

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

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**CR NO. C77-3003**

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**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**  
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**VOLUME XIX**

**Pages 3929-4196**

{3929}

MONDAY MORNING SESSION

April 11, 1977

Whereupon, the following proceedings were had and entered of record on Monday morning, April 11, 1977 at 9:05 o'clock, A.M., without the jury being present and the defendant being present in person:

THE COURT: I believe on Friday I had reserved ruling on, what's the number of that exhibit, Mr. Hanson, 197?

THE CLERK: 194, Your Honor.

THE COURT: 194. There were -- do you have it in front of you?

(Clerk handing Judge Exhibit 194.)

THE COURT: The part of 194 which was offered was the beginning of a sentence on the bottom of page 3, and then the first three paragraphs on page 4 excluding the last paragraph. There are only four paragraphs that appear on page 4. That portion of Exhibit 194 is admitted.

Are there any other matters that should be taken up before the jury is brought in?

MR. TAIKEFF: Yes, Your Honor.

THE COURT: You may proceed.

MR. TAIKEFF: I'm wondering if it would be possible for counsel for the defense to approach to advise Your Honor of certain matters concerning witnesses and their whereabouts.

THE COURT: You may.

{3930}

MR. TAIKEFF: Because I believe some course of action may be appropriate after the information is given.

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

MR. TAIKEFF: Your Honor, yesterday I interviewed the father of Myrtle Poor Bear and one of her sisters, both of whom arrived sometime within the twelve hours before I interviewed them. They both independently informed me that Myrtle Poor Bear has been living at home in Allen, South Dakota and the saw her at home just before they came up here.

I am reporting that to Your Honor in the event that she is produced here today because it seems to me that it was sometime in the latter part of last week that the marshals office was notified by Your Honor that she might be arrested as a material witness.

THE COURT: I think that was Friday.

MR. TAIKEFF: Yes. And I would imagine that under the circumstances they should have taken immediate action of one kind or another. And by Sunday she apparently was still home. That makes a total of at least three people and possibly four people who have advised us that they have seen her in and around Allen, South Dakota throughout the preceding week.

Now, in addition to Your Honor eventually notifying the marshall service that she was to be arrested as a material witness there was also the obligation of the marshall service, {3931} as I understood it, to find her or stay in touch with her because she had earlier been declared a material witness. And Mr. Warren personally advised me that they had lost contact with her as of a week ago yesterday. That would be the 2nd, as of the 2nd of April I don't know what steps they took to make sure that they knew where she was or that she stayed in touch with her, and I don't know that any inquiry should be made at this particular time. But I'm telling Your Honor

what I know and what I've experienced in the past week as soon as I learn things on this subject in the event that there may be the necessity to ask Your Honor for a hearing. I'm only doing this to protect our position and to make an accurate and complete record.

THE COURT: I am not sure what authority you are referring to when you say there is an obligation of the marshal service to remain in touch with a material witness.

MR. TAIKEFF: Well, she was supposed to keep in telephonic contact with the marshal service. And sometime early last week I went to see Mr. Warren to make inquiry about her appearance here because we were getting close to the time when we thought we would call her as a witness. And he informed me that the last contact they had had with her was on the preceding Sunday, which would be April 2nd.

THE COURT: This is a requirement on her part.

MR. TAIKEFF: This is a requirement on her part.

{3932}

THE COURT: Right.

MR. LOWE: You would think as a term of her being released on her personal recognizance.

THE COURT: That's right. I'm not sure that that imposes any additional duties on the marshal service except to receive a telephone call.

MR. TAIKEFF: It may be that that is true

THE COURT: The telephone communication.

MR. TAIKEFF: The telephone communication. I wasn't necessarily pressing the point.

THE COURT: The reason I raise the question is because I am not just aware of anything in the statute that would require the marshals to monitor the whereabouts of a material witness. It seems to me that's the purpose of the bond.

MR. TAIKEFF: Well, in any event there was some conversation with Mr. Warren in the course of that week from which I received information of the following kind: That she's not anywhere to be found. So apparently that's a reflection of some effort on the part of the marshal service to locate her. I say apparently because I didn't make any specific inquiry.

THE COURT: I don't know.

MR. TAIKEFF: And she's apparently been in Allen, South Dakota all this time.

In any event I would imagine that she should be here {3933} today under the circumstances because they had a warrant for her arrest as of Friday. I don't know what time of the day that

occurred, but even if it occurred towards the end of the day they could have arrested her over the weekend and brought her here. And I gather that she's not here.

THE COURT: When did the warrant issue for --

THE CLERK: Friday, Your Honor.

THE COURT: Pardon?

MR. HANSON: It's dated April 8th.

THE COURT: Was it Friday afternoon? My recollection is that it was Friday afternoon.

MR. TAIKEFF: I seem to recall the same thing, Your Honor.

MR. ENGELSTEIN: I got the information about 2:30.

MR. TAIKEFF: The other thing is that it was necessary for three witnesses to be produced with writs. Those witnesses are Ricky Little Boy, Marvin Bragg and Marion High Bull. I'm wondering if Mr. Ellison can inform us if they're within a reasonably close distance.

MR. ELLISON; Your Honor, I was informed this morning that Mr. Bragg and Mr. High Bull are in county facilities somewhere in this area. I don't know exactly where. And my understanding is that the marshal service can have both of these gentlemen present in Fargo by the latter part of the day. And we have instructed the marshals to bring them here {3934} as quickly as possible.

And I'm not quite, if they're here at the end of the day, it may seriously interfere with our expected order of call of witnesses and we would request that they be brought here as quickly as possible.

I don't know how far from Fargo they are. I was just told they were in county facilities in this area.

THE COURT: Well, have you made inquiry of the marshals?

MR. ELLISON: Not further inquiry than that because court was starting. I can do that at this time.

THE COURT: Very well.

MR. TAIKEFF: I have one other point that I want to advise Your Honor of. We expected the sister and the father of Myrtle Poor Bear to arrive at 2:45 on Saturday. These are arrangements which had been made with them by the telephone and we told them that they would be picked up at the airport and taken to their hotel. And exactly that time on Saturday I received a collect telephone call from Elaine Poor Bear, the sister, the sister who actually finally showed up on Sunday. And she said I'm calling to let you know that I'm not on my way to Fargo but that I'm still in South Dakota.

And I asked her why, and I will tell Your Honor what she said, not suggesting that she is accurate about it, only what she told me. She said that the FBI came to her house.

I then questioned her whether it could have been {3935} deputy United States marshals and she said, "Well, it could have been." I'm not sure whether they were FBI or marshals, but she seemed to understand the difference between the two. She said that he came to her house and told her and her father that it was not necessary for them to come to Fargo prior to Monday; that they were subpoenaed and that they didn't have to come over the weekend.

I told her that that was incorrect. I didn't know who these people were who spoke with her. I don't know what the basis of their inquiry was but that we requested her appearance before the time of giving testimony because we want an opportunity to interview in some detail. And she then promised that they would make an effort to get there the following day, Sunday. And indeed appeared the following day.

Now, I know nothing of the incident which occurred which was the basis of her collect phone call and statement. I am merely reporting to Your Honor and placing upon the record the experience I had at 2:45 P.M. on Saturday afternoon.

THE COURT: What happened to those two investigators that were required for the work on the reservation? I would assume that they should have completed the interview down there.

THE TAIKEFF: The existence of Elaine Poor Bear as a potential witness was not known to us until Jeanette Tallman came here and had her interview with me, not interview for the {3936} purpose of getting the information, but interview for the purpose of calming her down.

Your Honor may recall that when we were in chambers with Ms. Tallman I assured her that she should relax because the information she had given me produced a new potential witness; and that this new potential witness might be much more valuable than she on the very same subject. So I didn't know about Elaine Poor Bear's knowledge until either Thursday or Friday of last week.

THE COURT: Very well.

MR. ELLISON: Your Honor, I have some further information concerning Mr. High Bull and Mr. Bragg. I just spoke to Mr. Warren and he informs me that Mr. High Bull will be here by 11:30, and that Mr. Bragg will be here by 3:30. And that the reason for the two different times is a shortage of personal as far as U.S. marshal service is concerned. So that the same individuals will have to get Mr. High Bull and then go and get Mr. Bragg.

MR. TAIKEFF: Just on the suggestion of Mr. Hanson, a word to Your Honor to explain why we started a little later today. I received a call from Mr. Hanson that a witness by the name of Gregory Dewey Clifford had shown up pursuant to a subpoena and that he appeared to be very upset. And Mr. Hanson thought that I should confer with him for a moment and calm him down. And I went into Mr. Hanson's office and spent a few {3937} minutes with him assuring him that he should be calm and that he would be called as a witness sometime later in the day. just wanted that explanation because of the late start.

THE COURT: Very well.

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

{3938}

THE COURT: Is Counsel ready for the jury?

MR. TAIKEFF: Yes.

MR. HULTMAN: Yes, Your Honor.

MR. TAIKEFF: Your Honor, there are just two matters that I'd like to take up at this particular time concerning the appearance of the witnesses. I don't know whether it's clear to the government, I would like to make clear that the Special Agents Wood and Price who were on the tentative list should now be considered on the actual witness list and their appearance is required.

In connection with our assumption of the obligation of notifying the government as to our witnesses, we now have what we believe to be the final list of witnesses and with Your Honor's permission I would like to advise the government in open court on the record.

THE COURT: You may.

MR. TAIKEFF: Other than the special agents, we will call, and this is in approximate order of call which is a fact the government asked us to supply them with, William Muldrow, M-u-l-d-r-o-w, Marion High Bull, Marvin Bragg, Gregory Dewey Clifford, Robert Ecoffey, Marvin Amiotte, A-m-i-o-t-t-e, Florence Fire Thunder, Jeanette Tallman, Madona Slow Bear, Rickey Little Boy, Theodore Poor Bear, Elaine Poor Bear, Myrtle Poor Bear and Norman Brown.

Oh, yes. As mentioned last week, a Subpoena was {3939} served upon Special Agent Zigrossi of the FBI for his appearance and for him to bring a certain object with him, and as far as we know that the Subpoena was served and we have not heard from him. As far as we know he's not in Fargo. Perhaps the government would be in a position to make some inquiry about that.

MR. HULTMAN: I don't know, Counsel. But I shall. The list you've just given me, it might be Friday before you got to him from the list I see now, about 30 witnesses. Would you kind of give me some indication as to which order, which group is going to come first, like starting with the first witness this morning.

MR. TAIKEFF: I believe, Your Honor, I made the statement in such a way as to indicate the order in which the witnesses will be called from right now until we rest our case.

MR. HULTMAN: You didn't mention the eight agents that we've talked about. Are they coming first or at the end?

MR. TAIKEFF: Neither. They come where they fit in the logical sequence.

MR. HULTMAN: Who is going to be the first witness today, Counsel? Are you willing to indicate that at least?

MR. TAIKEFF: James Eagle who's name was previously given to you.

MR. HULTMAN: Just trying to get some kind of order here.

{3940}

THE COURT: The jury may be brought in.

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

MR. TAIKEFF: Your Honor, the defense recalls James Eagle.

THE COURT: Very well.

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

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

MR. HULTMAN: My reason for approaching the bench is in lieu of my comments and observations when he was called. I don't want to be placed in a posture again today not knowing what's liable or could possibly follow. My only question, Your Honor, and I believe Counsel, I believe, evidently is here that represents Mr. Eagle.

MR. RODENBURG: Yes. I'm here.

MR. HULTMAN: I don't want to be placed, if a question were asked and he takes the Fifth Amendment, if Counsel knows that ahead of time it's not something that I think would be very inappropriate and place the government in a posture that I think we ought to know about at least now.

MR. TAIKEFF: I think Mr. Hultman is entitled to know whether Counsel for the defense have any expectations that he will take the Fifth. I also would hope that Mr. Hultman would {3941} also realize that we're uninformed of such a possibility. I would have placed it upon the record for benefit of Counsel for the government. But to eliminate any ambiguity, there is no expectation whatsoever that this witness will take the Fifth Amendment either on direct or cross.

I intend to make inquiry of him in two areas, as I think I've already indicated at an earlier bench conference; namely, was he there on June 26th. I expect his answer to be no. I will elicit some detail from him as to where he claims he was. I then expect to make inquiry of him concerning whether or not he made any statements to certain individuals or in the presence of certain individuals that would constitute either an admission or a -- I expect he will say no and he will explain the very special instructions he was under concerning that particular subject and that will be the extent of his testimony.

MR. HULTMAN: On the basis of that, Your Honor, I would take the posture at this time that the testimony beyond the fact he was not there would be irrelevant because now the next, and it's going to be done, it's obvious from the witness list.

MR. HULTMAN (TAIKEFF): It would be irrelevant when he was spotted through a telescopic sight.

MR. HULTMAN: Wait until I get done.

I said beyond that issue that it's obvious to me from {3942} the list of witnesses you just read off that Counsel is then going to bring four people who have not been a part, or their testimony in any way been a subject of this trial who then make statements to the effect that this witness has made statements to them and I say that is totally collateral and has no relevancy of any kind, especially after Counsel has established that the witness is not there. From that point on we then get to hearsay pure and simple and collateral matters that have no relevancy.

MR. TAIKEFF: I think you should wait until the appropriate foundation.

MR. HULTMAN: I know, Counsel -- off the record you and I both know. You don't have to say on the record. I'm saying that's the only purpose you would call Marvin Bragg. That's the only purpose you would call three other witnesses on that list, because that's the only thing they have ever said or done or had any relevancy in anything to do with the matters here in this courtroom. You don't need to tip your hat. I'm stating on the record. I'm making the challenge at this particular time.

MR. TAIKEFF: I think it's premature, Your Honor. I think Mr. Hultman without intending to do so --

MR. HULTMAN: That's the only purpose for which this witness, beyond the fact that he's not there. The second part of the testimony that --

{3943}

THE COURT: At this point you may proceed and we'll see what develops.

MR. HULTMAN: Your Honor, could I at least be placed in the posture here, we don't, like I got with the witness from Denver, that the question is asked and the answers come in because a witness -- I'm not saying a witness is being coached but the witness volunteers matters that then place me in the posture of coming back and then we have to erase those particular matters. What I'm saying, I think if we're going to get into those matters I've just now indicated with a future witness that the government ought to have an opportunity to make a showing and its objection prior to the question coming in and answer being given.

THE COURT: I will simply lay down this requirement, that the question to the witness will not be in the form of an assertion of fact that is not a part of the evidence in the case.

MR. TAIKEFF: I would hope that with respect to the testimony of Bambi Sanchez that Your Honor is not suggesting that the question put to the witness was anything but the most nonleading question possible.

THE COURT: I don't remember what her testimony was off-hand.

MR. TAIKEFF: I think the question was, "What happened," and she started telling what happened.

{3944}

MR. HULTMAN: That's what I'm getting at.

MR. TAIKEFF: That was certainly no assertion of fact.

THE COURT: I had no reference to any particular witness. I'm simply stating that as far as this witness is concerned.

MR. TAIKEFF: There will be none.

THE COURT: Very well.

{3945}

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

MR. TAIKEFF: May I proceed with this witness, your Honor?

THE COURT: You may.

MR. TAIKEFF: Would your Honor deem it appropriate to advise the witness that the oath he took the other day is applicable at this particular time?

THE COURT: You have heard counsel, Mr. Eagle, state that the oath that you took the other day is applicable at this time, and that is a correct statement. When a person appears in a court proceeding and takes an oath to tell the truth, that oath is applicable throughout the appearance of that witness in that court proceeding.

THE WITNESS: All right.

MR. TAIKEFF: Thank you, your Honor.

Q (By Mr. Taikeff) Mr. Eagle, have you ever been convicted of a crime?

A Yes, I have.

Q And do you know the name of the crime with which you were convicted?

A Assault with a dangerous weapon.

MR. TAIKEFF: May I inquire whether the amplification system is working?

THE CLERK: It is on.

{3946}

Q (By Mr. Taikeff) Would you adjust the microphone so that you can sit back and relax?

You don't have to lean over into it, and try to speak up a little louder, please.

Would you repeat the name of the crime that you were convicted of?

A Assault with a dangerous weapon.

Q Was that in Federal Court?

A Yes, it was.

Q And are you presently in the process of serving that sentence?

A Yes, I am.

Q Is that the only crime you have ever been convicted of?

A Yes, it is.

Q Have you and I ever spoken?

A Yes, on two different occasions.

Q And where was that?

A At the Moorhead County jail.

Q And in the spring of 1975, you were accused of committing a crime, is that correct?

A Yes, I was.

Q In what month was it said you committed that crime?

A In -- well, there is three different crimes I was accused of committing.

Q Let's take them in the order in which the events supposedly {3947} occurred.

What was the first crime it was said you committed, and what was the date that it supposedly took place?

A On May 17th, 1975, I was accused of assault with a dangerous weapon, use of a firearm in the commission of a felony.

Q Is that the case from which your present sentence evolved?

A Yes, it is.

Q Did you go to trial on that case?

A Yes, I did.

Q And you were found guilty of one or more separate crimes?

A Just one. I was found guilty on both of them. I appealed, and they reversed one conviction.

Q Your conviction stood on the assault with a dangerous weapon?

A Yes, it did.

Q Now, were you bailed in connection with that first case?

A Yes, I was.

Q And you were permitted then to remain on the Reservation?

A Yes.

Q Which Reservation was that?

A Pine Ridge Indian Reservation.

Q Is that the place where you have always resided?

A Yes.

Q Look over your right shoulder at the chart which is Government Exhibit 71. Do you recognize the area that is shown {3948} on that chart?

A Yes, I do.

Q What is it?

A It is the area of Oglala.

Q What is it called or how is it known?

A It is the Pine Ridge Indian Reservation.

Q How about that particular area?

A Oglala area.

Q Just called the Oglala area. Any special name?

A Jumping Bull.

Q Jumping Bull, o.k.

Now, getting back to your involvement with the law in the spring of 1975, when were you first taken into custody in that first case, do you recall?

A No, I don't.

Q Was it shortly after the middle of May?

A Yes, it was. I am pretty sure it was.

Q And when did you have to make your second court appearance on that case?

A In July, the 9th.

Q Did you say a particular date in July?

A July, the best of my knowledge I think July 9th. I am not certain.

Q But at some time in the month of July?

A Yes.

{3949}

Q So between the time you were first charged and bailed in July, you didn't have to make any court appearances, is that right?

A I had a preliminary hearing.

Q And then the next court appearance was July?

A Yes.

Q O.k. Now, there was a second case that developed in your life, a second criminal case, is that right?

A Yes, it is.

Q And is that a case charging you and three other people with an incident that occurred on -- you tell us the date, if you remember.

A As I recall it was June 24th.

Q Can you name the other people who were charged in connection with that case?

A Kermit Thunder Hawk, Hubert Horse and Teddy Pourier.

Q Now, were you arrested in connection with the charges in that case?

A Yes, I was.

Q Do you recall the date that you were arrested?

A I am pretty sure it was in July.

THE COURT: You are going to have to speak up.

THE WITNESS: It was in July.

Q (By Mr. Taikeff) Is there any connection between your court appearance on your first case and your arrest in the second {3950} case?

A No, there isn't.

Q Where were you arrested in connection with the second case?

A I voluntarily surrendered.

Q I see. Were you ever tried in that case?

A Yes, I was.

Q And the result?

A I was acquitted on the charges.

Q Now, as far as you know, there was only one other case, criminal case against you?

A Yes, there was.

Q And just tell us the charges in connection with that.

A Murder, first degree murder.

Q The death of whom?

A Two FBI Agents.

Q Tell us whether or not you have ever had a trial.

A No, I didn't.

Q Now, when for the first time did you learn that your name was associated with the death of the FBI Agents on June 26th, 1975?

A It was two days, about two days after the incident happened.

Q And how did you learn that your name was associated with that incident?

{3951}

A It come out over the news, and I just -- I didn't know about it.

Q On June 26th, 1975, were you at the Jumping Bull compound?

A No, I wasn't.

Q What was the closest you came to the center of Government Exhibit 71, which is the residences, on June 26, 1975?

A The closest?

Q The closest any time between the beginning of the day, at 12:01 a.m., meaning just after midnight, all the way through the day until the end of the day at midnight again, the closest you came at any time to those residences in the center of the diagram.

A I would say about 15 miles.

Q Where were you?

A In Pine Ridge, South Dakota.

Q Were you indoors or outdoors?

A Indoors.

Q And did you know at that time that there was a warrant outstanding for you?

A No, I didn't.

Q Specifically where were you on that day? You have told us the town, you have told us you were indoors.

A I was at my grandmother's house.

Q What is her name?

A Gladys Bisenet.

{3952}

Q Now, you went to court -- you believe the date is July 9th, I will refer to it as July 9th from this point on -- with or without a lawyer?

A With a lawyer.

Q And what is that lawyer's name?

A His name is Marvin Amiotte.

{3954}

Q Where does he have his offices?

A He has two offices. One's in Pine Ridge, South Dakota and the other one's in Mission, South Dakota.

Q Now, when for the first time were you arrested and charged with the death of the two agents?

A It was on July 27th. In the early morning.

Q And where were you at that particular time?

A I was in Pennington County Jail.

Q That's --

A In Rapid City

Q That's the local jail in Rapid City, South Dakota?

A Yes, it is.

Q Now, you told us that on your first case you had been bailed?

A Yes.

Q And that you had to make a court appearance on the 9th. Did you show up for that court appearance?

A Yes, I did.

Q Now, what was the reason you were in the Pennington County Jail towards the end of July, 1975?

A That I was charged with the two robberies, robberies of the incident that arose from June 24th.

Q Were you bailed on that case?

A No, I wasn't.

Q Was bail set?

{3955}

A Yes, it was.

Q How much?

A 25,000.

Q Were you able to make the bail?

A No, I wasn't.

Q Is that the reason why you were in custody?

A Yes, it is.

Q Now, did you ever have any conversation with Mr. Amiotte concerning the fact that your name had come up in the presence as a person possibly involved in the death of the FBI agents?

A Yes, it did.

Q What was the nature of that conversation?

MR. HULTMAN: Well, I object to that clearly as being hearsay, Your Honor.

MR. TAIKEFF: Your Honor, I'm not offering it for the truth. I'm offering it to show that the declaration was made.

THE COURT: You may answer the next question. The last question rather.

A Yes. We did talk about it and he said, you know, that there will be a lot, you know.

THE COURT Just a moment. Question was: What was the nature of the conversation.

A It was about -- the nature was keeping silent.

MR. TAIKEFF: May I pursue that, Your Honor?

THE COURT: I didn't hear his answer.

{3956}

MR. TAIKEFF: He said it was in the nature of keeping silent.

MR. HULTMAN: Well, again I object to this as one, as having no probative value; two, whatever the nature of the conversation between the client and his lawyer, I clearly don't believe that has any relevancy here. There's been no showing of any foundation, Your Honor. No probative value.

THE COURT: I will permit you to pursue it.

MR. TAIKEFF: Thank you, Your Honor.

THE COURT: I'll permit you to ask another question at least.

MR. TAIKEFF: There's not much more to it. I just want to get to a specific or two.

Q (By Mr. Taikeff) It it correct for me to say that he gave you some kind of a warning?

A Yes, he did.

Q And is there any doubt in your mind that at that time he knew about what was in the press concerning this?

A Yes, it is.

MR. HULTMAN: This again calls for an assumption and --

THE COURT: That objection is sustained.

MR. HULTMAN: Leading and everything else.

Q (By Mr. Taikeff) What did he tell you concerning keeping quiet?

{3957}

MR. HULTMAN: And again I raise the same objection, Your Honor.

MR. TAIKEFF: I think Your Honor has already ruled on that objection.

THE COURT: Has it been brought out where and when the conversation was held?

MR. TAIKEFF: I'll be glad to do that.

Q (By Mr. Taikeff) Would you tell us where you had this conversation with Attorney Amiotte?

A In a federal building in Rapid City.

Q All right now, what did he tell you on the subject of keeping quiet?

A He told me that my name was put in the paper quite a few times and that it would be a great possibility that the Government would put somebody in the cell with me and that he said don't say nothing about it.

Q Did he say anything to you about discussing any news reports with anybody?

A No, he didn't. He just asked me to remain silent.

Q Now, do you remember the approximate date or the exact date hen he gave you this instruction?

A It was on the same day that I turned myself in.

Q Can you give us a date for that?

A Well, July 9th.

Q Okay. In other words, the day that you had to go to court {3958} on your first case is the day that you surrendered yourself for the second case?

A Yes.

Q The incident, alleged incident of June 24th?

A Yes.

Q Okay. Then you remained in the Pennington County Jail?

A Yes.

Q From that day until at least the FBI agents came to arrest you on June 26th -- I'm sorry, July 26th, 7th or 8th, whatever date it was?

A 27th. Yes, I was in custody.

Q Do you know the names of the agents who came to arrest you?

A No, not at this minute. No, I don't.

Q Do you know the names of any of the agents who came to arrest you?

A No.

Q Between the time Attorney Amiotte gave you whatever instruction or advice he gave you and the time the agents came to arrest you did you have any conversation with anyone concerning the death of the agents?

A There was, at that time there was quite a bit of talk. But like I say I kept it to myself.

Q What was the reason for doing that?

A For one because they're, they was looking for the reason.

Q I can't hear.

{3959}

A For one, they was looking for a good reason to charge me with it and that, you know, it was just something I didn't care to talk about.

Q Did you ever meet an agent by the name of Jacob --

MR. HULTMAN: Now, again, Your Honor, I object. The foundation that this is going to be is clearly leading. I have no objection again to ask this witness whether or not he remembers any agent, and so far that question has been asked and been answered, and I don't want anything leading so that the witness will be given a specific name of some kind.

MR. TAIKEFF: Your Honor, in spite of the fact that I'm entitled to lead for a foundation I will accept Mr. Hultman's suggestion.

MR. HULTMAN: Well, that's way beyond any foundation, especially in light of the foundation that he hasn't remembered any names of agents.

MR. TAIKEFF: No, Your Honor. He said he didn't remember the names of agents that arrested him.

Q (By Mr. Taikeff) Do you know the names of any FBI agents who had any contact with you in connection with this case?

A Yes, I do.

Q Tell us the name or names.

A Gary Adams.

Q Beg your pardon?

{3960}

A Gary Adams.

Q When did you meet Gary Adams for the first time?

A It was around the middle of August.

Q Where did that meeting take place?

A It was in the Pennington County Jail.

Q And did you call for him to come and see you?

A No, I didn't?

Q Was he alone when he appeared?

A No, he wasn't.

Q How many people were with him?

A There was one other agent.

Q Do you know the name of that agent?

A No, I don't.

Q Did you have any conversation with Mr. Adams?

A Yes, we did.

Q Tell us about that.

A Well, he come in and he asked me to sit down.

MR. HULTMAN: Again, Your Honor, I object on the grounds of relevancy.

THE COURT: Counsel have to approach the bench. I do not see the relevancy in that question.

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

MR. HULTMAN: Your Honor, my objection is on the grounds of, first of all, they're attempting to show that there {3961} has been no discussions because Amiotte has told him not to say anything to anybody. Now, they're turning around and they're trying to indicate that there's some discussions of some kind and I fail -- my objection is on the basis --

MR. TAIKEFF: I'm not trying to show there is a discussion.

THE COURT: What I am concerned about is what relevancy of -- you've asked him to go into his conversation with Adams. I'm concerned about what the relevancy of that conversation is.

MR. TAIKEFF: The relevancy, Your Honor, is that Adams said to him we want your help. Well, I'll tell you the entire thing. He said, "You don't have to say anything. I just want you to listen to what we have to say." And he said, "All right, I'm listening." And he said, "We want your help in this particular case and we know that you were not there that day. But if you do not help us we will see to it that you will be charged with the murder of the agents." He refused to assist and he was charged with the murder of the agents.

MR. HULTMAN: Well, I object to that on the grounds that it -- no relevancy of any kind and it's totally collateral.

MR. LOWE: Habits and practices, Judge, under the Federal Rules of Evidence that at least --

THE COURT: I'm not sure that that's admissible under habits and practices, but there is the testimony in the case {3962} that he was identified; and now the fact that Adams says -- that if Adams told him that he knows he wasn't there.

MR. HULTMAN: Well, now I want to now make very clear, and I think that counsel for the witness ought to be here, he's now under oath.

THE COURT: He's right behind you.

MR. HULTMAN: He's now under oath. There's no question in my mind at least what I think the results of a rebuttal witness is going to be. He's going to say that that is not true.

MR. TAIKEFF: I understand that.

MR. HULTMAN: That man is then placed in a position, I want to make it very clear, of giving testimony on the record under oath which is the basis for perjury. I want that made very clear here at the bench.

MR. TAIKEFF: Your Honor, the second meeting which the witness testified took place between himself and myself, was in the presence of his counsel who is presently at the sidebar, and indeed was at the request of his counsel. Because one of the things counsel was concerned about was what were the prospects for the prosecution of his client as a result of testifying, and one of the matters we discussed, and I can only assume that his counsel is well informed on, is that Mr. Hultman had said at the sidebar, the first time we came to the sidebar on this subject last week, that the Government {3963} would not be prosecuting this witness merely because he testified, but only if they could have proof that he testified falsely.

MR. HULTMAN: That's the point I'm now raising.

MR. TAIKEFF: And I reported to the witness's counsel, and I said all I want from your client is the truth as he knows it. And if he tells the truth he should have no fear of testifying; that he should know that like any other witness when he testifies. He testifies under oath and if he does not tell the truth he exposes himself to a perjury prosecution.

I assume that counsel for the witness has thoroughly discussed this with his client and advised his client of the absolute necessity for his own protection, and in the name of justice to tell the truth.

MR. HULTMAN: All I want to do is raise the issue, Your Honor, so that I don't, later get accused that I said one thing and did another,

My basic objection is still the same, Your Honor. One, there was no testimony of any kind in the Government's case that this witness was present at the day of the events happening. Not one scintilla --

THE COURT: As I recall Mr. Coward testified that he was. Wasn't that brought out?

