

GOLD, FARRELL & MARKS

ATTORNEYS AND COUNSELORS AT LAW

FORTY-ONE MADISON AVENUE

NEW YORK, N. Y. 10010-2201

(212) 481-1700

FACSIMILE (212) 481-1722

ALAN R. FRIEDMAN
MARTIN R. GOLD
RAYMOND J. HESLIN
CHRISTINE LEPERA
PAUL V. LICALS
LEONARD M. MARKS
JANE G. STEVENS

ROBERT P. MULVEY

MARK N. DILLER
MARK R. EISENBERG
PAULA M. GUIBAULT
MARK S. LAFAYETTE
AMY J. LIPPMAN
ROBERT L. MARGOLIS
DEBRA A. MAYER
THOMAS P. McCAFFREY
L. LONDELL McMILLAN
DAVID W. MILLER
HOWARD H. WELLER
LINDA YASSKY

THOMAS R. FARRELL
COUNSEL

file under
"Projects,"
Peltier

December 22, 1993

VIA FEDERAL EXPRESS

Ms. Anne Bartley
White House OEOB
Room 100
1600 Pennsylvania Avenue
Washington, D.C. 20500

Re: Leonard Peltier's Pardon

Dear Anne:

I really enjoyed our recent lunch. I am enclosing an amicus brief that we filed on Leonard Peltier's behalf by various religious leaders, which sets forth the facts of the case. The following points seem to me particularly compelling with respect to executive clemency:

1. The Federal appellate judge, who wrote the opinion affirming Leonard's conviction, has now written to Senator Inouye recommending a Presidential pardon for the following reasons:

The United States government made a military response at Wounded Knee, resulting in a deadly fire fight instead of considering the legitimate grievances of Native Americans; the FBI used blatantly improper tactics in securing Peltier's extradition from Canada and in investigating and trying the Peltier case; a healing process must begin where we nationally treat Native Americans more fairly, recognizing their unique culture

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December 22, 1993
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and contributions to our Nation (see Exhibit A to the brief). I don't know of any federal judge in this position who has ever recommended a pardon.

2. The two co-defendants of Peltier were acquitted in an early trial before a neutral Federal Judge.

3. The Judge presiding over Peltier's trial conviction was so biased that in another case, the Federal Circuit Court reversed an Indian conviction because this Judge improperly instructed the jury about "drunken Indian" stereotypes. This Judge issued a series of rulings during the Peltier trial that were completely biased, totally favored the government, and reversed virtually all the rulings from the earlier acquittals.

4. The FBI admitted suppressing from the defense ballistic reports which appear to have eliminated Peltier's gun as the murder weapon. This evidence was only revealed years after Peltier's conviction under Freedom of Information Act disclosures. The FBI has continued to refuse to produce all of the suppressed evidence claiming "national security". The Appellate Court found that with this suppressed material Peltier's defense would have had substantial additional cross-examination of the critical FBI witnesses, that these inconsistencies cast strong doubts on the government's case and that it was possible that the jury would have acquitted Peltier had this information been available.

5. After 17 years of imprisonment, Peltier recently applied for parole, and not only was denied parole, but was instructed that he could not again apply for parole until the year 2008.

6. Approximately 50 Canadian parliamentarians have filed a brief on Peltier's behalf because of the horrible lies that led to his extradition -- the FBI coerced affidavits from a mentally-ill woman named Myrtle Poor Bear, who said that she saw her boyfriend, Peltier, murder the agents at close range when, in fact, she had never even met Peltier, was not even present at the

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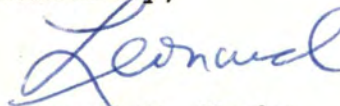
reservation during the fire fight, and was so crazy that the government did not even use her as a trial witness.

7. Many Senators and Congressional representatives have submitted amicus briefs on behalf of Peltier and have written to Attorney General Reno in support of the pardon application.

8. Various international groups and leaders have supported Peltier, including Nobel Peace Prize winners Bishop Desmond Tutu, Rigoberta Menchu, Amnesty International, etc.

Given the horrible history of our legal mistreatment of Native Americans over the past 500 years, this is a real opportunity for the President to initiate the healing process, particularly since this is the year of the indigenous people at the United Nations.

Sincerely,



Leonard M. Marks

LMM:as
Enclosures

An International Campaign for Justice

Beginning Nov. 21, 1993, thousands of supporters of justice for Leonard Peltier from all over the U.S. and from countries around the world will send their message to the White House. The Leonard Peltier Freedom Campaign will deliver to the White House steps over 1 million signatures urging President Clinton to sign the order for freedom for Native American activist Leonard Peltier, who has been unjustly imprisoned for 17 years.

Thousands of resolutions from Tribal Councils, unions, churches, city councils, schools and diverse community groups will also urge freedom for Leonard Peltier.

The holiday season is a traditional time worldwide for political leaders to free prisoners in the spirit of reconciliation and justice. This is a unique opportunity for President Clinton to immediately resolve this infamous miscarriage of justice.



