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.	)	Civil No.

VERIFIED PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner Leonard Peltier, by and through his undersigned attorneys, for his Verified Petition for a Writ of Habeas Corpus, states as follows.

INTRODUCTION

1. Leonard Peltier is a federal prisoner serving two consecutive life sentences at the United States Penitentiary, Leavenworth, Kansas, in connection with the 1975 deaths of two agents of the Federal Bureau of Investigation on the Pine Ridge Indian Reservation in South Dakota.

2. Despite an almost perfect record since 1979, petitioner has now been incarcerated for 276 months in connection with these offenses. This is significantly longer than the time at which a prisoner with a good record would normally have been granted parole under the regulations existing both at the time of the offense and the current regulation issued by the United States Parole Commission (the "Commission"). See 28 C.F.R. §2.20. Nevertheless, the Commission motivated by animus and self interest has repeatedly arbitrarily stated that it will not even

reconsider Mr. Peltier's release on parole until December, 2008, a date six years after the current date set by Congress for abolition of the Parole Commission.

3. The Commission's current regulations require it to identify the reasons supporting its decision to delay Mr. Peltier's parole so many years in excess of the guidelines. See 28 C.F.R. §2.13 (d). The only reasons articulated by the Commission are arbitrary, capricious, erroneous, unsupported by the evidence, and completely inconsistent with the position the United States has taken in judicial proceedings concerning Mr. Peltier's conviction.

4. In addition, the Commission failed to give adequate weight in considering Mr. Peltier's parole to danger, chronic and deteriorating physical conditions he suffers that cannot adequately be treated medically while he is incarcerated.

5. Mr. Peltier's continued incarceration -- and the failure of the United States to release him on parole -- is based on animus and cites erroneous information. Continued imprisonment is not supported by the reasons given by the Commission. The Commission's denial of parole violates the law, is an abuse of discretion, arbitrary and capricious, discriminatory, inconsistent with the Commission's own regulations, a violation of Mr. Peltier's Fifth Amendment right to Due Process of Law and Equal Protection of the Laws and constitutes cruel and unusual punishment in violation of the Eighth Amendment of the Constitution of the United States. The regulatory authority

under which the Commission purports to act and its decisions thereunder in ordering his further detention violates the ex post facto clause of Article I, Section 9 of the Constitution.

PARTIES

6. Petitioner is a Native American of the Turtle Mountain Chippewa and Lakota Sioux Tribes who was born, raised and educated at Indian Schools in North Dakota. From 1970 until his 1976 arrest in Canada, he was active in the American Indian Movement ("AIM") and participated regularly in political and traditional cultural activities, principally on the Pine Ridge and Rosebud Reservations in South Dakota. Petitioner is currently confined in the United States Penitentiary at Leavenworth, Kansas.

7. Respondent Joe W. Booker, Jr. is employed by the Bureau of Prisons, United States Department of Justice, as the Warden of the United States Penitentiary at Leavenworth, Kansas. As Warden, Mr. Booker has physical custody of petitioner.

JURISDICTION AND VENUE

8. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1651, and 2241, and the Constitution of the United States. Venue is proper in this Court because Mr. Peltier is incarcerated in this District.

MR. PELTIER'S CONVICTIONS

9. On June 26, 1975, Agents Jack Coler and Ronald Williams of the Federal Bureau of Investigation, ("FBI") were murdered during a major armed confrontation and shootout at the Pine Ridge

Reservation in South Dakota. The agents had been wounded by long-range gunfire during a shootout between large numbers of Native Americans and federal and state law enforcement officers. Agents Coler and Williams were killed by shots fired at close range after the agents had been incapacitated by wounds received earlier during the shootout.

10. On or about November 25, 1975, four individuals were indicted for the murders of Agents Coler and Williams. They were Darelle Dean Butler, Jimmy Eagle, Leonard Peltier and Robert Robideau. The government later dismissed all charges against Jimmy Eagle.

11. During the summer of 1976, defendants Butler and Robideau were tried for the murder of Agents Coler and Williams and acquitted by a jury in Cedar Rapids, Iowa.

12. Following his arrest in Alberta, Canada on February 6, 1976 petitioner was extradited from Canada to the United States on December 18, 1976, to stand trial for the murder of Agents Coler and Williams. The United States obtained the extradition by presenting false affidavits prepared by agents of the FBI who knew they were not true which were signed by a woman named Myrtle Poor Bear whom the FBI knew was incompetent and which falsely stated that she saw Leonard Peltier kill Agents Coler and Williams.

