THE TRIAL OF LEONARD PELTIER:

ANALYSIS OF CONSTITUTIONAL VIOLATIONS

People are commonly set free due to a single constitutional violation, but Leonard Peltier—faced with the staggering number of constitutional violations related to his trial—has yet to receive equal justice. The following is an overview of said constitutional violations.

I. Article 6. Treaties Made Under Authority of U.S. Are Supreme Law of the Land

A. Extradition From Canada Based on Affidavits Known to the U.S. Government to be False Violated the Requirements of the Extradition Treaty and Constituted Fraud upon the Canadian Government.

Leonard Peltier was extradited from Canada. The "evidence of criminality" presented to the Canadian tribunal as required by Article 10 of the Webster-Ashburton Treaty, 8 Stat. 572, consisted of the false affidavits of Myrtle Poor Bear, which the United States government coerced this frightened woman to sign, and which they knew to be false. This fraud was in violation of the Canada-U.S. Extradition Treaty. Aside from his obvious mistake as to the venue of the incident, one of Canada's foremost legal scholars, writer Gary Botting, PhD correctly observed: "Perhaps the greatest failure of justice in Canadian extradition history surrounds the decision of both the extradition judge and the Minister of Justice in the case of Leonard Peltier, an American Indian Movement (AIM) leader accused of the 1975 murder of two FBI special agents at Wounded Knee, South Dakota" (Botting, Gary. Extradition Between Canada and the United States, Ardsley, NY: Transnational Publishers, Inc., 2005). Botting relates, among other things, the unsuccessful attempt of Mr. Peltier's Canadian lawyers to defend him under the Canadian Bill of Rights. (See also In The Matter of the "Extradition Act", R.S.C., Chapter E-21 and In The Matter of Leonard Peltier, No 760176, Supreme Court, BC, Canada. June 23, 1976.)

B. The U.S. District Court Did Not Gain Jurisdiction Over Leonard Peltier.

Deliberate violation by the United States government of the Canada-U.S Extradition Treaty, made under the Authority of the United States pursuant to Article 6, constituted fraud. The resulting extradition was illegal and tantamount to kidnapping; hence, it did not provide the trial court with legal jurisdiction of Leonard Peltier. (See U.S. v Rauscher, 119 U.S. 407, 1886.)

II. Amendment 5. Due Process.

A. Testimony of Government Misconduct Leading to Extradition Was Excluded.

The U. S. District Court excluded testimony and declined to admit exhibits related to Leonard Peltier's unlawful extradition from Canada: "Now that the government has completed its presentation of evidence, the court's position to evidence to be offered by the defense is simply that evidence relative to the issues and the evidence presented by the government will be admitted. I will state, however, that witnesses who have testified will not be impeached by a showing of misconduct of the Federal Bureau of Investigation unless that misconduct relates to the testimony of the individual witnesses who have testified or unless that misconduct relates to exhibits that have been received in evidence." (P. 3458-3459.)

B. Testimony as to a Climate of Fear Leading to Peltier's Flight Excluded.

Testimony as to a history of egregious conduct by government officials on Pine Ridge Reservation to eliminate dissent and perpetrators of dissent—commonly known as COINTELPRO—which targeted members and supporters of AIM, leading to an investigation by the U.S. Commission on Civil Rights, was either excluded altogether or greatly curtailed. (p. 3509-3516;3589-3606; 3616-3628; 3837; 4226-4228). William Muldrow, investigator for the U.S. Commission on Civil Rights, attempted, over pointless objection from the prosecution, to give testimony tending to show that Mr. Peltier had reason to flee. Although most of the inane objections were overruled, the Court placed severe limits on Mr. Muldrow's testimony, and almost all the exhibits which would have illustrated the climate of fear on the Reservation after the deaths of the two agents had been disallowed. On direct examination, Mr. Muldrow was allowed to testify that after the agents died "it was obvious that there was a climate of extreme tension, emotions were very high, many persons were frightened for their own safety and for the safety of their family. They were concerned as to whether they would be stopped, questioned, in general there was a high level of fear and tension on the Reservation" (Muldrow, p. 4225- 4226.) He elaborated on cross examination: "I had been in close contact with the [Pine Ridge] Reservation for the previous six months actually, and we had been concerned about the rising climate of fear and tension on the Reservation; but during my visit following the June 26th shooting, it was obvious that this climate, this tension and fear, was much greater than it had ever been before in my observation" (William Muldrow, U.S. Commission on Civil Rights, p. 4229.; see also testimony as to government misconduct after the deaths on pp. 841; 104; 2573; 2582-2596; 3821-3826; 3868; 3960-4000;4060-4170;4590-4594;4599-4607; 4801-4805).

