

2013

The Leonard Peltier Case: An Argument in Support of Executive Clemency Based on Norms of International Human Rights

Joseph Ezzo

Follow this and additional works at: <http://digitalcommons.law.ou.edu/ailr>



Part of the [Criminal Law Commons](#), and the [Indian and Aboriginal Law Commons](#)

Recommended Citation

Joseph Ezzo, *The Leonard Peltier Case: An Argument in Support of Executive Clemency Based on Norms of International Human Rights*, 38 AM. INDIAN L. REV. 35 (2013), <http://digitalcommons.law.ou.edu/ailr/vol38/iss1/2>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized administrator of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

THE LEONARD PELTIER CASE: AN ARGUMENT IN SUPPORT OF EXECUTIVE CLEMENCY BASED ON NORMS OF INTERNATIONAL HUMAN RIGHTS

Joseph Ezzo*

Introduction

*No, I'm not the guilty one here; I'm not the one who should be called a criminal—white racist America is the criminal for the destruction of our lands and my people; to hide your guilt from the decent human beings in America and around the world, you will sentence me to two consecutive life terms without any hesitation.*¹

Leonard Peltier, an American Indian Movement (AIM) leader, spoke these words while standing before the trial judge awaiting his sentence six weeks after being convicted of the first-degree murders of two FBI agents. He concluded his statement by saying, “The only thing I’m guilty of and which I was convicted for was being Chippewa and Sioux blood and for believing in our sacred religion.”² Undaunted, trial judge, Paul Benson, responded, “You profess to be an activist for your people, but you are a disservice to Native Americans.”³ He then sentenced Peltier to two consecutive life sentences.⁴ The date was June 1, 1977; Peltier was thirty-two years old at the time.⁵ Today he is sixty-nine, in failing health, and remains in federal prison for the murders of FBI Agents Jack Coler and Ronald Williams.⁶

* Pima County Public Defender’s Office, Tucson, Arizona. J.D., University of Arizona James E. Rogers College of Law (2012); Ph.D. (Anthropology), University of Wisconsin (1991); M.A. (Anthropology), University of Arizona (1984); B.A. (Anthropology), Vanderbilt University (1979).

1. JIM MESSERSCHMIDT, *THE TRIAL OF LEONARD PELTIER* 114-15 (1983).
2. *Id.* at 116.
3. *Id.*
4. *Id.*
5. See Jeremy Strathman, *Leonard Peltier Trial: A Chronology*, FAMOUS TRIALS, <http://law2.umkc.edu/faculty/projects/ftrials/peltier/peltierchrono.html> (last visited Dec. 8, 2013).
6. See Jack Healey, *Human Rights Are Beyond Politics – Justice Should Be Too*, HUFFINGTON POST (Dec. 24, 2012, 9:29 AM), http://www.huffingtonpost.com/jack-healey/human-rights-are-beyond-p_b_2357065.html.

To some, Leonard Peltier is a hero; a warrior; a political prisoner; and a modern symbol of centuries of discrimination, persecution, and marginalization of the American Indian by the United States government and its institutions.⁷ Support for executive clemency has come from all over the globe, from organizations such as Amnesty International and the American Indian Movement, to individuals such as Archbishop Desmond Tutu, the Dalai Lama, and the Archbishop of Canterbury.⁸ When President Bill Clinton was considering granting Peltier executive clemency, the petition included an endorsement from these organizations as well as the European Parliament.⁹

But to others, Peltier is a cold-blooded, amoral murderer who cleverly manipulated the media and played upon public sympathy to create a fictitious, larger-than-life persona,¹⁰ to wit:

Because of his own growing self-indulgence and notoriety, something greater, albeit more remarkable, was needed. The Myth of Leonard Peltier needed the Agents' deaths to be something other than just a coincidence. Unless it was otherwise, a haphazard encounter would diminish his developing mythical stature. It would not have allowed him, in retrospect, to rise to the occasion and lead his People out of harm's way. . . . Leonard Peltier is no longer the same person he was on June 26, 1975. That American Indian does not exist; just the Myth of Leonard Peltier remains. Only the Myth can now say that he never regretted he stood up and protected his people, and that the murder of the agents that day was not a crime.¹¹

Wherever the reality may ultimately lie, Peltier's case is especially troubling to anyone concerned with justice and human rights. This article

7. There are many websites devoted to having Peltier freed from prison. *See, e.g.*, LEONARD PELTIER DEFENSE COMMITTEE, <http://www.leonardpeltier.org> (last visited Aug. 23, 2013); LEONARD PELTIER DEFENSE OFFENSE COMMITTEE, <http://www.whoisleonardpeltier.info> (last visited Aug. 23, 2013).

8. Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA Patriot Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1086 n.163 (2002); *see also* AMNESTY INT'L, HUMAN RIGHTS VIOLATIONS AGAINST THE INDIGENOUS PEOPLES OF THE AMERICAS 84-86 (1992).

9. Saito, *supra* note 8, at 1086 n.163.

10. An entire website is devoted to seeing that Peltier remains in prison. *See* NO PAROLE PELTIER ASS'N, <http://www.noparolepeltier.com> (last visited Aug. 23, 2013).

11. Ed Woods, *The Myth of Leonard Peltier*, NO PAROLE PELTIER ASS'N (Nov. 14, 2000), <http://www.noparolepeltier.com/myth.html>.

reviews and analyzes his case in light of possible constitutional and international human rights violations during trial. It concludes with an examination of whether Peltier is entitled to executive clemency.

I. The Essential Facts

On June 25, 1975, FBI Special Agents Jack Coler and Ron Williams were in Oglala, South Dakota, along with a Bureau of Indian Affairs (BIA) policeman, Robert Ecoffey, and another BIA officer, Glenn Littlebird.¹² They were searching for AIM member Jimmy Eagle on an outstanding warrant for robbery.¹³ After asking around at a few residences, they were eventually told Eagle had left in a red pickup truck.¹⁴ Shortly afterward, the men spotted three Indian youths walking toward the highway and detained them thinking one of them might be Eagle.¹⁵ The officers found a rolled-up towel containing an ammunition clip on one of the youths and took all three to the Oglala jail pending identification.¹⁶ They were released after being identified as Michael Anderson, Wilford Draper, and Norman Charles, three members of AIM.¹⁷

The three then went to the Jumping Bull Compound where a number of AIM members, including Peltier, had gathered to protect members and sympathizers who were being terrorized by Dick Wilson, tribal council chairman of the Pine Ridge Reservation, along with his brutal tribal police force known as the GOONs (Guardians of the Oglala Nation).¹⁸

Coler and Williams entered the Pine Ridge Reservation the next morning, June 26, 1975, to renew their search for Eagle.¹⁹ They followed a vehicle to the Jumping Bull Compound where the vehicle stopped.²⁰ The vehicle was red and white, but whether it was a pickup truck like the

12. MESSERSCHMIDT, *supra* note 1, at 39.

13. *Id.*

14. *Id.* at 39, 42.

15. *Id.* at 42.

16. *Id.*

17. *Id.*

18. *See id.*; PETER MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE 129 (1983); Douglas O. Linder, *The Leonard Peltier Trial*, FAMOUS TRIALS (2006), <http://law2.umkc.edu/faculty/projects/ftrials/peltier/peltieraccount.html>. Wilson was virulently anti-AIM and outlawed not only the movement on the Pine Ridge Reservation but also the sun dance. MATTHIESSEN, *supra*, at 129, 131. His violent tactics resulted in the Pine Ridge Reservation having the highest crime rate in the entire United States. *Id.* at 134. Wilson and the GOONs worked closely with the FBI in early 1975 to rid the reservation of AIM activity. *Id.* at 133.

19. MESSERSCHMIDT, *supra* note 1, at 44.

20. *Id.*

vehicle in which Eagle had purportedly left in the day before remains in controversy.²¹ Shortly thereafter, a firefight ensued and both agents were killed along with AIM member, Joe Stuntz.²²

Coler and Williams had communicated by radio that they were following the vehicle, were being shot at, and subsequently, were needing assistance.²³ As other agents arrived on the scene, they encountered fire and had to retreat.²⁴ Additional agents and BIA officers arrived throughout the afternoon. With the help of a local, they were able to negotiate a cease-fire and make it to the dead agents' cars.²⁵ After negotiations, the officers began an assault on the compound with tear gas; however, the buildings were empty because the remaining AIM shooters were in the hills about a quarter-mile away.²⁶ By dusk the FBI had secured the Jumping Bull Compound, and the AIM members involved in the firefight had fled.²⁷

Ultimately four AIM members—Bob Robideau, Dino Butler, Jimmy Eagle, and Leonard Peltier—were indicted for the agents' murders. Robideau and Butler were tried together in federal court in Cedar Rapids, Iowa. The defendants argued self-defense and were acquitted in July 1976.²⁸ Charges were eventually dropped against Eagle when it became clear he was not present at the firefight.²⁹

Peltier fled to Canada in February 1976, where he was subsequently arrested and held.³⁰ The U.S. government successfully extradited him back to the United States, in part by using affidavits by Myrtle Poor Bear, an Indian woman who claimed to have witnessed the firefights.³¹ After a five and a half week trial in the federal district court of Fargo, North Dakota, he was found guilty of two counts of first-degree murder and sentenced to two consecutive life sentences.³²

The trial was complex and contentious, with both the prosecution and the defense making claims that various actions during trial were prejudicial. The inconsistencies and evidence of government misconduct will be

21. *Id.* at 42, 44.

22. *Id.* at 48.

23. *Id.* at 44.

24. *Id.* at 45.

25. *Id.* at 48.

26. *Id.*

27. *Id.* at 48-49.

28. *Id.* at 38.

29. *Id.*

30. *Id.* at 31.

31. See discussion *infra* Part III.C.

32. MESSERSCHMIDT, *supra* note 1, at 38, 116.

explored in various sections of this article. However, before examining these points of controversy, it is necessary to present the FBI's perspective on Peltier and the Pine Ridge Reservation murders.

II. FBI Account of the Firefight and Trial

The FBI's account of the murders highlights an increase in crime on the Pine Ridge Reservation attributed to the factionalism that existed between Indian traditionalists and AIM members.³³ The description of Peltier's AIM membership focuses solely on his criminal activity.³⁴ From the viewpoint of the FBI, agents Coler and Williams unwittingly entered a climate of fear and violence created by AIM's presence on the reservation.³⁵

The agents were alleged to have been on the reservation to serve Jimmy Eagle with an arrest warrant. However, the account does not discuss how the FBI obtained information as to Eagle's whereabouts, nor is there mention that Eagle was anywhere near the reservation on the date of the incident.³⁶

Once on the reservation, the agents were allegedly told that Eagle had just left the area in a red vehicle. The FBI's version of the reservation murders (which they came to refer to as RESMURS) acknowledged there was a discrepancy in what FBI agents heard in radio transmission from Coler and Williams regarding a red vehicle.³⁷ However, the account also asserts that the one vehicle present at the Jumping Bull Compound was Peltier's red and white suburban.³⁸

The FBI account goes on to state that the ensuing firefight lasted about ten minutes, during which time both agents fired no more than five rounds, whereas their vehicles alone had 125 bullet holes.³⁹ Agent Williams radioed to other FBI agents that both he and Coler had been hit.⁴⁰ Once agents arrived on the scene, they were pinned down with sporadic "sniper fire" such that they were not able to recover the bodies of Coler and Williams

33. See *The RESMURS Case*, FED. BUREAU OF INVESTIGATION, MINNEAPOLIS DIVISION, <http://www.fbi.gov/minneapolis/about-us/history-1/the-resmurs-case> (last visited Sept. 9, 2013).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

until approximately 4:25 that afternoon.⁴¹ Agents noted that both had been killed at close range with shots to the head by a .223 bullet, and that three .223 bullets had struck the agents.⁴² Peltier was identified by witnesses as the only person in possession of a weapon that would fire a .223 type bullet at the time of the murders—an AR-15 rifle.⁴³

After the capture of Bob Robideau and Dino Butler, the two were tried for murder in Cedar Rapids, Iowa.⁴⁴ The government's top two witnesses, Michael Anderson and Angie Long Visitor, were unavailable to testify because neither witness could be located.⁴⁵ Additionally, the judge recessed the trial for ten days after the government rested its case to attend a judicial conference, thus allowing the defense extra time to prepare its case.⁴⁶

The defense was also permitted to present the jury with a theory that the "climate of fear" on the Pine Ridge Reservation was primarily due to FBI activity.⁴⁷ Robideau and Butler were both acquitted by reason of self-defense, and the jury foreman stated that the "climate of fear" theory played a role in the verdict.⁴⁸ In contrast, during Peltier's trial, the trial judge excluded much of the FBI background information under a requirement that all evidence be directly relevant to proving Peltier's guilt or innocence.⁴⁹

In describing the Peltier trial, the FBI account states, "Peltier had been indicted not only for the murders, but also on the grounds that he may have been an aider and abettor in the murders."⁵⁰ The account also refers a number of times to "witnesses,"⁵¹ presumably meaning the three youths picked up by Coler and Williams the day before the murders: Michael Anderson, Wilford Draper, and Norman Brown.⁵² The account states unequivocally that the firearms and toolmark identification of the AR-15 rifle supposedly used by Peltier during the firefight was matched to the .223 shell casings at the site of the agents' cars.⁵³

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. MESSERSCHMIDT, *supra* note 1, at 42.

53. *The RESMURS Case*, *supra* note 33. For purposes of this article, the term "firearms and toolmark identification" is used instead of "ballistics analysis." "Ballistics" has come to

The FBI concluded its account of the Peltier case by noting how generous the government was to Peltier throughout the legal proceedings, as if this treatment not only gave Peltier an unfair advantage but was also prejudicial against the government. The account states,

Normally, a federal criminal defendant is entitled to a single court-appointed attorney chosen by rotation. Peltier received five lawyers—two as trial attorneys and three as investigators. All were chosen by Peltier, rather than the normal rotation process, and all were paid for by the government. The defense received almost double the normal number of preemptory challenges during jury selection. Peltier's lawyers were allowed to personally question the jury, which is highly unusual in federal criminal cases. The trial court provided daily transcripts of testimony to the defense, a very expensive measure that is rarely allowed. After his conviction, Peltier was allowed to dismiss four of his five trial attorneys and hire new ones for his appeals.⁵⁴

III. The Points of Controversy

A number of points of controversy frustrate a fair and comprehensive understanding of the Peltier case. This section will focus on those points that pertain to conditions and conduct surrounding the trial, which include: Peltier's extradition from Canada, repeated denials of offers of proof, possible coerced testimony of AIM members, firearms and toolmark identification, discrepancies in vehicle description, and pathology reports on agents Coler and Williams. Before reviewing these points, it is necessary to put them in context by providing a brief treatment of the relationship between the FBI and AIM, as well as the attention paid to Peltier prior to the firefight.

A. The FBI and the American Indian Movement

The FBI's attitude toward American Indians in the 1960s and 1970s might well be summed up in the words of Norman Zigrossi, who served as Assistant Special Agent in charge of the FBI's South Dakota office: "They

be used to describe firearms and toolmark identification in general but actually refers to the motion that firearms create when discharging a projectile. See Adina Schwartz, *Challenging Firearms and Toolmark Identification – Part One*, CHAMPION, Oct. 2008, at 10, 11 [hereinafter Schwartz, *Challenging Firearms*].

54. *The RESMURS Case*, *supra* note 33.

[the Indians] are a conquered nation, and when you are conquered, the people you are conquered by dictate your future. . . . [The FBI must function as] a colonial police force.”⁵⁵

AIM originated in Minneapolis during the summer of 1968 when approximately 200 Indians convened and voiced their frustration over federal Indian policy, discrimination, reservation poverty, and unemployment.⁵⁶ They desired to overcome these obstacles and reclaim their destiny.⁵⁷ In particular, they were frustrated with the continual abrogation of treaty rights by the U.S. government and wanted these rights re-established, enforced, and respected.⁵⁸

In 1972, AIM members went to Washington, D.C. to present President Nixon with a manifesto entitled, “Trail of Broken Treaties 20-Point Position Paper.”⁵⁹ The manifesto dealt largely with the restoration of constitutional treaty-making, the enforcement of current treaties, the governing of Indians through treaties, and government investigations into broken treaties.⁶⁰

This coincided with the election of Dick Wilson as tribal council chair of the Pine Ridge Reservation. Wilson allegedly rigged the election and openly persecuted individuals sympathetic to AIM.⁶¹ These events triggered a protest by AIM in which members seized control of a small community near Wounded Knee, South Dakota in February 1973.⁶² This act brought a swift response from the FBI, which had already begun monitoring AIM activities, and a seventy-two day standoff ensued.⁶³

55. WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WARS AGAINST DOMESTIC DISSENT* 231 (1990) (alteration in original).

56. *American Indian Movement*, MINN. HIST. SOC'Y, http://www.mnhs.org/library/tips/history_topics/93aim.html (last visited Aug. 23, 2013).

57. *See id.*

58. *See* CHURCHILL & VANDER WALL, *supra* note 55, at 233.

