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JURISDICTIONAL STATEMENT

Jurisdiction of the District Court was based on 5 USC §552 (a) (4) (B). The basis of this Court's jurisdiction is 5 USC §552 (a) (4) (B) and 28 USC §1291. A Final Judgment was entered in this action on February 27, 2006. A Notice of Appeal was timely filed in the Western District of New York on March 22, 2006 and was duly served on all parties.

ISSUES PRESENTED FOR REVIEW

May the Freedom of Information Act (hereinafter FOIA) be used to remedy and deter Brady violations?

May unauthorized or illegal investigative tactics be shielded from the public by use of FOIA exemptions?

Did the District Court err when it sustained the FBI's claim of exemption under 5 USC §552 (b) (1), (b) (3), (b) (7) (C) and (b) (7) (D)?

STANDARD OF REVIEW

The standard of review for all issues presented in this case is *de novo*.

STATEMENT OF THE CASE

Plaintiff-Appellant Leonard Peltier (hereinafter Peltier) is currently incarcerated in the United States Penitentiary in Lewisburg, Pennsylvania, for the deaths of two FBI agents, which occurred at the Pine Ridge Indian Reservation in

South Dakota on June 26, 1975. See United States v. Peltier, 585 F. 2d 314 (8th Cir. 1978).

Peltier commenced this action on December 3, 2003 under FOIA, 5 USC §552, in the United States District Court for the Western District of New York, the Honorable William M. Skretny presiding, against Defendant-Appellee, Federal Bureau of Investigation (hereinafter FBI). Peltier sought access to certain records pertaining to him, which are maintained by the Buffalo Field Office of the FBI.

The FBI moved for summary judgment on July 13, 2004 under Rule 56 of the Fed. R. Civ. P. In a Decision and Order dated March 31, 2005, United States District Judge Skretny granted the FBI summary judgment with respect to its claim of exemption under 5 USC §552 (b) (3), 5 USC §552 (b) (7) (C), and 5 USC §552 (b) (7) (D). Summary judgment on the FBI's claim of exemption under 5 USC §552 (b) (1) was denied.

On June 15, 2005, Judge Skretny conducted an *in camera, ex parte* review of five pages of material being withheld under 5 USC 552 (b) (1).

Judge Skretny, in a Decision and Order dated February 24, 2006, granted the FBI summary judgment with respect to the FBI's claim of Exemption under 5 USC §552 (b) (1). Final judgment was entered in this action on February 27, 2006. This appeal followed.

STATEMENT OF FACTS

By letter dated November 1, 2002, counsel for Peltier sent a Freedom of Information Act (FOIA) request to the Buffalo Field Office of the FBI for all records pertaining to Peltier. (A. 10-13).

By letter dated November 14, 2002, the FBI notified counsel for Peltier that material responsive to Peltier's FOIA request had been located. The FBI also informed Peltier's counsel that the material responsive to his request was too voluminous to be processed by the Buffalo Field Office. As a result, Peltier's FOIA request was referred to FBI Headquarters for processing. (A. 14-15).

The FBI failed to provide Peltier with the information sought in his FOIA request dated November 1, 2002 within the time parameters set forth under 5 USC §552 (a) (6) (A) (i).

Peltier treated the failure on the part of the FBI to comply with his FOIA request of November 1, 2002 within the time parameters set forth under 5 USC §552 (a) (6) (A) (i) as a denial and filed an administrative appeal with the Office of information and Privacy (hereinafter OIP), U. S. Department of Justice, on April 1, 2003. (A. 16-17).

By letter dated May 19, 2003, OIP informed Peltier's counsel that it could not act until there was an initial determination by the FBI on Peltier's FOIA request of November 1, 2002. OIP also indicated that its letter could be treated as

a denial of his appeal and that an action could be brought in the appropriate federal court. (A. 18).

Peltier filed a complaint against the FBI under FOIA in the United States District Court for the Western District of New York on December 2, 2003. (A. 8-18). The FBI filed its answer on December 31, 2003. (A. 19-26).

The FBI moved for summary judgment on July 13, 2004. (A. 24-26). Peltier opposed said motion on August 11, 2004. The District Court heard oral argument from both parties on September 13, 2004.

