CASE NO. 05-3194

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LEONARD PELTIER,
Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OFNORTH DAKOTA
SOUTHEASTERN DIVISION

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF JURISDICTION

On or about December 14, 2004, Leonard Peltier ("Peltier") filed a Motion To Correct Illegal Sentence in the United States District Court for the District of North Dakota ("District Court"), under former Fed.R.Crim.P. 35(a), to correct the illegal sentences imposed upon him by that Court. The District Court entered judgment denying Peltier's Motion on July 20. 2005. Peltier timely filed an appeal from that judgment on July 29, 2005, under 28 U.S.C. §§ 2253, 2255.

QUESTIONS PRESENTED

I. Whether the District Court erroneously ruled that former Fed.R.Cr.P. 35(a) could not be used to challenge an illegal sentence based on the ground that the Court lacked subject matter over the crimes for which Mr. Peltier was tried, convicted and sentenced.

II. Whether the District Court erroneously failed to vacate the illegal sentence imposed on Mr. Peltier ruling, in error, that it had subject matter jurisdiction to sentence Mr. Peltier under 18 U.S.C.§§ 2, 1111, and 1114.

III. Whether the District Court erroneously refused to Apply the principles of the recent "BLAKELY" decision which requires this Court to vacate the illegal sentence imposed on Mr. Peltier.

STATEMENT OF THE CASE

This is an appeal from the District Court's denial of Peltier's Motion to Correct Illegal Sentence. Peltier was tried, convicted, and sentenced to two consecutive life sentences pursuant to 18 U.S.C. §§ 2, 1111, and 1114. This matter arises out of the deaths of two FBI agents on the Pine Ridge Indian Reservation on June 26, 1975. Peltier argued that the District Court lacked subject matter jurisdiction under the statutes upon which he was convicted and sentenced based on the undisputed facts of this case. The statutes in question require that the acts take place "within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 1111(b). Since the acts occurred on the Pine Ridge Indian Reservation, which is neither "within the special maritime [or] territorial jurisdiction of the United States," Mr. Peltier was convicted and sentenced for crimes over which the Court had no subject matter jurisdiction.

On June 15, 2005, the District Court held a hearing on Peltier's Motion. On July 20, 2005, the District Court issued a Memorandum and Order, denying the Motion. (A copy of the Memorandum and Order is attached as Addendum A.) Peltier timely appealed from that Order.

STATEMENT OF FACTS

On June 26, 1975, two FBI agents were killed in a gun battle at the Pine Ridge Indian Reservation. The agents became involved in a firefight with a group of Native Americans encamped at the "Jumping Bull Compound," as they drove in pursuit of another vehicle into a valley below that residential area. The agents were incapacitated by wounds suffered from long range firing and then allegedly killed by shots fired at point-blank range by a high-velocity, small caliber weapon. United States v. Peltier, 585 F.2d 314, 318 (8th Cir. 1978).

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

Peltier was charged in a two-count indictment for first-degree murder in violation of 18 U.S.C. §§ 2, 1111, and 1114. Peltier, 585 F.2d at 318. Peltier was tried, convicted, and sentenced to two consecutive life sentences

on both counts, even though the acts at issue all occurred on the Pine Ridge Indian Reservation.

Following his trial, Peltier issued Freedom of Information Act Requests ("FOIA") to the FBI and discovered material information and data which the government improperly withheld and which undermined the government's evidence that Peltier personally killed the two agents at close range with the so-called Wichita AR-15. See United States v. Peltier, 800 F.2d 772, 772-76 (8th Cir. 1986). The Eighth Circuit characterized the withheld evidence as "newly discovered evidence indicating [the government's ballistics expert] may not have been telling the truth…,"[1] and noted "**inconsistencies casting strong doubts upon the government's case**…." 800 F.2d at 777, 779-80 (Emphasis added.)[2] The Court also observed that the government erroneously argued at trial that there was only one AR-15 at the Jumping Bull compound on the day in question, since the evidence demonstrated the presence of multiple AR-15 shell casings that

[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.

