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

REPLY BRIEF FOR PLAINTIFF-APPELLANT LEONARD PELTIER

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Authorities

I. THE GOVERNMENT'S RECORD OF MISCONDUCT TOWARD LEONARD PELTIER PROVIDES A SUFFICIENT BASIS TO "QUESTION THE GOOD FAITH OF THE AGENCY" REQUIRING A MORE PROBING INQUIRY INTO THE CLAIM OF EXEMPTIONS THAN THAT GRANTED BY THE COURT BELOW.

Defendant-Appellee ("the Government") continues to categorically insist that there is no degree of governmental misconduct toward a FOIA litigant that could cause a court to "question the good faith of the agency," Cox v. Department of Justice, 576 F.2d 1302, 1312 (8th Cir. 1978), unless the litigant can prove misconduct in the FOIA proceedings themselves. The Government's assertion that it can wave away its sordid history of proven FBI and prosecutorial misconduct toward Peltier with a "what have we done to you lately" nonchalance rests entirely on the Government's own insistence. Without a shred of support in the case law, and utterly without logical foundation, the Government asks this Court to insulate the most pernicious misconduct from review.

A. *In Camera* Review And Waiver.

When Congress amended the FOIA in 1974 to permit *in camera* inspection, "Congress indicated its intent to facilitate *in camera* inspection and to minimize judicial unwillingness to take an active role in reviewing FOIA claims." See Allen v. Central Intelligence Agency, 636 F.2d 1287, 1294-1297 (D.C. Cir. 1980). Congress provided *in camera* review powers as a discretionary judicial tool, to be used if the withholding agency's affidavits were insufficient. Amending the

Freedom of Information Act, S. Rep. 854, 93d Cong., 2d Sess. (1973). "When there is a showing of bad faith, affidavits are not enough" and are per se insufficient. James T. O'Reilly, Federal Information Disclosure, vol. 1, ch. 8:13, p. 137 (June 2007 Supplement). In this unique case, there has been much more than a mere showing of bad faith. As discussed at length in Plaintiff's Brief, at point I, and herein, numerous courts of appeals, including this one, have already held that Appellee FBI engaged in extensive misconduct targeting Plaintiff Peltier. Most recently, in 2003, the United States Court of Appeals for the Tenth Circuit stated:

> Much of the government's behavior at 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 a letter urging "favorable action" by the President of the United States towards Leonard Peltier, U.S. Court of Appeals Judge Gerald W. Heaney—the author of one Peltier opinion and a member of a panel that rendered another—wrote that "the FBI used improper tactics in securing Peltier's extradition from Canada and in otherwise investigating and trying the Peltier case." 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.[1]

[1] Judge Heaney wrote, "My thoughts on these other aspects result from a very careful study of the records of the Peltier trial and the post-trial evidence and from

While trying to dismiss the relevance of demonstrated, repeated past bad faith and misconduct targeting Plaintiff Peltier, the Government's opposition brief is especially notable in that it entirely omits—and blithely ignores—Plaintiff's evidence that the FBI remains, to this day, engaged in a bad faith public misinformation campaign designed to cover-up its odious conduct with regard to Plaintiff Peltier. The Government continues to ignore the current lies, dissembling, half-truths, and distortions that litter the FBI's official websites (as well as the unofficial sites of former agents). See Peltier Br. at 17-20. Again, the Government insists that while it engaged in serious misconduct against Peltier in 1975 and 1976, and lies about that misconduct today, no one has any basis to believe that the FBI would act in anything other than good faith in concealing

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a study of the record in the Robideaux-Butler trial before Judge McManus in Iowa, a trial which resulted in the acquittal of Robideaux and Butler.

First, the United States government over-reacted at Wounded Knee. Instead of carefully considering the legitimate grievances of the Native Americans, the response was essentially a military one which culminated in a deadly firefight on June 26, 1975 between the Native Americans and the FBI agents and the United States marshals.

Second, the United States government must share the responsibility with the Native Americans for the June 26 firefight….

