07-1745

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LEONARD PELTIER,

Plaintiff-Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Minnesota

BRIEF FOR PLAINTIFF-APPELLANT LEONARD PELTIER

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SUMMARY OF THE CASE

> *[Leonard Peltier's case] is a blot on the judicial system of this country that ought to be corrected as quickly as possible."*
>
> --- Archbishop Desmond Tutu, April 18, 1999

Leonard Peltier has been wrongfully incarcerated for over thirty years. Public concern and moral outrage over the pattern of misconduct that led to Peltier's conviction persists. This action, pursuant to the Freedom of Information Act (FOIA), is designed to answer fundamental questions and address widespread public concern about Defendant's conduct in Peltier's case.

Despite the enormity of public interest in this case, the court below wrongly presumed that Plaintiff's "real" interest in this action was purely private, e.g. to collaterally attack his own conviction. The court's reasoning flies in the face of almost unprecedented public concern about Defendant's misconduct in this case and is tantamount to imposing a special test for FOIA requests from incarcerated persons. The court below compounded its erroneous analysis by failing to find that Plaintiff readily established the continuing institutional bad faith of Defendant with regard to Leonard Peltier and further erred by failing to consider whether numerous protected sources have waived confidentiality.

In light of the significance of this case and the complexities inherent in FOIA litigation—including an unresolved question of law the Eighth Circuit has yet to pass upon—, Plaintiff requests oral argument of 15 minutes.

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JURISDICTIONAL STATEMENT

Jurisdiction of the District Court was based on 5 U.S.C. § 552(a)(4)(B). The basis of this Court's jurisdiction is 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1291. A Final Judgment was entered in this action on February 9, 2007. A Notice of Appeal was timely filed in the District of Minnesota on March 15, 2007 and was duly served on all parties.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Did the district court err in finding that Defendant's past and continuing conduct is insufficient to establish that Defendant is withholding documents in bad faith? See Jones v. Federal Bureau of Investigation (FBI), 41 F.3d 238 (6th Cir. 1994); 5 U.S.C. § 552.

2) Did the district court err in holding that there is no public interest in Peltier's FOIA request? See Powell v. United States, 584 F. Supp. 1508 (N.D. Cal. 1984); National Archives and Records Administration v. Favish, 541 U.S. 157, 174 (2000); 5 U.S.C. § 552.

3) Did the District Court err in failing to examine claims of exemption based on promises of confidentiality and/or privacy in the context of waiver? See Irons v. Federal Bureau of Investigation, 880 F.2d 1446 (1st Cir. 1989); Parker v. Department of Justice, 934 F.2d 375 (D.C. Cir. 1991); Powell v. United States, 584

F. Supp. 1508 (N.D.Cal. 1984); Landano v. Department of Justice, 873 F. Supp. 884 (D.N.J. 1994); 5 U.S.C. § 552.

STANDARD OF REVIEW

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

STATEMENT OF THE CASE

Plaintiff-Appellant Leonard Peltier is currently incarcerated in the United States Penitentiary in Lewisberg, Pennsylvania for the death 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 November 14, 2002 under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, in the United States District Court for the District of Minnesota, the Honorable Donovan W. Frank presiding, against Defendant-Appellee, Federal Bureau of Investigation (FBI). Peltier sought access to certain records pertaining to him, which are maintained by the Chicago and Minneapolis field offices of the FBI. The district court set a schedule for periodic release of responsive documents. However, the FBI withheld approximately 11,000 pages of records, asserting various FOIA exemptions from disclosure.

The FBI moved for summary judgment on May 12, 2006 under Rule 56 of the Federal Rules of Civil Procedure. The FBI selected and provided the court

with a sample of approximately 500 pages—of the some 11,000 pages withheld—to facilitate the Court's evaluation of asserted FOIA exemptions.

Magistrate Judge Susan Richard Nelson, in a Report and Recommendation dated October 24, 2006, recommended that Defendant's motion for summary judgment be granted in part (to the extent that the FBI has withheld records other than those pertaining to Anna Mae Aquash) and denied in part (to the extent that the FBI has previously disclosed to any other FOIA requester any of the Aquash documents that are responsive to Plaintiff's request, but not to Plaintiff). In an Order and Memorandum dated February 9, 2007, Judge Donovan W. Frank adopted Judge Nelson's Report and Recommendation.

This appeal followed.

STATEMENT OF FACTS

Plaintiff Leonard Peltier submitted two FOIA requests, to the FBI's Chicago and Minneapolis Field Offices in August, 2001. (A. 13, A. 17). These FOIA requests seek the release of information at the heart of an ongoing public conversation of enormous public concern about Defendant's misconduct in the investigation, extradition, and prosecution of Native American activist Leonard Peltier.

After locating allegedly 93,800 pages of responsive records, Defendant referred the matter to FBI Headquarters. R & R at 2 (A. 172). Plaintiff was contacted by Defendant and told that "there were too many documents to produce." Complaint, Exh. D (A. 40). Defendants also asserted several other untenable reasons for not complying with the requests. Id. Instead of producing the 93,800 pages of responsive records, the FBI produced a 16-page summary on August 2, 2002 and a one-page summary on August 23, 2002. Complaint, Exh. C (A. 21).

Plaintiff filed this action on November 15, 2002 to seek judicial intervention in light of the FBI's continued obstinacy and refusal to comply with the plain mandates of FOIA, 5 U.S.C. § 552. Complaint (A. 10).

Keeping with tradition, Defendant FBI sought additional time due to "exceptional circumstances" and asked for a stay in the proceedings until December, 2005. See Defendant's Motion for Stay of Proceedings (Docket No. 11)(A. 3). The court granted Defendant's motion, requiring the periodic release of responsive records. Id. at 4. Order dated August 15, 2003 (Docket No. 24) (A. 3).

By letter, dated September 19, 2002, counsel for Leonard Peltier filed an appeal with the Department of Justice's Office of Information and Privacy. Complaint, Exh. D (Ltr. from Michael Kuzma to Richard L. Huff, Sep. 19, 2002) (A. 40).

In total, the FBI withheld approximately 11,000 pages of records, asserting various FOIA exemptions from disclosure. R & R at 2 (A. 172).

On May 12, 2006, Defendant moved for summary judgment, maintaining that information was properly withheld pursuant to 5 U.S. C. §§ 552(b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (b)(7)(A), (b)(7)(C), (b)(7)(D), (b)(7)(E), and (b)(7)(F), and 5 U.S.C. § 552a(j)(2). Docket No. 49 (A. 5). Defendant selected a sample of approximately 500 pages of the withheld documents to support its assertion of various FOIA exemptions. R & R at 3 (A. 173).

By a Report and Recommendation dated October 24, 2006 [hereinafter, "R & R"], Magistrate Judge Susan Richard Nelson granted, in part, Defendant's motion for summary judgment.[1] (A. 171). Judge Nelson's Report and Recommendation was adopted in its entirety by the Order and Memorandum of Hon. Donovan W. Frank dated February 9, 2007. (A. 204).

In the face of overwhelming public concern—articulated by everyone from the late Mother Teresa[2] to the Dalai Lama[3] to Archbishop Desmond Tutu[4]—

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[1] Defendant's motion was granted to the extent that the FBI withheld records other than those pertaining to Anna Mae Aquash and was denied to the extent that the FBI previously disclosed to any other FOIA requester any of the Aquash documents responsive to Plaintiff's request.

[2] See, e.g., Pamela White, *Prisoner No. 89637-132*, Boulder Weekly, Mar. 15, 2007.

[3] The Dalai Lama, Message, June 15, 1995 *available upon request*.

[4] "I would hope that the campaign to free him [Leonard Peltier] will succeed. I certainly support it very passionately…Because it is a blot on the judicial system of

Plaintiff continues his quest for disclosure on appeal to this Court. It is high time to answer outstanding questions in this extraordinary case.

SUMMARY OF ARGUMENT

The court below erred in its illogical, untenable holding that the FBI's past bad faith misconduct, already recognized by this Court (among others), could not establish a basis for finding continuing bad faith of the Defendant, or, at the very least, require full *in camera* review of the withheld documents. The Court below additionally erred by ignoring Defendant's current, official false statements about its own conduct as further evidence of Defendant's continuing bad faith. See p. 8.

