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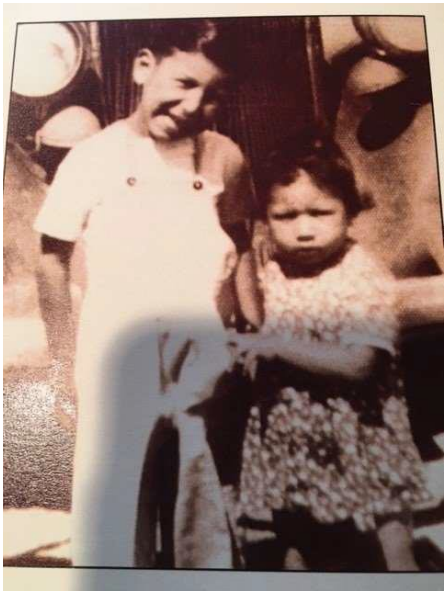
LEONARD PELTIER'S PETITION FOR EXECUTIVE CLEMENCY

Peltier's [case] was unusually troublesome . . . Forty years is enough."

– James H. Reynolds, former U.S. Attorney
who supervised Mr. Peltier's post-trial prosecution and appeal



Leonard Peltier (age 7) with his sister, Betty Anne (age 3). Within the next two years, the children were forcibly removed from their grandmother's home on the Turtle Mountain Indian Reservation and forced to attend an American Indian Boarding School.

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The story of the U.S. government's relationship with the American Indian population is one of endless betrayal, consisting of broken treaties, theft and desecration of sacred land, destruction of indigenous culture, and egregious, state-sanctioned violence. The events of Leonard Peltier's life are a testament to this painful and shameful history.

The land on which Leonard was born—a six-by-twelve-mile tract in North Dakota known as Turtle Mountain Reservation—is all that remains of millions of acres that the government extracted from the Chippewa Tribe through executive order, coercion, and fraud.[1] At age nine, Leonard was forcibly removed from his home by government agents and placed in an "American Indian boarding school," a euphemism for federally-funded institutions that sought to strip American Indian children of their culture through violence and intimidation.[2]

As a young man, Leonard's involvement with the American Indian Movement ("AIM") made him a target of the FBI's campaign to crush indigenous political momentum through surveillance, sham legal proceedings, and deputization of militia groups that assaulted and killed with impunity. In 1975, at age 31, Leonard became the government's scapegoat for the killing of two FBI agents and was convicted with the use of ***false testimony*** and ***fabricated evidence***. No less than a conspiracy to commit a fraud upon the judicial system.

Today, Leonard's story sounds like an unfortunate relic of the past, thankfully so. The FBI's abuses during this period have been catalogued and acknowledged. Judges and federal prosecutors have conceded that Leonard was denied a fair investigation and trial. In 2010, the United States officially apologized to American Indian communities for "years of official depredations, ill-conceived policies, and the breaking of covenants by the Federal Government."[3] President Biden, moreover, has made that goal a priority—appointing Deb Haaland to be the first indigenous Cabinet Secretary in U.S. history and declaring within a week of taking office that it is "particularly vital" for the United States to honor its past commitments to Tribal Nations.[4]

Yet, 46 years later, none of this progress has changed life for Leonard Peltier; he remains a casualty of this country's cruel and lawless war against American Indians. His

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[1] *See generally* North Dakota Department of Public Instruction, *The History and Culture of the Turtle Mountain Band of Chippewa* (1997), https://www.ndsu.edu/fileadmin/centers/americanindianhealth/files/History_and_Culture_Turtle_Mountain.pdf.

[2] *See, e.g.*, Mary Annette Pember, *Death by Civilization*, ATLANTIC (Mar. 8, 2019), https://www.theatlantic.com/education/archive/2019/03/traumatic-legacy-indian-boarding-schools/584293.

[3] John D. McKinnon, *U.S. Offers an Official Apology to Native Americans*, WALL STREET J. (Dec. 22, 2009), https://www.wsj.com/articles/BL-WB-15589.

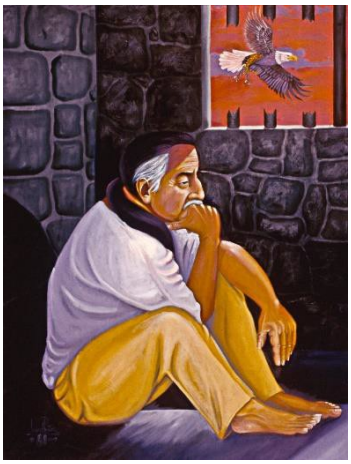
[4] *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships* (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/.

continued incarceration, moreover, is a constant reminder to Native communities that they are disposable in the eyes of the U.S. government and unworthy of the most basic protections afforded by our Constitution.

This Administration has the power to redress these ongoing injustices: Leonard, now 76 and in failing health, is a prime candidate for clemency. The exercise of that authority will not only show mercy to Leonard; it will also atone for an egregious abuse of government power staining this country's history and, in doing so, rebuild trust with indigenous communities.

Inaugural poet Amanda Gorman urged us to "merge mercy with might, and might with right," to strive to "leave behind a country better than the one we were left with."[5] Granting clemency to Leonard Peltier is a historic opportunity to live by those words. This country can be better than the one that stole 46 years of Leonard's life; that committed acts of unspeakable violence against his people; that kidnapped and traumatized a generation of indigenous children in a bid to destroy their rich, diverse culture; and that made a mockery of our legal system to achieve a politically expedient but unjust conviction. We can be better than that country—but we will not be so long as Leonard remains behind bars.

We respectfully submit this petition for executive clemency on behalf of Leonard Peltier so that he may spend his final years with his children and grandchildren. After half a century apart, Leonard should be able to return to the land of his childhood—on which his ancestors built the rich culture and unique traditions that have shaped and bettered this country—and to be reunited with a community that never lost faith in him.



Self-Portrait by Leonard Peltier

[5] *READ: Youth Poet Laureate Amanda Gorman's Inaugural Poem*, CNN (Jan. 20, 2021), https://www.cnn.com/2021/01/20/politics/amanda-gorman-inaugural-poem-transcript/index.html.

I. Leonard's Early Years: Deprivation and Trauma Spur Indigenous Community Advocacy

> *American Indians share a magnificent history—rich in its astounding diversity, its integrity, its spirituality, its ongoing unique culture and dynamic tradition. It's also rich, I'm saddened to say, in tragedy, deceit, and genocide.*
>
> – Leonard Peltier[6]

Leonard Peltier was born in 1944. His father was Chippewa, and his mother was Miniconjou-Dakota. He grew up on Turtle Mountain Reservation in North Dakota, a few miles shy of the Canadian border, where the Chippewa have lived since the 1800s. The Reservation once encompassed a sprawling 10 million acres—nearly a third of North Dakota's landmass—extending from the Red River Valley in the East to the Missouri River in the West.[7] By the time of Leonard's birth, however, the United States had dispossessed the Chippewa of 90% of their land, leaving the tribe with a Reservation approximately the size of Washington, D.C.[8]

Leonard's childhood years coincided with the United States' postwar economic boom, but they were not prosperous times on Turtle Mountain. Indeed, although nearly a third of Native men fought in WWII—including Leonard's father—this collective sacrifice did little to improve conditions for American Indians. The Peltiers relied almost exclusively on Leonard's father's Army pension, which was woefully insufficient to support a family of 15.

Leonard was raised primarily by his grandparents, a common practice in Native communities, in a home that was financially impoverished but rich with love and tradition. He describes his early years on the Reservation as "happy times"; he and the other children would hunt and trap muskrats and rabbits for dinner, gather ripe berries in the summer, and chop and haul firewood.[9] Leonard has commented that they were always thankful for "what Mother Nature provided for [them] to eat."[10]

This happy childhood was cut abruptly short when Leonard was nine. His grandfather died that year, which led his grandmother, who did not speak English, to seek financial assistance from the Bureau of Indian Affairs ("BIA"). Rather than help, agents from the BIA arrived at the Peltier home and announced that Leonard was being placed in an "Indian Boarding School" hundreds of miles away. Neither Leonard nor his grandmother were given

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[6] LEONARD PELTIER, PRISON WRITINGS: MY LIFE IS MY SUN DANCE 43 (1st ed. 1999) [hereinafter PRISON WRITINGS].

