

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.

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

VOLUME XVIII

Pages 3713-3928

{3713}

FRIDAY MORNING SESSION

April 8, 1977

Pursuant to adjournment as aforesaid, at 9:00 o'clock, a.m., on Friday, April 8, 1977, the Court met, present and presiding as before; and the trial proceeded as follows out of the presence and hearing of the jury, the Defendant being present in person:

THE COURT: Are there any matters to be brought before the Court before the jury comes in?

MR. TAIKEFF: Yes, your Honor, there are. Does the Government have any?

MR. HULTMAN: Go ahead.

MR. TAIKEFF: We wanted to report, as we said we would, on the subpoenaing of Clarence Kelly. We have decided we would not subpoena Clarence Kelly. Therefore, I notify the Government accordingly.

We do have some information I would like to communicate to the Court concerning witnesses for whom we have asked subpoenas, but for whom we do not need them. I don't know that we need necessarily to take the time of Government counsel and the jury to do that.

We would like an opportunity sometime today, when it is convenient to the Court, to report to the Court on that subject as a continuation, so to speak, of yesterday's 5:00 o'clock conference with counsel.

THE COURT: Very well.

{3714}

MR. TAIKEFF: At the same time we have decided what we would ask of the Court in connection with the Myrtle Poor Bear matter. We believe that we are entitled to take that up with the Court on an ex parte basis and make application at this time to do so when we report to the Court on the subject of subpoenas generally.

I would delineate the scope of that by saying that we seek the Court's assistance in finding the witness, and in that regard we think it essentially constitutes an investigative effort of the defense.

We think we are entitled to make our application on that limited subject on an ex parte basis.

THE COURT: And what others?

MR. TAIKEFF: We believe that a subpoena on Special Agent Norman Zigrossi, subpoena duces tecum was served within the past couple of days.

I would ask whether the Government is aware of his presence and whether or not he produced the object which was subpoenaed. If they have no knowledge, we will make other inquiry.

MR. HULTMAN: I didn't even know he was subpoenaed until this very second.

MR. TAIKEFF: I also wish to note that it has been called to my attention that there was an obligation on the {3715} part of the Government to make a more formal response with respect to the subject of electronic surveillance.

I am wonder whether the Government thinks that it has done so, and the reason I am speaking with some uncertainty is that certain papers were exchanged about two weeks ago, and because of other pressures those papers have not been reviewed by me; and so I am sort of calling upon the Government to help me as to whether that was their response in that particular regard.

MR. SIKMA: Yes, your Honor, I think I filed items in that regard and have given the defense a copy of it.

MR. TAIKEFF: I did receive it.

The only other thing I have, your Honor, is in relation to a letter, a copy of which was handed to me within the last 10 minutes. I don't know whether the Government has seen it.

THE COURT: I have instructed the bailiff to hand the Government a copy.

MR. TAIKEFF: I see.

THE COURT: Are you referring to Mr. Eagle?

MR. TAIKEFF: Yes. I am wondering if your Honor would hear briefly from counsel on that subject?

May I just say one or two sentences on it because I think the letter is very misleading and your Honor should know a fact or two.

{3716}

THE COURT: Yes, you may speak on it.

MR. TAIKEFF: It was pursuant to an arrangement made through the Court that counsel, that is to say, Mr. Lowe and myself, had an interview with Mr. Eagle at the jail in Moorhead; and it was supervised by a Marshal, although he was not present in the interview room.

The prospective witness voluntarily spoke with us, and I would say that we spoke at least an hour. It was a very compatible discussion. He was very easy going, answered all of our questions, at the end of which time we told him that we anticipated we would call him as a witness and we left.

There was no acrimony, there was no tension and I don't know what is the basis for the statement or statements made in this letter because as far as I know there was no other contact; but one contact at Mr. Eagle's request, he asked that Mr. Ellison call him on the telephone and assure him -- apparently Mr. Eagle knows Mr. Ellison because Mr. Ellison works and practices in Rapid City which is close to the Reservation; and he wanted Mr. Ellison to assure Mr. Eagle that Mr. Lowe and I were sensitive to his needs as a person, as an incarcerated person, that we were not out to harm him in any way; and so when Mr. Lowe and I left the jail, I got in touch with Mr. Ellison, and I told him of Mr. Eagle's request, and {3717} I said that -- I suggested he call Mr. Eagle and give him whatever assurances Mr. Ellison thought were appropriate under the circumstances because Mr. Ellison has worked with Mr. Lowe and myself in various ways in the past.

I do not know that that telephone conversation occurred. I assume it did because Mr. Ellison generally takes care of the matters that he has to attend to.

As far as I know, those are the only contacts that we have had with Mr. Eagle. I do not believe that there is any sound basis for the statements made in this letter.

MR. HULTMAN: The Government has no knowledge concerning the matters your Honor.

{3718}

THE COURT: Would counsel approach the bench for a moment on the Eagle matter.

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

THE COURT: The bailiff informs me that, I don't know whether he secured this information through defense counsel I or from Jimmy Eagle's grandmother, that apparently one of his primary concerns is that he's about, or he feels that he's eligible for probation now or in the near future and he's concerned as to whether or not his testimony at this trial would in any way jeopardize his opportunity for probation, or would subject him to possible future prosecution on some alleged wrongdoings on which he has not yet been prosecuted. I

MR. HULTMAN: Well, I might state for the record, Your Honor, that first of all the appearance of a witness certainly would not, and I think Mr. Eagle would be the first one to indicate that our relations between counsel and his counsel have been nothing but the most honorable from beginning to end. And I certainly would indicate on the record that that would not be the case.

However, if the testimony were such that I felt that he was not being honest, was not being fair, and so forth then I would likewise on the record indicate that that certainly would indicate any recommendations and so forth that I might have in the future because I think that would be an inappropriate {3719} matter.

But I only say that in response to the Court. The thought never entered my mind until the Court asked the specific inquiry. I would indicate, though, in the general matter that's concerned evidently with this letter, Your Honor, is a problem and it's not Mr. Taikeff certainly that I'm now going to address the remarks to, and I would want that very clear on the record, that one of the problems the Government has had from the very beginning of the events that concern this case, in fact there will be evidence even of certain witnesses that are in this case, maybe yet even testimony that will yet come, that all of the persons who were possible witnesses to the events that were nonGovernmental employees, to-wit: I'm saying all of the Native American witnesses, have all been represented literally from the very beginning by one group which has made it, if not impossible, extremely difficult for the United States at any time to secure information and to secure witnesses.

And even in the course of this trial one attorney has represented four, four witnesses on the record, Mr. Tilsen. The Wounded Knee Offense-Defense Committee has been used quite often, even from the beginning providing a letter to any possible witnesses even though they were not had, not been personally contacted and asked to represent them they were. They on their own provided a letter which certain individuals {3720} then presented to the Government indicating that they were, they refused to talk in any way and that these particular I people or groups are going to represent them, even though it hadn't been solicited by them.

So I just would want to put that on the record at this time because I think the letter then is indicative of that kind of a problem that has arisen quite often in the course. And as I say I certainly want to again relate that this has nothing to do with counsel, and I would make that very clear that Mr. Taikeff has not been a part to what I'm now talking about. It has to do with

other individuals and other matters. Maybe Bob might have something further on the specific issue

MR. SIKMA: When the investigation was in its early stages I was assigned as a special assistant in South Dakota, in October of last year after Jimmy Eagle's indictment. And his grandmother and relatives of his obtained a court order at that time requesting that he not be contacted by the Wounded Knee Legal Defense-Offense Committee. And the reason for this was because their belief was that since all the witnesses, all other witnesses were represented by the Wounded Knee Legal Defense-Offense Committee that there was a conflict of interest between many of the witnesses and the defendants themselves. And so the Court entered an order ordering the Wounded Knee Legal Defense-Offense Committee not to contact Jimmy Eagle on the basis of his grandmother's {3721} request, and he also I believe signed the application.

So he was then represented by a man from Birmingham, Alabama. I could not recall his name, but at the time we made an agreement with him with regard to the time of his trial and he made certain representations to us at that time about his theory of the case and indicated that under certain circumstances the charges against him would be dismissed. And although those circumstances have not fully come about because they included an instance if the jury verdict went against the Government in the case of Robideau, Butler and Peltier that the case would be dismissed. And I think under some of the circumstances of things that he indicated to us it depends what his testimony would be, that might possibly be consistent with what he has thus far indicated to us and as far as his involvement or his theory in the case.

THE COURT: You are suggesting that he is still subject to indictment?

MR. TAIKEFF: It has been dismissed I understand.

MR. HULTMAN: Yes, we dismissed the indictment.

MR. SIKMA: But it was not dismissed with prejudice, and I think that there is certainly, we have no idea what his testimony is going to be. If he claims, you know, if he states I was not there, something like this --

MR. TAIKEFF: That is his position by the way.

MR. SIKMA: We were provided with a number of other {3722} inconsistent statements, not by him but other people.

MR. TAIKEFF: He is, as far as I can tell from the interview, I have no reluctance in telling you he is going to claim that he was not there, not at the scene.

MR. SIKMA: Well, so far no witnesses have placed him at the scene.

MR. TAIKEFF: Okay.

MR. SIKMA: Although his own, he has made statements to a number of people that, you know, describing the scene and describing the incident stating that he was there. So, you know, whether he was or not is a factual question.

But I think that under those circumstances there are possible issues where he should be made aware of his rights and should be made aware of the possibilities in order to protect his own interests in this regard.

MR. TAIKEFF: May I ask Your Honor whether the Government would be willing in some written form, letter or memorandum, giving us in detail what are the conditions and understanding with respect to Eagle so that we may evaluate that in determining whether or not we should call him and what position we should take in connection with any matter that may come up at the time we call him.

I assume that Mr. Sikma having revealed as much as he has that it need not certainly remain confidential.

MR. HULTMAN: I think another matter between counsel, {3723} I don't think, Elliot, there's anything in it that in any way is other than basically what counsel has not represented on the record, and I don't think there's anything in any way that could possibly harm you in any way.

If there was I would certainly be the first one to mention it to you. Our position, let me relate a little bit more, the basis as indicated by counsel for his indictment, at least I assume that the grand jury, what they concluded was the basis for a number of statements made by Jimmy Eagle. Now, the truth and veracity of those of course ultimately have to be tested by the normal tests. But on the basis of his own statements to other people was the basis for, and was the proof for his indictment.

Later as indicated here by this record other than his statements basically and maybe one other item, it was determined in our mind that through his counsel's representations to him primarily to draw the conclusion ultimately which we then drew and was the primary basis for that negotiations then.

But I don't think there's any possibility that there's anything of knowledge, what I'm saying, or information that would be other than what literally counsel knows right now. I can't even imagine it would be anything else.

MR. TAIKEFF: Mr. Hultman's first response to Your Honor's inquiry about any difficulties that Mr. Eagle might encounter if he testified concerned the necessity that he {3724} testify truthfully. I hope the Government and the Court realize that we anticipate and expect that he will testify truthfully, specifically that he was not there and in the main that's the bulk of his testimony.

MR. HULTMAN: Well, the reason for my response, Counsel, was the fact as I say that because of a number of earlier statements made by him, which was the basis then of certain evidentiary matters, is why I raised the issue because obviously what he has later said is different from what he had earlier said.

MR. TAIKEFF: I understand. I was reminded by something that Mr. Hultman said to report an additional fact to Your Honor. In the conversation Mr. Lowe and I had he did express concern about his release, but only in this respect: He said that he expected it shortly to be eligible to go to a halfway house as part of his release on parole, and he wanted to make sure that he was not going to be held here in an excessive amount of time because they thought they would not make the release of him from here but would have to return him to a regular institution. But we assured him that we would get him on the stand and off the stand in a short time and that's the only concern he expressed to us about his parole status.

THE COURT: Well, that seems to corroborate to some extent at least what the bailiff has reported to me. And apparently his grandmother is here.

{3725}

MR. HULTMAN: Oh, I see.

THE COURT: In the courtroom, and has indicated she wants to represent him. And the bailiff advised her that she would not be permitted to do that.

MR. TAIKEFF: You mean the local rules don't allow Prohogmicha of grandmothers?

THE COURT: I guess I refer to Mr. Nelson as the bailiff, but of course he 's my second law clerk. But he did advise her that she would not be able to do that, to represent him. And I gather that there is one additional request that he has then, or that she has on his behalf, is that he be permitted to talk to his counsel apparently in Birmingham, is that what it is?

MR. TAIKEFF: Somewhere in the South, Atlanta or Birmingham.

MR. HULTMAN: I think he ought to be able to talk with his counsel.

MR. TAIKEFF: That's another point you just reminded me of. We spoke with him about contacting his counsel and asked him whether it was possible for him to make a phone call from the jail. And he said "Yes." And we recommended to him that the next morning, I think we saw him last Wednesday night, I don't remember exactly the day that he called his counsel and discussed the matter. And we assume that he did, but we did encourage him to make contact with his counsel.

{3726}

THE COURT: When do you intend to call him?

MR. TAIKEFF: Today.

THE COURT: I know. When today?

MR. TAIKEFF: If there is no compelling reason to do otherwise, after we finish with Stoldt he would be the next witness. But there's another witness from Oregon who's anxious to go back. But we've run into a problem concerning whether he has all the documentation necessary to testify, and so we may not be able to call him as planned. Your Honor may recall we called his name first before Stoldt, then he disappeared, then we called Stoldt. Now we find out he doesn't have all the documentation. But I think Eagle will be next.

MR. SIKMA: I'm trying to think of the lawyer's name. It seems to me it's Burke.

MR. TAIKEFF: Robert Bryant.

MR. SIKMA: Bryant.

MR. TAIKEFF: And Mr. Ellison tells me that Your Honor's law clerk has been given his telephone number by Mr. Nelson.

THE COURT: Mr. Nelson, would you come up here.

(Mr. Nelson approached the bench.)

THE COURT: Would you contact the marshal and tell him that I would like Mr. Eagle to be able to have an opportunity to visit with this attorney of his, or where is it, Birmingham?

MR. NELSON: Either Alabama or Louisiana.

THE COURT: Apparently you have the telephone number?

{3727}

MR. NELSON: Right.

THE COURT: And I would like him to have that opportunity to visit on the telephone with his counsel before gets called to testify. So why don't you give the message to the marshal at this time and I understand you have the number.

MR. NELSON: Right.

THE COURT: And I'm sure that he can call him FTS I would expect at least.

That completes the bench conference.

MR. TAIKEFF: Thank you, Your Honor.

{3728}

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

MR. HULTMAN: Your Honor, I have a matter, too, I would like to take up before the jury is called, if I may.

THE COURT: Very well.

MR. HULTMAN: Your Honor, the first item is I'd like to ask Counsel if he is not going to use the agents he doesn't plan to today, I'd like to be able to release them in order they might be able to go home for the weekend, other than those he intends to call. If he does intend to call all of

them, I will certainly keep them here today; if he doesn't intend to, I would like to be able to release them so they can catch a plane. Otherwise tonight they would not be able to.

THE COURT: Just a moment before we go into the other thing.

MR. TAIKEFF: Could I have a moment to confer? I might be able to accommodate them immediately.

Your Honor, we believe we have enough witnesses on our own, so to speak, to occupy the day's activities. However there is one possibility and that is for the appearance of Agent Coward. I'm wondering whether the government would be agreeable to releasing all the FBI agents except Coward. As soon as a clear indication comes we don't need Coward or don't have to have him today, we'd be happy to release him as {3729} well for the day.

MR. HULTMAN: You want then the balance of them back for Monday?

MR. TAIKEFF: Yes. They will all testify.

MR. HULTMAN: Thank you.

The other item, Your Honor, I had this morning filed, and I don't know whether Counsel has the filing yet, and I don't raise at this time to necessarily argue it but I raise it because procedurally again I understand that one of the names given to me, and I think by Counsel even yesterday for a moment was even going to be called yesterday and may well be today is a gentleman by the name of Vine Deloria. I wanted to raise it because I do have a motion which I have filed. I think it's very self-explanatory that it is the position of the government and will be that this witness pursuant to that motion has no testimony which would meet the test specifically in terms of the two rules, 17(b), 12.2(b) that I have certified and I don't mean to argue the motion, I'm not about to at this time, but at least I wanted to put both the defense and the Court on notice that that is the position of the government and that maybe there ought to be just something argued ultimately prior to the time he does take the stand.

MR. TAIKEFF: I only at this time am able to respond very generally. I haven't seen the government's motion paper. I would like the government to be aware of the fact that we {3730} understand the position they take, particularly with respect to the so-called massacre psychology. We have no intention of offering any testimony along those lines. We are carefully at this very moment going over the potential testimony of Mr. Deloria and I trust that the decision to put him on will only be made with respect to those items for which there has been some indication that the Court will allow the testimony, and I don't know that it will be necessary to argue the motion. But in any event, we will be prepared both with respect to his testimony and to answer the motions sometime later today.

THE COURT: Very well.

MR. HULTMAN: That's all I have.

MR. TAIKEFF: I do have a few other witnesses' names, if the government would like to have them now.

MR. HULTMAN: Fine.

MR. TAIKEFF: We have added to the list Stanley Doremus, D-o-r-e-m-u-s, Della Starr, S-t-a-r-r. I think yesterday I gave the government the name Jim James, am I correct about that?

MR. HULTMAN: Right. Right.

MR. TAIKEFF: Then Jim Hall, Wayne Curry, C-u-r-r-y, Bambi, B-a-m-b-i, Sanchez, S-a-n-c-h-e-z, Kevin McKiernan, M-c-K-i-e-r-n-a-n.

THE COURT: The jury may be brought in.

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(Whereupon, at 9:35 o'clock, a.m., the jury returned to the courtroom, and the following further proceedings were had in the presence and hearing of the jury:)

MR. TAIKEFF: May I proceed, your Honor?

THE COURT: You may proceed.

MARVIN STOLDT,

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

DIRECT EXAMINATION (Cont'd.)

By MR. TAIKEFF:

Q Mr. Stoldt, have you given any thought to the testimony that you gave yesterday since you were in the courtroom?

A Some, yes.

Q And is there any testimony which you gave yesterday which, for any reason, you wish to either change or correct?

A Not to my knowledge, no.

Q Would it be comfortable for you if you moved the microphone a little bit to your right so that your tendency would be to look at the jury as you testify?

A O.k.

Q Thank you. I am going to place before you a document which has been marked Defendant's Exhibit 194 for identification. It is an FBI 302, dated September 11, 1975, based on an interview on September 4, 1975, of you by Special Agent Coward.

A (Examining) Can I go through it?

{3732}

Q Yes. In fact I would like you to do it. I don't want you to read it in precise detail because it will take a long time.

A O.k.

Q However, if I ask you any question and you feel it is necessary for you to read any part or all of that document, please say so and I am sure it will be appropriate for you to do so.

A Fine, I appreciate that.

Q By the way, did you and I speak since you left the courtroom yesterday?

A No.

Q In person or on the telephone?

A No, I never saw you any place.

Q Or anyone from the defense team?

A No.

MR. HULTMAN: May I ask that you inquire as to the Government?

Q (By Mr. Taikeff) Did you speak with anyone from the Government?

A No.

Q O.k.

A (Examining).

Q I notice you are now reading from the second page. I will interrupt you only to ask you two preliminary questions; and I am perfectly willing to let you keep looking.

{3733}

Yesterday you testified that you did not see Agent Coward for several months?

A Yes.

Q After June 26?

A Yes, I think I mentioned two months.

Q Yes. Now, from June 26 to September 4 is approximately two months, a little more than two months?

A Yes.

Q Is there any reason why you would doubt the accuracy of a statement, if such a statement were made that you were interviewed by Coward on September 4, 1975?

A Would you repeat that again, sir?

Q Yes. This report seems to be an interview of you by Coward which occurred on September 4, 1975, which was typed up on September 11, 1975. Considering your testimony of yesterday do you have any reason to believe that it is not accurate, in other words, isn't it a fact that on or about September 4, 1975, Coward interviewed you?

A Yes.

Q And was that the conversation that you talked about when you said you didn't see him or speak with him for two months?

A That's true, what I was getting at.

Q O.k. Now, my second question is, am I correct that between June 26th and September 4 -- we will use the date, September 4 -- you did not speak with him at all whether on the case or any {3734} other reason?

A No.

Q You did not speak with him?

A No, I never saw him again after the 26th of June.

Q But I asked you whether you spoke with him because I am thinking about the thing called the telephone. Did you speak with him in between?

A No.

Q Did you speak with any other agents about the events of June 26?

A No.

Q You are sure about that?

A I am positive.

Q O.k. Now, satisfy yourself to whatever extent is necessary by looking at that report.

A (Examining).

Q By the way, did you read that report in Cedar Rapids when you went to testify at the trial last summer?

A Briefly.

Q And at that time did you note to the Government or to the FBI any objections about any serious mistakes you found in there?

A Not that as I recall.

Q O.k. Please continue reading. Let me know when you are finished, sir.

{3735}

A O.k. (Examining).

(Counsel confer.)

Q (By Mr. Taikeff) What page are you up to, Mr. Stoldt?

A Five.

Q Have you read everything on Pages 1, 2, 3 and 4?

A Yes.

Q Now, am I correct that the top of Page 5 begins with events occurring at approximately 6:00 p.m.?

A Yes.

Q Do you think it is fair for us to stop looking since I am only asking you about something which took place during the afternoon?

A Would you repeat that again, sir.

Q Do you think it would be fair of me to ask you to stop reading the report which has numerous additional pages since you have now read past the part of the activities which we have been talking about?

A That's all right, if you want me to.

Q O.k. Now, sometime that afternoon there was a small fire fight, or at least some firing coming in between an Indian male, a single Indian male and Agent Coward, is that right?

A Yes.

Q Now, did you tell Agent Stoldt in that interview which took place on September 4, 1975 --

A (Interrupting) Would you repeat that again.

{3736}

Q Yes. Did you tell Agent Coward -- if I said Stoldt I stand corrected --

A (Interrupting) O.k.

Q (Continuing) -- in the interview of September 4, 1975, that when he was having that fire fight or came under fire from that single Indian male, you were watching through your binoculars with the zoom lens?

A Yes.

Q You told him that in the interview?

A Yes.

Q Now, when you were in the house from which you saw the people running --

A (Interrupting) Yes.

Q (Continuing) -- why was it necessary for you to use somebody else's zoom binoculars if you had your own zoom binoculars?

A Well, I won't elaborate a whole lot, but I think that was the only pair of binoculars we had and the guys were passing them around the room, you know.

Q Well, I don't know. You have to tell us.

A I just did. I said that was the only pair of binoculars I think that we had, and the other guys were taking turns using them at this point.

Q But you didn't tell Agent Coward that you were using the group's binoculars, you said "my binoculars"?

A Actually they weren't my binoculars. They belonged to the {3737} Government, some of the officers had checked out. They were in my vehicle, as I recall.

Q So what you are saying is that after that episode, you then took those binoculars and returned them or gave them to somebody else?

A Yes. As I recall, they were, you know, like I said, I think that was the only pair of binoculars outside of some rifle scopes, you know, that they were using, a pair of binoculars to glance the area.

Q Now, do you recall how much earlier than the sighting of the people at a distance was this episode where you were using the group's binoculars?

A Would you repeat that statement again?

Q Yes. I will break it down into a few questions.

You just told us that there was an incident where there was a single Indian shooting at Coward apparently, and you watched it through binoculars, right?

A Yes.

Q That occurred at a certain time?

A Yes.

Q What time was that, approximately?

A Oh, approximately, I would say roughly maybe around 1:00 o'clock, 1:30.

Q And then there was a time when you were inside the house when you looked up or looked out to the east, and you saw some {3738} people running?

A Yes.

Q And what time was that, would you say?

A Like I said, nobody was looking at watches. It was hard -- it is hard to tell, you know.

Q Mid-afternoon?

