

**United States District Court
FOR THE DISTRICT OF NORTH DAKOTA
Southeastern Division**

CR NO. C77-3003-01

UNITED STATES OF AMERICA,

Plaintiff,

v.

LEONARD PELTIER,

Defendant.

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**U.S. District Court for the District
of North Dakota,
Southeastern Division**

VOLUME VI

Pages 960-1208

Pages 960-980 omitted.

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WEDNESDAY SESSION

March 23, 1977

9:00 o'clock, A.M.

WHEREUPON,

the following proceedings were had and entered of record on Wednesday morning, March 23, 1977 at 9:00 o'clock P.M. without the presence and hearing of the jury:

MR. TAIKEFF: May I be heard briefly, Your Honor?

THE COURT: You may.

MR. TAIKEFF: I believe that Your Honor has not yet ruled on Defense Exhibit 75. I was wondering whether the Court had reached a determination.

THE COURT: I have.

I was looking for the citation. I have in my notes here someplace the citation of the two cases which I am basing my ruling on.

The ruling of the Court is that Defense Exhibit 75, and there were two other exhibits.

THE CLERK: 81 and 82.

THE COURT: As the clerk reminds me, 81 and 82 have not been offered.

It will not be received as an exception to the Hearsay Rule.

The Court is influenced in that decision by Eighth Circuit case of U.S. versus Thompson, 487 Fd. 2d 146 1973 and {982} and U.S. versus Claudman, 534 Fd. 2d 123 1976.

If Counsel is to use Exhibit 75, its use appears to be limited to cross-examination of the special agent who prepared the exhibit.

MR. TAIKEFF: May we call the appropriate witnesses out of turn then so we can make proper use of the document in cross-examining?

THE COURT: I don't quite understand how that is going to enable you to make proper use of the document.

MR. TAIKEFF: Well, the government's position I would gather is that as to any person other than the person who prepared the document, any reference to the document in questioning such a person would constitute an improper question because it would incorporate hearsay information not already in evidence. Now unless we are to follow the procedure of not excusing all of the agents who testified, waiting until the defense begins its case, have the defense introduce the document by calling the three witnesses through whom the document can be introduced --

THE COURT: I think this is my Point. I'm not certain the document can be introduced but through those three witnesses.

MR. TAIKEFF: Your Honor, I believe that it would be elementary to get that document into evidence through those three witnesses because those witnesses --

THE COURT: When you say the three witnesses, you are {983} talking about Johnson and Price?

MR. TAIKEFF: Ald O'Clock.

THE COURT: And O'Clock.

MR. TAIKEFF: Between the three of them the information contained in the memorandum could be introduced into evidence either in bulk by laying the foundation and introducing the document once it's authenticated or an entry at a time, having the witness testify either directly from memory or as a past recollection recorded. It is my opinion one of the most elementary exercises in introducing evidence.

THE COURT: The problem, and the problem as I see it is that the document was prepared by an investigator through an interview of two individuals by the name of Price and Johnson.

MR. TAIKEFF: I believe that's not quite correct, Your Honor. In fact, I believe it is incorrect in two respects. The document itself reflects the efforts of one person, Johnson. The 302 concerning Mrs. Price is only corroboration for the events which took place or the circumstances under which the events took place

Reading Mrs. Price's 302 and Mrs. Johnson's 302 side by side, it's clear to the reader what was going on with all these people. The three of them, O'Clock, Price and Johnson were all in the same room with a loudspeaker that was broadcasting all of the FBI radio transmissions. One of them, {984} Miss or Mrs. Johnson was transcribing as best she could from what she heard as it was occurring and noting the time. Your Honor will undoubtedly recognize the fact that the times are very precise, 12:18, 1:24, 4:34, 4:22. Obviously those were not efforts on behalf of the person making those notes to estimate the time, but I'm assuming, and I think it's a fair assumption at this time, that the testimony will show that there was a clock and that this information was written down by glancing at the clock, noting the time and making as accurate a transcription as was possible under the circumstances.

We do not purport that every one of these things is a a quotation, that it is absolutely accurate or that it is verbatim, but we have an instance where somebody was listening to the radio transmission and contemporaneously making notes as to that person's subjective impression of what was coming over the radio.

All we want to introduce into evidence without reference to how much weight should be given to it is that person's contemporaneous impressions of what was coming over the FBI radio. Now surely those three witnesses between them would provide the basis for getting it in either by authenticating the document as such or it being a past recollection recorded. That the person no longer remembers the specific transcription, it is on the verge of being inconceivable that there would be such a total failure of memory on the part of those three people, {984} in spite of the fact that I have known law enforcement people to have selective failures of memory.

MR. SIKMA: Your Honor.

MR. TAIKEFF: May I finish my arguments without being interrupted, please.

MR. SIKMA: Your Honor, I would object to this present knowledge of Counsel concerning law enforcements.

THE COURT: The Court disregarded that remark as being not appropriate.

MR. TAIKEFF: Perhaps Your Honor's experience in North Dakota is different than my experience and we have to await --

THE COURT: It is still not appropriate.

MR. TAIKEFF: What testimony occurs in any event, even if there is a sudden rash of failure of memory, we have a past recollection recorded and that would suffice to get the document in.

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THE COURT: This brings up the point that I raised when this matter was discussed before, and I'm reading from the transcript.

"Is there any other records of these transmissions available other than which may have been recorded in this exhibit, this 302, Exhibit 75?" Mr. Sikma's response was, "Right. At that early part in the incident I'm not sure that there are. There are perhaps other transmissions of other agents, and I could check that out for the Court."

The problem that I'm having with that particular 302 is if this 302 is simply a report of an investigator's interview with a person who heard the transmissions. It is not admissible as an exception to the hearsay rule. Therefore, it seems to me that the person who would have to testify as to the transmissions that that person heard would be the person, the individual. In this case apparently his name is Johnson.

MR. TAIKEFF: Well, first of all I would like to advise Your Honor that only FBI agents write 302s. So even if you have an employee who has made extensive notes it is the technique, the procedure of the FBI, to have what appears to be an interview, but in fact is not an interview.

It is, Your Honor must remember these three people were together when this event was taking place. So it isn't an interview in the conventional sense. That agent goes to a prospective witness and says, "Tell me what you know," and then {987} records all that fact on a piece of paper and puts that into a 302. This is a case where the interviewee and the interviewer jointly shared the experience.

It was then formalized in a 302 which is a document that is written by, or completed by an agent. So one witness to the event and the co-witness to the event appear on the face of the document the interviewer and interviewee, but that really isn't the case. Undoubtedly this woman made notes of what she was doing. It is conceivable, given the fact that that document is more than twenty pages long, that Agent O'Clock sat down with Ms. Johnson and said, "Now, tell me what you remember." And she, in an effort to purge her memory, made statements which he then recorded and put in the 302. That's clearly not what the document is. And the briefest amount of testimony from the appropriate witnesses would establish that what I'm suggesting is the fact is indeed the fact. But it was recorded in that formal fashion.

In fact, if Your Honor will look at some other 302s, Your Honor will see that agents tend, when they write about their own activity to write in the third person about themselves as if they were interviewing themselves. And they call themselves by name instead of speaking in the first person. But that should not mislead the Court into thinking there was an interview in the conventional sense. But notwithstanding all of that, the point, Your Honor, is that if we are to avoid a procedure that {988} is going to lengthen the trial unnecessarily and keep all the FBI witnesses waiting until the defense puts on those three witnesses, and then recalls all the FBI agents to complete their cross-examination, we have a much simpler procedure to follow. And that is to allow at this time those witnesses to testify which would authenticate the document, and then we have the document in evidence for whatever weight the jury should give it.

We understand it does not purport to be a transcription carefully made from a tape recorder. The accuracy of which can be checked and rechecked as many times as anybody chooses in or out of the courtroom. We have here somebody who apparently made notes, looking at a clock and listening to a loud speaker, and sometimes

those notes are not quotations but they are subjective descriptions of what that person heard. Some weight must be given to that. The relevance of it should be crystal clear.

We ask Your Honor, so that we can cross-examine the agents who are yet to get on the stand, without interference from and unnecessary objection by the Government, to let us call those people to the stand now and satisfy Your Honor that the document has a legitimate role in evidence in this case. That was the alternative application that was made to Your Honor.

THE COURT: I recall that. I still have not had a {989} response to the question that I raised, that I just read from the transcript.

MR. SIKMA: Your Honor, there is a transcript from state agency radio, there is not another transcript from the federal agency radio. I would like to state that Mr. Taikeff in error in his statement as to what took place, particularly during that early portion from 12:00 o'clock to a little after 1:30. During that period Or time it is not true, I believe the evidence will show, that these three people were all together. Ann Johnson, in the early part of this thing, started to take some notes. At a later time, the times, the times were filled in in an interview where Special Agent O'Clock was interviewing Ann Johnson, and it is not as in transcript form as Mr. Taikeff would indicate.

MR. TAIKEFF: I didn't say it was in transcript form. I said specifically it wasn't in transcript form.

MR. SIKMA: Well, it appears somewhat to be in a transcript form from the way the 302 is set out.

However, in fact that is not the case. It was done that way for record-keeping purposes. This is not in fact Ann Johnson's. Something that is just copied down from what Ann Johnson stated. This is in fact an interview by Special Agent O'Clock with Ann Johnson, and that's where part of the problem arises because --

THE COURT: Well, that was the basis of my ruling.

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MR. SIKMA: Yes. And that's where the problem is with the information because I believe that Special Agent O'Clock confused some of the times in his questioning of Ann Johnson, and I think that's where the whole problem arises in this case.

THE COURT: Well, you stated that there may be a state agency transcript available.

MR. SIKMA: I think that there is one in the defendant's discovery information, or in information that they have had access to.

But this is not of FBI transcriptions or, you know, transmissions. This is a different network. But in some respects, since the state was transmitting at the same time, the federal agencies were transmitting. There would be some, there might be some corroboration as to the events that occurred.

THE COURT: Well, then that doesn't solve the problem.

MR. SIKMA: It does not.

But we would also object to the defense calling witnesses out of order because the defense will have an opportunity to put on its case. The Government should have the opportunity to put on its case in an orderly manner. We still have the availability of possibly calling some of these witnesses if we feel that it's necessary, Your Honor.

MR. TAIKEFF: I'd like to clarify two points that I {991} think Mr. Sikma either made or attempted to make.

There is a state frequency that was in use in South Dakota. That is a different radio frequency than the FBI frequency.

THE COURT: I understand that.

MR. TAIKEFF: Now, that may have been tape recorded with a special magnetic device so that as you listen to the tape recording you are able to watch on a neon print-out device the time. So you can sit here in this courtroom, listen to the radio transmissions as recorded, and on a clock-type device, a digital clock device, read the time as it's happening.

That has nothing to do with what we're talking about. We're talking about the transmissions on the FBI radio frequency, and in particular at this moment we're talking about a supposed transmission at 12:18 p.m. by Agent Adams. That is recorded in where else, except possibly in the memory of Ms. Johnson and in her notes and in the 302 which we have reason to believe evolved from her notes in a report written by Agent O'Clock which is Defendant's Exhibit 75.

The second point is that I thought I heard Mr. Sikma say or deny that something did not exist in the form in which I suggested it existed. He said it is not that way, and then immediately proceeded to say that it was done that way for record-keeping purposes.

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Now, I don't see how something at the same time cannot be done a certain way, but be done that way for record keeping purposes. The point, Your Honor, is that the Government is trying to disavow its own document prepared by an employee of the FBI and in the guise of saying that it doesn't want its case interrupted is preventing us from putting in now, so that we can make legitimate use of the document in cross-examining the remaining FBI agents. There's no reason why their case should not be interrupted for that purpose.

The jury has heard testimony on this subject. I think that if they're alert and paying attention they may very well be waiting for the other shoe to fall. And since we want to use this in connection with cross-examining other agents, not just to impeach Agent Adams, which indeed is one of our intentions, but so that we can use the document to cross-examine other agents.

There's no reason why Your Honor should not allow that to occur now so the rest of the trial can proceed in some sort of orderly, logical fashion. Otherwise we will not consent to any of the remaining FBI agents being excused. And we ask that they be held here for further examination during the course of the defendant's case.

MR. LOWE: May I make one point, Your Honor?

THE COURT: You may.

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MR. LOWE: Do you have in front of you, or have you had an opportunity to see this 302 we're talking about? All right. The point I would make is that that shows that the interview was conducted by Agent O'Clock on June 26th, which was of course the day that all of this took place. As such, this constitutes a statement by Ann Johnson to Agent O'Clock which was made immediately after these events took place.

Rule 803, which is the hearsay exception rule of the Federal rules of evidence, states, the first line of it says, "The following are not excluded by the hearsay rule even though the declarant is available as a witness." And the very first one, paragraph 1, present sense impression. A statement describing or explaining an event or condition made while the declarant was proceeding the event, or condition, or immediately thereafter by the plain language of this first paragraph, this statement made by Ann Johnson immediately after the event explaining or describing the event as she perceived it, is clearly admissible even though Ann Johnson is not available by that statement.

I recognize that there may not be any cases on that rule yet because it's a relatively new rule, but the rule is very simple and very clear in its language even though she is available.

MR. SIKMA: Your Honor, I believe that present {994} impression of which Mr. Lowe is speaking is a present impression of an observation, not a statement. And I think that's the difference.

If I, for example, make a, take down some, something that I've heard, said, or if I hear something a few hours later, state to someone else that I heard something being said, that is not what is considered a present impression. The present impression is, for example, if Gary Adams says "I see three people running across the field," now, he transmits that to another party and that other party is on the witness stand. I would say that what Gary Adams says is a present impression which the listener may testify to without calling Gary Adams to the witness stand.

Or to use another example, Special Agents Williams and Coler are not available as witness, but Special Agent Williams transmitted to Special Agent Coler, or excuse me, to Special Agent Adams, "It looks like they're going to shoot at us." That is a present impression, that is the type of exception to the hearsay rule of which we are speaking.

That is substantially different than a day full of radio transmissions which are heard by an individual and later on stated to another individual at the end of the day. This was a very long day that all these things took place, and I think that Ann Johnson's statements to Special Agent O'Clock are not by any means impressions. A present impression {995} is something that is flashed out, and it is a singular-type impression, something that is occurring at the time the thing is being recorded, and not something that takes place perhaps hours later.

MR. TAIKEFF: Your Honor, Mr. Sikma misrepresents the fact to the Court. When he suggests that Ann Johnson merely sat there through a long day and listened for several hours, perhaps six to seven hours, and then from memory transmitted this information to Agent O'Clock, that is not the case.

It would be impossible for her to remember times, such as 12:18 and 1:24, et cetera. She made notes of what was happening as it was happening. Therefore, it was an instantaneous recordation of her sense impressions. Those notes were transferred into that 302 with very little external influence over what was finally put into that 302. And if Your Honor would give us the chance to put Agent O'Clock and Ms. Johnson on the stand Your Honor would be persuaded that is the fact.

Now, that supports the claim of reliability and accuracy to the extent that the information was reported.

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MR. TAIKEFF: I don't understand what basis the government has for objecting except that the information will be used to impeach one of their own witnesses. Obviously they don't want that to happen and I would be surprised if they wanted such a thing to happen. But there is no legal basis for them keeping this out. It's done by a government employee who is employed by the FBI whose sense impressions were being recorded instantaneously as they were occurring in the presence of a person who ultimately wrote the report. But it makes no difference if that person, namely Agent O'Clock, may not have been there during the first hour because it's her sense impression which she wrote down in her notes and then subsequently have this information in writing or verbally or both to Agent O'Clock so he could create the 302 which is Defense Exhibit 75.

THE COURT: The problem we have here is that Counsel are diametrically in disagreement as to the authenticity of the, or the accuracy of the report covered in this 302 and I suppose the only way that that could be resolved would be to have the persons who were involved testify as to what in fact did take place, what the procedure was and that would have to be done out of the presence of the jury in order that I could make a determination as to whether these reports or communications, recorded communications do in fact possess the requisite of reliability so that the exhibit could be used for cross-examination.

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MR. HULTMAN: Your Honor, might I be of help to the Court at this time.

THE COURT: The Court appreciates any help from any source.

MR. HULTMAN: As has been, and I'm using now Mr. Lowe as a counterpart, we have had more than one conference from a protocol standpoint, as I understand the problem, Your Honor, Counsel has used and intends to continue to use the document. The only real issue at this time is whether it's admissible at this particular time, am I correct on that, Counsel?

MR. TAIKEFF: I have not used it without undue interference from the government by making objections that I was using something that was not in evidence. That's why I moved it into evidence.

MR. HULTMAN: All right.

I think it proper to solve all the problems, Your Honor, if Counsel would agree with this, to accomplish all of the ends that Counsel has indicated as well as the last one and the government would do this, which would normally be the procedure anyway, is that to call the specific witness Ann Johnson and at that time is the proper time to do the things that Counsel is wanting to do and should do. I will indicate to the Court at this time that with due diligence and do haste, but not in the next five minutes, because we have other witnesses {998} prepared and Counsel and I have agreed as to what witness is going to start, at least this morning;

that by tomorrow, because I've got to get the people here first, that I will have the two individuals who were the individuals who did the hearing available and those are the proper witnesses as to what they did see, did hear or did do. And so in that way, and I don't think that in any way will hamper Counsel by way of any agents because we're starting out with an agent this morning in the use of, and the use of any document that they may have to accomplish whatever purpose they wish to accomplish. I think this would be a way in which we could resolve all of the problems which are concerning Counsel for the defendant or concerning the Court and at this moment are concerning the government also. And if that would meet with the consent of Counsel, I will so proceed.

MR. TAIKEFF: If Mr. Hultman is suggesting that we have the hearing that Your Honor was alluding --

MR. HULTMAN: I'm not referring to any hearing. I'm going to have them here as part of the trial. No sense for an extra step of any kind.

MR. TAIKEFF: Put them on in front of the jury?

MR. HULTMAN: That's correct. And proceed with their testimony.

MR. TAIKEFF: I propose we have it be before the jury, Your Honor, so Mr. Hultman and I are in exact agreement.

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MR. HULTMAN: That would solve everybody's problem.

MR. TAIKEFF: I think the fact of waiting until tomorrow is not critical in view of the lineup of witnesses we have for today. I would be amenable to accepting Mr. Hultman's suggestion. I would hope if there are any written notes of any kind other than the 302s in question that those notes accompany the witnesses when they come to the courtroom.

THE COURT: I assume that you would instruct the witnesses to bring along whatever.

MR. HULTMAN: Your Honor, I will now do that. But I want to make it very clear on the record that we now from a legal standpoint, you're getting into still another issue and I would want that issue to be resolved by the Court prior to any time that any interplay takes place concerning notes and the production of them and so forth before this jury because we all know sitting here that there have been motions and there are questions concerning the use of notes and so forth. All I am saying there is, I think there is a proper procedure to be gone through at that time before we get an issue of that kind before the jury. I will certainly indicate to the witnesses to bring, as the Court has instructed me, anything that they may have.

THE COURT: Well, my primary concern is with the reliability of what has been reported on this 302.

MR. HULTMAN: I understand, Your Honor, and mine also. yes.

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THE COURT: And if that can be resolved by this procedure, then we may have solved the problem.

Is there anything more?

MR. TAIKEFF: Your Honor, I have been given a letter today by the United States Attorney's Office adding and deleting, certain names from the witness list and pursuant to our agreement and understanding with the government, it is our obligation to advise the government if anyone on the list is a potential defense witness so that they do not release that person from the jurisdiction, subpoena. Pursuant to that I wish to advise the government that Marvin Stultz who is on the list as being removed as a potential witness will be a defense witness and that Agent David Price may be, and in order to make sure that he doesn't slip through our fingers we'd like him to be held available as well. Although it's not clear at this time whether we will call Agent Price, there is a substantial possibility.

MR. HULTMAN: Your Honor, might I just respond with reference to the names that are on the witness list. That doesn't mean that we have those people here. It means we have them on the list and intend to call them and if Counsel does wish them I would like some notice so that I will be able to get them here. I mean, a number of the people that are on that list have never been here so I want that made very {1001} clear. You'll have to have enough notice in order to get them. I can't keep somebody here that hasn't been here.

MR. TAIKEFF: I understand and I will give you sufficient notice.

THE COURT: Very well.

MR. ELLISON: Your Honor, there are two more matters. The first matter, it has come to my attention that Your Honor has set out very detailed orders and rules which spectators should follow when they're in the courtroom and these rules are posted on two sheets of paper outside the courtroom.

It has come to my attention that several persons have been told that they cannot take notes or make any sketches unless they have proper press credentials and sit in the first row. Since the rules of the Court are set out, I assume are to maintain a certain decorum in the courtroom, and these rules do not include any mention of taking notes or of any sketches by persons other than press people and my failure to understand how such actions by persons would interfere in any way with the decorum of the courtroom. I would request a clarification from the Court because several persons have been instructed to stop taking notes and I have not noticed any interference at all with the decorum of the courtroom by their doing so.

THE COURT: All right. Number one, that is a long {1002} tanding rule in this jurisdiction that has been in effect for longer than I have been associated with the judiciary.

Number two, and I wasn't intending to bring this up at this time, it was reported to me this morning that the jurors have complained to the marshals about distractions in the courtroom. The particular reference that the jurors had was not to taking notes, it was to the movement of people in and out during the testimony. I instructed the marshals to observe and to report to me at the end of the day and I would then at that time make a determination what if any limits should be imposed.

So the rule to which you have just referred to, Mr. Ellison, will not change. As I say, it is a long standing rule of this court adopted by judges that preceded me and that we have felt it to be in the interest of the judiciary to continue.

MR. ELLISON: Could I ask Your Honor to include that in the written rules outside the courtroom so persons entering the courtroom would have appropriate notice because otherwise the only notice persons have is what is contained in the two sheets of paper outside the courtroom. I myself have never been in a courtroom where such a rule has been in place and therefore I was surprised to find the marshals were enforcing, this rule.

THE COURT: Well, it is announced now. I think the {1003} order that you have reference to is the standing order of this Court, it's probably been posted and perhaps it does not specifically relate to that, but as I say, it has been in effect for such a long standing period of time in this jurisdiction that I suppose it was just not thought necessary to spell it out.

MR. ELLISON: I would state to the Court that probably most of the people who are spectators here are not of this jurisdiction.

THE COURT: I appreciate that and I can understand the problem. But I'm sure all of them would have heard this exchange this morning now and do understand it.

MR. ELLISON: The other point, Your Honor, is that it has come to my attention that agents of the Federal Bureau of Investigation visited the home of Mr. Peltier's parents yesterday morning attempting to ascertain the location of Leonard Peltier's mother. I'd like to inform the FBI that Mrs. Peltier is in Fargo and has been attending the trial and at their request we would appreciate if they would not visit the home at any further time for such information because she has been in the courtroom, and I'm sure the FBI is unaware.

I'd also like to state to the Court the manner in which agents requested such information was a rather abusive manner. We'd ask the Court to instruct the FBI to properly conduct {1004} its investigation.

MR. HULTMAN: Your Honor, might I respond. First of all, I don't think this is a relevant matter in any way way to any issue before this Court at this time. I further would request that on any matters of this kind in the future that they be taken up at the proper time and place and, thirdly, I have no knowledge as to what Counsel is referring. But I will make it very clear that the United States is going to continue to fulfill any responsibilities and any officer of the United States in whatever capacity that they have and I'm not in any way going to be inhibited by any statement of Counsel in this courtroom.

THE COURT: Well, I have no information, of course, as to what activities have been or may have or may not have been going on and until I get some information in a more formal way, I'm not going to act on it.

Now if there are problems, I would expect that Counsel would try to resolve them between themselves before taking them up with the Court.

MR. ELLISON: Your Honor, I don't believe this had anything to do with the Counsel for the government. I believe it just had to do with the Federal Bureau of Investigation. That's why I did bring it to the --

THE COURT: The Federal Bureau of Investigation, I assume, is being used by the United States in some manner to {1005} conduct this investigation and assist with the trial. That's why I say that it should be resolved with Counsel before it's brought to the attention of the Court or an attempt should be made to resolve it with Counsel before bringing it up to the Court.

MR. ELLISON: Very well, Your Honor.

MR. HULTMAN: Also, Your Honor, I'd like to have the opportunity this be brought to the attention of the government where the problem is without being in open court with all the press. Then it becomes a matter --

THE COURT: Well, of course, if it's brought to Counsel before it's brought to the Court it's not going to be in open court.

MR. HULTMAN: I understand, Your Honor.

THE COURT: Very well.

You may bring in the jury.

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

MR. HULTMAN: May it please the Court, the plaintiff calls Wilfred Draper.

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WILFORD DRAPER,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. HULTMAN:

Q Would you state to the jury your name, please?

A My name is Wilford Draper.

Q And where do you live, Mr. Draper?

A Minifarms, Arizona.

Q And how long have you lived in Arizona?

A For the last eight years.

Q And with whom do you live in Arizona?

A My family.

Q And would you tell the jury the make-up of your family?

A I've got three sisters, two brothers, and of course, mom and dad.

THE COURT: Are you able to hear him?

Mr. Draper, the people at that table have to hear you, and I would ask that you try and speak up loud enough so that your voice may be heard.

Q (By Mr. Hultman) I want to take you to the year, 1975, and the early part of June 1975, Mr. Draper, and did you have an occasion to go to a convention?

A Yes, I did.

Q And would you tell the jury in your own words where it was that you went?

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A Went to Farmington, New Mexico, there, and participated in the American Indian Movement convention.

Q And did you meet old friends there as well as make new friends?

A Yes, I did. I met a Leonard Peltier, Dino Butler, and Bob Robideau, Norman Brown and Mike Anderson, Norman Charles.