[7] *The History and Culture of the Turtle Mountain Band of Chippewa*, *supra* note 1, at 13.

[8] *Id.* at 13–17; *see also Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935, 938 (Ct. Cl. 1974).

[9] PETER MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE: THE STORY OF LEONARD PELTIER AND THE FBI'S WAR ON THE AMERICAN INDIAN MOVEMENT 44 (2d ed. 1991) [hereinafter SPIRIT OF CRAZY HORSE].

[10] *Id.* at 45.

any say in this decision. In what can only be described as a state-sanctioned kidnapping, Leonard was ripped out of his grandmother's arms over her desperate pleas for the agents to stop.[11]

Leonard was transferred to the Wahpeton Indian School in Southeastern North Dakota. Wahpeton was one of many federally funded boarding schools for Native children created in the late 19th and early 20th centuries. The schools were modeled in the image of Civil War Lieutenant Richard Henry Pratt, who advocated the destruction of Native culture through forced "civilization." The dehumanizing motto of the first such school, established by Pratt in 1879, communicated its intent with chilling directness: "Kill the Indian, Save the Man."[12] In service of this goal, students were stripped of all things associated with Native life and subjected to military-style regimentation.[13] Long hair, a source of pride for many Native peoples, was cut short. Traditional clothing was forbidden in favor of uniforms. Students were punished for speaking Native languages. Physical and sexual abuse were rampant. Contact with family was discouraged or forbidden altogether. Leonard was unable to return home to his family, even for a short visit, for three years.[14] These so-called schools thus functioned as an extension of the United States' genocidal policy toward Native Americans.

Leonard returned to Turtle Mountain while still a child, but one profoundly shaped by the trauma of the preceding years. The reality of life on the Reservation did little to alleviate that trauma. Leonard arrived home as the federal Indian Relocation Act was taking effect. The 1956 law was yet another iteration of the United States' effort to weaken Native communities and promote assimilation—in this case, by relocating American Indians to urban areas. Though the Act did not force people to leave their homes, it exerted pressure through deprivation. The Act dissolved federal recognition of many tribes and ended federal funding for reservations' schools, hospitals, and basic services—along with the jobs they created.[15] Between 1950 and 1970, more than 100,000 American Indians relocated from

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11 *Id.* As Leonard described in an interview: "They took us to Wahpeton in a bus. A whole bunch of us kids were taken that year. They lined us all up and gave us all GI haircuts. Then they ran us through the showers, scrubbed us down, and as we came out of the showers and dried off, then they put DDT on us. That began three years of a memory of my life that I thought was very, very, uh, very, very harsh." Suzie Baer, *Warrior: The Life of Leonard Peltier* (1991).

12 State Historical Society of North Dakota, North Dakota Studies, *Section 5: Indian Boarding Schools,* https://www.ndstudies.gov/gr8/content/unit-iii-waves-development-1861-1920/lesson-3-building-communities/topic-2-schools/section-5-indian-boarding-schools.

13 Pember, *supra* note 2.

14 At some schools, moreover, poor living conditions and scarce medical attention routinely resulted in children's deaths. Their parents sometimes learned of their deaths only after they had been buried in school cemeteries, some of which were unmarked. *See id.*

15 Alexia Fernández Campbell, *How America's Past Shapes Native Americans' Present*, ATLANTIC (Oct. 12, 2016), https://www.theatlantic.com/business/archive/2016/10/native-americans-minneapolis/ 503441/; Larry W. Burt, *Roots of the Native American Urban Experience: Relocation Policy in the 1950s*, 10 AM. INDIAN Q., no. 2, Spring 1986, at 91, 95.

reservations to urban areas, where work and adequate housing were scarce, and poverty was rampant.[16]

For those that stayed, like the Peltiers, life was harsher than ever. At Turtle Mountain, children were starving, vast numbers of residents were in the grips of drug and alcohol addiction, and violence was commonplace.[17] Abuses by the BIA were also rampant. Agents used violence or the threat of violence to force some families to relocate from Turtle Mountain. Leonard's cousin, Patricia Cornelius, lost her baby after enduring a brutal beating by the BIA police.[18] These abuses of power cemented Leonard's belief that government agencies could not be trusted to protect his people; indeed, these entities were an active threat to the community's survival.

As a young adult, Leonard committed himself to helping restore the Chippewa's dignity and sense of safety by addressing the interwoven crises of addiction, incarceration, and domestic violence. He set up a makeshift halfway house for ex-convicts and those suffering from alcohol addiction in the upper level of the auto-mechanic shop he owned.[19] Leonard also founded Indian centers in Seattle, Washington and Flagstaff, Arizona that provided indigenous women and children with shelter and support to help them escape dangerous living conditions.

This work, which highlighted the staggering poverty and violence of Native life, led Leonard to the American Indian political movement and specifically to AIM. Leonard began speaking out against government abuses in the early 1970s. In 1971, he joined a group of AIM members who peacefully took over an abandoned Coast Guard station in Milwaukee, Wisconsin in an effort to reacquire the property under the terms of an 1868 treaty between the United States and Chief Red Cloud.[20] Ultimately, AIM members were able to establish programs for urban Indians, including a community school and a half-way house for those suffering from alcohol addiction. Many of these programs still exist today.

In 1975, Leonard traveled with Native advocates to the Pine Ridge Reservation, Where residents were facing escalating violence by local and federal law enforcement.[21] This

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[16] AKIM D. REINHARDT, RULING PINE RIDGE: OGLALA LAKOTA POLITICS FROM THE IRA TO WOUNDED KNEE 142 (Texas Tech Univ. Press 2009) [hereinafter RULING PINE RIDGE].

[17] SPIRIT OF CRAZY HORSE, *supra* note 9, at 46–48.

[18] *Id.* at 48.

[19] *Id.* at 49; John Hinterberger, *Indian Shop: Amid Junk but It's a Living*, SEATTLE DAILY TIMES, Nov. 25, 1969, attached hereto as Ex. 1.

[20] *See Indians Who Seized a Building Are Winning Support to Keep It*, N.Y. TIMES (Nov. 28, 1971), https://www.nytimes.com/1971/11/28/archives/indians-who-seized-a-building-are-winning-support-to-keep-it.html.

[21] INCIDENT AT OGLALA (Miramax Films 1992) 27:47 – 29:11.

fateful trip ultimately would put Leonard in the crosshairs of the FBI and lead to his wrongful conviction and incarceration.

II. The U.S. Government's Siege at Wounded Knee

> *[O]ur society is not bettered by law enforcement that, although it may be swift and sure, is not conducted in a spirit of fairness or good faith. . . . The waters of justice have been polluted . . . .*
>
> – Judge Fred Nichol, former Chief Judge the District of South Dakota[22]

The tragic events at Pine Ridge in 1975 did not occur in a vacuum. Decades of shameful government policy had separated and displaced Native families, shrunk reservations, and left most indigenous communities in extreme poverty. In 1972, this powder keg was ignited by an act of horrific violence. An Oglala man named Raymond Yellow Thunder was kidnapped and beaten to death by a group of locals from a town bordering the Pine Ridge Reservation, home to the historic Battle of Wounded Knee.[23] Members of the nascent American Indian Movement came to Pine Ridge to demand justice for Yellow Thunder, heightening tensions between residents of the Reservation and law enforcement.[24]

By late February, approximately 200 Oglala Lakota and members of AIM had gathered at Wounded Knee, South Dakota to draw attention to a host of injustices: broken treaties, violence against Natives committed with impunity, and corruption by U.S.-backed tribal leaders.

