United States District Court

FOR THE DISTRICT OF NORTH DAKOTA

Southeastern Division

CR NO. C77-3003

UNITED STATES OF AMERICA,	*	
	*	
Plaintiff,	*	
	*	**U.S. District Court for the District**
v.	*	**of North Dakota,**
	*	**Southeastern Division**
LEONARD PELTIER,	*	
	*	
Defendant.	*	

VOLUME XXII - SUPPLEMENT

Pages 4879-4947

{4879}

MR. LOWE: I put a piece of paper on your desk which relates to a motion, just so you would have it before you when I made the motion. When you're ready I would be prepared to address myself to that motion. Those are pages which are extracted from the daily copy in this trial.

THE COURT: Very well. You may state your motion.

MR. LOWE: Your Honor, during the course of Wilford Draper's testimony, the questions and answers and discourse shown in the pages which I've placed before you and I provided to Government Counsel arose and I recite for the record that I'm referring to the daily copy in this trial, pages 1056, 1058 through 1060, 1062, 1152A and B as the pages I'm particularly going to refer to.

Mr. Hultman was trying to elicit from Mr. Draper testimony about a statement which I'm sure Mr. Hultman expected would be described as having been made the night the group was walking to Morris Wounded's house and he made some inquiries and the witness did not give the particular answers Mr. Hultman was expecting. He went back to refresh his recollection by a

transcript of the proceedings last year in the Cedar Rapids trial and on page 1060 Mr. Hultman says, "Mr. Draper, in response to the question at the time in which we have been referring, is it not a fact your response was," and then reads the portion that has previously purported to have been given by Mr. Draper under oath and he said at that {4880} point that he did remember making the response. Then Mr. Hultman says, "Was that response at that time to the best of your knowledge a true response on your part?" And Mr. Draper said, "No."

Now there was some additional questions asked, but in essence the witness never recanted his statement to the best of his knowledge that was not a true response at the time it was made.

Thereafter at page 1152 on cross-examination at the bottom I went back and asked about the same statement and up at the top of 1152B I pointed out in cross-examination that it was dark and he said it was. He stated he only knew they were generally all in a group and I said, "You mentioned that something was said to the effect about the car and the shooting of the agents and I ask you now whether you can first of all, whether you can tell first of all who the statement was made by without guessing. Do you actually know who made the statement?" He said "No." Question: "Could you recognize the voice or were you just guessing when you said it was Leonard Peltier?" Answer: "I was guessing." Question: "Can you tell who the statement was made to or would you just be guessing on that?" Answer: "Guessing."

We start with the proposition, Your Honor, that the law is very clear that information which is read to a witness for the purpose of refreshing his recollection or impeaching him {4881} does not become evidence itself. It is, as a matter of fact, a proper application when the jury is instructed. It is not to be taken for the facts recited but is only for the purpose of showing either a prior inconsistent statement or to refresh the witness' recollection. That is the state of the record.

There have been rulings or statements made by Government Counsel, rulings by the Court in this matter which cause us concern, to be sure, everyone is understanding the law the same way that we do. And that is that up until this time the statements by Mr. Draper are not in evidence. That is the first point. The only statements which was in evidence was the corresponding questions in page 1156, basically said he didn't remember. The statement read by Mr. Hultman from last year's transcript is not in evidence because it was only used for a specific purpose and the witness disavowed it. There was no proffer of any witness to testify that he actually did testify that way. In fact, there was never a proffer into evidence of any portion of the transcript of last year's trial as a documentary exhibit.

So that we believe that there is no reason to go farther than to say that there simply is no evidence as to that statement and that that statement that Mr. Hultman read is not in evidence.

We take it a step farther to the extent there was {4882} even testimony that is confusing and where he said he just didn't remember and, of course, if Your Honor somehow feels that the statement made by Mr. Hultman at last year's trial was in evidence, we believe that the testimony of Mr. Draper at page 1152B in which he says first of all that he does not know who actually made the statement, he did not know, not just does not know, he did not know who made the statement; secondly, he did not recognize the voice, he was guessing it was Leonard Peltier, and, third, as to whether he could tell who the statement was made to, he was only guessing as to that. In other words, as to the person who spoke any such statement he was guessing and as to who might have heard it he was guessing.

This Court has a clear obligation in such instances to strike the testimony because there is no proper foundation and Your Honor has acquitted that responsibility in this trial at least twice.

In the daily copy at page 698 there was a statement made by Mr. Ecoffey in which he said something about the Wanda Sears' house and on voir dire it was brought out that he did not know that it was Wanda Sears' house, it was merely guessing or repeating something he didn't know personally. Motion to strike was made and he granted it properly.

In Mr. Coward's testimony at page 1318, Mr. Coward was doing some guesswork about the power of the binoculars or {4883} a scope on his rifle, I don't recall right now which one it was. I believe the binoculars. He was obviously speculating or guessing. Motion to strike was made and Your Honor properly granted that. There's no question motion to strike is proper when the witness is giving testimony which is really speculation or is based on hearsay. What Mr. Draper has said we believe is not in evidence. With the extent any of it may be considered in evidence, it is clearly subject to a proper motion to strike and I move at this time on that ground.

I would ask that the jury be instructed either one of two things: either, first, that there is no such testimony because it was only received for a limited purpose and is not considered testimony in this case and, second, if in the alternative that the testimony was based on speculation and pursuant to Your Honor's instructions to the jury already that is not permissible and it will be struck from evidence and not considered by the jury. That is my motion and I think I've stated it completely.

MR. HULTMAN: Let me just respond with about three sentences, Your Honor, in light of the fact I just now got it and, of course, one, I don't think it's timely; two, that this seems to be the character of the record from beginning to end that people have said something once under oath, don't recall it a second time and, thirdly, the response I believe, if you do read it is not as characterized by Counsel.

{4884}

I'm trying to find the actual response by Draper and this is clearly why, again, the jury has the opportunity to take this into consideration and his response was, "Does that refresh your recollection," and he said "yes." "Do you recall --

THE COURT: Where are you at?

MR. HULTMAN: I'm sorry. On 1059, Your Honor, page 1059.

THE COURT: I don't have a 1059. Excuse me. I guess I maybe do. I was looking at 11.

I do have a 1059.

MR. HULTMAN: It's the third page I have, Your Honor.

THE COURT: I have found it.

You may proceed.

MR. HULTMAN: His answer is then, "Do you recall having been asked that question and giving a response?" And, "Uh-huh," I assume that's yes. It's not, "Oh, no." "Now I would ask you the same question and ask you whether or not you can respond more fully with your recollection refreshed," and he said, "I can't remember that much." "Well, you're saying now that you don't

remember back at the time this statement?" Answer is "Yes." "You are not in any way saying I what you said at that time was not a correct statement of your memory to the best of your ability at that time?" Answer: "Well, it was something like that."

{4885}

Now this record is also replete with testimony and questions by Counsel that your memory is always better back then than now, is it not, and I would refer just one of many, many, many instances. That was Brown's testimony and the exact question to that effect and so I would respond only in that respect, Your Honor, that, one, I think it is established to the extent and the mere fact that then Counsel on cross comes back and makes sure his memory isn't any better than it is now doesn't in any way destroy, one, the testimony which he has testified on direct examination and surely the relevancy of that testimony in no way could be questioned.

{4886}

Now, as I say, I am not prepared in terms of any cases or anything because I just now -- but that is my total response at this time, one, that it is not timely, but two, that it is relevant testimony; and I would object to any instruction of that kind.

MR. LOWE: Your Honor, may I make an observation for the record because I just observed this? I am quite sure that the daily copy will bear me out. We have page 1060 and the next one is 1062; but the left-hand margin contains the interim pages numbered by the court reporter, of I-9 and I-10.

I recognize that the question on the bottom of Page 1060 corresponds to the answer at the top of Page 1062 . Right now I can't tell if that's a misnumbering, but it appears to be from the I-9 and I-10.

I would ask your Honor to simply recognize that. I am quite sure that's simply a misnumbering. We had an exchange of colloquy between counsel. If you have it there, perhaps you could check for us.