59. *See id.* at 234.

60. *See* AM. INDIAN MOVEMENT, *TRAIL OF BROKEN TREATIES: 20-POINT POSITION PAPER* (Oct. 1972), available at <http://www.aimovement.org/archives/index.html>.

61. MATTHIESSEN, *supra* note 18, at 61-62. According to Matthiessen, after the incident at Wounded Knee, Wilson declared “all-out war” on AIM and its sympathizers on the Pine Ridge Reservation, where AIM had been effectively outlawed. *Id.* at 101.

62. VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES* 71-72 (1974).

63. *Id.* at 79. The October 17, 1973 murder of AIM activist Pedro Bissonnette on the Pine Ridge Reservation and the continued harassment of AIM members and sympathizers brought increased tension to the Indians of South Dakota and increasing involvement of the BIA police and the FBI. *Id.* at 99-101. More than two thousand people attended

During this time, Russell Means, an AIM leader, announced on national television that the Oglala Sioux Nation had been formed and was independent of the United States.⁶⁴ He argued that the 1868 treaty with the U.S. government gave the Oglala Sioux the right to determine its borders and that anyone who violated the borders would be shot.⁶⁵ Meanwhile, the FBI had recruited informants to infiltrate AIM. One of them, Doug Durham, held a number of prominent positions within AIM.⁶⁶ Three years later, Durham testified before a Senate subcommittee on his activities. He claimed that AIM was responsible for a large number of deaths of Indians and non-Indians, that it had powerful Communist ties to various governments (including Fidel Castro) and organizations, and that its ultimate goal was to overthrow the U.S. government.⁶⁷

Although the FBI supposedly dismantled its Counterintelligence Program (known as COINTELPRO) in 1971, counterintelligence operations against social and political groups continued unabated throughout the 1970s.⁶⁸ By early 1973, the FBI was closely monitoring developments

Bissonnette's funeral, which was guarded by AIM security patrols, including a West Coast detail headed by Jim Robideau and Leonard Peltier. *Id.* at 102-03.

64. *Id.* at 77-78.

65. *Id.*

66. *Revolutionary Activities Within the United States: The American Indian Movement: Rep. of the Subcomm. to Investigate the Admin. of the Internal Sec. Act & Other Internal Sec. Laws of the S. Comm. on the Judiciary*, 94th Cong. 5 (1976) (statement of Douglas Durham, FBI).

67. *See id.* at 2-4. The purpose of the hearing, according to subcommittee chairman, Senator James Eastland, was to determine "whether there is, in fact, reason for believing that the American Indian Movement is a radical subversive organization rather than an organization committed to improving the lot of the American Indians." *Id.* at 2. The subcommittee was also looking for "demonstrable ties" between AIM and "the various Communist movements that exist in our country." *Id.*

68. *See* BRIAN GLICK, *WAR AT HOME: COVERT ACTION AGAINST U.S. ACTIVISTS AND WHAT WE CAN DO ABOUT IT* 7-10 (1989). COINTELPRO encouraged FBI field offices to create and implement "schemes to expose, disrupt, misdirect, discredit, or otherwise neutralize" specific targeted groups. *Id.* at 9 (footnote omitted) (internal quotation marks omitted). Field office agents were instructed to work with local police and prosecutors and to seek out friendly media for propaganda purposes. *Id.* Four primary methods of operations were employed: (1) "[i]nfiltration," used mainly to "discredit and disrupt," and at times for the FBI to brand genuine activists as undercover agents; (2) outside "[p]sychological [w]arfare," which included publishing false stories in media, disseminating phony pamphlets and literature, and harassing employers and landlords of activists; (3) "[h]arassment [t]hrough the [l]egal [s]ystem," using perjured testimony and false information to portray activists as criminals and as a pretext to arrest and incarcerate them; and (4) the use of

within AIM.⁶⁹ A memo on “Extremist Matters” from the Denver field office, dated January 12, 1973, indicated that the office had begun collecting information on those they identified as being leaders within AIM.⁷⁰ On May 4, 1973, the FBI’s Acting Director issued a teletype to the Special Agent in Charge (SAC), detailing the need to investigate “all AIM members and unaffiliated Indians arrested or involved in takeover of Wounded Knee”⁷¹ and that a “forceful and penetrative interview program of individual activists should be instituted.”⁷²

In an October 31, 1973 memo out of the Albuquerque office, the FBI described AIM’s occupation of Wounded Knee as possibly violating “Title 18, U.S. Code, Section 2383 (Rebellion or Insurrection) or 2384 (Seditious Conspiracy).”⁷³ By April 1975, the FBI had produced a position paper bearing as the subject “THE USE OF SPECIAL AGENTS OF THE FBI IN A PARAMILITARY LAW ENFORCEMENT OPERATION IN THE INDIAN COUNTRY.”⁷⁴ The report states that “[t]he FBI was instructed by the Department of Justice (DOJ) in the latter part of 1972 to conduct extremist and criminal investigations pertaining to AIM.”⁷⁵ Much of the rest of the report documents the difficulties the FBI experienced operating in a paramilitary role during AIM’s seventy-two day occupation of Wounded Knee. It concludes with a recommendation that if another such incident were to occur, the FBI should be given command and control.⁷⁶

In May 1976, the FBI began leaking teletypes on supposed AIM “Dog Soldiers” to the media, just before the trial of Bob Robideau and Dino Butler took place.⁷⁷ The teletypes alleged AIM had recruited a force of two

“[e]xtralegal [f]orce,” by using breaks-ins, threats, and beatings to frighten and subdue members of targeted groups. *Id.* at 10.

69. *Id.* at 22.

70. Report from FBI Denver Field Office (Jan. 12, 1973), in CHURCHILL & VANDER WALL, *supra* note 55, at 235-36.

71. Teletype from Acting Director, FBI to Special Agent in Charge, Albany (May 4, 1973), in CHURCHILL & VANDER WALL, *supra* note 55, at 260.

72. *Id.* at 261.

73. Memorandum from FBI Albuquerque Field Office (Oct. 31, 1973), in CHURCHILL & VANDER WALL, *supra* note 55, at 246.

74. Memorandum from J. E. O’Connell to Mr. Gebhardt (Apr. 24, 1975), in CHURCHILL & VANDER WALL, *supra* note 55, at 250.

75. Background Paper on the American Indian and the Takeover of Wounded Knee by the American Indian Movement (Apr. 24, 1975), in CHURCHILL & VANDER WALL, *supra* note 55, at 251.

76. *Id.* at 253-54.

77. CHURCHILL & VANDER WALL, *supra* note 55, at 274.

thousand guerillas trained to begin undertaking acts of terrorism.⁷⁸ One teletype claimed that the group, training in the Northwest, was to travel to the Yankton Sioux Reservation in June to attend a traditional dance, which was a cover for their plan to disrupt Second Biennial International Treaty Conference.⁷⁹ Ward Churchill and Jim Vander Wall summed up the FBI's intent for the teletype:

Although Butler-Robideau defense attorney William Kunstler put FBI Director Clarence Kelley on the stand and forced him to admit the Bureau had “not one shred” of evidence to support these allegations, the disinformation continued to generate headlines through the remainder of the trial. . . . [T]his was by conscious design of the FBI rather than through the story's having simply acquired “a life of its own.”⁸⁰

AIM was first listed in the FBI's *Domestic Terrorist Digest* on June 18, 1976,⁸¹ just a month before the acquittal of Robideau and Butler, and barely three months before the Senate subcommittee hearing that involved the statements of Doug Durham. The entry on AIM described two planned incidents: disruption of various celebrations of the nation's Bicentennial on July 4, 1976, reportedly based on an AIM members' statements that AIM planned to ““blow out the candles’ on America's birthday cake;”⁸² and a separate event culminating in an Indian caravan reaching the Little Big Horn River on June 26, 1976 in recognition of the 100th anniversary of Custer's defeat.⁸³ The entry also mentioned a shoot-out in November 1975 between Oregon state police and Indian militants who were in possession of “a large amount of explosives and weapons.”⁸⁴

In summary, it is clear from its actions that the FBI considered AIM a radical and pernicious element in American society that required it to investigate and bring charges against members whenever the opportunity arose. To highlight the significance of these actions, it is important to contrast the FBI's mission with the reality. The FBI characterizes itself as

78. *Id.* at 276.

79. Second “Dog Soldier” Teletype (June 22, 1976), in CHURCHILL & VANDER WALL, *supra* note 55, at 278.

80. CHURCHILL & VANDER WALL, *supra* note 55, at 276 (citations omitted).

81. *Id.* at 274.

82. *Bicentennial Overview*, DOMESTIC TERRORIST DIGEST, June 18, 1976 (vol. 7, no. 3), reprinted in CHURCHILL & VANDER WALL, *supra* note 55, at 275-76.

83. *American Indian Movement (AIM)*, DOMESTIC TERRORIST DIGEST, June 18, 1976 (vol. 7, no. 3), reprinted in CHURCHILL & VANDER WALL, *supra* note 55, at 276.

84. *Id.*

an intelligence-driven and a threat-focused national security organization . . . the mission of. . . [which] is to protect and defend the United States against terrorist and foreign intelligence threats, to uphold and enforce the criminal laws of the United States, and to provide leadership and criminal justice services to federal, state, municipal, and international agencies and partners.⁸⁵

In his autobiography, former FBI Director Louis Freeh articulated the core values of the Bureau as

rigorous obedience to the Constitution of the United States; respect for the dignity of all those we protect; compassion; fairness; and uncompromising personal and institutional integrity Respect for the dignity of all whom we protect reminds us to wield law enforcement powers with restraint and to recognize the natural human tendency to be corrupted by power and to become callous in its exercise. Fairness and compassion ensure that we treat everyone with the highest regard for constitutional, civil, and *human* rights.⁸⁶

In contrast, former agent M. Wesley Swearingen was more pessimistic about the honor and dignity of the Bureau, particularly with regard to its COINTELPRO operations:

Very few citizens know the extent to which the FBI has gone to control our society. The FBI thinks it knows what is best for the country [COINTELPRO] is a threat to our freedom when a police agency in a democracy takes it upon itself to be judge and jury and to decide who should be fired from a job or what newspaper should go out of business It is a sad state of affairs when the FBI, instead of fighting crime, has to investigate activists, lawyers, and professors.⁸⁷

85. *Quick Facts*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/quick-facts> (last visited Dec. 12, 2013).

86. LOUIS J. FREEH, *MY FBI: BRINGING DOWN THE MAFIA, INVESTIGATING BILL CLINTON, AND WAGING WAR ON TERROR* xiii (2005) (emphasis added).

87. M. WESLEY SWEARINGEN, *FBI SECRETS: AN AGENT'S EXPOSE* 110-11 (1994).

Finally, Churchill and Vander Wall have characterized the FBI in stridently critical terms:

[N]ot as the country's foremost crime-fighting agency – an image it has always actively promoted in collaboration with a vast array of “friendly” media representatives and “scholars” – but as America's political police engaged in all manner of extralegality and illegality as expedients to containing and controlling political diversity within the United States.⁸⁸

But why would the FBI choose to monitor and investigate AIM, especially given the marginal status occupied by Indians for well over a century prior to AIM's inception? One explanation involves the U.S. government's determination to access the great mineral wealth beneath Indian reservations. As Peter Mattheissen explained, in 1974,

[T]here was little if any documentation for the suspicion that the great wealth in minerals beneath reservation lands explained the government's remorseless attitude toward militant Indians. Not that a prudent bureaucrat would put such a crass policy in writing; even so, a stronger case could have been made for organized suppression of the Indians' long hope of sovereignty based on the treaty claims, and the vast complications for the government that that entailed. More likely, the government attitude, reflecting the needs of the great multinational corporations, was an outgrowth of both of these considerations; whatever its origins, the repression was carried out.⁸⁹

Jim Messerschmidt explained the government's conduct relating to the murders of agents Coler and Williams similarly. He noted that one-third of low-sulphur strippable coal and eighty percent of uranium in the United States were located on Indian lands at the time of the Pine Ridge Reservation murders.⁹⁰ Yet in 1974, “less than [one-percent] of the uranium leases. . . made to oil companies. . . were producing energy”; the same was true of thirty-six percent of coal leases.⁹¹ In other words, there were vast reserves of energy on Indian lands not being utilized.

Two other considerations also lend support to the theory that the U.S. government had its sights on Indian mineral resources. For one, it is

88. CHURCHILL & VANDER WALL, *supra* note 55, at 1.

89. MATTHEISSEN, *supra* note 18, at 107.

90. MESSERSCHMIDT, *supra* note 1, at 145.

91. *Id.*

important to remember other events that were occurring during this time period. For example, in 1974, the United States experienced the first OPEC oil embargo, thus exposing the public to how vulnerable the country might be with regard to energy resources. Additionally, treaties hindered the U.S. government and corporations from accessing natural resources in Indian Country; thus, breaking treaties became a necessity if such resources were to be profitably accessed and extracted. Interestingly, the repeated violation of Indian treaties by the U.S. government was the primary reason Peltier joined AIM. He stated,

Treaty issues have always been a major concern for Indian people. In every political campaign I can remember, honoring treaties was a focal point. The treaties would have provided for economic growth, adequate health care, education, and our own law enforcement and judicial systems, everything needed for a sovereign government to survive. Most important to us was that the United States government gave its word to Indian people and violated it, which in our culture is a dishonor. We had depended on the government's word only to be betrayed time after time.⁹²

The FBI's intensive effort to neutralize AIM was not an anomaly, but indicative of the way the agency investigated and sought to crush sociopolitical movements it deemed subversive or radical. Other movements during the 1950s, 1960s, and 1970s that felt the sting of the FBI's counterintelligence program included the Black Panthers, the Coalition for a New South, the Students for a Democratic Society, the National Organization for Women, the Weather Underground, and the New Left, just to name a few.⁹³ During its history, COINTELPRO opened no less than two-thousand investigations, some of which were sparked by nothing more than a letter to a newspaper protesting censorship.⁹⁴ This antagonism toward racial and ethnic minorities was present at the FBI's creation in 1908, a time when Jim Crow laws and segregation were acceptable societal forces.⁹⁵

92. Leonard Peltier, *Betrayal, Hope, and the American Judicial System*, 20 N.Y.U. REV. L. & SOC. CHANGE 199, 199 (1993).

93. See S. REP. NO. 94-755, at 26-27 (1976); Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 OHIO N.U. L. REV. 451, 474 (2004).

94. See Wells, *supra* note 93, at 474.

95. KENNETH O'REILLY, RACIAL MATTERS: THE FBI'S SECRET FILE ON BLACK AMERICA, 1960-1972, at 10-12 (1989).

Seen in this context, it should hardly be surprising that the FBI's response to AIM was swift, aggressive, and focused. One of the most effective strategies the FBI employed in crushing "radical" movements was to target key individuals within the movement and find ways to arrest and imprison them. Early in the history of AIM, before the Wounded Knee protest, Leonard Peltier came to the FBI's attention as someone who needed to be taken out of circulation.

B. Leonard Peltier and the FBI

Leonard Peltier had come under the watch of the FBI by February 1975 in connection with a charge of attempted murder of an off-duty police officer in Milwaukee.⁹⁶ Peltier failed to appear for trial on July 30, 1974, and the charge was still outstanding a year later.⁹⁷ The FBI issued a "Wanted" poster in connection with the charge, which describes Peltier as "armed and extremely dangerous."⁹⁸

In the investigation of the Pine Ridge Reservation murders, a teletype sent from the FBI Director claimed Peltier had been identified "running from Jumping Bull residence" on the day of the murders.⁹⁹ Another FBI teletype on developing investigative strategy included the language "lock Peltier and Black Horse [sic] into this case."¹⁰⁰

In July 1976, an urgent teletype was sent to the FBI Director from the Rapid City office analyzing what went wrong in the Robideau-Butler trial.¹⁰¹ It noted that no gag rule was imposed; as a result, the defense could

96. MESSERSCHMIDT, *supra* note 1, at 31. After Peltier's conviction of the murders of agents Coler and Williams, he was acquitted of the Milwaukee charges. *Id.* At trial, witnesses testified that off-duty police officers had severely beaten Peltier during the incident in question. *Id.*

97. *Id.*

98. Fed. Bureau of Investigation, Wanted by the FBI – Leonard Peltier (July 25, 1975) (poster), available at <http://www.whoisleonardpeltier.info/images/wanted.jpg>.

99. Teletype from FBI Director to FBI Field Offices (July 25, 1975), available at http://www.freeleonard.org/foia/resmurs_fbi_buffalofieldoffice.pdf.