Q Did you meet -- those were all men, is that right?

A Yes, sir.

Q And you have referred to Mr. Peltier. Do you see him in the courtroom here today?

A Yes.

Q And would you tell the jury where he is here in the courtroom?

A He is over there sitting, the yellow ribbon shirt.

MR. LOWE: We will stipulate identification, your Honor, no question about that.

THE COURT: Very well.

Q (By Mr. Hultman) Now, did you have occasion to meet some young women as well as these men that you have mentioned?

A Yes, I did. I met Jean Bordeau and Neelock and Lynn.

Q All right. How long about were you at the convention, do you recall?

A Three or four days.

Q And where did you go from the convention in Farmington, New Mexico?

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A We went to South Dakota.

Q And in what area in South Dakota?

A To the Pine Ridge Indian Reservation.

Q And would you tell the jury who it was that -- if anybody -- that you left Farmington with and how you traveled?

A I left with the people, the people I met there at Farmington, and we traveled in two cars.

Q And was that the group of people that you have just mentioned up to this time?

A Yes.

Q All right, and would you tell us what kind of cars were these and who did they belong to, if you know?

A There was a light green car, I think that belonged to Leonard Peltier, and there was a dark green pickup with a white camper. I don 't know the owner of that.

Q All right. Now, who did you ride with in going from Farmington to the area of the Pine Ridge area in South Dakota?

A I rode with Dino Butler and Robideau, and Norman Charles in the camper.

Q All right, and was Leonard with you in one -- was Leonard there in one of the two automobiles?

A Yes.

Q And were the rest of the names you have not mentioned in the other automobile traveling?

A Um-hum.

{1009}

Q All right. Once you got to the Pine Ridge Indian Reservation area, where specifically did you go?

A Went to the town called Oglala, and from there we went to a man by the name of Harry Jumping Bull's place out in the country.

Q And did you stay there at Harry Jumping Bull's then for some time after that?

A Yeah. We stayed there a couple of weeks.

Q All right. Now, I want you to turn around and to the back of you, to the rear of you is an object which is a map of an area; and it is Government's Exhibit 71, and ask you whether you recognize that particular exhibit?

A Yes, I do.

Q And you have seen that exhibit or one like it a number of times before, have you not?

A Yes, I did.

Q All right, and you are familiar with that particular area for the fact that you stayed in that area for a couple of weeks, is that correct?

A Yes, I did.

Q All right. Now, I want, Mr. Draper -- do you understand that the questions that I am asking you, I want you to respond on the things that you saw and observed at that time and not anything you may have learned since that time, by talking to other people or friends, do you understand my questions are {1010} going to be about the event that happened, and I want you to tell us about the things that you saw and observed at those times, and separate them from what maybe you have talked to somebody about since that time, do you understand?

A Yes.

Q To the best of your ability, of course, all right.

Now, where did you live in the Jumping Bull area, would you tell the jury and explain to the jury where you lived, and where any other people lived in the Jumping Bull area once you got there, and maybe you could take the pointer and point out where it is that you lived and where any others lived?

A (Examining) I lived right behind Harry Jumping Bull's place.

Q All right. Would you point that out to the jury?

A (Indicating).

Q All right, and when you say "behind it", are you referring to which direction with relationship to Highway 18?

A South, southeast.

Q All right. Would it be toward Highway 18 as different from away from Highway 18, from the Jumping Bull's?

A Yes.

Q And had you lived at any time -- or did you stay at any time down in an area which is known as the tent area?

A Yes. I used to stay down there.

Q Is that when you first arrived?

{1011}

Q And when you first arrived, then would you tell the jury who it is that stayed in the tent area?

A Stayed -- let me see. Dino Butler and Leonard Peltier, and Bob Robideau, Norman Browm, Norman Charles, Mike Anderson, Joe Stuntz, and Lynn Neelock and Jeannie.

Q All right, and about how long did you stay there with those people in the tent area?

A A couple of days.

Q All right. Then where did you go?

A I moved up to Harry Jumping Bull's place.

Q All right, and did you live in Harry Jumping Bull's, or did you live in the area of Harry Jumping Bull's home?

A In the area.

Q And what did you live in?

A White tent.

Q And why was the reason that you moved from the tent area?

A Didn't like the atmosphere down at Tent City.

Q What was the atmosphere that you didn't like down in Tent City?

MR. LOWE: Objection, Your Honor, this is not relevant to the charges, not talking about June 26th, absolutely irrelevant.

THE COURT: Sustained.

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

THE COURT: You may.

{1012}

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

MR. HULTMAN: Your Honor, the response to the question, counsel knows as well as I do, will be the reason --

MR. LOWE: (Interrupting) Can you keep your voice down? I know you want the jury to know this.

THE COURT: The last remark was unnecessary.

MR. HULTMAN: (Continuing) -- is the fact -- your Honor, I can't talk any lower than this and be heard, I am doing my best -- is the fact that the reason he left was because of all the guns, and in particarr the relationship

of the Defendant himself to the guns; and I think that's very relevant to all the events that are going to follow. That's my reason for the question, your Honor.

MR. LOWE: I don't think that changes the relevancy one bit, why he moved from one place to the other. He stayed in the area. It is not relevant, certainly not relevant to June 26th.

THE COURT: I will reverse my ruling on the basis of that information and permit the answer.

MR. LOWE: We will object, your Honor.

THE COURT: Very well. The record shows your objection.

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

{1013}

Q (By Mr. Hultman) Now, Mr. Draper, I will again ask the question that I just asked, why was it that you moved from the tent area?

A Like I told you, I didn't like the atmosphere down there.

Q And what is it that you referred to specifically when you refer to the atmosphere down at the tent area?

A Just didn't like it down there, that's all.

Q You have responded to that very question at an earlier time, have you not, specifically?

A Yes.

Q Under oath, and would you indicate to the jury what the specific reason was as to why you left and with reference to any specific individual?

MR. LOWE: Your Honor, the witness has just answered the question, answered it fully. He didn't indicate that he didn't understand the question. I would object as to its being asked and answered.

THE COURT: He had also indicated that he previously made a specific response under oath, so the objection is overruled. You may answer.

The reporter will read the question back.

(Question was read by the reporter.)

A Well, I left because Leonard Peltier was out there, and he was carrying guns around.

Q (By Mr. Hultman) All right. Now, Mr. Draper, would you {1014} tell the jury what at this time to which you are testifying, as well as during that time, what was your feeling concerning guns?

A Well, I like guns. I don't think it is wrong for people carrying guns and things like that.

THE COURT: You will have to speak up.

THE WITNESS: I said that I like to carry guns and do a little shooting, go hunting myself.

Q (By Mr. Hultman) During the time of the 26th of June, and the immediate days following that, did you have any gun or carry any gun of any kind?

A No.

Q Now, what did you do in and about the Jumping Bull property from the time you got there, approximately two weeks before the 26th of June, what did you do while you were there?

A Well, I used to help the old man, Harry, help him around the house, used to help Leonard, to help work and set up tents.

Q Did you do some work in an about the tent area where the rest of the people live?

A Yes.

Q And would you tell the jury what it is you did?

A Well, I helped chop wood, and I helped set up tents, and I helped haul water, things like that.

Q All right. Approximately how many tents were there in the area where the tents were located?

{1015}

A There was three tents and one tepee.

Q And did the people that you have mentioned, other than yourself, live in that area in those three tents, in the tepee?

A Yes, I used to live down there.

Q Now, during this period of a couple of weeks, what was it that the others did, in terms of their activity in general, would you tell us what generally took place during the two weeks?

A Well, they just about did the same thing I did. We just lived there for two weeks.

Q Was there any training of any kind that took place during the two weeks?

A Maybe there was, but we used to do a little shooting ourselves. I don't know if that's training.

Q Do you recall using the word "training" yourself in responding to a question at another time under oath, that you mentioned the fact that somebody was doing some training?

A Yes, I did.

Q Would explain just to the jury what it was that you mean and meant by the word "training"?

A Well, I used to shoot around, just like I would be sighting the gun, training yourself to sighting the gun.

Q Did anyone ever show you in the encampment area, the general Jumping Bull area and the tent area, or in that general {1016} area, how to use any particular kind of weapon or how to fire any particular kind of weapon?

A Yes.

Q Who was that?

A Leonard Peltier and Dino.

Q Let us go to the 25th of June, and I would like to ask you whether or not you remember doing anything that day sometime, at any time outside of the Jumping Bull area itself, did you go to town any time that day?

A Yeah. It was in the afternoon. I was with Mike Anderson and Norman Charles, and we went into Oglala, little compound there, went to take showers; and we knew some people there, so we went there and got cleaned up; and on our way back we got stopped by Jack Coler and Ronald Williams and some BIA police officers.

Q All right. You mentioned that you got stopped by two specific men and by name. Did you know at that time what those men's names were?

A No.

Q All right. Have you learned since what the names of those men were?

A Yes.

Q This is why I want to make certain, Mr. Draper, that in responding -- so that in all faithfulness and in all truthfulness, as I know you are, that you tell about what it is you saw {1017} and observed at the time and not necessarily something that you have learned since, so you understand what I am saying?

A Yes.

Q All right. So that you didn't know the names of the two agents at that particular time, is that right?

A No, I didn't know.

Q But you did know they were two agents, is that right?

A That's right.

Q All right. What, if anything, happened there, would you tell the jury then in your own words what it was that took place there?

A Well, they stopped us and asked us who we were, and they asked us if we know Jimmy Eagle. They had a warrant for Jimmy Eagle, and we told them "We don't know him," and the FBI Agent, I think it was Coler, said, "Well, we are not too sure about you guys." Then he said, "I don't know how Eagle looked myself, so we are going to take you into Pine Ridge; and when he was going through Norman's towels, stuff, found a gun clip on him.

Q Now, do you remember what the gun clip looked like, just in general?

A I think it has a 15 round clip, either 308 or 303.

Q I am going to show you a part of an exhibit which has been marked as Government's Exhibit 69-A, and I want you to show the jury or point out to the jury what it is, if you know, a clip is; could you just on this weapon point out to the jury what a clip is, or what you know a clip to be at that time?

{1018}

A Yes.

Q All right. Would you point it out to the jury, just what is the clip.

A This is a clip (indicating).

Q All right. Now, I'm going to ask you with reference to that evening and what you remember, or that day, and the clip you are referring to, does this in any way have any resemblance to the one that you have just touched on Government's Exhibit 69?

A No.

Q All right. What do you remember as far as the clip at that time, that particular time? What did it look like?

A It was a different shape than that for sure, and --

Q All right. And would you describe what the clip looked like as you best recall.

A (No response.)

Q Did it have any rounds in the clip?

A No.

Q As you recall it did not have?

A No.

Q Now, did the agents at that particular time ask any questions of you?

A They just told us "We're going to take you to Pine Ridge," that was it. So we went with them.

Q Did you recall them asking you what your names were?

A Yes.

1019

Q And what if any response did you make?

A I gave the name David Many Horses and Norman and Charles gave their name.

Q And did you recall any of the agents who were there doing anything at the time they asked you those questions?

A No.

Q Do you recall whether or not they wrote the names down in any way?

A Yes. They wrote it down.

Q All right. If I were to show you now what has been marked Government's Exhibit 15 and ask you to look at it and to read the items that are on there. I would ask you first of all whether or not you recognize, not from having seen them before, but just any words that are on that piece of paper. Do you recognize any words, just the words themselves?

A Yes. There's David Many Horses.

Q Is that the same name you gave on that occasion?

A Yes.

Q I notice on this exhibit there is a date, October 1, '58. Does that have any significance as far as you yourself, does that date mean anything to you just as a day?

A That was the birthday I gave to the agents.

Q All right.

MR. HULTMAN: Your Honor, at this particular time I would offer into evidence Government's Exhibit 15.

{1020}

MR. LOWE: No objection.

THE COURT: Exhibit 15 is received.

Q (By Mr. Hultman) Do you recall, Mr. Draper, any of the names that either of the other two men that were boys that were with you at the time gave to the agents?

A No.

Q All right. Now, did the agents at that time, was there anybody else besides the two agents that you recall?

A Yeah. There was some BIA police officers.

Q Did they come up before or after the FBI agents?

A At the same time.

Q All right. And were they in the same car or in a different car?

A Same.

Q All right. As you recall they were in the same car.

All right. Now, did anybody in the process of your discussion concerning whether you were Jimmy Eagle or not, did anybody give you a hard time or a hassle in any way at that time?

A No.

Q Would you explain to the jury what was the treatment that you received by the agents.

A They just asked us to go with them. We went with them. There was no fight or nothing.

Q All right. And who got in the car?

{1021}

A All of us.

Q All right. Now, do you recall at that time there were two agents; is that right?

A (No response.)

Q And there were three of you; is that right?

A That's right.

Q Now, did the BIA fellows get in the same car also?

A No. They went back before.

Q All right. So when you responded to me only one car a second ago you were just referring to the agents having one car; is that right?

A They came in two cars really. They sent an officer back to Pine Ridge and the agents stayed.

Q All right. Now, if I'm not, if you don't understand my questioning at any time, would you make sure that you ask me because I want to, want you to tell us what you do recall.

All right. What then happened when you got to the station at Pine Ridge?

A There was a man there, the booking officer. The agent told us that this man looked like Eagle, and he took us down to this man who recognized us. When we got there the man told the agents that this ain't none of them.

Q So it was your clear understanding at that time that somebody thought that maybe one of you was Eagle or looked like Eagle; is that right?

{1022}

A That's right.

Q And that's why you went to the station?

A Yes.

Q And at the station, though, the man that you talked to there who knew Mr. Eagle said, no, that they are not?

MR. LOWE: Your Honor, this leading is getting outrageous. I was waiting to see how far he was getting to him to give him a script.

THE COURT: The objection is sustained.

Q (By Mr. Hultman) What if anything, what if anything did you do next?

A We just waited around until another officer took us back to Oglala.

Q All right. And did he drop you off where you wanted to go?

A Yes.

Q Now, during this whole period of time did any of the officers in any way give any of you a bad time or anything resembling that?

A No. Were they carrying out their duties as you would expect them to?

A Yes.

Q Was there anything unusual or unordinary about it?

A No.

{1023}

Q Now, where was it, if you can tell the jury, that they left you off, or that this person let you off at your request?

A The turnoff right there on Highway 18. Turnoff that goes towards Jumping Bull residence.

Q All right. Would that generally be as you are looking at Government Exhibit 71, if you would turn, would that be somewhere up there on Highway 18 as you can see in this, in this exhibit?

A Yes.

Q All right. And what if anything did the three of you then do?

A We just walked back in the, to the place.

Q All right. And when you say "you walked back to the place," what are you referring to by the "place"?

A Jumping Bull's place.

Q All right. And where then specifically at Jumping Bull's place did you go?

A Over to his house, to one of the cabins there.

Q All right. And did you go, did you see anybody there at the cabin?

A Yes.

Q All right. And who was i[t]?

A We saw Leonard.

Q And what if anything was said or done at that time?

A He just told us, "I hear you guys went to Pine Ridge with some agents," and that was it.

{1024}

Q What was his reaction at that time?

A Well, he felt like he --

MR. LOWE: Objection, Your Honor, to the form of the question. He can only state what he observed. He can't read Mr. Peltier's mind.

MR. HULTMAN: I'm just referring to any observations that he made and any statement that Mr. Peltier may have made at that time.

THE COURT: Why don't you restate the question. The objection is sustained.

Q (By Mr. Hultman) All right. Did Mr. Peltier say anything specific to the three of you at that time?

A Just what I told him.

Q All right. And would you tell us the manner in which he said it to the three of you?

A He said, "I heard you guys went to Pine Ridge with some agents, and did they do anything to you guys, or anything like that, did they harm you?" We told him no, because we went along with them. Told him they were looking for Eagle. He said "It's okay."

Q All right. Now would you point out on Government's Exhibit 71 for the jury, and if you have to get up to do that, with the pointer, would you show them the building where this conversation took place.

A (Indicating.)

{1025}

Q And is that a log house?

A Yes.

MR. HULTMAN: Let the record show that the witness pointed out the residence that has been commonly referred to as the log house.

Q (By Mr. Hultman) Now, where did you stay that night then?

A I stayed up in the tent in the back of Jumping Bull's

Q All right. And did anybody stay there with you?

A No.

Q So is it a fact that you stayed in that tent by yourself; is that right, Mr. Draper?

A That's right.

Q All right. Now, tell us, in the morning what did you do in the morning, the next morning, which is the 26th of June?

A I woke up about 8:00 or 8:30, something like that, and I decided to haul water down to the tent area.

Q And was this something that you did regularly?

A Yes.

Q And about what time of the morning was that?

A 9:00. 9:00, 9:30

Q All right. And at that time of the morning did you see any people that were in the tent area?

A Yes. I saw little Jimmy, I saw Norman Charles, Dino, Leonard. I think it was Neelock, too.

{1026}

Q All right. And what did you continue to do that morning then?

A Just put water in the tank down there, the barrel; and stood around the talked.

Q All right. Did you have an occasion later that morning to hear anything that brought some events to your attention?

A No. Until later on, after a while when I was down there, I heard some gunshots.

Q All right. Where were you at the time that you heard the gunshots?

A I was in the tent area.

Q All right. And do you recall at that time whether or not there was anybody specifically with you at that time?

A No, there wasn't.

Q Would you describe the tent area in terms of the foliage and so forth for the jury.

A I don't understand your question.

Q Well, would you describe what the tent area was like in terms of trees and bushes and foliage.

A Yeah. There was bushes and trees. It was a pretty wooded area.

Q Is it very difficult to see in that area?

A Yes.

Q And when you heard the shots would you describe to the jury what it was that you heard, what did it sound like?

{1027}

A I'm pretty sure it was gunshots, that's for sure, and it came from the direction of, from the Jumping Bull's house.

Q All right. Would you tell us about how many shots that you heard?

A First I just heard two shots, then after that, I waited for a while and then some more shots.

Q And would you point out on the map behind you, Government's Exhibit 71, the area in which you heard the shots that you are now referring to.

A (Indicating).

Q All right.

MR. HULTMAN: Let the record show that the witness showed the general area between the point on Government's Exhibit 71 that is referred to as the green house and the area where a "P" is marked, an area between those two areas, those two particular points.

Q (By Mr. Hultman) What if anything did you do next?

A Well, I just stood around for a while and walked around the camp.

Then I heard somebody run up that way, heard some voices. They said, "Let's go check it out, see what's happening, up there." But I don't recall anybody carrying guns when they ran up there, though.

Q All right. When was the first time then that, you see somebody specifically after hearing the shots and doing the {1028} things that you've referred to?

A I saw little Jimmy there.

Q And what was little Jimmy doing, if you recall?

A Must have scared him or something like that, and stood around and asked me "What are you going to do, what are we going to do?"

Q Now, who is the next person or persons that you saw?

A Saw Joe Stuntz, Norman Charles. And after a while I saw --

Q When you saw the two you're now referring to what were they doing, what did they do?

A They were doing the same thing as I was doing, wondering.

Q All right. And what if anything did they then do?

A I think they ran up there to check it out.

Q All right. Now, what if anything then happened?

A Nothing. I just heard some more shots and some more and some more.

Q Now, when was the next time that you saw any other persons than the ones you've referred to?

A After a while I saw Dino and Norman Brown around there.

Q And what did they do?

A They just stopped for a while and went back up that way again.

Q Did you see them with any guns of any kind?

A No.

{1029}

Q All right. Now, what if anything did you do next?

A Well, I just walked through the camp and started walking down the trail and just kept walking to the woods, down the ravine away from the gunshots.

Q Now, did you hear gun shooting going on for a period of time then while you were walking away from the camp area itself toward the ravine?

A Yeah. There was all the time.

Q All right. Now, about how long did you stay in the tent area before you saw some other individuals back in the tent

A Quite a while.

Q All right. And when you came back to the tent area who were the first people that you saw when you returned from down behind the tent area back to the tent area?

MR. LOWE: Objection, Your Honor. There's no foundation that he came back to the tent area at this point.

THE COURT: Are you withdrawing your question?

MR. HULTMAN: I will withdraw the question, Your Honor.

Q (By Mr. Hultman) Did you subsequently come back to the tent area?

A Yes, I did, later on.

Q All right. Now, when you did come back to the tent area later on would you tell the jury who it was that you first saw?

A I saw Leonard and Dino and Bob.

{1030}

Q And where were they when you saw the three of them?

A The tent area.

Q And do you remember where specifically, or with relationship to any particular object in the tent area?

A Well, they were loading up some radio equipment in the red van.

Q All right. Now when you say the "red van" would you describe that to the jury, the color and the type of car, to the best of your knowledge as you knew it then.

A It looked like it was a '68 or '69 or '67. Looked like a Travellall van with red color, white top.

{1031}

Q It was a white top, you say, and what was the other color?

A Red.

Q Had you seen that particular vehicle earlier in the day that day?

A No.

Q Had you seen the vehicle on previous occasions in the Jumping Bull area?

A Yes.

Q Had you seen it on other occasions in the tent area?

A Yes. It was there the past weeks.

Q And do you know whose vehicle it was?

A No.

Q Did you know who normally drove it?

A Yeah. Bob and Leonard.

Q Now when you went down that morning to the tent area and was chopping wood and carrying water, was the red and white van there at any time earlier that day? Did you see it anytime earlier that day?

A I don't think so.

Q But when you returned the vehicle was there at the time you're now talking about?

A Yes.

Q Did anybody else come into the area after the three that you're referring to?

A Saw Norman Challes later on, then after while everybody {1032} came back in. Norman Brown, Mike Anderson.

Q Now what if anything took place then at that time, could you tell the jury in your own words what were the events that took place at that time in the tent area?

A The first thing, we wanted to get out of that place, so we decided to take the red van and get out, but after awhile changed our minds. We decided to just walk out.

Q Now did Leonard during this time give any directions?

A No.

Q Who was it that decided that you would leave in the van, if you know?

A I don't know.

Q Had you seen any radio equipment either in tent city, or in the tent area before that particular moment?

A I seen it there weeks before but...

Q Was anybody using it?

A Not as I recall.

Q Did you see the radio equipment at any time in New Mexico or on the trip back from New Mexico?

A Yes, I did.

Q And who did that equipment belong to, if you know?

A I think it belonged to Dino, Leonard or Bob.

Q But it was with you when you came from New Mexico, is that right?

A That's right.

{1033}

Q Was there any discussion at that time concerning whether or not all of you would leave together or leave separate?

A No. There was no discussion. We just happened to leave together and stay together and walk out together.

Q Was anything said as to what would happen if somebody didn't go as a part of the group?

A Yeah. For one thing if you left the group at that time you would get arrested.

Q And who was it that indicated that?

A Leonard and Bob.

Q Did Leonard indicate anything else to you that would happen if you didn't stay with the group?

A No.

Q Did you have any discussion with Leonard at that time as to you personally leaving the area by yourself?

A Yes.

Q And what did he tell you?

A He used to tell people that, like you run from your group or if you run from a firing group the leader of that group will personally shoot him, shoot him.

Q And is that the reason why you stayed in the group at that particular time?

A Yes. In this case Leonard was the leader.

Q Now did anybody leave the group before you actually left the tent area?

{1034}

A No. It was -- little Jimmy.

Q And when you referred to little Jimmy, would you tell the jury who little Jimmy was?

A It's a 12 year old boy at that time, full-blooded Sioux Indian. Jimmy Zimmerman is his real name. He's from Rapid City.

Q Now were each of you because of the closeness to each other, did you know each other by first names or by shortened names like little Jimmy you just referred to?

A Yes.

Q Did the other people know you by a specific name other than the name of Wilfred Draper, did they have a nickname or short name for you?

A Yes.

Q What is that, Mr. Draper?

A Wish.

Q So that when anybody refers to the name Wish, they're referring to you, isn't that correct?

A Correct.

Q And that's the name that most everybody knows you by, sort of a nickname or short name, right?

A Right.

Q Now how old, Wish, were you at this time?

A I was 18.

Q And you said little Jimmy was 12, is that right?

A That's right

{1035}

Q And who was it, was there somebody that was close to little Jimmy as far as the group of people that lived in the tent area?

A Yes. There was a Jane Bordeau. It was Jimmy's oldest sister. She was about 16 or 17.

Q Was there anyone of the fellows that was particularly close to little Jimmy?

A No.

Q Did you have occasions to be with little Jimmy?

A Yes.

Q And what was it that was determined at that time concerning little Jimmy?

A You mean at the time when he left the group?

Q At the time that you're now referring to; yes.

A Well, one thing was that he was, he was frightened and scared. We wanted to get away and so we let him go.

Q And where did he go?

A He went towards Jumping Bull's place.

Q And would you point out on the map the general direction from the tent city that he went and where you saw him last. Would you get up so that you can with the pointer touch the map and show where he was when he left and then where you saw him go.

A Right there (indicating).

MR. HULTMAN: Let the record show that he's pointing {1036} in the general vicinity to the south and east of the tent area.

Q (By Mr. Hultman) Then, Witness, would you show us, show the jury where it is he then walked as long as you saw him walk. With the pointer again, would you point out where it was that he went on that occasion as far as you could see him.

A I guess he came back towards Jumping Bull's place but that's as far as I saw him.

Q You saw him going towards Jumping Bull's, is that right?

A That's right.

Q All right.

Now why was it, if you know, that the van was loaded?

A Well, we were trying to get all our stuff together to get out of there, to move out.

Q And who was it, if anybody, or for what reason did you change your mind?

A I don't know that. Just came up I guess. Decided to change our mind. We just walked out.

Q And so then what next did you do as a group?

