NO. 05-3194

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-vs-

LEONARD PELTIER,

Appellant.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

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# APPELLEE'S BRIEF

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The United States believes that the record before the Court is sufficient, and no oral argument is necessary.

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## STATEMENT OF CASE

In 1977, Appellant/Defendant Leonard Peltier was convicted in the District of North Dakota of two counts of murder in the first degree for the 1975 killings of two FBI agents on the Pine Ridge Indian Reservation in South Dakota. Peltier was sentenced to consecutive life sentences by the United States District Court for the District of North Dakota.

In December 2004, Peltier filed a motion to correct an illegal sentence under Rule 35(a), Federal Rules of Criminal Procedure (1982), claiming the district court was without jurisdiction to impose a sentence because the court lacked subject matter jurisdiction over his crimes. He also claimed that Congress exceeded its authority under the Commerce Clause of the Constitution in enacting 18 U.S.C. § 1114. Finally, he argued that his sentences violated the recent Supreme Court decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004).

The district court denied Peltier's motion finding that Peltier's claims were inappropriate for a motion under Rule 35(a), and also that Peltier's claims were meritless. Peltier now appeals.

## STATEMENT OF FACTS

"In June of 1975, [FBI] Special Agents Coler and Williams were engaged in felony criminal investigations on the Pine Ridge Indian Reservation" in South Dakota. United States v. Peltier, 585 F.2d 314, 318 (8th Cir. 1978). They were attempting to arrest four persons charged with assault with a deadly weapon and armed robbery. Id. While engaged in their investigation, the agents came under heavy fire and were wounded. Id. They were then executed at point blank range. Id.

Peltier and three others were charged with two counts of first degree murder in violation of 18 U.S.C. §§ 2, 1111 and 1114. Id. Charges against one defendant were dismissed. Two defendants were acquitted. Peltier was found guilty of the charges and sentenced to consecutive life sentences. Id. Peltier appealed to this Court, but his convictions were affirmed. Id. at 335.

Peltier filed a motion to reduce sentence under Rule 35, Federal Rules of Criminal Procedure, in June 1979. United States v. Peltier, 189 F. Supp. 2d 970, 971 (D.N.D. 2002). This motion was denied. Id.

In 1982, Peltier then filed a motion to vacate under 28 U.S.C. § 2255 and for a new trial claiming the government failed to disclose exculpatory evidence in violation of Brady v Maryland, 373 U.S. 83 (1963), and used perjured testimony at

trial. United States v. Peltier, 553 F. Supp. 890 (D.N.D. 1982). The district court denied the motion. Id. This Court affirmed in part and reversed for an evidentiary hearing on Peltier's Brady claim. United States v. Peltier, 731 F.2d 550 (8th Cir. 1984). After an evidentiary hearing, the district court again rejected Peltier's Brady claim. United States v. Peltier, 609 F. Supp. 1143 (D.N.D. 1985). This Court affirmed. United States v. Peltier, 800 F.2d 772 (8th Cir. 1986).[1]

Peltier filed a second 2255 motion raising numerous challenges to his conviction. Peltier v. Henman, 997 F.2d 461 (8th Cir. 1993). The district court denied Peltier's motion, which denial was affirmed by this Court. Id.[2]

In November 2001, Peltier filed a motion attempting to renew his 1979 Rule 35 motion to reduce sentence. Peltier, 189 F. Supp. at 972. The district court

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[1]The defendant misstates the ruling of this court at pages four and five of his brief. The Court did not criticize the government's jury argument in its opinion. Rather, after a detailed analysis of the trial record concerning the .223 shell casings found in the crime scene area (all but 14 of 137 matched the Wichita AR-15 associated with Peltier), it agreed with the government's analysis that documents allegedly withheld would probably not have changed the results at trial. Id. at 778-80.

[2]Again, the defendant misrepresents and misstates the record at page five of his brief by ignoring this Court's ruling in Peltier v. Henman, 997 F.2d 461, 469-70 (8th Cir. 1993), that the government has never abandoned its trial position that the circumstantial evidence was indeed sufficient to justify a jury finding that it was Peltier who executed the agents at close range.

denied Peltier's motion. Id. at 975. This Court affirmed the district court's denial of the motion. United States v. Peltier, 312 F.3d 938 (8th Cir. 2002).

In December 2004, Peltier filed a motion under Rule 35(a), Federal Rules of Criminal Procedure (1982), claiming his sentence was illegal (Appellant's Appendix -- Brief in Support of Defendant's Motion Under Rule 35(a) to Correct Illegal Sentence). Peltier argued that the district court lacked subject matter jurisdiction over his offenses because 18 U.S.C. § 1114, one of the statutes used to charge Peltier, incorporated the special maritime and territorial jurisdiction element of the murder statute under 18 U.S.C. § 1111(b), another statute under which he was charged. He further argued that the Pine Ridge Indian Reservation, where the crimes occurred, was not within the special maritime and territorial jurisdiction of the United States, and the government failed to offer required evidence of federal enclave jurisdiction. He contended that, as a result, his convictions were illegal as well as his sentences. Peltier also claimed that the recent Supreme Court decisions of Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004), also required his sentence be set aside. In a reply to the government's response, Peltier also argued that Congress exceeded its power under the Commerce Clause when it enacted Section 1114, and the only crimes over which federal courts had jurisdiction in

Indian country were those covered in the Indian Country Crimes Act and the Major Indian Crimes Act, 18 U.S.C. §§ 1152 and 1153.

The district court denied Peltier's motion. The court found that Peltier's claims were an attack on his underlying conviction and, therefore, not proper under Rule 35(a). The district court also rejected Peltier's claims on the merits. The court further noted that Apprendi and Blakely did not apply retroactively to Peltier's case. Peltier now appeals.

## SUMMARY OF THE ARGUMENT

I. A defendant may not use Rule 35(a), Federal Rules of Criminal Procedure (1982), as a vehicle to challenge his underlying conviction. Peltier's claims challenge the legality of his underlying convictions and are not proper under Rule 35(a). The district court properly rejected Peltier's Rule 35(a) motion on this ground.

II. 18 U.S.C. § 1114 (Supp IV 1974) granted federal jurisdiction over the murder of listed federal officers, including FBI agents. In determining the offense and corresponding punishment for the murder of federal officer, Section 1114 incorporates the definition and punishment provisions of the 18 U.S.C. § 1111; however, it does not incorporate the special maritime and territorial jurisdiction element as a second jurisdictional element.

