IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

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| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | CRIMINAL NO. C77-3003 |
| | ) | |
| LEONARD PELTIER, | ) | |
| | ) | |
| Defendant. | ) | |

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**BRIEF RESISTING DEFENDANT'S MOTION UNDER RULE 35(a) TO CORRECT ILLEGAL SENTENCE**

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The United States of America, by Drew H. Wrigley, United States Attorney for the District of North Dakota, and Scott J. Schneider, Assistant United States Attorney, resists Leonard Peltier's motion under Rule 35(a) of the Federal Rules of Criminal Procedure to correct his sentence, which sentence he claims is illegal. Peltier's motion must be denied because his position is not supported by the facts and law.

## Introduction

The courts first heard of the case when two critical witnesses, Angie Long Visitor and Joanna LeDeaux, refused to cooperate with the grand jury. See In re Long Visitor, 523 F.2d 443 (8th Cir. 1975). Leonard Peltier, along with three other men, was charged with two counts of first degree murder in an Indictment filed on November 25, 1975. See docket entry 1, C77-3003.

Two of Peltier's codefendants were tried during the summer of 1976 in Cedar Rapids, Iowa. They were both acquitted. Peltier was fighting extradition in Canada; therefore, his case had to be tried separately. (Charges against the fourth man, Jimmy Eagle, were voluntarily dismissed by the government.)

Leonard Peltier was brought to trial in Fargo, North Dakota, pursuant to a change of venue. He was tried on the alternate theories that he either killed the agents himself or aided and abetted in their killings. See Peltier v. Henman, 997 F.2d 461, 468 (8th Cir. 1993). Following a five-week jury trial, Leonard Peltier was convicted on April 18, 1977, of two counts of first-degree murder. He was sentenced on June 1, 1977, to serve two consecutive life terms in prison. See docket entry 314, C3-77-3003.

Peltier appealed his conviction to the Eighth Circuit Court of Appeals. His conviction was affirmed. United States v. Peltier, 585 F.2d 314 (8th Cir. 1978). Certiorari was denied by the U. S. Supreme Court at 440 U.S. 945, 99 S. Ct. 1422 (1979). Following his initial appeal, Peltier made an armed escape from prison, was apprehended, tried, and convicted in the Central District of California. His conviction was affirmed by the Ninth Circuit Court of Appeals. United States v. Peltier, 693 F.2d 96 (9th Cir. 1982).

On April 20, 1982, Peltier filed his first Section 2255 habeas corpus petition for post-conviction relief. See docket entry 358, C77-3003. On December 30, 1982, the district court entered its order dismissing Peltier's motion for a new trial. United States v. Peltier, 553 F. Supp. 886 (D.N.D. 1982).

On April 4, 1984, the Eighth Circuit Court of Appeals entered its order affirming the district court judge's orders refusing to recuse himself and dismissing the petitioner's claims, without an evidentiary hearing, with one exception: it remanded for a hearing on the meaning of an FBI firearms teletype. United States v. Peltier, 731 F.2d 550 (8th Cir. 1984). Following the evidentiary hearing ordered by the Court of Appeals, the district court again entered an order denying Peltier relief. United States v. Peltier, 609 F. Supp. 1143 (D. N.D. 1985).

Peltier once again appealed to the Eighth Circuit Court of Appeals. This Court affirmed the district court's order dismissing Peltier's motion for new trial in its entirety. While criticizing the government for not having made full disclosure of all its firearms-related correspondence, the Court specifically pointed to the undisputed fact that a shell casing found at the execution site matched Peltier's rifle, a rifle with which Peltier had been seen at the execution site by one witness and had been seen firing at the agents from long range by another witness. United States v. Peltier, 800 F.2d 772, 777 (8th Cir. 1986). Certiorari was again denied by the United States Supreme Court at 484 U.S. 822, 108 S. Ct. 84 (1987).

Peltier filed a motion for post-conviction relief, Peltier v. Henman, with the United States District Court in Kansas. The United States moved to transfer the case to the District of North Dakota. This motion was granted by Judge Rogers, a United States District Court Judge from Kansas, in an order filed with the Clerk of U. S. District Court in North Dakota

on February 15, 1991, in A3-91-29. As is the usual practice, the case was again assigned to Judge Benson, who had originally tried the case. The post-conviction relief motion was then referred to Magistrate Judge Karen K. Klein for further proceedings. See docket entries 1, 2, and 7, A3-91-29. The United States moved to dismiss Peltier's claim in part on the ground that he had "abused the writ." The government's theory was that most of the issues raised in the post-conviction relief motion were simply repeats of arguments which had already been determined against him in prior proceedings or had been intentionally abandoned or bypassed. This motion was granted on July 24, 1991. The Magistrate Judge's recommendation was adopted by Judge Benson on August 22, 1991. See docket entries 16, 17, 25, 26, 32, 33, and 34, A3-91-29.

After a hearing in Bismarck, North Dakota, in which Peltier argued that the government had changed its theory of the case at the last argument before the Eighth Circuit Court of Appeals, the Magistrate Judge recommended dismissal of the balance of Peltier's claims on November 27, 1991. Judge Benson entered his order adopting the Magistrate Judge's recommendation on December 30, 1991. See docket entries 44 and 51, A3-91-29. Peltier once again appealed to the Eighth Circuit Court of Appeals from that decision. Peltier v. Henman, 997 F.2d 461 (8th Cir. 1993). The Court unanimously affirmed Peltier's conviction, specifically finding, among other things, that the government had never changed theories as to Peltier's guilt. Peltier v. Henman, 997 F.2d at 465-70.

Leonard Peltier had filed a Rule 35 motion to reduce his sentence on June 22, 1979. The United States filed its brief resisting motion for reduction of sentence on June 27, 1979. Shortly thereafter, Peltier escaped from prison. Therefore, Peltier's motion was not acted upon until October 4, 1979, after he was captured; the motion was denied by United States District Court Judge Paul Benson.

On November 1, 2001, Peltier filed a motion seeking to renew his Rule 35 motion for reduction of sentence originally filed in 1979. The principal basis of the renewed motion was Peltier's contention that the government changed theories of prosecution in 1985 and that the sentencing judge did not have this "changed theory" before him at the time of the Court's original sentence in 1977. The United States resisted any reduction or correction in Peltier's sentence, based on the facts and records of the case.

