) So far I think you've said you showed him a photograph of Leonard Peltier. He identified it, said some things to you about Mr. Peltier?

A Yes, sir.

Q Then he was shown a photograph of Jeannie Bordeau, young female Indian person, and he identified that photograph, right?

A Yes sir.

{4272}

Q And you showed him a photo of -- do you know whether the next person is Dino Butler's wife? Have any personal knowledge of that fact?

A Whether -- are you speaking of a legal wife? I have no, no knowledge at all of their marital status.

Q Whether they were formally married in a Christian ceremony, an Indian ceremony is of no concern.

MR. HULTMAN: Your Honor, I object I have no objection if counsel wants to, and that's where I started I believe to ask him whether or not on this occasion he identified a given photo, and then you identified that photo or anything about the person. But beyond that there's no showing that he asked whether or not she was married to somebody or that he knew this person in any other way. And that's the basis I'm objecting on. There's no foundation, one; and secondly, there's no showing that there was any discussion by the people at the time and place we're now talking about to the effect that counsel is now questioning, and I object on those grounds.

MR. TAIKEFF: Your Honor, my question simply was, was he shown a photograph of Dino Butler's wife and did he identify that photograph.

MR. HULTMAN: And ask if he knows what was shown and that was the discussion. Because there isn't any showing of that kind with reference to the document, Counsel.

{4273}

MR. TAIKEFF: Your Honor, if he doesn't know, he can say he doesn't know.

MR. HULTMAN: Well, then don't mislead him by saying that the name is something but. It's somebody else's wife.

Q (By Mr. Taikeff) Sir, do you know whether a photograph of Dino Butler's wife was shown to Mr. Anderson?

A I have no knowledge of Dino Butler's marital status.

Q Do you know whether he lives with a woman?

MR. HULTMAN: Well, now again, Your Honor, I object as it being totally irrelevant. The matter that he's inquiring about is certain photos were shown and certain names are on the photos later that counsel here sees, and I submit that there's no foundation or showing that the photo he's now talking about, Kelly Jean McCormick, had anything on it but Kelly Jean McCormick. And that's the only identification, if there was any, that was made.

MR. TAIKEFF: But, Your Honor, I'm not seeking her name. I'm seeking

to get some information about her identity

MR. HULTMAN: And I'm --

THE COURT: The question was: Do you know whether or not he was living with a woman, and I fail to see the relevancy of that question.

MR. TAIKEFF: I think Your Honor will in a moment if the witness answers it and I pursue it.

THE COURT: He may answer the question.

{4274}

Q (By Mr. Taikeff) Do you know whether Dino Butler at that time in 1975 was living with a woman?

A At the time of this interview I'm not sure if I had that knowledge or not. No.

Q Okay. In any event Mr. Anderson identified a photograph of a person you knew as Kelly Jean McCormick; is that correct?

A Yes, sir, that's correct.

Q And told you that she was an Indian male who lived in tent city, right?

A Yes, sir. In the course of elaborating.

Q And he elaborated and said upon departure she left in the immediate company of Dino Butler, right?

A Well, he actually said she fled along with Dino Butler, that's correct.

Q Okay. You like the word fled better than departed?

MR. HULTMAN: Well, I object, Your Honor. That's a clear, what's what the, that's a misstatement of the record by counsel and now we've gotten to the clear statement in the record and he accuses the witness in some way of whether he likes it better.

THE COURT: That objection is sustained.

Q (By Mr. Taikeff) Do you know whether Kelly Jean McCormick is a person known as Neelock?

A I believe that was one of the answers she uses, yes, sir.

Q Might that be her Indian name?

{4275}

A I would have no knowledge of that.

Q Do you know whether she's an Eskimo?

A No, sir.

Q Now, was he shown a photograph of Wallace Little, Jr.?

A Yes, sir.

Q And did he tell you that he knew this person as June Little, and that June Little lived with Wanda Sears in a house on the Harry Jumping Bull property?

A Yes, sir.

Q Did you show him a photograph of Jimmy Eagle?

A Yes, sir.

Q And did he tell you that Jimmy Eagle was a person he knew and that Jimmy Eagle was at the Harry Jumping Bull residence at the time of the shooting on June 26, 1975?

A Yes, sir.

Q And did he also tell you that a girl friend of Jimmy Eagle's was with him there? He only knew her by the name Wilma, and she was, she was cooking in tent city on the morning of June 26, 1975?

A Yes, sir.

Q And did you show him a photograph of a person whose formal or full name is Darelle Dean Butler and he said to you that he knew this person by the name of Dino Butler and that person ad been in tent city?

MR. HULTMAN: Well, again I object, Your Honor. It's {4276} clearly a misstatement of the record, the reference specifically and if counsel will read the only sentence that's there I'll have no objection. But that's a clear misstatement of the record as to what the witness told him at that time and is recorded.

MR. TAIKEFF: Your Honor, I would like to come to the sidebar to persuade Your Honor that Mr. Hultman is intentionally harassing me during this interrogation.

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

MR. TAIKEFF: May the question be read back first that I just put to this witness?

(Question read back: "Question: And did you show him a photograph of a person whose formal or full name is Darelle Dean Butler and he said to you that he knew this person by the name of Dino Butler and that person had been in tent city?")

MR. TAIKEFF: Now, Your Honor, what Mr. Hultman apparently is complaining about is that I didn't use the somewhat generative word "that he had fled from tent city". Now, clearly, Your Honor, if Anderson said that he fled from tent city he must have out of necessity been in tent city. And I summarized fairly and within reasonable bounds the fact that the name of the person was Darelle Dean Butler; that he said, "Yes, I know him, I know him as Dino Butler," and that {4277} he was someone who was at tent city. Now, I don't think that was unfair for me to present because in fact it is clear from this paragraph that all of that must be true and the answer must be yes.

If Mr. Hultman doesn't like the fact that I don't adopt all of the language that's employed here, as long as it is not material or a material fact concerning the willingness of this witness to make an identification, I think it's improper for him to insist that I do so.

MR. HULTMAN: Your Honor, I insist clearly that it's improper. The only reference on this whole page as for the specific purpose is as counsel is asking is identification. He's shown a picture and he responds and his response is not what counsel indicated. He doesn't say a word about tent city. His response is period, the person depicted was the individual who fled along with him and the other before named person period. And I say the question, if you are going to do this, that within the rules he should be quoting what it was in fact that was said in the document and not summary or conclusions on the part of counsel; and especially conclusions that aren't even reflected at this point.

THE COURT: I think the problem arises because counsel is interrogating this witness by leading questions. Now, I recognize that there possibly could be a showing that this {4278} witness is hostile.

MR. TAIKEFF: Now, it's not hostility, it's the fact that he has no independent recollection and that's why I have to do it that way. I started out with nonleading questions and I, at this point, would not claim that he is hostile. But he says he just has no memory and he's had the report

MR. HULTMAN: Then that's the very reason, Your Honor, that the only evidence that is good evidence, or the best evidence,is what he did record as to what the statement was at that time; and that's not the statement

that counsel gave in his leading question.

MR. TAIKEFF: But, Your Honor, I am not eliciting or attempting to elicit from this witness specifically what did the person tell. I am trying to show that the person willingly and accurately made certain photo identifications. I should not be limited by the language that someone chose in writing the report.

All I want to do is fairly and without any kind of improper manipulation establish that Anderson was responsive and that he accurately related whom he knew, and if the people were at tent city gave some indication of that fact. I don't know why I have to adopt the language of some other writer.

THE COURT: Well, the problem here also, as I see it, the person depicted was the individual who fled along with him and other named persons. That doesn't necessarily establish {4279} that he was at tent city.

MR. TAIKEFF: But, Your Honor, the evidence is clear they fled from tent city.

MR. HULTMAN: Yeah, but that's not the point that he says in writing in this interview.

THE COURT: You are questioning this witness as to what he has, as to what he has reported.

MR. HULTMAN: That Anderson said at that time.

MR. TAIKEFF; The use tent city right here, Your Honor so there's no question but that tent city was a place that was employed on September 11, 1975. That's page 5, paragraph 5.

MR. HULTMAN: But he refers to a given person in response to that question at that point. He doesn't refer to Darelle Dean Butler as a person who lived in tent city in response to the picture.

MR. TAIKEFF: Your Honor, the Government wants me to adopt their language which is written to a perspective point of view. I'm trying to establish facts and not what they wrote. And I don't feel that I should be bound to adopt their language which is written with a certain definite bias.

THE COURT: Well, except as I say, first of all, because this witness is not hostile, you should -- at least as to this point he's shown no hostility, nor shown himself to be an adversarial role.

{4280}

MR. TAIKEFF: I agree, Your Honor.

THE COURT: All right. You should interrogate him with nonleading questions to the extent that you are able to do so.

MR. TAIKEFF: Yes, I will, Your Honor.

THE COURT: And I think that that will eliminate this question.

MR. TAIKEFF: Yes, Your Honor.

THE COURT: This problem.

MR. HULTMAN: Very good.

THE COURT: Very well.

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

Q (By Mr. Taikeff) Agent Harvey, did you show Mike Anderson a photograph of a person whose name was Darelle Dean Butler? Yes or no.

A Yes, sir.

Q And did he tell you that he knew this person, or did he deny that he knew this person?

A He said he knew that person, yes, sir.

Q And did he indicate to you that he knew this person by some other name than Darelle Dean Butler?

A Yes, sir.

Q Just yes or no if possible.

A All right. Yes, sir.

{4281}

Q And would you tell the Court and jury what name did he say he knew this person?

A Dino Butler.

Q Did he say anything to you which indicated to you that this person had been in the area we call tent city? Yes or no.

A Yes.

Q On June 26, 1975?

A Yes, sir.

Q And did you show him a photograph of a woman by the name of Jean Ann Day?

A Yes, sir.

Q And did he identify that photograph as the photograph of someone he knew?

A Yes, sir.

Q And did he tell you where he last saw that person within the preceding month or so?

A Yes, sir.

Q And did you show him a photograph which you believed to be the photograph of a person named Joseph Bedell, B-e-d-e-l-l Stuntz?

A Yes, sir.

Q And at first what was his response to that?

A As to his response to any particular photograph, that's other than what's recorded, I obviously would not be sure just to the fact that this was almost two years ago.

{4282}

Q Read that paragraph on page 6 concerning the photograph of Joe Stuntz.

A Yes, sir.

Q And I am not going to ask you whether you have confidence in the accuracy of the paragraph, I just want to know whether the reading of it refreshes your recollection independently?

A You want me to read it out loud?

Q No, sir, it's not in evidence.

A Yes, sir.

Q Does that help you recall what took place?

A Yes, sir.

Q All right. When you first showed him the photograph what did he say?

A Well, when we showed him the photograph he identified that person depicted as the Indian male who was killed on the 26th.

Q Okay. And then did he say something about the photo in addition?

A Yeah He elaborated and said that this was not the person he recalled to be shooting alongside Norman Charles.

Q He said it didn't appear to be identical to the person; isn't that correct?

A Yes, sir.

Q Okay. And did you show him a photograph of a person by the name of Anna Mae Aquash, A-q-u-a-s-h?

A Yes, sir.

{4283}

Q And did he make any identification of that person?

A Not by the photograph. By name.

Q And did he tell you whether or not she was someone who was frequently in the tent city area?

A Yes, sir, he did.

Q And what did he tell you in that regard, that she was or that she was not?

A That she was.

Q Now, you then showed him a photograph of a person named Edgar Bear Runner; is that correct?

A Yes, sir.

Q And what was his response in looking at that photograph as to whether or not he recognized that photograph?

A Upon display of the photograph Mr. Anderson said he did not know that individual but --

Q No. You mean that individual didn't know the person who was in the photograph, right?

A That's right.

Q Okay.

A The person in the picture. But he did know Edgar Bear Runner, and he did not observe Mr. Bear Runner in the vicinity of tent city on the 26th.

Q Now, sir, if you need to refresh your recollection I suggest that you turn to page 2, and if necessary you can focus your attention on the latter half of the second paragraph. But try {4284} to listen to my question first and if you have to look please do so.

Did he tell you that the first time he looked over at the agents' cars, the agents were lying prone and that he was certain that they were already dead, or at least severely wounded?

A Yes, sir. That's correct.

Q And further that they at no time moved or in any other way indicated

that they were alive?

A That's correct.

Q Did he tell you that there came a time when he, Norman Charles and Joe Stuntz, left the area where they were and went to tent city?

{4285}

A Once again reading the thing.

Q I think we understand that the details are not fresh in your mind and if the report helps you remember, please look at it.

A Yes. We indicate that he, Mr. Stuntz, Mr. Charles stopped firing at one point and then that he, Mr. Anderson, then left the area.

Q Went to tent city and packed?

A Yes, sir.

Q For your guidance sir, perhaps you would turn to page 4 and once again to the extent possible if you can answer a question without looking I'd just as soon have you do it that way. If you have to look, it's okay to look.

Did he tell you that Bob Robideau was the leader of tent city or of the tent city community?

A Yes, sir. I believe he made a statement to that effect.

Q Now when you showed him the photographs of Leonard Peltier, what did he say to you?

A Once again Mr. Anderson said that he was familiar with Mr. Peltier and he went on to describe the basis with which he was familiar with him.

Q What was that basis?

A Mr. Anderson said that he rode with Mr. Peltier from Farmington, New Mexico, to South Dakota in May, '75.

{4286}

Q Did he tell you what event, if any, they were coming from?

A He may have. I don't recall.

Q Does it refresh your recollection any if I suggest that he said that they were coming back from a national AIM convention, American Indian Movement convention?

A Like I say, he may have said this.

Q Okay.

What else did he tell you concerning Peltier when you showed him

Peltier's photograph?

A He, Mr. Anderson, stated that Peltier was at the Jumping Bull residence on the 26th during the shooting.

Q What else did he tell you before he told you that Peltier was at that location on that day?

A That Mr. Peltier frequented that area.

Q Generally, not just on June 26th, is that right?

A Frequently. Yes, sir.

Q Now you made some inquiry of him, and to assist you I would suggest that you look at page 8, the first paragraph on the page. You asked him about a vehicle?

A Yes, sir.

Q In terms of the identity of the vehicle itself, describe the vehicle you asked him about, please.

A Well, if I remember this particular point in the interview --

Q Please note my question, though. I asked for the identity {4287} the description of the vehicle you asked him about.

MR. HULTMAN: I object on the grounds, Your Honor, that that assumes a fact which is not a part of the record and I think the witness ought to be given an opportunity to respond as to whether or not the facts that Counsel has submitted as a part of the record in his question are in fact a part of the record.

MR. TAIKEFF: Your Honor, I assume when Mr. Hultman says part of the record he's referring to the 302.

MR. HULTMAN: That's exactly what I'm referring to.

MR. TAIKEFF: I am asking this witness to tell us the content of his inquiry.

Q (By Mr. Taikeff) When you asked about the vehicle, what did you say to Mr. Anderson?

MR. HULTMAN: Again, Your Honor, it assumes a fact which is not a part of the record and in fact --

MR. TAIKEFF: Your Honor, I ask to come to the sidebar so there is no confusion in the witness' mind from this colloquy.

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

MR. HULTMAN: Your Honor, I object on the grounds again that what

Counsel has stated just now is not, first of all, in the record and, secondly, it's misleading to the witness. It's obvious to me the point he's trying to make. {4288} This witness, this statement indicates that at a point in the interview a question was asked of the witness, then he responds but the question was not specifically did the witness ask him about a specific automobile and that's where I say it is misleading.

MR. TAIKEFF: Your Honor, I am not trying to mislead the witness. It is clear that a conversation was had which led to a discussion about a certain vehicle.

MR. HULTMAN: About an individual first.

MR. TAIKEFF: I said a conversation was had which led to a discussion about a vehicle. What I wanted to know from him was what questions he put to Anderson concerning the vehicle.

MR. HULTMAN: I'd have no objection if you ask that but you assumed in your leading question, you said that, you asked specifically the effect about a red and white van. That's not what this paragraph --

MR. TAIKEFF: I didn't say red and white van, by the way.

MR. HULTMAN: Or a vehicle.

This would indicate he didn't ask necessarily any question about a vehicle. That was a response that was --

MR. TAIKEFF: I'll ask whether he asked questions about a vehicle. If he says yes I'll ask him what questions did you put to Anderson. I will then elaborate on the entire {4289} conversation. But I think I should be permitted to get the facts in the order in which I want them. I don't have to do them in the order in which he lived them. I have to get it in a certain order because I have a method of interrogating witnesses.

MR. HULTMAN: Your Honor, I say that's unfair. That's placing words in the witness' mouth. The foundation which Counsel has laid is that his best memory is what is said here and what Counsel has just said is not said here and that's the point and the reason for my objection, that Counsel said, you asked him about a vehicle. That is not in the record. In fact, this statement that he refers to, he's asked the question, "Do you know abouta LeRoy Casados?" In response the man said he knew him and he drove a red and white vehicle.

MR. TAIKEFF: Then he asked him questions about a vehicle. I want

to focus his attention, if he has an independent recollection, I'm willing to ask him if he has any recollection about any questions about a vehicle and if he says yes --

MR. HULTMAN: It was a response --

MR. TAIKEFF: I don't want him to tell me on my case how he got to it in the order in which you want me to lay the record. I'm entitled to develop the information in the order in which I want it. You have cross-examination. You can ask him any leading questions you want within reason to take care {4290} of anything which you think I have failed to do. But the order in which I get facts from a witness is a carefully planned thing on the part of Counsel.

MR. HULTMAN: And I say it's misleading, that's my very point, on the basis of this it's misleading.

MR. TAIKEFF: I'll ask him a nonleading question whether he has any independent recollection about a vehicle and if so what were the questions he put to Mr. Anderson.

MR. HULTMAN: Again I say that's misleading as far as the recollection in the record. The documents you're using -- I submit to the Court paragraph, the top paragraph with which we are now concerned.

The reason I object, Your Honor, is because Counsel has continually shown he is attempting to show that it is at the instigation always of the FBI and that's the point that I'm taking strong issue with.

MR. TAIKEFF: I assure you, Mr. Hultman, that when --

MR. HULTMAN: Let me finish.

MR. TAIKEFF: When I elicit the answers I will bring out the fact how they got to talk about it. I wish you would allow for the fact that I can develop the facts in an order which I think is appropriate as long as it is not misleading or unfair.

MR. HULTMAN: That is the point I am making, Counsel, that's misleading and unfair because the man, one, his {4291} recollection is, as you pointed out, is from the document and once it's done that, then you have to use or accept the document at least in terms of the questioning and not put something that is an assumption as something that is not here, not in the record in order to establish with a witness who doesn't understand the import of the question and is trying to give you a fair answer something

then which you turn around and be able to turn as a sort against him. So on cross examination I bring out the reverse, so what.

MR. TAIKEFF: I don't intend to use a sort against him, I think it's pretty clear the witness has given me his most honest answers and that they are consistent with the report. All I'm saying is that I want him to tell us whether reading this paragraph has refreshed his recollection. If it has not refreshed his recollection, then we're dealing with something different. But if it has independently refreshed his recollection, I'm entitled to ask him what his recollection is and then I was planning anyway to bring out how they got to this vehicle.

MR. HULTMAN: Let's use that procedure. You had a leading question. It didn't go to that procedure.

MR. TAIKEFF: I will do that with His Honor's permission.

THE COURT: Very well.

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

{4292}

Q (By Mr. Taikeff) Agent Harvey, if there is a question outstanding I'm going to withdraw it in order to ask you this one: Have you read the first paragraph on page 8 of the 302?

A Yes.

Q In reading that paragraph, is your recollection refreshed as to whether or not there were any questions at all put to Mr. Anderson concerning a vehicle?

A Yes, sir.

Q Do you recall the questions which were put to him?

A Specifically the exact question, no, sir. But --

Q What was the nature of the inquiry?