Third, the record persuades me that more than one person was involved in the shooting of the FBI agents…

Fourth, the FBI used improper tactics in securing Peltier's extradition from Canada and in otherwise investigating and trying the Peltier case. Although our court decided that these actions were not grounds for reversal, they are, in my view, factors that merit consideration in any petition for leniency filed." Ltr. from Hon. Gerald W. Heaney, United States Court of Appeals for the Eighth Circuit to Senator Daniel K. Inouye, dated April 18, 1991.

documents which may well expose additional misconduct. Such specious reasoning was rejected by the Sixth Circuit in Jones v. Federal Bureau of Investigation, 41 F.3d 238 (6th Cir. 1994), and should be rejected by this Court.

While the Government ruthlessly ignored Plaintiff's arguments about the continuing bad faith of the FBI, evidence of an agency's bad faith is grounds for an appellate court to order a district court to conduct an *in camera* review. James T. O'Reilly, Federal Information Disclosure, vol. 1, ch. 8:15, p. 253 (discussing the criteria which the D.C. Circuit applies and observing that "[t]he absence of one or more of these [criteria, which includes "evidence of agency bad faith"] may lead the [appellate] court into compelling the district court to do an *in camera* review of all the documents at issue"). "[T]he presumption of good faith articulated in Jones may be overcome when there is evidence of bad faith or illegality with respect to either the handling of the FOIA request or the underlying activities of the agency at issue." Detroit Free Press v. U.S. Department of Justice, 174 F. Supp. 2d 597, 600 (E.D.Mich. 2001)(emphasis added). See also Twist v. Ashcroft, 329 F. Supp. 2d 50, 54 (D.D.C. 2004)("It is certainly true that a showing of 'bad faith' can defeat a motion for summary judgment in a FOIA case"). Because of past and continuing bad faith of Appellee FBI with regard to the Peltier investigation and prosecution—and the fact that "plaintiff's request involve[s] activities that, if disclosed, would embarrass the FBI," id.—this Court should itself undertake or

order the court below to conduct a more searching review. Plaintiff does not merely suspect bad faith; this Court and others have found bad faith. See Twist, 329 F. Supp. 2d at 55 (declining *in camera* review because claims of "bad faith" were "based on mere allegations"). The Government's contention that the only relevant "bad faith" is "bad faith" in the preparation of the FOIA affidavit is illogical and incorrect.

> With respect to the issue of bad faith, the Court notes that, in general, a showing of bad faith by the agency "weigh[s] heavily" in the Court's decision whether to review the documents *in camera*. In the instant case, [plaintiff] Neuhausser's allegations of bad faith do not relate to this FOIA action. Instead, these allegations concern the Defendant's alleged actions in the underlying trial. However, in Jones v. Federal Bureau of Investigation, 41 F.3d 238 (6th Cir. 1994), the Sixth Circuit noted that "[e]ven 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." Thus, the Court must consider this issue in determining whether to review the documents at issue *in camera*.

Neuhausser v. U.S. Department of Justice, Slip Op, 2006 WL 1581010 (E.D.Ky 2006)(internal citations omitted). See also Ingle v. Department of Justice, 698 F.2d 259, 267 (6th Cir. 1983) overruled on other grounds Department of Justice v. Landano, 508 U.S. 165, 170 (1993)(decision to conduct *in camera* review involves consideration of "actual agency bad faith—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"); Rugiero v. Department of Justice, 257 F.3d 534, 544 (6th Cir. 2001)("A showing of bad faith would rebut the presumption of regularity the government enjoys in responding to FOIA requests and would weigh heavily in the decision to conduct an *in camera* review of responsive documents withheld or redacted")(internal citations omitted).

The Government attempts to distinguish Jones v. Federal Bureau of Investigation, 41 F.3d 238 (6th Cir. 1994) by asserting that in Jones, the information obtained through FOIA "led to the release and acquittal of Jones" whereas Peltier's conviction has been upheld. (Appellee's Br. at 33). But this argument undercuts the Government's earlier assertion that such past misconduct is *never* relevant, and also demolishes the Government's argument, elsewhere in its brief, that the private interest in reversing a criminal conviction can *never* supply the requisite "public interest" to override a claim of privacy.

