NO. 02-1761

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-vs-

LEONARD PELTIER,

Appellant.

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

APPELLEE'S BRIEF

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SUMMARY OF THE CASE AND WAIVER OF ORAL ARGUMENT

Leonard Peltier seeks reduction of his two life sentences from consecutive to concurrent terms in a renewed Rule 35 motion. The district court lacked jurisdiction to consider his renewed motion because it is time barred. Even if the court continued to have jurisdiction, the legal and factual matters have previously been raised and addressed by the district and appellate courts and, thus, lack merit.

The United States waives oral argument because, based on the record and briefs filed, the case should be summarily dismissed. Should this appellate Court decide to hear arguments, however, 20 minutes is sufficient for each party.

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STATEMENT OF THE CASE

The courts first heard of the case when two critical witnesses, Angie Long Visitor and Joanna LeDeaux, refused to cooperate with the grand jury. See In re Long Visitor, 523 F.2d 443 (8th Cir. 1975). Leonard Peltier, along with three other men, was charged with two counts of first degree murder in an Indictment filed on November 25, 1975. See docket entry 1, C77-3003.

Two of Peltier's co-defendants were tried during the summer of 1976 in Cedar Rapids, Iowa. They were both acquitted. Peltier was fighting extradition in Canada; therefore, his case had to be tried separately. (Charges against the fourth man, Jimmy Eagle, were voluntarily dismissed by the government.)

Leonard Peltier was brought to trial in Fargo, North Dakota, pursuant to a change of venue. He was tried on the alternate theories that he either killed the agents himself or aided and abetted in their killings. See Peltier v. Henman, 997 F.2d 461, 468 (8th Cir. 1993). Following a five-week jury trial, Leonard Peltier was convicted on April 18, 1977, of two counts of first-degree murder. He was sentenced on June 1, 1977, to serve two consecutive life terms in prison. See docket entry 314, C3-77-3003.

Peltier appealed his conviction to the Eighth Circuit Court of Appeals. His conviction was affirmed. United States v. Peltier, 585 F.2d 314 (8th Cir. 1978).

Certiorari was denied by the U. S. Supreme Court at 440 U.S. 945, 99 S. Ct. 1422 (1979). Following his initial appeal, Peltier made an armed escape from prison, was apprehended, tried, and convicted in the Central District of California. His conviction was affirmed by the Ninth Circuit Court of Appeals. United States v. Peltier, 693 F.2d 96 (9th Cir. 1982).

On April 20, 1982, Peltier filed his first Section 2255 habeas corpus petition for post-conviction relief. See docket entry 358, C77-3003. On December 30, 1982, the district court entered its order dismissing Peltier's motion for a new trial. United States v. Peltier, 553 F. Supp. 890 (D.N.D. 1982).

On April 4, 1984, the Eighth Circuit Court of Appeals entered its order affirming the district court judge's orders refusing to recuse himself and dismissing the petitioner's claims, without an evidentiary hearing, with one exception: it remanded for a hearing on the meaning of an FBI firearms teletype. United States v. Peltier, 731 F.2d 550 (8th Cir. 1984). Following the evidentiary hearing ordered by the Court of Appeals, the district court again entered an order denying Peltier relief. United States v. Peltier, 609 F. Supp. 1143 (D. N.D. 1985).

Peltier once again appealed to the Eighth Circuit Court of Appeals. This Court affirmed the district court's order dismissing Peltier's motion for new trial in its entirety. While criticizing the government for not having made full

disclosure of all its firearms-related correspondence, the Court specifically pointed to the undisputed fact that a shell casing found at the execution sight matched Peltier's rifle, a rifle with which Peltier had been seen at the execution sight by one witness and had been seen firing at the agents from long range by another witness. United States v. Peltier, 800 F.2d 772, 777 (8th Cir. 1986). Certiorari was again denied by the United States Supreme Court at 484 U.S. 822, 108 S. Ct. 84 (1987).