A The nature of the question was after we established that Mr. Anderson knew Mr. Casados, he knew what kind of car or vehicle Mr. Casados was driving.

Q What did he tell you?

A He said that Mr. Casados drove a red and white International Scout.

Q And who brought up the subject, the name LeRoy Casados, you or Mr. Anderson?

A I have no idea.

Q Look at the report and tell me if in looking at the report you have an idea.

A The question is which one, Mr. Adams or myself?

Q Oh, no. I'm sorry. The agents on the one hand or the person being interviewed, Mr. Anderson, on the other.

{4293}

A Oh, either Mr. Adams or myself asked Mr. Anderson.

Q About Mr. Casados?

A Yes.

Q Thank you very much, sir.

MR. TAIKEFF: I have no further questions.

MR. HULTMAN: I have no questions, Your Honor.

THE COURT: You may step down.

MR. TAIKEFF: Special Agent Doyle, Your Honor.

JAMES DOYLE,

being first duly sworn, testified as follows:

MR. TAIKEFF: May I inquire, Your Honor?

THE COURT: You may inquire.

DIRECT EXAMINATION

BY MR. TAIKEFF:

Q Mr. Doyle, have we ever met?

A No.

Q Have we ever had any conversation ever?

A None at all.

A Has anyone connected with the defense team ever questioned you or discussed with you the testimony you're about to give?

A Never.

Q Your occupation, sir?

A Special agent with the Federal Bureau of Investigation.

Q For how long have you been an agent?

A 25 years.

Q Where are you regularly assigned at this time?

{4294}

A Albuquerque, New Mexico.

Q Where were you assigned in July, August, September of 1975?

A Albuquerque, New Mexico.

Q Were you ever assigned in connection with this case to the Rapid City office?

A I was not assigned, I was sent there. I worked out of that office.

Q And did you work in a team from time to time with any of the agents regularly assigned to the Rapid City office in connection with this investigation?

A Yes, I did.

Q Are you able to tell us from your memory the names of any such people?

A I worked with J. Gary Adams.

Q Let's stop there for a moment.

A All right.

Q How often did you work with him?

A Oh, I would say on approximately three occasions.

Q Do you have an approximate idea or exact idea as to the dates when you worked with him?

A I recall several of the dates that I worked with him. October 10, 1975.

Q Where was that, sir?

A That was in Chinle, Arizona.

Q That was in connection with what?

{4295}

A An interview of Norman Brown.

Q Was there any other agent present at that interview?

A Yes. There was another, agent. Michael Nez.

Q Is he a local FBI agent?

A He works with me in the Albuquerque division; yes.

Q So you and Agent Nez, N-e-z-?

A Right.

Q Were joined by J. Gary Adams for an interview of Norman Brown on October 10, 1975, is that right?

A That's correct.

Q Was there another person present at that interview?

A There was a BIA officer, Frank Adaki.

Q Was there a female person present?

A No.

Q Where did this interview take place?

A It took place in the BIA headquarters in Chinle, Arizona.

Q At that particular interview was Norman Brown's mother present?

A No, she was not.

Q Did you ever attend any interview by Agent Adams when Norman Brown's mother was present?

A No, I did not.

Q Do you have any knowledge of whether or not any such interview ever took place?

A I believe there was. I don't recall the facts surrounding {4296} it.

Q Could you tell us the approximate month and year or perhaps even the exact date?

A I know it was prior to October 10 of 1975.

Q On October 10, 1975 a statement was taken from Norman Brown, is that correct?

A That's correct.

Q And am I correct in saying that that was a handwritten statement which he then initialed and corrected and then signed?

A That's correct.

{4297}

Q Now, were there any other occasions when you worked with J. Gary Adams?

A Yes. I worked with him in February of 1977.

Q That's two months ago approximately?

A That's correct.

Q And where was that?

A That was in Albuquerque, New Mexico.

Q And was there any other agent on the Bureau present?

A None.

Q Just you and him?

A Yes.

Q I gather then that J. Gary Adams was transferred to the Albuquerque office?

A No, he was not transferred. He was just there on assignment.

Q But he did come to Albuquerque to interview Norman Brown, and he came there in February to interview whom?

A Michael Anderson.

Q I see, and on these occasions where was he assigned?

A He was assigned at Rapid City.

Q Do you have information through official channels as to whether or not Michael Anderson stands convicted in the State of Arizona of burglary?

MR. HULTMAN: Your Honor, I object, this being irrelevant.

{4298}

THE COURT: Sustained.

Q (By Mr. Taikeff) Whom did you interview on February 3, 1977?

A On February 1st, 1975?

Q I apologize, February 1st.

A Michael Anderson, yes.

Q And that was in Albuquerque, New Mexico?

A Yes, it was.

Q Did you have any discussion with him about the fact or any fact concerning his status as a convicted person in the course of that interview?

A I knew what his status was.

Q Did you discuss it with him in any way, did it come up at all?

A His status, his status at that particular time?

Q Yes.

A Yes, I had arrested him that day.

Q For what?

A Probation violation.

Q Now, if a person is on probation, doesn't that mean that he was convicted of a crime?

A Yes.

Q And what crime was he convicted of?

A I am not sure. I believe it was burglary, I am not positive.

Q Was it a state crime or a Federal crime?

{4299}

A It was a Federal crime.

Q Was that because it occurred on a Reservation in the State of Arizona?

A I am not familiar with that charge at all.

Q When you arrested him on February 1, 1977, as a probation violator, what act or acts did he allegedly do which prompted him being arrested?

A He violated his parole or his probation, I am not sure what those acts were.

Q I am going to place before you, sir, two documents which have been previously marked Defendant's Exhibit 88 for identification, and Defendant's Exhibit 220 for identification; and I would ask whether you would confirm that the first one -- in fact, both of them are 302's concerning interviews of Michael Erwin Anderson on February 1, 1977?

A That's correct.

Q Now, those documents are not in evidence and should not be read from out loud.

I would ask you not to use them unless you first indicate that you need them to refresh your recollection, do you understand that, sir?

A Yes, I do.

Q Thank you. I

MR. HULTMAN: Could I at least look, counsel, so I know?

{4300}

MR. TAIKEFF: Yes, I will give you a look at them.

(Counsel examines documents.)

Q (By Mr. Taikeff) I think you have already answered this question, but I want to make sure there is no ambiguity about it.

In Defendant's Exhibit 220, the first paragraph reveals that certain things were done, certain formalities?

A That's correct.

Q Would you briefly detail what they were just by name so we know what they are?

A Photographed, fingerprinted.

Q And one other thing?

A I must refer to this.

Q Please do.

A (Examining) Advised as to his rights.

Q Such as the right to remain silent and things of that sort, is that correct?

A Correct, yes.

Q Now, what was this activity, those three things that you just detailed, connected to or related to?

A The photographing and fingerprinting of him was related, of course, to his arrest, that he had just been arrested.

Q As a probation violator?

A Correct. The advice of rights was concerning whether or not he desired to be interviewed at that time.

{4301}

Q Now, he said something to you that morning at approximately 10:50 a.m., on that very subject about whether or not he wanted to be interviewed, isn't that correct?

A That's correct.

Q And what did he say?

A He said he did not desire to be interviewed.

Q You told him specifically what you wanted to interview him about, isn't that true?

A That's true.

Q What subject matter?

A That's true.

Q What was that subject matter?

A I wanted to interview him concerning his activities on June 26th, 1975.

Q And he told you in essence that he didn't care to discuss this matter, is that right?

A That's true.

Q Now, the document which records or makes reference to the things that you testified to in the last few minutes concerning the fingerprinting, his refusal, et cetera, that is Defendant's Exhibit 220 for identification, am I right?

A That's correct.

Q Now, the other document, the other 302, in the main -- I am putting aside that preamble paragraph on the first page -- in the main contains what, without revealing its contents, {4302} just what is it?

A I don't understand that question.

Q Well, look at Defendant's Exhibit 88, the opening paragraph sort of tells you what the 302 is all about, doesn't it?

A That's true.

Q And then something follows which goes on for about seven pages?

A That's true.

Q Occupying two-thirds of the first page and all of the remaining pages, is it fair to say that something is reproduced or duplicated in this 302?

A I don't understand that question.

Q All right. Other than the preliminary paragraph, does the 302 contain the reproduction of three separate writings?

A It is a reproduction of a signed statement, yes.

Q But before the signed statement, is there not a duplication of the advice of rights form?

A That's true.

Q Then a duplication of the waiver of rights form signed by Michael Anderson?

A That's correct.

Q Followed then by a copy or duplication or reproduction of a statement he made which runs on for about five and a half pages?

A That's correct.

{4303}

Q O.k. He was read his rights at what time, according to that form or according to your memory?

A 1:40 p.m.

Q And he then signed a waiver saying basically, "I have heard my rights," I know them, I understand them, I waive them, I give them up"?

A That's correct.

Q And then he proceeded to give a statement?

A That's correct.

Q O.k. Would you tell us what happened between 10:50 a.m. in the

morning when he said he didn't want to discuss the matter and 1:40, approximately, in the afternoon when he waived I his constitutional rights and gave you a five and a half page typewritten statement?

A When he was -- when we talked to him in the morning which was very briefly, I called the United States Marshal's office and it was determined that his hearing would be at 4:00 o'clock that afternoon, and the United States Marshal said, "Bring him over here, we will detain him here until his hearing before the United States Magistrate."

At about 1:15 p.m., that day, I was en route to the airport with Gary Adams who was returning to Rapid City when a United States Marshal called us and said that Michael Anderson wanted to talk to us. This is when we returned at about 1:40.

Q Do I understand from your answer that you don't know what {4304} what happened between 10:50 --

A (Interrupting) I was not there between this time, 10:50 and 1:40.

Q Do you know where Gary Adams was between 10:50 and the time you were going to the airport with him?

A Yes, he was with me.

Q You don't have any knowledge of what may have changed Michael Anderson's mind?

A Nothing. He was merely placed in a holding cell really in the United States Marshal's office until he could make an appearance before the United States Magistrate.

Q Now, specifically with reference to Defendant's Exhibit 88 and its contents, I would like you to look at the last page. Were you present when the statement was taken from him?

A Yes, I was.

Q And how did you go about the process of recording what he had to say, was there a stenographer present?

A No, there was not.

Q Was somebody taking notes?

A Yes, I was.

Q Do you have those notes?

A They are available somewhere. I don't have them with me.

Q As a matter of convenience, I won't ask you to do it now, but

would you return after the lunchbreak with your notes, please?

{4305}

A Yes, um-hum.

Q So you took notes, someone was questioning, Anderson was answering, and then eventually those notes became a statement, correct?

A That's correct.

Q Anderson read the statement, I assume?

A Yes.

Q And then he signed it?

A Yes, he did.

Q And then it was written up as a 302 so that it would be a permanent report of what happened that particular afternoon?

A That's correct.

Q Now, as the questions were asked and the answers came in, assume you understood his answers, at least you understood the words he was speaking?

A I did.

Q I would like to ask you specifically about the fourth paragraph on that last page.

A On the last page?

Q I will read the words to you for the purpose of finding out what you understood at that time. The paragraph in quotes says: When I returned to the top of the hill and saw Peltier, Robideau and Butler down by the agents' cars, I then saw a white and green car and a police car parked out by the road.

End of paragraph.

{4306}

Do you recall being there when a question was asked which resulted in that answer?

A I don't recall the specific question, but I recall that particular phraseology, yes.

Q O.k. May I also assume that every single word that was spoken was not taken down verbatim, but just the principal material, important answers that were coming out as a result of an interview?

A That's correct.

Q O.k. So we are now focusing our attention on this particular answer which you recorded and eventually got into the typewritten statement?

A Now, I did not record this portion here (indicating).

Q Who did that?

A Mr. Adams.

MR. TAIKEFF: I see.

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

(Whereupon, at 12:29 o'clock, p.m., the trial of the within cause was adjourned until 1:30 o'clock, p.m.)

{4307}

AFTERNOON SESSION

Whereupon, the following proceedings were had and entered of record on Tuesday afternoon, April 12, 1977, at 1:30 o'clock, P.M., without the jury being present and the defendant being present in person:

THE COURT: Mr. Taikeff?

MR. TAIKEFF: Your Honor, could I have just one minute to inform Your Honor of something concerning Myrtle Poor Bear appearance?

THE COURT: You may.

MR. TAIKEFF: It's for the purpose of requesting that Your Honor give some instruction to the marshal service. I received in the last few minutes from what I consider to be a highly reliable source that Myrtle Poor Bear is at home this very moment in Allen, South Dakota; and if the marshals will get off their chairs and get into their cars they can execute Your Honor's warrant.

THE COURT: You can leave the courtroom and advise the marshal right now.

MR. TAIKEFF: Mr. Ellison will do so right now, Your Honor.

THE COURT: Very well.

MR. TAIKEFF: Defense is ready for the jury, Your Honor.

THE COURT: Before we bring in the jury I have before me Exhibit 219. I would ask, on which I reserved ruling. I {4308} would ask first of all to state the purpose for the exhibit.

MR. TAIKEFF: The purpose, Your Honor, is to show that as respects those particular agents whose names appear there that their 302's concerning the events of the 26th were all dictated on June 30th; and the

significance of that has to be considered in light of the evidence adduced from one of the other special agents, that as a rule agents will prefer to dictate their 302's as quickly as possible, especially if they don't have the opportunity to take notes.

All of the agents in question here did not take notes because of the surrounding circumstances. However, Your Honor will find in addition to those 302's which relate to the activities of the 26th, the so-called principal reports, or principal 302's, two other examples which are the only examples of things which were dictated prior to June 30th showing that the facilities are at least available to dictate those two particular items which are listed.

Also the last column on that exhibit shows the number of stenographers who worked on the reports of but these four agents because the initials are different.

THE COURT: I'm not sure that I follow everything that you said. I'm looking at these, at this exhibit which shows dates of dictation: 6/30/75, 6/29/75, 6/30/75, 6/28/75, 5/30/75, 6/30/75, 6,/30/75. What is the significance of that?

MR. TAIKEFF: Well, if Your Honor will note there is a {4309} designation. I can't see the exact words because Your Honor has the exhibit, but it basically says the principal activities on the reports of June 26th. I don't know the exact words, but I'm sure Your Honor knows which entry I'm talking about. That entry appears in every one of those.

THE COURT: Would you come to the bench.

MR. TAIKEFF: Certainly.

(Mr. Taikeff approached the bench.)

THE COURT: It shows interview. Each of these shows an interview on the 26th. I just read the entries that show the dictation.

MR. TAIKEFF: Yes. Now, in the case of Adams the first entry, likewise for Waring, Coward and Skelly, those are the 302's, the main, principal report concerning the events of June 26th. The witness who answered questions by comparing the reports to this chart said that the entries were a fair representation, and/or an accurate representation of what they purported to be.

In each instance each agent wrote one principal report concerning

what he did from the time he got there until the events concluded that day. In each instance that report is described in the exact same words and is the first entry where there are more, where there is more than one entry. In each and every instance those items were dictated on June 30th.

However, Gary Adams wrote an additional 302 concerning {4310} a certain specific subject on June 26th; and Gerard Waring wrote a 302 concerning a special subtopic, namely the crime scene search. Those two reports are listed here because they demonstrate that it was possible to dictate to a stenographer on June 29th in the case of Gary Adams and on June 28th in the case of Waring, which precludes any argument that there were no stenographers available to them until the 30th or that the 30th was the first time that either of these two had any occasion to sit down and do any reminiscing and dictating about what went on on the 26th.

And the chart is in fact, yes, I believe that, that basically what the chart illustrates and it provides the facts which are a matter of record in Government document which permit us a legitimate basis for making a certain argument to the jury concerning the significance of the fact that four days after this lengthy and complicated event all the key agents in the case who had the most important stuff to say about sightings and other things all sat down and dictated their reports at the same time.

It's a memorialized fact in the Government's documentation. It is an argument we wish to make to the jury concerning the certain aspects of certain reports which have been thoroughly gone into on cross-examination; and it is relevant to the argument that we wish to make concerning why the jury should not believe certain things that the agents {4311} reported.

MR. SIKMA: Your Honor, I would first of all argue that it's probably almost one of the most irrelevant things that's been argued during the course of the trial. Secondly, not only are the reports themselves inadmissible, now we're trying to get into some theory as to the dates and times that they were typed and who typed them which has nothing whatever to do with the evidence in this case.

Also there's no testimony at all that no one was available to take any dictation on that day. Secondly, there is no testimony --

THE COURT: I didn't understand the last comment you made.

MR. SIKMA: There is no evidence in the record that there is absolutely no one available to take dictation until the 30th. I think that the evidence will show and is conclusive that because of the length and complexity of these items or these 302's that were going to be dictated it was not the agents, the agents were not able to be freed from the direct responsibilities of investigation until the 30th, or in one case apparently the 29th and one case the 28th.

You'll also remember that in dealing with items such as finding specific items that's an entirely different situation than dictating an event concerning what happened Sometimes people make statements about what happened weeks after {4312} they occur. These very specific items it would seem reasonable that the agent would have that dictated at a somewhat earlier date. There is also some evidence that it appears that the dates on the 302's are perhaps typographical errors or inaccurate.

THE COURT: There is evidence that one of these obviously has an inaccurate date on it.

MR. SIKMA: Yes. I would say for that reason it is totally irrelevant.

THE COURT: Well, I think it has slight if any probative value, but it is a, it could be the basis for an argument by counsel. And you have just made the rebuttal argument which obviously could be made to the use of it. So I'm going to overrule the objection and Exhibit 219 will be received.

Are you ready for the jury?

MR. HULTMAN: We are, Your Honor.

MR. TAIKEFF: Yes, Your Honor.

THE COURT: Jury may be brought in.

MR. TAIKEFF: Before the jury comes in, Your Honor, may I ask if the witness has his handwritten notes, that he produce them.

MR. HULTMAN: Your Honor, as a matter of law on this the Government certainly objects on the basis that have been previously indicated with reference to notes. And there's no {4313} showing of any kind in this record that this witness is not capable of recalling what the events were without referring to any notes.

So it's on both those grounds that we object. One, that there's no basis in law for the production; but two, there's no showing even in the

record at this time as a basis for testimony.

MR. TAIKEFF: Your Honor, I wasn't suggesting that this witness was incapable of testifying without them. I was asking for them pursuant to Title 18, Section 3500.

MR. HULTMAN: And my resistance as a matter of law has been on that from the beginning.

THE COURT: And what is the basis for your objection under 3500?

MR. HULTMAN: There is not a statement, Your Honor, that's been given to the prosecution.

Also it's his witness, not ours so, Your Honor, 3500 material is a matter for me to give at the time I call a witness. This is not my witness.

MR. TAIKEFF: In the alternative I ask for them under Brady against Maryland.

MR. HULTMAN: And I won't argue that I state my opposition on the record and the law.

THE COURT: The objection to producing them under 2500 is sustained. {4314}

The motion that they be produced under Brady v. Maryland, I'll have to reserve ruling on that until I have an opportunity to examine the notes.

MR. HULTMAN: Could you right now, Your Honor? My understanding is they're very brief It wouldn't take a matter of maybe two minutes.

THE COURT: You may produce the notes. I will examine them.

MR. HULTMAN: I haven't seen them myself but that's the information given to me. I asked the agent to bring them.

MR. TAIKEFF: Your Honor, I might suggest that it would be appropriate for Your Honor to also see the 302 in question and perhaps respectfully suggest to the Court that the Court keep in mind that there was testimony that there was a certain aspect of the 302 which this witness took the notes for, and apparently some other aspect for which agent Adams took the notes that it may very well be that the relative portions for which this witness took the notes may follow some indefinite pattern rather than the first quarter or the first half or the first two-thirds.

It may cover selectively certain portions of it. By implication then the balance of it may have been a result of note taking or activity of Agent Adams. And on that basis alone I think it is subject to scrutiny

by the defense.

THE COURT: I do not want to take the time to analyze {4315} this at this time and keep the jury waiting.