In a Decision and Order dated March 31, 2005, Judge Skretny granted the FBI summary judgment with respect to its claim of exemption under 5 USC §552 (b) (3), 5 USC §552 (b) (7) (C), and 5 USC §552 (b) (7) (D). Summary judgment on the FBI's claim of exemption under 5 USC §552 (b) (1) was denied. (A. 87-124).

On June 15, 2005, Judge Skretny conducted an *in camera, ex parte* review of an unredacted copy of a classified Declaration of Mr. David M. Hardy, FBI, Section Chief, Record/Information Dissemination Section, Records Management Division, and the five pages of records being withheld under 5 USC §552 (b) (1). (A. 125-150).

In a Decision and Order dated February 24, 2006, Judge Skretny found that the FBI had properly invoked Exemption (b) (1) and granted summary judgment in favor of the FBI. (A. 151-154).

Final judgment was entered in favor of the FBI on February 27, 2006. (A. 155). This appeal by Peltier followed by the filing of a Notice of Appeal in the Western District of New York on March 22, 2006. (A. 156).

SUMMARY OF ARGUMENT

The District Court erred when it upheld the FBI's claim of Exemption under 5 USC §552 (b) (1), 5 USC §552 (b) (3), 5 USC §552 (b) (7) (C), and 5 USC §552 (b) (7) (D).

ARGUMENT

POINT I

FOIA may be used to remedy and deter Brady violations.

At the time of plaintiff's 1977 trial, the government produced roughly 3,500 pages of Brady material. As a result of this instant action, as well as another FOIA lawsuit brought against the Chicago and Minneapolis field offices of the FBI, in the United States District Court for the District of Minnesota[1], Peltier has learned

[1] Peltier v. FBI, Civil No. 02-4328 (DWF/SRN).

that the FBI actually maintains 142,579 pages of material, much of which has never been reviewed or released to Peltier or his attorneys.

The Tenth Circuit in Peltier v. Booker, 348 F. 3d 888, 896 (10th Cir. 2003), noted that:

> "Much of the government's behavior at the Pine Ridge Reservation and in its prosecution of Mr. Peltier is to be condemned. *The government withheld evidence*. It intimidated witnesses. *These facts are not disputed*." (emphasis added)

In Ferri v. Bell, 645 F. 2d 1213, 1218 (3rd Cir. 1981), modified 671 F. 2d 769 (1982), the Third Circuit stated:

> "The public at large has an important stake in ensuring that criminal justice is fairly administered to the extent disclosure may remedy and deter Brady violations, society stands to gain."

The court in Bright v. Ashcroft, 259 F. Supp. 2d 502 (E. D. La. 2003) noted that:

> " . . . the failure of law enforcement to act as it was constitutionally obliged to do cannot be tolerated in a society that makes a fair and impartial trial a cornerstone of our liberty from government misconduct."

Clearly, the material sought in this case should have been turned over to Peltier's defense attorneys at the time of his 1977 trial. This Court has the authority under 5 USC §552 (a) (4) (B) to correct this wrong by ordering the immediate release of all sought-after documents without redaction and without any further delay.

POINT II

Unauthorized or illegal investigative tactics may not be shielded from the public by use of FOIA exemptions.

> "Much of the government's behavior at the Pine Ridge Reservation and in its prosecution of Mr. Peltier is to be condemned. The government withheld evidence. It intimidated witnesses. These facts are not disputed." Peltier v. Booker, 348 F. 3d 888, 896 (10th Cir. 2003).
>
> " . . . there is evidence in this record of improper conduct on the part of some FBI agents . . ." United States v. Peltier, 800 F. 2d 772, 778 (8th Cir. 1986).
>
> "The use of the affidavits of Myrtle Poor Bear in the extradition proceeding was, to say the least, a clear abuse of the investigative process by the FBI. This was conceded by government counsel on the hearing in this court." United States v. Peltier, 585 F. 2d 314, 335, fn. 18 (8th Cir. 1978).