III Federal criminal jurisdiction in Indian country is not limited to those crimes covered in 18 U.S.C. §§1152 and 1153. The murder of federal officers in violation of Section s 1114 and 1111 is a crime of general applicability, that is, a crime in which the location of the offense is not an element and applies to all persons in Indian country, and elsewhere.

IV. Congress had the constitutional power and authority under the Necessary and Proper Clause, Article I, § 8, cl. 18, to enact 18 U.S.C. § 1114, along with section 111. Congress has the power to enact federal crimes applicable to Indian country and the rest of the United States. The FBI has been given the authority to investigate offenses that violate federal criminal laws, including those committed in Indian Country. Section 1114 and 111 were enacted to protect the federal function of investigating and detecting violations of federal criminal laws and the officers engaged in such functions by providing federal jurisdiction to prosecute those who kill and assault such officers. As such, Sections 1114 and 111 were appropriates means for carrying out Congress' constitutional authority in enacting federal criminal laws by ensuring the efficacy of the investigation of such offenses.

V. The Court had subject matter jurisdiction under 18 U.S.C. § 1114 to convict and sentence Peltier for first degree murder. Before trial, Peltier submitted a jury instruction to the court listing the essential elements of § 1114 and its jurisdictional basis for killing FBI agents while performing their duties; he did not request an instruction that federal enclave jurisdiction was the jurisdictional basis for the crimes. Although he could have raised this issue on direct appeal or in his motion under 28 U.S.C. § 2255, he did not do so. Consequently, he has waived the right to raise it.

VI. Apprendi and Blakely do not apply retroactively to Peltier's case because his conviction had become final long before the Supreme Court's rulings in those cases. Second, the jury made all the necessary findings to convict Peltier and authorize the imposition of life sentences.

## ARGUMENT

### I. The District Court Correctly Ruled that Peltier's Claims Challenged his Conviction and were not Proper Under Rule 35(a), Federal Rules of Criminal Procedure (1982).[3]

In his Rule 35(a) motion, Peltier claimed that the district court lacked subject matter jurisdiction to sentence him to two life sentences. He argued, and

[3]Since Peltier's crimes occurred prior to November 1, 1987, his motion is governed by 18 U.S.C. App., F.R. Crim. P. 35(a)(1982), hereafter referred to as Rule 35(a).

continues to argue, that 18 U.S.C. § 1114 incorporates not only the definition and punishment provisions for first and second degree murder set forth in 18 U.S.C. § 1111, but also the jurisdictional requirement that the murder occurred within the special maritime and territorial jurisdiction of the United States, as defined in 18 U.S.C. § 7 (federal enclave jurisdiction).[4] He further argues that the Pine Ridge Indian Reservation, where the crime occurred, is not within the special maritime and territorial jurisdiction of the United States and there was no contrary evidence. Peltier consequently contends that, as a result, his conviction was void and sentence illegal.

The district court found that Peltier's claim was an attack on his convictions rather than a challenge to the legality of his sentences and, therefore, could not be raised in a motion under Rule 35(a), Fed. R. Crim. P. Peltier argues that the district court's finding was erroneous. The district court's denial of a Rule 35(a) motion is reviewed for an abuse of discretion. United States v. Spambanato, 876 F.3d 5, 8 (2nd Cir. 1989). An abuse of discretion occurs if there is an error of law or a clearly erroneous assessment of the facts. United States v. Weiland, 284 F.3d 878, 882 (8th Cir. 2002).

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[4]All cites to 18 U.S.C. §§ 1114 and 1111 refer to the versions that were in effect at the time of Peltier's crime. 18 U.S.C. § 1114 (Supp. IV 1974); 18 U.S.C. § 1111 (1970).

In arguing that the district court's finding was error, Peltier claims that he is not attacking his underlying convictions but only his sentences. He argues that the district court did not have subject matter jurisdiction over the charged offenses and, as a result, his sentence is illegal. He is incorrect on both counts.

Rule 35(a) provided that a "court may correct an illegal sentence at any time." 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 involve multiple sentences imposed for the same offense. Hill v. United States, 368 U.S. 424, 430 (1962); United States v. Peltier, 312 F.3d 938, 942 (8th Cir. 2002); 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'"). The 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). As such, when considering a Rule 35(a) motion, the defendant's conviction must be treated as

valid. Lika, 344 F.3d at 153; United States v. Willis, 289 F.2d 581, 583 (8th Cir.)(1961) ("Rule 35 presupposes a valid conviction . . ."); United States v. Willis, 804 F.2d 961, 964 (6th Cir. 1986).

A challenge to the trial court's subject matter jurisdiction is a challenge to a defendant's conviction rather than sentence. Lika, 344 F.3d at 152-53. In Lika, as here, the defendant filed a motion under Rule 35(a) claiming his sentence was "illegal because the district court lacked subject matter jurisdiction over [his] case." Id. at 152. The Second Circuit held that such a claim "represent[ed] an attack on the underlying conviction" and was not appropriate in a Rule 35(a) motion. Id. at 153.

Similarly, in United States v. Kahl, 95 Fed. Appx. 200 (8th Cir.)(2004) (unpublished)(Appellee's Appendix A1-2), the defendant filed a motion under Rule 35(a) in which he claimed his life sentences for killing two Marshals were illegal because federal jurisdiction was not proved.[5] This Court affirmed the district court's finding that such a claim was not proper under Rule 35(a) because it did not relate to the legality of the sentence. Id. The district court made the same determination in the present Peltier case on the same basis.

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[5] The United States recognizes the limitations of citing unpublished opinions as set forth in Eighth Circuit Rule 28(i). However, Kahl was relied upon by the district court in denying Peltier's Rule 35(a) motion.

Peltier's own brief clearly evidences that his Rule 35(a) motion is an attack on his conviction by challenging the district court's underlying jurisdiction. In Issue III, Peltier essentially argues that the federal government only has jurisdiction to prosecute crimes in Indian country under 18 U.S.C. § 1152 and 1153. He asserts that, since he was not charged or convicted of any crimes listed in the Indian crimes statutes, the Court lacked jurisdiction to sentence him. (Appellant's Brief at 17). Similarly, in Issue IV, he challenges Congress' constitutional power to enact Section 1114. His own arguments reflect a challenge to the underlying convictions, which he attempts to distinguish by claiming he is only challenging the court's jurisdiction to sentence him.

A review of the purpose of Rule 35(a) highlights the error in Peltier's argument. Rule 35(a) was designed as a procedure to bring a defendant's "improper sentence into conformity with the law." Willis, 289 F.2d at 583. Under Peltier's claim, no appropriate sentence could be handed down, which shows he is really attacking his convictions, not his sentence. As discussed below in Issue V, 28 U.S.C. § 2255, under which Peltier has filed two motions, provides the proper remedy for a claim the "court was without jurisdiction to impose such sentence."