THE COURT: There is a 1061. That does not show up here.

MR. LOWE: I thought that was the case when I saw the margin.

Without repeating a whole lot of things and responding in detail, there is no question unequivocally and without {4887} any further rehabilitation, that Mr. Draper said what he said last summer -- the statement that he read to him was not true to the best of his knowledge.

That immediately means that that is a disavowal and cannot be incorporated.

THE COURT: (Interrupting) Excuse me. May I interrupt you?

MR. HULTMAN: It goes on two more sentences, your Honor. That is what I have been trying to say.

THE COURT: There is some discrepancy here. 1061 in the original transcript is numbered 1060 here, in your copy.

MR. LOWE: Maybe my copy was so bad it looked like 1060, and it was actually 1061. Page 1061 starts on the top "for a side bar."

THE COURT: 1061 in the original transcript starts "for a side bar."

MR. LOWE: The page numbers sir, very strained here.

For the record, what I referred to previously as 1060 is actually Page 1061.

THE COURT: That apparently 1060 was left out.

MR. LOWE: We didn't go back that far.

THE COURT: You have 1059.

MR. LOWE: I think 1060 probably had colloquy where counsel started which wasn't relevant to what I was trying {4888} to show in testimony. I know there were some pages I did not put in there because they simply weren't relevant to what I was trying to raise.

In any event, he specifically says, "No, it is not true." At no point in the sentences following there does he change his statement that that was not true.

MR. HULTMAN: Well, I disagree, your Honor.

On Page 1062 his response is, "I can't remember", not that it is not true; and the question: "Maybe I am not communicating", and then I asked him: "Are you saying that here and now you don't remember, is that what you are saying?" Answer: "I remember it, but I don't remember what was really said, is what I am trying to say."

He isn't denying. It is only when you go back and make a straw man again, and he now gets his memory, that we then get to that point.

So I am saying, John, that he has said point blank here on direct examination his basis and his reason.

I am not denying that in response on cross he then says what you say.

THE COURT: Well, to save time, I am not going to rule on the motions at this time.

Do you have other motions?

MR. LOWE: Your Honor, we would ask that your Honor {4889} give that instruction to the jury. We think that, at least for the reason that I stated, that he was guessing; that all that preceded that guessing must be stricken.

We would also move for a judgment of acquittal at this point under Rule 29.

No longer is the evidence taken in the light most favorable to the Government. It is not taken by a rational examination of all of the evidence, taken as a whole, as to whether it properly can be submitted to the jury.

We believe that the failure by circumstantial evidence or otherwise to show beyond any reasonable doubt, as a matter of law, that Leonard Peltier either shot the two agents at close range with those three shots or any of them, or that he actively and knowingly aided and abetted those or that person who did, is a fatal defect in their case which would warrant it not being sent to the jury on the grounds that there simply, as a matter of law, is insufficient evidence on which to convict; and in the alternative, on the basis that Mr. Taikeff mentioned at the close of the Government's case, that because of the inflammatory nature of some of the surrounding collateral events that the Government has allowed to bring in -- the Milwaukee event, the State of Oregon event, the Wichita blowing up on the highway, the Al Running Rosebud raid, {4890} the people found there, the weapons and dynamite, and statements and everything else -- this is one of those cases where even if your Honor doesn't find as a matter of law that the evidence is insufficient, you should find that given the evidence and the state of the evidence that the prejudice and the danger of submitting it to the jury makes it a case where in your discretion you take it away from the jury in any event.

For those reasons we would ask for a judgment of acquittal.

MR. HULTMAN: The Government just resists it, your Honor, for the record.

THE COURT: The motion for judgment of acquittal is denied.

Are there any other motions?

MR. LOWE: One other.

Because we feel at this point in trial -- I say this with all respect for the Court and in great sincerity -- that your Honor may now realize that some of the important evidentiary rulings made earlier in this case -- and all of us have 20-20 hindsight -- you may now realize some of those were erroneous and cannot be cured -- the witnesses are now long gone, the jury has heard the evidence, perhaps some of it damaging -- we believe that under the state of the record your Honor should grant a mistrial and {4891} order a new trial, and we so move at this time.

MR. HULTMAN: The Government just resists again, your Honor.

THE COURT: The motion is denied.

MR. LOWE: I yield to Mr. Engelstein.

Your Honor, may I ask that the pages of Mr. Draper's transcript that I handed you may be marked, that I gave you, as an exhibit. I don't know whether it will be an exhibit, or it will be simply filed with the papers, the supporting documents. I don't know whether all the daily copy would become a part of the record by reference and incorporation.

I would ask the Court to consider them as part of the record.

MR. ENGELSTEIN: I don't know about your Honor, but I feel like I am on the twenty-fifth mile of a marathon. I hope I can make it over the finish line.

THE COURT: Excuse me one minute.

I have retained -- the Clerk is looking at me critically -- I have retained a copy of the excerpts from the transcript which you have offered along with your motion, and that will become a part of the record.

MR. LOWE: Thank you.

MR. ENGELSTEIN: Your Honor, the defense has submitted 28 proposed instructions to the jury, four summary {4892} instructions.

THE COURT: Before we get into that matter, I want to say a word or two about my procedure in instructions for counsel for both sides.

I guess the only one that would probably be familiar with it is Mr. Crooks; but first of all, with reference to the argument tomorrow, I will preface this with a statement that counsel will receive a copy of the court's instructions prior to making argument.

However, I do not permit direct quotes from the instructions in counsels' arguments. The reason for that is that the jury must receive all of the instructions on the law at the same time and must receive it from the Court.

I have no objection to counsel arguing the law as to what they believe it will be, but I do not permit direct quotations, and the same thing will be true on the daily copy.

I will not permit direct quotations from any part of the transcript in the arguments. You may argue what you believe the evidence was, but the jury must make their determination based on their own recollection; and if we get into the matter of counsel for either or both sides starting to quote directly from the transcript, we are going to have a situation where undue emphasis may be {4893} given to part of the transcript; and then counsel for the other side will feel that it is necessary to read an additional part, and it would not provide for an orderly procedure.

{4894}

THE COURT: Furthermore on instructions my usual procedure is to take the requested instructions, prepare, give consideration to requested instructions from both sides, prepare the instructions and then furnish counsel with a copy of the Court's proposed instructions. And then prior to argument the jury give counsel for both sides an opportunity to state for the record any specific exceptions that they have to the instructions which the Court proposes to give.

I then give considerations to those exceptions and may or may not revise what I had intended to give. I am taking one additional step here because of the request from defense counsel in permitting counsel from both sides to make an argument on the instructions, and I would hope that you will limit your argument to those areas which you feel are particularly important, particularly critical and that should be called to the Court's attention.

Then I would propose before counsel leave this building tonight to have a copy of my proposed instructions ready for them so that they may take it home with them overnight. Now, I don't know what time that will be, but it would probably be within an hour after we have the, I have the discussion here in court.

MR. LOWE: Could Your Honor simply leave a copy with the marshals? We've done that on daily copy. It's worked out very well. The federal protective service downstairs and we {4895} can come back and pick it up.

THE COURT: If you want it that way, I just want to make it available to counsel so that you have the opportunity to consider it overnight and to be in a position to state your exceptions and also to whatever effect it might have on your argument.

MR. LOWE: Thank you, Judge.

THE COURT: All right, Now, Mr. Engelstein, with that out of the way you may proceed.

MR. ENGELSTEIN: Well, Your Honor has successfully cut off two-thirds of the remarks I was going to make which I think everybody will be happy about. I hope not for substance, but from the point of time. The other discouraging thing about Your Honor's remarks is the fact that usually it is difficult enough in oral argument to have the conviction that one is going to persuade the Judge of the power and the force and the compelling force of one's argument. Under the circumstances when I'm arguing against the federal complex and the instructions are already being printed I would expect that anything I have to say would not affect anything in the mechanics of the printing machine.