A. The American Indian Movement and COINTELPRO.

Peltier was a member of the American Indian Movement (AIM). See United States v. Peltier, 585 F. 2d 314, 318 (8th Cir. 1978) and Price v. Viking Penguin, Inc., 881 F. 2d 1426 (8th Cir. 1989). He is currently incarcerated in the United States Penitentiary in Lewisburg, Pennsylvania, for the deaths of two FBI agents, which occurred at the Pine Ridge Indian Reservation in South Dakota on June 26, 1975. AIM and its members were subjected to a number of

Counterintelligence Program (COINTELPRO) type activities by the FBI.[2] "COINTELPRO is the FBI acronym for a series of covert action programs directed against domestic groups. In these programs, the Bureau went beyond the collection of intelligence to secret action designed to 'disrupt' and 'neutralize' targeted groups and individuals."[3]

The Sixth Circuit recognized that: "COINTELPRO went beyond the detection and prevention of criminal activity; the program's infringement of civil liberties seem well documented." Jones v. FBI, 41 F. 3d 238, 243 (6th Cir. 1994). As Judge Charles S. Haight, Jr. noted in United States v. Marilyn Buck, 1986 U. S. Dist. LEXIS 16533 (S.D.N.Y. 1986):

> "One may readily accept the general proposition that the FBI's COINTELPRO programs did not represent that agency's finest hour."

Peltier submits that he has and continues to be targeted by the FBI with COINTELPRO type tactics because of his involvement with AIM. Further, it his

[2] David Cunningham, There's Something Happening Here: The New Left, The Klan, and FBI Counterintelligence 203-210 (University of California Press 2004).

[3] U. S. Congress, Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Final Report—Book III: Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, 94th Congress, 2nd Session, U. S. Government Printing Office, Washington, DC 1976.

contention that the sought-after documents are exculpatory in nature and will ultimately contribute to his vindication and release from prison.

B. FBI use of informants to compromise attorney-client communications of American Indian Movement members.

Plaintiff is particularly interested in receiving unredacted copies of all documents dealing with efforts by the FBI and/or its informants to monitor communications between Peltier and his attorneys.

With respect to AIM members, the FBI has a history of using confidential sources who often find themselves in a position to overhear attorney-client communications. The late Douglass Frank Durham[4] was a confidential source who infiltrated AIM. From April until September, 1973, he worked with the AIM chapter in Des Moines, Iowa. See United States v. Dodge, 538 F. 2d 770, 777 (8th Cir. 1976).

> "Mr. Douglass Durham, infiltrated the American Indian Movement under instructions of the FBI, won the confidence of Dennis Banks and Russell Means and other leaders of the movement, and occupied a series of high level positions in the organization."[5]

[4] Douglass Frank Durham died in Las Vegas, Nevada on February 22, 2004. His obituary was published in the Las Vegas Review Journal on March 6, 2004.

[5] U. S. Senate, Committee on the Judiciary, Report of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, Revolutionary Activities Within the United States: The American Indian Movement, 94th Congress, 2nd Session, U. S. Government Printing Office, Washington, DC 1976, p. 5.

In United States v. Cooper, 397 F. Supp. 277, 280 (D. Neb. 1975) the court noted that, "Douglass F. Durham was a paid FBI informant . . ." He was exposed as a FBI informant on March 7, 1975. See United States v. Dodge, supra.

The Eighth Circuit in United States v. Dodge, supra, indicated that:

> "There is evidence in the record and FBI files to indicate that Durham was privy to numerous conversations between Banks and his lawyers, that he was present in Saint Paul during the course of the trial, and that he was in constant communication not only with Banks and other defendants during the trial, but with the FBI."

Peltier is seeking full access to a three-page FBI teletype, marked PELTIER-74-Buffalo FO, PELIER-75-Buffalo FO, PELTIER-76-Buffalo FO, PELTIER-550-Buffalo FO, PELTIER-551-Buffalo FO, and PELTIER-552-Buffalo FO, (Exhibits to Second Hardy Declaration A. 43-69), dated July 7, 1975 from the Special Agent in Charge of the Buffalo Field Office of the FBI to the FBI Director and Mr. Richard G. Held, Special Agent in Charge, Pine Ridge, South Dakota. The language contained in PELTIER-75-Buffalo FO and PELTIER-551-Buffalo FO, in particular, seems to indicate that a confidential source was allegedly advised by the FBI not to engage in any activity that would compromise attorney-client communications.

