02-3384

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

PETITION FOR REHEARING EN BANC

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STATEMENT REGARDING ORAL ARGUMENT
Oral Argument Requested

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INTRODUCTION AND STATEMENT OF WHY THE PANEL DECISION SHOULD BE HEARD EN BANC

By this Petition, Leonard Peltier ("Peltier") seeks en banc review of a Panel decision which affirmed the United States Parole Commission's ("Commission") denial of Peltier's request for parole and refused to even consider Peltier for parole until December 2008, at which point Peltier will have served double the normal time under federal guidelines.[1] The Panel's decision raises three issues of extreme importance which should be reviewed en banc and is inconsistent with prior decisions of this Court.

First, in the face of undisputed government misconduct in the prosecution of Peltier, the Panel wrote: "Much of the government's behavior at the Pine Ridge Reservation and in its prosecution of Mr. Peltier is to be condemned. The government withheld evidence. It intimidated witnesses. These facts are not disputed." (Decision at 18.) (Emphasis added.) Despite recognizing these undisputed facts, and despite recognizing the merit of Peltier's argument, the Panel nevertheless concluded it lacked authority to review the Parole Commission's refusal to consider the outrageous government behavior in its decision to deny Mr. Peltier parole.

The Panel's conclusion poignantly poses an extremely important issue as to what branch of government has authority to review undisputed government misconduct if the courts lack such authority. Even under the most minimal standard of review, courts are charged by the United States Constitution to scrutinize government misconduct which

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[1] The Panel's decision ("Decision") is attached hereto as Addendum A.

has unjustly imprisoned a man for over 27 years. The Panel's abdication of its judicial responsibilities require that the decision receive en banc review.

Second, the Panel totally failed to fulfill its obligation to review the Commission's finding that Mr. Peltier ambushed and executed two agents. In the face of repeated admissions by government attorneys that the government could not prove who shot the agents, and the undisputed and outrageous government misconduct, the Panel's failure to conduct any review of the Commission's findings threatens to undermine society's trust in the court system and its deference to the Parole Commission constitutes reversible error.

The third question presented is whether the Panel could uphold the Commission's decision on a conclusion for which the Commission failed to make the specific findings required by 28 C.F.R. §§2.13(d), 220 n.1. The Panel ultimately concluded that its only inquiry was whether the Parole Commission rationally concluded that "Mr. Peltier participated in the execution of two federal agents." (Decision at 18-19; emphasis added.) This, however, was not the finding upon which the Commission rested its decision.

Recognizing that Mr. Peltier did not shoot the agents, the Panel affirmed the Commission's action in requiring Mr. Peltier to serve double the normal time under federal guidelines simply because he allegedly aided and abetted the killing of two federal agents where it was only shown that he was involved in a firefight sometime before the shooting of the two federal agents. The error is even more egregious because the Panel upheld the Parole Commission in the face of the Commission's failure to give

Mr. Peltier any opportunity to defend himself on the issue of aiding and abetting. To date, no court or the Commission has ever explained exactly what Mr. Peltier did to aid and abet the shooting of the agents.

Even if Mr. Peltier aided and abetted, Mr. Peltier has already long served the time set forth by federal guidelines and the Commission has never identified any aggravating circumstance justifying the doubling of those guidelines. Thus, this case raises the extremely important issue as to whether a person can be denied parole for double the normal time based on a finding other than a finding that he purportedly aided and abetted in a shooting when he has never been able to address this finding and where an aider and abetter is considered for parole under other circumstances at 100+ months.

FACTS

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. Peltier has already served over 338 months for purportedly executing two FBI agents at close range, even though the normal guidelines for parole of prisoners in Peltier's situation is 200+ months. The government has repeatedly conceded that it cannot prove that Peltier shot the agents, let alone identify the shooter(s). (App. 11-12, 14, 234-36.)

In upholding the Commission's decision that it rationally concluded that Peltier executed the agents, the Panel, as did the Commission, relied on circumstantial facts set forth in Peltier's first appeal. United States v. Peltier, 585 F.2d 314 (8th Cir. 1978). However, as recognized by the Panel, there is substantial record evidence developed

since that appeal that the FBI fabricated evidence, intimidated witnesses and withheld crucial evidence which completely undermines the government's finding that Peltier murdered the two FBI agents at close range.