13. In March and April, 1977, petitioner was tried before a jury in Fargo, North Dakota, for the murders of the agents. There was no eye-witness testimony or other direct evidence as to

who shot the two wounded agents at close range. The United States presented evidence, through the testimony of FBI Special Agent Evan Hodge, about a burnt and broken .223 caliber AR-15 rifle, hereinafter the "Wichita AR-15," which was later recovered from a Mercury station wagon which burned near Wichita, Kansas, nearly three months after the shoot-out. It argued the Wichita AR-15 was the murder weapon. In the station wagon were several AIM members from Pine Ridge including Robert Robideau, but not petitioner. The Wichita AR-15 rifle left extractor mark impressions which matched those on a .223 caliber shell casing found in the trunk of FBI Agent Coler's car near the bodies of the two agents. The government argued that this evidence linked petitioner to the crimes because Mr. Peltier was identified by two witnesses as carrying an AR-15 rifle on the day the agents were killed, that there was only one AR-15 rifle in the possession of Native Americans in the area that day and the Wichita AR-15 was that rifle.

14. On April 18, 1977, the jury returned verdicts of "guilty" on a verdict form containing only one place for entry of a verdict for the death of each agent thus requiring the jury to give one verdict covering charges both for murder and for aiding and abetting murder. The single verdict made it impossible to know which theory the jury convicted on. However, the government's principal argument was clearly that Leonard Peltier personally shot and killed the agents. On June 1, 1977 the Court sentenced Mr. Peltier to two consecutive life sentences. The

conviction was affirmed by the United States Court of Appeals for the Eighth Circuit on September 14, 1978. See United States v. Peltier, 585 F.2d 314 (8th Cir. 1978). A subsequent conviction in 1980, for escape from a federal prison and being a felon in possession of a firearm, which was affirmed on appeal after having initially been remanded for an error, deemed harmless on rehearing, in denying defendant adequate cross-examination of a government witness, see U.S. v. Peltier, 693 F.2d 96 (9th Cir. 1982), has not been the subject of any further legal proceedings and has been fully accounted for in the discussion herein of petitioner's eligibility for parole.

PREVIOUS HABEAS PROCEEDINGS

15. In 1981, petitioner received evidence through a Freedom of Information Act proceeding which revealed that the government had withheld significant exculpatory evidence. Among such important exculpatory evidence, Mr. Peltier learned that the government had withheld an October 2, 1975 teletype from FBI Agent Hodge, who was stationed in the FBI Laboratory, to the FBI Rapid City field office which stated:

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

16. By petition for a writ of habeas corpus, Mr. Peltier moved for a new trial on the grounds that this evidence together with other evidence was improperly withheld by the government at the trial that led to his convictions.

17. The government defended against Mr. Peltier's motion

for a new trial and on appeal, in part, by arguing that exculpatory evidence relating to the .223 caliber Colt AR-15 rifle and the shell casing found in the trunk of Agent Coler's car was of marginal importance to the case because Mr. Peltier was subject to conviction as an aider and abettor in the absence of evidence that he had fired the close-range shots that killed Agents Coler and Williams.

18. In upholding the District Court's denial of the new trial motion in 1986, the Eighth Circuit found that the government presented its case at trial on the theory Mr. Peltier was the actual shooter:

> The record as a whole leaves no doubt that the jury accepted the government's theory that Peltier had personally killed the two agents, after they were seriously wounded, by shooting them at point blank range with an AR-15 rifle (identified at trial as the Wichita AR-15)." U.S. v. Peltier, 800 F.2d 772 at 773 (1986).

It then pointed in footnote 1 to six places in the government's summation to support its holding, concluding with the last statement "... we proved that he went down to the bodies and executed those two young men at pointblank range.... TR at 5019."

19. Despite the Court of Appeals finding that the jury accepted the government theory that petitioner personally killed the agents, the government attorney during the October 15, 1985 oral argument before the Eighth Circuit had stated unequivocally that :

> The case against Mr. 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.

20. In an earlier opinion the Court of Appeals had found the withheld evidence raised questions "regarding the truth and accuracy of Hodge's testimony." United States v. Peltier, 731 F.2d 550, 554 (1984). The Court reiterated this finding in its 1986 opinion referring to "the newly discovered evidence indicating Hodge may not have been telling the truth...." and to "the inconsistencies casting strong doubts upon the government's case." United States v. Peltier, 800 F.2d 772, 777, 779-80 (8th Cir. 1986). It further found there was more than one AR-15 in the area at the time. Id. 800 F.2d at 779. Even Agent Hodge testified at least 3 AR-15s were involved at the scene. However, because the Court of Appeals could not conclude that the jury "probably" would have acquitted had the teletype been disclosed and the presence of more than one AR-15 been made clear to the jury, which was the standard required for reversal by United States v. Bagley, 478 U.S. 667 (1985), the Court held only that "There is a possibility that the jury would have acquitted Leonard Peltier had the records and data improperly withheld from the defense been available" and declined to set aside his conviction. 800 F.2d at 779-800.

