

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

CR NO. C77-3003

UNITED STATES OF AMERICA,	*
	*
Plaintiff,	*
	*
v.	*
	*
LEONARD PELTIER,	*
	*
Defendant.	*

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

VOLUME XXII

Pages 4680-4878

{4680}

THURSDAY MORNING SESSION

April 14, 1977

Whereupon, the following proceedings were had and entered of record on Thursday morning, April 14, 1977, at 9:00 o'clock, A.M., without the jury being present and the defendant being present in person:

THE COURT: Before I rule on Exhibits 177 and 134 I would like to ask counsel again to state briefly why they first of all, defense counsel, why they feel that these two exhibits should be admitted.

MR. LOWE: Exhibit 177, Your Honor, is, I'll speak to that one first because I think there's an independent basis that is different from the laboratory reports themselves. First of all, Exhibit 177 is comprised of two components, in fact, although they are one Xeroxed document. The

original document I understand is a green tinted paper document known as a green sheet which is used by FBI agents as a general practice to transmit or record or inventory items of evidence. And I believe it says bulk inventory, meaning that perhaps more than one item of evidence on that sheet.

This particular one was filed by Special Agent Hughes detailing certain items that he found or purportedly found in the crime scene area as a result of his activities on June 26, 1975. Two of the items on that list are listed as a 5.256 millimeter cartridge case, singular in each instance. In other words, there are two separate entries of a single cartridge {4681} case. In fact by Special Agent Hughes' testimony he found, I believe it was his testimony, that he found seven cartridge cases of 5.56 millimeter caliber.

In fact the Q numbers, which is the second component of Defendant's Exhibit 177, were put on there by either Mr. Hodge or his assistant at the FBI laboratory; and he testified that that would have been done when he received the items accompanying the green sheet in order to identify them for laboratory purposes in the future. And he not only wrote the numbers down on the green sheet but he scratched the numbers on the cartridge casings according to his, or wrote them in ink, whichever it was in that case.

The Q numbers opposite those two cartridges show a total of seven cartridges. So within the document there is an inconsistency that the agent reports two cartridges are being forwarded and the laboratory says that there were seven cartridges.

Now, one of the obvious essential evidentiary questions here that the Government has labored hard over and which will no doubt be a very important part of their final argument is the connecting up of the AR-15 known as Government Exhibit 34-A with the crime scene generally, with shooting at the agents in particular and with Exhibit 34-B in particular from the trunk of Coler's car.

Anything which would show irregularity as to the manner {4682} in which ammunition components later attributed to that AR-15 or any other .223 caliber weapon would relate very closely to one of the central issues in this case of identification of weapons and ammunition components with those weapons.

Now, it is obviously troublesome to the Government to have .223 cartridges which were fired by a weapon other than Government Exhibit 34-A, and I remind Your Honor that these seven cartridges were not merely -- excuse me, did not merely have insufficient markings in order to identify them with Exhibit 34-A, but rather the laboratory specifically said that they had not been extracted from 34-A but had been extracted all from the same weapon, if I'm remembering the testimony correctly.

In other words that there had to have been another weapon, another caliber .223 weapon which fired or extracted those seven cartridges.

Now, at this point the Government has failed to prove what weapon did fire those cartridges. It's not to say that they're required to prove that, but it is to say that that is an element which the defense concedes upon to show that there was one other .223 weapon there at some time prior to Special Agent Hughes finding those cartridges. But we are entitled to make arguments on our view of those facts and one of the important factors is that the inconsistency between the exhibit and the green sheet is a question which has not {4683} been resolved.

Now, it's not up to us to explain it, it's not up to us to say that the only explanation or that it's an explanation to help the defense. It is sufficient or relevant to point out that here among

many, many inconsistencies many very questionable items of evidence which is a direct contradiction and the laboratory saying there were seven. I think that it's a matter for the jury that FBI agents in this case have testified to the great care they took. Special Agent Hughes himself said he took great care and I think that that is something that goes to the credibility of their technique, the credibility of them as witnesses. It goes to the whole issue of whether there was another weapon. It goes to the question of whether there was some attempted cover-up of weapons or cartridges or other ammunition components.

THE COURT: Now, I think counsel overlooked one suggestion I made and that is that you briefly --

MR. LOWE: Yes, sir. We briefly -- but this is a very important issue, Judge, and I want to be sure the record is clear on our reasoning.

THE COURT: Then you may go on.

MR. LOWE: Yes, I'm going to right now.

Exhibit 177 ties in with one of the laboratory reports as well which reports the seven rounds. Q100 through 105 and Q130 is in one of the laboratory reports, but I gather that {4684} Your Honor's question was more general as to the offer of all of the laboratory reports. Am I correct on that?

THE COURT: That is correct.

MR. LOWE: All right. Again, going to the fact that perhaps the single most essential issue here is obviously who actually fired the bullets that killed the two agents. We do not have any evidence that says that these are the bullets, except for the one, there were some fragments I think found in Special Agent Coler but they're not connected to any weapon. There was a bullet jacket, a nonlethal bullet jacket found in Special Agent Williams. That's been identified to a weapon.

The three fatal shots, the so-called execution shots, the only evidence we have is what you might call, or the Government would argue as circumstantial evidence as far as identifying it with a weapon. Dr. Noguchi said that it appeared to him to be a high velocity shot of 30 caliber or perhaps smaller.

So one of the essential questions is what candidates are there in the area for having been the weapon to fire a high velocity 30 caliber or smaller shot that could have killed the agents. Well, there are some weapons that have already been identified and marked as an exhibit that would qualify. One would be Government Exhibit 34-A. The Government in its part would like the jury to believe, we think that is {4685} probably going to be a part of their argument. There are others, however. There is a British .303 Enfield which has been identified as a high velocity weapon. I point out to Your Honor that there is a round of that gun found at the residence, the red house, Wanda Sears' house. There were other rounds associated with it I believe found up around the white houses and others in tent city. We believe we are entitled to show that, and to show the extensive collection that was made by the FBI to show not only the presence of weapons that are identified, but also to show all of the weapons components for which weapons were not found.

{4686}

Now why is this relevant? Well, I call Your Honor's attention to Exhibit 41A which was a .22 rifle about which there seems to be no doubt, Norman Brown at one time pointed that rifle and was firing it from up around the residences. I think his testimony was he carried it back to the tent area preparatory to getting away on the escape route and put it down on the hood of the green Ford where it was found by the agents. Now obviously there might have been other people who carried their weapons back and left them in tent city for one thing and the pictures of the tent city showed many different weapons that were found there including the Commando Mark III which is the .45 semi-automatic weapon that looks somewhat like a Thompson submachine gun which was, I think, by one witness attributed to Bob Robideau and for which there are weapon components up around the houses. I believe also there may have been a bullet fragment found in one of the cars. There's another weapon taken back to the tent area and left there.

We're entitled to show these other weapons which the government did not choose to introduce into an exhibit but are also possibly weapons fired by persons or someone unknown at the present time and carried back down to the tent area. That's one explanation for some of the ammunition components here. In those instances, of course, we have weapons and components {4687} identified and connected up in the reports.

There is a second category that's very important. There were weapons carried away from the scene, at least we know of some that were carried away by the escaping party that Norman Brown was a part of and Draper was a part of. Some of those weapons were described only generally. Some were eventually, we believe, or by the government were recovered. For example, 34A was one of those weapons.

We also know there were other people that left this area that were either not in that escape party or perhaps completely unknown. We know of inferentially people shooting at different times after this escaping party had left from the red house, for example. We know there were people running across, according to some testimony, from the white house to point "Z1" at a time after the escaping party had left. We know of Mr. Ecoffey testifying there were people shooting something like 500 yards to the southwest of the tent area in the early part of the afternoon who had never been identified more than saying they apparently were four or five people there shooting an undetermined number of weapons. Those people had weapons which could have been carried away and we're entitled to show other ammunition components found in the area of the crime scene both up at the houses and in tent city which would tend to corroborate that other weapons, at least at sometime, had been in that area, had been used in {4688} conjunction with those ammunition components.

Now that by itself is explained in detail in these laboratory reports. It shows all the different ammunition components of weapons in some cases that don't match any of the weapons that we have actually produced in the case. In some cases weapons that we don't know where they are now. The government as far as we know never found some of these weapons and we don't know where they are, whether they're still in the possession of somebody or buried or burned or what may have happened.

Finally we believe as to the ammunition components portions there are nonammunition component portions. We argued we ought to be able to show the exhaustiveness of this search, the exhaustiveness of the listings, it affects whether they could have missed something or not, if they have got it this extensively. I think the jury would infer nothing was missed. It could have been found through human diligence. Whereas, the other side of the coin, will argue a certain type of ammunition was not found or certain weapon not found, the government might argue there is a crime scene area and it was an excited time. Perhaps they missed some things. We think these laboratory reports are concrete evidence they didn't miss anything. They picked up everything and did everything but mow the lawn in order to find items in that area. They were using metal detectors, I understand. They have an {4689} exhaustive list.

Finally, at some of the ammunition components in here, we believe that the place they were found is reported in a way there is no dispute on them and it's quite consistent with all of the testimony that the assimilation of certain items in certain places in clusters is significant. For example, the fact there was 30.06 rounds and .303 ammunition cartridge casings found at the red house indicates there was more than one person there. That's consistent with testimony that was given. That's a consistency we're entitled to have in corroborating part of the defense theory in explaining inconsistencies in the government theories.

We believe that the fact of where these were found as listed here is a buttress by the government which is proper to introduce and make arguments on. If it's unexplained, that's the government's problem. They have an opportunity to explain everything in this case; we have an opportunity to use government documents which have laboratory reports to show the information contained therein.

The agent, Special Agent Hodge testified that he did not have this information in his own recollection and as to a lot of it, he could not even recall his recollection by, or refresh it by reading these documents. He would have to rely on the information reported in the documents. That's saying nothing we don't all know to be the case generally. We believe {4690} we're entitled under all the rules of evidence relating to such documents to have those introduced. They're certainly relevant. These were ammunition components found in the crime area, the crime scene area.

For these reasons we believe we're entitled to have them for whatever value they may be and for whatever purpose we can use them for.

We also think the absence of information in these reports are very significant. I'll give you one example which I think is perhaps the high point of that particular thing and that is, it was not until February 10, 1976, seven months after the event and six months, approximately six months after the ammunition components were actually received by the FBI that the FBI had its first report of ballistic testing on ammunition components, including 34B which is a .223 round found in Coler's car and a number of other important rounds. And that's the first time in this very important investigation, which Hodge says it was one of the top ones, and they were working particularly hard on it. It's six months later before they have the first laboratory report purportedly connecting up that particular round found allegedly in Coler's trunk with Exhibit 34A. Even though they had the ammunition components since July 24 and they had Exhibit 34A in their laboratory since, I believe it was {4691} September 12 which was about four or five months earlier. We believe the jury is entitled to consider that.

Now if that were taken in a vacuum, if that were taken in a vacuum that would be enough of a basis by itself. But I call Your Honor's attention to the fact, and this is already in the record in an indirect way but not specifically enough to pin it down by the date that the Defendant's Exhibit 135, which is a report adopted by, I mean, written by Special Agent Hodge and he identified it as one of his reports saying that as of October 31, 1975, after the government had both batches of ammunition components from the Jumping Bull area, they had everything there that they ever did, as far as we know, that were found in the Jumping Bull area, two batches, one on July 5, one on July 24. So they had everything there. They had all of the Wichita weapons which, that was September 12, 1975, including AR 34A. And yet a full month and a half later they write a report saying that K40 which is 34A was found not to connect up with any of the ammunition components from the RESMERS area, meaning all of those components that they had prior to that date.

Now we know from our experience and from the testimony that the FBI tests very carefully. If they made a test from all of those components with Exhibit 34A resulting in a laboratory report dated October 31, 1975, saying there were none of the components that could be matched up and in the last line {4692} points out that the AR 34A was actually sent back to the alcohol,

tobacco and firearms people because they found it to have no relevance to any of the RESMERS ammunition, it was actually sent back and have shown on the face of the report and then miraculously, four months later, they connect up that very weapon with one of the alleged components found in Coler's trunk. Now if that is not relevant and if that is not the fact which we are properly able to argue to the jury --

THE COURT: Was that explored on cross-examination? That discrepancy that you explained.

MR. LOWE: I don't know what Your Honor means by explore. I got the agent to acknowledge this was a true and accurate report by him and it was made as carefully as he could humanly make it and they were all accurate.

THE COURT: Did you question the agent about time?

MR. LOWE: I'm sure he made some excuses or argument. Assume for the moment he did something illegal and was going to lie about it, I'm not obliged to give him the opportunity. Mr. Hultman and Mr. Sikma know about this report and in fact Mr. Sikma did ask a question about that on his, I guess it would be redirect, when he asked whether the first time they tested those components was in December and January of 1975 and '76 and Mr. Hodge indicated that it was.

{4693}

Now, I think that that is something which a human being on that jury is going to find incredible, that the first time they would test ammunition components received in July with a weapon they received in September, as to a report they wrote October 31, and that what the agent now says is the first time he ever examined them was in December after this report had been written, I think that's something that the Jury has a right to consider in evaluating all of this evidence and to evaluate it in connection of 34-A to that weapon, that component in the trunk of Coler's car.

Now, we are not obligated to ask questions about everything in order to get something in evidence. We are entitled to show things such as laboratory reports.

I point out to your Honor that the Federal Rules of Evidence specifically says that the availability of the declarant is immaterial, and that's the situation we have here. This is an utterance, and it is offered to show the utterance and it is offered also to show the truth of it because it is a business record kept in the ordinary course of business.

Unless the Federal Rules of Evidence are going to be ruled to be somehow absolutely without meaning, that document is relevant and we are entitled to have it in evidence; and that the basis for wanting all of these is {4694} to show not only the affirmative information but also to show the negative information, that is, that they did not find certain things.

THE COURT: Does the Government have any response?

MR. SIKMA: Yes, I do, your Honor.

First of all, this is, I believe, the principal reason for the Rules of Evidence, Rule 613(b), what the Defendant wants to do here is what they were starting to do with Mr. Ecoffey, to show him a statement and ask whether or not it was made, and then pull it away and then not ask him any

questions about it or give him any opportunity to explain it. They tried to get that in without even having the witness present on the stand in the first place.

THE COURT: What are you talking about now?

MR. SIKMA: I am talking about Ecoffey's statement by way of example.

Now, here what they are trying to do is to say, "Is this a lab report of yours?" Of course, it is a lab report of his, but I might point out that this AR-15, Government Exhibit 34-A, was during this period of time used in another trial dealing with Mr. Robideau down in Wichita, and had to be sent back for that purpose.

It seems to me that, first of all, the lab reports are technical records that do not directly relate to a {4695} number of items relating to this case.

The fact that the lab reports show that a number of items were examined does not show that they have any relevancy to this case.

On the one hand counsel says the laboratory did an extremely careful job of examining all these items; and then on the other hand, he said that it is inconceivable that between the time of September, when the first AR-15 was found, and December, that this laboratory expert would have examined somewhere in the neighborhood of 2,000 items.

Each one of these has to be placed in a microscope and compared with other items.

Now, it is inconceivable to me how we should be required now to call some expert who could come in here and explain to the jury what these laboratory reports mean in order to help them make a meaningful understanding -- determination as to these laboratory reports. As they stand, they are totally meaningless.

What the defense wants to do is to say to a witness, "Did you put on this -- did you make this laboratory report?" And then come up later on without having anyone have any conceivable idea of what they are talking about, come back later and pick one little piece out of it and say, "How do you explain this?"

For one thing, it would take an unreasonable length {4696} of time in the argument. I submit they could be explained, but for the jury to be able to understand all the technical aspects of these reports would be an unreasonable consumption of time.

They would also be, I believe, outweighed by their value as far as relevancy is concerned.

Counsel was given an opportunity to ask the witness when he was here about anything that he wanted to ask him about.

We stated that if the defense had certain items that they wanted to list and put them in in a readable, understandable means, we would be able to work something out; but all that has been done here is certain extracts have been taken from these reports, generally considered, these considered matters which I think are probably as relevant as anything which the defense is trying to put in here.

All it does is -- taking little pieces out of the report is to confuse the issues more and make it more difficult for the jury to understand.

I believe that these are excluded under Rule 403 and under 613(b) because they were not presented to the witness and he was not given an opportunity to explain them.

They also could have called an expert. They did not {4697} request an expert of their own to examine and find if there was anything wrong with the examination or with the laboratory work done by the FBI laboratory; but it is inconceivable to me how it could be argued that it is totally unreasonable to take two months to examine some 2,000 items under a microscope.

For that reason, I think, and the reasons stated earlier, these lab reports are inadmissible.

MR. LOWE: Your Honor, if I might just briefly respond?

Mr. Sikma seems to be attacking Mr. Hodge's veracity.

I don't mind him doing that. We are not here to try and prove that he was telling the truth or not.

He testified that these were accurate. If your Honor will look at Defendant's Exhibit 135, it is only a one page laboratory report. If the English language is susceptible of simplicity and clarity, this one sentence is: None of the other ammunition components was recovered at the RESMERS scene could be associated with specimens, K-40 and K-42.

And K-40 is the AR-15. You couldn't make it simpler. Maybe you could find one simple word to mean ammunition components, use bullets or casings. Nothing could make that simpler.

It is identified right away. K-40 is the .223 {4698} caliber AR-15, and the testimony is that's Government's Exhibit 34-A.

The Government wants to keep out any evidence that might cast doubt on its case. I don't even argue that's necessarily wrong. Maybe that's a part of their job.

If your Honor is not going to nullify the Rules of Evidence, somebody with presumably more wisdom than we have here decided that business records are admissible as an exception to the hearsay rule regardless of whether the declarant is available. It doesn't say "in the discretion of the Court." It doesn't say: If you can cross examine them or not cross examine them. It doesn't say: After you examined them on the witness stand. It says: The declarant's availability is immaterial.

I would hate to see this whole trial go down the drain on the grounds that clearly admissible evidence was excluded at the eleventh hour.

It seems to me clear -- at least to the extent it is not confusing -- these are admissible.

I vehemently object to the assertion by the Government that any of this is confusing. Laboratory reports are technical listings, but technical only in the sense they have numbers and identifications. They are written in simple English, and I would suggest anybody with a fifth

grade education can read them and say: Specimens obtained {4699} from Tent City, Pine Ridge Reservation, K-2, and it lists the weapon.

This is not in technical language. It does not go into a lot of metallurgical terms or biological terms.

It reports physical findings. It states in very simple terms whether the weapons found could have fired the cartridge casings found or not, and the language is very, very simple and very understandable.

The Government obviously does not want the jury to know that these other explanations, consistent with the innocence of the Defendant, exist because the Government only has a circumstantial case; and your Honor will explain to the jury that in weighing circumstantial evidence, before they can convict they must find that all of the circumstantial evidence excludes reasonably the thesis of innocence of the Defendant before they can convict, so if we provide explanations which are consistent with the circumstantial evidence, then that's going to hurt the Government's case.

{4700}

This is circumstantial evidence which we are entitled to show. It is legally admissible, it has been determined to be so under the Federal Rules of Evidence. I don't know what else I can say. Certainly as to Exhibit 135 and simple information of that nature, there's no basis for this Court excluding it.

THE COURT: The record will show, and counsel will recall, that at the time the agent was on the stand with reference to the laboratory reports I suggested to counsel at the bench conference that he proceed and examine the agent with reference to some of the details in this report, and he declined to do so. The reports, the exhibits will be received, but will be restricted simply to the, first of all, that part which has been etched out in red by counsel will be removed.

MR. LOWE: All right, sir.

THE COURT: And exhibits will be received, but will be restricted simply to a listing as to what they show on the face. In other words, the dates will not be gone into because you did have an opportunity on cross-examination to explore those dates.

MR. LOWE: May I, I'm not exactly sure, just so I understand what Your Honor is saying before I comment on it, as to what the document will look like when it goes to the jury they requested, will it be a Xeroxed copy that has every- {4701} thing except what is bracketed in red and with the date deleted, is that what you are saying?

THE COURT: No, no. I'm not saying that the dates will be deleted. I'm saying that you will not argue the dates to the jury from these documents because you had the opportunity to cross-examine the witness. The witness's testimony with reference to the preparation of these documents is the best evidence.

I specifically suggested to you that you pursue that and you chose not to do so. Therefore, it would be totally unfair now on the basis of the receipt of these documents in evidence to make

suggestions as to some discrepancy or some periods of time and days which might leave an erroneous impression.

MR. LOWE: May I just confirm then my understanding, is that we will get together with the clerk, or the clerk on his own if Your Honor chooses, and will make photocopies of these documents excluding the portions which are bracketed in red and those which I would ask to be marked with a letter A behind the exhibit; that we presently use the number, if that's agreeable with Your Honor so that it's simply referred to in the record and that those documents will be received in evidence, but that no argument may be based on the dates of the documents and any inferences to be drawn therefrom, is that your ruling?

{4702}

THE COURT: That's right.

MR. LOWE: All right. We'll certainly assist the Court and the Clerk in preparing those. We vigorously accept the Court's ruling.

MR. SIKMA: Your Honor, if the Court is ruling that those items come in as excluded, we would argue that the entire report should go in because the defense counsel has removed items from that report which are testified to which have been gone into in testimony. And consequently the jury gets a very ill-advised notion of what the reports are all about.

THE COURT: Very well. In the, I was suggesting that they be removed to eliminate confusion. I didn't know that you had objection to the removal.

MR. SIKMA: I have objections. If the Court is going to let them in the Government's position is that they should not be let in because the reports themselves, whether you exclude certain items or include certain items, are generally speaking confusing to the jury; and secondly, that the witness was not questioned on this, on these certain items. What has occurred here is that in, I believe it was in November a report went back to Special Agent Gammage which stated that no items found in the tent -- or in the crime scene area were connected with Government Exhibit 34-A or with K-15, I believe which is now Government Exhibit 34-A then the --

{4703}

MR. LOWE: K-40.

MR. SIKMA: What is it?

MR. LOWE: K-40.

MR. SIKMA: K-40. What the reports don't say, and what the witness was not questioned upon or was not asked about is the reason for this statement being there that nothing was found in the area which related to K-40, Government Exhibit 34-A. And the reason for that was because Government Exhibit 34-B and the 34 series had not been examined at that time, or at least Government Exhibit 34-B had not been examined at that time because it was in a package that was received a couple of weeks later and it contained perhaps a thousand items which the

agents had not had an opportunity to examine with reference to K-40, Government Exhibit 34-A.

And this is the kind of thing which makes the reports excludable. And the reason for the rule I believe which requires that before a document is admitted into evidence, or supposed a statement which is inconsistent with a witness's testimony, which this genuinely is inconsistent with this witness's testimony, he said that Government Exhibit 34-B did in fact, was found at the crime scene because of the evidence; and two, it was connected with K-40, Government Exhibit 34-A.

Now, the lab report says nothing was found in the items at the crime scene that was connected with 34-A. This leaves an inconsistency on the record which the witness has not had an {4704} opportunity to explain directly because counsel chose not to ask him about it. He offered the exhibit after the witness was gone, tried to offer all of these exhibits and that's what he's doing.

The Government does not want the jury, things to be kept from the jury, but the Government doesn't want the jury to have half truth or partial image of what actually occurred.