A It could have been, you know.

Q O.k., but there was some time between, at least an hour between that first event and the second event?

A Yes, roughly.

Q Do you remember returning the binoculars to or giving the binoculars to one of the other members of your team?

A There was a lot of excitement going on at this time, and as I recall, somebody took the binoculars from me. I don't recall who it was, but one of the other officers.

Q Then you didn't have them on when you were in the house?

A We were all in the house.

Q You didn't have them around your neck?

A No.

Q And then when you made that sighting, you took the binoculars from a person near you, is that correct?

A Yes.

Q Well then, tell me whether or not in the interview of September 4, 1975, you told Agent Coward that while you were inside the Pumpkin Seed house, you were sitting by the window {3739} which was open, located on the east side of the house, watching the Jumping Bull house for any activity with your binoculars?

A I was?

Q I am asking you whether you ever told that to Agent Coward on or about September 4, 1975?

A It is possible I did, yes.

Q Well, did you lie to him when you told him that?

A Why should I lie to him?

Q I can't answer that question, sir.

The question to you, sir, is: Did you lie to him when you said that?

A I have no reason to lie to Agent Coward.

Q Well then, let me ask you whether it is true that while you were inside the Pumpkin Seed house, you were sitting by the window which was open, located on the east side of the house, and at that time you were watching the Jumping Bull house for any activity with your binoculars?

A Where are you getting this?

Q Don't look at the document, please. Put the document down Turn it face down, please.

MR. HULTMAN: Well, I object, your Honor, to the procedure counsel is now using. He has established the fact earlier that the man didn't have any --

MR. TAIKEFF: (Interrupting) I would like to go to the side bar so the witness doesn't hear the colloquy.

{3740}

THE COURT: You may.

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

MR. HULTMAN: Your Honor, I object to the procedure on the grounds that he is trying to entrap the witness when he has established first he didn't have any independent recollection of these events.

The only basis on which he can recall is one by specifically looking at the document. He has now let him look at the document, but when it comes about to a specific and the man in effect wants to renew his memory, counsel is depriving him of his opportunity.

I would say that is an unfair method in procedure and use in examining the witness.

MR. TAIKEFF: I am going to let him refresh his recollection, but first I want him to exhaust his memory. I have no intention of preventing him from looking at the document. I want to first have testify as to his independent recollection. Then he may refresh his recollection after he has exhausted his memory.

MR. HULTMAN: I am going to object to that. This matter was gone into in great detail. The man did establish what his independent recollection was. Now, we are back, after showing him the document, we are back to a series of more questions that concern themselves only {3741} with binoculars; and that's the reason for my objection, alone, that it is repetitious, but two, that with the procedure that is being used, he ought to be --

THE COURT: (Interrupting) I am a little uncertain as to what defense counsel is attempting to do here. This your own witness. What are you doing?

MR. TAIKEFF: I am impeaching him, your Honor. I am now --

THE COURT: (Interrupting) Impeaching him for what?

MR. TAIKEFF: His earlier statement.

THE COURT: Earlier statement where?

MR. TAIKEFF: He made a statement yesterday concerning the events of June 26. On September 4, 1975, he made another statement concerning the matter.

THE COURT: You are attempting to impeach Coward, it seems to me.

MR. TAIKEFF: No, I am not. I am impeaching his statement made yesterday concerning what occurred on June 26th, and I am doing that with a subsequent statement he made which is inconsistent.

THE COURT: Well, he will be permitted to use the document.

MR. TAIKEFF: I will let him use the document, but I want to ask him questions to determine what his independent recollection is.

{3742}

THE COURT: You did that yesterday.

MR. TAIKEFF: No. His independent recollection concerning September 4. I am not on the events of June 26. I am on the events of September 4.

THE COURT: His independent recollection as to September 4 is totally irrelevant.

MR. TAIKEFF: As to what he said on September 4. I want to establish what his statements were on September 4 because I am trying to authenticate his statements. Now, he didn't write the document.

Your Honor has ruled consistently that the person who is not the author of a document cannot be responsible for what is in the document.

THE COURT: That's right.

MR. TAIKEFF: So I am asking him what he did and what he did not say to the agent. If at a point he needs the document to attempt to refresh his recollection, that, of course, is not objectionable, but in the meantime he cannot now rely upon the document as if it is authentic,

inconsistently with your Honor's ruling that he is not responsible in any way for what is in the document.

I want to know his independent recollection as of September 4 before he uses the document.

THE COURT: It seems that you are following the procedure that is going to result in total confusion as {3743} far as this witness is concerned, because first, you show him the document -- first you have him testify yesterday without a document. Then you show him a document.

Now, under the pressure of being on the witness stand, you start taking the document away from him and asking him for his independent recollection.

MR. TAIKEFF: Of what he said, not of the events, only what he said on September 4th to authenticate the contents of the document. Otherwise the document -- otherwise, don't you see what happens, your Honor, when he gets off the stand, I am in the following problem position: He didn't write the document so he cannot be responsible for what it says until he certifies to it, and if I put the Agent Coward on concerning this subject, Coward can say what we expect him to say, he wrote only what the person said.

If I don't get from him what he purportedly said, however he gives that to me -- independent recollection or refreshed recollection or a combination of the two, then when I get Coward up there, Coward merely says, "Look, that's what the guy said, I wrote down what the guy said. I can't explain why he told me that."

I have lost the opportunity to find out why he said what he purportedly said. I have to take these things in that particular sequence.

{3744}

THE COURT: Well, proceed, but I am going to --

MR. TAIKEFF: (Interrupting) I am not going to be unfair to the witness. I only want him to exhaust his independent recollection, and then he can use the document to whatever extent he needs.

MR. HULTMAN: Your Honor, again I object. This is irrelevant.

The issue is, first, it has been established by counsel and very carefully, as to what his posture of remembrance was. He went in detail as to the extent he could yesterday.

Secondly, now counsel gave him a document, let him read part of it and then it was taken away from him, and is now asking him in effect, "What is it that you said to Mr, Coward?" -- not "what you remember"; and I say one simple question would resolve that issue very quickly. If I were given an opportunity just to voir dire that with one question really --

THE COURT: (Interrupting) What is the question?

MR. HULTMAN: That question is: If you read this document on any given item, is this what you recall saying to Agent Coward at the time you gave the interview?

MR. TAIKEFF: He has actually said "yes" to that.

MR. HULTMAN: That's what I am saying. That's the reason for my objection.

{3745}

MR. TAIKEFF: I am now specifically making inquiry of him as to certain very relevant isolated items, to make sure that there was no question about his earlier general testimony after reading five pages. I am entitled to get that from him.

MR. HULTMAN: Again I say it is on the basis of irrelevancy, the ultimate issue of fact is: What did he see and what did he observe?

MR. TAIKEFF: We are past that. We are talking about a subsequent statement.

MR. HULTMAN: You are seeking to impeach him.

MR. TAIKEFF: I don't deny that.

MR. HULTMAN: It is an improper way.

MR. TAIKEFF: I think the Federal Rules of Evidence say that I can do that.

THE COURT: You can impeach him by that statement?

MR. TAIKEFF: Right. I don't have to hand it to him so we can read it and refresh his recollection. I don't have to sit there and let him testify with it in his hand as if it were a script.

MR. HULTMAN: So far, your Honor, there has been no showing in any response to any of the questions that counsel has asked there has been any impeachment. His response is --

MR. TAIKEFF: (Interrupting) Fine. What are you {3746} worrying about? Relax.

MR. HULTMAN: It is unfair.

MR. TAIKEFF: I am not going to treat him unfairly, I I assure you.

MR. HULTMAN: I know where we are going, it is obvious.

THE COURT: Proceed.

{3747}

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

THE WITNESS: Is this water for me?

MR. TAIKEFF: I think possession is nine-tenths of the law.

Q (By Mr. Taikeff) My question to you, sir, was: Whether in fact the statement you made on September 4th concerning your own activities that you're in the house, looking at the open window watching the Jumping Bull house for activity with your binoculars was true.

A Yes.

Q Is it a fact that on September 4, 1975 you told Agent Coward that a short time later, at approximately 4:30 to 5:00 P.M. you observed four individuals running from the rear of Harry Jumping Bull's house towards an open plowed field?

A Yes.

Q How much time later was that after the time you were just sitting at the window looking out with your binoculars?

A Well, we moved from window to window, you know. It was, it's hard to say, you know. I couldn't give you a specific time.

Q On that day, June 26, 1975 were you assigned to a BIA S.W.A.T. team?

A Yes, I was.

Q Were you out on maneuvers that day?

{3748}

A Yes, I was.

Q What kind of weapons were you and your colleagues carrying?

A We were carrying Smith and Wesson .38's.

Q Sidearms?

A We were carrying AR-15 rifles and I think somebody was equipped with an M-79.

Q What's an "M-79"?

A It's sort of like a grenade launcher, you know, where you can launch smoke with it. It's canister rounds.

Q How BIA people were out on maneuvers that day with you?

A Well, there was two teams of us. It was only S.W.A.T. team and then we had, we were the assaulting team and it was sort of a mock battle we were having that day.

I don't recall how many were on the other side, or who was on the other side, but I do recall the S.W.A.T team that I was with.

Q And what kind of weapons was the other team equipped with?

A Basically the same as we had. I would say AR-15's .38's with blanks.

Q And --

MR. HULTMAN: Would the reporter read the last answer back? I didn't hear it.

MR. TAIKEFF: And .38's with blanks.

MR. HULTMAN: With blanks?

MR. TAIKEFF: And .38's with blanks.

{3749}

MR. HULTMAN: Okay.

Q (By Mr. Taikeff) And did the members of those two groups that were out on maneuvers all come to this area and participate in the events around Jumping Bull Hall?

A No. We were at this time approximately when this thing was going down we had come in from lunch, we had finished our maneuvers, when I received a call on my radio to assist an officer.

Q Were you the only one of those two groups to respond?

A As I recall, yes. Since that was my district.

Q Do you have any quarrel with the fact that the sighting took place between 4:30 and 5:00 o'clock?

A How was that again? Would you repeat that?

MR. HULTMAN: Well, now, Your Honor, again I don't have any objection if counsel will read what the entire sentence said. It said "approximately between 4:30 and 5:00" and that is different than between 4:30 and 5:00.

MR. TAIKEFF: All right. I'll amend my question accordingly.

Q (By Mr. Taikeff) Do you have an quarrel with the statement that the sighting you made of seeing the people running across occurred at approximately 4:30 to 5:00 P.M. on that day?

A It's hard to say. Like I said, you know, nobody was watching their watches, you know. Nobody was checking time or taking statements or anything like that, you know. It's hard to say.

{3750}

Q Well, when you spoke with Agent Coward on September 4, 1975 how did it happen that you told him that it occurred approximately between 4:30 and 5:00 o'clock?

A Maybe I told him because that's what I thought the time was, you know. Maybe it wasn't. Like I said nobody was looking at watches, you know.

Q Well, that's what I'm asking you, if nobody was looking at watches how did you happen to state a specific time within approximately thirty minutes?

A It may have been, you know, that's what I thought the time elapse had been, you know. It could have been more, it could have been less.

Q Now, is it accurate to say that when you -- when did you first make any mention of sighting Jimmy Eagle?

A I don't recall.

Q Well, yesterday I showed you Government's Exhibit 195 which is a 302 of Agent Coward, one page, date of transcription 6/28. You read that yesterday, did you not?

A I glanced through it, yes.

Q Now, might it be possible that you made that statement to him on June 26th and that there's a typographical error there when it says that you were interviewed June 28th?

A No. I don't, I think that's highly impossible because of the fact that we were involved in so much. It wasn't time for anybody to sit down and give statements, you know.

{3751}

We'd, we were out chasing these four males around the hills, you know. There was no time for anybody, you know, to make any kind of statements or anything.

Q Well, how about the possibility that instead of making a formal statement, in a car ride later that day or perhaps on your way home with Agent Coward you may have just casually mentioned to him the sighting of a person who appeared to you to be Jimmy Eagle?

A I think that's highly improbable also because I and Coward did split up, you know.

I don't recall seeing, well, recall seeing him, but we were all walking on foot up this big hill, you know, and he was quite a ways from me.

Q Well, can you offer, if you have any basis to do so, any information about how Defendant's Exhibit 195 came into existence?

A Maybe he overheard somebody else say that and thought it was me.

I mean, there was a lot of excitement going on.

A guy could make a mistake.

Q But it does so that, it does say your name, doesn't it?

A Yes. It does say my name.

Q It says your name four different times, doesn't it? Five different times.

A It's possible it says that, my name five different times.

{3752}

Q Well, this document does say your name five different times?

A Do you want me to count them?

Q Yes just so we don't have any dispute there.

A All right. Okay. Correct, it says it five different times.

Q Now, is it accurate or fair to say that your sighting of Jimmy Eagle on the 26th of June, 1975 was not a positive identification? That the person appeared to be Jimmy Eagle to you?

A It's possible to say it appeared, yes.

Q Well, didn't you tell us yesterday that it was not a positive identification? Isn't that your phrase I'm using?

A Would you be -- restate that again. I can't put your meaning between appear and a positive.

Q Did you tell us yesterday in words or in substance that your identification was not a positive identification?

A Yes. I probably said that yesterday, yes.

Q Okay. Now, what does that mean in other words that it wasn't a positive identification?

A It could mean that it wasn't exactly certain, you know. Maybe characteristic squat or run or something, you know.

Q Could it also mean that the person appeared to be Jimmy Eagle?

A If you want to put it that way, yes. It's possible.

{3753}

Q That would be inaccurate, would it, if I chose to describe it that way?

A I don't think so, no.

Q Okay. Now, when you spoke with Agent Coward on September 4, 1975 you told him you thought you recognized two people that afternoon?

A Yes, yes.

Q And the second person you mentioned was Leonard Peltier; isn't that right?

A Yes. I was pretty sure it was Leonard.

Q When you say "I was pretty sure it was Leonard" are you saying that on June 26, 1975 you were pretty sure it was Leonard, or are you saying that you are pretty sure that you said that the second person was Leonard when you were interviewed on September 4th?

A Would you restate that. You are confusing me.

Q All right on June 26, 1975 were you pretty sure it was Leonard?

A On June 26th, 1975, yes I was pretty sure it was Leonard.

Q And when you told, when you spoke with Agent Coward on September 4, 1975 did you tell him you were pretty sure it was Leonard Peltier?

A Yes. I had two months to think about it, you know.

Q Didn't you tell Agent Coward on September 4th that you thought that the other person that you saw was Leonard Peltier?

{3754}

A Come again. You know, would you restate that again.

Q On September 4, 1975 when you spoke with Agent Coward didn't you say, concerning your sighting of Leonard Peltier, that you thought that the person you saw up on the hill was Leonard Peltier?

A Up on the hill? I don't recall him mentioning the hill.

Q Well, forgetting the hill for the moment, did you say that the person you saw you thought was Leonard Peltier?

A It's possible I said that.

Q Did you in your interview with Agent Coward make any mention at all about the use, either of the telescopic sight or binoculars when you were looking at these individuals?

A I think I mentioned, as I recall, I was using binoculars at this time, a scope and binoculars.

I had borrowed the scope from somebody, glanced through it; and it wasn't sufficient, you know, to give me magnification. I grabbed my binoculars as you recalled them earlier.

Q Now, when you read the first five pages of the report, those five pages included your discussion with Coward about the sighting, right?

A Yes.

Q When you read them earlier this morning?

A Yes.

Q Did you notice anything in those five pages about your using {3755} either a telescopic sight or binoculars to make the sighting?

A I think I did mention it, yes.

Q No, that's not my question, sir.

My question is: This morning when you read the first five pages of this report did you notice anywhere in that report concerning the subject of the sightings any mention of a statement by you that you used either a telescopic sight or binoculars to make the sighting?

MR. HULTMAN: Well, Your Honor, I object to this again now as an attempt on the part of counsel to -- after showing a document taken away from the witness.

MR. TAIKEFF: I'll give it back, I'll give it back.

MR. HULTMAN: If counsel wants to indicate whether it does or doesn't the Government will have no objection.

MR. TAIKEFF: All right. I would indicate that it does not say one word about it. Does the Government concede that fact?

MR. HULTMAN: I haven't read it with that great a detail. If counsel indicates that, I accept it, I accept it, I accept it.

MR. TAIKEFF: I represent that that is true.

MR. HULTMAN: I have no reason to disbelieve that.

Q (By Mr. Taikeff) Is it then fair to say that as to your identification of Jimmy Eagle it was not a positive identification

MR. HULTMAN: Your Honor, I object. This question {3756} has been asked and answered. It's repetitious.

MR. TAIKEFF: That's foundation for the next question.

MR. HULTMAN: It's been asked and answered about four times now

THE COURT: Sustained. It's been answered.

MR. TAIKEFF: All right.

Q (By Mr. Taikeff) Did you tell Agent Coward on September 4, 1975 that your identification of Jimmy Eagle was positive?

MR. HULTMAN: Again, Your Honor --

MR. TAIKEFF: That's a separate question, Your Honor. Subsequent statement.

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

THE COURT: Sustained.

MR. HULTMAN: That I previously raised.

MR. TAIKEFF: Your Honor, may I come to the sidebar, please.

THE COURT: You may.

{3757}

MR. TAIKEFF: Your Honor, may I come to the sidebar.

THE COURT: You may.

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

THE COURT: For the life of me I do not understand what you're trying to get out of this witness.

MR. TAIKEFF: I'm afraid, Your Honor --

THE COURT: Just a moment. He's your witness. You appear to be getting him up to make certain statements and then you're trying to knock him down on those statements and apparently what you're trying to drive at is trying to through this witness impeach the credibility of Coward.

MR. TAIKEFF: No. I am impeaching his citing of which we have heard testimony. That's what I'm doing. I'm impeaching his observations with his own statements. Even he says that he was positive that Jimmy Eagle was the individual that was running behind the person who appeared to be Leonard Peltier.

THE COURT: Then you will be permitted to show him that statement and have him read it and ask him if that's what he said.

MR. TAIKEFF: I'll do that, Your Honor.

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

{3758}

Q (By Mr. Taikeff) Sir, I'm showing you page 4 of Defendant's Exhibit 194 for identification. I call your attention to the second paragraph on the page. I want you to read the entire paragraph to yourself but pay particular attention to the last sentence, but to yourself.

On or about September 4, 1975 did you tell Agent Coward that you had or have continuously thought about what happened on June 26th, 1975 and at that time, meaning the time of the interview, you were positive in your own mind that Jimmy Eagle was the individual that was running behind the person who appeared to be Leonard Peltier? Did you make that statement in those words or substance to Agent Coward? Yes, or no?

A Can you give me a little time to think about it?

Q Absolutely.

A All right.

Q You can have all the time you want.

THE COURT: The witness may be advised that you do not have to answer the question yes or no. You can also answer it whether or not you remember.

A Then in that case I'll take the alternative, I'll say I don't recall.

Q (By Mr. Taikeff) I see.

If we would have offered four options do you think you might have chosen the fourth one?

{3759}

A It's possible.

Q I think it is.

One last point, sir.

A Okay.

Q When you testified before the grand jury you told them, did you not, that you recognized Jimmy Eagle and Leonard Peltier and made no explanation about whether you were positive or not, isn't that a fair summary of what you said to the grand jury?

A That's possible.

Q Now you may be happy to know I have only one other area of inquiry for you.

A Good.

Q I'm going to put before you again Defendant's Exhibit 194 for identification. You did say that when you read it in Cedar Rapids you don't recall having any disagreement about what you read, correct?

A Come again.

Q When you read Defendant's Exhibit 194 in Cedar Rapids last summer you told us earlier this morning you had no quarrel with what you read, is that right?

MR. HULTMAN: Your Honor.

A I don't --

MR. HULTMAN: The record might be clear. I think in all fairness the testimony of this witness earlier was that {3760} he glanced through some papers. He didn't say he read this document or read it in detail, he said he glanced through some papers.

Q (By Mr. Taikeff) To the extent that you looked at this document, do you have any quarrel with what you saw last summer?

A I don't recall. YoU know, that was last summer, awhile ago. I don't recall.

Q When you read this document this morning, the first five pages, you didn't have any quarrel with anything you read in there, did you?

A I didn't see anything; no.

Q Tell us what if anything you said to Agent Coward on September 4, 1975, concerning your interview with him a few days after the shooting. And if you cannot recall, look at page 4, second paragraph. But first tell me whether you can recall. Do you recall independently?

MR. HULTMAN: I object to the form of the question because I think it is a misstatement of what it says in that paragraph.

MR. TAIKEFF: All right. I will withdraw every question on that point and start new.

Q (By Mr. Taikeff) Don't look at the document yet. Tell me whether from your independent recollection before you look at the document, did you say anything to Agent Coward concerning any discussion with him about the sightings a few days after {3761} the shooting of the agents?

A As I recall telling you yesterday, I never saw Fred Coward after the 26th of June, 1975, until sometime in September.

Q Now take a look at page 4, paragraph 2, which starts with the words, "Stoldt stated that."

A What paragraph was that again?

Q Second paragraph.

There's no question. I just asked you to look.

Have you looked?

A Yes. I've looked.

Q Now I'll put the question to you. On September 4, 1975 did you say to Agent Coward in words or in substance that during the first statement you had given to the FBI a few days after the

shooting of the agents that you told those agents then, one of the agents being Agent Coward, that you saw Jimmy Eagle in the group, did you make that statement?

A No.

Q On September 4, 1975?

A I don't recall that; no.

I'm telling you I never saw Fred Coward again after the 26th of June, 1975, until September 4 or thereabouts.

Q Then what you're saying is that that statement is not accurate, if it appears in the report?

A It could be a mistake on somebody else's behalf.

Q I didn't ask whether it could be a mistake, I'm asking if {3762} what you're saying, if such a sentence appears in the report, whether it's factually incorrect, is that what you're telling us?

A It is possible.

MR. TAIKEFF: Your Honor, I offer those portions of Defendant's Exhibit 194 in evidence which pertain to the aspects of the September 4 interview which covered the sighting and the related activities.

MR. HULTMAN: I object, Your Honor, on the grounds it's previously been stated now and that could be cumulative. The matter's been asked and answered and it's part of the record. Not the best evidence.

THE COURT: Counsel will have to specifically identify the portions of the statement.

MR. TAIKEFF: I can do that very briefly, Your Honor. It's on page 3. I'll give the document to the clerk so Your Honor will have an opportunity to study it. The last two lines on page 3 to the end of the second full paragraph on page 4, which paragraph ends with the words, "the individuals were gone." That is a total of three paragraphs, two lines of which appear on page 3. All the rest appear on page 4.

I have no further questions, Your Honor.

THE COURT: You may cross-examine.

MR. HULTMAN: I have no questions.

THE COURT: You may step down.

{3763}

THE WITNESS: Are you finished with me?

MR. TAIKEFF: Yes. May the witness be excused, Your Honor?

MR. HULTMAN: You may.

THE COURT: You are excused.

MR. TAIKEFF: Defense calls Jimmy Eagle.

JIMMY EAGLE,

being first duly sworn on the sacred pipe, testified as follows:

MR. TAIKEFF: May I proceed, Your Honor?

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. TAIKEFF:

Q Mr. Eagle, have we ever met before?

A Yes, we have.

Q How many times?

A Once.

Q Where was that?

A In county jail.

Q County jail in Moorhead?

A Yes.

Q Make sure you speak into the microphone.

A Yes.

Q Was I with anybody else?

A Yes, you were.

Q Do you know that man's name?

A John Lowe.

{3764}

Q John Lowe.

For how long did we speak?

A I don't know. I'm not quite sure.

Q I'm sorry?

A I don't know. I'm not quite sure.

Q Approximately an hour?

A Possibly.

Q Now is it your wish that an attorney be here to represent you in connection with these proceedings?

A Yes, I do.