MR. HULTMAN: No, no, no. Not one scintilla of evidence in the Government's case. It is only when the {3964} defense brings a witness, that he's put on the stand and says he observed whom he thinks to be Jimmy Eagle. It's only then that we now start to establish a case of some kind that a phantom was there, and now we set up and we attack. But, yes, absolutely ---

MR. TAIKEFF: Oh, Mr. Hultman, I must beg to differ with you. I would like to remind Mr. Hultman that in your case Coward testified that on that afternoon he did not have time to do an in depth interview, but on the way back in the car Stoldt told him that he spotted Jimmy Eagle.

MR. HULTMAN: No, no. I would object to that, it being in the record as far as the Government's case. Absolutely not.

MR. TAIKEFF: That is how he explains the fact that after having testified that he didn't see the guy for a long time, namely until September when I showed him the one page 302 which was indicated June 28th. He said, "Oh, yes." In fact, he said two things. He said that was a result of a casual conversation on the way back in the car, and he claimed that that date had to be wrong. That it wasn't the 28th. Let me make it clear which date I'm talking about. The date of the interview was not the 28th, he said, that was a typographical error. That it should have read June 26th. And he said that was a result of a casual conversation in the car that Stoldt reported to him that he identified Jimmy Eagle. {3965} That is as clear in my memory as anything.

MR. HULTMAN: All right. I would go to the record to find out what it shows. I'm not, I'm not, and I'm not saying counsel is not accurately quoting the record. I think it's honestly and fairly in his mind,

MR. TAIKEFF; I'm certainly trying.

MR. HULTMAN: And I had, I admit to that without any question. What I'm saying, one, is I don't think that that's what the record shows. I don't think that Jimmy Eagle's name appears in the record specifically. Even if it does, and my memory is not that good, I confess I might possibly be wrong, if it does it only appears there specifically as a cross-examination question of counsel. Does not appear there as part of the Government's case in any way.

MR. TAIKEFF: But evidence is evidence whether it comes out on cross-examination or whether it comes out on direct. It's a Government position, elicited from a Government agent who was an eye witness.

MR. HULTMAN: But the postulate was --

THE COURT: Just a moment. You say evidence is evidence. Certainly that's true, but what is this evidence, what does this evidence seek to prove? What are you attempting to prove by this evidence?

MR. TAIKEFF: Of this witness? Is Your Honor asking me about this particular witness?

{3966}

THE COURT: About whether or not this witness was spotted on the afternoon of the 26th.

MR. TAIKEFF: Well, Peltier was presumably spotted by the same person, but he didn't remember it for a little more than two months when he was reinterviewed. He then remembered that he not only saw Jimmy Eagle of whom he was fairly positive, as indicated in the paragraphs which Your Honor allowed into evidence this morning, but also recalled that he spotted Leonard Peltier.

Now, that entire sighting episode is legitimately suspect and I think there's enough evidence in the record to make the jury suspect of that particular evidence. So this witness's testimony about the fact that he never came closer than fifteen miles that day certainly is relevant to that particular aspect of the case.

MR. HULTMAN: Well, beyond that now, we're now going still into another yet another matter and that's the part I'm primarily objecting to, Your Honor. First of all it is my contention that it was not a part of the Government's case in any way, anything concerning the matters which counsel has indicated here in the record. Those matters only came into this record as a result of counsel's -- if it did happen in cross-examination as a result of counsel's cross-examination.

What it then does, and the purpose as counsel has indicated here, is this very simply one, to show that Eagle was {3967} not here. That's already in the record. There isn't any question about that is in the record. The government did not bring the issue of Eagle into this trial. That I know to be a fact without any question.

MR. TAIKEFF: No question about that.

MR. HULTMAN: I will stake my life on that because I was the one who programmed this case.

Secondly, that it is now apparent that what happens then is after you established that Eagle wasn't there, which the Government established in effect by not putting him into the picture to begin with, you then set up a strawman who through other testimony now is attempting to be elicited that alleged statements which the witness later made and are now the subject of possibility of a future charge which is why I bring it here Whether he tells the truth or doesn't tell the truth are matters which have no relevancy and are totally collateral. Whether he said later to somebody else that he was or wasn't there after they've established that he wasn't there is totally and highly prejudicial. That's the point I'm trying to make.

MR. TAIKEFF: Your Honor, there is a statement by Peltier in evidence from a Canadian law enforcement official which said, "No, I didn't kill those agents but I know who did." Now, here is a witness who in essence could not have known anything at all because he wasn't there. And I don't {3968} think the Government contends that he was there, who is told we know you weren't there and we want your help in this particular case. And if you don't give it, we'll see to it that you are prosecuted. And then, Your Honor, he managed to get indicted for statements which he allegedly made to people who were his cellmates after he's been carefully warned by his lawyer that if he doesn't keep quiet he's going to end up getting in a lot of trouble with his cellmates.

Now, Leonard Peltier is also on trial in this particular case and one of the many arguments that might be made to the jury is that he, too, admitted that he had some knowledge or might be in a position to help. But of course didn't help the Government, and I think counsel are entitled to bring out in this particular case what was done by the FBI in collecting information and getting

witnesses prepared to say certain things, even though those things were A. untrue and B. known to the agents to be untrue. That --

MR. HULTMAN: Well, I object to this, Your Honor. First of all that that's not a proper showing of the facts. First of all there was evidence, they brought it out here themselves in this trial in their case, there was evidence that this witness was there. Now, I'm not testing whether it's truthful or untruthful.

MR. TAIKEFF: Who said he was?

MR. HULTMAN: You did by Stoldt. You called him. I {3969} didn't call him.

MR. TAIKEFF: But --

MR. HULTMAN: Wait until I get done.

MR. TAIKEFF: I'm sorry.

MR. HULTMAN: That's the first bit of evidence that he was there.

MR. TAIKEFF: I'm talking about the times that counsel is now --

THE COURT: I was under the impression that Coward had testified that he was there.

MR. HULTMAN: No, no, absolutely not.

MR. TAIKEFF: Peltier, Your Honor.

MR. HULTMAN: Peltier. Coward only testifies from the time of the beginning until today.

THE COURT: Even in cross-examination?

MR. HULTMAN: Oh, yes. They have said this man was there in any way.

MR. TAIKEFF: I must differ with Mr. Hultman. He said that Stoldt told him that Eagle was there.

MR. HULTMAN: I'm saying, all right, Counsel, what I'm saying is that one, Coward never saw this man there. Period. And is there any objection about that?

MR. TAIKEFF: No, agreed.

MR. HULTMAN: All right. So he's telling the truth as far as that's concerned.

{3970}

Now, at the time the agent goes to seek an interview what does the agent know, just assuming the record in this. One, there is a statement by an eye witness that he sees this man here, Stoldt's, the man they called. Now, that's at least the basis for which an agent better be asking some questions about. Secondly, he has statements. Now, this I don't know all the times, but there are allegations by individuals that this man has told certain details about the event.

MR. TAIKEFF: Yes.

MR. HULTMAN: Thirdly, you said that your man, one, is instructed not to talk to anybody, and thirdly, you are saying that the man who's going to seek the information knows he wasn't there and thus is being dishonest. I say there's no showing of that kind of any kind. The man is there seeking information. His only knowledge is that he has information this man was there.

MR. TAIKEFF: Well, I say it's an admission against the interests of the Government for an agent of the Government who is actively involved in this case one month after the incident to say to somebody we know you weren't there. And if you don't cooperate with us and help us in the ways we want you to help us we're going to see to it that you get indicted.

MR. HULTMAN: I say that's a collateral matter. Two, {3971} it will force me to bring the witness back to prove that this man is a liar at that particular point about a matter which is totally collateral and has no relevancy.

THE COURT: The ruling of the Court is that it is a collateral matter and the objection is sustained.

{3972}

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

Q (By Mr. Taikeff) When I asked you about a visit from an agent who you could identify by name, I think you said it was in the middle of August, is that correct?

A Yes. Around that time.

Q Would you think about whether it may have been at an earlier time than the middle of August.

A Might --

Q Or put it in terms of whether it was before or after you were arrested.

A It was after I was arrested.

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

MR. HULTMAN: Might I have just one moment, Your Honor, to confer with Counsel.

THE COURT: You may.

MR. TAIKEFF: Could we come to the side bar, Your Honor?

THE COURT: You may.

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

MR. TAIKEFF: Does Your Honor's ruling preclude me from asking this witness whether he made certain specific statements to certain people?

{3973}

THE COURT: What do the statements relate to?

MR. TAIKEFF: A detailed description of the events of June 26th.

MR. LOWE: As purported eyewitness to the execution, Judge.

THE COURT: What is the government's position on that?

MR. HULTMAN: I object, Your Honor. Again creating under the total collateral matters. He's already been asked whether or not, I believe the words to this effect that he discussed this with anybody, I think your earlier question indicated, and, secondly, he was given specific instructions by his Counsel not to discuss it with anybody. Now if you want to ask the one single question, did you discuss this case with anybody other than your Counsel, I don't see any objection to that. I think it's repetitive. I think you've already asked it. But to go beyond that --

THE COURT: What if he says yes?

MR. HULTMAN: Well, again I get back to the collateral matters again. That's the reason for my objection from the very beginning.

MR. LOWE: Judge, I think it's important for you to know that the statements which purportedly were attributed rather to Mr. Eagle and which we seek to explore with Mr. Eagle include a purported eyewitness account to the shooting of these agents. I believe I indicated, in details which first {3974} of all are impossible by the pathology. I think that would be a finding anybody made, and Counsel would concede, so that on its face it appears not to be a truthful eyewitness account and, secondly, it fits into the pattern we believe has been established prima-facie which we seek to show by way of impeachment of government witnesses, FBI agents and some of the other accounts that are in the record; namely, they were seeking willfully or recklessly statements of people who purported to be eyewitnesses without verifying them. In some cases it was obvious they were impossible because of the pathology of the described killing. In Mr. Eagle's case he describes sub-machine gunning, crisscrossing the chests of the agents. We know there were only three bullets in each agent. We believe this goes directly to the credibility of the witnesses who do testify here such as Mike Anderson. We believe it goes to the credibility of the FBI agents. If the jury believes that they have conducted themselves improperly or illegally through these activities, we believe it shows the FBI agents in this case, not one or two or three, that's what we offer it for.

MR. HULTMAN: Your Honor, could I --

THE COURT: The offer is denied. This witness has testified that he was not present. If we get into this other matter you're going to get into a trial whether or not he was present. He has testified he wasn't present.

{3975}

MR. TAIKEFF: There is also the argument to be made, even if he wasn't present he may have said things which would indicate he was present.

THE COURT: What relevance would that have except whether or not he was present?

MR. TAIKEFF: If, A, he wasn't present and, B, he never said anything by way of describing the events, then it is not possible for anybody to have heard him describing these events, whereas -  
-

THE COURT: That isn't in the case.

MR. HULTMAN: That isn't in the case. That's totally collateral.

THE COURT: That isn't in the case. He described --

MR. TAIKEFF: I'm going to call an agent to testify on that subject. That's going to be my next witness.

MR. LOWE: Which we were prevented from putting on as either cross or in the government's case by Your Honor's ruling saying we had to call in our part of the case.

MR. HULTMAN: And my objection will be from the very same standpoint as it is right now, that that's a totally collateral matter.

MR. LOWE: Credibility of witnesses is not a collateral --

MR. HULTMAN: You aren't attacking anybody's credibility --

MR. LOWE: J. Gary Adams, just to name the first one.

THE COURT: How does this attack the credibility of {3976} Adams?

MR. LOWE: He's the one that indicated this witness, he had made the statement, "We know you're not there and don't help us."

THE COURT: That's not in the case.

MR. LOWE: We're trying to put it in the case to show credibility.

MR. TAIKEFF: What we're exploring here are the tactics by the FBI which were employed in creating witnesses who had no knowledge of the subject matter. This is one of the people they were trying to solicit for that purpose and he turned them down and as a result they went out and found witnesses to say things about him which were not true which never took place and used that as a basis for indicting him. Now how can you say that is not relevant to this particular case when they were at the time exploring an ambush theory. Their postulated theory which they released to the news media was that this person purposely, purposely got a warrant issued against him, purposely got a warrant issued against him, not accidentally, but purposely so that it would draw FBI agents into the Jumping Bull area.

THE COURT: The investigative agency had the responsibility to explore all leads that might be made available to it and in preparation for trial, preparation for their indictment it seems to me they would have the right to adopt, to have a right {3977} to adopt or a right to reject certain leads and present their case accordingly.

MR. TAIKEFF: And what, Your Honor, if the statement purportedly made by this witness to the government informant witness contained information which no rational person could believe, even a knowledgeable participant, would have told someone in the process of describing his involvement. The statements allegedly made by this witness included details that no rational person in my opinion could believe that a confessing cell mate, a guilty confessing cell mate would bother to say but could only come and only have been supplied by the FBI itself.

MR. HULTMAN: Your Honor, that's a totally collateral matter.

THE COURT: The Court has ruled. You may make an offer of proof if you wish as to what you intend to prove.

MR. TAIKEFF: I would like to do that. But I'd also like to make inquiry of him whether present or not on June 26th he made any statements concerning the events of June 26th because I have not eliminated that possibility from the record. It leaves the government in a position that, sure, he wasn't there but he was boasting he was there when in fact he wasn't there.

MR. HULTMAN: My objection is still there for the reasons I've indicated, even to that question.

{3978}

THE COURT: I'm going to excuse the jury and let you ask the witness.

MR. TAIKEFF: Thank you, Your Honor.

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

THE COURT: Members of the jury, it will be necessary I excuse you from the courtroom for a few minutes in order this witness might be questioned on legal matters on which the Court has ruled and for which Counsel desires to make a part of the record.

As I informed you in my preliminary instructions, it's the responsibility of the Court to make the determination as to what evidence is admissible and what evidence is not admissible and we have a case here where ruling may be made, has been made and Counsel desire an opportunity to make a record of what testimony of the witness would have been and this is necessary because of my ruling that it may be made out of the presence of the jury. So the jury may leave the courtroom at this time.

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

MR. TAIKEFF: May I proceed, Your Honor?

THE COURT: You may proceed.

The record may show this interrogation is being received on an offer of proof.

{3979}

MR. HULTMAN: And my objection will be from the beginning, Your Honor, so that I won't enter anything as far as the offer. I want that clear on the record.

Q (By Mr. Taikeff) I think that the last question I put to you before we went to the bench to speak with the judge is what did Agent Gary Adams say to you when he came to see you?

A He come in and asked me to sit down and it was him and another agent there at the time and told them I refused to talk to them. He said, "We ain't asking you to talk, we're asking you to listen." That's when they brought up the thing about June 26th.

Q What did they say about June 26th?

A He said, "You know you're in a lot of trouble, don't you," and he went on to say that how much time I'd be facing, how long I'd be behind bars. He said, he also went into saying, "We know you know." He said, "We know you wasn't there but we think you could help us by linking a few things together for us," and then he went on to say that, he said, "Your brother's in a lot of, brother's in a lot of trouble," and I said, "Who?" He said, "Leon. He's out there with those guys in Oglala," and he went on. The other agent got up and he said, "Well, we could help you in any way you want. We'll get you out of here." He was referring to the jail. And he also said, "We could help you with your financial problems."

Q Did he tell you what would happen to you if you refused to {3980} help him?

A I would be in jail for quite awhile and I'd be indicted on a charge of murder.

Q Now do you know a person by the name of Melvin White Wing?

A Yes, I do.

Q Where do you know him from?

A He was in the Pennington County Jail, too.

Q While you were there?

A Yes.

Q In July of 1975?

A Yes, he was.

Q Were you in the same cell?

A Yes, we were.

Q How many people were in that cell?

A Approximately nine.

Q Do you know a person by the name of Marion Allen High Bull?

A Yes, I do.

Q And where do you know him from?

A From the Pennington County Jail.

Q Was he in the same cell with you?

A Yes, he was.

Q Do you know a person by the name of Marvin Bragg, B-r-a-g-g?

A No, I don't.

Q Do you know whether someone named Marvin Bragg was ever {3981} in the same cell with you in Pennington County Jail?

A I don't know.

Q Do you know a person by the name of Rickey Walker?

A Yes, I do.

Q Was he in the Pennington County Jail with you?

A Yes, he was.

Q During July of 1975?

A Yes.

MR. TAIKEFF: Would the government stipulate that Rickey Walker is an alias used by a person who's true name is Marvin Bragg?

MR. HULTMAN: If that's a fact?

MR. SIKMA: Yes. Yes.

MR. TAIKEFF: Would you state for the record.

MR. HULTMAN: So indicated.

Q (By Mr. Taikeff) Do you know a person by the name of Gregory Dewey Clifford?

A Yes, I do.

Q And was he in the Pennington County Jail with you in July of 1975?

A Yes, he was.

MR. TAIKEFF: IF I may have just one moment, Your Honor, please.

THE COURT: You may.

MR. TAIKEFF: To get a document.

{3982}

Q (By Mr. Taikeff) Now in July of 1975 did you ever tell Gregory Dewey Clifford that you were at the Jumping Bull compound on June 26th when an FBI agent showed up and was told to leave because this was private land?

A No, I didn't.

Q Did you ever tell Clifford that there were many people at that location and that they were armed, some of them with automatic weapons, including M16s and M14s?

A No, I didn't.

Q Now for the rest of this line of questioning I'm referring to Clifford. I will not continue to repeat his name, all right, do you understand that?

A Yes.

Q Did you ever tell him that after the agent was told to leave he left and that after that two FBI cars returned to the Jumping Bull location?

A No, I didn't.

Q Did you tell him that a shot was fired at these two cars?

A No, I didn't.

Q Did you tell him that one agent got out of his car and returned the fire with his handgun?

A No, I didn't.

Q Did you tell him that the other agent got out of his car, went to the trunk of the car, opened the trunk and got out what appeared to be a high powered rifle?

{3983}

A No, I didn't.

Q Did you tell him that the agent with the rifle was shot and went down where he could not do anything?

A No, I didn't.

Q Did you then describe a situation to him where you were standing approximately four feet from the other agent, meaning the one who had the handgun?

A No, I didn't.

Q Did you tell him that this agent attempted to get back into the automobile and he was dragged from his automobile by the Indian people who were there?

A No, I didn't.

{3984}

Q Did you say that the agent was questioned about why he was interfering with Indian land?

A No, I didn't.

Q Did you tell him that the agent said that he, the agent, was a friend of the Indian, that he had Indian friends and that he had a family, and that he begged for his life?

A No, I didn't.

Q Did you tell him that an Indian person who was standing immediately on your left fired at this particular agent with a .45 caliber Thompson submachine gun?

A No, I didn't.

Q Did you show Clifford by indicating with your finger on your chest the place or places where the agent was supposedly shot by the .45 caliber Thompson submachine gun?

A No, I didn't.

Q Did you tell him that the agent went four feet into the air and back into the car, putting a dent in the car?

A No, I didn't.

Q Did you tell him that you and your friends there took turns shooting the agents on the ground?

A No, I didn't.

Q Did you then tell Clifford that certain things were taken out of the FBI cars or from the agents?

A No, I didn't.

Q Did you tell him that a pair of binoculars was taken from {3985} the agents or their car?

A No, I didn't.

Q Did you tell him that a green Army-type jacket with FBI on the back was taken from the agents or out of the car?

A No, I didn't.

Q Did you tell him that both of the agents' handguns were taken from the agents or out of the car?

A No, I didn't.

Q Did you tell him that the agents' shotgun was taken from the agent or out of the car?

A No, I didn't.

Q Did you tell him that one of the cars was moved a certain distance?

A No, I didn't.

Q Did you tell him details about other agents' cars and the BIA police arriving on the scene after the agents were dead?

A No, I didn't.

Q Did you tell him how people shot at these cars to keep the BIA people and the agents away?

A No, I didn't.

Q Did you tell him of the shooting in the head of Joe Stuntz?

A No, I didn't.

Q Did you tell him of the shooting in the head of some Indian male?

A No, I haven't.

{3986}

Q Did you describe the Indian male who was shot in the head as the person who was wearing the FBI jacket that looked like an Army jacket with FBI on the back?

A No, I didn't.

Q Did you describe to him how you escaped --

A (Interrupting) No, I didn't.

Q Let me ask you the complete question, please.

Did you describe to him how you and the others escaped as it was starting to get dark?

A No, I didn't.

Q Did you describe to him the escape party as including women, and that you left by the back way?

A No, I didn't.

Q Did you describe to him your route in part by saying you went down a ravine and you made your way to a pasture in a valley?

A No, I didn't.

Q Did you tell him that you were shot at by the police and the FBI while you and the others were in the ravine, and that you returned fire at the police and the FBI?

A No, I didn't.

Q Did you tell him that you remained in hiding until you had to make your court appearance?

A No, I didn't.

Q And then showed up in court because you had an obligation {3987} to be in court?

A No, I didn't.

MR. TAIKEFF: Your Honor, at this particular time and for the purposes of this hearing only, I would like to have marked and introduced into evidence a copy of a statement dated July 27, 1975, which purports to be a statement given to the FBI by Gregory Dewey Clifford concerning things which Mr. Clifford said this particular witness said, which statement is witnessed by Special Agents Coulson -- (spelling) C-o-u-l-s-o-n -- and Wood.

MR. HULTMAN: For the purposes of the hearing itself, your Honor, I would have no objection.

THE COURT: It may be marked.

MR. TAIKEFF: That, your Honor, is Defendant's Exhibit 207. May I assume --

THE COURT: (Interrupting) The record may show that 207 is received without objection as a part of the offer of proof which counsel has put into the record in connection with the testimony of this witness.

MR. TAIKEFF: May I assume that subject to your Honor reading this for precision and exact detail, should your Honor choose, at this point your Honor understands I have exacted in asking those questions the purported statements from the Defendant's Exhibit 207.

THE COURT: I understand that.

{3988}

Q (By Mr. Taikeff) Did you ever make any statements exactly like or similar to the ones that I have just detailed to you one at a time?

A No, I didn't.

Q To any person anywhere?

A No, I haven't.

Q Now, I ask you specific questions concerning possible statements you made to Marion Allen High Bull, or that you may have made at a time and place where Marion Allen High Bull was present.

Did you tell Marion Allen High Bull that the FBI guys came in two cars and went down by the creek in Oglala?

A No, I didn't.

Q And did you tell him that the people there "opened up on them" down by the creek and the FBI guys started shooting back?

A No, I didn't.

Q Did you tell him that the people there hit one of the FBI guys and he went down?

A No, I didn't.

Q Did you tell High Bull that the next thing you could recall was that you and the other people were up real close to the second FBI guy who was standing outside his car?

A No, I didn't.

Q Did you say that this FBI guy who was standing outside his car said, "I have got a wife and kids"?

{3989}

A No, I didn't.

Q Did you tell him that you and the other people there got up real close to the second FBI guy and you and the other people there shot him, meaning the FBI person?

A No, I didn't.

Q Did you tell him that this shot knocked the second FBI guy back against his car and put a dent in his car?

A No, I didn't.

Q Did you tell him that you and the other people there took turns in shooting the FBI Agents?

A No, I didn't.

Q Did you tell him that you and the others escaped by going down to the creek and going around behind Oglala?

A No, I didn't.

Q Did you tell him that the second FBI guy got out of his car with his hands up and that you and the others were able to get real close to this second FBI guy, and then you and the others let him have it?

A No, I didn't.

Q Did you tell him that the second FBI guy who was shot real close was sprayed across the chest at close range?

A No, I didn't.

Q Did you tell him that a bullet came through one of the houses, and that it hit Joe Stuntz and that is how Joe Stuntz got killed?

{3990}

A No, I didn't.

Q Did you tell him that you knew of an agent by the name of Price, that if you ever got a chance to do so, you would blow away FBI Agent Price because you didn't like Agent Price's tactics?

A No, I didn't.

MR. TAIKEFF: Your Honor, likewise I ask for the purposes of this hearing to have marked a 302 dated July 27, 1975, and a statement dated August 1, 1975, the first document purporting to be an interview of Marion Allen High Bull on July 26, 1975, and the second document being a statement signed by Marion Allen High Bull and witnessed by two agents, Fredrick Howard and Richard Mahler -- (spelling) M-a-h-l-e-r.

THE COURT: What is the position of the Government?

MR. HULTMAN: Your Honor, again -- and I think it is very clear and will continue to be, your Honor -- one, that I have no objection for the purposes of the hearing but certainly I have my standard objections as far as the remainder of the trial.

MR. TAIKEFF: I understand that, your Honor.

THE COURT: The exhibit is received on the same basis that the prior exhibit was, that is, made a part of the record on the offer of proof.

MR. TAIKEFF: May I assume once again that your Honor {3991} realizes that the questions were posed by the use of these two documents? Those are Exhibits 208 and 209, respectively in the same order in which they were described.

THE COURT: The assumption of counsel is correct, and the record will show the identification of the exhibits.

Q (By Mr. Taikeff) Now, sir, I want to ask you some questions about possible statements, such as the ones I just questioned you about concerning a person named Marion Allen High Bull, and put these questions to you.

Did you ever make any of those statements which you have just said you didn't make to Mr. High Bull at a time or in a place where Mr. High Bull may have been present so that he might have overheard you making those statements to somebody else?

A No, I didn't.

Q And did you ever make any of those statements which I just read to you concerning Mr. High Bull to any person at any time in any place?

A No, I didn't.

Q All right. Now, I want you to divert your attention to the person known as Melvin White Wing, and the questions that I put to you now concern any possible statements you may have made to Mr. White Wing.

Did you ever tell Mr. White Wing that one of the FBI Agents went to the trunk of his automobile, opened the trunk and this agent got shot and went down?

{3992}

A No, I didn't.

Q Did you tell him that the second FBI Agent threw his gun down and said he surrendered, and he didn't mean for this to happen this way?

A No, I didn't.

Q Did you tell him that the second FBI Agent said he had a wife and kids?

A No, I didn't.

Q Did you tell him that you and the other people there then shot this second FBI Agent, and that then everybody took turns shooting the two FBI Agents?

A No, I didn't.

Q Did you ever tell him that a Joann -- (spelling) J-o-a-n-n -- and a Leonard lived there, meaning at the Jumping Bull compound?

A No, I didn't.

Q Did you tell him that you all escaped to a place behind the dam where cars were supposed to pick you up?

A No, I didn't.

Q Did you tell him that the cars didn't show up the first night, that the cars showed up on the second night and picked you up?

A No, I didn't.

Q Did you tell him that the agents were shot eight times?

A No, I didn't.

{3993}

Q Did you tell him that you purposely set up your own warrant?

A No, I didn't.

Q In order to set up the FBI Agents?

A No, I didn't.

Q Did you tell him that in fact you did set up the agents by getting a warrant launched against you?

A No, I didn't.

MR. TAIKEFF: Likewise, your Honor, I have two documents in this particular instance, the first one is a 302 which purports to be an interview of July 26, 1975, transcribed July 27, 1975, concerning Melvin White Wing. The second document is a statement signed by Melvin White Wing, and witnessed by Special Agents Hughes and Coward. It is dated August 3, 1975, if I failed to mention that; and I offer it in the same manner and on the same basis and with the same assumption as the preceding document.

THE COURT: The exhibits will be received on the basis offered and as a part of the offer of proof.

MR. HULTMAN: What is the number on those, counsel?

MR. TAIKEFF: Nos. 210 and 211, respectively.

Q (By Mr. Taikeff) Now, I want you to consider the questions I just put to you concerning possible statements made to Melvin White Wing, and I want to ask you the same kind of questions I did before.

{3994}

Did you ever make any of those statements --

A (Interrupting) No, I didn't.

Q Let me finish the question because I have to touch certain technical bases with you.

Did you ever make any of those statements at a time or in a place where Melvin White Wing may have overheard them even if you weren't speaking directly to him?

A No, I didn't.

Q Did you ever make any of those statements to any person at any time in any place?

A No, I didn't.

Q Now, I questioned you about a person you knew as Ricky Walker?

A Yes.

Q And which the Government has stipulated is a person whose true name is Marvin Bragg. I am going to refer to him as Mr. Bragg, if I mention his name hereafter.

{3995}

Q Did you admit or say to Mr. Bragg that you were down there at the time of the shooting in reference to the shooting of the agents on June 26th, 1975?

A No, I didn't.

Q Did you tell him that you were in on the ambush?

A No, I didn't.

Q Did you admit to him or say to him that you did some of the shooting at the federal agents?

A No, I didn't.

Q Did you ever say to him that if you found out that any person was giving evidence against you concerning these deaths or concerning the location of other people who were suspects that you would take a gun --

MR. TAIKEFF: Your Honor, I trust Your Honor realizes I'm now paraphrasing the statement and not making this question up on my own.

Q (By Mr. Taikeff) -- and blow their ass off?

A No, I didn't.

Q Did you ever tell him that you took part in the shooting?

A No, I didn't.

MR. TAIKEFF: Your Honor, I would seek to have marked and introduced for the purposes of the hearing a copy of a statement purportedly that of Marvin Bragg dated April 23, 1976 and witnessed on the same date by Agents Coward and Hughes with the same assumptions and for the same purpose.

{3996}

THE COURT: The exhibits will be received on that basis.

MR. HULTMAN: What is that number?

MR. TAIKEFF: That's 212.

MR. HULTMAN: Okay.

MR. TAIKEFF: Now, Your Honor, I believe that that is the conclusion of the offer of proof. I don't know whether the Government -- excuse me one second, Your Honor. I'm being signaled by Mr. Lowe.

(Defense counsel conferred.)

MR. TAIKEFF: Your Honor, I would ask the Court for the purposes of this aspect of the case to take judicial notice of the fact that on the very same indictment which is before Your Honor this defendant, he was at least the defendant within the indictment, was indicted along with Leonard Peltier, Robideau and Butler and charged with them in the premeditated murders of the agents, which indictment has been since dismissed on the application of the Government. And now --

MR. HULTMAN: And which at the request of counsel the names were deleted as far as this trial was concerned as I recall; isn't that correct?