Indeed, the United States Court of Appeals for the Eighth Circuit repeatedly and expressly recognized specific instances of FBI misconduct in Peltier's case: "There is evidence in this record of improper conduct on the part of some FBI agents...." United States v. Peltier, 800 F.2d 772, 777 (8th Cir. 1986). In an earlier opinion, the Eighth Circuit concluded that the FBI withheld critical ballistics evidence which raised questions regarding the truth and accuracy of a key witness' testimony,[2] and which undercut the lynchpin of the government's case - namely, the purported match between a casing found at the scene and the murder weapon purportedly wielded by Mr. Peltier. United States v. Peltier, 731 F.2d 550, 554 (8th Cir. 1984). The Eighth Circuit again discussed the critical evidence withheld by the FBI as "newly discovered evidence indicating [the government's ballistics expert] may not have been telling the truth," and that the evidence withheld by the FBI created "inconsistencies casting strong doubts on the government's case." United States v. Peltier, 800 F.2d at 777, 779 (emphasis added).

Beginning in the early 1980s when it became apparent that the government had acted outrageously in the prosecution of Mr. Peltier, the government changed its theory of the case from arguing that Peltier was liable for killing two agents at close range to arguing that Peltier's convictions could be supported by resorting to a theory of aiding and abetting. The government conceded that it could not prove who fired the fatal shots

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[2] Hodge was the FBI agent who acted as the government's ballistics expert.

at two different oral arguments before the Eighth Circuit, and that Peltier's conviction might well have been based solely on the firing of the agents at long range. (App. 234-36.)

In 1985, during oral argument before the Eighth Circuit on Peltier's appeal from his first habeas petition, 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 461 (9th Cir. 1993). 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).

The government admissions did not end there. 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).

Then, without providing Mr. Peltier with any opportunity to be heard, and thereby denying Peltier due process, the Parole Commission denied his appeal. The Parole Commission reiterated its position that Mr. Peltier's conviction itself was evidence that he was involved in the close range execution of agents. Also, in a single statement, without any findings as required by 28 C.F.R. §§2.13(d), 220 n.1, the Commission stated that it would double Mr. Peltier's time for consideration for parole simply because he was convicted of "aiding and abetting."

The ultimate key to the injustice suffered by Mr. Peltier and a major reason why Mr. Peltier remains in prison was best stated by a hearing officer whose recommendations the Commission accepted:

> Two people are dead. That is a fact. The method of death is known. Just who pulled the trigger(s) is uncertain...
>
> ***

> The fact that no one can be identified as the murderer does not alter the fact that they occurred. Subject [Peltier] unfortunately was the one person convicted. Therefore, in my opinion he must held be responsible for at least being part of the each act. That is the long range shooting and the shooting at close range....
>
> ***
>
> The fact that subject [Peltier] is the one person convicted infers that he must be held responsible to some extent for the murders. (App. 279)

(Emphasis added.) Thus, as evidence linking Peltier to shooting the agents evaporated, the government concocted an aiding and abetting theory so that someone would be held responsible. It was totally improper for the Commission and, on appeal, the Panel to do so.

ARGUMENT

I. The Court Failed To Conduct Any Meaningful Review of the Commission's Decision And Acted Inconsistently With Prior Decisions By This Court.

While the standard of review of a Parole Commission decision is based on whether the Parole Commission acted arbitrarily and capriciously or abused its discretion, this does not mean that the standard has no teeth. This court had made clear that a Commission decision must be reversed if "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...." Montoya v. United States Parole Commission, 908 F.2d 635, 639 (10th Cir. 1990), citing Misai v. United States Parole Commission, 835 F.2d 754, 758 (10th Cir. 1987). As demonstrated below, the Panel failed to conduct any

review. If it had, the inescapable conclusion would be that the Commission's decision is clearly arbitrary, capricious and irrational.

A. The Panel Erred in Failing To Review The Commission's Ignoring Of Governmental Misconduct.

The Panel acknowledged the undisputed government misconduct: "The government withheld evidence. It intimidated witnesses." (Decision at 18.) The Panel acknowledged merit in Peltier's argument that the Parole Commission ignored this undisputed evidence. Yet, the Panel indicated that these are questions it had no authority to review. Contrary to the Panel's decision, it is extremely important that the courts review the misconduct of other branches of government and the errors of the Parole Commission. Who has the authority to do so if the judicial branch lacks the power?

The litany of government misconduct in this case, as indisputably acknowledged, is astounding. As acknowledged in the cases of United States v. Peltier, 800 F.2d at 775, the lynchpin of the case against Mr. Peltier rested on the government's contention that a certain casing found at the scene matched an AR-15 purportedly wielded by Mr. Peltier. After trial, Mr. Peltier's legal team discovered that the government withheld evidence which totally refuted this lynchpin. The casing was not probative of Peltier's involvement in any way.

The government indisputably intimidated witnesses. (Panel Decision at 18.) From the inception of this case, by conspiring with Canadian officials, the government did fraudulently extradite Mr. Peltier by intimidating a woman named Myrtle Poor Bear and coerced her, at the threat of death, to execute three affidavits in which she ultimately

lied that she witnessed Mr. Peltier shoot the agents. Poor Bear was a known mental incompetent whom the FBI used in cases to sign false affidavits. As the Panel acknowledged, the government indisputably intimidated numerous other witnesses in connection with their trial testimony. (Decision at 18.)