Peltier's claim that the sentence was illegal is clearly based on the alleged lack of jurisdiction to prosecute him for murder, which is an attack on the

underlying convictions. Lika, 344 F.3d at 152-53; Kahl, 95 Fed. Appx. 200. It raises challenges to events that occurred prior to imposition of sentence, and such attacks are not proper under Rule 35(a). Hill 368 U.S. at 430. The district court's ruling that Peltier's claim was improper under Rule 35(a) should be affirmed.

## II. The District Court Correctly Determined that 18 U.S.C. § 1114 Incorporated the Definition and Penalty Provisions of 18 U.S.C. § 1111 and not the Jurisdictional Element that the Crimes Occurred within the Special Maritime and Territorial Jurisdiction of the United States.

The district court found that, even if Peltier's claim could be raised in a Rule 35(a) motion, it was meritless because Section 1114 did not incorporate the special maritime and territorial jurisdiction requirement of Section 1111(b). The district court's interpretation of a statute is reviewed de novo. United States v. Storer, 413 F.3d 918, 921 (8th Cir. 2005).

Peltier argues that Section 1114 incorporates all of Section 1111, including the requirement that the crime have been committed within the special maritime and territorial jurisdiction of the United States and that Indian Country is not part of the special maritime and territorial jurisdiction. The district court was correct in its ruling.

The indictment charged Peltier with first degree murder of the FBI agents in violation of 18 U.S.C. §§ 1111, 1114 and 2. At the time of the crimes, Section 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.

(emphasis added). 18 U.S.C. § 1114 (Supp. IV 1974). Section 1111 provided, in relevant part, 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. . .
>
> (b) Within the special maritime and territorial jurisdiction of the United States,
>
> Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto "without capital punishment", in which event he shall be sentenced to imprisonment for life . . ..

18 U.S.C. § 1111 (1970).

In enacting in 1934 the predecessors of 18 U.S.C. §§ 111 and 1114, which prohibited the assaulting, interfering with, impeding, or killing federal officers,

"Congress intended to protect both federal officers and federal functions." United States v. Feola, 420 U.S. 671, 679 (1975); United States v. Roy, 408 F.3d 484, 490-91 (8th Cir. 2005). Section 1114 is a jurisdictional statute which invokes federal jurisdiction in cases involving the murder of a federal officer. Feola, 420 U.S. at 676-77 and n.9; United States v. Harrelson, 754 F.2d 1153, 1173 (5th Cir. 1985); Kahl, 95 Fed. Appx 200 (Appellee's Appendix A2).

While Section 1114 provides subject matter jurisdiction for the killing of an FBI agent or other federal officer, it also incorporates the definitions and punishments of Sections 1111 (murder) and 1112 (manslaughter) for such an offense. Id.; Harrelson, 754 F.2d at 1173; United States v. Adams, 581 F.2d 193, 200 (9th Cir. 1978); United States v. Brunson, 549 F.2d 348, 351 n.1 (5th Cir. 1977). 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. 754 F.2d at 1172-73. 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

> § 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). 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.

As stated above, Section 1114 provides that a person who kills a specified federal officer "shall be punished as provided for in Section 1111 and Section 1112 of this title." In setting forth the punishment for murder, Section 1111(b) includes a reference to the special maritime and territorial jurisdiction of the United States. However, 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.

In Adams, the defendant was convicted of murdering a postal employee in violation of 18 U.S.C. §§ 1114 and 1111. Id. at 195-96. He claimed the indictment did not charge him with a federal offense arguing, similar to Peltier, that since Section 1114 referred to Section 1111, federal jurisdiction could only be proper if the offense occurred within the special maritime and territorial jurisdiction of the United States. Id. at 200. The Ninth Circuit rejected the claim

finding it "frivolous." Id.; see also Brunson, 549 F.2d at 351 n.1 (We agree . . . that § 1114 incorporates only the penalty, and not the jurisdictional, provisions of § 1111"); Kahl, 95 Fed. Appx. 200.[6]

During his trial, Peltier requested a jury instruction on first degree murder which did not request, as an element, that the crime be committed within the special maritime and territorial jurisdiction, but rather that the officers of the F.B.I. were in the performance of their official duties. (Appellee's Appendix at A3). Peltier even stipulated to the facts that the men were FBI agents engaged in the performance of their official duties at the time of their murders (Tr. Vol. XVI - pp. 3416-17, Appellee's Appendix at A5-6). His requested instruction and stipulation reflect his position at trial 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, or must have been, committed within the special maritime and territorial jurisdiction of the United States.

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[6] Peltier argued that Kahl was wrongly decided and is pending before the Supreme Court on petition for writ of mandamus. The Supreme Court denied Kahl's petition for certiorari. 125 S.Ct. 1096 (2004). The Court also denied his petition for writ of mandamus on October 3, 2005. In re Kahl, __ S.Ct. __, 74 U.S.L.W. 3013 (Oct. 3, 2005).

Peltier now argues that federal jurisdiction would only have been proper had he been charged under 18 U.S.C. §§ 1152 or 1153. At the time, 18 U.S.C. § 1153 (1970) provided that any Indian who committed any of the 13 enumerated offenses, including murder, against the person or property of another Indian or person, "within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

Similarly, 18 U.S.C. § 1152 (1970) provided, in part, that:

> except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to Indian country. (emphasis added).

This statute applies to Indian country the general laws of the United States, which already applied to places under the sole and exclusive jurisdiction of the United States, including the federal murder statute. Stone v. United States, 506 F.2d 561, 563 (8th Cir. 1974).

Like Section 1114, Sections 1152 and 1153 were jurisdictional statutes which incorporated the substantive murder statute of Section 1111. Yet, despite his claim that the incorporation in Section 1114 of the federal murder statute's

definitions and sentences also incorporates the special maritime and territorial jurisdiction of Section 1111(b), he acknowledges that jurisdiction to convict and sentence him would have been proper under Sections 1152 or 1153. Under the logic of Peltier's main argument, both of these statutes, since they also incorporate Section 1111, would also require a finding of *special maritime and territorial jurisdiction* in addition to Indian country jurisdiction. His supposed concession that jurisdiction would have been proper under Sections 1152 or 1153 is a contradiction of his own argument and reveals its absurdity.

In summary, it is clear that Section 1114 provides federal jurisdiction over the murders of federal officers and simply incorporates the definition and punishment provisions of the statute. It does not incorporate the special maritime and territorial jurisdiction provision.