21. In 1990, Mr. Peltier brought a second habeas corpus

action alleging, in part, that the government had misled the jury concerning petitioner's role in the shoot out, concealed evidence concerning the Wichita AR-15 and of the presence of more

than one AR-15 at the scene and failed to present evidence sufficient to prove its "direct shooting" theory and could not now change to an "aiding and abetting" theory in order to sustain the conviction. At the very beginning of his argument on appeal in the U.S. Court of Appeals for the Eighth Circuit on November 9, 1992, government appellate counsel, who also tried the case, argued trial evidence showed the presence of other AR-15s at the crime scene, stating:

> The first point that I would like to very briefly touch on, Mr. Clark mentioned, and I think simply a misstatement of the trial that there was no evidence presented and it was suppressed as to other AR-15s at the scene....

Mr. Peltier's attorney (Mr. Clark) responded at the beginning of his reply: "... if I'd misrepresented here then listen to what he said in his summation at the trial" where the government counsel (Mr. Crooks) argued

> There is only one AR15 in the group. There is no testimony concerning any other AR15 at Tent City or at the crime scene or anywhere else in the area, only one AR15, and who had it, Leonard Peltier. There isn't even any other AR15 or .223 shell found, accounted for, just about every shell found... TR4995.

It was not until after "strong" doubt was cast on the "convicting evidence," named the AR-15 shell casing, that government counsel said that they could not prove who shot the agents. See, U.S. v. Peltier, 800 F.2d at 779. The government has repeated this admission unequivocally in Court and before parole hearing examiners on several occasions.

22. During the November 9, 1992, oral argument before the United States Court of Appeals for the Eighth Circuit, the government repeatedly admitted in unequivocal language that it did not prove and disclaimed the ability to prove that Mr. Peltier was the person who

shot the agents at close range. The government attorney conceded:

> 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.
>
> * * *
>
> What I mean is we did not, we did not have any direct evidence that one individual, as opposed to another one pulled the trigger... and did the coup-de-grace... we think he did the actual coup-de-grace, but we did not prove it.
>
> * * *
>
> 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 Mr. Peltier was the one that squeezed off the final rounds.

23. The government conceded that the evidence was "sketchy" on the subject of who actually shot Agents Coler and Williams at close range. See Peltier v. Henman, 997 F.2d 461, 469 (8th Cir. 1993). No circumstantial evidence filled the gap in the evidence to establish who the actual shooter was. Fingerprints of another person on the dead agents' car, and the later possession of the Wichita AR-15 by persons other than petitioner might suggest one of the other persons indicted, or some other person, but not petitioner was the shooter, but that too would be speculation. No witness saw the shooting, or saw any one near the agents when shots were fired and there is no physical evidence identifying

anyone as the close up shooter.

U.S. Parole Procedures Since Petitioner's Offense

24. At the time of petitioner's offense in 1975 the U.S. Board of Parole functioned under a reorganization order of 1973 through five regional offices, each with approximately 20 employees and a budget in excess of $2,000,000. Hearings were conducted by two officers. All prisoners were eligible for parole after serving fifteen years at the maximum. The bulk of the parole policy guidelines then applicable had been adopted by the Board and published in the Federal Register on March 10, 1975. Two factors, the seriousness of the offense which was divided into six levels of severity, and the likelihood of recidivism which was measured by four predictive factors, combined into a "Salient Factor Score," were used to determine the individual guideline level for parole release. Guidelines applicable to offenses of "greatest" severity with the highest likelihood of recidivism began at 65 months, but were otherwise unspecified. They started at the maximum of 25-65 months applicable for offenses of the preceding level of "very high" severity. They made petitioner eligible for parole many years before the 200+ month aggregate guideline computation by the parole decision on December 11, 1995. Decisions outside the guidelines could be made for good cause based upon written reasons specifically applicable to the case.

25. Between the time of his offense in 1975 and his sentencing in 1977, the Parole Commission and Reorganization Act

of 1976 became effective. It renamed the Board of Parole as the United States Parole Commission. Under this act all prisoners became eligible for parole after serving ten years at

the maximum. The Act required the promulgation of explicit guidelines. It required that reasons for denying parole be provided a prisoner in writing. Decisions outside the guidelines could be made for "good cause" but specific written reasons for departure were required. The Act required review of parole decisions at not less than 24 month intervals after the initial hearing. It mandated a two level appeal system. Guidelines applicable to the most serious offenses, "Greatest II" severity, had a lower term ranging from 52 to 100 months and no upper limit.

