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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LEONARD PELTIER,

Petitioner-Appellant,

v.

JOSEPH W. BOOKER, JR.,

Respondent-Appellee.

On Appeal from the United States District Court
For the District of Kansas
The Honorable Richard D. Rogers
United States District Judge
District Court. No. 99-CV-3194

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STATEMENT REGARDING ORAL ARGUMENT
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PRIOR OR RELATED APPEALS

Petitioner-Appellant has had several prior appeals relating to the convictions at and matters raised in this appeal. They include *United States v. Peltier*, 585 F.2d 314 (8th Cir. 1978); *United States v. Peltier*, 693 F.2d 96 (9th Cir. 1982); *United States v. Peltier*, 731 F.2d 550 (8th Cir. 1984); *United States v. Peltier*, 800 F.2d 772 (8th Cir. 1986); and *Peltier v. Henman*, 997 F.2d 461 (9th Cir. 1993).

STATEMENT OF JURISDICTION

Leonard Peltier ("Peltier") filed this habeas petition in the United States District Court for the District of Kansas ("District Court") pursuant to 28 U.S.C. § 2241, challenging the Parole Commission's refusal to grant him parole. The District Court entered judgment denying Peltier's petition on September 26, 2002. Pursuant to 28 U.S.C. § 2253, Peltier timely filed an appeal from that judgment on October 18, 2002.

STATEMENT OF ISSUES

I. Whether The District Court Erroneously Accepted The Commission's Denial of Parole Where The Record Does Not Support The Commission's Sole Basis For Extending The Date Of Peltier's Parole Well Outside Normal Guidelines -- Namely, That Peltier Participated In An "Ambush" And "The Cold-Blooded Execution" Of Two FBI Agents.

STATEMENT OF THE CASE

This habeas proceeding challenges the United States Parole Commission's (the "Commission's") denial of Peltier's request for parole and refusal even to consider Peltier's release on parole until December 2008. The District Court entered judgment on the pleadings without an evidentiary hearing. *Memorandum and Order* (Sept. 26, 2002) (App. 379) (*"District Court Opinion").*[1]

Peltier is a federal prisoner serving two consecutive life sentences in connection with the 1975 deaths of two FBI agents on the Pine Ridge Indian Reservation in South Dakota. The normal guidelines for parole of prisoners convicted of similar crimes is 200+ months. Despite an almost perfect prison record during his more than 25 years of

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[1] References to Appellant's Appendix (filed herewith) are designated "App. __."

imprisonment, the Commission declined to grant Peltier parole within the normal guideline time established by its own regulations.[2] Instead, the agency refused even to consider establishing a parole date until December, 2008, at which point Peltier will have served almost double the normal guideline time.

This appeal turns on the whether there is a rational basis for the Commission's extending Peltier's parole so far beyond the normal guideline. In explaining its dramatic departure from the established parole guidelines, as it was required to do pursuant to 28 C.F.R. §§ 2.13(d), 2.20 n.1, the Commission identified only one reason for extending Peltier's incarceration: that Peltier was involved in an "ambush" of the two FBI agents, and executed them at point blank range after they were incapacitated. The District Court erred in rejecting Peltier's *habeas* where, as here, the Commission's stated reason (1) is not supported by Peltier's convictions or the Eighth Circuit decisions addressing post-conviction petitions, (2) is not supported by the evidence before the Commission, and (3) is undermined by the material exculpatory evidence the government improperly withheld at Peltier's trial.

STATEMENT OF FACTS

A. Background

On June 26, 1975, two FBI agents were killed in a gun battle at the Pine Ridge Indian Reservation. The agents became involved in a firefight with a group of Native Americans encamped at the "Jumping Bull Compound," as they drove in pursuit of

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[2] Peltier has already served some 322 months which is already over 11 years beyond

(Footnote continued)

another vehicle into a valley below that residential area. The agents were incapacitated by wounds suffered from long range firing and then killed by shots fired from point-blank range by a high-velocity, small caliber weapon. *District Court Opinion*, at 2 (App. 380).

Four Native Americans were indicted for the murder of the two FBI Agents – Peltier, Darelle Butler, Robert Robideaux and James Eagle. After Butler and Robideaux were acquitted by a jury in Cedar Rapids, Iowa, the government dropped its case against Eagle. Peltier was then tried and convicted of murdering the two agents. In June, 1977, he was sentenced to two consecutive life terms. *Id.*

Following his trial, Peltier used the Freedom of Information Act to discover a critical report, improperly withheld at trial, contradicting the government theory that Peltier personally killed the two agents at close range with the so-called Wichita AR-15 rifle. *See United States v. Peltier*, 800 F.2d 772, 772-76 (8th Cir. 1986). The Eighth Circuit characterized the withheld evidence as "newly discovered evidence indicating [the government's ballistics expert] may not have been telling the truth" and noted "inconsistencies casting strong doubts upon the government's case." 800 F.2d at 777, 779-80. The Eighth Circuit also observed that the government erroneously argued at trial that there was only one AR-15 at the Jumping Bull compound on the day in question, since the evidence demonstrated the presence of multiple AR-15 shell casings that could not be matched to the so-called Wichita AR-15. 800 F.2d at 779.

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the normal guideline time for release as established by the Commission's regulations.

The Eighth Circuit nevertheless affirmed the denial of Peltier's habeas petition. In doing so, the Court concluded that while the jury might have acquitted Peltier if the "record and data improperly withheld from the jury had been available," the Court could not conclude that the jury would have probably reached a different result. 800 F.2d at 779-80.

Faced with "improperly withheld" material evidence which cast strong doubt whether Peltier participated in the close range execution of the agents, the government began to emphasize that it was unnecessary to uphold the murder convictions to prove that Peltier executed the agents at close range. Indeed, the government conceded that it could not prove who fired the fatal shots at two different oral arguments before the Eighth Circuit. Moreover, the government argued that Peltier's convictions might well have been based solely on his firing at the agents from long-range. (App. 234-36.)[3]

B. Peltier's Parole Proceedings

In December, 1993, after serving 204 months (seventeen years) of his sentence, Peltier's case came before the Parole Commission. *District Court Opinion*, at 3 (App. 381) Peltier made an extensive presentation to the Commission, including a detailed account of his actions on June 26, 1975. Peltier expressly denied participating in the close-range execution of the agents after they had been wounded and incapacitated, though he admitted firing at the agents from a distance. (App. 87-101).

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[3] To avoid duplicity, the statements are set out in the argument section of the brief. *See* pages 14-15, below.

Under its guidelines, the Commission calculated Peltier would be eligible for release after serving 200+ months, based on his convictions and conduct in prison. Though he had served that time, the Commission not only denied parole, but ruled that it would not even consider establishing a parole date until a reconsideration hearing fifteen years later, in December 2008. (App. 197-99, 200).

The Commission's regulations require the Commission to articulate its reasons for extending Peltier's release beyond the normal guideline. The Commission provided its reasons in a February 14, 1994 Order:

> After review of all relevant factors and information presented, a decision more than 48 months above the minimum guidelines is warranted because you were involved in the ambush of two federal officers. After the officers were incapacitated by gunshot wounds, you participated in the premeditated and cold blooded execution of those two officers.

(App. 199).