[2] The United States Court of Appeals for the Tenth Circuit stated, as recently as November 2003: "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.)

could not be matched to the so-called Wichita AR-15. 800 F.2d at 779. The Eighth Circuit nevertheless affirmed the denial of Peltier's habeas petition. In doing so, the Court concluded that, while the jury might have acquitted Peltier if the "record and data improperly withheld from the jury had been available," the Court could not conclude that the jury would have probably reached a different result. 800 F.2d at 779-80.

Faced with having "improperly withheld" material evidence which cast strong doubt whether Peltier participated in the close range execution of the agents, the government began to emphasize that it was unnecessary to prove that Peltier executed the agents at close range to uphold the murder convictions. Indeed, the government conceded that it could not prove who fired the fatal shots at two different oral arguments before this Court.

SUMMARY OF ARGUMENT

Former Fed.R.Crim.P. 35(a) permits Peltier to challenge a sentence that is void or not authorized by law. The District Court erred by ruling that former Rule 35(a) could not be used to correct an illegal sentence which was void “ab initio,” because the Court lacked jurisdiction over the crimes for which Peltier was convicted and sentenced. A court has inherent authority to address lack of subject matter at anytime.

Peltier was convicted and sentenced under 18 U.S.C. §§ 2, 1111, and 1114. 18 U.S.C. § 1114 expressly incorporated the provisions of 18 U.S.C. § 1111(b) which provided both the jurisdictional and punishment provisions for the two statutes. See 18 U.S.C. S 1114 (1983). Section 1111 expressly required the government to establish the jurisdictional elements of 18 U.S.C. §1111, which required that the acts occur "within the special maritime and territorial jurisdiction of the United States," as required by § 1111(b) and defined in Section 7. The crimes for which Peltier was convicted and sentenced occurred in Indian Country and not "within the special maritime and territorial jurisdiction of the United States," and hence Peltier's sentences were void ab initio.

The District Court erroneously ruled that the alleged crimes did not have to occur with the territorial jurisdiction of the United States. The ruling is clearly wrong since the District Court read the jurisdictional phrase out of the statute in violation of the rule that a Court must give meaning to every word in a statute.

Since Indian Country is sovereign land, Federal jurisdiction over crimes in Indian Country derives from the "Indian Crimes Act," codified in 18 U.S.C. § 1151 et. seq., and the United States Constitution Art. I, §8, cl. 3. Indian Country is not a "place within the sole and exclusive jurisdiction of

the United States," and, by its terms, 18 U.S.C. § 7 does not extend federal jurisdiction to crimes committed in Indian Country. United States v. Wheeler, 435 U.S. 313, 324 (1978)("statutes establishing federal criminal jurisdiction over crimes involving Indians have recognized an Indian tribe's jurisdiction over its members"). Where the offense has not been committed strictly within the place expressly defined by Congress, as here, it "cannot be punished in the courts of the Union." United States v. Bevans, 16 U.S. (3 Wheat.) 336, 388 (1818).

The District Court's ruling rests on its conclusion that 18 U.S.C. § 1114 is "one of general applicability." This ruling is erroneous based on an analysis of the history of that statute and controlling case law. As applied here, Section 1114 has no express jurisdictional provision by which a Court could determine whether it appropriately applies extraterritorially in specific circumstances. Indeed, Section 1114 incorporates certain provisions of Section 1111, which expressly provides jurisdiction only "within the special maritime and territorial jurisdiction of the United States," i.e. "federal enclave jurisdiction." Hence, as applied here, 18 U.S.C. §§ 2, 1111 and 1114 have no express provisions that would permit a Court to apply them extraterritorially.

The District Court's reliance on the jury instructions by Defendant's counsel is erroneous. Parties cannot confer jurisdiction on the Court and, therefore, Defendant's proposed jury instructions are irrelevant.

Finally, the District Court rejected Mr. Peltier's arguments under Blakely v. Washington, 124 S.Ct. 2531 (2004), and Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), on the ground that the cases did not apply retroactively. However, the District Court's ruling is erroneous because it wrongly assumed that Mr. Peltier's Motion was under 28 U.S.C. 2255. Rather, Mr. Peltier's Motion was under Former Rule 35(a) which is significant because Apprendi addressed former Rule 32(b). Hence, Mr. Peltier's Motion does not present an issue of retroactivity, but rather the state of the law applicable to his case.