To accept Peltier's position that Section 1114 incorporates the special maritime and territorial jurisdiction of Section 1111(b) would lead to absurd results. For example, under his logic, the killing of a member of a federal officer's or federal judge's family would be chargeable in federal court only if the offense were committed within the special maritime and territorial jurisdiction of the United States because the statute also provides that such murder "shall be punished as provided in section 1111. . .." 18 U.S.C. §§ 115(a)(1)(A) and (b)(3).

The same would apply to the killing of a Member of Congress or Supreme Court justice as prohibited by 18 U.S.C. § 351(a), the killing of a juror or grand juror under 18 U.S.C. § 1503, or the killing of a federal witness under 18 U.S.C. § 1513(a), because those laws also provide for punishment as provided in sections 1111 and 1112. In fact, there would be no federal jurisdiction to prosecute a person for assassinating the President or Vice President unless committed within the special maritime and territorial jurisdiction of the United States. 18 U.S.C. § 1751(a). Finally, as indicated above, there would be no federal jurisdiction over any murder defined by federal law if committed in Indian country unless also committed within the special maritime and territorial jurisdiction, as Section 1152 and 1153 would also incorporate the special maritime and territorial jurisdiction requirement of Section 1111(b). It is simply incorrect to read Section 1114 as Peltier does.

## III. The District Court Properly Held There was Federal Court Jurisdiction Over Peltier's Crimes of Murder of FBI Agents.

Peltier claims that federal courts have jurisdiction over Indian country only if granted. He argues that the only express grant of jurisdiction for federal crimes in Indian country is in "the Indian Crimes Act." Peltier continues to argue that jurisdiction to prosecute and sentence persons under Section 1114 and 1111 for

the murder of a federal officer only applies to such crimes committed within the special maritime and territorial jurisdiction of the United States. Such is not the case. Claims addressing federal jurisdiction are reviewed de novo. United States v. Thunder Hawk, 127 F.3d 705, 706 (8th Cir. 1997).

First, as indicated above in Issue II, Section 1114 does not incorporate the special maritime and territorial jurisdiction provision of Section 1111(b). Rather, Section 1114 provides the sole basis for federal jurisdiction and uses only the definition and punishment provisions of Section 1111 for murder. Second, the crime of murdering a federal officer in violation of Section 1114 and 1111, is a crime of general applicability, one in which the situs is not an element of the offense, and which applies throughout the United States, including in Indian country.

Two cases cited by Peltier support our position that such crimes of general applicability apply to Indian country. United States v. Wheeler, 435 U.S. 313 (1978); United States v. Bruce, 394 F.3d 1215 (9th Cir. 2005). In Wheeler, the Supreme Court, in addressing whether double jeopardy precluded the federal government from prosecuting a tribal member who had already been prosecuted in tribal court, discussed the inherent sovereignty of a Tribe. 435 U.S. at 322-23. However, the Supreme Court clearly recognized that federal jurisdiction exists

over crimes such as assaulting a federal officer in Indian country, whether or not committed by an Indian, since there is an independent federal interest to protect. Id. at 331 n.30 and n.32. Similarly, in Bruce, the Ninth Circuit recognized it had previously held that laws of general applicability applied to Indians in Indian country unless specifically exempted by treaty; and, in summarizing criminal jurisdiction in Indian country, stated that such laws apply to all persons in Indian Country regardless of race. 394 F.3d at 1220-21.

The Eighth Circuit has repeatedly held that the federal criminal laws of general applicability apply to Indian country. United States v. Yankton, 168 F.3d 1096, 1097-98 (8th Cir. 1999); United States v. Wadena, 152 F.3d 831, 839-42 (8th Cir. 1998); United States v. Blue, 722 F.2d 383, 385 (8th Cir. 1983); United States v. McGrady, 508 F.2d 13, 15-16 (8th Cir. 1974); Stone, 506 F.2d at 563. See also Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960)("it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests").

In Stone, the defendants were charged with assaulting a federal BIA police officer in Indian country. 508 F.2d at 563. Relying on 18 U.S.C. § 1152, they argued that federal courts "lacked subject matter jurisdiction over [the] intra-Indian offense committed in Indian country." Id. However, this Court found the

law was one of general applicability which applies wherever committed. Id. The same principle applies to the murder of a federal officer in violation of 18 U.S.C. §§ 1114 and 1111.

The only possible exception to this rule is where the conduct regulated by a general criminal law prohibits conduct retained by an Indian tribe pursuant to a treaty. In United States v. White, 508 F.2d 453 (8th Cir. 1974), this Court held that 16 U.S.C. § 668(a), a general federal law prohibiting the taking of bald eagles, was inapplicable to tribal members while on the Reservation. The Court held that tribal members of the Reservation retained the right to hunt under treaty and, as such, it was necessary for "Congress to expressly abrogate or modify" that right. Id. at 457-58. The Court then found that Congress had made no such express abrogation or modification and, as a result, Section 668 did not apply to tribal members on the Reservation. Id. at 458-49.[7] Here, Peltier claims no treaty right to

[7] This Court's ruling concerning the application of the general federal prohibitions against the killing of eagles on Indian reservations was again challenged by the government is 1985. This Court affirmed *en banc* that such federal prohibitions were ineffective on the South Dakota Indian Reservation because of un-extinguished treaty rights. United States v. Dion, 752 F.2d 1261 (8th Cir. 1985)(en banc). In a unanimous decision, the Supreme Court reversed finding that, while Indians have inherent hunting and fishing rights on land reserved for them, these rights may be abrogated by subsequent legislation which is "plain and clear." The Court held that Congress intended to enact a series of general laws prohibiting the killing of eagles, and by "clear and plain" language terminated whatever right the Indians had to kill eagles on the Reservation.

kill federal law enforcement officers. Nor does he claim any tribal right by treaty to try and punish those who do. Indeed, Peltier concedes that whatever rights the Indian tribes had to prosecute individuals for homicides was extinguished long ago.

The statutes in question are easily distinguishable. United States v. Dodge, 538 F.3d 770, 775 (8th Cir. 1976). In Dodge, defendant Cooper, an Indian, was charged with violating Sections 111 and 1114 by assaulting a postal inspector on the Pine Ridge Indian Reservation. Id. at 774-775. Defendant Wesaw, an Indian, was charged with violating 18 U.S.C. §§ 231 and 371 -- conspiracy to obstruct, impede, and interfere with law enforcement officers, which also occurred on the Pine Ridge Indian Reservation. Id. at 774 and 776. This Court affirmed the district court's ruling that the federal court had jurisdiction over these offenses because the laws in questions were general criminal laws which applied to Indians on Indian reservations. Id. at 775-76. In so doing, this Court adopted the opinion of the district court which found that "the Indian Citizenship Act of 1924 . . . created federal jurisdiction to try Indians accused of violating federal general criminal laws." Id. at 775; United States v. Consolidated Wounded Knee Cases, 389 F. Supp. 235, 243-44 (D. Neb and D.S.D. 1975).