In 1995, Peltier appeared for a statutory interim parole hearing before the same hearing examiner who had presided over Peltier's initial parole proceeding in 1993. After conducting this second proceeding, the hearing officer advised the Parole Commission: "I have concluded after a review of the additional exculpatory evidence that a preponderance finding that Mr. Peltier actually executed the agents cannot be made." (App. 233) (emphasis added). He further advised that the government's representative at the parole hearing, Assistant United States Attorney Lynn Crooks, had "acknowledged that the government does not know, insofar as having the evidence to sustain a conviction

in Court, that Leonard Peltier fired the fatal bullets into the agents." (App. 232) (emphasis added).

The hearing examiner explained that his 1993 recommendation to defer Peltier's parole until at least December 2008 was based on a mistaken understanding of the meaning and gravity of the convictions:

> This examiner did recommend, and the Commission agreed at the initial hearing, that a 15 year reconsideration was indicated. This above-the-guideline decision was predicated essentially on the conclusion that Leonard Peltier's conviction for First Degree Murder of the two special agents had included a specific or directed finding by the jury that Peltier had fired the fatal shots into the agents causing their death. This examiner now understands that this is not the case and accordingly the finding to support the above-the guideline decision would need to be independently supported by a preponderance of the evidence finding . . . As explained in this dictation, the examiner does not believe that sufficient evidence exists to make this preponderance finding.

(App. 233).

Dissatisfied with these findings, the Parole Commission appointed a second review examiner to review the matter. The second hearing officer (who was not even present at the statutory interim hearing) disagreed with the original examiner's findings. (App. 279-80). On March 18, 1996, the Parole Commission adopted the second officer's recommendation and re-affirmed that it would not reconsider Peltier for parole until December, 2008. (App. 281). With respect to Peltier's objection that there was no evidence he had "ambushed" the agents or participated in their close-range execution, the Commission stated:

> You have not given a factually-specific account of your actions at the time of the offenses that is consistent with the jury's verdict of guilt, considering either theory of your participation in the crimes outlined by the government at trial. The Commission therefore has no reasonable basis to find an explanation of the facts concerning the agents' executions other than the version presented by the government . . .. The government has not changed its position that circumstantial evidence presented at your trial established your complicity in the executions of the agents. The circumstantial evidence, described in several of the decisions of the Eight Circuit rejecting your appeals, supports the previous finding that you participated in the executions.

Id.

Peltier appealed, and on July 12, 1996, the Parole Commission denied this appeal. The Parole Commission reiterated its position that Peltier's *conviction itself* was evidence that he was involved in the close-range execution of the agents:

> The Commission recognizes that the prosecution has conceded the lack of any direct evidence that you personally participated in the executions of the two F.B.I. agents. Your conviction, however, rests upon a significant body of circumstantial evidence.

(App. 300). The Commission also reiterated that Peltier had never given a "factually-specific account of [his] actions on June 16, 1975, in relation to the deaths of the FBI agents." *Id.*

The Commission found that the record evidence before it supported a finding that Peltier was "in fact, the individual who executed the two wounded F.B.I. agents by firing upon them at point blank range with an AR-15 rifle." In support of this conclusion, the Commission cited the following facts to support its claim:

(a) that trial witness Brown saw Peltier shooting an AR-15 that day from the sidelines;

(b) that trial witness Anderson saw Peltier standing by the agent's vehicles with an AR-15;

(c) that no other witness testified about anyone else with an AR-15 that day;

(d) that the agents were killed by a bullet fired from an AR-15;

(e) that the shell casing found in the agent's trunk was ejected from an AR-15 which was found in Wichita and which was allegedly Peltier's gun;

(f) that Peltier had a motive to commit murder because he believed the FBI agents were coming to arrest him in connection with a murder charge in Milwaukee, Wisconsin;

(g) that witness Draper testified that he heard Peltier discussing the murders that evening; and

(h) that after Peltier attempted to avoid arrest in Oregon, one of the agent's service revolvers was found in a vehicle inside a paper bag bearing Peltier's thumb print.

(App. 301).

Finally, the Commission noted in a single sentence that it would make no difference if Peltier had only aided and abetted the true executioner of the agents, because as an aider and abettor he would have the same culpability as the principal and would, moreover, be concealing the identity of the shooter. For that reason, the Commission concluded alternatively that he should not be considered for parole until nearly double the guidelines. (App. 301).

C. The District Court Habeas Proceedings

On June 4, 1999, Peltier filed this *habeas* proceeding challenging the Parole Commission's denial of parole and its refusal to establish a parole date until 2008. Over three years later, without conducting an evidentiary hearing, the District Court entered judgment denying Peltier relief. The District Court affirmed the Commission's decision as being supported by the published decisions entered in Peltier's criminal case and post-conviction actions and affirmed the imposition of a 15 year reconsideration period for the same reasons. (App. 379-93).

SUMMARY OF THE ARGUMENT

This appeal turns on whether the Parole Commission acted arbitrarily and capriciously by basing its harsh parole decision on the finding that Peltier "ambushed" the agents and then executed them at close range after they were incapacitated. As shown below, the Commission incorrectly assumed that the facts necessary to support that finding were established by Peltier's conviction and/or the Eighth Circuit post-conviction decisions. To the contrary, those decisions, and concessions by the government at oral arguments before the Eighth Circuit, establish that the government could not prove that Peltier "ambushed" the agents and that he shot the agents at close range. The jury verdict and the decisions make clear that Peltier was convicted either on the theory he actually killed the agents or that he aided and abetted. Indeed, as time has passed, the government as well as the Eighth Circuit decisions have stressed upholding the convictions on the aiding and abetting theory.

Perhaps most importantly, the Commission (and the District Court) failed adequately to consider the impact of critical exculpatory evidence which was improperly withheld by the government and which completely undermined the facts relied upon by the Commission to establish that Peltier shot the two FBI agents at close range. This was explicitly recognized by one hearing examiner of the Commission. However, the Commission then appointed a second hearing officer which upheld the Commission's earlier decision to deny parole and to not even consider establishing a date for parole until 2008.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY ACCEPTED THE COMMISSION'S DENIAL OF PAROLE WHERE THE RECORD DOES NOT SUPPORT THE COMMISSION'S SOLE BASIS FOR EXTENDING THE DATE OF PELTIER'S PAROLE WELL OUTSIDE NORMAL GUIDELINES - NAMELY, THAT PELTIER PARTICIPATED IN AN "AMBUSH" AND "THE COLD-BLOODED EXECUTION" OF TWO FBI AGENTS.

A. Standard of Review

In reviewing the Parole Commission's decision, this Court must determine whether the Commission acted arbitrarily and capriciously or abused its discretion. *Dye v. United States Parole Comm'n*, 558 F.2d 1376, 1378 (10th Cir. 1977). Under this standard, the Court "need only determine whether the information relied on by the Commission is sufficient to provide a factual basis for its reasons" and the inquiry does not involve whether the Commission's decision is "supported by a preponderance of the evidence, or even by substantial evidence; the inquiry is only whether there is a rational basis in the record for the Commission's conclusions . . .." *Lewis v. Beeler*, 949 F.2d

325, 332 (10th Cir. 1991); *Misai v. United States Parole Comm'n*, 835 F.2d 754, 758 (10th Cir. 1987). However, if this Court concludes that "a reason given by the Commission for going above the [parole] guidelines is factually incorrect or unsupported by the record material upon which the Commission specifically relies, it does not constitute a rational basis for the Commission's actions," and the decision must be reversed. *Montoya v. United States Parole Comm'n,* 908 F.2d 635, 639 (10th Cir. 1990), *citing Misai,* 835 F.2d at 758.