Blakely and Apprendi establish that Mr. Peltier's sentence is illegal. Sentences which are unauthorized, "infringe on the province of the jury," and are a pure usurpation by "a lone employee" of the Government, id., and clearly illegal. Blakely, 124 S.Ct. at 2538-43. Blakely completely supports Petitioner's arguments. Thus, Mr. Peltier's life sentences on Counts 1 and 2 are illegal because the government failed to establish that the acts occurred "within the special maritime and territorial jurisdiction of the United States,"

a jurisdictional and essential element of murder pursuant to 18 U.S.C. § 1111(b).

ARGUMENT

I. THE DISTRICT COURT ERRED IN RULING THAT FORMER RULE 35(A) WAS NOT AN APPROPRIATE RULE TO CORRECT AN ILLEGAL SENTENCE BASES ON THE COURT'S LACK OF SUBJECT MATTER JURISDICTION OVER THE CRIMES FOR WHICH MR. PELTIER WAS TRIED AND CONVICTED.

Former Fed.R.Crim.P. 35(a) provides: "Correction of sentence. The Court may correct an illegal sentence at any time. This rule applies to any offense committed before November 1, 1997. United States v. Nieves-Rivera, 961 F.2d 15 (1st Cir. 1992); United States v. Tosh, 141 F.Supp. 2d 738 (W.D.Ky. 2001); Bushman v. United States, 258 F.Supp. 2d 455 (E.D.Va. 2003), aff'd, 70 Fed. Appx. 153 (4th Cir. 2004). See also United States v. Weaver, 884 F.2d 549 (11th Cir. 1989). Rule 35 is merely the codification of the common law rule retaining inherent jurisdiction in a sentencing court to correct illegal sentences imposed and to correct sentences imposed in an illegal manner. See United States v. Rico, 902 F.2d 1065, 1067 (2nd Cir. 1990). Where the judgment is "void," it is not "final." DeBenque v. United States, 85 F.2d 202, 205 (D.C. Cir. 1936). An "illegal sentence" is among other things a sentence "that the judgment of conviction

did not authorize," Morgan v. United States, 346 US 502, 506, 74 S. Ct. 247, 98 L. Ed. 248 (1954), or when it is "not authorized by law." United States v. Peltier, 312 F.3d 938, 942 (8th Cir. 2002).

Contrary to the District Court's ruling, Peltier's motion does not challenge the underlying conviction or seek to re-examine errors occurring at trial. Rather, Peltier's motion claims that the District Court lacked jurisdiction to impose the sentences on the crimes for which Peltier was sentenced. Put simply, the sentence is illegal because the District Court never had jurisdiction and, therefore, the sentence is void ab initio.

The District Court erroneously ruled that Peltier could not raise the issue of subject matter jurisdiction. However, the law is clear that a "court may always raise the question of subject matter jurisdiction on appeal and in the courts below." United States v. Prestenbach, 230 F.3d 780, 782n.3 (5th Cir. 2000). See Goldin v. Bartholomew, 166 F.3d 710, 714 (5th Cir. 1999)(subject matter jurisdiction is appropriately raised at any time as to Court's jurisdiction to sentence); United States v. Santora, 711 F.2d 41, 42 (5th Cir. 1983)(same). See also United States v. Adonozio, 442 U.S. 178, 184 (1979); DeBenque, 85 F.2d at 205. The history of the Indian Crimes Act firmly establishes that Congress exercised "broad respect for tribal

sovereignty," and limited federal jurisdiction over Indian country by enacting the “Indian Crimes Act.”

II. THE CLEAR LANGUAGE OF THE STATUTES AT ISSUE ESTABLISH THAT THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION TO SENTENCE PELTIER UNDER 18 U.S.C.§§ 2, 1111, AND 1114.

At the time of the acts at issue, 18 U.S.C. § 1114 expressly incorporated the provisions of 18 U.S.C. § 1111(b) which provided both the jurisdictional and punishment provisions for the two statutes. See 18 U.S.C. S 1114 (1983). Section 1111 expressly required the government to establish the jurisdictional elements of 18 U.S.C. §1111 to confer jurisdiction to convict and sentence Peltier for the crimes with which he was charged. Section 1111(b) jurisdictionally requires that the acts occur “within the special maritime and territorial jurisdiction of the United States,” as required by § 1111(b) and defined in Section 7. Thus, the federal jurisdiction conferred by Section 1111, which jurisdictional elements are incorporated into Section 1114, depends on the location of the crime, not against whom the crime was committed.