Leonard Peltier's case falls into that extraordinary category of prosecutions that have brought to the surface of public consciousness important questions about nationhood, racism, truth, and justice. The district court wrongly assumed that because Peltier was convicted, the sole purpose of his FOIA request is to gather information to collaterally attack his conviction. Despite the Magistrate Judge's conclusion to the contrary, there is nothing "private" about this FOIA request or the Leonard Peltier saga, save the fact that Leonard Peltier himself remains

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this country that ought to be corrected as quickly as possible." Statement of Archbishop Desmond Tutu (April 18, 1999). See also Joint Letter from Archbishop Desmond Tutu, *et al*. to President Clinton (Dec. 11, 2000) *available at* http://www.freepeltier.org/vip%20letter.pdf [hereinafter, "Joint Letter to President Clinton"].

incarcerated for two murders that he did not commit. The district court's finding that this request is not a matter of public interest infected every aspect of the court's analysis, and was flatly, incontrovertibly inaccurate. See p. 20.

The court below also upheld Defendant's withholding of information on the grounds that information was provided by sources who received an express or implied promise of confidentiality and/or privacy. However, the court utterly failed to consider whether protected sources have waived that confidentiality, or whether the promise of confidentiality came with an expiration date. See p. 40.

ARGUMENT

I. LEONARD PELTIER'S CASE IS ONE OF THE RARE CASES IN WHICH THE PROVEN INSTITUTIONAL BAD FAITH OF THE FBI REQUIRES A COURT TO ENGAGE IN A FULL, *IN CAMERA* INSPECTION OF ALL DOCUMENTS WITHHELD.

Those who cannot remember the past are condemned to repeat it.
--- George Santayana, Life of Reason,
"Reason in Common Sense," ch. 12 (1905-06).

A. THE BAD FAITH EXCEPTION.

This Court has held that in FOIA litigation, as a general matter, *in camera* inspection is limited as it runs "contrary to the traditional judicial role of deciding issues in an adversarial context upon evidence openly presented in court." Cox v. United States Department of Justice, 576 F.2d 1302, 1311 (8th Cir. 1978). Of course, in FOIA litigation, the "adversarial context" is illusory; only one party has access to the evidence and is able to base its argument exclusively upon the contents of documents that the other party cannot examine. See e.g., Vaughn v. Rosen, 484 F.2d 820, 823-824 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). In trying to meet the burden of proving that the withholding goes beyond the statute, the plaintiff is a blind man, in a dark room, swinging at shadows. For this reason, FOIA specifically authorizes the reviewing court to "examine the contents of such agency records *in camera*." 5 U.S.C. § 552(a)(4)(B). Thus, while full *in camera* inspection of all withheld records is not mandated, it lies within the sound

discretion of the reviewing court. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978).

In this Circuit, such discretion is exercised upon a showing that there is some "reason to question the good faith of the agency." Cox, 576 F.2d at 1312. A litigant does not have to prove bad faith beyond a reasonable doubt, but must offer some "substantial reason" to question the good faith of the agency. Barney v. IRS, 618 F.2d 1268, 1274 (8th Cir. 1980). When such a substantial reason is shown, the court may not rely upon the affidavits, the credibility of the affiants, or a review of a mere sampling of the withheld documents prepared by the party seeking to withhold. See, e.g., Allen v. CIA, 636 F.2d 1287, 1298 (D.C. Cir. 1980)("When there is evidence of bad faith on the part of the agency . . . [i]n camera inspection is 'plainly necessary'.")

B. THE COURT BELOW ERRED IN HOLDING THAT THE FBI'S PAST BAD FAITH DID NOT PROVIDE A BASIS FOR FULL *IN CAMERA* REVIEW.

> *Even where there is no evidence that the agency acted in bad faith with regard to the FOIA action itself there may be evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue.*
>
> --- Jones v. Federal Bureau of Investigation, 41 F.3d 238, 242 (6th Cir. 1994).

Every court to consider the case of Leonard Peltier has found extensive bad faith and misconduct on the part of the Federal Bureau of Investigation. Much of this misconduct has occurred with respect to the FBI's deliberate concealment of

documents that the agency was required to produce as part of Peltier's criminal trial, and the FBI's manufacturing of evidence known to be false.[5]

This Court has repeatedly recognized specific instances of FBI misconduct in Peltier's case. Most notably, as a result of a previous FOIA request, Peltier uncovered a FBI teletype that, had it been produced at trial, would have raised questions "regarding the truth and accuracy of [Evan] Hodge's testimony." United States v. Peltier, 731 F.2d 550, 554 (8th Cir. 1984), cert. denied, 484 U.S. 822 (1987). Evan Hodge was the FBI firearms examiner who acted as a ballistics expert for the government. The failure of the government to produce that teletype

[5] Members of the American Indian Movement (AIM) were subjected to odious and unconstitutional Counterintelligence Program (CONINTELPRO)-type activities by Defendant FBI. "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." 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, 2d Session, U.S. Government Printing Office, Washington, D.C. 1976. Several Courts of Appeals have recognized gross misconduct on the part of the government in pursuing AIM associates, like Leonard Peltier—misconduct that includes the manufacturing of evidence and breaches of attorney-client communication through the use of paid informants. See, e.g., United States v. Dodge, 538 F.2d 770, 776-78 (8th Cir. 1976); United States v. Crow Dog, 532 F.2d 1182, 1196-98 (8th Cir. 1976); 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, 2d Session, U.S. Government Printing Office, Washington, DC, 1976, p. 61.

at trial was clear misconduct. Id. at 552, 554. Although the wrongfully concealed evidence was insufficient to overturn Peltier's conviction, this Court found "that the prosecution withheld evidence from the defense favorable to Peltier, and that had this evidence been available to the defendant, it would have enabled him to cross-examine certain government witnesses more effectively." United States v. Peltier, 800 F.2d 772, 775 (8th Cir. 1986), cert. denied, 484 U.S. 822 (1987).

At another juncture, this Court noted that "there is evidence in this record of improper conduct on the part of some FBI agents" and specifically 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." Peltier, 800 F.2d at 777, 779 (emphasis added).

This Court has also addressed the government's coercion of witnesses and extraction of perjured affidavits and testimony from, among others, a woman known as Myrtle Poor Bear. Despite knowing that Poor Bear was incompetent, the FBI, in order to extradite Mr. Peltier from Canada, had Poor Bear sign affidavits which falsely stated that she was Peltier's girlfriend and that she saw Peltier kill Agents Coler and Williams. It is now undisputed that she never knew Peltier and she was not present at the Jumping Bull Compound on June 26, 1975. This Court 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.

Peltier, 585 F. 2d at 331. This Court 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.]" Id. 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 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).

So pervasive was this and other misconduct that U.S. Court of Appeals Judge Gerald W. Heaney, who authored one Peltier opinion and was part of a panel that rendered another, recommended Presidential commutation for Peltier in 1991, noting that "the United States government over-reacted at Wounded Knee . . . and must share responsibility for the June 26 firefight." Ltr. from Hon. Gerald W. Heaney, Senior Circuit Judge, U.S. Court of Appeals for the Eighth Circuit to Senator Daniel K. Inouye, dated April 18, 1991 *available at* http://www.freepeltier.org/statements6.htm. In addition, Judge Heaney wrote that "the FBI used improper tactics in securing Peltier's extradition from Canada and in otherwise investigating and trying the Peltier case." Id.

More recently, in 2003, the United States Court of Appeals for the Tenth Circuit stated:

> Much of the government's behavior at the Pine Ridge reservation is to be condemned. The government withheld evidence. It intimidated witnesses. These factors are not disputed.

Peltier v. Booker, 348 F.3d 888, 896 (10th Cir. 2003), cert. denied, 541 U.S. 1003 (2004).