MR. TAIKEFF: I understand. There's no request that Your Honor do so.

THE COURT: Very well. I'm going to have to continue reserving my ruling.

The jury may be brought in.

Is there any reason why you need these now, sir?

THE WITNESS: No, sir.

THE COURT: Very well.

MR. TAIKEFF: Would it be possible for Your Honor to return the 302 temporarily?

THE COURT: Yes.

MR. TAIKEFF: I think the witness may need that

THE COURT: I'll return this also, and then the, I'll have the Clerk get it from you later

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

THE COURT: The false start in bringing you back into the courtroom was created by the fact that a legal argument commenced as you were on your way in and we hadn't anticipated it.

MR. TAIKEFF: May I continue the interrogation, Your Honor?

THE COURT: You may

MR. TAIKEFF: Thank you.

{4316}

Q (By Mr. Taikeff) I think at the time of the luncheon recess we had our attention focused on page 7, the fourth paragraph.

A Yes.

Q Now, I would like you to examine Defendant's Exhibit 88 for identification to tell me whether, beginning on page 2, there is the statement? Yes or no.

A Yes.

Q And whether that statement continues to develop generally peaking in a chronological way beginning the end of May, 1975, to some specific

comments about June 25, 1975; then on to the morning of June 26, 1975, the afternoon of June 26, 1975, finally in the middle of page 5 the night or first evening when they were escaping, June 26, 1975, and then a series of events up to, and I'm now in the middle of page 6 where Mr. Anderson makes, refers to the fact that he was in Wichita, Kansas. Up to that point have I generally described accurately the pattern of the statement? {4317}

A Yes, you have.

Q Now immediately following that paragraph which is the third paragraph at page 6 in which there is reference to Mr. Anderson's presence in Wichita, Kansas, the statement then adds a number of individual facts in a series of about ten separate relative short paragraphs.

A Correct.

Q You mention that Special Agent Adams took some of the notes and you took some of the notes.

A That's correct.

Q Is there any relationship between what happened in the middle of page 6 and the point where Agent Adams started taking notes?

A The point with which Agent Adams started not only taking the notes but typing while talking to Mr. Anderson.

Q Did I ever ask you that question before anywhere in or out of this courtroom?

A No.

Q Did anybody, government attorney, defense attorney, investigator, FBI agent or any human being ever ask you the question that I just asked you?

A No.

MR. TAIKEFF: Your Honor, I offer the entire document, Defendant's Exhibit 88, in evidence.

MR. HULTMAN: Same objections, Your Honor. And I {4318} might ask two or three questions of voir dire to establish that basis if the Court has any question.

THE COURT: You may.

MR. HULTMAN: I just have a couple of three questions, Agent Doyle.

You were there and participated in this event throughout the event,

were you not?

THE WITNESS: Yes, I was.

MR. HULTMAN: And the things that went into the 302 which is Defendant's Exhibit 88, you were present during all the time that the items, either the remarks of the witness or any questions were asked, were either asked by you or by Agent Adams and the answers and responses came in your presence, did they not?

THE WITNESS: Yes, that's true.

MR. HULTMAN: And in looking at proposed Exhibit 88, and I believe the date of this is the 3rd of February in the year 1977, is that correct?

THE WITNESS: That's correct.

MR. HULTMAN: Through your independent memory and your recollection of the events after having looked at proposed Exhibit 88, do you in fact recall the events as they did happen?

THE WITNESS: Yes, I do.

MR. HULTMAN: I renew my objection, Your Honor.

{4319}

THE COURT: The Court will reserve ruling.

MR. HULTMAN: And I also as part of the objection that under 613 (b) I believe is the section, Your Honor, that it was not shown at any other time to anybody.

Q (By Mr. Taikeff) Now, sir, I'd like to return to the contents of that particular paragraph on page 7 which in fact is the fourth paragraph. I think I'm going to quote it again because it was before lunch when I last quoted it. "When I returned to the top of the hill and saw Peltier, Robideau and Butler down by the agents' cars, I then saw a white and green car and a police car parked out by the road."

Now with respect to the questioning and answering around that paragraph, that is to say that part of the discussion, interrogation, call it what you will, was any chart used, any document?

A No.

Q Based on what you heard leading up to this specific answer which is in quotation, was there any identification in any other way besides the word "white and green car and a police car to identify the vehicles which were being talked about?

A Not that I recall.

Q Do you recall whether there was any reference to Highway 18?

A I don't recall that. I believe that one portion there he said that he was looking out towards Highway 18.

{4320}

Q In connection with that paragraph?

A Not in connection with that paragraph.

Q I'm only talking--

A I'm sorry.

Q I'm sorry if I mislead you.

I only mean in reference to that paragraph.

I'm wondering if you can help us in some way other than the words which are recorded here to identify specifically from what you heard what was under discussion at the time the white and green car being one vehicle and a police car being the other vehicle parked out by the road were under discussion on September, on February 1, 1977?

A I don't recall at this point.

Q All right. sir.

Have you ever seen either Exhibit 71 which is behind you or a copy of it?

A No, I haven't.

Q Did you hear any discussion at all on February 1, '77 concerning Agent Adams arriving in a car and a BIA police car arriving at approximately the same time and the necessity for them backing up to get away from the shooting?

A No. I don't recall that.

Q Okay.

Now, sir, in that interview of February 1, and I'll {4321} tell you the page number where you might look if you want to look, you're obviously not obligated to do so. Page 3, the last five lines. What time did Michael Anderson say that he was in tent city getting ready to eat?

A At 10:00 o'clock, A.M.

Q Now is it possible that there was a typographical error and he said 11:30?

A I was going to say about 10:00 o'clock A.M.

Q Now on page 2, paragraph 2 -- I'm sorry, sir -- page 4. Do you recall Mr. Anderson saying something in his statement about his first sighting of the agents' cars?

A Yes.

Q Now did he say that when he first saw the agents they were lying prone and appeared to be either dead or seriously wounded?

MR. HULTMAN: Your Honor, again I no object again. This is the very matter that's been gone into and repetitive.

MR. TAIKEFF: Not with this witness, Your Honor.

MR. HULTMAN: The questions have been asked and answered.

MR. TAIKEFF: I did not ask this witness. I asked the other witness who took the statement in September of 1975. That was from an entirely different document.

MR. HULTMAN: What page are you on, Counsel?

MR. TAIKEFF: I'm on page 4, Mr. Hultman.

{4322}

MR. HULTMAN: I further object, Your Honor, on the grounds that now it is an attempt on the part of Counsel to impeach a previous statement by now asking questions of a witness concerning an individual without the use of the other statement.

MR. TAIKEFF: Your Honor, I'm not attempting to impeach the other witness. I'll state for the record that the testimony of the other witness as to what he was told on September 15, 1975 was accurate testimony. I am now demonstrating what may be a change in what Anderson was saying to the agents. I'm not attacking the credibility of that last agent who testified.

THE COURT: Are you attacking the credibility of Mr. Anderson?

MR. TAIKEFF: I'm trying to establish what Mr. Anderson said from competent witnesses at various times.

THE COURT: Well, I'm wondering why you may not be barred by rule 613 (b).

MR.TAIKEFF: I have to take a look at the rule.

Yes. I don't believe I am barred, Your Honor.

THE COURT: Well, I assumed that you didn't believe you were barred. I'm asking you why you don't believe --

MR. TAIKEFF: I had to look because I didn't know the exact rule that Your Honor was referring to.

MR. HULTMAN: This has been the argument I made that {4323} the document has never been shown to the particular witness. This has been the basis for my objection primarily from the very beginning. The man who allegedly made the statement when he had him available and a chance to ask him --

THE COURT: Had you ever expressed that before?

MR. HULTMAN: I thought I had, Your Honor. But maybe I haven't made myself clear. I have been trying to do that.

MR. TAIKEFF: I think he's confused about something. When we show a document to the witness who didn't prepare the document, he's complaining that witness is not responsible for what's in the document. That's the position the government has taken. Now I've called a person who made the document to authenticate Anderson is incompetent to tell us what's in that; document.

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, from the beginning we have been through this particular procedure now for at least three weeks and the point simply being that procedurally if you're going to attack as Counsel has been attempting to do there is a duty and an obligation, as I understand the rules, to first present the witness himself and challenge him. Therein lies the first threshold position you must take. Counsel has {4324} refused to do that in any of the instances and here again we are again at the same situation. He's trying to impeach by a document that he refused to show the witness and challenge the witness on what it was he said at that time with the use of the document and chooses rather to attack the witness without ever showing him the document, without ever querying him on it through another witness.

MR. TAIKEFF: Your Honor, the witness has been afforded an opportunity to explain continues to have an opportunity to explain because the government --

THE COURT: Just a minute. What witness are we talking about at this

moment?

MR. TAIKEFF: The witness whom Your Honor believes is being impeached would have a right to deny the saying.

THE COURT: This is the point that I think that I'm making is that it seems to me what you are trying to do through this witness is to impeach the testimony of Michael Anderson and it seems to me that rule 613 (b) very clearly states that "extrinsic evidence of a prior inconsistent statement by witnesses is not admissible unless the witness is afforded an opportunity to explain or deny the same. The opposite party afforded an opportunity to interrogate him thereon."

MR. TAIKEFF: "Or the interest of justice otherwise requires."

THE COURT: "Or the interest of justice otherwise {4325} requires."

I do not recall in the examination of Michael Anderson that you ever attempted to impeach him on the basis of what he may have told this other witness that is now on the stand.

MR. TAIKEFF: May I refresh my recollection about one thing? I don't want to make a statement on the record unless I'm sure I'm right factually.

THE COURT: It's not my understanding, Mr. Hultman, that you specifically --

MR. HULTMAN: I have not --

THE COURT: I had that in mind this morning and was wondering whether there was going to be an objection on that basis.

MR. HULTMAN: I may not have articulated, Your Honor.

What I'm trying to say is this has been the theory and basis of this particular discussion from the beginning

MR. TAIKEFF: Your Honor, at the very least we rely upon the provision here which gives Your Honor discretion in the interest of justice to ignore the rule, assuming that proceeding this way would be in violation of the Rule and it's on this basis.

THE COURT: When --

MR. TAIKEFF: Anderson's the witness who testified on cross-examination that he was threatened by Adams, that he {4326} would be beaten unless he told them what they wanted to know Now I think that is a sufficient basis to establish through other FBI agents what he said on one occasion, what he said on the second occasion so that it could be

compared with what he said in court.

MR. HULTMAN: Counsel --

THE COURT: I do not see that the witness is on the stand and I do not recall that I ever prevented you from cross-examining him on a statement that he may have given to an interrogating FBI agent which you had available to you on the 302, and this witness was obviously a very reluctant witness and I do not see that justice, in other words, when I say reluctant witness, I think he was more favorable to the defense than to the prosecution. I do not see that justice requires under those circumstances that the Court waive the requirements of Rule 613 (b).

MR. TAIKEFF: As to the requirements of the Rule, he's not precluded from coming forward on rebuttal and explaining and claiming that he didn't make the statement. What more reliable evidence is there of what he said on those two occasions than two neutral FBI agents who have had no involvement in this particular case and who were there as functionairies, who have participated in the preparation of a document which memorializes with a great degree of accuracy what went on why should I be confronted with a witness like {4327} Anderson whose posture is difficult to fathom. I don't know whom he favors, whether it's the prosecution, the defense, himself or something else. He's a kind of person that I wouldn't want to rely upon to make a presentation to the jury and I trust maybe in some respects, I'm not soliciting an answer, the government feels the same way about it. But I've got a neutral person here who is competent, who is obviously quite professional. You can't ask a more reliable evidence of what came in.

Now Rule 613 (b), that somebody should not be disadvantaged by having impeachment come in out of the mouth of a third person when it's too late to come in and do anything about it, but it's not too late because there is a rebuttal case permitted here and if the government feels they have something they can say about him in making that statement, they have an adequate opportunity to do it.

THE COURT: As I recall Anderson's a witness from Arizona. We are near the end of this trial. You had your opportunity to cross-examine him with reference to any discrepancies between what he testified in court and what may have appeared in these 302s of the FBI. These 302s were made

available to defense prior to the trial. I don't know how long prior to trial but obviously they were made available.

MR. TAIKEFF: Availability is not an issue. That's conceded, Your Honor.

{4328}

THE COURT: The very requirements of the rule just specifically forbid it unless --

MR. TAIKEFF: But, Your Honor, it is clear from the language what the Rule has in mind. It has in mind not cutting off somebody from offering his explanation. There is not such s cutting off in this particular case.

THE COURT: There is such a cutting off. The witness is no longer here and that's my point.

MR. TAIKEFF: Your Honor, the government could have this witness here long before they finish their rebuttal case.

MR. HULTMAN: But that isn't true.

MR. TAIKEFF: Furthermore, this is one-witness who without question has perjured himself in this courtroom when he said he was not convicted.

THE COURT: All the more reason, if you are suggesting that the witness has perjured himself, all the more reason why this cross-examination should have been had of this witness at the time he was on the stand and not wait until after he's a couple of thousand miles away and then seek to impeach him through extrinsic evidence.

MR. TAIKEFF: He's an unreliable witness. Why does the burden fall upon us to assume the risk with him?

THE COURT: Because the Rule requires it.

MR. TAIKEFF: It only requires it if he does not have an {4329} opportunity to rebut if the government chooses to rebut what is brought out here. That's what the Rule contemplates.

THE COURT: The Court has ruled. I'm not going to argue the point further. The impeaching of Anderson by this witness is prevented under Rule 613 (b).

{4330}

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

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

MR. HULTMAN: I have no questions.

THE COURT: You may step down.

(Witness excused.)

MR. TAIKEFF: I would like to have this marked for identification, please.

Your Honor, this weapon has been marked Defendant's Exhibit 221 for identification. We offer it in evidence as the AR-15 uncovered in the mobile home in Oregon. I am showing the exhibit to the Government.

MR. HULTMAN: Well, your Honor, I have no objection to the fact that's just been stated, but I object on the grounds that there has been no relevancy of any kind shown as far as the admission of this exhibit, for its materiality

THE COURT: Excuse me. I was not able to follow everything that you said.

MR. HULTMAN: Well, counsel made a statement in front of the jury that this is the weapon that was found in the mobile home in Oregon; and I said I took no issue with his statement, but I objected to the admissibility, that there hasn't been any showing of either relevancy or materiality as far as the particular weapon. That's my objection, {4331} your Honor.

MR. TAIKEFF: I would call your Honor's attention to an exhibit which is in evidence.

MR. HULTMAN: Well, if we are going to discuss the matter, I would appreciate it if we could approach the bench.

THE COURT: You may approach the bench.

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

MR. HULTMAN: Your Honor, first of all, on the record I want to enter my objection and not in the presence of the jury because I don't want to be prejudiced any further.

I object, first of all, to the act of counsel to bring an exhibit -- exhibit it before the jury, make a statement there without any showing of any kind with any witness or any foundation of any kind.

Now, the reason for my objection is very simple, that I do not take issue with the fact -- in fact, we produced the weapon as per the request of counsel -- that this weapon was indeed found in the mobile home on

November 14th in Oregon; but I object, there has been no showing of any kind that it has any relevancy or materiality in any way. That's the reason for my objection.

MR. TAIKEFF: I am prepared to demonstrate that, I think, quite briefly to your Honor.

{4332}

I am holding both exhibits. As your Honor will see, except for the absence of the clip in the newly marked exhibit, they are virtually identical, although the flash suppressor on the front is not the same.

Now, there has been a great deal of testimony concerning 34-AA which is introduced as a look-alike; that this weapon, 34-AA looked essentially identical to the weapon being carried by Leonard Peltier.

In addition, there is almost a totally destroyed AR-15 which has been identified as the weapon which fired the shell casing which was found in the trunk of the car.

THE COURT: I am aware of that.

MR. TAIKEFF: As your Honor can see, these weapons are almost identical. Then the weapon in my right hand which was newly marked could have easily been the gun in Leonard's possession. It was found in the same mobile home in which he was traveling.

THE COURT: It might have been another one.

MR. TAIKEFF: That is absolutely correct. That is the point, and that is exactly the relevance.

MR. HULTMAN: With one weapon there is all kinds of evidence in this record that ties it directly to this Defendant. This weapon in no way -- other than the fact it was found with him -- there is no way it is tied to him.

MR. TAIKEFF: Why were all those guns introduced {4333} into evidence if they were not tied to him? I am talking about all of the photographs of all the things that were found in the mobile home which we objected to. If there is one thing that has any relevance to this case, you object to it.

MR. HULTMAN: One of the other items, your Honor, that has been introduced -- any weapon that has been introduced in evidence has been tied back to that right there --

THE COURT: (Interrupting) Just a moment, counsel. The statement which counsel just made, Mr. Taikeff just made, was that the photographs of other weapons that were recovered were received in evidence from this Oregon episode. There is also, as I recall, evidence that the AR-15 was not photographed, and there was some hassle as to why it was not.

MR. HULTMAN: Yes, I believe that's correct.

THE COURT: It was said they had not found it yet.

MR. HULTMAN: I believe that's correct.

THE COURT: I really do not see any relevance in that showing of that weapon, and I think the argument can be made very easily both ways, that "o.k., so he had it, so what is the relevance?" -- but the fact that photographs were received and the fact that apparently it is conceded that this weapon was found, it seems to me it has about as {4334} much probative value as Exhibit 34-AA. It is just another AR-15.

MR. HULTMAN: Your Honor, I am not going to argue the first point with the Court.

The second point I clearly argue though, the reason for 34-A, and it has been clear from the beginning that it is only for the purpose to show what 34-A looked like before it was burned. That's the only basis for entering it in the record, and it is the only testimony --

MR. TAIKEFF: (Interrupting) That's right. This one also looks like it, that's the point. That's precisely the point.

MR. HULTMAN: The only reason -- if you let me finish, counsel -- the only reason for 34-AA was to show as an illustration, not having any probative value other than that it was the same type of weapon that 34-A specifically is. This has not been introduced for the reason to say, counsel, that it is a look-alike, period, for 34-A; and that's preposterous, you know it isn't.

MR. TAIKEFF: It is shown as a look-alike for 34-AA, and the fact that it was recovered in Oregon with the Defendant.

MR. HULTMAN: Oh, now come on.

Well, your Honor, let me ask counsel one question first.

{4335}

(Counsel confer.)

MR. HULTMAN: Your Honor, on the basis of the Court's observation,

the Government would withdraw its objection in light --

THE COURT: (Interrupting) I was about to overrule it anyhow.

MR. HULTMAN: At least it shows unanimity.

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

THE COURT: Exhibit 221 is received. (Defendant's Exhibit No. 221, having been previously duly marked for identification, so offered in evidence, was received.)

MR. TAIKEFF: Your Honor, the Marshal's service has requested the exhibit for a moment. May we pause while they put a certain device on it?

THE COURT: I understand they want to make it inoperable.

MR. TAIKEFF: Yes.

MR. LOWE: Your Honor, may Mr. Sikma and I approach the bench on another unrelated matter?

THE COURT: You may.

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

MR. LOWE: We are going to try and get together to {4336} work out these laboratory reports on weapons that will come up on probably which either we can agree or which we might propose, and ask you to rule on.

Mechanically I am not sure the easiest way to do it. I have been through all the lab reports and made marginal notations as to certain items we would be willing to delete, clothing items and things not related to the case.

In looking this over, rather than take these voluminous reports and read them item by item, would it be easier for you if we were to take the exhibits and use a colored pen, like a red pen, and make marginal notations, "X's" or just a line of some sort to indicate those which we would be willing to proffer in the alternative; or do you have a way that you would like us to proceed?

Maybe Bob has some ideas of how to go about it.

MR. SIKMA: I didn't quite understand you.

MR. LOWE: Take the exhibits and mark in red pen, let's say, those items which we are willing to --

THE COURT: (Interrupting) This relates to those laboratory reports.