MR. TAIKEFF: That's true, but it's probably the most irrelevant thing I've heard so far in this trial.

MR. HULTMAN: Well, I just want the record to be, and, {3997} Your Honor, I object that counsel is making remarks of this kind. I have a right to object and make the clear and that's all I am attempting to do. What my motive may be I don't think is a part of any of the proceedings.

THE COURT: The remark was unnecessary.

MR. TAIKEFF: Your Honor, at this particular juncture -

THE COURT: Just a moment. I haven't ruled on the request for, to take judicial notice.

MR. TAIKEFF: I'm sorry.

Your Honor, I would add to the request of the Court unless the Court has the precise date in the Court record that Your Honor also take judicial notice of the fact that that dismissal took place approximately one month after the return of the verdict in the Butler-Robideau case.

THE COURT: The Court takes judicial notice that on application of the defendants on March 7, 1977 it entered an order striking the names of Robert Eugene Robideau, Darelle Dean Butler and James Theodore Eagle from the heading of the indictment in this case.

Now, any proceeding that may have taken place prior to that this Court has no knowledge of it.

MR. TAIKEFF: I believe the Court file is available to this Court. That is, the file of the other court.

THE COURT: That's the point that I am making that I would not take judicial notice until I have examined the file {3998} unless the Government concedes that judicial notice may be taken.

MR. HULTMAN: Your Honor, the Government does not, and for a lot of other reasons which I'll be glad to mention at this time. First of all that there's all kinds of speedy trial problems. Counsel seems to allude that the conclusion which he wishes to conclude, and then accuses me of whatever my remarks are being irrelevant or in bad motive. I want it made very clear on the record that speedy trial was a critical problem that had to do with the dismissal of that particular indictment at the time it was dismissed as well as many other reasons.

MR. TAIKEFF: I didn't raise the question of speedy trial or any other basis for doing it. I merely asked Your Honor to take judicial notice that he was indicted along with Peltier and the other two, and that the indictment was dismissed as to him.

THE COURT: Court will take judicial notice of anything that's in the record.

(Defense counsel conferred.)

MR. TAIKEFF: I'd like to ask a question of this witness concerning the date of the dismissal if he knows, Your Honor.

THE COURT: You may ask the question.

Q (By Mr. Taikeff) Do you know when the indictment was {3999} dismissed against you?

A September 8, 1976.

Q And did you ever see the indictment that was returned against you?

A Indictment?

Q Yes. The piece of paper charging you with the murders?

A Yes.

Q And were there any other people named in that indictment?

A Yes, there was.

Q Who were the people named in that indictment?

A Leonard Peltier, Dino Butler and Gene Robideau.

Q Do you recall how many counts were in that indictment?

A There was two counts.

Q Two counts did you say?

A Yes.

Q And do you remember which each count charged?

A One was for -- each count was for killing the two FBI agents.

Q On what date?

A On June 26th.

MR. TAIKEFF: Your Honor, before I address myself further to the Court I think it appropriate to ask whether the Government wishes to make any inquiry on this offer of proof.

MR. HULTMAN: I do. I'm trying to find a copy of 212 {4000} so I'll have something to refer to. If the Court will give me just a moment.

THE COURT: I assume the Clerk has it.

MR. HULTMAN: No. I have -- counsel's been marked here. This is the actual exhibit. It is in evidence. Can I have all of the documents that you just put into evidence so I'll refer to the specific ones?

MR. TAIKEFF: Yes. I'll give them to you right now.

MR. HULTMAN: I'll just use the ones that -- (No further response.)

THE COURT: I think before we proceed I will declare a ten minute recess. Court will recess until 11:00 o'clock.

(Recess taken.)

THE COURT: Mr. Hultman, you may proceed.

MR. HULTMAN: Yes.

CROSS-EXAMINATION

BY MR. HULTMAN:

Q May it please the Court. Mr. Eagle, I've never met you at any time, have I?

A That's right.

Q I'm Evan Hultman, the prosecutor in this particular case, representing the United States government.

Is it fair for me to conclude that until here in this courtroom today just a few minutes ago that you have never at any time talked to anyone from the federal government about the events that may or may not have taken place that have {4001} concerned us here relative to the death of two FBI agents?

MR. TAIKEFF: I object to the form of the question as being misleading, unless counsel means specifically attorneys as opposed to attorneys or FBI agents.

MR. HULTMAN: Okay. I'll get to that.

Q (By Mr. Hultman) First of all have you ever talked to any attorney at all of any kind from the Government about any of the things that may or may not have happened concerning the death of two FBI agents?

A Two FBI agents, I talked to them about it.

Q Okay. First of all you never talked to any Government lawyer of any kind, have you?

A No, I haven't.

Q In fact you've refused to, have you not?

A Yes, I did.

Q All right. Now, let us then go to another category of people. I am correct, am I not, in response to the questions that were asked you by counsel that you likewise have never told any representative of the Government, to-wit: the FBI or anyone else who is an agent of the Government that you knew anything about anything that took place with reference to the deaths of the two FBI agents?

A That's correct.

Q All right. So what I'm trying to conclude, if I'm fair and you correct me if what I say is not correct, do you understand?

{4002}

A Yes.

Q All right. So is it fair for me then to conclude that you have never made any statements at any time, anywhere to anybody from the Government concerning any part that you may or may not have played in the deaths of the two agents, or that anybody else may or may not have played in the deaths of the two agents? You just plain haven't discussed that matter with anybody from the Government, is that a fair conclusion?

A Yes.

Q All right. You do indicate, though, that there has been at least one or maybe two occasions when somebody came to talk to you, but you refused to talk to them about it, is that fair for me to conclude?

A Yes, it is.

Q All right, So that what we've heard here for the first time as far as anybody from the Government, isn't that fair for me to conclude as far as anything you've ever said anywhere, any time to anybody from the Government, today in the courtroom is the first time you've ever talked to anybody from the Government with the Government present about anything having to do or not to do with the death of the two agents; isn't that fair for me to conclude?

A I think I talked to my attorneys and I, we've sat down with Mr., the gentleman sitting right on your left hand side.

Q Sometime with your attorney?

{4003}

A Yes.

Q Sitting. You did talk with the presence of Mr. Sikma, but it was not with reference to anything that you saw or observed or did or anybody else did. It had to do with some proceedings, did it not?

A Yes, sir.

Q All right, okay. Now, with that base then I want to ask you some questions. First of all you indicated that there was a time when on direct examination when a Mr. Adams, an Agent Adams talked to you; is that correct; do you remember that?

A Yes, it is.

Q All right. Now, if I were to tell you that the date of that was August 29th would you have any reason to doubt it in any way if I represented that to you?

A No, I wouldn't doubt it.

Q All right. Now, was that the only time and the only occasion when you talked to Mr. Adams when you were in Mr. Adams presence that you know of?

A Yes.

Q All right. So there wasn't any other time that Mr. Adams to your knowledge was in your presence other than this one time?

A Yes.

Q All right. Now, do you recall ever asking specifically for the FBI during the time following the 26th of June where you yourself asked for somebody from the FBI to come and see you? {4004} Not they coming to see you because they wanted to, but you asking them to come to see you for some reason?

A No, I didn't.

Q Do you ever remember asking anybody to come see you for the sole purpose of the fact that you wanted it made known that you didn't want a particular lawyer representing you any longer? Do you remember anything about that?

A Yes. I remember that.

Q All right. Would you tell us what it is that you basically remember about that event, and this was sometime during July or August, was it not?

A Yes, sir. Yes, it was.

Q It's during the time frame that we've been talking about here. And if I were to tell you that it was on the 21st of August would you have any reason to doubt that that was the time?

A I wouldn't doubt it.

Q All right. Now, would you tell us what it was that happened on that occasion?

A Well, it started in the early morning and they, two Rapid City police officers, brought in a guy in our cell and they got into a fight. And both them cops tear gassed that guy and left him laying on the floor. And that room didn't have very good ventilation, so everyone was trying to get out of there.

So then I asked the jailer if he could move me and he {4005} said well, he couldn't do it, he'd have to talk to a U.S. marshal. So I asked him, well, I said, "Could you do it?" And he said, "Yeah, I'll see what I can do." And he left and he never did answer me.

And then later on that night, I think it shows on that evening is when Gary Adams and another FBI agent come in.

Q Well, are you really sure? Again, are you really sure that that's who it was that came at that time, and I'm not trying to put words in your mouth, I just want to make certain that you say what you definitely remember and if you don't specifically remember that you make it likewise clear.

Do you remember two agents coming and you pointing out to them that the only purpose you wanted to talk with them was to tell them that you wanted a certain lawyer's name taken off the approved visitors list for you? Do you remember that at all?

A No, not really.

Q You don't remember it, is that what you are telling me? You're not saying it didn't happen?

A What I'm saying was ever since this all happened I've argued with many attorneys and I just can't really, you know, make out the right one, which one.

Q All right. You wouldn't argue with me if I indicated to you that two FBI agents on the 21st of August did come to you {4006} and that was the sole subject of the conversation, and that there was no discussion of any kind about the events that may or may not happen on the 26th of June?

A But the only FBI agents that talked with me were the two. That was Gary Adams, and there was another one, and they didn't you know, really talk about the attorney. More they got into harassing me.

Q Okay. We've talked about that occasion. Counsel asked you about that occasion. I'm asking you about an occasion approximately a week or a few days before. The event that you've talked about with Mr. Adams. I'm asking you about another time, about a week before. Do you remember at all having talked to anybody from the FBI at your request and the only discussion being about whether or not a certain lawyer was to be taken off the approved visitors list to see you? Do you remember anything about that?

{4007}

A Well, yes. I do recall one.

Q There was one such occasion that you recall?

A No. About taking an attorney off my visiting list.

Q Right.

A But I don't recall the FBI.

Q You don't recall whether or not the FBI was there. Your testimony is you don't recall, you're not saying it did not happen?

A I'm saying I ain't certain. I ain't, you know, I ain't.

Q You aren't certain?

A It might have happened, it might have --

Q That's all I want to make clear, so we understand what your answers are very truthfully and very honestly. All right.

Now there wasn't any other occasion to your knowledge when the FBI did discuss in any way with you other than the incident that you're referring to, as you recall, with Mr. Adams, anything about the events concerning the two FBI --

A Other than that; yes.

Q That you remember without any question, isn't that true?

A Yes.

Q That that's the only time you recall anything about an FBI having any discussion with you in any way about the killing of the two FBI agents?

A On the morning that they handed me the warrant, there was two FBI agents there and they asked me if I wanted to talk about {4008} it and I told them no.

Q All right. All right.

Other than those two occasions --

MR. TAIKEFF: May we have a clarification. Was that later occasion when they came to arrest him and charge him?

THE WITNESS: That was on the 27th of July.

Q (By Mr. Hultman) On the 27th. They didn't discuss with you in any way at that time anything about the case, is that right?

A They just asked me if I wanted to talk about it.

Q And you told them no and that was the end of it, is that right?

A Yes.

Q So this in a nutshell then is the totality as you're concerning any discussions at any time in any way with the FBI, is that fair for me to conclude, about this event here or anything that may or may not have --

A I really didn't understand what you said.

Q You have told us that, one, there was an occasion when the FBI was in your presence and one of those agents was Gary Adams.

A Yes, he was.

Q Then you've told us that they served a warrant on you on a given date and you had no discussion because of the fact you told them you didn't want any discussion.

{4009}

A That's right.

Q And that ended it right then and there.

Other than those times and possibly another time which you don't remember, you indicate, has there been any other time that the FBI has asked you anything about this particular event that you can recall?

A No. I cannot.

Q Are you fairly sure about that?

A No. I ain't very sure about it.

Q All right. Very good.

Let us talk then about sometimes that you were places with relationship to other people other than the FBI. Do you understand?

All right. Tell us approximately where you went from the time you were arrested on the day or days, whenever it was, after the shooting of the FBI agents. You indicated at sometime after the 26th of June that you were arrested. Do you remember about when that was?

A Yes. It was in July.

Q And that's the time that you talked with Counsel, is that right?

A Yes.

Q Now did you go to the jail at that particular time then?

A Yes.

MR. TAIKEFF: Your Honor, I'm afraid that that was not {4010} the testimony.

MR. HULTMAN: Whatever it is, that's all I'm trying to get.

MR. TAIKEFF: I'd like to state it privately to Mr. Hultman so I don't signal the witness. May I have a moment to do that? I think he's misunderstood the testimony.

THE COURT: You may.

(Counsel confer.)

Q (By Mr. Hultman) The day that you went to court for the first time, which Counsel has indicated to me was around, if not exactly, the 9th of July, do you remember whether or not you went to jail at that time?

A Yes, I did.

Q Did you stay very long?

A In jail? I'd been there for quite awhile.

Q And you did not get back out on bond at that time, is that right?

A No.

MR. HULTMAN: Is that a fact, Counsel?

MR. TAIKEFF: My understanding since July 9th he's been continuously incarcerated.

MR. HULTMAN: Very good.

Q (By Mr. Hultman) Now approximately how long a period after July 9 were you incarcerated in, would it be the Pennington County Jail?

{4011}

A Yes, sir.

Q About how long a time from the 9th of July then were you there.

A I was there until December.

Q Sometime in December?

A Yes.

Q And that's 1975?

A Yes, it is.

Q Then where did you go after December, if you recall, just approximately?

A They transferred me to the South Dakota State Penitentiary.

Q All right.

I just wanted to establish. Were you in the Pennington County Jail only that one time and one period of time?

A No. I was brought back in the penitentiary from Sioux Falls.

Q That was at a later time, is that right?

A Yes, sir.

Q Let us talk a little bit. I have just a few questions I want to ask you about the time that Counsel has asked you about that you were in the Pennington County Jail. Do you remember somebody by the name of Clifford?

A Yes, I do.

Q Did you know the person before that time?

A Yes.

{4012}

Q How long approximately had you known him?

A About a year.

Q And would you tell us just a little bit about him, how you knew him and who he was.

A He wasn't the best of friends. I really didn't, you know, care to talk to him.

Q But you had known him before?

A Yes, I did.

Q Is he from the Pine Ridge area?

A Yes, he is.

Q Is he Indian?

A Yes. Part.

Q By the way, I didn't ask a question, were you a member of AIM during this period of time that we've talked about?

A I sympathize with what they do.

Q Now did you have conversations with Clifford during the time that you were in the jail with him?

A No, I haven't. Like I said, I didn't get along with him on the street so I didn't talk to him in jail.

Q Now there was a man named High Bull there, Marion High Bull. Do you recognize that by the questions by Counsel?

A Yes, I did.

Q Had you known him before?

A Yes, I did.

Q How long approximately had you known him?

{4013}

A I guess about four or five months.

Q And was he from the Pine Ridge area, too?

A Yes, he is.

Q Melvin White Wing, did you know him before?

A No, I haven't.

Q But that was the first time then that you had met him while you were in the Pennington County Jail?

A Yes, it was.

Q And Rickey Walker, had you met him before?

A No, I haven't.

Q Or Melvin Bragg it's been referred. You hadn't met him before?

A I met him before in the County Jail but not before. What I'm saying, I only got to know him while I was in the county jail.

Q When was it approximately that you had met him for the first time?

A I think it was about one or two weeks after I was in there. He was brought in.

Q Was this after the 26th of June, after the events concerning?

A Yes, it was.

Q Now I'm also going to ask you whether or not you knew Leonard Peltier.

A Not personally.

{4014}

Q Had you seen him on occasion?

A No. I never, I mostly read about him in the newspapers and things but, you know, up to about a week I'd just known him personally.

Q Up to about a week?

A Ever since I was brought from Grand Forks into Clay County.

Q When with relationship to the death of the two FBI agents had you ever met or known the defendant up to that time?

A No, I didn't.

Q Oh. All right. That's all I'm trying to establish. All right.

Now what about the people who, other people who live in the Jumping Bull area, did you know the Jumping Bulls?

A Yes, I did.

Q Did you know any of the people that were living down in tent city?

A No, I didn't.

Q Now on the 26th of June were you aware that, I believe you indicated that on direct examination that you weren't aware there was a warrant outstanding for you.

A No. I wasn't aware of it.

Q For the events that had happened a day or two before.

A No. I wasn't aware of it.

Q You later learned that?

A Yes, I did.

{4015}

Q Do you know that agents had been at your grandmother's house seeking you and indicating they had a warrant for your arrest?

A From my understanding they only wanted to talk to me.

Q Pardon?

A From my understanding they only wanted to speak to me.

Q I'm not sure --

A They said they only wanted to talk to me about an incident. That was from my understanding from what I overheard.

Q What I'm asking was did you know that they had been at your grandmother's house?

A Well --

Q Before the 26th.

A No. I didn't know they were there.

Q Where were you on the 25th and on the 26th?

A The 25th I was at my mother's and on the 26th I was in my grandmother's house.

Q Where is your mother's house?

A It's in the same, around the same area as my grandmother's house. In Pine Ridge.

Q That's in Pine Ridge?

A Yes, it is.

Q And on the 26th you were at your grandmother's house, is that right?

A Yes, I was.

{4016}

Q Were you during the 25th or the 26th ever at Wanda Sears'?

A No, I wasn't.

Q Do you know where Wanda Sears lives?

A Yes, I do.

Q Were you at Jumping Bull's on the 25th or the 26th?

A No, I wasn't.

Q You know where Jumping Bulls live, right?

A Yes, I do.

Q And you knew at that time, did you not?

A At what time?

Q Back on the 25th and 26th.

A Yes, I did.

Q That's the time I'm talking about, 25th of June, 1975, 26th of June, 1975.

A Yes, I did.

Q All right.

Now so that there's clearly no misunderstanding at all, did you have some conversation, I just want to talk about being in the presence of, not what the conversations may or may not have been but just whether or not you had any discussion of any kind in the jail during the periods of the months of July and possibly August of 1975. Did you have any discussions of any kind with Marion High Bull?

A Yes. We talked but not, you know, not about June 26th.

Q Well, now, don't jump ahead of me. Just answer what I asked {4017} you, okay?

I may get to some further questions.

Did you have some discussions there during the time you were there with Melvin White Wing?

A No, I didn't.

Q No discussions of any kind that you recall?

A No.

Q What about Marvin Bragg, did you have any discussions of any kind with him?

A Yes, we did.

Q And did you have any discussion of any kind with Clifford?

A No, I didn't.

Q Now at the time you were there, is it fair for me to conclude, Jimmy, that the shooting of the two FBI agents was something that was very much in the news at Pine Ridge?

A Yes, it was.

Q And it was something which was very much a subject of discussion, was it not?

A Well, at one -- yes, it was.

Q Because of the event itself, an event of this kind. You had never heard of anything happen like this before, had you?

A No, I haven't.

Q So is it fair for me to conclude that in the jail it was a subject of discussion likewise?

{4018}

A Well, at one time; yes.

Q All right.

Now I want to refer now to what has been introduced here as Defendant's Exhibits 207, 208, 209, 10, 11 and 12 and I want to ask you just a few questions about it.

I want to make on the record a point at this time. In referring to specific documents, and I don't remember the exact ones at this time but I think I will recall as I get into each one of them, but the general questioning of Counsel and the method was that he referred to you and others. Do you remember when he asked you a lot of questions about some very specific things and he said you and others and you said, you responded that, "I didn't say that." Do you remember all those lines of long questions?

A Yes.

Q He asked you.

A Yes, I do.

Q Now I don't want to ask you questions about you and others, I want to ask about questions that have to do with maybe the telling of a story by you, not saying that I, Jimmy Eagle was there and saw these things but somebody maybe in conversation with Jimmy Eagle and Jimmy

Eagle telling a story about things that he may have heard on the radio or may have heard in conversation or knowing the people because it was a subject of conversation. Do you understand the difference of what I'm trying {4019} to get at here? I'm not going to ask you about what you yourself said, you saw, but I'm going to ask you about some statements about maybe a story that somebody is telling about some events of some kind. Do you understand the difference?

A Yes. I understand.

Q Now Counsel has specifically referred and has introduced here as an Exhibit, 211, a statement by Melvin Bragg --

MR. HULTMAN: And I would on the record, Your Honor, make note that within that given document there is only one place, in fact it is clearly differentiated from everything else, it says in it where it refers to Eagle saying that Eagle said. In fact, it's drawn out very carefully in the document where it says Eagle said, so I want to separate from the rest of the document that is in evidence at this particular time.

Q (By Mr. Hultman) Now you responded with reference to Exhibit 211 that you didn't say these things, isn't that the way your response was?

A Yes.

Q In terms that you didn't say that you were down there, is that for me to conclude?

A Yes.

Q Because you've already said you weren't there, isn't that fair?

A That's right.

{4020}

Q And that is your testimony, that you weren't there so you don't know what happened. You yourself on that day as far as you being there and viewing the very events, is that fair for me to conclude?

A Yes.

Q Now, however, you did learn from the news media, from other discussions and so forth a lot of things that were being said as to what did happen down there allegedly, isn't that fair for me to conclude?

A Not exactly the main, the main reason, you know. The only way people got that kind of news in there was when drunks was brought in there and, you know, they'd be talking about it and that's how the rumors start.

Q Well, from the 26th of June, Jimmy, it's fair for me to conclude, isn't it, until the 9th of July that you had some discussions and learned some things and heard some things, whether they're

true or not, but things that had to do with what happened down there when the two FBI agents got killed?

MR. TAIKEFF: Object to the form of the question because it includes a number of activities and the witness could be confused wanting to answer yes to two of them but not to the third.

MR. HULTMAN: I'll rephrase my question. I agree, Counsel.

Q (By Mr. Hultman) You specifically responded to me with {4021} reference to my last question that the only time that you learned something in the jail is possibly when a drunk came in.

A Yes.

Q Now I want to ask you, at a time earlier than when you were in the jail, from the 26th of June until the time, be it approximately the 9th of July, you were not incarcerated, were you?

A No, I wasn't.

Q And you were living, were you not, on the Pine Ridge Reservation?

A No, I wasn't.

Q Where were you during that time?

A I was in Rapid City.

Q When was it after -- you said on the 26th you were at your --

A Grandmother's.

Q -- grandmother's. The 25th at your mother's. When was it then that you left Pine Ridge approximately?

A It was the night of the 26th.

Q The night of the 26th. All right.

Did you stay then in Rapid City?

A Yes, I did.

Q Until the 9th.

Well, the matter was also a matter which was generally discussed in Rapid City, too, was it not, the event itself?

{4022}

A Yes. The event itself.

Q And did you have, and I'm not referring to a specific conversation now or to specific things that you learned, but had occasions during that time to read the newspapers, watch TV and discuss what was being said about the event on the 26th, did you not?

A We didn't discuss the event.

Q I'm not trying to, I'm only trying to find out whether or not it's a fair conclusion that you did learn at least some things that allegedly happened on the 26th, whether they're true or not, that's not what I'm trying to get at. All I'm trying to establish is whether or not the subject of the deaths of the two agents and how it happened, may or may not have happened, was a matter of general discussion and publicity during this time we're now talking about, was it not?

A It was a lot of publicity but I didn't really discuss it with anybody.

Q You're saying you didn't discuss it with anybody?

A No, I didn't.

{4023}

Q All right. Now, you were in fact prior to the 4th of August which is I believe the record will show the date of a preliminary hearing, of which a record under oath was there made, you were in fact incarcerated with Dewey Clifford, were you, in the Pennington County jail?

A Yes.

Q You were actually there?

A Yes.

Q Where with relationship to him did you have access to where you could be in the same areas at the same time?

A With Clifford, yes, he was in the same cell.

Q And you were in a position where you could have heard conversations that he may have had or he overheard conversations that you may have had, isn't that correct?

A Well, I really didn't care what he said.

Q You didn't care what Clifford may or may not have said?

A No, I didn't.

Q What I am trying to establish is the fact that you were in his presence, the two of you along with some other people?

A Yes.

Q And conversations did take place during those times, isn't that clear?

A I don't know. I really couldn't tell. I don't know.

Q What I am saying, I am trying to establish, you were not isolated, you were not in a place where nobody could talk to you {4024} or you talk to anybody else?

A No.

Q This is the Pennington County jail?

A Yes.

Q Now, also in looking at Defendant's Exhibit 210, I find that there is only one reference in that whole exhibit, not to Eagle and the others, but only one specific reference to Eagle where Eagle stated something specifically concerning himself, and I want to ask you about that.

MR. TAIKEFF: Your Honor, I object on the grounds of competence. The witness couldn't possibly know what Mr. Hultman is seeing when Mr. Hultman looks at the document so he couldn't ask him about what he is seeing.

MR. HULTMAN: These are the questions, counsel, which you asked him, and that's with reference to Exhibit 210. Those are the specific items I am asking about.

THE COURT: How much further is it going to be necessary to go into the testimony of this witness?

MR. HULTMAN: Very little, your Honor, very little.

Q (By Mr. Hultman) Is it fair for me to conclude that from discussions that -- and conversations that you, Jimmy Eagle, were in, just in conversation about the events on the 26th of June concerning two FBI Agents, that possibly someone who is in the conversation or listening to the conversation could have concluded from what you said that you were there?

{4025}

A I never had -- that kind of conversation.

MR. TAIKEFF: I object to the question.

THE COURT: It is on an offer of proof.

MR. HULTMAN: All right.

Q (By Mr. Hultman) Were you personally ever down to Tent City, the Tent City area on the Jumping Bull property?

A No, I wasn't.

MR. HULTMAN: I have no further questions.

MR. TAIKEFF: Your Honor, I have just three points I want to inquire about on redirect.

THE COURT: Very well.

REDIRECT EXAMINATION

By MR. TAIKEFF:

Q I think you testified that when Agent Gary Adams spoke to you about the fact that he or they, meaning the FBI, knew that you weren't there but that if you didn't cooperate, you would be indicted for murder, you said that you believed that occurred in August, do you recall that?

A Yes.

Q And I think I asked you to reconsider the possibility that it may have been earlier and you said, "No, I am pretty sure it is in August"?

A That's right.

Q Do you recall that -- all right.

Now, when Gary Adams spoke to you, as you have testified, {4026} were you already charged with those murders?

A Well, they -- just first degree murder, just one count.

Q You were charged with first degree murder?

A Yes.

Q In connection with this case?

A Yes, I was.

Q You had already had a preliminary hearing?

A Yes, I did.

Q O.k., so this was after the preliminary hearing?

A Yes, it was.

Q Now, the person you said you were not the best of friends with and you didn't get along with him on the street, was that Clifford?

A Yes, it was.

Q For how long had you known him?

A I have known him for about a year or two.

Q And what kinds of difficulties did you have with him?

A Well, I don't know, just two people, some people I can't get along with and he was one of them.

Q Did you ever have any fights, or just arguments?

A Arguments.

Q Now, Mr. Hultman called your attention to the fact, and you agreed that the subject of the deaths of the agents, at least for a certain period of time, was a big topic of discussion in the jail, is that correct?

{4027}

A Not --

Q (Interrupting) Amongst all the people in the jail without making any specific reference to you?

A Yes.

Q O.k. Now, what did your lawyer tell you about that subject on July 9th before you went into the jail?

A Well, when I turned myself in, he told me, he said, he said, "You know, they are trying to connect you with that shooting in Oglala, and it is my advice for you, you know, just keep your mouth shut," and he said, "Don't pay attention to nobody if they try to bring it up. It is likely they will put a cop in your cell with you."

MR. TAIKEFF: Could I have just one moment, your Honor?

THE COURT: You may.

(Counsel confer.)

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

MR. HULTMAN: No further questions, your Honor.

THE COURT: You may step down.

(Witness excused.)

MR. TAIKEFF: May I assume that the Government has no questions on cross examination outside the scope of the hearing?

MR. HULTMAN: The Government, your Honor, has -- but {4028} I do want the witness to remain available in case we get into some other collateral matters.

MR. TAIKEFF: Your Honor, I would like to address the Court, if I may, on this particular subject.

At the outset of this trial, the Government made a motion in limine, and to use a catchword, although not necessarily to attempt to quote the Government's papers, the Government asked the Court to prohibit the defense from introducing any evidence or attempting to introduce any evidence on the general subject of the FBI counter- intelligence program sometimes referred to as COINTELLPRO, and basically took the position that it is not appropriate in this particular case to litigate those aspects of the Watergate era in which the Federal Bureau of Investigation may have been involved.

There has been no attempt on the part of the defense to bring up those subjects in any way before this Court. The Government did not address itself to the next subject, and at the same time the defense has not addressed itself to that subject, except at this particular time in arguing, in the absence of the jury; but there was rather serious misconduct on the part of the Federal Bureau of Investigation in connection with the trial held in St. Paul before Judge Nichol, where the Defendants, Means and Banks, were on trial; and in spite of the fact that the Government did {4029} not move in limine on that subject and in spite of the fact that one could make a rational argument that the conduct of the FBI with respect to their attempt to convict those two American Indian Movement leaders, which was so serious that Judge Nichol dismissed the indictment in the middle of the trial and wrote a lengthy opinion which is reported in the Federal Supp.; and one could further argue that if that's the attitude of the FBI towards those two AIM leaders, there is surely relevance to show that at any trial of any American Indian Movement leader, we have not made any such attempt to do that. What we have told the jury in opening and what we have on appropriate occasions in the absence of the jury advised your Honor, it was our intention, was to show conduct on the part of the FBI that should make the jury very concerned about the evidence in this case because those activities concern either the evidence which was actually adduced in this case or evidence which was being collected or, as the case may be, manufactured for the trial of this case at a time when it was not known that there would be one trial for Butler and Robideau, another trial for Peltier, and a dismissal of the indictment for Jimmy Eagle.

Now, it is that narrow subject, not Watergate, no COINTELLPRO, not the FBI misconduct with respect to Means and Banks which the defense is trying to introduce into {4030} this case.