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United States v. Dion, 476 U.S. 734, 738-40 (1986).

The district court in Consolidated Wounded Knee found that, even assuming the Tribe retained jurisdiction over such crimes when the Treaty of 1868 was signed, Congress expressed an intent to abrogate or modify any such provisions of the treaty. Id. Specifically, the court noted that in 1924, Congress granted citizenship to the Indians. Id. at 243. The court then examined the statute applicable to such granting of citizenship and noted that, although not expressly providing that general laws were applicable to Indians in Indian country, it did contain language that excluded property rights of an Indian from application of the statute. Id. The court found that such language could be interpreted "as expressing an intention to impose all other obligations of citizenship, including conformity to the general federal criminal law." Id. The court also examined the legislative history of the statute and found it supported such an interpretation. Id. at 243-44. Finally, the court relied on the fact that its reading of the statute was in accord with Eighth Circuit case law holding that general federal criminal laws applied to Indians in Indian country. Id. at 244.

In Wadena, the defendants were convicted of numerous crimes, including conspiracy in violation of 18 U.S.C. § 371, theft and bribery from federally funded programs in violation of 18 U.S.C. § 666, unlawful monetary transactions in violation of 18 U.S.C. § 1957 and § 2, misapplication of tribal funds in violation

of 18 U.S.C. § 1163, mail fraud in violation of 18 U.S.C. § 1341 and § 2, and conspiracy to oppress free exercise of election rights in violation of 18 U.S.C. § 241. 152 F.3d at 836. The defendants, who were Indians, raised essentially the same argument as Peltier -- that the federal court lacked jurisdiction over them because the only federal criminal laws that apply in Indian country are those made applicable by the Indian Country Crimes Act, 18 U.S.C. § 1152, and the Major Indian Crimes Act, 18 U.S.C. § 1153. Id. at 839.

This Court rejected this claim finding that the laws in question were laws of general applicability that applied to Indians in Indian country. Id. at 839-42. In so holding, the Court noted that, while it may have been assumed when the Indian Country Crimes Act was first passed that federal criminal laws "outside of [federal] enclave laws were not applicable to the Indian Country," such premise was disregarded as Indian Law evolved, and the general federal criminal laws now apply equally to all persons, including Indians within Indian country. Id. at 841-42. The Court then found Section 1152, which makes the general laws of the United States for offenses committed in the sole and exclusive jurisdiction of the United States applicable to Indian country, did not apply because the crimes for which the defendants were convicted did not require the "situs of the offense" as an element of the crime. Id. The Court examined the Indian versus Indian

exception to Section 1152, which reflects "'broad respect for tribal sovereignty, particularly in matters affecting only Indians'." Id. (quoting Felix S. Cohen, Felix S. Cohen's Handbook of Federal Indian Law, 290 (Rennard Strickland, et al. ed. 1982). However, the Court then found that the "application of the general federal criminal laws" at issue did "not implicate the tribal concerns of sovereignty addressed by the Indian Country Crimes Act." Id. The Court could not find any tribal interests paramount to the federal interests involved in the case.

The same analysis applies to Peltier. In fact, the protection of federal officers by prohibiting the assault and murder of such officers is one of particular federal interest. Wheeler, 435 U.S. at 331 n.30 and n.32; Blue 722 F.2d at 385 (recognizing Stone involved a crime of peculiarly federal interest--assault on a federal officer).

In summary, the murder of an FBI agent in violation of 18 U.S.C. §§ 1111 and 1114 is a general federal crime which applies to Indians within Indian country. Therefore, Peltier's claim should be rejected.

## IV. The District Court's Finding that the Adoption of 18 U.S.C. § 1114 was within Congress' Constitutional Power under the Necessary and Proper Clause of the Constitution was Correct.

Peltier claims in Issue IV that Congress exceeded its power under the Commerce Clause of the Constitution in enacting Section 1114.[8] However, the district court correctly held that the statute was enacted within Congress' power under the Necessary and Proper Clause of the Constitution. The district found that Section 1114 was constitutional under the Necessary and Proper Clause. Constitutional challenges are reviewed de novo. United States v. Bach, 400 F.3d 622, 627 (8th Cir. 2005).

Article I, § 8, cl. 18, of the Constitution provides Congress the power:

> to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. (emphasis added.)

The Supreme Court recognized that, in exercising its Constitutional powers, Congress may pass laws necessary to carrying out its powers or functions. McCulloch v. Maryland, 4 Wheat. 316, 17 U.S. 316, 411-421 (1819). In doing so, Congress is not limited to those laws which are absolutely necessary and

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[8]In Issue IV, Peltier presents other arguments concerning the application of Section 1114 to his case. The government has already addressed those arguments in Issues II and III above.

indispensable in carrying out its powers, that is, only those means without which the end would be unobtainable. Id. at 413-14. Rather, Congress, in its discretion, is entitled to employ all means it deems appropriate to carry out its constitutional powers unless prohibited by the Constitution. Id. at 419-21; Logan v. United States, 144 U.S. 263, 283 (1892).[9]

Congress has broad plenary and exclusive power under the Constitution to legislate with respect to Indian tribes. United States v. Lara, 541 U.S. 193, 200 (2004). The Supreme "Court has traditionally identified the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, as the source of [this] power." Id.

Within this constitutional authority, Congress has the power to enact criminal laws applicable to Indian Country. United States v. Antelope, 430 U.S. 641, 645, 648 (1977); United States v. Prentiss, 256 F.3d 971, 974 (10th Cir. 2001). Acting under this power, Congress enacted, among other things, the Major Indian Crimes Act, 18 U.S.C. § 1153, and the Indian Country Crimes Act, 18 U.S.C. § 1152. As stated above, Section 1153 provides federal jurisdiction over certain enumerated crimes committed by an Indian in Indian country. Because

[9] Logan was disagreed with on other grounds in Witherspoon v. United States, 391 U.S. 510 (1968).

Congress has the constitutional authority to enact a criminal code for Indian country, as well as other generally applicable federal crimes (whether enacted under the Commerce Clause, the Post Office Clause, etc.), it may also enact laws necessary and proper to carry out these functions. Logan, 144 U.S. at 283; McCulloch, 17 U.S. at 413-14, 419-21. Congress' exercise of enacting Sections 1114 and 111, which prohibit the killing and assault of an FBI agent while engaged in his official duties in order to protect its federal function and federal officers, was proper under the Necessary and Proper Clause. See generally Sabri v. United States, 541 U.S. 600, 124 S.Ct. 1941, 1946 (2004).

