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

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

BRIEF IN SUPPORT OF DEFENDANT'S MOTION
UNDER RULE 35(a) TO CORRECT ILLEGAL SENTENCE

INTRODUCTION

Defendant Leonard Peltier brings this motion, pursuant to former Fed.R.Crim.P. 35(a)[1], to correct the illegal sentences imposed upon him by this Court. Mr. 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 killing of two FBI agents on the Pine Ridge Indian Reservation on June 26, 1975. As demonstrated more fully below, this Court lacks subject matter jurisdiction under the statutes upon which Mr. Peltier 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]

[1] Former Rule 35(a) applies and provides in pertinent part:" The Court may correct an illegal sentence at any time …."

territorial jurisdiction of the United States," Mr. Peltier was convicted and sentenced for crimes over which this Court has no subject matter jurisdiction.

FACTS

On June 26, 1975, two FBI agents were killed on the Pine Ridge Indian Reservation in South Dakota. United States v. Peltier, 585 F.2d 314, 318 (8th Cir. 1978). Mr. 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. Mr. 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.

ARGUMENT

I. APPLICABILITY OF FORMER RULE 35(a).

The applicable rule is former Fed.R.Crim.P. 35(a), which provides: "Correction of sentence. The Court may correct an illegal sentence at any time…."[2] This rule continues to apply 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 (11 th Cir. 1989). Thus, Mr. Peltier's motion is timely since he contends that the sentence is illegal

[2] 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).

due to this Court's lack of subject matter jurisdiction based on the undisputed facts which establish that Mr. Peltier was illegally sentenced under 18 U.S.C. §§ 2, 1111 and 1114.

II. THIS COURT LACKED SUBJECT MATTER JURISDICTION TO SENTENCE MR. 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). See also United States v. Brunson, 549 F.2d 348, 351 (5th Cir. 1977) (§ 1114 prior to amendments "incorporates only the penalty" sections of § 1111 and 1112). Section 1111 expressly required the government to establish the jurisdictional elements of 18 U.S.C. §1111 to confer jurisdiction to convict and sentence Mr. 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.

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, 17, 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).

The Court's jurisdiction over the subject-matter of murder 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 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); 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

[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 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).

"within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 1111(b). Put simply, this 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 Petitioner. United States v. Goodwin, 11 U.S. 32 (1812).

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

Blakely v. Washington, 124 S.Ct. 2531 (2004), has affirmed the principles of Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), 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 reservation of power").[4] 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

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[4] 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.

(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 Mr. 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 Mr. Peltier's motion and vacate the illegal sentences imposed upon him.

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December 14, 2004

CERTIFICATE OF SERVICE

I, Barry A. Bachrach, hereby certify that I have served a copy of the foregoing by mailing same by Federal Express this 14th day of December, 2004 to the following:

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