LEONARD PELTIER

Unjustly imprisoned for 17 years

Leonard Peltier is an internationally known Native American leader jailed for 17 years for a crime he didn't commit.

The U.S. 8th Circuit Court of Appeals found that his trial and subsequent appeals had been riddled with FBI misconduct including coercion of witnesses, perjury, fabrication of evidence and suppression of vital information.

The Appeals Court found FBI misconduct in the case, "a clear abuse of the investigative process." Incredibly, they ruled against a new trial for Leonard.

At his trial in 1977, the prosecution was so desperate to gain a conviction that it claimed that Peltier killed 2 FBI agents "in cold blood, at point blank range," during a confrontation between the government and the American Indian Movement on the Pine Ridge Indian Reservation in South Dakota. The prosecution during 1985 and 1992 appeals admitted, "We do not know who shot the agents."

Despite this admission and proof of government fabricated evidence, Leonard remains in jail. President Clinton has the power to resolve this internationally infamous frameup by freeing Leonard.

Members of Congress, international leaders, religious leaders, celebrities and national organizations are all urging President Clinton to free Leonard.

Add your voice

Write • Call • Fax • Pass Resolutions

Petition to the White House

President Clinton, we urge freedom for Leonard Peltier!

We add our names to the over 20 million people worldwide who have written to urge freedom and justice for Leonard Peltier, an American Indian leader wrongfully imprisoned for 17 years.

We are deeply concerned about human rights and we are heartened that many prominent individuals and groups have supported Leonard Peltier, including many members of Congress, Amnesty International, the National Association of Criminal Defense Lawyers, the National Association of Christians and Jews, and 78 world religious leaders and human rights leaders, including Bishop Desmond Tutu of South Africa, the Arch Bishop of Canterbury, Jessie Jackson and Rigoberta Menchu.

Proven FBI misconduct in Peltier's trial, including suppression of key evidence and perjury, make continued imprisonment an international outrage.

We urge you to take immediate action in the UN Year of Indigenous People 1993!

Mail your letters and petitions, call and fax:

President Clinton
The White House
1600 Pennsylvania Avenue
Washington, DC 20500
Phone 202-456-1111 • Fax 202-456-2461

Use this as a petition and get resolutions passed from your school, union, church, or community group.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LEONARD PELTIER, Appellant

v.

G. L. HENMAN, WARDEN
UNITED STATES PENITENTIARY,
LEAVENWORTH, KANSAS, Appellee

No. 92-1129

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

AMICI CURIAE BRIEF
IN SUPPORT OF APPELLANT

LEONARD M. MARKS
DEBRA A. MAYER
GOLD, FARRELL & MARKS
41 Madison Avenue
New York, New York 10010
(212) 481-1700

Date: May 19, 1992

Counsel for The Cathedral
Church of St. John the
Divine, additional Amici
on inside cover.

AMICI

The Rev. Thomas M. Berry, C.P.
Director, Riverdale Center for Religious Research

The Rev. Dr. Joan B. Campbell
General Secretary, National Council of Churches of Christ, U.S.A.

James Carroll
Former Passionist priest

Bernard Glassman, Sensei
Abbot, The Zen Community of New York

The Rt. Rev. Richard F. Grein
Episcopal Diocese of New York

The Rt. Rev. Barbara C. Harris
Episcopal Diocese of Massachusetts

The Rev. J. Bryan Hehir
Associate Vice President for Church, Society and the University,
Georgetown University

The Rev. Theodore M. Hesburgh, C.S.C.
President Emeritus, University of Notre Dame

Daniel Gomez-Ibanez
Executive Director, Council for a Parliament of the World's
Religions

The Rev. Jesse L. Jackson, Sr.
Founder, Rainbow Coalition

Chief Oren Lyons
Faithkeeper, Onondaga Nation

The Very Rev. Bruce McLeod
President, Canadian Council of Churches

The Very Rev. James Parks Morton
Dean, The Cathedral of St. John the Divine

Dr. David Ramage
President, McCormick Theological Seminary

Julianna Schmemmann
Bishop's Council of Orthodox Church in America

The United Methodist Church
General Board of Church and Society

The Rev. Dr. Daniel E. Weiss
General Secretary, The American Baptist Churches in the U.S.A.

Dr. Gibson Winter
Adjunct Professor of Social Ethics, Religion Department, Temple
University

INTEREST OF AMICI

Amici are representatives of many faiths and religions (the "Religious Leaders"). They are deeply concerned with the rights and affairs of minorities, particularly with those of Native Americans. They are active in the pursuit of equality and justice for all people, regardless of race or religion.