26. In 1977, the Parole Commission modified the permissible grounds for a prisoner's appeal from denial of parole to make them more specific. Among the specific grounds set forth were (1) that a decision outside the guidelines was not supported by the reasons stated, (2) that especially mitigating circumstances justify a different decision, (3) that a decision was based on erroneous information and that actual facts justify a different decision, and (4) that there are compelling reasons why a more lenient decision should be rendered on the grounds of compassion. The Commission also initiated a procedure which provided for the designation of a "presumptive parole" release date to inform the prisoner at the beginning of his sentence of a date at which it was then presumed parole would take place to "remove much of the

dysfunctional uncertainty and anxiety surrounding the parole process." Petitioner was not informed of a presumptive parole date, as required, and has not been to this date.

27. In August 1981 the Parole Commission revised the Salient Factor Score then consisting of six items to include ten items for allegedly greater predictive validity and scoring reliability. Guidelines were generally increased. Petitioner was not evaluated.

28. In January 1983, the Parole Commission further revised its offense severity scoring system using the format of the proposed revision of the federal criminal code to make it more comprehensive and to reflect changes in the Commission policies for particular offenses, usually increasing the guideline range. The lower limit of the guidelines for murder were raised to a range of 100 to 180 months. The upper limits remained unspecified.

29. The Comprehensive Crime Control Act of 1984 replaced the existing sentencing and parole system under which federal judges had exercised broad discretion to impose indeterminate sentences and the Parole Commission had generally determined the time of a defendant's release under a guideline system. The new system under the 1984 Act provided for determinate sentences to be imposed with little judicial discretion pursuant to new sentencing guidelines and without parole. The Act created a United States Sentencing Commission and provided for the abolition of the Parole Commission five years from the effective.

date of the sentencing guidelines. The new guidelines were to be promulgated by the Sentencing Commission, to become effective on November 1, 1987. The Parole Commission

was to continue in existence during the five year transition period to handle consideration of parole eligibility for defendants convicted of offenses committed before November 1, 1987, under the same terms and conditions as before. The Parole Commission was to set a release date for inmates who would be in prison when the transition period expired sufficiently in advance to permit consideration of an appeal of the release date under Commission procedures. The Act also eliminated the two tier appeal process, providing for only a single appeal. The Parole Commission did not set a release date for petitioner and has not to the present time done so.

30. In 1986, legislation eliminated the requirement for five regional parole offices and authorized use of a single hearing examiner for parole hearings with the hearing record to be reviewed by a second examiner.

31. The number of hearings conducted by the Parole Commission declined from 20,465 in fiscal year 1988, the first full year after the November 1, 1987 effective date of the sentencing guidelines, to 16,619 for fiscal year 1989, a decline of more than 20% in the first year.

32. The Judicial Improvements Act of 1990 extended the life of the Parole Commission by an additional five years to November 1, 1997 because the Comprehensive Crime Control Act of 1984 had

failed to make adequate provision for handling cases in which parole provisions of earlier laws would be respected and effectively applied, as required by the ex post facto clause of the U.S. Constitution.

33. Parole Commission hearings for federal offenders for fiscal year 1990 declined to 12,665, nearly 25% below fiscal year 1989. In 1991, the Parole Commission closed two of its five regional offices. By fiscal year 1993 parole hearings were down to 6,769, less than 1/3 the number during the first year after parole was abolished five years earlier. Petitioner had his first parole hearing in December 1993. The Commission began using a single hearing examiner in parole hearings in 1994.

34. After July, 1993, 28 CFR §2.20 which set forth "Parole policy guidelines: Statement of General Policy" was amended to include a footnote which read in part:

> fnl Note: For Category Eight, no upper limits are specified due to extreme variability of the cases within this category. For decisions exceeding the lower limit of the applicable guideline category by more than 48 months, the Commission will specify the pertinent case factors upon which it relied in reaching its decision, which may include the absence of any factors mitigating the offense. This procedure is intended to ensure that the prisoner understands that individualized consideration has been given to the facts of the case, and not to suggest that a grant of parole is to be presumed for any class of Category Eight offenders. However, a murder committed to silence a victim or witness, a contract murder, a murder by torture, a murder of a law enforcement officer to carry out an offense, or a murder committed to further the aims of an on-going criminal operation, shall not justify a grant of parole at any point in the prisoner's sentence unless there are compelling circumstances in mitigation. Such aggravated crimes are considered, by definition, at the extreme high end of Category Eight offenses. For these cases, the

> expiration of the sentence is deemed to be a decision at the maximum limit of the guideline range.

This note reflects a totally new concept of parole release standards for persons sentenced to life imprisonment which was fundamentally new and different from those in existence when petitioner was sentenced and influenced the Commission's decision to deny parole and reconsideration until December 2008.