THE COURT: In the first place I might tell you they're not printed. And secondly, I do give consideration to exceptions and certainly will give consideration to arguments or I wouldn't have allowed --

{4896}

MR. ENGELSTEIN: I understand that you are not allowing that as a vain exercise. On the other hand I would like therefore to repeat -- I assume Your Honor has read our memorandum. We've taken a lot of care with it. We think that after an extraordinary trial of this nature, and I think it's been an extraordinary trial by any standard in terms of its length, in terms of the kind of care Your Honor has given to all kinds of aspects of the trial starting with the number of appointments, I would say rather unbelievable and extraordinary forebearen excessive legal argument to make sure that all aspects of the trial have been employed properly. It would be unfortunate if probably one of the most important aspects of a trial, namely the charge to the jury, should, because of time or whatever, be given a rather ordinary and mechanical treatment. It's pretty clear that this jury after five weeks has been inundated with a vast complexity of guns, pistols, photographs, casings, data, bits and pieces of all kinds of things and they need a framework within which to organize the evidence. A legal standard to which they can adapt the evidence and come to a conclusion.

These remarks, I only state them by way of introduction to the basic aspect of jury charge which disturbs us a great deal from having read the Government's proposed charges, Which is a basic failure to communicate with the jury. I {4897} don't intend to go into every instruction, obviously. But by way of illustration what worries us very much is the kind of instruction which states a principle of law. The principle of law is correct. But I submit to Your Honor as with respect to Instruction No. 9 in considering the lateness of the hour I think it's worthwhile perhaps being amused by a little bit. If you would look at Instruction No. 9 of the Government's recommended instructions, it consists of one paragraph having one sentence which is seven typewritten lines long and I submit to Your Honor that after I read it five times in a row I wasn't sure that I knew the meaning of it.

This is the kind of legal language that in a sense casts discredit upon our profession and should be avoided even though it is from Devitt and Blackman. And once I did figure out the meaning of that instruction. It turns out that the legal principle involved where somebody who commits the crime is doing essentially in, as a course of habit of life, like somebody who puts a bomb in a package and a letterman, postman delivered it is entirely irrelevant to the facts of our trial. I cite this not because it is so important, it would be another paragraph that would be read to the jury. There would be another paragraph that the jury would not understand at all But there are many such paragraphs in the Government's instructions which state principles {4898} of law which are correct in themselves, which have all kinds of terms such as willful and unlawful and malicious and so on which upon examination have no relevance to this case.

I hope Your Honor in his consideration and his conclusions with respect to submitted charges has taken that central point into consideration. For example, there is a charge, and that is Government charge number 19, which is a conspiracy charge. I trust Your Honor has the Government's charges before him as I cite them. Otherwise --

THE COURT: I have.

MR. ENGELSTEIN: Which is a conspiracy charge consisting of eight full paragraphs of legal language. Now, what is the objection? The objection is not that the language, is that the language is not legal or that the law is incorrect. The objection is that that's eight paragraphs of legal language which can only mislead the jury, has no basis on the evidence in the case presented before us, and by the implication of the Court submission of it as a charge to the jury suggests that in some possible way the law of conspiracy is relevant to the evidence in this case.

It's that kind of thing that characterizes the Government's instructions throughout which I hope Your Honor has taken consideration of when he has come to his final conclusion.

There was something rather casual and mechanical about {4899} the Government's submission because I cannot understand the rather extraordinary submission which is their submission number 21; which, if Your Honor will turn to it, you will discover it is either an audacious and perhaps creative attempt to change all of criminal law or an indication of the fact that somebody was told to type automatically some portions from Devitt and Blackman. It is not believable that the Government would submit a proposal which says after defining the difference between real evidence and circumstantial evidence that the jury should come to a conclusion based upon the preponderance of the evidence standard. Surely that's obvious to everybody. And Mr. Crooks obliges.

MR. CROOKS: Conceded.

MR. ENGELSTEIN: But what is even charming about this error, I like to think it's inadvertence on the part of the Government, but they also go further and they submit Instruction No. 23 which

we adopt, which states the proper standard of beyond a reasonable doubt which adds up to a composite of two instructions, 21 which says the standard is the preponderance of evidence --

MR. CROOKS: Your Honor, perhaps to, not to interrupt counsel, but we will stipulate that 21 should be withdrawn. Point is conceded that it is a duplication of 23. Should not be considered.

THE COURT: I was looking at my own notes and I had {4900} already.

MR. CROOKS: I assumed --

THE COURT: That it had already been eliminated.

MR. CROOKS: The only one I can blame this one on is Bruce Boyd who is not here, Your Honor.

MR. ENGLESTEIN: I was just going to wonder if the Government expected in addition to the burdens of the jury that they should be trying to decide the case both on the preponderance of the evidence and beyond a reasonable doubt at the same time thereby defying Aristotle's law of the excluded mill which you cannot do A and not A at the same time. Well, we'll accept the stipulation, however ungenerous since it's so obvious. But that's kind of a humorous remark due to the latest of the hour. What is seriously --

THE COURT: Lateness of the hour is a good reason for cutting all of that irrelevant remarks.

MR. ENGELSTEIN: Your Honor, if you'll forgive me, a little candor there has to be something in this for me.

THE COURT: I'll allow that one.

MR. ENGELSTEIN: When I realize I'm speaking after the instructions have been written at the midnight hour in the fourth day and the fifth week of a trial I thought I would indulge myself. However, I would like to get back to two main things that I consider really --

THE COURT: I was wondering when you were going to {4901} come to those two.

MR. ENGELSTEIN: Well, if you enjoy a state of wonder I have a few other remarks I can make by the way.

{4902}

I don't want to get very serious.

THE COURT: Very well.

MR. ENGELSTEIN: What I consider to be instructions upon which the conviction, the conviction or the acquittal of this defendant will turn, and I do speak now in utter seriousness, and that has to do with the government's request for the submission of the lesser included offenses under murder one.

THE COURT: This is one reason that I suggested that Counsel have argument because I realize that that's --

MR. ENGELSTEIN: I want to speak at some length about that and some length about the aiding and abetting charges because I believe if Your Honor does not accept our position, given the unique nature of this case having to do with a native American, having to do with a murder of two FBI agents, having to do with the enormous circumstantiality of the evidence, having to do with all the motion that has been generated and has to be generated due to the cultural differences, the history of the country and so on, any charge carrying the weight of the authority of Your Honor to the jury suggesting that a murder two or a manslaughter or an aiding and abetting charge of a certain type is proper will inevitably, since there is no inevitability in life, will be an enormous probability lead to a compromise verdict.

I'd like to support that conclusion with some analysis.

{4903}

The trouble with cutting one's speech short, one has to jump through one's notes. As every author knows how painful that is.

From the very beginning of this trial it has been the government's assertion, which we have accepted, in fact we enforced emphatically wherever appropriate, and I believe Your Honor has thought on some occasions were not so appropriate. This has been a single issue trial. There has never been any quarrel on our side and there has never been any other assertion on the government's side that this was not a brutal premeditated murder of two people, in a word. Without going on, in light of Your Honor's injunction to be brief, I don't want to indulge in any rhetoric.

There has never been a question of the nature of I the crime. There has only been a question of the identity of the criminal who committed the premeditated act of murder, not was it a premeditated act of murder.

I refer Your Honor again, I remind Your Honor of the government's Motion in Limine on page 2, there were two or three sentences which describe with graphic detail the close range execution of Special Agent Williams and Coler.

The Indictment speaks of premedicated murder with malice aforethought. A great deal of evidence has been admitted based on almost the tacit assumption that was the nature of the crime. A great deal of evidence has been excluded {4904} on the grounds that since this was a single act of murder at close range of murder in the first degree, so much of the so-called political aspects of the trial, so much of the so-called background, so much of the so-called evidence that would have gone in to indicate a possibility of defense of self-defense was considered not relevant so the government was in the position of having a theory of the case to start with, a theory of premeditated murder at close range of both people. On that position they argued and prevailed in some cases to exclude, to exclude evidence and to include evidence in favor of their theory.