B. Discussion

1. Neither Peltier's Convictions Nor The Eighth Circuit Post-Conviction Decisions Provide a Rational Basis For the Commission's Finding That Peltier Participated In An "Ambush" And Executed The Agents After They Were Incapacitated.

Where, as here, the Commission has extended Peltier's release beyond the guidelines, the Commission must articulate the reasons for delaying Peltier's release. 28 C.F.R. §§2.13(d); 2.20 n.1.[4] In its February 14, 1994 order, the Parole Commission made clear that its sole reason for delaying Peltier's parole was its belief that he was "involved in the ambush of two federal officers. After the officers were incapacitated by gunshot wounds, he participated in the premeditated and cold-blooded of those two officers." (App. 199).

[4] 28 U.S.C. § 2.13(d) provides that the Commission's parole order shall include "the specific factors and information relied upon for any decision outside the range indicated by the guidelines." 28 U.S.C. § 2.20 n.1 provides that "[f]or decision exceeding the lower limit of the applicable guideline category by more than 48 months, the Commission will specify the specific case factors upon which it relied in reaching its decision . . ."

The Commission has asserted that this finding is supported in two ways: (a) by the fact of Peltier's conviction for murdering the agents and the courts' denials of his previous *habeas* petitions; and (b) by the Commission's own evaluation of the evidence surrounding the agents' deaths. As explained below, neither theory provides rational support for the Commission's finding that Peltier participated in an "ambush" and the close-range execution of the agents after they were incapacitated.

a. Peltier's Convictions Do Not Necessarily Rest On The Theory That He Executed The FBI Agents.

Contrary to the ruling by the District Court and the Commission, the fact of Peltier's conviction and the published decisions denying previous *habeas* attempts, read together, do not support the Commission's critical finding that Peltier executed the agents at close range in an "ambush."

In *Peltier v. Henman*, 997 F.2d 461, 463 (8th Cir. 1993), the Eighth Circuit made clear that Peltier's convictions may well rest only on the alternative theory that Peltier aided and abetted shooting from long range: "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." The Court concluded:

> The foregoing discussion establishes that 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.

997 F.2d at 467. The Court also recognized "[t]he numerous statements by the government, the defense, and the District Court recognizing that the government was asserting that Peltier either personally committed the murders or aided and abetted their commission." 997 F.2d at 468.

Since the Eighth Circuit has made clear that the convictions rest on alternative theories, the convictions and the published decisions do not in and of themselves support the Commission's assumption that Peltier executed the agents at close range. Indeed, read as a whole, the published decisions make clear that the government and court have moved toward upholding the conviction on the aiding and abetting theory because the government improperly withheld evidence which refute the government's theory that Peltier executed the agents.

b. The Government Has Conceded That The Convictions Do Not Rest On A Finding That Peltier Executed The Agents.

Indeed, throughout the post-conviction proceeding, the government has several times admitted during oral arguments that it does not know who executed the two FBI agents and stressed that Peltier's convictions can be upheld on the alternative theory of aiding and abetting by shooting from a distance. In fact, since the trial, the government has repeatedly represented to the Eighth Circuit that it does not who actually shot the agents at close range.

In 1985, during oral argument before the Eighth Circuit on Peltier's appeal from his first habeas petition, the government argued that it did not have to prove that Peltier

executed the agents at close range. To the contrary, United States Prosecutor Lynn Crooks argued:

> The case against Peltier was tried on the basis that he was shooting from the sidelines at least and that was first degree murder.
>
> * * *
>
> Insofar as the United States was concerned this case was tried on an aiding and abetting theory. It was argued that way, it was tried that way.
>
> * * *
>
> I think the best precedent one can point to is the recent murder of our two marshals. We have exactly the same kind of situation. But we can't prove who shot those agents.

(App. 11-12, 234-35).

In 1990, Peltier brought a second habeas petition alleging, among other things, that the government engaged in outrageous conduct and had improperly changed its theory of the case by arguing for the first time in the earlier habeas petition that the conviction rested on an "aiding and abetting" theory. *Peltier v. Henman,* 997 F.2d at 465-71. At oral argument, the government again stressed that Peltier's conviction did not rest on his participating in the close range execution of the agents:

> We had a murder, we had numerous shooters, we do not know who specifically fired what killing shots. We knew who participated, we knew who was murdered, but we did not know quote unquote who shot the agents.
>
> * * *
>
> We tried the case with the facts available. The facts available did not give us direct evidence as to who did the coup-de-grace. They simply didn't . . .. We argued inferences and we

> certainly argued that strongly. But that's not the same thing as saying that we had direct evidence by any one witness that Peltier was the one that squeezed off the final rounds.

(App. 14, 235-36).

In sum, as the evidence linking Peltier to shooting the agents began to evaporate, the government more and more stressed that it tried Peltier on the theory of aiding and abetting. Therefore, it was improper for the Commission to rely simply on the convictions and the published decisions to support its conclusion that Peltier killed the agents at close range.

c. The Hearing Examiner Conceded That The Commission Erred in Assuming the Convictions Were Based on Peltier's Having Participated in the Close-Range Execution of the Agents.

In 1995 Peltier appeared for an interim statutory parole hearing before the same hearing examiner who had presided over the initial parole proceeding. At the conclusion of this proceeding, the hearing officer "concluded after a review of the additional exculpatory evidence that a preponderance finding that Peltier actually executed the agents cannot be made." (App. 233). He was moved by the government's statements, especially those by Assistant United States Attorney Lynn Crooks who had "acknowledged that the government does not know, insofar as having the evidence to sustain a conviction in Court that Leonard Peltier fired the fatal bullets into the agents." (App. 232). Moreover, the hearing examiner conceded that the 15-year reconsideration decision in 1993 was based on the mistaken belief that Peltier's convictions had

"included a specific or directed finding by the jury that Peltier had fired the fatal shots into the agents causing their deaths." (App. 233).

Dissatisfied with these conclusions, the Parole Commission appointed a second hearing officer (who was not even present at the statutory interim hearing), and who disagreed with the recommendation. (App. 279). On March 18, 1996, the Parole Commission reaffirmed the second officer's recommendation and reaffirmed that it would not reconsider Peltier for parole until December 2008 because of its stated position that Peltier participated in an ambush and executed the agents at close range. (App. 281).

The District Court erred in upholding the Commission's decision to the extent it relied on the fact of Peltier's convictions to support its finding that Peltier was involved in an "ambush" and that he executed the agents at close range after they had been wounded and incapacitated. As this case has developed and as the government has shifted the focus of its theories, the convictions and published decisions do not rationally support the Commission's finding.

2. There Was No Rational Support for the Commission's Purported Finding that Peltier Was Involved in an "Ambush" or that He Executed the Agents at Close Range.

In addition to relying on the fact of conviction and the published Eighth Circuit decisions, the Commission alternatively purported to find, based on its own evaluation of the evidence, that Peltier was engaged in an "ambush" and executed the agents at point-blank range after they were incapacitated. However, none of the factors it identified provides even tenuous support for its finding.

a. The Commission Identified No Evidence of an Ambush

To begin with, there is no evidence that the incident on June 26, 1975 involved an "ambush." None of the Eighth Circuit decisions makes any such finding, and the Commission cited no evidence whatsoever to support this conclusion. Peltier's *habeas* petition in this case properly alleged that "there is no evidence to support the claim that Peltier was involved in an ambush of the FBI agents, or that there was an ambush." (App. 22). In response, Respondent never identified any evidence to support the claimed "ambush."