35. By 1996 all regional offices of the Commission were closed and all functions of the Commission were conducted from its headquarters in Maryland. Congress enacted the Parole Commission Phaseout Act of 1996, extending the life of the Commission to November 1, 2002, providing for the reduction in the number of Commissioners to two by December 31, 1999 and one by December 31, 2001. The Commission had a total of 48 positions by the end of 1996, down from 145 in 1992. The number of Commissioners had declined to three. Appointments of new Commissioners and personnel of the Commission failed to conform to the requirements of the Appointments Clause, Article II, Section 2, cl. 2, of the Constitution.

36. The National Capital Revitalization And Self-Government Improvement Act of 1997 assigned all of the functions of the Board of Parole of the District of Columbia which was abolished effective August 5, 2000, to the U.S. Parole Commission and authorized an increase in the number of commissioners to five. It is anticipated that a total of 12, 000 parole cases will be transferred from the D.C. Board to the U.S. Parole Commission. These cases involve significantly different types of offenses,

statutory provisions and parole procedures and practices from federal cases before the U.S. Parole Commission. At petitioner's interim parole hearing in May an officer from the D.C. Parole Board sat in, but did not formally participate, in order to become familiar with U.S. Parole Commission hearing procedures.

37. The Parole Commission Phase-Out Act of 1996 required the Attorney General to report annually commencing in May 1998 as to whether it is more cost effective to continue the Parole Commission as an independent agency in its present form, or assign its functions elsewhere. On April 20, 1998, the Attorney General reported that because of the assignment of parole functions for the District of Columbia to the U.S. Parole Commission it was more cost effective to maintain the U.S. Parole Commission as an independent agency in its present form.

PETITIONER'S PAROLE PROCEEDINGS

38. The Parole Commission, as it was then constituted, first considered petitioner's case in December 1993, after he had been confined for a total of 214 months (17 years, 10 months). In a decision issued on February 1, 1994, the Commission noted that Mr. Peltier's "aggregate guideline range [for release on parole] is 188+ months to be served." Even though Mr. Peltier had already served significantly more than 188 months, the Commission determined that he would not be considered for parole for fifteen years, or until December, 2008, 180 months away and after a total imprisonment of 394 months, more than twice the 188

month+ guideline. The decision was motivated by animus toward petitioner and self interest. It was arbitrary, capricious and an abuse of discretion.

39. As was then required by 28 C.F.R. §2.13(d), the Commission set forth its specific reasons for delaying Mr. Peltier's consideration for parole more than sixteen years past the guideline time for parole release in two short sentences.

> After review of all relevant factors and information presented, a decision more than 48 months above the minimum guideline range 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.

40. These findings were the sole basis identified by the Commission at that time for delaying Mr. Peltier's parole so many years beyond the normal guidelines. They are not supported by the trial record or evidence before the Commission. There is no evidence to support the claim that Mr. Peltier was involved in an ambush of the FBI agents, or that there was an ambush. The ambush theory was dropped by the U.S. after the acquittals in the Cedar Rapids trial in 1976. The evidence shows the Indians reacted to an intrusion onto their property by federal agents and a shootout followed which involved hundreds of Indians and federal and state officers. These Parole Commission findings are completely inconsistent with the government's repeated representations that it can not and did not prove that Mr. Peltier committed the close-range executions of Agents Coler and Williams. Having sought to justify its failure to disclose

exculpatory evidence at trial on the theory that the evidence was of limited value because Mr. Peltier was subject to conviction as an aider and abettor, the United States cannot now deny Mr. Peltier parole on the grounds that he was, in fact, involved in the close-range executions.

41. The Commission arbitrarily reaffirmed its findings in "statutory interim proceedings" held in December 1995 to consider only whether a change of circumstances had occurred that warranted a different decision (28 C.F.R. §2.14) in Mr. Peltier's parole status.

42. At the hearing held on December 11, 1995 at the Leavenworth, U.S.P., FBI Special Agents in Charge of two field offices, Assistant U.S. Attorney Crooks who tried the case in 1976 and argued the last appeal in 1993 and the widow of one of the deceased FBI agents were present to oppose parole. A letter from the Director of the FBI to the Chairman of the Parole Commission opposing parole release was presented and read into the record. Opposition to parole by the Society of Former Special Agents of the FBI, Inc. was presented. Mr. Crooks also spoke in opposition to parole on behalf of his office, the Retired FBI and Federal Officers Association and the "widow of the second slain FBI Agent."