Despite recognizing the egregious nature and travesty of justice which has befallen Mr. Peltier, the Court concluded that it could not review the weight the Parole Commission accorded to these facts which was actually none. The Panel's conclusion that it could not review the Commission's conclusions is error, where, as here, the outrageous governmental conduct directly undercut the facts upon which the Parole Commission relied. Thus, the Panel's decision raises the important question whether a court must give so much deference to a Parole Commission ruling as to abdicate its role of judicial review where, as here, outrageous government conduct has caused Mr. Peltier to suffer over 27 years of incarceration.

B. The Panel Erred in Giving Deference to The Commission's Reliance On Factual Conclusions That Were Reached In An Opinion Written Before The Government Admitted It Could Not Prove Peltier Shot The Agents.

In a virtual refusal to review the Parole Commission's Decision, the Panel upheld the Commission's finding because the Commission's conclusion based upon circumstantial evidence that Peltier executed the two agents could be supported in Eighth Circuit decisions. However, the facts upon which the Parole Commission, and now the Panel, relied and which could potentially support the Commission's conclusion are found

only in Mr. Peltier's first appellate decision. United States v. Peltier, 585 F.2d 314 (8th Cir. 1978).

The Panel either erred in failing to consider that the circumstantial evidence set forth in the very first appeal of Mr. Peltier relied on by the Commission is completely undermined by subsequent governmental admissions. After the first appeal, it was revealed that the government withheld evidence and intimidated witnesses. As a result, and in the face of misconduct, the government repeatedly admitted that it could not prove who shot the agents. See supra at 4-5.

To uphold the Commission's decision on these now refuted circumstantial facts from which the Eighth Circuit once concluded that Mr. Peltier executed the agents is a complete abdication. To ignore the governmental admissions and the outrageous conduct by the government and to uphold the Parole Commission's decision based on facts set forth in the very first appellate decision ignores the Panel's responsibility to review the actions of the Parole Commission. Mr. Peltier has a right to appellate review of the Parole Commission's decision no matter how deferential that review may be. The Panel failed to conduct any review and, if this Court approves of the Panel's decision, the important question facing this Court is what branch of government will review outrageous conduct by other branches of government. What branch of government will uphold the right to due process.

C. The Panel Erred In Upholding The Commission's Decision On A Basis Upon Which Mr. Peltier Never Had Any Opportunity To Defend Himself.

Basic precepts of our Constitution require that a person receive notice and have the opportunity to provide a defense to the charges levied against him. Though the Commission based its refusal to consider Mr. Peltier for parole on the ground that he executed the agents, the Panel upheld the Parole Commission's decision to refuse to consider Mr. Peltier for parole until double the normal time because Mr. Peltier "participated" in the shooting of the agents by aiding and abetting. (Panel Decision at 18-19.)

The only reference by the Commission to upholding its decision based on an aiding and abetting theory was a simple throw away sentence in a decision by the Commission. Mr. Peltier never had notice of the Commission's consideration of this issue and never had any opportunity to address it with the Commission. Put simply, Mr. Peltier had never had the opportunity to place evidence before the Parole Commission to address a finding that he should be denied consideration for parole until December 2008 based on an aiding and abetting theory. The Panel is required to review the Commission's holding. The Panel cannot substitute its decision and rely on reasons to uphold the Parole Commission's findings which violate Mr. Peltier's due process rights. The Panel's decision affirmed a violation of Mr. Peltier's due process rights and is inconsistent with the standard of review the Panel is required to follow. See Montoya, 908 F.2d at 639.

CONCLUSION

The error of the Panel's decision is that the issue of aiding and abetting was never considered by the Commission and Mr. Peltier never had an opportunity to challenge it. Moreover, to simply say that Mr. Peltier participated in the shootings and that he was an aider and abetter does nothing more than indicate that he should have been considered for parole at 100+ months. To double Mr. Peltier's time for consideration of parole, there must be extreme circumstances. The important question posed to this Court is whether simply finding someone an aider and abetter is so extreme as to double the sentence. That is an astounding position and to refuse Mr. Peltier an opportunity to his right to due process is an abdication of the court's authority.

"Much of the government's behavior on the Pine Ridge Reservation and in the prosecution of Mr. Peltier is to be condemned. The government withheld evidence. It intimated witnesses. These facts are undisputed." (Panel Decision at 18.) It truly is a sad commentary upon our parole system and our government that a man must suffer 27 years in prison because "someone" must pay for a crime that he has not been proven to have committed and that he must suffer this injustice in the face of outrageous and undisputed government misconduct as recognized by the Panel.