In the Report and Recommendation of Magistrate Judge Susan Richard Nelson, the court below did not dispute this record of misconduct. Instead, it disregarded this evidence, holding that "the issue of whether the FBI and federal prosecutors committed misconduct during 1975 and 1976 is a separate issue from

whether the FBI properly withheld certain documents in the present FOIA action." R & R at 11 (A. 11). The court below went on to disregard as "unsubstantiated conjecture," the notion that the demonstrated, proven campaign of past misconduct might translate into present efforts to avoid further disclosure of that misconduct. R & R at 15 (A. 185). "Plaintiff cannot rely on misconduct from 30 years ago, but must either: (1) produce evidence countering the basis of the FBI's assertion of FOIA exemptions, or (2) offer proof that the FBI is now engaging in bad faith. R & R at 11, 15 (A. 181, A. 185).

In adopting the Report and Recommendation, the district court added its own *ipse dixit*: "Thus, any evidence of prior misconduct is irrelevant and Plaintiff's objections to the Magistrate Judge's failure to consider such evidence are without merit." Order and Memorandum at 4 (A. 207).

The district court cited no authority for the sweeping proposition that a litigant's past misconduct toward an opposing party is irrelevant in assessing the same litigant's current good faith toward the same opposing party. Logic would suggest that it is highly relevant. More important, here, at least, the law follows logic. The Sixth Circuit, the only court to consider the question, has held that proven agency misconduct toward a litigant, even in the remote past, is extremely relevant to evaluating the present bad faith of that agency toward that litigant's FOIA request.

In Jones, 41 F.3d 238, the Sixth Circuit faced facts eerily similar to those presently before the Court in Peltier's case. Harlell Jones was a Black Nationalist in Cleveland, Ohio, who had been an active political organizer in the 1960s and 1970s. Like Peltier, he and his group "were targets of the FBI's . . . COINTELPRO. . . ." Id. at 240. In 1970, members of the group shot two police officers, killing one. Id. In 1972, Jones was convicted of that murder, based largely upon the testimony of an informer. Id. Like Peltier, Jones initiated FOIA litigation against the FBI to help him discover facts to win a re-trial of his case. Id. at 241. Unlike Peltier, the documents that were produced to him formed the basis of a successful habeas corpus petition, and eventually, the charges against him were dismissed. Id.

Jones' release from prison did not terminate his FOIA litigation. In 1992, almost twenty years after commencing the FOIA request, the district court granted the FBI's motion for summary judgment, which was accompanied by affidavits and a Vaughn index. The district court did not conduct an *in camera* review of the documents. Id. at 242. Jones appealed, claiming that the bad faith of the FBI, demonstrated by COINTELPRO and the withholding of evidence from his 1972 trial, constituted bad faith and required *in camera* review.

The Sixth Circuit agreed. "Even where there is no evidence that the agency acted in bad faith with regard to the FOIA action itself there may be evidence of

bad faith or illegality with regard to the underlying activities which generated the documents at issue." Id. at 242 (emphasis added). The Sixth Circuit went on to note that "[w]here such evidence is strong, it would be an abdication of the court's responsibility to treat the case in a standard way, and grant summary judgment on the basis of Vaughn affidavits alone." Id. at 243. To do so would risk the public's perception that the courts are neutral. Id.

In words that could have been written about Peltier, the Sixth Circuit held that Jones' "case presents such evidence:"

> COINTELPRO went beyond the detection and prevention of criminal activity; the program's infringements of civil liberties seem well documented; and because the FBI worked closely with local law enforcement and supplied the key prosecution witness, the program is tied to the tainted prosecution of plaintiff for murder. This does not mean that the FBI acted in bad faith with regard to the FOIA request, but it does mean that the courts of this circuit should not process the case in the same manner as they would a request for documents regarding a routine FBI investigation.

Id. (emphasis added).

The core holding of Jones, that serious agency misconduct is not akin to points on a driver's license that are washed away over time, was recently reaffirmed. In Rugiero v. United States, 257 F.3d 534 (6th Cir. 2001), the Sixth Circuit held that "where it becomes apparent that the subject matter of a request involves activities which, if disclosed, would publicly embarrass the agency or that a so-called cover-up is presented, government affidavits lose credibility." Id. at

546, citing, Jones, 41 F.3d at 243, quoting, Ingle v. Department of Justice, 698 F.2d 259, 267 (6th Cir. 1983)(overruled on other grounds), United States Department of Justice v. Landano, 508 U.S. 165 (1983)(emphasis supplied in Ingle).

The analysis of the court below regarding bad faith is based on blind faith. Only through blind faith could a court conclude that a defendant who has so consistently acted with utter disregard for the rights of Leonard Peltier is now acting in good faith.

C. THE COURT BELOW ERRED IN REFUSING TO CONSIDER THE FBI'S CURRENT OFFICIAL FALSE STATEMENTS ABOUT ITS OWN CONDUCT IN THE PELTIER CASE AS PROOF OF THE FBI'S PRESENT MISCONDUCT.

Even if this Court were to grant the FBI full absolution for its past sins, or consider the agency "born again" and entitled to a fresh start, there is ample evidence of present agency misconduct. Beginning in 1975, Defendant FBI has engaged in an unabated institutional campaign against Leonard Peltier. To this day, the FBI operates a public campaign designed to counter or minimize allegations of misconduct — including those that have already been recognized by federal courts — in the prosecution of Leonard Peltier. See, e.g., Minneapolis Division Federal Bureau of Investigation Website, "RESMURS Case," http://minneapolis.fbi.gov/history_peltier.htm ("Leonard Peltier" page of the FBI's

official website) [hereinafter, "Official FBI Website"]. For instance, the FBI's manifesto on Peltier, available on the official FBI website, states:

> Accusations of government misconduct and claims that Peltier has not received fair treatment by the American justice system have continued since he was charged. A review of the legal defense afforded Peltier conclusively shows this is not the case."

Id. (under section entitled "Most Recent Legal Action").

The Tenth Circuit, however, has held that the FBI's position is "conclusively . . . not the case[:]"

> 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, 348 F.3d at 896. See also Peltier, 800 F.2d at 778 (". . . there is evidence in this record of improper conduct on the part of some FBI agents . . .").

Similarly, the FBI's public manifesto states:

> Peltier's extradition was based on evidence other than Poor Bear's affidavits.

The manifesto continues,

> [Myrtle] Poor Bear was never called to testify at trial, and therefore, her information had nothing whatsoever to do with Peltier's conviction.

Official FBI Webpage (under section entitled "Defense Allegations and Rebuttals"). However, the United States Court of Appeals for the Eighth Circuit found differently,

> The use of the affidavits of Myrtle Poor Bear in the extradition proceedings 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 at 335 n. 18.

In public venues, the Federal Bureau of Investigation today makes assertions about the Peltier case that are demonstrably false, and have been held to be false by the Courts of Appeals. In public venues, the Federal Bureau of Investigation today makes false assertions that it has not engaged in misconduct. In public venues, the Federal Bureau of Investigation today insists that its actions are now, and have always been, totally proper. Against this record of dissembling, the government asks this Court to accept the notion that while the FBI, institutionally, lies in public about the Peltier case, its private submissions to the district court are credible and straightforward. It is hardly "conjecture," (R & R at 15; A. 185) to posit that a litigant who today publicly lies to conceal his past misconduct might well lie in private submissions to a court in order to continue to conceal his misconduct.

To hold otherwise is to require Plaintiffs to meet an unmeetable standard. The FBI's refusal to disclose documents continues a course of conduct that began with false affidavits, infringements on attorney-client communication, and otherwise improper investigative techniques. In the face of the FBI's continued effort to mislead the public about its conduct, thereby continuing the judicially

recognized institutional misconduct of the past, the FBI's ongoing bad faith has been plainly established.

This Court should vacate the judgment below and remand to the district court for a full, *in camera* inspection of all withheld documents or, in the alternative, to designate a special master to receive, review, and release the withheld documents.

II. THE COURT BELOW ERRED IN HOLDING THAT THERE IS NO PUBLIC INTEREST IN PELTIER'S FOIA REQUEST.

> *There is hardly a political question in the United States, which does not sooner or later turn into a judicial one.*
>
> --- Alexis de Tocqueville, Democracy in America (1835).