A We just walked south, towards south down the ravine, down the tree line and just kept walking. We walked for about maybe a couple hours, three hours, I don't know. But it's quite awhile we walked. Stayed close to the creek and down the tree line.

Q Now during the course of the day, once you were in the tent area and you heard some shots, did you at any time during the rest of that day go anywhere from the tent city, from the tent {1037} area toward Jumping Bull's or up in the Jumping Bull area?

A You mean during the shooting?

Q Yes. Once you heard shots, from that point on.

A No.

Q So you don't know anything that took place up here in any way as to what the events were from that point on, is that right?

A That's right.

Q And am I correct from your testimony that all of this time you were in the wooded area?

MR. LOWE: Objection, Your Honor. It's either giving a summation or previous testimony or it's an outrageously leading question. In either event it's objectionable.

THE COURT: Sustained.

Q (By Mr. Hultman) Once the firing started, from that point until the next four days, were you at any time in the Jumping Bull area that's represented on this Government's Exhibit 71 except in the upper extreme right-hand corner of the exhibit in the wooded area?

A No.

Q Now would you tell us, Wish, where you then went. Did the group all go together except for little Jimmy?

A Yes.

Q And do you remember any of the things that any individuals were carrying? Did you carry anything with you when you left {1038} the tent area?

A Yes. I was carryiny two brown bags.

Q And why were you carrying two brown bags?

A Because there was no other people that could carry them.

Q Were they your bags?

A No.

Q What was in the bags, if you know?

A There was dynamite fuse.

Q And did anybody give you any directions that you were to carry those two particular bags?

A Yes. Bob told me to carry these so I said, "Okay."

Q And about how old is Bob Robideau, if you know, at that time.

A About 27.

Q Was Leonard carrying anything?

A Yes. He was carrying an AR 15.

Q When you say "AR 15, did you know the words "AR 15" back at the time that we're now talking about?

A No.

Q Have you subsequently either by discussions with the FBI or somebody else learned that what it was you described was an AR 15, is that how you now know it?

A Yes.

Q I don't want you again to talk about things that you may have learned since to describe, only the things that have {1039} happened then, you understand?

A Yes.

Q Would you describe for the jury as you remember what that weapon looked like, as you remember it then.

A Yes. It's a black, looked like a sub, semi-automatic rifle.

Q Had you seen a weapon of that kind in the tent area before this day?

A Yes.

Q Had you seen it on more than one occasion?

A Yes.

Q Who had you seen it with? Who had had it?

A Joe Stuntz had it, Leonard had it, Bob and Dino had it.

Q So that the weapon you're describing is not something that you had seen for the first time, you had seen it on a number of occasions?

A That's right.

Q And whether it's an AR 15 or not, you know the weapon in terms of what it looked like because you had seen it many times before, is that right?

A Right.

Q I'm going to show you what's been marked as an exhibit here and ask you if this weapon fits that general description.

I'm going to show you what's been marked as Government's Exhibit 34A and ask you whether or not the weapon that you had {1040} previously seen in the area with Mr. Peltier and others and had seen earlier that day is one of a general description of the kind that I'm now holding in my hand?

A That's right.

Q Let's talk about the others individually that you said were with you at this time. Since Leonard had, or since Bob had indicated to you what you were to take, what did he take, if you remember?

A I think he had a --

Q Now I'm going to ask you again to describe to the jury what it was without referring to it specifically in terms of something you may or may not have learned later. Do you understand?

A Yeah.

He carried a rifle but at the time I don't know what type of a rifle.

Q He carried a rifle, is that right?

A Yes.

Q Do you remember, did he carry anything else?

A Yes. He carried two in fact. One, was carrying a shotgun, too.

Q So Bob had a rifle and a shotgun, is that correct?

A That's correct.

Q Now do you remember anything specific at that time about either of these two weapons that you saw at that time and you {1041} recall very distinctly from that time? Is there any objects of any kind with reference to either of those two which would identify either of those two in any way as to whom they may belong or who might be the owner?

A Well, the shotgun didn't belong to him and I guess he picked it up from the agents.

Q Well, now again --

MR. HULTAM: Your Honor, I would ask the response now --

Q (By Mr. Hultman) You weren't down at the scene so you don't know anything that you just now said to be a fact, isn't that true?

A No.

Q You weren't down there so you don't know that happened, is that right?

A That's right.

Q I want that very clear.

Now what I'm asking you is what is it that led you to a conclusion of the kind you just said: did you see anything on either of the two weapons?

A Yes. The shotgun. The end of the stock had a little green sticker that said, "Denver FBI."

Q Now I'm going to show you a weapon which has been marked Government's Exhibit 36A and I'm going to direct you to the testimony that you just gave. Can you tell the jury from what you saw and observed then, not anything you may have seen or {1042} heard or anything since then but was the shotgun that you're talking about that he had at that time one that resembled the shotgun that I have in my hand?

A Yes.

Q You don't know whether this is the shotgun or not, isn't that true?

A Yes.

Q But there was something about the one that you saw that looked generally like this that you identified at that time, and would you tell me again what it was and where it was on the weapon?

{1043}

A It was at the end of the stock handle.

Q And what was it again?

A A little green sticker.

Q A little green sticker on it, and what was on the sticker?

A Denver FBI.

Q Denver FBI, all right.

Had you ever seen this weapon or one that looked like it in the tent area or any time before that day during the day?

A No.

Q Do you remember whether or not Mr. Butler was carrying anything?

A Yeah. He was carrying a rifle, too.

Q All right. Do you remember whether or not anyone else was carrying any weapons of any kind? Did you have a weapon?

A No.

Q Did Norman, was Norman Charles carrying anything?

A Yeah. Norman Charles was carrying one. Norman Brown.

Q And what was he carrying?

A I don't know the type it was.

Q Do you remember, can you give the jury just a general description of what it was that he was carrying?

A It's a long rifle.

Q All right. Was there anybody else that was carrying any weapons of any kind?

A Yes. There was Norman Brown, Mike Anderson.

{1044}

Q And do you remember anything about the weapons that any of those men were carrying?

A No.

Q Now, were there any handguns or short guns of any kind that you observed during this time that we're now talking about?

A Yes, I did.

Q And would you tell the jury with reference to any individual what it was that you observed with reference to any handguns.

A I saw 302 handguns.

Q Who had 302 handguns?

A Bob, Dino, Leonard.

Q All right. Each of them had handguns, Bob, Dino and Leonard; is that right?

MR. LOWE: Objection, Your Honor. Mr. Hultman is misstating what this witness is stating. He's leading the witness. I state that simply as improper.

MR. HULTMAN: Let us approach the bench, Your Honor?

THE COURT: You may. (Whereupon, the following proceedings were had at the bench:

MR. HULTMAN: Your Honor, the reason I've asked to approach the bench is that I think it's very evident that this witness is partially hostile to the Government by his own testimony and his observations we've made thus far.

Secondly, it's obvious that he's afraid and I've been {1045} doing the very best I can in order to elicit fair and honest responses, and I will do my very best to continue it. I do want the Court to know that there are going to be times when I am going to have to maybe be leading to some extent in order to get testimony which is testimony of which has been already given, and under oath, and that's the things to which I'm only trying to get. And I think I have every --

MR. LOWE: Can you keep your voice down, please.

MR. HULTMAN: I think I have every right in the world in light of testimony that is a matter of transcript under oath of which we know that testimony has been given to do everything within the rules to secure true and honest and a full response to those particular questions, and that's the reason, Your Honor.

THE COURT: As I understand the objection in this case, and I may not understand it fully, but it is my impression that the objection was directed to your simply repeating the answer of the witness.

MR. HULTMAN: All right. Is counsel saying that in repeating the answer that that was not his answer just now?

THE COURT: It just places undue emphasis.

MR. HULTMAN: I will try to do my best.

MR. LOWE: I would like to respond. I don't think there's any showing that this witness is hostile. He may not be an FBI Agent and just giving back the party line, but he {1045} certainly is not shown to be hostils. He is responding, he may be a little nervous, but a lot of the witnesses that the Government has are nervous.

Until a clear showing of hostility, I don't think it's proper to ask lesding questions under oath.

THE COURT: I might --

MR. HULTMAN: Your Honor -- excuse me.

THE COURT: I might comment that I have not observed that this witness is particularly hostile. He may, I have observed, that he may be hesitant. That is why I permitted you to go into questioning the fact that he had answered the question under oath before. But at this point I have not observed any hostility.

MR. HULTMAN: All right, Your Honor.

Your Honor, this is another matter that I want to bring to the Court's attention on the record now, and this is the reason why, among others that I have attempted to, at least have four seats immediately behind counsel continuously, Your Honor. And I want to put it on the record that I have noted different signs and various things that have gone on in the courtroom when a witness of this kind is on the stand. And I would request of the Court that the Court make a note of anything that the Court might see during the course of the proceedings here, because it's very obvious as to where individuals are sitting in the room, what the interest of those {1047} individuals are, and to which they have a right. And I'm not objecting to that in any way, but the point that does concern me is that in no way does, can this witness be put in an atmosphere where he by any way of intimidation of any kind by the actions of anyone in the courtroom.

Now, specifically use the illustration, yesterday I sat and watched myself Dino Butler make specific signs as I asked the question to witnesses. I looked at him as I asked the question and that's just an illustration of which I'm referring and that's what I'm referring to, Your Honor, when I say it's extremely difficult for counsel at a time or another to be placed in a posture where I do have to maybe be more leading than normally would be the case. But I do state to the Court that I'm trying in every way, and I will do the very best I can, not to repeat or not to be leading. I don't think that any of the questions at this particular point have been, or the responses, anything. But one what counsel knows is the ultimate response is there, is a matter of record under oath already of what that response is.

MR. LOWE: I don't understand what he just said. I'm not even going to try to respond to that. It made no sense whatsoever.

If he has a complaint about somebody in the audience he certainly has proper remedies he can take to that. We {1048} certainly have no control over the people in the audience.

THE COURT: I will state that it was reported to that to me that some court personnel, that they observed some individuals making signs when the witness was testifying yesterday. I did not observe it, I have not done anything about it. If I do observe that, that person will be asked to discontinue. And if he doesn't discontinue, then of course he will not be permitted in the courtroom.

MR. LOWE: I take no issue to that. I represent to the Court that I did not know anything about it.

MR. HULTMAN: And I want the record made very clear by my remarks, I in no way directed that in any way to counsel or anybody directly associated with counsel. That I want made very clear.

MR. LOWE: That does not give authorization for proper questioning of witnesses.

THE COURT: That is correct.

MR. HULTMAN: I understand.

Your Honor, I wonder what time we're going to take recess, Your Honor.

THE COURT: In about five minutes.

MR. HULTMAN: Okay.

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

Q (By Mr. Hultman) Now, when you left the tent area would {1049} you tell us, Mr. Draper, what it is that happened and where it is you went, and if you'll take it in a sequence as you best remember it did happen. What direction did you go after you left the tent area itself?

A We went south. Like I told you we walked for a while, maybe a couple of miles, couple hours, got to the road again.

Q Now, was there anything, in terms of a route that you followed or reason that you went the direction that you went?

A No. We just went along the creek, the creek took us to the road. When we got to the road we got -- we found a culvert. We went through the culvert to avoid the police cars and all the cars going above. We all went through the culvert.

Q Now, where would the culvert be located just in a general sense from the area of the Jumping Bulls' that is represented by Government's Exhibit 71? Would you just turn around and maybe indicate to the jury in any way you can what direction it would be. Just with the use of the pointer, point out a direction.

A (Indicating.)

Q All right. Now, you pointed out a point. Would you now point out for me, please, the direction then from that point that you took in terms of going along the creek so that the jury can approximate the direction that you then went.

A There's a creek here (indicating). We went this way and stayed along the creek until we got to the road.

{1050}

Q All right. Now, when you crossed under the culvert here, was anybody with you specifically at that time?

A I was with Norman Charles and Mike Anderson. And the other group has already went through the culvert and they were already on the other side of the road.

Q All right. And did you catch up with them at any time?

A Yes.

Q And where was that?

A They waited there for us, and after a while we just got out of the culvert and started running toward the hills to the --

Q All right. While you were running as a group toward the hill did anything happen?

A Yes. The BIA officers spotted us and they started firing. We ran quite a ways and they kept firing until some of our boys fired back.

Q Do you remember anybody specifically that fired back?

A No.

Q All right. And where did you go then from that point?

A We ran up the hill until we got to the pine ridges there. until we made it to the top, and by the time we got there it was sometime in the evening, it was close to nightfall.

Q And what if anything happened at that time?

A We stayed up in the hills for a while until nightfall came. We started walking at night. Stayed in the hills.

Q And did anything happen at a later time that evening other {1051} than walking?

A Yes. There was two riders that came to us, and I don't know what happened then. I think Leonard or somebody talked with the riders, but they went back and we kept walking on.

Q Did you know who the riders were at all?

A Yeah. One was Leon Eagle. And I don't know the other one. There was only two riders.

Q All right. And then what did you do next then?

A We just kept walking. By this time it was night and we walked for about, I'd say, two, three hours, couple of miles, until we got to another place and got back to the highway somehow.

Another rider came up to us and took us back across the road. Went towards a man by the name of Noah Wounded's place. This is back in the hills.

Q Do you know who the rider was that took you to Noah Wounded's?

A Ted Lane.

Q And was there anybody at Noah Wounded's when you get to Noah Wounded's?

A Yes. There was Noah himself. He was living all alone.

Q And would you describe Mr. Wounded for us?

A Yeah. He looked like an old man in his sixties. Grey hair.

Q And what if anything did you do there?

{1052}

A We stayed there that night. Rested up and he invited us in.

Q All right.

A When we got there.

THE COURT: Court will recess until 11:25.

(Recess taken.)

{1053}

(Recess taken.)

THE COURT: The jury may be brought back in.

(Whereupon, at 11:26 o'clock, a.m., the jury returned to the courtroom; and the following further proceedings were had:)

MR. HULTMAN: May it please the Court?

THE COURT: You may proceed.

MR. HULTMAN: Your Honor, at this time the Defendant and the Government have agreed to a stipulation, in order that a witness not be called just for this purpose, and the stipulation is this:

That Exhibit No. 15 which has now been entered into evidence was found on June 27, 1975, by Special Agent Ed Kelly in Special Agent Ronald A. Williams' FBI vehicle which was located near the Tent City.

THE COURT: And so the stipulation may have some meaning Exhibit 15 is that piece of paper --

MR. HULTMAN: (Interrupting) That is the piece of paper, your Honor, that we have been referring to that has various, three names on it and so forth.

MR. TAIKEFF: We have so stipulated, your Honor.

THE COURT: Very well, the stipulation is received.

MR. HULTMAN: Now, would the reporter read back to me the last question -- no problem.

Q (By Mr. Hultman) I believe we were at a point where you {1054} were at Noah Wounded's, is that correct?

A Yes.

Q I believe you described him as being an old man, is that right?

A That's right.

Q Now, what, if anything -- would you tell us what night, if you know, this was that you were at Noah Wounded's?

A The night of the 26th.

Q All right. This is the night of the day on which we are talking about, is that right?

A That's right.

Q Now, did you stay there all evening there?

A Yes.

Q And what, if anything, did you do the next day?

A Well, we stayed there all day, and at nightfall we started walking.

Q All right, and did you have any basis for any direction to go, anything to help you that night?

A Well, Noah Wounded drew us a map which way to go. Our destination was Manderson, and we took off for Manderson.

Q And who was it that had the map then?

A It was Bob.

Q All right, and what did you do from that point on?

A Well, we walked on towards Manderson.

Q Did anybody else have the map during the course of that {1055} evening?

A No.

Q I would direct your attention to an earlier time when you were asked the very same question under oath as to who had the map. Do you remember being asked that question at some other time?

A Yes.

Q And do you remember your response at that time as being Peltier?

A No.

Q All right. You wouldn't -- you don't dispute that you may have given that response at another time?

A Maybe Peltier carried the map some of the way, I don't recall, but it was given to Bob.

Q All right. So that as you recall it and as you best recall it, here in this courtroom in answering truthfully it is the response you have given here today, is that right?

A That's right.

Q All right. Now, where did you go then that night?

A Well, we were headed to a girl's house in Manderson, instead we ended up -- we were going towards Pine Ridge; and we walked all night and no sign of Manderson; and so the next morning, daybreak, we decided to stay in the hills again under some bushes, and we stayed there all day until nightfall again, and we walked again.

{1056}

Q All right. Now, the night that you were walking to Morris Wounded's house, did you ever overhear any conversation between any of your group?

A Yes, I did.

Q And would you tell us who the people were?

A It was Dino, Bob and Leonard.

Q All right, and would you tell the jury what, if anything, you heard at that time?

A Well, they said something about a car, an agent's car; but I don't recall, and they said something about moving him around. I don't really remember.

Q Do you remember who specifically said anything at that time?

A No. Could be -- but it was coming from the direction where Leonard, Dino and Bob was walking.

Q If I were to direct your attention to an earlier time, closer in time to the event itself, and you were asked this question --

MR. LOWE: (Interrupting) May we have a side bar, your Honor?

THE COURT: You may.

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

MR. LOWE: I think, your Honor, that this witness has answered this question fully and fairly. I do not think it is proper for counsel to read from prior transcript to {1057} this witness for the purpose of impeaching that information before the jury.

I think if your Honor wants to have a hearing outside of the presence of the jury in which there is some inquiry to refresh his recollection from earlier testimony, I would have no objection.

Counsel knows very well what he is doing. He keeps getting testimony which was impeached by cross examination before the jury, and I would ask further that if counsel is going to refer to a transcript that he identify the transcript by date and page number so we can follow along with it.

MR. HULTMAN: Your Honor, I will do that, and I will do it right now; and I am sure counsel --

THE COURT: (Interrupting) Again I think his objection is to your reading the question and answer. I think perhaps what you should do is show it to him and ask him to refresh his recollection.

MR. HULTMAN: I will be glad to follow that procedure.

THE COURT: Show it to him and ask him to read it to himself, refreshing his recollection. Have him establish that he was in fact asked that question and that he did give an answer.

MR. HULTMAN: I was trying to save some time, and I will, your Honor.

{1058}

I want the record to show that the question I am referring to is found at Page 938 of the transcript of the last trial. It is a question and a response of this witness and the question is:

Now, during this time that you were walking through the night, can you tell me whether or not there was any conversation about what happened to the agents?

The answer: The night we were talking to Morris Wounded's house, I heard Dino and Bob and Leonard talking about the agents. Leonard said something like this, "I helped you move them around the back so you could shoot them" Maybe he was talking about Butler or Bob. I don't know who he was talking about that night.

That is the response to which I am directing my inquiry, your Honor, and I will follow the procedure the Court has indicated.

MR. LOWE: It is just very difficult when you say "previous proceeding" without identifying the transcript date or page number, to pick up where you are.

MR. HULTMAN: I will do so.

THE COURT: Very well.

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

Q (By Mr. Hultman) Mr. Draper, I am going to show you a part of a transcript, Page 938, of a previous transcript at a {1059} previous time when you were under oath, which I will now do, and ask you to look at it and ask whether or not this in any way refreshes your recollection as to having been asked a question and having made a response under oath?

A (Examining).

Q Does that refresh your recollection?

A Yes.

Q Do you recall having been asked that question and then giving a response?

A Um-hum.

Q Now, I would ask you the same question and ask you whether or not you can respond more fully with your recollection refreshed?

A I can't remember that much.

Q Well, you are saying that you don't remember back at the time this statement --

A (Interrupting) Yes.

Q You are not in any way saying that what you said at that time was not a correct statement of your memory to the best of your ability at that time?

A Well, it was something like that.

MR. HULTMAN: All right, Your Honor, might we approach the bench again?

THE COURT: You may.

(Whereupon, the following proceedings were had at the {1060} bench:)

MR. HULTMAN: Your Honor. I am now in a posture -- that's the reason I have come to the bench -- that I think it is appropriate that I be able to read that question and that response.

MR. LOWE: We object, your Honor. This witness is testifying today, what he is testifying to is his recollection, the best he knows it. He said it might have been something like that. That's different. He has not said that was his correct testimony, and the fact is during cross examination he changed it substantially last year.

MR. HULTMAN: I don't agree with that at all. Your Honor, I think the record will show that this is a fair and accurate statement of what he said and is exactly what he said at that time.

I think it is proper for me now, as counsel has done many times earlier, to continue to use a transcript and continue to do, properly to read the exact response itself. I have a right to do it from the standpoint of impeachment. I have the right to show he is a hostile witness. This is a straight factual statement, and without - - under Rule 607, and that's what I would now propose, your Honor. I do -- I will not propose anything except out of the presence of the jury before I would do anything. That's why I asked {1061} for a side bar.

MR. LOWE: We object to it, Your Honor.

THE COURT: Well, under the new Rules of Evidence, you are permitted to impeach your own witness, and he does recall having given that testimony.

MR. HULTMAN: That is correct.

THE COURT: So I am going to allow it to be done.

MR. LOWE: The record has our objection.

THE COURT: Yes, your objection is on the record.

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

Q (By Mr. Hultman) Mr. Draper, in response to the question at the time in which we have been referring, is it not a fact that your response was:

The night we were walking to Morris Wounded's house I heard Dino and Bob and Leonard talking about the agents. Leonard said something like "I helped you move them around the back so you could shoot them." Maybe he was talking about Butler or Bob. I don't know who he was talking about that night.

End of response.

Do you remember making that response?

A Yes.

Q Was that response at that time to the best of your knowledge a true response on your part?

{1062}

A No.

Q It was not.

What about it was untruthful on your part?

A I can't remember. I just don't place it.

Q Maybe I am not communicating. Are you are saying that here and now you don't remember, is that what you are saying?

A I remember it, but I don't remember what was really said, is what I am trying to say.

Q Let's start with here in the courtroom at this moment. Do you remember on the night specifically what was said in that conversation right here and now?

A No.

Q You do remember there was a conversation?

THE COURT: Counsel approach the bench.

(Whereupon, the fo]llowing proceedings were had at the bench:)

THE COURT: It has just been called to my attention by the Clerk that that large gentleman in the green shirt has been seen signaling.

MR. HULTMAN: That is Mr. Peters.

THE COURT: After the Clerk called it to my attention, I watched it and I observed, after the question was made, he did make a signal.

MR. LOWE: Could we take this up out of the presence of the jury? I am not sure --

{1063}

MR. HULTMAN: (Interrupting) We ought to do it now before I ask any more.

THE COURT: This gentleman is going to have to refrain from any further activity of that kind or he is going to be ejected from the courtroom and not permitted to return.

MR. LOWE: Judge, I do not know who -- first of all, I don't know who you are referring to. I don't have any control over him.

THE COURT: I know.

MR. LOWE: You are directing the comment to me. I don't want the jury to get the wrong impression.

THE COURT: I suppose I am directing it to you because obviously he is trying to help your side of the case. That's what you call guilt by association.

MR. LOWE: I think is right.

What I am wondering is, I don't want anything like that said in the presence of the jury.

THE COURT: I appreciate that.

MR. LOWE: If you would like to excuse the jury perhaps, you know, for lunch or something, but I did not see it. I don't know anything about it.

MR. HULTMAN: Let me on the record state: This event has been observed a number of times by counsel at the counsel table and with this specific individual this {1064} morning. If my knowledge is correct --

THE COURT: (Interrupting) Who is it?

MR. HULTMAN: That's what I am now about to say. It is a man by the name of Ernie Peters.

THE COURT: The big gentleman in the green shirt?

MR. HULTMAN: That's correct, and he, your Honor, I think it can be shown, is one who may have a very personal interest in this particular case; and so I think it is a matter that we ought to take up, and we saw -- because now this is the second time that counsel at the table has observed it. First I personally observed it with Mr. Butler yesterday and on more than one occasion. Secondly now it was observed -- by Mr. Peters.

This, your Honor, I might indicate is something -- and again I want the record to show clearly that it has no bearing on counsel or any reflection on counsel; but this same type of activity, I can say, has happened with witnesses in other trials and that's the thing that concerns me; and I think it ought to be resolved without the jury in any way knowing, as counsel has said.

THE COURT: Well, yes, I am going to ask the jury to leave the courtroom at this time; and I am not going to let anybody proceed with this witness until we get this matter resolved.

MR. SIKMA: Your Honor, I might state further, I have {1065} turned around on a number of occasions while we were at the bench, he was doing the same thing; and the man to his right was making the same kind of motions.

MR. HULTMAN: This is not to infer, your Honor, and I want to show on the record that the Government is not making any showing that there is a relationship between the parties, but that it is an act being committed which could have impact on the witness. That's the point I want to make.

MR. TAIKEFF: I am sure that Mr. Hultman at the very least will appreciate what I am about to say. Mr. Engelstein has suggested that if, indeed, there are signals, Mr. Engelstein knows he is sending him the wrong signals.

MR. LOWE: Judge, I don't know when you would plan to recess. We are very close to the noon hour. Would you be excusing the jury and taking the matter up and let the noon recess begin early?

THE COURT: I intend to bring the jury back again.

{1066}

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

THE COURT: Members of the jury, as I've mentioned to you before prior, there are inconveniences caused to you because of matters that must be taken up out of your presence and this is not just a rule of the Court, it is the requirement of the Law. So we are faced with an interruption of this kind right now.

I am going to continue the trial until 12:30 before we recess for the noon but there is a matter which I have to take up out of the presence of the jury at this time and so I am going to ask that you retire to your jury lounge for just a few moments.