Now when we come to the end of the trial and we have the burden of instructing the jury what crime was committed that day, the government now wants the advantages of all the other possible crimes that could have been committed, murder two and manslaughter.

Now it is very subtle law, as our memo has shown, and we recite cases, especially in the eighth circuit, it is very subtle law -- I withdraw the remark about the eighth circuit. That has to do with aiding and abetting. It is generally subtle law that the Court must not submit a charge to the jury when there is no evidence to support a conviction on that charge. It is not a question here of throwing all the evidence at the jury, throwing all the possible lesser included offenses at the jury and say, "Jury, you are the fact {4905} finder, see if there are facts in the evidence that correspond to these crimes."

Your Honor, I submit that there are two levels of fact finding in a case of this type. The first level of fact finding is the jury's function. They look at all the evidence and they find the facts and even finding the facts is a kind of a misnomer because they are not looking for things that are loose, as it were. What they are really determining is whether certain facts are true. They are weighing the facts, they are determining what happened that day and that's the sense in which they find the facts. They are not supposed to generate facts, they are not supposed to find facts that do not exist because perhaps they would fill holes in the evidence. They only find the facts that are there, weigh them, assess them and come to a conclusion what really happened that day and then match it to the charges.

Now the Court, the judge has to find its own facts, so to speak, although they are not really facts. Just as the facts the jury looks for supports their verdict, the Court's obligation is to find the evidence that supports the charge.

Now there is no evidence in this case, and there is a Supreme Court opinion which cites in Sandstone vs. U.S. precisely on the question of lesser offenses and greater offenses. That Supreme Court opinion states that unless that element of greater offense in our case, the element of premeditation {4906} which distinguishes the greater offense of murder one from the offense of murder two and manslaughter, unless the element of premeditation which distinguishes murder is in dispute, is in issue, then charges for the lesser included offenses do not lie.

There has to be evidence with respect to the law. I put it to you, Your Honor. Let's assume it's the boy who apparently included proposal number 21 on a preponderance of the evidence. Let's say Mr. Boy also inadvertently, I suggest to you the charge of kidnapping and had eight paragraphs describing all the elements of the crime of kidnapping and the statement of the law of kidnapping would be accurate. I give this absurd example because clearly Your Honor would throw that out since there is no evidence in this case with respect to kidnapping.

Now to take a closer example, what if they charged assault with a deadly weapon. Now perhaps one could plausibly say, "Yes, there might have been an assault with a deadly weapon but there has been no evidence in this case with respect to that."

I conclude with the fact that since there is no evidence supporting the fact that there has been no premeditation in this case, you cannot charge, Your Honor cannot charge a second degree murder and manslaughter. It goes without saying. There is no assertion that the heat of passion overcame {4907} malice in this case.

THE COURT: Let me ask you this question: How do you reconcile your position on lesser included offense with your request for an instruction on self-defense?

MR. ENGELSTEIN: Your Honor will note that in the memorandum, the instruction for self-defense, and in this respect we parallel the government, the case has never been clear with respect to the theory, as Your Honor knows, for the simple reason that the government in its search for conviction, I'm sorry to say, has left the door open for two possibilities. On the one hand they want the premeditated murder of two people, on the other hand they talk about

shooting from a distance and all other kinds of things which might go to support the charge of aiding and abetting. Now if the aiding and abetting is going to come to the primary focus of the jury, then certainly justifications of self-defense with respect to that become very appropriate and I surmise, if I understood Your Honor, whom I listened to very carefully throughout the trial, I surmise the reason, I may be wrong, but the reason you didn't let a fair amount of evidence come into this trial with respect to the climate of fear, political backgrounds animosities between groups and so on, all of which would add up to the clarification of what the theory of self-defense would have been was precisely for the purpose of getting into evidence the counterbalancing {4908} considerations in light of an aiding and abetting charge from the shooting from a distance.

We don't urge a charge of self-defense. We say there is only one issue here and that's the premeditated crime and nobody says there was self-defense down there.

THE COURT: Is it your position that the Court should instruct the jury that Counsel are agreed that the offense that is charged in the Indictment is premeditated murder?

MR. ENGELSTEIN: Absolutely, unqualifiedly we urge that. The government deserves that. It's in the Indictment. It was the only reason that they were able to get Leonard Peltier back from Canada. It was the crime that was stated in the Warrant. It was the crime that was adjudicated. Adjudicated is not the right word. It was the crime that was heard to present the prima-facie case of first degree murder in Canada. From the very moment that Leonard Peltier was picked up it has been first degree murder on every judicial level on every proceeding.

Now we come to the end, we come to the end and we have the door open. Why? I'd like to cite something else for Your Honor's consideration on second degree murder and manslaughter. That is what happened in the Butler, Robideau case last year.

I submit to Your Honor that one must reflect upon the Government's failure to cite the instructions of Judge {4909} McMannus in that case. As Your Honor knows from our memorandum we have extensive quotations from those instructions.

{4910}

Isn't it astonishing? Same circumstances, same crimes same event, different Defendant to be sure, different slant of the evidence because of the different Defendant, a six weeks' trial. A Senior Judge in this Circuit having listened to six weeks and comes up with very extensive, and I must say in some respects very sensitive and uniquely tailored instructions, depending upon the evidence.

You know, your Honor, it is easy to take Devitt and Blackmur and give it to a secretary and say, "Type up those 16 instructions," Devitt and Blackmur is like going out and saying, "Get me a suit of clothes," and you get an average size suit of clothes, like for an average person.

On the charge which has to do with the charge of intent, which is the Government's Charge 26, the U.S. versus Little Bear in the Eighth Circuit, that charge has two paragraphs in it, as the Government has it.

The second sentence of Devitt and Blackmur which is in the charge submitted to your Honor was found unconstitutional by the Eighth Circuit which is the U.S. versus Little Bear.

I cite that only as an indication of the fact that Devitt and Blackmur is only a starting point for an instruction and is not where you wind up which, of course, {4911} is not what the Government does.

Perhaps Mr. Boyd was too busy doing otherwise to think about what are charges appropriate to this trial.

Another very important example -- I realize I'm on a little digression. I hope your Honor will bear with me, because if you compare our Instruction 16 with the Government's Instruction 18 on the question of accomplice testimony, you will see the following striking thing:

The Government's instruction taken straight from Devitt and Blackmur says that uncorroborated testimony -- I am summarizing -- may convict a Defendant but must be taken with caution and should be resolved beyond a reasonable doubt.

But the U.S. Supreme Court on two other cases has said that is not enough in recent years. They say -- and we submit this in our charge -- that the testimony of an accomplice going to the innocence of the Defendant need not be believed beyond a reasonable doubt. Note that distinction. If an accomplice said the Defendant is guilty, you need beyond a reasonable doubt.

Now, if that is all that is stated to the jury, how is the jury to weigh the evidence of an accomplice which goes to the innocence of the Defendant?

The Government proposal doesn't tell your Honor. Our proposal tells your Honor, and our proposal tells your {4912} Honor -- we get that text from the case law, not from Devitt and Blackmur -- that is the difference between the Government's instructions and ours. We have tried to include Devitt and Blackmur, case law and Judge McManus which brings me back to what was the starting point of this digression.

I wanted to get those points in anyway. Before I had decided I would exclude them. I am glad I got them in.

I would like to take the accomplice testimony in light of what I just said. Judge McManus in the last trial was asked to charge all the lesser included offenses as well. He did not charge manslaughter. He did charge murder two, and I think it is instructive to examine what must have been in the Judge's thinking and what the circumstances were which supported his conclusion in that respect.

Manslaughter was clearly not in the case, and the Government's submission of manslaughter to you as an alternative is perhaps a businessman's way of negotiation which gives your Honor three charges so you can knock out one in our favor and give them one in their favor.

If that's the approach to the charges, that has nothing to do with the conscientious concern for justice being done.

{4913}

In Judge McManus' trial there was no single theory of the crime, that is to say, there was no theory that both agents were killed at close range. The theory was that one agent -- I think it is Williams -- was killed at close range, and Coler was killed from a distance.