Amici are the Cathedral Church of St. John the Divine, and its Dean, the Very Reverend James Parks Morton; The Rev. Thomas M. Berry, C.P. Director, Riverdale Center for Religious Research; The Rev. Dr. Joan B. Campbell, General Secretary, National Council of Churches of Christ, U.S.A.; James Carroll, Former Passionist priest; Bernard Glassman, Sensei, Abbot, The Zen Community of New York; The Rt. Rev. Richard F. Grein, Bishop, Episcopal Diocese of New York; The Rt. Rev. Barbara C. Harris, Episcopal Diocese of Massachusetts; The Rev. J. Bryan Hehir, Associate Vice President for Church, Society and the University, Georgetown University; The Rev. Theodore M. Hesburgh, C.S.C. President Emeritus, University of Notre Dame; Daniel Gomez-Ibanez, Executive Director, Council for a Parliament of the World's Religions; The Rev. Jesse L. Jackson, Sr., Founder, Rainbow Coalition; Chief Oren Lyons, Faithkeeper, Onondaga Nation; The Very Rev. Bruce McLeod, President, Canadian Council of Churches; Dr. David Ramage, President, McCormick Theological Seminary; Julianna Schmemmann, Bishop's Council of Orthodox Church in America; The United Methodist Church, General Board of Church and Society; The Rev. Dr. Daniel E. Weiss, General Secretary, The American Baptist Churches in the U.S.A., and Dr. Gibson Winter,

Adjunct Professor of Social Ethics, Religion Department, Temple University.

The Religious Leaders, having witnessed repeated abuses of justice in the investigation, extradition, prosecution, and sentencing of Leonard Peltier, feel compelled to support Mr. Peltier's appeal for a new trial or dismissal of his conviction. It is time to remedy the injustice of Mr. Peltier's conviction and release him from prison, where he has been held for more than 15 years.

It is beyond argument that the treatment of Native Americans by the United States government is a blot on the pages of this country's history. See, e.g., United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (recognizing the taking of Indian property by United States government without just compensation); Ex Parte Crow Dog, 109 U.S. 556 (1883) (judicial affirmance of government's breach of Indian treaty); Scholder v. United States, 428 F.2d 1123 (9th Cir.), cert. denied, 400 U.S. 942 (1970) (in action by American Indians to enjoin, inter alia, Bureau of Indian Affairs ("BIA") from giving monies allotted to Indian irrigation project to a non-Indian, BIA's conduct found to be "shocking"); C. Wilkinson and E. Biggs, The Evolution of the Termination Policy, 5 Am. Ind. L. Rev. 139 (1977); F. Cohen, The Erosion of Indian Rights, 1950-53: A Case Study In Bureaucracy, 62 Yale L. J. 348 (1953); R. Weyler, Blood of the Land -- The Government and Corporate War Against The American Indian Movement

(Vintage Books, New York 1984); V. Deloria, Jr., Behind The Trail of Broken Treaties (Delacorte Press, New York 1974). Nor is there any doubt but that activities of the government with regard to members of the American Indian Movement ("AIM") in the 1970's, of which Mr. Peltier was a leader, has further undermined claims of equal justice for Native Americans. Indeed, the harassment and infiltration of AIM by the FBI, and the misconduct of the government in prosecuting cases against these Native Americans, have already been judicially determined. United States v. Banks, 383 F. Supp. 389 (W.D.S.D. 1974), appeal dismissed sub nom., United States v. Means, 513 F.2d 1329 (8th Cir. 1975).

The present case cannot be viewed separate and apart from this historic backdrop. "Whatever the nature and degree of his participation at Oglala, the ruthless persecution of Leonard Peltier had less to do with his own actions than with underlying issues of history, racism and economics, in particular Indian sovereignty claims and growing opposition to massive energy development on treaty lands and dwindling reservations." P. Matthieseen, In The Spirit of Crazy Horse, (The Viking Press, New York 1983, 1991).

The Religious Leaders believe that as interested non-parties, they are appropriate amici here. Funbus Sys., Inc. v. California Public Utilities Commission, 801 F.2d 1120, 1124-25 (9th Cir. 1986).

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PRELIMINARY STATEMENT

The Religious Leaders, as well as the international community, have universally condemned the investigation, extradition and prosecution of Leonard Peltier. The worldwide sense of the horrible injustice of these proceedings only increases with the passage of time, and is manifested by the following:

The outrageous government misconduct against Mr. Peltier is the subject of the recent critically acclaimed documentary "Incident at Oglala", and is underscored in the 1992 film drama "Thunderheart".

Congressional leaders have condemned the prosecution of Mr. Peltier and have filed amici briefs in the district court and in earlier proceedings.

A member of the Court of Appeals panel who wrote the opinion affirming the denial of Mr. Peltier's motion for a new trial based on evidence previously suppressed by the government, has set forth compelling reasons for the commutation or mitigation of Mr. Peltier's sentence. See Letter from the Honorable Gerald W. Heaney to Senator Daniel K. Inouye, dated April 18, 1991, attached as Appendix A hereto.

Nearly 20 million Europeans have signed petitions demanding clemency for Mr. Peltier. See Treen, A Question of Justice, People Magazine, 36 (May 4, 1992).

Spain awarded Mr. Peltier its Human Rights Award in 1986. See The San Francisco Chronicle, July 21, 1991, at Sunday Review, page 1.