Mr. Durham, like the informant referred to in the aforementioned July 7, 1975 teletype, was purportedly advised by the FBI not to engage in any activity that would violate confidences of the defense; to engage in no activities, or relate to the FBI any information that had to do with defense tactics, or any legal aspect of the operations of AIM or the defense at that point.[6]

In spite of the advice he allegedly received from the FBI, Mr. Durham testified in the United States Senate about the 1974 trial of AIM leader Dennis Banks: "If Dennis and I were sitting in a room and an attorney would walk in and start talking, I couldn't jump up and say, 'I can't be here, the FBI won't allow it.'"[7]

The District Court erred when it elected not to conduct an in camera review of this sought-after teletype so that it could ascertain whether attorney-client communications had indeed been compromised by an FBI informant. In light of the history on the part of the FBI to intrude upon the attorney-client relationship of AIM members through the use of informants, this Court should Order the

[6] U. S. Senate, Committee on the Judiciary, Hearing Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, Revolutionary Activities Within the United States: The American Indian Movement, 94th Congress, 2nd Session, U. S. Government Printing Office, Washington, DC, 1976, p. 61.

[7] Ibid.

immediate release of an unredacted copy of the July 7, 1975 teletype. Alternatively, the Court should invoke its authority under 5 USC §552 (a) (4) (B) to conduct an *in camera* review of the teletype in question to ensure that an FBI informant was not in a position to overhear attorney-client communications, or otherwise compromise or intrude upon such relationship.

C. Specific examples of FBI misconduct in Peltier's case.

The Eighth Circuit has repeatedly recognized specific instances of FBI misconduct in Peltier's case. For example, in United States v. Peltier, 731 F. 2d 550, 554 (8th Cir. 1984) the Eighth Circuit concluded that the FBI withheld critical ballistics evidence which raised questions "regarding the truth and accuracy of Hodge's testimony." Evan Hodge was the FBI firearms examiner who acted as a ballistics expert for the government. See United States v. Peltier, 731 F. 2d at 552.

Thereafter, the Eighth Circuit again discussed the critical evidence withheld by the FBI as "newly discovered evidence indicating Hodge may not have been telling the truth," and that the evidence withheld by the FBI created "inconsistencies casting strong doubts upon the government's case." United States v. Peltier, 800 F. 2d at 777 and 779. (emphasis added).

The Eighth Circuit has also addressed the government's coercing of witnesses and extracting perjured affidavits and testimony from, among others, a woman known as Myrtle Poor Bear. Despite knowing Poor Bear was incompetent,

in order to extradite Mr. Peltier from Canada, the FBI had her sign affidavits which falsely stated that she was Peltier's girlfriend and that she saw Peltier kill Agents Coler and Williams. However, it is undisputed that she never even knew Peltier, and she was never even at the Jumping Bull Compound on June 26, 1975. The Eighth Circuit described the Myrtle Poor Bear episode as follows:

> In February and March, 1976, Myrtle Poor Bear signed three affidavits which related her eyewitness account of the murders of the two agents on June 26, 1975. Two of these affidavits were considered by Canadian officials in the extradition proceedings. In testimony given outside of the presence of the jury at the trial, Poor Bear disclaimed virtually every allegation contained in the affidavits. She testified that she had been forced to sign the affidavits, which were prepared by the FBI, under threats of physical harm.

United States v. Peltier, 585 F. 2d 314, 331 (1978). The Eighth Circuit recognized that "[t]he Poor Bear....testimony was certainly consistent with [Peltier's] theory [that the FBI framed him by manufacturing evidence and inducing witnesses to testify in accordance with its theory of the murders.]" 585 F. 2d at 332.

In addressing the Poor Bear testimony at oral argument, United States Attorney Evan Hultman tried to minimize the government's role in presenting the testimony stating that "[t]he affidavits were accepted on their face as being statements of a witness who was present...who is testifying in the affidavit under

oath as to what it was she saw." Judge Ross of the Eight Circuit excoriated the government:

> Judge Ross: But anybody who read those affidavits would know that they contradict each other. And why the FBI and prosecutor's office continued to extract more to put into the affidavits in hope to get Mr. Peltier back to the United States is beyond my understanding.
>
> Mr. Hultman: Yes.
>
> Judge Ross:Because you should have known, and the FBI should have known that you were pressuring the woman to add to her statement.