In denying Peltier's habeas petition, the District Court did not identify any such evidence in support of the Commission's findings. Indeed, none of the Eighth Circuit decisions mentions ambush in any way. Rather, from the very first decision, the Eighth Circuit has indicated that the agents were attempting to locate and arrest four individuals, including Jimmy Eagle, and that the agents followed a vehicle on to the Jumping Bull property believing that Jimmy Eagle was in the vehicle. It was during the chase that the vehicle stopped and the occupants began shooting on the officers, at which time other AIM members present on the Jumping Bull Compound joined in the shooting. *United States v. Peltier,* 585 F.2d 314, 318 (8th Cir. 1978).

b. The Commission Identified No Plausible Evidence that Peltier Shot the Agents After They Were Incapacitated

There was also no evidence before the Commission which could rationally support a finding that Peltier participated in the point-blank execution of the agents after they had been incapacitated. Indeed, as found by the hearing examiner who was present at

Peltier's first two parole hearings, and who heard and actually spoke to the witnesses, including prosecutor Crooks: "the examiner does not believe that sufficient evidence exists to make this preponderance finding." (App. 233). Assistant United States Attorney Lynn Crooks has "acknowledged that the government does not know, insofar as having the evidence to sustain a conviction in court, that Leonard Peltier fired the fatal bullets into the agents." (App. 232).

Conceding the lack of direct evidence to support its finding that Peltier executed the agents after they were incapacitated, the Commission relied instead on a number of "circumstantial" factors to support the finding that Peltier executed the agents. *See* page 8, above. The District Court agreed that these factors adequately supported the Commission's finding. None of these factors, however, withstands scrutiny as rationally supporting the conclusion that Peltier shot the agents after they were incapacitated.

The findings can be separated into two categories: those which are completely undermined by the material evidence which the government improperly withheld and those which are not supported by the evidence and/or are irrelevant to whether Peltier shot the agents at close range. These categories of findings will be discussed in turn below.

i. Circumstantial Factors Relied on by the Commission That Are Completely Undermined by the Improperly Withheld Material Evidence

The District Court erroneously dismissed in one sentence Peltier's argument that the Parole Commission's finding is undermined by the material evidence which the government improperly withheld. This error by the District Court made it impossible to

properly review the Parole Commission's decision and requires outright reversal since the improperly withheld material evidence went to the heart of the government's case that Peltier executed the two agents at point blank range.

(1) The Link Between A .223 Casing And The So-Called Wichita AR-15 Was The Linchpin Of The Government's Case That Peltier Allegedly Executed The Two Agents At Point Blank Range.

In *United States v. Peltier,* 800 F.2d 772, 772-73 (8th Cir. 1986), the Eighth Circuit recognized that the critical evidence to support the theory that Peltier had personally killed the two agents was a casing from a .223 caliber Remington cartridge which was recovered from the trunk of Agent Coler's car on June 29, 1975 and evidence relating to Peltier's alleged use of the Wichita AR-15. In analyzing the government's case, the Eighth Circuit noted:

> As the government states, that .223 casing found in the trunk in Coler's car was "perhaps the most important piece of evidence in this case." TR at 4996. While the autopsies indicated only that the agents had been killed point blank by a high-velocity low-caliber weapon, the .223 casing pinpointed the Wichita AR-15 as the murder weapon to the exclusion of all weapons. Since the other evidence connected Peltier to the Wichita AR-15, the .223 casing provided the final link necessary to establish Peltier as the point blank murderer of both agents.

800 F.2d at 775. In addressing the theory that Peltier killed the two FBI agents at point blank range, the Eighth Circuit recognized that "the ballistics evidence, particularly as that evidence relates to a .223 shell casing, allegedly extracted from the Wichita AR-15 and found in Agent Coler's car is critical." 800 F.2d at 775. In short, the linchpin of the

government's theory that Peltier shot the FBI agents at point blank range required the establishing a link between the Wichita AR-15 and the .223 casing.

(2) The Government Improperly Withheld Evidence Which Established That There Was No Link Between The Wichita AR-15 and The .223 Casing Found In Agent Coler's Car.

Based on data and reports obtained from the FBI under FOIA requests, Peltier discovered that the government had withheld exculpatory evidence which ruled out the Wichita AR-15 as the murder weapon. More specifically, Peltier discovered a memorandum dated October 2, 1975 by a ballistics expert which ruled out the Wichita AR-15 (the murder gun purportedly used by Peltier). In addition, Peltier discovered other data suppressed by the FBI which demonstrated the existence of other AR-15s at the site that day. The withheld evidence unequivocally undermines the circumstantial finding that Peltier killed the two FBI agents because the evidence goes directly to the heart of the government's case and the Commission's findings which were upheld by the District Court.

At Peltier's trial, Special Agent Evan Hodge testified that the shell casing found in the open trunk of Agent Coler's car had been ejected from the AR-15 found in Wichita, Kansas. In introducing this testimony, the government improperly withheld documents "which included several teletypes from FBI officials and agents specifically requesting Hodge to compare submitted AR-15 rifles with .223 casings found at the scene, and Hodge's responses to these teletypes which, at least prior to February 10, 1976, consistently reported that the casings and rifles were nonidentical." *United States v.*

Peltier 800 F.2d at 776 and n.4 and n.5. Specifically, the government withheld an October 2, 1975 teletype which stated:

> Recovered .223 caliber rifle received from SA Gammage, BATF, contains a different firing pin than that in rifle used at RESMURS scene.

This teletype directly refutes the claim that Peltier fired the fatal shots with his AR-15. The government also withheld a November 24, 1975 teletype from the laboratory to the Portland and Rapid City agencies which reported that the "cartridge casings fired in submitted weapons in laboratory were compared with like caliber cartridge casings recovered at RESMURS scene and it was concluded that these two rifles, in their present conditions, could not have fired any of the recovered specimens." *Id.* at 776 n.5. Based on the evidence, the Eighth Circuit rejected Hodge's testimony and concluded there was ample evidence before February 10, 1976 that established that Special Agent Evan Hodge consistently reported that the casing and rifles were not identical and that the newly discovered evidence indicated that Hodge "may not have been telling the truth." 800 F.2d at 776-77.

The significance of the government's false linking of the Wichita AR-15 and .223 casing is even more outrageous because the government based this linkage on a less definitive test at trial, while suppressing exculpatory evidence of a definitive test which was performed, but which its witness claimed could not be performed on the Wichita AR-15. Hodge testified that there were generally two examinations available: A firing pin impression test which is conclusive and, an extractor marking test which is significantly less reliable. *See generally United States v. Peltier*, 731 F.2d 550, 554 (8th

Cir. 1984). Hodge testified about the results of the extractor test, but the government withheld evidence that the "conclusive" firing pin test indicating that the casing did not match the Wichita AR-15. 800 F.2d at 776-77.

There is substantial evidence that the government improperly withheld key evidence demonstrating that Hodge, in fact, performed the conclusive firing pin impression test and concluded that there was no link between the Wichita AR-15 and the .223. The improperly withheld evidence breaks the necessary link between the Wichita AR-15 and the .223 casing which is necessary to conclude that Peltier executed the two agents at point blank range. Thus, there is no rational basis to the Commission's finding that Peltier murdered the agents with the Wichita AR-15.