The Honorable Paul A. Magnuson, United States District Court Judge, denied Peltier's Renewed Motion to Reduce or Correct Sentence on February 15, 2002 (filed February 25, 2002); United States v. Peltier, 189 F. Supp.2d 970 (D.N.D. 2002). The Court held the Rule 35 motion to be untimely filed and, even if the Court retained jurisdiction, Peltier failed to allege sufficient changes in circumstances to warrant the Court's consideration of his motion. Peltier appealed Judge Magnuson's denial of his Renewed Rule 35 Motion. The Eighth Circuit, in United States v. Peltier, 312 F.3d 938 (8th Cir. 2002), affirmed Judge Magnuson's decision.

Peltier has now filed a third motion under Rule 35(a) of the Federal Rules of Criminal Procedure to correct his allegedly illegal sentence and requests a hearing on his motion.

**Facts**

For the purposes of this response to Peltier's latest Rule 35 motion, the facts of this case are adequately set forth in this Court's opinion on direct appeal, United States v. Peltier, 585 F.2d 314, 318-320 (8th Cir. 1978), cert. denied, 440 U.S. 945, 99 S. Ct. 1422 (1979). A summary of those facts follows:

On June 25, 1975, two FBI Special Agents, Ronald Williams and Jack Coler, began attempting to serve a felony arrest warrant on a young Indian male, Jimmy Eagle. They attempted to locate him at various locations on the Pine Ridge Indian Reservation in South Dakota. One of these locations was the Jumping Bull Compound located north of the village of Pine Ridge.

Shortly before noon the next day, June 26, 1975, the two agents returned again to the Jumping Bull Compound area. They arrived just after a red-and-white Chevrolet suburban. This vehicle contained Leonard Peltier. (Peltier was the leader of a group of AIM members who had been living at the Jumping Bull Compound for several weeks). The agents had been told the night before that Eagle might be riding in such a vehicle. They followed the Suburban down into the river valley and stopped. The Suburban stopped several hundred yards ahead of them. The occupants got out and started firing at them. Peltier knew who

the agents were; he believed they were there to arrest him on an outstanding attempted murder warrant.

Other confederates of Peltier came to his assistance. The agents were quickly surrounded and overwhelmed. The agents only fired five shots, compared to over 125 fired by Peltier's group. Both agents were quickly injured by long- range fire; fire in which Peltier indisputably participated.

Peltier and two other men then approached the agents' cars. Peltier was carrying an AR-15. He was the only person observed that day firing a weapon at the agents which was capable of chambering a .223 cartridge. Special Agent Coler was murdered while he lay unconscious on the ground. Special Agent Williams was murdered by a point-blank round which went through his outstretched right hand, tore into his face, and blew off the back of his skull. Peltier's weapon was used to kill both agents.

Peltier then led the escape out of the area and was overheard discussing the execution of the agents the first evening. He left the crime scene with a trophy of the deed, Special Agent Coler's service revolver. He carried this trophy with him until November, when he again encountered a peace officer and fired at him, seeking to again elude arrest. Peltier was arrested in Canada and later extradited to the United States. While in Canada he admitted to the Royal Canadian Mounted Police that the agents were killed when they came to arrest him.

**Summary of Argument**

Peltier claims that the district court lacked subject matter jurisdiction to sentence him to two life sentences because the two murders were not committed within the special maritime and territorial jurisdiction of the United States. He argues that 18 U.S.C. § 1114 incorporates and mandates the special maritime and territorial (federal enclave) jurisdiction requirement of 18 U.S.C. § 1111(b); the Pine Ridge Indian Reservation is not a location within the special maritime and territorial jurisdiction of the United States; and the government failed to show that the crimes occurred in such a location.

Peltier also argues that his sentence is illegal because it allegedly violates Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 124 S.Ct. 2531 (2004). He is apparently arguing that the jury failed to find the essential element of Section 1111(b) that the offense occurred in the special maritime and territorial jurisdiction of the United States; the judgment which cites that Peltier was convicted under Sections 1111 and 1114 reflects no conviction at all; and, therefore, his sentence of consecutive life terms is illegal and must be corrected by granting his Rule 35(a) Motion.

The court should deny defendant Peltier's Motion under Rule 35(a), Fed. R. Crim. P., because: (1) Peltier's consecutive life sentences are not illegal sentences subject to correction under Rule 35(a) because they are within the authorized penalty range of life imprisonment for first degree murder of FBI agents; (2) Peltier's claim that jurisdiction for the murders of the FBI agents should have been based upon the United

States' "special maritime and territorial" jurisdiction, i.e., federal enclave jurisdiction, under 18 U.S.C. § 1111(b), is a sham and subterfuge to get his case back before this court, because, as understood and not disputed by both parties at trial, federal jurisdiction was premised upon the status of the slain men as FBI agents engaged in the performance of their official duties under 18 U.S.C. § 1114, not the special maritime and territorial jurisdiction of the United States; and (3) Apprendi and Blakely, in addition to not being subject to retroactive application to this case, are inapplicable because the jury was required to determine, and properly found, federal court jurisdiction over the murders of the FBI agents as an essential element of the crimes based upon their status as FBI agents engaged in the performance of their official duties under 18 U.S.C. § 1114.

## I. Applicability of Former Rule 35(a) of the Federal Rules of Criminal Procedure.

Peltier was charged with and convicted of murdering FBI Agents Williams and Coler in violation of 18 U.S.C. §§ 1111, 1114 and 2. Specifically, Count One of the indictment charged:

> On or about the 26th day of June, 1975, near Oglala, in the District of South Dakota, LEONARD PELTIER [and others], with premeditation and malice aforethought, and by means and use of a firearm, did kill Ronald A Williams, a Special Agent of the Federal Bureau of Investigation, while the said Ronald A. Williams was engaged in the performance of his official duties, in violation of Title 18, United States Code, Section 1111, 1114, and 2.

Count Two charged that:

> On or about the 26th day of June, 1975, near Oglala, in the District of South Dakota, LEONARD PELTIER [and others], with premeditation and malice aforethought, and by means and use of a firearm, did kill Jack R. Coler, a Special Agent of the Federal Bureau of Investigation, while the said Ronald A. Williams was engaged in the performance of his official duties, in violation of Title 18, United States Code, Section 1111, 1114, and 2.

At the time, 18 U.S.C. § 1114 provided, in relevant part, that:

> Whoever kills . . . any officer or employee of the Federal Bureau of Investigation of the Department of Justice . . . while engaged in the performance of his official duties, or on account of the performance of his official duties shall be punished as provided under sections 1111 and 1112 of this title.