To hold otherwise would read language out of Section 1111(b) which is incorporated by Section 1114, which a Court of course cannot do since criminal statues must be strictly construed. 18 U.S.C. § 1111(b) provided:

> [W]ithin the special maritime and territorial jurisdiction of the United States,
>
> whoever is guilty of murder in the first degree ….

The District Court's ruling completely ignores the parenthetical phrase, which commences the provisions of Section 1111(b). Nowhere in Section 1114 does it provide that it only incorporates part of Section 1111(b). Rather, it expressly incorporates Section 1111(b) in its entirety and it is incumbent upon the Courts to give meaning to each and every word in that Section. Put simply, the District Court outright excised the plain language of § 1111(b) from the statute to sustain its jurisdiction and impermissibly uphold the "illegal" conviction and sentence of Peltier. United States v. Goodwin, 11 U.S. 32 (1812).

Thus, the District Court's jurisdiction depended upon proof that the offenses occurred "within the special maritime and territorial jurisdiction of the United States," 18 U.S.C. §1111(b), which jurisdictional element at the time of the instant offense was defined at 18 U.S.C. §7(1)-(5), none of which include the Pine Ridge Reservation.[3] Where the offense has not been

[3] Congress has, in fact, provided for the punishment of murder within Indian Country, 18 U.S.C. §1153(a), but the defendant has never been charged or tried for this offense. Instead, the government created a composite statute embracing elements of 18 U.S.C. §1114 and 1111, omitting the portion of the sentence from §1111 that authorizes punishment

committed strictly within the place expressly defined by Congress, as here, it "cannot be punished in the courts of the Union." Bevans, 16 U.S. (3 Wheat.) at 388; see also United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 94 (1820) ("The jurisdiction of the court depends on the place in which the act was committed" and an offense "is not punishable in the courts of the United States…unless it be committed" in the place expressly defined in the statute. The only question, then, IS "Is the place described in the…verdict" (Id. at 93); the place defined in the statute? There is no dispute that the acts in this case occurred on the Pine Ridge Indian Reservation, a location outside the territorial jurisdiction of the United States. The government offered no evidence that the acts occurred "within the special maritime and territorial jurisdiction of the United States." Indeed, the government made no attempt to prove this jurisdictional element because, as a matter of undisputed fact, **it could not**. The acts all occurred on the Pine Ridge Indian Reservation, which is, indisputably, not "within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 1111(b).

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and proceeded to try him accordingly. The Supreme Court has long forbid the government to create such composite offenses by borrowing terms from various statutes no matter how similar in character. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 93-94, 97, 99 (1820).

III. FEDERAL DISTRICT COURTS CAN EXERCISE JURISDICTION OVER INDIAN COUNTRY ONLY IF EXPRESSLY GRANTED.

Without exception, the Constitution and the declarations of the Supreme Court have held that "murder" is not and never has been punishable by Congress and the federal courts unless it has been committed "outside the jurisdiction of the state," and the murder offense prescribed by 18 U.S.C. § 1111 is and remains "applicable only on federal enclaves." Lewis v. United, 523 U.S. 155, 171 (1998); United States v. Parker, 622 F. 2d 298, 302-305 (8th Cir. 1980) (place requirements of § 1111(b) are mandatory to permit federal jurisdiction over offense); United States v. Leight, 818 F.2d 1297, 1305 (7th Cir. 1987) (exclusive place requirements of statute must be proven beyond reasonable doubt or court loses jurisdiction over offense).

Putting aside the merits of this Court's decision in United States v. Von Kahl, 95 Fed. Appx. 200 (8th Cir. 2004), cert. denied, 125 S. Ct. 1096 (2005), there is a significant distinguishing factor between Peltier's motion and that brought by Mr. Von Kahl.[4] Unlike the Von Kahl case, Peltier's

[4] Peltier respectfully submits that this Court's decision in the Von Kahl case was erroneous and that it erroneously ruled that 18 U.S.C. § 1111 and 1114 does not require the government to establish, as an essential jurisdictional element of its claim, that the crime occurred "within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 1111(b). Mr. Von Kahl's case is now pending before the United States Supreme Court on a writ of mandamus.

alleged crimes occurred in Indian Country.[5] Federal jurisdiction over crimes in Indian Country derives from the "Indian Crimes Act," codified in 18 U.S.C. § 1151 et. seq., and the United States Constitution Art. I, §8, cl. 3.[6] As the government concedes, Peltier was not charged with, or sentenced for, any crime under the "Indian Crimes Act."