C. Unduly Prejudicial Testimony and Evidence Allowed.

1. Over Defense objections, all autopsy photographs, including the unnecessarily gory photographs that had been prohibited in the Butler/Robideau trial, along with FBI academy graduation photographs of the dead FBI agents were allowed.
2. Unrelated weapons and collateral criminal acts by Mr. Peltier allowed:
    a. Prior unrelated attempted murder charge (p. 3417);
    b. Weapons unrelated to the shootings found in Wichita, Kansas, in a vehicle explosion (p. 1640; 2200);
    c. Mr. Peltier's alleged flight based on circumstantial evidence, from a motor home in Oregon, despite the fact that he was never actually seen there (p. 2223-2232);
    d. Mr. Peltier's possession of unrelated weapons at his arrest in Canada (p. 274-46);
    e. Dynamite, hand grenades and unrelated weapons seized in an FBI raid on Rosebud Reservation, at which Mr. Peltier was not present (p. 2573-2600)

D. All Defense Motions for Mistrial on Constitutional Grounds Denied.

1. Comment by Government that "defendant is very familiar with the evidence which will be adduced during the course of this trial. He's very familiar with the time sequence. He's very familiar with the items that were presented earlier" (p. 2197). Defense counsel asked for jury instruction as to non-evidence testimony by prosecution. Court denied the request and denied the motion for a mistrial (p. 2198, 2205).

2. Numerous Defense objections to cumulative prejudicial material overruled; motion for mistrial overruled (p. 2433-34).

3. Defense asked Court to reconsider and cure some evidentiary rulings and, in light of those errors, grant a mistrial and order a new trial. Court denied motion (p. 4890-4891).

4. Defense counsel Lowe objected to seven grievous mistakes of Government's argument and asks that the Court give "severe cautionary instructions" to the jury and moves for mistrial in that the Government (Prosecutor Crooks) stated, contrary to witness testimony or lack of testimony, that:

   a. Mr. Peltier started the shooting;
   b. Mr. Peltier was an interloper, not a resident of Pine Ridge and only came in early June. (Jean Day testified they came in April or May);
   c. Joe Stuntz got out of his car and fired at the agents;
   d. Angie Long Visitor heard a series of firecrackers. (She had testified she only heard one shot);
   e. Jury can assume that Special Agent Williams surrendered;
   f. Misstatement regarding weapon that contradicted both the laboratory report and the statement of the witness, Special Agent Lodge;
   g. Improper reference to stolen rifle discovered in New Mexico that had nothing to do with the crime scene at Pine Ridge, to which the owner testified he had no knowledge of who stole it.

The court denied the motion for a mistrial on these constitutional violations, and refused to give cautionary instructions to the jury, stating "The Court has already advised the jury before counsel started that if there's any misstatement that they should disregard it and rely on their own recollection" (p. 5001-5004).

5. Use of highly prejudicial evidence which went beyond its legitimate purpose: to show reason for flight. Motion denied; jury to be "appropriately instructed on the matter, on the matter of what that evidence can be used for" (p. 5166-5168).

III. Amendment 6. Compulsory Process.

A. Myrtle Poor Bear Subpoenaed but Not Allowed to Testify Before Jury.

While the Defense was allowed to subpoena witnesses and otherwise compel their attendance in court, by refusing to allow the testimony of Myrtle Poor Bear to be presented to the jury, the Court violated the very principal of compulsory process.

B. Jimmy Eagle Subpoenaed by Defense but Not Allowed to Testify Before Jury.

Jimmy Eagle had not been called by the Government; however, as other witnesses—notably Gary Adams—began testifying as to Mr. Eagle's whereabouts on the day of the shootings, it became necessary for the Defense to subpoena him as their own witness. After an in camera offer of proof, the Court denied Defense motion and Mr. Eagle was not allowed to testify before the jury.