For over 27 years Mr. Peltier has suffered indignity and injustice. The Courts have recognized the injustice since the early 1980s. The Panel recognized the undisputed injustice. If this is not an extremely important issue warranting en banc review, then how can any person of any creed ever have faith in the judicial system. The Panel's failure to recognize this issue and its responsibilities requires en banc review.

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Dated: November 17, 2003

CERTIFICATE OF SERVICE

I certify that on November 17, 2003, I sent an appropriate number of copies of the foregoing Petition for Rehearing En Banc for filing and for delivery to Counsel for Respondent at the following addresses:

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Tenth Circuit

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PATRICK FISHER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LEONARD PELTIER,

Petitioner-Appellant,

v.

JOSEPH W. BOOKER, JR., Warden,
United States Penitentiary,
Leavenworth, Kansas,

Respondent-Appellee.

No. 02-3384

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 99-CV-3194-RDR)

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Eric F. Melgren, United States Attorney (Nancy Landis Caplinger, Assistant U.S. Attorney, with him on the brief), Topeka, Kansas, appearing for Respondent-Appellee.

Before **SEYMOUR**, Circuit Judge, **ANDERSON** and **BRORBY**, Senior Circuit Judges.

PER CURIAM.

Leonard Peltier is housed at the United States Penitentiary in Leavenworth, Kansas. He is serving consecutive life sentences for the 1975 murders of two FBI agents. Pursuant to 28 U.S.C. § 2241, he filed a petition for habeas corpus, seeking immediate release on parole. The district court denied relief and we affirm.

I

A. The Pine Ridge Murders

The record on appeal and the prior federal court decisions regarding Mr. Peltier reflect the following facts. In 1975, the Pine Ridge Indian Reservation in South Dakota was embroiled in conflict between traditional elders, who sought independence from Bureau of Indian Affairs (BIA) managers, and Native Americans supportive of the BIA power structure. The conflict became violent, and the traditional elders sought protection from members of the American Indian Movement (AIM). Mr. Peltier and other AIM activists arrived at Pine Ridge to defend reservation traditionalists.

On June 26, 1975, FBI agents Jack Coler and Ronald Williams entered the Pine Ridge Reservation with an arrest warrant for four men charged with armed robbery and assault with a deadly weapon. The two officers began following a van carrying several men. The van came to a stop when it neared the Jumping

Bull Compound, and the officers stopped at a distance behind it. A firefight erupted between the agents and the men in the van and expanded to include others. The group firing on the agents was comprised chiefly of AIM activists. Agents Coler and Williams were wounded in the gun battle and then killed by shots taken at point-blank range with a high-velocity, small-caliber firearm. The murder weapon was subsequently determined to be an AR-15 linked to Mr. Peltier.

The government originally indicted four men for the officers' murders. Two were acquitted, charges were dropped against a third, and Mr. Peltier was convicted on two counts of first degree murder in federal district court in North Dakota. In June 1977, that court sentenced Mr. Peltier to two consecutive life terms for these crimes.

B. Mr. Peltier's Escape from Prison

Two years later, Mr. Peltier escaped from prison. He and his fellow escapees fired shots at prison staff in the course of their breakout. While a fugitive, Mr. Peltier reportedly committed armed robbery. Authorities apprehended Mr. Peltier in Oregon shortly after his escape. He was in possession of a semi-automatic rifle matching spent cartridges at the scene of the escape. Mr. Peltier was convicted in federal district court in California of escape and possession of a firearm and sentenced to a seven-year consecutive term.

C. Mr. Peltier's Habeas Corpus Petitions

Through the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Mr. Peltier was able to obtain a great deal of information not presented at his trial for the Pine Ridge murders, including a teletype which Mr. Peltier interpreted as relating to a shell casing found in Agent Coler's trunk. Arguing this new evidence undermined the link between his AR-15 and the agents' murders, Mr. Peltier filed motions to vacate the judgment against him for those murders, to disqualify the district court, and for a new trial based on newly discovered evidence pursuant to 28 U.S.C. § 2255. The district court denied these motions. *United States v. Peltier*, 553 F. Supp. 886 (D.N.D. 1982). The Eighth Circuit affirmed in large part, but remanded for an evidentiary hearing to consider "any testimony or documentary evidence relevant to the meaning of the October 2, 1975, teletype and its relation to the ballistics evidence introduced at Peltier's trial." *United States v. Peltier*, 731 F.2d 550, 555 (8th Cir. 1984). The district court was instructed to rule on whether the government withheld that evidence in violation of the *Brady* doctrine. *See Brady v. Maryland*, 373 U.S. 83 (1963).