Peltier filed his most recent motion for post-conviction relief, Peltier v. Henman, with the United States District Court in Kansas. The United States moved to transfer the case to the District of North Dakota. This motion was granted by Judge Rogers, a United States District Court Judge from Kansas, in an order filed with the Clerk of U. S. District Court in North Dakota on February 15, 1991, in A3-91-29. As is the usual practice, the case was again assigned to Judge Benson, who had originally tried the case. The post-conviction relief motion was then referred to Magistrate Judge Karen K. Klein for further proceedings. See docket entries 1, 2, and 7, A3-91-29. The United States moved to dismiss Peltier's claim in part on the ground that he had "abused the writ." The government's theory was that most of the issues raised in the post-conviction relief motion were simply repeats of arguments which had already been determined against him in

prior proceedings or had been intentionally abandoned or bypassed. This motion was granted on July 24, 1991. The Magistrate Judge's recommendation was adopted by Judge Benson on August 22, 1991. See docket entries 16, 17, 25, 26, 32, 33, and 34, A3-91-29.

After a hearing in Bismarck, North Dakota, in which Peltier argued that the government had changed its theory of the case at the last argument before the Eighth Circuit Court of Appeals, the Magistrate Judge recommended dismissal of the balance of Peltier's claims on November 27, 1991. Judge Benson entered his order adopting the Magistrate Judge's recommendation on December 30, 1991. See docket entries 44 and 51, A3-91-29. Peltier once again appealed to the Eighth Circuit Court of Appeals from that decision. Peltier v. Henman, 997 F.2d 461 (8th Cir. 1993). The Court unanimously affirmed Peltier's conviction, specifically finding, among other things, that the government had never changed theories as to Peltier's guilt. Peltier v. Henman, 997 F.2d at 465-70.

Leonard Peltier had filed a Rule 35 motion to reduce his sentence on June 22, 1979. The United States filed its brief resisting motion for reduction of sentence on June 27, 1979. Shortly thereafter, Peltier escaped from prison. Therefore, Peltier's motion was not acted upon until October 4, 1979, after he was

captured; the motion was denied by United States District Court Judge Paul Benson.

On November 1, 2001, Peltier filed a motion seeking to renew his Rule 35 motion for reduction of sentence originally filed in 1979. The principal basis of the renewed motion is Peltier's contention that the government changed theories of prosecution in 1985 and that the sentencing judge did not have this "changed theory" before him at the time of the Court's original sentence in 1977. The United States resisted any reduction or correction in Peltier's sentence, based on the facts and records of the case.

The Honorable Paul A. Magnuson, United States District Court Judge, denied Peltier's Renewed Motion to Reduce or Correct Sentence on February 15, 2002 (filed February 25, 2002); United States v. Peltier, 189 F. Supp.2d 970 (D.N.D. 2002). The Court held the Rule 35 motion to be untimely filed and, even if the Court retained jurisdiction, Peltier failed to allege sufficient changes in circumstances to warrant the Court's consideration of his motion. Peltier now appeals Judge Magnuson's denial of his Renewed Rule 35 Motion.

STATEMENT OF THE FACTS

For the purposes of this appeal the facts of this case are adequately set forth in this Court's opinion on direct appeal, United States v. Peltier, 585 F.2d 314, 318-320 (8th Cir. l978), cert. denied, 440 U.S. 945, 99 S. Ct. 1422 (1979). A summary of those facts follows:

On June 25, 1975, two FBI Special Agents, Ronald Williams and Jack Coler, began attempting to serve a felony arrest warrant on a young Indian male, Jimmy Eagle. They attempted to locate him at various locations on the Pine Ridge Indian Reservation in South Dakota. One of these locations was the Jumping Bull Compound located north of the village of Pine Ridge.

Shortly before noon the next day, June 26, l975, the two agents returned again to the Jumping Bull Compound area. They arrived just after a red-and-white Chevrolet suburban. This vehicle contained Leonard Peltier. (Peltier was the leader of a group of AIM members who had been living at the Jumping Bull Compound for several weeks). The agents had been told the night before that Eagle might be riding in such a vehicle. They followed the Suburban down into the river valley and stopped. The Suburban stopped several hundred yards ahead of them. The occupants got out and started firing at them. Peltier knew who the

agents were; he believed they were there to arrest him on an outstanding attempted murder warrant.

