

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2004

LEONARD PELTIER,
Petitioner,

v.

JOSEPH W. BOOKER, JR.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

- I. Whether the United States Court of Appeals for the Tenth Circuit erroneously affirmed the United States Parole Commission's ("Commission") refusal to consider Leonard Peltier for parole until December 31, 2008, double the time under federal guidelines, in the face of undisputed governmental misconduct in the prosecution of Mr. Peltier.
- II. Whether the United States Court of Appeals for the Tenth Circuit erroneously affirmed the Commission's refusal to consider Leonard Peltier for parole until December 31, 2008, double the time under federal guidelines, on the ground that Mr. Peltier executed two FBI agents even though the government has conceded on several occasions that it could not prove who shot the agents and even though the government withheld evidence and coerced witnesses to testify falsely.
- III. Whether the United States Court of Appeals for the Tenth Circuit erroneously affirmed the Commission's refusal to consider Mr. Peltier for parole until December 31, 2008, double the time under federal guidelines, even though the Parole Commission ultimately so ruled on the ground that someone had to pay for the crime and since Mr. Peltier was the only person ever convicted he would have to serve, at a minimum double his sentence under federal guidelines.

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LIST OF PARTIES

The names of all parties appear in the caption of the case. The petitioner is not a corporation.

CITATIONS OF OPINIONS AND ORDERS ENTERED BY LOWER COURTS

Peltier v. Booker, slip op., D.C. No. 99-CV-3194-RDR (D. Kan. September 26, 2002).

Peltier v. Booker, 348 F.3d 888 (10th Cir. 2000)

Peltier v. Booker, No. 02-3384 (10th Cir. December 11, 2003), order denying rehearing and petition for rehearing en banc.

REGULATIONS INVOLVED

28 CFR § 2.13(d)

In accordance with 18 U.S.C. 4206, the reasons for establishment of a release date shall include a guidelines evaluation statement containing the prisoner's offense severity rating and salient factor score (including the points credited on each item of such score) as described in §2.20, as well as the specific factors and information relied upon for any decision outside the range indicated by the guidelines.

28 CFR § 2.20 – Complete Text in Appendix

BASIS OF JURISDICTION

This petition seeks review of the decision of the United States Court of Appeals for the Tenth Circuit which denied Mr. Peltier's request for a rehearing en banc of a Panel's affirmance of the Commission's refusal to consider Mr. Peltier for parole until

December 31, 2008, double the time under federal guidelines. This petition is authorized and timely under 28 U.S.C. §2101 and Rule 13 (3) of the rules of the United States Supreme Court.

STATEMENT OF THE CASE AND PERTINENT FACTS

By this Petition, Mr. Peltier seeks review of a decision by the Tenth Circuit affirming the Commission's denial of Mr. Peltier's request for parole and its refusal to even consider Peltier for parole until December 2008, at which point Peltier will have served double the normal time under federal guidelines. The Tenth Circuit had jurisdiction to review the decision of the United States District Court for the District of Kansas under 28 U.S.C. §2253(a). The Tenth Circuit's decision raises three issues of extreme importance which should be reviewed by this Court because the decision "so far departs from the accepted and usual course of judicial proceedings." Rule 10(a) of the United States Supreme Court.

Mr. 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. Mr. Peltier has already served nearly 350 months for purportedly killing two FBI agents, even though the normal guidelines for parole of prisoners in Mr. Peltier's situation is 200+ months.

The first issue involves the Tenth Circuit's refusal to require the Commission to consider the undisputed evidence of outrageous government misconduct that the FBI fabricated evidence, intimidated witnesses and withheld evidence in considering whether

to parole Mr. Peltier. Indeed, the Court 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.” Peltier v. Booker, 348 F.3d 888, 896 (10th Cir. 2003) (Emphasis added.) Yet, the Tenth Circuit incredulously concluded it lacked authority to review the Commission’s refusal to consider this outrageous government behavior in denying Mr. Peltier parole. Peltier, 348 F.3d at 896.

The Tenth Circuit has not been the only Court to recognize the governmental misconduct permeating Mr. Peltier’s case. The United States Court of Appeals for the Eighth Circuit repeatedly 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,¹ 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

¹ Evan Hodge, who has been recently implicated in many questionable activities by the FBI ballistics laboratory, was the FBI agent who acted as the government’s ballistics expert.

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.

Those judicial revelations poignantly pose the extremely important issue as to what branch of government has authority to review undisputed government misconduct if the courts lack, or refuse to exercise, such authority. Even under the most minimal standard of review, the United States Constitution charges the courts to scrutinize government misconduct which has unjustly imprisoned a man for over 28 years. The Tenth Circuit's abdication of its judicial responsibilities require that the decision be reviewed by this Court.

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 Mr. Peltier was liable for killing two agents at close range to arguing for the first time that Mr. Peltier's convictions could be supported by resorting to a theory of aiding and abetting. The government conceded at two oral arguments that it could not prove who fired the fatal shots and that Mr. Peltier's conviction might well have been based solely on the firing of the agents at long range. In 1985, during oral argument, 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.

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 (8th 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-gras. 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.

The government admissions did not end there. In 1995, Mr. 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." (emphasis added). He further acknowledged that

the government's representative at the parole hearing, Assistant United States Attorney Lynn Crooks, admitted: "[T]he 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." (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.

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. . . 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.

Then, without providing Mr. Peltier with any opportunity to be heard and thereby denying Peltier due process, the Commission denied his appeal. Without providing Mr.

Peltier with any opportunity to be heard in violation of the United States Constitution, the Commission reiterated its position that Mr. Peltier's conviction itself was evidence that he was involved in the close range shooting of agents. Also, in a single statement, without any findings as required by 28 C.F.R. §§2.13(d), or § 2.20 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."