"Although physically within the territory of the United States and subject to ultimate federal control, they [Indian tribes] remain 'a separate people, with the power of regulating their internal and social relations.'" Wheeler, 435 U.S. at 322; quoting, United States v. Kagama, 118 U.S. 375, 381-82 (1886). Indian Country is not a "place within the sole and exclusive jurisdiction of the United States," and, by its terms, 18 U.S.C. § 7 does not extend federal jurisdiction to crimes committed in Indian Country. Wheeler, 435 U.S. at 324 ("statutes establishing federal criminal jurisdiction over crimes involving Indians have recognized an Indian tribe's jurisdiction over its members"); Draper v. United States, 164 U.S. 240 (1896)("the reservation was not within the sole and exclusive jurisdiction of the United

[5] As relevant here, Indian Country means "all lands within any Indian reservation under the jurisdiction of the United States Government…." 18 U.S.C. 1151(a).

[6] Congress' authority under Art. I, §8, cl. 3 is limited "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."

States, as the indictment fails to charge that the crime was committed by an Indian"); United States v. McBratney, 104 U.S. 621, 624 (1881).

The powers of Indian tribes are 'inherent powers of a limited sovereignty which has never been extinguished.'" Wheeler, 435 U.S. at 322, quoting, F. Cohen, Handbook of Federal Indian Law 122 (1945). While Indian tribes do not retain full sovereignty, the United States Supreme Court has established that they retain sovereignty: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory….[They] are a good deal more than 'private, voluntary organizations." United States v. Mazurie, 419 U.S. 544, 557 (1975). As stated by the Supreme Court in Wheeler:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. **But until Congress acts, the tribes retain their existing sovereign powers.** In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of the dependent status.

435 U.S. at 323 (emphasis added.)

Thus, had Congress extended federal criminal jurisdiction under Sections 1111 and 1114 to Indian Country, it could have amended 18 U.S.C. § 7 to include Indian Country. Instead, Congress exercised "broad respect for tribal sovereignty," and limited federal jurisdiction over Indian country

by enacting the "Indian Crimes Act." This is reflected by the history of the Indian Crimes Act.

It was not until 1885 that the federal government legislated jurisdiction over Indian Country. See Ex Parte Crow Dog, 109 U.S. 556 (1883)(federal court had no jurisdiction for murder in Indian Country). As a reaction to that case, Congress passed the Indian Crimes Act, which provided the federal government with jurisdiction over crimes in Indian Country in certain circumstances. See Keeble v. United States, 412 U.S. 205, 209-12(1973); United States v. Kagama, 118 U.S. 375, 383 (1886). See also United States v. John, 437 U.S. 634 (1978). The passing of the "Indian Crimes Act" is what provided the federal government with criminal jurisdiction over Indian Country as defined in 18 U.S.C. 1151 et. seq. Lacking that Congressional Act, the federal government lacked any jurisdiction to prosecute crimes in Indian Country.

Since the federal government has jurisdiction to sentence someone for a crime committed in Indian Country only under the Indian Crimes Act, this Court lacked jurisdiction to sentence Peltier since he was not charged or convicted with any crime under the "Indian Crimes Act." See United States v. Bruce, 394 F.3d 1215 (9th Cir. 2005).

IV. SINCE NEITHER 18 U.S.C. §§ 2, 1111 OR 1114 PROVIDE JURISDICTION TO SENTENCE PELTIER FOR A CRIME COMMITTED IN INDIAN COUNTRY, PELTIER'S SENTENCE IS ILLEGAL.

The District Court's ruling rests on its conclusion that 18 U.S.C. § 1114 is "one of general applicability." (Memorandum and Order at 6-7.) The legislative history and long standing case law, however, establish that the District Court's reasoning is erroneous.