Other confederates of Peltier came to his assistance. The agents were quickly surrounded and overwhelmed. The agents only fired five shots, compared to over 125 fired by Peltier's group. Both agents were quickly injured by long-range fire; fire in which Peltier indisputably participated.

Peltier and two other men then approached the agents' cars. Peltier was carrying an AR-15. He was the only person observed that day firing a weapon at the agents which was capable of chambering a .223 cartridge. Special Agent Coler was murdered while he lay unconscious on the ground. Special Agent Williams was murdered by a point-blank round which went through his outstretched right hand, tore into his face, and blew off the back of his skull. Peltier's weapon was used to kill both agents.

Peltier then led the escape out of the area and was overheard discussing the execution of the agents the first evening. He left the crime scene with a trophy of the deed, Special Agent Coler's service revolver. He carried this trophy with him until November, when he again encountered a peace officer and fired at him, seeking to again elude arrest. Peltier was arrested in Canada and later extradited

to the United States. While in Canada he admitted to the Royal Canadian Mounted Police that the agents were killed when they came to arrest him.

SUMMARY OF THE ARGUMENT

I. WHETHER PELTIER'S RENEWED MOTION TO REDUCE OR CORRECT SENTENCE WAS TIMELY FILED.

Rule 35 as it existed at the time of the defendant's conviction provided that motions to correct a sentence must be made within 120 days. In fact, a timely Rule 35 motion was filed by Peltier, but it was decided adversely to him in 1979. The current motion was not filed until 2002. It was based upon an alleged change of position by the government which occurred in 1985. By any standard, the motion is untimely.

II. WHETHER THERE WAS A CHANGE OF POSITION BY THE GOVERNMENT IN THE FACTUAL BASIS FOR PELTIER'S SENTENCES.

In 1992 Peltier filed his last motion for post-conviction relief, asking for a new trial on the basis that the government had abandoned the theory upon which the jury's verdict was based. This court ruled that the government had not changed its position, that it had tried the case on the basis that Peltier had either personally executed the two murdered agents or had aided and abetted those that did, and that it had not abandoned either theory. The current defense theory apparently is that Peltier is entitled at least to be resentenced because the sentencing judge had imposed sentence based upon his assumption that Peltier was

the executioner and had not considered that he may only have been an aider and abettor. Both the trial and the appellate records foreclose that argument.

III. WHETHER PELTIER IS ENTITLED TO A REDUCTION OF HIS SENTENCE TO CONCURRENT LIFE TERMS.

No serious argument can be made that the sentence imposed in 1977 was an illegal sentence because it was consecutive rather than concurrent. Life imprisonment was the penalty prescribed for first degree murder in 1977 and still is the penalty under the United States Sentencing Guidelines. At the time of Peltier's offenses, the question of whether a sentencing court should impose a concurrent or consecutive sentence where separate offenses were committed during a single scheme or course of conduct was left largely to the discretion of the trial court. Consecutive sentences was a mechanism used to demonstrate that an increased penalty was appropriate where more than one victim was intentionally harmed by a series of criminal acts. The manner in which the FBI agents were killed certainly justified the imposition of consecutive life sentences for Peltier.

STANDARD OF REVIEW

The standard of review for the district court's interpretation and construction of Rule 35 is *de novo*, as it involves a legal conclusion. See United States v. Idone, 38 F.3d 693, 696 (3rd Cir. 1994); United States v. Brummels, 15 F.3d 769, 771 (8th Cir. 1994); United States v. Davis, 288 F.3d 359, 362 (8th Cir. 2002). Therefore, the district court's conclusion that it lacked jurisdiction to consider Peltier's renewed Rule 35 motion due to its untimely filing, as addressed in the first issue, is reviewed *de novo*.

Abuse of discretion is the standard of review on the second and third issues as they address the district court's denial of the Rule 35 motion and an evidentiary hearing on such motion. See United States v. Kadota, 757 F.2d 198, 199 (8th Cir.), cert. denied, 474 U.S. 839, 106 S. Ct. 120 (1985); Johnston v. Luebbers, 288 F.3d 1048 (8th Cir. 2002); Idone, 38 F.3d at 696.