You must take into consideration that this lab report which went to Special Agent Gammage in November or December was made before these other items were examined microscopically and the jury with that kind of a, with that kind of a view will be presented with, on the one hand, Special Agent Hodge saying as an expert I was able to find a connection, a direct scientific connection between an item which was found in Coler's car and Government Exhibit 34-A. And on the other hand he has a lab report which no dates are made reference to which says there is no connection between items found at the crime scene and the matters --

THE COURT: Which part do you have reference to?

MR. SIKMA: Lab report, Defendant's Exhibit 134 I believe.

Well, wait, no, I don't think -- yes. If I may see the exhibits I will be able to tell.

Defendant's Exhibit 135 says none of the other ammunition components recovered by the RESMERS scene could be associated {4705} with specimens K-10 through K-42.

MR. LOWE: That's K-40 actually.

MR. SIKMA: Through K-42.

MR. LOWE: K-42.

MR. SIKMA: Yes. I see it isn't very legible here, I see. It is K-40. Well, that's Government Exhibit 34.

Now, that's an inconsistent statement with what the witness testified to on the stand. However, counsel never asked him about that when he had him on the witness stand. He just asked him if that was his report. And I would say that that's totally unfair to put that report in evidence when counsel had adequate opportunity to question the witness on this matter and give him an

opportunity to explain it as is required by rules of evidence 613 (B). Then we could have cross-examined on that particular item, but it wasn't --

THE COURT: I do not want to leave the jury out any longer.

MR. LOWE: May I make two very brief remarks, Your Honor. First of all the trial last summer, the same issue came up. The Government came up and knew that that was an inconsistency and could have themselves asked the witness to explain that. I assert that was Mr. Sikma's responsibility by asking the witness whether he hadn't only examined these cartridges in December or January, and that was the purpose of that question I suspect. And it certainly provided that basis.

{4706}

So that they knew about it, they could have explored all they wanted. They knew he just got through adopting these as being accurate reports and they knew very well that they were going to assert that that was not an accurate statement.

The most important part, Mr. Sikma has played fast and loose with the records. He said that the agent only received these ammunition components in a bag a couple of weeks after the report of October 31, 1975. I believe that's what I heard him say; is that correct?

MR. SIKMA: That is not correct.

MR. LOWE: Maybe you better restate what you said.

MR. SIKMA: He received it in a group that was separate from those received in the initial presentation through Special Agent Cunningham. But he did not examine them until after this particular day.

MR. LOWE: Then you made a misstatement before when you said he did not receive them a couple of weeks after that report was written. So if you stated that that was incorrect?

MR. SIKMA: That's correct.

MR. LOWE: All right. Because Exhibit 192 which is the February 10th laboratory report shows on its face that these specimens were received July 24th some, I guess it's six months earlier, and includes Q2628 on page 10 which is Government Exhibit 34-B.

I believe we understand your ruling and I would add, {4707} Your Honor, we certainly did not oppose having the entire documents in. That's what I asked for originally. But now we've got some red marks on there which I would not want the jury to see. They might draw some inference why they were there and if Your Honor changes his ruling I take a neutral position on it. If Your Honor changes his position I think we ought to have some clean copies made as exhibits. I think it is appropriate to leave Your Honor's ruling the way it was made.

THE COURT: I'm going to examine into this question that counsel has just raised with reference to Exhibit 135 and I'll make a ruling later in the day.

MR. LOWE: All right, sir.

THE COURT: Just one more matter for the record before the jury is brought in. Because of the inquiry of defense counsel just prior to the recess yesterday I will clarify for the record the ruling of the Court on the offer of proof of the testimony of Myrtle Poor Bear.

The offer of proof related to a collateral matter and under the Rules of Evidence is therefore inadmissible. If the witness as she testified yesterday were to be a believable witness the Court would have seriously considered allowing her testimony to go to the jury on the grounds that if believed by the jury the facts she testified to were such that they would shock the conscience of the Court and in the interests {4708} of justice should be considered by the jury.

However, for the reasons given on the record yesterday the Court concluded the danger of confusion of the issues, misleading the jury and unfair prejudice outweighed the possibility that the witness was believable.

Jury may now be brought in.

While the jury is coming in could I safely advise them that we expect the evidence to be completed today?

MR. TAIKEFF: Maybe this morning, Your Honor.

THE COURT: Very well. And my intention is to ask the jury if they want to work over the weekend. If so, I would anticipate that we would have arguments tomorrow, they will be charged first thing Saturday morning and then they can deliberate over the weekend.

MR. TAIKEFF: Your Honor, if it makes any difference, Your Honor, could I hope, tell them that counsel would encourage that schedule? Does the Government agree?

MR. HULTMAN: Even if the Court wants to charge them on Friday afternoon it's fine with the Government.

THE COURT: Well, we're going to have six hours of argument. I think --

MR. HULTMAN: I'm not anticipating three hours, Your Honor. There have been --

MR. TAIKEFF: I may take some of the Government's time, Your Honor.

{4709}

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

THE COURT: I am now able to report to the jury that counsel are agreed that all the evidence will be in today and counsel will argue the case tomorrow, which is Friday. The jury then would have the, and after they argue I will instruct you on the law.

It's entirely possible that depending upon how the day goes, how long the day becomes, I may withhold my instructions until the first thing the following day after the arguments are concluded. The jury will then have the choice of having the case submitted to them on Saturday morning, for example, so that they could continue their deliberations over the weekend; or they could have the weekend off and come in Monday morning and have the case submitted to them on Monday morning and then deliberate from that point on.

So I would ask the jurors to perhaps discuss it over your noon lunch and tell me what you prefer after we reconvene this afternoon. The lawyers are agreeable of course to either procedure, probably would prefer to the first, and that is that we just go through the weekend. But I'm going to leave that up to the jury. If the jury feels that they want to be free to the extent that a sequestered juror is free over the weekend I will do it that. If you prefer to have the case {4710} submitted to you, for example, Saturday morning and then use Saturday and Sunday to deliberate or however long it may take to deliberate, you may do it that way.

I just ask that you think about it and I will ask that you advise the marshals before you come in after we have our noon recess and then the marshals can report to the Court.

MR. LOWE: Your Honor, I have the stipulation we've entered into with the Government counsel. I would like to -- if I might read that to the jury at this time, Your Honor.

THE COURT: You may.

MR. LOWE: I think if they see the chart it would help them to put it in context.

Jury will remember testimony about Chart 34-1 which is before it and this stipulation relates to Defendant's Exhibit -- Government Exhibit 34-H which was a bullet. And it reads as follows: "It is hereby stipulated and agreed between the United States of America and the defendant as follows:

{4711}

Government Exhibit 34H was tested for presence of blood by the Federal Bureau of Investigation laboratory and there was no blood on the bullet fragment.

There was one other item. May I just confer with Counsel for a moment?

That's the conclusion of that stipulation, Your Honor.

Your Honor, there was an instruction you had under consideration. Was it your intent --

MR. HULTMAN: Could we out of the presence of the jury, if we talk about instructions --

MR. LOWE: Was that with other instructions or at a different time?

THE COURT: We'll go into that later. I was intending to ask Counsel about that earlier this morning and because I didn't think of it I'll go into it later.

MR. TAIKEFF: Defense calls Lieutenant Forney.

JAMES A. FORNEY,

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 May we have your full name, sir?

A James Arnold Forney.

Q And what is your occupation?

A Oregon State Police officer.

{4712}

Q What rank?

A Second Lieutenant.

Q And can you briefly explain your presence here today?

A I was subpoenaed here with a report.

Q And in connection with that document, would you tell us whether it is a memorandum report or record or date of compellation of acts, events, conditions, opinions or diagnoses made at or near the time by or from information transmitted by a person with knowledge of the events?

A Well, I can tell you it's our case number 717787. This is a case we have there on file that's compiled by numerous people that submitted the report.

Q I appreciate that information but I have to comply with the technical requirements of the Federal Rules of Evidence so I must ask you the technical question.

Let me go back a step. Would you say that what you have in there is a report?

A Yes.

Q Or a record, a police record?

A Yes.

Q And does it concern and record acts and events?

A Yes.

Q And was the report prepared at or near the time of those acts or events?

A Yes.

{4713}

Q And was it based on information transmitted by a person with knowledge of those acts and events?

A Yes.

Q And is that record kept in the course of a regularly conducted activity? That is to say, does the Oregon police function on a continuous basis?

A Yes.

Q And has it been doing so for awhile?

A Yes.

Q And is it the ordinary and regular course of practice of the Oregon State Police to make such reports of the kind you have in that envelope?

A Yes, it is.

Q And are you one of the custodians of such records?

A I am.

Q Now I place before you Defendant's Exhibit 227 for identification. Do you recognize it? Yes or no?

A Yes, I do.

Q And do you know anything about when and where and how it was prepared?

A Well, originally it's a copy of the original report that was prepared by Trooper Edward E. Hanson, Oregon State Trooper.

Q Relate that to what you may have in the envelope.

A It's a copy of an information report that is part of the original report that I have in this envelope that was prepared by {4714} the mentioned trooper.

Q And when was that copy made? It's a photocopy, is it not?

A Yes. It was made before, it was made yesterday.

Q And under whose supervision was it made?

A I observed this copy being prepared.

Q Now is it necessary when you leave here to take with you the original which is in the yellow envelope?

A Yes, it is.

Q Is that the reason why you prepared the photostat?

A Yes.

Q Now, sir, I ask you to look inside the yellow envelope. We had a brief conversation this morning, did we not?

A Yes, we did.

Q And I pointed out to you a certain information report that I wanted you to quickly be able to locate amongst that rather thick file.

A Yes, sir.

Q Have you got that?

A Yes, I do.

Q Now just to identify where we are, I want to ask you whether the records of which you are the custodian and which you have in court indicate information that was recorded by the Oregon State Police concerning a search of a mobile home? Just generally speaking.

A Yes.

{4715}

Q I'm just trying to get to the subject matter.

A Generally speaking. Yes.

Q Now does that record reflect any information concerning the photographing of any objects that may have been removed from that home?

A Yes. It does mention photographing.

Q What does the record in that regard --

MR. CROOKS: Your Honor, we object to this, number one, he's attempting to read into the record something which is not in evidence.

MR. TAIKEFF: I'm offering it in evidence by asking the question, Your Honor.

MR. CROOKS: Your Honor, unless I'm deaf I didn't hear any exhibit being offered. He's asking him to read into the record what the document says.

MR. TAIKEFF: That's how I'm offering it in evidence. It's already qualified under 803 subdivision six.

MR. CROOKS: Can we approach the bench?

THE COURT: You may.

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

MR. CROOKS: Your Honor, I don't know how many times we have to win the same thing. That police report, according to cases I previously cited, is not admissible under the Business Records Act unless they can qualify it as impeachment {4716} or some other material. This report was not offered as impeachment or shown under 613 to any witness and Counsel is attempting to read into the record something which is not in evidence and which cannot under any circumstances become evidence. There is no foundation for even asking this question.

I let Counsel go on and on with the offer of the supposed foundation but there is no way he can lay foundation for a police report under the cases we have previously cited. They are hearsay.

MR. TAIKEFF: I'm astounded. I have nothing to say in response. It's so obvious, it's so clear. This is an exception to the hearsay rule, plain and simple, under 803 subdivision 6. It's offered to rebut testimony obtained from an FBI agent and is affirmative proof of the finding of the AR15 in Oregon in a mobile home and I just can't possible understand what the government is talking about.

THE COURT: Are you offering the report at this time?

MR. TAIKEFF: Only that sentence in the report. I would offer the entire report except I haven't analyzed it. It's a very lengthy report and totally irrelevant except as to that one sentence.

THE COURT: Well, of course, you're not going to be able to have the sentence read without the Court first ruling whether or not it's going to be admissible.

{4717}

MR. TAIKEFF: I'd be glad to show Your Honor what sentence I'm talking about.

THE COURT: I'm saying you're not going to be able to have it read to the jury.

MR. TAIKEFF: I'm offering that sentence.

THE COURT: I understand you're offering that sentence. I am not prepared to rule on whether that sentence is admissible.

MR. TAIKEFF: Unless and until?

THE COURT: On the basis of which you offered it. I again want to examine the authorities that Mr. Crooks --

MR. CROOKS: Your Honor, I would again point out to the Court the two cases we have previously cited, U.S. vs. Schriever 414 Fd 2d 46, 5th Circuit (1969), U.S. vs. Thompkins 487 Fd 2d --

THE COURT: U.S. vs. Thompkins?

MR. CROOKS: 487 Fd 2d 146, 8th Circuit (1973).

THE COURT: The other one, what was the other one?

MR. CROOKS: Which are you looking for?

MR. TAIKEFF: 414.

MR. CROOKS: 414 Fd 2d 46.

MR. TAIKEFF: Could the government say what the holdings of those cases are, Your Honor?

MR. LOWE: He doesn't know.

MR. CROOKS: Your Honor, we have gone into this --

{4718}

THE COURT: Just a moment. Just a moment. You've got all the foundation you need from this witness, have you not?

MR. TAIKEFF: I'm afraid of that, Your Honor, because of Your Honor's ruling with respect to Mr. Ecoffey whom I laid in the same valid foundation, then when I offered his report I had to get him back up here to do it. I'm afraid to let go of the witness.

I have another document to put in by him anyway.

I'd like the chance to look at those cases because I'm positive they don't say, by raising this name at this time, suggest they say --

MR. CROOKS: Your Honor, these cases were cited earlier. I assume Counsel read them. The first case holds that police reports are not admissible under any construction of the Business Records Act, police reports of hearsay, and they are not admissible. The second case, the Thompkins case holds the same is true as the treasury claims. The treasury claims cannot be used to establish the mailing and theft documents simply because it's in the postal inspector's official report. The Business Records Act was not intended to cover what Counsel is attempting to elicit here; in other words, statements, narrative statements of --

THE COURT: Hold it down.

MR. CROOKS: Of observers. That is such basic law that I'm astounded Counsel hasn't bothered to read the cases.

{4719}

MR. TAIKEFF: Your Honor, I'm so certain this is such a basic question, without ever having read those cases I'm going to suggest by intuition what those cases hold. They hold that the prosecution can't offer those documents as a way of bolstering its case and I'd ask Mr. Crooks to state whether that in fact is what those cases were about. Yes or no, Mr. Crooks?

THE COURT: I don't suppose I should --

MR. CROOKS: I rarely respond to idiots and I will not do so at this time.

THE COURT: I don't suppose I should rule on the basis of your intuition.

MR. TAIKEFF: I heard what he said. He called me an idiot on the record. I'm perfectly happy he did. I know we're doing exceptionally well on this case and I won't even ask for an apology.

THE COURT: That's an improper statement and stricken.

MR. TAIKEFF: It's also an inaccurate statement.

THE COURT: I would agree with that, too.

MR. CROOKS: I'm not so sure.

MR. TAIKEFF: I think the government has made objections here that is in the purest sense, plain and utter gibberish.

MR. LOWE: That word came up last year. We made a definition on the record.

MR. TAIKEFF: I'd like to complete my examination as to {4720} the second document.

THE COURT: Very well.

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

Q (By Mr. Taikeff) Was there any action again with respect to the objects found in the mobile home, visa-vis the FBI?

A You're asking me to read this?

Q No. The judge has to make a ruling with respect to that particular part of the report. I'm now going to the document which is marked for identification and which is in front of you.

A Yes, sir. I have to read from this to tell you that information because I did not compile this.

Q Based on the record in your own words what happened to the things which were found in the mobile home, if anything, with respect to the FBI in terms of either being turned over or not being turned over?

MR. CROOKS: Your Honor, I will object to this. This witness has testified he has no personal knowledge. He is here as a custodian of the record and not in a position to make observations of what did or did not happen. Counsel is attempting to elicit information which is not in evidence.

MR. TAIKEFF: I'm eliciting it in an effort to get it into evidence. Of course, it's not in evidence. The government won't put this in, the defense is trying to put it {4721} in.

THE COURT: The reporter will read back the question.

(Whereupon, the last question was read back.)

THE COURT: Do you understand what happened?

THE WITNESS: I know from looking at this report, sir, what it says here.

THE COURT: But that's the only basis which you know?

THE WITNESS: I was not there when any of this transpired. I was not personally involved in any of the transaction.

THE COURT: The Court will then take under advisement the offer of that other portion of the report. This witness does not know.

MR. TAIKEFF: I wish to offer it in a different way or attempt to offer it in a different way. I understand Your Honor's ruling and I will comply with it and make a different foundation, if I may, Your Honor?

THE COURT: You may.

Q (By Mr. Taikeff) There is a document in front of you marked for identification?

A The original?

Q No. The copy.

A This one? Yes, sir.

Q I don't want you to reveal its content unless and until you're asked a question about its content. Do you understand {4721} that?

A Yes, sir.

Q Categorically or generically speaking what is that document?

A An information report.

Q And is it signed?

A Yes, sir, it is.

Q And by whom is it signed?

A Trooper Hanson.

Q And will you look at the last page of that document. Is there a signature there?

A Yes, sir.

Q By whom is it signed?

A Steven L. Hancock.

Q What's his occupation?

A Special agent, FBI.

Q Now look over that document just to refresh your recollection as to what it says generally. I do want you to read every word, but don't reveal its contents until His Honor rules that you may.

Now information report is a term used by the Oregon State Police for identifying a certain kind of report form, isn't that correct?

A Yes, sir, it is.

Q That report form was used to make up that particular {4722} document, is that correct?

A Yes, sir.

Q What does that document constitute without reference to the specific words that may be on the pages? What is it generally?

A If I understand you correctly, it's generally a supplemental report to the original report in this case.

Q And in that particular instance what does it constitute?

A Is a property list.

MR. TAIKEFF: I would like to show it to the Court, if I may.

MR. CROOKS: Your Honor, could government counsel have the benefit of seeing the document?

MR. TAIKEFF: Yes.

{4722}

MR. TAIKEFF: May I come to the side bar?

THE COURT: You may.

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

MR. TAIKEFF: In order to fully inform your Honor of exactly what piece of evidence is under consideration, there are two sentences in the document which the witness has the original of.

They read as follows, in the paragraph dealing with the search of the mobile home: "Most of the items seized by the writer" -- that's Mr. Hansen -- during the search of the vehicles have been photographed and turned over to Special Agent Steven Hancock. A list of these items is contained on an information report and receipted to Agent Hancock.

If I ask this witness what information report was referred to in that paragraph, he would identify it as Item 227 for identification. The seventh item on that list is the AR-15. The last page of that list is signed by the Special Agent who testified here; and furthermore, your Honor, it occurred to me after our last appearance at the bench that these materials were not supplied to us as 3500 material after the testimony of either Hancock or Hansen.

So assuming the argument could be made that this is {4723} not the appropriate time because we should have done it before -- and indeed I don't think any such argument could be made -- this is the first time we have had these materials produced when we had a witness who could tell us anything about it.

Secondly, your Honor, this witness is the custodian of records that are kept by the agent in the sense that he has signed -- or rather made by the agent and written by the officer who testified. The authenticity is not in dispute, their accuracy is not in dispute.

The Government has no foundation claim here. They may not like what the documents reflect, but that's no basis for keeping it out and that's constantly what the Government has been doing in this case, making an objection when they have no legitimate basis for making an objection.

MR. CROOKS: Well, your Honor, No. 1, counsel has stated that these were not turned over as 3500. The obvious reason was that they are not 3500 material. They are the State Police reports which I saw for the first time, as I have stated previously after the man testified -- and I certainly do not want the record to indicate that counsel in any way agrees with any inference that the United States has not complied with the 3500 with regard to this material.

As to the second point, this goes back to the same {4724} argument that was made again and again. Counsel is simply attempting to put in police reports in lieu of testimony.

My recollection was that both Officer Hansen and Officer Zeller used their own reports extensively to refresh their recollection, so counsel obviously knew they had them.

As a matter of fact, I think Mr. Hansen was asked what he was referring to, and he said he was referring to his own report. Counsel could have gone and gotten a copy of it. As a matter of fact, I think I even offered to let counsel examine it.

MR. TAIKEFF: That's not true. In fact, it was the exact opposite. You asked the Judge not to show it to counsel. You have the worst memory of any human being I have ever encountered.

MR. CROOKS: Mr. Taikeff apparently feels some need to attack me personally.

However, my recollection was that as the witness testified he looked at his exhibit, his report, and referred to it; and counsel even asked him what he was referring to, if he was referring to his 302's. He said, "No, I am referring to my report. Counsel didn't ask him to see it.

What counsel is talking about is something that {4725} happened long after the witness was off the stand.

All of this gets down to the bottom line, that there is absolutely nothing inconsistent with what counsel has referred to here and what any witness has testified to.

MR. TAIKEFF: That's not true at all.

MR. CROOKS: Could I at least have the courtesy of finishing my statement?

MR. TAIKEFF: I am sorry. You are correct, I should not interrupt. I apologize. I shouldn't interrupt even if it is a misstatement of fact.

MR. CROOKS: Counsel has inferred that there is something inconsistent with many of the prior statements.

The testimony was that as the weapons were taken out of the vehicle, Officer Hancock as an observer photographed them. That's exactly what the report says. That's exactly what Trooper Hansen testified when he testified.

The weapons were taken out and photographed and ultimately all of them were turned over and receipted to him.

What counsel is attempting to do, I would assume, is argue and inconsistency that's not there, so for that additional reason I would object to any further mention of these reports because there is nothing inconsistent.

MR. TAIKEFF: That's for the jury to determine.

MR. CROOKS: Further, there is no foundation under {4726} 613 for any of these.

Officer Hancock was recalled. I would assume that he was intending to put him on for some purpose, but he has not used him; and he was available and is still available if counsel wishes to lay proper foundation. The witness is here.

MR. TAIKEFF: This witness stands in the officer's shoes. I do not understand what Mr. Crooks is talking about. It is as if he never heard of the subject of evidence.

This witness stands in the shoes of that officer under Rule 803, Subdivision (6). That's exactly the function he is performing.

That's what the Business Records exception to the hearsay rule is. The classical problem of hearsay is that a person other than the one who has the information is attempting to offer the evidence, and that's exactly what we are doing here by this witness.

MR. CROOKS: Counsel apparently --

MR. TAIKEFF: (Interrupting) This witness is in the place of the officer, as the custodian of a record made by that officer.

THE COURT: Is the officer available?

MR. CROOKS: Well, Officer Hancock is, he is right here. Counsel subpoenaed him in.

{4727}

MR. TAIKEFF: Is he here?

MR. CROOKS: Of course, he is. We have had him in all week. You indicated you wanted Hancock and he is here.

MR. TAIKEFF: You are talking about the FBI agent?

MR. CROOKS: Yes.

MR. TAIKEFF: This witness stands in the shoes of the officer, or police officer, as the record made by him.

MR. CROOKS: I am not going to re-argue the business records exception. If counsel had even done a medium amount of research, he would know the business records exception is not designed to carry forward narrative type testimony. The business records exception is intended to carry forth business, normal business records; and that's what the two cases state.

MR. TAIKEFF: No. 227 for identification, we offer it as a business record, a receipt.

MR. CROOKS: Counsel has not shown any reason for introducing that document. If counsel wishes to call Officer Hancock back to the stand -- and he has been made available -- Officer Hancock is the best witness.

