

GUILTY UNTIL PROVEN INNOCENT: LEONARD PELTIER AND THE SUBLEGAL SYSTEM

*You are about to perform an act which will close one more chapter in the history of the failure of the United States to do justice in the case of a Native American. After centuries of murder . . . could I have been wise in thinking that you would break that tradition and commit an act of justice?*¹

At 11:00 a.m. on June 26, 1975, FBI Special Agents Jack Coler and Ronald Williams entered the Jumping Bull compound in Oglala, a traditional Native American community on the Pine Ridge reservation in South Dakota.² Coler and Williams were in search of an Indian wanted on charges of assault and theft.³ Within the next hour, a shoot-out occurred in which both Coler and Williams were killed.⁴ The ensuing investigation—termed the “Res Murs” investigation—raised several questions about the propriety of the government’s conduct.⁵ The Res Murs investigation resulted in an array of civil and criminal prosecutions, charges of government misconduct, claims of FBI harassment of witnesses, and allegations of an FBI frame-up through the manipulation and withholding of evidence.⁶ The end result of the Res

¹ PETER MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE 361 (1991) (quoting Leonard Peltier addressing the trial court during his sentencing). Peter Matthiessen is a founder of the *Paris Review*, author of several works of fiction including *At Play in the Fields of the Lord* (National Book Award nominee), and has authored widely acclaimed works of nonfiction, including: *The Snow Leopard* (National Book Award recipient); *The Cloud Forest* and *Under the Mountain Wall* (which together received an Award of Merit from the National Institute of Arts and Letters); and *The Tree Where Man Was Born* (National Book Award nominee). *Id.* at iii. Much of the factual account of the Pine Ridge shoot-out in this Note is derived from Matthiessen’s narrative based on interviews with the survivors.

² *United States v. Peltier*, 585 F.2d 314, 318 (8th Cir. 1978) [hereinafter *Peltier I*].

³ *Peltier I*, 585 F.2d at 318; MATTHIESSEN, *supra* note 1, at 154.

⁴ *Peltier I*, 585 F.2d at 318–19. Joe Killsright, a Native American, was also killed at the shoot-out. MATTHIESSEN, *supra* note 1, at 159–60.

⁵ See, e.g., *United States v. Peltier*, 800 F.2d 772, 774 (8th Cir. 1986) (appeal of Leonard Peltier due to concealment of evidence by FBI) [hereinafter *Peltier III*]; MATTHIESSEN, *supra* note 1, at 279–315 (accounts of FBI harassment of witnesses). “Res Murs” is short for reservation murders. MATTHIESSEN, *supra*, note 1, at 193.

⁶ See *Peltier III*, 800 F.2d at 774 (appeal of Leonard Peltier seeking new trial for concealment and manipulation of material evidence by FBI); *Price v. Viking Penguin, Inc.*, 676 F. Supp. 1051 (D. Minn. 1988), *aff’d*, 881 F.2d 1426 (8th Cir. 1989) (civil suit for libel and slander by FBI agent against Viking Press and author Peter Matthiessen of account of Peltier saga); MATTHIESSEN,

Murs investigation was the trial and conviction of Native American activist Leonard Peltier for the murders of agents Coler and Williams.⁷

Leonard Peltier has spent more than fifteen years in prison.⁸ His case has received considerable attention from the press, human rights organizations⁹ and even Hollywood.¹⁰ Peltier's notoriety stems from perceptions that he was a victim of the political process and, thus, not afforded a fair trial.¹¹ Peltier has continually maintained his innocence and has tried repeatedly to appeal his conviction.¹² He has sought a new trial on several occasions on grounds that the FBI withheld material exculpatory evidence during trial, and that the trial court denied him compulsory process by refusing to allow evidence supporting his defense of an FBI frame-up.¹³

This Note critically examines the prosecution of Leonard Peltier and analyzes the evolution and faults of the requirements for the

supra note 1, at 561 (civil suit for libel by former South Dakota Governor William Janklow against publisher of Matthiessen's account of the Res Murs investigation); *id.* at 279-315 (account of unpublished trial of other "Res Murs" suspects where harassment of witnesses by FBI proven).

⁷ *Peltier I*, 585 F.2d at 335.

⁸ See MATTHIESSEN, *supra* note 1, at 591.

⁹ See AMNESTY INTERNATIONAL USA, UNITED STATES OF AMERICA: HUMAN RIGHTS AND AMERICAN INDIANS 29 (1992). Amnesty International sent observers to Peltier's trial and subsequent appeals. *Id.* Amnesty International has repeatedly expressed its concern about certain irregularities in the proceedings that led to Leonard Peltier's conviction. AMNESTY INTERNATIONAL USA, THE AMERICAS: HUMAN RIGHTS VIOLATIONS AGAINST INDIGENOUS PEOPLES 85 (1992). The organization believes that Peltier may have been aggressively prosecuted on criminal charges by the FBI because of his role in the American Indian Movement and that his extradition to the USA from Canada in 1976 to stand trial was granted on evidence that the FBI later admitted it had fabricated. *Id.*

¹⁰ Two movies were released over the past two years depicting the Res Murs situation and subsequent investigation. See THUNDERHEART (Columbia-Tristar 1992); INCIDENT AT OGLALA (Carico International 1991). Additionally, film-maker Oliver Stone has indicated that he intends to produce a film on Peltier in the near future. Joseph Farah, *Oliver Stone: Far From the Malibu Crowd*, L.A. TIMES, Mar. 7, 1993, at M5.

¹¹ See AMNESTY INTERNATIONAL USA, THE AMERICAS, *supra* note 9, at 84-85. Leonard Peltier is recognized as the most important political prisoner in the United States by both Amnesty International and Human Rights for Political Prisoners. *Antihero*, SPIN MAG., Feb., 1991, at 62. Several years ago, over 21 million Soviets, who consider Peltier a political prisoner, signed a petition on his behalf. Joan M. Cheever, *Conviction or Convenience*, NAT'L L.J., June 25, 1990, at 28. In addition, reports indicate that former Soviet President Mikhail Gorbachev once asked President Ronald Reagan to pardon Peltier. *Id.*

¹² See *Peltier III*, 800 F.2d 772, 772-74 (8th Cir. 1986). Peltier has always denied killing agents Coler and Williams. AMNESTY INTERNATIONAL USA, THE AMERICAS, *supra* note 9, at 86.

¹³ *Peltier III*, 800 F.2d at 773 (appeal due to additional concealed evidence); *United States v. Peltier*, 731 F.2d 550, 551 (8th Cir. 1984) (hereinafter *Peltier II*) (appeal due to concealed evidence); *Peltier I*, 585 F.2d 314, 320 (8th Cir. 1978) (appeal over trial court's refusal to admit evidence of FBI frame-up).

Peltier recently filed another motion for a new trial pursuant to 28 U.S.C. § 2255 (1988), arguing that, due to concessions made by the government during the appellate proceedings, as

granting of a new trial.¹⁴ Through a thorough examination of Peltier's situation, this Note illuminates the existence and fundamental injustice of a sublegal system in which criminal defendants are functionally guilty until proven innocent.¹⁵ Section I describes the circumstances surrounding the murders on the Pine Ridge reservation, as documented primarily by author Peter Matthiessen, and reviews the trial and first appeal of Leonard Pelüer.¹⁶ Section II examines the evolution of the standards for a new trial in situations where the prosecution has withheld evidence.¹⁷ Section III discusses Peltier's discovery of evidence that was concealed at his original trial and examines his subsequent appeals.¹⁸ Section IV analyzes the importance of the standards for a new trial to Peltier's case and demonstrates that the current standards were misapplied in his appeal.¹⁹ Using Peltier as an example, Section V illustrates the existence and injustice of a sublegal system in which criminal defendants are guilty until proven innocent.²⁰ This section concludes that, in order to avoid the injustice of the sublegal system and ensure a defendant's constitutional right to due process, the standards for a new trial need to be lessened in situations where critical evidence was withheld at trial.²¹

I. THE RESERVATION MURDERS ON PINE RIDGE

The murders of FBI agents Coler and Williams were, on a small scale, the culmination of a struggle between the Pine Ridge tribal government and the reservation's residents.²² On a larger scale, the murders and the subsequent prosecution of Leonard Peltier have been

described in this Note, the record no longer supported his conviction. *Peltier v. Henman*, No. 92-1129, 1993 WL 241915, at *4 (8th Cir. 1993). The United States Court of Appeals for the Eighth Circuit held, however, that the government had not conceded the basis on which Peltier's conviction rested. *Id.* In dicta, the court also asserted that, because he was also charged with aiding and abetting, he would have been found guilty of this by the jury despite any concessions made by the government. *Id.* The appropriateness of an appellate court making such findings of fact is beyond the scope of this Note.

¹⁴ See *infra* notes 22-273 and accompanying text.

¹⁵ See *infra* notes 22-273 and accompanying text.

¹⁶ See *infra* notes 22-117 and accompanying text.

¹⁷ See *infra* notes 118-72 and accompanying text.

¹⁸ See *infra* notes 173-215 and accompanying text. Appeals not based on the withholding of evidence are not examined in this Note. See *supra* note 13 for a discussion of other proceedings in the Peltier case.

¹⁹ See *infra* notes 216-53 and accompanying text.

²⁰ See *infra* notes 254-72 and accompanying text.

²¹ See *infra* notes 270-72 and accompanying text.

²² See *Peltier I*, 585 F.2d 314, 318 (8th Cir. 1978); MATTHIESSEN, *supra* note 1, at 59-64; AMNESTY INTERNATIONAL USA, *THE AMERICAS*, *supra* note 9, at 86.

viewed as a continuation of the age-old struggle between Native Americans and the United States government.²³ Regardless of the underlying rationale for the shoot-out, the Res Murs investigation and the prosecution of Peltier and several other suspects is fraught with controversy over the propriety of the government's conduct.²⁴

A. *The American Indian Movement and
Their Presence on the Pine Ridge Reservation*

The American Indian Movement ("AIM"), founded in 1968, was an organization dedicated to increasing awareness about, and enforcing the rights of, Native Americans.²⁵ Author Peter Matthiessen describes AIM as the culmination of a growing consensus among Native Americans that government supervision was destroying the Indian people, and that Native Americans had to resolve their own problems if they were to survive.²⁶ In the late 1960s and early 1970s, AIM was active in seeking the enforcement of treaties between the United States and Indian peoples.²⁷ AIM sought to educate and elicit the support of the public by staging demonstrations, such as their occupation of Wounded Knee, the site of an Indian massacre by American troops in 1890.²⁸ AIM was also very active within Indian communities, providing legal advice and educating young Indians about their history and heritage.²⁹ Due to these activities, AIM received assistance and approval from community action groups, church groups and other foundations nationwide.³⁰ Matthiessen contends that AIM's political activities, how-

²³ See AMNESTY INTERNATIONAL USA, *THE AMERICAS*, *supra* note 9, at 84-86. Recent analysis by Amnesty International suggests that a covert war over the Pine Ridge Reservation was waged by the federal government at the time of the shoot-out. *See id.* at 86. The basis for this belief stems from the fact that the reservation is rich in uranium deposits, which the federal government and United States corporations were interested in procuring. *Id.*

²⁴ *See Peltier III*, 800 F.2d 772, 775-780 (8th Cir. 1986); MATTHIESSEN, *supra* note 1, at 279-315.

²⁵ *See* MATTHIESSEN, *supra* note 1, at 34-36.

²⁶ *Id.* at 34.

²⁷ *See id.* at 37-41. AIM specifically sought to enforce Indian fishing rights in Washington, Oregon and Idaho, to receive abandoned federal lands such as Alcatraz Island, and to enforce neglected treaties which reserved lands for Native Americans, such as the Mount Rushmore area of the Black Hills. *Id.*

²⁸ *Id.* at 65. Wounded Knee was the site of a violent massacre of unarmed Sioux Indians, including many women and children, by the soldiers of the Seventh Cavalry in 1890. AMNESTY INTERNATIONAL USA, *UNITED STATES OF AMERICA*, *supra* note 9, at 28 n.22.