(3) Testimony Relating To Peltier And The Wichita AR-15.

As the Eighth Circuit recognized, there was no direct evidence linking Peltier to the Wichita AR-15: "He was not in the vehicle which exploded near Wichita and there was no direct evidence, such as fingerprints, which made a connection between he and the weapon." 800 F.2d at 778. Thus, the only link rested on trial witness testimony.

In finding a link between Peltier and the murder weapon, the Commission referenced trial witness Brown's testimony that he saw Peltier firing his AR-15 from the treeline, and trial witness Anderson's testimony that he saw Peltier at the agents' vehicles with an AR-15 (though not shooting the AR-15). This evidence hardly suggests that Peltier used the AR-15 to shoot the agents at close range after they were incapacitated, especially in light of the withheld evidence which demonstrated otherwise.

The Commission concluded that there was only one AR-15 at the Jumping Bull Compound that day and it was Peltier's. That indeed was the testimony at Peltier's trial:

> The trial witnesses unanimously testified that there was only one AR-15 in the compound prior to the murders, that this weapon was used exclusively by Leonard Peltier and was carried out by him after the murders. The trial witnesses also testified unanimously that there was only one weapon which was seen firing at the agents that day which was capable of firing .223 ammunition and that this weapon was the AR-15 being utilized by Leonard Peltier.

800 F.2d at 778.

However, it is now clear there was more than one AR-15 at the compound. Contrary to the evidence presented at trial, the Eighth Circuit squarely held that "the evidence supports the view that there was at least one other AR-15 on the compound on the day of the murders." 800 F.2d at 775 n.2 (emphasis added.) Indeed, the evidence actually suggests that there were several AR-15s fired at the Jumping Bull compound. It is absolutely clear that there was also at least one other AR-15 present and fired that day because the evidence that the government improperly withheld from Peltier at trial demonstrated that the Wichita weapon had a different firing pin than the AR-15 which fired the shell casing found in the agent's open trunk on the day of the murders. Since there were undisputedly at least three AR-15s present and firing that day, that Peltier carried one is hardly probative of whether he fired the one that killed the agents at close range that day.[5]

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[5] The fact that the Eighth Circuit denied habeas relief notwithstanding the improperly withheld exculpatory evidence does not inform the issue before this Court.

(Footnote continued)

ii. The Other Circumstantial Factors Relied on by the Commission Were Neither Supported By The Record Nor Relevant To Whether Peltier Executed The Two Agents.

(1) Personal Motive to Commit Murder

The Commission concluded that Peltier "had a personal motive to murder the F.B.I. agents, because you had previously failed to appear for a murder trial in Wisconsin and you believed that the two F.B.I. Agents were coming to arrest you." (App. 301). This allegation (which Peltier denies) is utterly beside the point. The claimed motivation to commit murder to avoid arrest is hardly probative of whether he participated in an "ambush" or in the close-range execution of the agents after they were incapacitated. Indeed, once they were incapacitated, Peltier had little reason to fear they would arrest him.

The issue before the Eighth Circuit in the prior habeas was the validity of Peltier's conviction based on either theory the government presented – shooting from a distance or executing the agents at close range after they were incapacitated. By contrast, the Commission here relied explicitly in its parole decision on the assumption that Mr. Peltier was necessarily guilty of an "ambush" or that he executed the agents at close range after they had become incapacitated. None of the prior Eighth Circuit decisions addressed this question. Moreover, since the Eighth Circuit's decision, the United States Supreme Court has clarified that the Eighth Circuit applied an incorrect test by requiring Peltier to show that the result "would probably" have been different, if the government had not improperly withheld evidence. In addressing this issue, the United States Supreme Court recently stated: "The question is not whether the defendant would more likely than not received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence . . ." *Strickler v. Green*, 119 S. Ct. 1936, 1952 (1999), citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Had the Eighth Circuit applied this proper legal standard, it should have granted Peltier relief in his 1986 habeas proceeding since the government withheld critical evidence on the key ballistics testimony.

(2) Draper's Testimony That Peltier Discussed Details of the Murders

The Commission relied on the fact that "William Draper testified that he heard you discuss details of the murders the evening after the shooting took place." (App. 301). Again, however, Peltier has been convicted of some involvement in the murders – though it may be only firing from a distance. Thus, the fact that he discussed them is not probative of whether he fired the close-range shots. There is no allegation that Draper said Peltier discussed being involved in an "ambush" or in the close range execution of the agents after they were incapacitated. Indeed, it is undisputed that Mr. Draper answered "no" to the question "Do you remember on that night specifically what was said in that conversation right here and now." *See* Petitioner's Sur-Reply, at 4 n.1., citing *Trial Transcript*, March 23, 1977, Vol. VI (App. 375).

(3) The Paper Bag With the Agent's Service Revolver

The Commission also relied on the finding that, after Peltier fled from a van in Oregon, the government found, in that van, a paper bag bearing Peltier's thumb print that contained one of the agent's service revolvers. (App. 301). Again, however, this simply proves that long after the murders, Peltier came in contact with a bag that later was used to hold the agent's weapon. It is not probative of whether Peltier participated in the close-range execution of the agents.

(4) Peltier's Supposed Failure to Explain His Conduct on June 26, 1975.

Finally, the Commission relied on the supposed fact that Peltier had never provided a statement of what he did that day. Specifically, the Commission stated that he failed to provide:

> [a] factually-specific account of your actions on June 26, 1975, in relation to the deaths of the F.B.I. agents. You merely concede that you fired upon the F.B.I. agents from a distance, but you refuse to provide any further information about your involvement. The wounds inflicted upon the F.B.I. agents from a distance were serious but not fatal. You have therefore not explained how you could be guilty of either premeditated murder, or of aiding and abetting the premeditated murders that took place at close range, without having in any way personally participated in them.

(App. 300-01). This ground for the Commission's decision is fatally flawed for at least two reasons. First, it is simply not correct that Peltier failed to provide a factually detailed account of his actions that day. To the contrary, he provided just such an account in the parole submission made at his initial hearing. (App. 89-92). Thus, this cannot be a basis to deny parole. Moreover, the Commission argues that merely firing at a distance would not be sufficient to sustain the murder convictions, which is in direct contradiction of the prosecutors' position that "[t]he case against Peltier was tried on the basis that he was shooting from the sidelines at least and that was first degree murder." (App. 11-12, 234-35)

3. The District Court Also Erred in Affirming the Commission's One Sentence Alternative Holding That It Would Not Have Made a Difference if Peltier Was Only An Aider And Abettor.

The District Court also noted the Parole Commission's comment that "even if it were to conclude petitioner was an aider and abettor, it would make no different finding concerning his culpability: petitioner would be as guilty as a principal, and he would be concealing the identity of the shooter." (App. 301). This finding also lacks a rational basis, for several reasons.

First, the Commission's formal stated reason for exceeding the parole guidelines is that Peltier ambushed the agents and personally participated in executing them at close range after they were incapacitated. Moreover, the Commission's one sentence statement in the appeal decision that it would "make no difference" if its formal finding were incorrect hardly fulfills the regulations which require the Commission to set forth specific reasons for extending parole beyond the guidelines. 28 C.F.R. §§ 2.13(d), 2.20 n.1 In this case, the Commission has provided no reasons to justify Peltier's parole some twenty years longer than specified by the Commission's own guidelines for a person guilty of aiding and abetting. For that reason alone, this matter should be remanded to the Commission for reconsideration.