THE COURT: Refresh my recollection as to him.

MR. CROOKS: The FBI agent.

THE COURT: You said Officer Hancock.

{4728}

MR. CROOKS: Agent Hancock.

THE COURT: Was he the agent that -- let me finish my question.

Is he the agent who made the statement that the reason it was not photographed was because it had not been found?

MR. CROOKS: That's right.

MR. TAIKEFF: This is in rebuttal. Do I want to call that witness to establish the point I want to make, or do I want to call a neutral custodian of the records?

That's why this thing is like a Chinese fire drill.

THE COURT: What do you contend is prejudicial to the Government in allowing this information that counsel is seeking to get in?

MR. CROOKS: What I am contending, your Honor, is that the report itself is not the best evidence that should be offered for what counsel apparently is attempting to do.

On the face of it I see nothing, absolutely nothing inconsistent about what either Mr. Hansen said or Special Agent Hancock said in what is in the report; but apparently counsel is attempting to then argue to the jury that, "Here's a report that left something out, or says something different".

MR. TAIKEFF: The latter.

{4729}

MR. CROOKS: And the point that I am making is that Officer Hansen who has recorded his observations is the witness that should testify concerning his observations, not a recordation which appears in a police report; and the police report is not admissible in lieu of his testimony.

If counsel wishes to subpoena Officer Hansen back, he has got subpoenas available.

MR. TAIKEFF: That's what 803(6) requires, that the record in question be made by or through information transmitted by a person with knowledge of the subject. That's exactly what 803(6) says.

MR. CROOKS: You are not talking about Officer Hancock. You are using Officer Hansen's report to impeach Hancock.

I am saying that is not the evidence, and that is not the way to proceed.

If you want Officer Hansen to testify and repute something that Officer Hancock has said, then that's fine and that would be admissible to impeach Officer Hansen but not Agent Hancock.

Counsel is attempting to avoid calling Officer Hansen back who can explain the circumstances and then substituting in lieu of his testimony a police report, and that is not admissible.

THE COURT: Where is Officer Hansen?

{4730}

MR. CROOKS: Hansen is back in Oregon, your Honor. He has never been subpoenaed, I understand, by the Defendant, but he certainly could have been.

We have made Officer Hancock available. He has been sitting around for approximately four or five days now, and we assumed that they were going to put him on for some purpose; but now apparently what they intend to do is introduce, in lieu of Officer Hansen, introduce a narrative report which may or may not be complete. We have got no opportunity then to ask Officer Hansen further questions concerning what he reports.

MR. TAIKEFF: You can call him in rebuttal.

MR. CROOKS: That is not the purpose of Rule 16. The Rule 16 is that the witness on the stand must be shown reports. Counsel isn't even trying to impeach Hansen with his own report. He is trying to impeach Hancock with somebody else's report.

MR. TAIKEFF: Of course, I am. If it just became apparent to you, it is amazing to me.

THE COURT: I am going to look over both of these reports and think about this.

You have completed your foundation with this witness, have you?

MR. TAIKEFF: I believe that I have, yes.

(Whereupon, the following proceedings were had in {4731} the courtroom in the presence and hearing of the jury:)

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

THE COURT: Very well.

MR. CROOKS: We have no questions.

THE COURT: You may step down.

THE WITNESS: Sir, am I to be excluded, am I through now or do you want me to stick around?

MR. TAIKEFF: Your Honor, unless it means missing the flight home, I would rather that the witness stay close at hand until your Honor rules in case some other question comes up.

THE WITNESS: I haven't checked the return flights yet.

THE COURT: Very well. Stand by.

(Witness temporarily excused.)

(Counsel confer.)

THE COURT: Are you calling another witness?

MR. TAIKEFF: Oh, I didn't know whether your Honor was going to contemplate that matter now.

I had asked if I could see two volumes of Fed. Second.

Could I have a moment, or does your Honor want me to have the next witness at least brought in because it would only take me a moment to check those volumes?

THE COURT: Very well.

{4732}

MR. TAIKEFF In the meantime, your Honor, the defense would call to the stand Norman Brown.

{4732}

THE COURT: The next witness which has been called has appeared in this trial before and when he appeared he had his own attorney present in court, and apparently desires to have his attorney present again while he testifies. And we are waiting for the arrival of that attorney.

So the Court will take a recess at this time, probably about twenty minutes, but at least twenty minutes and perhaps longer if it's necessary to wait.

(Recess taken.)

MR. CROOKS: Your Honor, there is one thing which we'd like to go into. As I understand it have both of the Oregon exhibits been offered?

MR. TAIKEFF: Well, by virtue of asking the question as to the sentence, yes, and I have not offered in the presence of the jury. But at the sidebar the marked exhibit.

MR. CROOKS: All right. Your Honor, in lieu of requiring counsel to recall Mr. Hanson for any purpose the United States will have no objection and will withdraw its objection to Hanson's report and the receipt by Hancock. I would ask if I could see that to know which one I'm talking about.

What I have before me, Your Honor, is Defense Exhibit 227, and we will withdraw our objections to that if the entire report of Agent Hanson on November 14th, not just the one paragraph referred to by counsel as introduced, marked and {4733} introduced with it. If those two documents will be introduced together we will have no objection.

MR TAIKEFF: We don't offer the entire document, Your Honor. We offer the sentence or the two sentences that we had reference to at the sidebar and we offer the receipt. And we think that

the cases which the Government cited not only do not support the position the Government takes, but specifically support our position. And I don't know whether Mr. Crooks read the cases first and misunderstood the cases or whether he read the cases, understood them and misrepresented what they meant or he merely had a citation which he thought he could rely upon without having read the case first. But those cases clearly stand for two very clear-cut propositions: When a business record contains the statement of some third person that business record foundation is not sufficient to get the third person's hearsay statement in. But the person who made the record on personal knowledge is making a recordation which in some senses and under some circumstances we call a past recollection recorded. And that, you can get that into evidence notwithstanding the hearsay rule because the custodian can certify that it's kept in the ordinary course of business and it's made by or as a result of information transmitted by a person who had knowledge.

Now, in one of the cases cited by the Government for the proposition that police reports or reports of that type {4734} are not admissible under the Business Records Act, the very case which the Government relies upon is a case in which the Government offered such a record claiming that the Business Records Act permitted them to do so. The defendant objected and was sustained by the Court because there was a third person's comment in there which could not have come in through the mouth of the person who wrote the document and hence would have been hearsay in the form of oral testimony and would have been hearsay of the same degree offered in the document.

What the business record exception to the hearsay rule does, and I'm specifically referring to 803 Subdivision 6, is it makes it the recordation of a person with certain information equivalent to that person's testimony. And the custodian of the record is authorized to deliver up that particular information.

Now, the two sentences that we offer on the subject of the photographing of the objects found are from Hanson's report; and Hanson was the person who made the observations and wrote the report. This custodian is merely delivering that which Hanson wrote earlier.

THE COURT: Well, the ruling of the Court is that the report would be admissible to show that Hanson reported it, not to show that the truth of what he reported. In other words, the business record would simply show that Hanson made such and such a report but that, but the --

{4735}

MR. TAIKEFF: But of course, no, no record or no utterance of some person comes in for any other purpose. If the Government adduces testimony that Leonard Peltier said that I am six feet tall, that in itself doesn't prove that he's six feet tall. It only proves that he asserted that he is six feet tall. From that the jury could find that there's a high probability that it's true. But we're offering it that that was the utterance of the Oregon state officer at the time he wrote his report. That's the basis upon which we offer it and we offer the receipt to show that his comment on there was a receipt is corroborated by the existence of the report which is also kept in the ordinary course of business and assigned by the FBI agent.

MR. CROOKS: Well, Your Honor, I'm not going to get into an argument with counsel about what those cases say. The Court has the cases before it and I trust that the Court has read the cases previously and understands the principles enunciated therein. And namely that is the thrust of both cases that the report's not admissible to show the truth of the matter contained therein. And that's exactly what counsel is attempting to introduce these reports here for to show truth of certain items.

Now, counsel does not wish to agree to what I've offered, in effect that the, if the entire report will go in with the receipt then I stand on my resistance.

{4736}

THE COURT: Well, what would defense counsel's position be if the Government offered the balance of the report?

MR. TAIKEFF: We would object to it.

THE COURT: What is the Government's position on the offering the balance of the report?

MR. CROOKS: Well, I don't think that it's proper for any of the report to go, but I'm just stating the position so that counsel will not have to then make an argument that they're entitled to get Officer Hanson back to testify to those matters to get the entire report in.

If counsel wishes to let it all in for whatever use he wishes to make of it the United States will have no objection. But certainly to offer in part of a report which would not be proper in the first instance and then exclude the rest of the report would be grossly prejudicial. If we're offering a police report it seems to me the whole thing should go in or none of it should go in.

MR. TAIKEFF: Of course, Your Honor, if there's anything else in that report which concerns the subject matter of the finding, photographing and inventorying of the items found I surely would not object to those portions coming in. But as to anything else, just because the defense finds something that is appropriate for rebuttal of Government evidence is not the springboard for the Government to get a police report that it couldn't get in under the very case it cited in support {4737} of its earlier position.

THE COURT: What is the position of the Government as far as why do you desire the entire report in?

MR. CROOKS: Well, Your Honor, as I stated before and I would stand on our earlier legal record, that I don't think any of the report is admissible as such. I've simply stated that the United States will accede to the admission of the report if it all goes in.

If counsel wishes to put in the office's report, then I think in fairness the entire report should go in, and as simple as that. I'm not conceding that my legal argument was wrong. I think the Court has seen the cases that have been cited. I just don't feel that it's fair to take excerpts out of the report and have these go to the jury in any event.

If counsel is so anxious to have the police report in it seems to me that the entire report should go in.

THE COURT: Exhibit 227 and 228 will be received in their entirety.

MR. TAIKEFF: The entire police report?

THE COURT: Right.

MR. TAIKEFF: We're not offering the entire police report. This is not the Government's case, this is our case. They can't offer evidence at this time.

MR. HULTMAN: They can offer anything.

{4738}

MR. TAIKEFF: On Your Honor's ruling, if not under the Rules of Evidence in procedure, we couldn't offer evidence in the Government's case, they can't offer in our case, unless the rules are different for the Government than they are for the defendant.

MR. CROOKS: It seems to me that counsel introduced a whole pocketful of documents during our case.

MR. TAIKEFF: Only on examination of their witnesses.

THE COURT: 227 and 228 are received.

With reference to the next witness, his counsel desire to make a presentation to the Court.

MR. LOWE: Your Honor, is it clear on the record that the portion, other than the two sentences, is offered by the Government over objection of the defense and that you overrule our objection and introduce it.

THE COURT: The record may so show.

THE CLERK: It is marked as Plaintiff's 228.

THE COURT: Mr. Maring, you may state the problem to the Court for the record.

MR. MARING: Your Honor, on March 25 of 19 --

MR. HULTMAN: Might we approach the bench, Your Honor? I don't know what's coming, but I think --

MR. TAIKEFF: I object to approaching the bench. This a public trial and I think the public and the press have a right to know what's going on in this case. The jury is {4739} not here.

THE COURT: Counsel, you have asked many times to approach the bench. I think it's a rather --

MR. TAIKEFF: I've asked to approach the bench only when the jury is present, Your Honor.

MR. HULTMAN: Well, I have no objection.

THE COURT: It relates to immunity.

MR. HULTMAN: Very fine. I have no objection is counsel himself wishes to in this posture. That's fine with me.

THE COURT: Mr. Maring, do you have any objection to presenting it from there?

MR. MARING: No, I do not, Your Honor.

THE COURT: Very well. You may proceed.

MR. MARING: On March 25th of 1977 my client, Norman Patrick Brown, was granted immunity to testify in these proceedings and there is a signed order of immunity. What I am asking the Court for today is a clarification of that order to determine whether or not that order extends to him given by my client as a part of the defense case.

As the Court is I'm sure aware of the sections in the United States Code 18 U.S.C. Section 6002 and 6003 refer to immunity being granted by the Court upon a proper request being made by the U.S. attorney, and there must be approval of that request coming from the appropriate office or officer {4740} in the Attorney General's office.

Now, I feel that the appropriate request was made prior to the Court granting Mr. Brown immunity prior to his testimony as a part of the prosecution's case. However, again the question I have, and the question I'd like resolved is whether or not the Court is compelling Mr. Brown to testify and granting him immunity as a part of the defense case. And that's the problem, and that is the clarification I seek from the Court before Mr. Brown testifies.

MR. HULTMAN: Would the Court like the Government to respond, Your Honor?

THE COURT: Yes.

MR. HULTMAN: Your Honor, I would on the record indicate that I have no objection here in open court, and it would be the posture of the Government at this point. I haven't researched the matter or anything else, but I think I'm in a posture that representation made to this Court would properly bind, as far as the individual instant case. I think that the use immunity itself, as far as I am concerned, I'm not indicating I have been told this by anyone or ever been through it before, but I'm stating to the Court here that the Government has no objection and would indicate to the Court that I, as the U.S. Attorney would indicate as far as I am concerned and to the extent I could bind, and I think that would be binding as far as this Court is concerned, that use immunity {4741} which has been granted to him, I'm not saying as a proposition of law now, but I'm saying as far as the Government is concerned, I stand here before this Court in open court is that use immunity would apply to him from this point on as far as any testimony he would continue to give in this trial.

I think it would be a mockery to conclude anything else. I think for the Government to call a witness, grant him immunity and then deny the defense by a denial to go back again and seek that immunity again and Ipso Facto deny it, it seems to me would be a mockery of the trial proceedings.

So I'm saying, Your Honor, I've never been involved in it. I'm not speaking for the Attorney General of the United States at this moment because I mean personally I'm not, but I think I'm in a posture with the authority that I do have as the United States Attorney and as the special

prosecutor for this case that I could bind the Department of Justice and the Government as to this issue.

But then I want to address a second issue that follows, and that is I know counsel understands this, and I'm sure counsel over here understands this, and I am also sure that by this time I would hope that the witness understands it, or if he doesn't that he be made aware clearly of it, that that immunity does not extend to an issue that possibly could result from that testimony, to-wit: a subsequent charge with reference to whatever that testimony might be. Not addressing {4742} the issue of self-incrimination as far as what he did or didn't do on the 26th of June, but what he did or didn't do under oath.

And that I would want very clear that the use immunity in the beginning, the use immunity to which I am now addressing, and I'm sure that there is no question here on the part of counsel of either his own lawyer, the Government or the defense that there's any immunity of any kind, any place for a prospective charge of perjury. That's the statute to which I'm very clearly offering.

So I want to make that clear; and with that I think maybe I have at least responded first to the specific issue and secondly to something that could possibly or could not possibly follow.

MR. TAIKEFF: Your Honor, the defense is only indirectly involved in this matter, but I thought it was resolved in a conference between myself and the witness's counsel when I pointed out that we expected and hoped that the witness would tell the truth as to the questions we would put to him; and that the grant of immunity he had clearly did not cover any perjury which he committed. And I assume that his counsel understands that, and we understand that and hope and expect that he will tell us the truth in response to the questions we put to him.

MR. MARING: Your Honor, if I may --

{4743}

MR. HULTMAN: Excuse me, go ahead.

MR. MARING: My understanding of the law and my research of the law on this point indicates to me that what Mr. Hultman is saying is not the correct interpretation of Section 6002. This is not a transactional immunity that's granted under that section, but rather it's a use and a derivative use immunity. And so the question is not whether they can prosecute him for an event that occurred on June 26, 1975, but whether they can use or in any way indirectly use the testimony that he gives at this proceedings.

Now, I have a number of cases that support that position, but my inquiry would go further if he is granted immunity, my further inquiry would be to take a look at what that statute section says. The statute says, and your court order says, that the immunity is granted except for prosecution for perjury, giving a false statement or otherwise failing to comply with the order.

{4744}

Now again my research has indicated to me, and quite clearly so, that those exceptions refer to future perjury, future false statements and future failure to comply with the order. In other words, if he took the stand today and testified falsely, he would be subjecting himself to a perjury prosecution. However, nothing he says today in this proceeding can be used against him for any past perjury or past false statement. That's the second item I would want cleared up

before he testifies because if the government takes the position that that is not the law, then my witness would be in a different position as to whether or not he would be testifying as to certain questions that I feel will be asked by the defense and whether or not the Court would be compelling him to answer those questions and be granting him immunity for those answers, and there again is a more specific area I think needs be cleared up before Mr. Brown testifies.

MR. HULTMAN: I want no question in anybody's mind that the position postulated by Counsel just now is not the position of the government. It is 180 degrees opposite of what Counsel has just indicated and that's why I wanted it made very clear that the granting of the immunity to this witness in no way by what he says here defies the government that that testimony can be used and can be used for perjury with relationship to what has been said here under oath, and compared to what he has said at any other time, and especially at any other {4745} time under oath when the same issues were discussed and similar testimony given. I want that made unabundantly clear so there is absolutely no question.

So what's the sense in taking an oath as far as this proceeding is concerned?

THE COURT: If I understand what you have said, Mr. Hultman, you are saying that if the witness got on the stand today and made a statement under oath that would indicate that he may have perjured himself on a previous appearance in this courtroom that he would not be immune from prosecution?

MR. HULTMAN: Or any other statement that he may have made at any other time prior. That is my position, Your Honor, without any question unequivocally.

MR. TAIKEFF: Your Honor, the statement made by Mr. Hultman, as I understand it, I think gives the defense full standing on this particular matter because the question now is whether Your Honor's ruling by way of ordering the trial in a certain sequence because the appellate courts have always recognized the trial court has the power and the duty to do, is going to impinge on our right to fully question this witness concerning all subjects of which he has knowledge. The government's position constitutes a threat to this witness, a legal threat. I don't mean an improper action. I'm saying that the government has taken a position which constitutes a threat to the future of this witness.

{4746}

The government in essence is saying if you get on the stand and you tell this jury that you lied before the grand jury in this case under the influence of the FBI, you are subjecting yourself to prosecution for perjury before the grand jury. There is no sense keeping a tablecloth over the subject matter. That's exactly what is being referred to in this particular dialogue.

Now the witness' Counsel is concerned, if I understand what witnesses Counsel has said, that if his client gets on the stand here and says, "I lied before the grand jury and I lied specifically with reference to Leonard Peltier and I did so because the FBI wanted me to do so," he's concerned that his client may be prosecuted for perjury and I understand Mr. Hultman to say that he might be. Yes. Perjury in connection with his appearance before the grand jury is what I am referring to.

Now I understand Mr. Hultman to say, yes, that's possible. Well, I believe Mr. Hultman is incorrect. That is not what Section 6002 of Title 18 provides. It provides that there may be no use of the revelations made in the course of giving the testimony under the grant of immunity in any criminal prosecution except, and the only relevant exception is for perjury in connection with the testimony being given. You cannot get a grant of immunity and also get up there and

perjure yourself and say the grant of immunity applies to your perjury. {4747} But obviously if one takes an elementary look at the Fifth Amendment, obviously our constitution provides that a person may not be compelled to get up and say something which will lead to his conviction.

Now the use of immunity is a compatible, or at least it is said to be a compatible means of getting testimony in a case so that justice may be done without interfering with the Fifth Amendment constitutional rights of the witness. That means that if the witness comes forward and asserts the Fifth Amendment, at first the witness cannot be questioned at all because if the witness were questioned, and we can only assume that when a witness is asked a question he must give a truthful response, he might say something which would reveal that in the past he has committed a crime so we let him sit on his Fifth Amendment privilege, unless Section 6002 is invoked. Then the law says, "Well, we can make you talk anyway because there isn't a constitutional prohibition against making you talk, but we cannot convict you on the basis of what you have said here if you speak the truth because to do so would violate your Fifth Amendment right that you are made to speak words and those words are a source directly or indirectly of your prosecution for something other than your perjury while you were speaking those words." So the government cannot prosecute a person who testifies under a grant of immunity and admits prior perjury.

{4748}

MR. HULTMAN: Your Honor --

MR. TAIKEFF: Unless that person is lying when that person says "I perjured myself in the past," in which case the government wouldn't prosecute him for the prior perjury.

MR. HULTMAN: Your Honor, that is an interesting postulate.

First of all, I disagree that Counsel does have a standing. It's the witness that has standing. But beyond that, that doesn't get to the threshold issue. The threshold issue is a novel argument that Counsel has assumed that what this witness is going to say now under oath is the truth. Now I think it equally can be argued, and I think the new statute makes that very clear that the burden is not on the government to prove if there had been two statements which are in effect the opposite and would constitute perjury that the government then has to decide and prove which one of the two it is that is the truth. That's a postulate that is amazing on the part of Counsel, that we're going to assume the testimony this time under oath is going to be truthful. That was the whole thrust of Counsel's argument.

The thrust of the government's position is that in either event, either if he committed perjury in terms of a previous occasion of being under oath or if he commits perjury under oath here during this proceeding that the immunity, the statute itself does not grant in any way that that testimony not {4749} be subject to and a part of a possible, and I only use the word possible, a possible future criminal indictment for that particular crime and that's the posture that I am trying to indicate.

And thirdly, Your Honor, I want to indicate that I feel a little chagrined at Counsel after he's made a big public declaration that I wanted to proceed with these matters not personally in the presence of the witness himself for the very simple reason I feel now Counsel has clearly put me in that posture where I in no way wanted to be placed in, that posture now that Counsel has put me in, an antagonistic position with the witness very clearly in light of the demand that Counsel made. I don't think he had the right to make that demand in the first place and again I would like to place it on the record the reason why. I was trying to indicate this was a matter of side bar that ought to be handled at side bar because I had no indication with this witness other than on the witness stand since being on the witness stand in this courtroom. I have not discussed

the matter here that Counsel in effect is now saying the government is in effect blackjacking or in some way is now going to keep a witness away from this witness stand. I have had no discussions of any kind with this witness and I have, other than maybe in the courtroom here, and I think Counsel would indicate, I don't think I've had any discussion with him since in the courtroom while the witness is {4750} on the stand, have I?

MR. MARING: That's correct.

MR. HULTMAN: So I'm not in a posture in any way to try to deprive this witness, defendant of this testimony in any way.

It's only now that Counsel puts me in this posture in the presence of the witness, I have to be placed in an antagonistic position as far as this witness is concerned.

MR. TAIKEFF: I apologize to Mr. Hultman if I compelled him to state the truth in public.

However, I think his reference to the law in the last thing he said was to Section 1623 of Title 18 which is a relatively new perjury statute that deals with inconsistent statements. When a witness gets on the stand and admits under a grant of immunity prior perjury, that could not under any circumstances constitute a prior, could not fulfill the requirements of Section 1623. It's when a person testifies in one proceeding under oath and says X and then in another proceeding under oath minus X, asserting at the various times that both are true, that you have a violation of Section 1623. But when someone gets on the stand under a grant of immunity and admits a prior perjury at the behest of the federal government, that in no way could violate Section 1623, in addition to which any use of that testimony would constitute a violation of Title 18, Section 6002 because that's what use immunity means. {4751} It says we cannot use the testimony which you give as a basis for prosecuting you.

MR. HULTMAN: Except for perjury.

MR. TAIKEFF: Except for perjury. Except for perjury.