18 U.S.C. § 1114 (1970 Supp. V). Section 1111 provided that:

> (a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing . . . is murder in the first degree.
>
> Any other murder is murder in the second degree.
>
> (b) Within the special maritime and territorial jurisdiction of the United States,
>
> Whoever is guilty of murder in the first degree . . . shall be sentenced to imprisonment for life;
>
> Whoever is guilty of murder in the second degree shall be imprisoned for any term of years or for life.

18 U.S.C. § 1111 (1970).

Prior to 1987, Rule 35(a) provided that:

> CORRECTION OF SENTENCE. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

F. R. Crim. P. 35(a), 18 U.S.C. App. (1982).[1]

The purpose of Rule 35(a) was to correct illegal sentences not authorized by law, i.e., those sentences that the judgment of conviction did not authorize, which exceed the statutory maximum punishment, or when multiple sentences imposed for the same offense. Hill v. United States, 368 U.S. 424, 430, 82 S.Ct. 468, 472 (1962); United States v. Peltier, 312 F.3d 938, 942 (8th Cir. 2002)("Mr. Peltier, however, misunderstands the meaning of 'illegal sentence' under Rule 35(a)."); United States v. Lika, 344 F.3d 150, 153 (2d Cir. 2003)("Sentences subject to correction as 'illegal' under former Rule 35 are 'those that the judgment of conviction did not authorize'"). As such, Rule 35(a) "presupposes a valid

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[1] Rule 35 in effect at the time Peltier's conviction became final when the Supreme Court denied certiorari on March 5, 1979, see 440 U.S. 945, provided that:

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment by the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

18 U.S.C. App., F. R. Crim. P. 35 (1976). Rule 35 was amended effective August 1, 1979. F. R. Crim. P. 35, 18 U.S.C. App. (1979 Supp. III).

conviction," United States v. Willis, 289 F.2d 581, 583 (8th Cir.), cert. denied, 368 U.S. 856 (1961). This restrictive rule may not be used to challenge the legality of a defendant's underlying conviction. Hill, 368 U.S. at 430 ("the narrow function of Rule 35 is to permit correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to imposition of sentence"); Lika, 344 F.3d at 152; United States v. Fischer, 205 F.3d 967, 971-72 (7th Cir. 2000); United States v. Rourke, 984 F.2d 1063, 1067 (10th Cir. 1992); United States v. Smith, 839 F.2d 175, 181-82 (3d Cir. 1988).

Peltier argues that the district court lacked subject matter jurisdiction to impose life sentences because the murders occurred on the Pine Ridge Indian Reservation, a location not within the special maritime and territorial jurisdiction of the United States. In his Blakely/Apprendi claim, he goes on to contend that the Judgment, which references that he was convicted under Section 1111 and 1114, reflects there was no federal offense committed. In essence, his claim attacks the underlying conviction and, therefore, should be rejected because such a claim is not appropriate for relief under Rule 35(a). Lika 344 F.3d at 152-53.

In Lika, the defendant raised a similar argument in a Rule 35(a) motion. The defendant claimed, among other things, that because the second superseding indictment was not returned in open court, the district court was deprived of subject matter jurisdiction which, in turn, resulted in an illegal sentence. 344 F.3d at 152. The Second Circuit refused to determine the merits of this Rule 35(a) claim, as well as the defendant's other claims,

because the challenges were an attack on the underlying conviction rather than on the legality of the sentence. Id. at 152-53.

In United States v. Kahl, 2003 WL 21715352 (D.N.D. July 14, 2003) (unpublished)(copy attached as Exh. 1), this Court rejected an argument nearly identical to Peltier's. Kahl argued that the district court did not have jurisdiction to try him because the offenses for which he was convicted, second degree murder of a United States marshal and deputy marshal in violation of 18 U.S.C. § 1111 and 1114, because the crimes did not occur within the special maritime and territorial jurisdiction of the United States. The Court found that Kahl's Rule 35 claim did not attack the legality of his sentence and determined that the punishment Kahl received, concurrent life sentences, was authorized for his second degree murder convictions. The Eighth Circuit affirmed this Court's denial of Kahl's Rule 35(a) motion. United State v. Kahl, 03-3009, 2004 WL 878368 (8th Cir. April 26, 2004)(unpublished)(copy attached as Exh. 2).

Since Peltier's underlying convictions for the FBI agents must be considered valid under Rule 35(a) analysis, the only question is whether Kahl's sentences were authorized by law, that is, whether they were within the punishment authorized by statute. Hill, 368 U.S. at 430; Peltier, 312 F.3d at 942; Lika, 344 F.3d at 153. Section 1111 provides for a minimum sentence of mandatory life imprisonment for first degree murder. Therefore, Peltier's life sentences were authorized by statute, and his Rule 35(a) motion must be rejected.

## II. This Court had subject matter jurisdiction to sentence Mr. Peltier under 18 U.S.C. §§ 2, 1111, and 1114.

Even if Peltier's claim could be litigated in a Rule 35(a) motion, it must be rejected on the merits because the district court had jurisdiction over the crimes for which he was convicted, first degree murder of FBI agents under 18 U.S.C. § 1114. Federal jurisdiction over Peltier was never predicated on the special maritime and territorial (federal enclave) jurisdiction of the United States.

Congress is not limited to enacting federal criminal laws that only cover crimes occurring within the special maritime and territorial jurisdiction of the United States. As the Supreme Court stated in Logan v. United States:

> Although the constitution contains no grant, general or specific, to congress of the power to provide for the punishment of crimes, except piracies and felonies on the high seas, offenses against the law of nations, treason, and counterfeiting the securities and current coin of the United States, no one doubts the power of congress to provide for the punishment of all crimes and offenses against the United States, whether committed within one of the states of the Union or within territory over which congress has plenary and exclusive jurisdiction.

144 U.S. 263, 283 (1892) (emphasis added). In enacting criminal statutes such as 18 U.S.C. §§ 111 and 1114, which prohibit the assaulting, interfering or impeding federal officers, "Congress intended to protect both federal officers and federal functions," and such statutes are within Congress' power to enact. United States v. Feola, 420 U.S. 671, 678-79 (1975); United States v. Holder, 256 F.3d 959, 963 (10th Cir. 2001); United States

v. Barrett, 82 F. 2d 528, 534 (7th Cir. 1936). Similarly, 18 U.S.C. §§ 1111 and 1114 together prohibit the murder of federal officers.