The government's response was ruthless. Dozens of heavily armed U.S. Marshals, BIA police officers, and FBI agents were sent to Pine Ridge. Authorities cordoned off the area, trapping hundreds of people inside Wounded Knee and transforming the protest into an occupation that lasted more than 70 days.[25] Authorities cut off food, water, and electricity in an effort to starve or freeze the protesters into submission.[26] On the 50th day of the siege, supporters arranged to airdrop 2,000 pounds of food into Wounded Knee; when the protesters "ran out of the buildings where they had been sheltering to grab supplies, agents opened fire on them," killing a Cherokee man.[27] The man who coordinated the drop, Bill

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[22] *United States v. Banks*, 383 F. Supp. 389, 397 (D.S.D. 1974).

[23] RULING PINE RIDGE, *supra* note 16, at 126–27.

[24] *Id.*

[25] Emily Chertoff, *Occupy Wounded Knee: A 71-Day Siege and a Forgotten Civil Rights Movement*, ATLANTIC (Oct. 23, 2012), https://www.theatlantic.com/national/archive/2012/10/occupy-wounded-knee-a-71-day-siege-and-a-forgotten-civil-rights-movement/263998/; *see also* Memorandum to FBI Deputy Director Gebhardt from J.E. O'Connor (Apr. 24, 1975), attached hereto as Ex. 2, at 2 (describing decision by Special Agent in Charge to "set up roadblocks to contain the militants").

[26] Chertoff, *supra* note 25.

[27] *Id*.

Zimmerman, was arrested by the FBI and charged with violating the antiriot provisions of a 1968 federal crime bill.[28]

When these aggressive tactics failed to end the stand-off, U.S. authorities launched a paramilitary assault.[29] The FBI brought in over 150 agents and fired hundreds of thousands of rounds of ammunition against men, women, and children.[30] This operation was carried out despite an assessment by military observers that the protesters "d[id] not appear intent upon inflicting bodily harm upon the legitimate residents of Wounded Knee nor upon the Federal law enforcement agents operating in the area."[31] A lawyer who spent time at Wounded Knee during the assault wrote that the scene was "painfully reminiscent of Vietnam"—"the government had littered the hilly perimeter of Wounded Knee with electronic sensors to detect the odor or heat of human bodies, trip wires to detonate flares, armored personal carriers, military helicopters, dog teams, and hundreds of federal police and marshals armed with M-16 rifles."[32] The assault left two Native Americans dead, seriously injured at least a dozen more, and left twelve "missing" (presumed to be dead). In the aftermath, the FBI gave directives to initiate investigations into all AIM members and treat them as extremist threats to the government.[33]

After the siege at Wounded Knee, the U.S. Attorney's Office prosecuted AIM leaders Dennis Banks and Russell Means for leading the occupation of Wounded Knee and allegedly assaulting an FBI special agent.[34] Judge Fred Nichol, then Chief Judge of the United States District Court of South Dakota, dismissed all charges against the two AIM leaders based on his findings of egregious prosecutorial misconduct, including: knowingly offering false evidence; pressuring a teenage witness to change his testimony and then burying evidence of the inconsistency until after the trial; deception of the court; covering up the military's involvement at Wounded Knee; and withholding "material vital to the defense." [35] Judge

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[28] *FBI Arrests Three Suspects in Wounded Knee Food Drop*, HARV. CRIMSON (Apr. 23, 1973), https://www.thecrimson.com/article/1973/4/23/fbi-arrests-three-suspects-in-wounded. Zimmerman said of his arrest: "I have been accused of bringing food to Wounded Knee, South Dakota. According to the newspaper accounts I had read, these were people who were subsisting on one bowl of rice a day for the last three or four weeks." *Id.*

[29] An internal FBI memorandum from 1975 describes the siege at Wounded Knee as a "paramilitary law enforcement operation." Ex. 2, at 1. It also notes that on "a number of occasions" during the standoff, the FBI requested that the Nixon Administration "consider the use of troops." *Id.* at 3.

[30] SPIRIT OF CRAZY HORSE, *supra* note 9, at 192.

[31] *Army Tested Secret Civil Disturbance Plan at Wounded Knee, Memos Show*, N.Y. TIMES (Dec. 2, 1975), https://www.nytimes.com/1975/12/02/archives/army-tested-secret-civil-disturbance-plan-at-wounded-knee-memos.html.

[32] Richard Eiden, *A Personal Report from Wounded Knee*, SANTA BARBARA NEWS & REV., June 1, 1973, attached hereto as Ex. 3.

[33] SPIRIT OF CRAZY HORSE, *supra* note 9, at 55.

[34] *See Banks*, 383 F. Supp. at 391.

[35] *Id.* at 396.

Nichol ultimately was "forced to the conclusion that **the prosecution in this trial had something other than attaining justice foremost in its mind**" and acquitted both Banks and Russell.[36]

Tragically, this searing indictment was ignored, presaging further abuse of government power against American Indians.

III. The FBI's "Reign of Terror"

> *The only way to deal with the Indian problem in South Dakota is to put a gun to the AIM leaders' heads and pull the trigger*.
>
> – attributed to William Janklow, former South Dakota prosecutor[37]

Over the next three years, the FBI commenced a campaign against suspected AIM members that locals referred to as the "Reign of Terror." Beginning in May 1973, the FBI directed offices around the country to engage in domestic surveillance of suspected AIM members or "unaffiliated Indians" suspected of "similar confrontations or disorders elsewhere."[38] This domestic surveillance campaign was a tactical operation designed to disrupt AIM's leadership ranks and political momentum by tying up as many AIM members or suspected supporters in court proceedings—regardless of whether the charges were justified.[39]

The FBI's "Reign of Terror" arose as part of the now-defunct COINTELPRO project initiated under former FBI Director J. Edgar Hoover. In practice, the campaign involved intensive local surveillance, repeated arrests, and a seemingly endless cycle of fraudulent legal proceedings against Native Americans perceived by the government to be AIM members or supporters.[40] During this time, the FBI also supported and collaborated with a private, heavily armed paramilitary group called the "Guardians of the Oglala Nation"—known colloquially, and appropriately, as the "GOONS." The GOONS were funded in part by the U.S. government and led by Dick Wilson, a local tribal chairperson notorious for his corruption and abuse of power.[41]

The GOONS squad, in conjunction with federal law enforcement, committed rampant violence with impunity. In the three years following Wounded Knee, the murder rate on the

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[36] *Id*. at 397 (emphasis added).

[37] SPIRIT OF CRAZY HORSE, *supra* note 9, at 107.

[38] Memorandum from the Acting Director, FBI (May 7, 1973), attached hereto as Ex. 4.

[39] *See id.*

[40] RULING PINE RIDGE, *supra* note 16, at 169.

[41] Ward Churchill, *Death Squads in the United Sates: Confessions of a Government Terrorist*, 3 YALE J. L. & LIBERATION 83, 85 (1991).

Pine Ridge Reservation was more than 17 times the national average.[42] Some reports estimate that as many as 300 American Indians were murdered during the Reign of Terror, while hundreds more were beaten, harassed, or otherwise abused.[43] This brutal campaign occasionally extended to non-tribe members as well, including six lawyers representing AIM who were attacked and stabbed at Wilson's direction in 1975.[44]

The FBI also worked with local government agencies to disrupt and terrorize AIM members, conducting rigged investigations based on fabrications and falsified evidence. Local South Dakota prosecutors brought countless charges against tribe members during this time, with the efforts headed primarily by self-proclaimed "Indian fighter" William Janklow. During one such prosecution in 1974, twenty American Indians refused to stand when the presiding judge entered the courtroom. In response to this silent protest, a 24-man, heavily armed tactical squad burst into the room and overtook the seated protesters.[45] Most of the protesters were severely injured, many were knocked unconscious, and one man was blinded after a blow to his eye by a nightstick.[46]

The United States Senate Select Committee on Intelligence eventually opened an investigation into reports of the FBI's domestic spying and counterintelligence programs. Iowa Senator Frank Church led these efforts and, with the support of the U.S. Civil Rights Commission, had scheduled hearings to begin just days before the Pine Ridge rampage. The Church Committee, as it came to be known, would eventually issue a damning report on the FBI's actions toward Native communities, and AIM specifically; but those findings came too late for Leonard Peltier.[47]

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[42] RULING PINE RIDGE, *supra* note 16, at 205.