²⁹ MATTHIESSEN, *supra* note 1, at 36. AIM set up Survival Schools, which were an alternative to reform schools. *Id.* Young Indians enrolled in these "Survival Schools" to learn how to adjust to life in white society without losing their own culture. *Id.*

³⁰ *Id.*

ever, were not well received by the FBI, who labeled AIM an extremist group and placed AIM's leaders at the top of its list of key extremists.³¹

At the time of the murders of the two FBI agents, the Pine Ridge reservation was in a state of turmoil.³² The reservation, under the control of Richard Wilson, head of the Tribal Council, was the scene of much violence.³³ Strongly opposed to AIM, its focus on traditional Indian culture and its influence on the people of Pine Ridge, Wilson outfitted and armed a private police force to keep the residents subdued.³⁴ This armed unit came to be known on the reservation as the "Goon Squad," due to the brutality of its repression of the indigenous peoples.³⁵ The residents of Pine Ridge requested the presence of AIM members on the reservation, to protect them from the violence of Wilson's Goon Squad.³⁶ Complying with their wishes, several AIM members, including Leonard Peltier, Dean Butler and Bob Robideau, set up a "tent city" on the Jumping Bull compound, in Oglala, a more traditionally oriented section of the Pine Ridge reservation.³⁷ From the spring of 1975 until the fatal shoot-out in June of the same year, the AIM members remained on the reservation in an attempt to alleviate the conflict between Wilson and the Pine Ridge residents.³⁸

B. *The Pine Ridge Shoot-Out*

On June 26, 1975, Special Agents Coler and Williams, entered the Jumping Bull compound in search of Jimmy Eagle, a nineteen-year-old Indian wanted on assault and theft charges.³⁹ The agents followed a vehicle onto the Jumping Bull compound in the hopes of apprehending Eagle.⁴⁰ Transcripts of radio transmissions between Coler and Williams indicate that they perceived that the occupants of the other

³¹ *Id.* at 55-56.

³² *See id.* at 59-64.

³³ *See id.* at 131-32. During March of 1975, seven people, two of them children, were killed in gunfights. *Id.* Others were killed by snipers, drive-by shootings and arson. *Id.* Between 1973 and 1975, more than 60 Indians were killed and hundreds more assaulted and harassed, allegedly by Wilson's paramilitary squad. AMNESTY INTERNATIONAL USA, UNITED STATES OF AMERICA, *supra* note 9, at 28. During this period, the FBI failed to obtain a single conviction for the murders of AIM activists, and according to Amnesty International, complaints of assault and harassment went uninvestigated. *Id.*

³⁴ MATTHIESSEN, *supra* note 1, at 60-61.

³⁵ *Id.*

³⁶ *Id.* at 65.

³⁷ *See id.* at 146-48.

³⁸ *Peltier I*, 585 F.2d 314, 318 (8th Cir. 1978).

³⁹ *Id.*; MATTHIESSEN, *supra* note 1, at 154.

⁴⁰ *Peltier I*, 585 F.2d at 318. An informant had tipped the agents that Eagle might be riding in a similar vehicle. *Id.* at 318 n.2.

vehicle were about to fire on them.⁴¹ There is no record of what happened next, but a violent shoot-out ensued.⁴²

According to Matthiessen, the AIM members in the tent city heard an exchange of gun shots, grabbed their weapons and proceeded to the scene of the disturbance.⁴³ Both Coler and Williams, taking heavy fire, were wounded from a distance, but not fatally.⁴⁴ Some time later, Coler and Williams were shot and killed by a small caliber weapon fired at point-blank range.⁴⁵

Within forty minutes of the first shots, the Jumping Bull compound was completely surrounded by FBI agents, Bureau of Indian Affairs ("BIA") police, FBI and BIA SWAT teams, state police officers and members of the Goon Squad.⁴⁶ Matthiessen has concluded, given the hostility toward AIM, especially in the Pine Ridge area, the Indians probably feared that, whether or not the agents had survived the shoot-out, anyone involved would be shot on sight, even if they surrendered.⁴⁷ Thus, the residents of the tent city, including AIM members, women and children, dispersed and fled the area.⁴⁸ All were successful in escaping the various roadblocks and search parties.⁴⁹

C. *The FBI's Investigation of the Pine Ridge Shoot-Out*

Matthiessen maintains that the FBI attached great importance to its investigation of the murders of agents Coler and Williams.⁵⁰ The FBI initiated an extensive investigation, but the means it employed in locating and apprehending suspects have received much criticism.⁵¹ The results of the FBI investigation revealed that the agents were killed

⁴¹ *Id.* at 318. There is no evidence indicating that the agents attempted to identify themselves. *See id.*; *see also* MATTHIESSEN, *supra* note 1, at 155-56.

⁴² *Peltier I*, 585 F.2d at 318.

⁴³ MATTHIESSEN, *supra* note 1, at 155-56.

⁴⁴ *Peltier I*, 585 F.2d at 318. Coler was wounded by a bullet that flew through the trunk of his car, mutilating his right arm, and Williams was shot in his left shoulder. *Id.*

⁴⁵ *Id.* at 318-19.

⁴⁶ MATTHIESSEN, *supra* note 1, at 159.

⁴⁷ *Id.* at 158.

⁴⁸ *See id.* at 158-68.

⁴⁹ *Id.* at 168.

⁵⁰ MATTHIESSEN, *supra* note 1, at 193. According to Matthiessen, this is demonstrated by the fact that Joseph Trimbach, regional head of the FBI, was en route from Minneapolis to Pine Ridge within an hour of the firing of the first shots. *Id.* Trimbach sought to enlist the National Guard and commandeered high explosives brought in via Marine jet. *Id.*

⁵¹ *See id.* at 198-201. Matthiessen states, for example, that when the Jumping Bull family returned to their home after the shoot-out, they found that the FBI had ransacked the house, broken down the door, smashed furniture and shot the paintings that hung on the walls. *Id.* at 200. A few days after the shoot-out, the situation deteriorated to the point that the residents of Oglala marched on the FBI and BIA roadblocks, forcing the agents to abandon their stations. *Id.* at 201.

with a high-velocity small caliber weapon fired at point-blank range.⁵² Over 125 bullet holes were found in the agents' cars, but only five shell casings attributable to the agents' guns were recovered.⁵³

Leonard Peltier was one of four prime suspects in the FBI's investigation of the murders.⁵⁴ Peltier had been alleged to be riding in the vehicle the agents followed onto the Jumping Bull compound.⁵⁵ Furthermore, witnesses stated that Peltier was carrying an AR-15 rifle on the day of the shoot-out, which was the highest caliber weapon used by any AIM member.⁵⁶ An AR-15, ("Wichita AR-15") found on the Kansas Turnpike on September 10, 1975, in damaged condition, was believed to be the weapon Peltier had used in the Jumping Bull shoot-out.⁵⁷ Additionally, investigators at the crime scene had recovered a .223 caliber cartridge casing from the trunk of Agent Coler's car, which could have been fired from Peltier's gun.⁵⁸ Based on this evidence, the hunt for Leonard Peltier began.

Leonard Peltier, Bob Robideau, Dean Butler and Jimmy Eagle, all AIM members, were charged with and sought for the murders of agents Coler and Williams.⁵⁹ The charges against Eagle were subsequently dismissed, despite the claims of several witnesses, including Eagle himself, who admitted he had participated in the killings.⁶⁰ Peltier, Butler and Robideau all stood trial for the murders of Coler and Williams.⁶¹

D. *The Trial of Butler and Robideau*

Dean Butler and Bob Robideau were jointly tried in Cedar Rapids, Iowa, for two counts of the first degree murders of agents Coler and Williams.⁶² The prosecution's case centered on the testimony of several

⁵² *Peltier I*, 585 F.2d 314, 318 (8th Cir. 1978).

⁵³ *Id.*

⁵⁴ *Id.* The other suspects were Jimmy Eagle, Dean Butler and Bob Robideau, all of whom had charges brought against them for the murders. *Id.*

⁵⁵ *Id.* at 319. Questions have arisen as to the validity of the claim that Peltier was riding in the vehicle. See *Peltier v. Henman*, No. 92-1129, 1993 WL 241915 at *11 (8th Cir. 1993). The FBI described the vehicle at various points in its investigation as a red pickup, a red Scout, a red jeep, and an orange and white pickup. *Id.*

⁵⁶ *Peltier I*, 585 F.2d at 319.

⁵⁷ *Id.* at 320. The Wichita AR-15 was damaged due to a car explosion. *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 318.

⁶⁰ MATTHIESSEN, *supra* note 1, at 317. Matthiessen discovered that United States Attorney Evan Hultman thought that the case against Jimmy Eagle was weak, despite Eagle's own admissions of participating in the murders, and recommended dismissing the case so that the full prosecutorial weight of the federal government could be directed against Peltier. *Id.*

⁶¹ *Peltier I*, 585 F.2d at 318.

⁶² *Id.* at 318; MATTHIESSEN, *supra* note 1, at 280-315. This trial, like Peltier's, is not published, and all information, where necessary, is derived primarily from Matthiessen's book containing extensive research and documentation of the trial records.

FBI agents and eyewitnesses to the shoot-out.⁶³ The defense demonstrated that certain witnesses had lied both to the grand jury and during the trial itself,⁶⁴ that certain testimony was at best questionable,⁶⁵ and that the FBI had coerced witnesses during its investigation.⁶⁶ Under the auspices of Judge McManus, the defense presented the jury with evidence of the FBI's coercion of witnesses and a history of FBI misconduct in investigating prior crimes.⁶⁷ After five days of deadlock, on July 16, 1976, the jury returned a verdict finding both Butler and Robideau not guilty on all counts.⁶⁸

E. *Leonard Peltier's Extradition and Trial*

After the shoot-out on the Jumping Bull compound, Leonard Peltier made his way to Vancouver, from where he was eventually extradited to the United States on December 16, 1976.⁶⁹ Peltier was extradited based partly on pressure from the Justice Department.⁷⁰ According to Matthiessen, another influential factor in Peltier's extra-

It is interesting to note the state of anxiety and fear created by the FBI in Cedar Rapids during the trial. See MATTHIESSEN, *supra* note 1, at 283-84. The FBI published many reports, spreading rumors of AIM's plans to "kill-a-cop-a-day" and commit acts of violence on the populace of Cedar Rapids. *Id.* Matthiessen cites, for example, the fact that the FBI informed the local police that two thousand highly armed AIM members would invade Cedar Rapids in an attempt to assassinate the governor, blow up various dams, plants and law enforcement centers, burn farmers, snipe at tourists and take unspecified action at Mount Rushmore. *Id.* at 283.

⁶³ See MATTHIESSEN, *supra* note 1, at 287-98.

⁶⁴ *Id.* at 290.

⁶⁵ See *id.* at 294-97. Matthiessen tells of how the prosecution put James Harper on the stand to testify that, in the short time he had shared a jail cell with Dean Butler, Butler confessed to the murders in great detail. *Id.* at 295. In return for government protection, Harper filled in all the gaps in the prosecution's case. *Id.* at 297. Jury foreman Robert Bolin later commented that "not one single person believed one single word of what [Harper] said." *Id.* at 313.

⁶⁶ See *id.* at 300-03. Matthiessen recounts the testimony of John Trudell, who attested to the questioning of one witness, Annie Mae Aquash, who claimed to have been threatened by the FBI. *Id.* at 301. Annie Mae Aquash did not testify because she was later found dead, with a bullet hole in the back of her head. *Id.* at 256. The BIA and FBI investigated her death and concluded that she had died of natural causes. See *id.* at 256.