43. Mr. Crooks testified in the hearing claiming for the first time and contrary to the trial record that the deceased agents were at the scene in order to arrest Mr. Peltier and "for no other reason" and that Mr. Peltier's vehicle "was placed at

the location of the agents' murders" because "radio transmissions of the two agents monitored just prior to their deaths indicated that they were in pursuit of a red vehicle." There was no evidence the red car was petitioner's. Mr. Peltier owned an old green Ford. He borrowed a red and white van on occasion. Neither vehicle was placed at the scene. The record shows agents were looking for a person named Jimmy Eagle, not petitioner. FBI reports show that radio transmissions from Agent Williams shortly before his death on June 26, 1975 referred to Jimmy Eagle and the red pick-up he was following. Mr. Eagle had been seen by the FBI traveling in a red pick-up not a red and white van, the day before in the vicinity of the June Little Cabin on the Jumping Bull property. Mr. Peltier was informed of this and had no reason to believe agents were seeking him.

44. The hearing examiner "concluded after a review of the additional exculpatory evidence that a preponderance finding that Peltier actually executed the agents cannot be made." He stated the original 15 year period before reconsideration was based

> "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."

45. In his report the Hearing Examiner noted "As also discussed in the hearing summary previously, AUSA 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."

46. Thereafter the Parole Commission on July 12, 1996 decided the following:

> 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.... After careful examination of the evidence in the record, the Commission continues to be persuaded that you were, 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.... Although you are correct that the hearing examiner at your statutory interim hearing recommended a full reexamination of the facts, the examiner's recommendation was rejected by this Commission only after a careful review of the file persuaded the Commission that the arguments you presented were without merit.

47. The July 12, 1996 order of the Parole Commission to continue petitioner to December 2008 for reconsideration was based entirely on its findings concerning the nature of the offense and petitioner's "evident decision not to accept criminal responsibility." Its decision included the following erroneous information and mistakes of law:

a. The Commission after "carefully" examining the controversy surrounding the FBI teletype of October 2, 1975 held the "document does not negate the evidence that the .223 caliber shell casing recovered from Agent Coler's vehicle was ejected from the damaged AR-15 rifle recovered in Wichita, Kansas. The trial testimony concerning the likelihood that this AR-15 rifle was the weapon used to murder the F.B.I. agents continues to merit inclusion among the items of circumstantial evidence

probative of your guilt." Order p. 1, para. 2. This is directly contradicted by the FBI teletype which negates evidence the shell casing found in Agent Coler's car or any of the other AR-15 shell casings found at the scene, was fired by the Wichita AR-15 and that the Wichita AR-15 was fired at the scene because the rifle "contains different firing pin from that in the rifle used at Resmurs scene." Confronted by the Hodge report and evidence of other AR-15s at the scene the government argued that without such evidence linking petitioner to the murder scene, there remained evidence sufficient to support his conviction for aiding and abetting. The Commission has no more evidence than the prosecution provided it.

b. The Commission wrote "... you had a personal motive to murder the two FBI agents, because you had previously failed to appear for a murder trial in Wisconsin and you believed that the two FBI agents were coming to arrest you." Order, p. 2, para. 2. This was completely erroneous and revealed animus. The record shows the FBI had announced the day before it was looking for Jimmy Eagle. Petitioner was made aware of this. There was no evidence petitioner, whose presence at the Jumping Bull Compound was well known, had any reason to believe the FBI was looking for him and the record shows it was not. There is no evidence petitioner knew FBI agents were on the Jumping Bull Compound on June 26, 1975. If he had known of their presence and believed they were looking for him the only sensible thing to do would be flee, or surrender. The Commission also fails to note that when

petitioner was later returned to Wisconsin for trial he was acquitted.

c. Evidence noted by the Commission to support its conclusion taken from the Court of Appeals opinion in 1986 included that Norman Brown testified he saw petitioner firing an AR-15 after the shooting started at the Jumping Bull Compound, but from the tree line not near the death sites. Michael Anderson testified he saw petitioner with Darelle Dean Butler and Robert Robideau at the agents' vehicles with an AR-15, Decision, p. 2, para. 2, but he never saw, or heard shooting at that time. None of the evidence provides any circumstances sufficient to support conviction of petitioner for the close up murders, or that is any greater than circumstantial evidence concerning other persons, or that is sufficient to establish by a preponderance of the evidence that petitioner was the close-up shooter. The Commission's comment that evidence concerning other AR-15 rifles fired that day indicates these rifles were fired later, and at places from which direct aim could not have been taken at the murdered FBI agents, Decision, p. 2, para. 2, if true, does not in any way exclude their use as the murder weapon. The Wichita AR-15 was excluded as the weapon fired at the Resmurs scene by the October 2, 1975 teletype.