At the evidentiary hearing, Mr. Peltier contended the October 2nd teletype established that a shell casing found in Agent Coler's trunk–which had been a central part of the government's case at trial–could not have been fired from his weapon. *United States v. Peltier*, 609 F. Supp. 1143, 1145 (D.N.D. 1985). FBI

Special Agent Evan Hodge, author of the teletype at issue, was the only witness at the hearing. Agent Hodge controverted Mr. Peltier's position, insisting the teletype concerned casings other than the one found in the agent's trunk. *Id.* at 1150. The district court found his testimony credible. *Id.* at 1152. The court found the teletype not to be evidence of perjury and to be cumulative of other evidence that was used to cross-examine Agent Hodge at trial. *Id.* at 1153. The court denied relief because,

> in the context of the entire record, [the newly discovered teletype] would not have affected the outcome of the trial, and [did] not create a reasonable doubt that did not otherwise exist, [thus Mr.] Peltier . . . failed to establish constitutional error. The nondisclosure of the teletype did not violate the Brady doctrine.

Id. at 1154.

Mr. Peltier appealed the district court's denial. In reviewing his appeal, the Eighth Circuit held that "the prosecution withheld evidence from the defense favorable to [Mr.] Peltier, and that had this evidence been available to the defendant, it would have allowed him to cross-examine certain government witnesses more effectively." *United States v. Peltier*, 800 F.2d 772, 775 (8th Cir. 1986). In order to grant relief, however, the court would have had to determine that the newly discovered evidence made an acquittal reasonably probable. *United States. v. Bagley*, 473 U.S. 667, 682 (1985). It could not reach that conclusion. *Peltier*, 800 F.2d at 777. According to the Eighth Circuit, a "simple

but very important fact[] remain[ed]: The casing introduced into evidence had in fact been extracted from the Wichita AR-15 [linked to Mr. Peltier]." *Id.* While there were several AR-15s on the compound the day of the shootings, and while the evidence linking Mr. Peltier to the AR-15 that killed the officers was circumstantial, the evidence against Mr. Peltier remained strong enough to require denial of relief under the *Bagley* standard. *Id.* at 778-80.

Mr. Peltier filed a second § 2255 petition in 1991. In denying relief, the district court ruled that

> (1) the record does not support Peltier's contention that an alleged concession by government counsel during oral argument before [the Eighth Circuit] in the prior section 2255 appeal resulted in a change in the theory of the government's case and, therefore, produced a conviction that could not be supported by the evidence introduced at trial and (2) Peltier's other contentions–primarily that the government engaged in various kinds of misconduct in connection with the investigation and prosecution of the case–were not cognizable in [that] section 2255 proceeding because the contentions either were litigated, or could and should have been litigated, in the direct appeal of Peltier's conviction or the prior section 2255 proceeding.

Peltier v. Henman, 997 F.2d 461, 463 (8th Cir. 1993). The Eighth Circuit affirmed, agreeing that the government had never conceded it could not prove Mr. Peltier murdered Agents Coler and Williams, that the government had always advanced alternate theories of Mr. Peltier's guilt, either as the shooter or the shooter's aider and abettor, and that Mr. Peltier's other claims were either procedurally barred or meritless. *Id.* at 465, 472, 473.

D. Mr. Peltier's Applications for Parole

Mr. Peltier applied for parole in 1986, but later waived consideration. He reapplied in August 1993. He received a parole hearing on December 14, 1993, at which he was represented by counsel and made a statement. The Parole Commission calculated his parole guidelines at a *minimum* of 188 months due to his convictions for first degree murder, escape, and possession of a firearm; eleven incidents of institutional misconduct; and a reported armed robbery while he was a fugitive. At the time of the hearing, Mr. Peltier had served 204 months. The Commission refused parole and set a fifteen-year reconsideration period due to the nature of the several crimes in which Mr. Peltier had been involved. The Commission recommended referral to the Regional Commissioner, who concurred in its recommendation. That commissioner then referred Mr. Peltier's case to the National Commissioners, who also concurred. Finally, Mr. Peltier appealed to the full Parole Commission which, after correcting a miscalculation and raising his parole guidelines to a *minimum* of 200 months, agreed with the original parole decision.

In 1995, Mr. Peltier received a statutory interim hearing. The hearing officer was persuaded there was insufficient evidence to support a finding that Mr. Peltier personally shot Agents Coler and Williams at point-blank range. Despite that finding, he recommended no change in Mr. Peltier's parole status

because he believed evidence that Mr. Peltier was a co-conspirator or aider and abettor in the agents' executions justified his above-the-guidelines prison time.

A second hearing officer then reviewed Mr. Peltier's case. Based on a legal officer's recommendation, he determined that the first hearing officer had exceeded the scope of a statutory interim review and recommended the initial findings be reinstated. Adopting the legal officer's view, the second hearing officer recommended no change in Mr. Peltier's parole status.