In Sabri, 541 U.S. 600, 124 S.Ct. 1941, 1946 (2004), the Supreme Court addressed whether 18 U.S.C. § 666(a)(2), which prohibits bribery of a state, local or tribal officials of organizations or entities that receive $10,000 or more in federal funds, was a valid exercise of Congress power under the Constitution. 124 S.Ct. at 1944. The Court determined Congress had such power under the Necessary and Proper Clause to enact Section 666(a)(2) even if there is no requirement that the bribe or kickback be connected to federal funds. Id. at 1944-46. The Court stated:

> Congress has the authority under the Spending Clause to appropriate federal monies to promote the general welfare . . . and it has corresponding authority under the Necessary

> and Proper Clause . . . to see to it that taxpayer dollars appropriated under that power are in fact spent for general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars . . . Congress.

Id. at 1946. Congress' passage of Section 1114 was likewise authorized under the Necessary and Proper Clause.

At the time of Peltier's crimes, the FBI was (and still is) part of the Department of Justice which is headed by the Attorney General. 28 U.S.C. §§ 503 and 531 (1970). The Attorney General had authority to appoint officers to detect crimes against the United States and "conduct such investigation regarding matters under the control of the Department of Justice . . . as may be directed by the Attorney General." 28 U.S.C. § 533(1) and (3)(1970). In turn, the Attorney General has directed the FBI, and the FBI is authorized, to investigate violations of the laws of the United States. 28 C.F.R. § 0.85(a); United States v. Rodgers, 466 U.S. 475, 481 (1984); United States v. Blackfeet Tribe, 364 F. Supp. 192, 194 (D. Mont. 1973). That being so, the FBI has the power to investigate federal crimes in Indian country, as well as other federal crimes nationwide.

In the instant case, the agents were engaged in criminal felony investigations of robbery and assault with a deadly weapon on the Pine Ridge

Indian Reservation, Peltier, 585 F.2d at 318, crimes which the federal government had authority to investigate and prosecute. And Peltier stipulated at trial that the agents were engaged in their official duties when they were killed (Trial Tr. 3417; Appellee's Appendix A5-6).

Congress enacted sections 1114 and 111 to protect the federal functions as well as the federal officers. Feola, 420 U.S. at 679; Roy, 408 F.3d at 490-91. The roots of both Section 1114 and 111 stem from the Act of May 18, 1934, c. 299, 48 Stat. 78 ("1934 Act"). Feola, 420 U.S. at 679-80. In passing the 1934 Act, "Congress clearly was concerned with the safety of federal officers insofar as it was tied to the efficacy of law enforcement activities." Id. at 681.

As such, in enacting sections 1114 and 111, Congress intended to protect the investigation and enforcement of federal criminal laws it was empowered to pass. Feola, 420 U.S. at 679-81; Antelope, 430 U.S. at 648. The means employed by Congress in carrying out its powers, that is, protecting federal officers engaged in the federal function of investigating federal crimes, including those federal crimes committed on an Indian reservation, is related and "necessary" to carrying out such functions and to insure efficient and effective execution of such functions. See Sabri, 124 S.Ct. at 1946; Logan 144 U.S. at 283; McCulloch, 17 U.S. at 409-421.

In Logan, the defendants were convicted of conspiracy to injure or oppress citizens of the United States in the exercise of a right protected by the Constitution -- the right to be free from injury or assault while in custody of the United States, which involved the murder and assault of prisoners in the custody of the United States Marshal. 144 U.S. at 264-65, 273, 276. The defendants claimed lack of federal jurisdiction because (1) the right of a citizen in the lawful custody of a U.S. Marshal to be free from violence is a not right under the Constitution or laws of the United States and (2) that, if any crime was committed, it was within the jurisdiction of the state courts. Id. at 267-68.

In rejecting the claims, the Supreme Court focused on the Necessary and Proper Clause of the Constitution and Congress' power to enact any laws necessary and proper to carrying out its powers. Id. at 283. The Court stated that:

> 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. (emphasis added.)

Id. The Court then found that Congress had the power to enact laws for the arrest and commitment of persons violating the federal laws passed by Congress and to hold them safely in custody until trial. Id. at 284. As a result, the United States had a duty to protect such prisoners from violence and, in turn, there was a corresponding right secured by the Constitution and federal law "to be so protected." Id. at 284-85.

The Court then concluded by stating:

> The United States are bound to protect against lawless violence all persons in their service or custody in the course of the administration of justice. This duty and the correlative right of protection are not limited to the magistrates and officers charged with expounding and executing the laws, but apply, with at least equal force, to those held in custody on accusation of crime, and deprived of all means of self-defense. (emphasis added.)

Id. at 295. In other words, the United States has a right to protect those persons who are executing the federal laws as well as those who are in custody for violating such laws. Laws enacted to provide such protection are appropriate under the Necessary and Proper Clause.

The legislative history of the 1934 Act, in which Section 1114 has its roots, provides additional support for this position. The legislative history, which consisted almost entirely of a letter from the Attorney General, indicated that use

of state courts to prosecute assaults and murders of federal officers had been inadequate in protecting federal officers. Feola,420 at 679-81. Such inadequacy to fully protect federal officers and their functions would be "indication that [Congress] was acting within the ambit of the Necessary and Proper Clause." See Sabri, 124 S.Ct. at 1947 (Congress' decision to enact § 666 only after legislation had failed to protect federal interest is further indication that it was acting within the ambit of the Necessary and Proper Clause).

Furthermore, the Court in Feola also noted that:

> In the congressional mind, with the reliance upon the Attorney General's letter, certainty required that these cases be tried in the federal courts, for no matter how "respectable and well disposed," it would not be unreasonable to suppose that state officials would not always or necessarily share congressional feelings of urgency as to the necessity of prompt and vigorous prosecutions of those who violate the safety of the federal officer. From the days of prohibition to the days of the modern civil rights movement, the statutes federal agents have sworn to uphold and enforce have not always been popular in every corner of the Nation. Congress may well have concluded that § 111 was necessary in order to ensure uniformly vigorous protection of federal personnel including those engaged in locally unpopular activity.

420 U.S. at 684. In a more general sense, the Supreme Court recognized problems with reliance on state governments in the execution of powers granted to the federal government. In Logan, the Supreme Court repeated that:

> The government of the Union, though limited in its powers, is supreme within its sphere of action. No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution.