100. FBI Daily Summary Teletype (July 16, 1975), in CHURCHILL & VANDER WALL, *supra* note 55, at 272. The identity and involvement of "Frank Blackhorse" is yet another curious twist in the Peltier case. According to Mike Kuzma, one of Peltier's lawyers, Blackhorse was an FBI operative sent to infiltrate and win trust of members of AIM. See Fran Korotzer, *Leonard Peltier Turns 65*, NEXT LEFT NOTES (Sept. 20, 2009), <http://antiauthoritarian.net/NLN/?p=667>. Blackhorse was arrested with Peltier in Canada in February 1976 and returned to the United States, but charges against him relating to the Pine Ridge Reservation murders were dropped. *Id.*

101. Teletype to FBI Director from Rapid City (July 20, 1976), in CHURCHILL & VANDER WALL, *supra* note 55, at 283.

speak freely with the media, and the jury was not sequestered.¹⁰² Reference was also made to a lack of physical evidence linking the defendants to the crime scene, since the casings fired from the agents' handguns were not allowed into evidence even though they were found in the cabin where Butler was arrested.¹⁰³ Finally, the teletype cited a post-trial article from *The Cedar Rapids Gazette*, in which the jury foreman was interviewed and stated that one of the most crucial elements in the trial was that "an atmosphere of fear and violence existed on the reservation and that the defendants arguably could have been shooting in self-defense."¹⁰⁴

A month later, a memo bearing the subject heading "RESMURS – CONTEMPLATED DISMISSAL OF PROSECUTION OF JAMES THEODORE EAGLE; CONTINUING PROSECUTION OF LEONARD PELTIER" detailed a decision to drop charges against Jimmy Eagle "so that the full prosecutive weight of the Federal Government could be directed against Leonard Peltier."¹⁰⁵

The FBI had indicted four Indians for the deaths of agents Coler and Williams. Robideau and Butler had been acquitted, and it was increasingly obvious to the FBI that Jimmy Eagle had not been present at the Jumping Bull Compound the day of the firefight. That left one last possibility for a conviction: Leonard Peltier.

C. Extradition from Canada

Peltier fled to Canada to seek political asylum; he was arrested there on February 6, 1976 and subsequently extradited.¹⁰⁶ The extradition papers submitted to the Canadian government included affidavits by Myrtle Poor Bear claiming she was Peltier's girlfriend, was with Peltier at the Jumping Bull Compound, and was a witness to the killings.¹⁰⁷ In addition, she stated that Peltier admitted responsibility for the killings to her.¹⁰⁸

Myrtle Poor Bear provided the U.S. government with three affidavits dated February 19, February 23, and March 31, 1976. In the first affidavit, which was not included as part of the extradition package, she stated that

102. *Id.*, in CHURCHILL & VANDER WALL, *supra* note 55, at 285.

103. *Id.*, in CHURCHILL & VANDER WALL, *supra* note 55, at 284.

104. *Id.*, in CHURCHILL & VANDER WALL, *supra* note 55, at 286.

105. Memorandum from B. H. Cooke to Mr. Gallagher (Aug. 10, 1976), in CHURCHILL & VANDER WALL, *supra* note 55, at 287.

106. MESSERSCHMIDT, *supra* note 1, at 31.

107. *Id.* at 78-79.

108. *Id.*

Peltier “gave orders on what was to be done.”¹⁰⁹ During the second week of June 1975, Peltier and others began planning to kill various government officials.¹¹⁰ Poor Bear alleged Peltier knew agents were coming to the Jumping Bull compound the day before agents Coler and Williams arrived, that he told people to prepare to kill them, and that he instructed Poor Bear to get ready to escape.¹¹¹ In this first affidavit, Poor Bear also claimed to have left the compound the night before the shootings and thus was not present at the firefight.¹¹²

Four days later, her story changed rather dramatically. In the February 23 affidavit, Poor Bear claimed she was at the firefight: “I was present the day the Special Agents of the Federal Bureau of Investigation were killed. I saw Leonard Peltier shoot the FBI agents.”¹¹³

The March 31 affidavit told a more detailed and incriminating version of the killings. Here, Poor Bear alleged she saw an agent with a handgun confront Peltier, who was holding a rifle.¹¹⁴ Poor Bear said that when the agent surrendered, she attempted to flee but was restrained by another person.¹¹⁵ She then heard a gunshot, saw Peltier’s rifle jerk up, and saw the FBI agent’s body jump into the air and come face down on the ground.¹¹⁶ She heard additional shots fired as she left the area.¹¹⁷

During the extradition, Bill Halprin was the Department of Justice prosecutor acting on behalf of the United States.¹¹⁸ Halprin claimed he was unaware of the February 19 affidavit but would have submitted it as part of the extradition had he known of it.¹¹⁹

During the appeal of his conviction, Peltier claimed that the United States had violated the Webster-Ashburton Treaty in the matter of his

109. Poor Bear Affidavit (Feb. 19, 1976), in CHURCHILL & VANDER WALL, *supra* note 55, at 288.

110. *Id.*

111. *Id.*

112. *Id.*

113. Poor Bear Affidavit (Feb. 23, 1976), in CHURCHILL & VANDER WALL, *supra* note 55, at 289.

114. Poor Bear Affidavit (Mar. 31, 1976), in CHURCHILL & VANDER WALL, *supra* note 55, at 290.

115. *Id.* at 290-91.

116. *Id.* at 291.

117. *Id.*

118. L. Erin McKey, *Canada’s Effort to Have the “Poor Bear” Episode Explained*, UNITED STATES V. PELTIER FILE REVIEW (Oct. 15, 1999), <http://www.aics.org/LP/extrad76.html>.

119. *Id.*

extradition.¹²⁰ Signed by the United States and Great Britain in 1842, the critical text of the treaty is found in Article X, which reads,

It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their Ministers, Officers, or authorities, respectively made, deliver up to justice, all persons who, being charged with the crime of murder, or assault with intent to commit murder, or Piracy, or arson, or robbery, or Forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged, shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed.¹²¹

D. Denial of Offer of Proof

Peltier's defense at trial offered Myrtle Poor Bear's testimony "to demonstrate how the FBI intentionally and falsely constructed a case against Peltier by introducing certain pieces of evidence through particular witnesses, but that these pieces were flawed."¹²² During her testimony, Poor Bear stated that she had never met Peltier, that she was not his girlfriend, and that she was not at the Jumping Bull compound the day of the firefight.¹²³ Further, she claimed to have been very frightened of the FBI agents who interviewed her as they had threatened her with a fifteen-year prison sentence if she did not cooperate and repeatedly made references to Anna Mae Aquash, an Indian activist who had died under mysterious circumstances.¹²⁴ She also claimed to have signed two of the affidavits without having read them.¹²⁵

Judge Paul Benson did not allow any of this testimony to be heard by the jury.¹²⁶ Benson held that Poor Bear was under great stress, was not credible as a witness, and her testimony was likely to prejudice the prosecution.¹²⁷ The prosecutor, Lynn Crooks, agreed, stating that such testimony would

120. United States v. Peltier, 585 F.2d 314, 320 (8th Cir. 1978).

121. Webster-Ashburton Treaty, U.S.-Gr. Brit., art. X, Aug. 22, 1942, 8 Stat. 572.

122. MESSERSCHMIDT, *supra* note 1, at 84.

123. *Id.* at 83.

124. *Id.*

125. *Id.* at 83-84.

126. *Id.* at 85.

127. *Id.*

deflect attention from the case and make it appear that it was the government, and not Peltier, who was on trial.¹²⁸

E. Possible Coerced Testimony

Two of the three young AIM members picked up by agents Coler and Williams the day before the fire, Michael Anderson and Wilford Draper, along with a third AIM member, Norman Brown, testified as government witnesses during the Peltier trial.¹²⁹ Under cross-examination, they all claimed to have been coerced into giving false testimony by the FBI.¹³⁰ Although the government referred to each of the three as “eyewitnesses” to the murders, none of them testified that they actually saw Peltier shoot and kill Coler and Williams.¹³¹

Anderson’s testimony during direct examination appeared to be self-impeaching. He first stated that he had seen Leonard Peltier along the tree line shooting at the FBI agents.¹³² He also said he did not see anyone by the agents’ cars but then later claimed to have seen Peltier standing by them.¹³³ When he took a final look in the direction of the agents’ cars, he saw neither people nor vehicles.¹³⁴ Anderson had been interviewed about the murders on September 11, 1975 by FBI Special Agents Gary Adams and O. Victor Harvey; during cross-examination Anderson claimed that Adams threatened to beat him if he did not produce answers the agents desired.¹³⁵

Wilford Draper testified on direct that he heard the shooting during the fire but had gone and hidden in a ravine.¹³⁶ FBI Special Agents Doyle and Stapleton interrogated Draper following an arrest for alcohol and robbery charges in January 1976.¹³⁷ According to Draper’s testimony under cross-examination, the FBI warned him that if he failed to cooperate, he would be indicted for the murders of agents Coler and Williams.¹³⁸ He was also promised a new identity, job training, a job, and financial security if he

128. *Id.*

129. *Id.* at 64.

130. *Id.*

131. *Id.*

132. *Id.* at 66.

133. *Id.*

134. *Id.*

135. *Id.* at 72-73.

136. *Id.* at 67.

137. *Id.* at 75.

138. *Id.*

cooperated, as well as having the pending criminal charges against him dropped.¹³⁹

Norman Brown was brought to Sioux Falls, South Dakota in January 1976 to testify in front of a grand jury. Brown claimed to have seen Peltier, Bob Robideau, and Dino Butler near the agents' cars;¹⁴⁰ however, he recanted this testimony during the Peltier trial.¹⁴¹ When cross-examined, he alleged that he made the statements to the grand jury because he thought that was what the government wanted him to say.¹⁴²

F. Firearms and Toolmark Identification

1. The Evidence in the Peltier Case

Because the FBI considered a single .223 cartridge found in the trunk of Agent Coler's car to be an inculpatory piece of evidence against Peltier,¹⁴³ the controversy surrounding the firearms and toolmark identification is central to understanding the conviction and subsequent denial of Peltier's appeals.

The AR-15 rifle that Peltier used during the firefight was recovered from a car that exploded on a turnpike near Wichita, Kansas on September 10, 1975.¹⁴⁴ The vehicle was carrying Michael Anderson, Bob Robideau, Norman Charles, and three others. The car also contained a variety of weapons and explosives.¹⁴⁵ The firing pin of the AR-15 was badly damaged in the explosion, impairing the ability of Special Agent Evan Hodge, the ballistics specialist on the case, to perform analysis on it.¹⁴⁶ Two other weapons and the .223 shell casings were given to Hodge to analyze.¹⁴⁷

At Peltier's trial, the government produced a ballistics report from Hodge in which he could not connect any of the weapons he analyzed with the firefight at Pine Ridge.¹⁴⁸ While under oath, Hodge confirmed that he had written the report and stood by his findings.¹⁴⁹ However, Hodge maintained

139. *Id.*

140. *Id.* at 76-77.

141. *Id.* at 77.

142. *Id.*

143. *Id.* at 91.

144. *Id.* at 90.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

he had not yet looked at all of the .223 casings at the time of the report, particularly the casing found in the trunk of Agent Coler's car.¹⁵⁰

In February 1976, Hodge signed an affidavit while under oath claiming that he could connect the .223 casing in question with the AR-15 rifle extracted from the vehicle explosion.¹⁵¹ Because the AR-15 could not be fired, Hodge removed the bolt from it and placed it in another AR-15 and test-fired it.¹⁵² At trial, he explained to the jury that a firing test with the original firing pin was not possible because of how badly it was damaged.¹⁵³

Several inconsistent facts regarding Hodge's testimony emerged once Peltier's lawyers were able to obtain FBI correspondence.¹⁵⁴ One of the documents revealed that the .223 casing in question had arrived for Hodge to analyze sometime in July 1975, but he did not analyze it until December or January.¹⁵⁵ A September 27, 1975 teletype from the Rapid City FBI office to Washington specifically requested that the AR-15 from the exploded vehicle be matched against the casings found at the fire, particularly the one found in the trunk of Coler's car.¹⁵⁶ Five days later, the October 2 report from Hodge was sent via teletype to the Rapid City office, in which the comparisons between the casings and the AR-15 proved negative.¹⁵⁷ Given the interest of the Rapid City office in the specific .223 casing from the trunk of Agent Coler's car, Hodge's claim that he received no priority instructions contradicts good law enforcement policy for gathering evidence discussed above, particularly for a case of this magnitude.

The inconsistencies in protocol, prioritization, and analysis tend to discredit the firearms and toolmark identification evidence. In addition to the specifics of the Peltier case, there are unresolved fundamental issues regarding the use of firearms and toolmark identification in criminal trials in general. These concerns are highlighted in the following section.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 91.

155. *Id.*

156. *Id.* at 91-92.

157. *Id.* at 92.

2. Firearms and Toolmark Identification: "Science" Without Foundation

The strongest evidence proffered by the government in its case against Peltier was the firearms and toolmark identification, the so-called ballistics evidence. However, this type of forensic analysis has recently been shown to lack reliability and a firm scientific foundation, and thus is increasingly being restricted in courtrooms.

Professor Adina Schwartz succinctly described the practice: "The premise underlying firearms and toolmark identification is that a tool, such as a firearm barrel, leaves a unique toolmark on an object, such as a bullet. An equally crucial premise is that toolmarks are reproducible."¹⁵⁸ Professor Schwartz identified three ways in which toolmarks may be misidentified:

(1) the individual characteristics of toolmarks are comprised of non-unique marks, (2) subclass characteristics shared by more than one tool may be confused with individual characteristics unique to one and only one tool, and (3) the individual characteristics of the marks made by a particular tool change over time.¹⁵⁹

The first misidentification problem is analogous to the nuances of fingerprint and DNA analysis.¹⁶⁰ As Professor Schwartz explained,

As a result of the overlapping individual characteristics of toolmarks made by different tools, examiners who assume that a certain amount of resemblance proves that the same tool produced both test and evidence toolmarks may be wrong because the same amount of resemblance may exist in toolmarks produced by different tools of that type.¹⁶¹

The second and third misidentifications are far more problematic.¹⁶² With regard to the second, manufacturing processes tend to create tools and firearms with a uniform design, so that they have the same "subclass characteristics" and therefore lack the unique nature of fingerprints or DNA analysis.¹⁶³ The third concern relates to the changes in the firearm over time

158. Schwartz, *Challenging Firearms*, *supra* note 53, at 11.

159. Adina Schwartz, *A Systemic Challenge to the Reliability and Admissibility of Firearms and Toolmark Identifications*, 6 COLUM. SCI. & TECH. L. REV. 2, 5 (2005).

160. *Id.* at 11.

161. *Id.* at 13.

162. *Id.* at 11.

163. *Id.* at 18.

and how this can affect toolmarks.¹⁶⁴ Unlike an individual's DNA, which remains constant throughout the lifetime, toolmarks change with the weapon's use and age.¹⁶⁵

Professor Schwartz states that examiners often ignore the second and third misidentifications: “[I]nstead, they fundamentally mislead judges and juries (and perhaps themselves) by claiming to be able to single out a particular firearm or other tool as *the* source of an evidence toolmark, to the exclusion of all other tools in the world.”¹⁶⁶ She also noted that examiners use these same claims to evade the question of whether a randomly selected tool would make as convincing a toolmark as the suspect tool.¹⁶⁷

In a 2009 report, the National Research Council expressed deep concern over the reliability of firearms and toolmark identification.¹⁶⁸ The report noted, for example, that a good deal of forensic evidence “is introduced in criminal trials without any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline.”¹⁶⁹ Further, the report drew important attention to the lack of information regarding variability in firearm manufacturing such that there is no clear baseline for determining how points of similarity constitute a significant amount.¹⁷⁰ In addition, the methods used to determine variation lack sufficient study and review to be considered scientifically reliable.¹⁷¹

Even before the National Research Council report was made public, some courts were skeptical of the reliability of firearms and toolmark identification. For example, *United States v. Green*,¹⁷² decided in 2005, was one of the first cases to advocate for a more careful review of the admissibility of toolmark evidence in criminal trials. The district court held that experts “could only describe the ways in which casings were *similar* but not that the casings came from a *specific* weapon ‘to the exclusion of every other firearm in the world.’”¹⁷³ This is distinct from the FBI's presentation of the firearms and toolmark identification in the Peltier case,

164. *Id.* at 26.

165. *Id.*

166. *Id.* at 32 (alteration in original) (citation omitted).

167. *Id.* at 31-32.

168. NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 107-08 (Aug. 2009).

169. *Id.*

170. *Id.* at 154.

171. *Id.*

172. 405 F. Supp. 2d 104 (D. Mass. 2005).

173. Paul C. Giannelli, *Ballistics Evidence Under Fire*, CRIM. JUST., Winter 2011, at 50, 50 (emphasis added) (quoting *Green*, 405 F. Supp. 2d at 107).

where the bullets that killed agents Coler and Williams were presented as fired from the AR-15 later damaged in the vehicle explosion—and from that weapon alone.