Second, there is absolutely no record evidence suggesting that Peltier knows the identity of the shooter. The Commission has never even attempted to identify a factual basis for its belief that if Peltier was only an aider and abettor (i.e., he only shot from a distance at the agents) he nevertheless can be assumed to know the identity of the shooter.

Third, the Commission's observation that Peltier would still be "guilty as a principal" fails to recognize that what is at issue here is not guilt, but parole. This appeal does not challenge Peltier's convictions for murder. Instead, it challenges the Commission's decision to delay Peltier's parole some 20 years longer than specified by the Parole Commission's own guidelines for a person guilty of Peltier's offenses. In justifying this draconian result, the Commission specifically identified Peltier's personal involvement in an "ambush" and that he personally participated in the close range execution of the agents after they had become incapacitated. If that factual assumption is incorrect, the matter must surely be remanded to the Commission for full reconsideration of Peltier's parole date.[6]

CONCLUSION

For the above reasons, Peltier requests this Court to reverse the decision of the District Court and remand the matter to the Parole Commission for full reconsideration of Peltier's parole date.

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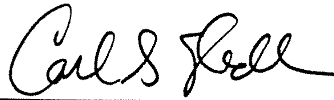
6 This is not a case where a statute imposes mandatory minimum sentences that prevent consideration of whether Peltier actually fired the fatal shots or aided and abetted at long-range. *Cf. United States v. Pinio-Perez,* 870 F.2d 1230 (7th Cir. 1989) (en banc). In this context, therefore, the Parole Commission can and should consider the lack of evidence that Peltier actually fired the fatal shots in considering when Peltier should be eligible for parole. See *id* at 1236 (noting that abetting came into the law at a time when all felonies carried the death penalty, and had been welcomed as a device for enabling the lesser participants in a felony to be punished more leniently than by death).

STATEMENT REGARDING ORAL ARGUMENT

Petitioner-Appellant respectfully requests oral argument. Because the case involves lengthy and complex proceedings before both the federal courts and the United States Parole Commission, petitioner-appellant believes oral argument would assist the Court in considering this important matter.

Respectfully submitted,

LEONARD PELTIER
By His Attorneys



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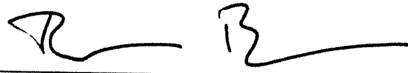

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December 9, 2002

CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(A) because it does not exceed 30 pages. Moreover, as required by Federal Rule of Appellate Procedure 32(a)(7)(B)(i), I certify that that the brief is proportionally spaced and contains 7,601 words. I relied on my word processor to obtain the count and it is Word 2000. I certify that the information in this Certificate is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

Carl S. Nadler

CERTIFICATE OF SERVICE

I certify that on December 9, 2002, I sent an appropriate number of copies of the foregoing "Appellant's Opening Brief" and the accompanying "Appellant's Appendix" by Federal Express overnight delivery for filing and for delivery to Counsel for Respondent at the following addresses:

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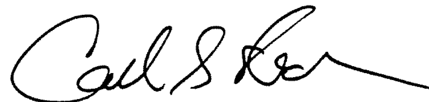

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Attachment A

Memorandum and Order (September 26, 2002)

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS

2002 SEP 26 A 10:21

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AT TOPEKA, KS.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

LEONARD PELTIER,

Petitioner,

v.

JOE W. BOOKER, JR., as Warden,
United States Penitentiary,
Leavenworth, Kansas,

Respondent.

CASE NO. 99-3194-RDR

ENTERED ON THE DOCKET
DATE: 9-26-02

MEMORANDUM AND ORDER

This matter is before the court on a petition for habeas corpus filed pursuant to 28 U.S.C. § 2241 by a prisoner in federal custody and housed at the United States Penitentiary, Leavenworth, Kansas. Petitioner contends his continuing incarceration is unlawful, and he seeks immediate release on parole.

Having examined the record, the court concludes an evidentiary hearing is not warranted in this matter and enters the following findings and order.

Factual and procedural Background

Petitioner was convicted in the United States District Court for the District of North Dakota of two counts of first degree murder for the murder of two federal agents on the Pine Ridge Indian Reservation in June 1975. He was sentenced in June 1977 to two consecutive life terms.

The underlying facts of the criminal case are known to the parties, and a brief summary of that action is sufficient. FBI agents Jack Coler and Ronald Williams entered the Pine Ridge Indian Reservation in South Dakota on June 26, 1975, with an arrest warrant for four Native Americans charged with armed robbery and assault with a deadly weapon. The agents followed a van that held several persons. The van stopped at the Jumping Bull Compound, and the agents stopped their cars some distance away. In the exchange of gunfire that followed, the agents were wounded by shots fired from a distance. Both agents subsequently were killed by shots fired at point-blank range from a high-velocity, small-caliber firearm.

Four persons were indicted for the murders. Two of the defendants were acquitted, and the government dismissed charges against a third defendant. Petitioner was a fugitive during the trial that ended in an acquittal, and following his apprehension and extradition from Canada, he was tried separately and convicted in the United States District Court for the District of North Dakota. Petitioner was sentenced to consecutive life terms.

In July 1979, petitioner escaped from custody. Several other inmates were involved in the escape, and the escapees fired on prison staff. Petitioner was captured approximately five days later, and a semi-automatic rifle found near him at the time of his arrest was linked to several spent cartridges found at the escape site. Petitioner was convicted in the United States District Court for the Central District of California of escape from the custody of the Attorney General and felon in possession of a firearm. He

was sentenced to a seven-year consecutive term for these crimes.

Petitioner first applied for parole in 1986 but later waived consideration for release. He next applied for parole review on August 24, 1993.

The United States Parole Commission ("Commission") conducted petitioner's initial parole hearing on December 14, 1993. Petitioner appeared with counsel and gave a statement concerning his activities on the Pine Ridge Indian Reservation on the day of the murders and concerning his escape from custody. Special Agent Ralph Carroll of the Federal Bureau of Investigation also appeared at the hearing.

The hearing panel calculated petitioner's parole guidelines as 188+ months based upon petitioner's convictions of first degree murder, escape, and firearms possession; eleven incidents of institutional misconduct; and a reported armed robbery following the escape. The panel noted petitioner had been in custody for 204 months but did not recommend parole due to petitioner's involvement "in the cold-blooded murder of two federal agents," an escape in which shots were fired at pursuing officers, and the commission of an armed robbery while on escape. Doc. 8, Attach. No. 2, Ex. H.

The panel recommended a fifteen-year reconsideration period with a hearing in December 2008 and also recommended referral to the Regional Commissioner for Original Jurisdiction consideration under 28 C.F.R. § 2.17. Id.

The Regional Commissioner likewise voted to continue petitioner to a fifteen-year reconsideration hearing and referred petitioner's

case to the National Commissioners for Original Jurisdiction consideration. Id., Ex. J. The National Commissioners agreed with the recommendation of a fifteen-year reconsideration.

Petitioner appealed that decision to the full Commission, which rejected his claims. However, the Commission found an error in the calculation of guidelines assessed for the escape offense behavior and increased those guidelines to 64-92 months, resulting in total guidelines of 200+ months. Id., Ex. N.