Q Do you have any money to hire an attorney?

A No.

Q Do you ask the Court to appoint an attorney for you?

A No.

Q I beg your pardon?

A No.

Q You do not?

A I have got my own attorney.

Q You have an attorney. Will that attorney come here?

A Yes, he will.

MR. TAIKEFF: On that basis, Your Honor, I believe it is not appropriate for me to proceed at this particular time.

THE COURT: Where is your attorney located?

THE WITNESS: I've got two of them. One's in Birmingham, Alabama and the other one is in Pine Ridge and none {3765} of them knew I was supposed to be here today.

THE COURT: Pardon?

THE WITNESS: None of them knew I was supposed to be here today. I guess at this time one of them is trying to get ahold of one of the defense attorneys.

THE COURT: Counsel approach the bench.

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

MR. HULTMAN: Your Honor, on the record, first of all, I want to object that this is totally improper in line of our previous discussions. I think now we have posed before the jury an opportunity for jurors to draw some conclusions that would be adverse to the government. I think that this should have been determined by Counsel prior to putting the witness on the stand and making the inquiries that he made.

MR. TAIKEFF: Your Honor, I think under the circumstances it is perfectly sensible and appropriate for him to ask for an attorney.

MR. HULTMAN: That's not what I'm saying.

MR. TAIKEFF: When the government had a witness on the stand, and this occurred at least once, my memory may be incorrect and it might have occurred twice, I'm sure it occurred once, the government witness indicated his desire to confer with his counsel and so the government didn't seem to be particularly sensitive about it to the jury that one of its {3766} witnesses had counsel in the courtroom and I frankly took the lead from the government's conduct.

MR. HULTMAN: We had established the fact prior to the time while we were here at the bench that the man had some inquiry and so indicated to Counsel that he wanted possibly to talk to a lawyer before he was ever on the stand. That's the only thing to which I'm referring.

MR. TAIKEFF: That's the same thing this witness said. He wants to talk to a lawyer.

MR. HULTMAN: That's what I'm referring to, this incident right now.

MR. TAIKEFF: The other case, before he was willing to answer the next question was he wanted to consult his lawyer He could have come back and said he --

MR. HULTMAN: It was determined ahead of time, one, he would not testify and two --

THE COURT: Why do you think this is prejudicial to the government?

MR. HULTMAN: Well, I think, Your Honor, for the reason that there is now by the very fact that the questions have been asked, it's indicated that he wants to talk to Counsel before he proceeds with any discussion of any kind. The only discussion, the discussion on the record with defendant's counsel and he may decide ultimately now not to testify at all. That leaves an impression of some kind before this jury that {3767} there is something going to be withheld from them, the postulate, because it's been indicated by the last testimony in great detail concerning Jimmy Eagle that this man does have something to testify to that the jurors are going to be denied that's important to the defense, and, thus, it's prejudicial to the government. That's my basis.

MR. TAIKEFF: Your Honor, a party is entitled to show the jury that a witness who is available to him to be called was in fact called and his refusal to testify was not of his own making. That is precisely why it is appropriate to adduce the testimony I just adduced.

THE COURT: I expect that we could get a local lawyer appointed. Do you think Maring would be willing to?

THE CLERK: Maring having represented Brown, do you think it would be appropriate to represent --

MR. TAIKEFF: Mr. Hultman, do you think there is any possibility of appearance of conflict to represent both Brown in this instance?

MR. HULTMAN: I don't think, without any question, it should be the same one. I think it not be.

MR. TAIKEFF: That is correct. I think Norman Brown testified Jimmy Eagle was not there.

THE CLERK: I suspect I could have an attorney over here within 15, 20 minutes.

THE COURT: Do you have another witness to go forward {3768} with?

MR. TAIKEFF: Yes, Your Honor.

THE CLERK: Maybe I could swear in the witness and then leave and obtain counsel for him and get the two together.

MR. TAIKEFF: Fine.

MR. HULTMAN: Very good.

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

THE COURT: Mr. Eagle, you may step down.

MR. ENGELSTEIN: Your Honor, the defendant calls Wayne Carter.

{3769}

WAYNE CURRY,

being first duly sworn, testified as follows:

MR. ENGELSTEIN: May I question, your Honor?

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. ENGELSTEIN:

Q Would you state your name and your occupation?

A Wayne Curry. I am an office machine salesman.

Q When you say "office machines", does that include typewriters?

A Yes, it does.

Q How many years have you been in this occupation?

A Be five years in June.

Q Five years in June. Would you explain what is meant in your business by a type face?

A Type face is the style of print on a typewritten document.

Q Well, what would be the features of the type face, the kinds of features of a type face that would distinguish one kind of type face from another kind of type face?

A Just the appearance of various size.

Q When you say the "appearance", for example, would it be the shape of a line or the size of a line or what?

A The shaping of a letter, most notably in most type styles is the difference in numbers.

Q Would you say there were many types of type face?

{3770}

A Absolutely. There is well over a hundred different type styles.

Q

A hundred different type styles?

A Certainly.

Q And is it also true that with any kind of type face there are variations of that type face?

A Right.

Q For example, a pica type face might have a hundred variations within the pica class of type, right?

A Right. Pica is a style spacing in a ten pitch spacing. There would be maybe a hundred different variations.

Q Would you say that in order for you to do your job properly as a salesman, you would have had to become familiar with most of these type faces?

A To a certain extent, yes.

Q So that if you were shown several pieces of paper covered with typewritten material, would you be, by virtue of your experience with type faces, be able to decide whether all the pages had the same type face or not?

A Certainly.

Q I now show you a document which has been marked Defendant's 83 which is Special Agent Waring's 302.

Have you and I met and discussed this document before, Mr. Curry?

A Yes, we have.

{3771}

Q Where was that?

A At my place of business.

Q When was that?

A Yesterday.

Q And how long was our meeting?

A A matter of maybe five minutes.

Q Maybe five minutes.

Now, I ask you to tell us, first, how many pages are there in the document you are holding?

A A total of eight.

Q Eight pages.

Would you look at the top page, Page 1, and tell us whether it is covered, completely covered with typewritten material except for standard margins on the top and bottom, and left and right?

A Yes, it is.

Q Is the same true for Page 2?

A Yes, it is.

Q Is the same true for Page 3?

A Yes.

Q Is the same true for Page 4?

A No.

Q What would you say about Page 4 with respect to the amount of space that is covered by the typewritten material?

A The page is only typed maybe one-third of the way down.

{3772}

Q One-third of the way down?

A Right.

Q And the rest of the paper is blank?

A Yes.

Q Page 5, is that completely covered with typewritten material except for the margins?

A Yes, it is.

Q Page 6?

A Yes.

Q And Page 7?

A Yes.

Q And Page 8?

A A little larger margin at the bottom, just about completely covered.

Q That's the conclusion of the document, Page 8?

A Yes.

Q For purposes of simplifying the rest of the examination, I will now refer to Page 1 through Page 4 as Part 1 of the document; and as Page 2 of the document, I will call Pages 5 through 8.

When we discussed this document in your office yesterday, you examined the document to see whether the type face in Part 1 was the same as the type face in Part 2, is that correct?

A Yes, I did.

Q Did you use any special magnifying glass or instrument or {3773} microscope, or whatever, in your examination?

A No. The difference was pretty apparent.

Q What conclusion did you come to with respect to whether the type face in Part 1 is the same as the type face in Part 2?

A The first four pages all correspond. The Part 2 all correspond. In Part 1 and Part 2 there are definite differences.

Q Part 1 and 2 are definitely different?

A Right.

Q Are you saying then that the type face used for typing the material from Pages 1 through 4 was different from the type face used in typing the material on Pages 5 through 8, is that correct?

A Yes, It could not be the same type.

Q When I showed you the document for the purpose of making that determination, how long did it take you to arrive at that conclusion?

A Just a matter of glancing over it.

Q I am sorry, I didn't hear you.

A Just a matter of glancing over it.

Q Just a matter of glancing over it?

A Right.

Q Would you say a few seconds or certainly less than one minute?

A Yes.

MR. ENGELSTEIN: I would like to have this document {3774} marked for identification.

MR. HULTMAN: May I see it so I know what we are talking about?

MR. ENGELSTEIN: Mr. Curry, I show you Defendant's Exhibit marked for identification 197, and ask you whether you recognize it?

A Yes. It is one, a couple of numbers that I drew for you a little earlier today.

Q (By Mr. Engelstein) You say there are a couple of numbers on there that you drew for me earlier today?

A Yes.

Q What numbers?

A The number "7".

Q How many numbers "7" are there on that page?

A Two.

Q There is one number to the left, and one number to the right, is that correct?

A Correct.

Q Now, when I asked you to draw two numbers on that page, what specifically was my request of you so that you drew those two numbers in those particular shapes?

A The number on the left corresponds with the number "7" as typed on the first four pages, and the number on the right corresponds with the number "7" typed on the last four pages.

Q So you drew an enlarged number "7" to represent what the {3775} number "7" of Part 1 looked like, and then a large number "7" next to it to represent what the number "7" of Part 2 looked like, is that correct?

A Right.

Q Now, would you look at those two large number "7's" and tell me with respect to the number "7" on Part 2 which is to the right of that sheet, how many strokes of the pencil are necessary without changing the direction of your stroke, are necessary without changing the direction of your stroke to make that number "7"?

A Just a matter of two straight lines.

Q Two straight lines. Now, with respect to the number "7" which is on the left of that page, which corresponds, I think, to the number "7" of Part 1 of the document, how many strokes of the pencil were necessary to make that number "7"?

A Three strokes.

Q Three strokes.

Now, with respect to the first number "7", are those two strokes that were made straight lines or curved lines?

A On the first number "7" the line is curved, and it has a tail on the top part of the number "7".

Q That's the number "7" of Part 1?

A One.

Q The number "7" of Part 1 has a tail on it and one curved {3776} line, the number "7" of Part 2 has --

A (Interrupting) Two straight lines.

Q (Continuing) -- two straight lines.

There was no question in your mind about the fact that those two numbers represented in Part 1 and Part 2 come from different type faces?

A Definitely.

Q You are certain of that?

A Absolutely.

Q I direct your attention to the table where Government counsel sit and the gentleman in the middle, Mr. Hultman who is the gentleman who is chief counsel for the Government in this trial; and ask you whether you are certain those two "7's" are different and come from two different type faces, as you are of the fact that Mr. Hultman and I are not identical twins?

A There are definite differences.

MR. ENGELSTEIN: Thank you. No more questions.

MR. HULTMAN: May I examine?

CROSS EXAMINATION

BY MR. HULTMAN:

Q Mr. Curry, you and I have never seen each other before, that's why you make the comparison between Mr. Engelstein and myself, is that right?

A Correct.

MR. HULTMAN: Could we use the document, counsel, {3777} since it has been referred to?

Q (By Mr. Hultman) First of all, you are a person who deals in this area all the time, that's your livelihood, is it not?

A Absolutely.

Q And you have some degree of expertise that somebody who merely dictates maybe and does not type would not have, is that a fair conclusion for me to draw?

A Yes, it is.

Q I notice -- I notice that you refer just to the "7's" in comparing the two. Is there any reason for that rather than all of the rest of the typing that is involved in those two different parts of those documents?

A It is very easy to distinguish the difference. Number "5" varies. Number "2" varies. There are definite other differences

Q If you had not analyzed this document as an expert but a layman, just looking at it, would you see any great difference between the typing, the general typing on the first section and the second?

A The formations of the letters, they are very, very similar.

Q And in fact, the letter "7" and the letter "5" are the only two differences that even an expert could sit down and distinguish, isn't that right?

A On the document that I went over, on a copy of a copy, yes, at that time it is hard to distinguish.

{3778}

Q I just have one other question: It wouldn't be unreasonable to conclude at all, would it, that if somebody dictated the whole thing, that possibly two secretaries on two different typewriters typed the two parts, would that be something that would be unusual to conclude?

A It could easily be done, be actually done on the same machine.

Q The next question: It could be done by one individual on the same machine, could it not?

A It could have been, sure.

MR. HULTMAN: I have no further questions.

MR. ENGELSTEIN: No questions, your Honor.

We would like to submit the two documents into evidence.

MR. HULTMAN: I object, your Honor, on the grounds that, one, of relevancy, and two, not the best evidence, and three, it is cumulative, no probative value.

THE COURT: For what purpose are those documents being submitted?

MR. ENGELSTEIN: If the expert's representation of two numbers go into evidence, it will give the jury an opportunity to assume how obvious it is -- since they are non-experts -- to make the determination the same as the expert.

THE COURT: What probative value does that have in (no other text here in the transcript)

{3779}

MR. ENGELSTEIN: The incident with respect to Special Agent Waring's 302 has to do with the authenticity of the document. In fact both parts of the document could have been written at different times for the purpose of re-telling the story or other objectives. This would go to prove that on some other typewriter and some other type face another story was told in the 302.

MR. HULTMAN: I object. There is no showing -- I object on the further grounds there is no showing to that effect, and furthermore, your Honor, that this witness himself indicated in response to my question that anyone, a layman looking at the general type, but for the letter "7" and "5" would come to the conclusion he has come to.

{3780}

THE COURT: The exhibits are irrelevant, they are without foundation, the record will show that Mr. Waring testified that he dictated to two separate secretaries. This witness states that the typewriter that the documents could have been typed on the same typewriter and I presume, just by changing the little ball on the typewriter, and I think it's a waste of time to offer that exhibit in this case.

MR. ENGELSTEIN: Your Honor, there's another issue, there's another question at issue, and that is the credibility.

MR. HULTMAN: May we approach the bench?

THE COURT: I have ruled, you may not approach the bench. The objection is sustained.

You may step down.

MR. TAIKEFF: The defense calls Jimmy Durham. JIMMY DURHAM, being first duly sworn on the sacred pipe, testified as follows:

THE COURT: I think before we proceed with the testimony of Mr. Durham court will recess until 11:15.

(Recess taken.)

(Whereupon, the following proceedings were had in chambers:)

MR. TAIKEFF: Your Honor, I would like to report something which came to my attention within the last ten minutes. We subpoenaed a person by the name of Jeanette Tallman, T-a-l-l-m-a-n, who lives in Allen, South Dakota which {3781} is on the Pine Ridge Reservation. She is a cousin of Myrtle Poor Bear. And I authorized the issuance of a subpoena for her because I was told that she was with Myrtle Poor Bear on June 26, 1975 and would be part of the proof that Myrtle Poor Bear in fact could not have been at the Jumping Bull Compound when the agents were killed.

It was reported to me shortly after the recess began that you had responded to the subpoena, that she was very nervous, on the verge of hysteria, and that she would not speak with anyone. I arranged to speak with her in one of the rooms of our office alone and learned the following information from her: Her present state of mind is as a result of a threat which was made to her. I didn't press her for details because she was very reticent. But my impression was that it was a threat made directly by Myrtle Poor Bear that if she came up here to testify that Myrtle

Poor Bear, they would get some guys to take care of her. I asked her whether in fact she was with Myrtle Poor Bear on June 26, 1975 and she confirmed that our investigative information was correct, that she was with Myrtle Poor Bear. And that she was a cousin of hers and that they both live in the same community, namely Allen, South Dakota.

She also told me that the last time she saw Myrtle Poor Bear, but did not speak with her, was Wednesday night, less than two days ago. And she saw her in the vicinity of {3782} Allen, South Dakota Now, she continues to be very worried in spite of my assurances to her that she's here for a legitimate purpose, and all she has to do is testify and testify truthfully. And I told her that I would report the matter to Your Honor.

I did not tell her that it was within the realm of possibility that at the appropriate time and under the appropriate circumstances Your Honor could provide some sort of marshal protection for her. But in view of her present state of mind, both considering how she feels personally and what impact it might have on her willingness to testify, I thought I would immediately bring the matter to Your Honor's attention, and perhaps Your Honor would wish to see her and give her some assurance, not necessarily including the possibility of marshal protection, but at least to assure her that you are cognizant of her condition, and maybe that will calm her down because she might have to wait until Monday to testify. She's apparently in a state of terror.

I don't specifically press Your Honor to do it. I thought it might be the best way to ease her concern, and if Your Honor feels it's inappropriate I'll abide by Your Honor's decision in that regard.

THE COURT: Well, when are you now going to call her? On Monday?

MR. TAIKEFF: We expect that we will call her on Monday.

{3783}

THE COURT: But not before Monday?

MR. TAIKEFF: I don't think so. I think otherwise she would be taken out of turn in such a way as to make her testimony meaningless.

THE COURT: I will be glad to see her. But I don't see any reason, if you're not going to call her before Monday, I don't see any reason for me seeing her right now.

MR. TAIKEFF: I'll have one of the attorneys advise her that at whatever time Your Honor thinks he'll see her, that the Judge will see her, and in the meantime she can stay in that office.

THE COURT: Why don't we, why don't we set, oh, 12:45.

MR. TAIKEFF: Yes, Your Honor.

THE COURT: And then she can come to the office here at 12:45 and I'd be glad to visit with her.

MR. TAIKEFF: Thank you, Your Honor. I appreciate your seeing her.

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

THE COURT: The jury may be brought in. (Whereupon, the following proceedings were had in the courtroom in the hearing and presence of the jury:)

MR. TAIKEFF: Defense would now call Jim Hall, Your Honor.

{3784}

JAMES R. HALL,

being first duly sworn, testified as follows:

MR. TAIKEFF: May I proceed, Your Honor?

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. TAIKEFF:

Q Your name is James Hall?

A Yes.

Q Have we ever met as far as you know? My name is Elliot Taikeff.

A I don't believe so, no.

Q Have we ever spoken on the telephone?

A I think so, yes.

Q For how long?

A Just a minute or two to tell me I should be coming here.

Q Okay. Where do you live, sir?

A 2414 10th Street North, Fargo.

Q And what is your occupation?

A Retail store manager and sporting goods, firearms, scopes, reloading.

Q Where is your place of business?

A West Acres Storeping Center.

Q For how many years have you been involved in such matters, Sporting goods, guns, et cetera?

A About two years before I went in the service, and about four years after. Last four years.

{3785}

Q So that's a total of six years?

A About that, yes, sir.

Q As a result are you familiar with firearms and telescopic sights and things of that sort?

A Yes.

Q Do you personally use firearms?

A Yes.

Q Do you personally use telescopic sights?

A Yes.

Q In the past week sometime you had occasion to use a rifle which had a telescopic sight mounted on it; is that not correct?

A Yes.

Q Do you see anyone in the courtroom who provided that rifle with telescopic sight to you?

A The fellow in the green jacket there.

Q All right. Was he accompanied by anyone else?

A He was. I didn't notice him real carefully. I don't --

Q Do you know whether that was Special Agent Munes of the FBI?

A He was an FBI agent. I don't recall his name.

MR. TAIKEFF: Will the Government stipulate at this time that the rifle in question was an FBI rifle with a variable power two to seven standard issue telescopic sight on it?

MR. HULTMAN: Yes, Your Honor, I believe if counsel {3786} so indicates.

MR. TAIKEFF: And would the Government further stipulate that was the rifle allegedly used to make the sighting with the very same telescopic sight on it that we've heard testimony about?

MR. HULTMAN: Yes. The Government so stipulates.

Q (By Mr. Taikeff) Would you explain to the Court and jury what you did, everything that you did in connection with making, or attempting to make a sighting through that telescopic sight without saying what the result was, just your preparation steps?

A We first went to a spot on 13th Avenue South in Fargo starting at about the Union State Bank; and we paced off with the odometer on the car going west one half mile.

Q What time of day was it?

A This was just a little bit after noon. Just around lunch, 12:30, 1:00 o'clock.

Q Was it done one day this week?

A Yes, it was. Day before yesterday.

Q And could you describe the weather conditions at the time you did this work?

A They were humid, sunny, chilly.

Q Was the light bright or dim?

A Quite fairly bright. Not a real clear sky, but quite bright.

{3787}

Q Was visibility to the naked eye good?

A At the first location on 13th Avenue visibility was only fair.

Q Did you do anything about that?

A We tested it at that location. Then we went to another location where visibility was better.

Q All right. Tell us briefly what you did at the second location where the visibility was better to the naked eye.

A We went down to the, there's a gravel road going south of West Acres Storeping Center paralleling the freeway, Interstate 94, where there was more grass area, and it was over a gravel road.

Conditions were the same except for the visibility was much better due to better mirage, or less mirage I should say.

Q You mean mirage effect?

A Well, it's the condition of moisture boiling out of the ground or obscures vision.

Q Now, the ground that you were looking over, when you looked, did not have any foliage growing on it; is that correct?

A First location had a little of dry grass as we were standing along the road near a ditch. Second location, very little.

It was over grass, dry grass, a little bit to the south. And then we looked mainly over plowed field.

Q Now, did you measure off a half a mile at the second location?

{3788}

A It came to just a little bit short of a half a mile, but it was on an angle which we had to walk out a little bit beyond what we actually measured. So it would be very close to a half a mile.

Q Before we get to the test itself I want to go back to the first time you were contacted by anybody concerning the possibility of your conducting this test. Were you asked whether in your opinion, looking through a 7 power scope through approximately a half a mile would reveal the features of a person's face or something to that effect? Do you recall being asked the question?

A One time, maybe a week, maybe a week or ten days ago, I was, by somebody who identified himself.

Q Was it Mr. Engelstein?

A He identified himself, the first person.

Q All right. Now, at that time did you express an opinion was to what the result would be?

A At that time I can't actually recall if I made an opinion on it or not. I don't think so, but I might have.

Q Do you recall whether you said you thought that could be done?

A Oh, if I made an opinion at all it would have been to the effect that I probably could not have made an actual identification.

Q All right. Now, were there other people present besides Mr. Gilbert and the special agent from the Federal Bureau of {3789} Investigation?

A I had one customer in the store. You mean at the time when we made the test?

Q When you made the test at the second location.

A We had. There was one customer in the store that I had been familiar with for about a year that accompanied us out to the test site.

Q Is he a person you would recognize if you saw him from forty or sixty or eighty feet away?

A Yes.

Q Now, what did that person do in connection with the test?

A He simply stood at the approximate half a mile away and to see if we could identify him.

Q Then what did you do?

A After we put him at this plot where he was going to stand we went back to the original, or we went back to the half a mile point so that to use the rifle and scope mounted on it to see if we could actually look at him and see him and identify him.

Q Now, did you look through the telescopic sight?

A Yes.

Q Did you hold your eye in such a position that you got the nearest possible image in the scope?

{3790}

A Yes.

Q Were you looking at an object which you believe to be the body of the person whom you knew for about a year?

A Yes.

Q Did you recognize that person?

A I would not be able to recognize him not knowing who he was.

Q Did you see any features on his face?

A I could not determine facial features; no. I could determine the fact he had white skin in the second location versus dark skin because the sun coming slightly from the west was shining on his face. I could determine he was either light skin or Caucasian, the dark hair, a white collar and dark jacket.

Q As you looked in that telescope, could you say, even knowing who it was to begin with, that it was the particular individual who you sent out there? Yes or no?

A No.

MR. TAIKEFF: I have no further questions.

CROSS EXAMINATION

BY MR. HULTMAN:

Q Mr. Hall, have you done a test of that kind before?

A Have I which?

Q Have you ever done a test of that kind before?

A Not at that distance; no.

Q You did it at a half mile, is that right?

{3791}

A Approximately a half mile.

Q That's 880 yards, isn't it?

A Yes.

Q You don't know what it would have been if you had done it at 700 or 750, is that fair?

A As the distance would decrease, it would become a little more easier to identify a person.

Q Now in order to make an observation of that kind, first of all there are many variables involved, are there not?

A Yes.

Q First of all, the variable of who is looking through the sight, isn't that a fair conclusion?

A Yes.

Q What if you were looking through the sight with your other eye?

A I wouldn't be able to see him at all, anything.

Q That's because you have a different capability in one of your eyes than the other, is that right?