The case of *United States v. Glynn*¹⁷⁴ closely followed the analysis of the National Research Council. The court stated that

[f]irearm and toolmark analysis rests on the twin assumptions that the surface contours of every gun are unique and that, every time that gun is fired, some of those unique markings, along with markings caused by the act of firing itself, are transferred to the shell casing and bullet, leaving distinctive patterns on each of them.¹⁷⁵

Noting how firearms are mass-produced in the modern era and produced with a high degree of precision, the court found the distinctiveness of an individual weapon clearly diminished as compared to earlier times when firearms were predominately manufactured by hand.¹⁷⁶

In *United States v. Taylor*,¹⁷⁷ the court restricted the firearms examiner's testimony. Specifically, the examiner could not state that his methods allowed him to reach his "conclusion as a matter of scientific certainty."¹⁷⁸ Further, the examiner was not permitted to state that the analysis produced a match to the exclusion of every other firearm.¹⁷⁹

Courtroom trends in light of the low probability that a firearms expert can determine with any degree of certainty that a bullet was fired from a specific weapon should be taken into account in recognizing the lack of evidence against Peltier.

G. Vehicle Discrepancy

According to testimony, agents Coler and Williams communicated by radio that they were following a red and white van into the Jumping Bull Compound.¹⁸⁰ After the fire, Special Agent Gary Adams, the first to arrive at the scene, radioed in that he saw a red pickup about to leave the compound.¹⁸¹ FBI stenographer Ann Johnson recorded the radio message,

174. 578 F. Supp. 2d 567 (S.D.N.Y. 2008).

175. *Id.* at 572.

176. *Id.*

177. 663 F. Supp. 2d 1170 (D.N.M. 2009).

178. *Id.* at 1180.

179. *Id.*

180. MESSERSCHMIDT, *supra* note 1, at 49.

181. *Id.*

and, when interviewed two days later, stated that she alone recorded the transmissions that were coming from Adams and others.¹⁸² Sometime later, the FBI claimed that Special Agent George O'Klock came to assist Johnson in interpreting the transmissions.¹⁸³ When testifying at the Robideau-Butler trial, Adams admitted that he had described a red pickup when sending the radio message; however, during the Peltier trial, he denied ever making such a transmission.¹⁸⁴ The inconsistencies in vehicle description are indicative of "the kinds of problems the FBI testimony presented throughout the [Peltier] trial."¹⁸⁵

H. Pathology Reports and Testimony at Trial

The FBI had Dr. Robert D. Bloemendaal perform an autopsy on agents Coler and Williams.¹⁸⁶ In a summary report dated June 27, 1975, Dr. Bloemendaal stated that the agents had been shot a total of three times (Williams once, Coler twice) from a distance of no more than ten feet.¹⁸⁷ Williams was struck in the hand first; then, the bullet penetrated his skull, killing him.¹⁸⁸ Coler was shot both in the head and chin, both having the potential of being "immediately fatal".¹⁸⁹

In addition, Bloemendaal's autopsy concluded that Williams had been shot first and died instantly.¹⁹⁰ This troubled the FBI, because Williams had supposedly radioed, "I'm hit," to other agents during the firefight.¹⁹¹ A memo was immediately sent to FBI headquarters discussing the need to clear up the confusion created by the autopsy report before the FBI made any public statements.¹⁹² The FBI then enlisted the services of Dr. Thomas Noguchi, who conducted expensive forensic tests with the objective of negating Bloemendaal's findings.¹⁹³

Trial testimony shed little light on the murders. Bloemendaal testified, per the FBI's theory, that it was the last shot that proved fatal to

182. *Id.* at 43.

183. *Id.* at 42.

184. *Id.* at 49.

185. *Id.* at 43.

186. *Id.* at 59.

187. *Id.* at 60.

188. *Id.*

189. *Id.*

190. *Id.* at 61.

191. *Id.*

192. *Id.*

193. *Id.* at 61-62.

Williams.¹⁹⁴ Additionally, the government, over vigorous objections by the defense, was permitted to introduce gory autopsy photographs of the two agents.¹⁹⁵

I. The United States Civil Rights Commission's Reports

As a corollary to the above discussion, the United States Civil Rights Commission produced two reports regarding the conduct of the FBI on the Pine Ridge Reservation post-firefight.

The first, dated July 9, 1975, described a state of fear on the Pine Ridge Reservation: Indians had their homes searched without warrants, they received threats from investigating FBI agents, and they were kept in the dark about the murders of agents Coler and Williams by the FBI.¹⁹⁶ The report concludes by stating that the director of the Civil Rights Commission had requested that the U.S. Attorney General investigate the "allegedly improper" behavior of the FBI on the Pine Ridge Reservation since the time of the murders of agents Coler and Williams.¹⁹⁷

The second report, dated March 31, 1976, focused specifically on other violent incidents on the Pine Ridge Reservation. The first incident began when shots were fired at the house of Gus Dull Knife.¹⁹⁸ Despite eyewitnesses pointing out shooters to BIA police, no one was arrested.¹⁹⁹ Sporadic shooting continued for two days with no law enforcement intervention.²⁰⁰ The second incident involved the discovery of the body of Anna Mae Aquash and allegations that the FBI was involved in a cover-up of her true cause of death.²⁰¹

194. *Id.* at 61.

195. *Id.* at 60.

196. *See* UNITED STATES CIVIL RIGHTS COMM'N, REPORT ON OFFICIAL MISCONDUCT ON THE PINE RIDGE RESERVATION (July 9, 1975), *available at* <http://www.whoisleonardpeltier.info/LEGAL/RESMURS.htm>.

197. *Id.*

198. UNITED STATES CIVIL RIGHTS COMM'N, REPORT ON THE EVENTS SURROUNDING THE SHOOT-OUT ON PINE RIDGE (Mar. 31, 1976), *available at* <http://www.whoisleonardpeltier.info/LEGAL/RESMURS.htm>.

199. *Id.*

200. *Id.*

201. *Id.*

IV. Post-Trial: The Appeals History

Peltier's appeals history is long and complex, with a variety of motions that included vacating judgment, disqualification of the trial judge, request for a new trial, sentence reduction, and parole issues.

His chances for success at the appellate level were undoubtedly hindered by his escape from Lompoc Federal Prison in California on July 20, 1979.²⁰² He was captured six days later in possession of a weapon.²⁰³ Peltier claimed he escaped after uncovering a plot to murder him in the prison.²⁰⁴ One of the men who left with Peltier was shot in the back and killed during the escape.²⁰⁵

The following narrative presents the appeals and motions in chronological order, relying almost exclusively on the various court opinions.

A. The 1978 Appeals of the Murder Conviction

After his conviction, Peltier appealed the district court's ruling to the Eighth Circuit.²⁰⁶ The appeal was submitted on April 12, 1978 and decided on September 14, 1978, with the Eighth Circuit affirming the trial court's verdict. The Eighth Circuit began its analysis by acknowledging that "the evidence against Peltier was primarily circumstantial."²⁰⁷ The court then cited eight elements of the case that provide "the strongest evidence that Peltier committed or *aided and abetted* the murders."²⁰⁸ The first piece of evidence listed was that Peltier was riding in the "van" the agents followed into the Jumping Bull compound.²⁰⁹ Second, Peltier knew he was being followed by the FBI, and also he had reason believe they were looking for him that morning.²¹⁰ Fourth was testimony from Michael Anderson that he saw Peltier with an AR-15 rifle that morning.²¹¹ Fifth, the agents were killed with a "high velocity, small caliber weapon," and Peltier's weapon

202. MESSERSCHMIDT, *supra* note 1, at 129.

203. *Id.*

204. *Id.*

205. *Id.*

206. United States v. Peltier, 585 F.2d 314 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979).

207. *Id.* at 319.

208. *Id.* (emphasis added).

209. *Id.*

210. *Id.*

211. *Id.*

was the “highest velocity weapon fired that day.”²¹² Sixth, the bullets found at the scene were linked to the AR-15.²¹³ Seventh, Wilford Draper testified he overheard Peltier discussing the murders the evening of June 26.²¹⁴ Finally, several months later, Peltier fled the scene after being stopped by police in Oregon, and the motor home in which he was traveling contained Agent Coler’s revolver in a paper bag bearing Peltier’s thumbprint.²¹⁵

Peltier’s appeal had five elements: (1) certain trial evidence was “prejudicial and inflammatory”; (2) the trial judge “refused to instruct the jury” that he had been framed by the FBI, and he was denied introducing much of the FBI misconduct at trial; (3) the trial court abused its discretion by refusing “to reread testimony requested by the jury”; (4) because the government violated the Webster-Ashburton Treaty, “the trial court had no jurisdiction to try him”; and (5) the doctrine of collateral estoppel effectively barred prosecution.²¹⁶

For the first element, Peltier argued the trial court’s decision to admit evidence of prior criminal charges was particularly “prejudicial and inflammatory.”²¹⁷ The trial court allowed in evidence of an earlier charge (later dropped) brought against Peltier in Wisconsin for attempted murder of an off-duty police officer, as well as evidence of flight in Oregon and the materials found in the motor home.²¹⁸ The trial court also admitted evidence of an alleged robbery of a ranch house in which Peltier took a .3030 rifle and pick-up truck as he fled to Canada.²¹⁹ Finally, the court admitted weapons evidence, including Agents Williams’ revolver, found three months later on the Rosebud Indian Reservation, even though Peltier was nowhere near there at the time.²²⁰ The Eighth Circuit stated, “Ordinarily the admission into evidence of weapons, or picture of weapons, which are not directly related to the crime, and to which proper objection is made, is prejudicial to the defendant and in many cases it has been held to be reversible error.”²²¹ However, the court noted that virtually no objection had been raised by Peltier’s counsel regarding the admissibility of such

212. *Id.* at 319-20.

213. *Id.* at 320.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 321.

218. *Id.* at 321-25.

219. *Id.* at 325.

220. *Id.* at 325-27.

221. *Id.* at 327.

evidence.²²² The court also held, “[T]he direct and circumstantial evidence of Peltier’s guilt was strong and, in our opinion, the admission of these additional exhibits did not prejudice the defendant’s chances for acquittal.”²²³ The Eighth Circuit had acknowledged earlier in its opinion that the evidence against Peltier was largely circumstantial and did not explain or describe the nature of the direct evidence against him nor why evidence of Peltier’s guilt was strong.²²⁴

The court also dismissed Peltier’s assertion of an FBI frame-up, stating that the trial judge instructed the jury properly about three witnesses: Anderson, Draper, and Brown, who confessed during cross-examination that they had lied before the grand jury because they had been threatened by the FBI, but swore under oath that their testimonies at trial were the truth.²²⁵ The appellate court found that the trial court’s instructions about credible witnesses was detailed and made clear to the jury that the defense was asserting a theory of government frame-up.²²⁶

Peltier argued that he was unable to introduce evidence of FBI misconduct, mainly because the trial court excluded the testimony of Myrtle Poor Bear and Jimmy Eagle.²²⁷ The court countered his argument: “It is only where the trial court excludes relevant evidence without sufficient justification that the defendant’s constitutional right to compulsory process is violated.”²²⁸ The trial court weighed four factors in determining whether to allow such evidence into the trial: (1) Peltier’s failure to show that any of this evidence was used against him; (2) lack of probative value of the evidence; (3) the probability that the government would respond by offering countervailing evidence, lengthening the trial; and (4) that the evidence might divert the jury’s attention from Peltier’s guilt or innocence and prejudice the government.²²⁹ The Eighth Circuit, without conducting analysis, merely concluded,

While the more prudent course might have been to allow the defense to present the evidence, we find no abuse of discretion in the trial court’s exclusion of the testimony of Jimmy Eagle and Myrtle Poor Bear, in light of its low probative value, the

222. *Id.*

223. *Id.* at 328.

224. *Id.* at 319.

225. *Id.* at 328-29.

226. *Id.*

227. *Id.* at 330.

228. *Id.* at 332.

229. *Id.* at 332-33.

potential for further delay in the trial, and the danger of unfair prejudice to the government.²³⁰

The last three elements of Peltier's appeal were also disposed of by the Eighth Circuit. The Eighth Circuit found that it was well within the trial judge's discretion to grant or deny jury requests to read certain trial testimony.²³¹ As for the treaty violation related to Peltier's extradition, the court stated it was "clear from a review of the trial transcript"²³² that the testimony of Myrtle Poor Bear was not the only evidence used in the extradition, and agreed with the government's argument that the "jurisdiction of the trial court over the defendant is not affected by the manner in which his presence before the court was obtained."²³³ As for the collateral estoppel claim, the court held that since Peltier was not a party to the acquittal trial of Robideau and Butler, he could not invoke the doctrine.²³⁴

At oral arguments of the appeal, Judge Ross questioned Evan Hultman, one of the government prosecutors, about the affidavits of Myrtle Poor Bear and the coercion used by the FBI to obtain her signatures on them.²³⁵ Hultman was extremely evasive to the judge's pointed questions, but agreed that given the contradictions in the affidavits, he was convinced that Poor Bear was not credible as a witness.²³⁶ Judge Ross pressed him on the issue, stating that if the government was willing to fabricate evidence for purposes of extradition, would they not also be likely to fabricate evidence at trial.²³⁷ Hultman had no choice but to offer his full agreement.²³⁸

B. Subsequent Motions and Appeals

1. California

After Peltier was apprehended following his prison escape, he was tried in federal district court in California and convicted.²³⁹ He moved to have the trial judge recused because of discriminatory statements the judge

230. *Id.* at 333.

231. *Id.* at 334.

232. *Id.* at 335.

233. *Id.*

234. *Id.*

235. MESSERSCHMIDT, *supra* note 1, at 86.

236. *Id.*

237. *Id.*

238. *Id.*

239. *United States v. Peltier*, 693 F.2d 96, 97 (9th Cir. 1982).

allegedly made against American Indians.²⁴⁰ The federal district court judge reviewing the motion stated it was not filed in a timely manner nor was it legally sufficient, and dismissed it.²⁴¹

Peltier then appealed his conviction of escaping from prison and being a felon in possession of a firearm to the Ninth Circuit.²⁴² He argued that he had been denied the opportunity to cross-examine a government witness and that his theory of defense--that he was going to be murdered in prison--was improperly restricted.²⁴³ In a per curiam opinion, the Ninth Circuit upheld the district court's ruling, stating it had examined the evidence of Peltier's claim that he was about to be murdered, but that "it [did] not measure up to probable cause to believe that any evidence exists that would justify an armed jail break pursuant to the defendant's theory."²⁴⁴

2. Motions to Disqualify Judge and Vacate Judgment

Later in 1982, Peltier filed a motion in the District Court of the Southeastern Division of North Dakota to vacate the judgment of his conviction and to disqualify the trial judge, Paul Benson.²⁴⁵ By this time William Kunstler was working as counsel for Peltier.²⁴⁶ Judge Benson, writing a memorandum and order for the district court, stated that the "mere filing of a motion" was insufficient to have a presiding judge disqualified.²⁴⁷ Further, he stated that the motion to disqualify came a day before a determination on the motion to vacate judgment; the motion was not timely and no explanation was offered for the delay.²⁴⁸ The disqualification motion failed because it

contends without specificity as to time, place or manner that the judge of this court participated in ex parte communications with members of the Department of Justice, the prosecution staff, and the F.B.I. The inference appears to have been drawn largely from events that took place before the judge of this court had any connection with the case²⁴⁹

240. *United States v. Peltier*, 529 F. Supp. 549, 551 (C.D. Cal. 1982).

241. *Id.* at 550-51.

242. *Peltier*, 693 F.2d at 97.

243. *Id.*

244. *Id.* at 98.

245. *United States v. Peltier*, 553 F. Supp. 886 (D.N.D. 1982).

246. *Id.* at 887.

247. *Id.* at 888.

248. *Id.* at 890.

249. *Id.* at 889.

Since no facts to support such claims were included in the motion for disqualification, Judge Benson dismissed the motion.²⁵⁰

In a separate opinion, Judge Benson dealt with the motion to vacate the judgment.²⁵¹ Peltier relied on *Brady v. Maryland*²⁵² to argue the illegality of the government's failure to disclose exculpatory evidence.²⁵³ The district court dismissed the motion on essentially three grounds. First, Peltier failed to establish that the prosecutor had introduced perjured testimony at trial and that this was testimony the prosecutor knew or should have known was perjured.²⁵⁴ Second, much of the argument in the motion dealt with nondisclosure by the government of exculpatory evidence.²⁵⁵ Peltier cited six violations of nondisclosure, including "a memorandum indicating that tests matching the .223 shell casing found in the trunk of Agent Coler's car with Peltier's AR-15 rifle were conducted with negative results, and documents indicating that it is highly unlikely that the government's ballistics experts failed to study the .223 casing for several months."²⁵⁶ Peltier also alleged *Brady* violations for failing to disclose these items: FBI reports and other documents demonstrating that more than one vehicle was present during the fire; documents showing that it would have been nearly impossible for an agent to have identified Peltier at the fire scene through a high-powered rifle scope; FBI reports and memos indicating conflicting evidence about the pathology results; evidence gathered by the FBI implicating several people who were never charged; and "documents suggesting that persons other than those identified to the jury were present" at the fire.²⁵⁷

The court stated that the materiality of the evidence relating to guilt or innocence guided the legal analysis. Judge Benson rejected Peltier's claim that Special Agent Evan Hodge's testimony relating to firearms and toolmark identification amounted to perjury because Hodge was neither inconsistent nor misleading.²⁵⁸ According to the court, a reasonable juror could conclude that the .223 casings discussed in the October ballistics

250. *Id.* at 890.