ARGUMENT

I.

WHETHER PELTIER'S RENEWED MOTION TO REDUCE OR CORRECT SENTENCE WAS TIMELY FILED.

At the time Peltier was sentenced, Rule 35(b) of the Federal Rules of Criminal Procedure gave the district court authority to

> reduce a sentence within 120 days after the sentence [was] imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction.

The district court was not given authority, however, to extend the time for taking any action under Rule 35, except to the extent and under the conditions stated in the Rule. See Rule 45(b) of the Federal Rules of Criminal Procedure.

> [O]nce a sentence has been imposed, the trial judge's authority to modify it is also circumscribed. Federal Rule Crim. Proc. 35 . . . authorizes district courts to reduce a sentence within 120 days after it is imposed or after it has been affirmed on appeal. The time period, however, is jurisdictional and may not be extended.

United States v. Addonizio, 442 U.S. 178, 189, 99 S. Ct. 2235, 2242-43 (1979) (footnote omitted). See also United States v. Colvin, 644 F.2d 703, 704-05 (8th Cir. 1981). The "defendant's filing of a Rule 35 motion within 120 days [is] the critical act entitling the trial courts to rule on the motion and exercise appropriate

discretion to reduce the sentence." United States v. DeMier, 671 F.2d 1200, 1206 (8th Cir. 1982). The court retains some flexibility to act on a Rule 35 motion more than 120 days after imposition of sentence, retaining jurisdiction for a "reasonable time" beyond the deadline. DeMier, 671 F.2d at 1206-07. See also United States v. Williams, 573 F.2d 527, 528-29 (8th Cir. 1978) (Rule 35 motion timely filed by defendant but court delayed ruling until 167 days after sentence had been imposed.)

There is "precedent holding that a district court may consider an untimely Rule 35 motion under certain circumstances," namely, situations involving aggravated or unjust circumstances, primarily where a defendant has made a good-faith attempt "to comply with the prescribed time limit, but for reasons wholly beyond his control and attributable to governmental negligence, the Rule 35 motion [does] not timely reach the court." United States v. Regan, 503 F.2d 234, 237 (8th Cir. 1974), cert. denied, 420 U.S. 1006, 95 S. Ct. 1449 (1975). See also cases cited in United States v. Blanton, 739 F.2d 209, 213 (6th Cir. 1984), giving examples of when the late filing of a Rule 35 motion may be excused: where delay resulted from reliance on affirmative statement by the court; delay resulted from reliance on statement in a letter sent by United States Attorney to defendant;

and delay of prison authorities in mailing what otherwise would have been prisoner's timely request for reduction of sentence.

There may also be "unique instances in which an untimely supplemental Rule 35(b) motion relates back to an original, timely-filed one." United States v. Heubel, 864 F.2d 1104, 1108-09 (3rd Cir. 1989). The "mere act of filing subsequent motions beyond the 120-day period," however, cannot revitalize an earlier timely filed motion for reduction of sentence. United States v. Dansker, 581 F.2d 69, 72 (3rd Cir. 1978).

No unique, aggravated, or unjust circumstances are present in this case to entitle Peltier to consideration of the Rule 35 motion at this late date.

II.

WHETHER THERE WAS A CHANGE OF POSITION BY THE GOVERNMENT IN THE FACTUAL BASIS FOR PELTIER'S SENTENCES.

In his district court motion Peltier cited several events which supposedly occurred since trial which entitled him to have his consecutive sentences reviewed as a renewal of his Rule 35 motion. These events included the following: the alleged change of theory by the government; the acquittal in Milwaukee; the lack of charges in the Oregon shootout; and the fact that concurrent sentences are now the norm under the Sentencing Guidelines. The district court ruled against Peltier as to each of these supposed events. The current brief appears to abandon all of these except the alleged change of theory by the government and the concurrent sentence argument.