MR. LOWE: Give the Judge something he can look at -- instead of

reading it into the record. Would that be an agreeable method for us to proceed?

THE COURT: Anything that counsel can work out between themselves is agreeable.

{4337}

MR. LOWE: I am thinking in terms of putting the red marks on the exhibit. You can make rulings in the record. We could proffer them --

MR. SIKMA: (Interrupting) Then on those items that come in --

MR. LOWE: (Interrupting) We would Xerox, make Xerox composites that would eliminate all of the items the Judge would not allow in. We would end up with Exhibit 188-A, 192-A, and so forth, so the jury would never see the marks.

THE COURT: I see no objection to that procedure.

MR. LOWE: We will get together in the recess. Thank you, Judge.

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

MR. TAIKEFF: If I may proceed, your Honor?

May the record reflect I have removed the clip from Exhibit 34-AA. Your Honor will note that Exhibit 221 has no clip in it. That's why I did that.

I would like an opportunity to display these two weapons side by side to the jury.

THE COURT: Very well.

MR. TAIKEFF: I will show one side and then turn them over and show the other side.

(Counsel displays to the jury.)

{4338}

MR. TAIKEFF: Now, your Honor, I would like to display to the jury that portion of 34-A which is the end of the barrel and Defendant's Exhibit 221 so the jury may see the two objects side by side. May I do that?

THE COURT: Any objection?

MR. HULTMAN: No objection, since they are in evidence, your Honor.

THE COURT: Very well.

(Counsel displays to the jury.)

MR. TAIKEFF: Your Honor, it has been suggested to me that perhaps

the jury did not understand that I was showing them the top part. May I walk in front of the jury box?

THE COURT: I think the jury understood what you were showing them, particularly in view of your statement.

MR. TAIKEFF: Ramona Bennett to the stand, please.

RAMONA BENNETT,

being first duly sworn, testified as follows:

MR. TAIKEFF: May I approach the Clerk, your Honor?

THE COURT: You may.

(Counsel confer.)

THE CLERK: Will the witness step forward?

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

THE COURT: Some of the native Americans who have {4339} testified have preferred to be sworn on the pipe rather than the oath that we normally administer to witnesses; and a reference was made as to whether you would have preferred to have taken the oath on the pipe rather than the way it was administered to you.

THE WITNESS: I would tell the truth under any circumstance, so the pipe would have special meaning.

THE COURT: But you would tell the truth under any circumstances, and it makes no difference in that respect, is that what you told me?

THE WITNESS: Yes.

THE COURT: Very well.

THE WITNESS: The pipe would have more significance than --

THE COURT: (Interrupting) Would it make any difference insofar as the truthfulness of what you testified?

THE WITNESS: No, no, sir.

THE COURT: Very well. Thank you.

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

THE COURT: Would counsel approach the bench? I want to report what the witness said.

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

THE COURT: The witness testified that she would tell {4340} the truth under either form of oath. The pipe may have special significance.

It would make no difference as far as her telling the truth is concerned.

MR. TAIKEFF: Fine, thank you.

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

MR. TAIKEFF: May I inquire, your Honor?

THE COURT: You may.

DIRECT EXAMINATION

By MR. TAIKEFF:

Q Where is your home?

A My home is on the Puillup Reservation in Washington State. That would be around the area of Tacoma.

Q Could you lower the microphone a little bit and move it just a little closer to you so it picks up your voice?

A Is this better?

Q I don't think so.

A little closer.

THE COURT: The chair does not move, but the microphone does.

A Is that better?

Q (By Mr. Taikeff) Yes, it is, thank you very much.

If you are uncomfortable leaning forward, you can pull the microphone closer and lean back.

Would you say again the name of the Reservation?

A Puillup -- (spelling) P-u-i-l-l-u-p -- Tribe which is in {4341} Pierce County in Washington State and covers some of the same geographical area as the City of Tacoma.

{4342}

Q Do you have an official standing with respect to that reservation?

A I'm the chairwoman of the Puillup nation.

Q Is that the, is that an office which is recognized by the Bureau of Indian Affairs, or is that strictly a tribal matter without legal consequence?

A No. It is recognized by the Bureau of Indian Affairs. I'm elected through the regular Indian Reorganization Act process. It's an elected position.

Q Do you know the person known as Leonard Peltier?

A Yes, I do.

Q Do you see him in this courtroom?

A Yes.

Q Would you point him out, please.

A (Indicating.)

MR. TAIKEFF: May the record reflect that the witness has pointed at the defendant.

Q (By Mr. Taikeff) Was there every a time in your life when you lived in the same area as Mr. Peltier?

A Yes. Previous to living on the Puillup Reservation I lived in Seattle about thirty miles away. While living in Seattle I was active with an organization called the American Indian Women's Service League that sponsors the Seattle Indian Center. And through this community work that I first met him.

Q Could you tell us in what year?

{4343}

A Yes. That was, would be around '68 or '69.

Q And for how long did you know him in the northwest, in that part of the country?

A About four years.

Q Did he reside there?

A Yes, he did.

Q Do you know what his employment was during that period of time?

A Yes. He had a business. He had an automotive repair business out in the south side of Seattle in the industrial area and it was a fairly substantial business with a working area maybe two and a half times as big as this room.

They did both auto body work there and the basic mechanical repairs; and it was through his work that I first encountered him because he was, well, he was recommended as a good mechanic and also was a pretty easy touch, well, you know, because it was a service organization. We would frequent --

MR. HULTMAN: Well, I think we've gone beyond the recitation in response to the question, Your Honor, and I would even request of counsel that if it is going to be a character witness that we get to the proper

questions and --

MR. TAIKEFF: I agree with Mr. Hultman, Your Honor.

THE COURT: Very well, proceed.

Q (By Mr. Taikeff) Are you aware of your own personal knowledge of any community work the defendant did during that {4344} four year period? I'm not talking about things he did in connection with his business, I'm talking about things he may have done in the community without compensation.

A In an Indian, in an Indian community cars, Indian cars are really notorious, just as a problem, and I think his voluntary services in that area was pretty close to a full-time commitment.

No, I'm not aware of any other involvement.

Q And have you had occasion since the first time you met him or became aware of his existence to speak with other people concerning him? Just tell me yes or no.

A Yes.

Q And as a result of speaking with these people have you some impressions as to what his reputation is in that community where he lived?

A Yes. He made a lot of friends there. A lot of the people are worried about him. Most specifically Ella Akino.

MR. HULTMAN: Well, again, Your Honor, I'm going to rise. Counsel knows the questions and I hope that the witness would be instructed to respond accordingly without going into a discussion of details of specific events.

A Most of them --

MR. HULTMAN: If it please.

THE COURT: Just a moment. The problem arises because you are going beyond answering the question. You should, {4345} Mr. Taikeff will ask you a question and you should listen to the question and respond to the question and not volunteer additional information.

Q (By Mr. Taikeff) Tell us what characteristics if any you have discussed, that is to say, characteristics of the defendant, personality traits by name, not by incidents or specific individuals, that you can report to the Court and jury as to what his reputation is. But first tell us the characteristics in question, such as reputation for honesty for something of that sort. I'm not trying to suggest to you what the answer

is.

A He was known as a helpful person, particularly by the elders.

Q Either based upon your personal knowledge or upon his reputation in the community can you tell us anything about the nature and quality of his relationship to children?

A It was good. He would always help, particularly families that had children, you know, people that were, that were in trouble that had children.

Q Do you know anything about his personal attitude towards children specifically?

A Well, I know about children's attitudes towards him. They liked him.

MR. TAIKEFF: I have no further questions.

{4346}

CROSS-EXAMINATION

BY MR. HULTMAN

Q I'm going to have to ask some questions because I don't know who the witness is.

Would you spell your last name for me. That may help me.

A B-e-n-n-e-t-t.

Q Are you any relation or a relative of Russell James Redner?

A No.

Q In any way?

A No.

Q All right. That's why I'm asking because the names themselves, I did not understand or what might possibly be a relationship.

Is it Ms. Bennett, is that what you go by?

A Yes.

Q I assume that your responses to counsel questioning didn't include the period of June 26, 1975 to this day in the courtroom, that you were talking about some other period?

A That would be correct.

MR. HULTMAN: I have no further questions.

MR. TAIKEFF: Nothing further. The witness may be excused, Your Honor.

THE COURT: You may step down and you are excused.

THE WITNESS: Thank you.

MR. TAIKEFF: Defense calls Special Agent Skelly.

{4347}

EDWARD A. SKELLY, JR.

being first duly sworn, testified as follows:

MR. TAIKEFF: May I inquire, Your Honor?

THE COURT: You may inquire.

DIRECT EXAMINATION

BY MR. TAIKEFF

Q What is your occupation, sir?

A Special agent of the FBI.

Q Have you and I ever met?

A No, sir.

Q Have we ever spoken with each other?

A No, sir.

Q Have you ever had an interview or any conversation with any member of the Peltier defense team concerning the subject matter of your testimony here?

A No, sir.

Q You don't know any of the questions that are going to be asked of you, do you?

A No, sir.

Q How long have you been with the Federal Bureau of Investigation?

A I've been employed as a special agent for five years.

Q And during that five-year period where have you been assigned?

A I've been assigned to Indianapolis, Indiana; Pine Ridge, or Rapid City, South Dakota, and presently Kansas City.

Q What are the dates, inclusive dates of your service out of {4348} the Rapid City office?

A From approximately July, 1973 until February of 1977.

Q As you know on June 26, 1975 two agents and a Native American person died on the Pine Ridge Reservation; is that correct?

A Yes, sir.

Q Since that time have you worked on different aspects of the investigation and that case?

A Yes, sir, I have.

Q Did your work on that case begin on the 26th of June, 1975?

A That is correct.

Q Now, other than the fact that you've been called here to be a witness has your work, at least in an active sense, terminated with respect to that case, or is it still something that you work on from time to time?

A I don't think I understand the question, sir.

Q Well, I'll put it a different way. You started working this case on June 26, 1975. Putting aside the fact that you re sitting here and testifying in this case when did your work end? When did your last assignment terminate on that particular case?

A Right off the top of my head, sir, it would -- within the last couple of months I would say.

Q When you first described your assignment to the Rapid City {4349} office you said that you were assigned to the Pine Ridge Reservation. May we understand from that that a great deal of your work when assigned to Rapid City was on the reservation?

A That is correct.

Q Did you reside on the reservation?

A No, sir.

Q Did you live in Rapid City?

A Yes, sir.

Q How far is it from Rapid City to the reservation?

A To Pine Ridge itself, or to various parts of the reservation?

Q Let's say Pine Ridge. I think that is a good enough reference point.

A I would say approximately a hundred and, hundred and ten miles.

Q And the FBI has an office in Rapid City, does it not?

A Yes, sir.

Q And that office is on the north side of town in the federal building?

A It's in the federal building. I don't know if it could be classified as the north side of town or the west side. It would be downtown Rapid City.

Q If you want to go from the FBI office to the reservation do you have to drive through Rapid City?

A Yes, sir.

Q How long does it normally take you to make that trip if you {4350} make it by car?

A Approximately two hours. An hour and forty-five minutes perhaps.

Q Now, you made use of the FBI radio in the course of the afternoon of June 26, 1975, did you not?

A Yes, sir, I did.

Q I want to ask you some questions about some of those transmissions, and I don't mean to embarrass your memory. Would it assist you if you had some document to which you could refer in case you wanted to refresh your recollection, or do you think you could discuss your transmissions that afternoon strictly from memory?

A I doubt if I could do it straight from memory, sir.

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

THE COURT: You may.

(Defense counsel conferred.)

MR. TAIKEFF: Your Honor, may I confer with Mr. Hultman for a moment?

THE COURT: You may.

(Mr. Taikeff and Mr. Hultman conferred.)

MR. TAIKEFF: Your Honor, I am placing before the witness after consulting with Mr. Hultman the entire document which had originally been marked Defendant's Exhibit 75 for identification.

Q (By Mr. Taikeff) And by way of advising the witness I want {4351} to state that only the first four pages are in evidence, otherwise it's not in evidence and should not be read from out loud. Do you understand that, sir?

A Yes, sir.

Q You may, of course freely look at the document, but first I would like to have you try to exhaust your independent recollection. If you have no recollection, please feel free to say so and you can make use of the document. Do you understand that?

A Yes, sir.

Q Sometime shortly after 2:00 P.M. do you recall making a transmission about "a couple of guys behind us over here to the left"?

A Over to the left or the west?

Q Yes. Either one, whichever of those versions might trigger your memory, and please be aware of the fact that behind you is Government Exhibit 71 which is a plan map of the immediate area, although it doesn't necessarily cover all the territory that you might have been on that afternoon.

Does that transmission, or does any transmission come to mind from the question that I put to you?

A Yes, sir. Basically what you say is true, that I did make a transmission to the effect that two individuals had been seen to our position, to our west.

Q Could you tell the Court and jury by making specific {4352} reference to the chart where you were at that particular time?

A Yes, sir. Should I --

THE COURT: You may step down.

Q (By Mr. Taikeff) You may step down, there's a pointer here.

A The area that I was, where I was is not, is below the chart here.

Q All right.

A It would be --

Q Was there a highway near there?

A Yes, sir. Well, a dirt road.

Q Do you know whether it's referred to as Highway 35?

A Yes, sir.

Q All right. You were in the vicinity of that, and where were you in terms of the residences which are at the center of the chart, opposite, to the left or to the right?

A I would say opposite, down in this general direction (indicating). Bottom of it.

Q Somewhat to the right, somewhat to the right as we look at it on the chart; is that correct?

A Yes, sir, I would say so.

Q Okay. Now, from that location sometime after 2:00 o'clock two individuals were spotted. Where were they spotted?

A After 2:00 o'clock?

Q Yes. And if it would help you, I'm not trying to cause you {4353} to make any mistakes inadvertently, look at 2:09 P.M. in the log, read the transmission just before it and just after it and refresh your

recollection to the extent necessary. Perhaps you'd look at page 6, sir.

A Yes, sir, I found it.

{4354}

A At that particular time the area which I made reference was to our rear, or behind us, to the west of this general area on the other side, the opposite side of the highway or road known as Highway 35 (indicating).

Q So that it was further away from the residences than you were, those residences being at the center of Exhibit 71?

A Yes, sir.

Q Were those people native American people?

A I didn't see them, sir.

Q Do you know if they were carrying weapons?

A No. I do not.

Q Now shortly after 3:00 o'clock, perhaps you would want to look at the transmission of yours, unless you remember doing something shortly after 3:00 on the radio --

A Not from my head; no, sir.

Q Please take a look at the entry for 3:09 P.M.

A Yes, sir.

Q Do you recall that set of circumstances?

A Yes, sir, I do.

Q How many people were involved in that sighting?

A That particular sighting?

Q Yes.

A I would say perhaps two. I'd been given the information relayed by radio.

Q And what were you told?

{4355}

A That three or four individuals -- you said not to read, right?

Q But as to the number of people, what were you told?

A Three or four individuals were seen running.

Q And where were they running to?

A Says "running toward the Highway 18."

Q Now can you give us some information about where they were and where they were headed?

A From that, from the transmission that I made?

Q Well, having looked at that perhaps it triggers your memory. That's what I'm asking for, what you now recall.

A This particular transmission here was a result of information that I had received perhaps a few minutes before that.

Q You didn't make the sighting yourself?

A No, sir, I did not.

Q I see. Okay.

Five minutes later check the paper in front of you. Don't read aloud.

A Uh-huh.

Q And tell us whether reading that entry refreshes your recollection.

A Yes, sir.

Q Does that involve the sighting of any individuals?

A Yes, sir.

Q What do you recall and can you use the chart to illustrate {4356} what you recall?

A The fact that that transmission referred to the earlier one of the three or four individuals who had been spotted and it was an update of sorts. I was repeating the information, passing it on to other units that three or four individuals had been spotted.

Q Do you recall whether it was reported to you or you observed them carrying weapons?

A No, sir. I did not observe myself. It was reported to me.

Q Now if you'd be kind enough to look at the transmission at 3:49 and read it to yourself, I'd like to know whether you recall anything about the facts surrounding that transmission.

A Yes, sir.

Q What can you tell us about that, and if you can relate it to Government's Exhibit 71.

A That refers to, that particular transmission refers to another sighting, a second sighting after which several of the members of the team that I was with had left our position down in here, or off the chart (indicating).

Q Below the chart?

A Below the chart. And had moved basically in a northerly direction

and somewhat down towards, at least towards the wooded area or creek area (indicating).

Q Now there is a house referred to in that incident, is there {4357} not?

A Yes, sir.

Q And can you point out the house in question on the chart?

MR. HULTMAN: Your Honor, I'm not sure at this point and in order I might interpose an objection, maybe Counsel would even ask a question. I got the impression that these transmissions are repeated transmissions not of things that he observed. If we'll separate out what he saw rather than hearsay that he's representing, maybe I won't have any objection. But if all that he is repeating here is what somebody else told him, then I'm going to have an objection to hearsay as to all of what he's testifying to at this time, Your Honor.

Q (By Mr. Taikeff) Agent Skelly, with respect to the activities of moving from where you had been near Highway 35 in a northerly direction, is that something you participated in personally?

A No, sir, it is not.

Q All right. I won't ask you any further details about that incident.

If you would be seated. I don't think it will be necessary for you to use the pointer anymore.

Do you recall any incident that day involving a person on horseback?

A Only a reported sighting of an individual on horseback {4358} which would have been later on that day.

Q Now in connection with whatever it is you recall about a person on horseback, whether it's someone's comments or your own observation, do you recall any sense impression that you had that there were a lot of people around in the woods and on the hills, et cetera, other than law enforcement people?

MR. HULTMAN: I object to this as calling for an opinion or conclusion of the witness for which no proper foundation has been laid.

THE COURT: Sustained.

Q (By Mr. Taikeff) I place before you Defendant's Exhibit 104 for identification which is a 302 of your activities on June 26, 1975, bearing the transcription date of July 4 and ask you to read to yourself the

paragraph which begins at the bottom of page 4 and ends at the top of the next page.

A To myself?

Q To yourself, please. It's not in evidence.

Now, sir, you've just read the paragraph to yourself. Do you have any recollection of the events which occurred on June 26th that caused you to write that particular paragraph?

A I'm not certain I know what you're asking.

Q Let's go back and do it in short steps. Defendant's Exhibit 104 for identification is a 302, correct?

A Yes, sir.

Q Who wrote it?

{4359}

A I did.

Q It reports your official activities on a certain day, right?

A Yes, sir.

Q What day?

A June 26, 1975.

Q What is it based upon: notes you took, memory or what?

A Recollections of mine.

Q Now in writing the entire report, you also wrote the paragraph which you just read to yourself?

A Yes, sir, I did.

Q And was that paragraph written based upon recollections of what occurred on June 26th?

A Yes, sir.

Q Now I would like to know what you were recalling when you wrote the last sentence in that paragraph which I'll show to you again so it won't be any doubt in your mind as to what sentence I'm putting my attention on.

MR. HULTMAN: Which paragraph, Counsel, are you referring to just out of curiosity?

MR. TAIKEFF: I'm sorry.

A Yes, sir. I've read that sentence.

Q (By Mr. Taikeff) Okay.

Now can you tell us something about what you were remembering or what was in your mind when you dictated that last {4360} sentence?

A I believe in my own mind what I had, what crossed my mind was the thought that some of, or all of the escaping individuals might possibly be in a position to out flank us.

Q Do you have any idea what time of day that was?

A It was after 5:30. Probably closer to 6:00.

Q And where were these individuals that you referred to?

A They were in the hills.

May I?

Q Certainly.

A Again, I can only give a general because it's below the chart, but it would have been south and west, or southwesterly direction. Quite a ways from here, back into a hilly area (indicating).

Q Let me describe that for the record.

MR. TAIKEFF: The witness has put the pointer approximately one-third of the way between the right-hand edge and the left-hand edge and then pointed it downward to show a position west of the lower edge of the chart one-third of the way from the right to the left.