Now, your Honor apparently has ruled that if the FBI induced certain people to say that somebody who was not present was (a) present at the crime scene, and (b) participated in the events including shooting at the agents, and (c) then escaped with those who are known to have left Tent City in the latter part of the afternoon, that that is relevant to the jury's deliberations on the entire credibility of the prosecution's case against this Defendant.

The mere fact, your Honor, that the Government chose not to introduce evidence through the mouths of the three or four informants who purportedly heard Jimmy Eagle confessing his guilt, or discussing his activities which would be tantamount to a confession of guilt, say for some legal defense he might have to explain his conduct, is surely relevant as to what the Federal Bureau of Investigation has done overall in this particular case in an attempt to convict someone whose presence is far clearer than the presence of Jimmy Eagle.

I think the Government, although it hasn't conceded it as such, acknowledges that Jimmy Eagle was not there that day. Am I incorrect about that, Mr. Hultman?

MR. HULTMAN: I will meet that issue when you get done, counsel, I will meet it.

{4031}

MR. TAIKEFF: All right.

Now, thus far in this case we have heard testimony from a Special Agent of the Federal Bureau of Investigation of a sighting on June 26th, 1975, that sighting having been made through his telescopic sight; and he says he saw Leonard Peltier.

He further testified that he wrote a short 302 which he claims incorrectly stated that the date of interview was June 28th, by explaining that he knows for sure that that date has to be wrong because he only saw Marvin Stoldt, who also purportedly made an identification at a long distance on two occasions, June 26th, and early in September, which we now know to be September 4th; and so he concluded that the thing that said interviewed on June 28th had to be a typographical error or some kind of administrative error, and further went on to say that he remembered a conversation with Stoldt in the car in which Stoldt said he saw Jimmy Eagle.

We also have had testimony in this case -- and it makes no difference who called the witness, and it makes no difference who called the witness, and it makes no difference whether the testimony came in on cross or direct -- we have heard in this courtroom in this trial Stoldt, who was a former BIA police officer, and although technically called by the defense, still presumably a {4032} person who would tell what he has to say whether he was called by the prosecution or the defense, and asked a particular set of questions, that he made a sighting on June 26th, 1975, and saw Jimmy Eagle; and that by September 4, 1975, he had concluded that he was positive that it was Jimmy Eagle.

Now, that evidence, like any other evidence that tends to place either the Defendant there or tends to corroborate someone else's evidence that he was there, because surely if one agent saw Peltier and somebody else saw both Peltier and Eagle, the second person's testimony corroborates the testimony of the first person, so any attack upon the absence or presence or the possible sighting of Eagle is relevant; and that raises the question, if there is a serious one about whether it was a mistake, inadvertence or something done intentionally, as to whether or

not other conduct in this case, particularly with respect to Jimmy Eagle, is relevant on the question of whether it was a mistake or whether it was an intentional effort to place somebody there who was not in fact there but for the purposes of the Government's theory had to be there.

Now, this witness says (a), "I wasn't there," (b), "My lawyer warned me that they would try to put me into that prosecution," and (c), he told me, "Don't speak with anyone in the jail about this subject. There may be a {4033} cop in your cell with you."

He further claims that he accepted that advice and he acted accordingly. He did not discuss the events of June 26th, whether seen by himself or whether reported in the newspapers, with anybody.

There is, as I trust your Honor can infer from the documents which have been referred to, at least one person and in fact there are four people who claim that in the Pennington County jail in the latter part of July, 1975, prior to the time he was arrested on July 27, that Jimmy Eagle made statements concerning the events of that particular day, where he refers to himself -- your Honor need only read the documents and see that they clearly reflect a statement by a person -- that Jimmy Eagle was reporting events that he both witnessed and participated in, so that the word "they" in that context, purportedly coming out of the mouth of Jimmy Eagle, was part and parcel of his alleged narrative of the events of June 26th, 1975.

{4034}

It is the position of the defense that since he never spoke to anybody it could not be that four different people have him confessing guilt; that they didn't just suddenly materialize independently by some sort of spontaneous birth. There had to be a father and a mother. Except for parameria we do not know anything that comes into existence without a mother and a father. And those stories had a mother and a father and we suggest that the father was the FBI and that those witnesses are the mothers. And it is relevant to prove the legitimacy and the propriety of the body of evidence which has been adduced against this particular person.

THE COURT: Is it not likely that this witness, Jimmy Eagle, did in fact make those statements to those people?

MR. TAIKEFF: If Your Honor's asking me whether or not it is possible, a fact, I would say yes.

THE COURT: Is it not the responsibility of an investigative agency to investigate any leads that it might have in preparing a case for prosecution?

MR. TAIKEFF: Your Honor, I am not saying that the FBI has never been approached by a liar or by a person who just makes up a story.

THE COURT: Excuse me for interrupting. But I am not defending the FBI. I am simply explaining the basis of the Court's ruling.

I have ruled that it, the evidence which you propose to {4035} offer on this matter was irrelevant. Now, you may continue to make your record but --

MR. TAIKEFF: Your Honor, please do not believe that anything I am saying constitutes a defense by Your Honor individually of the FBI. I am trying to persuade Your Honor in my role as a

lawyer, and Your Honor's role as a lawyer who has been elevated to the bench, and who is presiding over this trial, that Your Honor's ruling is either wrong or that Your Honor should exercise his discretion in favor of permitting the testimony in because amongst other things of a thing Your Honor just posed to counsel a question, Your Honor asked counsel isn't it possible, and I'm translating Your Honor's question, I don't mean to quote it, that Jimmy Eagle isn't telling us the truth. Well, Your Honor, it's possible because most things are possible when you consider human conduct.

The question is, who must determine that. Not Your Honor and not counsel for either the Government or the defense but the jury. Now, the question is it too attenuated, or is it too collateral, a word favored by judges and other lawyers, to allow such testimony to come in. Well, Your Honor, what we attempted to prove in addition to making our offer of proof is the nature and the quality of what it is that these people purportedly said to the agents who wrote up the statements which they eventually signed. Your Honor has to {4036} make a threshold determination, not of what the ultimate fact is, but whether something is believable within the realm of possibility.

If Your Honor finds that something is unbelievable as a matter of law Your Honor must not allow the jury to determine which is the facts because they'd have to speculate. It just is not within the realm of possibility.

But I offer to Your Honor this very significant possibility, and as a basis for asking the jury to make the determination. If Your Honor reads those statements, they're more comprehensible than what was brought out in the examination. The examination touched I think the principal highlights. Your Honor will see that there is stuff in there that no stretch of the imagination could allow any person to believe that even a confessing participant, even a confessing eyewitness or perhaps the word confessing isn't appropriate, even a talkative eyewitness or a confessing participant would never say. There are some things that human experience dictates could not really have happened.

Let us assume that Jimmy Eagle was there, and there's substantial proof that he wasn't there and the Government doesn't seem to be contending that he is or had been there, would it be within the realm of human experience for such a person to recount the events and bother to articulate some of the irrelevancies to what he would be saying such as describing {4037} the Indian male who was shot and killed as the guy who was wearing the FBI jacket with FBI on the back? What difference would it make to a person who wasn't there that the guy who was killed was wearing the jacket, the army-type jacket with the FBI insignia on it? If I was speaking to Your Honor, and Your Honor and I had shared an experience, of course I would make reference to things that would trigger Your Honor's memory. And I'd say, "Remember the guy with the FBI jacket on?" But if I were relating to Your Honor a long, complicated episode I could not possibly, unless I was some sort of extremely compulsive individual, bother to describe a significant event, namely the death of a person by pointing out that he was the guy who was wearing the FBI jacket that had the insignia on it.

Likewise, Your Honor, it is beyond the realm of human experience to believe that as a matter of law that a person would make a confession of his participation and bother to detail the fact that certain things were taken out of the vehicle. It is just not possible to believe that that occurred because if someone were talking about those events he would have no motivation, he would have no reason to say to the people he was trying to impress this minutiae of detail, that the agent stepped out and opened the trunk of the car and raised his gun and started shooting it and then he was shot down. Your Honor, that's right out of the script of this {4038} case. That is as to that and several other things in those purported admissions. That is right out of the testimony of the Government witnesses as to what happened. That is the FBI scenario for this case.

Now, Your Honor has to exercise his discretion in determining what is relevant and what is not relevant, what is collateral and what is not collateral. Pursuant to Rule 401 relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Well, Your Honor, the fact that it is of consequence in this case is whether or not the FBI manufactured evidence, whether they suborned perjury, whether they did wrong. In this particular case a witness has testified to a certain crucial fact. Another witness will testify that the FBI threatened him in order to make him testify to that same fact.

In this particular case we have shown on the hearing in the absence of the jury that a person who was not there, we know the jury has to determine whether he was there, but at this point I believe Your Honor is obligated to view the evidence in a light most favorable to the defendant just as the type or ruling under Rule 29 Your Honor does likewise to the Government. The jury could believe that he wasn't there after all that they heard from the agent who made the sighting. {4039} The agent, the BIA officer who made a sighting. The witness we called concerning the telescopic sight. The jury could make that finding. It is not beyond the realm of possibility that they will find that Jimmy Eagle was not there.

The Government's effort in finding four separate people who were willing to testify that Jimmy Eagle made such statements which he has categorically and flatly denied making will help prove a consequential point, namely that the FBI manufactured evidence here. This is a case in which four people were indicted. Jimmy Eagle was originally one of the people. The case to be brought initially was viewed as a case to be brought against all four of them together. The fact that Jimmy Eagle was not on trial is probably the most significant reason why the Government didn't adduce the evidence of his admissions.

Surely if Jimmy Eagle were on trial in this case we cannot believe with absolute certainty that the Government would have purposely and knowingly not called any one of those four people. So they shouldn't benefit from the fact that finally they got some religion and they dismissed the indictment. When I use the word "finally" I didn't mean to imply anything with respect to counsel because the record is quite clear. There has never been any suggestion about any participation in any of the alleged wrongdoing by Mr. Hultman. But the Government speaking in the broadest sense finally, {4040} finally did what it should have originally done and that is seeing to it that Jimmy Eagle did not stand accused of this crimes and dismissed that indictment in August of last year.

But the fact that the Government came forward and dismissed that indictment and did not resist the motion which was formally made by counsel for the defense, but acquiesced by the Government is the reason why they didn't introduce these admissions against Jimmy Eagle.

That doesn't protect them from the revelation that these things took place. It may be that Your Honor as an individual finds it difficult to believe that the FBI, or certain of its agents are capable of such things; and indeed I think the presumption should be of regularity as to the overwhelming majority of special agents of the Federal Bureau of Investigation. But this case doesn't concern the 7,000 men and women who make up the core of special agents of the FBI. It concerns the activities of a handful of agents who embarked upon the investigation and preparation of its case and who along the way did things that were very serious that they should not have done.

And we want to show these things to the jury and let them decide what really happened. Did these things occur, did they occur the way the defense argues that they occurred, because most of the facts themselves are not really in dispute. It's the interpretation of the facts that has to be done by the {4041} jury.

The Government will surely argue whatever it believes to be the appropriate position to take and we will argue that it represents misconduct on the part of J. Gary Adams and let the jury decide. That's what it means to say that they're the finders of fact and they are supreme in that regard. That's not something which we just mouth. Let them make that determination, let them say the defense in this case is full of hot air, they're ridiculous. What kind of nonsense is this, and quickly convict our client.

THE COURT: Specifically what are you alleging Special Agent Gary Adams to have done?

MR. TAIKEFF: I am alleging that agents of the FBI --

THE COURT: No, just a moment. I asked you specifically what you are alleging that Special Agent Gary Adams did?

MR. TAIKEFF: He committed the federal crime of coercion and obstruction of justice in violation of Section 1503 of Title 18 by saying to a person --

THE COURT: Now, that's a legal conclusion. What are the facts?

MR. TAIKEFF: Your Honor is a lawyer and I think --

THE COURT. What are the facts?

MR. TAIKEFF: In that --

THE COURT: Just a moment. My question is: What are the facts on which you base that conclusion? Now, that was {4042} the question that I was going to ask you.

MR. TAIKEFF: Your Honor, I was about to do that in rather one long sentence. In that he threatened a person, to-wit: "If you don't help us, I know you can be of help to us, I know you weren't there, but if you don't help us even though you weren't there I'll see to it you are indicted for murder." That, Your Honor, is both a violation of the obstruction of justice statute and it constitutes coercion just as if someone came around and tried to collect a debt with the threat of physical force. It is the same kind of illegality which is prohibited under federal law.

There is testimony in this case that, by Michael Anderson, a Government witness on cross-examination, that he was threatened with being beaten by J. Gary Adams.

THE COURT: And that is relevant testimony.

MR. TAIKEFF: But, Your Honor, it's part of a pattern, we're trying to show part of a pattern. Does Your Honor expect that the lawyers and nonlawyers, seven in number, who constitute the defense team have the wherewithal, the capacity to get an ironclad case of wrongdoing against the FBI, or are we going to be entitled to show what evidence we've been able to uncover by interviewing witnesses and by examining and carefully comparing documents and let the jury decide?

If the Government is entitled under the law where they {4043} have this immense burden that we have for hundreds of years in English and American jurisprudence required of the Crown or the Government, in light of that tremendous burden, before you can convict someone of a

felony and in deed put him in prison for the rest of his life which is mandatory, if they can do that, if any prosecutor can put a person in prison for life under the extreme burden that they face by circumstantial evidence, can it be said that the defense should not be entitled to prove from a series of incidents which involve the same four or five agents, circumstantially as well as specifically that the certain agents of the FBI did terrible and illegal things here?

We have another witness who testified on cross-examination that he was tied in a chair for three hours. What does Your Honor think that is, a cocktail party he was at? Does Your Honor approve of such things? Is Your Honor, does Your Honor suggest --

THE COURT: Just a minute, Mr. Taikoff. That evidence is in the record. There was never any suggestion by the Court that evidence was not relevant.

MR. TAIKEFF: But, Your Honor, if that occurred is it not possible that this occurred also? Is it not within the factfinding mission of the jury to determine whether these things occurred or not? Is it so farfetched? For years it would have been farfetched to, if someone had suggested to me {4044} that a prospective witness in a case --

THE COURT: You've already made that argument to the Court a couple of weeks ago.

MR. TAIKEFF: Well, then Your Honor must appreciate the position I take.

THE COURT: I understand the position that you've taken.

MR. TAIKEFF: We have a person who was not there at all. I'm not talking about Jimmy Eagle, I'm talking about somebody else, a person who was not there at all, who ended up being on the roster of FBI people who was prepared to say that she was there and interestingly enough what she said under oath, and what she said to the FBI agents, purportedly said to the FBI agents was exactly and precisely the stuff that Jimmy Eagle purportedly said to these informants.

Now, Your Honor, if the Government can prove guilt by circumstantial evidence surely the defense should have an opportunity to show by circumstantial evidence the misconduct of the FBI. We just do not have the resources, we do not have the capacity. It took the full power of the federal government to uncover what little was uncovered in Watergate. It took immense resources. We're just seven people. For us not to be able to show five or six distinct and serious acts of the FBI agents in connection with this case in order to be able to argue that they should mistrust, {4045} that they should fail to find to a moral certainty the guilt of the defendant is a total deprivation of our right to present a legitimate defense in this case.

Your Honor did admit the testimony about someone being tied in a chair. Should the Jury be left with the impression that that was a single aberration, that that was one event in many, or should we not be able to show to the jury some rather suspicious, rather questionable things in this particular case? There's a rule in the federal rules of evidence which allows the showing of things to show that there is a pattern. That's Rule 406. That is, a single incident is not a mistake, inadvertence, an error of judgment, but rather a part of a pattern of conduct, {4046} and that's what we're trying to demonstrate here.

Can it be said that the jury cannot consider the significance of what happened in connection with these telescopic sightings? Should it be said that the jury should not consider how the turnout that a person who was absolutely, positively not there, who on Saturday of this week said to two witnesses, "I don't even know Leonard Peltier," that this person somehow or other by some magical process came forward and said, A, "I know Leonard Peltier," B, "He was my

boyfriend," C, "We were living together at the Jumping Bull's," D, "I was standing next to him when he shot the agents," and then related in terms which are amazingly identical to the things which Jimmy Eagle purportedly said to four different people, one of whom he didn't even like well enough to even want to talk to about anything. How do those things happen, Your Honor? Your Honor doesn't have to give the answer to that question and Counsel doesn't even have to give the answer to that question. The answer to that question comes from the judges of the fact. Let them tell us all for all time what they make of these events which are part and parcel of this case which didn't just happen, Judge. They happened because human beings made them happen.

There is a case called United States against Vole reported 435 Fd 2d, page 774 which stands for the proposition that if there's any evidence showing that the government introduced witnesses to testify falsely that this is affirmative evidence of {4047} the weakness of the government's case.

Now the fact that the agents of the Federal Bureau of Investigation induced witnesses to testify falsely and then Mr. Hultman, because he recognizes his obligation as a lawyer, member of the bar and officer of the court doesn't call those witnesses, that's a credit to Mr. Hultman's professional standing. It's no credit to the FBI.

If Norman Brown takes the stand and testifies that he testified before the grand jury under threat from the FBI that our client and two others were down by the cars but it wasn't true, and that when he came to Cedar Rapids he said to Mr. Hultman when I gather he met him for the first time, "Mr. Hultman, I testified before the grand jury falsely, I'm telling you now that that's not true," and Mr. Hultman doesn't ask him the question in Cedar Rapids, what does that mean? It means Mr. Hultman understands his professional responsibility and acts accordingly, is entitled to our respect.

But what of the FBI conduct to make that person lie before the grand jury which is part and parcel of this whole Jimmy Eagle thing. It's just like it. It's cut out of the same bolt of cloth and just like the Myrtle Poor Bear thing and, of course, the government doesn't want it to come in and, of course, it's going to be an embarrassment to the FBI.

But what did happen? We can show and there won't be any proof that it didn't happen, it will only, there will {4048} be argument it doesn't mean anything, doesn't mean anything. If I grew an asparagus stalk out of the top of my head, what does it mean? It's there. I must ignore it. It's different but it's there. It has great significance in this case and I beg Your Honor to reconsider that ruling and to take a look at United States against Vole and reverse him.

MR. HULTMAN: Might I be heard just briefly, Your Honor?

THE COURT: Very well.

MR. HULTMAN: I really don't know where to begin. I guess maybe the place I'd like to begin is who is on trial? Jimmy Eagle isn't on trial. So I start with the issue of materiality or relevancy and I end the same place.

Somehow Counsel for the defense feels that because a witness who is a convicted felon says in response to his questions, a convicted felon who has never spoken to the government one word, let alone one word of truth, that "I wasn't there," but has never spoken to the government one word, and I confess it is beyond my comprehension if we're going to talk about asparagus and a few other things that it stretches my imagination to the breaking point that an individual who

was not there, who can prove he was with his grandmother and his mother has got any reason other than sometime to talk to somebody and say, "I just wasn't there."

But the government then is put in this posture and {4049} evidently Counsel believes that because certain items of evidence appear at a given time that the government and the FBI is forever bound through dishonesty then not to produce those witnesses, and I imagine what argument Counsel would be having if the government had produced those witnesses under some semblance or conclusion that maybe, one, there wasn't relevance but, two, as to whether or not somebody actually said, "I said I was there" when certain things happened.

Now let's examine what the record shows. Let's take the specifics which is the offer of proof and not a bunch of generalization, although it isn't Watergate, I keep hearing that word over and over again and I keep hearing the FBI being tried. I didn't know we were here to try the FBI or government and I submit that the scintilla of any items that Counsel has mentioned are so irrelevant and so collateral that they serve no purpose but to prejudice this jury on that issue.

Let's talk about then specifically just a moment. Counsel just argued at great length that Jimmy Eagle said that Gary Adams said that words to the effect, "You'd better tell us something or you're going to be indicted for murder," and I say to you that is absolutely astounding what that impact would be when the man sitting there is already accused of murder.

{4050}

MR. TAIKEFF: But not indicted.

MR. HULTMAN: Counsel, would you wait until I finish, please.

There evidently is a tremendous difference between being indicted for murder and having a murder charge against you. That's another legal conclusion that I'm sure Counsel is going to get up and argue that Jimmy Eagle knew that difference and so there was a fantastic difference at that particular time. I say it's preposterous. I also would say the proof will show if we got into the collateral matters, as I did, and I begged the indulgence of the Court, that the record will show as Jimmy Eagle actually said finally when we got around to some degree of clarity that the agents came at his request and I submit the proof will show, Your Honor, that on both occasions they came at his request and they came for the two reasons that Jimmy Eagle told you and told the record ultimately: One, concerning an event that had happened in the morning and on another occasion concerning a lawyer that he didn't want anything more to do with.

Now if the government, and especially Gary Adams, was going to put a story in somebody's mouth at any time and place, I submit you can't have it both ways as Counsel argues it one time one way and then the other. Can you believe for a moment, Your Honor, if the government was going to plant stories that are involved here that they couldn't come up with a hell of a {4051} lot more consistent stories and on the events then what these various stories that Counsel is now attacking and saying, "Oh, it was the FBI that put all these stories together and thus some challenge or some allegation of the commission of perjury" that is so preposterous that it is beyond even my imagination.

If you look at those four statements, Your Honor, you will find things in those statements beyond what Counsel has read into the record and what he's argued to the Court. You will find things in here about which there is no evidence of any kind, anywhere, anytime.

Now I say if the FBI was going to put that together, they could have done a little better job about, one, getting the stories together, two, talk about the relevant evidence and who it has to do with and cut out the extraneous that doesn't have anything to do with anything about anybody at any time. Now that's just a matter of argument. That's just a conclusion on my part.

But I say in defense of the actions that have been taken, Your Honor, one, that FBI agents have a responsibility the same as any other law enforcement agency to take down and do and accept whatever anybody says anytime, anywhere. They're not the grand jury to evaluate what was said or done, they're not the prosecutor, the special prosecutor in this instant to sit down and decide how much credibility to give to it. {4052} Their job is to take it down. And I submit to you that's exactly what this record shows period.

Now there comes a time, however, and Counsel has said well, it's still a big part of this big FBI conspiracy, to use the word, and so for some reason they didn't call these particular witnesses at this trial. Now we're not talking about the FBI at this point, we're talking about one individual and that's the special prosecutor and I can't separate, I can't separate what we do beyond the interviews, Counsel, and I want to make it very clear I can't separate it because you've eluded to a number of the items.

When I read the four statements, I came to the conclusion along with the rest of the evidence that Jimmy Eagle wasn't there and that's the same one you came to and I don't know what the relevance is from that particular point as far as this trial when all the evidence indicates that Jimmy Eagle wasn't there.

Now I did not conclude by that that there wasn't sufficient evidence for somebody at a given time, when you put together the testimony that you brought out, that somebody did think they saw Jimmy Eagle, that there was indeed a warrant for his arrest and the agents were looking for him, that there were individual statements that maybe if you didn't read them real close you might conclude honestly and fairly that Jimmy Eagle had said, "I was there, I did these things," and thus {4053} you got, I think, more than the amount of evidence that's necessary to, one, to bring a charge or, two, for a grand jury to indict. But when it's all done and all of the evidence is in, somebody's got to make a determination at that time, not an FBI agent on one day at one place at one time with reference to what somebody said they saw.

I will submit to this court, and Counsel knows it, they have got it in their document, there are hundreds of 322s that people say something that can't be checked out or corroborated in any way and would Counsel argue for a moment that the government is something terrible by not bringing those particular statements into the record and those witnesses, too.

In conclusion, Your Honor, all I say is that these matters are collateral with reference to the witnesses that they bring the charges about and concerns. They have the witness on the stand, they ask him the questions, that info is before this jury right now. They brought this, cross-examined the witness that made a comment about being tied to a chair. That's in the record, and legitimately in this record. They brought the record who said, and I would correct the record here to make sure there is a difference, and a significant difference, the witness said he said in his 302, he said everywhere with reference to Jimmy Eagle, somebody who appeared the first time, he saw him to be Jimmy Eagle. That's {4054} what the record shows and that's the fact. It is then at a subsequent time that he makes, as cross-examination brought out, a more affirmative, positive declaration. All those matters are before this jury and rightly so.

But when you start digging up phantoms and when you start bringing allegations by one single individual which is there by way of hearsay or somebody else, those are purely collateral. It then means that the government has nothing else to do but to bring in two more people like the statements that I've already brought in indirectly, by the agents, as well as the witness, that

clearly indicate I was there on the occasions, the two occasions that I spoke to this witness because he asked us to come for these purposes and for somebody to argue that at that time he was going to be threatened and thus give some further additional information on the basis that he was going to be indicted when he's already charged with the crime of murder seems to me to be so irrelevant that I speak nothing further.

It's only, Your Honor, on the basis of relevancy that the government attacks and that is position one. If, however by some stretch, and I don't think the Vole case reaches that point at all on any showing that's been made here, I'm familiar with the Vole case, too. I say even for some basis the Court could find some ultimate degree of materiality or relevance, it is so outweighed by the prejudiciality effect that it would {4055} have on the basis of the showing that one has either been made or could even possibly be made that it would be so prejudicial and so beyond the intent of those rules that it has no bearing here in terms of the ultimate proof as to whether or not this defendant on this day committed the crime of which he's charged.

MR. TAIKEFF: Your Honor, could I respond for three distinct points? I will not take very long.

THE COURT: You'll get three minutes to do it.

MR. TAIKEFF: I'll try to do it in less.

The government over objection of the defense has introduced into this case evidence of events which occurred in Portland, indirectly evidence of the fact that certain conditions exist as it were in Milwaukee, evidence of an event in Wichita and which the defendant is not even purported to have been involved or present and evidence of weapons uncovered in Canada, all of which was over our strenuous objection on the grounds that collateral issues were coming into this case and that all of this was being introduced would only prejudice the defendant and not give the jury any important insights into the central facts of this particular case.

Your Honor ruled in favor of the government in that regard. I most respectfully ask Your Honor to consider the relevant, or the comparative relevance to the guilt or innocence of the defendant of that body or those bodies of {4056} evidence and that which we offer to the jury for their consideration. I think the conclusion is obvious. But in any event, I ask Your Honor to consider it.

The second point, Mr. Hultman says if the FBI was really intent upon doing that job that the defense claims they did they would have done it much better. We don't agree with him, Your Honor. It requires an assumption that the FBI, or at least the agents involved were sufficiently competent to do the job correctly. I think he overlooks the possibility they were both venal and incompetent simultaneously.

Finally the government argues that Jimmy Eagle never spoke with them, not even to deny his guilt and explain to them that he was at his grandmother's house. Well, surely the government must recognize, and if they don't surely Your Honor must that Jimmy Eagle was charged in a most serious matter and exercised his Fifth Amendment right to be silent and Sixth Amendment right to be represented by Counsel. The fact he said nothing to the government by way of explanation, the fact his Counsel never said anything to the government to show how Counsel would have proven the negative of the charges is nothing that's relevant to this particular argument and finally, apropos of that, Your Honor, on November 13, 1975, J. Gary Adams interviewed a witness by the name of Hazel Little Hawk, also known as Hazel Shields, who lives on the reservation and she told them that during the afternoon of June 26th {4057} 1975 she was at the residence of Jimmy Eagle's grandmother, Gladys Bisenet, and Jimmy Eagle was at the Bisenet residence all afternoon; that Eagle was there visiting his grandfather. That was a few days before he was indicted. I don't see any evidence, Your Honor, that the government

with the help or the encouragement of the FBI held off indicting Jimmy Eagle until they pursued that particular aspect of the case.

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

(Recess taken.)

{4058}

AFTERNOON SESSION

(Whereupon, at the hour of 1:30 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, the Defendant being present in person:)

THE COURT: Is Mr. Taikeff coming?

(Mr. Taikeff enters the courtroom.)

THE COURT: For the record, the Government adheres to the ruling that it made this morning in this matter.

MR. TAIKEFF: Your Honor --

THE COURT: (Interrupting) I am sorry. The Clerk indicated to me I said the "Government". The Court adheres to the ruling.

MR. TAIKEFF: Your Honor, that calls into question what we should do with certain witnesses we have. Our offer of proof went only as far as it did, and I would assume that the testimony that would then be offered from Agent Coward and the individuals, such as Marion High Bull, Marvin Bragg and Gregory Dewey Clifford are not on the record; and I am wondering whether your Honor wants to set aside an appropriate time for that testimony to be taken outside of the presence of the jury, of course.

THE COURT: Yes, that is what I was considering. I am wondering, are they available?

{4059}

MR. TAIKEFF: Well, yes and no. Coward is available, and High Bull and Bragg are in custody and somewhere not too far away, but they have to be brought over and we have not yet had an opportunity to speak with them at all because they were arriving in this area only recently, as I understand.

(Counsel confer.)

THE COURT: I am considering the possibility of permitting the jury to be brought back to their hotel for the afternoon and spend the afternoon on these offers of proof.

MR. TAIKEFF: I would have no objection if we did that. It would require, of course, because we have not yet seen either High Bull or Bragg, to have some opportunity to have them here and to speak with them, unless your Honor thinks that time could be best used if we did that during this evening after 5:00 o'clock and then ask your Honor for whatever time seemed to be appropriate during the day tomorrow.

MR. HULTMAN: Your Honor, could I add just a note of maybe information to the Court? One, I would like to at least press on some way, and Coward, I have now sent him back and forth about three times now. He is here again. It would seem to me that whatever they are going to ask Coward they knew what they were going to ask Coward three {4060} months ago, and certainly know as of now; and secondly, it is my understanding Bragg and somebody else, I haven't seen them or talked to them. I think Bragg is here in the building and maybe some of the others are here in the building. My only concern, I think at some place we have got to press on.

THE COURT: We are going to press on. It is just a question of what direction.

The jury will be advised that the remainder of the afternoon will be spent on matters relating to offers of proof which must be taken up outside of the presence of the jury, so the jury may be taken back to their hotel.