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

THE COURT: Before the Court commenced this morning it was reported to me that yesterday afternoon while Mr. Anderson was testifying there were certain individuals in the audience that were signaling to the witness. I had not observed that because I was not paying any attention to the audience, inasmuch as everything had been quiet, relatively quiet and uneventful. I instructed court personnel to observe today and to inform me if any additional signal was detected. I have just been informed that a gentleman in the audience was {1067} signaling. After I was informed I watched that gentleman and I did observe signaling to the witness. I'm not going to identify the gentleman. He knows who he is. I am simply stating that that will not be permitted. If it is continued, if it is observed, the person who has been observed indulging in the tactics of that kind will be removed from the courtroom and will not be permitted to again re-enter the courtroom during this trial.

I am not taking any action at this time because I want there to be no misunderstanding as to the position of the Court and as to the results or consequences of any continued activity of that kind.

MR. ELLISON: Your Honor, I would like to make one statement for the record. Several persons have pointed out to me and other members of the defense team, while witnesses on the stand are undergoing cross-examination, attorneys for the government have been seen to either shaking their heads or shaking no; shaking their heads

yes when they like the response, shaking their heads no when they don't like responses. If the Court is going to watch the spectators, I would also appreciate if the Court would watch Counsel.

THE COURT: The Court has watched Counsel for both sides. The Court has observed some expressions somewhat similar to what you have referred to. The Court has also {1068} observed, particularly one member of the defense counsel who has made some very obvious indications of extreme displeasure when the Court has ruled on a certain matter and I would ask Counsel for both sides to conduct themselves professionally and to refrain from any indications of pleasure or displeasure with the testimony of a witness or the ruling of the Court.

The jury may be brought back in.

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

THE COURT: You may proceed.

Q (By Mr. Hultman) Mr. Draper, where did you go that evening then?

A We went to Pine Ridge and when we got to Pine Ridge we were looking right over Pine Ridge and somebody realized that this was a mess and from there we went to a man's house by the name of Lawrence Wounded which is out in the country about a mile north of Pine Ridge. We stayed there that night. They invited us. They welcomed us.

Q Now who was there at that home?

A Lawrence Wounded's wife.

Q Was there anyone else that you are --

A No. I don't recall anybody.

A And about what age is she: a young woman, a middle aged woman or an elderly woman, do you recall?

{1069}

A Between elderly and middle aged.

Q Now what if anything did you do next?

A We stayed there all the next day and the next evening of the next day and went to Porcupine. We stayed at a man's by the name of Oscar Bear Runner. We stayed there four or five nights. Then from there that's the last time I seen the group.

Q And was there anybody else there at Oscar Bear Runner's?

A Yes. The family. The family was there.

Q Could you tell us who by way of family do you mean?

A He has three sons and his wife.

Q Do you remember any of the sons' names?

A Dennis and Don and Edgar.

Q Now how did you leave the Bear Runner's?

A Well, I met -- after we went to Bear Runner's, people came to Bear Runner's and one of those people that came there was a woman by the name of Evelyn Bordeau, that's Jimm's mother. From there I met with her and some older people and they told me about how the government and they have --

Q I'm not interested in what somebody else may have told you at this particular point. I'm interested in what you saw and observed.

Did anybody leave Bear Runner's with you when you left Bear Runner's?

A Yes.

{1070}

Q Who left Bear Runner's with you?

A I left with Edgar and his wife and three other males. I don't remember and Evelyn and Jimmy.

Q All right.

How did you get transportation wise to Bear Runner's, if you recall?

A Well, from Lawrence Wounded's a woman came to his house, it was Lou Lame and her husband.

Q Who went with you?

A Well, it was a car. I went with Leonard, Dino and Bob. There was two trips to Porcupine that night.

Q The first, did you go on the first trip or second trip?

A No. The second.

Q And in the second trip who was it that went in the second trip, who were all the people?

A There was Norman, Norman Charles and Norman Brown, Mike Anderson and Jeannie, Neelock and Lynn.

Q And are they in age younger than the group that you went with?

A Yes.

Q Do you know approximately how old Dino Butler was at this time?

A About 30.

Q Do you know approximately how old Mr. Peltier was at this time?

{1071}

A About the same.

Q Do you know approximately how old Mr. Robideau was? Maybe I've asked you that question earlier.

A 27, 28.

Q And you went with those three persons, is that right?

A That's right.

Q Now it's my understanding then from your testimony that, how was it that you then left from Bear Runner's?

A Well, we left with Edgar's station wagon. I spent the night in Porcupine there, the town, some houses. Edgar's mother's place. The next day --

Q Did anybody leave with you when you left?

A Yes.

Q Who was it that left with you?

A Evelyn, Jimmy, Edgar and his wife and three other guys.

Q Do you know who the three other guys were?

A No.

Q All right.

Did any other of the members of you group that had come from the tent city area during the days that you're referred to beginning on the 26th of June, 1975, did any of them leave before you did?

A Yes. They left before us about -- let me see. We left on the same evening but they left a couple hours before. They went towards Rose Bud.

{1972}

Q Would you tell us who left before you did?

A There was Leonard, Neelock, Dino, Jeannie and Mike, Norman and the other Norman Charles. They went towards Rose Bud in two cars.

Q Did you see them after that then?

A No.

Q In the immediate future?

A No.

Q Then where did you go?

A I went to porcupine and then from Porcupine the next morning I went to Rapid City with Evelyn Bordeau and Jimmy and some more people and those three persons I met with and I stayed in Rapid City one night there. Then we left for Canada the next morning and I stayed in Canada for about five months until there came a time, "No use of running," so I just came home from Canada. It was in the winter, about December, and I come home to Arizona. As soon as I got back in the FBI, police officers were waiting for me.

Q Now while you were in Canada, did you use any other name than the name Wish or Draper?

A Yes. Yeah. I used Wish and I used David Many Horse.

Q What was the reason that you did?

A Because I was pretty scared and I didn't want to ever let nobody know I'm here.

Q Are you scared at this very moment?

{1073}

A No.

Q When you went by automobile with this woman from Wounded's to Bear Runner's, what did you do if anything with the guns in the bags and the things that you had with you at that time? The whole group now I'm referring to.

A Well, we put it in the trunk of the car, of the car and traveled like that.

Q Now did you leave when you left Bear Runner's with any of the objects that you described that various people carried from the tent area?

A No.

Q Did you keep the bags that you referred to with the things that were in it?

A No.

Q Who took those?

A Well, the group took that and went on to Rose Bud.

Q And was that true with all of the rest of the weapons?

A Yes.

Q And who was it that was in that group?

A There was Leonard, Dino and Neelock, Mike, Norman Charles and Norman Brown and Jeannie.

Q Now have you, Mr. Draper, in any way been given any promises of any kind by anyone either in law enforcement or by myself or anybody in the U.S. Attorney's office, anyone? Have you been given anything in response for coming to testify {1074} at this time or at any time?

A No.

Q Has something happened that you might in your own mind conclude because you could possibly be a witness that may or might not have been done?

A Yes.

Q There were some charges at one time or another. There were some questions asked of you at a previous time under oath about some possible charges of some kind, is that correct?

A Yes.

Q And have you ever come to trial as far as any of those charges in any way?

A No.

Q Is there any relationship in any way as far as you know between any of those other events and your testimony here in this courtroom today or in any other courtroom at any other time as far as you are concerned?

A No.

Q So is it fair for me to conclude --

MR. LOWE: Objection, Your Honor. Obviously it's a leading question coming up. I don't see how it can be anything else.

MR. HULTMAN: If you wait until I give the question --

{1075}

MR. LOWE: I don't have to wait for the question. That will tell the witness what he wants him to say.

MR. HULTMAN: I just want to ask him if to the best of his ability he has told the truth in the courtroom.

MR. LOWE: It didn't sound like you were starting that question.

MR. HULTMAN: That's the question I intended to ask.

THE COURT: The question will be permitted.

Q (By Mr. Hultman) Have you to the best of your ability told the truth as you now here in the courtroom today best remember the events?

A Yes.

Q And is that without any promises or any inducements or any threats on the part of anybody in any way having to do with the government?

A No. No threats. No promises.

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

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

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. LOWE:

Q Mr. Draper, my name is John Lowe. We have met before several times, haven't we.

A Yes.

Q And on two different occasions, one last summer and one last night, we were granted a consent interview with you, were {1076} we not?

A Yes, you were.

Q And you voluntarily talked with me about that time, didn't you?

A Yes.

Q I wanted to ask you some general background questions first, Mr. Draper.

First of all, I don't remember whether this was brought out or not, are you a believer in the ancient Indian religion of the pipe?

A Yes.

Q During the time you were spending several weeks in the Jumping Bull area were there religious ceremonies conducted that you were aware of?

A Yes.

Q Would it be fair to describe those as sort of like what some other people would know as a church service but relating to the pipe?

A Yes.

Q Were there sweat lodge facilities?

A Yes.

{1077}

Were those spiritual in nature when you used the sweat lodge?

A Repeat it again.

Q Was that a religious part of your religious beliefs when you used the sweat lodge?

A Yes.

Q Is that among other things for purification of you?

A Yes.

Q Did most of the members of the encampment participate in these various religious activities?

A Yes.

Q Did Leonard Peltier participate in them?

A Yes.

Q Are you now, or have you ever been a member of the American Indian Movement, AIM?

A Yes.

Q At the time this took place were you a member?

A Yes.

Q I want to pick a point to start on one area of inquiry, Mr. Draper, when you left the area and you were on this three or four or five day, traveling with the group after the events took place. And you mentioned at one point you were at Oscar Bear Runner. And you indicated that you talked with, or you were present when someone talked with Evelyn Bordeau. Am I remembering correctly?

{1078}

A Yes.

Q And you were about to tell us what Evelyn Bordeau reported to the group and I ask you now, for the purpose not of showing whether what she said was true or not, but to show state of mind of the people who were listening, if you will tell what it was that Evelyn Bordeau said.

A Well, this was at Bear Runner's and she told us that there were agents everywhere looking for you all. And she told me and Jimmy, "I'm going to have to take you guys someplace away from all this."

Q Did she say -- I'm sorry, I thought you were through. Go ahead.

A She told us, "We'll take you Canada."

Q All right. When she was talking about the agents, did she say anything about the conduct of the agents?

MR. HULTMAN: Well, if it please the Court, this is clearly -- I haven't objected at this point, but now all of this is clearly hearsay. And I object on this grounds from this point on, Your Honor.

MR. LOWE: Your Honor, I made, in order to be absolutely fair to counsel and to the Court, I made a clear statement that I was offering this evidence for proof of utterance and not for proof of the truth that was stated. That's a well-recognized comment and exception to the hearsay rule.

THE COURT: He may answer as to whether or not she said {1079} anything about the conduct of the agents.

MR. LOWE: Thank you.

THE COURT: You cannot go beyond that.

A Well, I don't really recall about what she said about the conduct of the agents.

Q (By Mr. Lowe) You don't recall?

A (No response).

Q Do you remember anything else she said at that time?

A No.

Q Okay. At that time or sometime fairly close after that did Evelyn Bordeau say anything to you specifically as to why you should go to Canada?

MR. HULTMAN: Well, if it please the Court, I object on the grounds that this clearly calls for hearsay. And I have no objection is counsel call this witness as to anything she said. This is an attempt to get into the record things that are clearly hearsay at this point.

MR. LOWE: We offer it for proof of utterance to show the state of mind of this witness as it affects testimony here today, as it affects other matters, and for no other purposes. So it's an exception to the hearsay rule, Your Honor.

THE COURT: I will allow the witness to answer the question.

A Can you repeat it again?

Q (By Mr. Lowe) Yes.

{1080}

Why did Evelyn Bordeau you should go to Canada?

MR. HULTMAN: Well, I think there's a preliminary question to this, Your Honor. If he knows. And that's the only objection at this point I'm making.

MR. LOWE: I'll rephrase the question, Your Honor.

Q (By Mr. Lowe) What did Evelyn Bordeau tell you was the reason you should go to Canada?

A Because all of us would get charged with what happened there at Pine Ridge and Oglala, and she was protecting her son, she was protecting me, too.

Q What did she say you'd be charged with?

MR. HULTMAN: Well, now again, Your Honor, I object to this as going beyond, and again object on the grounds of hearsay.

MR. LOWE: Again, Your Honor, we offer it for proof of utterance. And I think I'm entitled to do that to show why this witness took certain actions and how it affects his state of mind right now and in earlier testimony or interviews.

THE COURT: The jury, I will advise the jury at this time that the exchange between the lawyers relates to a technical and sometimes difficult and complicated question, legal question of law. The answers which this witness is giving relating to what this other person told him are being permitted solely for the purpose of bringing out that this statement was in fact made. Not whether or not the statement {1081} was justified, whether or not the statement was true, but just the fact that the statement was made.

And on that basis the Court will permit the witness to answer.

Q (By Mr. Lowe) Do you remember the question?

A No. Repeat it.

Q I'll just withdraw it and ask it again.

What did Evelyn Bordeau tell you you would be charged with or would happen to you?

A She said, "You guys would be charged with murder."

Q All right. When she told you that did you either at that time or over to the next period of a day or so think about what she told you?

A Yes.

Q Did it worry you?

A Yes.

Q Did you think about what it would be like possibly to spend the rest of your life in prison?

A Yes. I thought about it.

Q Is that one of the reasons why you went to Canada?

A Yes.

Q At some point while you were in Canada, either through the suggestion of somebody else or just through your own thinking about the situation, did there come a time when you thought that if you cooperated with the FBI, or told them what they {1082} wanted to know, that it might prevent your being charged with murder?

A Yes.

Q And did you leave Canada and return to the area where you lived in Arizona?

A Yes.

Q When you got there did there come a time very shortly after you arrived when you were confronted by an agent of the FBI?

A No.

Q All right. Did there come a time when you were confronted by some law enforcement officer while you were in Arizona?

A Yes.

Q Will you tell the jury what happened.

A When I was in a pickup driving with this guy we had some beer and we were drinking. And there was a car coming in front of us, and it was a police car. And there was an FBI in there, and there was a BIA policeman.

I guess they recognized me and there they pulled me over; and from there they told me about the subpoena of Rapid.

Q What was the first thing they did when they made contact with you by voice? What did they do?

A They just said the FBI, what he did was he came towards me and said, "Are you Wish?" I says, "Yeah." He told me, "Were you in Pine Ridge last summer?" I said, "Yeah." and then {1083} he asked me that a subpoena out here for me from Rapid City.

Q Now, is that the first thing he did, contact, or was it about something you were doing?

A That was the first contact.

Q Did he have his weapon drawn?

A Yes.

Q What kind of a weapon did he have drawn, do you know?

A A pistol.

Q And do you know who it was that did this and had the weapon draw?

A Yes.

Q Who was it?

A It was Charles Stapleton.

Q It he a special agent with the FBI?

A Yes.

Q What if anything was said about your drinking beer at that time?

A Nothing was said, but they just booked me for the beer charge and they took me to jail. And I spent the night in jail.

Q All right. I don't think you stated what time of the day was this that they saw you in the pickup?

A About 5:00 in the evening.

Q And about how long was it before they took you down to the jail?

A About three hours.

{1084}

Q Now, is that before they took you to the jail?

A Yes.

Q Where were you up until that time?

A I was in an office, and there they took me in there and they asked me all kinds of questions.

And they took my wallet and they took all kinds of papers I had with me and they put it in a plastic bag. And they said, "We're going to use this as evidence," and I just went with them freely. And they put me in a chair and handcuffed me and tied me to the chair.

Q How did they tie you to the chair?

A I was handcuffed in the back like this (indicating) and he got a belt and put it around the chair and buckled it around me, and the chair with it.

Q Had you made any attempt to run or anything up until that point?

A No.

Q Had you said anything to them about trying to escape or run or anything of that nature?

A No.

Q Did that scare you when they did that?

A Sort of scared me, yeah.

Q Were the handcuffs tight?

A No.

Q And they talked to you that way for three hours?

{1085}

A Yes. And they talked and they called all over the places.

Q Did you give them permission to look at your wallet and the papers in it?

A No.

Q Did they take it nonetheless?

A Yes.

Q Now, who was present while this was going on?

A There was another BIA special agent, Frank Gadake.

Q All right. Where did you spend the night?

A In the jail.

Q And where, what town was that in?

A Chinle.

Q What happened the next day?

A Well, they took me to Gallup, that's in New Mexico, and there I met some more agents.

Q Who else did you meet there?

A James Doyle.

Q Anybody else?

A Ken Oliver is an agent from Gallup and Mike Ness.

Q All right. What happened there?

A And he told me about what happened in Pine Ridge and they asked me about what happened up there. And they said, "We'd like to have a statement from you," things like that.

Q Did they tell you in detail what had happened at Pine Ridge?

{1086}

A No. They just told me about what happened, and I just told, gave a statement. Then from there they took me home. Within a week we went to Sioux Falls, to the Grand Jury.

Q All right. Now, did Special Agent Stapleton and Special Agent Doyle both talk to you there in Gallup?

A Yes.

Q What did they tell you would happen to you if you didn't cooperate with them?

A Well, they asked me you'll get indicted.

Q Indicted for what?

A Murder charge.

Q Did that scare you?

A Yes, it did.

Q Did it sound to you like Evelyn Bordeau had been right?

A Yes.

Q Over the years prior to that event while you were sitting in Gallup, New Mexico, did you have a general awareness of the presence of the FBI on the reservations and near where you were living?

A Yes.

Q Did you have a general sense that the FBI had a lot of power to do things?

A Yes. In a way I thought.

Q Did you have a general feeling that they could pull strings to make things happen when they wanted to?

{1087}

A Yes. I had a general sense.

Q So when Special Agent Doyle and Special Agent Stapleton told you if you didn't cooperate you would be indicted for murder, did you believe them?

A Yes.

Q Where did you go next?

A Well, we went to -- I went to Albuquerque with Doyle, and we flew out of there and went to Rapid. And from Rapid we went to Pine Ridge again, the reservation.

And they showed me where, took me back to Jumping Bull and Oglala and went to Bear Runner's place again and Morris Wounded's house. Then from there we went to Pierre and spent the night there, and the next day we went to Sioux Falls and went to the Grand Jury.

Q Now, in addition to telling you that if you didn't cooperate, that you would, that they would indict you for murder, did they tell you what would happen if you would cooperate? What they were willing to do?

A No. They just said --

Q Let me ask you specifically, did they tell you if you would cooperate that they would protect you?

A Yes.

Q Did they tell you they would give you a new identity?

A Yes.

Q Did they tell you they would get you a job somewhere else?

{1088}

A Yes.

Q Did they tell you they'd get you education or training if you needed it?

A Yes.

Q Did they tell you they could take care of you financially?

A Yes.

MR. HULTMAN: Might I interpose, Your Honor, voir dire? Just one or two questions to interpose an objection?

MR. LOWE: I would object. There was no objection to any questions that were just asked. They're answered and I want to move on.

THE COURT: Well, there's no question pending right now.

MR. LOWE: That's right.

Q (By Mr. Lowe) I show you what has been marked for identification as Defendant's exhibit 90, and I will ask you to take a moment and read that through.

MR. HULTMAN: Your Honor, could I renew my request of the Court in order that I might enter an objection to the last question that was asked and the response that was given in order that I might have the opportunity to then move if possible to have it stricken?

Counsel, would you just let me finish, please.

MR. LOWE: I thought you were finished, Mr. Hultman. You stopped, your voice stopped, and I thought you were {1089} finished. I'm sorry, I didn't mean to interrupt you.

MR. HULTMAN: In order that I might set the basis, Your Honor, for an objection, it would only be one or two questions at the most.

THE COURT: On redirect you will be permitted to ask the question that you now are suggesting that you'd like to ask at this time. And if you establish a reason why the answer should be stricken it will be stricken.

MR. HULTMAN: All right. Thank you, Your Honor.

THE COURT: Very well.

MR. HULTMAN: Counsel, when he's finished might I look at the exhibit, too?

MR. LOWE: Certainly.

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

(Recess taken.)

{1090}

AFTERNOON SESSION

(Whereupon, at the hour of 1:22 o'clock, p.m., the trial of the within cause was resumed pursuant to the noon recess heretofore taken; and the following further proceedings were had out of the presence and hearing of the jury in chambers, the Defendant being present in person:)

THE COURT: Because this is a rather sensitive matter, I decided to ask you folks to come into chambers rather than to bring it up in the courtroom, even though the jury would be absent. After that incident this morning, in which I made the comment that someone in the audience was observed signaling, another member of the audience came to the Clerk of this Court and advised the Clerk -- apparently this person had been observing for a day or two -- it appeared that the Defendant was using the pipe, holy pipe as a means of sending signals to witnesses, by changing the position of it, moving the feathers; and I am not going to pass judgment on it one way or the other. I am simply asking, if there is any reason why the pipe could not be covered and left covered.

(Counsel and Defendant confer.)

THE COURT: Now, the reason I asked the question as to whether it can be covered, I recognize the possibility that there may be some significance in the culture to have it uncovered; but on the other hand, if there is any {1091} possibility that it is being used for signaling witnesses, particularly witnesses of the Indian race, I am not going to permit that to go on.

MR. LOWE: Was there any specification as to what the significance of what was being done was or what was allegedly being done, so we have something more to go on?

THE COURT: It was told to Ralph.

MR. HANSON: As it was related to me, this person felt there was some significance in the feathers being placed in front of the pipe and then back of the pipe, and apparently brought to the head. That is the best I can relay this person's observation.

MR. LOWE: Was this a native American that said this?

MR. HANSON: I would just as soon not go any farther than a member of the audience.

MR. TAIKEFF: I would like to observe that the witnesses don't look in the direction of the defense table. I am at least 90 percent of the time focusing my attention on the witness who is testifying, and they don't look that way. They look either at the prosecutor, or they turn to the jury and give their answer that way. I was just going to say that I see nothing happening at the table that could possibly be any kind of a signal, but I think the important part of it is the fact that the witnesses aren't looking that way at all, with almost no exceptions to that {1092} fact.

THE COURT: There is no way that the witnesses can be monitored as to where they are looking.

MR. TAIKEFF: I am telling you Honor what I have actually observed.

THE COURT: I appreciate that, but I can appreciate the fact that the Defendant may want the pipe on the table and may want it uncovered. I am simply asking that if the pipe is on the table and if the pipe is uncovered, that it be placed in such a position that there is no maneuvering the pipe or feathers in relation to the pipe or anything else in relation to the pipe. That's all I am asking.

MR. TAIKEFF: That's understood, your Honor.

THE COURT: I will ask Mr. Peltier, do you understand that?

DEFENDANT PELTIER: Yeah, I still don't understand what is going on here.

THE COURT: Well, I fully explained it. If you have any questions, you are certainly free to ask them.

DEFENDANT PELTIER: I haven't given anybody any signal.

THE COURT: As I mentioned, Mr. Peltier, I am not passing judgment. The suggestion has been made by someone who claims to have been observing it for a day or two and {1093} because of what I did observe in the courtroom this morning, to insure that these witnesses give testimony uninfluenced to the maximum extent that it can be accomplished and without in any way depriving you of the right to have this symbol on your table and have it in front of you and have it uncovered, I am just simply asking that it remain in that position and that it not be moved by you, and that any feathers or other objects in relation to it not be manipulated; and as I say, I am not attempting to ascertain if there is any basis for it at all. I do not feel that I should have to do that. I do not want to do that.

I thank you for coming in.

(Whereupon, at 1:29 o'clock, p.m., the proceedings in chambers were concluded.)

{1094}

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

MR. LOWE: While we're taking care of the proceedings, would it be all right for the witness to look at this, save a little time possibly?

THE COURT: Yes.

The jury may be brought in.

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

MR. LOWE: Ready to proceed, Your Honor.

THE COURT: You may proceed.

Q (By Mr. Lowe) Mr. Draper, as we were breaking for lunch you were examining Defendant's Exhibit, I believe, 90, a seven page document which I showed to you and I'll ask you, first of all, the second through the seventh page, that is, the six pages that are attached behind the cover sheet, are those a favorable reproduction of the statement you made to Agents Dolle and Stapleton in Gallup, New Mexico?

A Yes.

Q That first page, was that covering sheet made by Special Agents Doyle and Stapelton?

A Yes.

Q And in the covering sheet there is a recitation by the agents that they advised you of your rights and told you what the purpose of the interview was and a few other things. Did {1095} you read them?

A Yes.

Q Do you see anywhere in that form 302 that is before you any recordation by the agents of the fact that they made threats or promises to you, that is, did they threaten you would be indicted if you did not cooperate?

A Yes.

Q You don't see that anywhere in there, do you?

A No.

Q Do you see anywhere in there that they promised you if you cooperated you would have a new life, new job, education, financial assistance, do you see anything like that?

A No.

Q I did not cover this, I skipped over briefly when you said you had gotten back to Chinle. Let me cover this while we're here. Up until the time of this event, had you been a student or had you been employed or unemployed or what was your status up until June 26th, 1975?

A I was self-employed.

Q Self-employed?

A Yes.

Q How were you employed?

A I was arts and crafts, silversmith and painter.

Q And between June 26th and the date that you were interviewed which I believe was January 19, 1976, about six months or seven {1096} months later, what were you doing during that period for employment or school if anything?

A I wasn't going to school. I wasn't working.

Q After you were taken away from Gallup, I believe you said you were taken to Rapid City at some point, in South Dakota, is that correct?

A Yes.

Q Did you also go to Sioux Falls, South Dakota?

A Yes.

Q Did you appear before a grand jury and testify under oath on one or both of those occasions?

A Yes.

Q Was it on one of them or on both of them?

A One of them.

Q Which one was it?

A Sioux Falls.

Q Between the time you were arrested and the time that you testified in the grand jury, you've identified talking on one occasion to Special Agent Stapelton and Special Agent Doyle of the FBI. I'll ask you, were there any other FBI agents you talked with during that period of time?

