Case No. 02-1761

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,	)	Criminal Case No. C77-3003
Plaintiff - Appellee,	)	APPEAL FROM MEMORANDUM AND ORDER FILED ON FEBRUARY 25, 2002 DENYING DEFENDANT LEONARD PELTIER'S RENEWED RULE 35 MOTION
vs.	)	
LEONARD PELTIER,	)	
Defendant - Appellant.	)	United States District Court District of North Dakota Honorable Paul A. Magnuson District Judge

OPENING BRIEF OF DEFENDANT-
APPELLANT LEONARD PELTIER

CERTIFICATE OF COMPLIANCE

ADDENDUM

and

CERTIFICATE OF SERVICE

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UNITED STATES OF AMERICA,) Criminal Case No.
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)
Plaintiff - Appellee,) APPEAL FROM MEMORANDUM
AND
) ORDER FILED ON
FEBRUARY
vs.) 25, 2002 DENYING
DEFENDANT
) LEONARD PELTIER'S
RENEWED
LEONARD PELTIER,) RULE 35 MOTION
)
Defendant - Appellant.) United States District
Court
) District of North
Dakota
) Honorable Paul A.
Magnuson
) District Judge
________________________________)

OPENING BRIEF OF DEFENDANT-
APPELLANT LEONARD PELTIER

I. SUMMARY OF THE CASE

Defendant-Appellant Leonard Peltier seeks a reconsider-ation and reduction of his two life sentences from consecutive to
concurrent terms based upon significant legal and factual matters
that were not and could not have been considered by the sentencing judge thereby denying Mr. Peltier a meaningful review of his sentences under Rule 35, Federal Rules of Criminal

Procedure. Because of the complexity and importance of the issues and the enormous public controversy surrounding Mr. Peltier's continued incarceration, it is requested that each side be provided at least twenty minutes for oral argument.

II. JURISDICTION

Defendant-Appellant Leonard Peltier's renewed motion

to reduce or correct his sentence was filed on November 1, 2001, in the United States District Court for the District of Hawaii pursuant to Rule 35, Federal Rules of Criminal Procedure, inter alia (Clerk Doc. No. 501). In a final Memorandum and Order filed
on February 25, 2002, the Honorable Paul A. Magnuson, United
States District Judge, denied Defendant-Appellant's aforemention-
ed motion in its entirety, without a hearing (Clerk Doc. No.
504).

A timely notice of appeal was filed on March 7, 2002, pursuant to 28 U.S.C. Section 1291 and Rules 3 and 4(b), Federal
Rules of Appellate Procedure, inter alia (Clerk Doc. No. 505).

III. ISSUES PRESENTED FOR REVIEW

(1) Whether the district court erred by concluding that Defendant-Appellant Peltier's renewed motion to reduce or
correct his sentence was untimely and that the court lacks
jurisdiction to consider it

Rule 35, Federal Rules of Criminal Procedure

United States v. Peltier, 800 F.2d 772 (8th Cir. 1986), cert. denied 108 S. Ct. 84 (1987);

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

United States v. Ellenbogen 390 F.2d 537 (2d Cir.), cert. denied 393 U.S. 918 (1968)

United States v. Morales, 498 F. Supp. 139 (E. D.N.Y. 1980)

United States v. Tucker, 404 U.S. 443, 30 L.Ed. 2d 592, 92 S.Ct. 589 (1972)

(2) Whether the district court erred by concluding that Defendant-Appellant Peltier is not entitled to a hearing upon the motion to reduce or correct his sentence [same authorities]; and

(3) Whether the sentences adjudged herein are flawed and/or tainted and should be reconsidered [same authorities].

IV. STATEMENT OF THE CASE

Defendant-Appellant Leonard Peltier is a Native American of the Turtle Mountain Chippewa and Lakota Sioux tribes who was born, raised, and educated at Indian schools in

North Dakota. From 1972 until his arrest in Canada, in 1976, he was active in the American Indian Movement ["AIM"] and participated in political actions and traditional cultural activities on the Pine Ridge and Rosebud Reservations in North and South Dakota, and in other parts of the United States.