In cases involving the murder of a federal officer, there is no requirement that the crime occurred within the special maritime and territorial jurisdiction of the United States. United States v. Adams, 581 F.2d 193, 200 (9th Cir.), cert. denied, 439 U.S. 1006 (1978); Barrett, 82 F.2d at 534. 18 U.S.C. § 1114, in effect at the time of Peltier's crimes, provided that whoever killed an officer or employee of the Federal Bureau of Investigation of the Department of Justice was to be punished in accordance with 18 U.S.C. § 1111 and § 1112, depending on whether the person was convicted of first or second degree murder, or manslaughter, respectively. Section 1114 is a jurisdictional statute which invokes federal jurisdiction in cases involving the murder of a federal officer. United States v. Harrelson, 754 F.2d 1153, 1173 (5th Cir.), cert. denied, 474 U.S. 908 (1985). The status of the officer is a key jurisdictional fact which must be proven by the government at trial, but the government need not generally prove the defendant knew of the officer's status as a federal officer. Feola, 420 U.S. at 684.

While Section 1114 provides subject matter jurisdiction for the killing of an FBI agent, it also incorporate the definitions and punishments of Sections 1111 (murder) and 1112 (manslaughter) for such an offense. Harrelson, 754 F.2d at 1173; United States v. Brunson, 549 F.2d 348, 351 n.1 (5th Cir.), cert. denied, 434 U.S. 842 (1977). See United States v. Bin Laden, 92 F. Supp. 2d 189, 215 n.43 (S.D.N.Y. 2000). In Harrelson, the Fifth

Circuit rejected the government's argument that it was not required to prove malice aforethought or premeditation to convict the defendant of conspiracy to murder a federal official because Section 1114 did not mention any such criminal intent requirement. Id. The Fifth Circuit stated that:

> Section 1114, as the government itself notes, generally proscribes the unlawful killing of federal officers; it is a jurisdictional statute. (emphasis added.) Relevant case law clearly demonstrates the truth of this assertion; we have found no case in which a prosecution was based on Section 1114 alone. Rather, particular offenses are invariably defined by reference to §§ 1111 and 1112.

Id. See also United States v. McVeigh, 153 F.3d 1166, 1197 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999). Therefore, in order to charge and convict a person for the murder of a federal officer under 18 U.S.C. § 1114, the definitions of first degree and second degree murder set forth in section 1111(a) must be used to define the crime.

Section 1114 also incorporates the punishment provisions of Section 1111(b). In setting forth the punishment for murder, Section 1111(b) also includes a reference to the special maritime and territorial jurisdiction of the United States; however, courts have found that Section 1114 incorporates only the penalty provisions of Section 1111(b), and not the special maritime and territorial jurisdiction provision. Adams, 581 F.2d at 200 (Defendant's claim "that 18 U.S.C. § 1114, by referring to 18 U.S.C. § 1111, limits federal jurisdiction over the murder of [federal] employees to those occurring in the special maritime and territorial jurisdiction of the United States . . . is frivolous"); Brunson, 549

F.2d at 351 n.1 (We agree . . . that § 1114 incorporates only the penalty, and not the jurisdictional, provisions of § 1111"); Bin Laden, 92 F. Supp. 2d at 215 n.43 (In Section 1114, "we think that Congress intended to refer only to section 1111(b)'s penalty provisions," not its jurisdictional limitation to the special maritime and territorial jurisdiction of the United States).

In Kahl, where the defendant raised a nearly identical claim as to the necessity of the United States proving the special maritime and territorial jurisdiction of the United States in cases involving the murder of federal officers, this Court found that Section 1114 incorporated only the definition portion of Section 1111(a) and the punishment provision of Section 1111(b). 2003 WL 21715352 at *2. This Court also concluded that the special maritime and territorial jurisdiction clause of Section 1111(b) was another independent federal jurisdiction clause that was not incorporated by Section 1114 and, therefore, there was no requirement that the government prove the crimes occurred at a location within the special maritime and territorial jurisdiction of the United States. Id.

In this case, Peltier requested a jury instruction on first degree murder which set forth the elements of first degree murder under Section 1111(a):

1. The act or acts of killing a human being unlawfully;
2. Doing such act or acts with malice aforethought;
3. Doing such act or acts while the officers of the F.B.I. were in the performance of their official duties;

5. That in killing the deceased, the Defendant was not acting in self-defense [if applicable].

(Defendant's Proposed Jury Instruction No. 6, Exh. 3). He made no request for an instruction that the murders must be proven to have been committed within the special maritime and territorial jurisdiction. Peltier even stipulated to the facts that the men were FBI agents engaged in the performance of their official duties at the time the time of their murders (Tr. Vol. XVI - pp. 3416-17, Exh. 4). His requested instruction and stipulation reflect that Section 1114 provided the basis for federal jurisdiction in the case, i.e., that the persons killed were employees of the FBI who were engaged in the performance of their official duties, and the definition and elements of first degree murder under Section 1111 were essential elements of the crime; not that the murders were committed within the special maritime and territorial jurisdiction of the United States. (See Court's Instruction No. 8, Exh. 5)

The Peltier Indictment did not purport to rely on the special maritime and territorial jurisdiction of the United States (18 U.S.C. § 1111(b)) or Indian jurisdiction (18 U.S.C.

§ 1153)[2]; it relied on the federal officer status of the murdered FBI agents under 18 U.S.C. § 1114 for its federal jurisdictional basis, which incorporates the definition and punishment provisions of Section 1111. Peltier's effort to convince the court that the United States was required to prove that the offense occurred within the special maritime and territorial jurisdiction of the United States as set forth in Section 1111(b), after having stipulated at trial to the jurisdictional facts and applicable law, is a frivolous attempt to seek a legal remedy to which he is not entitled. His Rule 35(a) motion must be denied.

### III. The recent "Blakely" decision does not require this Court to vacate the allegedly illegal sentence imposed on Mr. Peltier.

Peltier also raises a claim based on Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 124 S.Ct 2531 (2004). It appears he is claiming that, since the jury did not find the murders occurred at a location within the special maritime and territorial jurisdiction, he could not receive life sentences. This claim must be rejected.