A No.

Q Specifically let me ask you: did you talk with Special Agent Adams during that time?

A Yes.

{1097}

Q And I'll ask you if you can recall, first of all, Special Agent Stapelton and anyone he might have been along with when you talked with him? Can you tell the jury about how many hours you spent talking and being interviewed by Special Agent Stapelton?

A About three hours.

Q If I were to suggest to you that on an earlier occasion under oath you indicated eight to nine hours, would that sound reasonable? Would that refresh your recollection?

A Yes.

Q Eight to nine hours sounds about right?

A Yes.

Q And about how many hours in addition to that did you spend being interviewed by Special Agent Adams, if you recall?

A About two.

Q If I suggested to you that on the earlier occasion when you testified under oath you said four or five hours, would that refresh your recollection?

A Yes.

Q So then between the time you were arrested and the time you appeared at the grand jury, you spent somewhere between 12 and 14 hours being talked to and interviewed by FBI agents, isn't that correct?

A Yes.

Q Now how about members of the United States Attorney's {1098} staff, were you ever interviewed by them prior to going before the grand jury?

A Yes.

Q Can you tell the jury who you were interviewed by?

A By Robert Sikma.

Q Is that the same Robert Sikma sitting at Counsel table on the left end?

A Yes.

Q About how many hours did you spend being interviewed by Mr. Sikma?

A About two, three.

Q On how many different occasions did you talk with him?

A At a grand jury in Sioux Falls and Cedar Rapids, Iowa there at the trial.

Q And all told how many hours would you say you have been interviewed by Mr. Sikma or talked with him?

A About six, seven.

Q If I suggested that last summer under oath you testified that you met with him about five times for about eight hours, would that refresh your recollection?

A Yes.

Q Now during the early part of last year prior to any sworn testimony you may have given in any proceeding during interviews with Mr. Sikma, did he give you a transcript of your grand jury testimony for you to review and read over?

{1099}

A Yes.

Q Did he give you 302s that had been written by FBI agents about their interview with you for you to read over?

A Yes.

Q Would I be correct in suggesting that there were three or four such 302s?

A Yes.

Q Now at the time you gave testimony before a grand jury and at some times thereafter you have made some specific references to weapons that have been shown to you in this courtroom by their titles, their specific designations and I ask you during the time you were in the Jumping Bull area, how many of the various weapons were there you know to call by name or caliber or manufacturer, if you recall?

A There was about eight, something like that.

Q Okay. Let me clarify. Of all the various weapons that you had seen at Jumping Bull's, how many did you identify yourself when you were in Jumping Bull's before this incident took place or at the time it was taking place, how many different ones did you recognize by name?

A Just about two or three of them.

Q And do you remember which ones those were that you identified by name or by caliber?

A There was a .30.30 and a 22 and a shotgun.

Q Now since that time you have on various occasions identified {1100} other of those weapons that were in the Jumping Bull Area by specific names or calibers or manufacturers, have you not?

A No.

Q You have not in testimony at various times?

A Yeah. The agent told me what type of guns they are but I don't know what type they were.

Q Are the agents the only ones who told you what type of guns they were?

A Yes.

Q I'll ask you --

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

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

MR. HULTMAN: Your Honor, I think in this trial record it's very clear on direct examination that this individual has identified no more than three guns as per his responses just now by any type of name. I made it very clear on my questioning on direct examination that he was not to in any way refer to names of objects he has learned since. Now I object at this point. This is an attempt on the part of Counsel, as he did in the last trial, Your Honor, specifically to try and show to the jury that this young man now knows at a later time that a certain weapon, an AR 16 or 15, for example, is an AR 15 or 16. And then by that to insinuate to the jury that there is something sinister or the {1101} government has in some way done something that is in a bad light and it is the reason for this that I object now to going into anything of that particular kind because it's only for that purpose.

MR. LOWE: The purpose of the testimony is to show as this witness has previously testified under oath that he was coached, that he was given information that he did not himself have prior to his going before the grand jury and before going to trial last summer that it was not disclosed except on probing on cross-examination in the trial. And in the event of the grand jury, of course, there is no Counsel there so it was never disclosed to the grand jury. This information he was testifying about was not his own but had been given to him by Mr. Sikma and the FBI. I think this is quite relevant to have the jury judge the candor, the honesty and lack of bias of this witness. If this witness has been coached repeatedly by the government in ways which plant the fact in his mind as we believe the evidence shows and as he has testified under oath before, then that is quite relevant for the jury to know and quite proper for us to show, to show the bias of the witness and to cast doubt on his credibility. That is in sworn testimony of the transcript, Your Honor. This is what I'm referring to an I refresh his recollection here.

MR. HULTMAN: Your Honor, if I might speak one more time. This is an attempt, as I say, on the part of Counsel. I {1102} would ask him at this time, the testimony in this record at this time to date, one item that makes the category he's now probing on as far as this record is concerned in any way. That is purely an attempt on Counsel, against Counsel, that is exactly what it was last time and I submit it is again.

MR. LOWE: I don't understand what the question is. The record is complete --

MR. HULTMAN: What?

MR. LOWE: -- with Mr. Draper saying Mr. Sikma told him what the AR 15 was, for example, and said other FBI agents told him other weapons --

MR. HULTMAN: Tell me what the showing is, John, other than in this trial he knows what an object of this kind looks like. There was nothing to do whether it is or isn't an AR 15 and I made that very clear on direct examination.

MR. LOWE: Well, number one, he has already made a reference to a 308 or --

MR. HULTMAN: 308 or 303.

MR. LOWE: Both of those weapons, and didn't know either one of them. Somebody put that information there and whether or not the government, they had their fingers burned last summer, knows that, enough not to ask him these questions, it doesn't matter. The point is that he has been coached and coached and coached. He has been 14 to 16 hours with FBI agents and eight hours with Counsel and in this his sworn testimony he {1103} has said he was given this information by those people that he did not himself have. That is quite relevant for this jury to know in order to judge whether Mr. Draper is testifying about what he knows about or what somebody else was told him.

MR. SIKMA: Your Honor, I would say --

MR. HULTMAN: I would ask Counsel be given an opportunity because it is a --

MR. SIKMA: Counsel is attacking my integrity. I have never advised this witness what any of those weapons are. I was surprised at this witness' ability to recognize certain weapons and to point out certain items on the weapons. I have never advised this witness as to what various weapons were in my interviews. It is for some reason or another, had this knowledge beforehand and only upon, I would say, the coaching of Counsel in this respect has he ever come up with those kind of statements.

THE COURT: Well --

MR. SIKMA: I think it's --

MR. LOWE: I'll get the transcript and let you see where Mr. Draper -- I'm merely going on what Mr. Draper said.

THE COURT: I don't know, it's -- just a moment. I don't know it's necessary to go into this. I do observe, however, that, and I'm not sure you have a valid objection at this point. I do observe, however, that Mr. Lowe is doing exactly what you objected to.

{1104}

MR. HULTMAN: Ask me not to do.

THE COURT: Asked you not to do.

The witness answered two or three hours, then you go and say, "Would it refresh your recollection if I told you that you testified under oath you went six or seven hours." This is exactly what you people complained about the other side.

MR. LOWE: Judge, I'm on cross-examination. There is a world of difference between reinforcing your witness and being able to cross-examine.

THE COURT: It's still not the proper way to cross-examine. The proper way to cross-examine on the basis of a statement is to show him the statement.

MR. LOWE: I'd be happy to do that. I've never had that done before, Judge. I'd be happy to do it.

My understanding was that's when it was his witness. I'll be happy to do it thataway.

THE COURT: Or the very least to specifically read that statement, the lines and page. I don't know, I think I would have to agree with you that on cross-examination it is not necessary for you to actually take it and show it to him because you do have a little different legal situation, but you should read the statement.

MR. LOWE: I'd be happy to.

THE COURT: Line and page.

{1105}

MR. LOWE: We'll do it.

THE COURT: But insofar as your objection is concerned, I think it's entirely proper cross-examination. If you can show it in a legitimate manner there has been something, some pressure or some reason why the witness may have testified as he did on direct.

MR. HULTMAN: All right, Your Honor.

Your Honor, then I continue to object because I don't want to, could I have a continuing objection and would the Court then --

MR. LOWE: It's understood.

MR. HULTMAN: On the agreement of Counsel if it reaches the point where it would be repetitious or beyond the bounds that the Court would then so intercede. I don't want to, I want a standing objection but I don't want to interfere with Counsel, Your Honor.

THE COURT: Very well.

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

MR. LOWE: Would you read back the last question, please.

(Whereupon, the following questions and answer were read back: Are the agents the only ones who told you what types of guns they were? Answer: Yes. Question: I'll ask you --)

{1106}

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

THE COURT: You May.

MR. LOWE: Let me strike that last question.

Q (By Mr. Lowe) Mr. Draper, you said that you knew two or three of the weapons in the Jumping Bull area. Isn't it a fact that all the other names of weapons were given to you by the FBI or Mr. Sikma?

A That's right.

Q When you were being interviewed by the FBI agents after your arrest prior to the time you testified in the Grand Jury, did they show you a lot of pictures to see if you could identify various people?

A Yes.

Q Was one of the people living in the Jumping Bull area during this general period of time before this incident Dennis Banks?

A Yes.

Q And his family?

A Yes.

Q He was, was he there on that particular day?

A No.

Q And did either FBI agents or Government attorneys trying to ask you questions which were aimed at determining whether Mr. Banks was involved in this incident in any way?

MR. HULTMAN: Now, Your Honor, I'm going to object {1107} because of the generalness of the question. At this point we're talking about since the beginning of time, and I have no objection to counsel, if he wants to ask specific questions with reference to who did what, when, for example the FBI, and I have no objection to that question.

On the other hand if he wants to ask questions about counsel, then as to times and places this individual indicated times and places as to when counsel for one side or both sides may have, again I'll have no objection. But I'm going to continue to object if we're going to lump counsel and the FBI and all times and places into a general question of this kind. And that's the basis for my objection at this time and for this point forward, Your Honor, rather than me making it again. I'll just enter the general objection at this time.

THE COURT: Well, I fail to see the relevancy of the last question.

MR. LOWE: The relevancy will be clear very shortly, Your Honor, through a series of questions about that.

In response to Mr. Hultman, I can certainly ask a general question and then if I get a positive response I can then narrow it down more specifically. But if there's an awful lot of time instead of naming sixty-five FBI agents one at a time. To say did any FBI agents or any Government counsel ask this, and then if I get a positive response I'll try and pin it down and/or Mr. Hultman can on redirect. I don't think {1108} it's anything improper about the question.

The witness has not indicated that he doesn't understand or he can't answer it.

THE COURT: Except as I mentioned I do not see the relevancy.

MR. LOWE: Does the Court want me to state the relevancy?

MR. HULTMAN: If it please the Court, in the presence of the jury I think, Counsel, I would object further because this is an attempt to get before the jury matters that are not relevant.

MR. LOWE: Mr. Hultman, wasn't going to say I was going to offer it to the jury. I will come to the sidebar if the Judge wants me to tell it.

THE COURT: You may.

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

MR. LOWE: Your Honor, Leonard Peltier is a leadership person in the American Indian Movement and we will have testimony to back that up. I don't even think the Government would deny that. There was at least one occasion, maybe more than one occasion, in which there was interrogation of Mr. Draper by FBI agents, perhaps by Government counsel, I'm not clear I'll have to say, which there was a concerted effort to list and identify virtually all of the national American {1109} Indian Movement leadership personnel in an attempt to sweep them into this incident in some way, or to determine whether they were involved.

Dennis Banks is simply the first of a list of them. This came out in a previous trial proceeding. It is the theory of the defense that the reason that Leonard Peltier was singled out in this is that part of an ongoing campaign to discredit and to remove him from any kind of activity of members of the American Indian Movement we believe, or the leadership.

We believe that showing that there was great attempt made to involve other leadership members of the American Indian Movement is part and parcel and will dovetail with the testimony that the defense will put on indicating that that is part of a motivation of the Government in trying to convict Mr. Peltier.

And Mr. Draper will so testify that they asked him about all of these various AIM members, including people who apparently had never been to Jumping Bulls'.

MR. HULTMAN: First of all, on the record, Your Honor, I take personal offense to the last comment that this is an attempt on the part of the Government, this trial and the proceedings. These proceedings have taken place according to law through grand juries, through investigations, through indictments, and I take personal affront to the last comment {1110} of counsel to his statement that we have, to-wit, in some way with this particular defendant a cause of some kind. That's the first comment.

Now in response to the general issue. This is part of the reason for the Motion in Limine, Your Honor, and now I will enter my objection of relevancy from this point on to the matters here. There is a lawful basis for asking any question about Dennis Banks with relationship to the factual issue involved because he had to live, as the testimony says, in one of the three houses. Now, I don't know much of a better reason, in fact it would be negligence on the part at best of any investigator or any agency of the Government having anything to do with this case, not to at least find out something of what the whereabouts of one of the persons who lived in one of the three houses on the day concerned.

So I'm saying beyond that, and to the part that he specifically played or did not play, and the record of the last trial will clearly show he had nothing to do in any way, wasn't even in the area that particular day, and it's for the sole reason that counsel wants to bring in an issue which is not relevant. And that's now the basis for my objection.

THE COURT: The issue before the Court, as I perceive it, is whether or not this defendant either killed or aided and abetted in the killing of the two persons named in Count 1 {1111} and Count 2 of the indictment. This individual has testified with reference on direct, with reference to the whereabouts of the defendant and to his observations as to what went on and as to his personal participation in that. Now, that's all, and what happened after the event.

Now, what Dennis Banks has to do with the factual inquiry on that issue is beyond me. And I sustain the objection on the grounds of relevancy.

It may be something that you can bring up on defense if you can show what relevancy, but certainly not relevant to the cross-examination of this witness at this time based on his direct testimony.

MR. LOWE: May I say two things for the record?

THE COURT: You may.

MR. LOWE: First, Mr. Hultman should address his personal affront, his personal offense, to Mr. Peltier. I trust that he understands that counsel is announcing defense positions or strategies does not necessarily state counsel's personal views, but rather the views of the defendant.

MR. HULTMAN: I accepted it as that.

THE COURT: And I might state, if I might interrupt you, that I pretty much ignore these interchanges between counsel when they get to that basis.

MR. LOWE: Secondly, Your Honor, we believe that there will be a very substantial issue. I think it's already pre-{1112}sented itself, and it will be enlarged substantially during this trial as to tampering with evidence and with witnesses of threats to witnesses and of coercion, of impropriety of the mental misconduct.

Now, whether the Court or the prosecutors believe that that is raised to the level of a factual issue or proven or not, is not the point. The point is that it will be a fact issue for the jury. One of the things that is proper to show in relationship to that which goes, of course, to the credibility of all the witnesses of the Government is motive. And if the jury sees no possible motive for the Government falsifying, and when I say the Government, or any of its agents, I don't mean Government counsel certainly necessarily, but if there is no motive whatsoever it is less likely that the jury will perceive that that has been going on.

We believe that it is proper for us to show a motive from trying to falsify evidence against Mr. Peltier if that's what the evidence does show. And that's of course what Mr. Peltier believes it shows by showing there was a

conscious effort to interrupt and undermine the leadership of the American Indian Movement because the falsification would be consistent with that goal.

That is the reason that I would proffer from all of this testimony. I want the record to be clear on that so that {1113} if you make that ruling you do so with the understanding or proving it would be.

THE COURT: The ruling of the Court is that that evidence is not proper under cross-examination of this witness at this time.

MR. LOWE: All right, sir.

May I make just an offer of proof on the record?

THE COURT: You may.

MR. LOWE: In a previous trial, first of all, may I ask a point of inquiry? The transcript of the previous trial was ordered prepared by the Court. Is that transcript lodged with the Court in any way so that we can refer to it without actually introducing parts of it, again; or is it not, because that will simply my inquiry.

THE COURT: There is no transcript of the previous trial to my knowledge. I authorized the preparation of the transcript so counsel for the defense could have copies of anything which the Government ordered. To my knowledge that's all the transcripts that have been prepared.

MR. LOWE: I just wanted to be sure so I didn't refer to it and think it was part of the record.

THE COURT: No, it has not been made a part of the record in this case, and I have no intention of making it a part of the record.

MR. LOWE: My offer of proof is that Mr. Draper would {1114} testify, if allowed by the Court, that he was asked about many of the national AIM leadership personnel, such as Dennis Banks, Russel Means, Clyde Belcourt, Vernon Belcourt, Stanley Holder, Carter Camp, and that Mr. Draper understood these to be American Indian Movement personnel leadership at the time it was asked. And we would proffer that as the type of evidence we will submit in further showing of what I have represented to the Court. Thank you.

THE COURT: Very well.

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

Q (By Mr. Lowe) Prior to the time you were arrested in Arizona by Special Agent Stapleton had you been involved in conduct which resulted in your being charged with criminal offenses in one or more jurisdiction?

A Yes.

Q Would you state what jurisdictions and what the charges were.

A In Phoenix I was charged with strong arm robbery.

Q Anything else?

A No, that's it.

Q How about at the time you were arrested?

A Only the alcohol charge.

Q Okay. And I will ask you whether it has been some time since your arrest, perhaps since your grand jury, whether you {1115} had in your mind that these charges would be taken care of for you as part of your cooperation in this case?

A Yes.

Q In fact you have not been convicted in either of those cases, have you?

A No.

QQ And in fact they are not pending against you either, are they?

A No.

{1116}

Q Now, you have described, told rather, that there was some 12 to 14 hours that you were interviewed by FBI Agents and about eight hours by Mr. Sikma; and let me ask you this: Would it be fair to say that every time you go over the facts again with someone, you are able to remember the facts clearer when you talk about it the next time because you have been over them again?

A Yes.

Q In fact, each time you go over it again with an FBI Agent or the United States Attorney, you are able to remember the details in much more detail, aren't you?

A Yes.

Q Would it be reasonable to suggest that it is possible during these interviews every time you go over it again and again, that sometimes you might pick up a little detail here and there that you heard from one of the Agents and you might possibly remember that in a later interview?

A Yes.

Q So it is possible as to some of the things you have told us here that you are referring to something that some agent may have told you happened rather than what you actually saw or heard yourself, is that possible?

A Yes, that's possible.

(Counsel confer.)

Q (By Mr. Lowe) Now, going back to the time prior to the {1117} incident on June 26th, 1975, I will ask you if the people who were present in Jumping Bull compound or in that general area, didn't include a person named Jean Day?

A No.

Q Let me suggest this to you: Were one of the people in there a girl named Jean from Wisconsin?

A Yes.

Q If I suggested her name was Jean Day, would that refresh your recollection, does that sound right?

A Never heard her last name.

Q All right. What was her relationship to any other people in the camp, if anything?

A Well, she was a good friend of ours and a good friend of everybody.

Q I didn't hear what you said first. I am sorry.

A She was a good friend of us, and she was a good friend of everybody around the Jumping Bull area.

Q Was she somebody's girlfriend in particular?

A Yes.

Q Was that Leonard Peltier?

A Yes.

Q Do you remember during the time prior to this incident on any occasion meeting or seeing a woman in the Jumping Bull Area named Anna Mae Aquash?

A Yes.

{1118}

Q Did you ever see a woman, or did you ever know a woman during that time named Myrtle Poor Bear?

A No.

Q On June 26th, 1975, the date of this incident, do you know whether there was a person named Myrtle Poor Bear in the camp area?

A No.

Q Perhaps my question was not phrased as well as it could have been. Because you said "no", I am not clear. You mean that you don't know or that there was no such person, will you just state?

A No. I didn't see no person. I didn't know Myrtle Poor Bear until I got to Sioux Falls. A picture was given to me of Myrtle Poor Bear.

Q Did you know who it was?

A No.

Q Had you ever seen her at the camp?

A No.

Q And when I say "the camp", I mean the Jumping Bull area?

A I might have seen her, but I don't remember. I can't place her.

Q If she had been Leonard Peltier's girlfriend --

MR. HULTMAN: (Interrupting) Now, if it please the Court, I am now going to object. This question has been asked and answered four times. The foundation clearly {1119} shows that this witness doesn't know Myrtle Poor Bear.

MR. LOWE: Your Honor, he said he wouldn't remember. I am just going to ask a foundation question whether he would remember if he had seen her. That is proper cross

THE COURT: You may ask the question.

Q (By Mr. Lowe) If this person had been a girlfriend of Leonard Peltier during the time you were living there, do you think you would have known her?

A No.

Q You did know Jean Day there though?

A Yes.

Q And that was Leonard Peltier's girlfriend?

A Yes.

MR. HULTMAN: Now, I object, your Honor. That question has been specifically asked and been answered. It is the exact question and the exact answer, and I move that the last question, and response go out as repetitive.

THE COURT: It is cumulative.

MR. LOWE: Thank you, your Honor.

Q (By Mr. Lowe) During the time you lived in the Jumping Bull area, were you aware of fear of confrontation or attacks from the goons?

MR. HULTMAN: Your Honor, I have no objection except that we are using a term at this particular point, and I would have no objection if counsel would ask the question {1120} of this witness of what the word means. If he would take it in that order, the government would have no objection.

MR. LOWE: I have no objections to doing that, your Honor.

MR. HULTMAN: I have no objection if he does that, your Honor.

MR. LOWE: Strike that last question. I will withdraw it.

Q (By Mr. Lowe) Did you ever hear the term "the goons"?

A Yes.

Q Do you know who the goons are?

A Yes.

Q Tell the jury who the goons are?

A The goons are, you could say, civilians or just regular people who work for the police, and they do the dirty work for the BIA police of Pine Ridge Reservation there, and they are all hired by Dick Wilson.

Q How did the goons feel about AIM people back then?

A They feel harsh about AIM. They don't get along with AIM.

Q Now, let me ask you, was there, among the people in the Jumping Bull area, including the residences and the Tent City area, was there a fear that there might be an attack from the goons?

A Yes, there was a fear, but they never came; and yes, there was a fear among the people there.

{1121}

Q Did you feel that the place the goons were most likely to attack was the Tent City where everybody had guns and where the leaders were staying?

A Yes.

Q Is that the reason why you moved out of the Tent City, is that one of the reasons you were afraid to be down there instead of up at the houses?

A Yes.

Q Would it be fair to say that you were afraid if you didn't, you would get caught in an attack and get caught in a gunfire down there?

A Yes.

Q Would it be fair to say that there was an atmosphere of fear around the Jumping Bull area there with relation to being attacked?

A Yes, you could say.

Q On the day before this event you described an incident in which you were confronted by two FBI Agents, Coler and Williams, and some BIA officers in another car, I believe you said.

Now, I will ask you if you will state what happened when they first pulled up next to you on Highway 18.

A They just told us to stop right there, and I think it was Coler got out and talked to Norman or Mike, and they asked us if we knew Jimmy Eagle, who Jimmy Eagle was, and we told him, "We don't know Jimmy Eagle," but Coler wasn't too sure how {1122} Jimmy Eagle looked; and they took down our names, and that was it, and when they found the clip on Norman, they began to get leery of us, and then they took us to the Pine Ridge.

Q Did they search you at any time?

A No.

Q Did they tell you that you had any choice on whether you went into Pine Ridge or not?

A No.

Q Did they ask you or did they tell you, that is, did they ask you or did they tell you to go with them? I should finish the sentence.

A Well, they asked us.

(Counsel confer.)

Q (By Mr. Lowe) Now, when you got back from Pine Ridge that evening -- you were talking quietly, and I am not sure I heard what you said -- but I understood you to say that when you told Leonard Peltier that the agents

had taken you to Pine Ridge, he asked whether they had given you a hard time or something to that effect, is that correct?

A Yes.

Q And you told him that they had not, is that correct?

A Yes, they didn't give us a hard time.

Q And then he said, "That's o.k. then," or something to that effect?

A Yes.

{1123}

Q Now, the next morning, calling your attention to the day of the incident, June 26th, 1975, you described in the late part of the morning being in the Tent City when the shots were first heard; and I want to back you up from that a little while, perhaps an hour, let's say, take the hour before you heard the shots and ask you what were you actually involved in doing at that time during the hour before the shots?

A I was there in the tent area talking with the guys there.

Q Was everything calm?

A Yes.

Q Did anybody have any excitement or any thought that any trouble was going to happen?

A No.

Q Were people preparing for lunch or anything like that?

A Yes, Everybody was just going about what they usually do.

Q Was there anybody down there preparing for an ambush of FBI Agents while you were there?

A No.

Q Did anybody even mention FBI Agents coming at that time?

A No.

Q Now, you say you were talking with the guys. Just tell the jury who the guys were.

A I was talking with little Jimmy and Norman Charles, Mike Anderson, Norman Brown.

Q How many people were there named Mike Anderson living at {1124} the Jumping Bull's during this period of time?

A One.

Q And would you describe him, about how old was he?

A 16.

Q Do you know if you saw him yesterday in the witness room while you were here in the courtroom -- the courthouse?

A Yes.

Q So is that the same Mike Anderson you are referring to?

A Yes.

Q And as I understand what you are telling us for about an hour prior to the first shots being heard you were in a position of talkig with Norman Charles and Mike Anderson, is that right?

MR. HULTMAN: I object to that as not being a correct statement of the record.

MR. LOWE: I think it is a correct statement and if it isn't, Mr. Draper can correct, me. That's why I am asking the question. May the witness answer?

THE COURT: The witness may answer.

A Yes, he was there about an hour before the shots started.

Q (By Mr. Lowe) Thank you.

Now, during this hour before the shots were fired, did you see Leonard Peltier?

A No.

MR. LOWE: May I have a moment, your Honor, please?

THE COURT: Yes.