[43] SPIRIT OF CRAZY HORSE, *supra* note 9, at 266; WARRIOR: THE LIFE OF LEONARD PELTIER (ITVS 1991) 51:50 – 52:24 (discussing the FBI's tour of Pine Ridge and Oglala three weeks prior to the shoot-out where they indicated an interest in "assault[ing] these areas") [hereinafter THE LIFE OF LEONARD PELTIER].

[44] RULING PINE RIDGE, *supra* note 16, at 205; WARD CHURCHILL AND JIM VANDER WALL, AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT 175, 200–03 (South End Press 1990).

[45] SPIRIT OF CRAZY HORSE, *supra* note 9, at 107.

[46] *Id.*

[47] The Church Committee found that the FBI had exaggerated threats posed by AIM members through reliance on false reports by field agents, including one that falsely reported that AIM members had "bunkers" that would require military weaponry to overcome. Ultimately, the Church Committee condemned the FBI's COINTELPRO operation, including its use against AIM members and condemned it as "a sophisticated vigilante operation" targeting anyone that the FBI considered a threat "to the existing social and political order." S. REP. NO. 94-755, Book III, at 3 (1976), http://www.intelligence.senate.gov/sites/default/files/94755_III.pdf.

IV. The Pine Ridge Shoot-out

> *The United States Government must share the responsibility with the Native Americans for the June 26, 1975 firefight.*
>
> – Judge Gerald Heaney, former Eighth Circuit Court of Appeals Judge who presided over Leonard Peltier's appeal[48]

By 1975, conditions on the Pine Ridge Reservation had become intolerable. The intense and prolonged violence of the Reign of Terror had so traumatized residents that they came to fear the arrival of any unknown vehicle. One resident explained: "If anybody came up that you were not expecting . . . if it were night and they didn't blink their lights a certain way, you assumed they were coming to kill you."[49] Living conditions were also harrowing. During this time period, the Reservation had little infrastructure and no public transportation, and it was served by a single hospital. The unemployment rate on the Reservation was 70%, with a median income of less than $2,000. The average life expectancy was 44 years.[50]

These interlocking crises[51]—which posed real and imminent threats to the lives of Pine Ridge residents—were the impetus for Leonard's arrival on the Reservation in 1975. His intent was to help protect and support the community.

On June 25, 1975, FBI agents Jack R. Coler and Ronald A. Williams arrived at Pine Ridge allegedly in search of Jimmy Eagle, a nineteen-year-old suspected of stealing a pair of cowboy boots.[52] The residents told the agents that Eagle had not been seen for days and asked them to leave.[53]

The next day, the agents returned to the Reservation dressed in plainclothes. They drove two separate, unmarked cars onto private property known as the Jumping Bull Ranch. The area contained mostly families, children, and seniors. One woman whose children were playing outside thought she heard firecrackers and looked outside to see the two strangers,

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[48] Letter from Judge Gerald Heaney to Senator Daniel K. Inouye, Chairman of the Select Committee on Indian Affairs (Apr. 19, 1991), attached hereto as Ex. 5.

[49] INCIDENT AT OGLALA, *supra* note 21, at 28:50 – 29:00.

[50] LENNOX S. HINDS, ILLUSIONS OF JUSTICE: HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES 270–71 (Iowa City: University of Iowa 1978).

[51] In his report to the U.S. Commission on Civil Rights, specialist William Muldrow found that "[t]he climate of frustration, anger, and fear on the reservation" resulted from "poverty, ill health, injustice, and tyranny[.]" Report of William Muldrow, U.S. Commission on Civil Rights, Rocky Mountain Regional Office (July 9, 1975), attached hereto as Ex. 6, at 198.

[52] INCIDENT AT OGLALA, *supra* note 21, at 3:25 – 3:32; SPIRIT OF CRAZY HORSE, *supra* note 9, at 154.

[53] SPIRIT OF CRAZY HORSE, *supra* note 9, at 154.

one removing a gun case from his trunk and the other kneeling with a gun aimed in the general direction of her cabin.[54]

Shooting broke out between the FBI agents and the residents. Almost immediately, BIA patrol cars showed up, with additional support teams close behind.[55] By noon, Jumping Bull Ranch was surrounded by FBI agents, SWAT teams, BIA police, local law enforcement, and GOON members. Leonard and other AIM members ran to the scene to evacuate residents, though this plan was aborted when they became concerned that their presence was attracting additional gunfire.[56]

What unfolded next can only be described as government terrorism. FBI operatives armed with automatic weapons overtook Jumping Bull Ranch—breaking down the doors of family homes, ransacking houses, and terrorizing families at random. Early on in the rampage, agents burst into the home of a man named Joe Killsright and executed him with a bullet to the head.[57] When the dust settled, the two plainclothes FBI agents were also dead.

In the aftermath of this tragedy, the government could have reflected on the role of overzealous law enforcement in the outbreak of violence, or paid heed to Judge Nichol's condemnation of prosecutorial abuse toward members of AIM. Instead, the FBI embarked on a single-minded mission to find a Native scapegoat for the deaths of Agents Coler and Williams, no matter the cost. Congress followed suit; the newly formed Church Committee postponed indefinitely its upcoming hearings on the FBI's counterintelligence efforts against American Indians.[58]

V. The Prosecution of Leonard Peltier

> *. . . Leonard Peltier was not treated fairly and did not get a fair trial.*
>
> – John C. Ryan, former FBI Special Agent[59]
>
> *It is clear that the FBI has conducted their activities on the Pine Ridge Reservation in such a manner as to leave the Bureau with*

[54] SPIRIT OF CRAZY HORSE, *supra* note 9, at 155.

[55] *Id.* at 156.

[56] INCIDENT AT OGLALA, *supra* note 21, at 6:00 – 6:37; THE LIFE OF LEONARD PELTIER, *supra* note 43, at 56:15 – 56:41; PRISON WRITINGS, *supra* note 6, at 123–25.

[57] SPIRIT OF CRAZY HORSE, *supra* note 9, at 160.

[58] FBI Memorandum dated June 27, 1975, attached hereto as Ex. 7.

[59] Letter from John C. Ryan to President Barack Obama (Jan. 3, 2017), attached hereto as Ex. 8, at 2.

> *little or no credibility as either a law-enforcement or investigatory agency with the people whom they are there to serve.*
>
> – James Abourezk, former United States Senator of South Dakota[60]

The FBI's "investigation" into the deaths of Agents Coler and Williams was a sham. According to a report by U.S. Civil Rights Commission Specialist William Muldrow, the investigation involved warrantless searches, custodial detention without cause, and other abuses.[61] False and misleading statements were also leaked to the press to gin up fear of AIM members that would ultimately serve the FBI's prosecutorial purposes.[62]

Among other abuses, the FBI detained a teenage boy named Norman Brown and threatened him until he agreed to give a false statement implicating certain AIM members. These unlawful methods were effective. On November 25, 1975, Leonard Peltier, Darrell Butler, Robert Robideau, and Jimmy Eagle were indicted for first-degree murder.[63] Leonard fled to Canada, convinced that as a Native American accused of killing an FBI agent, he would never receive a fair trial.[64] As set forth below, this fear was eventually borne out.

While Leonard was in Canada, his co-defendants, Butler and Robideau, were tried separately in June 1976.[65] At trial, the judge allowed the jury to hear testimony on the FBI's Reign of Terror and the events leading up to and during the Pine Ridge shoot-out.[66] A key witness also testified that the FBI had threatened him and forced him to change his testimony to support the FBI's position. Based on this record, the jury found that both of Leonard's co-defendants were not guilty because they acted in self-defense.

The acquittals of Butler and Robideau was a promising signal for Leonard, who was charged with the same crimes and indicted based on the same tainted investigation. Unfortunately, the acquittals sealed Leonard's fate as the government's patsy. As the FBI later admitted, "emotion[s were] running very high" for the Bureau and it felt pressured to "resolve the case" because "the whole world was watching."[67] Former FBI agent John C. Ryan

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[60] SPIRIT OF CRAZY HORSE, *supra* note 9, at 260.