See Marshall v. State, 305 N. W. 838, 844-45 (S. D. 1981).

The withholding of evidence, coercion of witnesses, the use of confidential sources to compromise attorney-client communications, the targeting of groups and individuals the government deems subversive with COINTELPRO-type techniques, these are hardly the type of "investigative tactics" that should be encouraged or allowed to be hidden through the use of FOIA exemptions.

In Stern v. FBI, 737 F. 2d 84, 93 (D. D. C. 1984), the Court recognized that ". . . the public has a strong interest in the airing of the FBI's unlawful and improper activities . . ." Further, in Kuzma v. IRS, 775 F. 2d 66, 69 (2nd Cir. 1985), it was made clear that: " . . . unauthorized or illegal investigative tactics may not be shielded from the public by use of FOIA exemptions." See also Kanter v. Internal Revenue Service, 433 F. Supp. 812, 822 (N. D. Ill. 1977).

Given defendant's history of misconduct with respect to its investigation of Peltier and AIM, it is submitted that the FOIA exemptions are being improperly invoked by the FBI and all documents withheld in full or in part should be disclosed to Peltier without further delay.

The District Court in its Decision and Order of March 31, 2005 stated:

> "This Court has no independent knowledge of any bad faith on the Government's part. However, it accepts the truth of the comments and findings of the Tenth and Eighth Circuits. Nevertheless, even assuming that the Government engaged in misconduct during the investigation of the murders and prosecution of Plaintiff, it does not follow a fortiori that the Government continues to act in bad faith twenty-five years later in the processing of Plaintiff's FOIA request. There is simply no evidence whatsoever that Defendant has acted in bad faith during the course of these proceedings." (A. 101-102).

The District Court misconstrued the argument put forth by Peltier. There has been a long, sordid history on the part of the FBI with respect to the manner in which it has handled the investigation, extradition, and prosecution of Peltier. Although it is Peltier's contention that the FBI improperly invoked various FOIA exemptions to withhold material which is the subject of this lawsuit, he did not argue that the FBI acted in "bad faith" in the course of the proceedings in the District Court.

Although District Court asserted that " . . . it accepts the truth of the comments and findings of the Tenth and Eighth Circuits" (A. 101), it later went on to state that:

> "To the extent Plaintiff also asserts that the Government's prior actions in this case warrant release of the requested information to expose illegality within the FBI, this argument also fails. To succeed, Plaintiff must produce evidence that would cause a reasonable person to believe that the FBI acted illegally." (A. 115).

The District Court closed by claiming that "Plaintiff has presented no evidence of any illegality on the part of the FBI." (A. 116).

The reasoning by the District Court is tortuous to say the least. In one breath the District Court claims to have accepted the truth of the Tenth and Eight Circuits, both of which have acknowledged FBI misconduct in the investigation, extradition, and prosecution of Peltier. Yet, in the next breath the District Court asserts that Peltier " . . . presented no evidence of any illegality on the part of the FBI."

The record in this case is crystal clear, through the impermissible use of FOIA exemptions, the FBI is attempting to shield from the public view the unauthorized and illegal investigative tactics that have been employed in the investigation, extradition, and prosecution of Peltier.

POINT III

The District Court erred when it upheld the FBI's claim of exemption under 5 USC §552 (b) (1).

The preamble to E. O. 12958, as amended, states that "Our democratic principles require that the American people be informed of the activities of their Government." Further, E. O. 12958 §1.7 (a) is unambiguous in that:

> "In no case shall information be classified in order to: (1) conceal violation of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency."

The sought-after records at issue are over 25 years old. (A. 49). The FBI successfully argued in the District Court that these records are exempt from automatic declassification by virtue of E. O. 12958 §3.3 (b) (6), as amended. (A. 49).

The FBI, it should be noted, did not indicate how release of the requested information would impair relations between the United States and a foreign government. Further, the FBI failed to provide details regarding the FBI's promise of confidentiality with the intelligence components of specific foreign governments. The FBI did not shed any light on when or how these promises were allegedly made. Nor did the FBI indicate who gave these promises and under what authority such promises were made. The FBI did not disclose whether the promise was verbal or written, nor did the FBI furnish the District Court with any

information relating to the duration of the promise. The FBI claimed providing this information on the public record would risk revealing the very information it was attempting to protect under Exemption (b) (1). (A. 76-77).