On or about November 25, 1975, Mr. Peltier, Jimmy Eagle, Robert ["Bob"] Robideau, and Darelle Dean ["Dino"] Butler were indicted on charges that they had murdered Special Agents Jack Coler and Ronald Williams of the Federal Bureau of Investigation ["FBI"], in a shootout at the Pine Ridge, South Dakota, Indian Reservation on June 26, 1975 (Clerk Doc. No. 1).

On or about February 6, 1976, Mr. Peltier was arrested

near Vancouver, Canada and held for extradition to the United States.

Following a jury trial in Cedar Rapids, Iowa, conduct-
ed during the summer of 1976, Bob Robideau and Dino Butler were
acquitted of all charges in connection with the deaths of Special

Agents Coler and Williams on grounds of self-defense despite the
government's theory that Robideau, Butler, and Leonard Peltier
had aided and abetted one another in the agents' deaths. United
States v. Butler and Robideau, Cr. 76-11 (N.D. Iowa 1976). On or
about September 8, 1976, following the acquittal of Bob Robideau
and Dino Butler, the United States dismissed all charges against
Jimmy Eagle so that "the full prosecutive weight of the Federal

Government" could be directed against Leonard Peltier (see, e.g., Clerk Doc. No. 216).

On December 18, 1976, Mr. Peltier was extradited from Canada to the United States based upon false and fraudulent affidavits prepared by agents of the FBI in which a person named Myrtle Poor Bear was induced to lie that she knew Leonard Peltier, that she was at the scene of the shootout on June 26, 1975, and that she saw Leonard Peltier fire the fatal shots that killed Special Agents Coler and Williams. United States v. Peltier, 585 F.2d 314, 331, 335 (8th Cir. 1978), cert. denied 410 U.S. 945 (1979).

In March and April, 1977, Mr. Peltier was tried before United States District Judge Paul Benson in Fargo,

North Dakota. On April 18, 1977, a jury found Mr. Peltier guilty of the premeditated murders of Special Agents Coler and Williams based
upon the government's principal theory that he personally had killed the two agents, after they were seriously wounded, by shooting them at point blank range with an AR-15 rifle

(Clerk Doc. No. 300). On June 1, 1977, Judge Benson sentenced
Mr. Peltier to serve two consecutive life sentences (Clerk Doc.
No. 314).

In an opinion filed on September 14, 1978, the Court
of Appeals for the Eighth Circuit affirmed Mr. Peltier's
convictions holding, inter alia, that the trial judge did not
abuse his discretion on several evidentiary rulings and in
rejecting proposed self-defense jury instructions in light of the
strong evidence that Mr. Peltier fired the fatal shots. United
States v. Peltier, supra.

On June 26, 1979, Mr. Peltier's counsel filed a Motion
to Reduce Sentence pursuant to Rule 35, Federal Rules of Criminal
Procedure (Clerk Doc. No. 350). On June 27, 1979, counsel for

the
government filed a Brief Resisting Motion for Reduction
of
Sentence in which they argued, inter alia, that the
evidence
"established beyond a reasonable doubt that Leonard
Peltier
either supervised or actually fired the final killing shots
at
point-blank range which ended [the lives of Special Agents
Coler
and Williams]" (Clerk Doc. No. 351).

Without any new or different evidence at that stage
in
the proceedings, Judge Benson denied Mr. Peltier's Rule 35
motion
in apparent agreement with the observation of the Court of

Appeals that "[t]he evidence of Peltier's guilt was strong."
United States v. Peltier, 585 F.2d at 325 (Clerk Doc. No. 355).

In 1981 Mr. Peltier obtained documents through
Freedom of Information Act litigation demonstrating that

the
government's ballistics evidence was questionable and raising
strong doubts whether Mr. Peltier fired the shots which caused
the deaths of Special Agents Coler and Williams. These documents
were incorporated into and filed with a Motion for New Trial on
December 15, 1982 (Clerk Doc. No. 362).

Following an evidentiary hearing ordered by the United
States Court of Appeals for the Eighth Circuit, Petitioner's
Motion for New Trial was denied (Clerk Doc. No. 464), and the
Court of Appeals affirmed. United States v. Peltier, 800 F.2d
772 (8th Cir. 1986), cert. denied 108 S. Ct. 84 (1987). The
Court of Appeals concluded that although the evidence suppressed
by the government "cast a strong doubt on the government's

case"
and "possibly" would have resulted in an acquittal had the
evidence been disclosed at trial, it "probably" would not have
resulted in a different verdict. Id., at 779-780.