d. The Commission twice expressed its opinion that petitioner personally fired the close-up shots that killed the FBI agents despite the total absence of evidence to support it and the prosecution's admissions that the government did not know

and did not prove who shot the agents. It states: "... the Commission continues to be persuaded that you were, in fact, the individual who executed the two wounded FBI agents by firing upon them at point-blank range with an AR-15 rifle," (Decision, p. 2, para. 2), and "the Commission is persuaded that the greater probability is that you yourself fired the fatal shots." Decision, p. 2, para. 3. This is not only an improper function for the Commission, it reveals the Commission's animus by its insisting on stating what it cannot know from the trial record, even if it had possession of the record and examined it, which it did not. The U.S. prosecutor with all his sources conceded he did not prove and does not know who killed the agents. The Commission further reveals the impermissible nature of its clairvoyance by asserting that even if the evidence showed that petitioner only "aided and abetted the use of the above-mentioned AR-15 by another individual to execute the agents.... the Commission would find no difference in degree of culpability because an aider and abettor is as guilty as a principal, and because you would then be shielding the identity of the true murderer while at the same time demanding a parole." Order, p. 2, para. 3. The Commission insisted that an AR-15 that evidence originally withheld by the government proves was not used in the Resmurs is the murder weapon. The Commission also ignored the fact that evidence sufficient to support aiding and abetting need not relate to any weapon and the aider need not know who did the actual shooting. The Commission's statement that it would find

no difference in degree of culpability between the actual killer and someone who aided and abetted the murders, "because an aider and abettor is guilty as a principal" reveals a complete misunderstanding of the law and the role of the Commission in making release decisions. The Commission erroneously equates evidence held insufficient by a Court to overturn a conviction with evidence sufficient to deny parole. Order, p. 1, para. 2. This same error is implied in the later Commission statement that it "is not at liberty to disregard a judgment of conviction, and must conform its findings of fact to the jury verdict of murder with malice aforethought. Order, p. 2, para. 1. Its findings reveal both its animus toward petitioner and its conflict of interest. The Commission is on the threshold of being terminated and will not anger a power like the FBI, or work itself out of a job by releasing petitioner.

e. The Commission completely ignores the absence of evidence to show who the close-up shooter was. It completely ignores the wide range of differences in culpability between a person aiding and abetting murder and person committing murder. The culpability of a person who aids and abets may be negligible while the culpability of the murderer may be total. Its use of the phrases "not at liberty" and "must conform" conveys that the Commission is under the mistaken view that its "findings" are not findings of fact but are legally compelled conclusions and not the result of a weighing of the evidence.

f. The Commission repeatedly condemns petitioner for

failure to provide "a factually specific account of his actions on June 26, 1975 in relation to the deaths of the FBI agents." e.g. Decision, p. 1, para 3. It argues "You have therefore not explained how you could be guilty of either premeditated murder, or aiding and abetting the premeditated murders that took place at close range, without having in any way personally participate in them. Decision, p. 2, para 1. Petitioner has always denied any participation in the deaths of the agents. Petitioner is under no duty to explain why he is guilty and it is unlawful and unconstitutional for the Commission to condition petitioner's parole upon the making of such an admission. He can only properly state what he did. Petitioner has maintained that he did not "personally participate in" the close up murders, know of, or intend the close-up shooting of wounded agents, or even know it occurred until later informed. A wide range of lesser activity could readily be the basis for a conviction of aiding and abetting. The degree of culpability for such conduct could not possibly support denial of parole after serving a minimum guideline of as long as 200 months.

g. The Commission's conclusion that "Neither the state of relations between Native American militants and law enforcement at the Pine Ridge Reservation prior to June 16 [sic, should be June 26], 1975 nor the exchanges of gunfire between individuals at the Jumping Bull Compound and the law enforcement agents who arrived there during the hours after Agents Coler and Williams were murdered, explains or mitigates the crimes you committed",

again assumes petitioner was the close-up shooter. It also reveals the Commission's prejudice. More than sixty traditional Indian people had met violent deaths on the Pine Ridge Reservation between 1973 and June 1975. These were not Native American militants. There were at least scores of FBI and other police officers present around the Jumping Bull property before the FBI agents entered the compound in their car. And there is no evidence petitioner was the close-up shooter.

h. The Commission in concluding "Your release on parole would promote disrespect for the law in contradiction of 18 U.S.C. §4606(a)", Order, p. 3, para. 2, last sentence, relied on a criteria for release that was enacted into law the year after the murder of the agents. 18 U.S.C. §4206 was added by Public Law 94-233, §2, March 15, 1976, 90 Stat. 223. The application of the statute to petitioner's parole release violates the ex post facto clause of Article I, Section 9, and is too vague and indefinite to provide a standard for continuing imprisonment in violation of the Due Process Clause of the Fifth Amendment.

i. The Commission makes no mention of the excellent record maintained by petitioner for the past twenty years, or his major contributions in the field of human rights for which he has won numerous awards, and honors, including a nomination for the Nobel Peace Prize for the artistic skills he has developed that have made him an internationally known artistic painter.