A Yes, I do.

Q And that's similarly true with many other people is it not?

A Virtually everybody I would suppose.

Q Secondly, the condition, the conditions and terms of many factors surrounding the viewer makes a great difference, does it not, in viewing through a scope?

A Oh, yes.

{3792}

Q For example, if you're looking through, have you ever done any hunting?

A Yes.

Q Do any deer hunting?

A Not actually big game hunting.

Q All right.

If you're looking through a scope at an object where the background is contrasted with the object, there is a fair, far greater opportunity to conclude what that object is than if the background is similar or the same, isn't that true?

A Yes.

Q In other words, for example, if we were looking at a background of the white object behind you right now from a distance and the object we're trying to discern likewise was white, it would be difficult, would it not?

A Yes.

Q Kind of fuse into the background?

A Yes.

Q On the other hand if the object contrasted in any way, with the greater contrast would be black, if the object were black or red, any contrast, it would be much, much, much easier then to discern what that object is, is it not?

A Yes.

Q Now there's another factor which I think you even mentioned because you even changed the location, or at least there was a {3793} difference in the location and that if, and I don't know what the exact word was that I believe you used, but mirage, was that the word you used?

A Mirage. Yes.

Q There are a number of climatic conditions that have a real impact on what you can discern and see through a scope, isn't that a fair conclusion?

A Yes.

Q And if you have, for example, heat rays coming from the ground, that is an interference factor, is it not?

A Yes, it is.

Q The same with moisture?

A Yes.

Q That is an interference factor, is it not?

So that there are a number of variables that go into ultimately deciding whether somebody could or could not see an object at a given time and place, isn't that a fair conclusion?

A Yes.

Q Let me ask you one that I think it may be more significant and more important than any of those we've talked about. Have you ever stood with a rifle with a scope and tried to look at something offhand? Is that what you were doing that day?

A Yes.

Q That's the way you did the test, is that right?

{3794}

A Yes. Yes.

Q Now if you would compare that situation, I'm not holding 41A just for the only reason it does have a scope, no other significance for the record. If you would look through this scope as you have on occasions at an offhand position, is this somewhat the manner in which you made the test (indicating)?

A Yes, it is.

Q There is a tendency of body movement that it makes it difficult, does it not, to hold it at the greater range, specially on any given object?

A Yes.

Q It's quite a different test if I happen to be in a window and I have this weapon in any way in a fixed position where it's not offhand, isn't that a fair conclusion?

A Yes.

Q In fact, a difference almost between day and night what you can see and not see, isn't that true?

A Depends a lot on the ability of the person to hold the gun steady offhand.

Q It depends whether or not how steady the individual holds it offhand. Isn't that why we have some expert shooters and some that can't hit the broad side of a barn?

A That's right.

MR. HULTMAN: No further questions.

{3795}

REDIRECT EXAMINATION

BY MR. TAIKEFF:

Q How was the subject that you looked at standing, facing you or in profile?

A Facing me.

Q Did that give you a greater or a lesser chance of making the identification than if you comparatively had looked at him in profile?

A Probably in favor of making identification with this particular person.

Q Now you spoke about a number of factors, climatic factors that would make it less likely that you could see a particular object at a particular distance and I think among them, or perhaps describing them all you used the word mirage.

A Yes.

Q Now that would include factors such as moisture in the air?

A Yes.

Q The amount of moisture coming out of the surface?

A Yes.

Q The temperature?

A Definitely; yes.

Q Now as to those things, gravel road versus land on which grass or foliage is growing, which gives you the higher mirage effect and therefore the lesser chance to see?

A I never actually tested the two, one against the other under similar conditions. I really couldn't say. You'd have to have {3796} all the other conditions exactly the same to test that condition.

Q Wouldn't the availability of moisture in the surface be important?

A Yes. If there is a lot --

MR. HULTMAN: Well --

A -- of moisture in the surface and the sun is hitting it, the mirage is a lot higher than a cloudy day or dry soil condition.

Q (By Mr. Taikeff) So within a particular locality, a piece of ground, part of which was covered with gravel and part of which had grass and bushes on it, same temperature, same general circumstances, at which or over which would you expect to get a greater mirage effect and hence a lesser change to make a sighting?

A If the moisture is coming out of the foliage, I'd say you'd probably have a little more difficulty, green, wet moisture with the sun hitting it. If it's dry ground --

Q Well, assuming both parts of the ground that was talked of, the gravel part and the other part adjacent had been subject to the same exposure to moisture, where would you expect to get a greater amount of moisture immediately above the ground, above the gravel or above the growing grass and foliage?

A It would be very similar actually.

Q How about the temperature, the higher the temperature, the greater the mirage effect?

{3797}

A Depending on if the sun is hitting it or not. The actually warm would make a difference but you'd have a tremendous mirage factor in the wintertime and a tremendous mirage factor in the summer. Sun makes more of a difference.

Q Suppose the day in question were June 26th, that was almost cloudless, that it was in mid-afternoon and the temperature above 90 degrees.

A I would say you would have a very high mirage factor.

Q Which means a very low chance of making a sighting at a half mile with a seven power scope?

A In my opinion.

Q Now, sir, one final point. Mr. Hultman gave us a demonstration when he was holding that .22 caliber rifle with telescopic light and he asked you to compare the probabilities of being successful in looking when you held the rifle to your shoulder versus when you rested it on some solid object like a window frame and I think your answer was that when you rest it on a solid object you have a better chance of making an identification, am I correct about that?

A Yes.

Q And was the basis of your opinion that when you hold it in its free form, when you hold the rifle in the free form there is a tendency for the body to move or your arms to move and as a result you're moving the scope relative to the object?

A Yes.

{3798}

Q Now is there any difference between a scope moving a little bit and the object staying still or the scope staying still and the object moving?

A Both factors would complicate identification.

Q So if you now had that same telescopic sight on a sunny, hot summer afternoon in an area that was covered with foliage and grass and the person that you were looking at was seen in profile while that person was running, what do you say of the probabilities based on your own

test of making an identification of a person whom you may have seen only once or twice in your lifetime?

A Very, very difficult if not impossible.

MR. TAIKEFF: No further questions.

RE-CROSS-EXAMINATION

BY MR. HULTMAN:

Q I just have a question or two, Mr. Hall.

Let's just assume that we changed the circumstances of your test to a condition where you are standing on high ground and looking to an object across a valley on a similar high ground. Would you be able to without anymore changes of any kind in terms of what the background may be, what the factors may be with reference to mirage or anything else, assuming all the other things are equal but you are looking from a high ground point to a high ground point with a valley in between, would the conditions and the capability and the opportunity probably be better for you to draw a conclusion that would be {3799} more comprehensive and accurate than under the conditions where you were making your test?

A It would be easier to, you'd have clearer view because of less mirage. The higher up you go the visibility increases.

Q And you have no obstructions of any kind in between, do you?

A Right.

Q Or any real possibility?

A Right.

I have no further questions.

MR. TAIKEFF: Nothing further.

THE COURT: You may step down.

MR. TAIKEFF: May the witness be excused, Your Honor?

THE COURT: Any objection to this witness --

MR. HULTMAN: No objection.

THE COURT: You are excused.

MR. TAIKEFF: Your Honor, I believe the witness has been sworn. May he take the stand?

THE COURT: You may.

MR. TAIKEFF: May I inquire, Your Honor?

THE COURT: You may.

JIMMY DURHAM,

being previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TAIKEFF:

Q Mr. Durham, would you state your full name.

{3800}

A Jimmy Durham.

Q And where do you live, Mr. Durham?

A In New York City.

Q Are you a native American person?

A Yes. I'm Cherokee.

Q And what is your present occupation?

A I am the Executive Director and United Nations representative of the International Treaty Council, Organization of the American Indian Movement.

Q Where does it have its offices?

A An office on Pine Ridge, an office in Standing Rock, South Dakota and an office in New York City at the United Nations.

Q Do you travel in connection with your work?

A Pretty constantly.

Q And what are the kinds of people by terms of their occupation that you come in contact with in connection with your work?

A I travel to a lot of Indian reservations and communities and deal with the traditional people there and I go through the country and talk to governments, to international organizations.

Q Does the International Indian Treaty Council of which you're the executive director have any standing or status of an official kind at the United Nations?

{3801}

A Yes. We have what is called by the United Nations consultative status.

Q Could you briefly advise the Court and jury as to what the meaning or significance of that is?

A The consultative status that the United Nations granted to the international organizations that have specific things to contribute to the UN that can't be contributed to the other people in legal affairs, human rights affairs.

Q The organization of which you're the executive director has a Board of Directors, does it not?

A Yes. It has a Board of Directors presently of 108 people who are mostly traditional chiefs, medicine men and other leaders in the Indian community.

Q Have you prepared, published or had received by the United Nations any books, pamphlets or documents?

A In the past two and a half years we have prepared approximately a dozen different documents for the United Nations on Indian affairs in the Western hemisphere. We're presently preparing a very comprehensive document on the affairs of American Indians for conferences that the United Nations is holding on American Indian affairs.

Q Where is that conference to be held?

A In the United Nations in Geneva in September of this year.

Q For how many years have you been doing the kind of work or related work that you do now?

{3802}

A I started doing international work with the Indian affairs in 1971 and I joined the American Indian Movement in 1973. Before that, back home, I was doing community organizing with an idea towards getting into international affairs.

Q For how many years in totem has your work been oriented around the circumstances of Native American people?

A Since I was born almost. My family is an Indian family that has had to struggle for their rights so I grew up in that situation.

Q Although what I was really asking you in particular was with respect to your adult life and your adult work. How many years of such work have you done altogether?

A As long as I have been an adult except I served four years in military service.

Q Of the United States, I assume?

A Right.

Q Army?

A Navy.

Q I would like to inquire of you in two areas. The Pine Ridge Reservation is a reservation for which native American people?

A It's a reservation of the Oglala and Lakota.

Q Also known in English as what?

A The Oglala Sioux.

Q And in connection with matters that may concern events on that reservation, can you explain whether it is usual or {3803} unusual for Indian people of other tribes to come there or be there for such purposes?

A Well, it's completely usual. We see ourselves as nations of people but we see ourselves as one people at the same time as part of our philosophy of the sacred circle of life and we see ourselves as Indian people. Historically we have traveled to reservations, to each other's country and are always welcome.

Q I don't know whether you call them nations or tribes or bands or whatever word you use, how many such Indian entities are there in the United States?

A If you're talking about nations of people such as the Cherokee or the Lakota or Navaho, there are approximately 95 around.

Q 100 different --

A Reservations in the U.S., there are about 260.

Q 260 different subdivisions?

A Reservations.

Q Is there any common aspect amongst those people other than the fact that they are all of the red race? Is there some cultural or historical commonality between them all?

A You can see how racially mixed I am. It's not a question of race. It's a question of vision and the idea of this vision is centered around the pipe for almost all Indians and the idea of the sacred circle of life which the pipe represents.

{3804}

Q Are you saying then that all the Indian peoples of North America in their traditional religion respect and recognize the power of the pipe?

A Yes.

Q The other area that I want to inquire of has to do with the so-called traditional Indians and in this particular instance I'm asking you about the traditional Indians on the Pine Ridge reservation. If there are any differences elsewhere, please say so. Is there any reason that you know of as a result of your work, your expertise why the traditional people on the Pine Ridge Reservation should have any conflict with any other groups or forces on that reservation?

A The traditional people which are the legal government, the traditional council of chiefs, the legal government of Pine Ridge.

Q Under what authority?

A Under their own authority and recognized by the U.S. through the 1868 Fort Laramie Treaty. Different congressional acts have tried to pretend this treaty is not valid to the extent that those congressional acts say it is not valid. That is not constitutional in our vision and so there is a constant conflict of what amounts to a colonial government, the United States taking over our land, giving us the form of government on every reservation that is not our form of government setting up different economic factors that pit Indians against {3805} other Indians. The government uses every way that it can, the only way I can frankly say it, to harass us and to divide us.

MR. HULTMAN: I would object to this as not being responsive and further that it's not relevant and no proper foundation and it has no relevancy as far as it's too remote.

THE COURT: Sustained.

{3806}

THE COURT: Sustained.

Q (By Mr. Taikeff) Would your focus your attention then on the ways of the traditional people on the Pine Ridge which, by the way, you have visited how many times in your work?

A The first time I went to Pine Ridge was in 1974, and I have been there approximately seven or eight times since then for the past few years.

Q Can you relate what it is about the particular existence of the traditionals on the Pine Ridge, as they actually exist now, and in the past recent years?

MR. HULTMAN: Your Honor, I am going to object to this and anything further on the grounds of relevancy, of remoteness, and that this witness, if he is offered as an expert, I don't think he is qualified as one by the showing that has been made the few times that he has been there; and if it is being offered to elicit testimony as to the state of mind, I don't believe then that there has been compliance with Rule 12.2(b); and it is for all those reasons that I am going to object to any further testimony concerning this witness.

MR. TAIKEFF: Your Honor, I believe I have qualified this witness as an expert.

THE COURT: Will counsel approach the bench?

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

{3807}

THE COURT: I have asked you to come to the bench so that you may state for the record why you feel this testimony you are now going into is relevant.

MR. TAIKEFF: Yes.

First I would like to advise primarily Mr. Hultman, this was the last point of inquiry so that he would understand the scope and extent of it.

Secondly, your Honor, there has been testimony concerning the need of the traditional people in the White Clay District for the assistance of the AIM people and the cross examination of the Government tended to indicate a number of things which this witness has been called to counter, one of them being the unusual nature of the facts that the Indian people who came there were not Oglala Sioux people. I think that has already been covered by this witness' testimony.

MR. HULTMAN: I think it has.

MR. TAIKEFF: In addition to that, there has been a suggestion by some of the cross examination that there is not the tension or the violation in the lives of the traditional people --

THE COURT: (Interrupting) There is not what?

MR. TAIKEFF: The kind of tension and conflict which has been asserted by the defense because certain witnesses themselves have not experienced personally these assaults {3808} or acts of violence. This witness is called to give an overview of the situation and an explanation of its

origins and genesis so that the jury will not have to rely solely upon the testimony of those traditionals who testified and can determine whether or not they are exaggerating something.

This is a witness who has a rather objective overview of the situation and an explanation, not only of what does exist but the reasons underlying it so that its genesis can be understood, and hence the fact can be believed.

MR. HULTMAN: Your Honor, I am going to object on the grounds that it is very clear now that this is an attempt on the part of counsel through somebody who is clearly not qualified to determine or to lend evidence as to what the state of mind of this Defendant was when on that particular day that these events happened.

THE COURT: Just to interrupt you for just a second.

I am not sure that he is offering it to show state of mind of the Defendant. It seems to me that what -- if I understand Mr. Taikeff correctly -- he is offering it to show a reason why the American Indian Movement group was asked to come.

MR. HULTMAN: Well, I think the best evidence there has already been put in, that this man has by what he has {3809} indicated from foundation, has no special knowledge or peculiar knowledge as far as those very events.

We have had the individuals who were specifically involved on the stand as to those. The testimony of this man is only going to be very general in nature, and I say that goes ultimately though to the issue I have addressed the Court and that's the real ultimate reason for which counsel is going to use whatever testimony now this particular witness will give.

MR. TAIKEFF: Your Honor, I think that I am bound to respond to that by saying that Mr. Hultman is correct in part that it does touch that other issue. It touches it in a way that has nothing to do with the direct conclusionary testimony that this witness will be asked to offer because if he explains a condition that is prevalent and obvious and the reasons for it, and the jury then, on the basis of that and other testimony, chooses to find that indeed that condition (a) exists and (b) is rather prevalent, then it is appropriate for counsel to argue that people who were there in response to such a call obviously themselves must have known what was going on because they weren't living in a vacuum.

So to that extent I must say that Mr. Hultman is correct, but as to the specific evidence to be adduced from this witness, it is not going to be general. It is {3810} going to be very specific. Right now he is prepared to explain in relatively brief form -- I don't expect this to be a prolonged bit of testimony -- exactly what it is about the way of life that is followed by the traditionals which puts them in an extreme conflict with those forces who think another way of life should exist on the Reservation, and he has some very specific enlightening explanation of it. He doesn't take any position on the merits of it.

MR. HULTMAN: Well, I object, your Honor, on the matter of relevancy.

THE COURT: How is this relevant as to whether or not this Defendant committed the crimes alleged in the indictment or as to any of the evidence produced by the Government?

MR. TAIKEFF: To the same extent that any proof concerning why they were there and the quasi-official nature of their invitation is relevant because it shows that they are not an odd renegade band that just happens to be roaming the countryside.

THE COURT: I have allowed that in as to why they were there. I do not grasp the relevancy of going beyond what you have in the record already.

MR. TAIKEFF: All right, I can perhaps answer your Honor's question by posing a question for the Government to answer, whether they are prepared to stipulate that {3811} the testimony that has been received concerning the conditions which gave rise to the invitation are in fact true, and that is the general condition which existed in the White Clay District.

If the Government is willing to do that, frankly, I don't need this testimony; but I think the Government will not be willing to stipulate and will argue the contrary.

THE COURT: And what is this witness' expertise that he can testify as to the conditions that existed in the White Clay District?

MR. TAIKEFF: That is a combination of his work as an international expert in connection with native American matters, treaty matters, his understanding and involvement in the religious and cultural aspects of the native American peoples, and he provides the underlying explanation for why there is that conflict which must be positive to a jury in determining whether they are going to believe that the conditions we assert existed actually existed, unless the Government is willing to concede that those conditions actually existed.

THE COURT: What is this witness' exposure to -- is it the White Clay District?

MR. TAIKEFF: That is a prominent traditionalist district on that Reservation as per the testimony of Mr. Trimble.

{3812}

THE COURT: All right, and what is this witness' exposure to that District?

MR. TAIKEFF: I myself do not know specifically, I would have to ask him -- but I am prepared to ask him -- except that he knows the Reservation. He knows that particular Reservation generally, and as a result knows the problems of the traditional people. Mr. Trimble provided the evidence that the White Clay District is one of the prominent traditionalist Districts, so what conditions exist for traditional people would exist in particular in the White Clay District.

THE COURT: You have Mr. Trimble's testimony in there I am not going to permit any additional testimony from this witness unless you can show something, some personal familiarity on his part with this White Clay District.

MR. TAIKEFF: I will attempt to do that with nonleading questions, your Honor.

MR. COURT: Very well.

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

Q (By Mr. Taikeff) Mr. Durham, does the phrase, "White Clay District," mean anything to you?

A White Clay District is a district of the Pine Ridge Reservation.

Q And does it have any qualities or uniqueness as far as {3813} you are concerned?

A Well, it is like a stronghold of the traditional people, traditionalism on the Reservation.

Q Have I ever put either of those questions to you before this moment?

A No. You asked me at one time I knew the Reservation and if I knew about White Clay, and I said "Yes, I know about White Clay."

MR. TAIKEFF: May I proceed then, your Honor?

THE COURT: You have not brought out what the basis for his information is, what the basis is, from what basis his information arises.

Q (By Mr. Taikeff) All right. Do you understand what his Honor would like to know, from what his Honor just said?

A No.

Q All right. I will try it with some questions.

You have told us something about White Clay, based on your understanding.

What is the basis of that understanding about the White Clay District?

A Going to meetings weekly and going to other parts of the Reservation, traveling around the Reservation.

Q When you went to the meetings of the White Clay District, was that for social purposes?

A No. Those were treaty council meetings, meetings of the {3814} traditional people.

THE COURT: You have nothing in the time frame.

MR. TAIKEFF: All right. I am seeking guidance from the Court.

Q (By Mr. Taikeff) Could you tell the Court and jury when you made these trips, attended these meetings and learned whatever it is that you learned?

A Well, over the past three years, the last time I was there was in March of this year. I was there once in -- two or three times in '76. '75 is vague.

THE COURT: I didn't hear the last part.

A 1975 and '74 get vague because it is a long time ago. '75 I was there in February or March, and perhaps later the next winter, '75.

MR. TAIKEFF: Excuse me one moment. May I have that document?

MR. HULTMAN: Your Honor, I am going to renew my objection at this time.

THE COURT: The objection is sustained. This witness testimony as to his knowledge of the White Clay District in 1974 and 1975 is vague.

MR. TAIKEFF: He didn't say that the number of times is vague. It was that long ago. He gave us the specific number of times that he was there in '75.

MR. HULTMAN: May we again approach the bench?

{3815}

THE COURT: You may.

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

THE COURT: Just a moment. Look up the answer that the witness gave.

(Record here read by the reporter was as follows: "ANSWER: Well, over the past three years, the last time I was there was in March of this year. I was there once in -- two or three times in '76. '75 is vague. THE COURT: I didn't hear the last part. ANSWER: 1975 and '74 get vague because it is a long time ago, '75 I was there in February or March, and perhaps later the next winter, '75.")

MR. HULTMAN: Well, your Honor, I renew my objections for all of the reasons that I have objected to earlier. It is indicative that this man is going to primarily put into the record matters primarily based on hearsay, but beyond that are matters to which are not the best evidence.

First of all, if they were admissible, that there are individuals who live on that Reservation, been there, that's been the testimony which has already been elicited and placed into the record; but I am still back to my basic objection, that it is irrelevant as to any issue or any probative value of the issues in the ultimate issues involved in this case, and that is as to this Defendant and the alleged acts of this Defendant on that particular {3816} day. I just -- the relevance is beyond me.

MR. TAIKEFF: Well, the Government makes two separate points.

As to the first point it makes, this witness is not going to testify about hearsay, concerning specific events. He is going to attempt to explain the genesis, the origin of the problem from specific cultural factors and historical factors as an expert. He is not going to refer to one beating or one shooting or one incident. He is only going to look at certain aspects of the traditional life and explain how the insistence upon following that cultural and religious track has placed these people in severe conflict with other forces on the Reservation, without ever referring to a specific incident.

MR. HULTMAN: I will say that's still a collateral issue and doesn't provide any basis of relevancy for a killing that took place of two FBI Agents serving a warrant on that day. That's my objection, plain and simple.

THE COURT: Again I will ask you, specifically what do you intend to bring out from this witness now?

MR. TAIKEFF: He is going to point out that the nature of the cultural life, the traditional life and the religion which are closely intertwined, is such that the relationship to the land is primary and their attitude about and their religious belief in the significance of {3817} the land is such that they as an outgrowth of that must be in conflict with any progressive changes on the Reservation in terms of modernization and other things which occur on the Reservation which interfere with their ability to live the traditional life because of the things which have been brought upon or done to the land on the Reservation; and that it is their struggle to prevent those things from happening because if those things happen, the cultural existence is terminated. It is a thing which has been happening increasingly and incrementally over the last hundred years. It is their very problem that these things have been happening, and they are totally inconsistent with the continuation of their ability to live the traditional life; and that is the source of the conflict between the traditional people and the other people on the Reservation.

That explains why, as asserted by other people who had a very narrow view of it, because of their only isolated personal experiences, why you have Indian against Indian on the Reservation, fighting with each other; and if that explanation is satisfactory to the jury, they take a very easy step in believing what the other witnesses who have testified to the actual day-to-day existence is true; but without that the Government is in a position to argue that these witnesses are just not believable or that {3818} this whole thing is super-fantastic; but this person provides an expert rationalization of why the fact finder should believe those witnesses, that those conditions were as severe as they said they were.

MR. HULTMAN: I would still argue, your Honor, that I fail to see the relevance between events between Indians and Indians, that's not the issue in this case in any way.

MR. TAIKEFF: It certainly is one of the sub-issues in the case because your Honor has already ruled that it is relevant to show why that group was there and armed, and this is part of proving and satisfying beyond any doubt that explanation.

THE COURT: I will let you go to this extent, and that is to simply have this witness express an opinion as to whether there did exist in 1974 --

MR. HULTMAN: (Interrupting) '75, your Honor.