Mr. Nelson, would you ascertain from the Marshal whether that is going to create any problem so far as our going forward now?

Mr. Taikeff, you may proceed.

MR. TAIKEFF: Agent Coward.

FREDERICK COWARD, JR.,

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

MR. TAIKEFF: May I proceed, your Honor?

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. TAIKEFF:

Q Agent Coward, you realize you are still under oath?

{4061}

A Yes, sir, I do.

Q Do you know the name, Marion High Bull?

A Yes, sir, I do.

Q Do you know the name, Melvin White Wing?

A Yes, sir, I do.

Q Do you know the name, Marvin Bragg?

A Yes, sir, I do.

Q Did you have contact with them in your official capacity relating to this case?

A Yes, sir, I did.

Q Can you tell us, if it is possible to do so, what the three of them have in common as far as this case is concerned?

A Well, basically information received concerning people involved in the investigation of the shooting of Coler and Williams.

Q And let's focus our attention on Marion High Bull first. When for the first time did you discover his existence?

A You mean the dates?

Q Yes.

A I don't know the exact date.

Q Was it sometime in the month of July?

A It is possible.

Q I am talking about 1975.

A It is possible.

Q If I suggested to you that it was in July of '75 in Rapid {4062} City, specifically in the Pennington County jail, would that refresh your recollection any?

A For Marion High Bull?

Q Yes.

A I believe so, but I am not quite positive.

Q Have you ever had any contact with a person by the name of Gregory Dewey Clifford?

A No, sir.

Q If I suggested to you that you had contact with Marion Allen High Bull on July 26, 1975, in Rapid City, South Dakota, would that in any way affect your independent recollection?

A Well, I recall talking to him, the exact date I don't recall, but if that's what it says on there, I would agree.

Q If your 302 on the subject showed the date, July 26th, would you accept that?

A Well, I believe so.

Q (Handing).

A (Examining) Yes, my name is on there.

Q How do you know that that wasn't a typographical error?

A Well, the only thing I can say about that is, I have done several interviews for several people, and that would be the best I could say, that it was on that particular day.

Q Was that the first time you had any contact with Mr. High Bull?

A Well, I believe I had two contacts, one is so indicated on {4063} that 302, and then another one, it might be weeks later or a month or two later.

Q Could it have been on August 1, 1975, in Rochester, Minnesota?

A It was in Rochester, Minnesota, yes.

Q Would this document which is Defendant's Exhibit 209 for this hearing only help you in any way in confirming that fact, that it was August 1, 1975?

A It was dated August 1st, 1975, and it was at Rochester, Minnesota.

Q This document, Defendant's Exhibit 209 is a typewritten statement, is it not?

A Yes, sir.

Q And it was signed in your presence on or about August 1, 1975?

A Yes, sir, it was.

Q Can you tell me where it was typed?

A Where it was typed?

Q Yes, sir.

A I believe it was typed in Rapid City, South Dakota.

Q Was that before or after August 1, 1975?

A I believe it was before.

Q So is it fair to conclude that when you went to Rochester, Minnesota, for the purpose of meeting with Mr. High Bull for what I understand is the second time, you had the typewritten {4064} statement with you?

A I believe that's correct.

Q Now, between Defendant's Exhibit 208, which was the 302 I showed you, and 209 which is the typewritten statement, there is apparently reflected two meetings with Mr. High Bull. Did you have any others?

A No, sir.

Q How did he come to your attention so that you went to see him the first time?

A Well, it didn't come to my attention. It came to Special Agent Dean Hughes, and he received some information about High Bull, who I believe was at the Pennington County jail, incarcerated, and of course, Dean Hughes asked me to go along with him. It was his interview, and I assisted him in the interview, the initial interview.

Q That's reflected in the 302 which is Defendant's Exhibit 208, the first document I showed to you?

A The first document indicates that Dean Hughes was the author, if you will, of that 302.

Q Was High Bull a Federal prisoner or a state prisoner?

A I am not sure. I possibly might have been both.

Q Do you know what charges he was facing?

A Well, I am not sure, sir.

Q Does that mean your memory is not sufficient when you say you are not sure?

{4065}

A No.

Q Or is there some other basis for confusion?

A Well, there is some basis for confusion because he was incarcerated there, and I don't know if he was incarcerated for a Federal or state charge or what they were; but I recall going there with Special Agent Hughes to interview him about the shooting deaths.

Q Is it fair to say that he did have charges pending against him at the time?

A Well, I would suspect one way or another he did, if he was in jail.

Q Isn't it possible to be in jail serving time on a misdemeanor as opposed to being in a prison?

A Oh, yes, sir.

Q What I am trying to ascertain is whether there were any unresolved charges hanging over his head at the time?

A Well, I didn't inquire as to that.

Q Were you present throughout the interview?

A Yes, sir.

Q And as far as you know, did you pay attention to it?

A Well, the best I could.

Q Isn't it a fact that High Bull was immediately advised by Special Agent Dean Howard Hughes, that High Bull should not discuss or talk about any of the criminal charges currently against High Bull?

{4066}

A It is possible. Does it indicate that in there?

Q I will let you look for yourself (handing).

A (Examining).

Q Second paragraph.

A (Examining) O.k., it does say that, yes.

Q All right. Now, we both know that it says that. Now, I ask you when it took place?

A Well, like I said, Special Agent Hughes was controlling the interview and asking those particular questions. I initialed it at the time it came back and would concur with what would be in there, yes.

Q All right. That's the second time you have told us that it is in there.

My question to you is, on July 26, 1975, was any such statement actually made by Special Agent Hughes to High Bull?

{4067}

A I don't recall that.

Q Is it fair to say that the 302 in question was transcribed on July 27, 1975?

A I don't know. Does it say that, sir?

Q It does.

A Well, that would have been the day or subsequent day that Hughes would have received it back first. He gets it first.

Q But you did initial it?

A I believe I saw my initials on there, yes.

Q And when you initialed it it was only after you had read it; isn't that correct?

A That's the procedure, yes, sir.

Q And by initialing it you indicate that you are satisfied with the content in the sense that there's no obvious mistake or no mistake that you recognize?

A Well, at the time that I would have read it and then initialed it I would have been satisfied with the content, yes.

Q You don't recall telling anybody that the second paragraph was wrong in the sense that no such statement was made to High Bull?

A Well, I don't understand, sir.

Q What part of what I said did you not understand?

A The point that you were trying to make, sir.

Q Well, I was asking you a question. I wanted to know whether {4068} at the time you signed it you had no quarrel with the contents of the second paragraph?

A I didn't have any quarrel with any of it, sir, because it was not my interview.

Q Was any of the individuals I mentioned to you before, High Bull, White Wing or Bragg facing murder charges?

A High Bull, Bragg and --

Q White Wing.

A Murder charges. It's possible one of them might have been, but I'm not sure.

Q The possible murder charges that I speak of, and I ask you this by way of attempting to refresh your recollection fully, would be the killing of the person's own two children. That refresh your recollection any?

A Yes, sir, it does.

Q In what way, what do you now remember?

A Well, the connection between High Bull and that particular statement that you just made was the fact that I was cognizant of the fact that High Bull some months ago, you know, prior to that stood trial in Rapid City. And I believe was convicted, or if he stood trial. You know, I'm not quite clear on that because there is, you know, there's a lot of cases going on and we don't pay attention to everybody's cases that are going on.

But I do recall one thing that Marion High Bull was {4069} involved with the death of two children.

Q On the reservation?

A I believe so, yes.

Q And they were his own children?

A I couldn't say that, sir.

Q Now, is it a fact, is it not, that he could not be doing his sentence for murder or homicide in the Pennington County jail? That is a fact, is it not?

A I wouldn't say it's a fact. I don't know if he was or wasn't.

But to answer your question I believe sometimes that people can serve a sentence in a jail such as that.

Q Do you know whether at the time you interviewed him he had already been sentenced in connection with the homicide charges against him?

A That particular interview?

Q Yes. That's July 26, 1975.

A I don't know that, sir.

Q Did you have any discussion with him or was there any conversation in your presence concerning his upcoming sentencing on the homicide charges?

A No. But I do recall that Dean was very careful because Dean had I believe talked to him before.

I went along with Dean to do the interview and Dean was very careful at the outset of this particular interview to {4070} make sure that he, High Bull, did not discuss anything concerning that particular case. But yet our main concern was the killing of Coler and Williams.

Q Do you know when Agent Hughes previously spoke to High Bull?

A Well, I'm only assuming, based on the fact that Dean Hughes was the agent in charge of that particular murder case with the two children, and whether he talked to High Bull before or not I do not know.

But he was familiar enough to know about him and asked me to go along with him to the interview.

Q And do you know anything about the events that led directly to your going either from Agent Hughes or from your own observations or other sources?

A The only thing I can say to that, sir, is he asked me to go with him because he wanted to talk to him concerning some facts concerning the killing of Coler and Williams. Specifically why and what for I don't know that.

Q Now, before you went to the Pennington County Jail in Rapid City did either you or Hughes get any legal process from the United States District Court in Rapid City?

A I did not.

Q When you went there and asked for him did you present any legal process from the United States District Court or any other court?

A Not that I recall, sir.

{4071}

Q Where did you interview this jailed person, Marion Allen High Bull?

A I was trying to think of that, too. You know, I've interviewed so many of these people and I re-interviewed him again in so many different places that it's possible we, whether interviewed him there --

Q Do you want to finish that sentence or --

A Well, the thing that came to my mind was the marshal's office. But that was in connection with other names. But I would have to say it was in the Pennington County Jail.

Q Tell me whether looking at the first paragraph on page 1 of the Defendant's Exhibit 208 suggests anything else to you?

A Okay. Well, we were at the Pennington County Jail, yes.

Q Is that where the interview took place?

A I just can't remember that, that whole incident.

Q Isn't it a fact that you interviewed him in the FBI office in Rapid City?

A It says that, yes, sir.

Q I understand, but I want to make sure there's no ambiguity in your answer. When you said, "It says that, yes, sir," were you first telling me something and then saying yes, you interviewed in the FBI office?

A Well, what I'm saying, I stated initially that I recall going to the Pennington County Jail and, you know, talking with him. But whether in fact we concluded the interview at the office {4072} I just can't, I can't put it together is what I'm saying.

Q You need a little time?

A Well, like I say there were so many people we talked to and so many different places it's very difficult.

Q Well, that's why you write 302's, isn't it?

A Well, it's to refresh our memory and put the facts down as have, yes.

Q So that when the facts are put down and then checked by you before you initial the report an effort is being made to make sure you have the most complete and the most accurate information for future reference?

A Well, that's true. That would be at the time we did it, you know. Things are fresher in your mind when you do it, you know, as soon as you get done with the interview, yes.

Q So what you are saying at that time it was fresh in your mind and as far as you know you put it down accurately on paper; is that correct?

A To the best of my knowledge I'd have to answer that way, yes.

Q So you wouldn't quarrel with the statements here that the interview took place in the Rapid City office of the FBI, would you?

A I won't quarrel with that, no.

Q Okay. How did you get the guy out of the jail?

A Well, I don't even recall that. I mean, you know, how that {4073} took place. I'm assuming, because I went with Dean Hughes and he was in charge of the interview, and any necessary comments or discussion about what we were going to do to remove somebody from jail would have taken place by him.

Q But you know that once a person is incarcerated he can't be taken out of jail, assuming he isn't bailed out, without an order of the Court or writ or some other document; isn't that a fact, based on your own experience as a special agent of the Federal Bureau of Investigation?

MR. SIKMA: Your Honor, I would object to this as calling for a legal conclusion of the witness.

MR. TAIKEFF: I asked him what he knows.

THE COURT: You may answer, if he knows.

A I don't know the legal definition or reason, but the only answer I could give to that would be that it would have been done on the basis of taking him to the office for privacy to conduct a thorough interview.

Q (By Mr. Taikeff) Now, do you recall whether or not you took more than one person that day out of the Pennington County Jail and took more than one person to the FBI office in Rapid City?

A Myself?

Q In connection with your official duties with Agent Hughes.

A On that particular day?

Q Yes.

{4074}

A I don't recall, sir.

Q Now, when you got to the office, the FBI office, was there any conversation at all, and I mean by that question either on your part, Agent Hughes' part or Mr. High Bull's part, about any benefit of any kind that might result from his being interviewed by you or otherwise assisting you?

A No, sir.

Q Did Mr. High Bull ask any question concerning whether you could help him with any of his cases?

A No, sir.

Q Did he ask you whether it would be possible for you to intercede in any way in connection with his sentencing?

A No, sir.

Q Did he ask for any money?

A No, sir, not to me.

Q Well, you were present, were you not, with Hughes?

A That's correct.

Q When I say "you" I mean you or Mr. Hughes or both of you.

A No, sir, would be the answer.

Q Did he ask for any special jail privileges to be arranged for him?

A Not to my knowledge, sir.

Q Did he say anything about why he was willing to give you whatever information he then gave you?

A Not that I recall.

{4075}

Q Do you know whether he had a lawyer at that particular time representing him on at least one case?

A I don't recall that, sir.

Q Do you recall whether you contacted any attorney to ask permission to speak with Mr. High Bull?

A During that interview?

Q Prior, prior to that interview or during it, but by the time the interview was terminated.

A I don't recall that I did. Possibly Mr. Hughes did.

Q Taking into consideration your understanding of the significance of a defendant being represented by an attorney and what are the required practices of the FBI, do you think that if contact was made with his attorney to get permission to speak with him its the kind of thing which would go into a 302?

A Well, Dean Hughes had a reason to go there. I went with him and he put it into a 302.

Q Put what into a 302?

A The information.

Q About the interview?

A Yes, sir.

Q But I'm asking you about that very special aspect of your, or his activities. I'm asking you whether as an ordinary procedure --

MR. TAIKEFF: Could I finish my question? There's no {4076} jury here. There's no need for counsel to stand up until I finish my question. No one's going to be prejudiced.

MR. SIKMA; You may finish your question, Counsel.

MR. TAIKEFF: Your Honor, I appreciate Mr. Sikma's statement on what to do. I take my orders from the Court. I ask that Mr. Sikma be seated until I finish asking the question. There's no one to be prejudiced even if I ask an improper question, which I have no intention of doing.

THE COURT: Proceed.

Q (By Mr. Taikeff) My question was one of FBI practice so that we could evaluate Exhibit 208. If before you interviewed an incarcerated person who had counsel, and if you called his lawyer to

ask permission to have an interview with him, is that the kind of thing in your opinion that should be put into a 302 concerning that interview?

A Well, you mean if we contacted the attorney should it be noted in the --

Q Yes.

A Well, I would think so, yes.

Q Now, if I tell you there's no such entry there do you think that raises a high probability that no such call was made, assuming he had an attorney?

A Well, that's merely an assumption.

MR. SIKMA: Your Honor, I object to this as speculative and basically would also object to it as not proper as far as {4077} these proceedings are concerned at this time. It's, it appears to be matters of speculation which are little or no value.

THE COURT: Overruled.

A Well, like I was saying it would have to be an assumption on my part.

Q (By Mr. Taikeff) Now, did you hear what Mr. High Bull said in the course of the interview?

A I was attentive, yes, sir.

Q I beg your pardon?

A I was attentive, sir.

Q That doesn't answer my question. Did you hear what he said?

A Well, I'd have to answer that yes, sir.

Q Did he say that he asked Jimmy Eagle how it happened and that Eagle related the following information to him referring to the shooting deaths of the agents on June 26th, 1975?

A You mean did he say those specific words, or words to that effect?

Q Yes.

A Words to that effect.

Q Either one.

A I believe that's true.

Q Now, did High Bull say in words or substance that Eagle advised him that the FBI guys came in two cars and went down by the creek in Oglala, South Dakota?

{4078}

A I think basically that's true, yes, sir.

Q Did High Bull also say that Eagle said that they opened up on them down by the creek and the FBI guys started shooting back?

A Yes.

Q And did High Bull tell you that Eagle told him that they hit one of the FBI guys and he went down?

A Yes, sir.

Q Did High Bull then tell you that the next thing he could recall was that Eagle told him that they were up real close to the second FBI guy that was standing outside his car? If you have some trouble with that I'll be glad to show the 302.

A Well, basically to answer your question that was the conversation along those lines, yes.

Q Did High Bull tell you that Eagle said that they got up real close to the second FBI guy and they shot him?

A I believe that's basically true, yes, sir.

Q Did you at any time in the course of that interview, either you or Agent Hughes, ask High Bull if he knows who they refer to in the story he was relating?

A Well, I believe that the question came up so we could specifically determine if it was an I statement or they or we. In other words, was Jimmy Eagle participating or was he saying that he in fact was the individual doing those things.

{4079}

Q And what answer did you get from Mr. High Bull?

A Basically throughout the whole interview, as I recall it, High Bull stated that it was a, it was a story that he was hearing from Jimmy Eagle while he was in the jail and that's what he was telling us. He was conveying it to us as to basically what he was saying.

Q Now I want to make some inquiry of your state of mind as you sat there in the course of this interview. Do you understand what I'm talking about?

A My state of mind.

Q Okay.

Talking about what you understood at that time. I'm not asking whether you were right or wrong.

A Okay.

Q Okay. Do you understand that?

A Yeah.

Q You were sitting there and a person by the name of High Bull was telling you and Agent Hughes what he, High Bull, had heard Jimmy Eagle say, correct?

A That's correct.

Q And it appeared to you, did it not, that Jimmy Eagle when he spoke used the plural designation such as the word "they"?

A That's correct.

Q Did you at any time in the course of that interview ask Mr. High Bull if there was any revelation by Eagle as to {4080} who "they" referred to when Eagle was talking?

A I did not.

Q Did Mr. Hughes?

A I don't recall. It would only be an assumption that he tried to clarify those points.

Q Based on your experience, do you think that if such an inquiry were made that would be reflected in the 302?

A Well, that would depend on the individual who's doing the 302.

Q I'm talking about the ordinary requirement that we have been over a few times concerning what a 302 is supposed to accomplish, what's supposed to be in it, et cetera.

A The 302s many times are interpretations or, you know, you have to somehow with your own intelligence, your own vocabulary place those on the 302 to the best of your knowledge.

Q Now let me read to you the third full paragraph on page 2 of Defendant's Exhibit 208. "Eagle advised they escaped by going down the creek and going around behind Oglala, South Dakota, and Eagle said he later turned himself in at Rapid City, South Dakota." Now that is a summary of what Mr. High Bull said Jimmy Eagle said, am I correct?

A Yes, sir.

Q When you were sitting there listening to that, was there any doubt in your mind that at least as far as what Eagle was supposedly saying when he spoke that Eagle was talking about {4081} himself escaping at the time in question?

MR. TAIKEFF: I'm asking for his present state of mind during the interview.

MR. SIKMA: Your Honor, I would say that that's not the best evidence. There is a signed statement that, which is Exhibit 209 which is the best evidence and this witness has testified to some extent he doesn't recall the specific language, at least of the 302, nor of the other statement and I would contend that the best evidence would be government, or Defendant's Exhibit 209.

THE COURT: The Court is really not concerned at this point with the best evidence. The Court is concerned with whatever offer of proof Counsel has to present.

MR. TAIKEFF: Your Honor, to satisfy Mr. Sikma, he is apparently referring to the first paragraph on page 3 of Defendant's Exhibit 209. That says quote, this is signed by Mr. High Bull, quote "I was then told by Jimmy Eagle that they escaped by going down to the creek and going around behind Oglala, South Dakota. Jimmy Eagle then told me that he later turned himself in at Rapid City, South Dakota." I think the two paragraphs are virtually identical except one is written in third person and the other is written in the first person from the point of view of High Bull.

I'll proceed on the basis of the second version, Your Honor.

{4082}

MR. SIKMA: Your Honor, my point is that at any rate, this manner, this witness' testimony for setting out proof here for this record, offer of proof, would be admissible in any event and that's why my contention is that it's something that need not be gone into at this point.

THE COURT: Well, the Court is concerned with what Counsel has on an offer of proof and I'm going to hear a reasonable, I'm going to listen for a reasonable length of time.

Q (By Mr. Taikeff) I think there is a question outstanding for you, sir.

In hearing what went on at the interview on July 26th or in reference to the signing of the statement on August 1, 1975, was it your understanding that Jimmy Eagle had told High Bull that he and at least one other had escaped that day by following a certain route?

A Yes, sir.

Q Is it fair then to say that it was your impression -- withdrawn.

Is it fair then to say that it was not your impression that High Bull was reporting to you events that Jimmy Eagle was talking about that did not include the participation of Jimmy Eagle?

A I had no way to determine that. Basically we were listening to what he had to say about conversations that were taking place.

{4083}

Q I'm not asking you about the underlying truth or falsity of what you are being told, I'm only asking you what your sense impressions were as you listened to High Bull speak and I ask you about the use of the word "they" in connection with Jimmy Eagle saying that they escaped by going down to the creek, et cetera, and that Jimmy Eagle then later turned himself in. Was it not your impression that someone was telling you about what Jimmy Eagle said he and another or others had done?

A Yes. That's true.

Q Did High Bull tell you that Eagle said that the second FBI guy who was shot real close was sprayed across the chest at close range?

A I believe that's basically true, yes.

Q Did High Bull tell you that Eagle told him that a bullet came through one of the houses and hit Joe Stuntz and that is how Joe Stuntz got killed?

A I believe so; yes.

Q Did High Bull tell you that with reference to all of the things that he had related up to that point and I'm not suggesting that I've questioned you about every single one, that Jimmy Eagle had said these things several times and was excited while talking about it and seemed to enjoy talking about it?

A I think that's basically true; yes.

Q Now when this interview was over -- withdrawn.

Before the interview was over, did you have any {4084} further conversation with High Bull?

A I don't recall, you know, what conversation took place. I do recall that I said very little if anything that day.

Q How about Agent Hughes, did he say anything after High Bull related what he supposedly heard Jimmy Eagle say?

A That's very possible; yes, sir.

Q Do you recall the substance of that?

A I'm afraid I don't.

Q Do you recall anything about it at all?

A Not to my knowledge.

Q Once again referring to your own state of mind, did you believe that High Bull was telling you the truth?

A Well --

Q About what he had heard or what had been said?

A I don't think I could say what he believed if in fact you have nothing to base anything against that he's not telling you the truth. We were there listening to what he had to say and I would have to say, I mean, coming back to your question, that I had no reason to doubt him.

Q By the time the interview was over, would you say that whatever the nature of the cordiality was or wasn't remained the same; in other words, nothing had changed between you two and High Bull, no argument broke out or anything?

A No, absolutely not.

Q So however things were at the beginning, they were {4085} essentially the same at the end?

A Yes.

Q Did you ask him to take any further action on your behalf?

A I don't recall that, sir.

Q Did you tell him it was very important to find out who else was included within the word "they" and that he should go out and find out one way or another for you?

A I did not.

Q Did Agent Hughes?

A And I can't state whether he did or not.

Q Based on your own practices, your own techniques, if you were the only interviewer, would you at that time have asked the guy to go back and see if he could find out who the other people are or were?

A Well, I would be concerned as to finding out if that was possible, but whether it was probable remains to be seen, or would have remained to be seen.

Q Now is it not a fact that that same day you and Agent Hughes interviewed Melvin White Wing?

A That same day?

Q Yes.

A Possible.

Q Let me ask you a question concerning FBI procedure. If on a 302 after the typewritten file number it says "-sub capital {4086} A" and below that the number "857," for example, what's the significance of that?

A Well, sub A was the particular file that we refer to our 302s on, in connection --

Q Someway you refer to a particular file?

A Was a particular file that referred to all the files we were doing in a particular case. I mean, you know, 302s.

Q Well, were all 302s designated sub A?

A Well, to answer that unequivocally I can't. As I recall, 302s were sub A.

Q And the "857" or some number like it, what does that designate: page number in the sequence?

A Well, it would be numbers. I'd have to look at it. It could be how they come into the file.

Q Now as to the interview date, if there is a -1 after the date written in hand, what does that mean?

A After the interview date -1?

Q Yes. Typed 7 slash 26 slash 75, then there's handwritten dash one. What does that mean?

A I don't know.

Q How about dash two, does that have any meaning?

A (No response.)

Q Let me show you Defendant's Exhibit 210 which concerns White Wing where I think you'll find the dash one.

A Okay.

{4087}

Q And 208 which has the dash two. Can you tell what that means?

A I have no idea what that means.

Q Can you tell which of these two individuals were interviewed first, and I'm speaking about High Bull and White Wing?

A No, I don't, sir.

Q Can you tell us whether they were separately brought to the FBI office?

A I can't even recall that, if they were in fact both brought to the office that day.

Q If it says so in the first paragraph of the report, is that a sufficient indication for you to believe that they were?

A Yes.

Q Now what charges were pending against White Wing?

A Well, as I recall, he was in Pennington County Jail on misdemeanor, a local charge. We'll say it that way, whether it was a misdemeanor or not I don't know.

Q Already convicted or awaiting trial?

A I'm not quite sure, sir.

Q Do you recall any attempt or any suggestion at reaching his Counsel to ask permission to speak with him if he had counsel?

A I'm not sure if he had Counsel or we contacted him. I'd have to refresh my memory on it.

{4088}

Q If I told you that Defendant's Exhibit 210 which is the 302 of the interview said nothing about a contact with any Counsel, would you be satisfied that no such contact was made?

A If possible that would have been the results; yes.

Q White Wing reported things which he claimed Jimmy Eagle had said, is that correct?

A That's correct.

Q And he reported that these things had occurred on a different day than High Bull had reported it, isn't that true?

A That's possible. I'd have to again refresh my memory.

Q If I told you that the High Bull 302 says that the event occurred on a Thursday evening and that the White Wing 302 says it occurred either a Saturday or a Sunday, would that refresh your recollection any?

A It would basically have to be true.

{4089}

Q Then White Wing tell you that Eagle said that one of the FBI Agents went to the trunk of his automobile, opened the trunk and this agent got shot and went down?

A I think he did say that, yes.

Q Did White Wing tell you that Eagle advised that they then shot this second FBI Agent, and then Eagle stated everybody took turns shooting the two FBI Agents?

A I believe so, yes.

Q Did White Wing tell you that Eagle had told him there was a Joann and a Leonard living there?

A I believe he did, yes.

Q And did White Wing say that this information about Joann and Leonard had been stated by Eagle while Eagle was talking about the shooting of the FBI Agents?

A It is basically true.

Q Did White Wing tell you that Eagle said that they escaped to a place behind the dam where cars were supposed to pick them up?

A I believe he did, yes.

Q And did he tell you that Eagle said that the agents were shot eight times?

A Eight times?

Q Yes.

A I don't recall that.

Q All right. Let me show you Page 1 of Defendant's Exhibit {4090} 210, last sentence in the next to the last paragraph.

A (Examining) Um-hum.

Q Do you recall whether White Wing said that Eagle said that?

A I don't recall that, but that would have to be basically true if it is in there, yes.

Q When you say "basically true", you mean basically true that White Wing said that Eagle said those things?

A Yes, sir, that's what I am referring to. Yes, sir.

Q Now, did White Wing tell you that Eagle admitted to him that he, Eagle, set up the warrant in order to set up FBI Agents, and Eagle further stated that they set them up?

A I think that was basically the context of the interview.

Q Now, were there any further questions put to Mr. White Wing as to what other information he might have specifically concerning who they, quote, unquote, might be?

A Well, I think basically the whole interview was to determine what he had to say as to what he heard, and you know, we were recording what he said.

Now, whether that's the specific question, I can't recall if I asked that specific question. I am assuming we are trying to cover those bases.

Q On August 3, 1975, in Rapid City, South Dakota, did Melvin White Wing sign a statement which we have marked Defendant's Exhibit 211, which essentially summarized the information he had {4091} given in the interview?

A (Examining).

Q And I think in fairness I should give you the 302 so that you could make a quick check to see whether in fact there is a strong correlation.

A (Examining).

Q I am not asking you whether every single word is the same. I am talking about the points made by High Bull concerning Eagle's revelation of facts of June 26th, is it fair to say that the statement of August 3rd pretty much tracks the factual content revealed in the 302?

A I would say "yes" to that.

Q And would you say that that is essentially true for Defendant's Exhibits 208 and 209, one being the 302, the other being the statement that was signed by the informant?

A (Examining) I mean, you know, basically the story is there, yes.

Q Now I have asked you certain questions concerning events of July 26, 1975, before, during or at the end of the interview. I now put similar questions to you, but I am talking about the period between the end of the interview and the time that formal statements were signed. In the case of White Wing that would be August 3, in the case of High Bull that would be August 1. Do you understand the period of time I am focusing my attention on?

{4092}

A July to August?

Q Well, specifically July 26 to August 1 --

A (Interrupting) O.k.

Q (Continuing) -- in one case, that's the High Bull case, and July 26 to August 3 in the White Wing incident.

A O.k.

Q Were there any further interviews of either of those two people during the respective periods that have been stated for the record?

A I believe it is possible on White Wing. I am not positive -- I mean, I did talk to White Wing a couple of times other than those two times you have mentioned, but High Bull I don't believe so. I stand to be corrected, of course.

Q Is it fair to say that there were no interviews in which any further information concerning the events of June 26th, or what Jimmy Eagle might be saying about those things were obtained?

A Well, it is possible on the White Wing. There could be another one, but whether it says anything or not --

Q I am showing you now a 302, based on an interview of August 3, 1975, and transcribed August 6, 1975. Is that what you are referring to?

A (Examining) Yeah, that's one of them, yes.

Q Now, that interview on August 3, 1975, was relating to facts that were heard coming out of the mouth of James Eagle, but which White Wing, according to his own statement, did not

{4093} know whether they pertained to the shooting deaths, the conversations pertained to the shooting deaths of Williams and Coler?

A Yeah, that's true.

Q But that he thought, since reference was made to the word "gun", that it might be important and wanted to call it to your attention?

A Yes, that's true.

Q O.k. Now, was there any effort -- and again I am focusing attention on July 26 to August 3 in the case of White Wing, and July 26 to August 1 in the case of High Bull -- was there any effort to get either or both of these individuals to see if they could find out who the "they" referred to?