But you have to prove that the person perjured himself in the instant proceeding, not that he perjured himself at an earlier time.

And, furthermore, the question of the posture that we are in as a result of Your Honor's ruling is to how Your Honor would housekeep the order of proof. Had Your Honor permitted us to the full scope of inquiry with this witness when he was under cross-examination, then the safe grant of immunity would have applied and the question would have never come up and the defendant would not be put in the position now of the witness wondering, "Am I subject to something different because I'm now testifying for the defendant in this case than I was when I testified for the government in this case and was cross-examined by the defense."

THE COURT: Well, I think that you have misstated the situation. The immunity, if the immunity is present, was applicable when the witness testified fully, in other words, beyond the direct and cross-examination relating to the direct at the time he previously appeared or whether he now testifies on call from the defendant. The question the Court has to resolve is, and would have been present in either case, is {4752} whether this witness having once testified under oath now should get on the stand and say that he previously testified falsely under oath.

MR. TAIKEFF: Twice under oath. If Your Honor says once there may be some confusion in Your Honor's mind. He will not get on the stand in this case, as I understand it from my interview of

him in the presence of his Counsel, he will not say that anything he testified to at this trial was false. That clearly would be an admission that he perjured himself while under a grant of immunity. It is at an earlier proceeding. This will be the third time he testifies.

THE COURT: The point I am making though, and I think that's the point that the government has raised, is whether he could be subjecting himself to a charge of perjury and the determination would have to be made whether he was perjuring himself at this appearance or whether he perjured himself at an earlier appearance. That's the question that seems to me --

MR. HULTMAN: Your Honor, he was under immunity in both instances. That point I want made very clear.

THE COURT: This is a point that I am making that it isn't a question of immunity being granted at one time and taken away at another time.

MR. HULTMAN: No. No.

THE COURT: This is the question that Counsel for the witness has raised. It's a question of what does that {4753} immunity cover. What is the interpretation of this statute and that's a very serious question.

If it relates to two different, in view of the exception under 6002, may be used against the witness in any criminal case except a prosecution for perjury. If the witness were subjected to a prosecution for perjury, the question would be then did he perjure himself in the earlier appearance or did he perjure himself in this appearance. In any event, he is perhaps exposed to prosecution for perjury if he should get on the stand and testify differently from what he had previously testified under oath. I am not prepared to rule on that question without giving it a little bit of consideration.

MR. TAIKEFF: I understand that, Your Honor.

THE COURT: Because, as I say, it's a very serious problem.

MR. HULTMAN: Your Honor, I didn't mean by my remark with reference to 6002 that I was limiting myself to that section alone. I'm also, my remarks were directed to 1623 clearly also. I want that made very clear.

THE COURT: Now, Mr. Maring, have I in any way misstated your position?

MR. MARING: No. I don't think it's been misstated, Your Honor.

The purpose for me bringing the point before the {4754} Court is that we seek a clarification and seek an order from the Court either continuing immunity and continuing it for the certain types of testimony he will be giving or may be giving or not granting that immunity and so what we are we seeking is a clarification and an interpretation of that statute section.

MR. TAIKEFF: We are specifically seeking, after Your Honor considers the matter, an instruction from Your Honor to the witness that in the event, if the witness tells the truth when he resumes

the stand today he cannot be prosecuted, if in fact he tells the truth today. That's our position. If in fact he tells the truth today he cannot be prosecuted.

THE COURT: But that may be a fact that would have to be determined. That's the problem that concerns me.

MR. TAIKEFF: But, Your Honor, there is also Your Honor's interpretation which is yet to be made of what the use immunity means in terms of use and I think it's pretty clear that unless the government has extrinsic proof of the perjury on this occasion it cannot make use of the testimony via 1623 and say it's merely there because when you prosecute under Section 1623 the government is in a very comfortable position. They only have to show as a matter of fact that on occasion A there was testimony X and on occasion B there was testimony Y and that X and Y are mutually exclusive. Not admitting to this occasion that you perjured yourself before the grand jury {4755} does not give rise as a matter of law to the possibility of saying you have mutually exclusive statements because they address themselves to two entirely different things. They cannot by law be mutually exclusive and if they could be the use immunity grant, I hope I made myself clear that I don't believe they can be, the statements here used, but if they could be they would violate the use immunity provision because they're using the testimony here to make a case against him for an event in the past.

Now if they want to prosecute him for perjury in the past they have to do it by extrinsic evidence. They can't do it under this grant of immunity because then they will be violating the use immunity privilege.

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

THE COURT: Mr. Maring has.

MR. MARING: I have one further comment and that is that I think that the Section 6002 grants an immunity that is fully extensive with the Fifth Amendment privilege. Beyond that to help me clarify what the government's position is, and perhaps some enlightenment to the Court, I would request that Mr. Hultman again state what the immunity has been on prior occasions for Mr. Brown as I wasn't representing him at that time and it is important and of concern to me.

MR. HULTMAN: It was the same immunity -- I was not present or participating at the time of the grand jury. It did {4756} not, until April sometime, but I can state for the record in response that he had the same immunity that we're talking about now at the time of the grand jury in which he took an oath and then there were certain proceedings. That's the point I'm trying to make, that he was granted use immunity at that time and sworn to tell the truth.

{4757}

He has been granted use immunity this time, sworn to tell the truth; and I think in either instance, if he has committed perjury, that that is subject to a criminal prosecution, and that it isn't limited, or the testimony from either one of those, not limited, that it can't be used as far as the commission of the alleged crime at either time as well as at any other time.

THE COURT: The Court -- did you have something more?

MR. MARING: No, your Honor.

THE COURT: The Court is in recess until 1:00 o'clock.

(Whereupon, at 11:45 o'clock, a.m., the trial of the within cause was adjourned until 1:00 o'clock, p.m.)

{4758}

AFTERNOON SESSION

Whereupon, the following proceedings were had and entered of record on Thursday afternoon, April 14, 1977, at 1:17 o'clock, P.M. without the jury being present and the defendant being present in person:

MR. HULTMAN: Your Honor, might I on the record before we begin make further response to a question that I'm not sure whether it came from the Court or from one of counsel, and I addressed it as best I could at that time. The question came with reference to the specific immunity that had been taken that concerned the grand jury. And I have made inquiry to the best of my ability during the noon hour. It's, and I can find no specific record showing anything other than the granting of it by counsel in the course and prior to any proceedings that were taken place. So I would not want to in any way reflect the record to show anything then other than what I can truthfully find at this moment.

It would again be my posture that without any question I would be bound and the Government would be bound totally by any, in any event by that grant, anyone representing the U.S. Attorney or assistant U.S. Attorney as far as at that time and that point forward as far as that particular transaction. So I want that to be reflected.

This morning I responded as best I could that I wasn't there and I was sure that there had been some immunity granted {4759} that I was sure of and I'm now saying that again clearly on the record, and that the Government is clearly in my judgment bound. But I am indicating to the Court that I can't find anything more than what I've indicated to the Court. But I want it clearly on the record that my posture and my position is that that is without any question binding upon the Government in any event.

THE COURT: In considering this immunity question it is this Court's interpretation that if a witness has previously testified under oath under a grant of immunity or even without a grant of immunity and then subsequently appears in this court and testifies under oath under a grant of immunity, and if this testimony relates to the same incident and the same facts and if the testimony is so inconsistent that the testimony on one occasion is necessarily false, that the immunity does not bar a prosecution for perjury.

Statute specifically excepts prosecution for perjury.

MR. TAIKEFF: Your Honor, our position was --

THE COURT: Just a moment, I haven't finished.

MR. TAIKEFF: I'm sorry.

THE COURT: And it is not before this Court and it would not be appropriate for this Court to rule on what evidence, assuming a prosecution for perjury were subsequently brought, it would be for the Court before whom a prosecution for perjury was brought and would be an evidentiary ruling to {4760} determine what evidence is admissible on the prosecution.

MR. TAIKEFF: May I ask whether that means if the witness were called to the stand and were asked a question which in his counsel's opinion might lead to his prosecution for perjury that if he asserted his Fifth Amendment privilege Your Honor would uphold the assertion of that privilege without qualification and that no request from the Government that he be granted immunity at this time would avail?

THE COURT: Under the statute as this Court construes the statute, under the statute there is no immunity from prosecution for perjury.

MR. TAIKEFF: Then I gather that Your Honor would say in the affirmative that if the witness asserted the Fifth Amendment privilege Your Honor would uphold his right to do do and no grant of immunity under section 6002, given Your Honor's observations, should interfere with his assertion of the Fifth Amendment; am I correct, sir?

THE COURT: That is the way it appears.

MR. TAIKEFF: We are prepared to go forward, Your Honor.

MR. MARING: Your Honor, could I have just a moment or two to discuss this ruling with my client?

THE COURT: You may.

MR. MARING: And may I also ask the question to make sure I understood, that if Mr. Brown takes the Fifth Amendment that the Court will allow him to take the Fifth Amendment and {4761} will not compel him to testify?

THE COURT: Well, you are asking a hypothetical question which I am not able to answer until I know what question has been propounded to the witness. And Mr. Taikeff really was asking, was making the same kind of inquiry.

MR. TAIKEFF: Well, I made a specific inquiry. For instance, if I asked the witness "Did you lie before the grand jury" and his counsel has previously advised him or intercedes and then advises him and then advises him to take the Fifth Amendment, do I understand that Your Honor would sustain his right to do so in light of Your Honor's interpretation of 6002 and 1623? That was my question. Counsel's question was a little more general. Mine was now, or at least now is very specific.

Counsel wants to know and I want to know whether if that precise situation came up would Your Honor force him to answer, or would he be permitted to stand on his Fifth Amendment right? me reason the question of the possibility of Your Honor's forcing him to answer comes up is because he's here under a grant of immunity; and so it seems to be a rational question to put to the Court.

THE COURT: Mr. Maring?

MR. MARING: Nothing further, Your Honor. I was waiting for a response.

THE COURT: I'd ask Mr. Maring to approach the bench, {4762} please.

MR. HULTMAN: I would like to be heard ultimately to have the opportunity, Your Honor, but before --

THE COURT: Very well.

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

THE COURT: As I understand Mr. Taieff he is saying that apparently he is taking the position that under the grant of immunity which this witness has, if the witness is put on the stand and asked if he testified falsely before the grand jury the question would be whether this Court should compel him to answer that question, or whether it would recognize his claim of the Fifth Amendment.

Now, if the question were asked and I ruled that he had to answer under the grant of immunity I'm wondering if he wouldn't still be subject to possibility of prosecution for perjury under one time or the other.

MR. MARING: Are you saying that if you do or do not compel him to testify?

THE COURT: I'm saying that if I compel him to testify, if I compel him to testify under the grant of immunity which has been given him in this case.

MR. MARING: Right.

THE COURT: Isn't he still exposed to the possibility of a prosecution for perjury?

{4763}

MR. MARING: That's correct. He is. And that's why it would be my position that it would be inconsistent for the Court to rule that immunity doesn't cover things that he says now that are inconsistent with something he said back at the grand jury. Say that his immunity doesn't cover that and then if asked a question about that very circumstance to require him to answer. That clearly in my way of thinking would violate his Fifth Amendment privilege against self-incrimination. Because under your previous order, or excuse me, under the way you have interpreted the statute, what he says now could be used against him for a perjury prosecution relating out of what he said in the grand jury. And if you compel him to testify and say that he is not immune when giving that testimony then he's supplying evidence that's going to convict him of perjury at the time of the grand jury proceedings.

THE COURT: That is a most difficult question.

MR. MARING: Yes, it is.

THE COURT: And it's an important one. I'm going to hear what the Government has to say.

MR. MARING: Before we go back, could I ask could you clarify your order further for the record that you are in fact answering question number one that was posed this morning, that is, that the immunity order of March 25, 1977 is still in effect in the general way that we've discussed that he is {4764} still being compelled to testify and that the immunity grant is still in effect? I know we're, we still have an open question as to specific questions as to the false statement or perjury, but at least I'd like the first thing clarified on the record.

THE COURT: The Government indicated that that was their position that the immunity is in effect.

MR. MARING: That's correct. I want your order.

THE COURT: Yes. Court would hold that the immunity order remains in effect.

MR. MARING: Okay.

THE COURT: But the second question is the question that's the difficult one.

MR. MARING: And for the Court's information if the question does come up I will advise my client to take the Fifth Amendment on that question in light of what you previously said. I would also, I'm not sure how this can be handled correctly, but I would like to be able to communicate with my client in some manner when we start getting into questions in this area. And I know that motioning and head shaking and that type of thing is not necessarily a good policy. But some way I'd like to be able to communicate with him as to my advice to him as his counsel whether it's in his best interest to answer or not to answer a certain question.

Would I be allowed to motion to him in some way or {4765} indicate to him, or would the Court have some other suggestion?

THE COURT: I think what you should do is just stand up instead of motioning to him, just stand up and address the Court.

MR. MARING: Okay. And ask that I may speak to him?

THE COURT: That's right. That's the only way to do it, the most appropriate way to do it.

MR. MARING: That would be fine, that would be acceptable.

THE COURT: Very well.

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

THE COURT: Mr. Hultman?

MR. HULTMAN: Yes. Your Honor, maybe I can resolve the matter since it's ultimately the Government that's placed in this posture. In order that all of the rights that are involved, and this is again one of those instances where the rights of a defendant, the rights of a witness and the rights of the people are all involved, and where certain constitutional protections are involved as to all three of those entities, I think at this time, Your Honor, the Government would take this posture: That I will agree on the record not to prosecute for any possible past perjury, and in specifically before the grand jury, by use of the testimony that is given here today. In other words, I think this is a postulate that maybe counsel {4766} for the defendant, if not directly, indirectly I believe, may be going to expound here this morning. But that I would want it made very clear that I am not giving up the right to prosecute for perjury that may in the future, meaning what takes place in this courtroom today, because I don't believe there's any basis for ever to make that kind.

You can never give immunity to a future act, and certainly of all acts that are perjury under oath. So that is the posture now, Your Honor, upon which I will stand and I believe in so doing I have protected any rights of any kind that the witness himself would have under any circumstance constitutional, statutory. At the same time I think I have guaranteed the defense the opportunity to have the witness appear as they wish to have the witness, at least I sense from the fact that they've called him and the reason we have an issue here.

And lastly at least give the Government that same opportunity so that a jury is not left with all kinds of things to wonder about because of the posture that would be taken differently. So I am willing to give up, I'm not conceding that that necessarily is the point, Your Honor. But I am stating point blank I am willing to do this in this courtroom and proceed.

THE COURT: What you are saying, to be sure that I understand the position of the Government, is that the Government {4767} would not use any testimony of this witness in these proceedings to prosecute this witness for any possible perjury that may have been committed in the past; is that correct?

{4768}

MR. HULTMAN: That is correct, Your Honor.

THE COURT: Now the second point that you made then, as I understand it, is that you, to use your words which would be to make it perfectly clear --

MR. HULTMAN: I use that too often and I'm not clear at all.

THE COURT: That the government is not waiving any right that it might have to prosecute the witness for any perjury that he might commit on the stand in connection with these proceedings here today.

MR. HULTMAN: When I say the past, Your Honor, I'm referring, I'm referring so again there is no misunderstanding at all to his testimony at the grand jury. I am not referring to testimony as it has been in this trial. The total, whatever testimony has been given in this trial, is in the status that I am indicating, not just what may happen here today. I would want no misunderstanding about that.

MR. TAIKEFF: Your Honor, I understand what Mr. Hultman is saying and I have already indicated the general scope of the inquiry and I think in fairness to the prospective witness and his Counsel it might be appropriate for me to state with a greater particularity the few topics that I am going to question the witness about. Basically, to repeat what I've already said I think once, maybe twice, and so the government would be in a position to say, is that's the {4769} scope of his testimony and he's not going to attempt to change any of his direct, which in fact is not the case, then at this time we can see no reason why he should expect the prosecution.

MR. HULTMAN: I think that's fair.

MR. TAIKEFF: I don't want Mr. Hultman to tie the government's hands. On the other hand he could express his reasonable expectation and the topics are not many and they do not go to his direct testimony. That's precisely why it was reserved for this particular moment.

Would Your Honor permit to do that to rid the record and anybody else's mind that may be concerned about it of any ambiguity that could exist at this-time.

MR. HULTMAN: Could we do that though at the bench, Counsel? I think maybe we're now getting into matters --

MR. TAIKEFF: I was going to suggest, if Your Honor said yes, that the witness step outside so he not hear the offer of proof.

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

MR. TAIKEFF: I was waiting for his Honor's response.

THE COURT: You may proceed accordingly.

MR. TAIKEFF: May the witness then step outside.

MR. HULTMAN: Could we approach the bench in this in all fairness, Counsel, that I think it is a matter, I'm not trying to hide anything either.

{4770}

MR. TAIKEFF: There is nothing in here that anyone need be concerned about and it's a public trial in any event.

Your Honor, we intend to elicit primarily information about these topics from the witness: his experience with the FBI in trying to induce him to cooperate with them and to give certain testimony, and he will not as far as I know, and I say that just short of making a representation because it's not my own conduct that I have to be concerned about here but I essentially represent to the Court that he will not contradict any testimony he gave in his direct examination. This is not the case of a recanting witness.

Inquiry will be made by certain circumstances which, or events which occurred at or about the time of his being brought here to Fargo and his going to Canada and then his decision to come back which event took place just before the government subpoenaed him.

Those are the only areas we intend to go into and as far as I know he will not in any factual way contradict any fact he testified to on direct or indeed as far as I know on cross.

It is supplemental to his direct examination. Now I think on the basis of that it should be fairly evident to the government that they at this time have no reasonable expectation that were he to answer questions about those topics that there would be no basis or claim that he committed {4771} perjury in the direct testimony which he gave and the only possibility would remain that with respect to the specific events he talks about in this examination, if they could prove were not true they would be entitled absolutely to prosecute.

Now I just want to make sure that the government was not making a statement which amounted to this: "We will not prosecute him for any perjury before the grand jury but we may prosecute him for perjury on his direct testimony in this case as a result of some inconsistency between the direct testimony and the grand jury because he testified for the defense." Now clearly he's already testified on direct and cross. I assume the government has no reason at this time to prosecute him for anything he said on direct and cross so if that assumption is correct, the only question that remains is whether they will now seek to prosecute him for what he said on his direct and cross because he testified for the defense. I trust that the topics I've mentioned would not motivate the government to do that and as to the testimony he's going to give now, that of course has to be the truth. There is no question about that. Neither the witness, his Counsel or the defense suggest he is immune from telling the truth on this testimony.

MR. HULTMAN: Your Honor, might I respond by way of inquiry. I hope Counsel, that by the way you have just {4772} indicated that you are not in any way suggesting that I am not going to have the right to use in the subject areas that are matters of direct examination the minutes from the last grand jury or from 302s or anything else?

MR. TAIKEFF: I am not.

MR. HULTMAN: So there is absolutely no misunderstanding

MR. TAIKEFF: I do not mean to address myself to the possibility of any restraints on the government's right to cross-examine.

MR. CROOKS: Your Honor, might I rise to another question. Insofar as Exhibit No. 228 is concerned, Counsel indicated that he desired to have specific portions of that introduced on the record and I would be willing, if Counsel is still of that mind, to delete all of the parts except those that I believe pertain to the finding of weapons and so forth.

THE COURT: Excuse me. You'll have to identify the exhibit.

MR. CROOKS: Exhibit 228 which is the Oregon report.

THE COURT: Very well.

MR. CROOKS: I will state for the record, and I assume Counsel will respond when they have a chance to go over it, I believe the record should include down through subjects, "Peltier, Leonard, Banks -- "

THE COURT: Just a moment. What page are you on?

MR. CROOKS: On the first page, Your Honor.

{4773}

I believe everything could then be deleted and I would agree it has no particular bearing on the matters that Counsel went into down to the words, "November 15, 1975," and that should be left in because that's the only way that it gives the dates to the following.

Then all of page 2 could be deleted down to the last paragraph and I would intend then to leave in the last paragraph and the first paragraph on page 3, both of which put in context the finding of firearms. Then deleting on page 3 down to the last paragraph which again sets the stage for the first paragraph on page 4. So on page 3 the first paragraph would be in and the last paragraph and the matters in between would be deleted.

MR. TAIKEFF: Could I --

MR. CROOKS: And the fourth page would be --

MR. TAIKEFF: I have to ask a question. When Mr. Crooks says the first paragraph there's a balance of the paragraph carried over from page 2 which ends with the word "report," then there is a Paragraph which ends with the word "wagon." I don't know which he calls the first paragraph.

MR. CROOKS: I'm referring to the first paragraph carried over from the last page, page 3.

And if Counsel wishes to have any other part that I have indicated willingness to delete, I will certainly include those as well. I do not know if Counsel wishes to have the {4774} list of exhibits. If he does, then all of page 4 and the following pages could stay in, or if Counsel wishes to delete them I have no objection one way or the other.

MR. TAIKEFF: Your Honor, in principle we're agreed that that is a better way for both sides to proceed; namely to get into the record only those portions of this report that pertain in any way to the seizure and search of the vehicles and the findings made. However, I don't think it's possible at this time to do it carefully without wasting the time of the jury and since there is another matter that I think is very important for Counsel to bring to the court's attention, I would propose that Counsel be given a chance to confer and do it by stipulation, not necessarily written stipulation, sometime today. But I think we can agree on that matter.

THE COURT: Very well. 228 will be modified as Counsel agree and the clerk, counsel will confer with the clerk to carry out the mechanics of it.

MR. CROOKS: Right. That was my intention to put Counsel on notice of the government's willingness and we will attempt to get a satisfactory version which we will then have the clerk modify.

MR. TAIKEFF: I would assume that one thing is not in dispute and that is when the jury returns the sentence which was originally offered or the two sentences which were {4775} originally under discussion at the bench would surely be included in whatever is agreed upon and therefore may be read to the jury as part of the defense case.

MR. CROOKS: Yes. No question about that. That obviously would be in there.

MR. HULTMAN: I assume the receipt No. 227 is also in and for all purposes may be displayed to the jury?

MR. CROOKS: Yes. Yes.

THE COURT: Very well.

MR. TAIKEFF: Your Honor, I think Mr. Maring has risen.

MR. MARING: Your Honor, I'm not sure if there are other points to cover before Mr. Brown testifying. I would like an opportunity to speak with him just briefly. Before I do that I would like again and I don't want to belabor it, but I do want to clarify something said by Mr. Hultman and repeated by you and that is, as I understand it, Mr. Hultman stated that nothing said in these proceedings, the testimony at the Leonard Peltier trial, would be used against my client for any prosecutions for perjury at a grand jury proceedings at a previous trial or any false statements made in the past am I correct, Mr. Hultman?

MR. HULTMAN Well, I'll restate again, and I'm not trying to play on words, evidently not clear in what I say. What I am saying, that I agree not to prosecute for an alleged {4776} past perjury before the grand jury by using today's testimony. In other words, the charge would not be brought concerning statements that were made at a grand jury as the basis for perjury; that at that time he committed perjury using today's testimony to affect and be a part of the testimony for that charge. On the other hand, what I am saying constructively is that I am not giving up the right to prosecute a possible perjury charge based upon what he says today in this courtroom, and then I certainly would not be bound by using any material at any past time as far as what he says here today as that being my, or whoever would make such a determination, that he in fact did commit perjury in the courtroom by what he said here, and that would be the basis that, what he has said here constitutes perjury. Now that's, I've again tried to explain it as best I can.