THE COURT: (Continuing) -- 1975 a conflict, ideological or other type of conflict between the traditionalists and non-traditionalists on the Pine Ridge Reservation, and No. 2, if such a conflict did exist, what did this conflict arise out of, just general terms. That is as far as you can go.

MR. TAIKEFF: All right. I will do that. I will ask those two questions.

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

{3819}

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

Q (By Mr. Taikeff) Mr. Durham, I am going to put two questions to you. First, I ask you for your expert opinion as to whether or not in 1975 there existed on the Pine Ridge Reservation a conflict between the traditional Native Americans and the nontraditional Native Americans?

A Yes, there was.

Q The second question is: Would you summarize, based on your expertise, what in your opinion are the underlying causes for this Indian against Indian conflict?

A The traditional vision of Indian American Indians with the pipe centers around a harmony of a circle, harmony of every part of life with out animal brothers and sisters and with our human brothers and sisters and a harmony, and a reference for the sacredness of life. And this seems to come in direct conflict with white people's mentality.

The only way I can see it, and the situation on Pine Ridge is that the nontraditionals, the mixed-bloods, have accepted the white man's money, the white man's way of life and that is the difference.

MR. TAIKEFF: I have no further questions.

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

THE COURT: You may step down.

MR. TAIKEFF: Your Honor, I have a witness who I expect {3820} will be here in a relatively short time. May I call an additional witness now?

THE COURT: You may.

MR. TAIKEFF: Defense calls Bambi Sanchez.

BAMBI SANCHEZ,

being first duly sworn on the sacred pipe, testified as follows:

MR. TAIKEFF: May I proceed, Your Honor?

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. TAIKEFF

Q Can you look this way, please. Are you nervous?

A A little bit.

Q All right. Try to stay close to the microphone so that everybody can hear you.

Have you and I ever spoken about your testimony?

A Yes.

Q How many times?

A Once.

Q For how long?

A About five minutes.

Q Where do you live?

A Alamosa, Colorado.

Q Alamosa, Colorado?

A Yes.

Q Were you ever in a place called Boulder, Colorado where the name of Leonard Peltier came up?

{3821}

A Yes.

Q Where were you in Boulder?

A With, at a friend's apartment.

Q How many people were there?

A There was three people including myself.

Q Including yourself?

A (No response.)

Q And tell us what happened.

MR. HULTMAN: Well, could we, Your Honor, at least get a time.

MR. TAIKEFF: I'm sorry.

Q (By Mr. Taikeff) Could you give us an approximate time when that took place?

A I believe it was around September 10, 1975.

Q All right.

MR. HULTMAN: Could we find out, Counsel, who the people were?

MR. TAIKEFF: Yes, I will get to that.

Q (By Mr. Taikeff) Now, can you tell the Court and jury what happened from the beginning of the episode to the end concerning the name Leonard Peltier? Speak slowly and make sure that you speak loud enough for everybody to hear you.

A It was towards the evening and LeRoy Kosata and myself and another friend were all sitting around watching television and we heard a knock at the door. And the woman that owned the {3822} apartment just said, "Come in."

And there was this call and she went to the door to open it. Then all of a sudden about seven agents just rushed in with weapons and they put a gun to my head --

MR. HULTMAN: Well, Your Honor, I haven't had a chance to object yet but I'd like to approach the bench.

THE COURT: You may approach the bench.

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

MR. HULTMAN: Your Honor, first of all I'm totally surprised because, one, I never even heard of the person before and two, I have no knowledge as to what possibly the testimony could be.

And I would request at this time that there be some type of an offer of proof of showing as to what this witness is going to indicate in order to, I might interpose an objection before there be anything to come before the jury about an agent putting a gun to somebody's head. That's already before them. Even without the small possible relevance it may have.

MR. TAIKEFF: Your Honor, I'm torn between two impulses here. One is to answer Mr. Hultman as a matter of professional courtesy, and the other is not to because the defense was not aware of everything that every witness was going to say. And that surely did not provide the basis to come to the sidebar every time there was a question that the defense didn't know {3823} the answer to. And I don't think it's appropriate to set that kind of precedent in this case.

The Government has appropriate tools, cross-examination, which is the greatest engine ever invented for the ascertainment of the truth, the continuance if necessary. I don't see why I have to tell --

THE COURT: Just a moment. The problem you've got here is that she's starting to describe the incident relating to Leonard Peltier.

MR. TAIKEFF: That's correct.

THE COURT: In September of 1975. In Boulder, Colorado which is probably three, four hundred miles away from Pine Ridge Reservation. And she's starting to, she makes a comment that there's a knock on the door and seven agents come in and put a gun to her head. Now, that, my imagination may not be too fertile, but it's, I'm having difficulty seeing what that might lead to that would be relevant to the indictment.

MR. TAIKEFF: I believe Your Honor is incorrect concerning the statement of fertility, but notwithstanding I will respect the Court and provide some fertilizer.

The defendant unquestionably traveled from Pine Ridge Reservation through the western part of the United States into Oregon and into Canada.

THE COURT: I assume so.

{3824}

MR. TAIKEFF: I think that's crystal clear.

THE COURT: Right.

MR. TAIKEFF: One of the things we have to counter is the suggestion of the Government that the only reason he was going was because he feared successful prosecution and that that was a reflection of his knowledge of guilt. That's been clearly the position that the Government has taken on the basis of all of our objections about certain collateral and prejudicial evidence.

We will prove incrementally obviously there is no one, in fact there are not even three witnesses who can paint the whole picture that the defendant had good reason to believe that the effort being expended by the FBI was of such a nature as to concern him, that if he were ever confronted by them he would be gunned down, he'd never have a trial,

Now, Jean Day has provided some of that testimony in connection with what she saw on the reservation in early July and her conversation with Leonard and his expression of concern. This witness will corroborate the reasonableness of his concern because of what occurred at her apartment when a person was misidentified as Leonard Peltier.

Now, I admit, before anybody says anything, that there is going to be no proof that that specific incident was communicated to him. But when we prove actual events and sightings made by people who saw these things or experienced {3825} these events and we argue to the jury that that means that Leonard Peltier has reason to fear for his life that he would never have a trial before judgment was entered against him.

THE COURT: Specifically what is she going to testify to?

MR. TAIKEFF: She's going to testify that an agent thought that one of the people there was Leonard and told the other agent to shoot that person even though everyone had put his hands up and submitted to their power. And the fact that such a thing occurred corroborates the legitimacy of his belief predicated on the things which he in fact learned which we will prove he learned as he went along the way.

MR. HULTMAN: Your Honor, that is so remote and so prejudicial, and as counsel has even indicated it is something that was even within the knowledge of this particular defendant. It's an isolated instance that any time -- in fact the testimony already before it -- in order to rebut any such testimony, first of all the Government is now forced, and we've talked about many trials within trials, that was an issue raised by counsel, the Government will now have to go secure whatever individuals and that have no idea as to time, place or anything else, who they are, in order to come back and rebut that testimony. And I say that testimony, when it's tested by a relevancy versus prejudice, there's no question that that testimony is not relevant here.

{3826}

That's a collateral matter that is so far out that --

THE COURT: The objection is sustained.

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

MR. TAIKEFF: I have no further questions.

THE COURT: You may step down.

Court is in recess until 1:30.

(Recess taken.)

{3827}

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

MR. TAIKEFF: Your Honor, this is Jeanette Tallman from Allen, South Dakota.

THE COURT: How do you do. Just have a chair.

MR. TAIKEFF: Your Honor, I told Your Honor before about the concern that this person had. This is a person whom we have subpoenaed as a witness and in the course of asking her about the reasons for her concern she revealed what I think is an important fact and I'm wondering if I could put two short questions to her.

THE COURT: Sure.

MR. TAIKEFF: Would you tell the judge first when you last saw Myrtle Poor Bear and where that was.

JEANETTE TALLMAN: You mean the last time?

MR. TAIKEFF: The last time you saw her.

JEANETTE TALLMAN: That was Wednesday.

MR. TAIKEFF: What time of day?

JEANETTE TALLMAN: About 3:00.

MR. TAIKEFF: In the afternoon?

JEANETTE TALLMAN: Yeah.

MR. TAIKEFF: And where was that?

JEANETTE TALLMAN: At Allen.

MR. TAIKEFF: When you say "Allen," you're speaking of Allen, South Dakota?

{3828}

JEANETTE TALLMAN: Yes. Allen, South Dakota.

MR. TAIKEFF: On Pine Ridge Reservation?

JEANETTE TALLMAN: On Pine Ridge Reservation.

MR. TAIKEFF: The other thing I want to ask you about is the fact you were very upset yesterday afternoon I was told and when I spoke to you earlier today before I took you into the private office you also appeared to be very upset and you said you were, is that correct?

JEANETTE TALLMAN: Yes.

MR. TAIKEFF: Would you tell the judge what you were upset about?

JEANETTE TALLMAN: Well, this Myrtle said that before I testify against her, she said she was going to get some men after me.

THE COURT: If you testified against her?

JEANETTE TALLMAN: Yeah. If I come up here and testify.

MR. TAIKEFF: I'd like to add one other thing. Are you related in any way to Myrtle Poor Bear?

JEANETTE TALLMAN: Yes.

MR. TAIKEFF: Tell the judge what that relationship is.

JEANETTE TALLMAN: She's my second cousin.

MR. TAIKEFF: And perhaps so that the judge will understand the reason why you're here, were you with her on June 26th, 1975?

{3829}

JEANETTE TALLMAN: Yes.

MR. TAIKEFF: And how can you pinpoint that date: based on something you heard?

JEANETTE TALLMAN: Uh-huh.

MR. TAIKEFF: And what did you hear?

JEANETTE TALLMAN: Turned on the radio and came on the radio that the FBI agents were killed on Pine Ridge Reservation.

MR. TAIKEFF: Thank you very much.

THE COURT: You were with her at that time?

JEANETTE TALLMAN: Yeah.

THE COURT: And you are fearful that if you take the stand here that something may happen to you?

JEANETTE TALLMAN: Yes.

THE COURT: What kind of relationship have you had with her? Has she been friendly? Have you been friendly to her? Has she ever done anything to you, before?

JEANETTE TALLMAN: No.

THE COURT: Has she ever made threats of any kind to you before?

JEANETTE TALLMAN: No.

THE COURT: Has anybody else?

JEANETTE TALLMAN: No.

THE COURT: Where were you when she said this to you? Were you in her home or was she in your home?

{3830}

JEANETTE TALLMAN: We were in Gordon, Nebraska.

THE COURT: What were you talking about?

JEANETTE TALLMAN: She was asking me if I was subpoenaed in here, you know, Fargo. I told her, I told her that I didn't get anything. This was about a month ago and I just got my subpoena Tuesday, Tuesday afternoon.

THE COURT: This happened about a month ago?

JEANETTE TALLMAN: Yes.

THE COURT: That she said this to you?

JEANETTE TALLMAN: Yes.

THE COURT: Did you see her again last Wednesday?

JEANETTE TALLMAN: I seen her but I didn't talk to her.

THE COURT: When is the last time you have talked to her?

JEANETTE TALLMAN: Wednesday.

THE COURT: When is the last time you talked to her?

JEANETTE TALLMAN: Oh, that was same time.

THE COURT: You did talk to her last Wednesday?

JEANETTE TALLMAN: Yeah.

THE COURT: Did you tell her that you were going to come testify?

JEANETTE TALLMAN: I didn't know then so I didn't tell her anything.

THE COURT: But she told you about a month ago if you testified she'd get somebody to do something to you?

{3831}

JEANETTE TALLMAN: (Witness nods affirmatively.)

THE COURT: This bothering you as far as testifying?

JEANETTE TALLMAN: (Witness nods affirmatively.)

MR. TAIKEFF: Your Honor, I might indicate if it has any bearing on Your Honor's view of the matter that the witness toward the end of our conversation, the earlier conversation I had with her indicated to me and apparent willingness to tell what she knows because she gave me the name and address of a very important witness concerning this aspect of the case and she volunteered that so I think her attitude is one of a neutral witness and I don't think she has any particular ax to grind.

THE COURT: Well, if it's determined that your testimony is proper, then of course it will be necessary for you to testify. By that I mean if it's determined that you have something of importance to the case to testify on, it will be necessary for you to testify.

Now what is that going to do to you? Does it frighten you?

JEANETTE TALLMAN: (Witness nods affirmatively.)

THE COURT: Very much?

JEANETTE TALLMAN: Uh-huh.

THE COURT: What do you think that should be done to help protect you?

JEANETTE TALLMAN: I don't know.

{3832}

THE COURT: Mr. Taikeff, do you have any suggestion, any assurance I could give this witness?

MR. TAIKEFF: It might be possible if she testifies and after she has come off the stand if she feels the same way that the marshal service might make it possible for her to stay somewhere at a distance from where she presently lives until she feels that the matter is no longer as sensitive as she thinks it is now or might think it is when she gets off the stand. But I think if Your Honor would indicate to her that there are facilities for providing her with some protection over a certain period of time and that if necessary those facilities would be taken advantage of, perhaps that would ease her mind.

THE COURT: Where do you live?

JEANETTE TALLMAN: No response.

MR. TAIKEFF: I don't think she knew Your Honor was speaking with her.

THE COURT: Where do you live?

JEANETTE TALLMAN: Allen.

THE COURT: Pardon?

JEANETTE TALLMAN: Allen.

MR. TAIKEFF: Allen, South Dakota.

THE COURT: Do you have a family?

JEANETTE TALLMAN: Yes.

THE COURT: Do you live alone?

{3833}

JEANETTE TALLMAN: I have two children.

THE COURT: You have two children. Do they live with you?

JEANETTE TALLMAN: (Witness nods affirmatively.)

THE COURT: If you testify I will bring this matter to the attention of the marshals and the FBI. Would that bother you if I bring it to the attention of the FBI?

JEANETTE TALLMAN: No.

THE COURT: Because, and then we'll see what can be worked out for you.

MR. TAIKEFF: Do you feel better about that?

JEANETTE TALLMAN: No.

THE COURT: Not really?

MR. TAIKEFF: I would like to indicate to Your Honor that the information given to me by this witness concerning the existence of another witness is such that if we can locate and subpoena that witness I might feel sufficiently secure about that aspect of the factual picture that under the circumstances I would seriously consider releasing this witness.

THE COURT: Why don't you inquire.

Were you planning on having her testify this afternoon?

MR. TAIKEFF: No, Your Honor.

THE COURT: Why don't you look into that possibility.

MR. TAIKEFF: Do you understand what I said to the judge? {3834} If you wait outside, perhaps I can make arrangements with you to help me find that other witness and get that witness subpoenaed and when I have interviewed that witness, then I think because of your very special circumstances I might let you go without testifying. I'm not promising that you will but I promise to give it serious thought. Is that all right? Does that give you some relief at the moment?

JEANETTE TALLMAN: (Witness nods affirmatively.)

MR. TAIKEFF: I'll do that, Your Honor.

Could you wait outside. I have one other thing I'd like to say to the Judge. It doesn't concern you.

I don't know whether Your Honor has had his lunch, but if not perhaps there is a sound basis for my application, I and that is that the luncheon recess be extended a half hour. The special reason for it is this: Your Honor may have noticed that Mr. Ellison became very pale in the course of the morning proceedings and left the courtroom. He went into 326 to try to recover. Sometime after the morning recess it occurred and within a half an hour Mr. Engelstein advised me that he was in terms of the way he felt apparently seriously ill. He had been dealing with a cold and some inflation in his chest. Well, I saw him as he was taken out and he looked quite seriously ill and could not possible stay, even though he's been here awhile mildly ill. The reason that is of special concern is that he was the person {3835} who interviewed and was prepared

to examine the witness named Stanley Doremus who is from Washington, D.C. He is a relatively low level government official but he has certain information that only he is able to testify about.

I am prepared to put that witness on perhaps with a somewhat abbreviated version of his originally planned testimony but I need a short amount of time in which to eat and perhaps 30 to 45 minutes to prepare myself to examine him. On that basis I would ask for the extension.

THE COURT: We'll extend it.

MR. TAIKEFF: I'll take the task of notifying the government of the extension.

THE COURT: Fine.

MR. TAIKEFF: Thank you, Your Honor.

MR. NELSON: That means we come back at 2:00 o'clock. Is that enough time?

MR. TAIKEFF: I think we can do it all within that time.

{3836}

AFTERNOON SESSION

(Whereupon, at the hour of 2:00 o'clock, p.m., the trial of the within cause was resumed pursuant to the noon recess heretofore taken; and the following further proceedings were had out of the presence and hearing of the jury, the Defendant present in person:)

MR. GILBERT: Your Honor, Mr. Taikeff will be here in a moment, sir.

MR. ENGELSTEIN: He will be right in.

MR. TAIKEFF: I apologize, your Honor.

THE COURT: Very well.

Are counsel ready to proceed?

MR. TAIKEFF: Yes, your Honor.

THE COURT: Just a moment.

MR. HULTMAN: Just this one comment. I don't think it will need to delay the jury.

I wanted to move that the last answer go out, It came in before I had time to interpose the objection, and now that I have, I would move it go out on that grounds, the last response of the last witness with reference to a gun being at somebody's head.

THE COURT: You are moving that it be stricken from the record?

MR. HULTMAN: That is right, your Honor.

MR. TAIKEFF: My position was as stated at the side {3837} bar. I felt that the entire piece of evidence should be left in.

MR. HULTMAN: Your Honor, I am not asking -- so the record is clear -- for any admonition of the jury. They have heard it. It is only, I am asking that it be stricken from the record so that counsel would not be in a position to argue from it to the jury. That's my only reason.

THE COURT: That is the only request you are making?

MR. HULTMAN: That is the only request, your Honor.

THE COURT: Then the record may show that the response of the witness, Bambi Sanchez, is stricken.

The jury may be brought in.

(Whereupon, at 2:06 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:)

(Counsel confer.)

MR. TAIKEFF: The defense calls Stanley Doremus.

STANLEY DOREMUS,

being first duly sworn, testified as follows:

MR. TAIKEFF: May I inquire, your Honor?

THE COURT: You may.

DIRECT EXAMINATION

By MR. TAIKEFF:

Q Mr. Doremus, what is your occupation, sir?

A I am a Deputy Assistant Secretary of the Department of {3838} Interior in Washington, D.C.

Q And what connection, if any, is there between the Department of the Interior and the Indian lands which we refer to as Indian Reservations?

A The Department of the Interior through the Bureau of Indian Affairs has the trust responsibility for the Federal Government and for the Indian people in managing and caring for those lands.

Q Did you in connection with your professional activities go to the Pine Ridge Reservation in 1975?

A I did.

Q For how many years have you been with the Department of Interior?

A A total of six.

Q Can you briefly summarize for the Court and jury your educational background and the nature of work that you did prior to the beginning of the six years you just made reference to?

A I have a Bachelor's Degree in Civil Engineering from the University of Illinois.

I was first employed in the Department of the Interior by the Bureau of Reclamation.

Q What year?

A In 1950. In 1954 I joined the Bureau of the Budget in Washington, D.C., and in 1961 I joined the Agency for International Development. In the following six years spent {3839} four years abroad with that Agency.

After returning to Washington, I returned to the Bureau of the Budget which then became the office of Management and Budget. In 1974 joined the Department of the Interior again.

Q Now, when was it that the trip I refer to to the Pine Ridge Reservation began, or the events began?

A In early March of 1975 it came to the Department's attention that there was a high level of violence, crimes of violence on the Reservation to the point where the Secretary of the Interior, Roger C. B. Morton wished to gain some independent judgments of what was going on on the Reservation; and he designated a commission, Special Secretarial Commission, to go to the Reservation, observe conditions and report back to him.

I was designated the chairman of that commission on March 17th, 1975.

Q And how many other members of the commission were there?

A Five.

Q And were they all people who were employed by the Department of Interior?

A Yes, they were.

Q And were they people who were experienced with matters relating to native Americans?

A Yes, they were.

Q For how long did your commission make a study before it started to compile its report?

{3840}

A The commission's fieldwork covered visits to the Reservation during March, April and May of 1975. The last member of the commission left the Reservation on May 10th.

We then began to compile our report, and we -- because I was slow getting it together -- filed our report on June 24th, 1975.

Q Would you summarize for the Court and jury the method or methods by which your commission made its investigation on the Pine Ridge Reservation?

A The primary method of the commission was to interview any and all people on the Reservation who people who lived on the Reservation but wished to be interviewed off the Reservation. We discussed conditions with officials of the Bureau of Indian Affairs, members of the commission discussed conditions with members of the U. S. Attorney's office; but by and large it was an interview -- I should note that the commission, members of the commission held public meetings in every district on the Reservation during the time that we were there, with an open invitation for anyone who wished to come and talk to the commission about conditions on the Reservation to do so.

Q Was there any restriction as to the kinds of people or the political point of view or the attitude or organizational connections of the people who were permitted to come to the meetings or contact members of the commission?

A Not at all. In fact, in many cases we did not inquire as {3841} to the political attitudes or connections.

Q Can you tell us the approximate total number of people who the commission interviewed in the course of making its study?

A Probably around 200.

Q And could you tell us the areas in which findings were made without telling us what the findings are? I just want to know what the categories were.

A Findings were made in all areas of Bureau of Indian Affairs' responsibilities.

Q Can you tell the Court and jury what your commission concluded with respect to the law enforcement activities and capabilities on that Reservation in the spring of 1975?

A Our conclusion --

MR. HULTMAN: (Interrupting) Your Honor, I would object to this on the grounds of relevancy; and further, there is no showing of any kind that this report and subject matter there, which I have not seen or viewed in any way, has any relevancy so far as the issues in this case.

THE COURT: I will allow that question to be answered.

MR. TAIKEFF: Thank you.

THE WITNESS: Would you repeat the question, please?

THE COURT: The reporter will read the question back.

MR. TAIKEFF: Thank you.

(Question was read by the reporter.)

{3842}

A To put it as succinctly as I can, the commission concluded that there was a widespread perception of a breakdown in law enforcement on the Pine Ridge Reservation at the time we were interviewing people out there.

Q (By Mr. Taikeff) Now, one last question, sir: What was the nature of the violations of law which were not being effectively dealt with?

A I would say they were principally crimes of violence. There were also -- may I add one --

Q (Interrupting) I didn't mean to interrupt.

A I am into a tricky area from my own standpoint. I am not sure of the legal interpretation of what I am about to say.

There was widespread allegations of threats of violence on the Reservation.

MR. TAIKEFF: No further questions.

CROSS EXAMINATION

By MR. HULTMAN:

Q Mr. Doremus, I have never seen the report before. I just want to ask you whether or not this is the report (indicating)?

A No, it is not. Those are excerpts from the report. The report is much longer than that.

Q Well, is this the conclusions?

A I believe those are portions of the conclusions dealing with law enforcement.

Q Well, I would like --

{3843}

A (Interrupting) They are all of the conclusions dealing with law enforcement.

Q Take a look at this page right here (indicating), and don't respond -- I will ask you a question -- other than the fact to ask you whether or not these are conclusions that are on this page right here (indicating) -- they come from the report?

{3844}

A Those that come from the report, it's an excerpt from the report, that's correct.

Q All right. And I assume that this is reflective of generally what the report is supposed to represent?

A Yes, sir, that's correct.

Q Well, I note on, under item 3 "Law enforcement" it says, "many people feel that law enforcement is broken down." Was that the conclusion?

A Yes, sir.

Q All right.

MR. HULTMAN: I have no further questions.

MR. TAIKEFF: Nothing further, Your Honor.

THE COURT: You may step down.

MR. TAIKEFF: Defense calls Special Agent Coward. Your Honor, may that witness be excused for the record?

THE COURT: The witness may be excused.

MR. TAIKEFF: May we approach, Your Honor?

THE COURT: You may.