_____The Honorable Paul A. Magnuson, United States District Court Judge, in his Memorandum and Order dated February 15, 2002, and filed on February 25, 2002, disposed of Peltier's argument of a change of theory by the government as follows:

> The first alleged change in circumstances to which Mr. Peltier points, is that during oral arguments before the Eighth Circuit in 1985, the Government altered its theory of prosecution. Mr. Peltier contends that in 1985, the Government abandoned its theory that he had directly fired the shots which resulted in the deaths of the two FBI

agents. Mr. Peltier, in other words, makes essentially the same argument that he made in his 1991 Section 2255 motion.

The Eighth Circuit specifically rejected this argument, stating that the Government did not concede that it had failed to prove that Mr. Peltier killed the agents and that Mr. Peltier's conviction could only be sustained on an aiding and abetting theory. See Peltier v. Henman, 997 F.2d at 465. 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. United States v. Peltier, 189 F. Supp.2d 970 (D. N.D. 2002).

Peltier grudgingly acknowledges that he lost the appeal in Peltier v. Henman, 997 F.2d 461 (8th Cir. 1993), but he states that "Judge Magnuson is flatly wrong when he writes that 'The Eighth Circuit's holding on this matter is unequivocal and controlling.'" Opening Brief of Defendant-Appellant, page 13. His interpretation of the Eighth Circuit opinion apparently is that it did nothing more than rule that "the nominal inclusion of dual theories [which included aiding and abetting] at trial provided a sufficient basis to sustain the convictions." Id. Nevertheless, Peltier argues that the government has changed its principal theory from him being the executioner to "the now principal contention that he acted only

as an aider and abettor." Id. at 14. He argues that this change should at least entitle him to a reconsideration of the sentencing.

The district court was correct; this Court's ruling in Peltier v. Henman is "unequivocal and controlling." The dual/alternate theories upon which Peltier was tried, that he either personally executed the two agents or aided and abetted the individual who did, were before the district court at sentencing. There has been no abandonment of either theory by the government -- at the time of sentencing or at the current time.

In 1991 Peltier brought a motion for new trial on the ground, among others, that the government, in an oral argument before the Eighth Circuit Court of Appeals in 1985, had changed its theory of prosecution, that is, it had abandoned its theory on which Peltier had been convicted -- that Peltier had directly fired the fatal bullets which executed the two FBI agents. Supposedly the government had acknowledged that it could only support the conviction on the basis of aiding and abetting.

This argument was first submitted to the United States District Court in Kansas. Upon motion of the United States, the matter was transferred back to the District of North Dakota and assigned to Judge Benson, who was the sentencing judge. Judge Benson reassigned the matter to Magistrate Judge Karen K. Klein in

Fargo. The Magistrate Judge's recommended ruling was against Peltier, finding that there was no change of theory and, in particular, there was no abandonment of the principal theory that Peltier was the executioner. See Report and Recommendation filed November 27, 1991 (Joint Appendix, Tab 10). The Recommendation was adopted by sentencing judge Paul Benson on December 30, 1991, who, in his order affirming and adopting the Magistrate Judge's Report and Recommendation, stated:

> The Magistrate Judge's conclusion corroborates this trial judge's impression and understanding throughout the trial that the United States was proceeding on a basic theory that defendant was a principal in the offense but if the jury did not find him to have been a principal that the evidence would clearly support a finding in the alternative that he was guilty as an aider and abettor. The jury was instructed on the basis of that theory.

Order dated December 30, 1991 (Joint Appendix, Tab 11). Peltier then appealed the ruling to the Eighth Circuit Court of Appeals.

In its brief on appeal the United States pointed out, by specific reference to the trial record, that from Indictment to closing argument it had consistently tried the case on alternate theories:

> It was and still is the prosecution's belief that the petitioner personally executed Special Agents Coler and Williams. There were no eyewitnesses who testified to that fact, however. Circumstantial evidence did not conclusively establish it either. He was therefore also tried on an alternate aiding and abetting theory. The evidence at

> trial was sufficient to support either theory. United States v. Peltier, 585 F.2d 314, 319 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979).

Appellee's Brief dated April 23, 1992, at page 9 (Joint Appendix, Tab 12). See also Peltier v. Henman, 997 F.2d 461.