In the history of the American criminal justice system, there are few cases that have attracted as much attention, uncovered as much abuse of power, or raised as many questions amongst citizens of this country and abroad, as the prosecution, conviction, and imprisonment of Leonard Peltier. Peltier's case has both raised profound social questions to the surface of public consciousness and provoked profound criticism of Defendant's recognized misconduct. There is nothing private about this FOIA request, save the fact that Leonard Peltier himself remains incarcerated for two murders that he did not commit.

In the context of FOIA, the Supreme Court has defined the public interest, against which privacy interests are to be balanced, as "the citizens' right to be

informed about what their government is up to." United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773 (1989)(internal quotations omitted). Defendant argued below that "plaintiff's interest in obtaining the withheld records in this case—to advance his personal desire for freedom—does not satisfy the public interest standard under FOIA." (Def.'s Response to Pl.'s Objections to R & R at ¶ 2). Defendant maintained that since "[t]here is no public interest in disclosure of information to assist a prisoner in challenging his conviction[,] id., disclosure to Peltier is not in the public interest.

A. DISTRICT COURT ERRED IN PRESUMING THAT A FOIA REQUEST FROM A CONVICTED DEFENDANT LACKS PUBLIC INTEREST.

In balancing the public interest in disclosure with the various exemptions asserted by Defendant, the court below insistently focused on the assumption that "Plaintiff's current FOIA action is intended to discover facts that he would presumably use in his ongoing efforts to reverse his criminal conviction." R & R at 9 (A. 179).

While the Magistrate Judge paid lip service to the notion that "the identity of the particular plaintiff requesting government documents and the purpose to which he intends to use them are irrelevant in deciding FOIA actions," (R & R at 9; A. 179), the court continuously discounted the public interest in disclosure *because* Plaintiff intended, in the court's view, to use the requested documents to attack his

conviction. See, e.g., R & R at 18 (A. 188) (analogizing to the Western District of New York case, "Plaintiff sought the materials not in the public interest of governmental misconduct but rather for his own personal interest in mounting a collateral attack on his criminal conviction"); R & R at 21 (A. 191) ("Here, it is clear, that Plaintiff's real interest in seeking disclosure is to gain information to further attack his conviction")(internal quotations omitted). The Magistrate Judge relied on her finding that there was no public interest as a basis for granting summary judgment, generally, (see R & R at 9; A. 179), and explicitly relied on this finding in the context of withholdings justified under Exemptions 6, 7(A), and 7(C). See R & R at 21, 30 (A. 191, A. 200). The District Court, adopting the Magistrate Judge's Report & Recommendation, endorsed this utterly flawed analysis: "the Court agrees with Magistrate Judge Nelson's finding that Plaintiff's particular interest in discovering facts that he would use to reverse his criminal conviction is not the core purpose of the FOIA." Order and Memorandum at 4 (A. 207).

Where convicted persons seek information through FOIA to collaterally attack convictions, courts regularly deny the requests as falling outside the gambit of the public interested purpose of FOIA. See, e.g., Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981); Antonelli v. FBI, 721 F.2d 615, 619 (7th Cir. 1983); Triestman v. Department of Justice, 878 F. Supp. 667, 670 (S.D.N.Y. 1995). However, it cannot

be that FOIA requests issued by prisoners are presumptively designed exclusively to collaterally attack convictions, and therefore presumptively fall outside the public interest parameters of FOIA. It cannot be that were an overeager high school newspaper reporter or, perhaps, Nelson Mandela[6] (a supporter of Peltier) to file the FOIA request at issue in this case, the legal analysis would somehow turn out differently.

In Powell, 584 F. Supp. 1508, FOIA Plaintiff John Powell and his wife Sylvia Powell sought information concerning their indictment for treason. Confronting similar arguments, the court concluded that even where "the litigant is motivated by his own personal interest[,] that does not militate against disclosure where there is a general public interest to be served." Id. at 1527. The Powell court held:

> Clearly, this is not the case of an individual motivated solely by his own interests. There is a great public concern stemming from the governmental intrusions and excesses of the McCarthy Era and the subject matter which the Powells addressed and for which they were prosecuted. The Powells were charged and tried for sedition and treason based solely on the content of articles they had published which were critical of the United States' conduct in Korea. Among the criticisms leveled at the Untied States were allegations that it had stalled in peace negotiations, underestimated American casualties to the American public and engaged in bacteriological warfare in Korea with technology garnered from Japanese war criminals. It is axiomatic that these matters are of concern to a democratic society.

[6] See, e.g., Editorial, Free Leonard Peltier: Native American Activist a Political Prisoner, Michigan Daily, Jun. 5, 2000, at 4.

Id.

Whatever Plaintiff's purposes may be, the investigation, extradition, prosecution, and continued imprisonment of Leonard Peltier has been the subject of worldwide public interest, outrage, and concern. Long ago, Leonard Peltier ceased to solely be an incarcerated individual (though he is certainly that too). Peltier became, and remains, a symbol of American abuse of Native Americans; a symbol of gross misconduct by Defendant through COINTELPRO type activities. See Jones, 41 F.3d at 243 ("CONINTELPRO went beyond the detection and prevention of criminal activity; the program's infringement of civil liberties seem well documented"). Information related to the investigation and trial of Leonard Peltier is undeniably information that would "reveal" much about "an agency's [ ] conduct" and falls directly within the purview of FOIA. Reporters Committee for Freedom of the Press, 489 U.S. at 796.

B. THE COURT ERRED BY IMPOSING AN EXCESSIVELY ONEROUS STANDARD FOR FOIA REQUESTS FROM INCARCERATED PERSONS.

Even where courts assume "arguendo" that a prisoner's "primary purpose [is] not to challenge his conviction but instead to prove wrongdoing by the government[,]" courts deny FOIA requests where plaintiff "presents no factual basis upon which the Court can find that there exists a question as to any agency's

performance of its duties." Tanks v. Huff, 1996 U.S. Dist. LEXIS 7266, at *12 (D.D.C. 1996).

Where "the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties…the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." Favish, 541 U.S. at 174. Peltier has already established, and appellate courts have already found, "impropriety," id., on the part of the Government in this case. See Point I.B, ante (discussing recognized misconduct). However the court below dismissed these findings of gross abuse because the courts that have identified impropriety did not take the additional step of "revers[ing] or order[ing] a new trial." R & R at 9 (A. 179) quoting Peltier v. FBI, 2005 WL 735964, at * 15 (W.D.N.Y. 2005).

The court below has essentially created a special test for incarcerated FOIA requesters. With utter disregard for the Supreme Court's holding in Favish—requiring FOIA requesters to "produce evidence…that the alleged Government impropriety might have occurred"—the court below has singled out the incarcerated FOIA requester for a truly onerous, special burden. Favish, 541 U.S. 157, 174 (2004). Not only must the incarcerated FOIA requester show "impropriety." Id. S/he apparently must show "impropriety" that would result in the reversal of conviction or the ordering of a new trial. R & R at 9 (A. 179)

quoting Peltier v. FBI, 2005 WL 735964, at * 15 (W.D.N.Y. 2005)(holding that public interest in disclosure was not established despite findings of government impropriety by the Tenth and Eighth Circuit in part because "no court has ever reversed or ordered a new trial").

It simply cannot be that if you are incarcerated, courts both assume that your purpose in seeking information through FOIA is a private one (to collaterally attack your conviction) *and* additionally create a special test to measure public interest requiring you to first overturn your conviction in order to have access to the promise of FOIA. Leonard Peltier's case presents a perfect example of the problem with this logic. The outrageous manufacturing of evidence and flagrant impropriety of the government in producing false affidavits to secure Peltier's extradition is certainly "impropriety" within the meaning of Favish. However, under the district court's apparent reasoning, since the falsification of the affidavits would not (and could not) lead to an order for a new trial or the reversal of Peltier's conviction, they cannot establish "impropriety" within the context of FOIA. This conclusion flies in the face of the plain language and purpose of FOIA. In the words of the Supreme Court, it is the purpose of FOIA to "ensure an informed citizenry…[which is] needed to check against corruption and hold the governors accountable to the governed." NLRB, 437 U.S. at 242. The district court's analysis contravenes this purpose.