[61] Ex. 6, at 197.

[62] SPIRIT OF CRAZY HORSE, *supra* note 9, at 305.

[63] *Id.* at 245; *see also* INCIDENT AT OGLALA, *supra* note 21, at 11:05 – 11:11.

[64] SPIRIT OF CRAZY HORSE, *supra* note 9, at 277.

[65] INCIDENT AT OGLALA, *supra* note 21, at 38:50 – 39:10.

[66] *Id.* at 45:40 – 46:10.

[67] *Id.* at 31:35 – 32:00.

acknowledged that "[e]motion ruled the decision-making process and likely clouded the judgment" of the team, who "were driven to hold someone responsible[.]"[68]

It was in this context that the FBI redoubled their efforts to secure a conviction, this time focusing all their attention on Leonard. Indeed, the FBI went so far as to recommend that charges against Jimmy Eagle, whose alleged boot theft precipitated the shoot-out, be dropped so that the "**weight of the Federal Government could be directed against Leonard Peltier**."[69]

As set forth below, the federal government profoundly abused that power, irreparably tainting every aspect of Leonard's arrest and prosecution. So flimsy was the evidence against Leonard that the FBI's case was built on extorted testimony they knew to be false, fabricated evidence, and buried exculpatory information. At trial, the court acted as an extension of the prosecution, preventing Leonard from introducing any context for the events at Pine Ridge or the FBI's rush to judgment and use of unlawful tactics. The combined effect of these rulings was a denial of Leonard's fundamental due process right to present a defense.

1. The FBI Extorted False Witness Testimony

The first step in convicting Leonard was extraditing him from Canada.[70] To do so, the FBI coerced several people into giving false affidavits "purporting to show that Leonard Peltier had actually pulled the trigger in the agents' deaths."[71] The affidavits of Myrtle Poor Bear, a local Native woman known to have serious mental health problems, were especially critical to the extradition. Despite the fact that Poor Bear had never even met Leonard, FBI agents harassed and threatened her until she agreed to say that she was Leonard's girlfriend at the time, and that she witnessed the murders.[72]

Poor Bear originally maintained that she had not been at the Pine Ridge shoot-out, did not know Leonard, and "didn't even know what he looked like."[73] Her story changed only after relentless psychological torture from the FBI. First, FBI agents threatened to kill Poor Bear and take her daughter away unless she lied about her relationship with Leonard and her presence at the shoot-out.[74] Considering the recent history of murders on the

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[68] Ex. 8, at 2.

[69] Memorandum, B.H. Cooke to Mr. Gallagher, "RESMURS – Contemplated Dismissal of Prosecution of James Theodore Eagle; Continuing Prosecution of Leonard Peltier," (Aug. 10, 1976), attached hereto as Ex. 9.

[70] An excellent analysis of the fraudulent conduct in connection with Leonard's extradition is detailed at length in John J. Privitera, *Toward a Remedy for International Extradition by Fraud: The Case of Leonard Peltier*, 2 YALE L. & POL'Y REV. 49 (1983).

[71] SPIRIT OF CRAZY HORSE, *supra* note 9, at 251.

[72] INCIDENT AT OGLALA, *supra* note 21, at 50:00 – 54:00.

[73] *Id.* at 56:10 – 56:25.

[74] *Id.* at 52:10 – 52:25.

Reservation and the century-long practice of ripping children from their families, this was no idle threat.

Next, the FBI used grisly autopsy photographs of a woman named Annie Mae Aquash to scare Poor Bear.[75] Aquash had been picked up several times by the FBI and pressured to give an affidavit saying she knew who shot the FBI agents. Aquash refused to give the false testimony and told the FBI that she would testify in court for Butler and Robideau. Shortly thereafter, Aquash was found dead in the woods of a single gunshot wound to the head.[76] The pathologist sawed her hands off—allegedly so the FBI could take fingerprints—then took autopsy photos of her mutilated body. These were the photos that the FBI showed to Poor Bear. Faced with this thinly-veiled death threat, Poor Bear agreed to sign the false affidavits claiming that she was Leonard's girlfriend and had witnessed the murders.[77]

The FBI used similar methods to obtain additional false testimony tying Leonard to the Agents' deaths. The FBI threatened two teenage Native Americans until they signed false affidavits dictated to them, verbatim, by the FBI.[78] These affidavits alleged that Leonard was seen near the bodies.

Myrtle Poor Bear later acknowledged that her testimony was false, and forensic evidence confirmed that she was not present at the shoot-out.[79] Likewise, the teenagers, including Norman Brown, later repudiated their false testimony.[80]

2. The FBI Fabricated Inculpatory Evidence

The FBI also fabricated a new story about why they were on the Reservation in the first place. In order to place Leonard at the location of the shootings, the FBI claimed that the agents were following a red and white **van**—just like the one Leonard Peltier drove. Based on this, the FBI advanced the theory that Leonard recognized the agents, despite their

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[75] *Id.* at 52:55 – 53:10; 53:20 – 53:35.

[76] SPIRIT OF CRAZY HORSE, *supra* note 9, at 254–57.

[77] The FBI was assisted in preparing the extradition affidavits by Canadian Department of Justice prosecuting attorney Paul Halprin. During Leonard's trial, it came to light that Halprin had requested more details about the killings in advance of Leonard's extradition hearing. *See* Memorandum to the Department of Justice, "Leonard Peltier" (May 10, 1979), attached hereto as Ex. 10. After learning what Halprin needed, the agents kept Poor Bear in a motel room in Sturgis, South Dakota for two days. The resulting affidavit included additional, damning details that ensured Leonard's extradition. *See* SPIRIT OF CRAZY HORSE, *supra* note 9, at 338–40.

[78] Robert Dean, *Reservation Blues: How Leonard Peltier Became the Forgotten Native in Federal Lockup,* REBEL NOISE (May 28, 2019), https://www.rebelnoise.com/articles/reservation-blues-how-leonard-peltier-became-the-forgotten-native-in-federal-lockup; INCIDENT AT OGLALA, *supra* note 21, at 42:00 – 42:14.

[79] INCIDENT AT OGLALA, *supra* note 21, at 54:35 – 55:02; SPIRIT OF CRAZY HORSE, *supra* note 9, at 209. The trial court barred Poor Bear's father and sister from testifying to this account.

[80] Yvonne Bushyhead, *In the Spirit of Crazy Horse: The Case of Leonard Peltier*, 2 YALE J.L. & LIBERATION 13, 20 (1991).

unmarked cars and plainclothes, and shot them pointblank. But prior to Leonard's indictment, there was no mention at all of a van. On the call to headquarters the day of the shoot-out, the agents stated that they were following a red **pick-up truck** that fit the description of Jimmy Eagle's truck—the man they had been looking for the previous day at Jumping Bull Ranch. Moreover, for weeks after the shoot-out, FBI agents and local police were looking for a red pick-up. In other words, there is no evidence whatsoever that the FBI believed a van was involved until the FBI became obsessed with pinning the agents' deaths on Leonard.[81]

The FBI tried to explain away the sudden change in story by claiming, absurdly, that the two agents were "from the city" (Denver, Colorado) and therefore could not tell the difference between a pick-up truck and a van. Rather than let the jury hear the FBI's explanation and afford it whatever weight it was due, the judge on Leonard's trial determined that it was an adequate explanation and **did not allow the jury to hear about the inconsistency in the agents' stories.** This ruling ran contrary to basic constitutional principles. The right of an accused "to confront the prosecution's witnesses for the purpose of challenging their testimony" and to "present his own witnesses to establish a defense" is "a fundamental element of due process of law."[82]

3. The FBI Buried Exculpatory Evidence

The government's evidence against Leonard was weak, at best. For example, it relied on "eyewitness" testimony from an FBI agent who claimed to have seen Leonard running away from the scene through a rifle scope from half a mile away.[83] The only direct evidence at trial came from the prosecution's ballistics expert, Evan Hodge. Hodge testified that he had examined the forensic evidence and linked the .223 shell casing purportedly recovered from the deceased agent's car trunk to the rifle that the government contended was Leonard's. At the close of trial, the prosecution characterized the ballistics evidence as "perhaps the **most important piece of evidence in the case**."[84] The Eighth Circuit concurred, describing Hodge's testimony as "the final link necessary to establish Peltier as the pointblank murderer of both agents."[85]

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[81] INCIDENT AT OGLALA, *supra* note 21, at 1:12:30 – 1:13:24; *see* Report, Special Agent Lawrence J. Pavlicek, "RESMURS- David Many Horses; Et Al," (July 18, 1975) and Transcription of Robert Dale Ecoffey (June 30, 1975), attached together hereto as Ex. 11, at 7 ("ECOFFEY advised that at approximately 6:30 p.m., the group went to East Ridge Housing Development in Pine Ridge, South Dakota. He advised that they were still looking for the red pickup truck."); FBI Transcript, June 30, 1975, attached hereto as Ex. 12.