18 U.S.C. § 1114 is rooted in the Act of May 18, 1934, c. 299, 48 stat. 781, which is ultimately derived from the Act of March 4, 1909, s 276, 35 stat. 1143. See United States v. Feola, 420 U.S. 671, 679, 702 and n. 12-13 (1975). The Congressional record establishes that Section 1114 derived from Congress' authority to regulate commerce among the several states pursuant to the United States Constitution Art. I, §8, cl. 3. (See Congressional Record Vol. 43, Part I, 60th Congress January 20, 1908, at pp. 857-59). As applied in this case, Section 1114 neither regulates a commercial activity nor contains any requirement that it is in any way connected to interstate commerce. Cf. United States v. Lopez, 514 U.S. 549 (1995) (held that Congress had no authority to enact federal offense for Gun-Free School Zones). See also Foley Bros. v. Filardo, 336 U.S. 281(1949)(federal statute has no extra-territorial application absent express

statement by Congress); United States v. Flores, 289 U.S. 137 (1933) (same); United States v. Bowman, 260 U.S. 94 (1922)(same).

Even when federal assault statutes have exceeded Congress' commerce and taxing powers, e.g., Immigration Act of February 5, 1917, Chapter 29, 39 Statute 885 (premised on Congress' naturalization power under Art. 1, § 1, Clause 4), it was nevertheless grounded upon "one or more of [Congress'] powers enumerated in the Constitution". United States v. Morrison, 529 U.S. 598, 607 (2000).

By contrast, Section 1114 is grounded solely upon the executive "preference," thereby boldly usurping traditional state jurisdictions respecting murder of law enforcement officers. Feola, 420 U.S. at 680 and note 16 (legislative history reveals the Act passed solely upon the then United States Attorney General Cumming's letter to Senator Ashurst urging Congress to assume such jurisdiction because in his view it was "preferable"); 420 U.S. at 683-84 (noting in respect to Section 1114 Congress was "duplicating state proscriptions" solely to bring these traditional state offenses into federal courts).

The Constitution forbids such usurpation. Morrison, 529 U.S. at 618. See also 18 U.S.C. §§1114, revision notes of 1948 ("the section was extended…in view of the obvious *desirability* of such protective

legislation.") Ironically, the Supreme Court in Feola was unable to find a basis of legislative jurisdiction for subsection 1114 and resorted to speculation that it was grounded on mistrust of the states and federal morale. 420 U.S. at 684n.18. Neither reason provides a constitutional basis to support the enactment of the statute. Morrison, 529 U.S. at 607. Neither desire nor mere preference is a constitutional grant of power. Linder v. United States, 268 U.S. 5, 22 (1925) (such legislation is "not a `law…proper for the carrying into execution [a granted power],' and is thus … `merely [an] ac[t] of usurpation' which deserve[s] to be treated as such.'" Printz v. United States, 521 U.S. 898, 924-25 (1997).

Lopez is very instructive here. In Lopez, the United States Supreme Court ruled that 18 U.S.C. § 922(q) could not be applied to usurp state jurisdiction over the crime stated therein because it failed to expressly contain a jurisdictional element that would ensure, through a case by case analysis, that the requisite case had a nexus with interstate commerce. 514 U.S. at 561-62.

However, this Court need not decide the constitutional infirmity inherent in Section 1114 when it is read alone. By reading the punishment of Section 1114 "as provided under Sections 1111 and 1112" without excising any parts of the provisions, the plain language of such punishment

provisions limits punishment to offenses occurring "within the special maritime and territorial jurisdiction of the United States." - a proper basis for federal criminal jurisdiction.

As applied here, Section 1114 has no express jurisdictional provision by which a Court could determine whether it appropriately applies extraterritorially in specific circumstances. Indeed, Section 1114 incorporates certain provisions of Section 1111, which expressly provides jurisdiction only "within the special maritime and territorial jurisdiction of the United States," i.e. "federal enclave jurisdiction." Hence, as applied here, 18 U.S.C. §§ 2, 1111 and 1114 have no express provisions that would permit a Court to apply them extraterritorially. Indeed, these statutes apply only to "federal enclave jurisdiction."