251. *Peltier*, 553 F. Supp. at 890.

252. 373 U.S. 83 (1963).

253. *Peltier*, 553 F. Supp. at 893.

254. *Id.* at 895.

255. *Id.* at 897-98.

256. *Id.* at 894.

257. *Id.*

258. *Id.* at 895-96.

reports did not include the casing found in the trunk of Agent Coler's car (i.e. the casing allegedly fired from Peltier's AR-15).²⁵⁹

The court further dismissed any claims of perjury relating to the evidence of other vehicles, citing that a number of contradictory statements had been made at trial and the jury was aware of the general inconsistencies that existed regarding this issue.²⁶⁰ As for Peltier being identified through use of a high-powered rifle scope, the court asserted that even though there were failures to duplicate, the sighting does not amount to perjury; Judge Benson emphasized that the jury was aware of the witnesses' inconsistent testimonies.²⁶¹

The court, citing *United States v. Agurs*,²⁶² stated that the materiality of evidence is determined by whether admission of such evidence could affect the outcome of the trial.²⁶³ Furthermore, requests for disclosure of evidence must be specific.²⁶⁴ Specificity includes a number of factors, such as "the literal language of the defense request itself, the apparent exculpatory character of the evidence sought, and the reasonableness of the explanation for the prosecution not exposing the evidence or not considering it to be material."²⁶⁵

The court decided that the defense's very specific requests for disclosure of evidence on appeal indicated that its previous requests were of a general nature.²⁶⁶ In fact, the court stated, there were no general discovery motions filed by the defense because the defense counsel and the U.S. Attorney's office reached a discovery agreement, which amounted to total disclosure.²⁶⁷ As such, this failed the test of materiality developed by the Supreme Court in *Agurs*.²⁶⁸ Furthermore, the court held that the evidence that Peltier wished to have introduced would not "create a reasonable doubt that did not otherwise exist."²⁶⁹

Peltier appealed the district court's ruling on the motion to vacate judgment to the Eighth Circuit.²⁷⁰ The court reviewed the nondisclosures as

259. *Id.* at 896.

260. *Id.* at 896-97.

261. *Id.* at 897.

262. 427 U.S. 97 (1976).

263. *Peltier*, 553 F. Supp. at 894-95.

264. *Id.* at 897-98.

265. *Id.* at 898.

266. *Id.*

267. *Id.*

268. *Id.* at 903.

269. *Id.* at 899.

270. *United States v. Peltier*, 731 F.2d 550 (8th Cir. 1984).

well as the allegedly exculpatory evidence and remanded the case for an evidentiary hearing; however, the court limited the lower court's review to "any testimony or documentary evidence relevant to the meaning of the October 2, 1975, teletype and its relation to the ballistics evidence introduced at Peltier's trial."²⁷¹

3. Remand and Appeal of Motion to Vacate Judgment

With the Eighth Circuit's decision to remand, the history of Peltier's appeals reached a critical point. For the first time, a court had ruled in favor of Peltier, albeit limiting the evidence for a evidentiary rehearing to the October 1975 FBI teletype concerning the firearms and toolmark identification. Nevertheless, this gave Peltier and his attorneys hope that the introduction of the firearms and toolmark identification teletype, which contradicted later reports that had been entered into evidence at trial, might prove to be the key to overturning the murder conviction and the award of a new trial. After all, the government had claimed that the firearms and toolmark identification, and in particular the one .223 shell casing found in the trunk of an FBI car, was, as discussed earlier, "perhaps the most important piece of evidence in this case. This little, small cartridge is ejected by the killers into the trunk of the car."²⁷²

The U.S. District Court of the Southeastern Division of North Dakota returned an opinion on May 22, 1985.²⁷³ The court echoed the concerns of the Eighth Circuit about the wording of the October 2 teletype--that the AR-15 rifle received by the FBI contained a firing pin that was *different* from the one used at the murder scene.²⁷⁴ As the court stated,

This language raises several possibilities not considered by the district court and not as readily explained away by the record as it presently exists. For example, the use of the word "different" could indicate that the FBI knew the firing pin in the damaged AR-15 had been changed after the June 26, 1975, murders. Such a discrepancy can be found nowhere else in the record, and could raise questions regarding the truth and accuracy of Hodge's testimony regarding his inability to reach a "conclusion" on the

271. *Id.* at 555.

272. *Id.* at 552 (citation omitted).

273. *United States v. Peltier*, 609 F. Supp. 1143 (D.N.D. 1985).

274. *Id.* at 1145.

firing pin analysis and his positive conclusion regarding the extractor markings.²⁷⁵

But the court was quick to add that in the absence of hard evidence, it was not possible to suggest that the teletype established improper FBI or government “motives or actions.”²⁷⁶

The court devoted most of its opinion to a painstaking and confusing reconstruction of the sequence with which Special Agent Hodge analyzed the ballistic evidence. The key point appeared to be that Hodge had analyzed seven .223 casings (assigned Q numbers 100-105, and 130) against the AR-15 firing pin by the time of the October 2 teletype, and none of the casings were the one found in the trunk of the agent’s car.²⁷⁷ According to the court, “Hodge never received a specific priority request to examine the .223 casing found in the trunk of Agent Coler’s car (Q # 2628). Therefore, it was examined in the ordinary course of his work.”²⁷⁸ Because the government claimed that this casing was the single most important piece of evidence at Peltier’s trial, it is curious that no such priority request was made for its analysis.

The court concluded that the October 2 teletype did not “evince perjured testimony” because the .223 casing in question was not analyzed along with the firing pin of the AR-15.²⁷⁹ The word “different” used in the teletype simply meant “that the Wichita AR-15 could not be associated with any of the bullet casings that had been tested at that time based on firing pin comparisons.”²⁸⁰ Furthermore, not only would the introduction of the teletype have not affected the outcome of the trial, the teletype itself “can be considered preliminary information, which the prosecution had no obligation to disclose to the defendant.”²⁸¹

Peltier appealed the ruling. The Eighth Circuit, in what would be the closest Peltier would ever come to winning in court, affirmed, but in an evasive opinion that closed with a tepid speculation:

In the light of the full record, the jury might have given additional weight to the fact that there was more than one AR-15 on the compound on June 26 had the inconsistencies in the

275. *Id.* at 1145-46.

276. *Id.* at 1146.

277. *Id.* at 1152.

278. *Id.* at 1151.

279. *Id.* at 1153.

280. *Id.*

281. *Id.* *

ballistic evidence introduced at trial been supplemented with the reports and data discovered after trial. Moreover, under such circumstances it might have given more serious consideration to the possibility that an AR-15 other than the Wichita AR-15 was used in the murder of either Coler or Williams, but we cannot say that it is reasonably probable that it would have been sufficiently impressed by these possibilities to have reached a different result at trial. . . . There is a *possibility* that the jury would have acquitted Leonard Peltier had the records and data improperly withheld from the defense been available to him in order to better exploit and reinforce the inconsistencies casting strong doubts upon the government's case. Yet, we are bound by the *Bagley* test requiring that we be convinced, from a review of the entire record, that had the data and records withheld been made available, the jury *probably* would have reached a different result. We have not been so convinced.²⁸²

The *Bagley* test derives from *United States v. Bagley*.²⁸³ Justice Blackmun wrote the majority opinion and reviewed *Brady*, among other cases, to determine that “evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”²⁸⁴

4. *Motions to Set Aside Convictions and Reduce Life Sentences*

By the early 1990s, Peltier had been moved to Leavenworth Federal Prison in Kansas. For the second time, Peltier brought a post-conviction proceeding to set aside his conviction. The district court denied relief, and he appealed to the Eighth Circuit.²⁸⁵ Peltier's motion claimed that he was denied due process on four grounds: (1) that during the previous appeal, an alleged government admission changed the government's theory of the case and destroyed the legal basis for his conviction; (2) the district court denied him the opportunity to present evidence of self-defense; (3) the government

282. *United States v. Peltier*, 800 F.2d 772, 779-80 (8th Cir. 1986) (footnote omitted), *cert. denied*, 484 U.S. 822 (1987). The omitted footnote states that the defense failed to “stress in its cross-examinations or closing argument that there was more than one AR-15 on the compound on June 26.” *Id.* at 779 n.9.

283. 473 U.S. 667 (1985).

284. *Peltier*, 800 F.2d at 774-75 (quoting *Bagley*, 473 U.S. at 682) (internal quotation marks omitted).

285. *Peltier v. Henman*, 997 F.2d 461 (8th Cir. 1993).

engaged in improper conduct; and (4) “the government deliberately created an intimidating atmosphere at trial.”²⁸⁶

The Eighth Circuit denied the first claim, stating that the government had originally tried the case on alternative theories.²⁸⁷ One was that Peltier shot the agents at the close range, killing both of them, and alternatively, even if he had not killed them, he “was equally guilty of murder as an aider and abettor.”²⁸⁸ The court pointed out that the indictment originally charged Peltier with violating three sections of Title 18 of the U.S. Code, including: murder, murder of an FBI member or employee, and aiding and abetting an offense against the United States.²⁸⁹ The court followed with testimony from the earlier conviction appeal,²⁹⁰ an exchange between Judge Heaney and Assistant United State Attorney Crooks, the principal prosecutor in the case. Peltier had seized on Crooks’ reply to the judge--that the government could not prove who shot the agents--as evidence that the only theory the government could have pursued was aiding and abetting.²⁹¹ The court ultimately rejected the argument by stating that Crooks was “reiterating that the government did not present any direct evidence that Peltier shot the agents at pointblank range, since all of the government’s proof was circumstantial.”²⁹² It is interesting that during the first appeal, the Eighth Circuit claimed that evidence against Peltier was both direct and circumstantial.²⁹³

As for the remaining claims, the court stated that Peltier had failed to raise them in his first conviction appeal, and therefore introducing them now violated the Supreme Court’s reformulation of the “miscarriage of justice” test set forth in *McCleskey v. Zant*.²⁹⁴ The court further stated that Peltier had committed “an abuse of the proceedings” by failing to introduce the elements in the first appeal and bringing them forth in the second.²⁹⁵ His failure thus “justified the district court’s refusal to consider those issues in the present proceeding.”²⁹⁶ Finally, the court mentioned that amici had been filed for this proceeding by forty-nine members of the Canadian Parliament

286. *Id.* at 465.

287. *Id.*

288. *Id.*

289. *Id.* at 465-66.

290. *United States v. Peltier*, 585 F.2d 314 (8th Cir. 1978).

291. *Henman*, 997 F.2d at 466-67.

292. *Id.* at 469.

293. *Peltier*, 585 F.2d at 328.

294. *Henman*, 997 F.2d at 472 (citing *McCleskey v. Zant*, 499 U.S. 467 (1991)).

295. *Id.* at 473.

296. *Id.*

that challenged Peltier's extradition from Canada in 1976.²⁹⁷ The court dismissed such claims because it had already considered the issue and found no government misconduct; secondly, Peltier did not raise the issue in the current appeal.²⁹⁸

In 2002, Peltier brought a renewed motion before the U.S. District Court for the District of North Dakota to have his life sentences reduced.²⁹⁹ The court held that Peltier had 120 days after denial of certiorari by the Supreme Court to file such a motion, and more than twenty years had passed.³⁰⁰ Peltier claimed to have filed such a motion in a timely fashion, and therefore, his current motion related back to the original motion.³⁰¹ The district court held that since the appeal had been considered and denied, no such relation back existed.³⁰² The court also held the co-actors' acquittal changed nothing about his trial and conviction because the trial judge knew of the earlier acquittal.³⁰³ Peltier appealed, and the Eighth Circuit, in a brief opinion, affirmed.³⁰⁴

Peltier's next effort was filing for habeas corpus relief, seeking either release or parole. The U.S. District Court of Kansas denied the petition in an unpublished opinion. In Peltier's habeas petition he argued,

- (1) [the Parole Commission's] decisions were arbitrary and capricious because it could not determine who shot the agents;
- (2) the decisions were based on incorrect information and discriminatory factors and thus were unlawful;
- (3) application of parole rules and regulations revised after his convictions violated *ex post facto* principles; and
- (4) failure to grant parole in light of his medical condition was arbitrary and capricious and amounted to cruel and unusual punishment.³⁰⁵

It is necessary to review briefly Peltier's parole hearing history, which is described in the Tenth Circuit's opinion. He originally applied for parole in 1986, but waived consideration and reapplied in August 1993.³⁰⁶ At that

297. *Id.* at 474.

298. *Id.* at 475.

299. *United States v. Peltier*, 189 F. Supp. 2d 970 (D.N.D. 2002).

300. *Id.* at 972-73.

301. *Id.*

302. *Id.*

303. *Id.* at 974.

304. *United States v. Peltier*, 312 F.3d 938 (8th Cir. 2002).

305. *Peltier v. Booker*, 348 F.3d 888, 892 (10th Cir. 2003), *cert. denied*, 541 U.S. 1003 (2004).

306. *Id.* at 891.

time, the Parole Commission “calculated his parole guidelines at a *minimum* of 188 months” because of his first-degree murder conviction as well as several other convictions.³⁰⁷ At the time he had served 204 months.³⁰⁸ Peltier made a statement at the parole hearing while represented by counsel.³⁰⁹ The Parole Commission denied parole and “set a fifteen-year reconsideration period due to the nature of the several crimes in which Mr. Peltier had been involved.”³¹⁰ The Parole Commission referred its recommendation to the Regional Commissioner, who concurred, then passed it to the National Commissioners for review, and they also concurred.³¹¹ Peltier then appealed to the full Parole Commission, which recalculated his parole guidelines at a minimum of 200 months, and then concurred with the earlier recommendation.³¹²

Peltier was subsequently given a statutory interim hearing in 1995.³¹³ Although the hearing officer was persuaded that the evidence to support Peltier’s shooting of the agents was insufficient, he did not recommend any change to “Peltier’s parole status because he believed evidence that Mr. Peltier was a co-conspirator or aider and abettor in the agents’ executions justified his above-the-guidelines prison time.”³¹⁴ A second hearing officer reviewed the case and recommended that the original Parole Commission recommendation be reinstated.³¹⁵ Peltier appealed the interim hearing to the full Parole Commission, which acknowledged “the lack of direct evidence’ linking Peltier to the agents’ murders, but claimed that the circumstantial evidence of his involvement “met the preponderance of the evidence standard for the Commission’s findings.”³¹⁶

On August 20, 2009, the Parole Commission again denied Peltier parole and again stated that reconsideration would occur in fifteen years.³¹⁷ The

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* at 892.

317. Blake Nicholson, *Leonard Peltier, American Indian Activist, Denied Parole and Won't be Eligible Again Until 2024*, THE HUFFINGTON POST (Aug. 21, 2009, 3:16 PM), http://www.huffingtonpost.com/2009/08/21/leonard-peltier-american_n_265764.html.

Parole Commission also stated that he would be entitled to a statutory review every two years, beginning in July 2011.³¹⁸

In his motion to the Tenth Circuit, Peltier was contesting the fact that he had been denied parole and that the Parole Commission had delayed in reconsidering parole for fifteen years.³¹⁹ He argued only the first of the four factors he had stated in his petition to the district court. In denying the petition, the court stated, "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."³²⁰ After quoting from Peltier's petition in which he argued government misconduct should be a critical factor in determining whether he should be immediately considered for parole, the court continues,

He may be correct. But whether the Parole Commission gave proper weight to this mitigating evidence is not a question we have authority to review. Our only inquiry is whether the Commission was rational in concluding Mr. Peltier participated in the execution of two federal agents. On the record before us, we cannot say this determination was arbitrary and capricious.³²¹

Finally, the court stated that the Parole Commission's principal finding was that Peltier shot and killed the two agents, and they found this to be rational. Therefore, there was no need to consider "the Commission's implication that the same disposition is supportable if Mr. Peltier only aided and abetted at the murder scene."³²²

In 2005, Peltier moved to correct an illegal sentence. The U.S. District Court for the District of North Dakota denied the motion, and he appealed to the Eighth Circuit.³²³ Peltier contended that his sentence of two consecutive life terms was illegal, arguing the district court did not have jurisdiction because the two FBI agents were killed in Indian Country. In particular, Peltier was challenging the fact that he was convicted under 18

318. *Clemency and Parole*, NO PAROLE PELTIER ASS'N, <http://www.noparolepeltier.com/> (last visited Dec. 19, 2013).

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

320. *Id.*

321. *Id.*

322. *Id.*

323. *United States v. Peltier*, 446 F.3d 911 (8th Cir. 2006).