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 Tenth Circuit'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 Commission constitutes error which "so far departs from accepted and usual judicial proceedings." Rule 10(a) of the United States Supreme Court.

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), 2.20 n.1. The Panel ultimately concluded that its only inquiry was whether the Commission rationally concluded that "Mr. Peltier participated in the execution of two federal agents." Peltier, 348 F.3d at 896 (emphasis added.) This, however, was not the finding upon which the Commission rested its decision.

The Tenth Circuit affirmed the Commission's action that required 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 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. The Commission should not have refused to consider Mr. Peltier for parole until double the time for a prisoner in his circumstances when he has never been able to address the aiding and abetting finding and where an aider and abetter is considered for parole at 100+ months.

The ultimate key to the injustice suffered by Mr. Peltier and **THE** major reason why Mr. Peltier remains in federal prison is best represented by the following comment by the Commission:

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.)

In sum, as evidence linking Mr. Peltier to the shooting of 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 Tenth Circuit to do so.

ARGUMENT

THE TENTH CIRCUIT'S DECISION SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

While the standard of review of a Commission decision is based on whether the Commission acted arbitrarily and capriciously or abused its discretion, this does not mean that the standard has no teeth. Courts have 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 Tenth Circuit failed to conduct any meaningful review. If it had, the inescapable conclusion would be that the Commission’s decision was clearly arbitrary, capricious and irrational.

**A. The Tenth Circuit Erred by Failing To Review The
Commission's Disregard of Outrageous Government
Misconduct**

It is beyond question that “The government withheld evidence. It intimidated witnesses. These facts are not disputed.” Peltier, 348 F.3d at 896 (Emphasis added.) It is beyond question that critical evidence was 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.

The litany of government misconduct in this case, as indisputably acknowledged, is astounding. As acknowledged in the case 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 which was not found until three days after the firefight was not probative of Peltier’s involvement in any way.

The government indisputably intimidated witnesses. Peltier, 348 F.3d at 896. From the inception of this case, the government conspired with Canadian officials to 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. Id.

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 Commission accorded these facts, which was actually none. The Tenth Circuit'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 Commission relied. Thus, the Tenth Circuit's decision raises the important question whether a court must give so much deference to a Commission's ruling as to abdicate its role of judicial review where, as here, outrageous government conduct has caused Mr. Peltier to suffer over 28 years of incarceration.

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

In a virtual refusal to review the Commission's Decision, the Tenth Circuit upheld the Commission's finding because the Commission's conclusion could be supported in Eighth Circuit decisions. However, the facts upon which the Commission, and now the Tenth Circuit 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 Tenth Circuit erred in failing to consider that the circumstantial evidence set forth in this first appeal 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 undisputed misconduct, the government repeatedly admitted that it could not prove who shot the agents. See supra at 6-8.

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 of judicial review. To ignore the governmental admissions and the outrageous conduct by the government and to uphold the Commission's decision based on facts set forth in the very first appellate decision ignores the Court's responsibility to review the actions of the Commission. Mr. Peltier has a right to appellate review of the Commission's decision no matter how deferential that review may be. The Tenth Circuit failed to conduct any review and, if this Court approves of the Tenth Circuit'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.

The Commission's basing its decision on circumstantial facts which even the government has conceded were erroneous makes it clear that the Commission did not intend to review Mr. Peltier's case based on the actual merits. A grossly negligent review is the equivalent of no review or worse a direct disregard for Mr. Peltier's constitutional right to due process.

Mr. Peltier has a right to appellate review of the Commission's decision no matter how deferential that review may be. The Tenth Circuit failed to conduct any review and,

if this Court approves of the Tenth Circuit's, 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 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. Peltier, 348 F.3d at 896.

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 Commission to address a finding that he should be denied consideration for parole until December 2008 based on an aiding and abetting theory. The Tenth Circuit is required to review the Commission's holding. It cannot rely on reasons to uphold the Commission's findings which violate Mr. Peltier's due process rights. The Tenth Circuit's decision affirmed a violation of Mr. Peltier's due process rights and is inconsistent with the standard of review the federal appellate courts are required to follow. See Montoya, 908 F.2d at 639.

CONCLUSION

The Tenth Circuit's decision so far departed from the accepted and usual course of judicial proceedings that this Court should grant certiorari to correct the egregious errors. The Tenth Circuit upheld the Commission on grounds upon which Mr. Peltier never received an opportunity to be heard since 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.

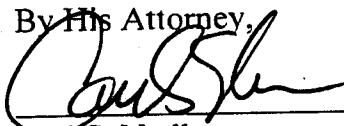
“Much of the government's behavior on the Pine Ridge Reservation and in the prosecution of Mr. Peltier is to be condemned. The government withheld evidence. It intimidated witnesses. These facts are undisputed.” Peltier, 348 F.3d at 896. It truly is a sad commentary upon our judicial system and our government that a man must suffer 28 years in prison because “someone” must pay for a crime that the government could not prove he committed and that he must suffer this injustice in the face of outrageous and undisputed government misconduct as recognized by the Panel.

For over 28 years Mr. Peltier has suffered indignity and injustice. The Courts have recognized the injustice since the early 1980s. The Tenth Circuit recognized the

undisputed injustice. If this is not an extremely important issue warranting the granting of this writ for a petition for certiorari review by this Court, then how can any person of any creed ever have faith in the judicial system.

For the reasons stated above, a writ of certiorari should issue to the United States Court of Appeals for the Tenth Circuit.

Respectfully Submitted,
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