Q (By Mr. Taikeff) Now that's where you were at the time you made certain observations which ultimately found its way into this paragraph, am I correct?

A Excuse me, sir. No. I was incorrect by pointing down this direction (indicating). I was a bit confused with my {4361} earlier position where I had been earlier in the day.

Actually the area that I had in mind would have been more up in this direction, more up to the south I would say (indicating).

Q All right.

Then let me describe for the chart the fact that you were now on the right-hand edge about a quarter of the way up from the bottom and you've pointed out to the right.

A Yes, sir. In that general direction.

Q How far out were you, would you say? Not in terms of the chart but in terms of actual distance at the location.

A At what time? At the time --

Q That you made whatever observation that caused you to write that paragraph.

A Using this as the center or what? From where?

Q Anyway you prefer to describe it and I'll then put it into the record.

One preliminary question. There is a highway that starts out in the chart larger on the left-hand side at Highway 18 and then comes around in a counterclockwise way and again after making at least a half a circle intersects Highway 18 again.

A Right.

Q And I then, we've all agreed that's called Highway 35. If it helps you to talk in terms of Highway 35, that may be best {4362} for us all.

A Fine. That would help.

The area that I was referring to would have been south and west, or southwest of Highway 35, and using it as a guide I would say that the area would have been approximately a quarter of a mile from Highway 35. I'm just not real sure.

Q A quarter of a mile which way? A quarter of a mile south which means to the right on the chart or a quarter of a mile west which means down on the chart?

A I would say more to the south, right on the chart.

Q You were more to the south?

A At that particular time.

Q Imagine that the chart was many times the size that it is extending both up, to the right and down and put your pointer approximately where you think you were at that time. Taking into account the scale which you can see at the top of the chart and there is also measurement gradation on the pointer you're holding.

A Approximately in this area (indicating).

Q All right. Could you hold your pointer there for a moment so that I can -- you were then off the right-hand edge of the chart opposite the area we've referred to as tent city and you say beyond the highway?

A Yes, sir.

Q How far beyond?

{4363}

A That's where I would have to guess at approximately a quarter of a mile or so beyond 35.

Q Thank you.

A May I?

Q Yes, please.

Do you recall whether that afternoon you had any conversations with Special Agent Coward?

A Yes, sir, I did.

Q And in particular did you have any conversation with Special Agent Coward concerning his identification by name of any person who may have been there that he might have seen?

A Yes, sir. A one sided conversation. I didn't, I heard him tell me that he had seen someone he felt he could identify.

Q And what did he say?

A I don't remember his exact words but they were to the effect that he felt that he saw Leonard Peltier.

Q Now that afternoon did you hear from anybody other than Agent Coward as you just related, any information concerning the sighting of any person who had been identified by name, who had been recognized in any way?

A No, sir, I did not.

{4364}

Q Did you participate in any daily meetings during the days which immediately followed June 26th, meetings of Special Agents of the FBI?

A There were daily conferences held, daily conferences held in the morning to go over what areas needed to be worked or investigated.

Q And at these conferences during the week, which followed June 26th, did the name, Leonard Peltier, ever come up?

A I really don't know for sure if it did or not, the first week.

MR. TAIKEFF: Now, do you know of -- do you want me to proceed, your Honor?

THE COURT: Yes.

Q (By Mr. Taikeff) Do you know of any person who was seen and identified at that location on June 26, 1975, other than Leonard Peltier; and when I ask you, "Do you know," I am talking about what you may have

learned in your official capacity during the first few days after June 26th, 1975 from attending meetings, from speaking with other agents?

A No, sir, not -- no one positively identified.

Q Now, when you met with your fellow agents in the mornings during the several days which preceded -- withdrawn -- during the several days that followed June 26th, the investigation was under discussion, was it not?

A Yes, sir.

{4365}

Q And assignments and things learned and new leads, et cetera were the kinds of things you talked about, right?

A That's correct.

Q Well, what was the extent of the conversation during the first couple of days about Leonard Peltier, how many minutes per day, how much of your meeting was taken up by discussion of Leonard Peltier, if any?

A I really don't recall how many or how much time may have been, if any. The first few days that I can recall there was no mention of him.

Q By the way, did you take any notes that day?

A No, sir, I did not.

Q Is it fair to assume that you were too busy and under the circumstances you just couldn't stop to take notes?

A Yes.

Q Given the nature of the activities you were involved in?

A Yes, sir, I would say that would be a fair statement.

Q Did you write any notes that night before you went to sleep?

A No, sir, I did not.

Q Did you write any notes the following day?

A Yes, sir, I did.

Q Do you have those notes?

A No, sir. The notes that I made were not kept once I dictated the 302.

{4366}

Q What do you mean by "not kept", is that a euphemism for "destroyed"?

MR. HULTMAN: Well, I object to the characterization of counsel. The question was asked and a fair response.

Q (By Mr. Taikeff) What happened to the notes?

A Once the FD-302 was dictated, the notes were thrown away.

Q And on what day did you dictate your 302?

A The date that I dictated it?

Q Yes.

A I don't recall the exact date. It was three or four days after the 26th, I would say.

Q I will show you the 302 and ask you specifically if by looking at it you can tell us the date on which you dictated it?

A (Examining) Yes, sir, June the 30th.

MR. TAIKEFF: Does your Honor wish me to proceed?

THE COURT: Are you suggesting maybe you would like a recess?

MR. TAIKEFF: No, I have a sense that your Honor might want to recess, and in some way your Honor is accommodating me. I am prepared to go through or not if your Honor chooses.

THE COURT: I was going to recess in about five minutes.

MR. TAIKEFF: I have five minutes right in front of me?

THE COURT: You may proceed.

{4367}

MR. TAIKEFF: Your Honor.

Q (By Mr. Taikeff) You have just mentioned June 30th as the day you dictated your report. Was June 30th a day of any kind of special activity?

A No, sir, not that I know of.

Q Was it a day devoted to reviewing the evidence up to that point any more so than any other day?

A Well, for me it was to a certain extent.

Q Can you explain that, please?

A Yes, sir. On the 27th of June I conducted a search of the vehicle of Special Agent Ronald Williams.

Q That was on the 27th?

A Yes, sir.

Q And can you tie that into any special activity on the 30th?

A Yes, sir. It was on the 30th that a review of the items that were found in Special Agent Williams' car, an inventory of sorts was prepared.

Q Was there any special reason why that activity occurred on June 30th?

A As opposed to the 29th?

Q The day before or the day after.

A No, sir, not that I am aware of.

Q Were there any other aspects of the case which was specifically reviewed on June 30th other than what may normally have been done at your morning meeting?

{4368}

A Not to my knowledge, sir.

Q Where were you when you dictated your report on June 30?

A In Pine Ridge, South Dakota.

Q In a temporary office which had been set up?

A Yes, sir.

Q Was it a large facility?

A It was fairly large.

Q Was it one room, or was it several rooms?

A Several rooms.

Q Did you see any of the other agents whom you knew from the Rapid City office there on June 30th?

A I saw them in the building at various times that day, yes, sir.

Q Was there a separate area set aside for the stenographic pool so that if an agent wanted to dictate a report, he would go to a certain location or would the stenographers come to wherever the agents were?

A That too would vary. Some men would go into the stenographic pool, and then others, the stenographer would go to where they were.

Q On June 30th, 1975, did you see Agent J. Gary Adams in the office appearing to dictate to one of the stenographers, that is to say, he was there, she was there and she had a pad with a pencil and she was writing?

A I just don't -- I don't remember when I saw him that day. {4369} It was a bad time.

Q How about Agent Waring, do you know him?

A Yes, sir, I do.

Q Do you know whether, or can you recall whether you saw him in the office dictating that day?

A Not to state specifically, no, sir, I may very well have, but I just don't recall right now.

Q How about Agent Coward?

A I would have to answer the same way. There were a number of agents in the building that day, and on the days preceding it, and --

THE COURT: Excuse me. The Court is in recess until 3:45.

(Recess taken.)

{4370}

(Whereupon, at 3:35 o'clock, p.m., the following proceedings were had in chambers, Messrs. Taikeff and Engelstein, and the Clerk of Court being present:)

MR. TAIKEFF:, Your Honor, the reason we asked to come into chambers at this time is that Miss Bagn has something which I think is important to advise your Honor of; and we didn't think it appropriate that she approach the bench or address the Court dressed as she is at this moment.

MISS BAGN: This is my undercover uniform, your Honor.

MR. TAIKEFF: Your Honor, we have had telephonic contact with Myrtle Poor Bear; and she is going to call back shortly, and I am wondering whether your Honor would allow Miss Bagn to briefly tell your Honor exactly what happened. She was the one that had the telephone call.

THE COURT: Yes, she may. Mr. Lowe has already been in here.

MR. TAIKEFF: That was as a result of a special aspect of that, and it occurred to me after I heard all of it that unless your Honor gives a specific order to the Marshal's Service to actually go there and finally execute that warrant, I fear that we are going to be out of witnesses before she gets here; and it is very important to us that we produce her.

THE COURT: Well, go ahead, Miss Bagn.

MISS BAGN: I talked to Myrtle's sister, Clara, on {4371} the phone first; and she told me that Myrtle was considering coming to Fargo because she was aware that we had requested her presence here.

Clara further said that Myrtle had been at home at least since Sunday and all day Monday and all day today, and that there had been no Marshals or anyone else of any official-looking nature near their house in Allen, South Dakota.

She also stated that Myrtle was extremely scared and had been spending

most of her time apparently hiding in the attic of their home. She then put me -- excuse me.

Clara talked then with her sister, Elaine, who was in the defense room and has been subpoenaed as a defense witness. After their conversation Elaine asked me to get on the phone with Myrtle, which I did. Myrtle said she was willing to come up, that she was very scared. She didn't want to come alone and wanted to preferably come with one of her sisters. She said that she wanted the Marshals to be unaware of her coming up and expressed a desire that perhaps the defense could have a ticket ready for her flight up here so that she wouldn't have to go through the Marshals and that she was very scared of doing that.

MR. TAIKEFF: If I may add something, it was recommended that when there is further telephonic contact -- and my {4372} understanding is that Myrtle Poor Bear will call in a little while -- that Miss Bagn is going to explain to her that the Marshals are a part of the court and not FBI or anybody else; but I am terribly concerned that the situation is so delicately balanced that she could actually disappear into the bushes, and in fact I use that expression because earlier today a note was handed to me, an update from one of the defense team who had apparently spoken with Chief Deputy Warren; and his report was that she was out in the bushes, and they couldn't find her.

Now, she has been present more at home, more than any fugitive in the history of this past decade; and I am afraid that it will require a specific instruction from your Honor that a certain number of Marshals drop what they are doing and go directly to her home and execute on that warrant in order for it to be done.

THE COURT: Mike, would you ask Mr. Warren if he would come up?

MISS BAGN: Your Honor, if I might add for the record I spoke with Mr. Warren this morning; and he informed me that at least one Marshal was going to be looking for Miss Poor Bear today in the Pine Ridge and Allen area.

THE COURT: The latest information that you have just given me, has that been given to Mr. Warren?

MISS BAGN: No, your Honor.

{4373}

MR. TAIKEFF: We attempted to, the door was closed in the last 15 minutes. Mr. Lowe attempted to report the matter to him. Since he wasn't around and the break was almost over, we decided we better make this known to your Honor immediately.

THE COURT: That is all we need on the record unless you want the Marshal on the record?

MR. TAIKEFF: No, your Honor, we have no need to do that.

THE COURT: I do not want you to run off. Is Mr. Warren coming in?

MR. NELSON: Yes, Ordean just went to get him.

THE COURT: That is all we need, Miss McArthur.

(Whereupon, at 3:45 o'clock, p.m., the reported chambers conference ended.)

{4374}

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

THE COURT: The delay was due to a conference with defense counsel relative to the attempt to locate a witness.

Are counsel ready for the jury?

MR. TAIKEFF: Yes, Your Honor.

MR. HULTMAN: Yes, Your Honor.

THE COURT: Jury may be brought in.

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

MR. TAIKEFF: May I continue, Your Honor?

THE COURT: You may.

Q (By Mr. Taikeff) Mr. Skelly, I'd like to go back to something to see if you can provide certain information. Perhaps you recall at the beginning of your direct testimony I asked you some questions about a radio transmission at 3:14 P.M. which concerned, and I'm not suggesting you have personal knowledge of the setting. I want you to understand that, I want Mr. Hultman to understand that. You made a radio transmission concerning some individuals who were spotted, apparently moving south right near the swamp. Now, what I would like you to tell us, or by the way there's a further bit of information which you apparently transmitted between the swamp area and the plowed fields. Based on that information, I'm not asking you whether

you made the sighting yourself, can you point out for {4375} the Court and jury what part of the diagram is referred to in that subject matter?

A No, sir, I honestly cannot.

Q Do you know any swamp area around there?

A No, I don't know of a swamp area at all. What I was under the impression -- nothing but a creek ran through the wooded area is what I would have, may have referred to as a swamp area, or the swamp.

Q Now, there is reference to plowed fields and of course you probably notice on Government's 71 there is one plowed field here (indicating), one plowed field here (indicating) and I believe that the stream runs somewhere in that vicinity, does it not?

A I would think it would follow the tree line.

Q That is over on this right-hand side?

A I don't know that it would be right on the inside or outside but --

MR. HULTMAN: Your Honor, I'm going to object on the ground that if this is a sighting that this witness saw I have no objection to him stating what it is. But if he's only relating some words that somebody else said to him I think it's pure speculation for him from that point on.

MR. TAIKEFF: Your Honor, I'm not talking about what the person saw. I'm trying to get a topographical fact from this witness independent of what somebody else may or may not {4376} have seen. And I thought I made that crystal clear.

MR. HULTMAN: I am objecting on the grounds, Your Honor, that there has been no foundation or any basis for this witness to testify in response to that question unless he does know specifically.

THE COURT: Well, he may testify if he knows. Do you know?

THE WITNESS: The specific location of the creek?

MR. HULTMAN: The specific radio broadcast transmission that counsel is asking you about at this point.

MR. TAIKEFF: I'm not asking him about a radio transmission, Your Honor. If I may proceed, I'm asking about the topography of this area.

Q (By Mr. Taikeff) And I want to know, sir, if you know in this area, and you may extend your consideration a reasonable distance in every direction, or the edges of this chart, where there is both the stream and

two plowed fields other than the particular area which I'm pointing to in the right-hand third of Government's Exhibit 71?

A Other than there?

Q Yes.

A I don't, I don't know of any other, other than what is shown there.

Q Now, once again, I am referring to a radio transmission at 3:49 P.M. I make no claim that you made the observation, but {4377} presumably you said the words "red house" in connection with some people who were chased back into the red house and they fired at our guys. All I want to find out from you is was there a red house at the Jumping Bull Compound, and I'm talking about the central part of Government Exhibit 71?

A There was a house that from where I was situated up here to be red.

Q And would you point that out, please.

A I would say this one (indicating).

Q And am I correct, sir, that that is the one that had a little magnetic arrow which the Government placed there which says "tan and red house"?

A Yes, sir.

Q Do you know of any other red house in that area?

A No, sir, I don't.

Q Thank you very much, sir. If you'd be kind enough to resume your seat.

Now, on June 26, 1975 in the latter part of the morning you overheard certain radio transmissions which you believe came from Special Agent Ronald Williams; is that correct?

A Yes, sir.

Q And if you can recall from memory, if you cannot, please let us know, do you recall anything that Special Agent Williams said concerning the subject of cover fire?

A I couldn't go into any specifics, but I do recall a general {4378} statement to that effect, yes, sir.

Q What does the phrase "cover fire" mean? Protective cover fire?

A That's what I would assume, yes, sir.

Q All right. Now, I'm going to put before you Defendant's Exhibit

114 for identification. I trust that you recognize that that's a 302 which you wrote?

A Yes, sir, I do.

Q And it concerns events of June 26 which you dictated on June 30th, and would you read to yourself only, because it's not in evidence, the first paragraph.

(Witness examining Defendant's Exhibit 114.)

A Yes, sir.

Q (By Mr. Taikeff) Now, does that refresh your recollection as to what you heard over the FBI radio from the voice you believed to be that of Special Agent Williams concerning cover fire or giving cover fire?

A Yes, sir, it does.

Q Would you be kind enough to tell the Court and jury about that radio transmission?

A From the beginning of the 302?

Q No. I'm concerned about the subject with cover fire which you quote in your 302. And now that you've had a chance to look at it I assume you've refreshed your recollection about it. I'd like you to tell the jury what Special Agent Williams trans- {4379} mitted in that regard.

A Transmitted words to the effect that if someone could get to the top of the ridge and give us cover fire we might be able to get out of here.

Q Now, sir, would you please tell the Court and jury about your interview of the eyewitness to the killings of the agents.

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

THE COURT: You may.

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

MR. HULTMAN: In order that I might properly object, is it my understanding now that you are going to go into an interview of Myrtle Poor Bear?

MR. TAIKEFF: Yes.

MR. HULTMAN: Well, it's going to be the position of the Government, Your Honor, that there is no relevancy of any kind until there is a showing of some kind, the same as has been in the past, by what testimony this person would give for this individual here. It's an attempt to get through

this witness without an opportunity on the part of the Government without that witness being here to elicit testimony from the witness, Myrtle Poor Bear. And that's the reason I raise the objection at this time to any -- that it's pure hearsay at this particular point. And there could be no {4380} probative value or materiality.

MR. TAIKEFF: We disagree, but in an exercise of caution we would agree to a continuance until she gets here before we proceed.

MR. HULTMAN: Well, Your Honor, and I object to that clearly on the grounds that I made it very clear on the record at a time in this record when Myrtle Poor Bear was here. These defendants had talked to her; that this was the very risk that was going to be run and this is where we were going to be sitting at a date sometime in the future if at that time they didn't take advantage of the fact that she was here.

MR. TAIKEFF: I'm astounded at the suggestion, Your Honor, of her being arrested and of her presence here as a witness.

MR. HULTMAN: I'm talking about as a witness.

MR. TAIKEFF: She was here, she was in the custody of the marshal service and Mr. Crooks came to me one day after 5:00 o'clock and said, "If you want her she's about to be released from protective custody." We supplied her with the subpoena, applied to the Court for a warrant to hold her as a material witness. We did everything which the law allows and permits.

THE COURT: Except to ask for a bond, a cash bond.

MR. LOWE: There was no bond entered into on the one {4381} that we did ask for. They never entered into a personal recognizance bond.

MR. HULTMAN: Plus, Your Honor, there could have been the proceedings that I had to resort to and which I was indicating at that time that the witness was here that that testimony could have been and should have been secured at that time in order to protect --

MR. TAIKEFF: That is totally contrary to the Government's position when we attempted -- when their witnesses were on the stand.

THE COURT: No. I do not agree with Government counsel on that. But I do feel that counsel for the defense knew that I had no hesitation in requiring a cash bond on a material witness. The fact is they, well these counsel, while you were not involved, you were certainly very closely

associated with counsel and went to the Court of Appeals on a matter where I required a substantial cash bond on a material witness in this case. In this case counsel for some reason known to yourselves did not want to ask for that type of a bond which would enable this Court to hold that witness here.

MR. TAIKEFF: The bond we asked for wasn't even set.

THE COURT: That has nothing to do with it. The point is that a personal appearance bond allowed her to go. Whether she -- the magistrate, I don't know what happened, why the {4382} magistrate didn't take the personal appearance bond, but all Mr. Lowe asked for was a personal appearance bond.

MR. LOWE: But, Judge, if she posted a cash bond she still would have been able to go.

THE COURT: I think if she had posted a cash bond there would have been a lot more compulsion on her part to be present because somebody would have had to raise the cash for the bond.

MR. LOWE: If this was a felony and she failed to appear she would have been a lot more compulsive and through no fault of the defense.