IV. Amendment 6. Confrontation of Witnesses.

A. Brady Material Detailing Inconsistencies and Fabricated Evidence Disallowed or Greatly Curtailed.

1. Myrtle Poor Bear:

   a. Scheduled Government Witness. Myrtle Poor Bear, frightened by the FBI into signing three conflicting affidavits stating that she saw Leonard Peltier kill the two agents, had been a scheduled Government witness. However, the Government, realizing that Ms. Poor Bear's conflicting and perjured testimony would not have the intended effect on the jury, refused, over Defense objections, to call Ms. Poor Bear, paving the way for the Court to rule: "With reference to Myrtle Poor Bear, she not having testified in the government's case, I see no relevance in the matter of her testimony in a prior proceeding or her activity in connection with the extradition proceeding. The only thing that's relevant to the extradition proceeding is that they were had and the defendant was returned. Whether or not he should have been extradited is not an issue before this Court" (p. 3459).

   b. Jury Not Allowed to Hear Testimony. The Court allowed Ms. Poor Bear to give an in camera testimony and then decided, without having Ms. Poor Bear examined by a psychiatrist, that she was mentally imbalanced (p. 4659). In a strange soliloquy, suggesting that perhaps the Court itself were mentally imbalanced, the Court reasoned: "If the witness, as she testified yesterday, were to be a believable witness the court would have seriously considered allowing her testimony to go to the jury on the grounds that if believed by the jury the facts she testified to were such that they would shock the conscience of the court and in the interests of justice should be considered by the jury. However, for the reasons given on the record yesterday the court concluded the danger of confusion of the issues, misleading the jury and unfair prejudice outweighed the possibility that the witness was believable" (p. 4707-4008).

2. Michael Anderson, Wilford Draper and Norman Brown: Teenagers who were tied up, tortured and threatened by FBI agents until they signed the coerced and false affidavits dictated to them by the FBI stating that they saw Mr. Peltier down by the bodies. All three of the young men repudiated their grand jury testimonies at trial; yet, the Court refused to allow the Defense to adequately cross-examine them. Based on their testimonies, each inconsistent with one another, and based upon the inconsistent testimony of other government witnesses regarding the shootings, Defense asked to recall Anderson as their own witness. The Court refused (p. 4320-4330; see also p. 1125-1127). Defense attorney Taikeff, who had previously interviewed Norman Brown, attempted to elicit testimony that Government attorney Sikma congratulated Brown after the grand jury testimony. Counsel approached the bench and Mr. Sikma said, "That's a lie. That's an absolute lie." The Court stated, "In view of the denial, the question will not be allowed (p. 4842-4843). It should be noted here that Defense offered to prove that Sikma had suborned the perjury of a chief government witness at the Butler/Robideau trial. The Court disallowed it and sealed the exhibit and record of the offer.

3. Reports of the Red pickup truck: FBI Special Agent Gary Adams heard Special Agent Williams radio; "It looks like they're going to get into that pickup." Adams testified that he saw a pickup leave the area (p. 90-94). Later, FBI secretary Ann Johnson testified that Adams radioed at 12:18 that he saw a red pickup leave the area (p. 1658). Gerald Waring heard "there was a red and white vehicle." Robert Ecoffey heard that the night before the shootings Jimmy Eagle had just left in a red pickup, and the next day that Williams had chased a red vehicle, van, or pickup. Ann Johnson testified that Adams radioed at 12:18 that he saw a red pickup leaving Jumping Bull Hall and that later, at 1:26, she recorded a transmission made by Adams to Coward that a red pickup with a driver and no passengers stopped at the log house and left with three people. At the Robideau/Butler trial in Cedar Rapids, Iowa, Adams stated that he made that call. He changed his statement at Peltier's trial in Fargo. Most of the testimony and the records containing the admissions were ruled inadmissible and was not made available to the jury (p. 263, 347, 350, 774- 775). The Court skirted the issue of fabricated testimony by refusing to allow any testimony of government misconduct: "I will state, however, that witnesses who have testified will not be

impeached by a showing of misconduct of the Federal Bureau of Investigation unless that misconduct relates to the testimony of the individual witnesses who have testified or unless that misconduct relates to the exhibits that have been received in evidence" (p. 3458-3459).

4. Jimmy Eagle: called by the Defense as a witness. The Court greatly curtailed direct examination and, over protest from both the Government and the Court, Defense recalled him. The Court agreed to an in camera offer of proof, which unequivocally revealed that Mr. Eagle was not on Pine Ridge the day of the shootings; that the FBI had coerced four former cellmates of his to give false testimony that Mr. Eagle told them he saw Mr. Peltier kill the agents; and that he had been threatened by Agent Adams (p. 3961-3979). The Court recessed before making its final decision to preclude this evidence from the jury. In a slip of the tongue that revealed its toadyism, the Court stated: "For the record, the Government adheres to the ruling that it made this morning in this matter." And then "I am sorry. The Clerk indicated to me I said the 'Government'. The Court adheres to the ruling" (p. 4028-4058).