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

{3845}

MR. TAIKEFF: There may have been a misunderstanding. Just before 2:00 o'clock, Your Honor, Mr. Gilbert approached me and said that he had been requested by the Government, although I now understand it was by Mr. Biner rather than one of Government counsel, to free Agent Coward to leave because he could catch a plane and have the weekend with his family. And my immediate response was to ask what time was his flight, and Mr. Gilbert said he thought it was at 3:00 o'clock. And I said, "Well, I'm perfectly willing. I only want him to identify certain portions of Defendant's Exhibit 194," and other than that I don't have to have him today. And I'm perfectly happy to accommodate his personal need.

And so Mr. Gilbert communicated word to that effect I thought. It turns out that Mr. Hultman informs me that he is available until 5:00 or 5:30, and I am not actually prepared to examine him at length right at this moment. And that's why I called his name out thinking that I was doing something that would accommodate him.

I would just as soon withdraw that request at this particular time, and if I need to, I will call him later in the day. He certainly has adequate opportunity to get to his flight if his flight is at 5:30. I just wanted Your Honor to be aware of the misunderstanding.

MR. HULTMAN: Well, my only point is I just don't want {3846} to bring him back if he's available and we could finish with him. That was my only --

MR. TAIKEFF: I'm not going to be rushed into examining him if I want to examine him.

MR. CROOKS: Why do you need him to identify 194? I thought that was, those paragraphs indicated were already in. Isn't that Stoldt interview?

MR. TAIKEFF: Yes. He did the interview, and he wrote the report. So he's the only person who knows anything about the accuracy and validity of the document. Let me put it to you this way, before the request was made to me I had no concern about calling him immediately after Mr. Durham and wouldn't have, say for the fact that I misunderstood the opportunity I had to accommodate him.

Now that I'm clear on the subject I just withdraw my request that he be called at this time.

MR. SIKMA: I thought that's why we kept him here so that you could call him today.

MR. TAIKEFF: Not just for this, though. But he's the witness who's going to testify on numerous subjects.

MR. HULTMAN: Are you going to use him on Monday then? When am I going to have him back here then?

MR. TAIKEFF: I want him to remain here for the rest of the afternoon, and at the break or the end of the break I will tell you whether I will call him between the end of {3847} the break and 5:09 o'clock. If I don't call him then I will surely call him on Monday.

MR. HULTMAN: Okay.

{3848}

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

JIM JAMES,

being first duly sworn, testified as follows:

MR. TAIKEFF: If I may inquire, Your Honor.

THE COURT: You may.

DIRECT EXAMINATION

BY MR. TAIKEFF

Q Your name is Jim James?

A Right.

Q Where do you live, sir?

A New Plymouth, Idaho.

Q What's your occupation?

A Local truck driver.

Q And in the fall of 1975 what was your occupation?

A Same.

Q By whom were you employed?

A Hollingsworth, Incorporation of Ontario, Oregon.

Q Do you recall an incident when you found a handgun, a revolver, in 1975?

A Yes.

Q Would you be kind enough to tell the judge and jury the details about that?

A I reported to work one morning and I got in the truck, started for Boise, Idaho to pick up a tractor. And on my way I went down to the freeway going east and I seen a gun laying {3849} on the side of the road.

I stopped, backed up, went back and picked it up, and then I started on towards Boise to pick up the tractor. And I decided I didn't want to have it in my vehicle, beings it was the company's, so I went home, which is only about a mile out of the way, and I left it in my bedroom.

I went on to Boise, picked up the tractor, came back. I forgot to go by the house to pick it up. But as I crossed the state line I seen a state patrolman and I assumed the FBI. They were on the opposite lane which I was on at the time.

Q Which one were you on at the time?

A I was on the westbound lane on the freeway.

Q So the law enforcement people were on the eastbound?

A Right.

Q Go on.

A Then I walked over and I told them that I was, I found a pistol. They wanted to know where and I pointed to, I thought maybe it was the right place, they wanted to know where it was at. So I told them it was at home.

And they asked me if I would go get it. I said, well, I had the company's rig, that I had to get it back to the place of business first. Then he said, "Well, we'll provide a state patrolman to watch your rig if you'll go and get it." And they said, "We'll take you."

So the state trooper and the FBI taken me to my home, {3850} I went in the bedroom, picked it up, I handed it, went out to the car and gave it to the FBI man.

Then on my way back to my vehicle, why, he ejected the bullets out of the cylinder. I don't recall how many. One of them, one of the cylinders had an empty shell.

Q And the others were live?

A Yes.

Q Or appeared to be live?

A Well, yes.

Q Do you know what caliber that gun was?

A If I recall, no. I didn't, no. But the FBI man mentioned there's a .357 magnum.

MR. TAIKEFF: I have no further questions of this witness, Your Honor. If the Government has no questions there's a stipulation that both sides will enter into.

MR. CROOKS: Well, I do have some questions but I prefer you enter the stipulation first. That was my understanding of the sequence.

MR. TAIKEFF: Okay. Your Honor, the Government and the defense will stipulate that the handgun that the witness has just testified about was found three-quarters of a mile down the road from where the mobile home and station wagon were first stopped. The location more specifically was near where the mobile home was found after it took off from its first stopping place. This stopping place -- withdraw that {3851} phrase, Your Honor. The movement of the mobile home from the first or initial location to the second or final location was at approximately the same time as the individual who was identified to be the defendant allegedly went over the fence.

It is further stipulated by the defense that the .357 magnum revolver about which this witness has testified is not the same .357 handgun which was allegedly found in the paper bag inside the mobile home.

And it is further stipulated that the Government has possession of this second .357 magnum revolver. The defense has not requested its production in view of the stipulation.

{3852}

MR. CROOKS: We will exceed to that stipulation, Your Honor.

THE COURT: The record may show the stipulation.

MR. CROOKS: If it please the Court.

THE COURT: You may proceed.

Q (By Mr. Crooks) Mr. James, I hand you Exhibit 198 which is a firearm in a plastic container. Could you examine that and say if you've seen that before?

A I couldn't say that that's the same pistol because the one I picked up had handles on it.

Q Had handles off of it?

A On it.

Q So the handles now apparently are in the bag with the pistol?

A Yes.

Q So you can't say definitely whether that is or is not the firearm?

A No, I couldn't.

Q Was it a firearm that looked in any way to be similar to that one?

A Yes.

Q And what about the barrel length, for instance, that appeared to be consistent?

A Yes.

Q And the approximate description of it appeared to be {3853} consistent?

A I would say yes.

Q When you found the pistol, approximately what time of the day was it, if you remember, Jim?

A Well, I checked in at work about 8:00 o'clock and it couldn't have been over 8:20 or 8:30 A.M.

Q And this would have been on the 15th, is that correct?

A I don't know the date.

Q You don't recall?

A No.

Q Well, did you later learn about an incident that happened on the highway?

A Yes.

Q Would that have been before or after the incident, as you recall it?

A Well, it was the next morning after the incident happened.

Q That's what I'm trying to get to. It would have been the next morning after the incident, is that right?

A Yes.

Q And you said it was on the side of the road. Was it down on the shoulder or was it still on the roadway itself, if you recall?

A It was still on the roadway. The highway has a white line, oh, I'd say a couple feet and then the shoulder.

{3854}

Q All right. So it was, would have been a couple feet in from the left, or, excuse me, the right-hand side of the road, am I stating it correctly?

A Well --

Q Or would it have been the inside white line?

A It was on the outside of the white line on the righthand side.

Q So as you're coming down eastbound it would have been on your right side, the right side of your lane?

A Right.

Q And you heard the stipulation. Were you there when the officer stepped off an approximate distance back to the place where the Incident had happened?

A No.

Q You don't have any personal knowledge of that one way or another?

A No.

Q Insofar as the revolver was concerned, did you have any further contact with it in any way?

A No.

Q And you have no personal knowledge as to where the revolver may or may not have come from?

A I do not.

MR. CROOKS: Your Honor, United States would offer Exhibit 198 and I will represent to the Court that this is a {3855} weapon which we can tie up through appropriate witnesses as being the same revolver.

MR. TAIKEFF: Your Honor, we'll accept the government's representation and concede this is the revolver which was found and we have no objection to its offer into evidence.

THE COURT: What is the number on it.

THE CLERK: 198.

THE COURT: Exhibit 198 is received.

MR. CROOKS: We have no additional questions, Your Honor.

MR. TAIKEFF: Neither do we. May the witness be excused?

THE COURT: Witness may step down and is excused.

MR. TAIKEFF: Defense calls Kevin McKiernan.

KEVIN MCKIERNAN,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TAIKEFF:

Q Your full name, sir?

A Kevin McKiernan.

Q I notice that you're quite tall. I think you can raise the microphone so you won't have to stoop to speak into it.

How old are you, sir?

A I am 33.

Q Where do you reside?

A In Boston, Massachusetts.

{3856}

Q What is your occupation or profession?

A I am currently a student.

Q Prior to the time you became a student, what was your occupation? Specifically in the year 1975?

A I was a reporter.

Q What kind of a reporter?

A I was the reporter for National Public Radio and a freelance reporter on assignment at that time for the New York Times.

Q What was the nature of your reporting work? Did it include writing?

A Yes, it did.

Q Broadcasting?

A Yes, it did.

Q And any other skills?

A Photography.

Q And where were you working in the spring of 1975?

A In the entire spring of 1975? Many different places.

Q How about where in South Dakota were you working?

A You would have to be more specific, sir. I was working --

Q How about June and July of 1975?

A I was assigned at that time to first the Custer trial, on American Indian Movement defendant in the Black Hills and then to the Pine Ridge Indian Reservation in South Dakota.

Q With respect to the latter assignment, when did that begin?

{3857}

A That began on June 26th, 1975.

Q And for how long, if at all, did you remain of that reservation?

A I was there for most of a month following the shootings on June 26th.

Q And in the course of your work, did you make any photographs during that particular period?

A Yes, sir, I did.

Q And did you show me certain photographs which you took on the reservation earlier today?

A Yes, I did.

Q And have you since then given those photographs to me?

A Yes, I have.

Q Now after June 26th, 1975, did you ever see on the Pine Ridge Reservation an object known as an APC?

A An armored personnel carrier. I have seen armored personnel carriers on the reservation. I was just trying to think prior to coming in here whether I saw the ones that were there during the time period following the shootings in Oglala or if I just understood them to be there from others who had seen them and frankly I'm not positive that I saw the ones that were there in, I guess, late June or early July of 1975. I have seen APCs on the reservation before; yes.

Q Did you ever photograph any APCs on the reservation?

A Yes, I have.

{3858}

Q I show you what has been marked Defendant's Exhibit 206 for identification. It's not in evidence. The jury may not see the photograph until and unless it is in evidence. Will you tell us whether that photograph depicts one or more APCs?

MR. HULTMAN: If it please --

A Yes, sir.

MR. HULTMAN: Could I interpose, you know, just a question or two by voir dire, Your Honor, to at least establish time or place in order I might enter an objection at this time.

MR. TAIKEFF: I don't think time or place are important. We have earlier had testimony about an APC and all -- Your Honor, I think that Mr. Crooks' laughtitis has become chronic.

MR. HULTMAN: I object further on the grounds there's no relevance.

MR. TAIKEFF: May I finish?

MR. HULTMAN: Or any foundation.

MR. TAIKEFF: There has been testimony, Your Honor, as to the presence of APCs on the reservation July 2nd, 3rd or 4th. I'm offering this photograph after it's identified to show the jury what an APC is in case they don't know.

MR. HULTMAN: Your Honor, I guess maybe Counsel and I have a different recollection of the record. I'm not saying who's right or who's wrong but I don't think there is any {3859} testimony in this record to the effect that there were any APCs seen on this reservation prior to the 26th. The testimony of the one and only witness, as I remember it, was subsequent to the 26th.

MR. TAIKEFF: That's correct. I have no quarrel with that.

MR. HULTMAN: That's the reason why I'm objecting now that, one, anything after the 26th with reference to this is irrelevant and further there has been no foundation laid. In fact, this witness has indicated by his previous testimony here on the foundation that he has no independent knowledge of any kind concerning the 26th.

MR. TAIKEFF: There is a claim here, Your Honor, of flight due to guilty knowledge. We take a different position which we'll articulate in our summation. This is part of the proof.

THE COURT: The objection is overruled.

Q (By Mr. Taikeff) Tell me, sir, whether this photograph depicts one or more APCs?

A Yes, sir. It depicts three APCs.

MR. HULTMAN: Now it's in the record, Your Honor. Could I voir dire at least two questions to find out when that picture was taken. I think if it's to be admitted and testimony is already in the record, at least that be established whether it's 1977 or when it was.

{3860}

Q (By Mr. Taikeff) When was that photograph made, sir?

A That taken in the spring of 1973.

MR. HULTMAN: Now I really object, Your Honor. May we approach the bench.

THE COURT: You may.

MR. HULTMAN: Now we're going to bring Wounded Knee into the record.

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

MR. HULTMAN: Your Honor, I strenuously --

THE COURT: Just a minute. Okay.

MR. HULTMAN: Your Honor, this is very evident this matter here now taken us back to Wounded Knee.

MR. TAIKEFF: Only because you raised the date. All I wanted to show is what the object was.

THE COURT: Well --

MR. HULTMAN: I'm getting sick of such cheap shots and I want to put it on the record right now. I ask for an opportunity for him to establish when these APCs were and he went ahead and asked these questions to get in the record. Now we find out it's during Wounded Knee and that's totally I objectionable on relevancy. I, Your Honor, indicate that it has no relevancy of any kind what happened in 1973.

THE COURT: I'm going to reverse my ruling on that. These pictures taken in 1973 have no relevancy to 1975.

{3861}

MR. TAIKEFF: Your Honor, it was the government which twice insisted that testimony be elicited as to when the photograph was taken.

THE COURT: That is right.

MR. TAIKEFF: So the answer whether it came as a result of my question or Mr. Hultman's question would have been the same. I did not offer any evidence when that photograph was taken because all I offered that photograph, or was going to offer it for was to show what an APC was. I could have gotten a photograph out of the military catalogue.

THE COURT: I just assume that this was a picture of an APC that was taken sometime after the 26th of June at the time I ruled on it.

MR. TAIKEFF: That's the testimony we heard from a witness that there were APCs on the reservation.

THE COURT: That's correct.

MR. TAIKEFF: After July 1. That photograph is to show what an APC is.

THE COURT: There's no foundation that this is, I know nothing about an APC. I would doubt that any member of that jury knows anything about an APC. There is no foundation to show that this is even an accurate representation of what this other witness testified to as being an APC.

MR. TAIKEFF: We'll have to call a military person to do that.

{3862}

MR. HULTMAN: I still would object, Your Honor, for the very same reason.

MR. TAIKEFF: We haven't heard any reasons.

THE COURT: I do not remember. I remember there was testimony.

MR. TAIKEFF: Jean Day.

MR. HULTMAN: Jean Day, Your Honor.

MR. CROOKS: Brought on by the defendant.

THE COURT: It was not elaborated on at that time.

MR. TAIKEFF: There is only one thing known as an APC, Your Honor.

THE COURT: I don't know and I can't take judicial notice of that.

MR. TAIKEFF: All right. We'll call a witness to testify to that.

THE COURT: That is still not going to establish whether what Jean Day saw was an APC.

MR. TAIKEFF: Then we'll recall Jean Day.

THE COURT: In view of this objection I'm going to sustain the objection.

MR. TAIKEFF: I haven't offered the photograph yet. It's not offered in evidence.

THE COURT: How come I accepted it if it hasn't been offered.

MR. TAIKEFF: No. Your Honor permitted me to proceed {3863} with the foundation.

THE COURT: Correct.

MR. TAIKEFF: The government objected to my proceeding to have this witness identify what was in the picture. It has not been offered in evidence.

THE COURT: I guess that's right.

MR. HULTMAN: Your Honor, my objection is again the information is now again once more before the jury. There is no basis or foundation of any kind for this individual's testimony to show in any way if this is what Jean Day may or may not have seen and that's the reason I object.

THE COURT: Furthermore, there is one other problem you have got with this Jean Day, now that you remind me who it was, she testified she has seen --

Any further noise in the courtroom will not be tolerated. The continuation will mean that the spectators will have to be excluded and I do not want to take that step.

MR. TAIKEFF: Your Honor was referring to Jean Day at the time.

THE COURT: Yes. She testified that she saw an APC. You've got a picture here of three APCs lined up together.

MR. TAIKEFF: They're all the same.

THE COURT: I know. But that --

MR. TAIKEFF: Similar objects.

THE COURT: That's entirely different. That can {3864} create an entirely different impression. You may have to cut that picture down to just one APC if I do allow it in.

MR. ENGELSTEIN: Introduce them separately.

MR. TAIKEFF: I understand. I understand.

THE COURT: You will not introduce them separately.

I see no humor in the situation. This is a serious business we're in. She testified that there was one APC and, as I say, there is nothing in the record to indicate that the jury or that she would know what an APC was and this witness now comes along with a picture apparently of at least three APCs which arose, apparently were present on the reservation in 1973, so when the proper foundation --

MR. HULTMAN: Your Honor, I also would like an opportunity to see what other pictures we're now going to deal with so at least I might have again a chance to interpose an objection and renew my request before that I be given a chance to see whatever exhibits -- I don't see anything about this exhibit that has any strategic value or any foundation. In fact, if I'd be able

to see it, I would have been able to interpose an objection at an earlier time and we wouldn't end up here we are right at the moment.

MR. TAIKEFF: That's exactly the thing I complained before, Your Honor. There is no obligation on the part of Counsel before offering an exhibit or laying a foundation to show opposing Counsel because then there is going to be {3865} constant harassment.

THE COURT: I would agree with that except before it can be exhibited to the jury.

MR. TAIKEFF: Clearly, clearly.

MR. HULTMAN: Or commented on by Counsel. Counsel was the one that commented about three APCs, as I recall it correctly.

THE COURT: By the way, I will advise Counsel this is the first time in my judicial career I've ever used a gavel.

MR. TAIKEFF: It's now memorialized, Your Honor.

{3866}

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

Q (By Mr. Taikeff) Now after June 26 did you take any photographs on the Pine Ridge Reservation?

A Yes, I did.

Q Did you take any photographs of Agents of the Federal Bureau of Investigation?

A Yes, I did.

Q How many such people did you see on the Reservation in the Pine Ridge area during the week or ten days immediately following June 26?

A I understood that there were somewhere between 150 and 200 Federal Agents, not including Bureau of Indian Affairs' personnel.

MR. HULTMAN: Well, I object, that this is evidently --

It is clearly hearsay.

THE WITNESS: What I say myself --

THE COURT: (Interrupting) Just a moment.

MR. TAIKEFF: I would not --

THE COURT: (Interrupting) I would ask the reporter to read back the question.

MR. HULTMAN: Unresponsive to the question.

(Question was read by the reporter.)

A I would have to make an educated guess of 80, 70, 80.

Q (By Mr. Taikeff) Were they dressed in any particular way?

{3867}

A They were dressed in military type uniforms, military type gear, battle fatigues, carrying automatic weapons, shotguns, sidearms, some had a camouflage type uniform, some did not.

Q I show you what has been previously marked Defendants' Exhibits 200, 201, 202, 203 and 204. These photographs are not in evidence, do not hold them in any which would permit the jurors to see them at this time.

A (Examining).

Q Please look at those photographs.

A (Examining).

Q Are they photographs which you took?

A Yes, they are.

Q Where did you take them?

A On the Pine Ridge Indian Reservation in South Dakota.

Q On what date?

A Within about 10 days following the June 26th shootings.

Q Without referring specifically to any photograph, just generically, what do they show?

A They show armed --

MR. HULTMAN: (Interrupting) Your Honor, I object, first of all, I have no basis standing here to understand in any way how prejudicial what he is now about to say is going to be, so I am in no position to interpose an objection. I rise for that reason.

THE COURT: The objection is sustained.

{3868}

You may ask him if they fair and accurate representations of what they appear to depict.

Q (By Mr. Taikeff) Are they a fair and accurate representation of what you saw at the time you took the photographs?

A Yes.

Q Do the photographs have anything to do with the FBI personnel that you saw on the Reservation?

A Yes, they do.

Q Are they of the FBI personnel you saw on the Reservation?

A Yes, they are.

MR. TAIKEFF: Your Honor, I will show them to Government counsel and then I offer them in evidence.

(Counsel examine photographs.)

MR. HULTMAN: Your Honor, I object on the grounds that there is no relevancy, highly prejudicial.

MR. TAIKEFF: May we show them to your Honor?

(Court examines photographs.)

THE COURT: Exhibits 200, 201, 203 and 204 are received. 202 is merely cumulative and will not be received.

(Defendant's Exhibits Nos. 200, 201, 203 and 204, respectively, having been previously duly marked for identification, so offered in evidence, were received.)

MR. TAIKEFF: Your Honor, may I at this time display these four photographs to the jury:

{3869}

THE COURT: You may.

MR. TAIKEFF: Thank you.

(Jury examines photographs.)

MR. TAIKEFF: Your Honor, I am returning those or giving those four exhibits to Mr. Hanson. I am also lodging with him Defendant's Exhibit 206 at this time, if I may.

THE COURT: Very well.

Q (By Mr. Taikeff) I now show you Defendant's Exhibit 205 for identification. It too is not in evidence, so I ask you to look at it in such a way that the jury cannot see it.

By whom was that photograph taken?

{3870}

A By myself

Q At what location?

A In Pine Ridge.

Q On or about what date?

A Sometime during the manhunt. Immediately following the shootings on the 26th of June.

Q Now, over how long a period of time have you made visits to the Pine Ridge Reservation?

A Over three years at that point.

Q Now, the photograph you have in front of you depicts a certain object or subject, correct, without revealing what it is?

A Yes, it does.

Q Do you know what that object or subject is? Just say yes or no?

A Yes, I do.

Q Now, before you tell US what it is please tell us whether it is typical in its appearance of those objects which may fall into that category that you have observed over the three years ending in 1973 that you spent on the reservation?

A I should correct that time sequence. It would be four years, I would say about four years now, not to confuse the issue.

This is a very current sight, very common sight that is very prevalent on the reservation.

{3871}

Q And is that true throughout your four year experience on the reservation on and off the reservation?

A Yes, it is.

Q I didn't mean to imply that you were there four years continuously.

Does it accurately portray the subject matter which it purports to portray?

A Yes, it does.

Q What is it?

MR. HULTMAN: Well, now again, Your Honor --

MR. TAIKEFF: What is the subject matter It's a very simple answer. It will not in anyway reveal anything to the jury except the generic description of a subject matter I assure you, Mr. Hultman.

A The subject matter is an armed rancher.

MR. TAIKEFF: I offer it in evidence.

MR. HULTMAN: Well, now, Your Honor, again I object on the grounds that this is one, totally irrelevant; and two, highly prejudicial, and of absolutely no probative value. And furthermore even if it did meet any one of those tests that it would be outweighed by within the rules that have its effect and impact. And I would like the Court to look at it.

(Court reviewing photograph.)

THE COURT: Objection is sustained.

Q (By Mr. Taikeff) I show you Defendant's Exhibit 199 and {3872} ask you did you take that photograph?

A Yes, I did.

Q When?

A Within a few days of June 26th.

Q Does it accurately portray the person who is depicted in that photograph?

A Yes, it does.

Q Do you know the name of that person?

A Yes, I do.

Q What is the name of that person?

A Cecelia Jumping Bull.

Q And at what location was that photograph made?

A At her home in Oglala, South Dakota.

MR. TAIKEFF: I have no further questions.

If the Government wishes to cross-examine on that last exhibit I'll make it available to the Government at this time. I'm not offering it in evidence at this time.

MR. HULTMAN: Well, it would be nice because otherwise I would have to recall this witness if it were offered at a later time possibly.

(Defense counsel handed photograph to Government counsel.)