The Appellee's Brief then went on to document that the alternate theories were raised at virtually every stage of the trial record. They were first raised in the Indictment and then again in response to a request for a bill of particulars. They were next raised in the opening statements and suggested by the evidence presented at trial. The discussion over the requested instructions, likewise, included a discussion of the alternate theories. The trial judge, who was also the sentencing judge, specifically ruled that the government had a right to let the jury decide which of the alternate theories to accept. See trial transcript quoted in Peltier v. Henman, 997 F.2d at 466-67. The final instructions of the court and the closing arguments of the prosecutors specifically included the alternate theories. Both the opinion of the Eighth Circuit Court of Appeals on direct appeal and the three-judge panel at the very argument where the supposed change of theory occurred recognized that the case had been tried on alternate theories. United States v. Peltier, 585 F.2d 314, 319 (8th Cir. 1978), cert denied, 440 U.S. 945,

99 S. Ct. 1422 (1979); Peltier v. Henman, 997 F.2d at 468-69. See also Excerpt from Appellee's Brief, pages 17-18 (Joint Appendix, Tab 12).

These arguments were unanimously accepted by the three-judge panel of the Eighth Circuit which heard the case of Peltier v. Henman, 997 F.2d at 465. They ruled as follows:

> Peltier's arguments fail because their underlying premises are fatally flawed. (A) The government tried the case on alternative theories: it asserted that Peltier personally killed the agents at point blank range, but that if he had not done so, then he was equally guilty of their murder as an aider and abettor. (B) The government's statement at the prior oral argument, upon which Peltier relies, was not a concession that the government had not proved that Peltier had not killed the agents personally, and that Peltier's conviction could be sustained only on an aiding and abetting theory. (C) The evidence allegedly supporting Peltier's self-defense claim, which he claims was improperly excluded, was correctly rejected.

The Court also observed, after discussing the trial record:

> The foregoing discussion establishes beyond question that from the beginning of this case through its submission to the jury (1) the government pursued alternative theories--that Peltier either himself directly killed the two agents, or aided and abetted others in doing so, (2) the defense was fully aware of these alternative theories and unsuccessfully attempted to compel the government to elect between them, and (3) the district court recognized the alternative theories and charged the jury in accordance with them.

Peltier v. Henman, 997 F.2d at 467.

The Court concluded its discussion of this subject by stating:

> We agree with the district court's statement in the present proceeding that "the government has never made admissions which changed its theory in this case." . . . [and]
>
> > "The totality of the government's argument to the Court of Appeals does not retract one bit from the government's trial position that Peltier was at least guilty on an aiding and abetting theory, but that the evidence would support a finding that he was the executioner of the agents."

Peltier v. Henman, 997 F.2d at 469-70.

From the beginning it has been recognized by the courts which have reviewed the evidence in the trial record in this case that there was no direct evidence that Peltier fired the execution shots. While the evidence which supported the conclusion that he did was circumstantial, that circumstantial evidence was regarded as sufficient to support a jury conclusion that he was the executioner. United States v. Peltier, 585 F.2d at 319; United States v. Peltier, 800 F.2d 772, 773 (8th Cir. 1986), cert. denied, 484 U.S. 822, 108 S. Ct. 84 (1987).

Peltier himself recognized that the evidence of his involvement with the execution was circumstantial. In paragraph 3(d) of William Kunstler's Affidavit dated June 22, 1979, filed in support of the Rule 35 motion to reduce sentence (Joint Appendix, Tab 6), he makes the observation that:

> There was no direct evidence offered by the government which indicated that defendant had shot and killed both agents. No eyewitness to the murders was ever produced and, in its summation, the government implicitly concealed [*sic*--conceded] that it could not be certain whether defendant, in fact, fired the fatal shots or merely was present when they were fired.

Peltier's argument herein flies directly in the face of this record. There is no way that one can reach the conclusion Peltier reaches unless the theory that he was the executioner had in fact been abandoned.[1] The Eighth Circuit, however, reached just the opposite conclusion, that neither of the theories upon which the defendant was tried had been abandoned.[2] This was the same conclusion reached by the Magistrate Judge and by the sentencing judge who had heard all of the evidence and arguments at trial.