[82] *Washington v. Texas*, 388 U.S. 14, 19 (1967); *see also Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense.").

[83] *United States v. Peltier*, 553 F. Supp. 890, 897 (D.N.D. 1982).

[84] Trial Transcript, attached hereto as Ex. 13, at 4996 (emphasis added).

[85] *United States v. Peltier*, 800 F.2d 772, 775 (8th Cir. 1986).

What the jury did not hear—and what defense counsel only learned years later from a post-trial FOIA request[86]—was that Hodge had authored another report four months prior to the one introduced at trial. The earlier report came to the exact opposite conclusion: that "[n]one of the other ammunition components recovered at the [shoot-out] scene could be associated with [the Wichita AR–15]."[87] The significance of this initial report was not lost on the government; the report was buried. As a result, the jury in Leonard's trial was never given the chance to consider the exculpatory information, nor to assess Hodge's credibility in light of his conflicting analyses.

4. The Court Excluded Evidence that Was Critical to Leonard's Defense

To ensure Leonard's conviction, the prosecution learned from the acquittals of Butler and Robideau and sought to keep several pieces of critical evidence from the jury. The court enabled this strategy every step of the way.

First, prosecutors worked to secure a jury that would be more receptive to their case. Butler and Robideau had been tried in Iowa due to concerns that a South Dakota venire would be unable to remain impartial. Leonard's case was initially assigned to the same judge, whose evidentiary rulings had permitted the defense to introduce evidence of the Reign of Terror and its effect on residents of Pine Ridge. Prosecutors on Leonard Peltier's case, unwilling to risk another acquittal if the jury heard this contextual evidence, transferred the case to North Dakota.[88] The presiding judge, John Paul Benson, was later reversed in an unrelated case for tolerating bias against Native Americans.[89] Similarly, in Leonard's case, Judge Benson permitted a juror with an acknowledged prejudice against Native Americans to remain on the jury.[90]

The transfer to North Dakota had the desired outcome. Judge Benson excluded evidence of the FBI's Reign of Terror and the events leading up to the shoot-out, concluding it was overly prejudicial to the prosecution's case. In fact, the ruling was catastrophically prejudicial to Leonard. The events precipitating the shoot-out were critical to his co-defendants' ability to successfully argue self-defense—specifically, that the FBI agents had arrived in plain clothes and unmarked cars and aimed guns at residents. With that same

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[86] Leonard's FOIA request also revealed further misconduct and obfuscation by the FBI: the Bureau had withheld from the defense 12,000 documents, of which only 6,000 were subsequently produced, relating to its investigation of Leonard and the shoot-out at Pine Ridge. As of 2021, the FBI still has thousands of documents related to the deaths of the agents that have never been disclosed.

[87] *Peltier*, 800 F.2d at 776.

[88] Despite this victory for the prosecution, the FBI took further steps to sway the jury in their favor. On the eve of trial, the FBI circulated rumors that AIM was planning a terrorist attack. Immediately after this, the jury was sequestered for the duration of the trial, preventing them from seeing any rebuttal to these baseless rumors. SPIRIT OF CRAZY HORSE, *supra* note 9, at 283–84.

[89] *See United States v. Lavallie*, 666 F.2d 1217, 1222 (8th Cir. 1981) (overruling a conviction presided over by Judge Benson because he allowed a "drunken Indian" stereotype at trial).

[90] *See infra* Part VII.

evidence excluded in Leonard's case, such a defense was impossible. Former United States Attorney General Ramsey Clark aptly called this ruling the "greatest exclusion," noting that "[Leonard Peltier] was there to protect people who were being killed. If that's a crime, where are we?"[91]

The court also prohibited Leonard's counsel from revealing the FBI's misconduct leading up to trial. Significantly, defense counsel was prevented from presenting testimony from Myrtle Poor Bear about how the FBI coerced and threatened her into signing false affidavits. Judge Benson ruled that she was an "incompetent" witness—a cruel irony in light of the fact that Poor Bear's testimony was the basis for the FBI's extradition and arrest of Leonard.[92] Judge Benson further concluded that her testimony should be excluded because evidence of the FBI's unlawful conduct "could be highly prejudicial" **to the government**.[93] This flawed analysis—which decreed that any evidence potentially helpful to Leonard was inherently improper—led the court to hold more broadly that Leonard's counsel could not impeach *any* witnesses using evidence of FBI misconduct.[94]

Finally, the court prevented Leonard from offering evidence that two other people—Butler and Robideau—had been charged in the deaths of the two agents and had been found not guilty on grounds of self-defense. This ruling facilitated the government's argument at trial that Leonard had personally executed the two FBI agents. This was a reversal of course by prosecutors, who had argued in the previous trial that Butler and Robideau were the individuals responsible for the agents' deaths.[95] More importantly, that theory was fundamentally incompatible with the verdict in the co-defendants' trial. By finding that Butler and Robideau acted in self-defense, the jury found, by definition, that Leonard's co-defendants were legally innocent but *factually* responsible for the agents' deaths. The court's decision to withhold that information from the jury allowed the government to successfully argue at trial that Leonard "went down to the bodies and executed these two young men at pointblank range."[96]

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[91] Presentation by Ramsey Clark, former United States Attorney General, regarding Leonard Peltier given at the Native American Journalists Association's Annual Conference, June 20, 1997, http://www.dickshovel.com/clark.html.

[92] Trial Transcript, attached hereto as Ex. 14, at 4707–08.

[93] SPIRIT OF CRAZY HORSE, *supra* note 9, at 347.

[94] *See United States v. Peltier*, 585 F.2d 314, 331 (8th Cir. 1978).

[95] SPIRIT OF CRAZY HORSE, *supra* note 9, at 317–61. Judge Benson, in keeping with his position that evidence harmful to the government's case was impermissible, would not allow the jury to hear evidence of this prior inconsistent position.

[96] *Peltier v. Henman*, 997 F.2d 461, 467 (8th Cir. 1993) (quoting prosecutor's closing argument). Though the jury was also charged on an "aiding and abetting" theory, the Eighth Circuit was emphatic that the jury accepted the execution theory: "The record as a whole leaves no doubt that the jury accepted the government's theory that Peltier had personally killed the two agents . . . by shooting them at pointblank range with an AR–15 rifle." *Peltier*, 800 F.2d at 772.

VI. The Post-Trial Unraveling of Leonard Peltier's Case

> *We don't know who killed the agents or what actual participation [Leonard Peltier] may have had.*
>
> – Lynn Crooks, Assistant United States Attorney prosecutor of Leonard Peltier[97]

> *[T]hey didn't have to tell us they don't know who shot the agents. The whole record shows they don't know who shot the agents. And they don't want anybody else to know.* ***Because they want the whole world to believe that Leonard Peltier shot the agents. Because they have staked their reputation on it.***
>
> – Ramsey Clark, former United States Attorney General[98]

In the decades following Leonard's conviction, many of the abuses of power and constitutional violations committed to secure it came to light.