MR. MARING: My question, Your Honor goes to whether or not Mr. Hultman is speaking merely to not using testimony at these proceedings for a prosecution for perjury at the grand jury proceedings but whether he is also saying that testimony from these proceedings will not be used against my client for prosecution for making a false statement in the past or for use against him for testimony at a prior trial, prosecution against him for perjury at a prior trial. What I'm merely trying to determine is whether you're talking about all the things in the past or just the grand jury proceedings?

{4777}

MR. HULTMAN: Good point. Counsel, my intent was that I am referring to all matters in the past and this thing I am excluding is what is taking place here today. This would be the possibility of the commission of a crime starting from this point forward as far as testimony is concerned. I think now you and I are in the same wave link.

THE COURT: As I understand it, government Counsel is saying that what he may have said in the past could be used in the prosecution of an alleged perjury for what he now says in this court under a grant of immunity.

MR. HULTMAN: That's what I'm saying.

MR. MARING: That brings up many other issues. The fact he testified with immunity.

THE COURT: I mention that so that there is no misunderstanding as to what he apparently has stated.

MR. MARING: That's my understanding of it. I would not agree with him on his interpretation of law whether he could use something said under immunity in the past to prosecute

MR. HULTMAN: I think that is a legal matter and I'm not here, it wouldn't be decided as the Court says but I would want to leave no misapprehension as to that particular issue. I think we are now, do fully understand each other. And by the same token I'm not here indicating that that's what I intend to do or anything else because I wouldn't necessarily be the determiner. But I want it made clear as to what I have bound {4778} the government on here today and what I have not bound the people on here today.

MR. MARING: I understand that.

And based on the representation made by the government which I would assume is in the form of a request that my client be granted immunity to the extent that we have just agreed on for the prosecution here today, I would request an order of the Court that he be compelled to give testimony as to possible perjury or false statements in the past and that he be granted immunity for such statements to the extent that we discussed.

I might be out of line because I think under the statute the government has to make that request and I would request the government to make such a request.

MR. HULTMAN: I don't think, Your Honor, I'm under anything further to do. I think the record speaks for itself and I think I've postulated the position the government is now bound by.

MR. TAIKEFF: Your Honor since it's not appropriate to address Mr. Maring directly, I address the Court. It's primarily to suggest to Mr. Maring the United States Supreme Court decision Santebello against New York has recently analyzed and discussed in the circuit the case called Perlermo against Oswald makes it clear that action taken against a person upon assurance of a representation of a prosecutor, even if he {4779} legally does not have the power to make such a promise, is binding because otherwise it would be highly inappropriate by a citizen to be guided by government officials. I strongly suggest to Mr. Maring his client is in good posture on Mr. Hultman's good faith.

MR. MARING: That's my understanding of the law and my understanding of Mr. Hultman's good faith representation. I was looking for one further thing and that would be an order from the Court.

THE COURT: What are you looking for now?

MR. MARING: An order from the Court in line with Mr. Hultman's representations that my client is compelled to give testimony in this proceeding concerning possible perjury or false statements that he made in the past and that the grand of immunity of March 25 would be in effect as to that compelled testimony.

THE COURT: Any response?

MR. HULTMAN: Your Honor, I don't think I have the authority to do that. I have very candidly and openly stated what I feel the posture is and the government will be bound by the position I have taken but I don't think I'm in any posture to go any further than what I have placed on the record here.

{4780}

I think that now gets into a formality matter which I know procedurally I don't have the authority to go do. Somebody procedurally in Washington has such duties and responsibilities. I am not about here to stand and knowing what the procedures are, to violate them.

That's the only reason for taking the posture that I am taking.

MR. MARING: We previously had such a letter that says you are authorized to ask for the immunity on the part of Norman Brown; and I think that letter from the Chief of the Criminal Division gives you the authority to make the request of the nature --

MR. HULTMAN: (Interrupting) Well, I don't have any further comment on that, your Honor.

THE COURT: Well, the witness, if he testifies under the present grant of immunity, would be required to testify as to the truth or falsity of any past statements that he has made.

That, however, does not protect him from any possible prosecution for any perjury that may be committed at this time relative to those past statements.

MR. MARING: That's the clarification I am seeking.

THE COURT: Very well.

MR. TAIKEFF: Your Honor, I understood that Mr. Maring wanted to confer with his client. Am I correct about that?

{4781}

MR. MARING: Yes, I would.

MR. TAIKEFF: If that's the case, I think -- he is, I think, our last witness.

However, if Mr. Maring would take the occasion to confer with his client, there is a matter which I believe is both very important and highly unusual. I would like to call a witness out of the presence of the jury during that interim.

THE COURT: You may confer with your client.

(Mr. Maring leaves the courtroom.)

THE COURT: Mr. Taikeff, you may proceed.

MR. TAIKEFF: Mr. Englestein has gone to get the witness, your Honor.

MR. HULTMAN: Was it announced to the Clerk who it is, counsel, so I might at least have some concept who it is.

MR. TAIKEFF: You will find out in a moment.

MR. HULTMAN: Thank you.

THE COURT: It is normal procedure, Mr. Taikeff, to announce who the witness is who is being called.

MR. TAIKEFF: I want to make sure the witness is available before I make the announcement. I am not sure.

THE COURT: You can still make the announcement. This is a courtroom, and you can follow the usual procedures.

MR. TAIKEFF: Yes, your Honor. The defense calls {4782} to the stand Myrtle Poor Bear.

MR. ENGLESTEIN: Bring her in?

MR. TAIKEFF: Yes.

MR. HULTMAN: Well, your Honor, the Government -- I don't know how many times we are placed in the posture of witnesses called and recalled and called again; but the Government would object on the grounds of relevancy and the fact that we have already gone into these matters as far as an offer of proof.

MR. TAIKEFF: We are not going to repeat our offer of proof, your Honor.

May she be advised that she is still under oath, your Honor?

THE COURT: The witness is still under oath.

MR. TAIKEFF: May she take the stand?

THE COURT: She may take the stand.

MYRTLE POOR BEAR,

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

REDIRECT EXAMINATION

By MR. TAIKEFF:

Q Miss Poor Bear, did we speak with each other today during the lunch time?

A Yes, we did.

Q And for how long?

{4783}

A Not even five minutes.

Q And did we discuss whether you would be willing to come back into the courtroom and testify before the Judge?

A Yes.

Q Myrtle, are you now scared of anything?

A No, I am not.

Q Are you prepared to answer any and every question that's put to you either by the Judge, the defense or the Government?

A Yes. I will try my best.

Q Myrtle, I want to ask you whether your experience in finally telling your story publically yesterday is what made you feel by this morning that you would no longer be afraid?

A What do you mean?

Q Why are you no longer afraid, why were you afraid yesterday and you are not afraid today?

A The reason why I was afraid yesterday was because the Government had me all confused.

Q Are you confused now?

A No, I'm not.

MR. TAIKEFF: Your Honor, I submit the witness to questioning by the Court or the Government on any subject it wants to go into.

I want to note a major change in her appearance, demeanor and composure.

MR. CROOKS: Your Honor, the United States has no {4784} further questions of this witness.

THE COURT: The Court has no questions of the witness.

MR. TAIKEFF: Then, your Honor, I wish to put some questions to her.

THE COURT: Just a moment.

MR. TAIKEFF: On the subject of her present state of mind and her ability to testify now, and not on the subject matter.

THE COURT: Does this relate to the offer of proof?

MR. TAIKEFF: It relates to her capacity to testify completely, totally and truthfully; and I think your Honor can see that she is an entirely different person today than she was yesterday, and her answers are straightforward and she looks at the questioner.

If your Honor would ask her a few questions, your Honor would be satisfied in an instant that the experiences of yesterday has transformed her; and it is obvious to anyone who would speak to her or ask her a question.

MR. CROOKS: Do you have her coached now?

MR. TAIKEFF: I do not have her coached. If the Government thinks I have her coached, they should indict me for a very serious violation of Federal law.

MR. CROOKS: We made no cross examination. Counsel finished his direct examination, and it seems to me that ends the matter.

{4785}

THE COURT: Furthermore, the jury has been advised that the evidence is going to be finished today, and I am not going to reopen this matter with this witness at this time.

MR. TAIKEFF: Your Honor, is your Honor totally disinterested in whether the representation I made to the Court is factually true? Can your Honor not see that this person has an entirely different posture and an entirely different demeanor than yesterday?

Your Honor made a very strong finding on the record this morning, and I represent to your Honor that Mr. Englestein came to me and said, "Something has happened, go see her, you won't believe it is the same person."

And during the luncheon recess I went out and spoke with her for about three minutes and assured myself that something had occurred since yesterday.

THE COURT: The next witness to testify in this court is the Witness that you have previously called, Mr. Brown. We are not reopening this other matter.

MR. TAIKEFF: Thank you, your Honor.

You may step down.

(Witness excused.)

THE COURT: You may call your witness.

MR. TAIKEFF: I just wanted to advise your Honor that there was a witness, a potential witness brought over {4786} on a writ; and in view of your Honor's ruling, I think it is now appropriate to advise the Court that a person known as Ricky Little Boy who, I believe, is in the Moorhead jail, but I am not certain of that fact, may be returned to the institution from which he came.

I think he may even be in the Marshal's custody at this very moment here.

THE COURT: The Marshal may be advised.

MR. TAIKEFF: Your Honor, one brief procedural inquiry.

A number of offers of proof and resubmissions in light of all the evidence need be made before the defense rests in order to either persuade your Honor to supplement the body of evidence, or in the alternative to protect our record.

Mr. Lowe and I have discussed the way in which he would like to proceed in that regard. He called my attention to the fact that your Honor may prefer to do that after both sides have rested on the record, so that the jury's presence is continuous.

We would have no objection to that as long as it was understood that we will reoffer certain documents, et cetera, in light of developments from that point until the end of the trial, and there were certain offers of proof made.

{4787}

We don't want to delay and cause the Government any delay in putting in its rebuttal case; but it would be part of our case in chief to make those offers.

I mention that to your Honor so your Honor can decide how he would like to receive those offers.

THE COURT: As I understand it, you are suggesting that after you have completed your evidence and the Government has completed any rebuttal evidence that it may have, that then you would be willing for your reoffers to be considered at that time?

MR. TAIKEFF: Yes, and considered as if we had not said in open court, "We rest."

THE COURT: Yes.

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

THE COURT: That procedure will be permitted.

MR. TAIKEFF: Thank you, your Honor.

THE COURT: The jury may be brought in.

(Whereupon, at 2:07 o'clock, p.m., the jury returned to the courtroom; and the following further proceedings were had in the presence and hearing of the jury:)

THE COURT: Mr. Maring may approach the bench.

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

MR. MARING: Your Honor, my client has requested of me to ask the Court if he may testify holding in his hand {4788} a round object that has 12 feathers on it which he describes as something spiritual for him which he feels will help him in telling the truth and as an aid to him in his testimony.

Before he comes into the courtroom with that object, I wanted to ask your permission.

THE CLERK: Is that the item just handed to him by a spectator that left the spectator's section about five minutes ago?

MR. MARING: That could be, I am not --

THE CLERK: (Interrupting) I observed it being removed from the courtroom.

THE COURT: The answer then is "no".

MR. MARING: All right.

THE COURT: Based on the statement of the Clerk that this item was handed to him by a spectator from the audience section of the courtroom, I am not going to allow it.

THE CLERK: To further clarify that, your Honor, I did not observe him handing it to him. I observed the person who has had custody of that all day leave the courtroom with that in his possession.

MR. MARING: Was it a round object with some feathers?

THE CLERK: Some type of sagebrush in a circle with feathers on it.

{4789}

MR. MARING: That is the object,

THE COURT: The answer is he will not be permitted to bring the object with him.

MR. MARING: Your Honor, may I go and tell him that and bring him back in with me so that the procedure will be followed?

THE COURT: Yes.

THE CLERK: One more thing. The oath will not be re-administered to him, and he will come in and take the stand and be reminded he is under oath and testify.

MR. MARING: He knows that, fine.

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

{4790}

NORMAN BROWN,

having previously been sworn, testified as follows:

MR. TAIKEFF: May I inquire, Your Honor?

THE COURT: You may.

MR. TAIKEFF: May the witness be advised that that he remains under oath from his last appearance, Your Honor?

THE COURT: Mr. Brown, you are still subject to the oath that you took on your last appearance in this courtroom.

DIRECT EXAMINATION

BY MR. TAIKEFF

Q Mr. Brown, when you went to Farmington to the AIM convention how old were you?

A I just turned fifteen.

Q And did you have a mother or a father living at that time?

A Two of them. You mean in Farmington or home?

Q At home. Was your mother living?

A Yeah. Both of them, yeah.

Q Both mothers.

A No. My mother and my dad.

Q Your mother and father were both living, okay.

A Yeah.

Q When you left Farmington you went back to the Pine Ridge Reservation with Mr. Peltier; is that right?

A Right.

Q Why did you not go home? Why did you go with him?

A Well, I told him that I was in Sun Dance and I asked him if {4791} he was in Sun Dance. He said, "Yeah." And I asked him if I could catch a ride there. And he said "Yeah." And I just told him where we were staying. Told him we were staying in Pine Ridge, that they had sweat lodges there and they had ceremonies and he said from there we can go to Crow Dog's Paradise.

Q And when was the Sun Dance scheduled to happen?

A July 29th through August 5th.

Q Now, were you outside the country recently? Outside the United States?

A Yeah.

Q Where were you?

A Canada.

Q When did you go there?

A Around October, November, around there.

Q And when did you come back from Canada?

A Last month.

Q Did you come back on your own?

A Yeah.

Q And where did you go?

A To Crow Dog's Paradise.

Q You have any kind of relationship with Leonard Crow Dog?

A Yeah.

Q What is that relationship?

A Like brothers and like a teacher to me. And, yeah, brothers, teacher.

{4792}

He tells me, you know, sacred things about nature and medicines and stuff like that.

Q He's a medicine man, isn't he?

A Yeah.

Q Do you know a place called Mission, South Dakota?

A Yeah.

Q When were you there last?

A March, I think it was the 23rd. I'm not sure.

Q How far is Mission, South Dakota from Leonard Crow Dog's place?

A About twenty-eight miles.

Q Generally speaking what were you doing at Leonard Crow Dog's place up to March 23rd from the time you got there until March 23rd?

A Well, went down there because he was gettin out and take some ceremonies with him and, you know, visit, too.

Q Did you have any family with him -- any of your family staying with him?

A No.

Q Do you have a wife?

A Yeah.

Q Where was she at that time?

A With me.

Q Had she been in Canada with you?

A Right.

{4793}

Q Now, what happened in Mission, South Dakota on March 23rd, as far as this case is concerned?

A Well, we went to this one store to look for saw blade for wood. We went to this one store.

Q Can you speak a little louder.

A We went to this one store and they didn't have one there so we were going down the street inside this T.V. repair Store. And we went by Abourezk store and there I saw two, two agents.

Q Go on.

A They were looking at us and in our pickup and we passed them and they were really looking at us. So I thought, you know, right there they recognized me. So we got out of the car and we

walked in that T.V. repair Store and Al Running was looking for a radio. He was going to buy a radio. We went in there and I was looking and then I saw these two agents come around by the parking lot. And they pulled up and they were sittin' there for about five minutes.

So I was looking at them. So I, you know, I thought they probably know who I am and so I walked out there, me and my wife, Al Running and Diane Running. We walked out and, like I saw them come out of cars and came behind me and he said, "Mr. Brown," and I was getting inside the car and he goes, "Mr. Brown." He said that about three times and the third time he said, "Mr. Brown." And so I turned around and they said, "We got a subpoena for you for Leonard Peltier's trial in Fargo." {4794} And I told Al, I said, "Do you know these agents, do you know their names, can you get their names?" So he got them and that agent gave me a subpoena and said I had to be over there.

Q Then what happened?

A Well, he just told me to get in the car.

Q Which car, your car?

A No. FBI car.

Q And then what happened?

A I got in the car. Then we went to Pierre, South Dakota and as soon as we got to Pierre we got on a small plane. Then we came here about 4:30.

Q 4:30 in the afternoon?

A Yeah. About 4:30, yeah.

Q Okay. Now, stop at that point. I want to show you a document, I'm handing a photostatic copy of it to Mr. Hultman, show you Defendant's Exhibit 229 for identification and I ask you who gave that to me, if you know?

A To me?

Q Who gave that piece of paper to me?

A A lawyer.

Q This man over here (indicating), Mr. Maring?

A Yeah, Mr. Maring.

Q Do you recognize it?

A Yeah.

Q What is it generally?

{4795}

A A subpoena.

Q Was that the subpoena you were shown or given on March 23rd in Mission, South Dakota?

A Yeah.

Q Okay. Now, you said they brought you up here in a small plane from Pierre, South Dakota; and when you got here where did you go next after you left the airport?

A You mean from here, this airport?

Q Yes. Fargo airport, right.

A There were some agents who were waiting so they walked me to one car.

Q Can you speak up a little louder, please, so everyone can hear you.

A I walked to this car and they told me "Get in one of them." So I got in there.

They took me to this hotel or motel the other side of Fargo and they gave me a room.

Q Do you remember the name of that motel?

A No.

Q Does it begin with the letter B?

A Yeah. It's the Biltmore, yeah, motel or hotel.

Q What happened there?

A Well, I got there, they gave me something to eat, then I went to my room.

Q By the way, before you left Mission did you say anything about {4796} wanting to get something?

A Yeah. I told the agent that I wanted to have a lawyer and he told me that I'd get one.

Q Did he say where you could get one?

A No. I asked him twice, that guy, to see a lawyer. And he says, "Yeah, you'll get one as soon as you get to Fargo."

Q All right. Now, I think you told us you were taken to the Biltmore in Fargo and you were fed and up to the time you were fed, but while you were in Fargo, did you say anything about a lawyer again?

A Yeah. Once, right after we ate. I asked, I said, "Am I going to get a lawyer?" And he said, "Yeah." So I was waiting all evening.

Q That night did anyone come to see you who said he was a lawyer?

A No. But Mr. Hultman came over to the room I was at.

Q And when Mr. Hultman came he tried to ask you questions, right?

A No. He just came up to me and he asked, he says, "I want you to tell me," you know, he says, "I'm not going to ask you any questions. I want you to tell me about, you know, June 26th again."

Q All right. Now, you told Mr. Hultman that you wanted a lawyer, right?

A Yeah.

{4797}

Q And when you told him that he left immediately, he honored your request, did he not?

A Right. As soon as I said that to him that, you know, he left.

Q Now, that left you with whom then?

A An agent.

Q Do you know the name of that agent?

A Mike Nez.

Q N-e-z?

A Yeah, N-e-z.

Q Where is he from?

A Gallup, New Mexico.

Q Did you make any phone calls from the motel room?

A Yeah.

Q Did a lawyer come to see you that night?

A No.

Q Then the next morning did you come to the courthouse?

A Yeah.

Q Did you testify for the Government?

A Yeah.

Q Now, you previously testified for the Government in connection with this case, did you not?

A Yeah. In Cedar Rapids.

Q At the trial last summer?

A Yeah.

{4798}

Q And did you testify before that?

A Yeah.

Q Where did you testify before that?

A Sioux Falls, South Dakota.

Q Was that at a trial or some other kind of proceedings?

A No. It was a grand jury.

Q Now, I want to ask you some questions that concern the events leading up to your grand jury testimony. Before you testified in the grand jury did you have any contact with any agents of the FBI?

A Yeah.

Q Do you know the name of the agent or the names of the agents if there was more than one?

A There was Victor Harvey. His first name is Olen. And there's another one, J. Gary Adams.

Q How many times in your life have you met J. Gary Adams before you went to the grand jury?

A How many times have I met him?

Q Yes. Before you went to the grand jury.

A I think it was twice, yeah.

I don't know, I think it was twice. Once -- I don't know, I can't remember.

Q Well, think about it and see if you can recall how many times.

A I can't remember. I think it was -- I don't know, I can't {4799} remember.

Q How much time would you say you spent with Gary Adams before you went to the grand jury?

A I don't know. A lot of hours, though, it seemed like.

Q Could you give us some estimate of how many hours is a "lot of hours"?

A I don't know. It seemed like about four and a half hours. I don't know. It seemed that long.

Q Did you ever have an interview with him when your mother was present?

A Yeah.

Q Where was that?

A Chinle, Arizona.

Q Is that where your mother has her home?

A No. It's Mini Farms about fifteen miles from there.

Q And who was present at that time?

A My mom, J. Gary Adams and Victor Harvey.

Q Would you tell the Court and jury what happened that day or evening.

A Well, I was at my sister's house in Chinle and tribal cop came and wanted to talk to me. And my mom went out there and talked for about a minute, minute and a half. She came in, she didn't say anything; and told me, you know, this, let's go to this one place. And I said, "Where?" "Let's go over there." So I said, "All right."

{4800}

So I went, got in our truck. Then we went to this trailer and he said, "Let's go inside." And we went in there.

Q Now, who was in there when you went in there?

A There was one BIA police. He's an officer. I think there was another one. I'm not sure.

Q How about the FBI agents?

A Well, I got there and I knew that they were going to question me about it. So I asked, you know, if I can go out. As I was going out the guy wouldn't let me out. He grabbed me.

Q He --

A He wouldn't let me go out of the trailer.

Q Did they tell you you were under arrest?

A No.

Q Who stopped you from going out?

A Arthur Newman. He's a BIA police officer.

Q Was Gary Adams there?

A No. He wouldn't let me out and he told me to wait there for about, for a while. And we waited there and he said, "Some agents are coming in, they're flying in." So we waited, we waited there, me and my mom and we were waiting. Some agents came and there was three of them came in. And the other guy, he's from Flagg Staff, and they came in. They showed us their names, their badges, and showed my mom their badges and their names. And I told my mom to get their names down, {4801} and she got them down.

Q Then what happened?

A Well, they said, they gave me a, my rights, or said something about my rights. I can't remember. They asked me if I understand them and I said, "Yeah." And they asked me, you know, where I was on June 26th, and I told them, you know, that I didn't know, you know.

I gave them a piece of paper and on that piece of paper it said that I wasn't suppose to talk to any law enforcement people or BIA, FBI or state patrol or any of them. That paper said that, and on that paper the guy, I went to Jack Schwartz, he's a lawyer and he typed that up for me and I gave that to them and they wouldn't let me call --

Q I didn't hear what you said.

A They wouldn't let me call a lawyer.

Q I see. When they read your rights to you did they tell you that you had a right to consult with a lawyer?

A Yeah.

Q And then you tried to call a lawyer and they wouldn't let you?

A Yeah.

Q Go on, tell us what else happened.

A Well, started asking me questions and I kept saying that I didn't want to talk to them. First they were nice, kind of nice. Asked me if I wanted a cigarette and coffee. Told them, {4802} no, that I wanted a lawyer. So they started getting kind of mad because I wouldn't answer their questions.

{4803}

And Victor Harvey told me, he said, "We knew you were there," and he said, "If you don't answer our questions we can indict you, we can charge you with those two murders of those two FBI agents." And I was just sitting there thinking of my mom. She knew what was happening.