After the June 26, 1975 firefight in which two FBI agents and AIM member Joe Stuntz Killsright lost their lives, Peltier left South Dakota. On February 6, 1976, Peltier was arrested in Canada. Peltier was later extradited from Canada to the United States, based in large part, on two of three contradictory affidavits provided by Myrtle Poor Bear, described by the Eighth Circuit as being ". . . not a reliable witness." See United States v. Peltier, 585 F. 2d 314, 332-33 (8th Cir. 1978). In its opinion the Eighth Circuit noted:

> "The use of the affidavits of Myrtle Poor Bear in the extradition proceeding was, to say the least, a clear abuse of the investigative process by the FBI. This was conceded by government counsel on the hearing in this court." See United States v. Peltier, supra, at 335, fn. 18.

See also the dissenting opinion of Chief Justice Wollman in Marshall v. State, 305 N. W. 839, 843-48 (S. D. 1981).

Peltier believes that the FBI improperly invoked Exemption (b) (1) to conceal misconduct on its part and to avoid further embarrassment concerning the manner in which it handled his case, particularly his extradition from Canada.

Additionally, at the time of his arrest February 6, 1976, Peltier was in the company of Frank Black Horse, whose actual name is Frank Leonard Deluca. Mr.

Deluca, like Peltier, was sought in connection deaths of Special Agents Coler and Williams.[8] Mr. Deluca was also under indictment for wounding FBI Special Agent Curtis A. Fitzgerald at Wounded Knee, South Dakota, on March 11, 1973. See In Re Grand Jury Proceedings, Des Moines, Iowa, 568 F. 2d 555 (8th Cir. 1977). Inexplicably, Mr. Deluca remains a free man in Canada to this very day. He has not been returned to the United States to stand trial for the wounding of FBI Special Agent Fitzgerald, nor has he been brought to the United States to be questioned concerning his role, if any, in the shooting deaths of FBI Special Agents Coler and Williams. Perhaps the documents, which the FBI is fighting so vigorously to keep from Peltier on "national security" grounds, may shed some light on why Mr. Deluca is allowed to remain free in Canada.

Amazingly, the District Court, in its Decision and Order of February 24, 2006, elected to disregard the findings of the Eight Circuit with respect to the use of the Myrtle Poor Bear affidavits in Peltier's extradition proceedings when it stated that " . . . plaintiff has not established the existence of bad faith or provided any evidence contradicting defendant's claim that the release of these documents

[8] Ward Churchill and Jim Vander Wall, Agents of Repression: The FBI's Secret Wars Against the Black Panther Party and the American Indian Movement 304 (South End Press 1990) (1988).

would endanger national security or would impair this country's relationship with a foreign government." (A. 154).

In Halpern v. FBI, 181 F. 3d 279 (2nd Cir. 1999) this Court indicated that a district court, when analyzing agency (b) (1) Exemption claims " . . . should make itemized findings, ideally with respect to specific documents or redactions, but at least at such a level of detail as to permit effective *de novo* review, if required, in the future." The District Court, in this case, failed to do so thereby making effective *de novo* review impossible.

POINT IV

The District Court erred when it upheld the FBI's claim of exemption under 5 USC 552 (b) (3).

According to the Second Hardy Declaration ¶51, among other things, specific records had been requested by a Federal Grand Jury. (A. 58). The Second Hardy Declaration, however, fails to indicate how this information would reveal the inner workings of the Federal Grand Jury that considered the case. In addition, Second Hardy Declaration was not based on personal knowledge. Such a declaration should have come from a person with personal knowledge of the Grand Jury material.

As the Court in Canning v. U. S. Department of Justice, 919 F. Supp. 451, 455 (D.D.C. 1994) noted:

> " . . . in order for the FBI to make the threshold showing for summary judgment on the issue of the material withheld under Exemption 3, they must provide further Vaughn material in the form of affidavits *by persons with personal knowledge of the grand jury material* explaining how this material falls under the protection of Rule 6 (e)." (emphasis added).