On appeal of Leonard's conviction, federal prosecutors conceded that Myrtle Poor Bear's affidavits were bogus; it was "clear," they acknowledged, that the testimony she provided under duress did not "check out with anything in the record by any other witness in any other way."[99] Moreover, despite the fact that the jury's verdict was based on the government's theory that Leonard personally executed the FBI agents, federal prosecutor Lynn Crooks later admitted that the government "can't prove who shot those agents."[100]

That concession is significant. It is true that the jury was instructed that they *could* find Leonard guilty of aiding and abetting the murders, a theory the government latched onto after trial in an effort to save the conviction from being overturned. But, in the Eighth Circuit's words, that was "not the government's theory. **Its theory, accepted by the jury and the judge, was that Peltier killed the two FBI agents at pointblank range with the Wichita AR-15**."[101] Essential to that theory, as the Eighth Circuit also aptly noted, was "the ballistics evidence, particularly as that evidence relates to a .223 shell casing allegedly

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[97] Dennis McAuliffe, Jr., *Last Stand for Leonard Peltier*, WASH. POST (July 4, 1995), https://www.washingtonpost.com/archive/politics/1995/07/04/last-stand-for-leonard-peltier/3e4fd676-3192-4e08-ae63-37e6d7cd07aa.

[98] *Ramsey Clark: While Leonard Peltier is in Prison, We All Are. America's Political Prisoner (1997)*, YOUTUBE (Apr. 24, 2014), https://www.youtube.com/watch?v=JZlOcWMAQm0; Presentation by Ramsey Clark, former U.S. Attorney General, regarding Leonard Peltier given at the Native American Journalists Association's Annual Conference, June 20, 1997, http://www.dickshovel.com/clark.html.

[99] Privitera, *supra* note 70, at 54 n.23.

[100] *Peltier*, 997 F.2d at 468 (quoting oral argument from Leonard's previous appeal).

[101] *Peltier*, 800 F.2d at 775 (emphasis added).

extracted from the Wichita AR-15 and found in agent Coler's car."[102] As set forth above, a prior report seriously undermining that ballistics evidence and calling the expert's credibility into question was withheld from the jury.

An "aiding and abetting" theory, moreover, makes little sense. The two other men charged in the deaths of the FBI agents were found to have acted in self-defense. Under this alternative theory, Leonard Peltier would be guilty of "aiding and abetting" a legally justified act of self-defense. The government has never offered a sound explanation for that bizarre theory. Indeed, when pressed by a judge on appeal to explain who Leonard was purportedly aiding and abetting, AUSA Crooks offered: "Perhaps aiding and abetting himself."[103] Suffice it to say, that concept cannot withstand basic logic, let alone legal scrutiny.

Finally, even if the government could have somehow obtained a conviction for aiding and abetting, Leonard's trial and sentence would have been radically different. As Judge Gerald Heaney noted during oral argument in Leonard's appeal:

> It seems to me that this would have been an entirely different case, both in terms of the manner in which it was presented to the jury and the sentence that the judge imposed, if the only evidence that you have was that Leonard Peltier was participating on the periphery in the fire fight and the agents got killed I don't think this would have been the same case at all.[104]

Taken together, these post-trial revelations confirm that Leonard's conviction and continued incarceration resulted from a profound miscarriage of justice. His extradition and arrest were based on extorted testimony subsequently proved to be false. He was found guilty of a heinous crime—intentionally executing FBI agents at point blank range—that the government has since admitted cannot be proved. And to the extent he could have been prosecuted for peripheral involvement in the shooting, he has served his time for that crime many times over.[105]

VII. Leonard Was Denied a New Trial Based on Antiquated Law

It is hard to fathom a case where a new trial was more justified than Leonard's—particularly where, as here, the appellate court repeatedly recognized the government's misconduct. In 1978, the Eighth Circuit called the use of Myrtle Poor Bear's affidavits "a clear

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[102] *Id.*

[103] *Peltier*, 997 F.2d at 469 (quoting oral argument).

[104] *Id.* at 468 (quoting oral argument from Leonard's previous appeal).

[105] The Eighth Circuit and the Supreme Court denied Leonard's petitions for rehearing *en banc* and certiorari, respectively.

abuse of the investigative process of the F.B.I."[106] In 1986, the court acknowledged "improper conduct" by the FBI and noted that Hodge's explanation for his initial, exculpatory report was "facially inconsistent with the newly-discovered evidence."[107]

Yet, twenty years ago, even flagrant violations of the right to a fair trial were often insufficient to overturn a conviction. When the Eighth Circuit ruled on Leonard's motion to vacate in 1986, the court interpreted then-controlling Supreme Court precedent[108] as requiring a finding "that it is reasonably probable the jury would have **acquitted** Peltier had it been aware of [the concealed] evidence[.]"[109] The Supreme Court subsequently clarified, in 1995, that the standard for reversal with respect to withheld evidence "**does not** require [a finding] that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal[.]"[110] Instead, the determinative question is whether, in the absence of the undisclosed evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence."[111]

Had the Eighth Circuit applied this standard to Leonard's appeal, it almost certainly would have found that he did not "receive a fair trial." Indeed, the court explicitly acknowledged the "possibility that the jury would have acquitted Leonard Peltier."[112] The court based this assessment on the fact that there were "inconsistencies casting strong doubts upon the government's case" that defense counsel could have "exploit[ed] and reinforce[d]" if "records and data improperly withheld from the defense" had been available to him."[113] It is clear from this analysis that the court did not believe Leonard's trial "result[ed] in a verdict worthy of confidence."

Moreover, the confessed racism of one of the jurors who convicted Leonard tainted the verdict in a manner that today's courts very likely would have forbidden. The juror admitted to the court that she had told her coworkers after being selected for Leonard's jury that she was "so prejudiced against Indians."[114] When questioned by the court, she claimed that she "would put all prejudices aside" to "render a fair verdict."[115] Counsel engaged in only cursory questioning about the juror's professed bigotry and her supposed ability to set it aside. Not only did defense counsel not move to exclude the juror, they *affirmatively argued* it was Leonard's constitutional right to have his case heard by a juror to whom he raised no objections.[116] Courts have recognized that such (in)action regarding a biased juror constitutes clear ineffective assistance of counsel.[117]

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[106] *Peltier*, 585 F.2d at 335 n.18.

[107] *Peltier*, 800 F.2d at 776, 778.

[108] *See United States v. Bagley*, 473 U.S. 667 (1985).

[109] *Peltier*, 800 F.2d at 777 (emphasis added).

[110] *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (emphasis added).

[111] *Id.*

[112] *Peltier*, 800 F.2d at 789.

[113] *Id.* at 789–90.

[114] Voir Dire Transcript, attached hereto as Ex. 15, at 11, 12.

By today's criminal justice standards, the constitutional injuries that Leonard suffered are outrageous and intolerable. The current Administration cannot undo the damage caused by prior government misconduct; but it can mitigate the severe and ongoingharm caused by that misconduct by granting Leonard clemency.

VIII. Leonard Peltier Deserves Clemency, and There is Broad Support for Granting It

> *Given that the case against Peltier unraveled years ago, his continued imprisonment is only protracting a grave miscarriage of justice. It is high time . . . for the U.S. government to intervene and right the wrongs of the past.*
>
> – Curt Goering, Amnesty International USA[118]

1. Leonard Peltier's Many Societal Contributions Despite Incarceration

Leonard has been tremendously productive during his nearly half a century of incarceration. An accomplished artist, Leonard's paintings have been displayed around the world. The sale of numerous pieces has been used to fund many charitable endeavors, including supporting the work of the ACLU, the Trail of Hope, an addiction recovery program, World Peace and Prayer Day, the First Nation Student Association, the Buffalo Trust Fund, and the Pine Ridge Reservation.

Despite the limitations posed by detention, Leonard has engaged in significant philanthropy and community service. He has sponsored annual Christmas clothing and toy drives, drives for Head Start programs and women's centers, and emergency food drives. He established a scholarship program for Native NYU law students. He helped set up a reservation health care delivery system, a reservation job creation and training program, a Native youth newspaper, and an arts program for the incarcerated. These are only a snapshot of Leonard's countless good deeds over the years.