5. 302s (Agents' daily notes): regardless of an applicable rule of evidence, were not allowed into evidence if the agent who wrote them testified.

6. Special Agent Fred Coward testified that after the shootings he saw Mr. Peltier through a 2x7 power rifle scope at a distance of one half mile. Defense produced an expert witness who stated that it was impossible to identify anyone at that distance and the Defense asked the judge and the jury to look through the rifle scope to see for themselves that it couldn't be done. The Court would not allow the experiment (p. 1797, 3786, 3790). Coward testified that he and special agents Skelly and Waring discussed the sighting. On the stand, neither Skelly nor Waring recalled such a conversation. Coward was recalled by Defense for impeachment purposes. Coward stated that the dates on his 302s were wrong due to typographical errors. Defense offers to introduce Coward's 302s into evidence in order to show that there was nothing on the reports relating to the alleged sighting were denied (p. 1305-1321, 1351, 2052, 4364).

7. BIA officer Marvin Stoldt, who was with Agent Coward at the time of the alleged sighting, testified that he didn't recall seeing anyone (p. 3671-3686, 3750); however, Agent Coward testified that Officer Stoldt told him he spotted Jimmy Eagle in the same group that Agent Coward spotted Mr. Peltier (p. 1308-1351).

8. While there was only one pathologist—Dr. Robert Bloemendaal—who examined the bodies of the two agents, the Government, dissatisfied with Dr. Bloemendaal's report, which did not corroborate their theory of the case, hired Dr. Thomas Noguchi, who not having examined the bodies of the agents, based his opinion on his theoretical test on animal parts.

B. Brady Material Deliberately Withheld By The FBI Proved That The "Most Crucial" Evidence Was Completely Fabricated.

1. Throughout the trial the Government stated that the AR-15 rifle found in the wreckage of the car in which Robideau was riding in Wichita, Kansas, was the weapon belonging to Mr. Peltier, the only AR-15 on Pine Ridge, the weapon that matched the shell casing found near the bodies—hence, the murder weapon. This weapon was referred to throughout the trial as the most crucial evidence against Mr. Peltier. Later, through FBI documents turned over to the Defense pursuant to the Freedom of Information Act, it was discovered that there was more than one AR-15 on Pine Ridge, that the military M-16 (FBI issue) fired the same shells, and that the shell casing could not have possibly been fired from the AR-15 discovered in Wichita.

2. FBI Agents Cunningham, Lodge and Hodge: The affidavit of Special Agent Cortlandt Cunningham, Chief of the FBI Firearms and Tool Marks Divison, reads: "Also in the said 1972 Chevrolet Biscayne automobile I found one .223 cartridge case in the trunk which I took into my possession and placed in an envelope marked 'Items recovered from trunk, Jack R. Coler automobile'" (p. 2113-2114). In contradiction to Cunningham's affidavit, FBI fingerprint specialist Winthrop Lodge testified that he found the .223 casing in the trunk of Coler's vehicle and turned it over to Cunningham, along with everything else he found in Coler's vehicle. He also testified that he removed everything from Williams' vehicle, but did not make notes of either of these vehicles (p.

3012-3013; 3079-3080; 3112-3138). FBI Special Agent Evan Hodge, Specialist, Firearms and Tool Marks Identification Unit presented deliberately fabricated evidence connecting the .223 casing found in the trunk of Coler's vehicle with the AR-15 rifle found in Wichita. The ballistics test supposedly conducted by Hodge was later proved by FOIA documents to be false (p. 3233-3247, 3388).

V. Amendment 6. Nature of Accusation.

Leonard Peltier was not informed of the aiding and abetting charge that the government alleges led to his conviction. He was extradited from Canada on two specific charges: Attempted Murder (which was tried after the Fargo case and resulted in acquittal in Wisconsin) and First Degree Murder. The Defense repeatedly asked the Court to charge the jury specifically as to the elements of first degree murder only (aiding and abetting and manslaughter being separate crimes for which Mr. Peltier had not been extradited). Despite a compelling and elegant analysis by Defense attorney Stanley Engelstein of the extradition order and the jury charge regarding first degree murder necessary to uphold the extradition order (p. 4902-4927), the Court disallowed much of the Defense jury instruction and allowed the Government to submit instructions that permitted the jury to convict Mr. Peltier on the aiding and abetting theory suggested by the Government's closing argument: "Now, you will note that I didn't say we have to prove Leonard Peltier pulled the trigger on either of the deaths because the law does not require that. All we have to show is that he was responsible, whether it was by pulling the triggers or by some other method or means" (p. 4973).