Logan, 144 U.S. at 283 (quoting McCulloch 4 Wheat at 405, 424).

In short: (1) Congress has the constitutional power to enact criminal laws applicable to Indian country, as well as throughout the United States, Antelope, 430 U.S. at 648; Logan, 144 U.S. at 283; (2) in so doing, Congress has the right to protect those officers engaged in investigating and enforcing federal law, Id. at 295; (3) Congress need not be required to rely on other governments that the federal government cannot control and who may or may not adequately carry out those responsibilities, Id. at 283; (4) reliance on state courts had not been adequate prior to the 1934 Act, and Congress was concerned with how state courts may protect those officers engaged in enforcing federal law, Feola, 420 U.S. at 680-81, 684; and (5) in enacting Sections 1114 and 111, Congress sought to protect the

federal function and those officers engaged in execution of the federal function in order to ensure efficient and effective execution of federal law. Feola, 420 U.S. at 679-81; Roy, 408 F.3d at 490-91. As such, enacting Sections 1114 and 111 was constitutional under the Necessary and Proper Clause.

In fact, shortly after the 1934 Act was passed, the Seventh Circuit was faced with a claim that Congress did not have the power to pass a law prohibiting the murder of an agent of the Division of Investigation of the Department of Justice because such murder was exclusively within the jurisdiction of the state in which the crime was committed. Barrett v. United States, 82 F.2d 528, 534 (7th Cir. 1936). The Court found no merit to the claim. Id. Peltier's claim is, likewise, meritless.

Peltier argues that Section 1114 was enacted under the Commerce Clause. To support his argument, Peltier argues that the 1934 Act, from which Section 1114 has its roots, was derived from a March 4, 1909 act ("1909 Act"). Law of March 4, 1909, ch. 321, §§ 273 and 275, 60th Congress, 2d Sess., 35 Stat. (pt. 1) 1088, 1143.[10] He then goes on to argue that the Congressional Record of the

[10] The 1909 Act codified, revised and amended the penal laws of the United States. 35 Stat. at 1088. Chapter 11 of the 1909 Act, which contained Sections 273 and 275, set forth offenses and punishments for crimes committed within the Admiralty and Maritime and the Territorial Jurisdiction of the United States. Id. at 1142. Section 273 set forth the crime of murder while Section 275 provided the

March 1909 Act reflects Congress was acting under the Commerce Clause when it enacted Section 1114.[11]

Peltier's authority provides no support for his contention that Congress was acting under its authority under the Commerce Clause in enacting Section 1114. First, he ignores the fact that the roots of Sections 1114 and 111 are from the 1934 Act, Feola, 420 U.S. at 679, not from an act over two decades earlier. Second, while he claims that Section 1114 may be traced back to Sections 273 and 275 of the 1909 Act, he does not argue that Sections 273 and 275 were enacted under the Commerce Clause. Rather, he relies on the congressional discussion of Section 62, a completely separate provision found in a different chapter of the 1909 Act.

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punishment. Id. Peltier cites Section 276 of the 1909 Act. Section 276 addresses various assaults.

[11]As for the Congressional Record that Peltier cites, 43 Cong. Rec. (pt. 1), 857-59 (January 20, 1908), this citation to Volume 43 (Part 1) is incorrect as pages 857-59 discuss a railroad right of way across a military reservation and a District of Columbia appropriations bill. It would appear that Peltier meant to cite to 42 Cong. Rec. (pt 1) 857-59 (January 20, 1908). These pages address a bill which contains a provision, Section 64, that made it unlawful to "forcibly assault, resist, oppose, prevent, impede, or interfere with any officer or employee of the Bureau of Animal Industry of the Department of Agriculture" while engaged in, or on account of the execution of his duties. The provision in question was ultimately enacted as part of Chapter 4 ("Offenses Against the Operations of the Government), § 62, of the 1909 Act. 35 Stat. at 1100. Section 62 was simply an amendment to an existing law which prohibited the same conduct. March 3, 1905 Act, Ch. 1496, § 3, 58th Congress, 33 Stat. 1264, 1265.

Furthermore, the discussion relied upon by Peltier provides no support for his conclusion. The legislative discussion he cites addresses but one portion of the 1909 Act, that which prohibits the assault of Bureau of Animal Industry offices and employees. This discussion provides no support for his assertion.

The 1909 Act contained other provisions which prohibited assaults on certain federal officers and employees engaged in, or on account of, their duties, such as: Section 65--officers of the customs or the internal revenue; Section 140--officers of the United States while serving or attempting to serve warrants, orders, writs, or other processes of a court of the United States; and Chapter 8--letter or mail carriers, 35 Stat. at 1100, 1114, and 1126. Peltier makes no claim that these laws, which prohibit essentially the same conduct, but against other federal officers or employees, were enacted under the Commerce Clause, and they were not. For example, the Constitution authorizes Congress to establish a Post office and Post Roads, U.S. Const. art. I, § 8, cl. 7, and the Supreme Court recognized that Congress could enact criminal laws under the Necessary and Proper Clause to carry out this function. McCulloch, 17 U.S. at 417. His focus on one single provision does not support his claim.

The actual language of Section 1114 reflects that it was not enacted under the Commerce Clause. Besides prohibiting assault of FBI agents while engaged

in, or on account of their duties, Section 1114 also prohibited assaults of, among others, federal judges, United States and Assistant United States Attorneys, United States marshals and deputy marshals and officers or employees of federal penal or correctional institutions while engaged in or on account of their duties. 18 U.S.C. § 1114 (Supp. IV 1974). Clearly, most, if not all, of the above-listed officials are not engaged in commerce.

In summary, Peltier offers no persuasive authority to support his claim that Congress was exercising its authority under the Commerce Clause in enacting Section 1114. Rather, adopting Section 1114 was a proper exercise of authority under the Necessary and Proper Clause even if the officers covered by 1114 were engaged in enforcing underlying federal laws adopted by Congress under a variety of constitutional authorities.

## V. The District Court Properly Determined That Federal Jurisdiction Was Premised on 18 U.S.C. § 1114; and Peltier Waived his Right to Challenge Jurisdiction by not Raising it on Direct Appeal or in His Motions Under 28 U.S.C. § 2255.

During his trial, Peltier requested a jury instruction on first degree murder, which set forth the elements of first degree murder:

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;

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

(Appellee's Appendix at A3). He made no request for an instruction requiring proof that the murders had been committed within the special maritime and territorial jurisdiction of the United States. Peltier even stipulated to the facts that the men were FBI agents engaged in the performance of their official duties at the time of their murders (Tr. Vol. XVI-pp. 3416-17, Appellee's Appendix at A5-6). His requested instruction and stipulation, which were accepted by the trial court, reflect his position at trial 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, or must have been, committed within the special maritime and territorial jurisdiction of the United States.