Petitioner received a statutory interim hearing in December 1995. Following that proceeding, the hearing examiner determined that, while there was insufficient evidence to support a finding that petitioner personally killed the two agents, the petitioner's guidelines were appropriate for the offense. The hearing examiner recommended no change in the fifteen-year reconsideration and in a decision above the guidelines due to petitioner's involvement as a co-conspirator or as an aider and abettor in the murder of two federal agents. Id., Ex. O-2.

A second hearing examiner reviewed the case and referred it the Commission's legal office for review. The legal officer determined the first hearing officer had exceeded the scope of review for a statutory interim hearing. The legal officer further found no basis for any change in the decision to provide a fifteen-year reconsideration hearing. The second hearing examiner adopted that opinion, and the National Commissioners agreed with the recommendation. Id., Ex. T.

Petitioner appealed to the full Commission, which affirmed the fifteen-year reconsideration. The Commission recognized the absence of direct evidence that petitioner personally executed the victims but found there was adequate circumstantial evidence, under the applicable standard of the preponderance of the evidence, to establish petitioner's personal participation in the crimes. While the Commission reached the conclusion that petitioner was the party who executed the agents at close range, it noted that, even if it viewed petitioner as an aider and abettor, it would find no difference in culpability. The Commission also found petitioner's release would be contrary to public respect for the law, as contemplated by 18 U.S.C. § 4206(a). Id., Ex. V.

In May 1998, the Commission held a second statutory interim hearing. The hearing examiner considered petitioner's arguments and his recent record of clear conduct but determined that no new information warranted a change in the recommended fifteen-year reconsideration hearing. Id., Ex. W. On review, the National Commissioners concurred with this decision. Id., Ex. Y.

Petitioner appealed to the full Commission, contending the Commission had failed to consider his medical condition and his release planning. Id., Ex. Z. The Commission declined to modify the recommendation, finding petitioner's medical condition did not merit release and that the seriousness of the crimes involved and petitioner's refusal to accept responsibility for the criminal conduct militated against parole. Id., Ex. AA.

In the present action for habeas corpus review, petitioner

contends: (1) the denial of parole is erroneous and arbitrary and capricious because the information upon which the Commission relies is contradicted by the government's admission that it cannot establish the identity of the person who shot the two agents; (2) the Commission's decision to conduct a fifteen-year reconsideration hearing is based on incorrect information and discriminatory factors, and therefore is unlawful; (3) the application by the Commission of rules and regulations revised after petitioner's conviction violated ex post facto principles; and (4) the Commission's failure to grant parole in light of petitioner's medical condition constitutes arbitrary and capricious action and cruel and unusual punishment.

Discussion

Standard of review

It is long settled in the Tenth Circuit that "[j]udicial review of Parole Board decisions is narrow. The standard of review of action by the Parole Commission is whether the decision is arbitrary and capricious or is an abuse of discretion." Dye v. United States Parole Commission, 558 F.2d 1376, 1378 (10th Cir.1977).

Under this standard, a court reviewing a determination by the Commission should determine only whether the information relied on by the Commission provides an adequate factual basis for its decision. The rational basis standard does not require the Commission to show that a preponderance of the evidence, or substantial evidence supports its determinations. Lewis v. Beeler, 949 F.2d 325, 332 (10th Cir.1991)(quoting Misasi v. United States

Parole Comm'n, 835 F.2d 754, 758 (10th Cir.1987)). The reviewing court may not reweigh the evidence, make independent determinations of credibility, or otherwise substitute its judgment for that of the Commission. Fiumara v. O'Brien, 889 F.2d 254, 257 (10th Cir.1989).

The Commission's decision to deny parole

The Commission's Notice of Action dated July 12, 1996, found there was sufficient circumstantial evidence to establish that petitioner was personally responsible for the murders of the two federal agents. The Commission specifically cited trial testimony that a damaged AR-15 rifle later recovered in Wichita, Kansas, was the murder weapon; that petitioner failed to provide any detailed account of his own actions beyond the admission he fired on the agents from a distance; that trial testimony reflected that Norman Brown saw petitioner firing an AR-15 after shooting began at the Jumping Bull compound, that Michael Anderson saw petitioner at the agents' vehicles with an AR-15, and that William Draper heard petitioner discuss details of the murders the evening following the shooting; that no witness saw any other party fire an AR-15 at the agents' cars or near the cars with an AR-15; that the agents were killed with high-velocity ammunition that no other weapon used that day could have fired; that a shell found in Agent Coler's car had an ejection mark matching the AR-15 recovered in Wichita; that petitioner had a personal motive for the murders due to his failure to appear for a murder trial in Wisconsin; and that Agent Coler's service weapon was recovered in Oregon from a vehicle in which petitioner was riding and that the weapon was found in a bag on

which petitioner's fingerprint was found. Finally, the Commission found that even if it were to conclude petitioner was an aider and abettor, it would make no different finding concerning his culpability: petitioner would be as guilty as a principal, and he would be concealing the identity of the shooter. Ex. V.

All of the factors cited by the Commission are supported by the published decisions entered in petitioner's criminal case and post-conviction actions.[1] The convictions remain valid, and the Commission's determinations are compatible with the reasoning of the Eighth Circuit in the decisions. The court concludes the reasons identified by the Commission's decision are sufficient to satisfy the quantum of "a rational basis in the record for the Commission's conclusions." Misasi v. United States Parole Comm'n, 835 F.2d at 758.

Imposition of fifteen year reconsideration

Petitioner next alleges the Commission's decision to conduct a fifteen-year reconsideration in his case was based upon erroneous information and mistakes of law. He specifically challenges the

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[1] See United States v. Peltier, 800 F.2d 772, 779 (8th Cir. 1986)(testimony of Norman Brown and absence of testimony that anyone but petitioner was seen firing an AR-15 at the agents' cars or near them with an AR-15); United States v. Peltier, 585 F.2d 314, 319-20 (8th Cir. 1978)(testimony of Michael Anderson, autopsy determinations that agents were shot with a high-velocity weapon and noting petitioner's AR-15 was "the highest velocity weapon fired that day," petitioner's reason to believe agents were looking for him due to his failure to appear, testimony of William Draper, and recovery of Agent Coler's service revolver).

Commission's evaluation of an FBI teletype dated October 2, 1975,[2] and the Commission's belief that petitioner was the individual who fired the final, point-blank shots that killed the two agents.

The Commission's Notice of Action dated February 1, 1994, discussed petitioner's disciplinary reports, his salient factor score, and the applicable guidelines. The Commission determined that a decision of more than 48 months above the minimum guidelines was appropriate based on its determination that petitioner was involved "in an ambush of two federal officers. After the officers were incapacitated by gunshot wounds, [petitioner] participated in the premeditated and cold blooded execution of those two officers." Ex. L.

The Commission did not accept petitioner's assertions of error concerning the degree of his involvement in the deaths of the agents, and petitioner continues here to advance his claims that there is a lack of evidence that he fired the final shots, based upon an October 2, 1975, teletype produced by the FBI concerning the cartridge recovered from Agent Coler's trunk and an alleged concession by the prosecution that it could not prove who killed the two agents.

This court, however, may neither reweigh the evidence nor substitute its judgment for that of the Commission, and it must be

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The teletype provides, in part: RECOVERED .223 CALIBER COLT RIFLE RECEIVED FROM SA ____, BATF, CONTAINS DIFFERENT FIRING PIN THAN THAT IN RIFLE USED AT RESMURS [reservation murders] SCENE.

noted that the points petitioner raises here were litigated extensively, in a different context, before the trial court and on appeal to the Eighth Circuit and determined to be without sufficient force to undermine petitioner's conviction.