This is confirmed in the recent case of Stantini v. United States, 268 F. Supp. 2d 168, 181 (S.D.N.Y. 2003), in which the Court addressed the scope of 18 U.S.C. § 1111 in connection with other federal criminal statutes. In doing so, the Court stated:

> Section 1111(a) defines murder in the first and second degrees. Section 1111(b) specifies the penalties for each of these two types of murder, and limits the reach of Section 1111 to murders committed "within the special maritime and territorial jurisdiction of the United States." The actual Section 1111, however, includes its own jurisdictional element, viz., 1111(b)-which limits Section 1111 as a whole to murders committed

> "within the special maritime and territorial jurisdiction of the United States."

Stantini, 268 F.Supp. 2d at 181, quoting United States v. Bin Laden, 92 F.Supp. 2d 189, 204-05 (S.D.N.Y. 2000). See also United States v. Parker, 622 F.2d 298, 301(8th Cir. 1980); United States v. Wilson, 565 F.Supp. 1416, 1428-29 (S.D.N.Y. 1983).

The cases relied upon by the District Court and the government which hold that 18 U.S.C. 1114 provides its own stand alone jurisdiction are based on conclusory reasoning which ignores that Section 1114 is not a stand alone statute, but must be read in conjunction with Section 1111 by the very terms of Section 1114. The cases relied upon by the government completely ignore the express jurisdictional limitations of that statute which, by its terms, has a very specific and limited jurisdictional application. It clearly does not apply to Indian Country by its terms.

This Court thus lacked jurisdiction to sentence Peltier under 18 U.S.C. §§ 2, 1111 and 1114. Hence the sentences imposed upon him by this Court are illegal. Put otherwise, because these statutes cannot be applied extraterritorially, they cannot be applied to a crime committed in Indian Country. Since Peltier was never charged or sentenced under the "Indian

Crimes Act," this Court lacked jurisdiction to sentence him and the sentences are illegal.

V. DEFENDANTS' PROPOSED JURY INSTRUCTIONS CANNOT CONFER JURISDICTION UPON THE DISTRICT COURT.

At page 7-8 of it Memorandum and Order, the District Court reasoned that Peltier is bound by the jury instructions proposed by his trial counsel. This reasoning lacks merit. It is well established that parties cannot confer jurisdiction upon the Court. Thus, this does not provide a basis to uphold jurisdiction where it does not otherwise exist.

VI. THE RECENT "BLAKELY" DECISION REQUIRES THIS COURT TO VACATE THE ILLEGAL SENTENCE IMPOSED ON MR. PELTIER.

The District Court rejected Mr. Peltier's arguments under Blakely, 124 S.Ct. 2531, and Apprendi, 530 U.S. at 466, on the ground that the cases did not apply retroactively. However, the District Court's ruling is erroneous because it wrongly assumed that Mr. Peltier's Motion was under 28 U.S.C. 2255. Rather, Mr. Peltier's Motion was under Former Rule 35(a) which is significant because Apprendi addressed former Rule 32(b). Hence, Mr.

Peltier's Motion does not present an issue of retroactivity, but rather the state of the law applicable to his case.[7]

Blakely, 124 S.Ct. 2531, has affirmed the principles of Apprendi, 530 U.S. at 490, and has made it clear that a sentence imposed upon facts not found by the jury or admitted by the defendant is unauthorized and illegal. 124 S.Ct. at 2538-39. It is a question of "power" and "authority." 124 S.Ct. at 2538-43 (it "is no mere procedural formality, but a fundamental

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[7] Because Blakely establishes or more properly corrects an area of law in which courts have been usurping "judicial power," invariably a question of jurisdiction itself, see Rhode Island v. Massachusetts, 37 US. (12 Pet.) 657, 718 (1838) (defining jurisdiction), it would of necessity apply retroactively even if it did not directly affect the fact-finding determinations of trial proceedings. Budinich v. Becton Dickenson & Co., 486 U.S. 196, 203 (1988) ("by definition, a jurisdictional ruling may never be made prospective only") (citation omitted). Compare Russell v. Roberts, 392 U.S. 293, 294-299 (1968) (applying "rules of criminal procedure fashioned to correct serious flaws in the fact-finding process at trial" retroactively) (citing cases); Ivan v. City of New York, 407 U.S. 203, 204 (1972) ("Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function…the new rule has been given complete retroactive effect." (citations omitted).