Therefore, the charge of murder two is arguable, appropriate in those circumstances, because clearly on the face of it the issue of premeditation which is essential to the murder one charge can be in dispute with respect to the long distance murder; and to repeat again, the Supreme Court question on this -- statement on this, if the element which distinguishes the greater offenses in dispute is not in dispute, we cannot charge the lesser offense; if it is, then you may.

In our case both are close-range murders, no dispute on premeditation, no long distance firing. That distinguishes our case from the case last year.

I think we should learn from Judge McManus. We don't have to follow it. We have to be impressed that the law is very valuable.

There are many charges of the Judge in the last trial which I think would be very appropriate in this trial, and we have submitted many of them for your consideration.

There is one other consideration your Honor would be advised to ponder seriously as possible reversibility, {4914} and that is the extradition issue. I think your Honor has been correct in my view and in the positions he has taken about the irrelevance of anything that happened at the extradition as being evidence in this trial; but I don't want to go into that at the moment. I do want to go into the basic effects of extradition law.

The United States has an extradition treaty with Canada. That treaty specifies the circumstances under which Canada, the asylum country, will surrender a fugitive to the United States, the demanding country. One of those conditions, or actually one condition with two parts, is that the fugitive will be surrendered after a prima facie showing; and that was the kind of showing that was held in the hearing, not an adjudication of guilt or innocence after a prima facie showing that the crime he is being charged with in the United States is an extraditable crime -- that's the first half of the condition necessary for the extradition -- and the crime he will be charged with in the United States is the crime upon which he was extradited.

That means that the United States cannot go to Canada and say, "We want this man on first degree murder," and bring him here and charge him for anything else but first degree murder.

Now, there is perhaps a certain lack of clarity of {4915} thinking when one thinks of a lesser included offense. It is true that as a matter of elements, murder two and manslaughter are necessarily included offenses in murder one, since if you have the willful killing, you have the necessary malice. If you have the premeditation, that's the greater offense. If you have the greater offense, inevitably you have to have the lesser offenses. They are included in the sense they include all the elements of the offense in stages incrementally.

It does not follow -- in fact, it is exactly opposite to the degree of the crime. Murder second even developed in the history of criminal law. They are just the same crime, but have slightly different degrees. If you don't make premeditated, you fall back in murder two. That's what you have to prove beyond a reasonable doubt is there is no premeditation in murder two. It is not a part of murder one. If I have reasonable doubt of murder one, I will fall back in murder two. I will get back to that.

I think the psychological pitfall we are all in with respect to the possibility of a compromise verdict -- because of what is involved in this case and this whole business of lesser included offenses -- if your Honor rereads the language of the lesser included offenses charges, and the reason of the point of view, one, the psychology of the juror when he hears, "If you do not {4916} feel convinced that the Defendant committed murder one, then you may or must reconsider whether he committed murder two," and so on, the language is so filled with the implication, sort of one thing, that the invitation to somebody who feels there is some guilt here, there was some crime, and by God, there has been a crime, there has been a great social tragedy and a social disaster, naturally it is a human feeling that somebody should pay for it, the guilty person who should pay for it. The crime is the crime of first degree murder, no other crime.

I come back to my extradition point. I am sorry I get a little bit worked up when I get into this.

The extradition issue is a matter of law. I cite the key cases in the memo, the May case going back to 1886, and a very important case in the Second Circuit by Judge Kaufman where he restates the principal applied to those circumstances, and a New York case: If the United States tries a man on any other charge that is in the warrant of extradition or any charge for which the prima facie case for the extradition was made in the asylum country, there is no jurisdiction in this Court.

I alert your Honor to the fact that I believe, as an appellate issue, you risk the jurisdiction of this Court with respect to this trial at all if you charge the jury with any other crime than the crime for which he was {4917} extradited.

I would like to talk about a lot more. I will just talk about two more things. One is the aiding and abetting.

{4918}

When I speak of the psychological trap or pitfall of danger a compromised verdict due to the undeniable and necessary tendency in a human being to want to come to a conclusion, think of it. Five weeks this enormous social effort, millions of dollars, perhaps all of this energy, twelve different people go into the jury room, each with different sense impressions and different degrees of conviction whether the defendant is guilty or innocent.

What drives these people to come to their own individual conclusions, and they will be different on things in the nature of the case. How do they come to the unanimity? The seek for formulas under the authority of the Court which will enable them to square their verdict with their conscience to the degree that the Court supplies them with crimes that they can convict against to that degree do they have more possibilities of conviction and therefore resolve that question in their minds. That though I have reasonable doubt about premeditated murder in the first degree I don't have any doubt about the fact that maybe he did kill him somehow or maybe he was an aider or abetter. After all he was present, we don't deny that.

What is being contest is what he did that day. But two young men were killed. That's an impressive, emotional fact and everybody wants some kind of retribution, we know that in the history of criminal law what that's involved. Now, {4919} I don't think your honor, after this kind of a trial that we have had with all its square and scrupulous necessarily wants to invite a compromised verdict. I get down more specifically and eliminate some agitation, if I may characterize it that way, to the legal aspects of aiding and abetting charge. I would like Your Honor to compare our charge number 9 and our supplementary charge number 2 with the Government's three charges of 7, 8 and 10 straight out of Devitt and Blackmun. mere was of course nothing wrong with the law of Devitt and Blackmun. It's pretty fair law except it has

willful cooperation, general participation, very vague language. Devitt and Blackmun was written a number of years ago. There is a lot of law and a lot of it in the 8th Circuit and here is when I meant to make the remark I made before which specifies with great particularity what is involved in order to have committed the crime of aiding and abetting. There is a parallelism between the danger of compromised verdict on aiding and abetting on the lesser included offenses in this sense. A juror thinks who is in doubt with respect to premeditated murder. A juror likewise can think if he's in doubt about premeditated murder maybe he aided and abetted, He was shooting up there from the hill, he was there, he was in the army camp.

Now, aiding and abetting is not helping. Helping is not aiding and abetting, and we have enumerated and specified {4920} five very specific elements, each one of them supported by case law. As you notice in our memo that you're now looking on, Your Honor, which requires it seems to me the spelling out for the jury so that they understand so there's not a verdict not based on understanding what is meant by community of intent, what is meant by common design, what is meant by the defendant being aware in the first place that even if something he did did in fact aid the commission of the crime, and this is part of our supplementary motion. He has to be aware of the fact that what he did would have in fact facilitated the commission of the crime, not merely that he did the act and it did in fact facilitate the commission of the crime.

Intent after all is what distinguishes a civilized from a barbarous criminal law. Did he intend to participate, did he work with him, did he work with him prior to the plan? Those are the elements of aiding and abetting that a juror has to understand in order for their verdict, not simply to be a layman's casual saying, well, the defendant must have been there, he must have helped somehow. He's an aider and abetter in a colloquial sense of the term. That is the danger to be avoided.

We have, I don't want to read them now, it's late, although I would love to take each element and try to explicate it in somewhat greater detail hoping Your Honor is sensitive to the danger that Your Honor yourself would like to avoid. {4921} Well, Your Honor, I would like to avoid that the jury not get a false notion of what aiding and abetting means. Aiding and abetting is a crime in its own right. It is not simply an assistance to the principal crime.

Now, there is one very specific and important point of law that we mentioned in our proposal that I want to alert Your Honor to because it's a serious matter of law. When we struck the names of the other defendants in the indictment we had an understanding that there would be no reference to the previous trial. There's been plenty of reference to the previous trial, but no reference to an acquittal in the previous trial as far as I know and I've been here almost all of the time. That agreement has been honored, But I think we have to talk about that here because the law of aiding and abetting says with very great specificity that if the only principals of the crime are acquitted you cannot be an aider and abetter to that crime. Now, I'm fully aware of the law, and if the Government intends to respond I will save them the trouble by saying that it is not necessary for the principals of the crime to be known if the jury feels that somebody killed those people but they don't know who it is, then it would be not improper if they find that all the elements of the crime of aiding and abetting are satisfied to convict the defendant of aiding and abetting. But -- and this is the thrust of that sentence we have in that proposal. There has been a lot of {4922} evidence in this trial about Bob and Dino and Dino and Bob and Butler and Robideau and ski masks and guns and a whole bunch of stuff about Dino and Bob. They are principals in the minds of the jurors.