Mr. Peltier appealed this interim determination to the full Parole Commission. While that body recognized the lack of direct evidence indicating Mr. Peltier personally executed Agents Coler and Williams, it pointed to adequate circumstantial evidence of his personal involvement, which met the preponderance of the evidence standard for the Commission's findings. The Commission reasserted its belief that Mr. Peltier was in fact the shooter, but noted it would make the same determination regarding his parole if he were merely an aider and abettor. Release of Mr. Peltier, found the Commission, would be contrary to the public respect for the law contemplated by 18 U.S.C. § 4206(a).[1]

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[1] If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history of the characteristics of the prisoner, determines: (1) that release would not

(continued...)

Mr. Peltier's request for parole was denied and his reconsideration period remained at fifteen years.

In May 1998, Mr. Peltier had his second interim statutory hearing. The Commission found no new information to warrant a change in his status. Specifically, the Commission found Mr. Peltier's medical condition did not warrant release and the seriousness of his crimes and failure to accept responsibility militated against granting parole.

E. Mr. Peltier's Current Habeas Petition

Mr. Peltier applied to the district court for habeas corpus review of the Parole Commission's actions, arguing (1) its decisions were arbitrary and capricious because it could not determine who shot the agents; (2) the decisions were based on incorrect information and discriminatory factors and thus were unlawful; (3) application of parole rules and regulations revised after his conviction violated *ex post facto* principles; and (4) failure to grant parole in light of his medical condition was arbitrary and capricious and amounted to cruel and

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[1](...continued)

> depreciate the seriousness of his offense or promote disrespect for the law; and (2) that release would not jeopardize the public welfare; subject to the provisions of . . . this section, and pursuant to guidelines promulgated by the Commission . . . , such prisoner shall be released.

18 U.S.C. § 4206(a).

unusual punishment. The district court denied relief. Mr. Peltier appeals to this court, reasserting only argument (1) above. He contends "[t]he 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." Aplt. Br. at 10.

II

"Judicial review of Parole Board decisions is narrow." *Dye v. United States Parole Comm'n*, 558 F.2d 1376, 1378 (10th Cir. 1977). The Commission's decision will stand unless it is arbitrary and capricious. *Id.* "[I]t is not the function of courts to review the Board's discretion in denying parole or to repass on the credibility of reports received by the Board in making its determination." *Id.* A reviewing court must make some inquiry into the factual basis for the Commission's decision. *Misasi v. United States Parole Comm'n*, 835 F.2d 754, 758 (10th Cir. 1987). But "[t]he inquiry is not whether the Commission's decision is supported by the 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 embodied in its statement of reasons." *Id.* (quoting *Solomon v. Elsea*, 676 F.2d 282, 290 (7th Cir. 1982)). We assess the Parole

Commission's decision in light of these standards.

The Parole Commission's July 12, 1996, Notice of Action thoroughly lays out the facts relied upon by that body in denying Mr. Peltier's parole and delaying its reconsideration until 2008:

> 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. Trial witness [and AIM member] Norman Brown testified that he saw you firing an AR-15 rifle after the shooting started at the Jumping Bull Compound. Trial witness [and AIM member] Michael Anderson testified that he saw you at the agents' vehicles with an AR-15 rifle. No witness testified that anyone other than you fired an AR-15 rifle at the agents' cars, or that anyone other than you was seen at the agents' cars with an AR-15. (The evidence concerning other AR-15 rifles fired that day indicates that these rifles were fired later, and at places from which direct aim could not have been taken at the murdered F.B.I. agents.) The agents were killed with high-velocity bullets that no other weapon used against them that day but an AR-15 could have fired. A .223 shell caliber casing found in the trunk of Agent Coler's car had an ejection mark matching a damaged AR-15 rifle subsequently recovered in Wichita, Kansas, from a vehicle driven by your associates. Furthermore, you had a personal motive to murder the two 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. Moreover, [AIM member] William Draper testified that he heard you discuss details of the murders the evening after the shooting took place. Further evidence against you is that, after you avoided arrest in Oregon, Agent Coler's service revolver was found in your vehicle inside a paper bag bearing your thumb print . . . . The Commission finds that the two F.B.I. agents, armed only with their service revolvers and driving separate cars, were performing a routine law enforcement function . . . when they were suddenly ambushed and overwhelmed with superior firepower by you and your associates. (There were 125 bullet holes in the agents' cars and their rifles were stored in the car trunks.)

Aplt. App. at 301-02.