THE COURT: I suspect if she would have been able to post bond she would not have been able to make the bond and she would have been held.

MR. TAIKEFF: I don't know why that assumption should be made, Your Honor. I mean, Angie Long Visitor made her bond and her circumstances generally speaking are no different than Myrtle Poor Bear's.

THE COURT: And she appeared, too, because she had a bond and it was a substantial bond.

MR. TAIKEFF: She appeared here because she was a person who always responded to court process at all times throughout the history of these proceedings, not just in connection with this trial.

MR. HULTMAN: Your Honor, beyond that issue I would {4383} then go to the issue of even were she here the testimony that we're about to elicit does not meet the test of relevancy. Again what is the testimony going to show, where do we go but to create a straw woman as we have argued this from the beginning and then in some way try to destroy.

I don't know what the position of counsel is that she was there, she wasn't there. It cannot appear in the Government's case in chief in any way and I challenge the materiality of it on any grounds. Well, as

far as this witness, it's hearsay.

MR. TAIKEFF: It is not hearsay. I wish it would finally be a situation in this case where what hearsay is is clearly understood. Hearsay is an out of court declaration which is offered to prove the subject matter, or the matter asserted within the declaration. This is not hearsay.

MR. HULTMAN: It's an attempt to get through a statement which --

THE COURT: Just a moment.

MR. HULTMAN: By a witness who's not here, Your Honor.

MR. TAIKEFF: May I inquire who the author of this is?

MR. HANSON: Mark Suby, one of the judge's law clerks handed it to me.

MR. TAIKEFF: Could we mark this for identification?

THE COURT: No. That is not evidence in this case.

{4384}

I would like to, I would like to have you state for the record what it is that you were about to ask this witness and that counsel is objecting to.

MR. TAIKEFF: I was going to ask him of circumstances surrounding his meeting this witness, how he got to know about her, what investigation he did in connection with what she had to say, to lay the foundation for a framework in which her testimony has some meaning.

We're certainly not offering it for the truth. When we, when we get her on the stand we're obviously not offering it for the truth. She says that saw Leonard Peltier shoot the agent.

THE COURT: What other witnesses do you have this afternoon?

MR. TAIKEFF: I'd have to look at my list, Your Honor.

THE COURT: Very well.

MR. TAIKEFF: With one exception, and that person is planned as our last witness, all the remaining witnesses who are presently here relate to the Myrtle Poor Bear aspect of the case. But I would remind Your Honor that Agent Wood has yet to testify on the offer of proof.

THE COURT: I have that in mind. That was the reason I was --

MR. TAIKEFF: Yes. And there is, there are at least two witnesses who, or for whom subpoenas were turned over to {4385} the marshal service some time ago, who as far as we can tell have not yet been subpoenaed.

And I couldn't say anything about their appearance at this moment.

So basically we don't have a witness that does not deal with the Myrtle Poor Bear aspect available to testify. Although we have some six or seven witnesses to call on that subject.

MR. HULTMAN: Well, is Norman Zigrossi to testify to Myrtle Poor Bear?

MR. TAIKEFF: No. Norman Zigrossi was subpoenaed on another subject. Has he responded to the subpoena?

MR. HULTMAN: Well, Counsel, everybody that you've asked to be here is here and been sitting around. Now, if you are going to --

MR. TAIKEFF: I have twice inquired about Zigrossi.

MR. HULTMAN: You said a minute ago that the only witnesses were Myrtle Poor Bear witnesses. Did I hear you right?

MR. TAIKEFF: No, you did not hear me right. You'll see that you overheard there are two other witnesses. I said there are two other witnesses for whom subpoenas were issued some time ago and as far as I know they have not yet been served or have not responded. And indeed those two people are Robert Ecoffey and Mr. Zigrossi.

MR. HULTMAN: Mr. Zigrossi is here.

{4386}

MR. TAIKEFF: This is the first I've heard of it. I have twice inquired on the record. He's a high-ranking official in the FBI. He's not going to report to my office. He's going to report to your office.

MR. HULTMAN: Well, are there any more that you want to inquire about?

THE COURT: Just a moment. I'm trying to determine how we're going to proceed.

Is Mr. Zigrossi someone you could put on at this time?

MR. TAIKEFF: I need about a five minute interview with him, but I think I could.

MR. HULTMAN: And, Your Honor, I think before we go on with him, again there's another matter we ought to be heard on. It's my understanding that the subpoena was a subpoena duces tecum. The item to be brought is an interview he had with Rolling Stones, and I submit to this Court that there isn't anything about -- I haven't heard the interview, but I'm, I've read the article; that that particular recording has no relevancy of any

kind as far as -- our materiality as far as the issues in this case.

MR. TAIKEFF: I think that's a perceptive ability Mr. Hultman has by not even listening to the tape, he knows there's nothing on there that's relevant.

MR. HULTMAN: Just a little bit like your comment about Myrtle Poor Bear, or some witness that hadn't appeared yet on {4387} the record, that you indicated what her testimony is going to be. And I have at least read the article from whence the interview came and that is my basis.

THE COURT: I would suggest that the witness step down but be available yet this afternoon if necessary; that you proceed with Mr. Zigrossi. Is it Zigrossi?

MR. HULTMAN: Zigrossi.

THE COURT: And then I think I'll allow the jury to leave for the day and we'll continue with the evidence on the offer of proof. And then we may also explore this Myrtle Poor Bear situation more fully.

MR. TAIKEFF: Will Your Honor preserve this piece of paper?

THE COURT: It's preserved. I'll give it to Ralph.

MR. TAIKEFF: All right, thank you. May the record reflect that.

MR. HULTMAN: Might I inquire. I've had one witness that I didn't know until she was on the stand this morning, I still don't even know who she really is, but are there any other witnesses now other than Myrtle Poor Bear witnesses and Zigrossi, are there any other witnesses, Counsel, that you can give me that are going to be called?

MR. TAIKEFF: I have given them to you, but the answer to your question, there are no additional witnesses other than those you mentioned except Robert Ecoffey whom I previously {4388} identified, but there are no other witnesses that I know of.

MR. HULTMAN: Ecoffey, Zigrossi and Myrtle Poor Bear?

MR. TAIKEFF: Right. And Norman Brown.

MR. HULTMAN: Well, now, we add another one. Is there any more now?

MR. TAIKEFF: I gave you all these names before.

MR. HULTMAN: I know. You gave me a long list of many more that we haven't talked about.

MR. TAIKEFF: I've given you every single name.

THE COURT: Norman Brown --

MR. TAIKEFF: He's our last witness, Your Honor. Saving him for last.

MR. HULTMAN: Are there any other witnesses other than those you have named that you expect to call at this time, not on a list you gave me? I'm asking here and now.

MR. TAIKEFF: I told you that all the names I gave you are all the witnesses. So if you have a list you know all the names.

MR. HULTMAN: Is it asking too much of counsel to at this time --

MR. TAIKEFF: Repeat the names?

MR. HULTMAN: Yes. That's all I'm asking.

MR. TAIKEFF: Glad to repeat the names. If that's what you wanted all you had to do is ask. Robert Ecoffey, when he shows up --

{4389}

THE COURT: Excuse me. When do you have --

MR. HULTMAN: I have no idea, Your Honor. He is not a governmental employee.

MR. TAIKEFF: He is a BIA police officer, and I would like to indicate now, because maybe it would affect Mr. Hultman, in this connection that the subpoena for him has been out for some time and we've been getting an indication from the marshal that they can't serve him.

THE COURT: Well, I'm going to have the marshal brought in and we're going to make a record on this business, who we can or cannot serve, or why he cannot serve them. We'll do that after the jury leaves this afternoon.

MR. TAIKEFF: To finish answering Mr. Hultman's question, Robert Ecoffey, Mr. Zigrossi, Special Agent Wood, Special Agent Price, Florence Fire Thunder, Jeanette Tallman, MaDonna Slow Bear, Ricky Little Boy, Theodore Poor Bear, Elaine Poor Bear, Myrtle Poor Bear and Norman Brown.

MR. HULTMAN: Now, it's my understanding, except for Ecoffey, so that I have no misunderstanding, Ecoffey and Brown, the reason for calling any of the others, is solely Myrtle Poor Bear. Is that what you've indicated?

MR. TAIKEFF: That is correct, except that Wood is also here on the offer of proof.

MR. CROOKS: What about Waring, I didn't hear. Is he now going to be scratched or what?

{4390}

MR. HULTMAN: He didn't have anything to do with Myrtle Poor Bear.

MR. TAIKEFF: I don't think that I asked for Mr. Waring on the definite list, He was only on the possible list. I don't think he was asked to be here, actually present.

MR. HULTMAN: All right. Fine.

THE COURT: Does the Government anticipate rebuttal witnesses?

MR. HULTMAN: I do, Your Honor.

THE COURT: How many do you expect to have?

MR. HULTMAN: Well, depending upon where we go with Myrtle Poor Bear it could make a --

THE COURT: Well, I'm just --

MR. HULTMAN: I would say we're probably talking about at the outside, as far as the Government's testimony, two hours at the most. Maybe an hour.

THE COURT: This is really the information that I wanted.

MR. HULTMAN: Yes.

MR. TAIKEFF: May I now ask for a reciprocal discovery and ask the Government for the names of its witnesses?

MR. HULTMAN: I don't think I've got to make this determination until such time as I do. You'll know ahead of time and I will.

MR. TAIKEFF: Okay. I accept that.

{4391}

MR. HULTMAN: Right here and now there's a lot of things imbalanced and I might end up calling none of them.

MR. TAIKEFF: I would assume that we would at least have overnight notice.

MR. HULTMAN: No problem.

THE COURT: We're talking about overnight notice. We're also talking about getting this case to the jury this week.

MR. HULTMAN: Well, let me ask you this, Counsel: When does it appear that you are going to be -- are you going to be completing tomorrow do you think?

MR. TAIKEFF: I suspect so. We've predicted either Tuesday or Wednesday and I think we're pretty much on schedule.

MR. HULTMAN: Do you think we would get to this then possibly tomorrow, the testimony itself, if I had rebuttal testimony?

MR. TAIKEFF: If not tomorrow surely the first thing the following

morning or very close to the --

MR. HULTMAN: If I let you know tomorrow morning would that be soon enough once I do know?

MR. TAIKEFF: Yes. I would accept that as an adequate notice, yes.

MR. HULTMAN: Okay. I will do that.

MR. TAIKEFF: Your Honor, may I comment on one other {4392} fact, or that Your Honor might want to consider with respect to scheduling. The question of the argument on requested charge.

THE COURT: Yes.

MR. TAIKEFF: With no further comment. I just want to remind Your Honor about it.

THE COURT: I have it in mind.

MR. TAIKEFF: Thank you.

THE COURT: And it was my intention to go into that as soon as the evidence is in. I'll even hold a night session if necessary to go into it, but it's, but I do not want to go into it until all the evidence is in.

MR. TAIKEFF: Yes, Your Honor.

MR. HULTMAN: Very good.

THE COURT: Well, then this witness may step down temporarily.

MR. TAIKEFF: Yes, Your Honor.

{4393}

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

THE COURT: Mr. Skelly, you may step down subject to recall.

Have you called another witness?

MR. TAIKEFF: No, Your Honor. I don't believe we will at this particular time.

THE COURT: It was my impression you were going to call Special Agent Zigrossi.

MR. TAIKEFF: I thought I said to Your Honor I needed five minutes. I never met him. I wanted to have a very brief conversation with him.

THE COURT: You did. I forgot about that.

Why don't you take your five minutes and go interview him.

Court will stand at ease for five minutes.

(Recess taken.)

THE COURT: It's been reported to me that we are encountering some additional delay so what I'm going to do is excuse the jury for the day and the court will remain in session, take further evidence on the offer of proof that was not completed yesterday and any other matters that need to be handled out of the presence of the jury. I just feel that it's close enough to the time we normally recess so that it would be an imposition to keep the jury around any longer today.

{4394}

So, members of the jury, you are excused then for today and insofar as you're concerned the court is in recess until 9:00 o'clock tomorrow morning.

The Court will again stand at ease until Counsel are ready to proceed.

(Recess taken.)

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

THE COURT: Mr. Taikeff.

MR. TAIKEFF: Your Honor, I was advised that Your Honor had sent the jury home.

I did complete the interview with Mr. Zigrossi. He will be called as a witness and I will do so first thing tomorrow morning so he doesn't lose any time from his usual duties.

THE COURT: Very well.

MR. TAIKEFF: I have the impression from something Your Honor said at the side bar that Your Honor may wish at some point to take up the matter of subpoenas which are still outstanding. Am I correct, Your Honor does intend to do that?

THE COURT: No. Not necessarily. I was just attempting to get some quarterly procedure between now and the time that the evidence is in. That does not create too much disruption as far as the jury is concerned.

MR. TAIKEFF: I would ask one thing then. At some {4395} time before Your Honor retires for the day that you give the defense an opportunity to advise the Court of certain things relating to certain subpoenas. At any time that may be appropriate.

THE COURT: Are you now talking about the Myrtle Poor Bear situation?

MR. TAIKEFF: I have some further information based on further telephone calls I personally made during that recess.

THE COURT: I would like to have Mr. Warren come in and I'd like to get a record made on this matter right now.

MR. SIKMA: Your Honor, while we're waiting for Mr. Warren, could I make a record on these government exhibits with regard to, excuse me, Defense exhibits that relate to the laboratory reports in general. I found one item that we agreed that we would stipulate to. For the rest of the items, I think unless we would let them all in, which I think would be confusing to the jury, about all I can find that is not marked out by defense counsel is irrelevant and I haven't found anything in this regard that we can really agree on.

THE COURT: Well, I'm not ready to go into that matter at this time.

MR. SIKMA: Very well.

THE COURT: The Court will at this time go into the matter of the efforts to secure the presence of witness Myrtle {4396} Poor Bear.

I wonder, Mr. Warren, if you'd take the witness stand.

Mr. Taikeff, you may now then report as to what progress you've made or anything you may have to say on this matter.

MR. TAIKEFF: Is it possible for me to elicit some information from Mr. Warren?

THE COURT: Yes, you may.

HAROLD C. WARREN,

being previously sworn, testified as follows:

EXAMINATION

BY MR. TAIKEFF:

Q Mr. Warren, I only want to elaborate upon the record matters concerning efforts relating to this afternoon since the time we were all in the Judge's chambers on the Myrtle Poor Bear matter.

MR. HULTMAN: Not the United States.

MR. TAIKEFF: No. I'm sorry. That was gone on ex parte basis and I stand corrected. The government was not present.

Q (By Mr. Taikeff) My understanding, and correct me if I state anything which is not factually precise, was that a deputy United States Marshal from the Rapid City office was on his way to Allen, South Dakota

sometime this afternoon to take care of in one respect or another the warrant outstanding for Myrtle Poor Bear. Is that understanding of mine factually correct?

A I relayed that to you in the Judge's chambers that I was {4397} led to believe that a deputy marshal was enroute from Rapid City to the Allen, South Dakota area in an attempt to locate Myrtle Poor Bear. That was in conjunction with other duties that this deputy had to do.

I find that now that this deputy had arrested two persons in the Pine Ridge area and was obligated to return those two persons to Rapid City and could not go to Allen, South Dakota, to attempt to locate Myrtle Poor Bear.

Q So that means that this particular afternoon, as far as you know, there is no marshal available to go to her house and execute the warrant?

A May I explain?

Q Sure.

A The circumstances.

Q Yes. Sure.

A Since we departed from the Judge's chambers, arrangements have been made for a BIA officer to go to and remain in the Allen, South Dakota area. He will be in radio contact with our Rapid City office. On our notification where Myrtle Poor Bear is Rapid City will advise the BIA officer who will attempt to take Myrtle Poor Bear in custody. If this does not come about through a telephone conversation that you referred to within the Judge's chambers to assist us in this, and it's not possible to locate Myrtle Poor Bear, if the BIA officer cannot locate Myrtle Poor Bear this afternoon with your assistance of the {4398} telephone conversation, then a deputy marshal will be dispatched tomorrow morning to Rapid City to spend the day in the Pine Ridge, the Allen area attempting to locate Myrtle Poor Bear with or without the assistance of Myrtle Poor Bear or your office, whatever it might be. That's where we are at this point.

Q I see.

MR. TAIKEFF: I have some information to advise the Court. I have no further questions at this particular time.

I was advised about halfway through my interview with Mr. Zigrossi that we had received a telephone call from a certain person. I would gladly

advise the Court of the matter but I don't want to put the name on the record at this particular time.

This person apparently wants to assist Myrtle Poor Bear in getting here but reports, and I'm now telling Your Honor what I was told on the telephone because I had a number of telephone conversations in the last 15 minutes with this person. Myrtle Poor Bear is apparently afraid to be brought here by federal authorities and said to this man she's willing to come on her own in the company of this man who has identified himself to me. He gave me a telephone number at an institution of learning. I returned the phone call. He answered the telephone so I'm reasonably certain that this person has accurately described himself. He's a rather articulate person. I think he is the person he says he is both in terms of his {4399} name and in terms of the occupation he has described to me.

He said that she is not unwilling to come but she's afraid to go with federal authorities and I asked him whether he was in a position to come with her tonight and I was told that he would do so. And so in view of what has occurred so far in terms of the failure of the United States Marshal service to accomplish the execution of the warrant, I would ask at this particular time that Your Honor vacate the warrant temporarily and I will be in a position to further advise Your Honor early tomorrow morning. Because according to Mr. Warren's testimony there is morning that can be done between now and then anyway and I think maybe we just may get lucky with the services of private citizen who has offered to come to her aid.

Now if Your Honor feels that we ought not to proceed this way --

THE COURT: We may proceed this way but why vacate the warrant?

MR. TAIKEFF: I'm just concerned on their way to the airport, which would surely be an indication of their seriousness of actually getting on the flight for which arrangements have been made, she may then get arrested and quite frankly there would be no need to do that at this particular time.

THE COURT: If you request I will vacate the warrant. I will advise you, however, that I am not going to delay this trial.

{4400}

MR. TAIKEFF: Your Honor, I am not going to waive any right to ask

for a continuance under all these circumstances. If it's a choice between protecting my client and my concern for another person that seems to be suffering unnecessary anguish in connection with this, I must of necessity choose my client. But I think what has occurred here, whether it was inadvertent, whether it was lack of appropriate motivation at other times is such that a motion for a continuance were one necessary should be granted without any hesitation.

Now the chief deputy has already advised us pursuant to his testimony of a few minutes ago that there is nothing that can be done until tomorrow anyway.

THE COURT: Mr. Warren, you may step down. I think we're through with you.

MR. TAIKEFF: I'm just trying in the interim to do something which may save a lot of people a lot of effort and trouble. If Your Honor doesn't want me to do that, because I have to give something up in order to make additional effort that may not cause any delay but rather may permit us to go forward, I won't make that effort.

THE COURT: You make whatever effort you choose. I'm going to ask you at this time to state for the record the testimony that you expect to elicit from this witness.

MR. TAIKEFF: I expect this witness will testify that she was induced by the FBI to make false statements and give {4401} false statements and give false statements under oath. That she will testify that she does not know Leonard Peltier and has never seen him or met him or spoken with him in her life and she was not at the Jumping Bull location on June 26th, 1975, and probably on any other date and that through the efforts of the FBI she was made to give a statement and then in turn, and I'm not sure of the exact sequence, I think the affidavit came before the statement, that she was caused to sign affidavits by the Federal Bureau of Investigation that were not true.

THE COURT: And were those used in the prosecution of Mr. Peltier?

MR. TAIKEFF: Yes, they were.

THE COURT: In what respect?

MR. TAIKEFF: They were used in extraditing him from Canada.

THE COURT: And were they used in any other respect other than

extraditing him?

MR. TAIKEFF: Yes, they were. They were used up to a point to qualify her as a potential witness in this case and the government put her name on the witness list both in the Cedar Rapids trial last summer and in this case here.