During oral argument in October, 1985, before a panel
of the Eighth Circuit Court of Appeals, government counsel
commented, for the first time, that the government does not know,
and cannot prove, who actually fired the fatal shots
which caused the deaths of Special Agents Coler and
Williams. Mr. Peltier thereupon filed a 2255 motion
arguing that he had been
denied a fair trial because of repeated rulings by Judge Benson
that were predicated upon the government's theory that Mr.
Peltier had fired the fatal shots. The motion was denied by
the District Court and affirmed on appeal. Peltier v. Henman, 997
F.2d 461 (8th Cir. 1993).

On January 31, 1996 a parole board hearing examiner recommended that Mr. Peltier's parole status be reviewed in light of the government's repeated concessions, during parole proceedings, that it could not be proved that Mr. Peltier fired the fatal shots that killed the two FBI agents (attached as Exhibit 4 to Defendant's Renewed Motion to Reduce or Correct his Sentence [Clerk Doc. No. 501]).

Appellant's renewed motion to reduce or correct his sentence was filed on November 1, 2001, in the United States District Court for the District of North Dakota pursuant to Rule 35, Federal Rules of Criminal Procedure, inter alia (Clerk Doc. No. 501). In a final Memorandum and Order filed on February 25, 2002, the Honorable Paul A. Magnuson, United States

District
Judge, denied the motion without a hearing (Clerk Doc. No. 504),
and this appeal followed.

V. <u>STANDARD OF REVIEW</u>

The District Court's determination of jurisdictional
issues presents legal questions which are reviewed de novo on
appeal.

VI. <u>SUMMARY OF ARGUMENT</u>

Mr. Peltier never has been afforded the opportunity to
argue to any Court that his sentences should be determined on the
basis that he, at most, aided and abetted in the deaths of Special Agents Coler and Williams, that there is no reliable
evidence that he fired the fatal shots which caused the two
agents' deaths, and that he acted in the belief that he was
defending himself and others. Accordingly, Mr. Peltier submits

that the motion to reconsider his Rule 35 motion was timely in light of belated governmental disclosures of material evidence which occurred several years _after_ the initial motion already had been ruled upon and the government's resulting reassessment of Appellant's limited role as an aider and abettor, that the original Rule 35 proceedings unfairly denied him the due process to which he was entitled therein, and that the interests of justice warrant a hearing upon the motion and reconsideration of Mr. Peltier's consecutive life sentences.

VII. ARGUMENT

A. The motion to reconsider was timely.

In his Memorandum and Order (Clerk Doc. No. 504) Judge Magnuson concedes that Appellant's original Rule 35 motion was timely, but Judge Magnuson nevertheless found that

Appellant's

Renewed Motion to Reduce or Correct His Sentence is untimely and that the District Court therefore lacks jurisdiction to hear it.

In its earlier form, as applicable to this case, Rule 35 authorized a sentencing judge to entertain a motion to reduce sentence filed within 120 days from the receipt of an order of the Supreme Court denying an application for a writ of certiorari. Alternatively, Rule 35 enabled the Court to correct an illegal sentence at any time.

> A Rule 35 motion . . . is in the nature of an appeal of a sentence, albeit not an appeal to a higher court. Its purpose is to give "every convicted defendant a second round before the sentencing judge, and at the same time, it affords the judge an opportunity to reconsider the sentence in the light of any further information about the defendant or the case which may have been presented to him in the interim." United States v. Ellenbogen 390 F.2d 537, 543 (2d Cir.), cert. denied 393 U.S. 918 (1968).

United States v. Morales, 498 F. Supp. 139, 142 (E.D.N.Y. 1980).

> The power to reduce is an inherent power of the court and is one aspect of the control which a court retains over a judgment which it has entered.

United States v. Ellenbogen, supra, at 540.