⁶⁷ *Side By Side: How Two Trials Compare*, NAT'L L.J., June 25, 1990, at 30 (evidence included misconduct in COINTELPRO and the Church Report on domestic spying). COINTELPRO, which stands for Counter-Intelligence Program, was an FBI surveillance operation that targeted domestic political groups, including AIM, in the late 1970s and early 1980s. AMNESTY INTERNATIONAL USA, UNITED STATES OF AMERICA, *supra* note 9, at 29 n.23.

⁶⁸ *Peltier I*, 585 F.2d 314, 318 (8th Cir. 1978); MATTHIESSEN, *supra* note 1, at 312. Throughout the trial, Peltier had been included in descriptions of events surrounding the shootout, but had in no way been singled out to have acted differently from Butler and Robideau. *Id.* at 317. Matthiessen has concluded that had Peltier been tried with Butler and Robideau at Cedar Rapids, it seems almost certain that he would also have been acquitted. *Id.*

⁶⁹ MATTHIESSEN, *supra* note 1, at 319.

⁷⁰ *Id.* at 318.

dition was the testimony of Myrtle Poor Bear.⁷¹ Myrtle Poor Bear's affidavit stipulated that she was Leonard Peltier's girlfriend and had been physically forced to watch Peltier execute the FBI agents.⁷² She subsequently admitted, however, that she was sixty miles away from the Jumping Bull compound at the time of the shoot-out and had never met Peltier prior to his trial at Fargo.⁷³ Poor Bear's original affidavit, withheld from Peltier's attorneys and the Vancouver court, contradicted even this, stating that she had left the compound prior to June 26, the day of the shoot-out.⁷⁴ Nonetheless, based on Poor Bear's testimony, Peltier was extradited to the United States to stand trial for the murders of agents Coler and Williams.⁷⁵

In a jury trial at Fargo, North Dakota, with Judge Paul Benson presiding, Leonard Peltier was tried and convicted of the first degree murders of agents Coler and Williams.⁷⁶ The government's case against Peltier was primarily composed of circumstantial evidence.⁷⁷ Judge Benson disallowed most of the defense's evidence, greatly crippling their attempts to demonstrate that the FBI had constructed evidence to convict Peltier by any means necessary.⁷⁸ After a twenty-five-day trial and a guilty verdict, Judge Benson administered the harshest punishment available, sentencing Peltier to two consecutive life terms in federal prison.⁷⁹

⁷¹ *Id.* at 341. After using Myrtle Poor Bear's affidavit to extradite Peltier, United States Attorney Evan Hulman referred to her as "incompetent in the utter, utter, utter, ultimate sense of incompetence." *Id.* at 445.

⁷² *Id.* at 339-40.

⁷³ *Id.* at 342.

⁷⁴ MATTHIESSEN, *supra* note 1, at 319. This conflict in testimony may have resulted, according to Poor Bear's own allegations, from threats by FBI agents to her and her young child. *See id.* at 342-44. Specifically, Poor Bear alleged that FBI agents, in the course of questioning her, mentioned the mysterious murder of a young Indian woman, showed Poor Bear pictures of the corpse, and suggested that she too could be executed with impunity. *Id.* at 342. *See supra* note 66 for a discussion of the murder of Annie Mae Aquash after she was questioned by the FBI.

⁷⁵ *Id.* at 319, 341. In April of 1978, British Columbia Supreme Court Justice R.P. Anderson, in commenting on Peltier's extradition, declared: "[i]t seems clear to me that the conduct of the U.S. government involved misconduct from inception." *Id.* at 319.

⁷⁶ *Peltier I*, 585 F.2d 314, 318 (8th Cir. 1978); *but cf. Peltier v. Henman*, No. 92-1129, 1993 WL 241915, at *4 (8th Cir. 1993) (dicta asserting that Peltier was also tried as an aider and abettor). For a full account of Peltier's trial, see MATTHIESSEN, *supra* note 1, at 320-61. The FBI's behavior during the trial was similar to its actions at Cedar Rapids. *See id.* at 320. *See also supra* note 62 for a discussion of the FBI's behavior at the Cedar Rapids trial. Matthiessen contends that the FBI furnished local police and media with unsubstantiated rumors of the pending threat of armed Indians laying siege to the town. MATTHIESSEN, *supra* note 1, at 320. The twelve white jurors were sequestered, constantly guarded by SWAT teams, and shuttled to the courtroom in a bus with taped windows. *Id.*

⁷⁷ *Peltier I*, 585 F.2d at 319.

⁷⁸ *See* MATTHIESSEN, *supra* note 1, at 323, 341, 357.

⁷⁹ *Peltier I*, 585 F.2d at 318; MATTHIESSEN, *supra* note 1, at 364.

The government's case centered around two major lines of reasoning.⁸⁰ First, the government presented evidence that Peltier may have been riding in the vehicle followed by the agents onto the Jumping Bull compound, and that he may have thought he was being pursued for an outstanding arrest warrant.⁸¹ The government argued that this evidence provided some motive for the killings.⁸² Second, the government linked Peltier with an AR-15 high-velocity rifle ("Wichita AR-15") that had been recovered by police officers, in damaged condition, on the Kansas Turnpike.⁸³ The crucial piece of evidence linking this rifle to the murders was a .223 shell casing recovered from the trunk of Coler's car.⁸⁴ Although an FBI laboratory report of October 31, 1975, prepared by ballistics expert Evan Hodge, stated that the Wichita AR-15 could not be associated with the .223 casing, nearly four months later, Hodge concluded that the Wichita AR-15 theoretically could be linked to the casing in question.⁸⁵ Hodge asserted that, although the gun itself could not be accurately compared to the .223 casing, because it had been badly damaged in an explosion, the bolt from the gun had been removed, loaded in another AR-15, and yielded markings similar to those on the .223 casing.⁸⁶ Hodge thus concluded

⁸⁰ See *Peltier I*, 585 F.2d at 319-20.

⁸¹ *Id.* at 319. See *supra* note 55 for a discussion of inconsistencies in the FBI's identification of the vehicle the agents followed onto the compound. The outstanding arrest warrant related to an attempted murder charge from an incident in Wisconsin in 1972. *Peltier I*, 585 F.2d at 321. Peltier eventually stood trial and was acquitted on this charge. *Id.* at 322 n.6; MATTHIESSEN, *supra* note 1, at 368.

⁸² See *Peltier I*, 585 F.2d at 322.

⁸³ *Id.* at 319-20. There was evidence that there were several AR-15s around during the shoot-out, not to mention Agent Coler's own rifle and several other weapons that fit the description of the high-velocity weapon used to kill the agents. MATTHIESSEN, *supra* note 1, at 354-55.

⁸⁴ *Peltier I*, 585 F.2d at 320; MATTHIESSEN, *supra* note 1, at 352. The government's theory at trial was that the casing had been ejected from the rifle into the trunk of Agent Coler's car when the fatal shots were fired. *Peltier v. Henman*, No. 92-1129, 1993 WL 241915, at *2 (8th Cir. 1993). United States Attorney Crooks referred to the casing as "probably the most important piece of evidence in this case." MATTHIESSEN, *supra* note 1, at 352. The circumstances surrounding this casing are questionable. See *id.* at 352-53. The casing went unnoticed by the five FBI agents who searched the death scene, and was not mentioned in their 302 investigation report of Agent Cunningham, head of the FBI firearms division, who inspected the car personally. *Id.* at 353. The casing reportedly was discovered by Agent Lodge, who had checked the car for fingerprints; its discovery turns up on the last page of Lodge's notes for that day (although he took no notes while inspecting Agent Williams' car on the same day). *Id.*

⁸⁵ MATTHIESSEN, *supra* note 1, at 353-54.

⁸⁶ *Peltier I*, 585 F.2d at 319-20. Hodge's basic assertion was that, due to the gun's damaged condition, a more accurate firing pin analysis was impossible, but a less accurate markings comparison yielded a positive result. See *id.* See *infra* notes 180-82 for a discussion of FBI documents indicating that the more accurate firing pin analysis was conducted and yielded negative results.

that the Wichita AR-15, which had been linked to Peltier, had fired the .223 casing found in the trunk of Coler's car.⁸⁷ This casing may have been one of the fatal shots fired at the shoot-out.⁸⁸

The defense's case was based on the theory that the government was attempting to frame Peltier.⁸⁹ According to the defense, the FBI had decided in the first days of the investigation that Peltier was guilty.⁹⁰ Consequently, the defense argued that the FBI constructed evidence and engaged in other forms of misconduct to support Peltier's guilt and meant to see Peltier convicted by any means necessary.⁹¹

Judge Benson ruled from the outset that evidence would be limited primarily to the events of June 26, 1975, the day of the shoot-out.⁹² Although the defense had prepared two weeks of testimony, the trial court disallowed about four-fifths of its evidence.⁹³ The defense was prevented from presenting evidence of the suspect affidavits used to extradite Peltier, a background summary of the violence on the Pine Ridge reservation, the FBI's extensive persecution of AIM, and the verdict or any testimony from the Butler-Robideau trial at Cedar Rapids for the same crime.⁹⁴ The result, according to Matthiessen, was that the prosecution put on witnesses who directly contradicted their testimony in the prior Cedar Rapids trial, and the defense was prevented from impeaching those witnesses.⁹⁵ In the end, based on fifteen days of testimony from the prosecution and two and a half days from the defense, the jury convicted Peltier of both counts of first degree murder.⁹⁶

F. *Leonard Peltier's First Appeal*

Leonard Peltier appealed his conviction to the United States Court of Appeals for the Eighth Circuit ("*Peltier I*").⁹⁷ Peltier sought reversal of his conviction, alleging that five errors were committed by

⁸⁷ See *Peltier I*, 585 F.2d at 320. The ballistics testimony in the trial transcript fails to establish Peltier's presence at Oglala, much less his identity as the killer. MATTHIESSEN, *supra* note 1, at 355.

⁸⁸ See *Peltier I*, 585 F.2d at 320.

⁸⁹ MATTHIESSEN, *supra* note 1, at 341.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 323.

⁹³ *Id.* at 357.

⁹⁴ MATTHIESSEN, *supra* note 1, at 323; *Side by Side: How Two Trials Compare*, *supra* note 67, at 30.

⁹⁵ MATTHIESSEN, *supra* note 1, at 323.

⁹⁶ *Id.* at 357, 361.

⁹⁷ *Peltier I*, 585 F.2d 314, 320 (8th Cir. 1978).

the trial court.⁹⁸ First, Peltier argued that the trial court's admission into evidence of his flight from the Pine Ridge reservation after the shoot-out, accounts of other alleged crimes, and the circumstances surrounding the recovery of the Wichita AR-15 were prejudicial, inflammatory, and resulted in a denial of due process.⁹⁹ The *Peltier I* court granted great deference to trial judge Paul Benson, who had heard the evidence,¹⁰⁰ and held that even if Judge Benson had abused his discretion in admitting the evidence of flight and other crimes, the error was harmless.¹⁰¹ The *Peltier I* court similarly found, without deciding that the Wichita AR-15 evidence was erroneously admitted, that there was no plain error and that the evidence was not unfairly prejudicial to Peltier.¹⁰²

Second, Peltier argued that the trial court deprived him of a fair trial and compulsory process by refusing to instruct the jury on the defense's theory of an FBI frame-up and by ruling inadmissible the bulk of his proof of fabricated evidence.¹⁰³ The court likewise rejected these arguments.¹⁰⁴ As to the jury instruction, the *Peltier I* court held that the testimony of witnesses at trial provided no support for the instruction that the government induced them to testify falsely,¹⁰⁵ and that the instruction was essentially a credibility test, not one that incorporated Peltier's theory of defense.¹⁰⁶ The court also found that Judge Benson's refusal to admit most of the defense's evidence relating to its theory of an FBI frame-up was not an abuse of discretion, because "the evidence was only minimally relevant."¹⁰⁷

⁹⁸ *Id.*

⁹⁹ *See id.* at 320-28.