The October 1975 FBI teletype was considered at length by the Eighth Circuit on appeal from the denial of petitioner's motion for a new trial, and that court determined the evidence was insufficient to require a new trial. See United States v. Peltier, 800 F.2d 772 (8th Cir. 1986)(finding it was possible, but not probable, that petitioner would have been acquitted had the jury been aware of the teletype evidence) and Peltier v. Henman, 997 F.2d 461 (8th Cir. 1993)(agreeing the prosecution made no admission that it had abandoned the alternative theory that petitioner fired the final shots).

Where the federal courts, after considering evidence and argument, have resolved the exact claims advanced by a petitioner and the Commission adopts a compatible determination, this court cannot find there is no rational basis for the decision reached by the Commission. The court therefore concludes the Commission's determination that petitioner fired the final shots may not be disturbed under the narrow standard of review which applies in this action.

Ex post facto considerations

Petitioner contends the decision in his case, which is based upon current parole policy, violates ex post facto principles.

In Article I, § 9, Clause 3, the Constitution provides, "No Bill of Attainder or ex post facto law shall be passed."

The Tenth Circuit recently summarized the ex post facto analysis which applies to alleged retroactive change in parole laws as follows:

> Th[e] [ex post facto] clause "is aimed at laws that retroactively alter the definition of crimes or increase the punishment for criminal acts." Cal. Dep't. of Corr. v. Morales, 514 U.S. 499, 504, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995)(internal quotations and citations omitted). Two critical elements must be present for a law to fall within the ex post facto prohibition: "first, the law must be retrospective, that is, it must apply to events occurring before its enactment; and second, it must disadvantage the offender affected by it." Miller v. Florida, 482 U.S. 423, 430, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987)(internal quotations and citations omitted).
>
> The Supreme Court has rejected the argument "[t]hat the Ex Post Facto Clause forbids any legislative change that has any conceivable risk of affecting a prisoner's punishment." Morales, 514 U.S. at 508. The Ex Post Facto Clause was never intended to result in judicial "micromanagement of an endless array of legislative adjustments to parole and sentencing procedures..." Id. Instead, The Court has consistently held that "the question of what legislative adjustments will be held to be of sufficient moment to transgress the constitutional prohibition *must* be a matter of degree." Id. at 509 (internal quotations and citations omitted, emphasis in original). "Retroactive changes in laws governing parole of prisoners, in some instances, may be violative" of the prohibition against ex post facto laws, Garner v. Jones, 529 U.S. 244, 250, 120 S.Ct. 1362, 146 L.Ed.2d 236 (2000), but the controlling inquiry is not whether the law is retroactive, but "'whether it produces a sufficient risk of increasing the measure of punishment attached to the covered crimes.'" Morales, 514 U.S. at 509 (footnote omitted); see also Lynce v. Mathis, 519 U.S. 433, 444, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997). When the amendment creates only "the most speculative and attenuated possibility" of increasing the measure of punishment, it is "insufficient under any threshold" to violate the Ex Post Facto Clause." Morales, 514 U.S. at 509.

Henderson v. Scott, 260 F.3d 1213, 1215-16 (10th Cir. 2001).

It is uncontested that, at the time of the murders for which petitioner was convicted, parole decisions were made by the United States Board of Parole. The Board used a salient factor score, based upon offense severity and the likelihood of recidivism, to determine guidelines for release. However, decisions outside the guidelines could be made for good cause. Federal law provided the Board with considerable discretion:

> If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.
>
> [....]
>
> 18 U.S.C. § 4203(a).

Following the 1995 statutory interim hearing, the Commission entered an order that stated, in part, that petitioner's release would promote disrespect for the law, citing 18 U.S.C. § 4206(a). Petitioner asserts the Commission's reliance on that section, enacted in 1976, violates ex post facto principles.

After a review of the record, the court is persuaded petitioner cannot establish that he has been disadvantaged by the modifications in the parole regulations since the time of his offense. It is clear that federal parole authorities have had broad discretion at all times and that petitioner has no entitlement to release.

Parole guidelines are flexible, and because the Commission may use discretion in the application of the guidelines, courts

reviewing similar challenges have determined the guidelines are not laws subject to an ex post facto analysis. See Resnick v. United States Parole Commission, 835 F.2d 1297, 1301 (10th Cir. 1987)("we note that the decided weight of authority is that guidelines of this sort, being guidelines only, are not subject to the ex post facto prohibition")(citations omitted).

The court likewise sees no significant difference between the provisions of 18 U.S.C. § 4203(a), which was in effect at the time of the offense and allowed for release only where the parole authority found it to be compatible with "the welfare of society," and 18 U.S.C. § 4206(a)(1), which required the Commission to consider whether release would promote disrespect for the law or otherwise jeopardize the public welfare.

In Resnick, the Tenth Circuit considered whether a denial of parole on the ground that release would "depreciate the seriousness of his offense behavior," as set out 18 U.S.C. § 4206(a)(1), was contrary to ex post facto principles because, at the time of the petitioner's federal convictions, 18 U.S.C. § 4203 was in effect and did not contain that language. The court found no disadvantage to Resnick, stating, "The enormity or magnitude of the offenses which form the basis for a prisoner's incarceration has always been a basis for denying parole, notwithstanding guidelines." 835 F.2d at 1300.

This court finds the reasoning of Resnick compelling and concludes the provisions of the predecessor statute, 18 U.S.C. § 4203, and 18 U.S.C. § 4206 are essentially congruent. The court

therefore finds no merit in petitioner's claim that he was disadvantaged by the Commission's determination under 18 U.S.C. § 4206 that his release would "promote disrespect for the law."

Medical condition

Finally, petitioner contends he is entitled to parole based upon his medical condition, an immobility of the jaw, which limits dental care and thus renders him susceptible to certain other conditions.

Both federal statute and regulation require the Commission to consider the offender's physical condition, where information is available and relevant. 18 U.S.C. § 4207(5) (reports of physical examination to be considered); 28 C.F.R. § 2.19(a)(5)(same). A prisoner's medical circumstances, however, are only one factor to be weighed by the Commission, and "poor health, in and of itself, does not entitle an offender to early parole or release from incarceration." Cerullo v. Gunnell, 586 F.Supp. 211, 213 (D. Conn. 1983).

While petitioner contends he may suffer serious conditions in the future due to his jaw condition, he has not established any basis for release on parole. To the extent petitioner claims he has received inadequate medical care, he may present his claim in a civil rights action.

Conclusion

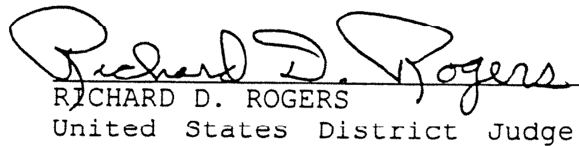
For the reasons set forth, the court finds no basis to grant habeas corpus relief.

IT IS THEREFORE ORDERED the petition for habeas corpus is dismissed and all relief is denied.

Copies of this Memorandum and Order shall be transmitted to the parties.

IT IS SO ORDERED.

DATED: This 26th day of September, 2002, at Topeka, Kansas.



RICHARD D. ROGERS
United States District Judge