In Jones, the defendant's conviction was overturned when he was able to obtain, through FOIA, a statement by an eyewitness that had not been provided to trial counsel. The statement, which did not mention the defendant, was potentially exculpatory. Jones v. Jago, 428 F.Supp. 405 (N.D. Ohio 1977), aff'd., 575 F.2d 1164 (6th Cir.), cert. denied, 439 U.S. 883 (1978). The State asserted that it did not provide the statement because it was hearsay, did not mention the defendant, and was ambiguous. This complex question of whether the statement met the

"materiality" standard of United States v. Agurs, 427 U.S. 97 (1976), was decided against the State by the district court, which refrained from opining whether the State's error was deliberate. Id. at 411. By any standard, the Government's misconduct in Peltier's case was far more severe. Deliberate elicitation of a perjured affidavit, followed by submission of that affidavit to a foreign government to obtain extradition, is far graver misconduct than a too-restrictive reading of materiality. There is also far greater public interest in the latter than the former. Unfortunately for Peltier, the abuse he suffered in the extradition process has no legal effect on the validity of his conviction.

To choose a different example, the Government's suppression of the Evan Hodge teletype, the same misconduct as that which occurred in Jones. In both cases, the Courts of Appeals carefully weighed the potential impact of the suppressed material against the quantum of evidence of guilt, overturning the conviction in Jones and affirming in Peltier. But the fact that Jones prevailed and Peltier did not cannot be used as an argument to bar Peltier's further access to additional materials that may yet tip the balance in his favor. If anything, the reverse is true.

The Government seeks to escape the consequences of its own misconduct by alleging that a parade of horribles will ensue should this Court actually give some

effect to its repeated findings of governmental misconduct in Peltier's case. The Government writes:

> By alleging an instance of government misconduct at some point, even in the distant past, a plaintiff could impose enormous burdens on the judiciary and evade the standards and mechanisms created by the Supreme Court . . . .

(Appellee's Br. at 34). This prediction has already been proven false, at least in the Sixth Circuit. Commencing in 1994 with Jones, the Sixth Circuit continues to look to whether there is "evidence of bad faith or illegality with regard to the underlying activities that generated the documents at issue" in evaluating the good faith of the agency in FOIA claims. Jones, 41 F.3d at 242. See also Detroit Free Press, 174 F. Supp. at 600. No court within the Sixth Circuit has noted any untoward increase in its burdens.

"[I]n reviewing a trial court's exercise of its discretion," with regard to conducing an *in camera* review, appellate courts "look to such factors as evidence of bad faith[.]" Center for Auto Safety v. Environmental Protection Agency, 731 F.2d 16, 21, 23 (D.C. Cir. 1984)(denying *in camera* review because the affidavits were sufficient and the court "found no allegations or evidence of agency bad faith"). In addition to the showing of bad faith, the strong public interest in this case calls for *in camera* review. When analyzing the propriety of *in camera* review, appellate courts look at showings of bad faith and "strong public interest—where the effect of disclosure or exemption clearly extends to the public at large,

such as a request which may surface evidence of corruption in an important government function, there may be a reason to give lesser weight to factors like judicial economy." Ingle, 698 F.2d at 267.

More significantly, the Government conflates Peltier's lengthy, documented, proven history of the most serious governmental misconduct with some fanciful, gauzy grievance made by some hypothetical litigant. The Government again demonstrates that it does not now, nor has it ever, taken seriously any of the courts that have admonished it about the treatment of Leonard Peltier. It has been proven that the FBI has withheld exculpatory evidence, manufactured inculpatory evidence that it knew to be false, coerced witnesses, and engaged in an over-reaction at Wounded Knee sufficiently grave to cause a Senior Judge of this Court to opine that the Government shares responsibility for the firefight that led to the deaths of two FBI agents. The Government has shown no solicitude for the "enormous burden on the judiciary" that its *own* malfeasance has caused.

In any future litigation involving those hypothetical litigants, the burden will be on the plaintiff to prove his or her allegations of misconduct, and to prove that they are sufficiently grave and systematic to cast doubt on the agency's overall good faith. Hopefully, such cases will be rare, although the Government's worries presumably are based on its own knowledge of its own catalogue of unconfessed

sins. It may be that righting the wrongs of the past will entail an "enormous burden." If so, it is a burden any and every court should be glad to bear.