In discussing Rule 6 (e) of the Federal Rules of Criminal Procedure, this Court has noted that, ". . . the Rule is intended only to protect against disclosure of what is said or what takes place in the grand jury room." See United States v. Interstate Dress Carriers, Inc., 280 F. 2d 52, 54 (2nd Cir. 1960). Also see Fiumara v. Higgins, 572 F. Supp, 1093, 1104 (D. N. H. 1983).

This Court went on to say:

> ". . . when testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before the Grand Jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being examined by a grand jury." United States v. Interstate Press Carriers, Inc., supra.

In discussing Rule 6 (e), the D. C. Circuit has made clear that: "There is no per se rule against disclosure of any and all information which has reached the grand jury chambers . . ." See Senate of Puerto Rico v. U. S. Dept. of Justice, 823 F. 2d 574, 582 (D. C. Cir. 1987). Also see Securities and Exchange Commission v. Dresser Industries, 628 F. 2d 1368, 1382 (D. C. Cir. 1980).

The Court in Senate of Puerto Rico v. U. S. Dept. of Justice, supra, went on to state:

> "Automatically sealing all that a grand jury sees or hears would enable the government to shield any information from public view indefinitely by the simple expedient of presenting it to the grand jury."

Also see Fiumara v. Higgins, 572 F. Supp, 1093, 1104 (D. N. H. 1983).

The Second Hardy Declaration ¶51 (A. 58) is woefully inadequate and, as consequence, the FBI did not sustain its burden of proof with respect to its claim of exemption under (b) (3).

POINT V

The District Court erred when it upheld the FBI's claim of exemption under 5 USC §552 (b) (7) (C)

A. A claim of exemption under (b) (7) (C) is inappropriate where government impropriety might have occurred.

The Supreme Court recently had an opportunity to deal with an agency's claim of exemption under (b) (7) (C). The Court held that a ". . . requester must produce evidence that would warrant belief by a reasonable person that the alleged Government impropriety might have occurred." National Archives and Records v. Favish, 541 U. S. 157, 174 (2004).

The Court in SafeCard Services, Inc. v. SEC, 926 F. 2d 1197, 1205-1206 (D. C. Cir. 1991) made it clear that a claim of exemption may be overcome where there is " . . . compelling evidence that the agency denying the FOIA request is

engaged in illegal activity, and access to the names of private individuals appearing in the agency's law enforcement files is necessary in order to confirm or refute the evidence . . . " See also Nation Magazine v. U. S. Customs, 71 F. 3d 885, 896 (D. C. Cir. 1995) and Davis v. U. S. Department of Justice, 968 F. 2d 1276, 1282 (D. C. Cir. 1992).

As noted earlier, both the Eighth and Tenth Circuits have recognized the misconduct on the part of the FBI with respect to the handling of its investigation, extradition, and subsequent criminal prosecution of Peltier. Consequently, any claim of exemption under (b) (7) (C) is of dubious validity.

B. A claim of exemption under (b) (7) (C) for high profile FBI personnel involved with the investigation of Peltier is unwarranted.

The FBI invoked exemption (b) (7) (C) to, among other things, protect third party names as well as the identities of some FBI employees. The invocation of this exemption by the FBI is curious indeed. The FBI maintains a website, www.minneapolis.fbi.gov/peltier.htm, which contains third party names, along with the identities of FBI personnel.

It should also be noted that retired FBI Agent, Edward Woods, maintains a website, www.noparolepeltier.com, relating to Peltier's case. This website, much like the website maintained by defendant, contains third party names as well as those of FBI personnel.

Further, a number of FBI employees have maintained a particularly high profile as it relates to Peltier's case. These agents are: Special Agent in Charge Richard G. Held, Special Agent in Charge Joseph H. Trimbach, Special Agent J. Gary Adams, Special Agent David Price, Special Agent Edward Woods, and Special Agent Norman Zigrossi. In fact, Mr. Trimbach is writing a book due out next year about his experiences with AIM.[9]

Consequently, any claim of exemption under (b) (7) (C) with respect to these FBI employees is suspect.

C. The FBI took inadequate steps to ascertain whether individuals it sought to protect under 5 USC §552 (b) (7) (C) are still alive.

The records being sought are over 25 years old. (A. 49). Many of the individuals referenced therein are no longer alive.