Peltier is technically correct that "parties cannot confer jurisdiction upon the Court." Appellant's Brief, p. 23 (Issue V). However, that statement ignores the legal requirement that a convicted defendant must raise jurisdictional challenges either on direct appeal or in a timely-filed motion under 28 U.S.C. § 2255. Here,

Peltier did not challenge the Court's subject matter jurisdiction under 18 U.S.C. § 1114 in his direct appeal, Peltier, 585 F.2d 314; or in either of his Section 2255 motions. Peltier, 553 F. Supp. 890; Peltier, 997 F.2d 461. He then improperly filed a motion under Fed. R. Crim. P. 35(a) to attack the Court's subject matter jurisdiction to convict and sentence him. See Appellee's Brief, pp. 9-13 (Issue I).

28 U.S.C. § 2255 specifically provides, in part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. . . .
>
> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain-
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(emphasis added). Therefore, Peltier's claim that the district court lacked jurisdiction to sentence him would have been cognizable under 28 U.S.C. § 2255,

and should have been raised in his earlier Section 2255 motion. However, he did not raise this claim in his initial Section 2255 motion, even though the factual and legal basis for his claim was available to him at that time. He waived this issue by not raising it in a timely-filed Section 2255 motion, and has no legitimate ground for raising it in a successive Section 2255 motion. 28 U.S.C. § 2255.

Peltier is now attempting to raise his subject matter jurisdiction issue under Rule 35(a) because he has no legal basis to raise it in a successive Section 2255 motion. However, even if Peltier had properly raised the issue in his initial Section 2255 motion, he would have lost on the merits because the Court had jurisdiction to convict and sentence him under 18 U.S.C. §§ 1114, 1111 and 2, and the United States was not required to prove the crime occurred within the special maritime and territorial jurisdiction of the United States. ( See Issues II and III, Appellee's Brief, pp 12-26.) The United States' reference to Peltier's requested jury instruction on the elements of the crimes is evidence that, at the time of trial, even the defendant knew Section 1114 jurisdiction did not require proof of federal enclave jurisdiction, and he was right.

## VI. The District Court's Finding Properly Rejected Peltier's Claim that Apprendi and Blakely were Violated in his Case.

Peltier finally claims that his conviction and sentence violate Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004), because there was no evidence that the crimes occurred within the special maritime and territorial jurisdiction of the United States. The district court properly rejected this claim.

First, the district court ruled that it was not necessary for the United States to plead or prove special maritime and territorial jurisdiction as an element of the crimes or sentence. As stated above in Argument II, Section 1114 provides the jurisdictional basis for the crimes and uses the definition and punishment provisions from Section 1111, but does not incorporate the special maritime and territorial jurisdiction requirements of Section 1111(b). The jury found all the necessary elements to convict Peltier and impose life sentences.

Second, the District Court correctly found that Apprendi and Blakely did not apply retroactively to Peltier's Rule 35(a) motion. Apprendi and Blakely do not apply retroactively to convictions that were final when the Supreme Court decided those cases. United States v. Moss, 252 F.3d 993, 997 (8th Cir. 2001), United States v. Bellamy, 411 F.3d 1182, 1186-88 (10th Cir. 2005). See also

Never Misses a Shot v. United States, 413 F.3d 781, 783-84 (8th Cir. 2005). Peltier's conviction became final when the Supreme Court denied certiorari on direct review. United States v. Johnson, 457 U.S. 537, 542 n.8 (1982); Campa-Fabella v. United States, 339 F.3d 993, 993-94 (8th Cir. 2003). Peltier's petition for certiorari was denied on March 5, 1979, long before Apprendi and Blakely. 440 U.S. 945. As such, they should not apply retroactively to his case.

Peltier argues, however, that the principle of general non-retroactive application of new rules should not apply here since his claim is under Rule 35(a) rather than collateral attack under 28 U.S.C. § 2255. This argument should be rejected.

It does not matter whether a claim based on a new rule announced by the Supreme Court is brought in a 2255 motion or a Rule 35(a) motion. New rules such as Apprendi and Blakely, do not apply retroactively to convictions that are final. Conversely, such new rules would apply to pending criminal cases, including those that are on direct review. Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 2522 (2004); Johnson, 457 U.S. at 543. Direct review of Peltier's case concluded over 26 years ago. Therefore, Apprendi and Blakely do not apply to Peltier's case.

## CONCLUSION

The District Court properly determined that Peltier's Rule 35(a) motion challenging his convictions and sentence was not properly brought under Rule 35(a), and was meritless; the District Court had jurisdiction to try Defendant Peltier for the murders of FBI Agents Jack Coler and Ronald Williams; 18 U.S.C. § 1114 does not require that the crime have been committed within federal enclave jurisdiction; 18 U.S.C. § 1114 was properly adopted by Congress pursuant to its authority under the Necessary and Proper Clause; and Peltier's first degree murder convictions are not affected by the Apprendi and Blakely decisions because the jury decided all essential elements of the crimes, and those cases do not apply retroactively to Peltier's already final convictions. Therefore, the District Court's

denial of Peltier's meritless Rule 35(a) motion should be affirmed without a hearing.

Dated at Bismarck, North Dakota, this 26th day of October, 2005.

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The undersigned hereby certifies that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7) and 8th Cir. R. 28A(c) in that the number of words contained in this brief is 12,443. Corel WordPerfect 9 is the name and version of the word processing software used to prepare this brief.

Pursuant to 8th Cir. R. 28A(d), I further certify that the computer diskette provided with this brief has been scanned for viruses and that it is virus-free.

Dated October 26, 2005.

_____
SCOTT J. SCHNEIDER
Assistant United States Attorney

CERTIFICATE OF SERVICE BY MAIL

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| UNITED STATES OF AMERICA | ) | |
| | ) | No. 05-3194 |
| | ) | |
| vs. | ) | |
| | ) | |
| LEONARD PELTIER | ) | |
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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 October 26, 2005, she served, by first-class mail, two copies of the following:

APPELLEE'S BRIEF

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The undersigned further certifies that on October 26, 2005, she dispatched to the Clerk, United States Court of Appeals for the Eighth Circuit, St. Louis, Missouri, by Federal Express the original and nine copies of the APPELLEE'S BRIEF and a 3½" computer diskette containing the full text of the Brief.

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RENITA A. NAGEL, Legal Assistant