Bad faith has been established. Appellee's affidavits are insufficient. The court below should have conducted a full *in camera* review.

B. The Government's Erroneous Argument That Peltier Waived Full *In Camera* Review By Consenting To Their Provision Of A Sample Of Documents Should Be Rejected.

The Government's attempt to cast Plaintiff's argument for more exacting review as somehow "new," coupled with the Government's aspirational argument that "Peltier expressly agreed to and requested judicial review based on a representative sample" should be rejected as simply incorrect. (Appellee's Br. at 23). This is neither a new argument nor did Plaintiff urge the Court to merely review a sample of the withheld documents.

The Government argues that Plaintiff "urged" the Court to review a sample of documents, and thereby has waived his standing request for full *in camera* review. See Appellee's Br. at 27. Plaintiff, however, never "urged," id., the Court to review only a limited sample of the withheld documents. Plaintiff merely accepted Appellee's offer to show a sample of the documents to the Court. In no way did this rescind Plaintiff's request for *in camera* review or waive his ability to seek such review upon a showing of agency bad faith. A plaintiff in a FOIA action

is often a blind beggar—that a beggar accepts a crumb does not mean the beggar has stopped seeking a sandwich.

Appellee points to a "joint status report" as evidence of its position that Plaintiff agreed that *in camera* review of 500 pages of the withheld documents "would suffice for meaningful judicial review." (Appellee's Br. at 24). However, Plaintiff never agreed that review of a mere 500 pages of withheld documents "would suffice for meaningful judicial review." Id.

Plaintiff accepted Appellee's offer to disclose a sample of the withheld documents to the Court for review. By so accepting, however, Plaintiff did not rescind his previous request for the Court to review withheld documents *in camera* nor did he waive his right to continue to demand more exacting review. To argue otherwise is to arm government agencies with a FOIA booby-trap. Where an agency offers a paltry quantity of withheld material for *in camera* review, under Appellee's rubric, Plaintiff is thereby forever estopped from seeking fuller judicial review. If either party is "sandbagging," a word Appellee deploys with relish, it is the Federal Bureau of Investigation.

C. Plaintiff's Request for *In Camera* Review Is Properly Preserved. In Any Event, The Government Is In No Way Prejudiced.

The Government's statement that "Peltier did not request *in camera* review of any other documents, and he certainly never suggested that the district court should undertake review of thousands of pages" is inaccurate. (Appellee's Br. at

23). During argument before the district court, Hon. Donovan W. Frank presiding, counsel for Plaintiff on at least two separate occasions requested that which the Government claims Plaintiff never so much as "suggested." Id. Counsel for Plaintiff implored the Court:

> We think it is extremely important that, in [and] request, that the Court issue a scheduling order so that we can bring this to a head on a summary judgment and even request that the Court take these documents *in camera* to review our arguments.

Tr. Apr. 15, 2005, at 18-19 (emphasis added).

> And so, number one, I would request that the Court set up a briefing schedule and take – and if appropriate, the Court deems it appropriate, review these documents *in camera*…"

Tr. Apr. 15, 2005, at 19-20 (emphasis added).[2]

As the FBI never offered all of the withheld documents up for full *in camera* review, Plaintiff accepted the FBI's offer to show the reviewing court a limited sample of 500 pages of the documents. The Government's attempt to parse Plaintiff's words in order to argue that Plaintiff's counsel agreed that a "representative sample along with a Vaughn declaration would suffice for meaningful judicial review" is simply untrue. (Appellee's Br. at 24). Yes, Plaintiff accepted the FBI's offer to show the Court 500 pages. No, Plaintiff did

[2] The "documents" referred to were the documents dealing with "informants" and the Anna Mae Aquash subfile, (Tr. Apr. 15, 2005, at 18-19), comprising the most significant, discussed, and disputed categories of withheld documents in this litigation.

not suggest that this "would suffice." Id. In no way, did Plaintiff's agreement to the sample forfeit Plaintiff's right, the Court's ability, or Plaintiff's request for the Court to conduct a fuller *in camera* review.