C. PUBLIC INTEREST IN PELTIER'S CASE IS ALMOST UNPRECEDENTED; IN THEORY AND IN PRACTICE, THE FAVISH 'REASONABLE PERSON' STANDARD HAS BEEN OVERWHELMINGLY SATISFIED.

In Favish, the Supreme Court held that "where the public interest asserted is to show that responsible officials acted negligently or otherwise improperly in performing their duties, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." Favish, 541 U.S. at 174 (emphasis added). The public interest in this case—and the manner in which Peltier was prosecuted—has reached the highest offices in this nation and abroad. Presidents, attorneys general, and their foreign counterparts have considered, reviewed, and inquired about the prosecution of Leonard Peltier.

In light of evidence, confirmed by federal courts, showing gross abuse of power by Defendant, many "reasonable person[s]," id., in this country and abroad publicly call for Peltier's release or express grave concern about Defendant's misconduct in this case, including: Mother Teresa,[7] Nelson Mandela,[8] Archbishop Desmond Tutu,[9] Rigoberta Menchu Tum,[10] Tenzin Gyatson (the 14th Dalai

[7] See, e.g., Pamela White, *Prisoner No. 89637-132*, Boulder Weekly, Mar. 15, 2007.
[8] See, e.g., Editorial, Free Leonard Peltier: Native American Activist a Political Prisoner, Michigan Daily, Jun. 5, 2000, at 4.
[9] Joint Letter to President Clinton.
[10] Id.

Lama),[11] and Coretta Scott King.[12] "Reasonable" organizations have done similarly, including: the European Parliament,[13] the Belgian Parliament,[14] the Italian Parliament,[15] the Kennedy Center for Human Rights,[16] Amnesty International,[17] and the U.N. High Commissioner on Human Rights.[18]

Numerous books have been written.[19]

Songs have been sung.[20]

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[11] The Dalai Lama, Message, June 15, 1995 *available upon request.*
[12] Joint Letter to President Clinton.
[13] Resolution, European Parliament, B4-0557/94, (Dec. 13, 1994) *available at* http://www.freepeltier.org/statements_ep.htm#top; Resolution, European Parliament, B4-0169, 0175, and 0199-99 (Feb. 1999) *available at* http://users.skynet.be/kola/epres2.htm.
[14] Resolution, Belgian House of Representatives, 603/6-95/96 (Mar. 13, 1997) (unanimously adopted).
[15] Resolution, Italian Parliament, 800033 (Apr. 28, 1998).
[16] See, e.g., Editorial, Free Leonard Peltier: Native American Activist a Political Prisoner, Michigan Daily, Jun. 5, 2000, at 4.
[17] "Amnesty International Urges Clinton to Grant Pardon to Peltier," Amnesty International, Nov. 16, 2000 *available at* http://web.amnesty.org/library/index/engamr511722000.
[18] Letter from Mary Robinson, United Nations High Commissioner for Human Rights ,to President Clinton (Dec. 22, 2000) available at http://freepeltier.org/mary_robinson.htm
[19] See, e.g., Peter Matthiessen, In The Spirit of Crazy Horse (Penguin Books 1992); Jim Messerschmidt, The Trial of Leonard Peltier, (South End Press 1983); Harvey Arden, Have You Thought of Leonard Peltier Lately?, (HYT Publishing 2004); Leonard Peltier, Prison Writings: My Life Is My Sundance, (St. Martin's Press, NY, 1999).
[20] See, e.g., *Freedom (*Rage Against the Machine); *Crazy Life* (Toad the Wet Sprocket); *Night Hawkman* (J.D. Nash); *Leonard* (Buffy Sainte Marie); *Song for Leonard* (Jim Page); *Leonard, I'll remember you* (Turn the Stairs Upside Down)(United Kingdom); *Leonard, Free Him Now* (Casper Native Roots 9)(Reggae); *Red Boy* (Ron James Saugeen First Nation); *Red Child*

Mountains of articles and essays have been published (a Google search for "Leonard Peltier" results in an astonishing 558,000 hits).[21]

Movies have been made.[22]

Indeed, public interest in Peltier's case has been, and continues to be, so overwhelming that in 2004, Leonard Peltier appeared on the ballot as a candidate for President of the United States.[23]

Recently, Peltier's continued incarceration was again on the front pages of major newspapers when David Geffen, a Peltier supporter, withdrew financial

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(Mannitu)(Switzerland); *Free Leonard* (Basque Country)(Spain); *To the FBI With Love from Leonard* (Layla Orlando Rock Band); *Libre Someday* (Kloot)(Belgium); *Wind Chases the Sun* (Talitha)(Ireland); *Medicine Man* (Martha Redbone); *Ballad of Leonard Peltier* (Wayquay); *Little Hawk* (Troy Westwood); *Songs of Freedom* (Blue Stone); *Home Again* (J-san); *Barren Wind* (Evening Rain)(Cherokee); *Free Leonard* (Project Alpha)(Netherlands); *Response* (Bob Wiseman); *X To End Racism* (Native AXEman)(Northern Cheyenne); *Dedication to Leonard* (Buggin); *Warrior of the North Prairie* (Barbara Andres)(Canada); *Sundancer* (J. Shenondoah); *Free Peltier* (Vice Versa)(Europe); *Leonard* (Renaud)(France); *Please Sign Here* (Joanne Shenandoah); *Eagle Horse* (Mitch Walking Elk); *Dakota Wind* (Ellen Klaver); *Pray For The People* (Carolyn M. Brittell; *Anna Mae* (Larry Long); *Not For Sale* (Alice Di Micele); *Stolen Land* (Bruce Cockburn); *You're A Brave One* (Joanne Shenandoah); *A Crime That Isn't Mine* (Julie Robbins); *Leonard* (Steven Van Zandt); *Bury My Heart at Wounded Knee* (Buffy Sainte-Marie).

[21] Even the finer details of the case have generated a plethora of writing. A Google search for "AR-15, Evan Hodge and teletype" yields 47 sites where this one issue, generated by a FOIA disclosure, is discussed.

[22] See, e.g., *Incident at Oglala* (1991)(produced by Robert Redford).

[23] Peltier was the Peace and Freedom Party's candidate for President of the United States. In 2004, Peltier received .2% of the votes statewide in California, more than candidate Ralph Nader. See Statewide Summary 2004 Election Results, "President," California Secretary of State *available at* http://www.ss.ca.gov/elections/sov/2004_general/ssov/formatted_pres_detail.pdf.

support from Senator Hillary Rodham Clinton's leading presidential campaign allegedly because he was disillusioned by President Clinton's refusal to pardon Peltier.[24] During the last days of the Clinton Administration, speculation surrounding a potential pardon led to a protest of hundreds of FBI agents outside the White House and a letter from FBI Director Louis Freeh to the President.[25]

Public interest in Peltier's case is so great, that legal and political analysis of Peltier's trial, conviction, and imprisonment has elicited extensive cultural commentary, including a film produced by Robert Redford[26] and statements of outrage, concern, and/or support from cultural icons including: Barbra Streisand,[27] Kurt Vonnegut, Jr.,[28] E. L. Doctorow,[29] Mikhail Gorbachev,[30] Rose and William Styron,[31] Harvey Arden,[32] Peter Coyote,[33] Willie Nelson,[34] Robert Redford,[35]

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[24] See, e.g., Maureen Dowd, Obama's Big Screen Test, N.Y. Times, Feb. 21, 2007; Jennifer Steinhauer and David M. Halbfinger, Et Tu, David? A Lucrative Friendship Sours, N.Y. Times, Feb. 23, 2007.
[25] See, e.g., FBI Agents Urge President Clinton Not To Free American Indian Activist, CNN, Dec. 15, 2000 *available at* http://archives.cnn.com/2000/LAW/12/15/peltier.clemency.crim.02/index.html.
[26] *Incident at Oglala* (1991).
[27] Joint Letter to President Clinton.
[28] Id.
[29] Joint Letter from E.L. Doctorow to Editors, The New York Review of Books, July 20, 2000, available at http://www.nybooks.com/articles/15.
[30] International Peltier Forum, "Leonard Peltier Is Innocent Petition," *available at* http://users.skynet.be/kola/vips.htm [hereinafter, "International Petition"] (website contains links to .pdf files of each signatory).
[31] Id.
[32] International Petition.
[33] Id.