Throughout the United States and many foreign countries, including Sweden, Mexico, Switzerland, Ireland, Canada, Italy, Denmark, Germany, India, Holland and France, groups have formed to support Mr. Peltier's legal efforts to obtain a new trial. See Crazy Horse Spirit 9 (spring ed. 1985).

Four Russian Nobel Prize Winners have petitioned for his release. See New York Times, June 27, 1984, Section A at 3, col. 1.

The World Peace Council sitting in Helsinki, Finland issued a position paper in Mr. Peltier's defense. See "Leonard Peltier and the American Ethnocide".

Two books have condemned the tactics used by the prosecution in Mr. Peltier's case. See P. Mathiessen, In the Spirit of Crazy Horse (The Viking Press, New York 1983, republished in 1991); J. Messerschmidt, The Trial of Leonard Peltier (South End Press, Boston 1983).

Amnesty International considers Mr. Peltier a political prisoner. Even before it was known that the FBI suppressed critical information favorable to Mr. Peltier, Amnesty International concluded that in the Peltier case "the FBI's pressuring of witnesses and withholding of information, reveals at the very least, some disrespect for the law on the part of the

FBI." See Amnesty International, "Proposal for a Commission of Inquiry Into the Effect of Domestic Intelligence Activities on Criminal Trials in the United States of America" at 47 (1981).

The primary reason for this universal condemnation is the fact that Mr. Peltier has suffered mistreatment delivered directly from the hands of America's judicial system -- a system which should be the bedrock of equality and justice. It is outrageous that within this judicial system:

1. Federal agents overreacted to Native American grievances at Wounded Knee with a paramilitary response that inescapably fomented the violence at Pine Ridge and resulted in the deadly firefight of June 26, 1975.

- a. The FBI armed the Guardians of the Oglala Nation ("Goons"), a group of violent roughneck enforcers and intimidators of Tribal Chief Dick Wilson, who opposed the traditional Native Americans and AIM. The FBI also condoned and incited the hostilities by the Goons against AIM and its supporters, including those in the AIM Jumping Bull encampment. (App. Mem. at 6.)

- b. Duane Brewer, former head of the Goons, and former BIA police officer on the Pine Ridge Reservation, has admitted the misconduct of the FBI and United States marshals and, for the first time, has confirmed that FBI agents provided ammunition to the Goons for use against AIM. Brewer also corroborated in chilling detail the beatings of the AIM lawyers

at the airport on the reservation and other violence by the Goons described by defense witnesses in testimony or offers of proof in the 1977 trial. Brewer also told of Goons having AR-15s, gas guns and "busting heads"; having M-16s, fragmentation grenades, plastic explosives and .357 magnum pistols; "kicking the hell out of people", "punching out" people and scaring them with weapons; shooting a man and firebombing his house, shooting up houses; firebombing journalist Byron Desersa's house; pistol whipping a man badly enough to send him to the hospital; and receiving armor piercing ammunition from FBI agents, "in case they're in a brick building". (App. Mem. 6 and n. 4, 36.)

2. Federal agents indisputably procured perjurious testimony harmful to Mr. Peltier to secure his extradition and conviction by threatening and coercing "witnesses".

a. This Court found:

[T]here is evidence in this record [conceded fabrication of eye witness account affidavits submitted to the Canadian authorities which induced them to extradite appellant] of improper conduct on the part of some FBI agents. . ."

800 F.2d at 778 (emphasis added). See also United States v. Peltier, 585 F.2d at 335 n.18.

b. A mentally ill woman named Myrtle Poor Bear was used by the government to create testimony that she had witnessed her "boyfriend" Mr. Peltier murder the agents at close range, when in fact she was not even at Pine Ridge on June 26, 1975. Through ineptitude, the agents fabricated three separate,

conflicting perjurious affidavits which were so obviously inconsistent that the government could not even use her testimony at trial. Ms. Poor Bear was not Mr. Peltier's "girlfriend"; she had never even seen him before his trial. (App. Mem. 5-6, 36.)

3. Federal agents indisputably suppressed exculpatory evidence and falsified incriminating evidence.

a. This Court stated:

[W]e find that the prosecution withheld evidence from the defense favorable to Peltier [H]ad this evidence been available to the defendant, it would have allowed him to cross-examine certain government witnesses more effectively."

800 F.2d at 775 (emphasis added).

If the newly discovered evidence had been available at trial [the evidentiary ruling below that prevented the defense from demonstrating the importance of the ballistic inconsistencies] might very well have been different. In any event, the defense would have had substantial additional documentary evidence upon which to cross-examine Hodge and would have had greater reasons to pursue the inconsistencies more vigorously than it did."

Id. at 777 (emphasis added).

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."