In any event, Appellee's counsel is right to point out that there are "limited exceptions to the waiver rule [that] allow a party to raise a new issue…when appellate review would be unhindered by a party's failure to present an issue earlier." (Appellee's Br. at 25). This Court has often held that it may "consider an issue for the first time on appeal when the argument involves a purely legal issue in which no additional evidence or argument would affect the outcome of the case[.]" Snider v. United States, 468 F.3d 500, 512 (8th Cir. 2006)(internal quotations omitted). See also Orion Financial Corp. of South Dakota v. American Food Group, Inc., 281 F.3d 733, 740 (8th Cir. 2002)(holding same); Tarsney v. O'Keefe, 225 F.3d 929, 939 (8th Cir. 2000)(holding same). This Court has also recognized that the general rule regarding raising new arguments at the appellate level is "not a flat rule but rather a matter of prudence and discretion." Jolly v. Knudsen, 205 F.3d 1094, 1097 (8th Cir. 2000) quoting Struempler v. Bowen, 822 F.2d 40, 42 (8th Cir. 1987). See Aholelei v. Department of Public Safety, 488 F.3d 1144, 1147 (9th Cir. 2007). There is no "additional evidence or argument" necessary for this Court to evaluate the record below, the standards applied, and the decision rendered to be guided by a meager sample of documents and sworn affidavits from the same

agency that continues to publicly lie about Plaintiff Peltier. As this is a motion for summary judgment, all factual inferences have been made in Plaintiff's favor. Therefore, the sole remaining question is whether those facts mandate more exacting *in camera* review. Plaintiff urges this Court to find that it does.

Somehow, the Government feels "sandbagged" by a FOIA plaintiff's request for a court to review these withheld documents. (Appellee's Br. at 25). To support its contention that Plaintiff is "sandbagging," the Government cites, at length, Stafford v. Ford Motor Co., 790 F.2d 702, 706 (8th Cir. 1986). (Appellee's Br. at 25). Stafford presents two rationales for prohibiting arguments raised for the first time on appeal. The first rationale is that "the record on appeal generally would not contain the findings necessary to an evaluation of the validity of an appellant's arguments." Id. The second rationale is that litigants "should not be surprised on appeal…of issues upon which they had no opportunity to introduce evidence." Id. Somehow, Appellee comes to the conclusion that "[t]hose rationales apply with force in this case." (Appellee's Br. at 25). They do not.

There is no conceivable "evidence" that could have, would have, or should have been introduced on the question as to whether fuller *in camera* review was proper, aside from the evidence of past and continuing bad faith already before this Court. Furthermore, this is not the first time this issue has been raised, discussed ante, and even if this were the first time it was raised, the record on appeal already

"contain[s any of] the findings [that are] necessary to an evaluation of the validity of … appellant's arguments[,]" Stafford, 790 F.2d at 706; specifically, the analysis of the FBI's continued bad faith with regard to Plaintiff Peltier.

Finally, it should be noted that even if this Court finds that Plaintiff did not request *in camera* review, given the fact that Plaintiff established Appellee's past and continuing bad faith, governing caselaw requires district courts to consider the propriety of more exacting review, including the need for *in camera* inspection. See Neuhausser, Slip Op, 2006 WL 1581010, at *4 (although plaintiff "has not requested *in camera* review" in the face of allegations of bad faith "the [c]ourt must consider this issue in determining whether to review the documents at issue").

Given the enormity of bad faith that has characterized the Government's relationship with Plaintiff, it is wholly appropriate for this Court to remand for full *in camera* review by the district court, a special master,[3] and/or undertake such review itself. See Lame v. U.S. Dep't of Justice, 767 F.2d 66 (3rd Cir. 1985)(appellate court may look at the documents underlying a FOIA dispute *in camera*).

[3] Plaintiff rejects as utterly frivolous Appellee's characterization of our arguments on the appointment of a Special Master as "passing references…[that] do not constitute an argument before this Court." (Appellee's Br. at 30 n. 12). Plaintiff raised the appointment of a special master precisely to highlight the panoply of options available to the Court and to urge the Court to take advantage of them. Plaintiff would be curious to know whether Appellee's footnote suggesting that the Court "sua sponte" find claim preclusion constitutes "an argument before this Court" or a mere "passing reference[]." (Appellee's Br. at 31 n. 13).