{1125}

Q (By Mr. Lowe) I refer to a statement you made under oath last summer in another proceeding. I am referring to Page 1015, counsel, at Line 4; and I read you the following, interchange between you and an attorney, to refresh your recollection, Mr. Draper.

Question: What I am asking is whether you told us yesterday that both Bob and Leonard were there when you distributed the water?

Answer: Yes.

Question: Now how soon after you distributed the water was there shooting?

Answer: About 30 minutes to 45 minutes.

Now, based on hearing that, I will ask you whether that refreshes your recollection as to whether you saw Leonard Peltier during the hour before the shooting took place?

A No, I didn't see Leonard.

Q This doesn't refresh your recollection?

A No.

MR. HULTMAN: Did you, counsel, read the third line of that page, the response on the third line? I mean, I think it would be appropriate if you did, the third line of the page to which you are referring, with reference to the specific question.

MR. LOWE: There is a whole preceding section there I would have to read into the record. There was certain {1126} conversation.

Let me finish, will you, Mr. Hultman?

There is a preceding dialogue about different people and where they were and what elicited the conversation which I quoted was a statement: Bob was around. I didn't see Leonard around; and then on further examination. Mr. Draper stated that he had seen him 30, 45 minutes before the shooting.

I mean, you are free to read any part of the transcript when you have redirect, Mr. Hultman, I have no objection to that.

Q (By Mr. Lowe) Now, I believe you said that when you were sitting there talking with Norman Charles and Mike Anderson, that you first heard three shots and then some more, am I correct about that?

A Yes.

Q Do I also recall that you said that some people started running up towards the shots?

MR. HULTMAN: If it please your Honor, again I didn't have time to interpose the objection; and I want to go back and interpose an objection on the part of the last question, the last complete question; and that is, I object, your Honor, on the grounds that that is not a proper statement again of the record. That's the reason

that I make my objection as to who was in the presence of {1127} this witness at the time he heard the shots, the specific people.

MR. LOWE: Mr. Hultman has been listening to a different witness than I have, your Honor. I will re-ask the question.

Q (By Mr. Lowe) Just immediately prior to your hearing the shots, were you sitting and talking with Norman Charles and Mike Anderson?

A No. I wasn't talking when I heard the shots.

Q Were they with you when you heard the shots?

A Yes. They were around, but I wasn't with them.

Q O.k. So when you and Norman Charles and Mike Anderson were there in the tent area and you first heard the shots, I believe you said that you heard three shots first and then some more, am I correct?

A Yes.

MR. HULTMAN: Now, again I object, your Honor, for the same reason that the statement that counsel is using is not a fair statement of the record. The witness said they were around. He did not say he was with them at that particular time, and "around" can be anywhere.

THE COURT: The witness said they were around, he was not with them.

MR. LOWE: He said he wasn't talking with them. I will let the jury remember what he said. I don't think {1128} there is any question about what he said.

THE COURT: All right. Then you should phrase the question in the words of his answer.

Q (By Mr. Lowe) Let me ask you again, Mr. Draper, just prior to hearing the shots was Norman Charles and Mike Anderson there in the tent area with you?

A No. they weren't with me, but they were around.

Q They were right around in the tent area?

MR. HULTMAN: Again I object.

MR. LOWE: I am on cross examination. I think Mr. Hultman is trying to tell the witness what to say, and I strenuously object to it.

THE COURT: Well, the objection is overruled. You may answer.

A They was around, but I didn't see them when the shots first rung out.

Q (By Mr. Lowe) But during the hour prior to the shots you did see them down there?

A Yes, I saw them earlier.

Q And you saw them during the hour prior to the shots, didn't you?

A Yes.

Q All right. Now, during the hour prior to the shots, when you saw Mike Anderson, did he say anything to you about "Hey. I just got back from being up on the roof up at the other end {1129} of the Jumping Bull's"?

A No.

Q Did he look to you like he was excited, like he just finished running a half mile?

A No.

Q Did he look like he was out of breath from having run a half mile?

A I didn't see him when the shots first rang out.

Q But prior to that, when did you see him?

A Yes, a little after.

Q But before the shots you didn't see him at any time when he was excited and out of breath, did you?

A No.

(Counsel confer.)

Q (By Mr. Lowe) Now, when you heard the first three shots, not talking about any later, but the first three shots, did you say that some people started running towards Jumping Bull's?

A Not at that moment, but a little while after they started running up there.

Q How long would you say, a minute or two?

A A minute. After that, Mike came back down, and then he went back up again. Then later Dino came, and Bob came, and they ran back up there; but I didn't see the whole thing at the same time, but I was walking to the camp, walking from them away from them.

{1130}

Q All right. Now, when the shots first rang out, and then about a minute passed, you said, and some people ran up towards Jumping Bull's, is that right, they ran up towards Jumping Bulls?

A Yes.

Q Was Mike Anderson one of those people?

A No. He came a little later.

MR. LOWE: O.k.

(counsel confer.)

{1131}

MR. LOWE: Could I have just a moment, Your Honor.

THE COURT: You May.

Q (By Mr. Lowe) Last evening we had an interview with you across the hall, didn't we?

A Yes. And there was a court reporter present we arranged for through the judge, wasn't there?

A Yes.

Q I'll read you a question and answer sequence you gave last night and ask you if you --

MR. HULTMAN: If it please the Court, at this particular time I would make a request that Counsel for the government be given an opportunity to, one, see the document so I can be in a position in order to enter an objection at a proper time.

At a consent interview was given and I had no knowledge of material now that Counsel is alluding to and has no way in which to enter an objection of any kind.

MR. LOWE: I would certainly offer at this time two things: First of all, I'd be willing to give Mr. Hultman all of our interview notes if he'd be willing, to give us all the FBI interview notes.

MR. HULTMAN: If it please the Court, Your Honor, I'm referring to a transcript and not any notes. Counsel understood clearly what I was referring to.

{1132}

MR. LOWE: That's no different category.

MR. HULTMAN: It's all the difference in the world, Counsel, and you know it.

MR. LOWE: No different category.

I think this is a matter of work product. The reason we asked to have a court reporter present so there was no question about impropriety at the interview.

MR. HULTMAN: If there is no other copy, Your Honor, the government would allow Counsel to proceed if I just be given an opportunity of the witness before he answers to enter an objection if the government has one, Your Honor.

THE COURT: Very well. Proceed.

Q (By Mr. Lowe) The question: "Norman Charles was around, Mike Anderson was around at that time?"

Answer: --

MR. HULTMAN: Well, now object, Your Honor. Clearly because there is no showing of any time as to whether we're talking about the 25th of June --

MR. LOWE: That's exactly --

MR. HULTMAN: -- 26th of June or today, last night in this courtroom.

MR. LOWE: Mr. Hultman, let me finish. I'll back up one question so I can give the time, Your Honor.

Q (By Mr. Lowe) Backing up one line, one question: "Well, either tell me when you woke up or how many hours you were up by the time you first heard the shooting." Answer from Mr. Wilford Draper Draper: "I woke up at about 8:00 o'clock, something like that." Question: "Would you say it was about four hours later when the shooting started?" Answer: "Something like that." Question: "Now Norman Charles was around, Mike Anderson was around at that time?" Answer: "Yes." Question "What happened then once you became aware of the shooting that was going on?"

MR. HULTMAN: Now, Your Honor, I do enter the objection clearly. This witness has clearly testified in response to Counsel a few minutes ago exactly the same as he did evidently in that interview. He's used almost the same word, "Around." Now Counsel is attempting again to put people at specific times and places to which this witness has now answered not only last night but again now in the courtroom at least twice and I enter an objection at this time, Your Honor, that it's repetitious.

MR. LOWE: I accept Mr. Hultman's statement that that's what the testimony was before. I withdraw the question in view of that and the record will reflect that.

Q (By Mr. Lowe) Mr. Draper, when you saw Mike Anderson returning up towards the Jumping Bull's, let me ask you first, did he have a weapon with him? This is after the shots now.

A Yes.

Q When did you next see him come back?

A Till the shooting stopped. It was quite awhile when I saw {1134} him again.

Q Now when the shooting took place, I believe you said you ran down into a ravine generally to the southeast of the tent area, am I correct about that?

A Yes.

Q And did you stay there until -- let me ask you, how long did you stay there?

A Until the shooting stopped.

Q Till the shooting had stopped. Then what did you do?

A Came walking back towards the camp.

Q Did you get through the tent area?

A Yes.

Q And was Mr. Peltier and other people already there?

A Yes.

Q During the time that the group was preparing for the escape trip, did there come a time when the group stopped a prayed?

A I don't recall.

Q You don't know or you just don't recall?

A Don't know.

Q During this time, that is, during the time you all were in the tent area after the shooting had stopped, what can you tell us about the various weapons that Mr. Peltier had in his possession from time to time? Did he only have one or change a lot of weapons around or just what?

{1135}

A He had an AR 15 and, I don't recall the other.

Q Would it be fair for me to say he kept putting one weapon down and picking one up and putting one down and picking one up and just handling a whole lot of different weapons?

A Yes.

Q Did you see or have any way of knowing what weapon he had prior to your coming back up to the tent area?

A No.

Q Can you even say whether he had a handgun or rifle?

A Yeah. He had a rifle.

Q If you could see.

You didn't see it with him, did you, prior to your coming back to the tent area?

A I couldn't see when I was coming back, but when I got back to the camp he had one in his hand.

Q Do you know whether he had just picked that up a minute or two before you had just come up to camp or whether he had it for an hour?

A I don't know.

Q Possibly he might have picked it up just before you got to the camp in preparation for loading, isn't that it?

A Yes.

Q Would it be fair to say you just have no way of knowing what weapon he had prior to your coming back up to the tent area?

A Yes.

{1136}

Q Now you mentioned something and I didn't hear you and I would ask you to clarify for me. I thought you said there were 302 handguns, or three or two handguns. Do you remember what you said about that?

A Yes.

Q What did you say?

A I saw three or two handguns there.

Q Three or two?

A Yes.

Q Do you have any way of knowing who had the handguns or where they came from prior to your coming back from the tent?

A No.

Q Did different people handle those handguns at different times?

A Yes.

Q And is that true during the time of the escape, the three or four days that different people handled them at different times?

A Yes.

Q Is that also true for various rifles and shotguns and so forth?

A Yes.

Q Is that also true and is that consistent with the practice with regard to weapons in the tent city prior to this incident, {1137} that they were sort of community weapons?

A Yes.

Q And different people would use different weapons on different days?

A Yes.

Q I show you Government Exhibit 37A and I ask you if you had ever seen that weapon in the camp area prior to the incident in question?

A I've seen this.

Q It's a rather unusual weapon, is it?

A Yes.

Q Do you know what the name of the weapon is?

A Commando Mark III.

Q Was that red ribbon on it when you saw it in the tent area?

A Yes.

Q Was the stock sawed off short the way it is there?

A Yes.

Q Was the white sawtoothed design on the butt?

A Yes.

Q Did you ever see any other weapon that looked like that or is that a fairly unique weapon? I'm talking about now all these red ribbons and white sawtooths?

A No. There's no weapon like that design.

Q Did you see that weapon when you were in the tent city {1138} getting ready to go on the escape route?

A Yes. I've seen it around.

Q Who was carrying it if anybody during the escape?

A Dino Butler.

Q Did you see it with him during the three or four days that you were escaping?

A I don't think so.

Q You don't think so.

I call your attention to an occasion last summer when you testified under oath. I'm referring to a transcript proceedings on page 921. That's the beginning point.

MR. HULTMAN: Your Honor, might we approach the bench, please.

THE COURT: Yes.

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

MR. HULTMAN: Your Honor, this is, I'm going to object to anything further in this area because this is an attempt on the part of Counsel, at the last trial he did what he's now doing and then specifically told the witness that the weapon in front of him right now was a weapon different from, the same style, make and so forth but different because it had some red ribbons on it from the weapon that Dino Butler carried out. Now Counsel told the witness this in the course of the trial and that witness now knows it. It is a fact, {1138} no question about it. He has answered truthfully on the stand what is the fact and Counsel knows better than anybody as what are the facts and now I'm going to object because it's clearly an attempt on the part of Counsel now to, after he constructed the witness last time to now turn around and try and use a tactic which will attempt to get this witness to say something different than what the truth is and what Counsel knows the truth is and what he himself brought out the truth with this witness at the last trial. I'm going to object. The questions have been asked, they have been honestly answered and they have been honestly answered pursuant to what this Counsel

on cross-examination did with the witness last time. That's the reason I have asked to come to the bar so that the Court would know the reason why Counsel for the government is now going to object.

If we get into a trick of some kind here to now trying to trick this witness into saying something, that he had a misapprehension about before, he had an incorrection, that correction was pointed out by Counsel on cross-examination and now the witness knows what the true facts really are and I'm going to object for this reason.

It's an attempt on the part of Counsel now to confuse this witness as to a fact the witness now knows.

MR. LOWE: Well, to begin with, Mr. Hultman, grossly {1140} misstates the record from last year. We had the transcript. I would invite Your Honor to look at it if you choose. I made no misleading statements last summer. This witness testified --

MR. HULTMAN: I didn't say, John, you made a misleading statement last summer. Didn't say that.

MR. LOWE: Let me -- I thought that's what you were talking about.

MR. HULTMAN: Listen.

MR. LOWE: There was testimony on direct by this witness identifying this weapon specifically. It was put in front of him as it is now. He testified on cross-examination that Mr. Butler took this weapon with him on the escape march and saw this particular weapon, the one in front of him then and in front of him now with the red streamer and white sawtooth. It's a unique weapon, no duplicates to that weapon. He testified vigorously that over three or four days he saw Butler with it every single day. At the end of that having let him make his erroneous testimony on the record, I pointed out with stipulation of government's counsel that weapon was found by the FBI in the tent area on June 26th or 27th, I don't remember which it was, and in fact one of the FBI photo books has a picture of that weapon lying on the ground where the FBI found it. I told Mr. Draper that it was impossible for him to have seen that weapon for {1141} four or five days and didn't that at least cause him to doubt his own testimony as to whether it was; he said "no."

I think it's perfectly proper for me to show that he has testified vigorously that he saw something that was impossible that he had seen in order to call it to the jury's attention the fact on at least one occasion under sworn testimony this witness so testified in a matter that was clearly erroneous, either wilfully or just by mistake, so that the jury can use that to gauge this witness' credibility. The record is quite clear. The manner in which I'm going about it is quite proper. I'm simply going to read in his testimony from last summer. Your Honor can hear the testimony. It was clear and unambiguous. I think that's a proper way to impeach this witness as to his recollection.

MR. HULTMAN: Your Honor, the facts are as Counsel well knows because the government, this information was given to Counsel and it wasn't any surprise. The government, that there was another weapon exactly like this in shape, in everything, but for the fact whether or not there was any red ribbons around it. This witness has testified then, testified again this time that he saw the defendant with a weapon of this kind, general description. That's what the direct examination is.

In the last trial, as counsel has indicated, that was the sequence of events. There is no question that was the {1142} sequence of events. Counsel told him at the end of that testimony that Mr. Draper, this cannot be the weapon for the reasons you have indicated here and so now this witness knows that fact and all I'm saying to Your Honor is that I don't want Counsel, I have no objection to him doing the things that he's indicated but I do not want him placing this witness in a position where he now knows that he was mistaken, to be placed in a position where Counsel is eliciting now that he's going to lie again when he knows it's a fact.

MR. LOWE: That's not the point. Your Honor knows that. I'm trying to get him to acknowledge his testimony from last year. I can read it out of the transcript. I told him I'll read it to him.

MR. HULTMAN: Now I think it's improper cross, Your Honor, for this reason: I think knowing what the record shows last time, this witness, knowing, I think he has a right to be given the opportunity to explain or to purge the actual facts on the basis you now know them, Counsel, and see how he knows them.

MR. LOWE: He has that opportunity.

THE COURT: What are you proposing now to ask him?

MR. LOWE: I'm proposing to read him his testimony from last year in which he dug his heels in and absolutely insisted this weapon was with Butler, this particular weapon, not in general terms, this weapon with the red ribbon and white {1142} saw. He dug his heels in, Judge, in ways you can hear when I read it, very specifically and did not change that testimony even in the face of the fact that the government stipulated that it was impossible he was seeing this weapon along the escape route because it was there, it was in the possession of the FBI. That goes directly to this witness' credibility.

MR. HULTMAN: Let me ask you one question, John: if you do that, when you finish will you ask him one simple question and that is do you know now that you were mistaken?

MR. LOWE: I'm willing to stipulate he knows now he was mistaken. I'll ask him that, certainly. I don't mind that. I think it's self-evident. I have no objection to doing that. I don't think I have to do it. That's all I want to do and that's --

THE COURT: Have you gentlemen resolved it?

MR. HULTMAN: I think we have. On the grounds it be the same questions as last time.

MR. LOWE: I'm going to read it.

MR. HULTMAN: I don't want to have to come back and ask him the question and object if I ask for a voir dire to clear up that given point.

MR. LOWE: I'm going to read him the testimony out of the transcript.

MR. HULTMAN: You're going to ask him at the end, do {1144} you now now you're mistaken as to that time?

MR. LOWE: Yes.

MR. HULTMAN: Will you ask him the question whether or not he saw another weapon?

MR. LOWE: Let me make the record clear. I showed him, I frankly thought he could confuse this weapon with another weapon that was not introduced by the government but was shown to us during the discovery phase last year.

MR. HULTMAN: That's right.

MR. LOWE: Which does not have the sawed off butt, does not have a red ribbon, does not have a white sawtooth. In order to be fair to the witness, I showed him a picture we had taken of that weapon during discovery and he denied it was that weapon and insisted it was this weapon.

MR. HULTMAN: If you saw the picture, John, you and I both would have to admit it would be impossible if I even really knew that weapon.

MR. LOWE: It was a good glossy black and white close up picture of the weapon. This witness is perfectly capable of testifying for himself. He specifically said it was that weapon.

MR. HULTMAN: I'm willing to proceed.

THE COURT: Very well.

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

{1145}

Q (By Mr. Lowe) I will read you a portion of the transcript of previous proceedings where you testified under oath, Mr. Draper, beginning at page 921 to see if I can refresh your, either refresh your recollection or in order to lay the foundation for a question to you.

Beginning at line 22. "Dino Butler was carrying," and this is talking about on the escape route, "Dino Butler was carrying a Comando Mark 3 automatic rifle."

Turning over to page 928, continuing. "By Mr. Sikma: Question: I show you what is marked as Government Exhibit 37-A and ask you whether or not you can identify that document, Government Exhibit 37-A?

"Answer: It is a semiautomatic rifle weapon called a Commando Mark 3."

Then down at line 15, "After the shooting Dino Butler carried it."

"Question: Where did he carry it?"

"Answer: To Bear Runner's."

"Question: How did you identify this particular firearm?"

"Answer: Sawed off stock and little carving right there."

All right. Now, on cross-examination, page 986, "Question: By Mr. Lowe: I believe I am correct that Government Exhibit 37-A you identified as being rather unique because of the {1146} sawed-off butt and the sawtooth emblem on the stock and the red ribbons as being -- "

MR. HULTMAN: And there, Your Honor, I enter an objection because that I do not recall from the earlier statement by the witness that there were any red ribbons in the testimony that he earlier read.

MR. LOWE: I don't understand this, Judge. I'm reading the testimony sworn by this witness last summer. That's what I'm trying to do, and it's what this witness said, and I'm, I'm aghast. I can't answer.

MR. HULTMAN: Well, counsel, what I'm just trying to do, would you go back to what you just got through reading as to what it was he testified to as to how he recognized the weapon, if there are any red ribbons there.

MR. LOWE: That's what I'm reading.

MR. HULTMAN: I'm not indicating now, I'm asking you to go back to the material that you just read a moment ago when he first gave his description. This is your description you are reading now.

MR. LOWE: And his response that it's, yes, it's correct, and that's just evidence on direct examination.

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

THE COURT: You may.

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

{1147}

MR. LOWE: He was shown the weapon and in his presence while he was looking at it.

MR. HULTMAN: Would you keep it down just a little bit.

MR. LOWE: Trying to find it here, page 928.

MR. HULTMAN: Okay.

MR. LOWE: I think the question you are referring to is line 18.

MR. HULTMAN: Okay. Line 18, all right. The answer that this man gave, Your Honor, which was the record in that trial was "sawed-off stock and the little --

THE COURT: Excuse me. What was the question?

MR. HULTMAN: The question was, "How did you identify the particular weapon? This is page 928. The response was on the official record, "sawed-off stock and the little carve right there period," end of response, end of discussion concerning that particular identification.

MR. LOWE: Not true, not true. Just end of direct discussion, not cross-examination.

MR. HULTMAN: Wait, John, until I get done. Now, let us go to the question which you asked him. Give me the page.

MR. LOWE: 986.

MR. HULTMAN: All right, all right. Now, this is, now this is the question that counsel, and this is why I continually object, Your Honor, of misstatements of the record. {1148} And now here again is a misstatement of the record in the question by counsel. You just heard the description that had been given in the record. Now, counsel says, "Question: I believe I am correct that Government Exhibit 37-A you identified as being rather unique because of the sawed-off butt and the sawtooth emblem and the red ribbons."

That is a misstatement of the record.

MR. LOWE: Am I correct in that answer-question? How is that incorrect if he says that it's true?

THE COURT: The objection is, as I understand it, apparently it goes to the fact that Mr. Butler apparently did have a weapon, similar weapon on the trail.

MR. HULTMAN: That is correct, Your Honor.

MR. LOWE: There's no testimony of that, Judge, no testimony whatsoever.

MR. HULTMAN: I'll voir dire right now and we'll establish that fact; and there were not any red ribbons.

MR. LOWE: All I'm trying to do is read the record, Judge, from last summer and that's what you told me I could do.

MR. HULTMAN: The record is misleading.

MR. LOWE: You can correct it on redirect if you think it's misleading.

THE COURT: He's objecting to the fact that no mention was made of the red ribbons until you mentioned it, until you {1149} included the red ribbon in your question.

MR. LOWE: But, Judge, the witness specifically in several instances with the weapon in front of him said that that was part of the weapon that he identified. Now, that's the cross-examination, just as proper evidence, and it's just as of the record as direct is.

MR. HULTMAN: Your Honor, if I would have the opportunity to interpose just one or two questions on voir dire I would then have no objection to any questions.

MR. LOWE: This is not a voir dire question, this is for redirect. I'm doing proper cross-examination, I'm reading correctly here. If Mr. Hultman thinks I'm misreading this --

MR. HULTMAN: Not misreading, misstating the record.

MR. LOWE: I'm not misstating the record. How can I misstate when I'm reading it.

THE COURT: The problem I think is it would have been an objection at the time.

MR. HULTMAN: That is correct.

THE COURT: It would have been a sustainable objection at the time it was made.

Now, counsel apparently included something into the question which the witness had not previously testified to, and then the witness gave an affirmative answer. I don't know how that can be corrected at this time.

{1150}

MR. LOWE: May I just offer some fact for you, Judge, I that I think you did not, either didn't pick up when we were reading because Mr. Hultman had objected. But Mr. Hultman is overlooking the fact that Mr. Sikma held up that very weapon, Exhibit 37-A and said, "Who had this weapon and where did you see it?"

And by George if I can't ask him questions about that weapon that he's held up in front of him and the red ribbon was on it, that makes it a completely different story, Judge, even accepting your postulation that it was acceptable. It was not, when he held up the weapon having the red ribbons on it.

Mr. Sikma is the one that asked him about the weapon. I didn't raise that for the first time, and it had the red ribbons on it. And he said that is the weapon.

MR. HULTMAN: All right. John, am I clear, you're going to ask the same question?

MR. LOWE: I'm going to read him right out of the record.

MR. HULTMAN: And that's going to be the end of it?

MR. LOWE: I'm going to ask any proper questions.

THE COURT: Proceed.

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

Q (By Mr. Lowe) Continuing, Mr. Draper, where I was a moment {1151} ago. Page 986 line 10, "Question: I believe I am correct that Government Exhibit 37-A you identified as being rather unique because of the sawed-off butt and the sawtooth emblem on the stock and the red ribbons as being the Commando Mark 3 which Dino Butler took away from the tent area when you went to Bear Runner's. Am I correct in that?"

"Answer: Yes."

"Question: And you remember him carryingr that to Oscar Bear Runner's and seeing it there also, don't you?"

"Answer: Right."

"Question: This is pretty unique, isn't it? There was no other gun that had red ribbons on it and everything was there?"

"Answer: No." You don't deny that you gave that testimony last summer, do you?

A No.

Q Do you now know that that testimony was factually in error?

A Yes.

MR. LOWE: May I approach the witness, please, Your Honor.

THE COURT: You may.

Q (By Mr. Lowe) I show you Government Exhibit 55, page 12, picture C, one of the pictures taken by the FBI agents in the tent city area on June 26th or 27th, and this is the picture {1152} here, and I ask you if you can state what object is prominently located in the foreground of that picture?

A Same gun as this one right here (indicating).

Q This one right here, isn't it?

A Yes. And when I finished with the testimony I just read to you last summer I asked you, did I not, as to whether this picture looked like that gun?

A Yes, you did.

Q Page 987,

"Question: Now, I hand you Government Exhibit 5524." I think the number may have been different last summer because it was that exhibit. "Ask if you will look at it and tell me whether that isn't a picture of the Commando Mark 3 which I just showed you if you can tell. Take your time and look at it. I don't know if you have seen that picture before or not."

"Answer: This is the same gun."

