NO. 02-1761

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

-vs-

LEONARD PELTIER,

Defendant - Appellant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT LEONARD PELTIER

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In this Court's opinion in United States v. Peltier, 800 F.2d 772 (8th Cir. 1986), cert. denied 108 S. Ct. 84 (1987), the distinguished panel painstakingly elaborated upon the govern- ment's misrepresentations of the critical ballistics evidence utilized at Mr. Peltier's trial to portray him as the person who fatally shot FBI Special Agents Williams and Coler at close range. Although the Court concluded on that occasion, in its 1986 opinion, that there was an insufficient basis to order a retrial, the three judges expressed serious concerns about the process which ultimately resulted in the imposition of two consecutive life terms of imprisonment, and at least one member of that panel publicly has supported Mr. Peltier's efforts to obtain relief from his continuing incarceration.

Although the 1986 decision rejected Mr. Peltier's plea for a new trial, in our view the Court sua sponte should have re-

manded the case, at that time, for a sentencing reconsideration because it already was evident -- and it became even more evident in the next round of litigation -- that when Judge Benson sentenced Mr. Peltier he did so upon the erroneous premise that Mr. Peltier fired the fatal shots.

Subsequently, in Peltier v. Henman, 997 F.2d 461 (8th

Cir. 1993), the government conceded and this Court again acknow- ledged that the current perception of Mr. Peltier's role is different than what the government sought to prove and the jury and Judge Benson relied upon at trial. Obviously, that change in
perception was not enough to convince the Henman panel to order a new trial, but it should have provided a sufficient basis for reassessing Mr. Peltier's two consecutive life terms.

In United States v. Tucker, 404 U.S. 443, 30 L. Ed. 2d 592, 92 S.Ct. 589 (1972), the Supreme Court belatedly ordered the petitioner to be resentenced because his original sentence was not "imposed in the informed discretion of a trial judge" and "was founded at least in part upon misinformation of con- stitutional magnitude." 404 U.S. at 447. In that case, as here, the government argued that resentencing was not mandated because there was overwhelming support for the conviction, itself, and because there was no indication that any different or lesser sentence would be adjudged. In rejecting those arguments, the Tucker majority ruled that a new sentencing hearing would be re- quired if the trial judge had acted upon erroneous information which, if it had not been considered, "might" have resulted in a different sentence.

In the instant case Judge Benson clearly acted upon erroneous information that not only "might," but most probably would have resulted in concurrent rather than consecutive life sentences for Mr. Peltier. Both at the time of the original sentencing and for the purposes of the tainted Rule 35 proceedings, Judge Benson definitely believed that the government's ballistics evidence was dispositive and that Mr. Peltier was the person who fired the fatal shots. And Judge Benson acting accordingly, adjudging the most severe sentences available to him. Nowhere, at any time in the extensive records of this litigation, has Judge Benson ever been afforded the opportunity to revisit his sentencing actions in light of the current perception that Mr. Peltier only aided and abetted in shooting at the two agents from a distance and therefore that the extent of his culpability and his sentence should be reassessed accordingly.

CONCLUSION

We submit that this Court has ample supervisory authority, at any time, to correct a sentence that has not fairly been adjudged and has resulted in a miscarriage of justice. See, e.g., Rule 35, Federal Rules of Criminal

Procedure; United States v. Tucker, supra. The relief sought by Leonard Peltier herein is not unreasonable, is not excessive, is not unprecedent- ed, is not untimely, and certainly is not unimportant enough to warrant a summary determination, as the government requests. For all of the reasons set forth in our opening brief, in the records and files of the Court below, and in the previous decisions of this Court it is requested that this matter be set for argument and that the District Court thereafter be directed to reconsider and reduce Mr. Peltier's sentences.

DATED: Honolulu, Hawaii, June 14, 2002.

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