Id. at 779-80 (emphasis added in part).

b. The FBI suppressed important admissible exculpatory evidence which would have totally destroyed its

primary trial theory that the agents were killed by "Peltier's AR-15 rifle", after chasing Mr. Peltier in his "red and white van". The government suppressed at least 25 clearly exculpatory documents revealing that the weapon attributed to Mr. Peltier had been eliminated as the murder weapon by October 2, 1975. A favorable FBI ballistics report was never provided pursuant to discovery orders, and was not discovered until it was obtained through the Freedom of Information Act by defense counsel long after Peltier's conviction. The new evidence also established that at least two AR-15's were present at the scene and were fired at the FBI agents. It thus cast grave doubts on crucial evidence the government presented at trial linking Mr. Peltier to the alleged murder weapon. (App. Mem. 5, 7, 36.)

c. The government also suppressed corroborating evidence that the red pick-up truck which apparently drove away with the murderers minutes after the shooting of the agents was a different vehicle than Mr. Peltier's red and white van. Special Agent J. Gary Adams, in a contemporaneous radio transmission, reported observing at 12:18 p.m., just minutes after the stipulated time of death of the agents, a red pick-up truck leaving the Jumping Bull compound, heading north. He also testified at the Cedar Rapids trial under oath that he had said that at 12:18 p.m. there was a red pick-up truck leaving the Jumping Bull area going north. Yet at Mr. Peltier's trial, Adams tried to retract his earlier testimony in

the Cedar Rapids trial and tried to contradict and explain away the transcript of his 12:18 p.m. radio transmission. Other evidence supports the presence of the red pick-up truck. This red pick-up truck was there and left at 12:18, minutes after the murders, and it was not Mr. Peltier's red and white Suburban van, because that van was found in the camp when the FBI back-up paramilitary force arrived. That vehicle could not have both left the area heading north and remained behind.

The 1976 Cedar Rapids jury which acquitted co-defendants Butler and Robideau actually found as a fact that there had been a red pick-up truck, which was a different vehicle than the red and white van driven by Mr. Peltier. The jury foreman, Mr. Bolin, said that for the jury the red pick-up truck and the question of whether the people in the red pick-up truck were the murderers was a key part of the defense. When told that in Mr. Peltier's trial SA Adams denied that he saw a red pick-up truck, Bolin said, "Sounds like [SA] Adams is a liar, too." Mr. Bolin also opined that if Mr. Peltier had been tried with the same jury and evidence as his co-defendants, Bolin was sure that he would have been found not guilty ("How could he be anything else?"). This proves both the significance of SA Adams' changed testimony and the prejudicial effect to Mr. Peltier's defense of the government's manipulation of this evidence.

By the end of the Butler/Robideau trial in Cedar Rapids, the government generally, and SA Adams particularly, were

aware that the red pick-up truck referred to by SA Williams in his radio transmissions was a major obstacle to conviction of anyone, as demonstrated by the acquittals of Butler and Robideau. Since Mr. Peltier was driving a red and white van, which was clearly not a red pick-up truck, all government efforts at his trial were bent to convert the red pick-up truck into a red and white van. (App. Mem. 5, 37; App. Reply Mem. 15-17.)

4. Federal prosecutors resorted to scare tactics to intimidate the jury and influence the judge at trial.

a. At Mr. Peltier's trial, the defense repeatedly called Judge Benson's attention to Special Agent Waring's FD-302, which had obviously been altered to delete information favorable to the defense. Judge Benson refused to acknowledge that he could see the alterations and had been so adversely affected by the atmosphere of fear and intimidation that he was unable to make an objective assessment of the document.

b. Judge Benson also feared that there was "bugging" by the defense of his chambers or the courtroom and had the FBI investigate bugging, and he immediately construed innocuous actions by courtroom spectators as being signals to witnesses on behalf of the defense.

c. Judge Benson also authorized marshals to transport the sequestered jurors in a bus with shades over the bus windows "to protect them from snipers", and SWAT teams would

clear the way and secure the vicinity before the jurors were brought out of the courthouse onto the waiting bus, all performed within the sight and knowledge of the jurors. (App. Mem. 41 and n. 13.)

5. The government's massive misconduct to obtain Mr. Peltier's conviction followed the trial of his co-defendants who were acquitted by jurors who questioned the reasonableness of the FBI's actions and believed that AIM members returned two agents' fire in self-defense.

a. According to the foreman of the acquitting jury in the Butler/Robideau trial in Cedar Rapids, the jury acquitted the two co-defendants of Leonard Peltier on the grounds of self-defense, and defense of their families, notwithstanding the fact that they were shooting at FBI agents.. The foreman explained that the jury knew that if the defendants had not been shooting in self defense, they would have been guilty on the basis of aiding and abetting. The jury concluded that the defendants had not been willfully aiding and abetting, and that they had fired in self defense. The jury also felt that the FBI agents were as responsible for the shootout as were the defendants. (App. Mem. 19 n. 7, 37.)