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[115] *Id.* at 17; *see also id.* at 18 ("I would still base any verdict on the evidence and the court alone and I really feel I could do it.").

[116] *Id.* at 19.

[117] *See*, *e.g.*, *Hughes v. United States*, 258 F.3d 453, 460, 463 (6th Cir. 2001) (finding that "no sound trial strategy could support counsel's effective waiver of Petitioner's basic Sixth Amendment right to trial by impartial jury"); *Johnson v. Armontrout*, 961 F.2d 748, 755, 756 (8th Cir. 1992) (holding that counsel was ineffective where he failed to request for-cause removal, or even question about bias, jurors who were exposed to evidence at an earlier trial); *see also id.* at 756 (deeming "[t]he presence of a biased jury . . . outside the gamut of harmless error analysis").

[118] George M. Anderson, *The Case of Leonard Peltier*, AM. MAG. (Aug. 28, 2019), https://www.americamagazine.org/content/all-things/case-leonard-peltier.

Leonard has received many honors and awards for his humanitarian work, including but not limited to:

- 1986 International Human Rights Prize, Human Rights Commission of Spain;
- 1993 North Star Frederick Douglas Award;
- 2003 Humanist of the Year Award, Federation of Labour (Ontario, Canada);
- 2004 Silver Arrow Award for Lifetime Achievement;
- 2009 First Red Nation Humanitarian Award;
- 2010 Kwame Ture Lifetime Achievement Award;
- 2010 Fighters for Justice Award;
- 2011 First International Human Rights Prize, Mario Benedetti Foundation (Uruguay); and
- 2015 Defender of Pachamama (Mother Earth), awarded by President Evo Morales of Bolivia.

2. Worldwide Support for Leonard's Release

There is deep and widespread support for granting Leonard clemency. One of the most prominent figures who has advocated for Leonard's release is His Holiness Pope Francis. Other religious leaders who have voiced their support for Leonard include The Most Reverend Eminence Sean O'Malley, Cardinal and Archbishop of Boston; The Most Reverend Thomas Gerard Wenski, Archbishop of Miami; and The Very Reverend James Parks Morton (deceased), Dean Emeritus, The Cathedral of St. John the Divine and founder of the Interfaith Center of New York.

In addition, scores of other international leaders, politicians, and notable celebrities have called to correct the ongoing injustice of Leonard's incarceration, including: James H. Reynolds (former United States Attorney who supervised the prosecution of Leonard Peltier during the critical post-trial and appeal period); Nelson Mandela (deceased), former President of South Africa; The Reverend Dr. Thom White Wolf Fassett, a citizen of the Seneca Nation and Emeritus General Secretary of the General Board of Church and Society of the United Methodist Church; His Holiness The Dalai Lama; Saint Mother Teresa (deceased); Archbishop Emeritus Desmond Tutu; Father John Dear, American Catholic priest and international nonviolence advocate; Rigoberta Menchu, Nobel Peace Prize recipient and Indigenous peoples advocate; Dave Archambault, II, former Tribal Chairman of the Standing Rock Sioux Nation; Jack Healey, Human Rights Action Center and former Director of Amnesty International; Dorothy Ninham, former member of the Oneida Nation judiciary; musicians Gene Simmons, Willie Nelson, Kris Kristofferson, Rita Coolidge, and Robbie Robertson; and actors Robert Redford and Pamela Anderson. The list goes on.[119]

[119] Other notable supporters of Leonard's release include: Former representative Constance A. Morella (Republican, Maryland's 8th congressional district); The Most Reverend Robert Cantuar, Archbishop of Canterbury; Rev. Joseph P. Cirou of the Ecumenical Catholic Church; John C. "Jack" Ryan (former FBI Special Agent); National Council of the Churches of Christ in the USA; United Methodist Advocacy Board; National

In 1991, Judge Heaney, one of the judges who sat on two of the appeals in Leonard's case, took the unusual and courageous step of publicly voicing support for Leonard's release. In a letter to Senator Daniel Inouye, Chairman of the Select Committee on Indian Affairs, Judge Heaney wrote that after "a very careful study" of Leonard's trial and the post-trial evidence, presidential action "commut[ing] or otherwise mitigat[ing] the sentence of Leonard Peltier" was appropriate.[120]

Most recently, the National Congress of American Indians unanimously passed Resolution #ABQ-19-002, "To Secure Relief and Release for Leonard Peltier Through Transfer, Parole, Compassionate Release or Executive Clemency." The NCAI represents a diverse network of tribal nations, tribal citizens, and Native organizations. There are more than 570 federally recognized tribes in the United States. NCAI support demonstrates the importance of clemency for Leonard Peltier to the Native population—a segment of our population that after 9/11 served in the Armed Forces at a higher rate than any other racial group. Currently, there are more than 31,000 American Indian and Alaska Native men and women on active duty, serving in Iraq, Afghanistan, and elsewhere around the world.[121] Additionally, clemency is supported by the International Indian Treaty Council, an organization founded on the Standing Rock Indian Reservation and which, among other things, advocates for Indigenous Peoples' human and treaty rights.

3. Leonard Peltier's Health and Reentry Plans

Leonard suffers from a variety of ailments, including kidney disease, Type 2 diabetes, high blood pressure, a heart condition, bone spurs in his feet, a degenerative joint disease, constant shortness of breath and dizziness, and painful injuries to his jaw. A stroke in 1986 left Leonard virtually blind in one eye. An assault in 2009 also resulted in injuries. In January 2016, doctors diagnosed Leonard with a life-threatening condition: a large and potentially fatal abdominal aortic aneurysm that could rupture *at any time* and would result in Leonard's death. Prison doctors advised Leonard that the condition required surgery, but the maximum-security prison where he is incarcerated does not have the capacity to treat the condition. Leonard's physical condition is dire, and he cannot physically defend himself in prison, let alone threaten anyone with harm.[122]

Association of Christians and Jews; World Council of Churches; Church of Saint Matthew; The Episcopal Diocese of North Carolina; Springfield Area Council of Churches; and Sisters of the Blessed Sacrament.

[120] Ex. 2.

[121] *Native American Veterans: 5 Facts You May Not Know*, VETERANAID.ORG (Sept. 6, 2017), https://www.veteranaid.org/blog/native-american-veterans-5-facts-you-may-not-know.

[122] Leonard's record while incarcerated is remarkably uneventful given the many years he has spent in high security facilities. Although Leonard was involved in an escape attempt in 1979, he did so only out of fear for his life, because he learned another inmate was promised parole in exchange for killing him. Since then, Leonard has only been involved in a handful of minor incidents. For example, in 1987, he was involved in, but did not instigate, a wrestling incident. In 2011, a guard found a loose wire in the lighting of Leonard's cell. An

The Turtle Mountain and Pine Ridge Reservations have both offered Leonard housing and access to medical care, should he be granted clemency. His family, moreover, wants desperately for him to return home and will provide any support he needs. Leonard's wish is to return to Turtle Mountain, his childhood home, where he can get to know his grandchildren for the first time.

IX. Conclusion

The Biden Administration has already been transformative on issues of U.S. government-Native American relations, and it is on track to have a similarly profound impact on matters of criminal justice reform. Leonard Peltier's request for clemency sits at the intersection of those issues and presents a powerful opportunity for President Biden.

A grant of clemency will show mercy and compassion to Leonard—who has spent more years incarcerated than free,[123] has made substantial contributions to his community during that time, and is dangerously close to dying in prison. Clemency will also show every American, both Native and not, that the rights guaranteed by our Constitution are not hollow promises, and that egregious abuses of government power will eventually be acknowledged and rectified. It is too late for Leonard to reclaim the life he might have had; but it is not too late to end a miscarriage of justice nearly fifty years in the making.

We respectfully request that President Biden exercise the clemency power afforded him by the Constitution and commute Leonard Peltier's sentence so that he may spend his remaining days on Turtle Mountain with his family.

assault charge subsequently filed against Leonard was unfounded, as he played no role in the guard touching the loose wire.

[123] Factoring in credit for good behavior, Leonard has already served well over half a century.