Q Where was she?

A Right beside me here. I don't know. She freaked out. She knew what was happening. She kind of tapped me and I looked over there and she said, "Why don't you tell them." I said, "I don't want to tell." Ask the agent what was going on and the agent told her I was involved in the shooting with the agents and he said, "I knew you done it," like that. And they said that then "I know." Still didn't say anything.

So that guy Victor Harvey says, "We can indict you," he said, "for those two murders," and he said, "We even had a gun that you had, you know, that killed one of them." He said that to me. And my mom, she was crying. She didn't know what to think. Kept telling me to say something, talk.

So I was sitting there and I won't say anything to them. Victor Harvey got mad again and he said something else too.

Q Is it something you don't want to say in court?

A Yeah.

Q Was it a bad word?

A It wasn't a bad word, just what he said. He said, you know, {4804} "If you don't talk to us," you know, "you might never walk the earth again."

Q I see. Go ahead.

A And what I thought was, you know, put me in jail and my mom started crying. They told my mom that "You won't see your son again for a long time." "You won't see your family again." And I said something that got them mad and then he said, "We'll do everything in our power, do everything in my power that you go to jail if you don't answer our questions." And he told me that I won't see my mom for a long time. My mom told me to talk to them, to lawyers, I mean, to FBI agents.

Q Go ahead.

A She was crying and she just told me to talk.

Q Go ahead. You can continue testifying.

MR. HULTMAN: If you would ask a question he might have an opportunity to respond.

MR. TAIKEFF: The question is what happened.

A Okay.

And they said that to me, then my mom told me that she didn't want to see me in jail and told me to think of her and my brothers and sisters, my family. And I started answering their questions.

Q How did they ask their questions of you?

A They say, "We know you saw this and saw that. People tell us, somebody told us that you saw this." I said, you know, "Who {4805} told you this," and they said they couldn't tell.

Q How did you feel while this was going on?

A Well, I wasn't going to say anything but my mom, she was crying and everything and I didn't want to do --

Q You were just past 15 years of age at this time?

A Right.

Q You knew that Gary Adams and Victor Harvey were from the FBI, did you not?

A Right.

Q Do you remember the date when this took place?

A September somewhere. September 23 and the 3rd.

Q Earlier that month you had had some kind of an encounter with the FBI, isn't that correct?

A Yeah.

Q Would you tell the Court and jury about that.

A Well, it was at Crow Dog's one night. Me and my wife were staying this one place and next we woke up there was these agents running all over the place. There was a lot of them.

Q How were they dressed?

A Dressed like Viet Nam, army fatigues and those greens, you know, they were in Viet Nam. Saw some carrying M16s. Looked like that, you know. And sawed off shotguns and bulletproof vests and could hear choppers, too.

Q A what?

A Chopper.

{4806}

Q Helicopter?

A Yes.

Q Yes.

A And, you know, all around the camp. They just came in about 5:30, around there. It was pretty early.

Q How many agents did you see that day?

A I don't know. About 80. 80 to 100. Around there.

And we heard people running by and I looked out and one of them saw me and said "All right, come out with your hands up." I came out and they pulled back their guns and said, they cocked it, I guess, and I came out and said, "Anybody in there with you?" Said "Yeah." "Tell them to get out." So told my wife to come out and we came out and they told me, you know, "Get on the grass," so I laid down. They searched me and her. Then, you know, they had M16s and told us to get up and they pushed us with those M16s and said, "Why don't you go over where the women and kids are." They said that to us.

We started walking where all the women and kids were at and were standing there. There was a lot of FBI agents around, around where the women and kids were.

Q Go ahead.

A And, well, they were just all over. There were a lot of them. And kids were crying.

MR. HULTMAN: Your Honor, I haven't entered an objection up till now. I do object on the grounds of any relevancy of {4807} any kind.

MR. TAIKEFF: Foundation testimony concerning state of mind at the time of testifying before the grand jury, Your Honor.

MR. HULTMAN: This is an event six months before. Isn't that right, Counsel?

MR. TAIKEFF: That's correct, Your Honor.

MR. HULTMAN: I renew my objection.

MR. TAIKEFF: It's actually four months before I think.

MR. HULTMAN: I believe the dates are September 23rd and January 13th to be exact.

MR. TAIKEFF: Four months, Your Honor.

MR. HULTMAN: I object on the grounds of relevancy.

THE COURT: Sustained.

Q (By Mr. Taikeff) When you went to the grand jury in January, did the experience you just told us about have any affect upon what you did in that grand jury room? Yes or no?

A Yes.

MR. HULTMAN: Same objection, Your Honor.

MR. TAIKEFF: I don't know whether I should ask the next question, Your Honor.

THE COURT: I know you do not. I was considering the objection.

MR. TAIKEFF: I didn't mean to interrupt Your Honor's consideration. I wasn't sure whether I should go forward.

{4808}

THE COURT: Overruled.

Q (By Mr. Taikeff) Tell the Court and jury what was the nature of the effect of that experience that you just told us about had upon you when you went into the grand jury and what you did inside that grand jury room?

A You know, there weren't, you know they meant --

Q They what?

A They meant what they did and, you know, they were for real. They meant what their word was. You know, I mean like I don't know just --

Q Explain what you meant by the statement "they were for real."

A Like, they were serious, you know. They meant it. You know they were serious, you know. They didn't, I don't know. They were serious what -- they, you know, I thought they weren't messing around. They meant what they were doing.

Q Did you consider the things they said to you when they spoke with you and your mother?

A Yeah.

Q In the grand jury you testified that you saw Leonard and Dino and Bob down by the cars, isn't that a fact?

A Right.

MR. HULTMAN: I object to any further leading questions of this kind.

MR. TAIKEFF: That's a foundation question.

{4809}

MR. HULTMAN: I understand. When they get all done it will still be foundation.

THE COURT: Objection sustained.

Q (By Mr. Taikeff) Did you ever see Leonard and Dino and Bob down by the cars on June 26th, 1975?

A No.

Q Why did you tell that to the grand jury?

A Well, they were, you know, back there when they first came, when I was telling about, they said, "We know you saw this and saw that."

Q Specifically. Be specific. They said that they claimed --

MR. HULTMAN: Just a minute, Your Honor. I object. We're about now to clearly get a leading question.

MR. TAIKEFF: I was not going to ask a leading question. I was going to put it in terms of him telling us what they said they knew he knew.

THE COURT: You may ask the question without suggesting the answer.

MR. TAIKEFF: All right. Thank you.

Q (By Mr. Taikeff) You just told us. Tell us specifically what did they say to you they had heard or knew that you knew?

MR. HULTMAN: That assumes that that was the case, Your Honor, and that's the very reason I objected to the leading.

MR. TAIKEFF: That was his very testimony before. Testified that they told him that someone told them certain {4810} things and then they repeated those things and I want him to say what those things were.

THE COURT: He may answer. You may answer that.

A They told me, they said, "We know you saw those guys down there." Said, "Who?" They said, "I don't know." They said, "We know you know." They said, "Somebody told us that you saw Bob, Dino and Leonard down there," and I didn't know what to think after, you know, my mom, I just told them I saw them down there.

Q Did the FBI ever mention to you the names of the people that they thought killed the agents when they were interviewing you the first time they interviewed you?

MR. HULTMAN: Object on the grounds of being leading.

THE COURT: Overruled.

A I don't understand your question.

MR. HULTMAN: And further on the grounds that the question has been asked and answered.

MR. TAIKEFF: It's been answered? Could I have the answer read back, Your Honor, please. I didn't seem to hear it.

MR. HULTMAN: The testimony just previously to the last question.

MR. TAIKEFF: I'd like to have the answer read back then because I apparently missed it. I must have been looking at my notes and I --

MR. HULTMAN: I have no objection to the question, Your {4811} Honor, as long as it's not leading.

THE COURT: Proceed.

Q (By Mr. Taikeff) When the agents first interviewed you, did they tell you who the murderers were?

MR. HULTMAN: Same objection.

A No. They just told us that "We know you saw those guys down there."

A I'm holding in my hands Government Exhibit 34AA in evidence. As you sit there now do you know what kind of a weapon this is?

A You mean right now?

Q Do you know now?

A Yeah. Now I know.

Q What is it?

A It's an AR15.

Q In September of 1975 did you know the name of that weapon?

A No.

Q Did you ever have any discussion with the FBI about the name of weapons?

A Yeah. I told them "That that gun there," I said --

Q I'm sorry. I didn't hear the beginning of your answer.

A "That gun."

Q Yes. What did you tell them or did they tell you. That's what I'm trying to find out.

{4812}

A They asked me, you know, "What kind of guns," you know, they had and they asked me about Leonard. Says, "It looks like an M16," and kept saying "was it M16"? I said, "I don't know." I said, "Looks like one." Kept saying, "It was one, wasn't it?" I said, "I don't know. Looks like one." Kept saying that and making me, I don't know, so many questions.

Q When you testified before the grand jury that you saw Leonard and Bob and Dino down by the agents' cars, where did you get that information from?

A FBI.

Q Did you ever see that on June 26th, 1975?

A No.

MR. TAIKEFF: Your Honor, at this time I offer Defendant's Exhibit 229 both on the testimony of this witness and because it is a copy of an official court paper in this case.

MR. HULTMAN: Well, I object, Your Honor, that it has no materiality of any kind. The same as any other subpoena in this trial.

MR. TAIKEFF: I believe it does, if Your Honor will look at it I think Your Honor will perceive it was served on the 23rd when he was illegally taken into custody.

MR. HULTMAN: If it please the Court, if we're going to discuss matters let's not discuss them before the jury. I request we approach the bench.

{4813}

THE COURT: You may.

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

MR. HULTMAN: About illegal matters.

MR. MARING: May I be allowed to approach the bench also?

THE COURT: You may.

MR. HULTMAN: On your record, Your Honor, I'm getting sick, very sick about illegal acts on the part of the government.

MR. TAIKEFF: Is it proper to serve somebody on the 23rd with a subpoena returnable on the 14th and take him into custody against his will? Is that not an illegal act?

MR. HULTMAN: Counsel, I'm referring to your conduct before this jury. That's the issue I'm talking about. I want it made clear on the record if you've got matters to take up out of the presence of the jury you do it. Don't do it and prejudice the jury any longer.

MR. TAIKEFF: What do you think you're doing right now by yelling? You can be heard six blocks away.

MR. SIKMA: So can you, Mr. Taikeff.

THE COURT: What's the issue before the Court?

MR. HULTMAN: I'm objecting, Your Honor, first of all, to his conduct in front of the jury. That's the first thing.

Secondly, I'm objecting and have a right to object and {4814} I did object to the entrance of this exhibit on materiality and then without a speech on the part of Counsel in front of the jury about the conduct of the government.

MR. TAIKEFF: You've got to fight fire with fire, Mr. Hultman.

MR. HULTMAN: I don't have any response.

THE COURT: What is the materiality of this exhibit?

MR. TAIKEFF: This witness was intimidated by illegally being taken into custody upon the authority of a subpoena which it was not even valid because it was served on the 23rd of March, returnable on March 14th and even if it were returnable after the 23rd -- just a moment.

I'm looking for the 23rd of March.

MR. TAIKEFF: Your Honor, he testified that it was served upon him on the 23rd and I think the government will concede that his memory is correct. It's this date which is important, although it doesn't matter what date was there, you cannot take a person into custody on a subpoena. A subpoena is not a warrant of arrest.

MR. SIKMA: That's not proof.

THE COURT: Again we're getting into collateral issues whether or not he was taken into custody and I'm not going to permit that.

MR. TAIKEFF: This witness testified to the prosecution.

THE COURT: You have been permitted to bring out {4815} from him the facts as to what happened. We're not going to get into a legal determination as to whether or not he was taken into custody.

MR. TAIKEFF: He's already testified he was taken into custody.

THE COURT: Testified he accompanied the agents. Now whether that was being taken into custody or not is something this Court doesn't have to determine at this time. It's irrelevant to these proceedings.

MR. TAIKEFF: Doesn't it reflect upon his state of mind when he testified on direct examination for the government?

MR. HULTMAN: You already postulated, Counsel, he told the truth. You've said that 16 times in the courtroom at least this afternoon.

THE COURT: Objection to 229 is sustained.

MR. HULTMAN: Your Honor, could I have an instruction as to the remarks that Counsel made in front of this jury just a moment ago? I think that's highly prejudicial.

MR. TAIKEFF: When you stop signaling witnesses I won't say anything like that.

THE COURT: Counsel may proceed.

{4816}

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

Q (By Mr. Taikeff) On March 23 when you were brought here via Pierre, South Dakota, did you want to leave Mission, South Dakota?

A No.

Q Where was your wife then?

A She was with me.

Q Is she pregnant?

A Yeah.

Q Was she pregnant then?

A When? You mean --

Q (Interrupting) On March 23rd.

A Yeah.

Q When is the baby expected?

A July 22nd.

Q Why did you go with the agents?

A Because I always think about my wife and my boy.

Q Did they tell you that you had to go with them?

A Well, they just told me to go, and I thought, you know, I had no choice.

Q Did they show you any arrest warrant?

A No. I asked them if I was arrested.

Q What did they say?

A They said "no".

{4817}

Q Did you look at the piece of paper that you had?

A Yeah, and I asked them to read me my rights and they said I wasn't arrested.

Q He said you weren't arrested so he wouldn't read you your rights?

A Yes.

MR. TAIKEFF: I have no further questions.

RE CROSS EXAMINATION

By MR. HULTMAN:

Q Norman, let us start with something that is maybe fresher in your mind than some other things.

Do you recall counsel asking you some question about you and I meeting on the night that you came here that he has just talked to you about, do you remember that night?

A Yeah.

Q Now, I am being correct and I am being honest and I am being fair, that when I met you, that without discussing anything about what took place, I asked you whether or not you had any questions that you wanted to ask me, is that a fair and truthful --

A (Interrupting) Say that again.

Q Isn't the first thing that I said to you and continually asked you when I met with you on the night that counsel is talking about, "Do you have any things that you would like to ask me?"

{4818}

A Yeah.

Q And didn't we spend the time that you and I were together, me answering the questions that you had to ask of me?

A Yeah.

Q Including when you asked whether or not you could have a lawyer?

A Right.

Q Now, did I at any time during that evening discuss with you any of the facts or what might be your testimony that you gave the next day here in the courtroom?

A I don't understand.

Q All right. Did you and I at any time that evening talk about any of the specific events that did or did not take place on the 26th of June, 1975?

A No.

Q There isn't any question in your mind about that at all, is there?

A No. You didn't ask me no questions about it, the June 26th.

Q All right. Now, did you tell me at that time that you had any idea but the fact that you were a witness that was called and would be a witness called to testify in this trial, you understood that you were to be a witness at that time in this trial, did you not?

A Yeah.

{4819}

Q And then you were a witness the next day, were you not?

A Yeah, but --

Q (Interrupting) Now, did you the next day testify to things that you saw and you observed truthfully and honestly before this jury?

A Yeah.

Q And anything that happened the night before or the day before concerning the FBI with a subpoena or whatever counsel asked you about, it didn't have any impact on what your testimony was that day here before this jury, did it?

A What do you mean?

Q You told the truth, did you not?

A Yeah.

Q And there isn't any question in your mind that as to what you said that day before this jury, that what you told them is true, is there any question at all about that?

A Yeah.

Q Did you say the things that day to the jury because the FBI had forced you at some time to say it?

A They didn't force me, but they just gave me a lot of questions.

Q I am asking you about the testimony that you gave here before this jury. Let's just talk about that for a moment, o.k.?

A You are asking me if they forced me to testify?

{4820}

Q I am asking you if there was anyone who forced you in any way to give and say what it was you said here in this courtroom before these people here when you were previously here, did anybody force you to say anything that day?

A No.

Q You did this because it was the truth, is that right?

A Yeah.

Q And there isn't any question in your mind, sitting here now, that what you told them that day is the truth, is it?

A That day I was here?

Q Yes.

A Yes.

Q All right. Now, let us go back in the beginning, all of these things counsel has asked you about, you indicated that you were at Crow Dog's Paradise, and you talked about some events that took place there.

Which of the people that were in Tent City or at Jumping Bull's on the 26th were there at Crow Dog's with you?

MR. TAIKEFF: Objection, beyond the scope of the direct and irrelevant as well.

MR. HULTMAN: Well, counsel went into the various reasons, your Honor, as to why certain events followed; and I think this is within the scope of that examination.

THE COURT: He may answer the question.

A Would you ask that again?

{4821}

Q (By Mr. Hultman) Who were the people that were at Crow Dog's with you that were with you on the 26th of June when you were at Jumping Bull's, 1975?

A Everybody that was there except Wish.

Q Was Leonard there?

A Yeah.

Q Now, let us go to the first time that anyone asked you from law enforcement about what happened or what you knew about the 26th of June, 1975; and is that the day that you talked about that happened down in Arizona?

A You mean when the FBI came?

Q Yes, that's the first time, is it not, that anybody from law enforcement --

A (Interrupting) Yeah.

Q (Continuing) -- talked to you about anything that may or may not have happened on the 26th of June?

A Yeah.

Q Now, isn't it a fact that during all the time that you told or answered questions about what took place on that day, that your mother was seated right beside you?

A You mean when they asked me questions, my ma was beside me?

Q There isn't any question about that, is there?

A No.

Q You were 15 at the time, were you not?

{4822}

A Right.

Q In fact, it was your mother that brought you there, was it not?

A Yeah.

Q You didn't come on your own?

A Well, I knew I was going.

Q You didn't want to come, in fact, did you?

A No.

Q In fact, I believe you indicated even to your mother to get those names of the FBI's, isn't that what you said on direct examination?

A Yeah.

Q Now, your mother didn't have any qualms about bringing you, did she?

A She didn't know what was happening there. She didn't know why they were there.

Q Now, isn't it a fact that after there was discussion about your rights in the presence of your mother, she had some questions to ask about it, did she not?

A What do you mean?

Q Well, didn't she ask some questions of the FBI and the BIA agent who was there at that particular time concerning rights?

A I don't know.

Q Do you remember her asking about the fact that your age {4823} was 15 and that she felt that she should be there because she was your mother and you were 15?

A Yes.

Q And do you remember the FBI asking and answering specific questions that she asked concerning what your rights were?

A Can you say that again?

Q Well, isn't it a fact that your mother asked about what rights you had at that time?

A Yeah, I guess so. I don't know.

Q And didn't the FBI explain all of the things that you know very well at this particular time it has to do with rights?

A Yeah. They told me about my rights, yeah.

Q And they told your mother too, did they not?

A Yeah, they told my mom.

Q Now, isn't it a fact, Norman, that both you and your mother, knowing that you had a right to have an attorney present and after being explained, and that you didn't have to talk to the agents in any way, and if you wanted an attorney they would get one, that you indicated that you were willing to go ahead and tell whatever it is you knew, to tell the truth?

MR. TAIKEFF: I have to object to the form of that question because it includes some consideration of his mother's state of mind on the subjects of a lawyer. He is not competent to answer.

MR. HULTMAN: I will only deal first with the witness.

{4824}

THE COURT: The objection to the form of the question is sustained. You may rephrase your question.

MR. HULTMAN: Yes.

Q (By Mr. Hultman) Isn't it a fact that after you were explained all of those things and were asked whether or not you were willing to go ahead and tell the truth about whatever it is that you knew, that you replied "yes", that you were willing?

A No. My lawyer first -- I gave them that piece of paper.

Q And where did this piece of paper come from -- you were 15 years old, were you not?

A Yeah. Right after June 5th at Crow Dog's, I went to Rapid City.

Q Wasn't it a form letter sent out by Mr. Ellison who just -- wasn't his name on it -- that just walked out of the door, it was a form letter, was it not?

A What do you mean?

Q It was a letter which is produced in many numbers?

A No.

MR. TAIKEFF: Your Honor, I object to that as being totally irrelevant. The letter apparently is not in dispute. It existed. Who prepared it is irrelevant.

THE COURT: Sustained. Produce the letter.

Q (By Mr. Hultman) Well, wasn't it just --

A (Interrupting) It was in the letter. They gave it to me. I asked them if there was any way they could help me, and {4825} they typed it out, Jack Schwartz.

Q Well, why did you -- when and where was it that you asked for somebody to help you?

MR. TAIKEFF: Objection, irrelevant. His consultations with counsel are irrelevant to the issue on this matter. In any event, he has the right not to answer that question under the attorney-client privilege.

THE COURT: That is a right for the witness to decide.

MR. TAIKEFF: I have a right to object if he is not being fully advised of his rights at this particular time.

THE COURT: I am not sure that counsel was involved.

MR. TAIKEFF: He said Jack Schwartz as his attorney. He consulted with him. I believe he said that on direct examination.

THE COURT: I did not hear that. The objection is sustained.

Q (By Mr. Hultman) Do you remember the request that your mother made, not what was in her mind, but the specific request that your mother made after the discussion concerning what your rights were, do you remember her requesting that a certain person come, do you remember that; do you remember asking that Mr. Arthur Newmann come and join and be present?

A I don't know. I don't remember.

{4826}

Q You wouldn't dispute that?

A What do you mean?

Q You are not saying it is not the case, you don't remember?

MR. TAIKEFF: Objection on the grounds of competence. If he doesn't remember, he couldn't dispute it or agree to it.

THE COURT: Sustained.

Q (By Mr. Hultman) Now, let me ask you just one simple question, Norman: Wasn't it in fact your mother all through this interview who urged you to tell the truth, and that was the reason for the statements, the answers, the story that you told at that time?

{4827}

A What do you mean? I mean, could you restate that so I can understand the question?

Q Wasn't it your mother's urging for you to tell the truth during this time that we are talking about is the reason you said the things that you did say?

A What do you mean? I mean, I don't understand your question.

Q I'm going to ask you one more time.

Isn't it the truth, Norman, that the reason that you said the things that you said that day was because for the first time somebody was asking you to tell what you knew happened on the 26th of June?

A Yeah. She told me that. But they weren't true.

Q What you said that day wasn't true?

A You mean that first, the first time they came?

Q That's what we're talking about, the first time.

A Yeah. Right.

Q So what you said that day you are saying wasn't the truth?

A Right. This is what I thought they wanted to hear because they asked me those questions. Victor Harvey.

Q You didn't think it was important for you on that day with your mother present and her urging you to tell the truth just to tell whatever the truth was; is that right?

MR. MARING: Your Honor, may I talk to the witness?

THE COURT: Yes.

MR. MARING: Should I come up there or can he come {4828} down here?

THE COURT: Witness may step down to confer with counsel.

(Mr. Maring conferred with the witness.)

Q (By Mr. Hultman) Now, I want you to think very carefully in response to the next question that I'm going to ask you. How is it that you explain that it was the FBI on that day that mentioned there was an AR-15 in the hands of Leonard Peltier rather than you, when in fact the FBI agents were there didn't even know that such a weapon existed or was in anybody's hands?

MR. TAIKEFF: Objection, Your Honor. That assumes a fact not in evidence.

MR. HULTMAN: That assumes a fact that is in the record.

MR. TAIKEFF: May we note, may we know the basis of that statement, Your Honor?

MR. HULTMAN: The basis for that statement is the fact that there is no knowledge of any kind of an AR-15 even being in existence at that particular time.