¹⁰⁰ *Id.* at 321. Deference is given to trial judge as propounded in *United States v. Bohr*, 581 F.2d 1294, 1298-99 (8th Cir. 1978); *United States v. Weir*, 575 F.2d 668, 670 (8th Cir. 1978). *Id.*

¹⁰¹ *Peltier I*, 585 F.2d at 325. At least, the appeals court was convinced beyond a reasonable doubt that it was harmless under *Weir. Id.*; *see Weir*, 575 F.2d at 671.

¹⁰² *Peltier I*, 585 F.2d at 326.

¹⁰³ *See id.* at 328-34.

¹⁰⁴ *See id.* at 329-34.

¹⁰⁵ *Id.* at 328-29. The defendant in a criminal trial is entitled to have the jury instructed on any theory of defense that is supported by law and has some foundation in the evidence, however tenuous. *Id.* at 328.

¹⁰⁶ *Peltier I*, 585 F.2d at 328. The refused jury instruction stated:

Testimony has been adduced in this case which if believed by you shows that the government induced witnesses to testify falsely. If you believe that the government, or any of its agents, induced any witness to testify falsely in this case (or in any related case), this is affirmative evidence of the weakness of the government's case.

Id.

¹⁰⁷ *Id.* at 332. The court found that Myrtle Poor Bear's testimony lacked probative value because she was not a reliable witness. *Id.* The defense, however, sought to offer this testimony to bring into question the validity of other witnesses who had testified for the prosecution. *Id.*

The *Peltier I* court also rejected Peltier's remaining three claims of error.¹⁰⁸ The court denied Peltier's claim that the trial court had erred in refusing to reread testimony to the jury, because this was not an abuse of discretion on the part of Judge Benson.¹⁰⁹ The *Peltier I* court also rejected the claim that the trial court had no jurisdiction over Peltier, because he was extradited in violation of the Webster-Ashburton treaty.¹¹⁰ The court found this claim to be lacking in substance.¹¹¹ Finally, the court rejected Peltier's claim of collateral estoppel, because he was not a party to the Butler-Robideau trial.¹¹² The court therefore affirmed Peltier's conviction.¹¹³

After his conviction, Peltier was sent to Marion Penitentiary in Illinois, from where he began the appellate process.¹¹⁴ As previously noted, Peltier's first appeal unsuccessfully sought a reversal of his conviction due to allegations of several errors committed by the trial court.¹¹⁵ Subsequently, on several occasions, Peltier uncovered evidence which was withheld at trial and created doubt as to the validity of his conviction.¹¹⁶ After the discovery of this evidence, Peltier sought a new trial, and, although he won a limited victory on his second appeal, he was denied a new trial on his third and final attempt.¹¹⁷

This would have been accomplished by showing the FBI's harassment of Poor Bear and its use of her false testimony to extradite Peltier from Canada. See MATTHIESSEN, *supra* note 1, at 319, 342-44.

¹⁰⁸ See *Peltier I*, 585 F.2d at 334-35.

¹⁰⁹ *Id.* at 334. The decision to reread testimony as requested by the jury rests within the sound discretion of the trial judge. *Id.* (citing *United States v. Ballard*, 535 F.2d 400, 407 (8th Cir.), *cert. denied*, 429 U.S. 918 (1976)).

¹¹⁰ *Peltier I*, 585 F.2d at 334-35. The treaty provides:

[T]he United States and Her Britannic Majesty shall deliver up to justice all persons who, being charged with the crime of murder shall seek asylum, or shall be found, within the territories of the other. Provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial.

Id. at 335.

¹¹¹ *Id.* Peltier's claim was that his extradition was based on fraudulent testimony. *Id.* at 334-35. The court, however, found substantial evidence in the record to support his extradition, excluding the fraudulent testimony. *Id.* at 335.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ MATTHIESSEN, *supra* note 1, at 364. First-time convicts are rarely sentenced to serve their time at the Marion high-security penitentiary. *Id.*

¹¹⁵ See *supra* notes 97-113 for a discussion of *Peltier I*.

¹¹⁶ See *Peltier III*, 800 F.2d 772, 773-76 (8th Cir. 1986); *Peltier II*, 731 F.2d 550, 551-53 (8th Cir. 1984).

¹¹⁷ *Peltier III*, 800 F.2d at 779-80 (denial of new trial on basis of concealed evidence); *Peltier II*, 731 F.2d at 555 (remand to trial court to hold evidentiary hearing and determine if new trial warranted).

Peltier's second and third appeals are examined in Section III, but a thorough understanding of the questions presented therein first requires an examination of the law pertaining to the granting of a new trial on the basis of concealed evidence.

II. STANDARDS FOR A NEW TRIAL

Courts have long found problematic the question of when and on what basis a defendant in a criminal trial is entitled to a new trial.¹¹⁸ In the 1935 case of *Mooney v. Holohan*, the United States Supreme Court held that a contrivance by the state to deliberately deceive the court and jury by the presentation of testimony known to be perjured is inconsistent with the rudimentary demands of justice.¹¹⁹ The Court restated this policy in the 1942 case of *Pyle v. Kansas*, asserting that imprisonment resulting from perjured testimony, knowingly used by state authorities to obtain a conviction, constitutes a deprivation of rights guaranteed by the federal Constitution.¹²⁰ The Court later expanded this doctrine to cases where the state does not solicit false evidence but allows it to go uncorrected when it appears.¹²¹

A. *Brady v. Maryland*

In the 1963 case of *Brady v. Maryland*, the United States Supreme Court determined that relief was warranted where evidence had been withheld, not falsified, at trial.¹²² The *Brady* Court held that the withholding of evidence by the prosecution violates due process where the evidence had been requested prior to trial, is favorable to the accused, and is material either to guilt or punishment.¹²³ In *Brady*, the Court addressed the issue of concealment, rather than fraudulent use, of evidence by the prosecution.¹²⁴

The defendant, Brady, had been found guilty of murder and sentenced to death.¹²⁵ Brady later uncovered evidence of another defendant's admission of guilt to the crime, and discovered that this evidence had previously been requested and withheld from the de-

¹¹⁸ See, e.g., *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Pyle v. Kansas*, 317 U.S. 213, 215-16 (1941); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

¹¹⁹ 294 U.S. at 112.

¹²⁰ 317 U.S. at 215-16.

¹²¹ *Napue*, 360 U.S. at 272.

¹²² 373 U.S. 83, 87 (1963).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 84.

fense.¹²⁶ Brady moved for a new trial, but was only granted a rehearing on the question of punishment, not guilt.¹²⁷ The *Brady* Court refused to retry the question of guilt because Brady had been convicted as an accomplice, and therefore the concealed evidence would have had no impact on the jury's finding of guilt.¹²⁸ In determining whether a retrial of the question of punishment was warranted, the *Brady* Court noted that it could not put itself in the place of the jury and determine whether it would have attached any significance to this evidence in considering the defendant's punishment.¹²⁹ Therefore, concluding that the withheld evidence was favorable to the defendant, material to punishment (but not guilt), and that the withholding of the evidence was prejudicial to the defendant, resulting in a denial of due process, the Court upheld the retrial of punishment, but refused to retry the question of guilt.¹³⁰ Thus, although the defendant fared poorly, *Brady*'s significance stems from the Supreme Court's adoption of a framework with which to deal with the concealment of material evidence.¹³¹

B. *United States v. Agurs*

In the 1976 case of *United States v. Agurs*, the United States Supreme Court expanded the scope of the *Brady* doctrine to encompass situations where the concealed evidence had not been specifically requested.¹³² Prior to this, the *Brady* test for withheld evidence only applied where the defense had requested the evidence prior to or during trial.¹³³ In *Agurs*, the defendant had been convicted of second degree murder.¹³⁴ The defendant, Agurs, contended on appeal that the prosecution failed to supply the defense with background information about the victim's criminal record.¹³⁵ Agurs had never requested this evidence, but he argued that it should have been disclosed because it would have supported his claim of self-defense.¹³⁶ Although the Court failed to find that the non-disclosure warranted a new trial, the Court

¹²⁶ *Id.*

¹²⁷ *Brady*, 373 U.S. at 84-85.

¹²⁸ *Id.* at 88 (quoting *Brady v. State*, 174 A.2d 167, 171 (Md. 1961)).

¹²⁹ *Id.* In Maryland, the jury determines not only guilt, but also punishment. *Id.* at 85.

¹³⁰ *See id.* at 86-89.

¹³¹ *See id.* at 87-88.

¹³² 427 U.S. 97, 107 (1976).

¹³³ *Brady*, 373 U.S. at 87. The test also requires that the evidence be favorable to the accused and material to either punishment or sentence. *Id.*

¹³⁴ 427 U.S. at 98.

¹³⁵ *Id.* at 98-99.

¹³⁶ *Id.* at 99, 100.

held that some situations may give rise to a duty to disclose such evidence, even when no request is made.¹³⁷

The *Agurs* Court's reasoning expanded the *Brady* doctrine in two distinct ways.¹³⁸ First, the Court stipulated that where a broad general request for all exculpatory or favorable evidence is made by the defense, the prosecutor violates the *Brady* doctrine if evidence is withheld that is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce.¹³⁹ Second, the Court determined that where no request for evidence is made, the prosecutor does not violate his or her duty of disclosure unless the omission of the evidence is of sufficient significance to result in a denial of due process.¹⁴⁰ Noting that the Constitution does not require complete and detailed disclosure of all investigatory materials in the prosecution's files, the Court classified the mandatorily disclosed evidence as "substantial material evidence."¹⁴¹ The Court described the evidence to be disclosed as that which is highly probative of innocence, and not merely preliminary, challenged or speculative.¹⁴²

The *Agurs* Court promulgated specific guidelines for the granting of a new trial, which reflect the overriding concern of justice in determining guilt.¹⁴³ Specifically, the Court required that in cases where the evidence was not in the state's possession, but obtained from a neutral source, the defendant must satisfy the severe burden of demonstrating that the newly discovered evidence would have resulted in acquittal.¹⁴⁴ This guideline is based on the fact that in this situation, the prosecution really has not withheld anything.¹⁴⁵ Where the prosecution has concealed the evidence, however, the standard is weaker, requiring only that the omitted evidence create a reasonable doubt that did not otherwise exist.¹⁴⁶ Furthermore, the Court stated that, if the verdict is already of questionable validity, additional evidence of relatively minor

¹³⁷ See *id.* at 108, 114.

¹³⁸ See *id.* at 106-07.

¹³⁹ *Agurs*, 427 U.S. at 107.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 109 (quoting Chief Justice Traynor of the California Supreme Court in *In re Imbler*, 387 P.2d 6, 14 (Cal. 1963)).

¹⁴² *Id.* at 109 n.16, 110.

¹⁴³ *Id.* at 112.

¹⁴⁴ *Agurs*, 427 U.S. at 111. This is the standard for motions for a new trial pursuant to FED. R. CRIM. P. 33. *Id.* at 111 n.19.

¹⁴⁵ See *id.* at 111.