It would be an error, but unhappily from the point of view how serious we are about our justice system and an error we would never be able to discover that if the jury came to a sincere conviction that Butler and Robideau were the people who killed them, and only they were the people that killed them and Leonard Peltier aided and abetted them, and as a matter of law

Leonard Peltier could not have aided and abetted them because they were acquitted in a previous proceeding.

Therefore we have a very straight forward, a very straight forward proposal in that charge which simply states in a very factual matter if that is what they come to a conclusion, and we are very careful in that language to specify only, only Butler and Robideau are the principals, then there cannot -- a charge of aiding and abetting cannot lie.

To go to another area. I want to now speak of cautionary instructions. Your Honor did admit a rather vast amount, large amount of evidence covering a vast geological territory and covering a large period of time from Wichita to Oregon to Canada to Milwaukee and so on. We argued the points, {4923} we disagreed with your rulings, but they were the rulings of the court and that's where we are. At the time Your Honor indicated that they would be admitted for limited purpose. I would like to stress now that if we want to get a verdict on the evidence, and I sincerely believe that is what Your Honor is striving to get judging from everything that Your Honor has done in this trial so far, all the immense, all the time, all the concern, then probably the largest danger that looms before us if we want to get a trial that is just, which means a verdict on the evidence whether the verdict is guilty or innocent is not relevant, but a verdict on the evidence, then we need the kind of cautionary instruction, especially in this trial that goes far to tell the jury that this man's character is not on trial. There's a very great sentence from Wigmore dealing with a whole, dealing with the question of the admission of evidence of other crimes in which he says there's a tendency in human beings to want to punish for evil that is done. And if a juror feels that the man on trial is an evil man or a bad man they will not be so conscience stricken about convicting him for the crime beforehand because they will feel sure if they acquit him he will go out and commit another crime. And that is the theory behind the rule of admission of evidence of other crimes. And yet a great deal of stuff has come in with respect to other alleged crimes of the defendant. Obviously I'm not {4924} re-arguing the merits of those results. What I'm asking Your Honor is to give great thought and almost in terms tell this jury that they've only have one task, and only one task, not to come to a conclusion about this man's propensity for crime based on things they have heard, not to want to in somehow reflect retribution of society upon a person because a horrible crime was committed. And indeed it was a horrible crime. {4925} No justification of crime of that sort. There is equally no justification for convicting innocent people for crimes of that sort unless the evidence against them is proved beyond a reasonable doubt.

We ask Your Honor to read those cautionary instructions and I have no desire to put words in Your Honor's mouth, but I would have gone further except it might have been presumptuous to go further and speak of the fact that they are not convicting or judging the man's character or the man's past, they are judging the evidence of that day and the crime committed on that day.

I have more to say but it is late. I want to conclude with a great sentence that is in one of the charges and with all the things I have said about Devitt and Blackmun, I now take it all back because that sentence is in one of their charges. Needless to say, the government did not include it. The last sentence in charge number 27 of or proposed charges, a charge also included that Judge McMannus, says "The government always wins win justice is done regardless of whether the verdict be guilty or not guilty. The prosecution is not supposed to seek convictions, they are supposed to seek justice and justice will be done if the verdict comes down on the evidence." And the verdict will only come down on the evidence, Your Honor, if you go through those charges and not treat them as an ordinary run of the mill Devitt and Blackmun {4926} kind of thing, bargain basement charges, address each element from the point of view of most recent case law, anticipate the psychology of an average group of 12 people and how they will respond to the complexity of these facts, the dynamics of being a native American versus the FBI. It's inherently difficult for them to look at the thing concretely. We must help that jury and that burden rests upon Your Honor. I trust you will carry it off in a manner that's been consistent with your scrupulousness and consciousness with which the trial was conducted.

THE COURT: With reference to that last sentence of Devitt and Blackmun you approved of so heartily, I must advise you I revised that about three years ago and used my revised version ever since.

MR. ENGELSTEIN: I hope it's a revision upward and not sideways.

THE COURT: I might tell you I have revised it "If justice is done society wins whether the verdict be guilty or not guilty."

MR. ENGELSTEIN: Well, you have been so --

THE COURT: I am not going to give you an opportunity to argue that.

MR. ENGELSTEIN: I don't want to quibble.

The name of the government has been used so often. It's an interesting distinction. The government, we're all part {4927} of the government and this arm of the government and we use the term, government can be misleading. Now I have had my say, since I think the issues are substantially, needless to say, as you granted all your questions based on our memorandum, I have no objections whatsoever. But in fact, all of the issues we directed our attention to and all our submissions of case law and whatever have in fact not been absorbed in any reasonable amount, I would feel really distressed at the conclusion of an incredible trial and I think it raises the possibilities of a tanous compromise verdict to a very high level.

MR. SIKMA: Your Honor, I wish to speak very briefly on these matters.

If what Mr. Engelstein said was true about lesser included offenses, I think there would hardly ever be a case where the government charges of first degree murder, that lesser included offenses would not be charged. When the government charges first degree murder, this includes all of the other charges of murder and I think that his statement that in this case we had been from the beginning charging first degree murder is not accurate.

I'm going to speak first very briefly about the issue of extradition. The defendant was not extradited on a charge of first degree murder, The defendant was extradited on a {4928} charge of murder and section 1111 and 1114 provide that anyone convicted of murder charged, that anyone who is convicted of murder shall be punished as provided in section 1112 and 1114, or whoever kills a federal officer shall be punished as provided under section 1111 and 1112 which would lead us to believe that if one is charged of killing a federal agent as the defendant is charged, then this would include the charge of manslaughter. I do not think that that would prevent the Court from issuing an instruction in this case with regard to a lesser included offense of manslaughter.

We are here, as the evidence would warrant a manslaughter instruction. The law requires that such an instruction be given. I think that it is imperative in this case because of what the defense has been, that a lesser included instruction be given.

I will point out that the defendants themselves offered evidence to show that the defendant and a number of his companions were involved in a situation where they set themselves up as a vigilante group outside of the law to protect certain people directly contrary to the local laws, directly contrary to the law and if someone is killed in that process I think that would, even if the jury didn't find that the defendant himself committed the murder directly but found that the murders were committed as a result of the fact that the defendant and his companions were

acting in this manner, that {4929} the jury could find that the defendant was guilty of manslaughter and therefore by the defendant's own evidence they have raised this question. Also by raising the question of self-defense they have raised the issue of what the defendant's intent was with regard to this offense. An intent is frequently or is often a matter of degree, particularly when it comes to killing another human being.

If the defendant was assisting someone to the degree that his mental state would be such to fall within the manslaughter category, then that instruction must be given, and if either party requests the instruction, the law as is now stands requires that such an instruction be given.

With regard to the area of aiding and abetting, I would state that aiding and abetting is helping. Aiding and abetting is seeing to it or assisting someone in the commission of a crime. Now even if the jury did not believe that the defendant himself walked up to the agents and shot them from close range, from one foot or point blank range, they could nevertheless believe beyond a reasonable doubt under the state of the evidence that the defendant helped the person who did and the government is not required under the law in the eighth circuit to prove that this defendant actually pulled the trigger if the defendant is responsible in aiding and abetting. There is evidence to show circumstantial evidence by his contact both before and after the offense to prove that {4930} he aided and abetted those who were involved with him.

{4931}

I think also that the Government has never contended that this offense was committed by one person, and only one person was involved in the commission of this offense.

Such an interpretation of the evidence would be totally absurd.

While the Defendant, we believe as the evidence shows, was directly responsible, directly involved in the killing of these two agents, in the murder of these agents; and that the evidence certainly would substantiate a verdict of first degree murder, that, nevertheless, if the jury is not convinced of that, they must be given the alternative second degree murder and manslaughter; and in addition to this, they must be given the opportunity to decide that the Defendant or that the agents were killed, and aided and helped by one of these phantoms that the Defendant has been presenting evidence about in the court.