THE MOST RECENT PAROLE PROCEEDING

48. The Commission held a further hearing to consider Mr.

Peltier's parole status in May, 1998. Mr. Peltier in requesting release on parole presented testimony and argument requiring parole release and relied on the failure of the government to offer any rational or supportable explanation for delaying reconsideration of his parole seventeen years beyond the guidelines established by the Commissions' own regulations.

49. At that hearing, Mr. Peltier also presented evidence that he suffers from immobility of his jaw that has been aggravated by unsuccessful major surgery which endangered his life and thereafter received inadequate treatment in the Federal Prison system. Mr. Peltier demonstrated that this physical condition makes it impossible to perform needed dental work, because he cannot open his mouth sufficiently to permit access to his teeth. Petitioner as a result risks infection, blood poisoning and complications from digestive disorders, ulcerative colitis, stomach ulcers and cancers of the digestive tract which endanger his health. Petitioner has not and cannot receive adequate treatment for his condition while incarcerated in the federal system.

50. On May 23, 1998, the Commission acting from animus and conflict of interest re-affirmed that Mr. Peltier would not be considered for parole until December, 2008. On October 2, 1998, the National Appeals Board of the Parole Commission preemptively affirmed this decision with the same purposes.

51. On information and belief, the Parole Commission did not have available to it and did not review petitioner's trial

record at any time.

52. Mr. Peltier has exhausted all administrative remedies available to him.

CLAIM ONE

53. The Commission's denial of parole to Mr. Peltier was illegal, clearly erroneous, arbitrary, capricious and unconstitutional because the information and reasons set forth by the Commission which it relied on as aggravating factors to support denial of parole to Mr. Peltier are not supported by the evidence and are contradicted by the government's repeated admissions that it did not know or prove who shot the agents.

CLAIM TWO

54. The Commission's decision to schedule its next parole release hearing date in December 2008 for petitioner which was fifteen years in the future and seventeen years in excess of the guidelines applicable to petitioner resulted from animus and conflict of interest, was based on erroneous information and impermissibly discriminatory factors, was contrary to law, clearly erroneous, arbitrary, capricious, unconstitutionally excessive, deprived Mr. Peltier of his liberty without due process of law, and denied him equal protection of the laws.

CLAIM THREE

55. After petitioner's offense in June 1975, the controlling statutes and the Parole Commission's rules, regulations and practices were frequently changed. The changes expanded authority to continue imprisonment for additional

periods of time and repeatedly altered standards for the exercise of Parole Commission discretion. These changes and altered standards unfairly acted to the disadvantage of prisoners, including petitioner, who were sentenced to life imprisonment for offenses committed before 1976 and for persons sentenced for the murder of law enforcement and investigative agents. The changes were motivated by a desire to punish such offenders after the date of the offense for which Mr. Peltier was convicted, and after statutory sentencing changes during his confinement, and changes in the statutes governing parole consideration, including parole abolition. The nature and quality of the rules, regulations, practices, personnel, administrative capacity, procedures and motivation of the Parole Commission have been changed repeatedly since petitioner's offense to more strictly constrain release on parole and to continue imprisonment of such prisoners. As a result of these changes Mr. Peltier has been imprisoned for a longer period of time than the law authorized at the time of his offense, or than he would have served if the changes in law had not been made. These changes in law, practice and procedure during the past twenty three years have deprived Mr. Peltier of his liberty without due process of law, denied him equal protection of the laws, and deprived him of the fair consideration for parole guaranteed by the law in existence when his offense was committed in violation of the ex post facto clause of Article I, Section 9, of the United States Constitution.

CLAIM FOUR

56. The failure of the Parole Commission to grant Mr. Peltier parole despite his medical condition and the known effects and danger to his health of continued confinement under the circumstances was clearly erroneous, ignored the especially mitigating circumstances of his physical condition and the compelling reasons warranting the grant of parole on the grounds of compassion, was arbitrary and capricious, was motivated by animus and conflict of interest, subjects petitioner to cruel and unusual punishment and threatens his life in violation of the Eighth and Fifth Amendments.

WHEREFORE, petitioner prays for relief as follows:

(1) For issuance of an order directing the respondent to show just and sufficient cause why a writ of habeas corpus should not issue releasing petitioner from respondent's custody and control;

(2) For an evidentiary hearing upon the merits of this petition;

(3) For the issuance of the writ of habeas corpus and other appropriate orders releasing petitioner from respondent's custody and control; and

(4) For such other and additional relief as the Court deems just and proper.

Dated: June 3, 1999

Respectfully submitted,

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Verification

I verify under penalty of perjury that the foregoing petition is true and correct.

Executed on June 3, 1999

_____

Ramsey Clark
Attorney for Petitioner
Leonard Peltier