¹⁴⁶ *Id.* at 111-12. The *Agurs* Court's rationale for this standard was that, where a finding of guilt was supported by evidence beyond a reasonable doubt, if the omitted evidence creates a reasonable doubt that did not otherwise exist, then constitutional error has been committed. *Id.*

importance might be sufficient to create such a reasonable doubt.¹⁴⁷ Thus, the *Agurs* Court expanded the *Brady* doctrine to all cases of withheld evidence and allowed for relief where the concealed evidence could or would have created a reasonable doubt, depending on the specific facts of each case.¹⁴⁸

C. United States v. Bagley

In 1985, in *United States v. Bagley*, the United States Supreme Court tightened the requirements for the granting of a new trial.¹⁴⁹ In *Bagley*, the Court set out the general rule that impeachment evidence, which had been withheld by the prosecutor at trial, fell within the *Brady* rule just as exculpatory evidence did.¹⁵⁰ More importantly, the *Bagley* Court strengthened and clarified the level of materiality of concealed evidence necessary to warrant a new trial.¹⁵¹

In *Bagley*, the defendant had been convicted of federal narcotics violations.¹⁵² Prior to trial, the defendant, Bagley, filed a discovery motion seeking to uncover any deals the government's witnesses had made with the government.¹⁵³ The prosecution replied that no such deals had been made.¹⁵⁴ Bagley later uncovered documents showing that the chief government witnesses in fact had been paid for their testimony.¹⁵⁵ The *Bagley* Court held that this impeachment evidence, and not just exculpatory evidence, was protected under *Brady* and its progeny.¹⁵⁶

The *Bagley* Court proceeded to clarify the standard of materiality of concealed evidence necessary to warrant a new trial.¹⁵⁷ The Court reasoned that evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.¹⁵⁸ The Court further clarified the materiality standard by stating that a reasonable prob-

¹⁴⁷ *Id.* at 113.

¹⁴⁸ *See id.* at 112-13.

¹⁴⁹ *See* 473 U.S. 667, 682 (1985).

¹⁵⁰ *Id.* at 676 (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

¹⁵¹ *See Bagley*, 473 U.S. at 682.

¹⁵² *Id.* at 671.

¹⁵³ *Id.* at 669-70.

¹⁵⁴ *Id.* at 670.

¹⁵⁵ *Id.* at 671.

¹⁵⁶ *Bagley*, 473 U.S. at 676.

¹⁵⁷ *See id.* at 682.

¹⁵⁸ *Id.* This test was originally formulated for the granting of a new trial where the defense attorney had acted incompetently in the original trial. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

ability is a probability sufficient to undermine confidence in the outcome of the trial.¹⁵⁹ The high standard of materiality for newly discovered evidence presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the trial whose results are challenged.¹⁶⁰ The Supreme Court foreclosed all previous forms of analysis by dictating that this standard was applicable to all cases of concealed evidence that fell under the *Brady* test, whether the evidence was specifically requested, generally requested or not requested at all.¹⁶¹

Although the withholding of crucial information would hamper a defendant's plan of attack at trial, the *Bagley* Court instructed other courts to consider directly any adverse effect the prosecutor's failure to respond may have had on the preparation and presentation of the defendant's case.¹⁶² This necessarily includes an assessment of the totality of the circumstances of the proceeding, with an awareness of the difficulty of reconstructing the course that the defense would have taken had it received the evidence.¹⁶³ Thus, *Bagley* imposed the same stringent standard of materiality on all *Brady* cases of withheld evidence, regardless of the form of the concealment.¹⁶⁴

D. Post-Bagley Developments

The United States Supreme Court has continued to uphold the strict reasonable probability test of the materiality of concealed evidence established in *Bagley*.¹⁶⁵ In 1987, in *Pennsylvania v. Ritchie*, the Court ruled that classified state files should be disclosed to the defendant where the files are material to the defense.¹⁶⁶ In so holding, the Court reasoned that evidence is material only if there exists a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different.¹⁶⁷ Consistent with *Bagley*, the Court stipulated that a reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.¹⁶⁸

¹⁵⁹ *Bagley*, 473 U.S. at 682.

¹⁶⁰ *Strickland*, 466 U.S. at 694.

¹⁶¹ *Bagley*, 473 U.S. at 682.

¹⁶² *Id.* at 682-83.

¹⁶³ *Id.* at 683.

¹⁶⁴ *See id.* at 682.

¹⁶⁵ *See Sawyer v. Whitley*, 112 S. Ct. 2514, 2524, 2530-32 (1992); *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987).

¹⁶⁶ 480 U.S. at 57-58.

¹⁶⁷ *Id.* at 57 (quoting *Bagley*, 473 U.S. at 682).

¹⁶⁸ *Id.* Similarly, in the 1992 case of *Sawyer v. Whitley*, the United States Supreme Court

In summary, the current standard for the granting of a new trial represents a combination of the *Brady* and *Bagley* approaches.¹⁶⁹ *Brady* dictates that the withholding of evidence warrants a new trial where the concealed evidence is favorable to the defendant and material to guilt or punishment.¹⁷⁰ The *Bagley* decision stipulates that the concealed evidence is material to guilt or punishment only where, had it been disclosed at trial, a reasonable probability exists that the result of the proceeding would have been different.¹⁷¹ *Bagley* defines this reasonable probability as a probability sufficient to undermine confidence in the outcome of the trial and instructs judges to consider the entire trial record in making this determination.¹⁷²

III. PELTIER'S SECOND AND THIRD APPEALS: CONCEALED EVIDENCE

After his conviction and failed appeal, Leonard Peltier discovered documents through the Freedom of Information Act that were relevant to his case but had been withheld at trial.¹⁷³ Peltier's second and third appeals focused on the validity of his conviction in light of these concealed documents.¹⁷⁴ In his second appeal ("*Peltier II*"), the United States Court of Appeals for the Eighth Circuit provided Peltier with an opportunity to demonstrate, through an evidentiary hearing at the trial level, that a new trial was warranted due to the concealment of material evidence.¹⁷⁵ After failing at this evidentiary hearing, Peltier discovered additional concealed evidence and filed a third appeal ("*Peltier III*").¹⁷⁶ *Peltier III* focused on the question of whether the concealed evidence was material to the outcome of Peltier's trial, and thus warranted a new trial under the *Brady* and *Bagley* decisions.¹⁷⁷

A. Peltier II, 1984

After his first appeal, Peltier examined thousands of documents obtained through the Freedom of Information Act regarding the gov-

applied the *Bagley* standard of materiality to the withholding of a child's affidavit in conjunction with a sentencing hearing in which the death penalty was imposed. 112 S. Ct. at 2528, 2530-32. The Court determined, however, that the evidence would not have affected the hearing. *Id.* at 2529.

¹⁶⁹ See *id.* at 2530-32; *Ritchie*, 480 U.S. at 57.

¹⁷⁰ 373 U.S. at 87.

¹⁷¹ 473 U.S. at 682.

¹⁷² *Id.* at 682-83.

¹⁷³ *Peltier III*, 800 F.2d 772, 773 (8th Cir. 1986); *Peltier II*, 731 F.2d 550, 551 (8th Cir. 1984).

¹⁷⁴ *Peltier III*, 800 F.2d at 774; *Peltier II*, 731 F.2d at 551.

¹⁷⁵ *Peltier II*, 731 F.2d at 555.

¹⁷⁶ *Peltier III*, 800 F.2d at 773.

¹⁷⁷ *Id.* at 777.

ernment's investigation of his case.¹⁷⁸ Within these documents, Peltier uncovered evidence calling into question the validity of the FBI ballistics tests linking the .223 caliber shell casing found in Agent Coler's car trunk to the Wichita AR-15.¹⁷⁹ This newly discovered evidence called into question ballistics expert Hodge's testimony at Peltier's trial and his late December 1985-early January 1986 lab report showing that, although the casing may have come from the Wichita AR-15, this could not be conclusively determined due to severe damage to the gun's firing pin and breech face.¹⁸⁰ Through the Freedom of Information Act, Peltier uncovered an October 2, 1975 FBI teletype which stated that the .223 caliber rifle contained a different firing pin from that used in the Pine Ridge shoot-out.¹⁸¹ This evidence would have discredited Hodge's testimony at trial that no conclusion could have been reached from a firing pin analysis of the Wichita AR-15, and would have seriously undermined the prosecution's inference that the gun had, in fact, fired the fatal bullets.¹⁸²

On April 20, 1982, with this new evidence in hand, Peltier filed a motion to vacate the judgment, and a motion for a new trial pursuant to 28 U.S.C. § 2255.¹⁸³ On December 15, 1982, Peltier filed a motion to disqualify the district court from considering the § 2255 motion along with a motion for a new trial under Federal Rule of Criminal Procedure 33.¹⁸⁴ The district court, Judge Paul Benson presiding, denied all motions.¹⁸⁵ Judge Benson made this ruling without the benefit of an evidentiary hearing.¹⁸⁶

Peltier appealed Judge Benson's decision, arguing that under the Supreme Court's decision in *Brady v. Maryland*, the FBI documents should have been revealed to him at his original trial.¹⁸⁷ On appeal,

¹⁷⁸ *Peltier II*, 731 F.2d at 551.

¹⁷⁹ *Id.* at 552-53. See *supra* notes 83-89 and accompanying text for a discussion of the relationship of the casing and the Wichita AR-15 to Peltier, as established at trial.

¹⁸⁰ *Peltier II*, 731 F.2d at 552-53.

¹⁸¹ *Id.*

¹⁸² *Id.* at 553.

¹⁸³ *Peltier II*, 731 F.2d at 551. 28 U.S.C. § 2255 provides in pertinent part:

A prisoner in custody under sentence of a court . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255 (1988).

¹⁸⁴ *Peltier II*, 731 F.2d at 551. Rule 33 provides: "The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." FED. R. CRIM. P. 33.

¹⁸⁵ *United States v. Peltier*, 553 F. Supp. 886, 890 (1982).

¹⁸⁶ *Peltier II*, 731 F.2d at 551.

¹⁸⁷ *Id.* at 551. In *Brady*, the United States Supreme Court held that the withholding of

Peltier contended that Judge Benson erred in denying him an evidentiary hearing in which he could prove his substantive claims.¹⁸⁸ The United States Court of Appeals for the Eighth Circuit agreed with Peltier that the October 2 teletype raised factual questions bearing directly on his legal claim that the government had denied him due process in withholding the teletype.¹⁸⁹ The court remanded the case to Judge Benson with instructions that an evidentiary hearing be held to determine whether a new trial was warranted.¹⁹⁰

On remand, Judge Benson held an evidentiary hearing.¹⁹¹ The government contended that the October 2 teletype was an advanced version of FBI ballistics expert Hodge's October 31 laboratory report, which had been admitted into evidence at the Fargo trial.¹⁹² Agent Hodge stipulated that, although he had information by September 24, 1975, that Agents Coler and Williams were shot at point-blank range with a high-velocity weapon, that the Wichita AR-15 was probably used by Peltier, and that witness Norman Brown had reported seeing Peltier approaching the wounded agents armed with an AR-15 or M-16, he failed to compare the .223 cartridge with the Wichita AR-15 until January of 1976.¹⁹³ Hodge testified that, because he never received any specific priority request to examine the .223 casing found in Agent Coler's trunk, he did not examine it until January of 1976.¹⁹⁴ Thus, Hodge asserted that the October 2 teletype did not refer to the .223 casing found in Coler's trunk, but to the other casings found on the Jumping Bull compound.¹⁹⁵

Judge Benson was satisfied with this explanation, especially in light of the fact that Hodge's lab notes dated after the October 2 teletype describe his examination of the crucial .223 casing.¹⁹⁶ The fact that

material exculpatory evidence constitutes a violation of the defendant's due process rights, 373 U.S. 83, 87 (1963).

¹⁸⁸ *Peltier II*, 731 F.2d at 551.

¹⁸⁹ *Id.* at 554.

¹⁹⁰ *Id.* at 555.

¹⁹¹ *United States v. Peltier*, 609 F. Supp. 1143, 1144 (1985).

¹⁹² *Id.* at 1146.

¹⁹³ *Id.* at 1151-52.