All of the facts relied upon by the Commission can be found in previous Eighth Circuit decisions. That court quoted Norman Brown's testimony. *Peltier*, 800 F.2d at 779. It also described the testimony of Michael Anderson and William Draper. *Id.*; *United States v. Peltier*, 585 F.2d 314, 319, 320 (8th Cir. 1978) (direct appeal). The Eighth Circuit outlined facts and testimony suggesting Mr. Peltier's motive to murder the agents. *Peltier*, 585 F.2d at 319-20. The Commission's statement that "[n]o witness testified that anyone other than you fired an AR-15 rifle at the agents' cars, or that anyone other than you was seen at the agents' cars with an AR-15," Aplt. App. at 301, came directly from an Eighth Circuit opinion. *See Peltier*, 800 F.2d at 779. Mr. Peltier previously alleged that FBI intimidation of trial witnesses compromised their reliability. *Peltier*, 585 F.2d at 328-29. The Eighth Circuit recognized the intimidation of AIM activists, but noted each witness's attestation that his trial testimony was truthful. *Id.* The Commission clearly has a rational basis for relying on this testimony to dispose of Mr. Peltier's parole appeal.

The physical evidence cited by the Parole Commission was also catalogued by the Eighth Circuit. That court noted that only the AR-15 linked to Mr. Peltier could have fired the fatal shots into the two agents, that the .223 casing found in Agent Coler's trunk matched the AR-15 recovered in Wichita and linked to Mr.

Peltier, that other AR-15's present on the Reservation were fired at locations far from the murder scene, and that Mr. Peltier was apprehended in possession of Agent Coler's service revolver. *Id.* at 319-20; *Peltier*, 800 F.2d at 779. After the evidentiary hearing on Mr. Peltier's first habeas petition, the district court in North Dakota held that the October 2nd teletype did not cast doubt on the connection between the .223 casing found in Agent Coler's trunk and the AR-15 linked to Mr. Peltier. *Peltier*, 609 F. Supp. at 1152. On appeal, the Eighth Circuit asserted the casing "had in fact been extracted from the . . . AR-15 [linked to Mr. Peltier]." *Peltier*, 800 F.2d at 777. As with the testimony discussed above, the Parole Commission could rationally rely on this evidence in denying Mr. Peltier's request for parole and delaying reconsideration until 2008.

Both in briefing and at oral argument, counsel for Mr. Peltier challenged the accuracy of the Commission's description of events leading up to the agents' deaths. While the Commission's use of the word "ambush" may have been imprecise, the Commission was clearly correct in stating the agents were "overwhelmed." Aplt. App. at 302. As reported by the Eighth Circuit, Agents Coler and Williams were on the Pine Ridge Reservation merely to execute an arrest warrant. *Peltier*, 585 F.2d at 318. The results of the firefight in which they became entangled suggest they were ill-prepared for such an event. When the smoke cleared, 125 bullet holes were found in the agents' cars. *Id.* Only five

casings attributable to the agents' revolvers were ever found at the scene. *Id.*

The Commission's description of the murders in various Notices of Action as "executions" and "cold-blooded" was warranted. Aplt. App. at 199, 281, 301. Evidence from the scene indicated

> Williams attempted to shield his face from the blast with his right hand, turning his head slightly to the right. The murderer placed the barrel of his gun against Williams' hand and fired. The bullet ripped through Williams' hand, into his face, and carried away the back of his head. He was killed instantly. The murderer shot Coler, who was unconscious, across the top of the head. The bullet carried away a part of his forehead at the hairline. The shot was not fatal, however. The murderer then lowered his rifle a few inches and shot Coler through the jaw. The shell exploded inside his head, killing him instantly.

Peltier, 585 F.2d at 318-19. The Commission's characterization of these events appears accurate to this court.

The facts relied upon, of course, must support the Commission's conclusions. The Commission's Notice of Action reasoned that:

> [a]lthough the above evidence is consistent with your having, while at the scene of the murders, aided and abetted the use of the above-mentioned AR-15 rifle by another individual to execute the agents, the Commission is persuaded that the greater probability is that you yourself fired the fatal shots. . . . It would be unjust to treat the slaying of these F.B.I. agents, while they lay wounded and helpless, as if your actions had been part of a gun battle. Neither the state of relations between Native American militants and law enforcement at the Pine Ridge Indian Reservation prior to June 16, 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. . . . Your release on parole

would promote disrespect for the law in contravention of 18 U.S.C. § 4206(a).

Aplt. App. at 301-02. Previous federal court decisions provided the Commission with ample facts to support its conviction that Mr. Peltier personally shot Agents Coler and Williams. We cannot hold that the Commission's reliance on these decisions, nor its determination that the aggravating circumstances of this crime outweigh mitigating evidence presented by Mr. Peltier, constitute arbitrary and capricious action on the Commission's part.