"Question: That is the same gun. Now would it trouble you any, Mr. Draper, if I told you that the Government has represented to us that this picture was taken by FBI Special Agent Mike Dyer who is from Chicago on June 27, 1975 at the crime scene in the tent area as they went through and made a crime scene search, which is the day after you said that Dino Butler carried from the tent area to Oscar Bear Runner's. Would that trouble you?"

{1152A}

"Answer: No."

"Question: It wouldn't. Could you explain to the jury how this weapon that is on the board would have been in the tent area on the day after the shooting and could have been found there by an FBI agent if Dino Butler carried it away and took it to Oscar Bear Runner's?"

"Answer: I saw him carry it to Bear Runner's."

"Question: So you stick by your guns even though the FBI has a picture here that they took the next day in the tent area, and you say that is definitely the gun? You just stick by your guns, that you are positive that you saw Dino Butler carry it to Bear Runner's, and saw it at Bear Runner's?"

"Answer: Right."

MR. HULTMAN: Could I ask counsel whether or not there is a question to be asked?

MR. LOWE: I was just reading the last portion of this, and I'm looking for a moment, if you don't mind for a moment.

Q (By Mr. Lowe) Do you remember that testimony, that interchange between us?

A Yes.

Q All right. Now, you described, Mr. Draper, a time on the march after you had left the area when you and a number of the others were walking somewhere. I believe you said on the way to Noah Wounded's. Am I correct on that?

{1152B}

A Yes.

Q Was it dark?

A Yes.

Q Do you know precisely where everybody was at that time, or just generally that you were all in a group?

A We were generally all in a group.

Q And you mentioned that something was said to the effect about the car and shooting the agents, and I ask you now when you can tell first of all who the statement was made by without guessing. Did you actually know who made the statement?

A No. Could you recognize the voice or were you just guessing when you said it was Leonard Peltier?

A I was guessing.

Q And can you tell who the statement was made to or would you just be guessing on that?

A Guessing.

Q Could you tell the full content of the words that you heard spoken, or were you just taking what you remembered?

A I was just taking what I remembered.

MR. LOWE: Excuse me, Your Honor.

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

THE COURT: The court is in recess until 3:35.

(Recess taken.)

{1153}

(Recess taken.)

THE COURT: The jury may be brought in.

(Whereupon, at 3:36 o'clock, p.m., the jury returned to the courtroom; and the following further proceedings were had:)

MR. TAIKEFF: May I approach with Mr. Hultman, your Honor?

THE COURT: You may.

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

MR. TAIKEFF: Your Honor, I had an FBI report marked Defendant's Exhibit 87 for identification. In looking at it just now I realized that I had stapled to the last page of that report a one page report which is not part of it; and I wanted to show this to Mr. Hultman and record this on the record so that there would be problem about it. He can ascertain for himself that the last page of Defendant's Exhibit 87 is in fact not the last page of the report in question, but an extra piece of paper concerning the same person that accidentally got attached.

MR. HULTMAN: O.k. let me take a look. (Examining.)

Elliot, let me ask you this --

MR. TAIKEFF: (Interrupting) It is an entirely different date.

MR. HULTMAN: I am not trying to probe or anything.

{1154}

Do you want it to remain? Is there a reason that you want it to remain as a part of it?

MR. TAIKEFF: No. I want to remove it. I didn't want to do so without notifying you and the Court since it now has the official status of having been marked.

MR. HULTMAN: Because it is another 302.

MR. TAIKEFF: It should not have been attached in the first place.

MR. HULTMAN: My only question is this: As I recall, it was shown to the witness, was it not?

MR. TAIKEFF: Only to ask him whether or not his report of June 26th was incorporated in the 302 verbatim; and as you will see, the page before is the end of that report.

MR. HULTMAN: O.k. Let me see just a second. I don't even recognize what they have got here (examining).

THE COURT: That is Ecoffey?

MR. TAIKEFF: Yes, your Honor. In case you want to, we can mark that last piece of paper 87-A for identification just in case you ever want to know what piece of paper that was.

MR. HULTMAN: If you represent to me, and I know you are honestly and fairly representing to me, that it has no particular significance, accidentally it was attached?

MR. TAIKEFF: Yes.

{1155}

MR. HULTMAN: The Government would agree it would be removed. It is a separate -- this event doesn't have anything to do with it?

MR. TAIKEFF: That's correct, nothing at all. It is just mechanically a mistake was made in stapling all of those pages together.

MR. HULTMAN: I just noticed, looking at a page in a transcript, I had two pages the same and the next page was not there.

THE COURT: Why don't you just remove it?

MR. HULTMAN: Remove it now, yes.

MR. TAIKEFF: Exhibit 87 for identification now consists of six pages, all of which are numbered except the first page, which is dated 7-9-75.

MR. HULTMAN: Very good.

MR. TAIKEFF: Thank you, your Honor.

THE COURT: Very well.

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

THE COURT: You may proceed.

Q (By Mr. Lowe) Mr. Draper, do you know what we mean when we talk about immunity from prosecution?

A No.

Q All right. Let me ask you a series of questions then, and I will try not to use that term.

{1156}

You testified that when you were first picked up and interviewed by agents, that you had a fear of being prosecuted and you testified that the agents told you that they would indict you if you didn't cooperate.

Now, I want to shift the time to later when you were at the Grand Jury or as to any other proceedings at which you testified under oath since then.

Now, I will ask you whether you continued to have concern that you yourself would not actually be prosecuted for these murders, would that be fair?

A Yes.

Q And would it be fair to say that you continued to be worried that your own testimony might put you in a position of being prosecuted, would that be fair?

A Yes.

Q Did there come a time when the Government agreed not to prosecute you if you would testify?

A Yes.

Q Were you given a promise that that wouldn't take place as long as you testified?

A I don't know whether it was a promise or not, but they said that you wouldn't be prosecuted, or you wouldn't be indicted if you testify.

Q And then did you testify?

A Yes.

{1157}

Q And you are testifying here today.

Do you now understand, as a result of having testified, that the Government will keep its word and will not prosecute you or indict you for these murders?

A Yes.

Q On January 13, 1976, at Sioux Falls, South Dakota, did you appear before the Grand Jury?

A Yes.

Q Did you testify there under oath?

A Yes.

Q Would I be correct in saying that some of the testimony you gave was false?

A Yes.

MR. LOWE: No further questions.

REDIRECT EXAMINATION

By MR. HULTMAN:

Q Mr. Draper, I just have two questions, one with reference to the discussion concerning a weapon a few moments ago, is it fair for me to conclude that you were honestly mistaken as to what your testimony was earlier?

MR. LOWE: Your Honor, that's so leading, I object.

THE COURT: Overruled.

A Yes.

Q (By Mr. Hultman) Do you know as a fact that there were two weapons of this kind in the area?

{1158}

MR. LOWE: Objection, your Honor. There is no factual basis for that. The witness has testified that this weapon was unique in all the world, not two of a kind.

MR. HULTMAN: This counsel in the record pointed out in the record at the last trial and again today that there was a second weapon.

THE COURT: I am going to sustain the objection on the basis that it is a leading question.

MR. LOWE: Thank you, your Honor.

MR. HULTMAN: I just have one further question.

Q (By Mr. Hultman) Have the answers which you have given in this courtroom today, regardless of how far in time it may be from the event, how many people may have talked to you in between and including at least two consenting interviews with the defense counsel where you have met with the defense counsel on two occasions?

A Yes.

Q Have you told the truth in the courtroom today as you very best can remember the events at the time they took place?

A Yes.

MR. HULTMAN: I have no further questions.

RE CROSS EXAMINATION

By MR. LOWE:

Q Mr. Draper, as to the question that Mr. Hultman, just asked you about whether you have told the truth the best you can, is {1159} that true as to your cross examination answers as well as your direct examination answers?

A Yes.

MR. LOWE: No further questions.

THE COURT: You may step down.

(Witness excused.)

MR. SIKMA: The Plaintiff calls Mr. Fred Coward.

THE CLERK: What was the last name?

MR. SIKMA: (Spelling) C-o-w-a-r-d.

FREDERICK COWARD, JR.,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. SIKMA:

Q Would you please state your name again to the jury?

A Frederick Coward, Jr.

Q And Mr. Coward, what is your occupation?

A Special Agent with the Federal Bureau of Investigation.

Q And where are you assigned duty in that regard?

A Presently?

Q Yes.

A Phoenix, Arizona.

Q What was your place of assignment in June of 1975?

A Rapid City, South Dakota.

Q And do you recall the date of the 26th of June, 1975?

A Yes, sir.

{1160}

Q Do you recall where you were at about 12:30 on that date, 12:30 noon?

A At about 12:30, on that particular day, that was on my way to Oglala, South Dakota.

Q And how did it come about that you were on your way to Oglala, South Dakota?

A Well, just shortly after 12:00, that noon, I was return to the office and I was informed that there was a shooting taking place near Oglala, South Dakota.

Q And did you know where the shooting was taking place as far as Oglala, South Dakota, was concerned?

A I subsequently learned that it was in an area identified as the Jumping Bull community.

Q Approximately what time did you leave for Oglala, South Dakota?

A At was approximately 12:20 on that particular day.

Q And did you go with anyone, or did you drive there by yourself?

A I went alone.

Q And approximately how long did it take to get there?

A It took me approximately one hour.

Q I will ask you to turn around and look at what has been marked as Government Exhibit 71. Do you recognize what is on Government Exhibit 71?

A Do I recognize it?

{1162}

Q Yes. Do you recognize what that is?

A Well, it is an area which is located on the Pine Ridge Indian Reservation, and it is what I later learned to be the Jumping Bull community.

Q Now, is this the area to which you went on the 26th of June, 1975?

A I proceeded to that location, yes.

Q Now, you indicated that you arrived there approximately an hour later, is that correct?

A That's correct, sir.

Q And can you see a point on that map which approximates the position to which you went?

A Yes, sir.

Q Would you use the pointer and point it out to the jury?

A (Indicating).

MR. SIKMA: May the record reflect that on the far right-hand -- excuse me, the left-hand side of the map is an intersection on Highway 18 to which Special Agent Coward is pointing on Government Exhibit 71.

Q (By Mr. Sikma) Did you at that time -- were you attempting to meet with anyone in particular at the time that you arrived at that point?

A Yes, sir.

Q And who was that?

A Well, I was trying to locate Special Agent Gary Adams.

{1162}

Q And had you worked with Special Agent Gary Adams in the past?

A Yes, sir.

Q And where was he assigned?

A Rapid City, South Dakota.

Q Did you discover or determine at that time where Special Agent Adams was at that particular time?

A Well, I never did see him. I saw an area which I pointed out, and was advised that he was a few hundred yards over a hill.

Q O.k., and would you point out at that time approximately where it was you believed him to be?

A (Indicating) Somewhere in that area.

MR. SIKMA: May the record reflect that the witness pointed to Government Exhibit 71, to the right of the intersection identified earlier to be a bend in that intersection about a foot to the right of the intersection.

Q (By Mr. Sikma) In your radio communications with -- or in your communications with Gary Adams, did you discuss where you would go or what you would do after you arrived at the scene?

A It was when I arrived at the scene, I was advised by Gary Adams to take a group of men and go around the other side of the dam.

Q O.k. In which direction would that have been from Government. Exhibit 71?

{1163}

A Should I point it out?

Q Yes.

A It would have been over here off the map (indicating), just basically in this area.

MR. SIKMA: Let the record reflect that this is an area which is in the middle of the -- in the center of the map at the bottom which is marked "wooded area", that the area pointed to by the witness was below the tree line or below the area designated as a "wooded area" in the center, lower center of the map.

Q (By Mr. Sikma) Would you state if there was anything, any particular thing at that point where you went as you designated earlier, just on the lower side of the map there?

A Well, there was a road that connects the main highway which is Highway 18 that goes around behind the dam. It is a dirt and gravel road.

Q O.k. Where does the road start that loops around the area of the dam?

{1164}

A It starts just north of Oglala, South Dakota.

Q And?

A And continues on around the lake and goes on past the pumpkin seed and the Rooks residence, across the bridge and enters back down onto Highway 18.

Q Now would the pumpkin and Rooks residences, if the map was large enough, be lower or down below the area indicated by the map?

A Yes. It would be. It would be longer. It can't be depicted because, you know, the board is not long enough.

Q Now you indicated, I believe, that the area to which you went was actually right on the bottom of the map, almost on the map, is that correct?

A Well, it wouldn't be right on the bottom, it would be a little further.

Q Slightly more, slightly below that?

A Yes.

Q Approximately how far in inches?

A Two or three inches maybe, roughly.

Q Would that be south of the corral there, or, excuse me, down from the corral? Southwest of the corral?

A I would call it west.

Q What was there at that point which you went? Were there buildings or what did you do when you went in that direction?

{1165}

A Well, there was a small home, the pumpkin seed family lived there.

Q Were you familiar with the pumpkin seed family?

A Well, I had visited that home years ago, couple years before that.

Q So you were familiar with that residence?

A Yes, I was.

Q From that residence I asked you to look at the map and tell me what area of the map, if any, you could see from that residence.

A Well, I could see, I could see Gary Adams' car over here (indicating). I could see the highway, I could see these residences here, I could see these residences here (indicating). I was up on a little plateau in the Pumpkin Seed house and I could see right across. Because of the plateau I had a beautiful advantage, sight advantage of seeing this particular residence and these buildings here (indicating).

Q Now you see an area on the map which is, there is an arrow drawn to it and it says, "Coler's Car." Could you see that area?

A No I could not.

Q What time of the day was it approximately that you arrived at the Pumpkin Seed residence?

A Well, it was getting towards 2:00, you know, approximately.

{1166}

Q And did you have anyone with you or were you with someone?

A There were approximately seven of us there.

Q And what did you do at that time?

A Well, the decision was made because of the sporadic shooting to occupy the dwelling, if people were in there to bring them to safety which that was done. The main concern was to occupy, to set up a perimeter, to secure any movement and maintain a position and get in contact with Gary Adams again to see what exactly was happening.

Q Did you get in contact with Gary Adams again?

A Yes. Our team did.

Q Now while you were there, did you see any people from, did you, first of all, during that time did you hear any shooting?

A Yes, sir, I did.

Q And could you tell where the shooting was coming from?

A I eventually determined that.

Q And where was the shooting coming from?

A It was coming from a white stucco type building which I later found out was the residence of Harry Jumping Bull.

Q And would you point that out on the map.

A This white house here (indicating). It was the bigger of the homes, houses.

{1167}

MR. SIKMA: May the record reflect the witness pointed to the white house on Government Exhibit 71.

Q (By Mr. Sikma) And did you observe any people around this particular area?

A That particular time?

Q Yes.

A Well, not at that time; no.

Q Did you at any time during the afternoon?

A Yes, sir.

Q And approximately what time did you observe?

A It was approximately 3:45 P.M.

Q And would you describe for the jury what it was generally that you saw.

A Well, I had maintained a position in the pumpkin seed house in the back and suddenly my attention was called upon by Bureau of Indian Affairs officer Marvin Stoldt. He was in the front window of the house and I was in the back. We were watching the activity determining, you know, to see what was going to happen and suddenly he called out for me to come to the front portion of the window, the front window, which I did and he said there

was some activity, there was some people running from the Jumping Bull house and for me to take a look, so I did.

Q And how did you view the people running from the house?

A First of all I did it with my naked eye. I could see people {1168} running from the area away from the house towards the woods, towards the creek.

Q Now at this time did you know the condition and whereabouts of Special Agents Ronald Williams and Jack Coler?

A No, sir I did not.

QQ Would you tell what happened next.

A I proceeded to take my rifle, I had a scope on it, a seven power scope and I proceeded to focus in on the four people who were running away from that location.

Q And did you see anyone who you recognized?

A Yes, I did.

Q Who was that?

A It was Leonard Peltier.

Q Do you see Leonard Peltier in the courtroom?

A I sure do.

Q Would you point him out?

A Sitting right there in that yellow shirt (indicating).

MR. TAIKEFF: Identification is acknowledged.

THE COURT: Very well.

MR. TAIKEFF: That is to say, Your Honor, the identification in the courtroom is acknowledged.

THE COURT: The record may so show.

Q (By Mr. Sikma) Would you point out to the jury by using a pointer where the individuals were running, including the {1169} individual you identified as Leonard Peltier.

A The white house that I mentioned before is an area, comes down here, that's a little road (indicating). It comes down the little slope that I later determined, I walked it myself. At the time I didn't know it because of the elevation factor, and when I saw them, I first picked them up, they were in this area and several seconds they continued to run in this direction (indicating).

Q And you indicated that you were using a rifle scope to look at this individual.

A Yes, sir.

Q What was the power of that rifle scope?

A It was a 2 x 7 power scope.

Q Now how far were you from the area where these individuals were running?

A I was positioned approximately 800 yards from the house that I was in until the white house of Harry Jumping Bull, that was my approximation.

Q And they were running at an angle but slightly in your direction.

A That's correct.

Q Approximately how long did you stay in that position in that house, in the Pumpkin Seed house?

A I stayed there until such a time or shortly after I was informed, the others were informed that Ron and Jack were {1170} located dead.

Q And about what time was that?

A Approximately 4:30 is when I received the word over the air that they were dead.

Q And approximately when did you leave the Pumpkin Seed house?

A Shortly thereafter because I was standing outside and one of the Bureau of Indian Affairs officers called to my attention, he said there was some activity down along the creek, that he had observed two, two individuals.

Q And about what time was this?

A It was shortly after the announcement was made.

Q And where did you go from there?

A Well, four of us left in cars and we went to the area to, you know, thinking that possibly this was still part of this group that we had seen earlier, to try to determine what was going on. I proceeded to that location. Not to

that, well, to the immediate location where Officer Weston had said he had seen these individuals. I had never seen these individuals.

Q Okay.

What happened at that time?

A Well, I got to the area. I was with an officer Marvin Stoldt and there was another agent by the name of Vince Breci who was with an officer Conroy, I believe, and we split up. {1171} It was agreed that the other two officers would go down below along the creek line to see if they, you know, could locate these individuals that were observed by Weston, and I stayed up on the high plateau.

Q And what happened?

A Well, myself and Marvin Stoldt, we made our way to the end of the drainage, was an area, a high plateau that could overlook the creek, you know, so we could look down in and see if we could see any people, which we did. I laid down, I moved along there very slowly.

Q And what happened at that time?

A Well, while I was in this position lying down, I began to hear shots, gunshots.

Q From which direction were they coming?

A Well, I looked down into the creek area and I could not see anything. Then I looked over to the area of the Jumping Bull Hall residence, you know, the Harry Jumping Bull's house and I saw a person.

Q And where was that?

A Well, it appeared at that time that this individual was running from the, which would be the east side of the creek area running east towards the buildings.

Q And how long could you see this individual?

A Oh, for, you know, a few minutes or some short amount of time.

{1172}

Q Do you recognize this individual?

A No, I do not.

Q Did you ever in the afternoon observe any other individuals during that afternoon?

A Yes, I did.

Q And would you tell about what time that was and what the circumstances were surrounding that occasion.

A Well, it was, we had just come back to the Pumpkin Seed house after this incident and we needed more people. Marvin Stoldt wanted to go down to the other area of the Rooks' residence and we were discussing, you know, what had happened so far. Suddenly there was a radio message, apparently from one of the other BIA cars, asking for some kind of assistance. There were three agents and four BIA police officers there and I had taken charge of the three agents and assumed control there and had made the decision that if he was going to respond to the immediate area he should take his men and I should continue to keep a safe perimeter because we still had activity down in the Jumping Bull housing area that had not been decided as yet.

Q Now how long did you stay then that afternoon in the Pumpkin Seed house?

A Well, after Marvin left, it wasn't but five minutes that I began to hear shooting and it was almost immediately that upon hearing the shooting, we all gathered, there was a {1173} transmission from Gary Adams who was on the other side of the field who said, "Fred, there they go. They're shooting down there and they're going up into, across the road," or something like that. I can't remember. "Up the hill."

Q Now where was this hill, which direction was the hill from the Jumping Bull residence?

A It was down the road quite a bit.

Q Down the road, but which direction from the Jumping Bull residence?

A It would have to be in a southwest direction.

Q And was this across the road that leads around the bottom of the map?

A Yes.

Q To Highway 18, touching Highway 18 to the right of the map and to the left of the map?

A Yes.

Q Does this road of which you're speaking in a sense form sort of a horseshoe around the bottom of the map?

A Almost. Yes.

Q Is there a culvert anywhere on that map, on that road?

A Yes, there is.

Q And which direction is that from where you were?

A Well, there are a couple of them, sir.

Q Would you point out or try to describe where they were.

A If I may.

{1174}

If you keep on going down this way (indicating), kind of paralleling this road, the creek and the tree line kind of paralleled it until over here the road came around, way around and over here (indicating) and it starts thinning out as this road and the winding around road come together. That area starts thinning out and there is a culvert down there (indicating). I had seen it later on as I went down to that area. But when I first heard the shooting, I heard it in the area of the Rooks' residence.

Q Now where is the Rooks' residence with regard to this map?

A That's on down this creek area, too, and near this culvert (indicating).

Q And which direction were the people running which you saw?

A They were running in a westerly direction up the slope of the hill.

Q And did you have occasion to go to that area?

A Yes, I did.

Q Would you tell the jury what happened when you went to that area.

A Well, I was responding in, like I said, just about the same time that I could hear Agent Adams saying, "They're shooting down there," and, "There they go," So I responded, I decided at that point that my assistance was needed there. {1175} I drove with myself, Agent Skelly and Agent Breci. I did not drive. Agent Skelly drove. We drove down there to assist at that location.

I was in the right front seat. We drove on down. At that point you couldn't hear any shooting. But as I got closer, rolling the windows down, I then realized that the group moved up more to the hills. Suddenly as we drove up, the road has kind of a bank there and it kind of rolls like this (indicating). If you go down the road, if you happen to be behind one of these banks, you can't see what's happening in the upper pasture and we kind of overshot the group that was going up. At that point., as we passed, I yelled for Agent Skelly to stop. I could hear the shooting. The people who were running away had guns. You could see the smoke and you could hear the shots being fired. I yelled to him, I said, "Back up." I said, "They're shooting at us." And so he did.

I saw other people along the roadside also moving up into the hill but not as far as the group of people running away.

{1176}

Q Approximately, did you have occasion to pursue these people?

A Well, I did eventually.

Q And how much later was that?

A Well, I had taken a position back up the road from whence I came from and into the pasture, the three of us stood with a car. And it was probably some five hundred yards away at that point. And shooting was going on.

They were running in every direction, up into the hills and out of sight. I took that position, made that decision based on the fact that I thought possibly they would continue to move that way, but they did not. At which time I knew it was vulnerable, we were in the open, and decided that we should go back to the Pumpkin Seed House which we did, three of us.

Q And about what time was that?

A Well, it's getting, it's getting around 6:00 o'clock or so because shortly thereafter I met up with state troopers from the state of South Dakota. Highway patrolmen.

Q And where did you go from there?

A I saw them coming in from the other side of the roadblock and I, we all got in our vehicle and we drove to meet them. And we didn't quite understand what was going on at that point.

The still headed into the area where the group had taken off, and we joined up with them. And then we finally {1177} stopped after we got back in there some distance and then they informed me that the aircraft that was flying above had located that same group.

Q Did you follow them?

A Yes, I did.

Q And for about how long did you follow them?

A Well, it continued on the rest of that day and eventually, I believe it was around 8:00 o'clock is when I left. It was dark when I left.

Q Had you went back?

A Well, I went back over to the area of the Harry Jumping Bull residence.

MR. SIKMA: I have no further questions.

MR. TAIKEFF: May we approach, Your Honor?

THE COURT: You may.

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

MR. TAIKEFF: Your Honor, I wish to advise you that I am not fully prepared to conduct a cross-examination, although I can begin. I don't know whether I can occupy all the time that remains.

I'd like to offer Your Honor a brief explanation. It is not by way of criticizing the Government. I was, and have been given, 3500 material in advance. Sometimes we get it for five, six or seven witnesses at a time. We had {1178} exhausted all but one of the witnesses I got, not in the last batch, but in the batch before, and that was the special agent by the name of Waring whom I expected would testify prior to the first of the young Indian witnesses.

But then the evening before the first young Indian witness testified Mr. Hultman advised me that as long as he had the young Indians here he was going to call them first because he had certain reservations about keeping them around and not putting them on the stand. And although I couldn't say that he specifically advised me, I did have a definite impression he was then going to put Agent Waring on. And so although last night we were given the 3500 material for this witness, I did not prepare for this witness because I anticipated that Waring was going to testify before this witness.

And so I can go for a while, but I'm afraid that I cannot do a complete cross-examination; and as I said before I do not criticize the Government for what has happened. I just wanted Your Honor to know why I was not prepared to maintain Your Honor's schedule.

MR. SIKMA: Your Honor, may I comment on that?

THE COURT: You may.

MR. SIKMA: We called this witness because we knew that Mr. Hultman would have a rather long witness, and I suspected this witness would be very short. So we called this one to give him a few minutes break, and had intended thereafter {1179} to call Special Agent Waring after we finished this witness.

MR. TAIKEFF: Now, perhaps --

MR. SIKMA: I didn't expect there would be --

MR. TAIKEFF: I am positive it was all don in the best of faith.

MR. HULTMAN: Both ways.

MR. TAIKEFF: Yes. I'm sure of that. I didn't realize it until I started looking at the materials while he was testifying that in fact I may have him for quite some time on cross-examination on a number of important things.

Now, I would like to avoid losing any trial time. Perhaps the Government would consent to the following: Have this witness step down because he has to await, I think, the testimony tomorrow concerning Defendant's Exhibit 75 before we would be willing to excuse him in any event. If he steps down now Agent Waring can go on and if Agent Waring is finished before 5:00 o'clock I can begin his cross-examination and then finish with this agent's cross-examination subsequently. The point is, I'm willing to make any arrangement that would permit us to continue until 5:00 o'clock, but I cannot assure the Court that once I begin now at twenty after 4:00 that I could continue with this witness because I haven't fully prepared myself.