U.S.C. § 1114,³²⁴ “because § 1114, as applied to murders occurring on reservations, is an unconstitutional exercise of Congress’s power under the commerce clause.”³²⁵ The court was unsympathetic, stating that Peltier’s claim was not appropriate under the relevant Federal Rules of Criminal Procedure, and that § 1114 “criminalizes the killing of federal officers engaged in the performance of their official duties.”³²⁶

In 2001, Peltier requested all documents pertaining to himself from the FBI.³²⁷ Frustrated by a lack of response, Peltier filed an action against the FBI in 2002 and received 70,419 pages of material.³²⁸ But the FBI withheld another 10,557 “on the ground that these records were exempt from disclosure under FOIA.”³²⁹ During the district court hearing, 500 such documents were produced, and the court was sufficiently satisfied to grant the FBI’s motion for summary judgment.³³⁰ However, the court ordered the FBI to release to Peltier all documents pertaining to Anna Mae Aquash that had not been previously disclosed.³³¹

The Eighth Circuit affirmed on grounds that although the government engaged in misconduct regarding the Peltier case, it was not so “severe and extensive as to create a general public interest in disclosure regarding all matters related to Peltier’s case that overrides the privacy interests of third parties” as recognized in 5 U.S.C. § 552(b)(7)(C).³³² Additionally, an insufficient public interest existed in “the potential for disclosure of records that would disclose deliberate interference with Peltier’s confidential attorney-client relationship.”³³³

In 2008, Peltier returned to the District Court of Minnesota and brought an action requiring the FBI to disclose documents under the Freedom of

³²⁴ 18 U.S.C. 1114 deals with the deals with murder or attempted murder of an employee of the United States while they are engaged the performance of their official duties See <http://www.codes.lp.findlaw.com/uscode/18/1/51/1114>.

³²⁵ Note 319, *supra*, at 914.

³²⁶ *Id.*

³²⁷ *Peltier v. Fed. Bureau of Investigation*, 563 F.3d 754, 756-57 (8th Cir. 2009).

³²⁸ *Id.* at 757.

³²⁹ *Id.* A website, leonardpeltier.net, claims that the government continues to withhold more than 100,000 documents pertinent to the Peltier case. See Elaine Wakaksan Matlow, *After Leonard Peltier Was Born: Part Two of Three*, LEONARD PELTIER DEFENSE COMMITTEE (Jan. 2007), <http://www.leonardpeltier.net/documents/historywalk1/HistoryWalkEdited.htm>.

³³⁰ *Peltier*, 563 F.3d at 757.

³³¹ *Id.*

³³² *Id.* at 765.

³³³ *Id.*

Information Act (FOIA).³³⁴ In an unpublished opinion, the court granted the FBI's motion for summary judgment for all but one category of documents.³³⁵ Peltier then appealed to the Eighth Circuit, as discussed above.³³⁶

In an unpublished opinion in 2009, the Tenth Circuit denied a petition of habeas corpus for Peltier and Yorie Von Kahl, also serving multiple life sentences for the murder of two federal law enforcement officers, which sought specific parole release dates.³³⁷ The appellants claimed that § 235(b)(3) of the Sentencing Reform Act of 1984 gave them the right to the issuance of specific parole dates, and their continued incarceration violated the Ex Post Facto Clause, Bill of Attainder Clause, and Due Process Clause.³³⁸ The court articulated that the appellants remained under the authority of the Parole Commission, which the two were contesting; therefore, the particular section of the Sentencing Reform Act did not provide them with the relief they sought.³³⁹

C. Summary

The long and complex appeals history of the Peltier case highlights the legal morass that individuals convicted of very serious federal crimes often face. Because the victims of the murders were FBI agents, Peltier's chances for a positive outcome in the appeals process are slight. The power and influence of the FBI cannot be understated; according to a December 15, 2000 CNN article, more than 500 FBI agents and their families marched on the White House in response to President Clinton's willingness to consider a pardon for Peltier.³⁴⁰ According to another source, the protest was officially sanctioned by the Bureau and was accompanied by the letter from FBI Louis Freeh to the President, in which he described Peltier as a

334. Peltier v. FBI, No. Civ.02-4328 DWF/SRN, 2005 WL 1009595 (D. Minn. Apr. 26, 2005).

335. *Id.*

336. Peltier, 563 F.3d 754.

337. Von Kahl v. United States, 321 F. App'x 724 (10th Cir. 2009).

338. *Id.* at 727.

339. *Id.* at 732.

340. *FBI Agents Urge President Clinton Not to Free American Indian Activist*, CNN (Dec. 15, 2000, 3:46 PM), <http://edition.cnn.com/2000/LAW/12/15/peltier.clemency.crim.02/>.

“vicious murderer.”³⁴¹ Clinton continued to consider the pardon but failed to sign it before leaving office the following month.³⁴²

The district court’s opinion regarding Peltier’s motion to vacate judgment³⁴³ is highly emblematic of the legal struggles Peltier experienced following his conviction. The Supreme Court’s decision in *Agurs* ultimately hamstrung the efforts of Peltier’s counsel to have the judgment vacated because of a failure on the part of the prosecution to disclose exculpatory evidence.³⁴⁴ The *Brady* rule on that issue was fairly straightforward, but after the Court qualified the rule in *Agurs*, much of the clarity was lost.³⁴⁵ One commentator opined that *Agurs*

was an extremely troublesome opinion which endlessly befuddled the lower courts and legal commentators. What is of concern here is not so much its failed attempt at settling the doctrine, but rather the manner in which the Court engaged the interpretive process to disavow the original promise of *Brady*.³⁴⁶

Indeed, Justice Stevens, writing for the majority, appeared to offer hope to Peltier when he wrote,

If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made.³⁴⁷

But Justice Stevens further stated that a key test is whether or not guilt had been demonstrated beyond a reasonable doubt.³⁴⁸ If such is the case, then the exculpatory evidence not disclosed by the prosecution does not warrant “justification for a new trial.”³⁴⁹ The materiality inquiry established by the Court has been succinctly explained by Professor Jennifer Laurin:

341. Joanne Laurier, *Clinton Refuses to Pardon Leonard Peltier*, WORLD SOCIALIST WEB SITE (Jan. 25, 2001), <http://www.wsws.org/articles/2001/jan2001/pelt-j25.shtml>.

342. *Id.*

343. *United States v. Peltier*, 553 F. Supp. 890 (N.D. 1983).

344. *See id.* at 895.

345. *Compare id. with United States v. Agurs*, 427 U.S. 97, 107 (1976).

346. Eugene Cerruti, *Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 233 (2005).

347. *Agurs*, 427 U.S. at 107.

348. *See id.* at 112.

349. *Id.* at 112-13.

In *United States v. Agurs*, the Court erected a three-tiered materiality inquiry, which hinged largely on prosecutorial fault. Where deliberate misrepresentation or concealment of evidence could be shown (not the case in *Agurs*), the defense burden of demonstrating materiality would be at its lowest. Where no such misconduct could be shown, but where the undisclosed evidence had been specifically requested by the defense, the materiality analysis would be stricter. But in a third situation, the one actually posed in *Agurs*, in which there was either no defense request for exculpatory evidence or a request only of the most general sort, the test for materiality would pose a greater burden on the defense: Reversal would occur only if the defendant could show that the undisclosed evidence, evaluated in the context of the entire trial record, created a “reasonable doubt” of guilt in the mind of the reviewing court.³⁵⁰

Alternatively, if conceding that the district court and the Eighth Circuit both applied the standard of *Agurs* faithfully, the procedural history of the Peltier trial at least offered a level of convenience, which the courts no doubt found useful in upholding the trial court’s judgment. One of the arguments against the *Agurs* test is the impossibility of the defense asking for disclosure of potentially exculpatory evidence of which it has no knowledge.³⁵¹ Such was the case with the preliminary ballistics report from October 2, 1975.³⁵² Yet, it is precisely this situation for which the Supreme Court places the greatest burden of the *Agurs* test on the defense.³⁵³ This has led one commentator to advocate a pre-trial *in camera* review of evidence, thus removing favorability of determination from either prosecution or defense and placing it in the hands of the trial judge.³⁵⁴ Despite the clear actions by the government to avoid disclosing exculpatory evidence before the Peltier trial, and its determination to “lock” Peltier into a conviction,³⁵⁵ the controlling case law gave Peltier and his attorneys almost no legal leverage to convince the court that the admission of such

350. Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1019 (2010) (footnotes omitted).

351. Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391 (1984).

352. See *United States v. Peltier*, 731 F.2d 550, 552-53 (8th Cir. 1984).

353. Capra, *supra* note 352, at 402.

354. *Id.* at 397-98.

355. See MESSERSCHMIDT, *supra* note 1, at 44.

exculpatory evidence at trial might have changed the jury's verdict. The virtually unquestioned certainty of guilt by which the district court and the Eighth Circuit moved through the Peltier appeals made it nearly impossible for him to prevail under the *Agurs* test.

In the Eighth Circuit's opinion following Peltier's appeal, the court considered the recently-decided *Bagley* test, but determined that the verdict probably would not have been different even if the exculpatory evidence proffered by Peltier in his motion to the district court had been introduced at trial.³⁵⁶ One commentator analyzed the Eighth Circuit opinion and found that the *Bagley* test was misapplied.³⁵⁷ He explained that the two critical pieces of evidence regarding the firearms and toolmark identification were (1) although the .223 cartridge was extracted from the AR-15 rifle, it may not have been fired from it; and (2) testimony indicated that only one AR-15 was used by AIM activists during the firefight.³⁵⁸ Yet, he argued that

both of these pieces of data are intricately affected by the concealed evidence. First, the October 2 teletype, which stated that the .223 caliber rifle tested by Hodge contained a firing pin different from that used at the Pine Ridge shoot-out, is damaging to the testimony that only one AR-15 was used in the shoot-out. . . . Second, the teletype in conjunction with Hodge's testimony and the concealed requests for Hodge to compare the .223 casing with the Wichita AR-15 demonstrate that not only was the .223 casing included in the October 2 teletype (and had not been fired from Peltier's gun), but that the FBI was, for some reason, covering its tracks. Therefore, the concealed evidence also calls into question the conclusion that the .223 casing had at some time been loaded into the Wichita AR-15.³⁵⁹

The Eighth Circuit's misapplication of the *Bagley* test, then, stems from its failure to recognize the impact these two pieces of information might have had on the jury's assessment of the government's case in the trial. It failed to appreciate the possible effects the undisclosed information might have had on the prosecution's case and essentially ignored any impacts it could have had on the defense's argument.

356. *United States v. Peltier*, 800 F.2d 772, 779-80 (8th Cir. 1986).

357. Joseph C. Hogan, III, *Guilty Until Proven Innocent: Leonard Peltier and the Sublegal System*, 34 B.C. L. REV. 901, 925 (1993).

358. *Id.* at 929.

359. *Id.*

The *Bagley* standard of materiality, by making it more difficult to get a new trial, makes it easier for governmental agencies like the FBI to play judge and jury, admitting only the evidence they see fit to convict whomever they deem to be guilty, while the *Bagley* decision ensures that the victims of this process will be at a severe disadvantage in trying to regain their freedom.³⁶⁰

Another highly troubling aspect of the post-trial appeals process has been the repeated denial on the part of the federal courts of Peltier's right to a parole hearing, or at the very least, a scheduling date for a parole hearing. A review of the history of his parole hearings reveals that he had certainly served the minimum sentence to receive a parole hearing. The reconsideration period of fifteen years can only be described as excessive, given the Parole Commission's admission that no direct evidence existed for linking Peltier to the agents' murders. The legal rejection of his invocation of the Sentencing Reform Act relegated him to the mercy of an unsympathetic Parole Commission, which seemed intent of seeing him remain behind bars. Yet, these repeated denials of parole and the scheduling of a parole date remain predicated on circumstantial evidence only.

The history of the Leonard Peltier case contains sufficient legal and judicial inconsistencies to warrant analysis and interpretation of potential claims for constitutional and human rights violations, which is the focus of the remainder of this article.

V. Possible Constitutional Violations of Leonard Peltier's Rights

The Leonard Peltier Defense Offense Committee, based in Fargo, North Dakota, is currently pursuing several executive and judicial avenues on behalf of Peltier. These include: (1) executive clemency, in which the President of the United States would grant a pardon to Peltier; (2) executive review, in which the Department of Justice would investigate possible prosecutorial misconduct that might result in having the original conviction overturned; (3) early release, in which the pursuit of Peltier's release could be guided by various congressional programs designed to alleviate overcrowding in federal prisons as well as the high cost of confining inmates; and (4) transfer of custody, based primarily on an international human rights instrument--Article 1 of the International Covenant on Civil and Political Rights (ICCPR).³⁶¹ Article 1 of the ICCPR protects Peltier's

360. *Id.* at 931.

361. Cover Letter, *in* Letter from Delaney Bruce to S. James Anaya (July 6, 2010).

right to self-determination and would encourage custody of Peltier to be transferred to the Turtle Mountain Band of Chippewa Indians.³⁶²

The Defense Offense Committee also analyzed the constitutional violations Peltier suffered, beginning with the FBI's investigation of AIM and continuing to the present. Most, however, focus on the trial itself. The Committee prepared an unpaginated eight-page report that was included as part of the July 6, 2010 letter from Bruce to Anaya.³⁶³ To briefly summarize, the Committee argued that Peltier's rights under Article VI of the Constitution, the Fifth Amendment, the Sixth Amendment, and the Eighth Amendment have been violated.

The Article VI violation relates to the extradition of Peltier based on coerced testimony and the resulting affidavits of Myrtle Poor Bear; the use of potentially fraudulent information in an extradition order may have violated the Treaty Clause, and in particular the Webster-Ashburton Treaty that governs extradition between the United States and Canada, discussed above.³⁶⁴

The report cited four potential violations of Peltier's rights under the Fifth Amendment, all of which relate to Peltier's due process rights.³⁶⁵ First, the Commission alleged that the government engaged in misconduct while extraditing Peltier back to the United States, and testimony and exhibits of such misconduct were excluded by the district court at trial.³⁶⁶ Second, the FBI's engagement with AIM had created a climate of fear among AIM members, which led to Peltier's flight to Canada. Yet, testimony on this topic was likewise excluded by the district court at trial.³⁶⁷ Third, testimony and evidence prejudicial to Peltier was admitted during the trial.³⁶⁸ This included all autopsy photographs of the murdered agents and FBI academy graduation photographs of the two agents.³⁶⁹ Also admitted was evidence of Peltier's previous attempted murder charge, weapons unrelated to the firefight that came from the exploded vehicle near Wichita, Peltier's purported flight to Canada from a motor home in Oregon despite no one ever actually having seen him there, his possession of

362. *Id.*

363. The Trial of Leonard Peltier: Analysis of Constitutional Violations, *in* Letter from Bruce to Anaya, *supra* note 362.

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

unrelated weapons when he was arrested in Canada, and a variety of deadly weapons found on the Rosebud Reservation that could not be linked to him.³⁷⁰ Fourth, his defense requested a mistrial on several occasions throughout the trial and was denied each time.³⁷¹ Much of this had to do with jury instructions relating to prejudicial material, and to facts alleged by the government that were contrary to witness testimony or wholly lacked testimony.³⁷²

The possible Sixth Amendment violations were more diverse, including violations of Peltier's (1) right to compulsory process; (2) right to confront witnesses; (3) right to be made aware of the nature of accusations; (4) right to an impartial jury; (5) and right to a public trial. The compulsory process relates to Myrtle Poor Bear and Jimmy Eagle both being subpoenaed by the defense but not being allowed to testify before the jury at trial.³⁷³ The violation of the Confrontation Clause may be one of the most significant in the case. *Brady* was the controlling case at this time, yet a variety of sources of exculpatory evidence—the testimony of Myrtle Poor Bear and Jimmy Eagle; the coerced testimony of Anderson, Draper, and Brown; the radio transmission reports of the red pickup; the alleged sightings of Peltier and Eagle through a rifle scope; pathologists' reports; and the firearms and toolmark identification—were excluded from trial, and some of this evidence was unknown to the defense because the prosecution did not disclose it.³⁷⁴ The possible violation of the right to be made aware of the nature of the accusations against him related to Peltier being uninformed that the charge of aiding and abetting led to his conviction.³⁷⁵ Peltier's defense argued that he was not extradited on the aiding and abetting charge and sought to have the judge issue appropriate instructions to the jury.³⁷⁶ Yet, the judge allowed the prosecution to raise the aiding and abetting theory during closing arguments:

Now, you will note that I didn't say we have to prove Leonard Peltier pulled the trigger on either of the deaths because the law does not require that. All we have to show is that he was

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

responsible, whether it was by pulling the trigger or by some other method or means.³⁷⁷

The Commission based its argument for the lack of an impartial jury was argued on the jury's composition--the jury was all white--its sequestration throughout the trial, the judge's inadequate instructions before deliberations, and the judge's denial of the jury's two requests to re-hear certain testimony.³⁷⁸ Finally, Peltier's right to a public trial was arguably violated when on the day of the reporting of the verdict, the judge chose to exclude the public from the courtroom, including Peltier's family.³⁷⁹

The sole Eighth Amendment violation alleged was for cruel and unusual punishment. The Commission argued that while Robideau and Butler were acquitted, Peltier was found guilty and sentenced to two consecutive life terms, and this conviction was based solely on circumstantial evidence.³⁸⁰

In summary, there are a number of troubling inconsistencies concerning how the trial was handled and possible misconduct on the part of the government that effectively prevented Leonard Peltier from receiving a fair trial. Particularly disturbing is the fact that, despite the Supreme Court's ruling in *Brady*, a significant amount of exculpatory and potentially exculpatory evidence was not disclosed by the prosecution, thus hindering the defense's case. The lack of opportunity to have Myrtle Poor Bear and Jimmy Eagle testify before the jury is just one example of this failure to disclose. Also, considering that two AIM members were indicted and then acquitted on similar murder charges, the sentence given to Peltier raises the issue of cruel and unusual punishment. When coupled with a failure on the part of the government to apprise him of the nature of accusations against him, and thus be able to present to the jury an aiding and abetting theory of which to find Peltier guilty, a violation of cruel and unusual punishment becomes even more important to consider.