¹⁹⁴ *Id.* at 1151. Peltier later uncovered FBI documents directly contradicting this testimony. See *Peltier III*, 800 F.2d 772, 776 n.4 (8th Cir. 1986). Specifically, a July 21, 1975 document accompanying the shipment of the .223 cartridge to Hodge requested that it be compared with the weapons attributed to the Pine Ridge shoot-out; a September 15 memorandum requested a comparison of the Wichita AR-15 to casings from unsolved crimes; and a September 27, 1985 transmission requested the comparison of the Wichita AR-15 to cartridges from the Pine Ridge shoot-out. *Id.*

¹⁹⁵ *United States v. Peltier*, 609 F. Supp. at 1146.

¹⁹⁶ *Id.* at 1151-52.

Hodge had testified that the lab notes were written by either him or his assistant, when they were actually in the handwriting of other agents, did not detract from Hodge's credibility in the eyes of Judge Benson.¹⁹⁷ As a result of this testimony, Judge Benson concluded that the October 2 teletype was merely cumulative in relation to the evidence presented at Peltier's trial, did not evince perjured testimony and would not have affected the outcome of the trial when evaluated in the context of the entire trial record.¹⁹⁸ The trial court thus denied Peltier's request for a new trial.¹⁹⁹

B. Peltier III, 1986

After losing his second appeal, Peltier again uncovered further exculpatory evidence from FBI files obtained through the Freedom of Information Act.²⁰⁰ The evidence consisted of a July 21, 1975 document accompanying the shipment of the .223 to Agent Hodge requesting a comparison of the cartridge with the weapons attributed to the Pine Ridge shoot-out, a September 15 memorandum requesting the comparison of the Wichita AR-15 to cartridges from unknown subject crimes, and a September 27 teletype requesting comparisons of the Wichita AR-15 with cartridges from the Pine Ridge shoot-out.²⁰¹ These documents directly contradicted Hodge's testimony in the evidentiary hearing, where he had claimed not to have been aware of any particular urgency connected with the .223 casing and not to have received any priority requests to examine it.²⁰²

On the basis of this evidence, Peltier again sought to appeal Judge Benson's earlier decision.²⁰³ In an opinion written by Judge Gerald Heaney, the United States Court of Appeals for the Eighth Circuit held that, although the possibility existed that the jury would have acquitted Leonard Peltier had the concealed documents been properly disclosed, the court was not sufficiently convinced that such a result would

¹⁹⁷ *Id.* After Hodge testified that the notes were either in his handwriting or that of his assistant, Twardouski, he recanted and admitted that he did not know whose writing accounted for the lab notes. *Id.* at 1151. Later, another FBI agent, William Albrecht, admitted to writing some of the notes. *Id.* at 1152.

¹⁹⁸ *Id.* at 1153-54.

¹⁹⁹ *Id.* at 1154.

²⁰⁰ See *Peltier III*, 800 F.2d 772, 776 (8th Cir. 1986).

²⁰¹ *Id.* at 776 n.4.

²⁰² *Id.* at 776.

²⁰³ *Id.* at 774.

have in fact been reached.²⁰⁴ The court therefore denied Peltier's request for a new trial.²⁰⁵

Recognizing that the critical piece of evidence in support of the FBI's theory of Peltier's guilt was the .223 caliber cartridge, the *Peltier III* court concluded that the concealed FBI documents (which related to the validity of the inference that Peltier's AR-15 had fired the .223 casing) were favorable to the defense and might have been material to the outcome of the trial.²⁰⁶ The court reasoned that this new evidence would have allowed the defense to more effectively cross-examine certain government witnesses who had linked Peltier and the AR-15 to the actual fatal gun shots through the .223 cartridge.²⁰⁷ The court, however, was not convinced that it was reasonably probable, as required by *Bagley*, that the jury would have returned a different verdict.²⁰⁸ The court reasoned that other circumstantial evidence linking Peltier to the .223 cartridge was likely to have been sufficient for the jury to return the same verdict of guilty.²⁰⁹ The *Peltier III* court admitted reservations in its conclusion, due both to Judge Benson's ruling that prevented the defense from bringing up inconsistencies in the ballistics evidence

²⁰⁴ *Id.* at 779-80. Judge Heaney later wrote United States Senator Daniel K. Inouye (D-Hawaii), criticizing the role of the FBI and the U.S. government in precipitating the shoot-out and prosecuting Leonard Peltier. Joan M. Cheever, *Peltier Pardon?*, NAT'L L.J., July 8, 1991, at 3. The letter was eventually forwarded to President Bush. *Id.* Judge Heaney outlined mitigating circumstances that he urged Bush to take into account and recommended favorable action on the President's part in granting Leonard Peltier a presidential pardon. *See id.* Specifically, Judge Heaney's letter said that the "United States government must share the responsibility with Native Americans for the June 26 firefight," and that the government's role in escalating the conflict into a firefight should be considered a mitigating circumstance. *Id.* Furthermore, Judge Heaney was persuaded by the record that more than one person was involved in the shooting of agents Coler and Williams, and that the FBI and prosecutors used improper tactics in handling the case. *Id.*

²⁰⁵ *Peltier III*, 800 F.2d at 779-80.

²⁰⁶ *Id.* at 775. Favorableness and materiality of evidence withheld at trial are required under *Brady v. Maryland* to warrant a new trial. *See supra* notes 122-31 and accompanying text for a discussion of the *Brady* standard. The .223 cartridge was critical to the prosecution's case, because it pinpointed the Wichita AR-15, linked to Peltier, as the murder weapon, to the exclusion of all other weapons. *Peltier III*, 800 F.2d at 772, 775.

²⁰⁷ *Id.* at 777. The court, however, failed to consider the impact of this concealed evidence on the defense's theory that the FBI had manipulated and fabricated evidence to put Peltier in jail at all costs. *See id.*; *see also* MATTHIESSEN, *supra* note 1, at 341 (discussion of defense theory).

²⁰⁸ *Peltier III*, 800 F.2d at 777.

²⁰⁹ *Id.* at 777-78. Because the evidence led to the inference that the .223 had been loaded in, but not necessarily fired from, the Wichita AR-15, the court thought the jury unlikely to have found that the FBI had manipulated the .223 cartridge, either by altering the lab tests or loading a different cartridge in the Wichita AR-15 after the fact and using it in the place of the original one. *Id.* The court failed to recognize that either of these contingencies was supportive of and supported by the primary defense theory that the FBI had framed Peltier. *See id.*

presented to the jury,²¹⁰ and to the increased likelihood that the jury would have found that there were multiple AR-15s involved in the shoot-out.²¹¹

In sum, after three appeals and the discovery of crucial concealed evidence, Leonard Peltier was denied a new trial.²¹² Peltier was convicted primarily on the basis of ballistics evidence linking the Wichita AR-15 rifle, which witnesses testified he had used at the Pine Ridge shoot-out, to a .223 cartridge found near the agents' bodies.²¹³ The subsequent discovery of withheld evidence that contradicted the ballistics tests and removed the link between Peltier's gun and the casing was held to be insufficient to warrant a new trial.²¹⁴ Although the *Peltier III* court determined that the concealed evidence was crucial to Peltier's conviction, the court did not find that the applicable standards for a new trial were satisfied.²¹⁵

IV. THE *BRADY* DOCTRINE'S MISAPPLICATION TO PELTIER

Leonard Peltier's final appeal to the United States Court of Appeals for the Eighth Circuit ("*Peltier III*") implicated the *Brady* doctrine.²¹⁶ Peltier sought a new trial pursuant to the *Brady* and *Bagley* decisions, due to the prosecution's withholding of evidence favorable to the defense.²¹⁷ Specifically, Peltier uncovered documents questioning the validity of the crucial piece of evidence in the prosecution's case, the .223 cartridge.²¹⁸ In *Peltier III*, the defense argued that the withholding of this evidence constituted a violation of the *Brady* doc-

²¹⁰ *Id.* at 777. The district court's ruling clearly hampered the defense. *Id.* at 777 n.8. The argument foreclosed by this ruling, that the FBI lab may have changed its conclusions concerning the .223 casing to fit the theory of Peltier's guilt, could have been significant. *Id.*

²¹¹ *Id.* at 779. The jury may have given more serious consideration to the possibility that an AR-15 other than the one linked to Peltier was used to murder Agents Coler and Williams. *Id.*

²¹² See *id.* at 779-80. Peltier was recently denied another request for a new trial, based on different grounds. See *supra* note 13 for a discussion of *Peltier v. Henman*.

²¹³ *Peltier I*, 585 F.2d 314, 319 (8th Cir. 1978).

²¹⁴ *Peltier III*, 800 F.2d at 779-80.

²¹⁵ *Id.* at 775, 779-80.

²¹⁶ See *id.* at 774-75.

²¹⁷ See *supra* notes 173-215 and accompanying text for a discussion of the *Peltier II* and *Peltier III* appeals based on suppressed evidence.

²¹⁸ *Peltier III*, 800 F.2d at 773-74. The evidence, uncovered through the Freedom of Information Act, called into question the validity of FBI ballistics expert Hodge's test results that had linked Peltier to the .223 cartridge and therefore to the murders. See *Peltier II*, 731 F.2d 550, 551-53 (8th Cir. 1984). Specifically, Peltier uncovered an October 2, 1975 FBI teletype asserting that the Wichita AR-15 attributed to him contained a firing pin different from the one that fired the .223 cartridge, and documents dated prior to that teletype requesting that the Wichita AR-15 (attributed to Peltier) be tested against the .223 cartridge were also found. *Peltier III*, 800 F.2d at 776 n.4 (requests for testing .223 cartridge); *Peltier II*, 731 F.2d at 552-53 (October 2 teletype).

trine, and that a new trial was warranted under the *Bagley* test of materiality.²¹⁹

The *Peltier III* court began its analysis by affirming the contention that the .223 cartridge was critical to the prosecution's theory that Peltier had killed the two FBI agents at point-blank range with the Wichita AR-15.²²⁰ The court therefore reasoned that the concealed evidence, which was damaging to the prosecution's link between Peltier and the murders, was favorable to the defense, and had it been disclosed, it would have allowed the defense to cross-examine government witnesses more effectively.²²¹ The evidence was favorable and exculpatory, and thus would have warranted a new trial if the court concluded that the concealed evidence was material under the *Bagley* test.²²² The court, however, determined that the concealed evidence was not material to the outcome of the trial and denied Peltier's appeal.²²³

The *Peltier III* court misapplied the *Bagley* test of materiality to the concealed evidence. First, the court's assessment of the potential effects of the withheld evidence on the trial was deficient because the court ignored the impact of the evidence on the defense's theory of an FBI frame-up. Second, based on this deficient assessment, the court's application of the *Bagley* test was inaccurate and contrary to the dictates of the Supreme Court.

A. Inadequate Assessment of the Trial Record

In *Peltier III*, the court failed to comply with the Supreme Court's *Bagley* requirements by inadequately assessing the withheld evidence in light of the entire trial record.²²⁴ The *Bagley* test allows for a new trial where material evidence is withheld by the prosecution, and defines material evidence as that which creates a reasonable probability

²¹⁹ 800 F.2d at 774.

²²⁰ *Id.* at 775. The court noted that, had the FBI prosecuted Peltier as an aider and abettor, this evidence would not have been critical to the prosecution's case. *Id.*

²²¹ *Id.*

²²² *Id.* Had the *Brady-Agurs*, pre-*Bagley* test been applicable, Peltier probably would have been granted a new trial. Under the *Brady-Agurs* test, where the prosecution withholds evidence, a new trial is warranted where the omitted evidence creates a reasonable doubt that did not otherwise exist. *United States v. Agurs*, 427 U.S. 97, 112 (1976). In *Peltier III*, Judge Heaney expressed discomfort with his decision, because the withheld evidence would have brought up inconsistencies in the ballistics evidence and would have established the presence of multiple AR-15s at the shoot-out. 800 F.2d at 777, 779.

²²³ *Peltier III*, 800 F.2d at 777, 779-80.