6. The trial of Mr. Peltier and the remanded proceedings were presided over by a judge who has been reversed for substantially prejudicing a jury against a Native American in a criminal case.

a. In the case of United States v. Lavallie, 666 F.2d 1217 (8th Cir. 1981), this Court reversed the conviction of defendant, of Indian descent, finding Judge Benson's voluntary intoxication instruction -- given without evidentiary support or relevance to the crime charged -- to have denied him a fair trial. In so holding, the Court agreed with defendant's argument that the unsolicited instruction improperly raised the stereotype of a "drunken Indian" in the minds of the jurors. See United States v. Lavallie, 666 F.2d 1217 (8th Cir. 1981).

7. Mr. Peltier's two co-defendants were acquitted in a separate trial before another federal judge whose evidentiary rulings contrasted sharply with the pro-government rulings of Mr. Peltier's judge (for a comparison of the rulings, see J. Messerschmidt, The Trial of Leonard Peltier, at 40-41, annexed as Appendix B hereto). This Court found:

a. "One of our sources of discomfort with our decision is that although the defense was aware at trial of the inconsistencies, it was not able to demonstrate their importance because of an evidentiary ruling by the district court."

800 F.2d at 777.

b. The ruling in question "clearly hampered the defense" in that it "refused to allow defense counsel to mention the dates of the [inconsistent] reports or any inferences to be drawn from the date in his argument to the jury. Since the primary impeachment value of the reports is that their timing creates an inference that the FBI lab may have changed its conclusion concerning the relation of the .23 casing found in Coler's trunk to the Wichita AR-15 only after it

appreciated the alleged connection between the shell, the Wichita AR-15 and the murders, the argument foreclosed by the ruling could have been significant."

800 F.2d at 777 n.8.

8. The government conceded that it could not prove Mr. Peltier shot the agents at close range when the exculpatory suppressed evidence was finally revealed and threatened to undermine Mr. Peltier's conviction.

a. Confronted with its own previously suppressed ballistics documents discussed in paragraph 3a the government now concedes as unproven its theory that Leonard Peltier was the actual murderer. Its effort to minimize the impact of these documents (by now claiming its trial theory was that Mr. Peltier aided and abetted some unknown murderer) fails to save the government's case because it is plain from the record, and this Court had found as a matter of law, that despite the aiding and abetting prong in the indictment, Mr. Peltier was tried and convicted of first degree murder. United States v. Peltier, 800 F.2d 772, 773 (8th Cir. 1986). (App. Mem. 14-15.)

9. Mr. Peltier was thus convicted on a theory of guilt that the government concedes it has not proven, and there is no evidence he shared the requisite intent or motive of the close range shooter(s) to have aided and abetted the crime. (App. Mem. 18-21.)

10. The trial court has now refused to consider proffered evidence of (1) self defense (that was successfully introduced in Mr. Peltier's co-defendants' trial) on the government's aiding and abetting theory and (2) the absence of intent to aid and abet.

It is shocking to the universal sense of justice that Mr. Peltier has been convicted on this tainted basis, particularly when another former AIM member has now confessed that he, not Mr. Peltier, killed the FBI agents. See The National Law Journal, July 8, 1991, page 3.

STATEMENT OF ISSUES

1. Whether the district court's (i) exclusion of the evidence of self-defense and absence of intent to aid and abet, and (ii) refusal to entertain Mr. Peltier's claims of government misconduct and the atmosphere of intimidation at trial result in a fundamental miscarriage of justice? McCleskey v. Zant, 111 S. Ct. 1454 (1991); Kuhlmann v. Wilson, 477 U.S. 436 (1986).

2. Whether the Court should exercise its supervisory powers to correct the injustices in Mr. Peltier's case? McNabb v. United States, 318 U.S. 332 (1943); United States v. Banks, 383 F. Supp. 389 (D.S.D. 1974), appeal dismissed sub nom., United States v. Means, 513 F.2d 1329 (8th Cir. 1975).

STATEMENT OF THE CASE

Amici adopt the Statement of the Case as recited by appellant in his brief to the Court.

ARGUMENT

I. THERE HAS BEEN A FUNDAMENTAL MISCARRIAGE OF JUSTICE

This Court should reverse the district court's dismissal of the petition as an abuse of the writ of habeas corpus, because a constitutional violation of Due Process has caused the conviction of Mr. Peltier without proof that he committed the crime he was convicted of -- the close-range shooting of the FBI agents.

Under the standard of McCleskey v. Zant, 111 S. Ct. 1454 (1991), Mr. Peltier has sufficiently shown that a fundamental miscarriage of justice resulted from the exclusion of his self-defense evidence and evidence of his absence of intent to aid and abet, and will further result from the failure to entertain his claims of government misconduct and the deliberate creation of an atmosphere of intimidation.

In McCleskey, the Supreme Court recognized that a fundamental miscarriage of justice can be found when a petitioner presents a constitutional claim supplemented with a "colorable showing of factual innocence", and thus there has not been an abuse of the habeas corpus writ. 111 S. Ct. at 1471, quoting

Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986). Such is the case here. Appellant's constitutional claim is that the preclusion of evidence on self-defense and absence of intent to aid and abet, as well as the government's enormous, continuing misconduct and its deliberate creation of an atmosphere of fear and intimidation at trial amount to a fundamentally unfair trial in violation of Due Process. Appellant's constitutional claim is supplemented by a colorable showing of factual innocence: the government has now admitted that it failed to prove that Mr. Peltier shot the agents point-blank, another person has confessed to killing the agents, and appellant's two co-defendants were acquitted on self-defense grounds. Under these circumstances, the lower court's findings -- that the writ of habeas corpus has been abused by Mr. Peltier and that no evidentiary hearing is required on his claims -- must be reversed.