II. PUBLIC INTEREST IN THE PROSECUTION AND INVESTIGATION OF LEONARD PELTIER.

A. Appellee Misrepresents The Analysis And Holding Of The Court Below. The Court Below Crafted A Special Test To Measure Public Interest In FOIA Requests From Incarcerated Persons.

Appellee is absolutely correct that the public interest—not the Plaintiff's interest—is the appropriate standard to utilize in analyzing FOIA claims. (Appellee's Br. at 35). Unfortunately, despite the Government's protestations to the contrary, the explicit text of the Magistrate's Report & Recommendation, as well as the district court's Opinion, makes perfectly clear that this standard was not applied in this case. In evaluating the "public interest in these documents," (R&R at 21)(A. 191), the Magistrate Judge found:

> …the remaining issue is whether the public interest in these documents outweighs the privacy interests. Here, "it is clear" that Plaintiff's "real interest in seeking disclosure is to gain information to further attack his conviction." Peltier v. FBI, 2005 WL 735964, at *15 (W.D.N.Y. March 31, 2005). "There is no public purpose, however, in disclosing information to assist a prisoner challenging his conviction." Id.

(R&R at 21)(A. 191). See also R&R at 18 (A. 188)(Magistrate Judge, analogizing to a 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"). The district court, similarly, adopted this improper analytical rubric finding that "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).

The Government's contention that "Peltier attempts to misrepresent the district court's holding" (Appellee's Br. at 35) is improper, inaccurate, and beyond the pale of appropriateness. Plaintiff does not, and needs not, "misrepresent"' anything. Id. The fact of the matter is that the court below viewed the "public interest" in this petition as limited to the interest an incarcerated man has in freedom, rather than the overwhelming public interest in (and the right of the public to know) about the offensive misconduct perpetrated by the FBI during the investigation and prosecution of Leonard Peltier.

Plaintiff agrees with Appellee that "by pointing to those who have asserted an interest in his case, Peltier cannot obtain any benefit as compared to any other FOIA requester seeking the same documents." (Appellee's Br. at 36)(emphasis added). However, Plaintiff does not argue that he is somehow more entitled to the release of this information than, say, Mother Theresa (one of Peltier's past supporters). The point is that the public interest in this case is inescapably overwhelming. That Leonard Peltier is making this FOIA request does not render it less valid than were Archbishop Desmond Tutu (another one of Peltier's supporters) making the request. However, the Magistrate Judge and district court

remained, at the Government's urging, obstinately focused on the fact that Plaintiff was incarcerated and would, in the court's view, seek to use disclosed information for the purposes of a collateral attack on his conviction. By limiting the public interest calculus to an interest in bringing a collateral attack on Peltier's conviction, the court below improperly imposed an utterly arbitrary (and often insurmountable) burden on incarcerated individuals seeking information from the federal government pursuant to FOIA.

B. The Relevant Public Interest In Names And Identifying Information Is Well Documented In The Record Of This Litigation.

The Government acknowledges that the public interest in disclosure is relevant in the balancing test applied by courts under FOIA exemptions, including Exception 7(c). (Appellee's Br. at 37). Furthermore, all parties agree that a "core purpose" of FOIA is to enlighten citizens as to how they are governed, or to shed light on "what the[] government is up to." (Appellee's Br. at 39 quoting Department of Justice v. Reporters Committee for Freedom of the Press ("Reporters Committee"), 489 U.S. 749, 773 (1989)). However, Appellee incorrectly concludes that the disclosure of the withheld information "will provide no additional information that would shed light on the FBI's performance of its duties." (Appellee's Br. at 41). Furthermore, Appellee astonishingly claims that Plaintiff "never identifies any relevant public interest in disclosure of the names or

other identifying information that would outweigh the individual interests in privacy and confidentiality." (Appellee's Br. at 37-38).

It is as if the FBI has amnesiastically erased the entire record in this proceeding. Throughout this litigation, Plaintiff has argued that release of this information will, at long last, disclose to the public the FBI's unconstitutional and utterly unethical efforts to "compromise attorney-client communications of AIM members by using informants." (R&R at 10)(A. 180)(Magistrate Judge Nelson discussing Plaintiff's arguments for disclosure).