Although the 120 day requirement has been held to be "jurisdictional," United States v. Addonizio, 442 U.S. 178,

189
(1979), trial courts routinely have fashioned ways to
extend
their authority to reduce sentences pursuant to Rule 35.
In
Government of Virgin Islands v. Gereau, 603 F.2d 438 (3rd
Cir.
1979), the Court of Appeals weighed the merits of a late
filed
Rule 35 motion to reduce consecutive life sentences. In
a
footnote to its opinion, the Gereau court suggested and
appears
to approve of the practice of holding and not ruling upon
a timely Rule 35 motion for up to several years to
determine
whether any new information obtained during that period
warrants
a reduction of the sentence initially imposed.

In Leyvas v. United States, 371 F.2d 714 (9th
Cir. 1967), the Court ruled that the trial judge erred in
reducing the

defendant's sentence pursuant to a Rule 35 motion to give

the
defendant credit for time served in a county jail. Although the
deadline for a new Rule 35 motion had long since passed, the
Court suggested that the trial judge could achieve the same
sentencing objective on remand by making a portion of one count
concurrent with the sentences imposed on certain other counts. See also United States v. Woykovsky, 297 F.2d 179, 182 (7th Cir.
1961) (Rule 35 enables a trial court to reduce a sentence by
changing concurrent terms to consecutive terms).

Mr. Peltier did not contrive to avoid or evade the
timelines established by Rule 35. Nor is he seeking to
"revitalize [his Rule 35 options] by the mere act of filing
subsequent motions beyond the 120-day period." Compare United
States v. Dansker, 581 F.2d 69, 72 (3rd Cir. 1978) (quoted

by
Judge Magnuson at p. 4 of his Memorandum and Order [Clerk Doc.
No. 504]). Unlike Appellant Diaco in United States v. Dansker,
supra, Mr. Peltier never has been afforded the review contem-
plated by Rule 35 to correct a sentence that was predicated upon
erroneous factual and/or legal considerations. Interestingly in
Dansker, supra, Appellant Diaco's co-defendants were permitted to
refile belated Rule 35 motions and did obtain reductions in their
sentences precisely because there were newly developed reasons
why their original sentences should be reconsidered and reduced. United States v. Dansker, supra, at 71.

In United States v. Ferri, 686 F.2d 147 (3rd Cir. 1982) (cited by Judge Magnuson at p. 4 of his Memorandum and
Order [Clerk Doc. No. 504]), Defendant Matthews successfully had

obtained reductions of his sentences pursuant to an initial Rule
35 motion and sought additional reductions in a second Rule 35
motion filed well outside the 120-day time limit. In ruling that
the second Rule 35 motion was untimely the Third Circuit quite
clearly presumed that Mr. Matthews already had received the fair
treatment and process due to him in the original Rule 35
proceedings, and that the District Court therefore did not have
jurisdiction to hear his second, untimely, motion.

In United States v. Gonzalez-Perez, 629 F.2d 1081 (5th
Cir. 1980) (cited by Judge Magnuson at p. 4 of his Memorandum and
Order [Clerk Doc. No. 504]), the appellant had fled after
sentencing and therefore never filed any appeal or any motion for
reduction of his sentences. Eight years later, after he

was
apprehended in Ecuador and returned to the United States, he
filed a very belated Rule 35 motion which the District Court and
the Fifth Circuit held untimely -- as it clearly was.

In United States v. Friedland, 83 F.3d 1531 (3rd Cir.
1996) (cited by Judge Magnuson at pp. 4-5 of his Memorandum and Order [Clerk Doc. No. 504]), the appellant clearly was a con
artist who already had received appropriate reviews of his
sentence and was employing repeated Rule 35 motions as one of
several vehicles to evade responsibility for his multiple frauds. It is disturbing that Judge Magnuson analogizes the

facts in Friedland to what he describes as the "notoriously convoluted procedural history of this case" [Memorandum and Order (Clerk Doc. No. 504), at p. 1).

Unlike all of the cases cited by Judge Magnuson, Mr. Peltier never has been afforded any meaningful opportunity to have his consecutive sentences reviewed in light of the government's concession that he was, at most, an aider and abettor in the deaths of the two agents. Mr. Peltier never has had "a second round before the sentencing judge" as intended by the drafters of Rule 35. United States v. Ellenbogen, supra; United States v. Morales, supra. To the extent, therefore, that Mr. Peltier effectively has been denied the same opportunity to have his sentences reviewed that routinely is extended to other

defendants, he has not been afforded the full due process to
which he is entitled, and his consecutive sentences may thereby
be subject to correction under the provision of Rule 35 for which
there is no time requirement whatsoever.