II. THE COURT SHOULD EXERCISE ITS SUPERVISORY
POWERS TO CORRECT THE INJUSTICES HERE

Because the misconduct of the government in Mr. Peltier's extradition and conviction is so pervasive and longstanding as to "shock the conscience", see Rochin v. California, 342 U.S. 165, 172 (1952), this Court should exercise its supervisory power to assure justice here.

It is critical to the continued integrity of our system of criminal justice that the investigation, trial and conviction

of persons charged with serious criminal offenses not be tainted by governmental misconduct:

If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means -- to declare that the government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

The Court is charged with the duty of "establishing and maintaining civilized standards of procedure and evidence", McNabb v. United States, 318 U.S. 332, 340 (1943) and to that end it has supervisory powers over the administration of criminal justice to prevent the federal courts from becoming accomplices in the willful disobedience of law. Id. at 341, 345. This supervisory power requires the Court to make certain that justice is done. Communist Party of the United States v. Subversive Activities Control Board, 351 U.S. 115, 124 (1956). See also Elkins v. United States, 364 U.S. 206, 223 (1960) (judicial supervision also based upon consideration of judicial integrity, which was invoked to vacate a conviction because the federal courts should not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold"); Mesarosh v. United States, 352 U.S. 1, 8 (1956) (court has duty to use supervisory power in criminal cases "to see that the waters of justice are

not polluted", and where a conviction is so tainted, the taint should be "remedied at the earliest opportunity" because the "government of a strong and free nation . . . cannot afford to abide with [tainted convictions]"); Rea v. United States, 350 U.S. 214, 216 (1956) (recognizing supervisory powers of federal courts over federal law enforcement agencies).

Misconduct by the government undeniably has tainted the investigation, extradition and conviction of Leonard Peltier. As a matter of Due Process, the Court should exercise its supervisory powers to preserve both the appearance and substance of justice by ordering that Mr. Peltier's 1977 conviction be vacated, or that he be granted a new trial. See United States v. Banks, 383 F. Supp. 389, 394 (D.S.D. 1974) (court dismissed with prejudice indictments arising from AIM's occupation of Wounded Knee because "the totality of the prosecutor's misconduct was sufficiently offensive to our traditional notions of justice to demand exercise of the supervisory power"), appeal dismissed sub nom., United States v. Means, 513 F.2d 1329 (8th Cir. 1975). See also Derden v. McNeel, 938 F.2d 605, 609 (5th Cir. 1991) (habeas relief warranted where cumulative errors amount to Due Process violation); Cooper v. Sowders, 837 F.2d 284, 288 (6th Cir. 1988) (writ of habeas corpus granted where cumulative errors produced a fundamentally unfair trial); United States v. Twigg, 588 F.2d 373, 379 (3rd Cir. 1978) ("fundamental fairness will not permit any defendant to be convicted of a crime in which

[governmental] conduct was 'outrageous'"); United States v. Omni Int'l Corp., 634 F. Supp. 1414, 1438 (D. Md. 1986) (even under narrowest interpretation of supervisory power, court's power to dismiss an indictment "must be utilized" in a case where government personnel committed repeated misconduct at the pre-indictment stage, the discovery stage, and in hearings before the court).

CONCLUSION

For the foregoing reasons and those set forth in appellant's briefs, amici curiae respectfully pray that this Court:

1. reverse the district court and enter final judgment for appellant, vacating his 1977 convictions, dismissing the charges against him and ordering his immediate release;
2. in the alternative, reverse the district court and remand with instructions to grant the appellant a new trial; or
3. in the alternative, reverse the district court and remand with instructions to grant appellant an evidentiary hearing on his claims of government misconduct and deliberate creation by the government of an atmosphere of intimidation at trial.

Dated: New York, New York
May 19, 1992

Respectfully submitted,

GOLD, FARRELL & MARKS

By: _____

A Member of the Firm
Attorneys for Amici Curiae
The Cathedral Church of
St. John the Divine, et al.
41 Madison Avenue
New York, NY 10010
(212) 481-1700

Of Counsel:

Leonard M. Marks
Debra A. Mayer

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Exhibit A

Divider Title: _____

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CHAMBERS OF
GERALD W. HEANEY
UNITED STATES SENIOR CIRCUIT JUDGE
FEDERAL BUILDING
DULUTH, MINNESOTA 55802

April 18, 1991

Senator Daniel K. Inouye
United States Senate
Select Committee on Indian Affairs
Washington, D.C. 20510-6450

Re: Leonard Peltier

Dear Senator Inouye:

Unfortunately I did not receive your letter of February 1, 1991 until April 13, 1991. When I did receive your letter, I was visiting your state. Thus, this is my first chance to reply.