MR. HULTMAN: Your Honor, could I make a suggestion? I think if we did get to Waring, with no question we won't get {1180} done with him by 5:00 o'clock. There are a couple three more short witnesses of which you

have the 3500 material, and I don't think there will be any problem. What I would suggest is that we take those.

MR. TAIKEFF: Agreed.

MR. HULTMAN: Afford you the opportunity, because otherwise we're going to be in the middle of two witnesses.

MR. TAIKEFF: I understand. That's perfectly agreeable, Your Honor.

I apologize to the inconvenience I have caused to the Court.

MR. HULTMAN: Let's give the names now so that counsel -- who do we have yet to call that we could call?

MR. SIKMA: Dyer.

MR. HULTMAN: Dyer. D-y-e-r. He will be the next witness we will call.

I think we would be able to go through a couple three very shortly.

MR. TAIKEFF: That will be fine.

MR. HULTMAN: And accomplish what the needs are.

MR. TAIKEFF: Thank you, Your Honor.

THE COURT: Very well.

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

THE COURT: The cross-examination of Mr. Coward will {1181} not be had at this time, and you may step down, Mr. Coward.

Counsel may call the next witness.

MR. CROOKS: Government calls Michael Dyer.

MICHAEL T. DYER,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CROOKS

Q Special Agent Dyer, would you again give you full name for the record, please.

A That's Michael T. Dyer, D-y-e-r.

Q What is your occupation, Mr. Dyer?

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

Q And what is your present duty assignment?

A Chicago.

Q Calling you attention back to June of 1975. Did you have occasion to be on the Pine Ridge Indian Reservation near Oglala, South Dakota?

A I did.

Q And calling your attention specifically to the 26th of June of that same year, 1975, did you assist in the search conducted in the crime scene area?

A I believe that was the 27th, sir.

Q Well, 26th or 27th.

A That's correct.

Q It was the 27th that actually the search was conducted; is that correct?

{1182}

A That's correct.

Q And were the searches conducted in conjunction with search warrants issued from the South Dakota Federal Courts?

A They were.

Q And during the course of the search would you indicate which area particularly you were searching?

A I was in the area of tents which was south of the Jumping Bull Hall area.

Q All right. I hand you Exhibit 37-A, ask if this is an item that you can identify?

A It is.

Q And what is that?

A This is a Commando Mark 3 semiautomatic 45 caliber rifle.

Q So the jury can distinguish, to me that looks like what we call a Tommy gun. That is not an automatic weapon?

A No. That's what I thought it was when I first saw it, but it's a semiautomatic.

Q In other words for each round you have to pull the trigger each time?

A It will fire as fast as you can pull the trigger.

Q But pulling the trigger would be an automatic? In other words, you pull it once and it keeps going until you take your hand off the trigger?

A That's correct.

Q But that is not that, that is a semiautomatic?

{1183}

A Semiautomatic, that's correct.

Q With regard to that weapon, would you indicate with the pointer, and indicate to the jury where in the tent area it was that you located it. Calling your attention to Exhibit 71, the large map behind. Approximate location.

A That was approximately in this area right here (indicating).

MR. CROOKS: Let the record indicate an area roughly on the easterly portion of the thatched area referred to as the tent area.

Q (By Mr. Crooks) Where was this exhibit found? Was it lying open on the ground or was it under something, concealed in some way? Would you give a description of that.

A No. The -- I had stepped over that weapon a number of times. It was hidden under some bark.

Q All right. For the jury's information we have seen a photograph or a movie film, and a weapon similar to that appeared. Would that have show the finding of that weapon as depicted --

A I found it and I called the photographer over.

Q And the weapon was the one that was shown in the photograph, or the movie film?

A That's correct.

Q All right.

MR. CROOKS: United States will offer 37-A.

MR. TAIKEFF: No objection.

THE COURT: Exhibit 37-A is received.

{1184}

MR. CROOKS: That's all the questions we have, Your Honor.

Mr. TAIKEFF: May I inquire, Your Honor?

THE COURT: You may.

CROSS-EXAMINATION

BY MR. TAIKEFF

Q Agent Dyer, you wrote one or more official reports in connection with your activities relating to this case, did you not?

A Reports of interviews, 302s?

Q Yes, 302 forms.

A Yes, I did.

Q And as a general rule, am I correct that these reports are to be written in as much detail as possible so as to record every single fact which comes to your attention before you write the report?

A No, that's not a general rule.

Q You don't do that?

A No. Not every fact that comes to your attention. Some facts --

Q Every fact that you think has some significance in connection with your investigation?

A That is correct.

Q Every fact that you think has some significance in connection with your investigation?

A That is correct.

Q You don't put what color shoes you were wearing, but you put down something that someone said that might be important in connection with the investigation; is that right?

{1185}

A That's correct.

Q Now, as a rule the 302 has three different places where a date is put; is that correct?

A That's correct.

Q And one of the spaces marked "interviewed on" is the date on which you interviewed a person, if that's what the report is about, or the date on which you did the things which you are recording on the 302 if it wasn't an interview?

A That's correct.

Q So if you interviewed somebody on June 28th you'd put June 28th in the space marked "interviewed on," right?

A That's correct.

Q And if instead of interviewing someone you went out and you searched an area and you found something such as that gun, then instead of making some recordation you would put in the box marked "interviewed on" the date on which you found that object, even though in fact you didn't interview anybody?

A That's correct.

Q Now, there's a date that the report itself is physically prepared or typed; is that right?

A That's correct.

Q And that date appears in the upper right-hand corner of the 302, right?

A That is correct.

Q And that's designated "date of transcription" correct?

{1186}

A The date and the time, that's correct.

Q And then there's one other date. That's the date dictated, and that would be the date that you either write out the report longhand or put it on some kind of dictation equipment or dictated to a stenographer, whichever of those three you happen to do? That's the date dictated and that's reported on the 302, is it not?

A That is correct.

Q Now, in connection with the 302s which you --

MR. CROOKS: Your Honor. Excuse me, Counsel.

MR. TAIKEFF: Yes.

MR. CROOKS: Your Honor, I'll object to this line of questioning. It appears to be going nowhere. It's completely beyond the scope of the direct examination.

I had assumed that somewhere he was going to be showing him supposedly inconsistent statements of some sort. Apparently he's just trying to have this witness testify as to a general matter of 302, and we certainly object to that.

This is not the time and place to go into that with this witness.

MR. TAIKEFF: Well, Your Honor, this witness has said that in connection with his activities here he did complete, or write, certain 302s. I am making certain inquiries on the subject generally so I can --

MR. CROOKS: Well, Your Honor, I didn't go into any {1187} 302s on my direct examination. My point simply is that it's irrelevant to this witness's testimony and cross-examination of him.

If counsel wishes to call FBI agents during their own case to go through the details bearing 302, that's of course their business.

My objection is, it's immaterial and irrelevant at this particular time to cross-examination of this witness unless he's attempting to go into a prior inconsistent statement of some sort. And I haven't seen any evidence that he's doing that.

MR. TAIKEFF: Well, I couldn't possibly know whether I had any such are to go into until, and unless I had certain information that I needed from this witness. I now have that information, Your Honor.

THE COURT: The witness may be, I assumed that the question asked of this witness was preliminary. The witness may be cross-examined on the matter testified to on direct.

Q (By Mr. Taikeff) Now, in connection with your finding of the exhibit which was just offered and accepted into evidence, when you first saw that weapon you thought that it was something other than what it was; is that correct:

A That's correct.

QQ And upon examining it you found that it was a semiautomatic rifle?

{1188}

A That's true.

Q Now, what's the difference between an automatic weapon and a semiautomatic weapon?

A The difference is an automatic one, once you've depressed the trigger, it continues to fire.

A semiautomatic weapon only fires as fast as you release the trigger and re-pull it.

{1189}

Q Now, in order to possess a fully automatic weapon you either have to be a member of the military or law enforcement officer or have a special license, is that correct?

A I have no knowledge in that area. I am sure that is the rule, sir.

Q And as far as you know, that weapon which was just offered into evidence is a weapon which a person can purchase over the counter in a sporting goods store, isn't it?

A I don't know that to be a fact, but I assume if it is not automatic, I am sure you could purchase it.

Q I am showing you Plaintiff's Exhibit 34-AA in evidence, and ask, sir, if you know what that is?

A This is an AR-15 Colt.

Q Is that a copy of something else?

A It is a copy of the military weapon.

Q The military weapon, semi-automatic or fully automatic?

A It is automatic.

Q How about this one (indicating)?

A That's semi-automatic.

Q You can buy it at any sporting goods store if they are in stock?

A If they are selling them, that is correct.

Q As far as you know there is nothing illegal about my owning a gun like that, is there?

A Not that I know of.

{1190}

Q Behind you is a map, Government's Exhibit 71. Can you tell us where you were when you entered the Jumping Bull area, how you got into that area?

A I came down Highway 18 and came down by Jumping Bull Hall.

Q That would be the first road, if you travel from the upper right to the lower left, is that correct?

A Down this here (indicating) and down by Jumping Bull Hall.

Q And, all right, down. Now, at Jumping Bull, beyond Jumping Bull Hall, trace the path you followed on your way to Tent City?

A Came through this area (indicating).

Q All right, past the residences?

A Right.

Q Were you on foot?

A I was on foot.

Q Go on now, slow down at this point because I want to pin-point something with you.

A All right. Came down through here (indicating).

Q All right. Stop at that point.

A O.k.

Q Were you on the road or were you on the grass, assuming there was grass there, at that "Y" intersection, you see what I am talking about, here, right here (indicating), where the letter "P" is, where these cars are depicted, how close did you get to those cars?

{1191}

A I don't remember ever going down next to those cars.

Q Did you see any cars there?

A I saw the cars there.

Q Do you have any recollection of what they looked like?

A Looked like old cars.

Q Was there a red pickup there?

A I have no independent recollection of that.

Q Let me see if I can refresh your recollection.

MR. TAIKEFF: Your Honor, may I have these photographs marked for identification, two of them?

Thank you.

Q (By Mr. Taikeff) Placing before you, sir, after I show them to counsel for the Government -- (indicating) -- photographs which have been marked 93 and 94 for identification, Defendant's Exhibits.

A (Examining).

Q Do anything to your recollection?

A It appears to be the area. The individual truck doesn't mean anything.

Q You couldn't say whether the vehicle depicted there was in the vicinity on the map now marked with the letter "P"?

A If I saw a]l the vehicles together, possibly it would, you know.

Q All right, let me see if I can help you in that regard, I don't know whether I can -- sorry.

{1192}

A Like I say, the individual vehicle does not refresh my recollection. It appears to be the area.

Q I am holding in my hand Government Exhibit 55 in evidence, the Tent City book, and I am turning it to Page 31 showing a red and white Chevrolet vehicle.

First, sir, I ask you if you can describe what type vehicle that is?

A That appeared to be a four-wheel type, van type.

Q Van, o.k.

Did you ever see that before?

A Yes, I recall that vehicle.

Q Where did you see that?

A I saw that in the area of the tents.

Q Did you ever see that vehicle anywhere else in this area?

A I did not.

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

Your Honor, I have just had pointed out to me a photograph. I am wondering if I could re-zoom for a moment.

THE COURT: Very well.

Q (By Mr. Taikeff) Agent Dyer, I am holding in my hand Government Exhibit 56, aerial view of Tent City, and I have it open to Page 4; and I ask you, sir, to look at Photograph D on Page 4 in particular -- but perhaps you would want to look at {1193} all the photographs on Page 4 -- and my specific question is whether roughly in the center of Photograph D you see this "Y" intersection which is marked "P" on Government Exhibit 71?

A I do.

Q Now, sir, do you see in that photograph the several vehicles which are depicted with little black rectangles on Government Exhibit 71?

A I do.

Q In looking at that photograph, does that in any way assist you in telling us whether the vehicle I showed you in the two photographs, which are defense exhibits for identification, whether that vehicle is amongst that group?

A This is a picture of the area, but these cars are so small it is impossible for me to say.

Q Well, looking at Photograph D, would you say whether or not there was a red pickup in that group?

MR. CROOKS: Your Honor, I will object to this. This is cumulative. repetitious. The witness has said he can't identify the pickup, he can't identify the photograph. He wasn't paying any attention to it in the first place. I will object to it as simply cumulative and a waste of time.

MR. TAIKEFF: Your Honor, the Government may have an objection. The witness has never said he wasn't paying attention to it, and I object to the Government throwing {1194} signals at a witness.

THE COURT: Well, the witness has answered that the pictures are so small he could not distinguish it.

MR. TAIKEFF: Your Honor, the witness has said he doesn't have a recollection. I am trying to refresh his recollection, if that's possible. If it is not possible, I will accept his answer; but I would like it to be his answer.

A I recollect the vehicles being there, and that's obviously vehicles but I can't recollect that individual vehicle.

MR. TAIKEFF: That's all I wanted to know. Thank you very much, sir.

MR. CROOKS: We have no redirect, your Honor. We ask the witness be excused.

THE COURT: You may step down.

(Witness excused.)

MR. SIKMA: Mr. Coppinger, David Coppinger.

DAVID J. COPPINGER,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. SIKMA:

Q Would you please repeat your name to the jury?

A My name is David J. Coppinger.

Q What is your occupation?

A I am a Special Agent for the Federal Bureau of Investigation.

{1195}

Q And where are you assigned to duty?

A I am assigned to Milwaukee, Wisconsin.

Q And do you recall where you were on the 29th of June, 1975?

A Yes, I do.

Q Where was that?

A At the Pine Ridge Reservation.

Q O.k. Do you recall being in an area to the southwest of the Jumping Bull residence on the Pine Ridge Indian Reservation?

A Yes, I do.

Q And what were you doing there at that particular time?

A We were conducting a search of what was called the escape route of the individuals who we felt were involved in the shooting of the agents; and we were searching this escape route for any evidence that we might find which would identify the people who ran this route.

Q Could you tell me whether or not there was a culvert in this area?

A Yes, there was.

Q And approximately how far, or where was this culvert located?

A Well, the culvert was actually, as I recall, a cattle tunnel where cattle passed underneath the highway, from one pasture to another, and going out away from the crime scene area up toward the hills, we conducted this search away from, {1196} going the direction that the individuals were involved fled.

Q Is that -- would that be to the west and to the south?

A It was a southerly direction, as I recall.

Q Did you personally find anything along that route?

A Yes, I did.

Q And what was that?

A I found a four quart water canteen approximately 80 yards in, into the cow pasture from the cattle tunnel.

Q I will show you what is marked as Government Exhibit 17 for identification, and ask you whether or not you have ever seen this before?

A (Examining) Yes. This is the water canteen that I located, as I stated, about 80 yards in from the cattle tunnel where the individuals were believed to have fled.

MR. SIKMA: Your Honor, I would offer into evidence Government's Exhibit 17.

I would state that the Government expects to connect this up in later testimony, but this witness is taken slightly out of order.

MR. TAIKEFF: Your Honor, based on that representation, there will be no objection.

THE COURT: Has it been marked 17, did you say?

MR. SIKMA: Yes, your Honor.

THE COURT: Exhibit 17 is admitted on condition that it be connected up.

{1197}

(Plaintiff's Exhibit No. 17, having been previously duly marked for identification, so offered in evidence, was received.)

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

MR. TAIKEFF: May I have just one moment, your Honor, for a possible document to be brought into the Court?

THE COURT: You may.

(Counsel confer.)

{1198}

BY MR. TAIKEFF:

CROSS-EXAMINATION

Q When you first entered this area, how did you enter it?

A Are you referring to the pasture?

Q No. The general area.

A Pardon?

Q The general area. And there is a map behind you that you might find useful in giving your answer.

A Could you clarify. You mean the reservation itself or where I found this piece of evidence?

Q I'll make it easy for you, for all of us. Where were you at 10:00 o'clock on the morning of June 26th, 1975?

A I was in Milwaukee, Wisconsin.

Q And when did you get to the reservation?

A I arrived approximately 2:30 A.M. on June 27th.

Q Then did you go to the area known as the Jumping Bull Hall area?

A That's correct.

Q When you first arrived at the Jumping Bull Hall area, how did you enter that area?

A I myself and several other agents actually went to an area we know as tent city. Now initially we went by automobile.

Q Initially?

A Yes.

Q How did you enter that area off the public highway?

A We walked.

{1199}

Q Would you be kind enough to turn around and take a look at the exhibit behind you. There is a pointer behind you right now and show us how you entered that particular vicinity off the public highway.

A On my feet, sir?

Q If you are more comfortable that way.

A Well, actually we left the vehicles out on the highway, or pulled them off onto a side road or area like this (indicating).

Q That's on Highway 18?

A That's correct.

Q Above the center top of the chart?

A I think before, where we left, the particular car I came in would not be on this diagram. In other words, it would be back up the highway a ways.

Q All right.

A We actually came in and come over what we now know as tent city, coming through this wooded area right here (indicating).

Q So you went directly in the road to the tent city area?

A I wouldn't say it was the most direct route, but we did go to tent city.

Q Do you see the area in the center of the chart which is indicated by several things, including the word "residences"?

A Yes. Right here (indicating).

{1200}

Q Did you ever go to that area on that day or any day after that?

A As I recall, after we had discovered SA Williams' car here, as is shown here near tent city, there were some search warrants executed in this area. Then, as I recall, when we left this area with that evidence that we secured there, we did come back up this road (indicating) and it was at that time when I first saw these residences here that you speak of. Went on out the usual route.

Q I gather then from the way your pointer moved that you reached that Y intersection where the letter "P" is written in by hand?

A This "P" here?

Q Right there. Yes.

Did you go through or pass that intersection?

A This particular area? I really don't recall whether I come up the road -- in other words, again, I was walking, as best I recall, again, our car was, as I recall it, back out this way. The one I came in on. This area here was not particularly, the terrain is not that difficult to get over. I may have necessarily hit this Y. I don't recall hitting it particularly any particular time.

Q Would you be kind enough to resume your seat.

Now on direct examination you said you went to tent city because, I'm not quoting you but I'm describing what I {1201} believe was your testimony in substance, to investigate people whom you believed were involved in the shooting of the agents, is that correct?

A I recall --

Q Is that the effect of what you said on direct?

A On direct. I wouldn't quote that escape route.

Q Did you describe the people?

A I said individuals I believe.

Q Or individuals whom you believed used that escape route as people whom you believed to be involved in the shooting of the agents?

A That's correct.

Q Now generally speaking, upon what was that knowledge or function based?

A Well, this was obviously based on information relayed to me from those agents who were on the scene the day before.

Q Since the 26th FBI agents had been in and around that area in the course of their official duties, is that not correct?

A Well, I can only, I arrived on the 27th.

Q People spoke to you, did they not?

A That's right. I was given information.

Q By other agents?

A That's correct.

Q You're not accustomed to other agents giving you false information, are you?

{1202}

A No.

Q So you were operating under the assumption, were you not, that they were giving you information which was gathered in connection with their official work, weren't you?

A That's correct.

Q And they told you something about what their beliefs were up to that time, did they not?

A They told me what they had firsthand knowledge of. In other words, these individuals had been followed through this cattle tunnel on up into the hills, across this cow pasture the day before.

Q But they told you what the investigation was about generally, didn't they?

A Well, obviously I knew what that was.

Q Don't say obviously. I'm asking you whether they told you something about what the subject matter of your work was that day.

A Well, I knew that before I left Milwaukee. Two agents had been shot in this area.

Q And did they, did they give you any information? Did they discuss with you up to that point what they believe to be the case?

MR. SIKMA: Your Honor, I'd object to this as irrelevant, beyond the scope of direct examination and also totally irrelevant. The question and statement were merely {1203} preliminary to indicate the state of mind of the witness as to why he was in this specific and particular area and it was very limited in scope, Your Honor.

MR. TAIKEFF: Your Honor, I think it was rather substantial in scope and I'll exploring the basis for his state of mind. It was offered by the government on direct, otherwise I would not be questioning him this way.

THE COURT: What was offered by the government on direct examination?

MR. TAIKEFF: His statement that he was going to investigate the escape route of the individuals who they believed to be involved in the shooting of the agents.

THE COURT: Very well. Proceed.

Q (By Mr. Taikeff) Now did you speak with other officials at the Federal Bureau of Investigation prior to the time you reached the assumption or conclusion which you testified to?

A I spoke to other agents; yes.

Q Did you speak to Agent Adams?

A I, on June 27th? Prior to the time I went into tent city are you asking?

Q Well, you put two facts in there. Let's just say prior to the time you went into the tent city, whether it's on June 27 or any other time prior to the time you went into tent city.

A I don't recall speaking to Agent Adams.

Q And can you say whether or not you did or not at all?

{1204}

A Pardon me?

Q Or your memory is blank?

A I said I do not recall speaking to Agent Adams on the 27th of June.

Q How about on the 26th?

A I did not speak to Agent Adams on the 26th.

Q How about on the 25th?

A No.

Q Can you name any agent you spoke to on any of those three days?

A I could.

Q Tell us the names.

A I spoke to Agent Dale Miller. The agents that you've asked me about --

MR. SIKMA: Your Honor, I would object to this. There is absolutely nothing of relevancy here whatsoever.

THE COURT: Objection to the question is sustained. It's too broad as to whether he talked to any agents.

MR. TAIKEFF: Before he went into tent city. I just want to know the names of the agents who gave him information upon which he based the statement which he made in his direct examination.

THE COURT: Very well. I will allow that question. But that wasn't the question asked.

MR. TAIKEFF: I stand corrected, Your Honor.

{1205}

A You want the name of the agent who relayed the information there was such a place existed as tent city?

Q (By Mr. Taikeff) No, sir. That's not my question.

A Well, the agent I spoke to on the 25th and 24th of June and the 26th were all in Milwaukee, Wisconsin, obviously, because I was not not on Pine Ridge Reservation until June 27th. In the early part. Dawn as I recall of that morning.

Q Let me take you back so you'll understand the origin of my question. On your direct examination, in response to a question by the government, you indicated, perhaps not in these precise words, that you went there to investigate the so-called escape route those individuals who we believe to be involved in the shooting of the agents. Now I'm trying to find out from you what was the basis of your belief by asking you who gave you information which brought about the belief that you have told us about in your direct examination. Do you understand what I'm looking for?

A The agent, I cannot recall his name that actually, you're asking me when I arrived at the Pine Ridge Reservation who gave me information? Let me clarify something.

When I found this piece of evidence, Exhibit 17, the canteen, this was on June 29.

Q All right.

A June 27th, I spent the day basically at tent city searching that area pursuant to a search warrant.

{1206}

Q Okay.

A The escape route, as I recall, we did not conduct that search of that escape route actually until June 29th because there was a lot of other work closer in to the crime scene that was being conducted on the 27th and 28th.

The 29th we got out to the cattle tunnel, crossed the cow pasture, as I mentioned, and this is when I found the canteen.

Q Is it accurate to say the moment before you embarked upon your search of the so-called escape route you believed that you were checking on the escape route of individuals who had been involved in the shooting of the agents on June 29th? Yes or no?

A Yes.

Q Now I want to know the names of the people who provided you with the information which led you to that belief.

MR. SIKMA: Your Honor, this question has been asked and answered. He indicated, I believe.

MR. TAIKEFF: That's correct. It's been asked but it's never been answered. It's been asked three or four different times and I can't seem to get an answer out of this agent.

THE COURT: Are you able to answer the question.

THE WITNESS: Your Honor, I don't recall the agent who was really in charge of telling us how to conduct the sweep {1207} of this escape route this moment. The information, I'm sure, as Counsel has suggested, may have come from, as he indicated, Special Agent Adams who was on the scene the day of the crime and a few others that were on the scene who have or possibly will be testifying.

Q (By Mr. Taikeff) Were you asked or was it suggested to you in connection with your official work by any other agents of the FBI that you look for a red pickup truck? Yes or no.

A Counsel has to ask -- you mean on what date are we talking about?

Q At any time that you were there doing investigation in connection with this case.

A I can't recall that we -- I was instructed to look for a red --

Q Was there talk about a red pickup truck amongst the fellow agents?

MR. TAIKEFF: And I hope the government will not throw a sional to the witness.

MR. SIKMA: Your Honor, I would object. This is completely --

THE COURT: Objection sustained. This goes beyond the direct examination.

MR. TAIKEFF: I have no further questions.

THE COURT: You may step down

Just a moment. Do you have any questions?

{1208}

MR. SIKMA: No further questions.

THE COURT: You may step down.

MR. SIKMA: Your Honor, could I make an offer of evidence of a couple of items which were brought up during the course of the day at this time?

THE COURT: How much time do you intend to take?

MR. SIKMA: Just long enough to read off the list of items, Your Honor.

THE COURT: Very well.

MR. SIKMA: Government Exhibit 34AA which is the AR 15, Government Exhibit 36A which is a shotgun, Government Exhibit 33A is a .44 caliber Luger which was identified by Wilford Draper. 36A is a shotgun which I believe Counsel for both sides have agreed to stipulate was the shotgun which was owned by Special Agent Coler which was with him on the 26th of June, 1975, at the time he met his death and Government Exhibit 34AA is an AR 15 which is not a firearm which, is one which was both identified by Anderson and also identified by Wilford Draper. 36A, or, excuse me, 33A was also identified by Anderson.

MR. LOWE: No objection, Your Honor.

THE COURT: 33A, 34AA, and 36A are received.

The court is in recess until 9:00 o'clock tomorrow morning