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[2]The defendant suggests that the court lacked jurisdiction because the murders occurred on an Indian reservation where, supposedly, the general laws of the United States have no application. Thus, as we understand his argument, he could only have been charged under 18 U.S.C. § 1153, the Major Crimes Act, which invokes Indian jurisdiction, which he was not. Eighth Circuit case law, however, forecloses this argument. In a case where the defendant relied upon an exemption contained in 18 U.S.C. § 1152 for crimes of one Indian against another Indian, the court stated, "This exemption [of § 1152] does not encompass the laws of the United States which make actions criminal wherever committed." United States v. McGrady, 508 F.2d 13, 16 (8th Cir. 1974); See also, United States v. Allen, 574 F.2d 435, 437 (8th Cir. 1978) (at note 1) (juvenile delinquency); United States v. Blue, 722 F.2d 383, 384-386 (8th Cir. 1983) (distribution of marijuana and possession with intent to deliver). The United States would also have had federal jurisdiction to charge Peltier with murder pursuant to the Major Crimes Act, 18 U.S.C. § 1153(a), i.e., Indian jurisdiction, in addition to federal jurisdiction under 18 U.S.C. § 1114 as charged.

In Apprendi, the defendant had pleaded guilty to an offense which normally carried a ten-year maximum term of imprisonment. 530 U.S. at 468-70. However, under New Jersey law, if the offense involved the aggravating factor that the crime was committed with a biased purpose, the maximum term of punishment was increased to 20 years. Id. at 470. The trial court found that the defendant's crime was motivated by racial bias and sentenced him to a 12-year term of imprisonment. Id. at 471. The Supreme Court determined that the Constitution requires that any fact, other than a prior conviction, which increases the statutory maximum punishment must be found by a jury beyond a reasonable doubt, and held that the enhanced sentence based on the trial court's findings violated this constitutional right. Id. at 490-97.

In Blakely, the defendant was convicted of second degree kidnaping involving domestic violence and use of a firearm and sentenced to a 90-month term of imprisonment. Id. at 2534-35. Such an offense was a Class B felony punishable by a term of up to ten years under Washington law. Id. at 2534-35. Another provision of Washington's sentencing law provided a standard sentencing range of 49-53 months for the defendant's conviction. Id. at 1235. However, Washington law also provided that a court could impose a sentence above the standard range if it found aggravating factors. Id. The trial court found the existence of an aggravating factor and sentenced the defendant above the standard range to a 90-month term of imprisonment. Id.

The Supreme Court determined that its holding in Apprendi v. New Jersey, 530 U.S. 466 (2000), applied and held that sentencing the defendant above the standard range of 49-53 months based on the judge's findings, rather than by a jury, violated the defendant's Sixth Amendment right to have a jury find all the essential elements relevant to punishment. Id. at 2535-38. In so doing, the court noted that the maximum statutory sentence the defendant could receive was not the maximum for a Class B felony, ten years, but the maximum that could be imposed based on the conduct admitted by the defendant, or, in the case of a jury trial, those facts found by a jury, which was 53 months. Id. at 2537-38.

It would appear that Apprendi would be the more appropriate case for this issue, because it dealt with statutory maximums being increased based on judicial fact-finding. Blakely simply extended the holding in Apprendi to a determinate sentencing scheme that involved a range (49-53 months) within the statutory penalties (up to ten years). No such sentencing scheme existed when Peltier was sentenced.

A.

Neither Apprendi nor Blakely should apply retroactively to Peltier's case. Peltier claims that this is a Rule 35(a) motion which is part of the criminal case, rather than a collateral attack or habeas corpus action, and procedural default rules do not apply (Peltier Memorandum at 5, n.4).

The fact that an issue is raised in a Rule 35(a) motion rather than a 2255 motion is not dispositive. Section 2255 was enacted to provide a remedy equivalent to habeas corpus

in the sentencing court. Hill 368 U.S. at 427-28. However, a 2255 motion must be filed and docketed in the underlying criminal case. Rule 3(b), Rules Governing Section 2255 Proceedings. Furthermore, in discussing the reason for eliminating a filing fee for a Section 2255 motion under Rule 3, the Advisory Committee Notes (1976 Adoption), noted that the change was "done to recognize specifically the nature of a § 2255 motion as being a continuation of the criminal case whose judgment is under attack." The Eighth Circuit has recognized the same. Green v. United States, 262 F.3d 715, 718 (8th Cir. 2001)(although a § 2255 proceeding is a continuation of a criminal case, a § 2255 evidentiary hearing his not a criminal trial. . . .). In fact, one court has found that a new rule announced by the Supreme Court does not automatically apply retroactively to final sentences which are being challenged in a Rule 35(a) motion. See United States v. Woods, 986 F.2d 668, 674-76 (3rd Cir. 1993). Therefore, although Peltier's motion is under Rule 35(a), he should not be entitled to benefit from Apprendi or Blakely unless they fit within those new rules which the Supreme Court has identified as appropriate for retroactive application.

A "new rule" is announced "'if the rule was not dictated by existing precedent at the time a defendant's conviction became final.'" Caspari v. Bohlen, 510 U.S. 383, 390 (1994) (quoting Teague v. Lane, 489 U.S. 288, 301 (1989)). In order to decide this, a court must first determine when a defendant's conviction became final. Id. Second, the law at the time the defendant's conviction became final must be examined to determine if the court "'would have felt compelled by existing precedent to conclude that the rule [the defendant]

seeks was required by the Constitution.'" Id. (quoting Saffle v. Parks, 494 U.S. 484 (1990)). If the defendant's conviction was final and not dictated by existing precedent, it must be determined if the new rule falls within two exceptions to non-retroactivity: (1) a new substantive rule of criminal procedure -- one which "alters the range of conduct or class of person that the law punishes" by narrowing the scope of conduct prohibited by statute or placing certain conduct or persons beyond the power of a State or Congress to criminally punish; or (2) a "watershed rule" of criminal procedure -- one that "'implicates the accuracy and fundamental fairness of the criminal proceeding,'" that is, "one 'without which the likelihood of an accurate conviction is seriously diminished'" Schriro v. Summerlin, 124 S.Ct. 2519, 2522-23 (2004).

Peltier's conviction and sentence became final on March 5, 1979, when the Supreme Court denied certiorari, 440 U.S. 945. See Clay v. United States, 537 U.S. 522, 527 (2003). This was well before Apprendi and Blakely were handed down in 2000 and 2004, respectively.