Given this record, it is inconceivable that the sentencing judge would have sentenced Peltier differently, even had Peltier presented him with his argument of

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[1] In a rather transparent attempt to improve his record, Peltier cites a recommendation made by a Bureau of Prisons hearing examiner following one of his parole hearings that the description of the offense of conviction be changed to aiding and abetting. He does not bother to point out that this recommendation was not accepted by the Parole Commission and is currently the subject of pending litigation in the District of Kansas. Leonard Peltier v. Joe W. Booker, Jr., Warden, U.S. Penitentiary, Leavenworth, Kansas, Case No. 99-3194-RDR.

[2] At the bottom of page 15 of his brief Peltier cites a passage from the 1986 opinion indicating that the government only had one theory. This passage was disavowed by the court in Peltier v. Henman, 997 F.2d at 468, as being inconsistent with the trial record.

an alleged change of theory on a timely basis. This is particularly true in view of Judge Benson's December 30, 1991, order (Joint Appendix, Tab 11) in which he endorses the Magistrate Judge's ruling that neither of the government's alternate trial theories had been abandoned by the government.

III.

WHETHER PELTIER IS ENTITLED TO A REDUCTION OF HIS SENTENCE TO CONCURRENT LIFE TERMS.

The principal underlying basis for this argument is that the sentencing judge would have sentenced him differently had he known then what is known today. Again, this assumes a change of theory by the government which includes an abandonment of the theory that Peltier personally executed the two murdered agents. The argument that this theory was abandoned was specifically rejected by this Court in Peltier v. Henman, 997 F.2d at 465-470. This subject has been addressed above and does not need to be addressed again.

Peltier also advances the argument made below that, since concurrent sentences are now the norm under the Sentencing Guidelines, he has some additional claim to an evidentiary hearing in which he can present his case for why he should receive concurrent sentences. "A court need not hold an evidentiary hearing or otherwise develop the factual record when there was sufficient evidence at trial to support its sentencing decisions." United States v. Davidson, 195 F.3d 402, 410 (8th Cir. 1999), cert. denied, 528 U.S. 1180, 120 S. Ct. 1218, and 529 U.S. 1093, 120 S. Ct. 1732 (2000). See also United States v. Bellrichard, 62 F.3d 1046, 1051 (8th Cir. 1995), cert. denied, 517 U.S. 1137, 116 S. Ct. 1425

(1996) ("A district court judge may make 'findings based on evidence presented at the trial phase even though no additional exhibits or testimony are introduced at the sentencing phase.'" (Citation omitted.))

In the instant case, Peltier has offered no new facts that were not previously considered by the district and appellate courts. "Whether to grant a rule 35 motion is within the informed discretion of the district court." United States v. Kadota, 757 F.2d 198, 199 (8th Cir.), cert. denied, 474 U.S. 839, 106 S. Ct. 120 (1985). "[T]he district court's failure to order an evidentiary hearing on [Peltier's] motion [is] not an abuse of discretion," Kadota, 757 F.2d at 199-200, for there is nothing new to be addressed. Therefore, Peltier is not entitled to an evidentiary hearing.

Furthermore, Rule 7.1(A) of the Local Rules of Court for the District of North Dakota provides that motions are deemed submitted and taken under advisement by the court upon the filing of briefs. The court may order oral argument on its own motion or upon application of either party but there is no requirement that it do so. A defendant has no right to an evidentiary hearing on a Rule 35 or other motion unless he makes a "substantial threshold showing" that his claims have merit. See Wade v. United States, 504 U.S. 181, 186, 112 S. Ct. 1840, 1844 (1992); United States v. Rounsavall, 128 F.3d 665, 667-68 (8th Cir. 1997). Peltier certainly has made no such "threshold showing."

There is simply no legal basis for Peltier's request for a hearing or for reducing his sentence to concurrent life terms, as Judge Magnuson ruled in his Order filed February 25, 2002, pages 8 and 9 (Joint Appendix, Tab 13). No serious argument can be made that the sentence imposed in 1977 was an illegal sentence because it was consecutive rather than concurrent. No such argument was made at the time of the original Rule 35 motion to reduce sentence and none is made now. Life imprisonment was the penalty prescribed for first degree murder in 1977. It still is the penalty under the United States Sentencing Guidelines. See USSG § 2A1.1.