VI. Amendment 6. Impartial Jury.

A. All-White Jury.

Although the Eighth Circuit is made up in large part of Native Americans, the jury was made up of twelve white people: ten women, two men, and two alternates, a man and a woman. Shortly after the trial began it became known to the court that juror Shirley Klocke admitted in front of three friends and then in front of Judge Benson, the attorneys and Mr. Peltier that she did not like American Indians. Because she said she could be fair, she remained a juror (see p. 269-299).

B. Jury Sequestered.

A climate of fear also surrounded the court proceedings. The indictment against Jimmy Eagle had been dropped and Robert Robideau and Darrelle Butler (whose names were stricken from the heading of the indictment along with Mr. Eagle just shortly before Mr. Peltier's trial) had been previously acquitted in Cedar Rapids, Iowa. With only one member of the American Indian Movement left to blame, the anti-AIM media was now rampant with anti-Peltier sentiment. Hence, the jury was sequestered during the entire five and a half weeks of testimony.

C. Undisclosed Alternates.

As if sequestering were not enough to raise their resentment level, the jury was kept in the dark as to which twelve persons would actually decide the case. It was not until after the opening statements that the court nonchalantly informed them: "One thing I neglected to mention to the jurors, and that is there are 14 of you in the jury box. When the case has been submitted to you for your deliberation, it will be submitted only to 12 of you" (p. 53). While decisions to sequester the jury and not disclose the alternates are not uncommon, they are not helpful to an already unpopular cause. The trial consisted of three weeks of prejudicial photos and horror stories followed by two and a half weeks of Defense testimony pebbled with objections. Most Defense exhibits were disallowed. Through this prejudicial trial fourteen people, at least one of whom disliked Native Americans, prevented by law from communicating with their families, friends and employers for five and a half weeks without any idea as to their actual part in the deliberation process were expected to remain impartial.

D. Inadequate Jury Instructions.

Denying specific requests of Defense, the Court gave the jury confusing and inadequate instructions on:

1. self defense;
2. premeditation;
3. circumstantial evidence;
4. the elements of murder in the first degree;
5. aiding and abetting.

The Court also gave no instruction whatsoever on:

1. aiding and abetting someone other than persons who have been acquitted;
2. cautionary instruction that Mr. Peltier's answer "no, but I know who did" to a Canadian officer's question "did you kill the agents" in no way constituted aiding and abetting;
3. acquitting if Government case based on perjured testimony and false evidence;
4. excluding all possibilities of innocence before convicting.

E. Requests to Re-Hear Certain Testimony Denied.

Several hours into the deliberation process, over strenuous objection from Defense, the Court denied two jury requests to read or hear certain testimony: the first, regarding Anderson's activities at Wanda Siers' house during the shootout; the second for the statements made by Mr. Peltier at the time of his Canadian arrest. The Court stated: "I might say this: they are asking for a portion of the transcripts, two different parts of the transcript. Of course, we have never had daily copy before, but in the past when I have had requests of this kind, I sent in a note stating that they have to rely on their own recollection." Defense asked that the jury be allowed to hear the testimony re-read. The court refused. "My position will be that unless counsel on both sides agree, I am not going to read or submit a portion of the transcript to the jury" (p. 5268-5275).

VII. Amendment 6. Right to Public Trial.

On the last day of what the Court admitted was an orderly trial with no security problems, over rigorous Defense objections, the Court decided to exclude the public, including Mr. Peltier's family, during the reporting of the verdict (p. 5275-52 81).

VIII. Amendment 8. Cruel and Unusual Punishment.

While his co-defendants, tried on the same charges in another court at another time by another judge and jury, were acquitted by reason of self defense, Mr. Peltier was sentenced to two consecutive life sentences. Given the unfair trial, he expected no better. To the Court's question "Mr. Peltier, do you desire to make a statement in your own behalf or present any information to the Court which the Court might consider in mitigation of punishment in your case," Mr. Peltier replied "Yes I do. Judge Benson, there is no doubt in my mind or my people's you are going to sentence me to two consecutive life terms." He continued with a sensational statement detailing the injustices of his trial (Volume 26, Sentencing, p. 2-10). Enraged, the Court carried out its intention and sentenced Leonard Peltier to two consecutive life sentences. In light of the fact that there was nothing but circumstantial evidence in the trial of Leonard Peltier, the sentence was unusual, and it was deliberately cruel.