The Defendant has presented evidence that somebody else came in. They have been trying to leave this impression in the mind of the jury, that some phantom came in and committed these murders.

Well, from the Defendant's actions, both during the time of the offense before the agents were killed, before the agents were dead, and after the agents were dead, it is obvious that the Defendant was helping whoever {4932} committed this crime; and I think that's the Government's comments at this time.

Perhaps on some of the requested instructions that the Defendants have made, Mr. Crooks has prepared an argument on that, your Honor.

MR. CROOKS: Your Honor, this will be very brief. The only ones that I will touch on -- most of them we have objected merely -- an objection merely to the form.

I think, as Mr. Engelstein indicated, the case has been tried hard. However, on No. 3 counsel again raises the --

THE COURT: (Interrupting) Whose No. 3 are you talking about?

MR. CROOKS: Their No. 3.

They asked the Court to instruct before the Defendant can be convicted solely on the basis of circumstantial evidence, the jury must be satisfied that every possibility other than killed by circumstantial evidence -- that, of course, is a misstatement of the law.

The Holland case, I think the Court is well aware of, Holland versus the United States, 348 U.S. 121, Pages 139 to 140, a 1954 case, states very specifically that that instruction is improper, it is confusing, it is an incomplete statement of the law; and there are numerous cases which cite -- including the United States {4933} versus Shahane, in this Circuit, 517 Fed. Second 1173, that that is not a proper statement of law; and in this Circuit they have now apparently agreed that even the Circuit Court cannot use it as a viewing stand.

The next instruction which I feel deserves some special comment is their Instruction, Request No. 6.

I do not think the citation, Mulberry versus Wilbur, is appropriate. That case simply held that the burden cannot be shifted to the defense upon self defense. I do not think that is an element of the crime. This is a statement of law. I do not think that is an element of the crime.

Self defense is raised, and obviously under Mulberry versus Wilbur, the United States has the same burden beyond a reasonable doubt as it does to all other issues; but it is not an element of the crime of murder.

The next area which I would take disagreement with counsel's legal argument is their Paragraph No. 5 on their Instruction No. 9, the part where they talk about Robideau and Butler: You cannot convict them if you feel that Peltier is aiding and abetting them.

I do not believe that is a correct statement of the law.

I would cite to the Court, United States versus Musgrave, a Fifth Circuit case found at 483 Fed. Second {4834} 327; cert. denied, 94 Supreme Court 447; and Pigman versus the United States, 407 Fed. Second 237, Eighth Circuit, 1969.

I do not believe that is the decision. I believe the law, as stated at least in this Circuit, is an acquitted co-defendant does not bar the conviction of someone else who was aiding and abetting.

The next instruction that I would take issue with as to the legal conclusion on is their Instruction No. 13. This goes into what Mr. Sikma said. I do not believe that is a correct or complete statement of the law.

Obviously, firing from the junked cars can be considered by the jury as circumstances to be considered in the aiding and abetting as respect to the case; and I do not believe that it is correct to make an instruction as indicated by counsel, that obviously it is evidence with which

the jury can determine that the Defendant was in fact aiding and abetting, and that is a misstatement as it appears in counsel's request.

THE COURT: What part did you state that you considered?

MR. CROOKS: Well, I would state, your Honor, that --

THE COURT: (Interrupting) Maybe I am on the wrong page.

MR. CROOKS: Their Instruction No. 13.

{4935}

THE COURT: I was looking at a different 13.

MR. CROOKS: Their Instruction No. 13, very short: If you find as a fact that the Defendant fired at the agents from the junked car or similar distance, you must find the Defendant not guilty unless you also find beyond a reasonable doubt a conscious and willful involvement in the actual premeditation; and my objection is that that, as it appears there, is a misstatement because of its incomplete nature.

That is evidence which a jury can consider in determining whether or not he did aid and abet; and to segregate it out in the fashion that counsel has here, it becomes a misstatement by being an incomplete statement.

The other objection which I would have specifically is with regard to No. 19. I do not believe that that stands for the proposition of the Vold case basically.

First of all, there is no evidence, I don't think, of any testimony that the Government witness has -- or the Government witness has been induced to testify falsely.

MR. ENGELSTEIN: Could I chuckle at that?

MR. CROOKS: Go ahead.

However, the statement is not -- the correct statement of the law is as set forth in Vold. I do not {4936} think this is a matter which is a correct statement of law. Counsel has in effect said that if any witnesses testified falsely on the Government's side, that then is the reason to doubt the entire Government's case; and that is not a correct statement by any manner or shape.

The correct statement would be the general charge that any witnesses who testified falsely may be disbelieved by the jury; and I would object to putting the instruction in the form it is here because it is confusing and misleading.

The last item which I would comment on, your Honor, is simply with regard to No. 25. That is not a correct statement of the law as per Rule 801(d)(1). The correct statement is that

testimony given under oath which is used for the purposes of impeaching and so forth is admissible as substantive evidence.

Now, that is a change in the Rule. There is no question but that is the law under Rule 801(d), that prior inconsistent statements made under oath are admissible as substantive evidence, and that is then specifically set out in the Rule; and I would think in every case where the witness has admitted the statement is made, that would apply, and it can be considered by the jury as substantive evidence so the instruction which was requested, No. 25, it simply a misstatement.

{4937}

That instruction states the law as it was prior to the amendment of the Rule.

MR. ENGELSTEIN: May I respond briefly, your Honor?

THE COURT: You may.

MR. ENGELSTEIN: I think it is unfortunate, considering the seriousness of the charges in the record in this respect, we did not get a responsive brief from the United States, so that we would have the occasion to ponder some of it, in fact read some of the citations he has thrown at us, because if your Honor will forgive me, we have some experience in the way in which the Government uses citations.

{4938}

MR. ENGELSTEIN: I call your attention to, I call your attention to the Government's proposal number 24 which is a quotation from U.S. v. White whose point is to suggest that guilt can be inferred from the act of flight. I don't know whether Your Honor or his law clerks read this case, but I put it to you that it is a laboratory specimen, as a laboratory specimen of selective quotation for the purpose of misleading. I would rather put it that way than to suggest that a failure of plain literary on the part of the Government. If you look at that case you will discover that the conclusion that the Government draws from the case with respect to that kind of instruction is cited by the Judge in that case as the kind of charge that a judge may not give. That case stands for the proposition that that charge must not be given, but in the circumstance of that case in this respect the Government is not entirely erroneous. It was not a cause for reversal because under the totality of the circumstances the error in the charge was considered harmless in consideration to the overwhelming guilt of the defendant.

But for the Government to cite boldly a charge citing the authority of a judge when that judge said precisely said that charge is an improper charge, what shall I say? And the Government now throws cases at us. We've seen the two cases they threw at us. With respect to the point that conveniently served as our law clerks because they supported {4939} our proposition, rather theirs, and with respect to number 3, with respect they cited a Government 1954 case. But Your Honor, we cite three cases supporting our charge with respect to circumstantial evidence, cases as late as 1971 and others.

I ask Your Honor to check it out to see on whose side does the case law fall. I think Mr. Crooks, despite his best intentions, does have a point on our proposal number 13. And I think that a cure for that proposal, a cure for that point would be in number 13 with respect, if you find as a fact that the defendant fired at the agents, I think if you put in the word "only fired at the agents" then there's an internal consistency and logic to our proposal which makes it stand on its own feet. And this of course, this of course does not relate to aiding and abetting charge

which has its own complexity. And Your Honor must know those aspects of any single proposal for charge that don't quite cover the subject are covered with the other charges within the totality of the charges. And the charges must be judged as a whole So that even if this event occurs the defendant must be found not guilty of the primary charge; and then if he's found to be guilty as an aider and abetter it is not because he helped, as Mr. Sikma would have it, assisted or something he did was helpful, but he must satisfy the elements of a crime.