Here, of course, the question itself goes to this court's subject-matter jurisdiction to impose any sentence and, hence, cannot be foreclosed. United Sates v. Cotton, 535 U.S. 625, 630 (2002). In any case a Rule 35(a) motion is a motion in the original case, Heflin v. United States, 358 U.S. 415, 418 n.7 (1959), and procedural default rules applicable in collateral proceedings do not apply. United States v. Landrum, 93 F.3d 122, 125 (4th Cir. 1996) (citing cases). See United States v. Shillingford, 586 F.2d 372, 375-376 (5th Cir. 1978) (new rule by Sup. Ct. retroactive in Rule 35(a) proceedings). Therefore, Blakely is fully applicable to these proceedings.

reservation of power"). Blakely held that a defendant who had never been convicted by a jury (beyond a reasonable doubt) of specific facts that permit a statutorily provided sentence has an "entitlement" to the sentence prescribed by the verdict alone. 124 S.Ct. at 2543.

The guilty verdicts on Counts 1 and 2 in this case do not reveal any offense either within the terms of 18 U.S.C. § 1111(b) (federal murder offense) or 18 U.S.C. § 1114 (killing of federal officer in performance of official duties offense). No offense punishable or triable in a federal court exists upon the face of the verdicts, as a matter of law in 1975.

Mr. Peltier is "entitled," 124 S.Ct. at 2543 (emphasis by Court), to the result of the jury's findings, which in this case is vacation and dismissal of the illegal life sentences. The "Sixth Amendment was not written for the benefit of those who choose to forgo its protection. It guarantees the right to jury trial." 124 S.Ct. at 2542 (emphasis by Court). The Sixth Amendment "limits judicial power... to the extent that the claimed judicial power infringes on the province of the jury." 124 S.Ct. at 2539-41.

Mr. Peltier did not choose to forgo this constitutional protection and he simply seeks judicial enforcement of this "right" and his "entitlement" to expungement of the illegal life sentences. "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not

found all the facts 'which the law makes essential to the punishment...and the judge exceeds his proper authority.'" 124 S.Ct. at 2537 (citation omitted) ("the judge's authority to sentence derives wholly from the jury's verdict.") Similarly, a verdict of murder without proof that the offense occurred "within the special maritime and territorial jurisdiction of the United States" - i.e. "federal enclave" jurisdiction -- is a non-federal offense triable beyond the subject matter of the federal court. Lewis v. United States, 523 U.S. 155, 166, 171 (1988); United States v. Bevans, 16 U.S. (3 Wheat.) 336, 387-389 (1818) (same). Any sentence upon the guilty verdicts "alone," Blakely, 124 S. Ct. at 2537, is constitutionally and statutorily prohibited as well. Fed. R. Crim. Pro. 32(b) ("other reason" discharge is mandatory). Cf. 18 U.S.C. § 3231 (district court's jurisdiction statutorily limited to "offenses against the laws of the United States"). See also Article III, Sec. 2, Cl. 2 (judicial power limited to "cases" and "controversies" "arising under" the "Constitution, Laws of the United States, and Treaties" -- does not include state offenses of murder); id., Clause 3 ("The Trial of all Crimes.., shall be by Jury").

Sentences which are unauthorized, "infringe on the province of the jury," and are a pure usurpation by "a lone employee" of the Government, id., and clearly illegal. Blakely, 124 S.Ct. at 2538-43. Blakely completely

supports Petitioner's arguments. Thus, Mr. Peltier's life sentences on Counts 1 and 2 are illegal because the government failed to establish that the acts occurred "within the special maritime and territorial jurisdiction of the United States," a jurisdictional and essential element of murder pursuant to 18 U.S.C. § 1111(b).

CONCLUSION

Because the face of the record discloses that the Trial Court convicted and sentenced Peltier for offenses not within the scope of the "relevant statutes," 18 U.S.C §§ 2, 1111, and 1114, and therefore, not within the sentencing court's subject-matter jurisdiction or its Article III jurisdiction -- there being no violation of any "laws of the United States," 18 U.S.C. S. 3231---this Court should grant Peltier's motion and vacate the illegal sentences imposed upon him.

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By His Attorney

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