A Not by me.

Q Do you know of any such effort by the Federal Bureau of Investigation?

A Well, I mean, to expand that "they", of course, we were trying to determine who was all involved in the shootings, yes.

Q I understand that. I am focusing attention on the efforts by the agents in Rapid City on these two possible sources of some concrete information, that you were doing in other directions, trying to solve this case?

A Not to my knowledge. It is possible, I mean. I can't say unequivocally.

Q Putting aside the question of it being within the realm of possibility, do you know of anything along those lines?

{4094}

A Boy, not that I can remember.

Q On or after August 3rd -- withdrawn.

When you went to see Mr. White Wing on August 3rd to get him to sign a more formal version of what he had originally told you, or to put it in other terms, to get him to sign a statement -- in his case it is Defendant's Exhibit 211 -- did he then voluntarily give you the information which is reflected in that 302 -- which I better have marked for identification so there is not any confusion in the record, I am talking about the 302 showing an interview of August 3, '75, and a transcription date of August 6, '75, and that is now Defendant's Exhibit 213 -- (handing) did he voluntarily give you that extra piece of information that he overheard a certain conversation, didn't know whether it applied to June 26th, but because the word "gun" was involved, he thought you ought to know about it?

A As I recall, again I went with -- (examining) Dean Hughes regarding -- I think it was a request by him to see us. That's how the interview began. That's the reason we went.

Q When was that statement typed that he signed?

A Oh, it says 8-6-75.

Q I am not talking about the 302 which you are holding which is Defendant's Exhibit 213. I am talking about the typewritten statement which he signed on August 3rd, which confirmed what he had previously told you on July 26.

A You mean the date was July 26, '75, is that what you are {4095} inquiring about?

Q What I am trying to find out is, when was the typing done of the statement which bears the date, August 3, which White Wing signed, not that document, I am talking about Defendant's Exhibit 211 (handing)?

A (Examining) When was the typing done?

Q Yes.

A I believe it was done the day before. They are always instructed to obtain them.

Q And when you went there with that statement, which is now 211 for identification, Mr. White Wing gave you some information voluntarily, did he not, and that's reflected in 213?

A Um-hum, that's the one.

Q Now, as of the time Mr. White Wing gave you that information, is it fair to say that it was your impression that he was willing to be helpful to you?

A Well, he was willing to be helpful in any way with any information that would assist us in the investigation of the shooting deaths of Coler and Williams.

Q And you knew that or believed that at that particular time, is that right?

A Well, he was very cooperative.

Q Now, had there been any discussions with him about helping him in any particular way?

A No, sir.

{4096}

Q And that includes cases, money, jail privileges or any of the things which I mentioned to you before?

A As far as I am concerned, no, sir.

Q Well, when it was apparent to you, at least by August 3rd, that he was quite cooperative and would tell you things that might concern June 26th --

A (Interrupting) Um-hum.

Q (Continuing) -- do not make any request of him to go back and find out who "they" referred to?

A I did not, no.

Q Was that because you didn't believe him?

A No, because as I stated before, Hughes was in charge of the interviews. I had no reason to doubt him, and the decision to do anything additional as to those interviews would be his decision.

Q Again I ask you for your own personal state of mind at the time. Did you not think that this information was very important to your investigation -- and I am talking about the information you got from White Wing, High Bull and anybody else who was in the Pennington County jail who told you he overheard conversations -- didn't you think it was important stuff?

A Of course, we did.

Q And didn't you think it was worth finding out more about that inside the jail, if that were possible?

A Well, the thought could have occurred to me; but these are {4097} statements that we were receiving from these people based on what they voluntarily wanted to tell us.

Q But once they were there voluntarily telling you these things, was no effort made to direct their future attention towards getting some more information?

A Well, I think what you are getting at is, if they heard anything else, yes, let us know. That's good investigative technique. Now, as far as directing, no, sir.

Q I said directing their attention, I meant suggesting to them, "If you hear anything else in the future, we want to know about it"?

A Well, absolutely.

Q And how about saying, "Look, this guy was talking about `they', we would like to know who `they' is"?

A No, it wasn't directed that way. It would have been in the general sense, "Appreciate your cooperation, if you hear anything additional that would help us in this investigation, we would appreciate your cooperation." Now, words to that effect.

Q Now, when you checked back with a person who has given you information, whether you get information or not, isn't it true that you write a 302 of the further contact?

A You mean as far as the investigation?

Q Yeah, I will give you a simply hypothetical.

Suppose you interviewed me on a Monday, I gave you whatever {4098} information I had and I said, "Come back on Friday, I will give you the name of that person I can't think of, you know"; if you came back to see me on Friday and I said, "I am waiting for it to arrive in the mail, check with me again on Monday," wouldn't you write up a short one paragraph 302 or at least a one paragraph 302 recording the fact you had seen me on Friday, I still didn't have the information, I told you to come back on Monday?

A It is possible. If it is relative to the case you are working on, yes.

Q Well, do you know of any further attempt to contact either of those two individuals to see what more they had learned?

A Not by me.

Q Do you know of the existence of any 302 which reflects a further attempt to find out what else they had learned?

A Well, I believe I had talked to White Wing an additional time. I am not positive on that, but I talked to him two or three times, possibly four times.

Now, whether there was a reiteration or like when the contact was made, "Is there any additional information that you would know, give to us, that would assist us, that would help us in this investigation, we would be appreciative," and that would be the basic context of any contact of that nature.

Q Now then, there was a person by the name of Marvin Bragg who might also have an alias. Do you know the alias he used?

{4099}

A Yes, I do.

Q What is that?

A Ricky Walker.

Q And Marvin Bragg gave you a statement in his own handwriting which he signed on April 23, 1976, isn't that correct?

A Partially correct.

Q Beg your pardon?

A Partially correct, sir.

Q Tell me what in my question was incorrect.

A Well, first of all, he didn't do it in his handwriting.

Q Whose handwriting was it?

A Depends on which one you have, sir.

Q Should I have more than one?

A Well, on that particular date?

Q On any date.

A I don't know if you should have them, but in answer to your question, the statements that I took, the signed statements that I took concerning him were not done in his handwriting.

Q I think I understand what you are getting at. I would like to attempt to clarify the record.

You are saying that Marvin Bragg gave you several statements?

A That's correct.

Q Altogether, one of them concerning conversations he either had with or overheard with Butler, another one concerning the same general subject matter with Robideau and another one {4100} concerning Eagle?

A That's correct.

Q And so when you were referring to the plural, you were referring to at least those situations?

A That's correct, sir.

Q O.k., but now I want to make sure as to the number of such statements taken from him concerning Eagle, was there one such statement?

A To the best of my knowledge there was.

Q Now, I show you as of this moment unmarked documents, both dated May 5, 1976 -- that refers to the date of transcription -- both referring to statements of April 23, '76, I am putting those before you for the moment.

{4101}

Q Now, I am showing you Defendant's Exhibit 212 which is the typed written version, and ask you whether or not that typewritten version, Defendant's 212 is in fact the typed version of this three page handwritten document? I'll have all of these marked in a moment.

A I'll have to go through it and see if it's the same.

Q Okay. 212 is a typewritten version of this handwritten statement?

A Appears to be.

Q All right. That latter piece of paper will now be marked Defendant's Exhibit 216.

In whose handwriting is 216, if you know?

A 216 is mine.

Q And that was signed by Marvin Bragg?

A I believe it is Marvin Bragg.

Q Okay. Now, how did you get to know Marvin Bragg?

A Well, I was summoned to the Pennington County Jail concerning a jailbreak whereby --

Q When did that happen?

A When?

Q Approximate date.

A Well, it's going to be right around that same time because that's the only contact, that's how the contact started.

Q That when then be in the month of April, 1976?

A Could be a month before, a couple weeks, somewhere around {4102} there.

Q Okay. But all of Mr. Bragg's statements, whether handwritten, typewritten or whether both handwritten and typewritten, appear to be dated April 23, 1976. So somewhere in the period immediately preceding that date you started investigating a possible jailbreak, and that's how you came in touch with Mr. Bragg, is that a fair, general statement?

A That's a fair, general statement, sir.

Q All right. Now, Mr. Bragg told you something about Jimmy Eagle saying something way back in July of 1975; isn't that correct?

A I believe that's true.

Q How did it come about that you got to talking with Mr. Bragg about what he heard or supposedly heard Jimmy Eagle say in July of 1975 when you questioned him in April of 1976?

A Well, I was informed that information by two individuals also with the FBI.

Q Who were those people?

A Be Special Agent William Wood and David F. Price.

Q Now, did any conversation occur between you and Mr. Bragg concerning possible benefits of any kind, direct or indirect to Mr. Bragg, for any information he might give you?

A Not by me, sir.

Q By anybody else in your presence?

A Not to my knowledge and not in my presence.

{4103}

Q So as far as you know Mr. Bragg did whatever he did without any inducement of any promises of any kind from you or the federal government?

A To the best of my knowledge.

Q As far as you know?

A As far as I know, that's correct.

Q And in the course of taking a number of statements from him on April 23, 1976 did he tell you that on or about the 21st, 22nd and 23rd days of July, 1975 he had some conversation with Jimmy Eagle?

A I believe he did, yes.

Q And did he further tell you, but without specifically identifying any exact date, that Eagle admitted that he, Eagle, was down there at the time of the shooting?

A I believe that's true, yes.

Q And did Marvin Bragg also tell you that Eagle admitted to him that he, Eagle, was in on the ambush?

A That would be true, yes.

Q And did Marvin Bragg tell you that Eagle admitted to him that he, Eagle, did some of the shooting at the federal agents?

A That's correct, sir.

Q Now, by April 23, 1976 when you took that statement a trial was close to beginning, was it not?

A I believe it was.

Q And as of that time what understanding if any did you have {4104} as to who might be tried for the murder, imminently tried I should have asked you, imminently tried?

A Concerning that particular trial or other trials?

Q Well, there were four people indicted for the murders of the FBI agents, am I correct?

A I believe that's true.

MR. HULTMAN: Well, I'll indicate on the record, Counsel, because I'm the only one that knows that at that particular time --

MR. TAIKEFF: I'm only interested in his state of mind. I know the facts I hope. I'm just concerned with that person's state of mind. But I thank Mr. Hultman for the offer.

Q (By Mr. Taikeff) As of April 23, 1976 what was your understanding as to who was about to go to trial?

A Well, as I recall there was a trial coming up. Now, whether it was that date, but concerning the trials, I believe it was Darelle Dean Butler, Robert Eugene Robideau.

Q And as of April 23rd do you recall what information you had concerning when their trial was to begin?

A Well, I can't say specifically what date that would have been.

THE COURT: Court is in recess until 3:15.

(Recess taken.)

MR. TAIKEFF: Your Honor, while the witness is coming {4105} in I would like to offer on the hearing the one page 302 which has been marked Defendant's Exhibit 213.

MR. SIKMA: No objection.

THE COURT: Very well.

MR. SIKMA: For the purpose of the hearing offer of proof.

THE COURT: The exhibit will be received on the offer.

MR. TAIKEFF: Your Honor, I believe that the exhibits which have been introduced on the offer are Defendant's Exhibit 207 through 213 inclusive; and from my conversation with Mr. Hultman I understand that the Government will agree with me that at this time it appears that those are the only 302's or documents relating to statements of the category of informants we have been looking in this particular offer of proof as far as we can tell at this time.

MR. SIKMA: Yes, of Jimmy Eagle.

MR. TAIKEFF: Yes.

MR. SIKMA: I would say that is correct.

THE COURT: I might also advise that we will probably take another recess before the afternoon is over and then continue on until 6:00 o'clock tonight.

MR. TAIKEFF: May I at this particular time in light of Your Honor's statement indicate that there are two incarcerated potential witnesses who I understand are either here already or will be here momentarily that we would be {4106} making application to the Court after we finish with this witness to have an opportunity to speak with them briefly? Before we proceed would Your Honor's contemplated recess allow sufficient time for that?

THE COURT: Well, I don't know how much time you are talking about.

MR. TAIKEFF: I'll probably need a half an hour in doing that.

THE COURT: Are you talking about a half hour at one time, or are you talking about a half hour divided up into --

MR. TAIKEFF: Whichever is convenient to the Court. I assume Your Honor will recess of what Your Honor has said, and I just wanted to inform the Court that I need some time to determine whether I'll have additional proof to offer in this offer of proof.

THE COURT: I will bear your request in mind.

MR. TAIKEFF: Thank you, Your Honor.

May I resume the inquiry?

THE COURT: You may resume.

Q (By Mr. Taikeff) I think, sir, that we had gotten to the point where I was asking you questions about Marvin Bragg.

A That's correct.

Q And I was making some inquiry about trial date. I want to ask you some specific information about that. In connection with {4107} the jailbreak or attempted jailbreak, is it accurate to say as far as you know that the sheriff's department uncovered this alleged attempt and took action on it on or about Friday, April 16, 1976?

A I believe that's correct.

Q Would you say likewise that Monday, April 19, 1976 is the day that the FBI went into the jail to pursue its investigation of the attempted escape?

A Well, it would be the same day that we received the information. I believe that was the 16th now that you mentioned it.

Q I see.

MR. TAIKEFF: Now, I understand that the Government will stipulate for the purposes of this offer of proof that the originally set trial date for Robideau and Butler, which trial was to take place before Judge Boge in Rapid City, was April 19, 1976.

MR. SIKMA: We would stipulate to that. However, I believe there had been an earlier trial date set and the case was continued until April 19th.

MR. TAIKEFF: Well, what I'm concerned with, the trial date on or about April the 19th was a trial date.

MR. SIKMA: Yes. We had a date certain set up at that time.

MR. HULTMAN: And if the record was complete then on {4108} 19, 18, 17, 16 which was the Friday before the Monday, then it was postponed again.

MR. TAIKEFF: Yes, Your Honor.

MR. HULTMAN: On the 16th it was postponed again.

MR. TAIKEFF: I think that counsel for both sides can agree that on or about the 15th of April --

MR. HULTMAN: 15th or 16th.

MR. TAIKEFF: -- Mr. Lowe and Mr. Ellison went to the Circuit Court concerning both the change of venue and a change of presiding judge. The net result was that sometime prior to 9:00 o'clock on the morning of April 19th, what has been described as an administrative change of judge and an administrative change of venue occurred, thereby taking the case out of Rapid City and simultaneously assigning the case to Judge McManus. And the trial date therefore was reset for sometime early in May on that initial administrative change.

I note that Mr. Hultman is nodding in the affirmative, so I trust that the record will reflect that counsel for both sides agree on those facts.

THE COURT: Very well.

Q (By Mr. Taikeff) Now, sir, you were aware, were you not, that a trial was imminent at or about the time you took the statement of Marvin Bragg?

A Imminent?

Q Yes. It was about to take place, very soon, there was going {4109} to be a trial before a jury on the part of the Government and at least two defendants, Robideau and Butler?

A Well, I was aware that there were a trial coming up on those two particular individuals.

Now, whether it was before or after or, you know, in line with that particular interview, I can't say. In other words, you know, was it, did I interview him before the trial or did I interview him after the day. I can't say specifically.

Q Is it fair to say that at least as far as your state of mind was concerned as the events were occurring that you had some consciousness about when the trial was coming up because you were a prospective witness amongst other reasons?

A I was aware that there was a trial coming up.

Q Okay. Now, you were also aware, were you not, throughout the months of April, May and June that Jimmy Eagle was still named in the indictment and the indictment was still viable as against him?

A I believe he was still under indictment.

Q Now, you may not have been in the courtroom, but a stipulation was entered into that perhaps you should know, and that is that all of the papers which we have marked, that's

Defendant's Exhibits 207 through 213 have been admitted in connection with this special hearing.

Now, I'm going to take all of those papers and place there before you in such a way as to make things easiest. I {4110} put all the Marvin Bragg stuff together. Put the Melvin White Wing stuff together. Put the Marion High Bull things together and I just show you that 207 concerns Gregory Dewey Clifford which you had nothing to do with, right?

A Not to my knowledge.

Q Now that it has been agreed between counsel for both sides is all of the paperwork in connection with the Jimmy Eagle admissions or confessions, depending on how you look at them, other than the complaint which was filed against him in federal court --

A Sir --

Q Now, I want to explain for the record, because this is an offer of proof, if you knew that there wasn't going to be a trial very soon and you knew the indictment included Jimmy Eagle and that therefore he was as likely as any a defendant to be put to trial, why didn't you do any further investigation through any of the people whom you had contacted and who appeared to be cooperative and willing to tell you things without any inducements of any kind?

{4111}

A Well, the first thing off the top of my head is not to participate or have these particular interviews. In other words, it was not my province to go out and make the decision, it was doing additional investigation. Dean Hughes was the primary agent as far as doing these interviews. I initially got into this whole thing right here because of Dean Hughes, him asking me to come with him and I believe that started with the Marion High Bull situation and that's what, you know, these other things. Now I believe also the Marvin Bragg situation was brought about because of an attempted escape.

Q Now you recognized, did you not, in connection with what Mr. Bragg said Mr. Eagle said to him that apparently, looking at the statement, Jimmy Eagle considered Marvin Bragg someone he could tell some rather important, sensitive things to because he basically confessed to his participation in shooting the agents, right?

A Basically he did.

MR. SIKMA: Your Honor, I would object to that as a misstatement, at least of the statement there in front of him as far as characterization of participation in the shooting and I refer to --

MR. TAIKEFF: I'd like to read those three sentences into the record for Your Honor's consideration. It says in Marvin Bragg's statement as to what Jimmy Eagle told him, quote "Eagle admitted to me that he was down there at the time {4112} of the shooting. Eagle also admitted to me that he was in on the ambush but he really didn't know what was happening. Eagle admitted to me of doing some shooting at the federal agents, but he did not say that he killed them" unquote.

Q (By Mr. Taikeff) Now did you not recognize when you took the statement from Marvin Bragg which you wrote in your own hand that Eagle's supposed statement to Bragg that he was in on

the ambush and that he did some of the shooting at the federal agents constituted a very important and very serious admission on the part of Defendant Jimmy Eagle if in fact he had made those statements?

A You're asking me whether they were significant or important, is that what you're saying?

Q Viewed from your perspective as a special agent of the FBI.

A Well, of course they were.

Q And did you not recognize that if a jury believed that Jimmy Eagle said those things there would be a very, very strong likelihood that a jury would convict him on those statements alone?

A Well, that would strictly be an opinion.

Q Yes. I'm talking about your professional opinion.

A I think it would be supportive.

Q I think it would be significant if not controlling. Put aside the possibility it would be controlling. Do you think it {4113} would be a significant piece of evidence if the jury believed he was in on the ambush and did some of the shooting at the agents?

A Outside of the law I would. It's relevant information.

Q Isn't it virtually a confession of guilt to you in your mind?

A It's hearsay.

Q No. I said if he actually said those things. If Eagle actually said those things.

A Uh-huh.

Q Wouldn't that be a virtual confession to you?

A If he said them to me it would; yes.

Q Okay.

Now did you take any steps at all to see to it if possible that Mr. Bragg had some further contact with Jimmy Eagle within the prison system so maybe he could get some more information about this?

A Well, the only thing I can say to that is they were separated so that couldn't be done.

Q I didn't ask you for the final conclusion, I asked whether you made any inquiries, made any attempts or took any steps.

A No.

Q To try to get these two people together again so that some further --

A No.

{4114}

Q -- information might be obtained about what happened, who was there, et cetera.

A Not by me it wasn't; no.

Q And you did interview Mr. Bragg yourself, didn't you?

A Well, I was with Dean Hughes; yes.

Q But you wrote his statement in your hand, didn't you?

A I wrote one of them; yes.

Q The one concerning Jimmy Eagle?

A That's correct.

Q Would you identify for us Defendant's Exhibit 130. Before you do that let me inquire of the Court.

MR. TAIKEFF: Your Honor, may I assume that the court file contains a copy of the Complaint which was filed against James Theodore Eagle for purposes of rounding out the record?

THE COURT: I have no knowledge.

The clerk tells me the only thing we have here is the indictment.

MR. TAIKEFF: I see. In that case, Your Honor, I would ask this witness whether he will concern the following: the four page document, Defendant's Exhibit 130, is a photostatic copy of the complaint which was filed against James Theodore Eagle, also known as Jimmy Eagle, with the following qualification: that on pages 2 and 3 the underscoring which appears was not in the original complaint but apparently was added subsequently and therefore appears in this photostated document.

{4115}

A You're asking me to do something here that I had nothing to do with, the Complaint.

Q You recognize that on my foot there is a shoe?

A Yes.

Q You didn't make that shoe, did you?

A No.

Q Then take a look at that piece of paper and tell me whether that is the, if you know, complaint which was filed against Jimmy Eagle.

MR. SIKMA: Your Honor, I would suggest this is --

THE COURT: The question is do you know.

THE WITNESS: I don't know anything about this Complaint, Your Honor.

THE COURT: There's your answer.

MR. TAIKEFF: Will the government stipulate that that was the Complaint and I'll show it to government Counsel.

MR. SIKMA: It appears to be complete with the exception that it does not have the date, the docket number or case number.

MR. TAIKEFF: Well, if at any time, Your Honor, the government would want to supplement the record with respect to information, I'd be happy to consent but I would point out that the preliminary hearing minutes, so this is, the magistrate's docket number was 75-112-M, capital M as in Michael.

MR. SIKMA: Okay.

{4116}

MR. TAIKEFF: Upon the concession from the government I would offer for the purposes of the offer of proof Defendant's Exhibit 130.

MR. SIKMA: We have no objection for that.

THE COURT: 130 is received in the offer.

MR. TAIKEFF: There are no further questions by the defense of this witness on the offer, Your Honor.

MR. SIKMA: We have no cross on this witness on this matter.

THE COURT: You may step down.

MR. TAIKEFF: May I note, to avoid any possible confusion, that the witness will be called to testify as a defense witness on two subjects and therefore should appear tomorrow morning or make himself available to be called tomorrow morning that do not relate to the Jimmy Eagle episode, of course.

THE COURT: You're excused for the day.

MR. TAIKEFF: Your Honor, the defense calls Special Agent William B. Wood on the offer.

MR. SIKMA: He won't be here until tomorrow.

MR. HULTMAN: We didn't find out until this morning.

MR. TAIKEFF: The government is quite correct. I would ask Your Honor's permission to call him in that regard any time before the proceedings are concluded that's convenient for the Court to do so.

{4117}

MR. SIKMA: Your Honor, since this is an offer of proof, there is an alternative means of making an offer of proof and that is by having Counsel state what they intend to prove by the calling of these witnesses and we would suggest that in those instances where a witness is not available such as Special Agent Wood, under these circumstances that Counsel make his offer of proof.

MR. TAIKEFF: Your Honor, I would do part of that in an effort to conserve time of the jury but I have a certain problem. First of all, Wood was to be called in connection with another aspect of the case so his presence indeed is required notwithstanding the offer of proof.

Secondly, as illustrated by the testimony taken from Agent Coward, there are aspects of this which concern, to use a catch phrase, the state of mind of the interviewing agent that cannot be obtained from any of the documents and so although I am certain that Agent Wood would testify to an interview with Gregory Dewey Clifford and that interview took place on or about July 27, 1975; and

that he then and there voluntarily signed a statement which is Defendant's Exhibit 207 and he would undoubtedly confirm that Gregory Dewey Clifford told him each and every essential fact which is recorded in the statement, I'm afraid, never having met Agent Wood, I could not give Your Honor of proof as to what he would say about how he got to know Clifford, {4118} how these events came about or what his state of mind was with respect to any aspect of it.

I believe that it is appropriate for the defense at this time to make the record as complete as possible because if there is an appeal after a conviction, it would be the job of appellate counsel to argue forcefully as to what the defense was deprived of by Your Honor's ruling and the only way we can do that is to make the record sufficient with respect to other aspects of it which are not reflected in this document.

Your Honor, the only two other witnesses who might possibly be called are people who are, or have been in custody and I understand that they are either here or at hand. Perhaps Mr. Ellison can tell me specifically.

While Mr. Ellison is doing that --

MR. ELLISON: Your Honor, I've just been informed by the marshal Mr. Bragg is present and in a holding cell.

MR. TAIKEFF: So we are in a position to interview one of those two incarcerated persons.

In addition to that, I'm saying this so that Your Honor can make a decision as to how Your Honor wishes to allocate the Court's time in this courtroom, we have reason to believe that it is appropriate to make presentations to Your Honor concerning a witness we are having some severe difficulty in encountering. I think under the circumstances {4119} the best way to do that from the point of view of the defense is to present very briefly the sworn testimony of five people concerning the whereabouts of a certain witness which the United States marshal service seems to be having extreme difficulty in locating, and because it now appears that that witness will not be available tomorrow, under these circumstances we'd like Your Honor to be apprised of the facts by testimony being taken.

THE COURT: Which witness are you talking about?

MR. TAIKEFF: Myrtle Poor Bear.

I've had a personal report from Chief Deputy Warren sometime in the course of this afternoon, I'm not sure whether it was during the luncheon recess or subsequently, but that apparently there is some difficulty in locating her and I think, it is appropriate for defense counsel to make a record on that subject.

THE COURT: And what will her testimony be?

MR. TAIKEFF: She's never spoken to me, Your Honor. I don't know.

THE COURT: Why are you calling her?

MR. TAIKEFF: I'm calling her because I believe she will testify she was not present on June 26th, 1975, and that she was compelled to sign affidavits that she was and identify Leonard Peltier as the person who killed the agents, even though she did not know him at the time. I can't be certain that's {4120} WHAT she's going to testify to because she's refused to answer any questions up until now. But independent investigation reveals that if she takes the stand and tells the truth that's what she would say. And that in addition she harbors an extreme fear of one or more agents of the FBI whom she will name.

THE COURT: And what is the relevance of that, of the testimony you stated?

MR. TAIKEFF: The relevance it shows that the named agents whom she will presumably name suborn a full statement taken under oath which I believe constitutes suborning of perjury in connection with the charges against the defendant in this case. Not some other defendant named in the indictment but the particular defendant named in this case and that this was done

in an effort to acquire her as a witness who would testify against him as an eyewitness, a false eyewitness who wasn't there and who didn't know the defendant.

THE COURT: She hasn't testified on the government case. I guess we would all agree on that.

MR. TAIKEFF: Of course she has not testified. And I trust that was a result of Mr. Hultman's evaluation of her.

MR. HULTMAN: The same as Mr. Lowe's evaluation in the opening statement, as I have pointed out to the Court before.

{4121}

MR. TAIKEFF: I don't feel it appropriate to inquire of Mr. Hultman why he made a judgment about not calling a witness, but I can only assume that he did not feel secure about putting her on the stand. But there are many factors why a lawyer decides that a witness who has relevant testimony to offer isn't going to go on the stand.

THE COURT: Myrtle Poor Bear not having testified in the government's case, what testimony could she give now that would be relevant on the issue that's in the indictment and the plea of not guilty?

MR. TAIKEFF: The effort of the agents to get her to lie about Leonard Peltier having shot the agents and her witnessing it.

THE COURT: And what effect do you contend that has on the evidence before this Court? In other words, for what purpose are you offering it?

MR. TAIKEFF: I'm offering it to show that certain agents of the FBI in connection with the effort to --

THE COURT: Which one?

MR. TAIKEFF: She will name the agent.

THE COURT: Do you know?

MR. TAIKEFF: She hasn't talked with us so I don't know. But I have information that indicates she has said that she fears these agents. She knows --

THE COURT: Which ones?

{4122}

MR. TAIKEFF: I don't know, Your Honor. Only she knows. She has refused to speak with us. I have to --

THE COURT: I interrupted, excuse me. I interrupted you. You indicated that she will testify that certain agents of the FBI --

MR. TAIKEFF: Who were working on this case.

THE COURT: Yes. Proceed with what you were going to say.

MR. TAIKEFF: Induced her to sign affidavits falsely and to swear to those affidavits in preparation for this trial. Now the fact that a lawyer evaluated that that witness should not be put on the stand is not the end of the inquiry.

{4123}

May I ask Mr. Hultman a question, your Honor, before I make another further offer of proof?

(Counsel confer.)

MR. TAIKEFF: The only other information I have concerning her I have just gotten by conferring with Mr. Hultman and Mr. Sikma and that is while she was being interviewed and evaluated as a witness -- and I gather that was last summer in connection with the Cedar Rapids trial -- she was reimbursed normal amounts for her expenses. There was no other payment or emolument to her, and that there was a period of time -- I don't know the duration -- during which time she was in protective custody of the United States Marshal's Service.

MR. HULTMAN: And that's at her request, not at the request of the Government, and only remains in that status as long as she has made the request.

THE COURT: How do you elect to proceed right now?

MR. TAIKEFF: While we are all in the courtroom, if it is not inconvenient to the Court, I would call those witnesses in connection with her non-appearance.

THE COURT: Are they available?

MR. TAIKEFF: Yes, they are all available as far as I know.

One second, I have to confer with counsel.

(Counsel confer.)

{4124}

MR. TAIKEFF: I understand, your Honor, from Mr. Ellison that four of the witnesses have left, but one of those witnesses would be Mr. Warren, Chief Deputy; and in addition to that, I am just informed by Mr. Ellison that Chief Deputy Warren has stated that Mr. High Bull who is also in custody should arrive momentarily, so that places before your Honor all the information. Whatever schedule your Honor wishes to follow is acceptable to us.

THE COURT: I will recess until 4:00 o'clock to give you an opportunity to interview the one witness who is now available, Mr. Bragg.

MR. TAIKEFF: Yes. Thank you, your Honor.

THE COURT: The Court is in recess until 4:00 o'clock.

(Recess taken.)

(Defendant was present in person.)

MR. LOWE: Would you like me to try and find Mr. Taikeff? He is not here, I assume he is coming.

THE COURT: He is coming.

MR. TAIKEFF: Defense calls Marvin Bragg.