THE COURT: Was she in fact used in the Cedar Rapids trial last summer?

MR.TAIKEFF: She was not.

{4402}

THE COURT: And, of course, she has not been used here.

MR. TAIKEFF: Of course, Your Honor.

THE COURT: And that is the testimony, that is the substance of the testimony that would be --

MR. TAIKEFF: Well, there is more to it. It's what they had her say which is equally significant because it follows a very definite pattern. The content of it. The act itself is significant, of course, but the content of what she was made to say which was not true is very revealing.

THE COURT: And assuming the truth of what you are suggesting, would you state for the record how that is relevant to the issues in this case.

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

MR. TAIKEFF: May I confer with him?

We have received reports from certain members of her family that she is terrified of the FBI and we anticipate that we have been accurately advised in that regard. When she gets here, if she gets here, and we interview her, we expect that she will testify as to the basis of those fears, as to what was said to her. Now we also believe that she may have been a paid FBI informant; that she may have gotten some compensation for doing this. We can only discover this by speaking with her directly to be certain that we have testimony in that regard. But we believe that's the case.

{4403}

We have information to that subject from one member of her family.

THE COURT: And you have not answered my question as to how, assuming the truth of everything that you say, how is that relevant to the issues in this case?

MR. TAIKEFF: Because the conduct of the FBI in connection with the

inducement of this witness is a direct reflection on all of the evidence in this case. It shows what -- if believed by the jury, it shows what the FBI has been willing to do in an effort to connect this Defendant with this crime in order to convict him.

THE COURT: So what you are saying is that this would be offered not to impeach the testimony of any particular witness, or any particular exhibit that has been received in the trial of this matter, but that it is your theory that this taints the entire case and impeaches in effect the entire Government case in general.

MR. TAIKEFF: The latter part of what your Honor said is correct, but the former part is not correct.

THE COURT: All right. State what is not correct.

MR. TAIKEFF: Michael Anderson testified at this trial that he saw Butler, Robideau and Peltier down by the cars in the vicinity of the agents. That's something which she says, and the fact that the FBI got her to say that when she wasn't even there is indicative of the value {4404} of that particular piece of testimony coming out of the mouth of Michael Anderson, and that, your Honor, should be considered in light of the fact that on his first statement Michael Anderson said that when he first looked down at the agents' cars, the very first time he saw those cars, the agents were lying on the ground and were either dead or so severely wounded that they couldn't move; and then testified here that he looked down and saw Leonard Peltier and Robideau and Butler at the cars, and in addition to that, a witness will testify that he was coerced into giving that testimony in a --

THE COURT: (Interrupting) Excuse me. Who was coerced?

MR. TAIKEFF: That he, a witness was coerced, another witness was coerced into giving that very same testimony and did so under oath before the Grand Jury that indicted this Defendant, and it wasn't true; and the only reason he did it was because he was threatened by the FBI.

So we have three people, one of whom testified in this case, the person who lied about having been convicted and who came here and testified that Leonard Peltier was down by the cars; then we have a second person who perjured himself before the Grand Jury and earlier admitted to Mr. Hultman --

MR. HULTMAN: (Interrupting) That is not factual, {4405} counsel. I am going to rise to that. You have stated that twice.

MR. TAIKEFF: That is what he said.

MR. HULTMAN: I don't care what he said. That's not necessarily a fact because it was stated --

MR. TAIKEFF: (Interrupting) What?

MR. HULTMAN: Just because somebody has indicated something to you, still doesn't necessarily mean it is fact. I have listened to this twice. I heard it distinctly this time, but I wasn't sure I heard it before this time. That's what is going to come from the witness chair when you put the witness there, then we are going to find out the facts are.

MR. TAIKEFF: That's precisely right.

MR. HULTMAN: I will take that matter up with the witness when the time comes. I am not a witness.

MR. TAIKEFF: The witness will testify that he told Mr. Hultman in Cedar Rapids that he in fact had lied before the Grand Jury, and Mr. Hultman, according to the witness, said in that case, "I will not ask you that question," and Mr. Hultman did not ask him that question at the last trial; and the record is clear in the Grand Jury this witness said, "I saw Leonard and Bob and Dino down by the cars." A crucial piece of evidence was not adduced from this witness in the last trial, was not adduced from that witness in this trial.

{4406}

So so far we have one witness who was willing to come here, perjure himself about whether he was convicted, and testify that he saw Leonard Peltier and two others down at the cars.

We have a second witness who did so perjure himself before the Grand Jury on that very same subject but refused beyond that to give that testimony, and was not questioned in Cedar Rapids as to that point, was not questioned here as to that point although he testified that way before the Grand Jury. No attempt was made to elicit that from him. No attempt was made to impeach him with the fact that he had given that testimony before the Grand Jury.

And finally, we have another witness who as far as I know was not called before the Grand Jury, and I assume that that fact was correct,

but who swore in a series of affidavits to essentially the same fact except that at this time she was standing right next to Leonard Peltier and pounding him on the back trying to make him stop while he was doing it.

Now, if that's not relevant to the jury's consideration of Michael Anderson's testimony that he saw Leonard Peltier down by the cars, then nothing is and I am not here. I am just having a dream.

THE COURT: The testimony relative to Myrtle Poor {4407} Bear and her activities will necessarily be presented to the Court initially on an offer of proof. The Court will then make a determination as to whether or not it will be permitted to go to the jury.

The Marshal will be advised to hold up on the execution of the warrant in order to give the defense an opportunity to bring the witness here by the method that Mr. Taikeff suggested.

MR. TAIKEFF: Thank you, your Honor.

THE COURT: And the record may show that Mr. Lee just left the courtroom presumably to so advise the Marshal.

MR. TAIKEFF: Because of others speaking, I didn't hear what your Honor said last.

THE COURT: The record may show that Deputy Marshal Lee just left the courtroom and headed for the Marshal's office, presumably to advise Chief Deputy Warren of the Court's ruling that the execution of the warrant for the arrest of Myrtle Poor Bear will be held up in order to give Myrtle Poor Bear an opportunity to appear as you suggested, that it was indicated to you that she would in the presence of some other person.

MR. TAIKEFF: May I assume, your Honor, that I may go to the Marshal and send someone to the Marshal to then advise him of the flight number and the name of the two passengers, and so he can prepay the ticket for Myrtle {4408} Poor Bear, and we will make arrangements to prepay the ticket for the other person if it is the Court's wish that we pay for the other person. We will not quarrel with whatever decision your Honor makes in that regard.

THE COURT: Really I think the Court's wish has nothing to do with it. I do not think the Court has any authority to order payment for the other person.

MR. TAIKEFF: We will make that arrangement.

THE COURT: Very well. Yes, and you may contact the Marshal in that respect, give him that information.

MR. TAIKEFF: Thank you.

May I have a moment to confer with Mr. Engelstein?

THE COURT: You may.

MR. TAIKEFF: Thank you, your Honor, for the opportunity.

THE COURT: Are you now prepared to go forward with the offer of proof in connection with the Jimmy Eagle matter?

MR. TAIKEFF: Yes, with Agent Wood. We are prepared to conclude the offer of proof in that regard.

May I state the portion of the offer of proof that I was going to put into the record concerning the attorney, Martin Amiotte?

THE COURT: Yes, you may.

MR. TAIKEFF: He was the attorney who represented Jimmy Eagle, and if he were called to testify, he would {4409} testify that he gave cautionary instructions to Mr. Eagle in the early part of July, in sum and substance corresponding to what Mr. Eagle testified to.

THE COURT: Very well. The record may so show.

MR. CROOKS: Mr. Bienner just went down to get him.

WILLIAM B. WOOD,

being first duly sworn, testified as follows:

MR. TAIKEFF: May I proceed, your Honor?

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. TAIKEFF:

Q Mr. Wood, are you a Special Agent of the Federal Bureau of Investigation?

A Yes, sir, I am.

Q Since when?

A I joined the Bureau in June of 1966.

Q And in July of 1975, to which office were you assigned?

A I was on special assignment in Rapid City, South Dakota.

Q When did that special assignment to that office begin?

A June the 30th of that year.

Q Where had you been transferred from?

A Baton Rouge, Louisiana.

Q And until when did you continue on temporary assignment to the Rapid City office?

A Until I was permanently assigned there in, I believe it {4410} was August of that year.

Q You continue to be assigned there at this time?

A Yes, sir.

Q Now, on July 27, 1975, a statement was signed in your presence by a person named Gregory Dewey Clifford. Do you recall that incident?

A What was the date again, sir?

Q July 27, 1975.

A I don't recall the exact date, but I did take a statement from Mr. Clifford.

MR. HULTMAN: Your Honor, could I rise -- I don't mean to interrupt, counsel, but I do have an objection other than the one that has been standing; and that is, your Honor, that I would object that this testimony would not be relevant for the reason that the defense has chosen not to call Mr. Clifford even though he has been subpoenaed, is available, and the defense has chosen not to call him. Therefore, again without the threshold issue being met, any and all of the testimony concerning what that witness may or may not have said is totally irrelevant for the reasons we have talked about earlier today, as well as reasons which have been previously discussed. I just want that put in the record at this particular time.

THE COURT: I think counsel for the defense will concede that Mr. Clifford was available and was not called, {4411} you chose not to call him?

MR. TAIKEFF: That's absolutely correct, your Honor.

THE COURT: Very well.

You may continue --

MR. TAIKEFF: (Interrupting) Thank you, your Honor.

THE COURT: (Continuing) -- with your interrogation.

Q (By Mr. Taikeff) I think you said that you didn't know the exact date, but you recall taking the statement, is that right?

A Yes, that's correct.

Q And you remember the place where you took that statement?

A Yes, sir. It was in the FBI office.

Q Located where?

A In Rapid City.

Q Is it possible that it took place in Deadwood?

A No, sir, it did not.

Q I show you Defendant's Exhibit 207 which is in evidence for this offer of proof, and ask whether that is a copy of the statement which was taken and signed on July 27, 1975?

A (Examining).

MR. TAIKEFF: 207, I think, yes.

A Yes, sir.

Q (By Mr. Taikeff) Now, doesn't that statement beneath the date show Deadwood, South Dakota?

A Yes, sir, it does.

{4412}

Q Could you explain what that means then?

A Yes, sir. The original interview, one of the interviews with Mr. Clifford took place in the Rapid City office, and the typed up -- I think it was the typed up statement, I don't recall exactly all the steps there, but the -- apparently that one was signed in Deadwood.

MR. TAIKEFF: If I may have one moment, your Honor, please?

THE COURT: You may.

(Counsel confer.)

{4413}

Q Before taking the stand this afternoon did you read any materials in an effort to refresh your recollection about these incidents?

A I looked over one copy of a -- one of my records.

Q What kind of a record?

A It was a FD 302.

Q And am I correct in assuming that that 302 covered your initial interview with Mr. Clifford which preceded the signing of the July 27th statement?

A Yes, sir.

Q And do you recall where you interviewed him on that earlier

occasion?

A At that time on the earlier occasion it was in Rapid City.

Q Was he on that day a person who was remanded to the Pennington County Jail?

A Yes, sir.

Q Was he facing federal or state charges or both?

A To the best of my recollection I believe he was facing federal charges.

Q Do you know what the charges were?

A No, sir, I don't recall.

Q Did you get any judicial process of any kind before you went over to see him?

A No, sir.

Q Did you take him out of the jail?

{4414}

A Yes, sir.

Q Did you have a court order or a writ that permitted you to take him out of the jail?

A No, sir.

MR. TAIKEFF: Your Honor, there may be a misunderstanding on my part, but I'm under the impression that we had an informal agreement, that is to say, between myself and the Government, that all of the documents which have been marked for the offer of proof are the entire body of written materials, 302's and signed statements.

Now, it is my belief that there is no 302 amongst the marked documents for Mr. Clifford. There was one for each of the others and a corresponding typed statement. Now, it may due to inadvertence on our part or possibly the Government's part, but in our files we did not have a 302 corresponding to Mr. Clifford. And therefore we did not have one marked yesterday.

But if there is one I would accept it on the basis that it was an oversight on the part of either ourselves in not recognizing that we had it in the file, or on the Government's part in not providing it to us. But I believe there is a missing piece of paper at this particular time for the offer of proof.

MR. HULTMAN: Well, Your Honor, I don't know. I felt that counsel

has everything, but maybe there is something. I {4415} have what was marked yesterday I thought your 207 and on it, it's about a one paragraph 302 that I thought was a part, one and a part of the same document maybe. Was that what you are referring to, Counsel?

MR. TAIKEFF: No. My Defendant's Exhibit 207 is a seven page double-spaced statement that appears to have been made on plain white paper. Because I see no indication that it was a 302 and I'm showing it to Government counsel.

MR. HULTMAN: Okay. This is what I've got. You've got something different than I've got then. It may be just a typed copy.

MR. TAIKEFF: I think it's even more significant to say that Mr. Hultman has something different than I have.

MR. HULTMAN: Maybe it's a typed copy, I don't know. Well, let me see if I've got a copy of it.

MR. TAIKEFF: All right. I'll proceed while that matters is being looked into, Your Honor.

THE COURT: You may.

Q (By Mr. Taikeff) Is it fair to say that the typed statement pretty much tracks the 302 and was a way of sort of formalizing what the earlier interview had revealed?

A Without -- I would say that probably it's fairly close, yes.

Q Okay. So for the moment I can refer to Defendant's Exhibit 207 in making inquiries of you.

{4416}

MR. HULTMAN: Okay. It would appear, I mean I was not aware, but it tracks. I think the 302 is very similar to the statement.

Now, just a minute, The other thing is, now I understand the reason. You almost --

THE COURT: You just lost your document, Mr. Taikeff.

MR. HULTMAN: Your Honor, this is a witness called by them and thus 3500 material was not presented. And that's what this particular item is and that's the reason, Your Honor.

MR. TAIKEFF: I wasn't accusing Mr. Hultman of any bad faith, and upon my saying that I hope you'll give the papers back to me.

MR. HULTMAN: No, I do not intend to. It's not 3500 material. And

that's the reason it was not provided.

I didn't realize that until now, but that is the reason, and that is the position of the Government.

MR. TAIKEFF: Well, Your Honor, in that case I'll have to ask for a continuance so I can apply for a subpoena duces tecum to serve on the FBI to produce three, 302's.

MR. HULTMAN: 3500 prohibits that.

THE COURT: I don't think you would be entitled to it under 3500.

MR. TAIKEFF: To make my offer of proof, I cannot make my offer of proof complete without having those 302's.

{4417}

MR. HULTMAN: You would not be entitled if the witness was on the stand right now, Your Honor, and that's the reason. I got the impression first that -- and I know, I don't mean to infer that Mr. Taikeff was giving this impression, but the impression I got was that he had been deprived of something to which he was entitled. I then realized as I was about to give it to him that that is not 3500 material. It is his witness and that's the reason why it was not provided, and I do not intend to do it now.

MR. TAIKEFF: May I ask then how come at some point in the proceedings the Government turned over the 302's concerning High Bull and White Wing?

MR. HULTMAN: Because of the fact that a given time there was some basis either because of the witness being called or because of the statements in it as to Rule 16, or for some other reason. This is 3500 material and that's the reason it was not given over.

MR. TAIKEFF: Might it have been because the Government at one time was going to call White Wing and High Bull?

MR. HULTMAN: No, not whatsoever.

MR. TAIKEFF: Because it would --

MR. HULTMAN: It probably was Coward's 3500 material. Without me going back and seeing whose name specifically was on what, I cannot conclude it. But the reason is point blank that you don't have this material is that it does not, it's {4418} 3500 material, that's the conclusion. The reason is this has not been a witness that the Government has called, that's the reason.

MR. TAIKEFF: Then how is it that the defense has exhibit, Defendant's

207 which is the typed written version?

MR. HULTMAN: You've gotten a lot of things along the line, Counsel, by way of the last trial. That may be the reason you have this. And I don't know the reasons, and I don't have to state any given reasons at this time.

MR. TAIKEFF: May I indicate that the Government was indeed planning to call these three witnesses.

MR. HULTMAN: That is not the reason.

THE COURT: Well, the statute seems to be quite clear. In any criminal prosecution brought by the United States no statement or report in possession of the United States which was made by a government witness or prospective government witness other than the defendant shall be the subject of subpoena discovery or inspection until said witness has testified on direct examination in the trial of the case. After a witness called by the United States has testified on direct examination the Court shall on motion of the defendant order the United States to produce any statement as hereinafter been defined in the possession of the witness which relates to the subject matters as to which the witness has testified. If the entire contents of any such statement relate to the {4419} subject matter of the testimony of the witness the Court shall order it to be delivered directly to the defendant for his examination and use.

Well, as counsel for the Government has pointed out this witness has not been called by the United States and as the Court has suggested the 35 -- the statement is not producible under 18 U.S. Code, Section 3500, 3500.

MR. TAIKEFF: Just to make sure that my record is protected, Your Honor, I ask for it under Brady against Maryland.

THE COURT: The United States may respond to that request.

{4420}

THE COURT; Brady versus Maryland, as I understand it, requires the government to produce any exculpatory information that it may have in its files material to an issue in the case.

MR. HULTMAN: Your Honor, my cup runneth over. My generosity being, I'm going to give the documents to Mr. Taikeff since they're so critical to his case, so critical at this time.

THE COURT: Did you mess up the table when your cup runneth over?

MR. TAIKEFF. Your Honor --

MR. LOWE: You can tell, Mr. Crooks laughs.

MR. TAIKEFF: Your Honor, it seems we have an epidemic of over running cups. Not only did you have the benefit of Mr. Hultman's logess, indeed -- it's just been reported to me that the United States Marshal service has just arrested Myrtle Poor Bear.

THE COURT: Very well. Now I presume then I should not direct them to release her.

MR. TAIKEFF: That is absolutely correct, Your Honor.

THE COURT: The reason, and I didn't make that request facetiously because the word has just gone to the marshal service not to execute the warrant.

MR. TAIKEFF: Apparently in connection with that very message being transmitted or inquiries made by someone {4421} from the defense team, we got the answer back that she's been arrested.

THE CLERK: One second, Mr. Taikeff.

THE COURT: The word has just been relayed to me she's been released.

MR. TAIKEFF: I'm wondering whether we could sign the Marx brothers for this case.

THE COURT: Mr. Lee, do you have --

MR. LEE: Chief Warren came down and informed me that she had been arrested and she was released.

THE COURT: Because of the word?

MR. LEE: Yes, sir.

THE COURT: That's what I was concerned about. Find out if she can still be picked up.

Q (By Mr. Taikeff) Mr. Wood, I am sorry I have to direct your attention to such mundane details in the midst of all of this excitement but I would like to ask you some questions about the statement, that is Defendant's Exhibit 207. Can you tell us anything about whether or not Mr. Clifford was interviewed in Deadwood, South Dakota?

A Yes, sir, he was.

Q Was he?

A A continuation.

Q How did that come about?

THE COURT: May I interrupt?

{4422}

MR. TAIKEFF: Yes, Your Honor.

THE COURT: Mr. Warren?

MR. WARREN: I relayed your instructions to the marshal at South Dakota to temporarily vacate the warrant on Myrtle Poor Bear. He advised that he would notify Rapid City and they would in turn advise Francis Two Bears, that BIA officer at Allen, South Dakota, to disregard picking up Myrtle Poor Bear. When that communication reached Francis Two Bears he at that time had Myrtle Poor Bear in his custody. He was advised by the Marshal at South Dakota to release her according to the court order which, which he did, which the only other information that is at hand is Myrtle Poor Bear said she was voluntarily coming to Fargo tonight.

THE COURT: She was voluntarily coming tonight?

MR. WARREN: She stated to Francis Two Bears.

THE COURT: Should we leave it at that?

MR. TAIKEFF: Yes, Your Honor. I believe she will in fact be here.

THE COURT: Thank you.