²²⁴ See *supra* notes 204-11 and accompanying text for a discussion of the *Peltier III* court's assessment of the withheld evidence.

that, had it been disclosed, the result of the proceeding would have been different.²²⁵ Reasonable probability is further defined as a probability sufficient to undermine confidence in the outcome of the trial.²²⁶ In performing a *Bagley* analysis, the court is to consider the totality of the circumstances surrounding the trial.²²⁷

The *Peltier III* court failed to assess the totality of the circumstances of Peltier's trial in determining the impact of the concealed evidence on the jury. The court assessed the impact of the concealed evidence on the prosecutor's case, finding that it substantially weakened it.²²⁸ The court, however, ignored the parts of the trial record in which the defense asserted FBI misconduct. Although the court concluded that the conflicting ballistics evidence called into question the validity of the FBI's assertion of Peltier's guilt, the court failed to examine the defense's argument that the FBI had manipulated and fabricated evidence in an attempt to frame Peltier.²²⁹

The court treated the concealed evidence solely as evidence that could have been used to impeach ballistics expert Hodge's testimony.²³⁰ The court noted that the defense had been prevented from bringing out inconsistencies in the ballistics reports at trial, and that this evidence would have assisted them in doing so.²³¹ The court did not evaluate the concealed evidence as exculpatory in nature and failed to examine it in light of the evidence that the defense had presented.

The concealed evidence, which supported the defense's contention that ballistics expert Hodge had lied on the stand and that a cover-up was possibly in the works, would have added substantially to the defense theory in the juror's eyes.²³² Specifically, given the other evidence of FBI misconduct, the withheld evidence would have strengthened Peltier's theory of an FBI frame-up.²³³ The jury would

²²⁵ *United States v. Bagley*, 473 U.S. 667, 682 (1985). See *supra* notes 149-64 and accompanying text for a discussion of the *Bagley* test of materiality.

²²⁶ *Bagley*, 473 U.S. at 682.

²²⁷ *Id.* at 682-83.

²²⁸ *Peltier III*, 800 F.2d 772, 777, 779 (8th Cir. 1986). See *supra* notes 207-10 and accompanying text for a discussion of the impact of the concealed evidence on the prosecutor's case.

²²⁹ See *Peltier III*, 800 F.2d at 775-76. Although the *Peltier III* court recognized that the concealed evidence may have demonstrated FBI misconduct in this case, the court failed to believe that such misconduct actually occurred and therefore ignored this line of analysis in its reasoning. See *id.* at 778. Although evidence of FBI misconduct already appeared in the record, the court refused to believe that the concealed evidence indicated further misconduct and thus failed to consider how the jury would have weighed this evidence in reaching its verdict. See *id.*

²³⁰ See *id.* at 777.

²³¹ *Id.* at 775.

²³² See *supra* notes 89-91 and accompanying text for a discussion of the defense's theory of an FBI frame-up in *Peltier I*.

²³³ See *Peltier III*, 800 F.2d at 778 (FBI misconduct on the record).

have attached at least minimal weight to the conflicts in the ballistics reports and testimony and recognized the possible merit in Peltier's claim of an FBI frame-up.²³⁴ The court recognized the existence of improper conduct by the FBI in this case, but failed to lend credence to the assertion that the concealed evidence would comprise or indicate further misconduct.²³⁵ The court assumed away the most critical issue of the case.²³⁶ In other words, the *Peltier III* court failed to assess the force with which this evidence would support the defense theory of a frame-up and ignored any impact of this theory on the jury's deliberations.

Part of the jury's deliberations necessarily included an assessment of the defense's theory of an FBI frame-up. If the court had weighed the concealed evidence in light of the other evidence of FBI misconduct presented at trial, then the defense's case would have been strengthened and the prosecution's case weakened respectively. Specifically, had the evidence been available at trial that, prior to October 2, Hodge had received several requests to compare the .223 casing with the Wichita AR-15, and that on October 2, Hodge had issued a report stating that the Pine Ridge .223 casings did not match the AR-15, the logical conclusion would have been that Peltier's gun did not fire the casing found near the agents' bodies. Furthermore, given the multiple requests for Hodge to compare the casing to Peltier's gun prior to October 2, and Hodge's testimony that he never received any requests to examine the .223 cartridge and that he did not test it until the beginning of the next year, the inference that the FBI was manipulating evidence would have been strengthened.²³⁷ With this argument made, the defense would have had a solid footing to convince the jury that the FBI had fabricated its tests demonstrating that the .223 casing had at some time been loaded into the Wichita AR-15. Given the other evidence of FBI misconduct on the record, the concealed documents would have greatly supported the argument of an FBI frame-up and put doubt into the jury's deliberations that the casing had ever been

²³⁴ See *supra* notes 179-82 and accompanying text for a discussion of the conflicts in ballistics reports and testimony made apparent by the concealed evidence.

²³⁵ *Peltier III*, 800 F.2d at 778.

²³⁶ The court failed to consider the possibility of further FBI misconduct other than that included in the trial record. See *id.* This is especially egregious when one realizes that a great deal of FBI misconduct had been disclosed in the Butler-Robideau trial. See MATTHIESSEN, *supra* note 1, at 290, 294-97, 300-03. It is unclear, but the court may have had the discretion to examine this case in determining whether further FBI misconduct was possible, because the Butler-Robideau trial was a related case and may be considered part of the totality of circumstances under *Bagley*. See *United States v. Bagley*, 473 U.S. 667, 682-83 (1985).

²³⁷ See *supra* notes 179-82 and accompanying text for a discussion of Hodge's conflicting testimony.

in the Wichita AR-15. The *Peltier III* court recognized, as the jury would have, had the documents been made available, that, given the fact that the FBI had a personal stake in the outcome of the trial, it may have falsified the test results.²³⁸ The FBI may have even replaced the original .223 cartridge found in Coler's trunk with a different one that had been loaded into the Wichita AR-15 by either Peltier or the FBI.²³⁹ Nevertheless, the court failed to believe that the jury would have considered this evidence important in its deliberations.²⁴⁰

B. *Misapplication of the Bagley Standard of Materiality*

The *Peltier III* court's inadequate analysis of the effects of the concealed evidence on the trial record resulted in an inaccurate determination of the materiality of the withheld evidence.²⁴¹ *Bagley* dictates that withheld evidence is material (and a new trial warranted) where there is a reasonable probability that, had the evidence been disclosed, the results of the trial would have been different.²⁴² Reasonable probability is assessed as a probability sufficient to undermine confidence in the outcome of the trial.²⁴³ The *Peltier III* court admitted serious reservations in its holding that there was not a reasonable probability that the jury would have acquitted Peltier.²⁴⁴ Thus, the court expressed doubt in the confidence of the outcome of the trial.²⁴⁵ This lack of confidence is highlighted by opining Judge Heaney's letter to President Bush, in which he recommended that the President pardon Leonard Peltier.²⁴⁶ If Judge Heaney had been convinced that a different verdict would not have been reached had the withheld evidence been disclosed, it is doubtful he would have taken such an extreme measure to assist Peltier.

The court's error stems from its assessment of the impact of the concealed evidence on the deliberations of the jury and on its application of the *Bagley* test.²⁴⁷ The court based its opinion that the jury

²³⁸ *Peltier III*, 800 F.2d at 777-78.

²³⁹ *Id.* at 778.

²⁴⁰ *See id.*

²⁴¹ *See supra* notes 224-40 and accompanying text for a discussion of the *Peltier III* court's inadequate assessment of the impact of the concealed evidence based on the trial record.

²⁴² *Bagley*, 473 U.S. at 682.

²⁴³ *Id.*

²⁴⁴ *Peltier III*, 800 F.2d at 777, 779. The court admitted that, had the withheld evidence been available at trial, it is very likely that the trial court's evidentiary rulings would have been more permissive to the defense, allowing it to show inconsistencies in the ballistics evidence. *Id.* at 777.

²⁴⁵ *See id.* at 779-80.

²⁴⁶ *See Cheever, supra* note 204, at 3.

²⁴⁷ *See supra* notes 206-11 and accompanying text for a discussion of the *Peltier III* court's application of the *Bagley* test of materiality.

would still have found Peltier guilty on the existence of additional evidence in the trial record that the .223 cartridge had been extracted, but not necessarily fired, from the Wichita AR-15, and that testimony was given that there was only one AR-15 used in the Pine Ridge shoot-out.²⁴⁸ This evidence tended to single out Peltier as the killer.²⁴⁹ The problem is that both of these pieces of data are intricately affected by the concealed evidence. First, the October 2 teletype, which stated that the .223 caliber rifle tested by Hodge contained a firing pin different from that used at the Pine Ridge shoot-out, is damaging to the testimony that only one AR-15 was used in the shoot-out.²⁵⁰ If Peltier's gun did not fire the casings tested, then there necessarily must have been at least one other gun present that did. Second, the teletype in conjunction with Hodge's testimony and the concealed requests for Hodge to compare the .223 casing with the Wichita AR-15 demonstrate that not only was the .223 casing included in the October 2 teletype (and had not been fired from Peltier's gun), but that the FBI was, for some reason, covering its tracks. Therefore, the concealed evidence also calls into question the conclusion that the .223 casing had at some time been loaded into the Wichita AR-15.²⁵¹ The court failed to adequately assess the impact of the concealed evidence on the jury's assessment of the government's case against Peltier.

The *Peltier III* court was correctly concerned with the decision to deny Peltier a new trial under *Bagley*. But because the court failed to adequately address the impact of the concealed evidence on the prosecution's case and ignored its impact on the defense's case, it arrived at the wrong conclusion. Although the court took comfort in the other evidence linking Peltier to the murders, namely the cartridge examination and testimony that only one AR-15 was present at the shoot-out, their acquiescence was ill-founded.²⁵² Both pieces of evidence become questionable to the point of nullification when considered in light of the withheld evidence. The *Peltier III* court's analysis overlooked the doubt that this evidence would have cast on the prosecution's theory that Peltier had fired the fatal shots.

It is more likely than not, given the trial record and the concealed evidence, that the jury would have acquitted Peltier, for the only evidence linking him to the murders is discredited by the concealed evidence. Thus, under *Bagley*, the probability that the jury would have

²⁴⁸ *Peltier III*, 800 F.2d at 777-78.

²⁴⁹ See *id.*

²⁵⁰ See *Peltier II*, 731 F.2d 550, 553 (8th Cir. 1984).

²⁵¹ See *id.*

²⁵² See *supra* notes 208-09 and accompanying text for a discussion of the *Peltier III* court's reliance on other evidence presented at trial.

returned a different verdict given the withheld evidence is very good. At least, the probability is sufficient to undermine confidence in the outcome of the trial, which is what *Bagley* dictates.²⁵³ Leonard Peltier should have been given a new chance to prove his innocence.

V. THE *BAGLEY* TEST OF MATERIALITY: THE SUBLEGAL SYSTEM

Imprisonment, such as in the case of Leonard Peltier, resulting from perjured or concealed testimony knowingly used or withheld by state authorities, is inconsistent with the rudimentary demands of justice and constitutes a deprivation of rights guaranteed by the federal Constitution.²⁵⁴ The United States Supreme Court has provided relief to any citizen convicted on the basis of concealed evidence, allowing for a new trial where the evidence was exculpatory (or favorable) and material to guilt (or punishment).²⁵⁵ The standards for determining the level of materiality necessary to warrant a new trial, however, as expressed in *Bagley*, fail to adequately ensure a defendant's due process rights.²⁵⁶ In fact, in some circumstances, the *Bagley* test creates a sublegal system in which defendants are guilty until they prove their innocence. The *Bagley* standard of materiality is contrary to the demands of due process and requires modification to ensure justice.