Finally, given Peltier's indigenous status and his affiliation with AIM, was racial discrimination a motivating force behind the trial-related behavior exhibited by the government? Did Peltier's status as an indigenous person in the United States play a significant role in preventing him from possibly getting a fair trial and receiving a cruel and unusual punishment? If there were violations of his fundamental freedoms as an American, is there a positive correlation between the violations and his status as an indigenous

377. *Id.* (quoting trial transcript at 4973).

378. *Id.*

379. *Id.*

380. *Id.*

person, an American Indian? To address this aspect of the case, it is necessary to turn to a consideration of whether Peltier's human rights as an indigenous person were violated, as presently defined by customary international law.

VI. Possible International Human Rights Violations

A. Previous International Involvement of the Peltier Case

In December 1976, Peltier challenged his extradition from Canada before the U.N. Human Rights Committee, the committee responsible for hearing complaints relating to the ICCPR, a covenant that the United States has ratified.³⁸¹ This was the first time an extradition matter had been brought before the committee.³⁸² Peltier challenged the extradition on grounds that the statements by Myrtle Poor Beach were coerced, and also "on the grounds that the shootings had taken place on sovereign Indian territory and that the offence [sic] was of a political nature because of his involvement in the American Indian Movement for National Liberation."³⁸³ Among the ICCPR provisions that Peltier invoked were Article 1, on self-determination, and Article 13, which provides safeguards against expulsion.³⁸⁴ The Human Rights Committee never discussed the specific applicability of the provisions invoked.³⁸⁵ Rather, they gave the entire matter "short shrift," declaring that the communication was inadmissible, in part because it drew on events that took place before the treaty took effect in Canada, and in part because Peltier had failed to exhaust his domestic legal remedies.³⁸⁶

In 1984, at the height of the Reagan-Gorbachev Cold War, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities welcomed seventeen newly elected expert members to its twenty-six-member board and convened in Geneva.³⁸⁷ The meeting agenda included human rights violations in certain countries, the status of indigenous

381. Joanna Harrington, *The Absent Dialogue: Extradition and the International Covenant on Civil and Political Rights*, 32 *QUEEN'S L.J.* 82, 93 (2006).

382. *Id.*

383. *Id.*

384. *Id.* at 94.

385. *Id.*

386. *Id.*

387. Larry Garber & Courtney M. O'Connor, *The 1984 U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 79 *AM. J. INT'L L.* 168, 168 (1985).

peoples, slavery, states of emergency, as well as other matters.³⁸⁸ Under the heading of human rights violations, the Soviet Union and the United States each submitted three resolutions “that the Sub-Commission found too controversial to consider.”³⁸⁹ The United States introduced resolutions concerning the plight of Soviet dissident Andrei Sakharov, the Swedish World War II hero Raoul Wallenberg who disappeared after being taken prisoner by the Russian Army, and Jews in the Soviet Union.³⁹⁰ The Soviet Union countered with resolutions regarding the situation in Northern Ireland, President Reagan’s remarks relating to the launching of a nuclear attack, and the plight of Leonard Peltier.³⁹¹ The Sub-Commission managed to avoid dealing with resolutions in a rather convenient fashion: “It decided that [the U.S. and Soviet resolutions] would be considered only after all the others and then ran out of time before debate could begin on the political resolutions.”³⁹²

B. Potential International Human Rights Violations of Leonard Peltier

The International Convention on the Elimination of All Forms of Racism and Discrimination (ICERD) is a particularly important international treaty for Peltier’s case. First, the treaty entered into force on January 4, 1969--well before the events in question occurred--and as the United States had ratified the convention, the U.S. government is legally bound to its provisions.³⁹³ Article 2 defines the State’s responsibility in eliminating racism and discrimination; Article 2(1)(a) states that “[e]ach State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.”³⁹⁴ Article 2(1)(b) is also pertinent and says, “Each State Party undertakes not to sponsor, defend or support racial

388. *Id.* at 169-79.

389. *Id.* at 176.

390. *Id.*

391. *Id.* at 176-77.

392. *Id.* at 177.

393. Although the United States signed ICERD on September 28, 1966, it did not ratify it until October 21, 1994. See *International Convention on the Elimination of All Forms of Racial Discrimination*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-2.en.pdf> (last visited Dec. 19, 2013).

394. International Convention on the Elimination of All Forms of Racial Discrimination art. 2, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

discrimination by any persons or organizations.”³⁹⁵ These provisions make it clear that any signatory state must not support any form of racial discrimination nor allow public institutions to engage in such behavior. Article 5 outlines individual rights, including three rights on point: (a) “[t]he right to equal treatment before the tribunals and all other organs administering justice;” (d)(ix) “[t]he right to freedom of peaceful assembly and association;” and (e)(vi) “[t]he right to equal participation in cultural activities.”³⁹⁶

The Committee on the Elimination of Racial Discrimination (CERD), the U.N. body responsible for dealing with complaints under the Convention, has “early warning measures” and “urgent action procedures” to address current problems that may become more serious if immediate action is not taken.³⁹⁷ Peltier could potentially use these measures and procedures to seek direct review by CERD. Peltier could also include arguments based on the provisions of ICERD in a petition for executive clemency or executive review.

Another international covenant that could be helpful in arguing Peltier’s case is the International Covenant on Civil and Political Rights (ICCPR). Although the Covenant was open for ratification in December 1966, it did not enter into force until March 23, 1976.³⁹⁸ This occurred after the Pine Ridge Reservation murders but before Peltier was extradited from Canada and before he stood trial. The Covenant has been ratified by the U.S. government, thus binding it legally to the Covenant’s provisions. In addition, as with ICERD, this instrument reflects international customary law and current international legal norms, and therefore can be invoked in an argument of the possible violations of Leonard Peltier’s human rights.

As with ICERD, Article 2 of the ICCPR defines the duties of signatory states in ensuring the rights of individuals. Article 2(3)(b) states, “To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities,

395. *Id.*

396. *Id.*

397. Comm. on the Elimination of Racial Discrimination, Rep. on the Guidelines for the Early Warning and Urgent Action Procedures, 71st Sess., Aug. 2007, U.N. Doc. A/62/18, Annexes, Chapter III. CERD adopted these procedures at its forty-fourth session in 1993. See U.N. Doc. A/48/18, Annex III, ¶ 8 (1993). See generally S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 199-200 (2009).

398. The U.S. ratified the covenant on June 8, 1992. See *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Dec. 19, 2013).

or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.”³⁹⁹ This obliges the State to ensure that good-faith efforts are made to serve justice and to ensure everyone has the right to participate in a just system. Part III of the ICCPR consists of twenty-two articles that articulate individual rights.⁴⁰⁰

The individual rights listed that are relevant to the Peltier case are Article 7, for the prevention of cruel, inhumane or degrading treatment or punishment; Article 9(2), which requires that arrestees be promptly informed of all charges against them; Article 14, particularly subsections 1, 2, and 3(e), which protects the right to a fair trial; Article 21, which includes the right to peaceful assembly; Article 22, covering the right to freedom of association; Article 26, protecting equal treatment under the law and equal protection under the law without discrimination; and Article 27, discussing minorities’ right “to enjoy their own culture”.⁴⁰¹

It is worth pointing out two recent decisions of the U.N. Human Rights Committee under the ICCPR regarding the unfair trials of individuals. The Human Rights Committee recommended that Russian citizen Konstantin Babkin, who was tried for murder and given an unfair trial, be given both compensation and a retrial.⁴⁰² The State responded by stating that the Committee’s recommendations had been forwarded to all of its high courts “to ensure that this type of violation will not occur again.”⁴⁰³ In the matter of A. Aliev of Ukraine, who had been denied a fair trial by not having counsel present, the Human Rights Committee recommended that consideration be given to an early release.⁴⁰⁴ In this instance, the State strongly disagreed with Aliev’s allegations, claiming they had no basis and that he had been tried fairly⁴⁰⁵

Another U.N. convention that may be pertinent to the Peltier case is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which entered into force on June 26, 1987 and

399. *See* International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171.

400. *Id.*

401. *Id.*

402. Rep. of the U.N. Human Rights Comm. on Individual Communications, Human Rights Committee, 95th Sess., March 16-April 3, 2008, U.N. Doc. CCPR/C/95/4 (Feb. 17, 2009).

403. *Id.*

404. Aliev v. Ukraine, Human Rights Comm., No. 781/1997, U.N. Doc. CCPR/C/78/D781/1997, (Aug. 7, 2003).

405. U.N. Human Rights Comm., Rep. on 99th Sess., July 12-30, 2010, U.N. Doc. CCPR/C/99/3 (2010).

was ratified by the United States on October 21, 1994.⁴⁰⁶ Again, although this ratification occurred after the events in question, the convention follows international customary law and legal norms and is legally binding on signatories. This convention, rather than outlining specific individual rights, defines a variety of responsibilities on the signatory states to protect its people from torture. Article 1 of the convention, which defines torture, is relevant to the Peltier case:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.⁴⁰⁷

The U.N. Declaration on the Rights of Indigenous Peoples also has important implications as an international human rights instrument in relation to the Peltier case. Adopted in 2007 and endorsed by the United States in 2010, the Declaration reflects international customary law and is the first international human rights instrument created by the U.N. that deals explicitly with the rights and freedoms of indigenous peoples.⁴⁰⁸ The fact that Leonard Peltier is an American Indian cannot be overemphasized, given his role in AIM and the FBI's campaign to suppress the activities of AIM. Therefore, Peltier's fate cannot be severed from or considered wholly independently of the long history of discrimination and marginalization of American Indians by the U.S. government.⁴⁰⁹ In this context a few facts that

406. See G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (June 26, 1987).

407. *Id.*

408. *Remarks by the President at the White House Tribal Nations Conference*, WHITE HOUSE (Dec. 16, 2010; 9:39 AM), <http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>; *Victory!: U.S. Endorses UN Declaration on Rights of Indigenous Peoples*, CULTURAL SURVIVAL (Dec. 16, 2010), <http://www.culturalsurvival.org/news/united-states/victory-us-endorses-un-declaration-rights-indigenous-peoples>.

409. See, e.g., VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* (1969); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* (1990). For more general information on this topic see, for example, GEORGE E. TINKER, *MISSIONARY CONQUEST: THE GOSPEL AND NATIVE AMERICAN CULTURAL GENOCIDE* (1993);

indicate incidents of discrimination against Peltier are worth reiterating. As previously discussed, there is a school of thought within the FBI that views American Indians as conquered people and the federal police as a colonizing force.⁴¹⁰ During the 1960s and into the 1970s, the FBI responded forcefully to virtually any activity by minority groups that it considered subversive.⁴¹¹ Peltier was charged with attempted murder of police officer in Milwaukee in 1972, yet witnesses stated that two off-duty policemen jumped Peltier in a bar and beat him severely, leading to the charges against him.⁴¹² During Peltier's trial in California for his prison escape, the trial judge allegedly said at sidebar, "I have lived and gone to school with those kind of people all my life so I know those kind of people."⁴¹³ Paul Benson, the judge who presided over Peltier's murder trial, called him a disservice to his people.⁴¹⁴ This suggests a stereotypical view of American Indians as second-class, vanquished peoples who understand their position in the hierarchy of American society, and those who attempt to change that status by uplifting them only make their situation worse. Benson's point of view is consistent with many government officials who sought to discredit AIM by emphasizing the fact that even among American Indians AIM had its detractors and those who disagreed with its ideology. As Gerald Vizenor, a White Earth Chippewa elder, once stated with regard to AIM,

The confrontation idiom means punching out the symbolic adversary of racism and oppression at the front door, with the press present, and walking out the back door. Those who followed the ideology of confrontation were in conflict with those who believed that confrontation should lead to negotiation and institutional changes. The negotiation idiom means punching out the adversary at the front door with the press present but waiting around for an invitation to return and grind out some changes...The militant [AIM] leaders are dedicated men who

WARD CHURCHILL, *A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS, 1492 TO THE PRESENT* (2001).

410. *See* note 55, *supra*.

411. *Id.*

412. MESSERSCHMIDT, *supra* note 1, at 31.

413. *United States v. Peltier*, 529 F. Supp. 549, 551 (C.D. Cal. 1982). The district court described the trial judge's remark as "so unspecific that it has no meaning within the context of this motion. Appellant's conclusion that such a vague comment supports a cultural or racial bias against him is devoid of specific factual allegations tending to show any personal bias against the appellant and therefore is legally insufficient." *Id.*

414. MESSERSCHMIDT, *supra* note 1, at 116.

have given many years of their lives to a cause, but it takes more than a rifle and the symbolic willingness to die to bring about institutional changes that will benefit tribal people.⁴¹⁵

These examples are not random, but part of a larger pattern of discrimination to which Peltier, as well as other members of AIM (and many American Indian activists not associated with AIM), was subjected throughout the period of time covered in this paper. The contemporary standards of customary international law are clear with regard to governmental practices of discrimination.

The United Nations' human rights treaties and declarations all share a powerful anti-discrimination orientation. The right to be free from discrimination is as strong as any other human rights expounded upon in international human rights instruments. The Universal Declaration of Human Rights, adopted by the U.N. in 1948, soundly rejects discrimination in Articles 2 and 7.⁴¹⁶ As mentioned above, the ICCPR does so with equal emphasis in Article 26.⁴¹⁷ Of course, ICERD is devoted in its entirety to the eradication of discrimination in all its forms. Regional instruments, such as Article 2 of the American Declaration on the Rights and Duties of Man and Article 24 of the American Convention on Human Rights, likewise reject discrimination broadly. The U.N. Declaration of the Rights of Indigenous

415. PETER NABOKOV, *NATIVE AMERICAN TESTIMONY* 377-80 (rev. ed. 1999).

416. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III)(Dec. 10, 1948).

Article 2 of the Universal Declaration on Human Rights states,

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Id. Article 7 states, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." *Id.*

417. *See* ICCPR, *supra* note 400, at art. 26. Article 26 of the ICCPR states,

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id.

Peoples is very strongly anti-discriminatory; denunciations of discrimination occur four times in the Declaration's preamble.⁴¹⁸ In summary, Leonard Peltier's right to be free from discrimination has been systematically violated by the U.S. government—at least three years before the firefight at the Jumping Bull compound and right up to the present, because of his status as an American Indian and a member of AIM.

Although the Declaration is not legally binding on signatories, its adherence to principles of international customary law can serve as a guide for assessing possible human rights violations not only of indigenous peoples but also of individuals who are indigenous. There are ancillary and special rights that attend an indigenous person and can be denied because of discrimination; some of these, which are articulated in the Declaration, merit mentioning as well. Although the Declaration is primarily an instrument of collective, rather than individual rights, its spirit speaks to the importance of community and cultural sharing that is absolutely critical to the survival of indigenous peoples. It also emphasizes the relationship of indigenous peoples to their land and resources (Peltier's involvement in AIM centered around preserving Indian lands and resources, see discussion, *supra*).⁴¹⁹ It further contemplates the right of self-determination of indigenous peoples, through preservation of life styles, culture, traditions, lands, and indigenous institutions. Article 37 of the United Nations Declaration on the Rights of Indigenous Peoples guarantees that treaties will be honored and protected by States.⁴²⁰ Violations of provisions of the Declaration generally result in the cultural destruction and loss of self-identity of indigenous peoples.

In addition, Peltier's status as a political prisoner can be considered in light of the Declaration, given that (1) he is indigenous; (2) he was pursued

418. Preamble, United Nations DECLARATION on the RIGHTS OF INDIGENOUS PEOPLES, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). As well as in Articles 2 (free from all forms of discrimination), 8 (redress for propaganda of a discriminatory nature), 9 (free from discrimination to live in an indigenous village), 14 (preventing indigenous children from being discriminated against in schools), 15 (preventing discrimination against culture and tradition), 16 (preventing discrimination against indigenous peoples' languages), 21 (preventing discrimination in the pursuit of economic development), 22 (prevention of violence and/or discrimination against indigenous women and children), 24 (preventing discrimination of access to social and health services), 29 (preventing discrimination with regard to the conservation of indigenous peoples' environments), and 46 (stating that the Declaration is non-discriminatory in character).