B. The government has conceded significant changes in the factual basis for Appellant's sentences.

In Peltier v. Henman, supra, Appellant sought a new
trial based upon claims that he had been convicted upon evidence that he fired the fatal shots, not as an aider and abettor, and
that in a new trial as an aider and abettor he would be afforded
the opportunity to defend on grounds of self-defense that had not
been allowed by Judge Benson in the face of the government's original theory of the case. It is true, as Judge Magnuson ruled,

that in Peltier v. Henman this Court rejected Mr. Peltier's
arguments that he had not been tried as an aider and abettor

and

ruled, instead, that the nominal inclusion of dual theories

at

trial provided a sufficient basis to sustain the convictions.

But Judge Magnuson is flatly wrong when he writes

that

> The Eighth Circuit's holding on this matter is unequivocal and controlling. Mr. Peltier's argument that there has been a change of theory by the Government that was not before the sentencing Judge is therefore untenable.

Memorandum and Order (Clerk Doc. No. 504), at p. 7.

In 1979, Government counsel strenuously opposed

Mr.

Peltier's motion to reduce his sentence by characterizing

the

relevant offense conduct as follows:

> On June 26, 1975, Leonard Peltier brutally murdered in cold blood two incapacitated, defenseless human beings with whom he had no personal quarrel except that they were law enforcement officers. The evidence at trial conclusively established that Leonard Peltier was the instigator of and an active participant in the commission of the murders. The evidence further established beyond a reasonable doubt that Leonard Peltier either supervised or actually fired the final killing shots at point-blank range which ended these two young men's lives.

The government forcefully maintained that

> [n]o person who is so devoid of normal human inhibitions and feelings as to be capable of

> such wanton disregard for the value of human life, who commits murder under the circumstances shown in this case, should ever walk the earth again as a free man.

Exhibit 2 attached to Defendant's Renewed Motion to Reduce or Correct his Sentence (Clerk Doc. No. 501). On the basis of those

operative facts and impassioned arguments, Judge Benson denied

Mr. Peltier's Rule 35 motion thereby affirming the sentences to

two consecutive life terms (Clerk Doc. No. 355).

In 1986, this Court stated unequivocally that

> [o]n April 18, 1977, Leonard Peltier was found guilty of the premeditated murder of Jack Coler and Ronald Williams, special agents of the Federal Bureau of Investigation. The record as a whole leaves no doubt that the jury accepted the government's theory that Peltier had personally killed the two agents, after they were seriously wounded, by shooting them at pointblank range with an AR-15 rifle.

<u>United States v. Peltier</u>, 800 F.2d at 772.

Seven years later this Court recognized that although

the government had sought to portray Mr. Peltier at trial as the

person who fired the fatal shots, the case was tried

on
alternative theories including the allegation that Mr. Peltier
was an aider and abettor. Peltier v. Henman, supra, at 465. Thus, the government's candid concession that it cannot actually
prove who fired the fatal shots does not equate to a change in
the theories of the prosecution, and therefore would not entitle Mr. Peltier to a retrial on the now principal contention that he
acted only as an aider and abettor. Id.

That is a far cry from this Court's language, quoted
above, that Mr. Peltier actually fired the fatal shots and from
Judge Magnuson's observations that nothing of significance has changed that might or should affect the sentences adjudged by
Judge Benson on the premise that Mr. Peltier executed Agents Coler and Williams.

Although government counsel does not now recall his
intent or the context in which he made the initial

concession
that "we can't prove who shot those agents," Peltier v. Henman,
supra, at 468, those words were uttered and, indeed, Mr. Crooks
has reaffirmed the statement with specific reference to the
alleged murders of Agents Coler and Williams by Mr. Peltier. See, e.g., Exhibit 4 attached to Defendant's Renewed Motion to
Reduce or Correct his Sentence (Clerk Doc. No. 501).