Neither Apprendi or Blakely should apply retroactively. Regarding Apprendi, the Eighth Circuit has made clear that it does not apply retroactively. United States v. Moss, 252 F.3d 993 (8th Cir. 2001), cert. denied, 534 U.S. 1097 (2002). In Moss, the Eighth Circuit has found that Apprendi announced a new rule of criminal procedure that was not a "watershed" rule and, therefore, did not apply retroactively. Id. at 997-1001. Similarly, Blakely, which simply extended the holding in Apprendi to Washington's guideline

sentences, should not be applied retroactively. See Lilley v. United States, 342 F. Supp. 2d 532, 538-39 (W.D. Va. 2004); United States v. Cino, 340 F. Supp. 2d 1113, 1115-1118 (D. Nev. 2004); Morris v. United States, 333 F. Supp. 2d 759, 769-72 (C.D. Ill. 2004); Orchard v. United States, 332 F. Supp. 2d 275 (D. Maine 2004); United States v. Stoltz, 325 F. Supp. 2d 982, 986-87 (D. Minn. 2004). Therefore, Peltier is not entitled to have the holdings in Apprendi and Blakely applied to his case.

B.

More importantly, the jury made the necessary findings to subject Peltier to mandatory life sentences. As set forth in Section II of the Argument, there was no requirement that the United States prove that the murders occurred within the special maritime and territorial jurisdiction of the United States. Section 1114 provides the federal jurisdictional basis and incorporates the definitions and punishments of 18 U.S.C. § 1111. It does not incorporate the special maritime and territorial requirement and, therefore, the jury was not required to find that the murders were committed in the special maritime and territorial jurisdiction of the United States.

The jury was properly instructed that it was required to find that, at the time of the murders, the agents were employees of the Federal Bureau of Investigation and engaged in the performance of their official duties. Furthermore, as stated above, Peltier did not request that the jury find the crimes occurred within the special maritime or territorial jurisdiction of the United States. Rather, he requested a jury instruction on first degree

murder which requested as an essential element of first degree murder that the agents were federal agents engaged in performance of their official duties at the time of the killings, that is, "the officers of the F.B.I. were in the performance of their official duties" (Defendant's Requested Jury Instruction 6, Exh. 3). He also stipulated to these jurisdictional facts (Tr. Vol. XVI - pp. 3416-17, Exh. 4).[3] As reflected by the verdict, the jury clearly found this jurisdictional element under 18 U.S.C. § 1114 based upon the federal status of the slain agents.

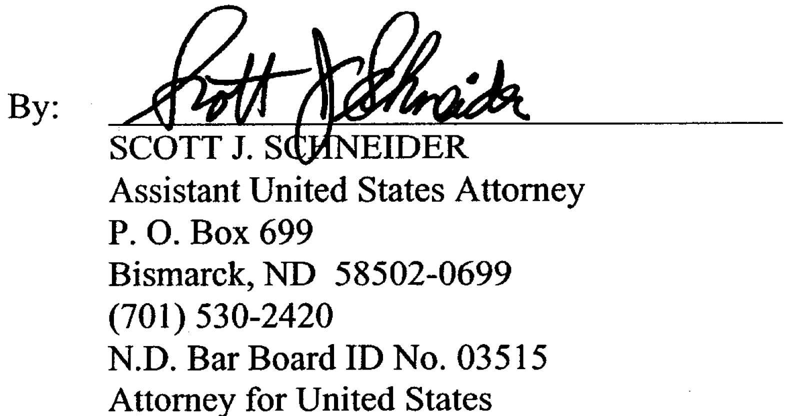
## Conclusion

Based upon the facts, law and argument set forth in this Response, the United States respectfully requests that the Court deny defendant Peltier's Rule 35(a) Motion.

Dated at Bismarck, North Dakota, this 29th day of December, 2004.

DREW H. WRIGLEY
United States Attorney

By:



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Attorney for United States

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[3] Some courts have concluded that when a defendant finds a jury instruction acceptable or specifically requests such an instruction, he cannot complain of any error in the instruction. See United States v. Fulford, 267 F.3d 1241, 1247 (11th Cir. 2001).

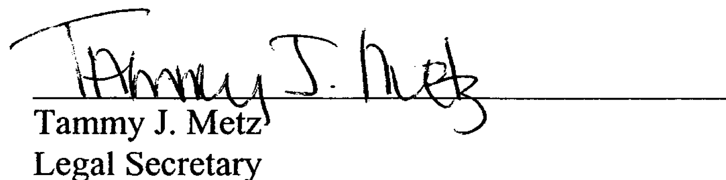
## CERTIFICATE OF SERVICE BY MAIL

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | Criminal No. C77-3003 |
| Plaintiff, | ) | |
| | ) | |
| -vs- | ) | |
| | ) | |
| LEONARD PELTIER, | ) | |
| | ) | |
| Defendant. | ) | |

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the District of North Dakota and is a person of such age and discretion as to be competent to serve papers.

That on December 30, 2004, she served a copy of the attached **Brief Resisting Defendant's Motion Under Rule 35(a) to Correct Illegal Sentence** by placing said copy in a postpaid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States mail at Bismarck, North Dakota.

Addressee: Mr. Barry A. Bachrach
Attorney at Law
PO Box 15156
Worcester, MA 01615-0156



Tammy J. Metz
Legal Secretary

Only the Westlaw citation is currently available.

United States District Court,
D. North Dakota,
Southeastern Division.

UNITED STATES of America, Plaintiff,
v.
Yorie Von KAHL, Defendant.

No. A3-96-55.

July 14, 2003.

ORDER DENYING MOTION FOR CORRECTION OF SENTENCE PURSUANT TO RULE 35(A)

RALPH R. ERICKSON, District Judge.

*1 Before the Court is a motion by Yorie Von Kahl to Correct an Illegal Sentence pursuant to Rule 35(a) of the Federal Rules of Criminal Procedure (doc. # 70). Plaintiff has filed a brief in opposition (doc. # 74). Defendant filed a reply brief (doc. # 81).

BACKGROUND

The events leading up to the present motion began in 1977. In that year, Yorie Kahl's father, Gordon, was convicted on two counts of failing to file income tax returns. After being released from prison, Gordon violated the terms of his probation and then refused to appear in court on the matter. A warrant for his arrest was issued.

On Sunday, February 13, 1983, the United States Marshal's Office located Gordon, who was with a group of people that included Yorie and Scott Faul. *United States v. Faul,* 748 F.2d 1204, 1208 (8th Cir.1984). The marshals attempted to arrest Gordon. *Id.* at 1209. A shootout started and two marshals were killed. *United States v. Udey,* 748 F.2d 1231, 1234 (8th Cir.1984). On May 28, 1983, a jury found Yorie guilty of two counts of second degree murder, assaulting United States Marshals and other law enforcement officers, conspiracy to assault, and harboring and concealing a fugitive. *Faul,* 748 F.2d at 1207. The court imposed two concurrent life terms for the second degree murders. *Id.*

ANALYSIS

Former Federal Rule of Criminal Procedure 35(a) stated that a court may "correct an illegal sentence at any time." *United States v. Landrum,* 93 F.3d 122, 125 (4th Cir.1996). This rule applies to all sentences imposed for offenses committed before November 1, 1987. *Id.* A jury convicted Yorie of offenses committed in 1983, so the Court has jurisdiction to decide the present motion. See *id.* (stating that a court may correct an illegal sentence at any time for offenses committed before November 1, 1987).