As you know, I wrote the opinion in United States v. Peltier, 800 F.2d 772 (8th Cir. 1986), and I sat as a member of the court in an earlier appeal, United States v. Peltier, 731 F.2d 550 (8th Cir. 1984). In the case I authored, our court concluded:

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.

United States v. Peltier, 731 F.2d at 779-80. No new evidence has been called to my attention which would cause me to change the conclusion reached in that case.

There are, however, other aspects of the case that the President may see fit to consider in determining whether he should take action to commute or otherwise mitigate the sentence of Leonard Peltier. My thoughts on these other aspects result from a very careful study of the records of the Peltier trial and the post-trial evidence and from a study of the record in the Robideaux-Butler trial before Judge McManus in Iowa, a trial which resulted in the acquittal of Robideaux and Butler.

EXHIBIT A

April 18, 1991
Senator Daniel K. Inouye
Page 2

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

Second, the United States government must share the responsibility with the Native Americans for the June 26 firefight. It was an intense one in which both government agents and Native Americans were killed. While the government's role in escalating the conflict into a firefight cannot serve as a legal justification for the killing of the FBI agents at short range, it can properly be considered as a mitigating circumstance.

Third, the record persuades me that more than one person was involved in the shooting of the FBI agents. Again, this fact is not a legal justification for Peltier's actions, but it is a mitigating circumstance.

Fourth, the FBI used improper tactics in securing Peltier's extradition from Canada and in otherwise investigating and trying the Peltier case. Although our court decided that these actions were not grounds for reversal, they are, in my view, factors that merit consideration in any petition for leniency filed.

Fifth, Leonard Peltier was tried, found guilty, and sentenced. He has now served more than fourteen years in the federal penitentiary. At some point, a healing process must begin. We as a nation must treat Native Americans more fairly. To do so, we must recognize their unique culture and their great contributions to our nation. Favorable action by the President in the Leonard Peltier case would be an important step in this regard. I recognize that this decision lies solely within the President's discretion. I simply state my view based on the record presented to our court. I authorize you to show this letter to the President if you desire to do so.

Again, I am sorry your letter was not delivered to me at an earlier date.

Sincerely,

GERALD W. HEANEY

GWH:bn

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Exhibit B

Divider Title: _____

A COMPARISON OF THE TWO TRIALS

<i>Butler-Robideau Trial Cedar Rapids, Iowa</i>	<i>FBI analysis of Cedar Rapids Trial: Reasons for Not Guilty verdict*</i>	<i>Peltier Trial Fargo, ND</i>
—Only a few autopsy photos of dead agents were allowed for fear of prejudicing the jury.		—All autopsy photos were entered into evidence, plus FBI Academy graduation photos of the two agents.
—FBI Special Agent Gary Adams testified to the presence and departure of a red pickup truck at 12:18 p.m., moments after the agents were shot.		—FBI Special Agent Gary Adams denied existence of 12:18 pm red pickup truck.
—Extensive FBI 302's entered into evidence.	—"The Court rulings . . . forced the government to furnish the defense with all 302's prepared by Special Agents who testified for the government."	—No 302's entered as evidence if agent who wrote it testified.
—Witnesses told of FBI coercion in obtaining their testimony.	—"The defense was allowed freedom of questioning of witnesses. . . ."	—FBI coercion of important defense witnesses not allowed to be presented to jury.
—Defense allowed to present testimony concerning the number of unsolved murders that occurred on Pine Ridge Reservation as well as climate of fear on the reservation.	—"The Court continually overruled government objections . . ." and "As a result, the defense inferred the FBI created a climate of fear on the reservation which precipitated the murders".	—Defense allowed to talk of unsolved murders occurring on Pine Ridge only in a general sense, and were not allowed to exhibit evidence of FBI creation of climate of fear.
—History of FBI misconduct allowed as testimony.	—"The Court allowed testimony concerning past activities of the FBI relating to COINTEL PRO and subsequently allowed the Church Report into evidence"	—No evidence regarding past history of FBI allowed to be introduced.
—Defense lawyers and members of Butler-Robideau Support Group held frequent meetings and rallies in an effort to educate the public about June 26th and events leading up to it. National press blackout existed, but local press carried daily related articles.	—"The defense was uncontrolled in its dealings with the news media. . . ."	—Judge ordered the only news carried about Peltier could come from the courtroom. Defense lawyers and potential witnesses were not allowed to speak publicly about the trial.
—The jury was not sequestered.	—"The jury was not sequestered."	—Jury sequestered under complete control of U.S. Marshall Service

*Three additional reasons the FBI gave for the not guilty verdict at the Cedar Rapids trial were: 1) the government was prohibited from entering into evidence certain collateral exhibits; 2) there was a lengthy recess after completion of the government case; 3) the jury had a difficult time putting things together because it was a complicated case.