MR. TAIKEFF: Are we talking about September 22, or October 10th?

MR. HULTMAN: I'm talking about September 22nd.

MR. TAIKEFF: Does the Government mean to say, Your Honor, that they did not find the .223 cartridge in the trunk {4829} by that time? Is that what Mr. Hultman is saying in this courtroom?

MR. HULTMAN: I am saying an AR-15. That is what I am referring to.

MR. TAIKEFF: Doesn't that cartridge get fired from an AR-15 that you found in the trunk?

MR. HULTMAN: At a later time according to the report it was so determined, Counsel.

MR. TAIKEFF: Well, what did it look like, a Pepsi-Cola bottle when it was found in the trunk?

THE COURT: Just a moment. The jury will disregard any comments by counsel which are obviously meant for the jury's attention. And I'm referring specifically to the dialogue that just took place between counsel. That was obviously designed simply to have the jury hear the argument.

It is irrelevant at this point in the trial with reference to this question pending before this witness.

MR. HULTMAN: May I continue, Your Honor?

THE COURT: You may proceed.

Q (By Mr. Hultman) Norman, it was in fact you that stated that day that Leonard Peltier had an AR-15, was it not, because you had seen him with an AR-15?

A What do you mean. I said it was, looked like an M-16. I didn't say it was an AR-15.

Q All right. It was, you then said that it was an M-16 or {4830} looked like an M-16; isn't that right?

A Well, that was after they told me that I knew who were down there. They asked me what kind of guns they were carrying and I -- they asked me about Leonard and I told them that he had one that looked like an M-16.

Q Now, didn't you indicate the same thing at a subsequent time when you -- did you at a time not too much later sign a statement which indicated the same things that were the statements

that you made at the time we're talking about now. Did you later sign an actual statement that told about the things that you had said on the occasion that we're just now discussing?

A Would you say that again?

Q Did you in fact sign a statement a little bit later concerning the matters and the things that we have just now been testifying about?

A Yeah. It was --

Q And I'm going to show you now what has been marked a similar copy as Defendant's Exhibit 110 and I am going to show you the original document itself and ask you whether or not you recognize the signature that is thereon?

A Yeah.

Q And whose signature is that?

A Mine.

Q And do you remember the time and the occasion when you signed that particular signature?

{4831}

A Yeah.

Q And was that on Chinle on the 10th of October in 1975?

A Might have been. I mean, the date, I don't know, I don't remember the date.

Q Well, if you were to look at the document itself would that help you in any way?

A What do you mean?

Q If you were to look at it would it give you an, or refresh your memory as to approximately what time it was?

A Yeah. The date's up there and the time.

Q And do you recall in having looked at it that that was approximately when it was, both date and time?

A No. Just remember that second time. I don't remember the date, though.

Q All right. Do you remember that it was sometime around 12:05 P.M., around noon sometime?

A Yeah. Around noon.

Q All right. And were the persons present who are indicated on there in addition to yourself?

A What do you mean?

Q Well, were the people that were there with you the same people as you have testified to earlier and that appear on this particular document, the agents?

A Are these the people that were there?

Q That's what I asking you.

{4832}

A Yeah.

Q All right. And did you likewise initial all of the various pages that are on that particular document?

A Yeah. They told me to.

Q And did you in fact use your initials at some places where some corrections of one kind or another were made?

A What do you mean?

Q Do you remember counsel asking you at an earlier time about possibly some corrections and your initials appearing on a similar document to this? A copy that he showed you. For example, do you remember making these initials right here (indicating)?

A I don't remember.

Q All right. Now, did you then at a later time appear before a grand jury?

A Yup.

Q And outside of the two times I have discussed with you now were there any other times that agents had talked to you about the events on the 26th of June, 1975?

A What do you mean?

Q Well, counsel asked you how many times, or words to this effect, that the agents had seen you and talked to you; and I don't remember exactly what you said, but I'm wondering whether

or not, and that's why I'm asking you the question, were there any times other than these two occasions up to now we're going {4833} to talk about the grand jury?

A No.

Q It was those two occasions; isn't that right?

A Yeah.

Q And those were the only times?

A Yeah.

Q All right. Did your mother go with you to the grand jury?

A Yup.

Q And was she with you outside of the time that you were in the grand jury itself to talk to you and visit with you and discuss anything with you that you wanted?

A Yeah.

Q Now, were there any FBI agents in the grand jury at the time you told the things that you told them in the grand jury?

A I don't think so.

Q Just a group of people, was it not?

A Yeah.

Q And somebody asking you some questions?

A Yeah.

Q Now, I'm going to ask you, Norman, whether or not you remember being asked this question at the grand jury. Do you remember being asked the question: "Did you see anyone other than the two agents go down towards the cars at that time?"

Do you remember being asked that question?

A Yeah, I think so.

{4834}

Q All right. And then your answer: "What?"

And then the question: "Did you see anyone go down, walk down toward the cars," and do you remember what your answer then was?

A You mean to that question?

Q Yes.

A Yeah. That I saw Bob, Dino and Leonard down there.

Q All right. Your answer was "Yes" and the question was: "Would you tell the grand jury as closely as you can what you recall about what happened and who the individuals were that went down there?"

Do you remember that was the next question then?

A Might have been. I don't remember the questions.

Q All right. And do you recall an answer, your answer then which was substantially what you just said a second ago and in a little greater detail, "Well, I was sitting by the propane tanks. Then I got up, I was looking on both sides of the houses. That house then I saw two people go down. I think one was Peltier and the other was Butler this way."

That was what you said to the grand jury in response to that general question. "Would you tell the grand jury as closely as you can what you recall about what happened and who the individuals were that went down there?"

Isn't that a fair conclusion? That is what you said at that time?

{4835}

A Yeah. I guess so, yeah.

Q There weren't any FBI men in there at that time, were there?

A I don't know.

Q Your mother was there outside, was she not?

A Who?

Q Your mother?

A Yeah.

Q You also -- do you remember being asked this question: "What happened at the time you saw three people down at the bottom of the hill by the agents?"

Do you remember giving any answer of any kind to a question of that kind?

A No, I don't remember.

Q This is after you had gone ahead and in response to that I do show the record fairly, that you indicated in response to a question that you said then: "I looked around again and the hood was up and then I saw three of them down there. And I don't know who the other one was."

"Question: Did you at one time indicate who you thought it was or who it might have looked like?"

And your answer: "Yes." And then the question to you: "Who was it?"

Do you remember what your answer was to the grand jury?

A No.

{4836}

Q Would you argue with me at all if I said the answer was: "I think it was Robideau."

Do you remember saying that?

A Yes.

Q All right. Now, then I get to the question I just asked so that I wasn't misleading anyone. The question was: "What happened at that time that you saw three people down at the bottom of the hill by the agents?"

Do you remember what your response was to that question?

A No.

Q Would you argue with me if I indicated the answer, the record was: "I heard some shots, I think it was three, or was it? Two or three shots, it was three shots."

Do you remember giving an answer of that kind?

A Yeah, I remember.

Q Do you remember the only time that I talked to you other than the brief moments on the night we've already discussed in Cedar Rapids, do you remember that occasion?

A You mean that night before we left?

Q Yes.

A Yeah.

Q Do you remember where it was that I met you and who was with you?

A No.

Q Wasn't it with your mother?

{4837}

A Might have been. I don't -- I can't remember.

Q You wouldn't say it wasn't your mother if I indicated to you that it was?

A I don't know.

Q She came with you, did she not?

A Cedar Rapids?

Q Yes.

A Yeah.

Q And at that time when I discussed some matters with you did your mother at any time indicate anything about the FBI at any time mistreating you when she was in your presence? Do you remember ever saying anything of that kind?

A What?

Q Do you remember when you and your mother and I were together her indicating anything in any way that anybody had mistreated you at any time?

A I don't understand your question.

Q Did your mother on that occasion, if you recall, make any complaints of any kind concerning any agents of the FBI?

A No. What she thought was after this, you know, she thought I wouldn't have to go to jail, you know, after this. This won't bug me no more is what she thought.

Q Norman, do you think that it's important that we tell the things that we saw and we observed?

A Are you trying to tell me that I saw them down there?

{4838}

Q No, no.

A That's what you're trying to say. I didn't see them down there. I'm saying that because the agents said that they said we know you saw this, we know you saw that.

Q My only question to you is just this if I might restate it to you.

A Yeah.

Q It's important that we honestly tell the things we saw and observed, isn't that a fair --

A Yeah. I did, too. I told the truth.

Q Would you now just please respond to my question. I'm just speaking in general terms. It is, and you feel strongly about that, do you not?

A Yes. It seems like, like you're calling me a liar. It seems that way to me. And I swore on that pipe there, sacred pipe.

Q No, my question, Norman, is this: Why is it then that even on the first occasion when somebody wanted to ask you truthfully what happened there that you asked your mother to take the names of the FBI agents?

A Yeah. That I told her to get the names of the agents.

MR. HULTMAN: I have no further questions.

REDIRECT EXAMINATION

BY MR. TAIKEFF

Q I think in response to a question from Mr. Hultman you said that Leonard Peltier was at Crow Dog's. Did you say that?

{4839}

A Yeah.

Q What date did you think you were being asked about?

A Could you say that again?

Q You were talking about a raid on Crow Dog's. Do you know the date that that occurred?

A September 5th.

Q Was Leonard Peltier there on September 5th?

A No.

Q How long ago had he left there?

A About a week, two weeks before that. I'm not sure. I think it was a week.

Q When Leonard was at Crow Dog's that summer do you know what he was doing there?

{4840}

A Yeah.

Q What was he doing there?

MR. HULTMAN: I object, Your Honor. This is beyond the scope of redirect.

MR. TAIKEFF: Your Honor, I'm trying to ascertain the date through this inquiry of his departure.

THE COURT: Very well. You may answer the question.

Q (By Mr. Taikeff) What was Leonard Peltier doing at Crow Dog's on the Rosebud Reservation that summer when you were there?

A Sun dance together. Sun dance.

Q What dates did you say were the dates of the sun dance that summer?

A July 29th through August 5th.

Q And do you recall, did he stay throughout the full sun dance?

A Yeah.

Q And do you recall how long after the sun dance was over he left the Rosebud?

A Would you say that again.

Q Yes. The sun dance ended on August 5th. How long did he stay after the sun dance?

A About, don't know, about two weeks.

Q Now Mr. Hultman pointed out the fact which is not in dispute that your mother was at your side.

A Uh-huh.

{4841}

Q When you were being interviewed by Agent Adams, Nez and Doyle. What was your mother doing during that interview?

A She was crying.

Q Now Mr. Hultman asked you a number of questions that were put to you on the grand jury and he also said to you, "Did you give certain answers," and he read your answers and you said basically "Yes, I was asked those questions and I gave those answers." Was that testimony true?

A No.

Q Were you afraid of the FBI when you were before the grand jury?

A Yeah.

Q When you came out of the FBI, I'm sorry, when you came out of the grand jury --

MR. TAIKEFF: Your Honor, I believe I have to correct myself. I may have misstated a question and put a fact in that should not be in.

Q (By Mr. Taikeff) What were the names of the agents who were there when you were interviewed and your mother was with you?

A J. Gary Adams and Victor Harvey.

Q It wasn't Doyle and Nez, is that right?

A No.

Q I was wrong about that?

A Yeah. You were wrong.

{4842}

Q When you got finished testifying in the grand jury and you came out, did you see any of the lawyers sitting at the government table?

A Yeah. It was that guy (indicating).

Q Which one is that?

A Sikma.

Q Mr. Sikma?

A Yeah.

Q Did he say anything to you?

A Yeah.

MR. HULTMAN: Your Honor, I object again. This is irrelevant, immaterial to any issue here and it calls clearly for hearsay.

MR. TAIKEFF: I'm asking him what was said, not to prove the truth of the statement.

MR. HULTMAN: And further --

MR. TAIKEFF: Prove the statement was made.

MR. HULTMAN: And further it's beyond the scope.

THE COURT: Counsel approach the bench.

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

THE COURT: What do you expect the answer to be?

MR. TAIKEFF: I expect the answer will be Mr. Sikma said quote "You did good. We could have put you away for a long time."

{4843}

MR. HULTMAN: I object to that.

MR. SIKMA: That's a lie. That's an absolute lie.

MR. HULTMAN: Absolutely irrelevant and beyond the scope of direct and highly prejudicial.

THE COURT: In view of the denial, the question will not be allowed.

MR. LOWE: Mr. Sikma's denial?

THE COURT: That is right.

MR. TAIKEFF: We accept your ruling, Your Honor.

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

Q (By Mr. Taikeff) Finally, Mr. Brown, Mr. Hultman asked you about whether you believed that it was important for every witness who comes here to tell the truth and I think you said, I don't mean to quote you, "Of course I believe that, I swore on the sacred pipe." When you testified before the grand jury, did you swear on the sacred pipe?

A No.

MR. TAIKEFF: I have no further questions.

THE COURT: Mr. Taikeff and Counsel approach the bench.

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

MR. HULTMAN: Your Honor, again --

THE COURT: Just a minute.

{4844}

MR. HULTMAN: I was going to --

THE COURT: I previously in these proceedings, Mr. Taikeff, called to your attention the rule which I thought had been violated.

MR. ENGELSTEIN: Rule 610 I believe on the oath.

THE COURT: Yes.

MR. ENGELSTEIN: 610 I believe.

THE COURT: 610?

MR. ENGELSTEIN: Yes.

THE COURT: Rule 610 which provides "evidence of beliefs or opinions of a witness on matters of religion are not admissible for purpose of showing by reason of their nature the credibility is impaired or enhanced."

I'm warning Counsel because of two occasions which Mr. Lowe mentioned that I did not think it was proper and I would like your explanation as to why you asked the witness questions?

MR. TAIKEFF: Your Honor said Counsel would not be permitted to argue to the jury one form of an oath or another was to be considered superior, that different categories of witnesses should not be considered more credible because they swear in a particular kind of way. However, Mr. Hultman opened the door on that inquiry because of the nature of his inquiry concerning this witness' beliefs in the necessity of telling the truth after pointing out that he gave testimony under oath {4845} in the other proceeding and then proceeded to ask him whether he believed it was appropriate to tell the truth when you come to testify and there was for this witness a specific personal difference. It may not be recognized by the law as between two different people but to this particular witness that issue was raised by Mr. Hultman's inquiry on cross-examination as to whether he believed it was appropriate for him to tell the truth.

MR. HULTMAN: I think, Your Honor, that the record will show my last question concerning the truth had to do with speaking with reference to law enforcement officers and coming forward I believe the record will show is my inquiry.

THE COURT: Just a moment. Just a moment.

MR. TAIKEFF: Immediately after reading --

THE COURT: I'm not going to pursue it any further. The record may show I consider it to have been an improper question, particularly in view of the previous ruling of this court.

MR. TAIKEFF: Okay.

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

MR. HULTMAN: No further questions. Thank you, Norman.

THE COURT: The Court is in recess until 3:55.

(Recess taken.)

{4846}

MR. LOWE: Your Honor, before the jury is brought back in, may I be sure the record is clear about the matters that we want procedurally to have straight by categories and it will only take me a moment so Your Honor knows what we are talking about. We have, first of all, Your Honor

has reserved decision on laboratory reports and Defendant's Exhibit 177 and the rulings on those would be something that might affect something that would take place before the end of the defense case.

We have 302s that we are going to resubmit and we have additional supporting argument on those. I have specific numbers on them.

We have several offers of proof which possibly could convince Your Honor to hear witnesses which you have previously ruled would not hear, although I frankly doubt it. But I would normally want to make those prior to the resting of our defense case.

Now what we are agreeable to doing, as I understand Your Honor has somewhat adopted, is to go ahead and finish up with the witnesses and take whatever government rebuttal witnesses there are so we can get the jury finished and consider these matters. In other words, we will rest subject to the record, if you will, and then if it becomes necessary to do something with regard to the jury, you can always do that later. I frankly do not anticipate that it would.

{4847}

THE COURT: Very well.

MR. LOWE: But I wanted to be sure we were clear as to all the matters we were going to raise.

MR. HULTMAN: Your Honor, we're going to be placed in the posture we certainly want the defense to rest before we are in a posture of deciding who is going to be on rebuttal. I'm not going to bring on rebuttal without defense having rested.

MR. LOWE: In order to put Mr. Hultman's mind to ease, I'm not speaking of raising any new matters. They are reoffers of things he's aware of. Obviously, if Your Honor's made some ruling that would let something in that he felt he needed to rebutt, I would be the first to say he would be permitted to do it other things in rebuttal. I'm not trying to mousetrap the government on this. Our expectation would be, it would not require more witnesses from either defense or prosecution.

MR. HULTMAN: Now I do resist, Your Honor. I do not want to be placed in the posture that the defense at the last minute is reading to the jury because that is not the proper procedure and that is why I'm insisting what I am insisting.

THE COURT: Very well.

Would the clerk of court advise me of the number of that exhibit commonly referred to as the green sheet.

MR. LOWE: 177.

THE CLERK: Your Honor, that's Plaintiff's 177.

{4848}

MR. LOWE: Is it plaintiff's? I thought it was defendant's.

THE COURT: I think it was marked Plaintiff's 177 and I think the defense offered it.

MR. LOWE: Yes.

THE COURT: That exhibit is received.

MR. LOWE: Thank you, Your Honor.

THE COURT: Will the clerk state the numbers of the so-called laboratory reports.

THE CLERK: Your Honor, they are exhibits, Defendant's Exhibit's 134, 135, 187, 188, 189, 190, 191, 192 and 222.

THE COURT: Those exhibits are received on the basis that I previously stated, that the dates will not be argued. They are received for the material that is listed in it.

MR. LOWE: Your Honor, may I just inquire. You said as you previously described. When you did describe them previously you said you were going to excise the portions that were bracketed in red and I'm not clear --

THE COURT: The entire exhibit will be received.

MR. LOWE: May I work something out with the clerk to either camouflage or remove the red bracketing so the jury does not think they have some significance.

THE COURT: It should be removed.

MR. LOWE: Maybe we can get clean copies between Government and Defense to substitute for those.

{4849}

THE COURT: Very well.

MR. LOWE: We would obviously accept your ruling that we cannot refer to the dates, Your Honor, but I understand your ruling.

THE COURT: Now there are some other exhibits which rulings have been reserved. One is the ski mask.

MR. HULTMAN: Your Honor, I would on behalf of this --

I'm sorry, Your Honor.

THE COURT: At the time that exhibit was offered, would you state the number of it? Will the clerk state the number of that exhibit.

THE CLERK: Your Honor, that's 21A.

MR. HULTMAN: Your Honor, I would at this time withdraw the offer of that particular exhibit.

THE COURT: Very well.

The other exhibit in which the Court, another exhibit which the Court reserved ruling on was the radio equipment found in the Jumping Bull residence. Would the clerk identify that by number.

THE CLERK: Your Honor, those are Exhibits 50A and 50B.

THE COURT: Very well. 50A and 50B, the objection to those exhibits is sustained.

Now are there any other exhibits on which the Court {4850} has not ruled?

MR. SIKMA: At this point Counsel for the, Mr. Taikeff and Mr. Crooks are discussing a defendant's exhibit regarding the Oregon matter and they should have that completed momentarily as to what should and should not be excised from that report. I think they probably have that now.

MR. TAIKEFF: Your Honor, Mr. Crooks and I have resolved the matter with respect to Exhibit 228.

THE COURT: Very well.

MR. TAIKEFF: And I think that if Your Honor wishes we can just show the clerk and he can amend the exhibit he has.

THE COURT: That procedure will be permitted.

MR. TAIKEFF: We'll take on moment, Your Honor.

THE COURT: Very well.

The Court will state for the record that the reason for the ruling on the use of the dates on the exhibits which I generally will refer to as the laboratory exhibits is that it appears the dates would be extrinsic of prior inconsistent statements of the witness. On checking the transcript of the proceedings, I note that on two occasions I suggested to defense counsel, Mr. Lowe, that matter, not that specific matter, but the witness be interrogated on whatever matters he felt were important in those exhibits and he declined to do so.

MR. LOWE: I think, Your Honor, that's a slight misstatement.

{4851}

THE COURT: The record will show.

MR. LOWE: Yes, sir. I mean you said any additional matters. I had already elicited the testimony I felt was important, that is, he affirmed they were accurate and true to the best he could do them when he made them which is all I think I need to do. Past recollection recorded. If it is an inconsistent statement, under the Rule of inconsistent statement which is Rule 613, if I'm remembering my number correctly, the only requirement, "That extrinsic evidence of a prior inconsistency is not applicable unless the witness is afforded an opportunity to explain or deny the same." He did affirm all of those report dates. Government Counsel, and he's a government witness, Government Counsel could have asked him anything they wanted to that he was offered an opportunity, that he had the documents and also that the opposite party afforded the opportunity to interrogate him there and they had a full opportunity to do that so that simply, even if we're offering it under Rule 613, and we were not, that would still be permissible under the Federal Rules of Evidence.

I might add, in addition, Mr. Sikma did bring out certain date information with regard to some of them and I think that at least the door was open in that respect.

THE COURT: Are there any other exhibits on which the Court has not acted?

{4852}

Mr. Lowe, are there some other matters?

MR. LOWE: Yes, sir, there are.

If your Honor wants, I will go into them now. I don't know if it will take a long time.

First of all, there were certain exhibits prepared by the Clerk pursuant to admissions made by the Court. I don't have the numbers. The Clerk has the ones I am referring to. This is where you admitted a specific paragraph of a 302 or an affidavit, and the Clerk has extracted by Xeroxography the particular portion which you did admit according to the Clerk's understanding.

However, in each instance the only thing that is on the piece of paper which is now marked as being the exhibit is the actual paragraph itself; and obviously, that is completely meaningless to the jury unless they have the heading of the document.

For example, in the case of an affidavit, they would simply have the portion of the affidavit which says at the top of the page, as an example in Exhibit 145, the State of -- the United States, State of Oregon, in the matter of Extradition and the matter of Leonard Peltier.

Affidavit, William P. Zeller, first being duly sworn, upon his oath deposes and says -- and then it should skip down to Paragraph 10, I think in this case that's what it was.

{4853}

So the jury understands what it is the particular paragraph refers to, what the document is, it is a part of, it should have a subscription and signature block. In other words, the objection that

was sustained was to the content of the affidavit, not the fact that it was an affidavit or who executed it.

To give the jury only that little squib that says "Paragraph 10", without anything explaining what it is, with date or name, would be hopelessly confusing and would not really carry out the substance of what your Honor has admitted into evidence.

I would request that each of these exhibits in question -- and maybe I better read them into the record to make sure the record contains the numbers I am referring to.

First, Defendant's Exhibit 145, 147 and 191, and 194 -- and those are the four of them -- that the Clerk be instructed to get with counsel and we can take the caption off of it, and the signature and subscription portions off of it, and delete the portions of the substance which your Honor has found inadmissible.

I think that would be a matter that I would ask your Honor to rule on, since the Clerk has called it to my attention and asked for our guidance.

THE COURT: What is the position of the Government {4854} on that matter?

MR. CROOKS: Well, we have no objection. I think Mr. Lowe is right, that this Paragraph 10 doesn't mean too much unless there is some indication of what document it came from, and we have no objection to that.