419. See note 55, *supra*, and discussion *supra* Part III.A.

420. United Nations DECLARATION on the RIGHTS OF INDIGENOUS PEOPLES, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

by the FBI in part because of his involvement in a “subversive” organization; and (3) was not accorded a fair trial with regard to the charges brought against him. His case can therefore be compared generally with the case of Lori Berenson, an American activist who was convicted on terrorism charges in Peru in the late 1990s.⁴²¹ Although Berenson was not an indigenous person, she was connected, according to Peruvian authorities, with a subversive domestic organization, and there is controversy surrounding whether she received a fair trial.⁴²² After convictions in both military and civil courts in Peru, Berenson appealed her case to the Inter-American system for protecting human rights.⁴²³ The Inter-American Commission on Human Rights received a petition from Berenson’s counsel in 1998, reviewed the case, and in 2002, after Peru had failed to act on its recommendations, referred the case to the Inter-American Court of Human Rights.⁴²⁴

Berenson was arrested in November 1995 in Lima, for allegedly organizing a domestic terrorist attack against the Peruvian government.⁴²⁵ The charges brought against her by military officials were not made plain to her, nor was her lawyer allowed “to examine evidence or cross-examine witnesses.”⁴²⁶ The Inter-American Court described the military trial as follows:

The military trial was held on January 11, 1996, at the Chorrillos Military Base, in a type of room, like a tent, where there were several armed men in uniform. While the judgment was being read, the judges and prosecutors had their faces covered with balaclava helmets. The trial lasted “a couple of hours” and consisted merely in the reading of the judgment. At this trial she was sentenced to life imprisonment; she was not questioned; she was only asked if she would appeal the sentence. Even though her lawyer was present, she could not consult him to take the decision to appeal, although she could signal to him.⁴²⁷

421. Joseph May, *Lori Berenson v. Peru: An Analysis of Selected Holdings by the Inter-American Court of Human Rights*, 20 AM. U. INT’L. L. REV. 867, 868-69 (2005).

422. *Id.* at 868.

423. *Id.* at 868-70.

424. *Id.* at 880.

425. *Id.* at 878.

426. *Id.*

427. *Berenson-Mejia v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 13, ¶ 74 (Nov. 25, 2004)*, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_119_ing.pdf.

Following a series of appeals and motions on the part of Berenson's lawyers, in 2000, the Military Supreme Court found that due to an error, part of Berenson's sentence should be annulled, and the case was referred to civil court.⁴²⁸ The following June, Berenson was convicted of terrorism in civil court in Peru.⁴²⁹ Her lawyers brought the case before the Inter-American Commission, alleging multiple human rights violations, including right to humane treatment (Article 5 under the American Convention) and right to a fair trial (Article 8).⁴³⁰ The Inter-American Court found that her right to a fair trial had been violated by the military court, and that conditions in prison violated her right to humane treatment; however, the Court did not find that any of her rights were violated by the civil trial, and therefore, while ruling that she was entitled to compensation, the Court did not rule that she should be freed from prison.⁴³¹ The important point here is that had Berenson only faced a military tribunal, the Court would have demanded her release on the ground that her right to a fair trial had been violated; one would expect that the Inter-American system would likewise find that Peltier's right to a fair trial had been violated as well.

Table I provides a quick reference to potential international human rights violations suffered by Leonard Peltier along with the applicable U.S.-ratified international human rights instruments and the Declaration on the Rights of Indigenous Peoples.

428. *Id.* ¶ 88(44).

429. *Id.* ¶ 88(69).

430. May, *supra* note 423, at 880.

431. Tim Curry, Nerina Cevra & Erin Palmer, *Updates from the Regional Human Rights System*, 12 HUM. RTS. BRIEF, no. 2, 2005 at 22, 26, available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1312&context=hrbrief>; see also May, *supra* note 423, at 902 (expressing concern over the Inter-American Court's possibly hasty conclusion that the Peru civil trial did not violate any of Berenson's rights).

An interesting aside to the Lori Berenson case is the divisive reactions it has generated in the law review literature. Suffolk Transnational Law Review published two student notes in consecutive years that hold almost diametrically opposite conclusions about the case. Jack Gallo argued forcefully that the trials were unfair, that political forces shaped Berenson's fate, and that she should be extradited to the United States to stand trial. Jack Gallo, *Human Rights Policy or Hardball Politics? Why the United States Should Press Peru to Extradite Lori Berenson for a Fair Trial*, 25 SUFFOLK TRANSNAT'L L. REV. 91 (2001). *But see* Patricia A. Morisette, *The Lori Berenson Case: Proper Treatment of a Foreign Terrorist Under the Peruvian Criminal Justice System*, 26 SUFFOLK TRANSNAT'L L. REV. 81 (2002) (arguing that Berenson was indeed a terrorist who got what she deserved, that she was convicted fairly on the basis of law and evidence, and that the United States should not interfere in the matter).

Table I. Summary of possible international human rights violations

Human Rights Violation	ICERD	ICCPR	Universal Declaration	Declaration on Rights of Indigenous Peoples	CAT (UN Convention against Torture)	Rationale in a Nutshell
Equal treatment under the law; freedom from racial/ethnic discrimination	Article 5(a)	Article 26	Articles 2, 7	Articles 2, 8, 15		As an American Indian and member of AIM, Peltier was likely targeted by the FBI for discrimination.
Prevention of cruel and unusual punishment		Article 7	Article 5		Article 1	Peltier, not permitted the same defense as Robideau and Butler, was given two consecutive life sentences based solely on circumstantial evidence, some of which may have been tampered with.
Right to a fair trial		Article 14	Articles 10, 11			The FBI seemed intent on "locking" Peltier into convictions for the murders after Robideau and Butler were acquitted; exculpatory evidence was withheld by the government; Peltier not given opportunity to confront certain witnesses. Additional possible Fifth and Sixth Amendment violations (discussed, <i>supra</i>) interfered with his right to be tried fairly. In addition, the strongest evidence offered against Peltier – the firearms and toolmark identification – was fraught with problems; the technique itself has now been seriously called into question for its lack of a clear scientific foundation.
Right to assembly and association	Article 5(d)(viii)	Articles 21, 22	Article 20(1)			Peltier's association with AIM, a legal organization, brought him under the scrutiny of the FBI, which intended to suppress the movement.
Right to be informed of charges after arrest		Article 9(2)				Peltier claims that he was never apprised of the aiding and abetting charges, only the murder charges.
Right to cultural activities	Article 5(e)(vi)	Article 27	Article 27(1)	Article 15		Peltier's status as an American Indian played a role in whatever lack of justice he may have experienced; his activity in AIM to preserve aspects of Indian culture and tradition was criminalized by FBI efforts to suppress AIM.

VII. Conclusions: The Elements of a Case for Executive Clemency Based on International Human Rights Violations

A. Executive Clemency and Executive Review

Two of the four possible remedies posited by the Peltier Defense Offense Committee--executive clemency and executive review--are considered here; from the perspective of international human rights, they provide the most appropriate avenues to achieving justice for Leonard Peltier.

A person may seek executive clemency through “pardon, reprieve, commutation of sentence, or remission of fine.”⁴³² In Peltier’s case a commutation of sentence might be the best path to take. The requirements for commutation are presented in § 1.3 of the Rules Governing Petitions for Executive Clemency: “No petition for commutation of sentence, including remission of fine, should be filed if other forms of judicial or administrative relief are available, except upon a showing of exceptional circumstances.”⁴³³ One can safely say that, given Peltier’s long and painful journey through the appellate process, having three times been denied certiorari by the Supreme Court, that other forms of judicial relief are no longer available.

Executive review would compel the U.S. Attorney General to review the history of the Peltier case, with emphasis on the trial, and determine if sufficient misconduct or abuse of discretion or other procedural errors worked in such a way as to result in a verdict that would not have been rendered had the trial been fair and just.⁴³⁴ A successful outcome of an executive review would be to have the original judgment vacated and a new trial ordered. If Peltier is acquitted, he will be acknowledged as innocent, and the court ruling would exonerate him; executive clemency, on the other hand, would not necessarily provide such exoneration, but may simply proclaim that his sentence has been commuted and he becomes a free man. In other words, there may be no acknowledgment of innocence or of having been the victim of injustice in a commutation of sentence. Amnesty International, in a 1992 report, recommended a new trial. After describing how the extradition papers contained “testimony from a mentally disturbed Indian woman,” the report stated, “These and other factors have led

432. 28 C.F.R. § 1.1 (2013)

433. *Id.*

434 See http://www.freedomarchives.org/pipermail/ppnews_freedomarchives.org/2009-September/002450.html

Amnesty International to conclude that justice would best be served if the United States authorities were to grant Leonard Peltier a retrial.⁴³⁵

Whereas obtaining a successful executive review may not be as difficult as obtaining executive clemency, the risks, however, are greater. A new trial would not necessarily ensure a fair trial, and Peltier would have several factors likely working against him: the reality that the crime still involves the deaths of two FBI agents, and if Peltier is acquitted no one would be held responsible for the crime; that more than thirty years have elapsed since the trial would make it difficult to call reliable witnesses or introduce new testimony (beyond the materials obtained by Peltier through the FOIA); that it would no doubt cause a firestorm of protest from the FBI (not unlike the protest sparked when President Clinton considered clemency for Peltier in late 2000); and the stress of a new trial may be unduly damaging to Peltier physically.

Therefore, the most prudent course of action is to seek a commutation of sentence through executive clemency. This would wipe the conviction off Peltier's record and restore his freedom without conditions or another trial. With that in mind, what follows is a summary of the critical points to be included in a letter supporting a petition for executive clemency that would highlight the injustices suffered by Peltier from the standpoint of international human rights norms.

B. Executive Clemency for Leonard Peltier: The International Human Rights Perspective

As discussed above, President Clinton reviewed a petition for executive clemency for Peltier but chose not to sign it.⁴³⁶ The effort for a successful petition for clemency continues. The Leonard Peltier Defense Offense Committee has prepared a letter online to President Barack Obama seeking executive clemency; the screen has fields for individuals to sign.⁴³⁷ As recently as October 21, 2010, an email containing a letter from Peltier was forwarded to Professor S. James Anaya in which Peltier mentioned new legal action his team of attorneys is preparing.⁴³⁸ In support of a petition for

435. AMNESTY INT'L, HUMAN RIGHTS VIOLATIONS AGAINST THE INDIGENOUS PEOPLES: THE AMERICAS 5 (1992) available at <http://www.amnesty.org/en/library/asset/AMR01/001/1992/en/d903956b-edbf-11dd-a95b-fd9a617f028f/amr010011992en.pdf>.

436. Laurier, *supra* note 342.

437. See *Executive Clemency for Leonard Peltier*, IPETITIONS http://www.ipetitions.com/petition/peltier_clemency2008/ (last visited Dec. 19, 2013).

438. E-mail from George Galvis to Tony Gonzales et al. (Oct. 21, 2010, 10:46 CST) (on file with author).

executive clemency, an argument, from an international perspective, that claims that Peltier's human rights have been violated, might be organized in a letter that would contain the following:

PART I: BACKGROUND

- An introductory paragraph stating support for executive clemency;
- A paragraph discussing the essential facts of the case;
- A paragraph discussing the FBI's position regarding the case;
- A paragraph or two listing the major points of controversy;
- A paragraph or two summarizing the post-conviction case law.

PART II: POSSIBLE INTERNATIONAL HUMAN RIGHTS VIOLATIONS

(Emphasis in discussing these violations should focus on Peltier's status as an indigenous person and activist and the racial discrimination he has suffered as a result, as well as his association with an organization considered to be "subversive" by the U.S. government; appropriate treaties and the Declaration, as discussed, should be invoked with the presentation of each violated right).

- Equal treatment under the law;
- Prevention of cruel and unusual punishment;
- Right to a fair trial;
- Right to assembly and association;
- Right to be informed of all charges after arrest;
- Right to participation in cultural life.

PART III: CONCLUDING STATEMENT

The concluding statement should emphasize:

- the importance of international human rights instruments in the contemporary world of jurisprudence;
- the need for the recognition of equal justice for indigenous peoples and indigenous individuals;
- how justice will be served for Peltier if executive clemency is granted.

C. Final Thoughts

Leonard Peltier's case has gained worldwide attention, and many prominent individuals and organizations continue to press for his release. In addition to artists, scholars, and lawyers, the current list of supporters includes eight Nobel Prize winners, including Nelson Mandela (now

deceased), the Dalai Lama, Rigoberta Menchu, Tum, and Mearaid Maguire; the Belgium and Italian parliaments; civil rights leaders, including Jesse Jackson and Jim Silk; human rights organizations such as Amnesty International, Indigenous Women's Network, Human Rights Commission of Spain, and Veterans for Peace; religious organizations including the World Council of Churches, National Association of Christians and Jews, and the Maryknoll Office for Global Concerns; and forty-four Native American tribes, organizations, and tribal leaders.⁴³⁹

The weight of the evidence indicates that Peltier was pursued by the FBI because of his association with AIM, that he was extradited from Canada using information based in part on false testimony, that significant exculpatory evidence was withheld by the government before and during his trial, that he was unfairly convicted of the murders of FBI agents Coler and Williams, and that he was denied, during his appeals process, being allowed to introduce withheld evidence as well as timely parole hearings. One commentator who believes that Peltier may very well have murdered the two agents, nevertheless has decried the treatment he received from the government and the abuse of justice that resulted:

The claim by Kamook Nichols that Leonard Peltier boasted of killing the agents at Oglala has received wide attention, mostly because Peltier's detractors have said it justifies his conviction

439. See *Current and Past Supporters of Clemency for Leonard Peltier*, LEONARD PELTIER DEFENSE OFFENSE COMMITTEE, <http://www.whoisleonardpeltier.info/LEGAL/uploads/supporters.pdf> (last visited Dec. 19, 2013). The Native American organizations and tribal leaders include: Assembly of First Nations of Canada, Chemehuevi Indian Tribe, Cherokee Nation, Chief Arvol Looking Horse, Coyote Valley Tribal Council, Duckwater Shoshone Tribe, Forest County Potawatomi Community, First Nations School Association, Great Lakes Inter-Tribal Council, Inc., Greenville Rancheria Tribal Council, Honor the Earth, Howonquet Indian Council of the Smith River Rancheria, Indian Treaty Council, Kaw Tribe of Oklahoma, Lac Courte Oreilles Tribal Governing Board, Lakota/Dakota/Nakota General Council, Los Coyotes Reservation, Lower Brule Sioux Tribal Council, Mashpee Wampanoag Indian Tribal Council, Inc., National Congress of American Indians, Navajo Nation, Nez Perce Tribal Executive Committee, Northern Arapaho Business Council, Oglala Sioux Tribe, Oneida Tribe of Indians of Wisconsin, Ponca Tribe of Oklahoma, Prairie Band Potawatomi Tribal Council, Prairie Island Indian Committee, Prairie Island Tribal Council, Puyallup Tribal Council, Rohnerville Rancheria Tribal Council, Saginaw Chippewa Indian Tribe of Michigan, San Pasqual Band of Mission Tribal Council, Schaghticoke Tribal Nation of Kent, Connecticut, Inc., Smith River Rancheria Tribal Council, Standing Rock Sioux Tribe, Tohono O'Odham Legislative Council, Tonkawa Tribal Council, Turtle Mountain Band of Chippewa Indians, United Auburn Indian Community of the Auburn Rancheria, Upper Sioux Community, Wampanoag Tribe of Gay Head, Westbank First Nation, and Winnebago Tribal Council.

and will justify denying him parole. . . The argument is spurious. It brushes aside the fact that Peltier was denied the right to a fair trial and so could not argue to a jury, as Dino Butler and Bob Robideau did, that even if they found he had killed the agents, the government was more guilty than he. . . . I have never met Leonard Peltier, and I doubt I would much like him if I did. I also believe it is far more probable than not that he finished off the agents while one of them begged for their lives. But the man has been imprisoned thirty years in consequence of being railroaded in the most obscene way, and that is suffering enough, particularly since his railroaders have never been jailed a day. He should be set free.⁴⁴⁰

When the puzzle of his arrest, trial, conviction, and appeals process is assembled as completely and accurately as possible, the simple yet disturbing question posed by distinguished Professor Blanche Wiesen Cook, more than a decade ago, resonates profoundly: “Why is Leonard Peltier still in prison?”⁴⁴¹

Perhaps it is most appropriate to close with Peltier’s own words, reflecting his status as an indigenous person in the United States and the discrimination indigenous people frequently face when confronted with an often hostile judicial system: “Innocence is the weakest defense. Innocence has a single voice that can only say over and over again, ‘I didn’t do it.’ Guilt has a thousand voices, all of them lies.”⁴⁴²

440. STEVE HENDRICKS, *THE UNQUIET GRAVE: THE FBI AND THE STRUGGLE FOR THE SOUL OF INDIAN COUNTRY* 368-69 (2006).

441. Blanche Wiesen Cook et al., *The Genesis of the Declaration: A Fresh Examination*, 11 *PACE INT’L L. REV.* 27, 50 (1999) (panel discussion).

442. LEONARD PELTIER, *PRISON WRITINGS: MY LIFE IS MY SUN DANCE* xxiii (Harvey Arden ed., 2000).