In the summary judgment briefings below, Plaintiff made inexplicably clear that disclosure would allow Plaintiff to determine if the FBI was engaging in activities designed to violate attorney-client communications between AIM members and their attorneys. See, e.g., Pl. Mem. of Law In Opp. To Appellee's Mot. for Summ. J. at 2 (discussing the need for access to documents in unredacted form, including the Government's violation of rights through the use of "FBI informants gaining access to [ ] legal defense" communications). Plaintiff has discussed in the district court and before this Court the undisputed fact that AIM was targeted by a number of Counterintelligence Program (COINTELPRO) type activities by the FBI. (Peltier Br. 9-13; Pl. Mem. of Law In Opp. To Def.'s Mot. for Sum. J. at 7). Plaintiff has discussed, at length,

> [o]ne of the COINTELPRO-type tactics used by the FBI and, in particular against AIM, was the infiltration of defense camps, and

> hence the attorney-client privilege, by paid informants. Douglass Frank Durham was one confidential source who infiltrated the highest levels of AIM and who was exposed on March 7, 1975. See United States v. Dodge, 538 F.2d 770, 777 (8th Cir. 1976).

(Pl. Mem. of Law In Opp. To Def.'s Mot. for Summ. J. at 7-8). Mr. Durham, as Plaintiff described to the court below, was allegedly advised by the FBI not to engage in any activity that would violate confidences of the defense, but testified before the Untied 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.'" See Pl. Mem. of Law In Opp. To Def.'s Mot. for Summ. J. at 8. Plaintiff is not motivated by mere conjecture; Plaintiff is propelled by the now established strategy of the FBI to authorize the infiltration of privileged discussions between criminal defendants and their attorneys.

The systematic interference with core constitutional liberties, like the right to counsel, certainly falls safely within the core prong of FOIA's purpose to "shed light on an agency's performance of its statutory duties." Reporters Committee, 489 U.S. at 773. The Government's invocation of Exemption 7(C), withholding documents "relating to third parties" affiliated with the FBI, (Appellee's Br. at 39), makes it impossible for Plaintiff to determine the full extent of the FBI's abuse of power. Disclosure of the names of FBI informants and cooperators is the only way to determine how widespread the FBI's fundamental abrogation of attorney-client

privilege was, and how deep its utter disregard for constitutional boundaries penetrated. The singular significance of the withheld names—identifying individual informants and FBI operatives present during privileged defense strategy sessions—cannot be understated.

To write-off the public interest of the numerous intellectual, cultural, and political leaders cited in Plaintiff's opening brief as merely "generalized"' interest that is "unhelpful in the balancing process mandated by FOIA" is naive and unfortunate. (Appellee's Br. at 39). The Supreme Court in Favish noted that "the balancing exercise…might require us to make a somewhat more precise determination regarding the significance of the public interest and the historical importance of the events in question." National Archives and Records Administration v. Favish, 541 U.S. 157, 175 (2004)(emphasis added). The "historical importance," id., of the Peltier investigation and prosecution has been well documented. The significance of the names contained in the withheld documents will demonstrate—and is the only mechanism *to* demonstrate—the FBI's systematic sabotage of criminal defendants' right to counsel and evisceration of attorney-client privilege in the context of a highly politicized campaign against Native peoples and political activists.

Despite the Government's protestations to the contrary, even the most casual review of the record below demonstrates that this point was repeatedly emphasized, and ultimately (and improperly) ignored by the court below.

III. THE DISTRICT COURT HAD A DUTY TO EXAMINE WHETHER, IN THE PAST THREE DECADES OF PROSECUTIONS, ANY OF ITS SOURCES WAIVED PROMISES OF CONFIDENTIALITY.

In its discussion of waiver of confidentiality, the Government urges this Court to adopt a blanket rule that once an individual is promised confidentiality, his or her public testimony never constitutes a waiver of that promise. The Government then, gets to use the promise of confidentiality both as a sword and a shield. The Government is free to violate its "promise" of confidentiality whenever it is convenient to use the confidential source as a witness, but when a citizen desires information, the Government asserts the "promise" of confidentiality. Like much of the Government's argument, little law and less logic supports it.