Q (By Mr. Taikeff) I believe, sir, I asked you how it came about that this second installment of your contact was in Deadwood, South Dakota?

A The reason for that was that Mr. Clifford's request he was transferred up to Deadwood, South Dakota to the jail up there for his personal safety.

{4423}

Q Did you have any conversation with him before he made the first statement to you concerning helping him in any way?

A No.

Q In the jail or out of jail?

A No, sir.

Q Did he indicate to you any desire that you help him and which request you then rejected?

A Did he ask --

Q Did he make a request of you? I asked you whether you made any offer of help, you said no. Now I'm asking whether he made any request of you.

A He requested that he be transferred to another place other than Pennington County Jail.

Q Other than that, did he make any request of you?

A No, sir.

Q When he first spoke with you was anybody else present?

A You mean over at the jail?

Q Either at the jail or at the Rapid City office.

A Yes, sir. To the best of my recollection I think I had somebody with me at all times when I talked with him.

Q Did you at any time after he gave you the first statement ask him to get any specific additional information if he could?

A No, sir.

Q He told you, did he not, "That Jimmy Eagle said he was at a group of houses at the reservation when an FBI agent approached {4424} the area in a car"?

A I would like to have the benefit of reviewing of the document that you're reading from.

Q I believe I could use the 302 while you use the document which is 207 which I trust that they're sufficiently similar.

A Yes, sir.

Q Now I want to touch the highlight points. I don't mean to suggest that this was the entire statement that Mr. Clifford gave to you. Basically he said that "He overheard Jimmy Eagle say that Jimmy Eagle was at a group of houses at the reservation when an agent approached in a car. The agent was told to leave because it was private land."

A Yes, sir.

Q "Eagle said that there were many people at this location and they were armed and some of them were armed with automatic weapons including M16s and M14s."

A Yes, sir.

Q Eagle then related that a shot was fired in the direction of the agents' cars. One of the agents got out of his car and returned the fire with his handgun while the other agent got out of his car, went to the trunk of the car, opened the trunk and got out what appeared to be a high powered rifle."

A Yes, sir.

Q "The agent who had the rifle fired a shot and that agent was then shot and went down where he could do nothing, or could {4425} not do anything."

A Yes, sir.

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

THE COURT: You may.

Q (By Mr. Taikeff) "Then according to Clifford, "Eagle then described another situation where he was standing approximately four feet from the other agent, this agent attempting to get back into the automobile and was dragged from the automobile by the Indians. He was standing by his automobile thereafter and the Indians were questioning him regarding what he was doing interfering on Indian land. Eagle said the agent was a friend of the Indians, that he had Indians as friends, that he had a family and he begged for his life and then Eagle said that the Indian standing to Eagle's immediate left then fired at this agent with a .45 Thompson and Eagle then indicated with his finger where the agent was struck across the chest."

Does that summarize the main part or the main aspect of that part of what Mr. Clifford told you?

A Yes, sir.

Q Then apparently Mr. Clifford told you that Eagle mentioned some of the items which were taken either out of the FBI cars or from the agents, is that correct?

A Yes, sir.

{4426}

Q Now what did Mr. Clifford say to you when he got to that particular point in his narrative? Did he say the words, "Eagle then related some of the items which had been taken either out of the FBI cars or from the agents and named the following items," or are those just your words?

A Those are words, those are my words, I suppose.

{4427}

Q O.k. Now, what were the words said to you by Clifford that resulted in your writing those words which I just read?

A Basically he said that Eagle told him about some things, some

things that he had taken out of the car. I don't recall his exact words.

Q And amongst those items was a green army type jacket with FBI on the back, both of the handguns and a shotgun, is that right -- that's not the complete list -- those were amongst the items?

A Yes, sir.

Q And the rest of the statement concerned events which occurred later in the day which I am not going to detail because that document in fact is in evidence for the purposes of this offer of proof. I just want to get to certain highlights and question you about those highlights.

Towards the end of the statement -- you might want to look so that you can tell us whether Clifford told you that Eagle said, that he escaped late at night and hid out until a time when he had to go to court and decided to turn himself in -- basically I am just touching.

A He said they escaped around evening and then hid out, yes.

Q Now, what I want to know is this: You were investigating the deaths of two FBI Agents when you were involved in the activities which are reflected in these documents, is that correct?

{4428}

A The taking of the statements, you mean?

Q Yes.

A Yes.

Q And was there any doubt in your mind when you were listening to Mr. Clifford that if he was telling you the truth about what Jimmy Eagle said, that Jimmy Eagle was involved in these events with other people?

A No, sir. There was no doubt in my mind as to that.

Q Now, assuming once again that Jimmy Eagle was saying this and he was speaking truthfully, you knew that Jimmy Eagle was one of the participants in one way or another, maybe just a witness, but surely very close to what was happening, is that correct?

A It appeared that way.

Q And didn't it also appear that Jimmy Eagle apparently was standing right next to the person who actually pulled the trigger on the gun that fired the bullets that killed one of the agents?

A According to what Mr. Clifford had told us.

Q Yes, I am operating under the assumption that when Clifford told

it to you for the purposes of getting it down on paper, you were willing to assume at least then and there that he had actually heard Jimmy Eagle saying these things; if you believed absolutely that he wasn't telling you the truth, you wouldn't have bothered to take it down and get a second statement, {4429} would you?

MR. HULTMAN: I object to that.

MR. TAIKEFF: Why doesn't the witness answer the question?

THE COURT: The witness may answer.

A I took the information because it was offered.

Q (By Mr. Taikeff) But then you went back again on a later date and formalized it in a statement in virtually identical language and had him sign that statement, isn't that correct?

A Yes, sir.

Q Now, when Clifford was speaking with you, he chose his own words and you made notes, is that right?

A Yes, sir.

Q And then you took your notes and you wrote up this 302 which has not yet been marked but which is typed on 7-26; date dictated, 7-26; date of interview, 7-25, correct?

A Yes, sir.

Q So by the time the 302 became a document in existence, it reflected to a considerable extent your subjective way of describing what happened in the first interview -- I am not saying you made up the contents, I am saying you chose the words except to the extent that something is quoted or specific words are referred to such as, Eagle then related some of the items which had been taken either out of the FBI cars or from the agents and named the following items, isn't that a perfect {4430} example of words which you chose which you believed accurately reflected what took place in the first interview?

A Yes, sir.

Q Now, when you wrote up that typewritten statement which is No, 207, didn't you write into that statement the very same words which I just read to you starting with the three words, "Eagle then related"?

A Yes, sir.

Q Now, you recognize, do you not, that the document in front of

you, No. 207, is supposed to be a statement that someone made to you, right?

A Yes, sir.

Q And isn't a statement, as it is conventionally recognized by law enforcement officers, supposed to be the words of the person who made the statement, basically written in the first person?

A Yes, sir.

Q But in fact, all you did was take the 302 and reproduce most of it, if not all of it, and make it look like someone's statement which you then had him sign, right?

A Yes, sir.

Q So the words which are on 207, except to the extent where it appears to or purports to quote somebody, is really your method of writing your impressions that you got from someone else's statement to you of approximately a few days earlier, {4431} two or three days earlier?

A Well, he was given the statement to read, and he signed it.

Q I know he read it, and I understand he signed it. I just want to make the record clear that in reality, guided by what he told you, those are your words that are on 207, not his words?

A Yes, sir.

Q Now, after he signed the statement, did you ask him any questions?

A Not that I recall.

Q You did want to find out who killed those agents, didn't you?

A Certainly.

Q Did you at any time ask Mr. Clifford, since he apparently was privy to some pretty important statements by Mr. Eagle, to see if he could find out some more to identify some of the other people?

A Yes, sir.

Q When did you say that to him?

A We asked him if he was -- if he had any further knowledge of any names or anything, and he said that he didn't receive any further names -- any other names.

Q Did you put that down in your 302?

A I would have to look at it to see.

Q (Handing).

A (Examining) No, I don't see it in there.

{4432}

Q Did you at any time ask Mr. Clifford if he would keep his ears open and listen to what Jimmy Eagle would say to see if he could get some additional information?

A No, sir, because after I talked to him he wasn't any longer in a position to do that.

Q Was some sort of a public announcement made about the fact that he had given you an interview?

A No, sir.

Q In fact, Mr. Clifford was not the only person who reported to the FBI that they had overheard this conversation or one similar to it, isn't that true?

{4433}

A That's the only one that I have knowledge about. That's the only one I interviewed.

Q I know it's the only one you interviewed. Do you know a person by the name of Marion High Bull?

A I've heard of Marion High Bull, yes.

Q Did you know that he was also a person that gave a statement about Jimmy Eagle?

A Yes, sir, I had heard that.

Q Was he transferred out of the Pennington County Jail?

A I don't recall.

Q Was anybody else who gave a statement transferred out of the Pennington County Jail?

A Not to my knowledge.

Q After you got the signed statement, 207, did you ever go back to contact Mr. Clifford to see if he had any additional information about Jimmy Eagle?

A Yes, sir.

Q And when did that take place?

A I think we went back to see him on -- I don't recall the exact date. Just to see if he had thought of anything else that he added. I don't recall the exact date.

Q If he had thought of anything else concerning the original,

originally covered conversation; is that correct?

A Yes, sir.

Q Was the last contact you had with Clifford after he signed {4434} the formal statement?

A Yes, sir.

MR. TAIKEFF: I'd like to have these three documents marked, Your Honor.

THE COURT: They may be marked.

Q (By Mr. Taikeff) Isn't it a fact, sir, that Clifford was serving a sentence when you interviewed him?

A I don't recall.

Q I show you Defense Exhibit 225.

MR. TAIKEFF: Your Honor, may I assume that 223, 224 and 225 just marked are considered in evidence for purposes of the offer of proof?

THE COURT: They may be received for purposes of the offer of proof.

Q (By Mr. Taikeff) I'm showing you 225 and calling your attention to the last paragraph.

A Okay.

Q He was serving a three year federal sentence?

A Yes, sir.

Q For what crime?

A Carnal knowledge.

Q Now, Pennington County Jail is not a penitentiary, is it not?

A No, sir, it is not.

Q If he was already serving a three year sentence, which would {4435} by definition be for a felony, do you know why he was in Pennington County Jail and not in a federal prison somewhere?

A No, sir, I don't.

Q Do you know whether there were any additional charges pending against him at the tine he was in the Pennington County Jail?

A No, sir, I don't recall that.

Q If I may have one moment to confer with Mr. Lowe, Your Honor.

THE COURT: You may.

(Defense counsel conferred.)

MR. TAIKEFF: Your Honor, I have no further questions on the offer

of proof.

THE COURT: Does the Government have any?

MR. HULTMAN: Yes. I have just one question, Your Honor. Maybe two.

CROSS-EXAMINATION

BY MR. HULTMAN

Q Agent Wood, is it fair for me to conclude that there are Legal, federal legal proceedings held in both in Deadwood as well as in Rapid City? By that I mean do they hold court and hold proceedings of various kinds there?

A Yes, sir.

Q And during those times is it customary for anyone who might be related in any way to those proceedings, either as a defendant or as a witness, if he is someone who has been {4436} incarcerated to be in the Pennington County Jail?

A Yes, sir.

MR. HULTMAN: I have no further questions.

MR. TAIKEFF: No further questions, Your Honor.

THE COURT: You may step down.

MR. HULTMAN: Is the witness excused?

MR. TAIKEFF: From the offer of proof. He's on our witness list in connection with the defense.

THE COURT: Does the -- are you through with your offer of proof, sir?

MR. TAIKEFF: Yes, we're closed on that, Your Honor.

THE COURT: Does the Government have anything to offer on the offer of proof?

MR. HULTMAN: Government has nothing, Your Honor.

MR. LOWE: I have a matter, before we conclude, of the Court. If you have something you want to rule --

THE COURT: I'm going to rule on the offer of proof.

MR. LOWE: Fine, thank you.

Your Honor is very quick sometimes to say court is recessed. I didn't want to get caught sitting down.

THE COURT: Probably about time to recess.

The Court finds that the offer of proof has no probative value to

any of the issues in this case and that any relevancy that it might have is outweighed by danger of confusion of the issues and misleading of the jury. And the offer of proof is {4437} therefore denied.

You may now present any other matters that you have.

MR. LOWE: Your Honor, pursuant to our earlier discussion I have taken Government Exhibits -- excuse me, Defense Exhibits 134, 135 and 187 through 192 and marked with red pen in the left-hand margin thereof the portions which we would be, in view of Your Honor's ruling, that you would not allow the entire laboratory reports.

THE COURT: Could you give me the numbers of those laboratory exhibits again?

MR. LOWE: Yes, sir. 134, 135, and 187 through 192. These are the laboratory reports that we offered the other day.

THE COURT: I'm aware of what they are.

MR. LOWE: Your Honor indicated you are not willing to allow the entire reports in and over our exception to that ruling I did try to cull out items which we, at least in view of your ruling, would suggest could be deleted from those documents.

I marked those in the left-hand margin in a red bracket and some of them are very substantial and some reports leaving only a few items and other reports there are only a couple of items deleted. And we would want substantially the whole reports.

I have given these to Mr. Sikma and I don't mean to {4438} suggest that he has had a chance to digest or been able to respond, but I am concerned that Your Honor would rule on these in a timely manner in view of the possibility that the defense's case might close tomorrow in order to allow some discussion and some possible alteration in order that Your Honor finds some things to be unacceptable. It may be that we could make some further adjustments.

I don't know what Your Honor's ruling would be and Your Honor doesn't know until you look at the documents. What I'm going to suggest is that early tomorrow, perhaps first thing in the morning or perhaps even earlier than 9:00 o'clock, if Your Honor please, that perhaps we would be able to give Your Honor the documents giving Mr. Sikma an opportunity to extract the markings to his copies, or however he wants to do it, and to let Your

Honor look at them and perhaps hear discussion or ask us question or have us present arguments as to the position we take so that if Your Honor rules against us as to some of the items and there is some possible adjustment to be made that we would have time to do it before we are cramped up against the end of the defense case and don't have an opportunity to do that without our case.

THE COURT: Well, this does not interfere in any way, I mean --

MR. LOWE: Not with Myrtle Poor Bear and those witnesses, {4439} no, sir.

THE COURT: What I'm trying to ask is it would not interfere with your orderly presentation of the remainder of your case?

MR. LOWE: None at all, Your Honor.

THE COURT: Basically you are asking for a ruling before you, before the case is closed?

MR. LOWE: Yes, sir, that's right. And I don't think it would affect any of the witnesses that Mr. Taikeff has announced. We had indicated some question about having Special Agent Hodge come back for additional questions if we couldn't preserve through these documents the record of what we feel we absolutely essentially need; and that would be a consideration. But I'm hopeful that we can work it out and take care of what Your Honor has ruled earlier.

In that regard the Government did find the December 16, 1975 report which I asked for in open court and advised the Government of and apparently I gather this is one that they didn't have either because Mr. Sikma had looked one day and neither one of us found it and neither did Mr, Hodge.

We do have that now. The Clerk has marked it as Defendant's Exhibit 222 and I would ask the Court to receive that as an offer along with the other laboratory reports.

I have also marked it in a similar manner and shown {4440} it to Mr. Sikma and ask that it be simply included in the offer of those other laboratory reports and considered at the same time. And I think Mr. Sikma has the others; am I correct?

MR. SIKMA: You gave them to the Clerk.

{4441}

MR. LOWE: I'll return it to the Court as part of our offer.

THE COURT: Mr. Sikma started to address the Court on part of your offer.

MR. SIKMA: Yes, Your Honor. In the form that Counsel for the defendant has extracted items which I believe were marked in red that he would be agreeable to taking out of the report, they're just as confusing as ever and perhaps even more so. The only things he agreed to take out were those things that I can see any relation to this case and consequently as to the form that Counsel has provided to the government, we object to them the same as we did before. It was my understanding initially that Counsel would not want to ask or cross-examine Special Agent Hodge on these matters because it might irritate the jury by reading through all these items which apparently have little or no connection to the case or which are, there are a great number of items which aren't listed in reading those and asking the witness about those would probably cause some confusion to the jury and some irritation to the jury as a result of the fact that Counsel is going into all these matters. For the same reason I would say that these matters are just going to confuse the jury as the items are extracted from the exhibits offered by the defendants. They are completely without meaning as they presently stand and therefore the government objects to them {4442} in the present form as suggested by defense counsel. I don't think that a genuine effort is made here to make these items more meaningful to the jury.

In addition to this, I would say that there is one item which is related to the item which was found under the bodies of the agents, or was in the body of the agent. It states on the laboratory report that no human blood was found on this item. I think it's one of the government's exhibits.

MR. LOWE: 34H.

MR. SIKMA: 34H. And we will stipulate to that fact. The other items I would state that --

THE COURT: 34H?

MR. SIKMA: Yes.

I would state as far as the other items I don't think the defense counsel has really extracted items to be presented into evidence which relate to this case. I think it's just more confusing than it was before.

It took me several months to learn how to read these reports and understand them and I don't think the jury could ever be expected to understand them. Therefore, I think they're irrelevant under Rule 403.

MR. LOWE: Your Honor, with regard, let me speak first of all to this bullet fragment, 34H, which Mr. Sikma addressed.

It had been my recollection, I think we had maybe {4443} some side bar discussion, I know we discussed with Counsel that in last year's trial there had been, I thought there had been testimony that a laboratory found no blood but I have not found any testimony. We found the laboratory report. It's also my recollection the person, whoever it was that gave the testimony, said that this could not have been one of the bullets that went through an agent because there was no blood on it.

MR. SIKMA: I don't think that's the case at all because it was found in the ground under several inches of dirt and there was no testimony by any witness concerning this item.

This was a matter again that was stipulated to in the last trial but it was not something that a witness testified in court about.

MR. LOWE: I may have talked to a witness. Somebody has said that and I don't know. I cannot find it anywhere in the transcripts or reports.

Do you contend in fact there was no human blood on those bullet fragments that could have been the result of one of the fatal shots? Does the government take a position?

MR. SIKMA: I think that would not necessarily exclude it as possibly one of the bullets that went through the agents simply because it doesn't have human blood on it. It was found under several inches of dirt and at the speed the {4444} thing is traveling certainly would be cleared by going through several inches of dirt.

MR. LOWE: I'll pursue that further.

Let me respond to the general question of what we have done. We did make a culling of what we think is arguably not relevant. Although, we, of course, the whole document should be allowed. Basically what we did is allowed all the ammunition components found in the Jumping Bull area or weapons in the same place, ammunition components found elsewhere but tied into that area. We eliminated all kinds of other things like clothing, tools, explosives and things that were not involved with the firearms and

we also eliminated virtually all of the firearm components, the cartridge casings and cartridges that were found at Al Runnings in the raid or Portland or wherever it might be and I think we made a significant culling.

If Your Honor rules, for example, that we are not entitled to show all of the different kinds of ammunition components in tent city, Your Honor has not said that, if you make that ruling, then we may have some additional culling to do and all I was asking Your Honor to do was make whatever ruling he's going to make tomorrow morning to either allow or disallow it. If you disallow it, give us guidance as to the basis of your disallowance so we can try over our objection of Your Honor's ruling to bring the documents within
{4445} the guidelines Your Honor would find acceptable so we can have some evidence that relates to these ballistics information.

Now that's why I just asked we hear that. It shouldn't take very long. The first thing in the morning. I expect Your Honor can flip through quickly and see whether Mr. Sikma is right or whether we have done a good enough job and then try to come up with a final copy according to the rules. But we're trying in earnest to avoid consecutive testimony and trying to come up with something the Court would find acceptable.

Perhaps Your Honor would want to have those either late this afternoon or the first thing in the morning to look at and tell us what you want to do.

THE COURT: Right now we're going to recess.

The Court is in recess until 9:00 o'clock tomorrow morning.

(Whereupon, at 6:20 o'clock, P.M. a recess was taken until 9:00 o'clock A.M. on April 13, 1977.)