Susan Sarandon,[36] Tim Robbins,[37] Yoko Ono Lennon,[38] Dustin Hoffman,[39] Michael Apted,[40] Kris Kristofferson,[41] Kevin Spacey,[42] Peter Matthiessen,[43] Madonna,[44] Bono,[45] Sting,[46] Gwyneth Kate Paltrow,[47] Vivienne Westwood,[48] Giorgio Armani,[49] Cher,[50] Kylie Minogue,[51] Elton John,[52] Oliver Stone,[53] Raquel Welch,[54] Joan Collins,[55] Ozzy Osbourne,[56] Bianca Jagger,[57] and Yves Saint Laurent.[58]

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[34] Free Leonard Peltier Benefit Concert, Pacific Amphitheater in Costa Mesa, CA, 10/28/87.
[35] Joint Letter to President Clinton.
[36] International Petition.
[37] Id.
[38] Id.
[39] Id.
[40] Id.
[41] Id.
[42] Id.
[43] Joint Letter to President Clinton.
[44] International Petition.
[45] Id.
[46] Id.
[47] Id.
[48] Id.
[49] Id.
[50] Id.
[51] Id.
[52] Id.
[53] Id.
[54] Id.
[55] Id.
[56] Id.
[57] Id.
[58] Id.

Innumerable international human rights advocates have called for Peltier's immediate release from prison, and many have spoken publicly about the misconduct of Defendant in Peltier's case, including: The Dalai Lama,[59] Archbishop Desmond Tutu (Nobel Peace Laureate),[60] Rev. Jesse Jackson,[61] Coretta Scott King,[62] Nelson Mandela,[63] Rigoberta Menchu Tum (Nobel Peace Laureate),[64] Gloria Steinem,[65] Mother Teresa[66] (for many years before her death), Sister Helen Prejean (*Dead Man Walking*),[67] Mary Robinson (U.N. High Commissioner for Human Rights and Former President of Ireland),[68] Ramsey Clark (Former U.S. Attorney General),[69] and Danielle Mitterand (Former First Lady of France).[70]

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[59] The Dalai Lama, Message, June 15, 1995 *available upon request.*
[60] Joint Letter to President Clinton.
[61] Interview with Jesse Jackson, Pacifica Radio (2000), partial transcript *available at* National Union of Public and General Employees Website, http://www.nupge.ca/news_2000/News%20Dec/n01de00e.htm.
[62] Joint Letter to President Clinton.
[63] See, e.g., Editorial, Free Leonard Peltier: Native American Activist a Political Prisoner, Michigan Daily, Jun. 5, 2000, at 4.
[64] Joint Letter to President Clinton.
[65] Id.
[66] See, e.g., Pamela White, *Prisoner No. 89637-132*, Boulder Weekly, Mar. 15, 2007.
[67] Joint Letter to President Clinton.
[68] Letter from Mary Robinson, United Nations High Commissioner for Human Rights ,to President Clinton (Dec. 22, 2000) *available at* http://freepeltier.org/mary_robinson.htm.
[69] Presentation by Ramsey Clark, Former U.S. Attorney General, Native American Journalists Association's Annual Conference (June 20, 1997).
[70] International Petition.

Current and former elected officials of the United States government have similarly indicated their support for, or concern about government misconduct in obtaining the conviction of Leonard Peltier, including: Rep. Ronald V. Dellums,[71] Sen. Paul David Wellstone,[72] Rep. Neil Abercrombie,[73] Rep. Gary Ackerman,[74] Senator Ben Nighthorse Campbell,[75] Rep. William Clay,[76] Rep. John Conyers, Jr.,[77] Rep. Eni F.H. Falcomavaega,[78] Rep. Elizabeth Furse,[79] Rep. Dan Hamburg,[80] Sen. Daniel Inouye,[81] Rep. Ed Markey,[82] Rep. Toby Moffett,[83] Rep. Howard

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[71] Joint Letter from Rep. Don Edwards, House of Representatives, *et al.* to Hon. Janet Reno, Attorney General of the United States (Aug. 4, 1993) *available at* http://www.freepeltier.org/statements_18reps_2.htm#top [hereinafter, "Congressional Letter to Attorney General Reno"].

[72] Joint Letter from Sen. Paul Wellstone, United States Senate, to Hon. Janet Reno, Attorney General of the United States (July 22, 1993) *available at* http://www.freepeltier.org/statements_wellstone2.htm#top [hereinafter, "Senator's Letter to Attorney General Reno"].

[73] Congressional Letter to Attorney General Reno.

[74] Interview with Rep. Ackerman on Pacifica Radio, *available at* National Union of Public and General Employees website, http://www.nupge.ca/news_2000/News%20Dec/n01de00e.htm.

[75] Senator's Letter to Attorney General Reno.

[76] Congressional Letter to Attorney General Reno.

[77] Id.; http://www.freepeltier.org/statements5.htm#top;

[78] Congressional Letter to Attorney General Reno.

[79] Id.

[80] Id.

[81] Senator's Letter to Attorney General Reno.

[82] Joint Letter from Hon. Toby Moffett, *et al.*, United States Congress, to President Carter (Dec. 17, 1980) *available at* http://www.freepeltier.org/statements_congress3.htm#top [hereinafter, "Congressional Letter to President Carter"].

[83] Id.

Wolpe,[84] Rep. Gerry Studds,[85] Rep. Richard Ottinger,[86] Rep. Andrew Maguire,[87] Rep. Shirley Chisholm,[88] Rep. Mickey Leland,[89] Rep. Ted Weiss,[90] Rep. Wyche Fowler,[91] Rep. Edward Markey,[92] Rep. William Clay,[93] Rep. Benjamin Rosenthal,[94] Rep. Leon Panetta,[95] Rep. Tom Downey,[96] Rep. Peter Stark,[97] Rep. Matthew Martinez,[98] Rep. Robert T. Matsui,[99] Rep. Norman Mineta,[100] Rep. Eleanor Holmes Norton,[101] Rep. Nancy Pelosi,[102] Rep. Bill Richardson,[103] Rep. Jose Serrano[104] Rep. Fortney Pete Stark,[105] Rep. Edolphys Towns,[106] Rep. Maxine

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[84] Id.
[85] Id.
[86] Id.
[87] Id.
[88] Id.
[89] Id.
[90] Id.
[91] Id.
[92] Id.
[93] Id.
[94] Id.
[95] Id.
[96] Id.
[97] Id.
[98] Congressional Letter to Attorney General Reno.
[99] Id.
[100] Id.
[101] Id.
[102] Id.
[103] Id.
[104] Id.
[105] Id.
[106] Id.

Waters,[107] Rep. Pat Williams,[108] Rep. Don Edwards,[109] Rep. Constance A. Morella,[110] and Senator Dennis Deconcini.[111] It is hard to imagine that these are not "reasonable person[s]" within the meaning of Favish.

Numerous associations have similarly indicated their concern about the conviction of Peltier, including: International Indian Treaty Council,[112] Union of British Columbia Indian Chiefs,[113] National Indian Brotherhood,[114] Amnesty International,[115] International Union of Longshoremen,[116] National Association of Criminal Defense Lawyers,[117] National Association of Social Workers (NASW),[118]

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[107] http://www.freepeltier.org/maxine_waters.htm#top
[108] Congressional Letter to Attorney General Reno.
[109] Id.; Statement of Hon. Don Edwards (Dec. 14, 2000) *available at* http://www.freepeltier.org/donedwards.htm#top.
[110] Letter from Hon. Constance A. Morella, United States Congress, to President Clinton (Aug. 14, 1996) *available at* http://www.freepeltier.org/statements_morella.htm#top.
[111] Id.
[112] Resolution on Leonard Peltier, International Indian Treaty Council (Aug. 7, 2005) *available at* http://treatycouncil.org/PDFs/IITC_Peltiier_Resolution.pdf.
[113] Letter from Chief Stewart Phillip, President, Union of British Columbia Indian Chiefs, to President Clinton (Jan. 17, 2001) *available at* htt;://www.freepeltier.org/stewart_phillip/htm#top.
[114] "Justice for Leonard Peltier," Resolution 26/99, National Indian Brotherhood, July 22, 1999 *available at* http://freepeltier.org/statements_afn.htm#top.
[115] "Amnesty International Urges Clinton to Grant Pardon to Peltier," Amnesty International, Nov. 16, 2000 *available at* http://web.amnesty.org/library/index/engamr511722000.
[116] Statement of Policy on Leonard Peltier, International Union of Longshoremen, *available at* http://archive.ilwu.org/0100/policy0100.htm.
[117] Amicus brief filed in U.S. v. Peltier, 8th Cir. 1986, 800 F.2d 772.
[118] Newsletter, NASW Committee for Peace and Social Justice, vol. 1, issue 1, June 2000, *available at* http://www.socialworkers.org/practice/peace/psj0101.pdf