The purpose of Federal Rule of Criminal Procedure 35 is to "permit correction at any time of an illegal sentence." *Hill v. United States,* 368 U.S. 424, 430 (1962). An illegal sentence available for correction under this rule is a sentence not authorized by the judgment of conviction. *United States v. Peltier,* 312 F.3d 938, 942 (8th Cir.2002) (quoting *United States v. Morgan,* 346 U.S. 502, 506 (1954)). Situations where a sentence is illegal include when the punishment is in excess of that prescribed by statute and when multiple terms of incarceration are imposed for the same offense. *Hill,* 368 U.S. at 430 . If the court had the discretion to impose the challenged term of incarceration, it is not an illegal sentence. *Peltier,* 312 F.3d at 942.

Yorie argues that his sentence is illegal because the court did not have jurisdiction to try him for murder. He argues that the federal government only has criminal jurisdiction on the high seas or on property owned by the United States. Since the murders in this case did not happen on the high seas or on property owned by the United States, Yorie argues that the federal court lacked jurisdiction.

*2 These arguments do not relate to the legality of the sentence imposed because Yorie is not arguing that his sentence is in excess of that authorized by statute, or that he received multiple terms of incarceration for the same offense, or that it was legally or constitutionally invalid in any other respect. *Peltier,* 312 F.3d at 942. The relevant statute, 18 U.S.C. § 1111, allows a court to impose a life sentence on an individual found guilty of

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EXHIBIT 1

second degree murder. Since Kahl's sentence was authorized by statute, it is not illegal.

Even if Kahl's motion were properly before the Court, his arguments fail on their merits. It is well-settled that the same act may constitute an offense against the United States and an offense against a state. *Crossley v. California,* 168 U.S. 640, 641 (1898). Congress has the power to pass laws that "provide for the punishment of all crimes and offenses against the United States." *Logan v. United States,* 144 U.S. 263, 283 (1892). The unlawful killing of a federal officer is an offense against the United States, and 18 U.S.C. § 1114 gives federal courts jurisdiction to try those cases. *United States v. Harrelson,* 754 F.2d 1153, 1173 (5th Cir.1985). For the definitions of murder, 18 U .S.C. § 1114 incorporates the definitions found in 18 U.S.C. § 1111. 18 U.S.C. § 1114(1).

The definitions portion of 18 U.S.C. § 1111 is found at subsection (a), which contains a mens rea element and the different degrees of murder. The "special maritime" and "territorial jurisdiction" language of 18 U.S.C. § 1111 is not incorporated by 18 U.S.C. § 1114(1) because 18 U.S.C. § 1114(1) only incorporates the definition and punishment portions of 18 U.S.C. § 1111. See United *States v. Young,* 248 F.3d 260, 274-74 (4th Cir.2001) (stating that when a federal statute refers to the definition portion of 18 U.S.C. § 1111, it is only referring to subsection (a)). The "special maritime" and "territorial jurisdiction" language of subsection (b) of 18 U.S.C. § 1111 is another independent jurisdiction clause. *Id.* at 275. Since that portion of subsection (b) is not incorporated by 18 U.S.C. § 1114, the government did not have to prove that the crime took place within the special maritime or territorial jurisdiction of the United States.

Kenneth Muir and Robert Cheshire were federal officers who were killed while performing their official duties, therefore the federal court had jurisdiction to try the case. 18 U.S.C. § 1114; see also *Logan,* 144 U.S. at 283 (stating that Congress has the authority to pass laws that punish crimes against the United States). Yorie's argument that the court lacked jurisdiction is frivolous, *United States v. Adams,* 581 F.2d 193, 200 (9th Cir.1978), and without merit, *United States v. Deering,* 179 F.3d 592, 597 (8th Cir.1999); *Barrett v. United States,* 82 F.2d 528, 534 (7th Cir.1936).

Yorie also appears to find significant a difference in the wording between the first degree murder charge and the second degree murder charge on the verdict form. The first degree murder charge includes the words "as charged in the indictment" while the second degree murder charge does not include that language. The Court fails to see the significance of this difference. The language on the verdict form specifically states that the jury found Yorie guilty of the "offense of second degree murder of Kenneth B. Muir" and the "offense of second degree murder of Robert S. Cheshire, Jr." The verdict form identifies both men by name and states the charge. Muir and Cheshire were both officers or employees of the United States engaged in official duties when they were killed. Therefore, the court had jurisdiction over this case, 18 U.S.C. § 1114, so the judgment is not void.

DECISION

*3 Based on the foregoing, Defendant Yorie Von Kahl's Motion to Correct an Illegal Sentence pursuant to Rule 35(a) of the Federal Rules of Criminal Procedure is DENIED. Defendant's Motion for extension of time to file the reply brief and for an order compelling the United States to provide legal opinions and records (doc. # 80) is moot.

IT IS SO ORDERED.

2003 WL 21715352 (D.N.D.)

END OF DOCUMENT

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**H**

Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Eight Circuit Rule 28A(i). (FIND CTA8 Rule 28A.)

United States Court of Appeals,
Eighth Circuit.

UNITED STATES of America, Appellee,
v.
Yorie Von **KAHL,** Appellant.

No. 03-3009.

Submitted April 1, 2004.
Decided April 26, 2004.

Appeal from the United States District Court for the District of North Dakota.

Scott Jordan Schneider, U.S. Attorney's Office, Bismarck, ND, for Plaintiff-Appellee.

Yorie Von Kahl, Leavenworth, KS, pro se.

Before BYE, McMILLIAN, and RILEY, Circuit Judges.

[UNPUBLISHED]

PER CURIAM.