The clear and undisputed facts are that the evidence
of Mr. Peltier's alleged firing of the fatal shots is and always
has been circumstantial, at best, and that evidence was weakened
substantially as a result of the "new" ballistics evidence that
emerged belatedly in post-trial hearings conducted in 1985. United States v. Peltier, 800 F.2d at 775-79. See also the
letter from Senior Judge Gerald W. Heaney attached as Exhibit 3

to Defendant's Renewed Motion to Reduce or Correct his Sentence (Clerk Doc. No. 501). As a consequence of this Court's opinion in Peltier v. Henman, supra, the legal sufficiency of Mr. Peltier's convictions rests upon the fact that he was charged, alternatively, as an aider and abettor -- but his Presentence Report was premised upon assertions that Mr. Peltier fired the fatal shots, and Judge Benson clearly sentenced him on that factual basis alone. See United States v. Peltier, 800 F.2d at 775 ("[The government's] theory, accepted by the jury and the judge, was that Peltier killed the two FBI agents at pointblank range with the Wichita AR-15").

C. Appellant is entitled to a reduction of his sentences to concurrent life terms.

If he were afforded a hearing on the merits of his renewed motion, Mr. Peltier could establish that, as an aider and abettor, the acts attributed to him do not constitute separate

or
multiple acts thereby justifying or supporting consecutive
sentences. Although current Federal Sentencing Guidelines do not
apply to Mr. Peltier's case, it is instructive that under 5G1.2
sentences must run concurrently, rather than consecutively,
unless a specific statute requires or allows for consecutive
sentencing. Because the guidelines embody a public policy
disapproving of consecutive sentences, except in certain narrowly
defined circumstances, it is submitted that the Court's dis-
cretion to impose consecutive sentences has been narrowed
significantly.

The evidence also would show that the only other
persons who admittedly engaged in the same conduct attributed
to Mr. Peltier by shooting at the two agents were

acquitted, and
therefore the consecutive life sentences adjudged herein are grossly disproportionate and unfair. See United States v. McRoy,
452 F. Supp. 598 (W.D. Mo. 1978). Judge Magnuson's summary dis-
missal of this point is peculiar since, at the time of his
original sentencing, and later when Judge Benson denied Mr.
Peltier's Rule 35 motion, the Court believed Mr. Peltier's conduct was far more serious and therefore had no reason to
compare Mr. Peltier's situation to the circumstances of his two
former co-defendants.

In the event of a hearing Appellant can correct undisputed errors in the Presentence Report including allegations
about other misconduct of which Mr. Peltier subsequently was
acquitted or exonerated. Moreover, consistent with the purposes
for reconsideration of sentences as set forth in United States

v.

Ellenbogen, supra, and United States v. Morales, supra, Mr.

Peltier can adduce substantial evidence that his prison record

has been exemplary for an extended period of time, that he has

donated his art work and engaged in socially conscious and

productive activities while incarcerated, and that there is

widespread public support for his release on parole following

such prolonged incarceration.

Based upon the foregoing, it is submitted that any

fair and reasonable consideration of applicable sentencing

factors would and should have produced a very different result

than the consecutive life sentences which Mr. Peltier currently

is serving.

VIII. CONCLUSION

We are as anxious as Judge Magnuson and government
counsel to conclude this litigation which admittedly has taken a
long course, but in doing so, we want to obtain the measure of
justice and fairness to which Mr. Peltier is entitled. See,

e.g., United States v. Tucker, 404 U.S. 443 (1972). Mr. Peltier
appealed his original convictions because of serious errors that
were alleged. Thereafter he filed his initial 2255 motion
which resulted in significant evidentiary disclosures and very nearly
impelled this Court to set aside the convictions. Finally, he
initiated a second 2255 motion on the well-founded contention
that the jury would have reached a different verdict if he had
been tried merely as an aider and abettor and availed himself of

the same defense that resulted in the acquittals of Bob Robideau
and Dino Butler.

Now, based upon the foregoing, and in the interests of
justice, United States v. Tucker, supra, it is requested that
this Court vacate and set aside the Memorandum and Order of Judge
Magnuson, filed in the court below, and remand the instant matter
for an evidentiary hearing to review and reconsider Mr. Peltier's
sentences.

DATED: Honolulu, Hawaii, May 2, 2002.

____

ERIC A. SEITZ

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Appellant Leonard Peltier