National Congress of American Indians,[119] National Council of Churches,[120] and United University Professions.[121]

Foreign governments have passed formal resolutions about Peltier's case. In February, 1999 and December, 1994, the European Parliament approved resolutions calling for Peltier to be released.[122] On March 13, 1997, the Belgian House of Representatives unanimously passed a resolution calling on the United States Congress to investigate Defendant's misconduct in the Peltier case.[123] Subsequently, on January 18, 2000, the Belgian House of Representatives passed a resolution calling on President Clinton to grant clemency for Peltier.[124] The Soviet

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(reporting that Board of Directors voted on April 2000 to support efforts to free Leonard Peltier).

[119] "Leonard Peltier," Resolution VAN-99-044, National Congress of American Indians (1999) *available at* http://freepeltier.org/statements_ncai.htm.

[120] "Resolution on Supporting Executive Clemency for Leonard Peltier," National Council of Churches (Nov. 12, 1997) *available at* http://www.ncccusa.org/assembly/peltier.htm.

[121] Letter from William E. Scheuerman, President, United University Professions, to President Clinton (Feb. 14, 2000) *available at* http://www.freepeltier.org/statements3.htm#top (quoting in full Resolution calling for the immediate release of Peltier).

[122] Resolution, European Parliament, B4-0557/94, (Dec. 13, 1994) *available at* http://www.freepeltier.org/statements_ep.htm#top; Resolution, European Parliament, B4-0169, 0175, and 0199-99 (Feb. 1999) *available at* http://users.skynet.be/kola/epres2.htm.

[123] Resolution, Belgian House of Representatives, 603/6-95/96 (Mar. 13, 1997) *discussed at* http://www.1worldcommunication.org/belgianparliament.htm (unanimously adopted).

[124] Resolution, Belgian House of Representatives, 50 0483/005 (Jun. 29, 2000) *available at* http://users.skynet.be/kola/belres2.htm.

Union publicly commented on the injustice of Peltier's conviction in major publications. Seth Mydans, Soviet Points Finger At Civil Rights Case In U.S., N.Y. Times, Jun. 27, 1984, at A3.

Even Judge Heaney of the U.S. Court of Appeals for the Eighth Circuit—who wrote the opinion in Peltier, 800 F.2d 772 (8th Cir. 1986), and sat on the panel of Peltier, 731 F.2d 550 (8th Cir. 1984)—has expressed concern about Defendants' conduct and Peltier's conviction, and encouraged the President to commute Peltier's sentence. Ltr. from Hon. Gerald Heaney, Judge, United States Court of Appeals for the Eighth Circuit, to Sen. Daniel K. Inouye (April 18, 1991) *available at* http://www.freepeltier.org/statements6.htm. Judge Heaney wrote, "the FBI used improper tactics in securing Peltier's extradition from Canada and in otherwise investigating and trying the Peltier case." Id. Judge Heaney reaffirmed this position in a subsequent letter dated October 24, 2000. Ltr. from Hon. Gerald Heaney, Judge, United States Court of Appeals for the Eighth Circuit, to Sen. Daniel K. Inouye (Oct. 24, 2000) *available at* http://www.freepeltier.org/statements6.htm.

Public interest in this case is extraordinary. The names and organizations listed above do not even scratch the surface of the enormous public commentary upon, discussion about, and belief in the fact that "government impropriety might have occurred." Favish, 541 U.S. at 174. Despite this, the court below held that,

"Plaintiff's current FOIA action is intended to discover facts that he would presumably use in his ongoing efforts to reverse his criminal conviction. To date, however, the courts have rejected all such efforts." R & R at 9 (A. 179).

The court's reasoning is inherently flawed. The mere fact that Leonard Peltier's private interest largely overlaps with the overwhelming public interest in disclosure cannot mean that the public interest merely is subsumed by Peltier's interest in reversing his conviction. In Meeropol v. Meese, 790 F.2d 942 (D.C. Cir. 1986), for example, the grown children of Julius and Ethel Rosenberg filed a FOIA request for all documents related to their parents. Their intent was to clear their parents' names and expose the governmental misconduct that accompanied that cold war prosecution. Their FOIA request "may well be the most demanding FOIA request ever filed" according to the D.C. Circuit, yielding approximately ½ million documents, of which some 300,000 had claims of exemptions. At no point was it intimated that the Meeropol quest, however privately motivated, was lacking in public interest.

The widespread controversy surrounding Peltier's prosecution has generated a public interest in disclosure that cannot be extinguished by the fact that Magistrate Judge Nelson believes Plaintiff's "real interest in seeking disclosure is to gain information to further attack his conviction." R & R at 21 (A. 191).

Furthermore, ample evidence has been offered showing government misconduct that weighs heavily in favor of disclosure in the public interest.

Just as Jackie Robinson's success on the ball field meant more than another homerun for the Dodgers, and the Inquisition tribunals meant more than the fate of individual heretics, the public interest in, and significance of, Leonard Peltier's case is much bigger than the fate of Leonard Peltier himself. To deny this, as the court below did, because Peltier is a prisoner interested in collaterally attacking his conviction, is to blind oneself to the conversation about Peltier and the FBI's fierce efforts to capture, incarcerate, and silence him. To deny this is to see no evil.

The Magistrate Judge's erroneous evaluation of the public interest in this FOIA request seems to have infected every aspect of her decision, including a broad finding that, as a general matter, Plaintiff's request fell outside the public purpose of FOIA because it was "clear that Plaintiff's current FOIA action is intended to discover facts that he would presumably use in his ongoing efforts to reverse his criminal conviction." R & R at 9 (A. 179). This erroneous reasoning seems to have permeated every aspect of the court's analysis, adding yet another reason for this Court to remand for full *in camera* review of all withheld documents or, in the alternative, to designate a special master to receive, review, and release the withheld documents.

III. IN THE THREE DECADES OF PROSECUTIONS RELATED TO THE ACTIVITIES OF THE AMERICAN INDIAN MOVEMENT, NUMEROUS SOURCES WHO ORIGINALLY PROVIDED INFORMATION BASED UPON AN EXPRESS OR IMPLIED PROMISE OF CONFIDENTIALITY AND/OR PRIVACY HAVE WAIVED THAT PROMISE BY PUBLICLY TESTIFYING. THE DISTRICT COURT SHOULD HAVE EXAMINED THE CLAIMS OF EXEMPTION UNDER 6, 7(A), 7(C), 7(D), 7(E), AND 7(F) IN THE CONTEXT OF WAIVER.

While claiming that the passage of time washes away the sins of the FBI, the government simultaneously claims that its need for various law enforcement records exemptions is as urgent now as it was on the day that Special Agents Coler and Williams were killed. But in the three decades of prosecutions related to the activities of the American Indian Movement, many sources have waived confidentiality and testified publicly about their roles as informers. Indeed, whatever promises of confidentiality were expressed or implied by the FBI could not have been intended to be eternal, *viz.*, the need for public testimony in trials for murder generally qualifies all promises of confidentiality. Many of the law enforcement techniques and procedures used in the investigation and prosecution of AIM members have already been disclosed. And all of the "enforcement proceedings," save further prosecutions in the murder of Anna Mae Aquash, have been completed.