****1** Yorie Von Kahl (Kahl) appeals from the final judgment entered in the United States District Court [FN1] for the District of North Dakota denying his motion to correct an illegal sentence. Kahl, who was sentenced to life imprisonment in 1983 for his role in a shootout that resulted in the deaths of two United States Marshals, brought this motion pursuant to a former, pre-1987 version of Fed.R.Crim.P. 35(a) (court may correct illegal sentence at any time). As the district court determined, Kahl's arguments in support of the motion did not relate to the legality of his sentence and, in any event, were meritless. *See Hill v. United States,* 368 U.S. 424, 430, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962) (narrow function of Rule 35 is to permit correction of illegal sentence; sentence is not illegal if it did not exceed that prescribed by relevant statutes, multiple prison terms were not imposed for same offense, and terms of sentence itself were not legally or constitutionally invalid); *United States v. Woods,* 973 F.2d 677, 678 (8th Cir.1992) (sentence within statutory maximum is not illegal sentence). Contrary to Kahl's contention, federal jurisdiction supporting the jury verdicts was established, and his convictions and sentences for second-degree murder were authorized by 18 U.S.C. § 1111 (maximum sentence of life) and § 1114 (conferring federal jurisdiction to punish those who kill United States employees engaged in performance of official duties). Accordingly, we affirm. *See* 8th Cir. R. 47B.

FN1. The Honorable Ralph R. Erickson, United States District Judge for the District of North Dakota.

95 Fed.Appx. 200, 2004 WL 878368 (8th Cir.(N.D.))

Briefs and Other Related Documents (Back to top)
. 03-3009 (Docket) (Aug. 12, 2003)

END OF DOCUMENT

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EXHIBIT 2

UNITED STATES v. LEONARD PELTIER, Criminal Number C77-3003-01

DEFENDANT'S PROPOSED JURY INSTRUCTION
NUMBER 6

The following are the essential elements which the Government is required to prove to convict the Defendant of First Degree Murder as charged in both counts of the indictment.

1. The act or acts of killing a human being unlawfully;

2. Doing such act or acts with malice aforethought;

3. Doing such act or acts while the officers of the F.B.I. were in the performance of their official duties;

5. That in killing the deceased, the Defendant was not acting in self-defense [if applicable].

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence.

United States v. Butler & Robideau, CR76-11 (N.D.Ia. 1976)
Instruction Number 11

(#5) Mullaney v. Wilbur, 421 U.S. 684 (1975)



EXHIBIT 3

(Copy)

VOLUME XVI

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

- - - -

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff, | ) |
| -vs- | ) Criminal No. C77-3003 |
| LEONARD PELTIER,<br>Defendant. | ) |

- - - -

TRANSCRIPT OF PROCEEDINGS

- - - -

Before:

Honorable PAUL BENSON

Fargo, North Dakota
April 6, 1977

ZONA A. Mc ARTHUR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
FARGO, NORTH DAKOTA

EXHIBIT 4

order to allow him to leave without being arrested, that is why I asked that question.

Q Well, you know that the word conspiracy implies criminal conduct by two or more people to give the simplest possible definition, isn't that correct?

A Yes, sir.

Q Where did you get any information that there may have been some other people involved in the incident?

A I don't know that there was, sir.

Q So you just happened to ask him that question, is that what you say?

A Yes, I did, sir.

MR. TAIKEFF: I have no further questions.

MR. CROOKS: We have nothing further.

THE COURT: You may step down.

MR. HULTMAN: Your Honor, the government has, and Counsel for the defendant has entered into further stipulations which I would like to read at this particular time.

With reference to stipulation of evidence, paragraph 1 of that major stipulation, "Government Exhibit 1, document appointing Ronald A. Williams and Jack R. Coler as special FBI agents and the authority for Williams to carry a personally owned firearm, a Smith and Weston model 19, .357 caliber revolver, serial number 3K10439, the parties hereby stipulate and agree that said documents are genuine and further authenti-

cation and foundation is not required. That pursuant to Federal Rules of Evidence 803 (6). If the custodian or other qualified witness of these documents were called he would testify that they were kept in the course of a regularly conducted business activity and it was the regular practice of that business activity to make such documents."

Therein I would submit into evidence and offer at this time Government's Exhibit No. 1. That exhibit is from the chief of the record section of the Federal Bureau of Investigation, three documents and the covering letter of those particular documents, and I would offer them into evidence now with the understanding that since they are under seal and they are in six copies that the clerk would withdraw five of each of the three copies. I have not withdrawn them because they are under seal and I would make that offer at this particular time.

MR. TAIKEFF: Can we have one of the copies?

MR. HULTMAN: Yes.

MR. LOWE: No objection, YOur Honor.

THE COURT: Exhibit 1 is received.

MR. HULTMAN: Then I have just received from the Clerk a copy of a stipulation which has been agreed to herein and I will read it at this time: "Previous stipulation that it is hereby stipulated and agreed between the United States of America and Defendant Leonard Peltier and his counsel that

on June 26, 1975 Ronald A. Williams and Jack R. Coler were employees of the Federal Bureau of Investigation, department of justice and were at the time of their deaths on said date engaged in the performance of their official duties."

And lastly, "it is hereby stipulated and agreed between the United States of America and the Defendant Leonard Peltier and his Counsel, one, that on November 22, 1972 Leonard Peltier was charged with attempted murder in Milwaukee, Wisconsin. He was served with an arrest warrant concerning said charge on or about November 22, 1972, was arraigned, pleaded not guilty and was released on the bond;

two, on or about July 29, 1974 Leonard Peltier failed to appear for trial on said charge pursuant to the terms of his bond and his bond was forfeited and a bench warrant issued for his arrest;

three, on August 9, 1974 a warrant was issued from the United States District Court in the eastern district of Wisconsin charging Leonard Peltier with unlawful flight to avoid prosecution concerning his failure to appear on the charge mentioned in one above. However, there is no evidence that Leonard Peltier was aware of the existance of this warrant on June 26, 1975;

four, on June 26, 1975 Leonard Peltier was aware that a warrant was outstanding for his arrest concerning the attempted murder charge in Milwaukee. He knew if he were taken

INSTRUCTION NO. 8

The following are the essential elements which the government is required to prove to convict the defendant of first degree murder as charged in each of the two counts of the indictment:

1. The act or acts of killing a human being unlawfully;
2. Doing such act or acts with malice aforethought;
3. Doing such act or acts with premeditation;
4. Doing such act or acts while the officers or the FBI were engaged in the performance of their official duties.
5. That in killing the deceased, the defendant was not acting in self-defense.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The parties have stipulated that on June 26, 1975, Ronald A. Williams and Jack R. Coler were employees of the Federal Bureau of Investigation of the Department of Justice and were, at the time of their deaths on said date, engaged in the performance of their official duties. The jury must accept the stipulation as evidence and on the basis of the stipulation regard the fourth element as proved.

EXHIBIT 5