I beg of Your Honor, aiding and abetting is not helping. {4940} Aiding and abetting is a crime. This defendant can go to jail for life because he helped. There had to be a principal crime. He had to have a community of intent, prior design, a desire to help, a fact that he helped and awareness that he helped. All of these elements have to be satisfied beyond a reasonable doubt. Not mere helping, as Mr. Sikma would have it.

Mr. Crooks says Vold does not stand for the proposition for which it is presented to the Court. I don't know whether Mr. Crooks noted, I hope Your Honor noted, that Vold stands for which we present is in quotation marks. It's been the entire language of our language. mat sentence could not be put more perspectively by us. It is the sentence of the Court It is the sentence of the law and I note, and this has been a theme with respect to your honor's rulings on evidence questions. The question of Government misconduct as stated in that charge in Vold simply is reasonable to put before the jury as another element for them to weigh the merits of, with respect to the weakness of the Government's case. Because there are other elements in the Government's case we suppose.

We would not like to think that the Government would have brought forth a case if there were no other elements in the case that they could prove. Mr. Sikma thinks that the Government must be given an opportunity to do X, Y and Z. I think Mr. Sikma wants the Government to be given the opportunity {4941} to get a conviction. If you have the lesser included offenses in the charges you give the jury the opportunity of convicting the defendant on six crimes: murder one, murder two, manslaughter, aiding and abetting. Murder one, aiding and abetting; murder two, aiding and abetting; manslaughter. Six possible crimes with which the jury can satisfy their feeling that some crime was committed. This man's a bad man, he must have been there somehow. We've got six multiple choice, a multiple choice of six crimes. That's what Mr. Sikma would like, and I understand that. It is inaccurate as a matter of law that when the Government charges premeditated murder an indictment automatically follows; that lesser included offenses are chargeable. me case that we cite in our, I think it's U.S. v. Kopla is a case in which the trial judge, Your Honor's counterpart in that case, charged only murder in the first degree. The appeal went up on the failure to charge the lesser included offense. The trial judge was upheld on the ground that there was no evidence in the record, none whatsoever to support the possibility of a conviction on the lesser offense.

The notion of lesser offense, which means the elements of the lesser are included in a greater, does not mean that when you charge the greater offense you automatically charge the lesser offense. It's not a lesser charge. After all, murder two is an enormous crime. It's not a lesser crime. {4942} It only lacks one element of the greater offense.

Mr. Sikma, under question of extradition, I have, and I cite in the brief the Canadian Extradition Act. And it does happen that Mr. Sikma is not inaccurate, but only technically. There's a schedule in the Canadian Extradition Act and I cite that in the brief which lists the crimes which are extraditable and within the meaning of U.S. v. Rocha, the landmark case. The crimes therefore upon which the defendant must be charged in the demanding country, if in fact there is an extradition, and in the schedule there is murder which is number one, murder or attempted, or conspiracy to murder, and number two is manslaughter. Number two is an absolutely distinct crime and it is the kind of such an audacious disregard of what the element is. Taken in the situation for Mr. Sikma to ask for manslaughter, he says it's elementary law. Is Judge McManus ignorant of elementary law that he failed to charge manslaughter in the last case under the same circumstances? In fact, under our argue of the more plausible

circumstances, considering the theory of that case where there was murder from a distance. Now, murder, the Canadian law as far as I know, and I've inquired from Canadian lawyers and I'm sorry I cannot cite this to you, they don't have a concept of murder two. They just say murder or attempt to conspire. It is not known to us whether the Canadian authorities, what attitude they would have taken on murder two. {4943} But it's not for us to understand what attitude they have.

The case of U.S. v. Stowbell on the extradition by Judge Caufman of the 2nd Circuit cited in our brief specifies very, very exactly the need to try the defendant on precisely the crime that is in the warrant and that is in the indictment.

Now, Mr. Sikma might be right. The charge in Canada may have been on him for murder, but the charge in Canada was based on the U.S. indictment. And the U.S. indictment is murder premeditated with malice aforethought which is murder in the first degree. mere is a slate of handling in the argument, Your Honor. Now, just two slight points. And that is I fail to mentioned something rather important in my presentation. If I may indulge, although I recognize this is rebuttal, there were five or six charges, Your Honor, in which you are being asked to refer to evidence in the case. For example there's a charge of, if my memory serves, about third part culpability if they interfere with the arrest of the arrestee. That is to say if FBI officers, if you find FBI officer who comes on the reservation to arrest Jimmy Eagle and Leonard Peltier interferes with that then the culpability of Jimmy Eagle will transfer itself to the culpability of Leonard Peltier. I don't quarrel with the statement of law, that's in the first paragraph. But for Your Honor -- by the way, there is no evidence to support that charge to start with. That --

{4944}

THE COURT: Which request do you have reference to?

MR. ENGELSTEIN: That's number 30 of the Government's charge. If you read that charge, Your Honor, you'll see the following interesting thing that the Government has tried to do. Paragraph one states a perfectly correct statement of law. The question is its relevance. I'm sorry, I'm continuing to talk while you are still looking for the charge. {4945} Sorry I'm continuing to talk while you're still looking for the charge. Charge 30 of the government.

THE COURT: Very well.

MR. ENGELSTEIN: The first paragraph, as Your Honor will note, is an accurate statement of the law, no doubt. It's the second paragraph that receives the support of the accurate statement on the first paragraph suggests a scenario for the day. It's a theory of the case. Now that is saved as a suggested scenario to be given the enormous weight of Your Honor's position with respect to the jury. After all, the jury knows nothing about what Your Honor is going to tell them. The scenario is not said to have the small words in it. If you find that the government did such an assume of Jimmy Eagle and Leonard Peltier, the facts there are enormously suggestive. That is true of two or three or four of the government's proposals. Numbers 20 and 22 deal with the duties and the jurisdiction of the FBI, that I they have a right to do A, B, C, D and F. That's stipulated. It's known. It's not an issue in the case. It's merely self-serving and inflammatory. That's government's instructions 20 and 22.

Government's instructions number 29 properly states the law of the right of the FBI to use force, et cetera, et cetera under some circumstances. The question is relevant. It's not at issue.

Nobody can test it. They have that right. {4946} They did it. It was not an issue in the trial. Why does it have to be told to the jury.

Your Honor, it's very clear the government would like Your Honor to tell it to the jury because it tells the jury once again about the atrocity of the crime. It is in fact the weighing of evidence which is not properly the scope of the giving of instructions to the jury for determination of the law.

Under the question of self-defense, I guess I can merely repeat since it was raised by Mr. Sikma and that is a rather, I think, sticky theoretical issue in this case. We have to straddle our responses because the government straddles its theory. We say that i£ somehow due to the charges of Your Honor, due to the evidence it is Your Honor's belief that there is the possibility of a reasonable aiding and abetting conclusion on the part of the jury which the must come to beyond a reasonable doubt, then the I instruction on self-defense is appropriate and I once again cite the authority and good judgment of Judge McMannus who has the very elaborate self-defense. In fact, it would be an irony in this case if all of the evidence that Your Honor has in fact permitted, I don't want to stress how much you have not allowed in, but what I do think of what Your Honor has allowed in the case, that self-defense is relevant precisely because that did come into the case. If it is going {4947} to be said that this defendant did anything other than the close range premeditated act of murder, it's in that sense that we say self-defense should be charged. We do not urge it, we would stipulate it out of the case.

To conclude, Your Honor, it is one crime and the question is that did this defendant do it and I think given the nature of the jury, given what we know of human psychology, what we know of the need for unaninimity, what we need to know to punish, if Your Honor leaves the door open by the inclusion of multiple crimes, confused and complicated as they must be even for a law student to understand and lends the weight of the authority of our system of law expressed through Your Honor, that jury will come in with a verdict of guilty even though they believe that this defendant is innocent, not guilty. That no evidence has been proven against this defendant beyond a reasonable doubt for the guilt of first degree murder, for the crime of first degree murder.

THE COURT: The Court is in recess.