The Court in Schrecker v. U. S. Department of Justice, 349 F. 3d 657, 662 (D. C. Cir. 2003) noted that:

> " . . . a court must assure itself that the Government has made a reasonable effort to ascertain life status."

In Schrecker v. U. S. Department of Justice, 254 F. 3d 162, 166 (D. C. Cir. 2001), the Court noted: "The fact of death . . . while not requiring the release of

[9] Joseph H. Trimbach, "Truth, too, Buried at Wounded Knee," Rocky Mountain News, April 17, 2006.

information, is a relevant factor to be taken into account in the balancing decision whether to release information."

Further, in Campbell v. U. S. Dept. of Justice, 164 F. 3d 20, 33 (D. C. Cir. 1998), it was noted that: ". . . death clearly matters, as the deceased by definition cannot personally suffer the privacy-related injuries that may plague the living. A court balancing public interests must therefore make a reasonable effort to account for the death of a person on whose behalf the FBI invokes exemption 7 (C)."

The court went on to note:

> "The proper inquiry is whether the Government has made reasonable use of the information readily available to it, and whether there exist reasonable alternative methods that the Government failed to employ."

Requiring the FBI to consult the Social Security Death Index to determine if any of the individuals it seeks to protect are deceased would not be unduly burdensome.

The Third Hardy Declaration claimed that requiring the FBI to check the Social Security Death Index would place an "enormous burden" on the FBI. (A. 79). There was, however, no indication by the FBI that the number of individuals referred to in its Buffalo Field Office file pertaining to Peltier was excessive. See Davin v. U. S. Dept. of Justice, 60 F. 3d 1043, 1059 (3rd Cir. 1995).

POINT VI

The District Court erred when upheld the FBI's claim of exemption under 5 USC §552 (b) (7) (D).

The Supreme Court noted in Department of Justice v. Landano, 508 US 165, 178 (1993):

> " . . . Congress did not expressly create a blanket exemption for the FBI; the language that it adopted requires every agency to establish that a confidential source furnished the information sought to be withheld under Exemption 7 (D)."

The Supreme Court went on to note that:

> " . . . the Government is not entitled to a presumption that a source is confidential within the meaning of Exemption 7 (D) whenever the source provides information to the FBI in the course of a criminal investigation." Landano, supra, at 181.

In order to sustain a claim of Exemption under (b) (7) (D) where a confidential source was allegedly provided an express assurance of confidentiality, evidence must be provided in one of a number of forms. This Court has held that such proof may include " . . . declarations from the agents who extended the express grants of confidentiality, contemporaneous documents from FBI files reflecting the express grants of confidentiality, evidence of a consistent policy of expressly granting confidentiality to certain designated sources during the relevant time period, or other such evidence that comports with the Federal Rules of Evidence." See Halpern v. FBI, 181 F. 3d 279, 299 (2nd Cir. 1999).

The FBI did not furnish the requisite supporting documentation to support the claim that several sources provided information under an express assurance of confidentiality.

The Second Hardy Declaration ¶62 (A. 63) asserts individuals were interviewed under circumstances from which an assurance of confidentiality may be implied. The Second Hardy Declaration fails to indicate what formed the basis for this conclusion or the evidence used to support this contention. Additionally, the Second Hardy Declaration ¶68 (A. 66) claims that foreign law enforcement agencies provided information under an "express" assurance of confidentiality. Once again the Second Hardy Declaration fails in that it does not shed any light on when or how the "express" assurance of confidentiality was allegedly made. Nor does the Second Hardy Declaration indicate who at the FBI made this assurance and under what authority such assurance was made. Was the "express" assurance of confidentiality verbal or written? What is the duration of the "express" assurance of confidentiality? The FBI simply did not sustain its burden of proof as it relates to its claim of exemption under (b) (7) (D).

CONCLUSION

This Court has recognized that ". . . where any agency withholds or redacts documents requested under FOIA, the agency bears the burden of sustaining its action." See Massey v. FBI, 3 F. 3d 620, 622 (2nd Cir. 1993). The FBI did not

meet its burden in this case. Consequently, the Judgment of the District Court should be reversed and the documents sought by Peltier must be Ordered released.

Dated: June 7, 2006

Respectfully submitted,

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