MARVIN BRAGG,

being first duly sworn, testified as follows:

MR. TAIKEFF: May I have one moment further to consult with the Clerk, your Honor?

THE COURT: Very well.

{4125}

DIRECT EXAMINATION

By MR. TAIKEFF:

Q What is your name, please?

A Marvin Bragg.

Q Where do you presently reside?

A Beg your pardon?

Q Where do you live?

A Doing time right now.

Q Where are you doing time?

A Formerly Rapid City, South Dakota. Sioux Falls, South Dakota, right now, I am in Federal custody.

THE COURT: Mr. Bragg, would you speak up a little?

Q (By Mr. Taikeff) Move your chair so you won't have to lean forward when you speak.

A The chair doesn't move.

Q How about moving the microphone a little closer to yourself?

A O.k.

Q How much time are you doing?

A 30 years.

Q And were you sentenced in a Federal or a state case?

A State.

Q And when were you sentenced?

A I don't know the specific time. It was in '75, '76.

Q Wasn't it in early 1976?

A Yeah, you could say that.

{4126}

Q How many times have you been convicted of a felony?

A Twice.

Q And what was the first felony you were convicted of?

A Breaking and entering.

Q Was it breaking and entering or was it burglary?

A Breaking and entering.

Q Were you found guilty or did you plead guilty in that case?

A Found guilty.

Q Where was that trial?

A Iowa.

Q Were you living in Iowa at the time of the offense for which you were convicted?

A This one, or the one before?

Q You were first convicted of breaking and entering?

A Right.

Q You said that the crime took place in Iowa?

A Right.

Q Now, I want to know whether you lived in Iowa at the time that crime took place?

A Yes, I did.

Q And at that time were you a heroin addict?

A At the time I was convicted?

Q At the time that crime was committed.

A Yeah.

Q How old were you at the time that crime was committed?

{4127}

A I think about 14, 13.

Q And for how long had you been using heroin?

A About two years.

Q And by what method were you using heroin?

A Shooting.

Q In your veins?

A Right.

Q How much of a sentence did you get in connection with that case?

A 10 years.

Q And were you ever paroled?

A Yes, sir, I was.

Q And when were you paroled?

A I think in '73.

Q Could you tell us the month in 1973?

A No, I couldn't.

Q Now, when you came out of prison, having been paroled, did you start using heroin again?

A No, sir, I didn't.

Q In other words, the last time you used heroin was sometime before you went to prison on that first sentence?

A Right.

Q Going back for a moment to the time when you were using heroin at or about the time that the crime was committed for which you were convicted, how much heroin were you using daily?

{4128}

A I really couldn't say.

Q How many times a day did you shoot up?

A Three or four.

Q How many bags at a time?

A Two.

Q Cost you at least \$5.00 a bag?

A No, at the time it was three.

Q Did you go through any medical or psychiatric program?

A No, sir.

Q Concerning your addiction at any time?

A No, sir.

Q Could I see your arms, please?

A (Indicating).

Q The other one too?

A (Indicating).

Q When you injected heroin, where did you inject it?

A The main vein.

Q In your arm?

A Yes, sir.

Q Now, after you got out of prison in 1973, you were involved with the law again, is that correct?

A Yes, sir, I was.

Q And what was the charge against you the second time?

A Well, see, I was put in jail again on parole.

Q Violating parole?

{4129}

A You could say that.

Q Well, would you say that?

A Nah, I wouldn't say it.

Q What were you put in jail for, would you say?

A For another breaking and entering.

Q So you were charged with another breaking and entering, or perhaps another burglary?

A Breaking and entering.

Q Do you see some difference between burglary and breaking and entering?

A Yeah, must be.

MR. HULTMAN: Your Honor, could we approach the bench for another minute?

THE COURT: You may.

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

MR. HULTMAN: I am concerned about this man's rights. That is the reason why I have asked to approach the bench.

I am concerned at this particular point. I still have some responsibilities that go beyond just prosecuting a criminal case. I also have responsibilities as to the rights of people, even criminals.

I am concerned at this point, your Honor, as to -- I don't know where the questioning is going, but I think it may go to something that I personally discovered in reading {4130} the 302 about a year ago, and this may be where counsel is going and I would guess that it probably is.

If it is, I think we run the risk of this man not being represented. First of all, I don't know whether he has got counsel. Secondly, if we get to that testimony, we may be a situation where I am placed in the position of -- may be faced with a perjury charge again, and I will relate specifically to where I think you are going.

As I read these 302's and I read the statement, I found an item in the statement --

MR. LOWE: (Interrupting) Perhaps the witness could step down and have a seat while we are discussing this. He is within earshot, Mr. Hultman would agree.

MR. HULTMAN: I don't want him to hear.

MR. LOWE: Step down and sit over by the line of chairs. Is this a Marshal that brought him in? Have him sit over next to the Marshal, the man with the tan tie.

MR. GILBERT: Sitting right here (indicating).

MR. HULTMAN: Go to the corner, sit in the far corner.

THE COURT: Counsel have asked that you step down, Mr. Bragg, while they confer with me; and perhaps you could sit in a chair over there. Mr. Tucker will show you where to sit.

MR. HULTMAN: What I discovered in reading the 302's or statements -- I don't remember which it was -- is the {4131} fact that in one part of one statement he alludes to a conversation with somebody. Now, I don't know whether it was Robideau or whether it was Butler, which in checking my notes and other events I did not believe could happen at the time that he said physically because of the fact that whichever witness it was, as I understand it, in reading the total records was in another jail or another prison or something of this kind. That's one of the reasons -- total analysis that I make as to testimony, whether it is credible or whether it isn't, whether it is inconsistent, et cetera, et cetera.

Now, the point I am getting at, your Honor, is if that is -- a couple of more things begin to fall in place, I believe. When your co-counsel asked me about a specific statement with reference to one of the past Defendants, as to where he was incarcerated at a given time, and I said I would be willing to sign such a stipulation if such representation is made to me as being the facts; and I think that may well be the same person now that I think a little more about it.

So what I am saying, your Honor, is this: That I am afraid we now are going to put or somebody is going to put a witness under oath in a posture where maybe we are going to be concerned with a perjurious statement; and I am concerned that he have counsel to represent him. That's {4132} all I am concerned about.

THE COURT: I frankly do not see the relevance of these questions that Mr. Taikeff asked this witness, and I think he rolled up his sleeve. It seems to me, No. 1, this offer of proof relates to the contention by the defense that the FBI has fabricated some statements, one of which is supposed to have been given by Mr. Bragg. Why don't you just ask him?

MR. TAIKEFF: I understand your Honor's concern that he be asked, and he will be asked; but I hope your Honor will recognize that in presenting the matter before a jury, were we permitted to do so, all of these questions would have been asked because they are relevant to the issue as to whether or not, as he will contend no promises were made, never asked for any such assistance; and in order for an appellate court to evaluate the record, they must have some indication of what the testimony would have been. Now --

THE COURT: (Interrupting) It would seem to me, first of all, you should ask him whether he made the statement.

MR. TAIKEFF: I will be glad to do that, your Honor.

The only reason I proceeded as I was because I knew when asked, he would say "Yes." I wasn't going to come to the end of it and find out he would say, "No". I am {4133} confident he would say "Yes".

I will be happy to ask him immediately.

THE COURT: Then you can go into areas as to --

MR. HULTMAN: (Interrupting) I wanted to make this one point on the record. I don't want to be placed in the posture, that I am placed in a position where because of questions asked on -- even on your offer of proof is still under oath on direct examination, that I am forced in the position where I have got to ask questions; and if he is not represented by counsel, I don't want later my position to be in, I have been placed in a position without him being represented, placing him in a perjurious situation.

MR. TAIKEFF: I understand. Can you inform us whether you have his FBI fingerprint record concerning his convictions?

MR. HULTMAN: I don't know. I am sure I could find out.

MR. TAIKEFF: If so, could you sometime in the course of the examination have Mr. Bienner bring it up?

MR. HULTMAN: I will find out right now.

MR. TAIKEFF: Thank you very much I will ask him that question, your Honor.

THE COURT: Very well.

(Whereupon, the following proceedings were had in the courtroom:)

{4134}

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

Q (By Mr. Taikeff) Mr. Bragg, I'm placing before you Defendant's Exhibit 212 in evidence on this proceeding. It's a typewritten statement. I ask you to look at it and if you can tell us whether it is a typewritten copy of a handwritten statement which you signed on or about April 23, 1976?

A Yes, it is.

Q And did you make that statement to the FBI?

A Yes, sir, I did.

Q Now, I want to get back to your second legal problem with the criminal law. You said that after you got out on parole you were charged again with breaking and entering?

A Yes, sir.

Q And they took you both as a parole violator and as a defendant in a criminal case, right?

A Yes, sir.

Q Now, when were you arrested on that second case?

A I couldn't give you a specific time.

Q How about a month and year?

A It was in '73.

Q And did you make bail?

A No, sir.

Q Where did that crime take place?

A In Iowa.

{4135}

Q In Iowa?

A Yes, sir.

Q In the same city in which you had been charged?

A Yes, sir.

Q The first time?

A Yes.

Q What city was that?

A Des Moines, Iowa.

Q And that's where you were residing at the time?

A Yes.

Q Now, other than those two burglary cases --

A Breaking and entering.

Q I'm sorry, I stand corrected, breaking and entering, in 1974 or 5 did you have any other felony cases pending against you?

A Not that I can remember.

Q Did you have any misdemeanor cases pending against you?

A I might have.

Q Beg your pardon?

A I might have.

Q No, that you are aware of.

A No.

Q And what were you doing in the Pennington County Jail in Rapid City, South Dakota?

A I said '74.

{4136}

Q I said in 1974 or 1975 did you have any other felony cases pending against you. You said no. I said misdemeanor cases and you said no, none that you knew of. Now, I ask you if you were charged in your second case in Iowa. What were you doing in a jail in Rapid City?

MR. HULTMAN: Your Honor, I'm going to --

A You are talking about something I'm being convicted of now.

MR. HULTMAN: Your Honor, might I interpose an objection even though it's an offer of proof? I think it's appropriate.

THE COURT: Excuse me. I didn't hear your answer.

MR. HULTMAN: And I'd like to interpose it before the response. He's already evidently responded.

THE COURT: He has already responded. I'd like to know what the response was.

THE WITNESS: He's talking about something I've been convicted on now.

MR. HULTMAN: Might I interpose my objection now?

THE COURT: You may.

MR. HULTMAN: Before the next question.

Your Honor, it seems to me that we've gone way beyond what is appropriate examination with reference to the status of an individual witness, whether he's been convicted of a felony, whether or not he's got sixteen hundred charges at one {4137} time or another I think even Mr. Taikeff would be the first one to rise to say that doesn't constitute a conviction and is not a relevant matter as far as this witness or these proceedings is concerned. And therefore I want the objection to stand even as of now as to an offer of proof beyond all the testimony they've already gotten in terms of what charges, in terms of convictions the man has had.

MR. TAIKEFF: Well, I notice that Mr. Biner just delivered what I assume is the witness's FBI fingerprint report, and then I can use that as a guide so I won't confuse the record in any way.

MR. HULTMAN: My point again, Your Honor, is, and this is in my possession, Counsel, and I intend to keep it here at the moment, is that this is irrelevant, beyond the showing of whatever crimes, felonies he has been convicted of. That this goes way beyond anything beyond to which counsel can allude to and can inquire about. And that's the reason for my objection on the record now.

MR. TAIKEFF: Your Honor, I'm making this inquiry for two separate reasons. First of all to establish what may have been this witness's motivation at the time he gave the statement on April 23, 1975 as part of my offer of proof because it is a relevant part of what I would prove if we were doing this in front of the jury. And secondly as a general credibility question because the record must reflect what would {4138} be the general state of this witness's credibility were he to testify before the jury. And the only way I can do that is asking him about felony convictions, and that's why I ask the Government to obtain his FBI fingerprint report.

MR. HULTMAN: And I will affirm through '76 that per his report that he's only been convicted of the felonies to which he has testified to.

THE WITNESS: Thank you.

MR. TAIKEFF: May I take a look at that report, Your Honor.

THE COURT: Any reason why counsel cannot see that?

MR. HULTMAN: No particular reason. But I'm going to object to anything that has to do at a remote time.

MR. LOWE: Your Honor, may the record reflect that statement was April of '76 just so the record is clear. I don't think there's any question about that.

MR. TAIKEFF: I did mean April of '76, Your Honor.

Your Honor, I think Mr. Hultman perhaps inadvertently made a mistake. I'd like the opportunity to point something out to him.

THE COURT: Very well.

(Counsel conferred.)

Q (By Mr. Taikeff) Am I correct, sir, that your conviction, your first conviction was on June 28, 1972 and that's the case in which you got ten years sentence in Des Moines?

{4139}

A Correct.

Q Okay. Now, do you remember the month and year when you got out of prison on that particular matter?

A No, I don't. I know it was in '73.

Q In 1973?

A Yes, sir.

Q Now, on October 24, 1974 I would assume, according to your earlier testimony, that you were not using narcotics?

A No, I wasn't using narcotics.

Q In other words when you went into jail or prison on or about June 28, 1972 that was the end of your career with narcotics; is that right?

A All depends what you mean by "narcotics". Talking about marijuana, too?

Q No. Marijuana is not a narcotic.

A Then I wasn't using narcotics.

Q Okay. Is it not a fact that on October 24, 1974 you were arrested and charged with using narcotics?

A '74?

Q Yes, sir.

A Probably used that as an excuse.

Q What kind of an excuse? What are you talking about?

A To go to the hospital instead of staying in jail.

Q Well, if you went to jail on June 28, 1972, or prison as the case may be, and then you got out on parole in 1973 what {4140} were you doing in the hospital instead of in jail in 1974? Can you explain that remark?

A I was arrested on another case, and instead of staying in jail I told them I was using drugs and they sent me to the hospital.

Q But weren't you charged with using narcotics in that case?

A I've never been charged with using narcotics.

MR. TAIKEFF: Your Honor, I'd like to have marked for identification this two page document within which Mr. Hultman handed to me a little while ago.

MR. HULTMAN: Your Honor, again I'm going to object on the grounds that charges are not admissible and counsel knows it here. We're talking about convictions here in this court and that's what the rule has reference to.

MR. TAIKEFF: Your Honor, I'm making a record --

MR. HULTMAN: And I'm objecting to the document in the record.

MR. TAIKEFF: -- of this witness's credibility. That's all I'm attempting to do.

MR. HULTMAN: This document doesn't show in any way that this particular witness has knowledge specifically, or what was done or not done as far as this document, and I'm objecting on the grounds that one, the evidence is not admissible, and would not be admissible if we were appearing before the jury at this particular time; and that it's an {4141} attempt on the part of counsel, one, to set up through the witness some events, then turn around and discredit this particular witness when in the first place he's being called for some reason which I'm not quite sure at this particular time as far as relevancy.

But I object specifically, Your Honor, on the grounds that, one, the document is not the best evidence for the purposes that he's seeking, and secondly, he's using it for a purpose that is beyond the rules.

THE COURT: It seems to me that the state of the record right now is that defense attempted to offer evidence by which they would seek to impeach or taint the investigative efforts of the Federal Bureau of Investigation in this case by attempting to establish that they somehow got false statements from four witnesses relating to an alleged statement made to those witnesses by a person by the name of Jimmy Eagle.

{4142}

THE COURT: This witness on the stand at the present time, Mr. Bragg, being one of those four witnesses, has testified that he did in fact give such a statement to the FBI. Now it has been represented to the Court that Counsel is attempting to show some type of an inducement. It seems to me we are really getting far afield on a collateral issue. It hasn't even been shown that the witness was being held in Pennington County Jail on any kind of a federal charge that might offer some basis for an inducement that could be offered by federal officials.

MR. TAIKEFF: All right, Your Honor. I'll move directly to that point right now.

THE COURT: I wish you would.

MR. TAIKEFF: Thank you, Your Honor.

Q (By Mr. Taikeff) In 1975 what case or cases did you have pending against you?

A First degree murder.

Q Is that all?

A No, sir, it wasn't.

Q Tell us all the cases you had pending against you in 1975.

A Three counts of burglary and I think it was for rape.

Q Where is the place where the rapes supposedly took place?

A Pennington County.

Q That's why you were in the Pennington County Jail, isn't that correct?

{4143}

A Yes, sir.

Q And on what day did you enter that jail?

A 1975, July 21.

Q Do you remember the month or the year?

A July 21.

Q If I said it was July 22, would you argue with me?

A Yeah, I would. It was 21st.

MR. HULTMAN: He might be more accurate than the report, Counsel.

MR. TAIKEFF: I understand. I just want to see if this in any way changes his recollection.

Q (By Mr. Taikeff) I show you Defendant's Exhibit 217 and I indicate to you the entry here. What name were you arrested under?

A Rickey Walker.

Q Now would you tell me if in looking at that --

A 7/22/75.

Q Docs that in any way alter your opinion as to what date you went in?

A No, sir.

Q You remember it was July 21?

A 21st.

Q Were you ever convicted of those rape charges?

A No, sir.

Q What happened to the case?

{4144}

A It was thrown out.

Q After a trial or before a trial?

A They dropped the rape.

Q Who is they?

A Prosecuting attorney.

Q Now did you say there were three rape charges?

A Three or four.

Q In 1975 did you know what the maximum penalty was if you were convicted of rape?

A Yeah.

Q What?

A Ten to life.

Q Ten years to life?

A Yeah.

Q On each count of rape?

A Right.

Q Did they charge you with raping the same woman several times or with the charges that you raped different women?

A Different.

Q And that case was dropped?

A Yes, sir.

Q Now this statement which you gave to the FBI is based on something you claim Jimmy Eagle said to you, is that right?

A Yes, sir.

Q And where were you when Jimmy Eagle made this statement to {4145} you?

A Pennington County Jail.

Q I can't hear you. You'll have to speak louder.

A Pennington County Jail.

Q And where inside the jail?

A In a cell.

Q How many other people were in that cell?

A I don't have any idea. About five, six.

Q Was Jimmy Eagle one of those people?

A Yes, sir.

Q Before you entered the Pennington County Jail on July 21, 1975, had you ever met Jimmy Eagle?

A No, sir.

Q Did you have any kind of a personal, social or business relationship with him?

A No, sir.

Q Now the burglary, the second case, weren't you convicted there of burglary in the third degree?

A No.

Q I beg your pardon?

A No. Thought it was burglary first degree.

Q Sir, I'm sorry, but I'm unable to hear you.

A I thought it was burglary first degree.

Q I want to show you this document which has been marked 217 and show you these last two entries. Can you tell me from {4146} looking at those entries whether those two entries concern the same case or were they different cases?

A Say that again.

Q You see these last two entries on the second page of Defense 217 for identification?

A Yeah. I see them.

Q Can you tell me whether that next to the last line is a different case than the one on the last line?

A Yeah. It's different.

Q They're different?

A Yeah.

Q Now altogether weren't you convicted three times for either breaking and entering or burglary?

A Yeah.

Q Three times?

A Right.

Q So you were mistaken when you said two times earlier in your testimony?

A I didn't know I said that.

Q You didn't know that you said earlier that you had been twice convicted, is that what you're telling --

A You call this three convictions, right?

Q Well, I asked you whether the last two entries were two different cases and you said yes. Right.

A Oh. There.

{4147}

Q Then on the first page there's your 1972 conviction, right, the one where you got ten years, isn't that correct?

A Right.

Q That's three, isn't it?

A If you put it that way. Yeah. It's three. I figured it was two.

Q Now you said, did you not, before that you had two separate breaking and entering cases in Iowa.

A Yeah.

Q Now isn't it a fact that the burglary case was a South Dakota case?

A I don't understand what you're talking about.

Q Well, let me --

A Breaking and entering and burglary is usually the same. The one that happened in Iowa, I beat the second case.

MR. HULTMAN: Your Honor, again I go back to my second objection. I don't know for sure whether he has had two convictions or three.

THE COURT: I think --

MR. HULTMAN: I read the document but the reason I'm asking it is I think there is a revocation of probation involved.

THE COURT: I think it's totally irrelevant. The only matter that the Court is even interested in at this time is whether at the time he gave this statement which is reported on the 302 of the FBI, whether there were any federal charges {4148} pending against him at that time.

Q (By Mr. Taikeff) Were there any federal charges pending against you?

A No, sir.

Q When you gave your statement in April of 1976?

A No, sir.

Q And when did you first meet either Special Agent Wood or Special Agent Price?

A '75 I think. '75, '76.

Q Now do you remember the name of the agent who took that, or wrote that handwritten statement which you signed?

A No. Not really.

Q Do you know the name Frederick Coward?

A Yeah.

Q Is he the agent who wrote the statement which I showed you before, Defendant's Exhibit 216?

A That one there; yes, sir.

Q Now when did you first have contact with him?

A When I was in jail.

Q Which jail?

A Pennington County.

Q And what month and year?

A I think it was March '75. '76.

Q In March of --

A '75. March of '75.

{4149}

Q Don't you mean March of '76?

A '76, '75. April, March. Somewhere around there.

Q You didn't enter the Pennington County Jail until July 21, 1975, right?

A I beg your pardon?

Q The first time in your life that you were ever in the Pennington County Jail was on July 21, 1975?

A Correct.

Q Right.

A Correct.

Q So you could not have been interviewed there by Agent Coward in March of 1975, isn't that correct?

A Correct. It was '76.

Q March of '76. And how did it come about that you told him what Jimmy Eagle supposedly said to you?

A I was questioned like several other people.

Q Did they specifically ask you any questions about Jimmy Eagle?

A Yeah. Sort of.

Q What did they say?

A They asked me if I heard anything on Jimmy Eagle. I've talked to Jimmy Eagle and I said yeah.

Q And then what happened after that?

A They asked me what he said. I refused to talk to him the first time.

{4150}

A They locked me back up.

Q They got you back up?

A Locked me back up in my cell.

Q Then what happened?

A I stayed locked up.

Q Did you ever speak to the agents again?

A Yeah. Later on, about a month and a half.

Q How much later on?

A About a month and a half. I think somewhere around there.

Q And then what happened on that second time?

A They come back.

Q And what happened then?

A They come back for a specific reason.

Q Came to ask you about a certain jailbreak, right?

A Right.

Q And then in connection with that what was, what did you say to them about Jimmy Eagle?

A What do you mean what did I say to them?

Q Well, did you say anything to them about Jimmy Eagle?

A That the time of the jailbreak?

Q At the time the agents came back for the second visit what conversation did you have with them? Can you tell us their names first?

A Price and Fred.

Q Price and who?

{4151}

A Fred Coward.

Q Fred Coward?

A Yeah.

Q And what was the conversation?

A It was about what happened on the reservation, Jim Eagle. They asked the questions, "Has Eagle ever talked about what happened down there," and I told them, "Yeah."

Q Now they came to question you in March about anything you may have heard from Jimmy Eagle, right?

A Yeah.

Q Do you know how they came to question you at that time?

A Because they was questioning several people at the time.

Q Did you send for the agents in March?

A No.

Q They just showed up?

A Yeah. They were questioning several people I said. Not only me, was several people.

Q Did you ask them, "How come you guys have to see me"?

A I think first time they called me I did.

Q That was in March of 1976?

A I can't really give you any specific dates. It was several months back, you know. I don't think about the time. I'm thinking about the time I'm doing.

Q You don't like the time you're doing, do you.

A Sure I don't. Would you?

{4152}

Q No, I wouldn't. I'm asking you though.

A I wouldn't really think about the past time, though. I'm just concerning about what I'm doing now, you know.

{4153}

Q Did they give you an answer to your question when they first came to see you when you said, "Why are you guys coming to see me?"

A Yeah.

Q What did they say?

A They was questioning several people that have been incarcerated with Jimmy Eagle.

Q So they indicated to you that they knew you had been in the cell with Jimmy Eagle, is that right, at some time in the past?

A Yeah.

Q And you said you didn't want to speak with them at all, right?

A Yes, sir.

Q Now, on or about April 23, 1976, you gave the FBI several statements, didn't you?

A Yes, sir.

Q And one of these statements concerned the attempted jailbreak, right?

A Yes, sir.

Q And one of the statements concerned things that Dino Butler had told you?

A Yes, sir.

Q And one of the statements concerned things that Robert Robideau had told you?

{4154}

A Yes, sir.

Q And then one of the statements concerned things that Jimmy Eagle had told you?

A Yes, sir, what we had talked about.

Q What changed your mind between the first time they came to see you and April 23, 1976, when you gave them all of these statements?

A I did.

Q Beg your pardon?

A I changed my mind.

Q What made you change your mind?

A Mostly the jailbreak.

Q The jailbreak made you change your mind?

A Yeah.

Q In what sense, how did the jailbreak make you change your mind, you saw a chance to end your problems?

A No, no, not necessarily.

Q Got angry that someone was going to break out jail?

A No, no.

Q Well then, tell us, you suddenly felt for the first time in your life like a civic-minded citizen, right?

A No, I consulted with my attorney first.

MR. HULTMAN: I object. This is clearly misleading. This is not what the witness --

THE COURT: (Interrupting) Sustained.

{4155}

Q (By Mr. Taikeff) You consulted with your attorney?

A Yes, sir.

Q What was that conversation or those conversations about?

A Me.

Q Your future?

A Me.

Q "Me", you mean you and your lawyer spoke about you?

A Yes, sir.

Q And what you were facing at that particular time, right?

A He was concerned about the jailbreak at that time, where I was stationed, getting a charge from the FBI about the jailbreak.

Q Your lawyer suggested to you that you might be involved as a Defendant in the jailbreak case?

A Yes, sir.

Q Were you ever charged in the jailbreak case?

A No, sir, I wasn't.

MR. HULTMAN: Your Honor, in all fairness, again I think the record ought to reflect that that is a matter before a Grand Jury; and we won't draw any conclusions -- in fact, no particular indictments have come out yet. It is not a matter of fait de accompli. I think it --

MR. TAIKEFF: (Interrupting) I didn't intend to go into it. I was under the impression your Honor is about to preside --

{4156}

MR. HULTMAN: (Interrupting) Is in the record and that his man has not been charged, and you draw some conclusion from it.

THE COURT: Mr. Bragg, I will advise you, first of all, you have a right not to discuss any conversations that you have had with your lawyer relative to a criminal matter.

THE WITNESS: Yes, sir.

THE COURT: Secondly, you have the right not to make any statement regarding any matter on which there may be pending a possibility of a criminal charge against you.

THE WITNESS: Yes, sir.

Q (By Mr. Taikeff) Now, Mr. Bragg, as to the two points which his Honor just addressed himself to, right now you are not a possible Defendant in that jailbreak case, are you?

A I haven't any idea.

Q Aren't you going to testify for the Government in that case? "Yes" or "no".

A Yes, sir.

Q And didn't they tell you that they wouldn't prosecute you if you testify for them?

A No, they did not.

Q Did they give you a grant of immunity?

A No, sir, they did not.

Q So I understand you are going to get on the stand in the {4157} middle of that trial and tell about this attempted escape, you are not even sure that they are not going to prosecute you?

A Right.

Q Are they going to have your present sentence reduced, is that your expectation?

A No, sir.

Q You are doing that out of the goodness of your heart, you are going to testify at the jailbreak case without a grant of immunity and without any promise because you are a generous person, is that correct?

MR. HULTMAN: Your Honor, again I object.

THE COURT: The objection is sustained.

THE WITNESS: I get my time deducted back at the penitentiary.

Q (By Mr. Taikeff) You are hoping to get your time reduced?

A I will get it reduced eventually.

Q If you testify?

A No, the Board of Parole. The FBI don't have nothing to do with it.

Q Did anybody make any promises to you in connection with your testifying at the jailbreak case?

A None whatsoever.

Q And you don't have any expectations that anyone is going to do anything for you if you testify?

A No, sir.

{4158}

MR. HULTMAN: Your Honor, again I object. This has been asked and answered, and asked and answered, it is repetitive.

THE COURT: Sustained.

Counsel will make no further reference to this matter of the jailbreak case.

MR. TAIKEFF: All right.

Q (By Mr. Taikeff) Before you took the stand this afternoon, did I speak with you?

A Yes, sir, you did.

Q Was that the first time in your life you ever met me or spoke with me?

A Yes, sir.

Q Did you tell me then about the conversation you had with your lawyer between the first time the agents saw you --

A (Interrupting) Somewhat.

Q Beg your pardon?

A Somewhat.

Q What did you tell me then?

A I told you my lawyer messed me up. Didn't represent my case like he should have represented it.

Q Did you tell me he told you to give the FBI the information they wanted because that would help you?

A No.

Q Did you tell me that your lawyer was concerned with the {4159} time you might have to do and told you to cooperate?

A Yeah.

Q He did tell you that?

A Yes, sir.

THE COURT: Mr. Taikeff, I think you have made the point on your offer of proof. Any further questions to this witness will have to be cleared with me at the bench first.

MR. TAIKEFF: All right. I would like to come to the bench.

THE COURT: You may.

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

MR. TAIKEFF: First, --

THE COURT: (Interrupting) I just might make a statement first.

(Witness leaves witness stand.)

MR. HULTMAN: I am sorry. I apologize. I thought you just wanted counsel for the defense.

THE COURT: It seems to me you are going into a collateral matter in great detail. You are wasting the time of this Court, and I would like to know what additional matters you intend to bring out from this witness on this offer of proof.

MR. TAIKEFF: One additional matter.

{4160}

THE COURT: Very well.

MR. TAIKEFF: When he reported to the FBI on April 23 , 1976, that he had heard certain things from a person while he was in the Pennington County Jail, and in fact that person was not in the jail at that time.

MR. HULTMAN: Finally he got to the matter I brought up. That's my position, your Honor, that it is obvious from the record here that he is not that conversant with times and places, and that's the conclusion I drew when I read the statement.

MR. TAIKEFF: He was very specific about remembering that Jimmy Eagle had just been sentenced, and in fact Jimmy Eagle was sentenced at the very end of September or the beginning of October of 1975.