A. *The Sublegal System*

When a jury deliberates a criminal case, the jurors attempt to determine whether, beyond a reasonable doubt, the facts prove the defendant's guilt. This rather high standard is necessary to ensure that the defendant is not deprived of life or liberty without due process of law. The granting of a new trial, in contrast, tips the scales by requiring the inverse: namely that, had the evidence been disclosed, it is reasonably probable that the jury would not have convicted the defendant.²⁵⁷ In certain situations, this can result in a destruction of the presumption of innocence and the imposition of an antithetical sublegal system.

The high standard of materiality under *Bagley*, a showing of reasonable probability that the jury would have returned a different verdict, presupposes that the trial was fair and accurate.²⁵⁸ On the basis of

²⁵³ 473 U.S. 667, 682 (1985).

²⁵⁴ See *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Pyle v. Kansas*, 317 U.S. 213, 215-16 (1941); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

²⁵⁵ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

²⁵⁶ See *supra* notes 149-64 and accompanying text for a discussion of the *Bagley* test of materiality.

²⁵⁷ See *Bagley*, 473 U.S. at 682.

²⁵⁸ *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

this presumption, a judge, usually at the appellate level, is required to speculate on the course the defense would have taken had it obtained the concealed evidence.²⁵⁹ Judges must necessarily put themselves in the place of juries and try to determine what the jurors' views would have been had the evidence been exposed.²⁶⁰ The judge becomes the jury and assumes the role of a psychic, in an attempt to determine what the jurors considered important in a trial over which the judge probably did not preside. The fact that these cases are often decided on appeal, by a judge far removed from the actual trial, creates an inaccurate but unavoidable scenario.

The tough standard of materiality in *Bagley* has more serious consequences. In both the Peltier and Butler-Robideau trials, a plentitude of evidence existed indicating FBI misdealings in the investigation and prosecution of the suspects.²⁶¹ This is understandable, given the fact that two FBI agents were killed, and their colleagues probably wanted the murderer to pay for the crime.²⁶² The concealment of critical ballistics documents in *Peltier III* could very well have been, as the defense asserted, an attempt on the part of the FBI to convict the man they thought was guilty. The problem is that, knowing the tough standards applicable to the granting of retrials if concealed evidence ever surfaces, the unlikelihood of its surfacing at all, and the lack of punishment for such concealment, no safeguards exist to prevent the FBI or any other governmental organization from manipulating the flow of evidence to obtain a desired conviction. The *Bagley* standard of materiality, by making it more difficult to get a new trial, makes it easier for governmental agencies like the FBI to play judge and jury, admitting only the evidence they see fit to convict whomever they deem to be guilty, while the *Bagley* decision ensures that the victims of this process will be at a severe disadvantage in trying to regain their freedom.

The circumstances surrounding the Pine Ridge murders support the contention that the FBI concluded early on that Peltier was guilty. The FBI manipulated, withheld and possibly fabricated evidence in order to win a conviction.²⁶³ The application of the *Bagley* test com-

²⁵⁹ See *Bagley*, 473 U.S. at 683.

²⁶⁰ *Brady*, 373 U.S. at 88 (quoting *Brady v. State*, 174 A.2d 167, 171 (Md. 1961)).

²⁶¹ See *supra* notes 62-68 and accompanying text for a discussion of the Butler-Robideau trial; see *supra* notes 71-84 and accompanying text for a discussion of FBI misdealings in the Peltier trial.

²⁶² In fact, the *Peltier III* court recognized that the FBI had acted improperly in this case. See 800 F.2d 772, 778 (8th Cir. 1986).

²⁶³ See *supra* notes 178-82, 201-02 and accompanying text for a discussion of the FBI's conduct regarding the concealed evidence.

pounded Peltier's denial of due process, with the end result being his imprisonment in Marion and Leavenworth for more than fifteen years. The effects of *Bagley* are thus inconsistent with the goals of its predecessor, *Brady*, where the Supreme Court proclaimed that society wins not only when the guilty are convicted, but when criminal trials are fair.²⁶⁴

The flaws in the *Bagley* standard are more serious than is at first evident. *Bagley* provides no incentive to disclose exculpatory evidence and no sanctions for its concealment. Thus, in a criminal trial, the primary safeguard to a defendant's due process is the integrity of the prosecutor and investigator. In situations where the defendant is considered a threat, or the prosecutor or investigator has a personal stake in the outcome of the trial, this is no safeguard at all.²⁶⁵ In such cases, the likelihood is increased that evidence can and will be successfully concealed. Once this occurs, and a conviction is won, the defendant is at a disadvantage in obtaining a new trial. First, the defendant must be lucky enough to procure the concealed evidence through the Freedom of Information Act or some other means. This can take years, during which time the defendant is serving a sentence improperly conveyed. Second, *Bagley* imposes on the defendant a very high standard of proof to gain a new trial.²⁶⁶ Under *Bagley*, the defendant must literally prove his innocence to an appellate judge in order to receive a new trial.²⁶⁷ The end result of this process is a second or sublegal system, in which disfavored defendants are found guilty and imprisoned without the benefit of a fair trial and then must prove their innocence to get that new, fair trial.

Using *Peltier* as an example, the existence and effects of this sublegal system become apparent. Peltier was investigated and charged with murder by the FBI, which had a strong personal interest in the case. Due to the fact that two FBI agents had been killed, and three of the four suspects had already been exonerated, the FBI had a strong incentive to withhold and manipulate evidence to ensure that the final suspect, Peltier, was convicted. The record indicates that the FBI actu-

²⁶⁴ *Brady*, 373 U.S. at 87.

²⁶⁵ See *supra* note 31 and accompanying text for a discussion of the FBI's perception of AIM activists as a threat to national security.

²⁶⁶ See *supra* notes 149-64 and accompanying text for a discussion of the stringent *Bagley* standard.

²⁶⁷ See *United States v. Bagley*, 473 U.S. 667, 682 (1985). This results exclusively from *Bagley*'s standard of materiality requirement that the appellate judge be convinced that it is reasonably *probable*, not merely possible or likely, that the result of the trial *would* have been different had the evidence been disclosed. *Id.* Thus, the defendant must convince the judge that in all probability he would have been acquitted. See *id.*

ally did withhold evidence to win Peltier's conviction.²⁶⁸ Once convicted, Peltier spent years in prison trying to prove his innocence. After uncovering the concealed evidence, Peltier, under *Bagley*, had to convince the appellate court that it was probable that the jury would not have convicted him had he been given a fair trial, where all pertinent facts were disclosed.²⁶⁹ Thus, Peltier was convicted and imprisoned without the benefit of a fair trial, and under *Bagley*, he had to prove his innocence in order to receive that trial. *Peltier III* accordingly demonstrates the inherent injustice of the sublegal system imposed by *Bagley*, where defendants can be treated as guilty until proven innocent.

B. A Remedy for the Sublegal System

What can be done to remedy the harsh effects of *Bagley*? The debate is one of justice versus judicial expediency. If every convict were entitled to a new trial after uncovering favorable concealed evidence, then the criminal justice system would choke on its own backlog. Under *Bagley*, however, it is the unfairly convicted that are currently choking in prison. There must be some middle ground in which justice and judicial expediency exist in symbiosis. As the Supreme Court stated in *Brady*, "[T]he United States wins its point whenever justice is done its citizens. . . ."²⁷⁰ The standard of materiality needs to be reduced in order to accomplish this.

The appropriate standard would be one that is more consistent with the standards applicable to the original finding of guilt. Namely, if a jury is required to determine guilt beyond a reasonable doubt, then concealed evidence would be material and warrant a new trial if it creates a reasonable doubt as to the outcome of the trial, and not a reasonable probability that the outcome would, in fact, have been different. Where a defendant was convicted under the "beyond a reasonable doubt" standard, then evidence which could have created that reasonable doubt should be sufficient to warrant a new trial.

The proposed standard of materiality, which is based on and consistent with the actual finding of guilt, is not a revolutionary idea. Rather, it is the same standard that the Supreme Court adopted in *Agurs*, which was poorly replaced by *Bagley* nine years later.²⁷¹ In adopt-

²⁶⁸ *Peltier III*, 800 F.2d 772, 773, 776, 778 (8th Cir. 1986). See *supra* notes 178-82, 201-02 and accompanying text for a discussion of the FBI's concealment of evidence in the Peltier case.

²⁶⁹ 473 U.S. at 682.

²⁷⁰ 373 U.S. 83, 87 (1963).

²⁷¹ See *United States v. Agurs*, 427 U.S. 97, 112-13 (1976). See *supra* notes 132-48 and accompanying text for a discussion of the *Agurs* test of materiality.

ing *Bagley*, the Supreme Court was in search of a flexible standard applicable to requests for new trials on the basis of concealed evidence.²⁷² This flexible standard has proved ill-conceived and contrary to the rudimentary demands of justice. The proposed return to the *Agurs* test of materiality will more greatly ensure just convictions and prevent fraudulent imprisonment.

By returning to a standard of materiality consistent with the finding of guilt, the harsh effects of the sublegal system will be eliminated. First, such a standard will tend to negate the benefits currently available to any governmental agency that sees fit to render its own form of justice by withholding evidence and perpetrating a fraud on the court and the convicted. This will occur due to the reduction of the benefits associated with the concealment of material evidence, namely the permanent imposition of conviction and sentence. Second, where the new standard of materiality failed to prevent the concealment of material evidence, a convicted defendant will stand a much greater chance of receiving a new and fair trial. If material evidence was withheld at the original trial, and that evidence was material in the sense that it created a reasonable doubt about the conviction, then the defendant will be granted a new trial without having to prove that the jury probably would have acquitted him. Thus, even where defendants are unfairly convicted and functionally treated as guilty without a true and accurate finding of guilt, they will escape the sublegal system through a showing that the concealed evidence could have, and not would have, resulted in a finding of innocence.

VI. CONCLUSION

The extradition, prosecution and affirmations of conviction of Leonard Peltier demonstrate not only the fundamental injustice possible in our legal system, but also the failure of the *Bagley* standard to correct those faults. Due to stringent standards and the ease with which crucial evidence may be concealed, Leonard Peltier has become one of the victims of a sublegal system, where citizens are functionally guilty until proven innocent. A judicial system that affirms a conviction ob-

²⁷² See 473 U.S. at 682. Instead of ignoring whether the withheld evidence had been requested specifically, generally, or not at all, the Court became concerned with developing a standard that would cover all possibilities, sometimes at the expense of justice (as demonstrated by *Peltier III*). *Id.* Ideally, the Court should focus its concern on the impact of the evidence on the jury's deliberations. Although the reason for suppression may be a consideration, justice would be served best by the Court's focusing on the impact of the facts and not the applicability of a universal rule.

tained through the most questionable of means, while the affirming judge feels compelled to ask the President of the United States to pardon the convicted, is a system that has failed in its quest for justice. Only a rejection of the harsh *Bagley* standard, and a reimposition of the *Agurs* test can restore justice to our judicial system. Those convicted under the standard of "reasonable doubt" should receive a new trial if the prosecution withholds evidence that would have originally created that reasonable doubt. The time has come to free those, who like Leonard Peltier, are convicted on lies and remain imprisoned on technicalities.

In a recent interview from his cell at Leavenworth, Peltier eloquently summed up his situation and his message:

Many people in the U.S. continue to believe their government is honest and truthful in its work. It is hard for them to believe their government is involved in illegal activities—producing propaganda, continuing its hundreds of years of genocide, engaging in war against the Indian people and others, and practicing false imprisonment. People think these things happen in other countries; they think it can't happen here.²⁷³

Although he has failed in his attempts to obtain a fair trial, Leonard Peltier has continued to promote Native American awareness from his cell in Leavenworth. He has tried, through the courts and the media, to educate other Native Americans so that they may avoid his fate.

JOSEPH C. HOGAN III

²⁷³ *Antihero*, *supra* note 11, at 63. Books and information concerning Peltier's situation can be obtained by contacting the Leonard Peltier Defense Committee, Box 583, Lawrence, Kansas 66044.