In attacking the rational basis for the Parole Commission's decision, Mr. Peltier first posits "[n]either Peltier's convictions nor the Eighth Circuit post-conviction decisions [support] the Commission's finding that Peltier participated in an 'ambush' and executed the agents after they were incapacitated." Aplt. Br. at 11. But a jury convicted Mr. Peltier of premeditated first degree murder. *Peltier*, 997 F.2d at 463; *Peltier*, 800 F.2d at 772. Contrary to Mr. Peltier's assertion that evidence undergirding his conviction has begun to "evaporate," Aplt. Br. at 15, the evidence supporting the jury's verdict appears in numerous Eighth Circuit opinions. Neither the conviction nor any of the subsequent court decisions have been overturned. The Commission may justifiably rely on the conviction and the Eight Circuit's refusal to overturn it in making its parole determinations. *See Fiumara v. O'Brien*, 889 F.2d 254, 257-58 (10th Cir. 1990) (in making parole determinations, Commission may consider formally adjudicated

crimes, as well as information from prosecutors and other parties).

Mr. Peltier correctly asserts his "convictions do not necessarily rest on the theory that he executed the FBI agents" and that the government has conceded as much. Aplt. Br. at 12, 13. As the Eighth Circuit recognized, "[t]he 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." *Peltier*, 997 F.2d at 465. It is possible the jury accepted only the aiding and abetting theory to convict Mr. Peltier of premeditated first degree murder. Were that the case, the Commission, based on the evidence before it, could still reach the conclusion it did.

Thus, in *Lewis v. Beeler*, 949 F.2d 325, 328 (10th Cir. 1991), this court upheld a denial of parole based on the Commission's conclusion that a man serving time for extortion was actually the Tylenol murderer. In condoning the Commission's reliance on evidence that he committed murder, we stated "while we might not have concluded that Lewis was the Tylenol murderer based on this evidence, it provides a rational basis for the Commission's finding to that effect." *Id.* at 332. If the Commission may rely on uncharged crimes in denying parole, it can certainly rely on the body of evidence here suggesting Mr. Peltier in fact executed the agents. That the government argued in the alternative and the jury possibly accepted that Mr. Peltier only aided and abetted the murderer does not

upset the rational basis for the Commission's decision.

Mr. Peltier also calls our attention to the report of the interim hearing officer stating "that a preponderance finding that Peltier actually executed the agents cannot be made." Aplt. App. at 233. However, Mr. Peltier fails to point out a significant feature of this officer's report. Despite his finding insufficient evidence that Mr. Peltier pulled the trigger, *the officer recommended no change in the Commission's denial of parole and fifteen-year reconsideration period.* It would exceed our authority under the arbitrary and capricious review standard to rely on this officer's opinion, which recommended *no change* in Mr. Peltier's status and which was ultimately rejected by the full Commission, to reverse the Commission's parole determination.

In attacking the evidence relied on by the Commission in denying parole and setting the lengthy reconsideration period, Mr. Peltier seems to suggest we should reweigh this evidence in rendering our decision. We cannot. *Fiumara*, 889 F.2d at 257. We can, however, inquire into whether the Commission was rational in considering it. *Misasi*, 835 F.2d at 758.

As noted above, the Commission's description of the firefight as an "ambush" was imprecise: there is no indication any of the participants were lying in wait for the agents. But the officers were on a routine law enforcement mission when they encountered overwhelming firepower from Native American

activists. And the Commission's choice of the word "execution" in describing the murders was quite apt. While Mr. Peltier asserts "[t]he Commission identified no plausible evidence that [he] shot the agents after they were incapacitated," Aplt. Br. at 17, this statement is simply not true. The evidence linking Mr. Peltier to these crimes is enumerated above. The most damning evidence–the .223 casing found in Agent Coler's trunk–may be more equivocal after the surfacing of the October 2nd teletype, but it has not been "ruled out," as Mr. Peltier contends. Aplt. Br. at 20. There is no direct evidence that Mr. Peltier shot the agents because no one testified they saw him pull the trigger. But as we stated above and restate here, the body of circumstantial evidence underlying the Commission's decision is sufficient for the purposes of rational basis review.

Much of the government's behavior at the Pine Ridge Reservation and in its prosecution of Mr. Peltier is to be condemned. The government withheld evidence. It intimidated witnesses. These facts are not disputed. Mr. Peltier asserts that "the blatant government misconduct is a mitigating factor which should bear strongly on whether [he] should be immediately considered for parole . . . ." Aplt. Rep. Br. at 2. He may be correct. But whether the Parole Commission gave proper weight to this mitigating evidence is not a question we have authority to review. Our only inquiry is whether the Commission was rational in concluding Mr. Peltier participated in the execution of two federal

agents. On the record before us, we cannot say this determination was arbitrary and capricious.

III

Because we hold the Commission's principal finding–that Mr. Peltier shot and killed Agents Coler and Williams–was rational, we need not address the Commission's implication that the same disposition is supportable if Mr. Peltier only aided and abetted at the murder scene. As such, we **AFFIRM** the district court's denial of relief.