MR. HULTMAN; That only goes to attack his credibility.

THE COURT: Just a minute. Apparently Mr. Hultman is willing to concede what you have just stated.

MR. HULTMAN: That is correct.

THE COURT: So you have got your offer of proof completed.

MR. TAIKEFF: Just to make certain that I have touched -- I want to identify it, because this is in evidence, for the offer of proof.

I am referring, your Honor, to Defendant's Exhibit 214.

THE COURT: Very well.

{4161}

MR. TAIKEFF: Page 2. There are a number of paragraphs. The second full paragraph describes in detail a conversation which of necessity had to take place in the latter part of September or October. According to the statement the witness said the conversation took place in October of 1975. However, we will leave it at that.

At that time, your Honor, Mr. Robideau was incarcerated in the Sedgwick County jail in Wichita, Kansas, from September 10 through January 13; that that is to say, September 10, 1975,

through January 13, 1976, Mr. Robideau was in the State of Kansas and was incarcerated in the Pennington County jail for the first time on January 13, 1976.

MR. HULTMAN: And the Government would stipulate that that is -- in fact, I have already agreed. I don't agree with the relevancy ultimately.

THE COURT: I understand the stipulation is to the fact.

MR. HULTMAN: That is correct.

THE COURT: Very well.

MR. TAIKEFF: I think under the circumstances I ought to lodge 214 with the Clerk since it was not previously offered and to make it official in the proceedings. That's the document in which is contained the paragraph to which I alluded, so I am going to lodge it with the Clerk as {4162} part of it so it is now in essence in the case.

MR. HULTMAN: I have no objection for the purposes of this hearing.

THE COURT: Make it the entire document.

MR. TAIKEFF: Offer on the offer of proof Defendant's Exhibit 217 which is the FBI fingerprint record.

THE COURT: Any objection?

MR. HULTMAN: Well, I think it doesn't have any relevance, even for an offer of proof. I do make an objection.

THE COURT: I am not concerned with the relevancy. This is his offer of proof.

MR. HULTMAN: All right.

THE COURT: 214 and 217 are received on the offer of proof.

MR. TAIKEFF: O.k. I have no further questions of this witness.

(Whereupon, the following proceedings were had in the courtroom:)

{4163}

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

THE COURT: Does the Government have any questions of this witness?

MR. HULTMAN: Your Honor, I have just two questions.

CROSS-EXAMINATION

BY MR. HULTMAN

Q Mr. Bragg, do you remember an occasion where Mr. Lowe, who's in this courtroom, and Mr. Kunstler asked you some questions about a year ago? Do you remember such an occasion?

A Yes, sir.

Q All right. Now, I just want to ask you just two questions that were asked of you among others at that time and what your response was, and ask you whether or not one, that response was true then and ask you whether it's true now.

Can you remember being asked this question at that time:

"Question: May I ask you has anyone, FBI agents or marshals or United States attorney suggested to you that you declined to talk with us?"

"Answer: No, they haven't."

Q (By Mr. Hultman) Do you remember that question being asked you at that time and an answer of that kind?

A Yes, sir.

Q Was it true then?

A Yes, sir.

{4164}

Q If I were to ask you that same question here today in this courtroom now would your answer still be the same?

A Yes, sir, it would.

Q All right. Now, I'm going to ask you one other question and answer at that time.

"Question: Has anyone suggested to you that you might get some consideration if you would cooperate and testify?"

"Answer: No way. I know I can't get no consideration."

Q (By Mr. Hultman) Do you remember that question being asked by either Mr. Lowe or Mr. Kunstler when the two of them were together and asking you that question and your reply?

A I said I wouldn't, and I wouldn't get no, there were no deals were made whatsoever.

Q All right. Now, was your answer to that question true then?

A Yes, sir.

Q And if I were to ask you that same question now would your answer be the same?

A Yes, it would.

MR. HULTMAN: I don't have any further questions.

MR. TAIKEFF: Nothing further.

THE COURT: You may step down.

MR. TAIKEFF: May I ask Your Honor what Your Honor's intentions are with respect to the other incarcerated potential witness?

{4165}

THE COURT. You indicated you wanted to interview him.

MR. TAIKEFF: Yes, Your Honor.

THE COURT: I will recess until 5:10.

(Recess taken.)

Mr. TAIKEFF: Defense calls Marion High Bull.

MARION HIGH BULL,

being first duly sworn, testified as follows:

MR. TAIKEFF: May I proceed, Your Honor?

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. TAIKEFF

Q Mr. High Bull, I'm showing you Defendant's Exhibit 209 which is a four page document. Would you look at it and tell me whether that is a document which you signed on the date which is shown on the first page.

A Yes, it is.

Q That document is dated August 1, 1975. Could you tell us when you first had contact with the agents who prepared that statement and brought it to you to sign on August 1, 1975?

A When did I first meet them?

Q Yes.

A About August.

Q Might it have been near the end of July?

A End of July, yeah.

Q Did you tell them to come and see you?

{4166}

A No, sir.

Q Did they just show up and introduce themselves and start questioning you?

A Yes, sir.

Q Other than the time when you signed the document that you just identified which was August 1, 1975 how many times did you meet with them?

A That was about the only time.

Q Just that one time near the end of July?

A Yes.

Q Are you presently serving a prison sentence?

A Yes.

Q How many years?

A Thirty.

Q Was that for a federal conviction?

A Yes.

Q You were in the Pennington County Jail in July of 1975, am I right?

A Yes.

Q And you were there on federal charges?

A Yes.

Q For a crime that it was charged occurred on the Pine Ridge Reservation; is that correct?

A Yes.

Q What was the crime or what were the crimes charged?

{4167}

A The charges were two counts of second degree.

Q Second degree murder?

A Yes.

Q Was there any relationship between yourself and the people who died that you were charged with the death of?

A Yes, I would say so.

Q What was the relationship?

A Say by cousin. I wouldn't -- on my wife's side.

Q Say it again.

A Say cousin and a niece.

Q A cousin and a niece?

A Yes.

Q Now, you went to trial in connection with the deaths of those two people, did you not?

A Yes.

Q Or did you plead guilty?

A No, I went to trial.

Q And a jury found you guilty?

A Yes, sir.

Q When did you go to trial?

A October of '75.

Q So that in July you still had the charges pending and there was no guilty verdict against you?

A No, sir.

Q Did you have any conversation with the agents concerning {4168} the possibility that they could help you with your murder case?

A No.

Q Did they have any discussion with you at all about the fact that a case was pending against you?

A No.

Q Did you have a lawyer representing you at that time?

A In my questioning with the FBI's?

Q Yes. In July.

A No.

Q I didn't mean whether there was a lawyer there, I meant whether there was a lawyer in your life who was representing you?

A Yes.

Q And did you contact the lawyer before you spoke with the FBI?

A No, sir.

Q Did the agents tell you that they had called your lawyer?

A Not that I know of.

Q And did you expect in any way that speaking with them might help your case, your murder case?

A No, sir.

Q Now, I spoke to you a few minutes ago in the marshal's holding cell, didn't I?

A Yes, sir.

Q Was that the first time in your life that you ever saw me {4169} or spoke with me?

A Yes, sir.

Q And after I introduced myself by name and told you that there was a trial going on did you say something to me concerning the question of whether or not I represent the defense?

A Well, actually I didn't have nothing to do with this.

Q No, I understand that, sir. I'm talking about the conversation we had in the marshal's cell. Did you say something to me about whether I represent the defense?

A Yes, sir.

Q And what was it that you said?

A I asked you who I was testifying for.

Q And? Go on, tell everybody the entire conversation.

A And then I didn't want to testify for anybody.

Q Is that what you said to me inside?

A That's what I said.

Q Didn't you say to me that you don't want to testify if you represent the, if I represented the defendant?

A I said I didn't want to testify for anybody.

Q When do you become eligible for parole?

A 1981.

Q And you are in a federal prison?

A Yes, sir.

Q And you have to appear before the federal parole people in order to be paroled; isn't that correct?

{4170}

A I believe so.

Q And you know that the Federal Bureau of Investigation is a federal agency, do you not?

A Yes.

Q And do you have any concern that if you testify or that by testifying here as a defense witness that your parole will be jeopardized in any way?

A I told you I couldn't answer that question.

Q Well, I am asking you what you believe what's in your head. Do you believe that by appearing here as a defense witness and answering questions you are somehow or other possibly affecting your chances for parole?

A I would say no.

MR. TAIKEFF: No further questions.

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

THE COURT: You may step down.

MR. TAIKEFF: Your Honor, other than the Special Agent Wood who was the person who handled the other informant, there is no other testimony to be adduced with respect to the offer or proof.

THE COURT: Is the informant available?

MR. TAIKEFF: The informant is deceased. I have a copy of his death certificate.

THE COURT: I misspoke, I'm sorry. The witness himself.

{4171}

MR. TAIKEFF: No. I understand from the Government that he's due here tomorrow.

MR. HULTMAN: Well, they just told me late, or sometime this morning, and I immediately indicated to get him on the way here.

THE COURT: Excuse me, I still haven't made myself clear.

MR. HULTMAN: I'm sorry.

THE COURT: Mr. Woods, the agent who testified as to his interview with someone by the name of Clifford. My question is: Is Clifford available? Could he be put on the stand?

MR. TAIKEFF: I'm under the impression, Your Honor, that if he's brought on the stand he wouldn't say anything because we have his death certificate.

Oh, I'm sorry, I am misinformed, Your Honor, and I misspoke. That particular informant is alive and apparently is available, but he's not being called as a witness. It's only the agent who took his statement who would be called.

THE COURT: He is available, but you have elected not to call him?

MR. TAIKEFF: That's correct.

THE COURT: Very well. You indicated earlier that you wanted to call Mr. Warren.

MR. TAIKEFF: And I have the other witnesses available {4172} as well. I told Your Honor before that I wasn't sure of their whereabouts. I thought they had left. Indeed they had, but they returned.

THE COURT: Very well.

MR. TAIKEFF: They probably went out for some refreshments.

THE COURT: You may proceed on that.

MR. TAIKEFF: Jeanette Tallman.

MR. HULTMAN: What was the name again, Counsel?

MR. TAIKEFF: Jeanette Tallman, one word.

MR. HULTMAN: Is this still on the offer?

MR. TAIKEFF: No. The offer is closed at this moment except for Wood which will be done tomorrow.

MR. HULTMAN: Okay.

{4173}

THE COURT: This, Counsel, as I understand it, relates to the availability or nonavailability of Myrtle Poor Bear, is that it?

MR. TAIKEFF: That's correct, Your Honor.

THE COURT: Very well.

JEANETTE TALL MAN,

being first duly sworn, testified as follows:

MR. TAIKEFF: May I proceed, Your Honor?

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. TAIKEFF:

Q Miss Tall Man, where do you live?

A Allen, South Dakota.

Q That's A-I-I-e-n?

A Yes.

Q Is that on the Pine Ridge Reservation?

A Yes, it is.

Q I'm showing you a piece of paper which contains a reproduction of a photograph. It's marked Defendant's Exhibit 158. Would you please look at that.

Have you ever seen that piece of paper before?

A No.

Q Have you ever seen that photograph that is reproduced in that piece of paper?

A No.

Q Do you know whose photograph that is?

{4174}

A No, I don't know.

Q Do you know a person by the name of Myrtle Poor Bear?

A Yes.

Q Is she a member of your family?

A Yes.

Q What's the nature of your relationship to her?

A She's my first, first -- she's my second cousin.

Q And do you know where she lives?

A Allen, South Dakota.

Q And with whom does she live?

A With her father.

Q Anybody else?

A Her sister.

Q Does she have a sister by the name of Elaine?

A Yes.

Q When was the last time you saw Elaine?

A I've seen Elaine?

Q Yes. Did you see her today?

A Yes, I did.

Q Is she here in Fargo?

A Yes.

Q When was the last time you saw Myrtle Poor Bear?

A Last Wednesday.

Q Less than a week ago?

A Yes.

{4175}

Q And where did you see her?

A Outside of her house.

Q In Allen, South Dakota?

A Yes.

Q And before that when did you see her just prior to Wednesday, whether it was a day, a week, a month, a year, when was the last time before that you saw her?

Q About a month ago.

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

MR. CROOKS: I'm somewhat unclear as to what the purpose of this line of questioning was but we have no questions.

MR. TAIKEFF: It is for all practical purpose making a record for the defense in connection with the appearance or nonappearance of a witness.

THE COURT: You may step down.

MR. TAIKEFF: Theodore Poor Bear.

THEODORE POOR BEAR,

being first duly sworn, testified as follows:

MR. TAIKEFF: May I inquire, Your Honor?

THE COURT: You may inquire.

DIRECT EXAMINATION

BY MR. TAIKEFF:

Q Mr. Poor Bear, if you talk to that microphone everybody will be able to hear you. Do you understand that?

{4176}

A Yes.

Q Where do you live?

A Allen, South Dakota.

Q And do you have any family that lives with you?

A Yes.

Q Are they your children?

A Grandchildren.

Q And children, too?

A Yes.

Q Do you have a daughter named Elaine?

A Yes.

Q Does she live with you?

A Yes.

Q Is she here with you in Fargo?

A Yes.

Q Just outside this courtroom?

A Yes.

Q Do you have a daughter named Myrtle?

A Yes.

Q Where does she live?

A She lives at Allen.

Q The same place in Allen?

A Yes.

Q In your house or apartment?

A My house.

{4177}

Q In your house. How long has she lived with you in your house?

A Ever since she was a child.

Q And how old is she now?

A 25.

Q So practically all of her life she lived at home with you, is that right?

A Yes.

Q When did you come to Fargo?

A Yesterday.

Q On Sunday?

A Sunday; yeah.

Q And when was the last time you saw your daughter Myrtle?

A Before I left from Allen.

Q What time did you get here on the airplane on Sunday?

A Around 3:00 I think.

Q Quarter to 3:00?

A Yes.

Q And you came from Rapid City?

A Yes.

Q How did you get to Rapid City?

A In a car.

Q Did you see your daughter Myrtle on Sunday?

A Yes.

Q Did she sleep at home the night before?

{4178}

A Yes.

Q She slept at home Saturday night?

A Yes.

Q Was she home on Saturday during the day?

A Yes.

Q Was she home the night before, Friday night?

A Yes.

Q Did she sleep at home?

A Yes.

Q Was she home on Friday?

I'm going backwards now, back now three days to last Friday.

A Yes. I think.

Q Was she home all week last week?

A Yes. All week.

Q Did she sleep at home every night?

A Yes.

Q I show you a piece of paper which we've marked Defendant's Exhibit 158. There's a copy of a photograph on that piece of paper. Would you look at it, please.

Does that photograph mean anything to you?

A No. I don't think so.

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

MR. CROOKS: We have no questions.

{4179}

THE COURT: You may step down.

MR. TAIKEFF: Elaine Poor Bear.

ELAINE POOR BEAR,

being first duly sworn, testified as follows:

MR. TAIKEFF: May I proceed, Your Honor?

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. TAIKEFF:

Q Where do you live, Miss Poor Bear?

A Allen, South Dakota. On the Pine Ridge Reservation.

Q And did you live with any members of your family?

A Yes, I do.

Q And who are they?

A I live with my sisters Angie Poor Bear and Clara Poor Bear, Myrtle Poor Bear and myself and my father.

Q When did you come to Fargo?

A Yesterday.

Q What time did you arrive?

A I believe it was 2:45.

Q And before you left home did you see your sister Myrtle?

A Yes, I did.

Q Where did you see her?

A At home.

Q I show you a piece of paper which has on it a duplication of a photograph. It's been marked Defendant's Exhibit 158. Would you please look at that. Do you know who's depicted in [[NOTE: PAGE 4179 ENDS HERE IN MID-SENTENCE. PAGE 4180 BEGINS AS SHOWN BELOW, WITHOUT COMPLETING THIS SENTENCE.]]

{4180}

A My sister Myrtle.

Q Does she look different than she usually does?

A Yes.

MR. TAIKEFF: I have no further questions.

MR. CROOKS: We have none.

THE COURT: You may step down.

MR. TAIKEFF: Defense calls Chief Deputy Warren.

HAROLD C. WARREN,

being first duly sworn, testified as follows:

MR. TAIKEFF: May I inquire, Your Honor?

THE COURT: You may inquire.

DIRECT EXAMINATION

BY MR. TAIKEFF:

Q Mr. Warren, I don't think it is necessary to belabor the record with your qualifications and status. You're the Chief Deputy United States Marshal in this division of the district of North Dakota, are you not?

A That's correct.

Q And in connection with your official duties you have had some contact since the time this trial began with the subject of a person named Myrtle Poor Bear?

A Yes, I have.

Q Now, sir, I would like to begin with an event which occurred slightly after 5:00 o'clock one afternoon within the past couple of weeks after Court recessed for the day that has to do with the presence of Myrtle Poor Bear in your office. Are {4181} you acquainted with the particular subject and event that I'm talking about?

A Yes, I am, Counselor.

Q Do you happen to recall the date? I don't know and that's why I ask.

A No, I don't.

Q Now on that particular day did Myrtle Poor Bear have any status with the United States Marshal service?

{4182}

To put it more directly --

A (Interrupting) I understand your question. If my memory serves me right, I believe she did on that day.

Q And what was that, sir?

A She was a protected witness under the Witness Security Program of the U. S. Marshal's Service.

Q Do you know how long she had been in that status?

A No, I do not.

Q Do you know where she came from -- I am talking about only the state, not the exact location -- prior to arriving here?

A As a fact I do not, only by hearsay.

Q Does that hearsay indicate she came from California?

A That it does.

Q And was she transported from whatever location she came from in the custody or in the company, at the very least, of a U. S. Deputy Marshal?

A No, she was not.

Q She came alone?

A Yes, she did.

Q Now, somewhat after 5:00 o'clock, Mr. Lowe and Mr. Engelstein and I came to your office, and there was a court reporter present?

A That's correct.

Q And in addition, Myrtle Poor Bear was sitting on a couch in the Chief Deputy's or the Marshal's private office, is that {4183} correct?

A That's correct.

Q And also present was yourself, and at least one other Deputy Marshal?

A That's correct.

Q Now, at that time, either Mr. Lowe or I explained who we were and told Miss Poor Bear that we represented Leonard Peltier, and that we wanted to know whether she would be willing to be interviewed by us and she said, "No," is that correct?

A That's correct.

Q And during all of that time you were present in the office?

A That's correct.

Q Now, after she said, "No," I believe that I handed you a piece of paper and asked you to serve it for me, is that correct?

A That's correct.

Q And was that a subpoena which was returnable the following morning at 9:00 o'clock in this courtroom?

A That's correct.

Q Now, between the time we left your office, shortly after those events, and the next morning, can you tell us where she was and whether she was under your protective custody?

A She was in the Fargo area, in a local motel in the Fargo area. She was under our protection, correct.

Q And the following morning at or about 9:00 o'clock, or possibly a little earlier, she came to this courthouse, did she {4184} not?

A That she did.

Q And during the period that she was here or at least initially, she was still in your protective custody?

A That's correct.

Q That morning?

A That's correct.

Q Had she indicated to you in any way the preceding afternoon of her desire to terminate her status as a protected witness?

A No, she did not.

Q Did anyone say anything to you about the possibility of her terminating her status that afternoon?

A Well, I inquired of our Washington office as to her status.

Q What were you advised?

A I was advised that at that specific day, whatever the date was, was the last day that authorization had been extended for her participation in the Witness Security Program.

Q And that particular day was the day on which we came to your office, or was the following day when she was still here because of the subpoena?

A The following day because of her presence based on the subpoena.

Q Now, do you know whether it was the intention to terminate her involvement in the witness protection program on the day when we came to your office?

{4185}

A Well, this had been determined approximately 10 days prior to that.

Q And the day that was picked was the day that we were coming to your office or the following day?

A The day that was actually picked was the day that you came into our office. I requested an additional day be authorized, which was granted.

Q That was because we had gotten a subpoena from the Clerk and it required her presence the next morning, so I gather in your judgment you decided she better stay in your protective custody until the matter of the subpoena was dealt with, is that a fair summary?

A That's a fair summary, right.

Q O.k. Now, later that day -- I am now speaking of the second day in the sequence -- you received some process from his Honor, Judge Benson?

A That we did.

Q And what was that process?

A That was a material witness warrant.

Q Which authorized you to arrest her and bring her before a judicial officer so that she could be dealt with according to law?

A That's correct.

Q Did you execute that warrant?

A That warrant was executed by a Deputy Marshal. She was {4186} taken before a Magistrate, and the Magistrate released her after she had -- after the portions of the material witness -- conditions of the material witness warrant had been expressed to her; and she was returned to the Marshal's office, and I was advised that the Magistrate had approved her departing from our custody based on her agreeing to the conditions of the material witness warrant.

Q And as far as you know, she left on her own steam?

A That she did.

Q Now, what were the conditions that you referred to a few moments ago?

A The No. 1 condition was that she execute a thousand dollar personal recognizance bond. The second condition was that she maintain contact with the Marshal's office at Fargo, North Dakota by telephone at least once a day.

Q Now, beginning on the day that she was released -- and do you happen to know that date?

A No, I do not.

Q Did she keep daily telephonic contact with your office as far as you know?

A No, not daily.

Q When she left the custody of the Deputy or Deputies who had her in their custody, do you know whether or not she had executed the thousand dollar personal recognizance bond?

A At the time I was informed that it was believed that {4187} she had not executed by signature the one thousand p.r. bond.

Q Do you have any information concerning why she did not -- and in fact I think the court record reflects that she had not executed such a bond?

A No. I have no personal knowledge of why it was not done.

Q May I assume though that whoever turned her loose or let her go was under the impression that she had signed such a bond, or do you have information to the contrary?

A No. I believe that the Deputy that took her before the Magistrate felt in their own mind that she had not signed a p.r. bond.

As a matter of fact, if my memory serves me right, it was brought to the attention of the U. S. Magistrate, that she did not believe that the bond had been signed.

Now, I say "she", it was a female Deputy Marshal that escorted her.

Q I understand that, sir. Do you know what determination the Magistrate made in connection with that suggestion that was made?

A No, I do not.

Q That suggestion was made before Myrtle Poor Bear left the courthouse, am I correct?

A That's true.

Q Do you know the name of that Magistrate?

A Magistrate Hill, James Hill, I believe it is.

{4188}

Q Now, sometime --

THE COURT: (Interrupting) I think maybe the record should be corrected to show the name of the Magistrate to be William Hill.

MR. TAIKEFF: Yes, your Honor.

THE WITNESS: William Hill, I am sorry.

Q (By Mr. Taikeff) May I assume -- if it is a fair assumption and tell me if I am wrong -- that the Marshal who had Myrtle Poor Bear in her custody was aware that the warrant required the execution of the bond and needed a certain piece paper in order to let her go free of the warrant?

A I don't think that's a fair assumption. We are laymen and not attorneys; and when an attorney who is a United States Magistrate advises us to release an individual based on his decision to release that individual, we don't argue.

Q O.k. I meant normally, when you or one of your colleagues takes a prisoner who is to be bailed or bonded before a judicial officer, as a general rule you expect some piece of paper that will show why you gave up the body, as a matter of general procedure I am talking about?

A Now, I don't think it is a general procedure. It is somewhat of a practice procedure. Sometimes we receive it, sometimes we don't. That would be a release or temporary commitment, we don't require it.

Q I see. You are satisfied if a judicial officer says that {4189} person may leave, to let that person go?

A That's true.

Q O.k. Now, sometime after she was released, she stopped contacting you for a certain number of days, am I correct?

A Correct.

Q And you and I had a conversation in which I indicated that I was curious to know whether you were in touch with her because I wanted her brought here; and at that time you said to me, "I haven't heard from her since last Sunday"?

A That's true.

Q Now, I don't remember so I ask you in case you do, was the Sunday you were talking about one week ago yesterday or was it two weeks ago yesterday?

A One week ago yesterday.

Q So it is now approximately eight days since you last heard from her?

A That's true.

Q What, if anything, have you done since eight days ago to secure her attendance here as a material witness?

A We have on several occasions, almost daily, contacted or called by telephone the telephone numbers that Miss Poor Bear provided us with, which one belonged to an aunt and uncle in Pine Ridge, one was a contact telephone number at Allen, South Dakota, a May's Store which was near Miss Poor Bear's father; another was in Alliance, Nebraska.

{4190}

We have contacted the Marshal's office in Rapid City, South Dakota. We have asked them to notify the local law enforcement BIA in the area, attempted to locate Myrtle Poor Bear and to make contact with her, and likewise to us.

Q Now, this past Friday your office received another warrant signed by Judge Benson, is that correct?

A That's correct.

Q And this one provided for her arrest and bail in the amount of \$10,000,00 cash or surety, is that correct?

A I don't recall the amount, but we received a warrant of arrest for Myrtle Poor Bear.

Q Do you recall the approximate time of day, or if you have the exact time of day when you got that warrant?

A No, I don't. It was Friday afternoon, and that warrant came from the Clerk of Court's office with the Clerk of Court -- Deputy Clerk of Court's signature on the warrant authorizing the warrant.

Q You know it was sometime after 12:00 noon?

A Yes, sir.

Q Now, did you directly or indirectly dispatch any Deputy U.S. Marshals to look for her, either before or after Judge Benson signed the warrant this past Friday?

A After we received the warrant, we telephoned Rapid City, South Dakota. We asked them to attempt to locate Myrtle Poor Bear that a warrant had been issued; we were teletyping the {4191} warrant to the Marshal's office in Sioux Falls, South Dakota, and that was the extent of our activity on Friday.

{4192}

Q Was there any activity on Saturday, Sunday or today?

A This morning I talked with Rapid City and learned that a deputy marshal and matron had departed Rapid City and spent, oh, last Friday, spent most of Friday night and Saturday in an attempt in Rapid City, the Pine Ridge, the Allen, South Dakota area in attempting to locate Myrtle Poor Bear and they had not located her; although they had observed, obtained information she was in the area but they were unable to arrest her.

Q As far as you know do you have her home address in Allen, or the location of her house?

A Yes. Approximate location of her house.

Q And do you know if any deputy marshal went to that home address?

A I was advised that they had been to that address.

Q On what day or days?

A I would, I'm assuming it would have been Friday evening or Saturday. I don't know for sure.

MR. TAIKEFF: I have no further questions at this time, Your Honor.

MR. CROOKS: We have no questions of Mr. Warren.

THE COURT: You may step down.

THE WITNESS: Thank you.

MR. HULTMAN: Mr. Wood I understand has arrived, is on a plane and we'd be glad to go ahead with him.

THE COURT: It's getting very close to the time that I {4193} said I was going to quit.

MR. HULTMAN: I thought maybe we'd even go later.

THE COURT: No. I think I had indicated earlier that we would go until 6:00 o'clock.

I would like to see counsel for the defense on a couple of matters relating to witnesses and the counsel for the government are excused at this time then if they wish to leave.

I would ask counsel to approach the bench.

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

THE COURT: I'm a little shocked, I might mention, the witness has not yet been called, has been sitting here for sixteen days and now wants to come someplace other than where she came from. I'd like some explanation for it.

MR. TAIKEFF: I have no explanation for this because the information which is contained in this memorandum dated April 11th, or is something I learned for the first time on this piece of paper. With respect to her presence here I think her original subpoena date was for the day we expected to begin our case. And once she came here and there was a delay there's no reason to send her back. We thought that it would be a mistake for her to return around and come back and make another return trip.

Now, I interviewed her in connection, I knew the subject {4194} matter of which she was going to testify, and was satisfied and am satisfied that if she could credibility testify to those things and have the competence to testify to those things and it was not hearsay that she would be a valuable witness. But in my opinion she was not able to testify of her own knowledge of the bulk of what she was to be called for. That what she had heard, she had heard from another witness in the case by the name of Norman Charles who is her brother. And she did not have firsthand knowledge. So that her testimony, although on its face apparently very important and very valuable concerning threats to Norman Charles, turned out to be in the main nothing more than what she had subsequently been told rather than what she observed with her own eyes and ears. And I realize that she just could not be put on the stand.

THE COURT: Now, today there was handed to me a request for subpoenas for a Hazel Shields and a Marvin Amiotte.

MR. TAIKEFF: Yes. I can explain about them. Hazel Shields' name came up in the course of the proceeding this morning. Your Honor may recall a 302 which indicated that there was an interview on November 13, 1975 of Hazel Shields in which she testified, or told the agents that on June 26th James or Jimmy Eagle was at his grandmother's house, Mrs. Visnette's house, and that she was there and witnessed his presence on that {4195} particular afternoon. At the time this was prepared there had not yet been the present status of the matter concerning Jimmy Eagle.

THE COURT: I gather that this Marvin Amiotte is Eagle's attorney?

MR. TAIKEFF: He's the attorney.

THE COURT: Well, is there any need then for these two witnesses at this time in view of the Court's ruling?

MR. TAIKEFF: I just want to tell Your Honor, I spoke with the attorney for Mr. Eagle that Your Honor had appointed locally and I asked him whether he could represent to me that he had spoken with Mr. Amiotte and that Mr. Amiotte would confirm the statement that he made to Jimmy Eagle. And he said he himself did not verify it. So I didn't want to make an offer of proof on the basis of something I didn't have from a reliable, or a more reliable source.

He's part of my offer of proof. If Your Honor is willing to let the record reflect, tomorrow we'd have to do this in the presence of the Government as to what, that he in fact told those things. Now, I would be satisfied to do it that way. There's no special need to have him appear personally.

THE COURT: Why don't we explore that in the morning.

MR. TAIKEFF: Yes, Your Honor.

I return this to Your Honor, I assume.

THE COURT: Yes.

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

THE COURT: Court is in recess until 9:00 o'clock tomorrow morning.

(Whereupon, the court recessed at 6:00 o'clock P.M.; to reconvene at 9:00 o'clock, A.M. on April 12, 1977.)