In finding for the government pursuant to (7)(D)[125] claims of express grants of confidentiality, the Report and Recommendation held that:

> Here, the FBI satisfied its burden by establishing that the records themselves – through such phrasings as "'PROTECT IDENTITY,' 'PROTECT,' 'CONCEAL' and 'PROTECT PER REQUEST'" – expressly indicate the need to assume the source of confidentiality." Peltier v. FBI, 2005 WL 735964, at *19 (W.D.N.Y. March 31, 2005).

R & R at 23 (A. 193). With respect to the government's claim of exemption based upon implied grants of confidentiality, the Report and Recommendation found that the nature of the crimes being investigated justified a finding of implied confidentiality. Id.

The court below viewed the FBI's claims of confidentiality through the prism of 1975, rather than today. Whatever the original expectations of the informants/sources, their conduct, and the conduct of the government, waived whatever confidentiality was promised or implied. For example, the government argued, and the court below agreed, that a stamped entry stating "PROTECT" next to the name of an informant on an "Urgent" FBI teletype dated July 26, 1975 (Peltier-40-MP File; A. 148), renders that document and its contents forever

[125] The FBI also claimed, and the court below upheld, exemptions under 7(C); persons who assisted in the investigation of Peltier with an express or implied promise of confidentiality. While 7(C) requires balancing of interests and 7(D) does not, waiver, if found, applies to both. Similarly, if the government's arguments under 7(C) fall, so do its claims under Exemption 6. R & R at 21, n. 7 (A. 191).

subject to 7(C) and 7 (D) privacy and confidential source exemption.[126] Such mechanical reasoning ignores the fact that whatever the need to protect confidentiality when the information was given, such promises were never meant to be eternal, and were waived by the sources testifying, in public, at various hearings and trials.

The Eighth Circuit has yet to address the question of whether, and to what extent, a confidential source waives the FBI's right to claim an exemption once that source provides testimony in open court. The Supreme Court expressly declined to decide this issue. Landano, 508 U.S. at 174-175. The treatment of this issue has been uneven in the district courts and in the courts of appeals. Most persuasive is the district court's opinion in Powell, 584 F.Supp. 1508, which stands for the common-sense notion that when one appears on the witness stand and testifies in open court, one is no longer a "confidential" informant and the rationale for protecting that person, and his or her information, evaporates.

In Powell, plaintiffs faced a series of prosecutions under the Smith Act, commencing in 1956 and ending in 1961. In 1978, the plaintiffs brought a FOIA action seeking all documents related to their prosecutions. In response, the government claimed both 7(C) and 7(D) exemptions. The district court held that the government's "blanket assertion of privacy involving records over twenty years

[126] See generally, Exhibit QQ to the Third Hardy Declaration. The inclusion of the Peltier-40-MP-File document is merely illustrative. (A. 148).

old is impermissible." Id. at 1527. The district court noted that the passage of time diminished "the likelihood of embarrassment and harassment," and that "some individuals may have waived their privacy interests by public involvement or disclosure." Id. at 1526. At the very least, the "government must consider [these] factors in determining what records must be disclosed, and what records retain valid privacy interest," id. at 1527, rather than proceed through categorical claims of exemption.

The Powell court was also clear that "confidential sources" who testify at public trials lose their right to claim confidentiality:

> The Department also appears to contend that persons who were prospective witnesses and even persons who actually testified at the Powells' trial are confidential sources. However, it is difficult for the court to see in what sense these witnesses are confidential. . . . Clearly, witnesses who actually testified at trial should not generally be considered confidential sources. Once a witness testifies his or her identity is disclosed and no purpose is served by further withholding the source's identity in a FOIA suit.

Id. at 1529 (emphasis added).

Similarly, in Landano,[127] 873 F.Supp. 884, plaintiff argued that the FBI had waived confidentiality of its sources by disclosing them in the course of the criminal justice process. Id. at 890, 890 n. 18. The Landano court noted that logic would suggest that even if confidentiality could be inferred, the need for it would dissipate once the informant was identified to the defendants or the public, such as

[127] This opinion followed the Supreme Court's reversal and remand in Landano.

by being a witness at trial." Id. at 890. The Landano court held that "[i]f disclosure became necessary for law enforcement purposes, and thus public, the exemption should not apply." Id. "Trial related releases of information" were not subject to exemption. Id.

In Irons v. FBI, 880 F.2d 1446 (1st Cir. 1989)(en banc), the First Circuit took a more restrictive approach, holding that a confidential informant only waived confidentiality with respect to the actual testimony given in public, and no more. In Irons, plaintiffs researching the McCarthy era sued for information that would "reveal what certain FBI informants, who testified at the Smith Act trials of alleged Communist leaders in the 1950s, had told the FBI (and other related material about those informants)." Id. at 1446. The government claimed 7(D) exemption. Although it was a given that plaintiffs could receive documents reflecting that which had already been disclosed, the question in Irons was whether plaintiffs can receive more than what the "Smith Act trials in fact brought to light." Id. at 1448 (emphasis in original). The Irons court found no basis in the text of FOIA or its legislative history to find a "waiver" exception to an otherwise applicable exemption.[128] This holding was qualified by the First Circuit noting that "sometimes, of course, the fact that a source later gave public testimony might show that a law enforcement agency never gave a valid assurance of

[128] In Landano, the Supreme Court, citing Irons, expressly refused to address this holding. 508 U.S. at 175-175.

confidentiality in the first place; and sometimes it might show that an assurance was intended to expire after a certain time." Id. at 1448 (citations omitted). Cf., Bretti v. DOJ, 1990 U.S. Dist. LEXIS 7514 (N.D.N.Y. 1990)("Once an informant testifies, however, he waives confidentiality only with respect to the subject matter of his testimony, and not with regard to related information not actually disclosed at trial.")

The suggestion in Irons, that some promises of confidentiality come with an expiration date, has particular force in Peltier's case. The FBI was, after all, investigating the murder of two FBI agents. No rational person could conclude that their provision of information about such a matter would remain forever secret; the need for testimony at trial would always trump any grant or implication of confidentiality.

In Parker, 934 F.2d 375, the D.C. Circuit, by contrast, held that there is no waiver of confidentiality when a confidential source appears in public and testifies. The Parker court noted that the text of the exemptions makes no reference to "waiver", the legislative history was designed to provide "a broad exemption," and the courts of the various circuits had applied the exemption broadly and without a "waiver" provision. Id. at 380 (collecting cases).

At least one court has expressly found that Parker's holding, and the cases on which it relied, were undermined by the Supreme Court's decision in Landano.

Because Parker's treatment of the presumption of confidentiality was expressly rejected by Landano, so too was the Parker court's treatment of the presumption of eternal confidentiality. See Landano, 873 F.Supp. at 890. But see, e.g., Sanderson v. IRS, 1999 U.S. Dist. LEXIS 665 (E.D. La. 1999)(Public testimony does not waive right to claim 7(D) exemption, except for exact portions that were in the public record, citing, Parker).

The "confidential source" exemption, if misused, has the capacity to conceal vast quantities of otherwise disclosable information because once the agency received information from a "'confidential source' during the course of a legitimate criminal investigation . . . all such information obtained from the confidential source receives protection." Parker, 934 F.2d at 380 (citations omitted)(emphasis in original). The court below erroneously allowed parties' expectations in 1975 to govern what should be disclosed in 2007. Accordingly, the matter should be remanded back to the district court with a direction to disclose the withheld documents that describe informants, sources, techniques and information that has previously been placed in the public domain.

CONCLUSION

This Court has been involved in the jurisprudence of the Pine Ridge/Wounded Knee shootings for over three decades. Before the sun sets on that litigation, the last of the sunshine should fall upon the documents the government still wishes to conceal.

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June 7, 2007

Respectfully submitted,

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[129] Counsel wish to thank Susan Bailey for her invaluable contributions in the preparation of this Brief and for her three decades of support for Leonard Peltier and for native peoples struggling against oppression.

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,566 words, as counted by Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font (Microsoft Word 2003).

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Dated: June 7, 2007

ANTI-VIRUS CERTIFICATION

I, David Pressman, certify that I have had the electronic version of Appellant's Brief, submitted in this case via CD-ROM, scanned for viruses utilizing Norton Anti-Virus 2006. No viruses were detected.

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DAVID PRESSMAN, ESQ.

Dated: June 7, 2007

ADDENDUM