The Government disingenuously asserts that "seven circuits" have held that public testimony does not waive a promise of confidentiality, and urges this Court to adopt the same rule. (Appellee's Br. at 43.) The Government ignores the fact that most of these cases do not survive the Supreme Court's holding in Landano, 508 U.S. at 174-175, the logic of which undercuts the Government's argument and the express language of which refused to endorse the line of cases cited by the

Government. The Government mangles the holding in Irons v. FBI, 880 F.2d 1446 (1st Cir. 1989)(en banc), ignoring that the Irons court specifically held 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 confidentiality in the first place; and sometimes it might show that an assurance was intended to expire after a certain time.

Id. at 1448. The Government ignores the thoughtful and well-reasoned district court cases that have found waiver, except to dismiss them as "only two district court opinions." (Appellee's Br. at 43).

Having distorted the jurisprudence in this area to manufacture a spurious consensus, the Government goes on to try its hand at the policy reasons that Peltier's argument should fail. First, the Government claims that the language of 7(D) does not "contemplate a waiver . . . ." (Appellee's Br. at 44). It is unclear what the Government means by "contemplate." There is no express provision for waiver in the language of the statute, but this is true of almost all statutory and constitutional enactments that create protections and rights. Waiver, of its nature, tends to be a judicially-created doctrine rooted in concepts of fundamental fairness. Its purpose is to prevent the unfairness of allowing the holder of a right or privilege to make selective, favorable disclosures while claiming shelter for the facts that are less favorable. The government is not permitted to cherry-pick its informants for public disclosure while hiding the cherry-pits under a cover of confidentiality.

See, e.g., Koch v. Cox, 483 F.3d 384 (D.C. Cir. 2007); Tennenbaum v. Deloitte & Touche, 77 F.3d 371 (9th Cir. 1996). Second, the Government correctly notes that FOIA did not intend to hinder the ability of law enforcement to recruit and maintain sources. (Appellee's Br. at 45). But the waiver doctrine does not hinder the FBI's ability to recruit informants; it merely hinders the FBI's ability to violate its own promises of confidentiality, at its convenience, then invoke them when full disclosure may become embarrassing. Third, the Government correctly notes that cases have "broadly interpreted the protection in Exemption 7(D)." (Appellee's Br. at 45). But "broadly" does not mean "without limitation." The sources are indeed entitled to broad protection until they waive that protection; for example, by testifying in one of the most carefully studied trials in the history of the Eighth Circuit. Fourth, the Government argues that a "promise" of confidentiality should not be "broken based on subsequent events." As a general matter, that is correct. Promises should be kept. Mom, if not the law, taught us that. But protections can be waived and promises sometimes do come with expiration dates. Whether a person providing information in a case involving the murder of two FBI agents believed that his or her information and identity would forever remain secret does not, as the Government insists, "beg[] the question." (Appellee's Br. at 45). It *is* the question. Lastly, the Government asserts that "a waiver rule would not be workable." Id. Why? Courts routinely make determinations of waiver in almost

all areas of litigation. Hearings are conducted, evidence taken, and facts found in areas as diverse as whether a defendant waived his right to counsel before speaking with the police, to whether certain claims or defenses are waived by the subsequent conduct of litigants. Indeed, scarcely any case reaches this Court without one party, or the other, claiming someone waived something. The Government offers no explanation as to why, suddenly, waiver in the context of FOIA presents obstacles so great that the court system of the United States of America is simply not up to the task of surmounting them.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing Brief for Plaintiff-Appellant Leonard Peltier complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). This Brief contains 5,815 words, as counted by Microsoft Office Word 2003.

2. I further certify that 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). This Brief has been prepared in a proportionally-spaced typeface using Times New Roman 14 point font (Microsoft Office Word 2003).

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Dated: October 9, 2007

ANTI-VIRUS CERTIFICATION

I, David Pressman, certify that I have had the electronic version of the enclosed Reply Brief for Plaintiff-Appellant Leonard Peltier, 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: October 9, 2007