THE COURT: Defendant's 145, 147, 193 and 194 will be modified accordingly.

MR. LOWE: Thank you, your Honor.

The next item, your Honor: Your Honor ruled it was either yesterday or today -- time is slipping in here -- on the Oregon exhibit, over defense objection initially, that the entire Oregon exhibit would be received on the Government's motion.

Now, that has since then been modified somewhat. The Government withdrew its application and limited it to certain portions.

Your Honor did make the ruling -- I presume your Honor made the ruling because your Honor felt there was legal basis for admitting it under the Federal Rules of Evidence.

We can see no distinction between that document and a number of documents which the defense earlier had offered. It occurs to us that some of the things that have taken place in the trial since we have offered those documents may have either called your attention to some {4855} authorities you have had a chance to refer to, or perhaps the context of the case has suggested that they should be admitted; and I would like by speaking specifically to one document that comes to mind immediately, and to mention others generically by the numbers.

First of all, a document which we consider to be extremely important is the 302 which was prepared by Agent O'Clock which referred to the information he received in interview from Miss Johnson, a stenographer. I believe that's Defendant's Exhibit 75 for identification; and in particular the information there was offered only to show the proof of utterance or of

occurrence, that is, she actually heard radio transmissions which she testified she accurately wrote down to the best of her ability.

We did not offer it for the proof of the information contained in the radio transmissions themselves. We believed at the time, and we have argued since then, that that was not only not hearsay because it was only shown for proof of the utterance, but was also admissible under the various Rules.

Now, your Honor has ruled on the Oregon matter; and we believe that the authorities which the Government suggested, the Tompkins case and the other case -- the name escapes me, but it is 414 Federal Second 461, which your Honor, I believe, had an opportunity -- we all did -- {4856} to read during this morning at a recess concerning the Oregon matter -- that those two cases are clear cases standing for the authority that business records of police agencies can be admitted for the proof of the utterance, that is, the proof of the occurrence as long as it is not offered for the proof of third party declarations; and we specifically offer those, not for the proof of third party declarations -- and if necessary, would ask your Honor simply to instruct the jury that they are only offered for proof of utterance and not for the proof of the third party declarations then. That is to say, in view of the transmissions, in view of the Tompkins case and the other case, and your Honor's ruling on the Oregon matter, we believe that should be reoffered at this time.

In addition, as a part of the defense case in chief, not just on cross examination, your Honor may have drawn some distinction on that basis. We feel at this point we ought to be able to admit it.

I point out the first four pages are already in evidence, as I understand it; and we ask for the entire document for whatever legitimate purpose can be made by counsel. I would like to mention the others. Because the argument is the same, then your Honor can make a ruling on any or all. We would resubmit the other 302's {4857} we proffered on the same basis, Agent Adams and Agent Coward and some others.

I am giving the numbers. They are Exhibits 83, 87, 88, 91, 105, 106, 142, 144, 156, 166 and 178; and again we offer these for the proof of utterance or recollection and not for the proof of third party statements contained therein and would ask that the Court, if it is necessary, instruct the jury of that limited purpose.

We believe that these are properly admitted at this time as part of our case in chief even if they were not earlier offered.

Now, as to some of the exhibits also, your Honor, we offered specifically the whole exhibit and over objection, your Honor only allowed us to put in a paragraph or a line or several portions of the document; and we would reoffer the entire document in each of those cases pursuant to the same authority your Honor obviously had in mind when we offered only two sentences of the Oregon report and your Honor immediately received in evidence the entire report. Whatever the authority was your Honor had in mind at that moment is the authority I rely on for admitting all those 302's. I yield to your Honor on insight even though I don't have the specific authority.

THE COURT: The specific authority on that exhibit is {4858} I did not feel it was admissible; but I decided in the interests of justice to admit it, and then permit the counsel for the Government to have the balance of it admitted.

MR. LOWE: Your Honor, in the interests of justice, I adopt that as a very sound basis for admitting documents in this trial. I ask these 302's be admitted.

MR. TAIKEFF: I hope I might add, since your Honor is smiling, it sounded like to me it was in the interests of the Department of Justice.

MR. LOWE: These are the 302's that I will reoffer on that basis, and all of the previously enumerated bases at this time.

THE COURT: For the record, I would also indicate that I had in mind Rule 106 on that Oregon exhibit. That states the point.

MR. SIKMA: Your Honor, the Government retains its objections as to these matters inasmuch as they are narrative in nature; and for example, the radio logs, if they are only to show that radio transmissions were made and not to show the truth of the matter asserted, they seem to be totally irrelevant because it would be irrelevant if certain radio transmissions were made if they didn't have any meaning; and I think that an instruction in this regard with that much would be totally {4859} meaningless.

THE COURT: I will re-examine those exhibits before I rule on them.

MR. LOWE: Thank you, your Honor.

Finally, your Honor, there are a number of offers of proof -- excuse me. One last thing I had stuck in the wrong place.

Defendant's Exhibit 87 which was the 302 of Mr. Ecoffey, I believe was offered on one basis on the record that I heard; and I do not know whether it was also offered on the basis of proving the utterance and the various bases which I just enumerated for these other 302's; and your Honor did reject it and I just want to be sure that the offer was also made on that basis as well; and if your Honor would also just re-examine 87 in that group, I would appreciate it.

THE COURT: Very well.

MR. LOWE: Finally, we have offers of proof as to information which your Honor has rejected; and what would want to do here, many times on an appellate record if you simply say there are isolated instances of violence -- and you, I understand, have ruled we could not show them -- that's a little bit bare in black and white, does not tell the Appellate Court where it was prejudicial to exclude them, if there might have been any probative {4860} value as to state of mind.

At some point -- I don't claim it should be now -- on some of these witnesses, on Bambi Sanchez, William Rossmore, which was an isolated incident --

THE COURT: (Interrupting) Excuse me. Give me the first name.

MR. LOWE: Bambi Sanchez actually testified. Your Honor prohibited a certain line of inquiry.

I would want to make an offer of proof at some point as to what the questions were and what the expected answers would be.

William Rossmore was a witness we had called as to an isolated incident of violence which was --

THE COURT: (Interrupting) What was the name?

MR. LOWE: Rossmore -- (spelling) R-o-s-s-m-o-o-r-e. He was subpoenaed and called off after your Honor made a ruling we would not --

THE COURT: (Interrupting) R-o-s-s-m-o-o-r-e?

MR. LOWE: (Spelling) m-o-o-r-e. I believe that is the way in which it is spelled. He is an attorney from Connecticut.

In addition a witness named Jack Steele was involved in another incident in which he was beaten up. We understand your Honor's ruling covers those two.

It is not for the purpose of having to change the {4861} ruling, but merely to be sure the record reflects what the expected testimony was.

THE COURT: Jack who?

MR. LOWE: (Spelling) S-t-e-e-l-e -- so I would just want at some point to make a record on that.

With regard to Myrtle Poor Bear, in light of your Honor's ruling, there were witnesses, family members and others whose testimony would have been relevant to show that the state of mind and her fear was not something that had just occurred recently but extended over a period of time.

I understand in view of your Honor's ruling, that there was no purpose in calling those witnesses since obviously you had already ruled that her testimony would not be heard in chief. We would want -- and also that they were here on the 26th of June.

We would want to make a record of that. It might make a difference to an Appellate Court in the event of an appeal.

I believe your Honor did not allow any information or testimony as to the significance of the Poor Bear affidavits in the extradition proceedings in Canada although we felt that it indicated that as late as February of 1977 the United States Government was still basing very serious legal consequences on those affidavits; {4862} and I understand the Court's rulings, and it is not for the purpose of challenging that here but to make a proper record as to what we would have shown.

I believe that these are not matters which would call for rebuttal unless the Government wants to make an offer of proof as a type of rebuttal, so I don't think it's necessary to delay the return of the jury for those purposes; but perhaps sometime, even when the jury is out deliberating, if we could have some opportunity to put those on the record, I would like to reserve that

opportunity, so that is simply to advise your Honor on that and ask for any guidance you would give us on that.

{4863}

MR. LOWE: Your Honor has before him a matter you have not ruled on. That is the warning or the cautionary instruction to the jury about Exhibit 29-1 and 34-1, and I call your attention that we have had no ruling on that yet and what you will do on it.

That's the last, so if Your Honor would give -- if you'd just sanction what I have explained I would suggest as an offer of proof we can do that at a later time and not delay the jury returning.

THE COURT: As I understand it you did not bring forward William Rossmore, Jack Steele, either. William Rossmore or Jack Steele?

MR. LOWE: They were subpoenaed and their subpoenas were cancelled after Your Honor ruled that it would not be admissible rather than bringing them here all that way for that purpose. And I might add if Your Honor changes his ruling I think we could obtain them. But I don't understand that Your Honor would entertain a change of that ruling.

THE COURT: Well, the offer of proof as to those two is denied.

MR. LOWE: I'm not clear I understand why, Your Honor. You mean you refuse to reconsider or you will not even let us make an offer of proof? I just want to state it, Your Honor. I don't mean to call these people here and put them under oath and have them testify.

{4864}

THE COURT: Denied as being untimely.

MR. LOWE: Well, we haven't closed our case yet, Your Honor. I'll still call those witnesses if Your Honor wants, but I understand we could not call them and put them on the witness stand. This is why I want to do this before we rest.

THE COURT: The point is I have never specifically ruled on those. Those two witnesses have never been presented to me to my knowledge.

MR. LOWE: Can I just have a moment?

(Defense counsel conferred.)

MR. LOWE: Your Honor, I'm at a little disadvantage because it was on one of the dates that I was called home by an illness in my family. But I understand that Your Honor made a ruling that we would not be permitted to show specific acts of violence and that that was a ruling of the Court. And on the basis of that general ruling we cancelled a number of witnesses whose purpose solely would have been to give witness to specific acts of violence.

THE COURT: We can go on this at a later time, but I'm not going to take the time.

MR. LOWE: I make the offer of proof now and I make the offer available if Your Honor will not. Unless I misunderstood. Do I understand what Your Honor's ruling was that I was not here for. Am I correctly stating it?

{4865}

THE COURT: We will go into those later.

MR. LOWE: All right. Your Honor, I make the offer to produce them or an offer of proof if Your Honor would allow.

THE COURT: You may make whatever record you wish at that time.

MR. LOWE: Thank you, Your Honor.

THE COURT: Does that cover all the matters?

MR. LOWE: That's all I have, Your Honor.

MR. TAIKEFF: Yes, Your Honor.

THE COURT: Are you now ready to proceed?

MR. TAIKEFF: Yes, Your Honor. We have one thing that remains and then we will be prepared to rest.

THE COURT: And what is that?

MR. TAIKEFF: That's to read from exhibits recently admitted into evidence which the jury has not heard about yet.

THE COURT: Very well.

Jury may be brought in.

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

MR. TAIKEFF: May I proceed, Your Honor?

THE COURT: You may proceed.

MR. TAIKEFF: Your Honor, there is now in evidence a document which is numbered 228, an Oregon state police report, and in addition an exhibit numbered 227 which is {4866} entitled

"Information Report" which is from the Department of State Police in Oregon. I would like to read appropriate portions from these two exhibits to the jury if I may.

THE COURT: You may.

MR. TAIKEFF: Thank you. From Exhibit 228. I'm at page 4. The paragraph from which I am reading begins with the words "On November 17, 1975". The person who signed this report was Edward E. Hanson an Oregon state trooper. And it says as follows: "Writer, W-r-i-t-e-r inventoried the items seized from the motorhome and then researched the Plymouth station wagon. And at 3:45 P.M. turned the station wagon over to the FBI for their search. Most of the items seized by Writer during the search of the vehicles have been photographed and turned over to Special Agent Steven Hancock.

A list of these items is contained on an information report and receipted to Agent Hancock."

Exhibit 227 is an information report on the state police and the preamble sentence after the identifying information at the top says: "On November 18, 1975 the following property was released to FBI agents as requested by Malheur, M-a-l-h-e-u-r, county deputy district attorney by Ron Chatfield." And there follows a list. The seven items on that list is a Colt AR-15 caliber .223. On the last page of that exhibit is the signature which reads "Steven L. Hancock," and beneath the signature line it's typed, "Steven L. {4867} Hancock, comma Special Agent FBI".

Upon that, Your Honor, the defense rests subject to the record.

THE COURT: Does the Government have any rebuttal evidence?

MR. SIKMA: The Government does, Your Honor.

THE COURT: You may proceed.

MR. CROOKS: Your Honor, before our first rebuttal witness is called the United States at this time would reoffer Exhibit 38-H which has been previously identified as a document in the recreational vehicle in Oregon in September following the September 14th matter. Previous foundation has been laid that this was a document found by Special Agent Milam and it was a document identified by Mr. Mulholland as having had the fingerprint of Leonard Peltier. And we offer it at this time in rebuttal of evidence offered by the defense as to the character of the defendant.

MR. TAIKEFF: May we come to the sidebar on that, Your Honor?

THE COURT: You may.

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

MR. TAIKEFF: Your Honor, there is no proof that that was either authored or adapted by him. Merely happened to be in a place where he and other people were; and the mere {4868} fact that he touched it does not necessarily mean that he either adopted it or authored it or even read it in fact. There were at least five or six people in that motorhome traveling together.

THE COURT: Do you have any response to counsel's --

MR. CROOKS: Well, Your Honor, we have already stated it. The United States offers this to rebut the testimony offered that Mr. Peltier was a man of good character, quiet, peaceable type of individual and this is a document which he had in his possession which contained his fingerprints and which were found on the recreational vehicle from which he escaped on November 14, 1975. And we feel that it certainly has a direct bearing on the issue of his reputation and character and I think all the foundation has been laid through the fingerprint expert.

I had him testify without actually introducing the exhibit that Leonard Peltier's fingerprints were found on it and Special Agent Milam testified that it was found in the recreational vehicle, which among other things it had been found with Leonard Peltier's fingerprints on it.

THE COURT: I'm going to reserve ruling on that.

MR. TAIKEFF: Could I say something further in connection with it?

THE COURT: You may.

MR. TAIKEFF: I don't see how the fact that a person {4869} in a country that has a first amendment to the United States Constitution can be said to be of a given character because he touched or even touched and read a piece of political literature unless there is some proof that he generated it, distributed it, adopted it or assumed what it had to say as his principle. Doesn't go to his character at all. It would assume that if someone read a newspaper story about a burglary and left his fingerprints on the article it would be proof of the fact that he is a potential burglar.

MR. CROOKS: Well, Your Honor, I believe that this does, this does correspond with the testimony of the agents and photographs in evidence which correspond with, for instance, explosive devices. There are photographs of these in the Oregon photographs and I don't think there's any question that it's a direct connection between that and the vehicle and the condition of the vehicle. And I agree with the Court that when it was initially offered it would not have been relevant because counsel had not yet raised the character of Mr. Peltier and certainly they've now done so. And I think we're entitled to introduce it based upon the foundation that was previously laid; and as I said, for instances the watches tie in directly with testimony and document and photographic exhibit of watches which are being used for the making of the bomb.

MR. TAIKEFF: By the way, I don't know that there was {4870} a character witness who testified on the subject of his character or behavior --

MR. CROOKS: Mrs. Bennett, I assume that's what you put her on for.

MR. TAIKEFF: You misperceive what she said, totally misperceive what she said. We have shown and not denied that he was a person who was armed and lived in an armed encampment. You are not rebutting anything that has been conceded or proven by you and conceded by us in your case, or trying to put that in for your prejudicial basis because it's of extreme political value for someone. I don't know what organization put that out, but that's the only reason you are putting it out. And if it were relevant as rebuttal it should clearly be kept out because of the availing prejudice that it would generate.

MR. CROOKS: Well, perhaps I misunderstood, but I understood that about four or five of counsel's witnesses had testified to Leonard Peltier's character of being a man of nonviolence and so forth and this goes directly to that

MR. TAIKEFF: I haven't heard anybody testify that way in this case. No such witness has been called.

MR. LOWE: In any event, Judge, Mr. Crooks has a fingerprint present on that and I would not assume that he adopts it because his fingerprint is on that. I would violently oppose that in showing bad faith on the part of Mr. Crooks. I {4871} just wanted you to know that I'm a first amendment believer.

THE COURT: Court will reserve ruling.

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

MR. SIKMA: Plaintiff calls Bruce Dalton.

MR. TAIKEFF: We're happy to stipulate to the document if the Government wants to proceed without wasting any time.

MR. SIKMA: We'll be calling the witness, Your Honor. But we will accept the stipulation as to the admissibility of the document, Your Honor.

MR. TAIKEFF: We're not going to contest it, but we don't want Mr. Dalton to have wasted his trip to Fargo.

BRUCE DALTON,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SIKMA

Q Would you please tell the jury your name.

A My name is Bruce Dalton, I'm office manager at Dalton Buick International, Scotts Bluff, Nebraska.

Q And as an office manager are you the custodian of records made of sales of vehicles made by Dalton Buick?

A Yes, sir, I am.

Q Do you have the record of a sale which you of a 1975 orange Scout?

A Yes, sir, I have that right here (indicating).

Q And how many documents do you have there?

{4872}

A I have five documents here.

Q And do these documents relate to that sale of that vehicle?

A Yes, sir.

MR. SIKMA: Your Honor, could I have these marked as exhibits.

THE COURT: Documents may be marked.

MR. SIKMA: Your Honor, if there's no objection I would substitute a copy at this time so the, so Mr. Dalton could take the original.

MR. TAIKEFF: There's no objection. We don't need the originals here, Your Honor.

THE COURT: The copy may be substituted.

Q (By Mr. Sikma) I will show you what is marked as Plaintiff's Exhibit 230 --

MR. SIKMA: And since there's no objection I would offer it into evidence at this time, Your Honor.

MR. TAIKEFF: No objection.

THE COURT: Exhibit 230 is received.

{4873}

Q Does Government's Exhibit 230 made up of five parts show the sale of a particular vehicle?

A Pardon me?

Q Does Government's Exhibit, or Plaintiff's Exhibit 230 show records of the sale of a particular vehicle?

A Yes.

Q Does it also show the record of a trade-in of a vehicle?

A Yes. It shows Volkswagen Rabbit as being traded in on this.

Q Now to whom was the sale of the vehicle made?

A A LeRoy Casados.

Q What kind of vehicle was that?

A Sold to him was a 1975 International Scout.

Q And can you tell what the color of that vehicle was?

A It was orange.

Q And what was the date, if you know, of that sale?

A The date of the sale was the 26th. Eighth month, 26th day. The original order was written up the 25th subject to financing and then was completed on the 26th.

Q What year?

A '75.

Q So that would be August, on August 25th, 1975 an order was made for this vehicle?

A Right.

{4874}

Q And on August 26th, 1975, the transaction was completed?

A Correct.

Q Is that correct? Now was this a new or a used vehicle?

A New vehicle.

Q So this vehicle was not out of your organization or had not gone out of your lot prior to August 25, or August 26, 1975, is that correct?

A That's correct.

Q And what kind of vehicle was this traded for? What kind of a trade in? What was the kind of vehicle that Mr. Casados traded in on this Scout?

A 1975 Volkswagen Rabbit, two-door.

MR. SIKMA: That's all I have of this witness.

MR. TAIKEFF: I have just a few questions, Your Honor.

CROSS-EXAMINATION

BY MR. TAIKEFF:

Q I'm placing before you Defendant's Exhibit 95 in evidence. Is that an International Scout?

A Yes, sir.

Q And what color is it?

A Orange.

Q Now do you know Mr. Cadados?

A No, sir.

Q You were satisfied, were you not, that he owned the Volkswagen Rabbit which he traded in on the vehicle you sold {4875} him, is that a fair statement?

A Yes.

Q What other vehicles did he own at that time?

A I'd have no way of knowing that.

MR. TAIKEFF: I have no further questions, sir.

MR. SIKMA: I have no further questions.

THE COURT: You may step down.

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

THE COURT: You may.

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

MR. HULTMAN: Your Honor, this will complete the Government's testimony except I would like the opportunity of a ruling on the specific item that was proffered a moment ago, 38H, because I'd like the jury to be able to see that prior to the government's case as far as resting. That is the only item of evidence left.

The only other issue would be whether or not Counsel would stipulate that the vehicle at Running's is one and the same as this vehicle that -- I can tell you it is.

MR. TAIKEFF: I accept.

MR. HULTMAN: The two serial numbers are the same.

MR. TAIKEFF: I accept your representation.

MR. HULTMAN: The serial number that was --

MR. TAIKEFF: I'll accept it and make such a stipulation.

{4876}

MR. HULTMAN: It would save calling another witness.

THE COURT: I'm not prepared to rule on that exhibit.

MR. HULTMAN: All right, Your Honor.

The government would rest. Could the government have the understanding that if the Court did rule that exhibit did come in that government would have the opportunity to project it to the jury?

MR. TAIKEFF: I would assume you could do that in summation and not only project it but argue about it at the same time.

MR. HULTMAN: I suppose we could do that. That's good enough.

THE COURT: I would think that you certainly can argue from any exhibits that are received.

MR. HULTMAN: That's fair enough.

With just that simple stipulation, then the government would rest. I would like to make that statement to the jury.

THE COURT: The stipulation relating to the vehicle?

MR. HULTMAN: Yes.

THE COURT: Okay.

MR. LOWE: We would have some motions, obviously. I'll say that here. The motions which I think Your Honor would want to at least hear the substance of them, if not full argument.

THE COURT: I'm going to hear argument on the instructions this afternoon, too.

{4877}

MR. LOWE: Okay. Fine. We concur.

Has the jury made its choice, Your Honor?

THE COURT: I was going to mention that after they left. They would prefer to be charged either, if they can be charged Friday, fine. If not they do not want to be charged before 11:00 o'clock on Saturday, and then they would deliberate through Saturday but they would not deliberate on Sunday. So that would be their preference.

MR. TAIKEFF: Has Your Honor decided whether he's going to begin instructing the jury at or about 5:00 P.M. on Friday?

THE COURT: I'm not inclined to. I would probably, if we get down to that late I would probably wait and instruct them at 11:00 o'clock Saturday morning. I feel after a case of this length and the arguments that necessarily have to be made, I do not anticipate it would be particularly, it would be better to instruct the jury the following day.

MR. SIKMA: I just have, plaintiff and defendant will stipulate that the vehicle, Exhibit 230 is one and the same as the vehicle which is covered in exhibit, in which Government Exhibit 31A, Ron Williams' service revolver was found.

MR. TAIKEFF: No problem with that.

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

{4878}

MR. SIKMA: Your Honor, the plaintiff and defendant will stipulate that the vehicle identified in Government Exhibit 230, the orange Scout International identified in Government Exhibit 230 is one and the same as the vehicle in which Government Exhibit 31A in which Ron Williams' service revolver was found.

MR. TAIKEFF: That is stipulated to, Your Honor.

THE COURT: Very well.

MR. HULTMAN: That, Your Honor, completes the rebuttal evidence of the government.
Government rests.

THE COURT: Members of the jury, the evidence is all in. There are some legal matters that the Court will have to take up with Counsel yet this evening, but they may now be excused from the courtroom and may return to your hotel. Insofar as the jury is concerned, the Court is in recess until 9:00 o'clock tomorrow morning.

The Court will stand in recess for ten minutes 5:05.

(Recess taken.)