"District courts have broad discretion in making sentencing decisions . . .." United States v. Phillips, 726 F.2d 417, 419 (8th Cir. 1984); Castaldi v. United States, 783 F.2d 119, 123 (8th Cir.), cert. denied, 476 U.S. 1172, 106 S. Ct. 2897 (1986). Indeed, it was clear at the time of Peltier's offenses that the question of whether or not the sentencing court should impose a concurrent or consecutive sentence where separate offenses were committed during a single scheme or course of conduct was left largely to the discretion of the trial court. United States v. Moss, 631 F.2d 105, 106 (8th Cir. 1980); Phillips, 726 F.2d at 419-20. If the crime was one in which two victims were separately assaulted, for example, consecutive sentences were fully warranted. Thorne v. United States, 406 F.2d

995, 999 (8th Cir. 1969). If, on the other hand, a defendant fired but one bullet which killed or wounded two individuals, only a single offense could be charged. Ladner v. United States, 358 U.S. 169, 178, 79 S. Ct. 209, 214 (1958).

Peltier's reference to the Sentencing Guidelines as expressing a preference for concurrent sentences adds nothing to the issue. The two systems are simply not comparable. In the system in place at the time Peltier was sentenced, parole was available. Under the current guidelines system, parole is no longer available. Consecutive sentences was a mechanism used to demonstrate that some increased penalty was appropriate where more than one victim was intentionally harmed by a series of criminal acts, that it simply should not be as cheap to injure or kill two persons as it was one. The Sentencing Guidelines incorporate features which take into account the added damage done by multiple counts, thus consecutive sentences no longer fulfill their previous function. See USSG Chapter 3, Part D.

Multiple murders by definition under § 3D1.2(d) are not grouped, so each additional murder would theoretically increase the offense level. Since all first degree murders call for life imprisonment at the top offense level of 43 under USSG § 2A1.1, and all reductions from that level must be by downward departure, the "increase" for multiple murders or even the imposition of consecutive sentences would be academic.

All of the other points Peltier attempts to incorporate into his argument, such as the fact that he has supposedly been a model prisoner since his recapture following his escape from prison, are simply inappropriate, in any event, for a Rule 35 motion and are better addressed to the Parole Commission.

CONCLUSION

Clearly, Peltier has failed to make a showing that his case fits under some exception to the jurisdictional time limit for making Rule 35 motions under the former rule. His claim is time barred. Even if it were not time barred, it must fail on its merits and should be summarily dismissed.

Dated May 31, 2002.

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Certificate of Compliance

Pursuant to 8th Cir. R. 28A(d), the undersigned hereby certifies that the computer diskette provided with this brief has been scanned for viruses and that it is virus-free.

Dated May 31, 2002.

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LYNN E. CROOKS
Special Assistant United States Attorney

CERTIFICATE OF SERVICE BY MAIL

United States of America,	)	No. 02-1761
	)	
Appellee,	)	
	)	
v.	)	
	)	
Leonard Peltier,	)	
	)	
Appellant,	)	

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the District of North Dakota and is a person of such age and discretion as to be competent to serve papers.

That on May 31, 2002, she served, by first-class mail, two copies of the following:

APPELLEE'S BRIEF

and one 3½" computer diskette containing the full text of the Brief, by placing the copies and the diskette in a postpaid envelope addressed to the persons hereinafter named, at their last known addresses, and depositing said envelope and contents in the United States mail at Fargo, North Dakota:

Eric A. Seitz
Attorney at Law
820 Mililani St., Ste. 714
Honolulu, HI 96813

The undersigned further certifies that on May 31, 2002, she dispatched to the Clerk, United States Court of Appeals for the Eighth Circuit, St. Louis, Missouri, by Federal Express the original and nine copies of the APPELLEE'S BRIEF and a 3½" computer diskette containing the full text of the Brief.

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Charlotte E. Berg