MR. HULTMAN: Thank you, Counsel.

I have no questions to ask Mr. McKiernan.

THE COURT: You may step down.

{3873}

MR. TAIKEFF: May counsel approach and confer with the Court?

THE COURT: You may.

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

MR. TAIKEFF: Your Honor, for the record may that witness be excused?

MR. HULTMAN: He may.

THE COURT: The witness is excused.

MR. TAIKEFF: It's my understanding, Your Honor, that local counsel for Jimmy Eagle has advised Your Honor that he's not to be put on the stand today. Apparently his regular counsel will either confer with him by telephone or come here. And he asked me whether I would defer calling him on that basis until Monday, and I indicated my willingness to do so.

But I have no official report since that time if, in fact no unofficial report, as to the status of the matter.

THE COURT: The inquiry was made of me by local counsel Apparently Mr. Eagle indicated that he didn't want him, he wanted either this counsel from South Dakota or from Alabama.

The local counsel also advised me this was the understanding that Mr. Eagle was not going to be called today. I advised his local counsel to advise him and anyone else interested that I would not authorize under the Criminal Justice {3874} Act the appearance of his counsel from Alabama or from South Dakota. I would appoint local counsel to represent him. I understood that local counsel was going to make a determination from his other counsel as to whether or not they still wanted to come. And I indicated that that was proper inasmuch as my understanding he wasn't going to be called today anyhow.

I would not, I had prior to that indicated a reluctance to hold up the trial if this witness was a witness that you wanted to call this afternoon; that he would have to appear with local counsel. The position of the Court is that he would have to appear by local counsel if he would appear this afternoon.

MR. TAIKEFF: The unavailability of him at this time, if I may refer to it that way, although I understand what Your Honor said and that I could call him to the stand, puts a little pressure on me. But I think I will be able to continue for the rest of the afternoon with some other witnesses in second rank priority

THE COURT: Very well.

MR. TAIKEFF: I trust the Court will understand that I'm cut short by several hours worth of expected testimony because of this turn of events. I do not think it appropriate to press him to go on the stand as long as he has requested an opportunity to confer with his counsel and/or to give his {3875} regular counsel an opportunity to come here if they choose to do so.

But I think by Monday morning, unless we hear something new or something special, it would be appropriate for me to call him back to the stand.

THE COURT: Yes. There was some indication that he had, the witness had said that his regular counsel would come. There was another indication that his regular counsel had asked that local counsel be appointed. I don't know what the true story was.

I authorized a telephone call by FTS to out of state counsel to ascertain what the situation I've had no report.

MR. TAIKEFF: I see. Well, his local counsel and I spoke briefly and he seems to be aware of what the problems are. I assume that he's going to make appropriate inquiry of the other counsel who will perhaps be able to report back. And I would ask in view of the fact that Mr. Eagle is incarcerated if it is necessary for me to make an application that he be produced at 9:00 o'clock Monday morning and that his counsel be available with him, whether it be his out of town counsel or his local counsel.

THE COURT: Very well.

MR. TAIKEFF: Thank you, Your Honor.

MR. HULTMAN: Could we, one other question I might ask counsel in light of the problem, could you proceed with {3876} Coward rather than me sending him home and then bringing him back again on Monday? I'm just making a -- if it's possible.

MR. TAIKEFF: I am reluctant to do so because I do not have a proper sense of security with it. I had to fill in for Mr. Ellison during the lunch hour and it deprived me of securing enough of a familiarity with the Coward aspect of it to be able to put him on the stand. And I intended to this morning. It was my best intention, but I'm afraid events made that impossible for me.

I think I can get through the afternoon without calling him at all. And in fact may I ask Your Honor what Your Honor's intentions are with respect to an afternoon recess? We did come back at 2:00 and that's why I'm uncertain what Your Honor's plan is.

THE COURT: I try to run an hour and a half at a time if we can so we are, we probably are within twelve minutes of the time I would normally recess.

MR. TAIKEFF: Well, in that case I think I could call a witness who would probably be on the stand for about ten minutes. And then during the recess I will look over the Coward situation and if I can I'll put him on and be finished with him this afternoon. And if I can I'll notify you as quickly as I can.

MR. HULTMAN: It will just save a trip for him.

MR. TAIKEFF: I'll be happy to do that if I can.

{3877}

MR. SIKMA: He's also in the process of doing some moving with his family and he's on vacation and this comes right in the middle of his vacation, and so he has to --

MR. TAIKEFF: You don't have to persuade me any more. I'm also happy to accommodate another human being.

MR. SIKMA: Okay.

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

MR. TAIKEFF: Your Honor, something has just been reported to me that I think I should advise the Court of.

THE COURT: Very well.

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

MR. TAIKEFF: Just been advised that as we stand here, or sit here as the case may be, Myrtle Poor Bear is at home in Allen, South Dakota. And under the circumstances I would ask Your Honor's indulgence to take the recess at this time so that Your Honor may give appropriate directives to the marshal service to take immediate action to take her into custody.

THE COURT: She's where, Myrtle?

MR. TAIKEFF: At home right now we've just --

THE COURT: I know. Where's her home?

MR. TAIKEFF: Allen, South Dakota.

THE COURT: Allen, South Dakota. Very well.

{3878}

MR. TAIKEFF: Mr. Engelstein asked me to tell Your Honor that we received a telephone call from a member of her immediate family advising us of that fact.

THE COURT: Very well.

MR. TAIKEFF: Thank you, Your Honor.

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

THE COURT: Court is in recess until 3:40.

(Recess taken.)

{3879}

THE COURT: Are you ready to proceed?

MR. TAIKEFF: Yes, we are, Your Honor.

THE COURT: You may proceed.

We have to bring the jury in. You may, however, call your witness.

MR. TAIKEFF: Yes, Your Honor. I believe she's waiting outside. I'm recalling Jean Day.

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

MR. TAIKEFF: Your Honor, may the witness be advised her oath continues to apply?

THE COURT: The witness is advised that the oath which you took when you appeared earlier as a witness in this case is still applicable.

THE WITNESS: Okay.

JEAN DAY,

being previously sworn, testified as follows:

REDIRECT EXAMINATION

BY MR. TAIKEFF:

Q Miss Day, in connection with your being a witness today or at any other time were you ever shown the photographs?

A No.

Q Did I speak with you today?

A Yes.

Q How long ago?

A During the break. Just a few minutes.

{3880}

Q Do you recall the first question I put to you?

A Do I know what an APC is.

Q What was your answer?

A I said yes, I do.

Q What was my second question to you?

A "Could you describe one."

Q Did you answer that question?

A Yes, I did.

Q Would you tell the Court and jury what you said in response to my second question during the break.

A I told you that it looked, it was like a box, metal thing and it was very big. It looked something like a tank but it didn't have the, that front piece sticking out.

Q Do you know what that piece is called?

A No, I don't. I just know there's a thing sticking out the front. And then on the top, it didn't have that thing where a man could come in and out of.

MR. TAIKEFF: May the record reflect I am not yet showing the witness the photograph but I am first reoffering any part or all of Defendant's Exhibit 206 which His Honor wishes to admit if His Honor will.

THE COURT: You may hand it to the Clerk.

Approach the bench.

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

{3881}

THE COURT: I told the Clerk that I would admit this exhibit if it is excised in this fashion (indicating).

MR. TAIKEFF: That is to show the one object on the right-hand corner?

THE COURT: That's right. It be excised this way and then if you can eliminate the dog.

MR. TAIKEFF: All right, Your Honor. Without objection I'll eliminate the dog.

THE COURT: It would make it cleaner.

MR. TAIKEFF: Your Honor, we'll mask it in some such way and show it to the government before we submit it to the Clerk. We'll show approximately the upper right-hand quadrant. Everything else will be covered and a label will be replaced.

THE COURT: That would --

MR. HULTMAN: What are you going to end up showing?

MR. TAIKEFF: Just that (indicating).

MR. HULTMAN: Well, you know, there is no showing that the U.S. Army was there with an APC.

MR. TAIKEFF: I'll stipulate when I reoffer it that this is only showing as a --

MR. HULTMAN: I think you ought to blot this out.

THE COURT: That designation should be blotted out.

MR. TAIKEFF: Yes. All right. It will be done before it's formally submitted, Your Honor.

{3882}

THE COURT. Very well.

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

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

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

THE COURT: You may step down.

MR. TAIKEFF: Defense calls Russell Loud Hawk.

RUSSELL LOUD HAWK,

being first duly sworn on the sacred pipe, testified as follows:

MR. TAIKEFF: May I inquire, Your Honor?

THE COURT: You may inquire.

DIRECT EXAMINATION

BY MR. TAIKEFF:

Q Mr. Loud Hawk, how old are you?

A 55.

Q Would you be a little more comfortable if you pulled the microphone closer so you don't have to lean forward?

Where do you live, sir?

A Oglala, South Dakota.

Q That's on the Pine Ridge Indian Reservation?

A Right.

Q Are you a full blooded Oglala Sioux?

A Right.

Q Have you lived on the reservation all your life?

A All my life.

{3883}

Q Generally what is your occupation? How do you earn your living?

A Well, I work as a conservationist on the reservation.

Q Were you ever employed by the United States Government in that type of work?

A No. I work for the tribe.

Q Have you presently any employment?

A At the present time I'm unemployed.

Q Are you waiting for any particular appointment to become effective?

A Yes.

Q Would you tell the Court and jury what job you're waiting to step into.

A Well, the tribe recently appoint me as a police commissioner.

Q Of what part of the reservation?

A Pine Ridge Indian Reservation.

Q Of the entire reservation?

A Well, I think I just have to take care of my own district.

Q What district is that, sir? White Clay district, Oglala.

Q Now do you consider yourself an American Indian Movement supporter?

A Yes. I'm a supporter.

Q And could you tell the Court and jury, and I want you to go back to 1975, whether people on the reservation who were either {3884} members of the American Indian Movement or who openly supported the American Indian Movement had any special kind of problems?

A Well, I can go back to since Wounded Knee.

Q That's 1973.

A Yeah.

Q But if the conditions are the same say so, but I'm particularly interested in 1975.

A Okay.

Q Was it the same in '73, '74 and '75?

A Right.

Q Tell us what special problems, if any, American Indian Movement members or supporters had on the Pine Ridge Reservation?

A Well, the FBIs, the goons, the BIA cops were harassing the people, especially in Oglala because most of the Oglala people are traditional people so they were harassed every day, every night.

Q Could you tell us briefly, not with any specific incident, but the kinds of things which happened that you have referred to as harassment.

A Well, I don't know what the FBI looking for, but they constantly, especially the older people, they couldn't talk the white man's tongue. They harassed them. I know for one thing a guy by the name of James Branshoulder, two couples living eight miles west of Oglala.

A whole bunch of FBIs went there {3885} and harassed him and this guy had a heart attack and died. Things like that happened.

Q What can you tell us about shootings in your district in '73, '74 and '75, if it was the same situation throughout those three years?

A Same situation.

Q Tell us something about it. Just generally.

A Well, one time, that was May 19, 1975, we had a rodeo at Oglala and the goons came and they worked over some of the traditional boys and they almost shot a lady.

Q Look over your right shoulder and tell me if you recognize the chart which is Government Exhibit 71. What does it show?

A That's the area where they had the shoot-out. Jumping Bull area.

Q Did you know any of the people from the American Indian Movement who were living in that area?

A Yes.

Q Do you know how they got the food that they ate?

A Well, most of the people around Oglala, they give food, little money, gas money.

{3886}

Q Did you yourself ever give them anything?

A I give them money for gas.

Q Did they force you to give them money?

A No.

Q How did you happen to give them money?

A Well, they are there without anything. They need help, and they came there to protect the Oglala people.

Q Now, you remember that there was a shootout on June 26th?

A Yes.

Q And were on that Reservation for the week or two or three after the shootout?

A Yes, I was there.

Q And did you get around to different places?

A Yes.

Q Did you see any FBI people there?

A A lot of FBI's, I imagine over two hundred.

Q I am talking about what you saw yourself, not what somebody told you.

A Yes.

Q Tell us what you saw yourself.

A Well, there was all kinds of lawmen there, troopers, BIA cops, goons, FBI's.

Q Now, have you ever spoken to any people in the White Clay District about Leonard Peltier?

A Spoken to Oglala people?

{3887}

Q Have you ever talked to people in White Clay about Leonard Peltier?

A Well, in Oglala everybody knows him, everybody respect him, especially the older elements because he doesn't drink. He is a real good man.

Q This is based on conversations you have had with the people in White Clay?

A Right.

MR. TAIKEFF: I have no further questions.

CROSS EXAMINATION

By MR. HULTMAN

Q Mr. Loud Hawk, have you gone by another name at some time?

A No. That's my name right there.

Q Have you ever gone by Russell Broken Nose?

A That was a long time ago. I changed my name.

Q Who was it specifically on the Jumping Bull property that you had your dealings with?

A My dealings?

Q Yes, concerning the giving of food or whatever it was that you testified to on direct examination.

A Well, the AIM people that are living there.

Q Well, who was it specifically that you had your dealings with?

A Well, really I never did give them that, just talked to them. I gave them money to June Little, to give it to them.

{3888}

Q Well, June Little isn't one of those, June Little lives there, isn't that right?

A He lives there.

Q Well, June Little isn't one of the group that moved in there from the outside, is he?

A Well, he is pretty well acquainted with the people.

Q But you had your dealings with June Little, is that right?

A Yes.

Q Were you ever down there and actually had any dealings with any of these people specifically?

A No, I don't think so.

Q Did you -- when did you first meet Leonard Peltier?

A Well, when he was -- when they were around there he usually comes to the -- attends our community meetings and powwows and different things.

Q Well, how long a period of time, when was it approximately that you first met him?

A I think it is early spring of `75.

Q Well, let me ask you, what the total period was that you knew him, from when approximately to when?

A Oh, I would say from March up until when the incident happened.

Q Until about the 26th of June?

A Yes.

Q Did you ever see him after that then?

{3889}

A No.

Q Did you know that he was wanted for attempted murder at the time you knew him from March to June?

A That I don't know.

Q Did those people that you have referred to, in response to counsel's questions, do you know whether or not they knew that fact?

A No, I don't think so.

MR. HULTMAN: I don't have any other questions.

MR. TAIKEFF: No questions.

THE COURT: You may step down.

MR. TAIKEFF: May the witness be excused, your Honor?

MR. HULTMAN: He may.

THE COURT: The witness is excused.

(Witness excused.)

MR. TAIKEFF: The defense calls Della Starr.

DELLA STARR,

being first duly sworn, testified as follows:

MR. TAIKEFF: May I proceed, your Honor?

THE COURT: You may proceed.

DIRECT EXAMINATION

By MR. TAIKEFF:

Q Miss Starr, how old are you?

A 32.

Q Would you pull that microphone a little closer and pull it {3890} down a little bit so that it will automatically pick up your voice and you won't have to move around in your chair?

Where were born?

A On Pine Ridge.

Q And have you lived there all your life?

A Yes.

Q Do you describe yourself as an American Indian Movement supporter?

A Yes.

Q Do you also describe yourself as a traditional Indian person?

A Yes, I do.

Q Because you are an American Indian Movement supporter, are you known from time to time by a certain name?

A Yes.

Q What is that name?

A An AIM bitch.

Q Are you any relationship to Harvey and Cecelia Jumping Bull?

A Yes, sir, my grandparents.

Q Did you ever work on the Pine Ridge Reservation as a community health representative?

A Yes, I worked there for eight years.

Q Until when?

A Until Wilson's administration.

Q Did anything special happen Wilson's administration took {3891} over that affected your job?

A He fired me because I didn't go along with what he was doing.

Q At that time did other full-blooded traditional people lose their tribal jobs?

A Yes.

Q How many of them?

A I think most of them.

Q Did you know Leonard Peltier?

A Yes, I know Leonard.

Q Since when?

A Since March of 7 -- I think it was `75.

Q Do you know the expression "goons", don't you?

A Yes, I do.

Q Can you identify the area where they either come from or where most of them are to be found?

A In Pine Ridge.

Q And when you say "in Pine Ridge", you don't mean the whole reservation, do you?

A No, I don't. Pine Ridge is --

Q

A village?

A Yes.

Q The main village on the Reservation?

A Yes.

Q Do you know why -- well, withdrawn.

{3892}

Was Leonard Peltier on the Reservation in 1975?

A Yes.

Q Do you know what part of the year he was there?

A March.

Q Until when?

A I would say June.

Q Do you know why he was there?

A He was there because Indian people were harassed by the goons, BIA police and FBI's.

Q And can you tell some of the things that he did in your community while he was there?

A He did a lot of things for us. He helped us in organizing our communities, like social, you know, and he helped elderly people a lot, and he was a spiritual, you know -- I don't know.

Q Use whatever words you think will describe what you want to say.

A Well, he has really done a lot for us, and I can't explain it but --

Q Could you say a word or two about any religious matters that he may have been involved in?

A Yes.

Q Tell us about them.

A Well, in the Indian way we believe in our pipe, and we have had ceremonies and he was always there, like sweats.

Q When you say "sweats", are you referring to the sweat lodges?

{3893}

A Um-hum, and well, he helped us, you know, in like putting up bingos for the kids.

Q Putting up?

A Bingos, and we got to -- like swim films for the kids. Well, you know, as the community -- to organize the community, but every time we tried to have something going on, you know, in the community, the goons and the BIA police would come and harass us.

{3894}

Q And what if anything did Leonard do in connection with that kind of event?

A What do you mean by that?

Q Well, you said that when you tried to have meetings and other such community meetings you were harassed. Did Leonard do anything about that?

A Well, for a long time we, you know, we, everytime start having a bingos or something the goons and the BIA police would start coming around and, you know, start shooting around. And they'd start, you know, start some kind of trouble and then we'd have to break up, you know.

We try to avoid their trouble, and they were even shooting at our houses. And we have, you know, there's a lot of kids, you know, in some of these homes. And what the goons really done a lot of harassing. But there was nothing that could be done. We couldn't go to the BIA police because they were right with them. So finally the traditional, the elderly people got together and asked, you know, that we'd have our own security around Oglala area so we can have at least a little protection.

And the goons and the BIA police didn't like that. And we predicted trouble from the goons and the BIA police because there was a pond across from my grandparents' house there where the goons started shooting fishes, and they went on for a long time. And we went to the rangers, but it was the {3895} rangers that were doing most of it.

And I think every day there was a cop car and, you know, the ranger pickups, and goons that were down there shooting around. That went on for at least two or three months. But there was really no one to go to. We couldn't go to the tribal council, you know, because Dick Wilson supports these people.

MR. HULTMAN: I haven't interrupted at all, but I think it's time counsel asks another question.

MR. TAIKEFF: I was about to.

Q (By Mr. Taikeff) Do you consider yourself a violent person?

A No, we don't.

Q No, yourself personally?

A No.

Q Did you ever carry a gun?

A No, I don't.

Q Did you ever in the past carry a gun?

A I have a gun in my house, but I don't know how to use it.

Q When I interviewed you did you tell me that any changes had occurred in your life and the life of your fellow traditionalists since the time the American Indian Movement came into the White Clay District?

A Yes.

Q How has your life changed?

A Well, before we never used to have, we never used to speak up for ourselves. We didn't know, you know, we were being pushed {3896} around. Someone comes up to us and tells you "You do this and do that," or, you know, we'd say, "Yes or no," and that's about all we can do.

Q And now?

A And now we learn how to speak up for ourselves. We can stand up for ourselves.

Q Any other changes that have entered your life since the appearance of the American Indian Movement?

A We knew about our treaties.

Q Anything else?

A And our rights.

Q Is there anything else you want to say on that particular point?

MR. HULTMAN: Does counsel -- I object unless counsel has a question.

MR. TAIKEFF: I have no further questions. Thank you.

CROSS-EXAMINATION

BY MR. HULTMAN

Q Mrs. Starr, you indicated in reference to one of the questions about observing cop cars. Do you remember that response?

A Yes.

Q Very easy to recognize them on Pine Ridge, isn't it?

A A cop car?

Q Yes.

A Yes.

A cop car has lights on top.

Q There hasn't been any problem at any of the time that you've {3897} lived on Pine Ridge of recognizing a law enforcement vehicle, has there been?

MR. TAIKEFF: Objection to the form of the question, Your Honor.

Q (By Mr. Hultman) I'll use the word "cop car". That's the phrase you used. I assume by cop car you meant the same group of law enforcement people that you've testified to before?

MR. TAIKEFF: She said, Your Honor, that she hasn't seen a BIA police car.

THE COURT: She may answer.

A It all depends on what kind of a cop car you are talking about.

Q (By Mr. Hultman) Well, I'm asking you is there any difference as far as the cop cars, as far as the law enforcement people in the reservation?

A Well, there's two kinds of law enforcement people on the reservation, and that's a cop and an FBI.

Q Well, is there any difference between their vehicles?

A Yes.

Q Generally, what's the general difference?

A A cop car has lights on top and they have the, I guess you call them emblems, I can't say it, but on the sides.

And an FBI car is a later model car with a CB antenna in the back someplace.

Q And they're easily distinguishable, are they not, to tell the {3898} difference between the two?

A Sure, you can tell the difference.

Q And that generally was the case on the reservation, was it not?

A Yeah. We know what a cop car is and what an FBI car is.

Q Because of the general descriptions that you've given; isn't that a fair conclusion for me to draw?

A (No response.)

Q Generally the FBI was a shiny, new, clean car; isn't that fair conclusion for me to draw?

A Yeah, I guess that's what you call it.

Q Well, that's what you in effect said to me, did you not, with an antenna on it?

A Sure.

Q And very easily discernible, you see them all the time on Pine Ridge, do you not?

A You see them every day.

Q And you seen them every day back in 1975, did you not?

A Yes, I did.

Q And it wasn't any problem, would be no problem for anyone to distinguish between an BIA car or a goon car and an FBI car, would there?

A Well, we know the difference.

Q All right. How is Angie Long Visitor related to you?

A She's my sister-in-law.

{3899}

Q She was living, was she not, on the Jumping Bull property in the little green house on the 26th of June, 1975?

A Yes.

Q Did you have an occasion during the spring of 1976 at about 11:00 P.M. to take her somewhere?

A When was this?

Q In the spring of 1976?

A No, I never took her anyplace.

Q You never took her to Candy Hamilton's?

A No, I didn't.

Q Did you know where she went in the spring of 1976 when she left living on the Jumping Bull property in the little green house?

MR. TAIKEFF: Your Honor, I object because it's beyond the scope of the direct examination.

MR. HULTMAN: I'll make her my own witness at this particular moment.

MR. TAIKEFF: I object just as the Government did when I tried to adopt a witness during their case.

THE COURT: Objection is sustained.

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

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

MR. HULTMAN: Your Honor, I'm going into an impeachment matter pure and simple and I think I have every right in the {3900} world to go into an impeachment matter, and where it's going to lead me is that counsel went into great questioning about the fact that she is an AIM supporter, what her feelings are, how strong they are and I specifically am going into a matter

to ask her concerning what part she had in impeaching her testimony and seeing that her sister was unavailable in terms of the last trial.

MR. TAIKEFF: That doesn't impeach her testimony.

THE COURT: That, I will not allow that on this cross-examination.

MR. HULTMAN: All right, Your Honor.

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

Q (By Mr. Hultman) How long a period of time, Mrs. Starr, have you known the defendant in this action, Mr. Peltier? When did you first meet him approximately?

A In March.

Q And when was the last time that you saw him up until the last two or three weeks?

A I don't remember.

Q Would it have been sometime prior to the 26th of June of that very same year?

A Yes.

Q What was it specifically that Mr. Peltier did during the time that you knew him that made this difference that counsel {3901} asked you about on direct examination between the conditions before and the conditions since, whatever that had reference to?

A Say that again.

Q Well, I somehow got the impression that counsel in some way on direct examination was indicating that there had been some changes of some kind taken place. Do you remember all that in line of questioning?

A Yeah. I think if you lived on the reservation you'll know what it's like since Dick Wilson got in as tribal chairman. And it's been, we've lived in fear, threats, everything else.

MR. HULTMAN: Your Honor, I move this is not responsive to the question that I asked.

Q (By Mr. Hultman) I'm referring specifically to the changes that have taken effect because of the period of time that Leonard Peltier lived on the reservation Do you understand the area of questioning that I'm asking you about? You said that he had been there, you met him from sometime in March, believe, 1975; is that right?

A Yes.

Q And then the last time that you saw him was sometime prior to June 26, 1975; is that a fair conclusion for me to draw from what you already indicated?

A I know Leonard and for the short time I've known him I know he isn't a violent person.

He was always, you know, helping the elderly people. {3902} He was always good to everybody, not only me, but the community. He's always helping people, you know, like a lot of our elderly people, you know, use wood. They still use firewood. And they --

MR. TAIKEFF: May the witness finish her answer, Your Honor?

THE COURT: I don't think her answer was responsive.

MR. TAIKEFF: I thought the question was what Leonard did, and I think she's telling us some of the things that Leonard did.

Q (By Mr. Hultman) Is there anything more specific that Leonard did?

A Went around helping people with their gardens. And like said, they, we try to have some social gathering, like having Indian dancing and bingos and other things like this.

Q All right. Let me ask you, you stated that he was not a man of violence just in response to my question, did you not?

A Yes, he never was violent.

Q Well, did you ever see him, did you ever see him with a weapon of this kind in his hands (indicating)?

A No, I didn't. I've never seen that before.

Q If you had seen Leonard with this weapon in his hands would maybe your opinion be a little different?

A I guess so, but I've never seen Leonard with that. I've seen the goons with guns like that.

{3903}

Q Only the goons have guns like that?

A Sure. They were the only ones permitted to have the guns on the reservation, not the Indians.

Q Well, are you saying to me that there's some people, that there's nobody who doesn't have a permit or authorization to have a gun of this kind did have guns of this kind during the time you and I are talking about?

A Well, at that time if you went to Pine Ridge Reservation you'd see all the goons with weapons like that. Not -- I don't know if they're exactly like that, but they had big guns like that on their pickups.

Q All right. I'm asking you about Leonard Peltier.

A Yeah.

Q Do you understand?

A I've never seen a gun like that with him.

Q Now, did you know at that time that you knew him during this time that you're talking about that he was wanted for attempted murder?

A No, I didn't know that.

Q Would that have changed your opinion possibly if you knew that about that answer of whether or not he was a man of violence or not?

A I don't know. I don't think he's that kind of person that would do something like that.

MR. HULTMAN: I have no further questions.

{3904}

MR. TAIKEFF: No questions.

THE COURT: You may step down.

MR. HULTMAN: Let the record show, Your Honor, that I was holding Government's Exhibit 34-AA when I asked the questions of the witness.

{3905}

MR. TAIKEFF: Your Honor, I have had Exhibit 206 masked as suggested by Your Honor. It is not the most artistic job I've ever seen but I'm showing it to the government.

Now I think Mr. Crooks should laugh, Your Honor. And he has accommodated us.

THE COURT: Mr. Crooks, you have license to laugh.

MR. TAIKEFF: The magnificent offering is offered in evidence.

MR. HULTMAN: The government objects for the previous reasons, Your Honor, just for record purposes.

THE COURT: Exhibit 206 is received.

MR. TAIKEFF: Your Honor, may we call Ethel Merrival. In the moment it takes her to come in may I pass this single photograph to the jurors.

THE COURT: You may.

ETHEL MERRIVAL,

being first duly sworn on the sacred pipe, testified as follows:

MR. TAIKEFF: May I proceed, Your Honor?

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. TAIKEFF

Q Miss Merrival, where do you live?

A Pine Ridge, South Dakota.

Q And were you born on the Pine Ridge Reservation?

A Yes, I was.

{3906}

Q In what year?

A 1906, May 9.

Q Have you lived on the reservation all of your life except for time away at school?

A Yes.

Q And what is your occupation or title?

A Right now I'm a tribal attorney for the Oglala Sioux tribe, of course. I'm a notary public for the state of South Dakota. I'm a retired BIA clerk, steno.

Q I'd like you to focus your attention on the period 1972, '73, '74 and '75 generally. The questions I ask you I'd like you to answer with respect to that period providing your answer is that it was uniform throughout the entire period, otherwise tell me that it is not so. Do you understand that?

A I'll try.

Q Could you briefly describe in a word or two, if that's possible, what your life was like on the reservation during that period.

A Unbelievable. I couldn't go to sleep at night without fear for the next day or even that night. Twice my house was shot up.

Q Were any members of your family killed?

A No. But they were beat up terribly and I had some granddaughters that were seduced by the BIA police.

Q Did you lose a nephew in a shooting?

{3907}

A Peter Bisenet. He's a relative on my father's side.

Q He was not --

MR. HULTMAN: Your Honor, again I'm going to rise to an objection for the reasons that have been stated earlier, that I feel that this particular testimony is not relevant. For the reasons I've stated on the record previously.

THE COURT: I have previously ruled that witnesses on this subject may testify generally.

MR. TAIKEFF: Yes, Your Honor.

THE COURT: She is testifying specifically and so the jury may understand, the reason that they may testify only generally rather than specifically is because if we allow specific incidents to be testified to, then the other side would have a right to present evidence to show that it was not so and we would be getting into many mini-trials within the main trial which is not permitted under the law.

THE WITNESS: May I ask a question, Your Honor? I don't know what generally, what you mean when you say generally.

THE COURT: All you have to do is just answer the questions that Mr. Taikeff asks you.

THE WITNESS: All right. Thank you, Your Honor.

Q (By Mr. Taikeff) I'll try to frame the questions in such a way that you'll understand what I'm looking for.

A Yes.

{3908}

Q I want you to tell us not of any one specific incident but what the general picture was like at the time in question on the reservation concerning people carrying guns or arming themselves by categories of people, if you choose to do it that way.

A I see a lot of people carrying guns, FBI, BIA police, marshal and few of our Indians who feared for their lives felt that they needed to have a gun to protect themselves.

Q Is it fair to say that you are a supporter of the American Indian Movement?

A I am an American Indian Movement member.

Q You're a member as well?

A Yes, I am.

Q In connection with the Pine Ridge Reservation and the years in question, and I'm asking now generally, categorically, not the specific event, can you tell the Court and jury what role the American Indian Movement played, what things it did? And I'm including specifically activities of Leonard Peltier, if you know of any.

A Yes.

Q Would you tell the Court and jury, please.

A The American Indian Movement is a group of people organized to struggle for their freedom against hatred, oppression and against people in power. They came, we invited them on the reservation to help us in civil rights.

{3909}

Q Did they perform any function in your life or in the spiritual side of your life?

A Oh, yes. They taught us the value of placing our hands, our lives into the hands of the great spirit.

Q When you were brought up, were you raised in a traditional Indian religion?

A Yes. I was baptized and raised as a Catholic.

Q First as a Catholic?

A Yes.

Q Then did you subsequently adopt the traditional Indian religion of the pipe?

A Well, not really. I'm just a supporter. I don't attend their spiritual meetings regularly and, you know, I'm old, I'm 70 years old and I'd like to stay home and not go out in the cold weather.

Q You took your oath on the pipe?

A Yes, I did.

Q Do you recognize that as a binding oath?

A Yes, I do.

Q Getting back to AIM activities in those years on the reservation, can you address yourself in any way to the question of education of the young.

A Yes. We have spiritual, not spiritual but schools, survival schools. This year we had 80 dropouts in our schools {3910} and there is a need for survival schools to take on the children's education to keep them.

Q What did they drop out of?

A Out of grade school and high school.

Q The regular school?

A Yes. The BIA school.

Q And then the survival schools take in any of those people?

A Yes. We have one in Rapid City. We haven't got one on Pine Ridge Indian Reservation but we hope to.

Q Does alcohol present any kind of a problem on the reservation?

A Yes. It was one of our main problems.

Q Does AIM take any position with respect to the consumption of alcohol by native American people?

A Yes. They advise us against the use of it. They feel they can only combat and work out our program without the use of alcohol.

Q Is there any particular affection or lack of affection between the goons and the AIM, American Indian Movement?

A There is hatred of goon toward AIM. As an AIM member, I don't say I hate the goons, I only feel sorry for them.

Q During the years in question, did the BIA take any official position with respect to AIM?

A Well, in '72 they wouldn't help us in our civil rights or {3911} oppressions from other bordering towns and as a result the AIMs came to our support and we relied on it. The BIA also allowed their employees, civil service employees to take up arms and appear at roadblocks to defeat the American Indian Movement.

Q At election time you mean?

A At election time and various times.

Q Is it fair to say that the division of opinion about whether to support AIM or not to support AIM had literally divided many families on the reservation, is that a fair statement? Yes or no?

A Yes.

Q In your own family is there any such problems like that?

A Yes, there is. My brother died angry with me because I was an AIM.

Q Now there is another person in your family with whom you have some difference of opinion on the subject.

MR. HULTMAN: Your Honor, first of all it's leading, but secondly I believe the relevancy is at this time any foundation basis and I would object on the grounds of it I being remote and not being relevant. I thought we were concerned with events in 1975.

THE, COURT: That goes beyond --

MR. HULTMAN: I object at this time.

THE COURT: That goes beyond the scope of the {3912} interrogation that's permitted under the Rule that has been laid down by the Court.

MR. TAIKEFF: I withdraw the question, Your Honor.

THE COURT: Very well.

Q (By Mr. Taikeff) My final area of inquiry, Miss Merrival, is to find out whether or not you had occasion to speak with people on the reservation who have had something to say specifically about the individual known as Leonard Peltier. Yes or no?

{3913}

A Yes.

Q As a result of speaking with these people and hearing what they have had to say about him, have you any indication or idea of what his reputation is amongst that community?

A His reputation is very bad, but his character is good.

Q What is his reputation?

A What is his reputation?

Q Yes.

A Very violent man.

Q From whom have you heard that?

A The goons and the FBI's.

Q How about amongst the traditional people?

A I have never heard them make any remarks like that.

Q Have you heard them make any remarks about his reputation?

A I can't answer that question.

Q Why not?

A Because I am not sure that -- well, let me answer it this way: They have never said anything derogatory against his character.

Q Have they ever said anything positive about it?

A Only good.

Q Well, tell us about that. I would like to hear about that too, if you don't mind.

A They pray for him as a young man, clean in character, clean in his appearance, very kind to children, nobody scared {3914} of him on the Reservation. He is welcome into our homes.

Q How about the way in which he has devoted his life?

A Well, he is devoting his life to a cause that he believes in, civil rights.

MR. HULTMAN: Your Honor, I am now going to object.

This goes far beyond the proper questions in this particular area.

THE COURT: And no foundation.

MR. HULTMAN: No foundation.

MR. TAIKEFF: I was just inquiring as to his reputation in the community. I have no further questions, your Honor.

CROSS EXAMINATION

By MR. HULTMAN:

Q Ethel, the people you referred to as "goons", they are also residents of the Reservation, are they not?

A Yes, they are.

Q And they have rights also, do they not?

A Not the rights that they take upon themselves, the bad rights, oppression.

Q When you speak about -- in response to counsel of the reputation of Mr. Peltier, what is the period that you are talking about, have you ever met Mr. Peltier?

A Yes, I seen him. He has been on the Reservation, particularly at a meeting where Townsend, the Commissioner of Indian {3915} Affairs, came to oust Howard Trimble.

Q When was that?

A A couple of years ago.

Q Do you remember what month it was?

A No, I don't.

Q What is the period of time that you knew him on the Reservation?

A Well, a year, couple of years ago.

Q Well, would you tell the jury when it was approximately that you first met, and then how long that you knew him?

A Well, I can't say that I really was introduced to him because we Indians don't go around and introduce one another. We just mingle together and become acquainted ourselves.

Q Do you know as a fact he was only there for a period of about three months in the year, 1975 -- has he been there since the 26th of June, 1975, to your knowledge?

A Not that I know of.

Q Well, what acts is it -- have you ever seen any acts that Mr. Peltier did to determine and form an opinion concerning him?

MR. TAIKEFF: Objection, your Honor. I don't think that the witness expressed her own opinion, but opinions that were expressed to her by other members of the community.

MR. HULTMAN: Well, I am asking now, and I have a right to examine about specific events she has had {3916} experience with him. That's what I am getting at, not now on general reputation.

Q (By Mr. Hultman) Have you had any experience with Mr. Peltier himself?

A Not any great experience that would affect this trial.

Q Well, I am asking you, have you had any experience at all personally with Mr. Peltier?

A To talk to him and see him, yes.

Q Well, when was this that you saw him and talked to him?

A I told him that it was when Townsend, the Commissioner of Indian Affairs, came and we had a meeting, and there were numerous American Indian Movement members there. There were numerous goons, police.

Q All right. That was one event, one time, is that right?

A That was one event that I was particularly impressed with him.

Q Did you ever see him on any other occasion of any kind?

A No.

Q I assumed that -- what is it about the goons that put them in a different category?

A They were the hirelings of Dick Wilson, our president, and went around beating people up.

Q Well now, would you have the same opinion of somebody who was wanted for murder, same opinion about them as you have about goons?

{3917}

A I would want to be sure they done the murder.

Q Well, do you have any other different basis upon making that same allegation about somebody that you put in a goon category, don't you give them likewise the same benefit of the doubt?

A I always try to be tolerant and fair. I certainly wouldn't them to be accused of a murder when they were not -- when they did not murder, or be convicted on circumstantial evidence.

I am a mother. I have five boys, and I wouldn't want any of that to happen, my boy to be murdered, but neither would I want any other boy to be prosecuted for the murder of that boy unless they had concrete evidence.

Q Well, I think that's not responsive to what my question was.

A Say it again, I am sorry. I got carried away.

MR. HULTMAN: I don't have any further questions, thank you.

MR. TAIKEFF: Nothing further, your Honor.

THE WITNESS: Thank you.

THE COURT: You may step down.

MR. TAIKEFF: Your Honor, may this witness be excused?

The witness cannot get transportation until tomorrow. May she be excused as of tomorrow's date, your Honor?

THE COURT: Very well.

{3918}

MR. TAIKEFF: Thank you, your Honor.

(Witness excused.)

MR. TAIKEFF: May counsel approach the bench?

THE COURT: You may.

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

MR. TAIKEFF: I regret to say that I have run out of witnesses.

THE COURT: Well, it is 10 to 5:00.

I am going to give the jury a special instruction at this moment. Mr. Hultman made the comment about "wanted for murder".

MR. HULTMAN: I am sorry, your Honor. I didn't realize I had misspoken and I apologize. I didn't realize it.

MR. TAIKEFF: I didn't catch it.

THE COURT: That is why I thought you wanted to approach the bench.

MR. TAIKEFF: I wanted to inform your Honor I had run out of steam.

I would also like to remind your Honor that I wanted to report to your Honor on the question of subpoenas. Perhaps we could take advantage of the few minutes after the jury leaves to make that report.

MR. HULTMAN: I didn't follow.

{3919}

MR. TAIKEFF: That I have to report to the Court because of the indigency on the subpoenas.

MR. HULTMAN: All right.

{3920}

MR. TAIKEFF: Your Honor, may we come back on that very point which Your Honor raised?

THE COURT: Yes.

MR. TAIKEFF: I just had a thought about that.

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

MR. TAIKEFF: I myself, as I stated a moment ago, was not sure that Mr. Hultman had misspoken. But ever as it stands I think the record is appropriate and I would specifically indicate that an instruction is not necessary because it could be interpreted if he said "murder" that he was asking the witness whether she had any change of opinion about him knowing that he was sitting here accused of murder. And I think her answer was perfectly appropriate to the situation, that if he's accused and not convicted she's not impressed, and I think it should be left just as it is.

MR. HULTMAN: She talked specifically and response in rambling on about being charged and so forth and so on. I did not intend to misspeak. In fact, I didn't realize I had and I surely will abide by any request of either --

THE COURT: You are asking that I would not give the jury the instruction?

MR. TAIKEFF: Yes. I am satisfied that Mr. Hultman misspoke, certainly did not do intentionally and did not do any harm. I think the answer was responsive to the question. {3921} I'm satisfied with the state of the record, Your Honor.

THE COURT: Very well.

MR. HULTMAN: Thank you. Very good, Counsel.

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

THE COURT: We will recess at this time, at least the jury will be excused at this time. Counsel has indicated they have some legal matters they wish to take up with the Court. So the Court will remain in session, but the jury is excused for the weekend until 9:00 o'clock on Monday morning.

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

MR. TAIKEFF: Your Honor, before we take up the matter of the subpoenas, which I trust will be on an ex-party basis I was wondering whether it might be appropriate at this time to indicate to the jury that the probabilities are that the case will end sometime during the week. I sense from the expressions on their face that they're starting to wonder whether they're ever going to become unsequestered. I think perhaps if Your Honor sent word through the marshal that they won't know exactly when, but we think they'll get the case sometime next week, It might give them some respite.

THE COURT: Any objection?

MR. HULTMAN: The Government would have no objection to {3922} that, Your Honor.

THE COURT: Very well. Jury may be advised that counsel appear to be in agreement that the case will be, will very likely be submitted to them sometime during the week of the forthcoming week.

MR. LEE: Yes, sir.

THE COURT: I had forgotten momentarily that this matter of witnesses was something that you asked the Court to consider x-party.

MR. TAIKEFF: Yes. And the Government has considered its willingness to vacate the courtroom if Your Honor wants to do it at the sidebar. Whichever Your Honor prefers.

THE COURT: As long as you wish to do it x-party and the counsel are leaving the courtroom well, just do it from the counsel table.

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

MR. TAIKEFF: Your Honor, the days no longer have any definition for me so I may be incorrect about my statement that based on Your Honor's rulings early yesterday, but I think those rulings were made yesterday, we evaluated in a rather lengthy meeting last night, not only the question of Clarence Kelly's appearance, but the question about producing on the witness stand all of the witnesses that we thought we had a legitimate right to produce. And I have a rather informal {3923} list which I will either turn over to Mr. Hanson or to the marshal whichever Your Honor directs.

THE COURT: Mr. Hanson.

MR. TAIKEFF: I just want to give Your Honor some impression about what the situation looks like. There are a rather substantial number of names, Because of the statement counsel made during colloquy concerning the Anna Mae Aquash incident we are eliminating eight separate witnesses, and only two of those witnesses were served and appeared. All the rest, either were not served or were waiting for a call. So that there are only two people who came here unnecessarily in that particular regard.

Concerning Your Honor's ruling as to the nature of the testimony concerning the climate of violence or fear and the exclusion of individual incidents we found it appropriate to not call seven people who are on the subpoena list, and one person whom we ordered up pursuant to a writ ad testificandum. I understand that word went to the marshal on Robert Robideau to ask Your Honor to satisfy the writ so that he could be sent back to his institution. I don't know whether word has reached Your Honor or not.

THE COURT: It has not.

MR. TAIKEFF: But I'm officially informing Your Honor of that fact.

Of the remaining people which who are seven in number {3924} the only person who showed up, or there was only one person who showed up, and that person showed up with his wife who was the witness and that takes care of that particular category. No, I'm sorry, apparently two additional names were added, so there are nine people of which three had already showed up.

I think I had already explained to Your Honor, we had to make sure that a certain number of people came so that we had a reservoir of witnesses, and that's why there's a number of apparently wasted trips involved. But most of these people live not too far from here.

There was another category which we arbitrarily called climate of fear. It's just for our own work that we use these names. One of whom was the author, Vine DeLoria that the Government had made an application about which is now moot about I think, and in that category there were seven people. Except that one of them was put on, Rosalyn Jumping Bull did testify even though we had indicated to her that we -- I I'm sorry, Your Honor, I have to take that back. I'm mistaken. Rosalyn Jumping Bull did show up and we did decide that we would not use her. And she did not testify, so in that category there are altogether seven people and three of them have shown up.

With reference to the Myrtle Poor Bear aspect of the case at this particular time we've advised Canadian counsel, {3925} whom we were going to call as an expert technical witness via the Canadian proceedings not to honor the subpoena which had been ordered. So there was no wasted effort at all there. And two miscellaneous witnesses by the name of Rosen and Harper who never showed up and in fact may never have even received their subpoenas. So I don't know the exact number, but it's rather substantial, and I think there were a relatively few wasted trips. And amongst those so-called wasted trips there were one or two people who initially appeared to be perfectly appropriate as witnesses, upon not their initial interview but upon the effort to prepare them to testify became apparent to me that they should not be called. And so I exercised my right as a trial counsel to decide not to call them.

I want Your Honor to understand that we have made a conscious effort at all times to respect the privileges which Your Honor has extended to us.

THE COURT: I appreciate your putting that on the record also. I think it's well in a case of this kind that a record be made of the procedure that was followed.

MR. TAIKEFF: And I want to add, because I suspect that it is very much a part of what Your Honor is thinking about, that we have had the best of facilities that could possibly be obtained by any defendant who had unlimited funds.

THE COURT: Well, that is in accordance with the {3926} philosophy of this Court that they should not be conservative on the resources that are made available to an indigent defendant upon certification of competent counsel that certain matters are necessary for an adequate defense.

MR. TAIKEFF: One thing, off the record, Your Honor. I just want to say we might have had a better deputy clerk in charge, but other than that I have --

THE COURT: Put that on the record.

MR. HANSON: Might I inquire of Mr. Taikeff one more matter. Approximately how many witnesses does that leave that you feel will be used next week to complete the case?

MR. TAIKEFF: I can answer that, but I have to step to the table for a minute. May I do that?

THE COURT: Very well. What was your inquiry to Mr. Taikeff?

MR. TAIKEFF: He wants to know how many witnesses to go.

MR. HANSON: Approximately. You don't have to testify, just approximately.

MR. TAIKEFF: I even have to look to be approximate because quite frankly with Mr. Lowe absent and Mr. Ellison sick I am not entirely cognizant at this point. First of all there were two additional witnesses identified today in connection with the interview of the second cousin of Myrtle Poor Bear, and we requested subpoenas for those two people {3927} which I think are in the courtroom. So there are those two people.

Now, from the FBI list we've heard from Marvin Stoldt, so we have four agents who will definitely be testifying. And then there is the possibility, a moderately good one, that two more will, and a relatively small possibility that one more on top of that will. So that's definitely four, probably six and then maybe seven from the FBI list altogether.

Now, in connection with the so-called Jimmy Eagle aspect of the case, the first witness will be one of the agents previously referred to. The second witness will be James Eagle himself. So that's, we're actually adding only one to the number I've already stated. And then there is a possibility of up to three individuals, one or two of whom are in custody and for whom writs ad testificandum have been issued I believe. Just one -- well, all right. Then one has been sought by writ, and two are being sought by subpoena. So if all of them are produced that's three more on top of that. I think we're somewhere around twelve or thirteen at this moment.

On the Myrtle Poor Bear aspect, the first witness would be the agent, but he's already been counted; Myrtle Poor Bear herself, let's say that makes fourteen, and I would say three miscellaneous witnesses concerning Myrtle Poor Bear, and two of the agents that I said probably would then be in {3928} this category, So depending upon how the Myrtle Poor Bear thing develops we may or may not get those two agents. And I believe that's it.

So I would say in round numbers about fifteen, not more than twenty, and I frankly think we're going to do it in two days, We may do it in three days. That's my best estimate as of this time, Your Honor.

THE COURT: Is that it?

MR. TAIKEFF: Yes, sir, Have a Happy Easter, sir.

THE COURT: Thank you.

Court is in recess.

(Whereupon, the court recessed at 5:05 o'clock, P.M.; to reconvene on April 11, 1977 at 9:00 o'clock A.M.)