



Court. See Hill, 368 U.S. at 430; Golden v. Bartholomew, 166 F.3d 710, 714 (10<sup>th</sup> 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 (Cir. 1983)(same). See also United States v. Adonizio, 442 U.S. 178, 184 (1979). Thus, there is no merit to the government's contention that Mr. Peltier's Rule 35(a) motion is not properly before this Court.

## **II. MR. PELTIER'S CASE IS DISTINGUISHABLE FROM THE VON KAHL CASE RELIED UPON BY THE GOVERNMENT.**

Putting aside the merits of this Court's decision in United States v. Von Kahl, there is a significant distinguishing factor between Mr. Peltier's motion and that brought by Mr. Von Kahl.<sup>1</sup> Unlike the Von Kahl case, Mr. Peltier's alleged crimes occurred in Indian Country.<sup>2</sup> 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.<sup>3</sup> As the government concedes, Mr. 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

---

<sup>1</sup> Mr. 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 certiorari. Mr. Peltier continues to support that position both in his principal brief and in this brief.

<sup>2</sup> 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).

<sup>3</sup> 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."

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"); Draper v. United States, 164 U.S. 240 (1896)("the reservation was not within the sole and exclusive jurisdiction of the United 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 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.

In sum, 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 Mr. Peltier since he was not charged or convicted with any crime under the “Indian Crimes Act.”

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

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, 60<sup>th</sup> 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 Article 1, Section 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, as argued in Mr. Peltier's principal brief, these statutes apply only to "federal enclave jurisdiction."<sup>4</sup>

---

<sup>4</sup> The government’s reliance on United States v. Bin Laden, 92 F.Supp. 2d 189 (S.D.N.Y. 2000), for the proposition that Section 1114 can be applied extraterritorially is misplaced since it ignores the teachings of Lopez as to the extraterritorial jurisdictional application of federal statutes.

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(8<sup>th</sup> Cir. 1980); United States v. Wilson, 565 F.Supp. 1416, 1428-29 (S.D.N.Y. 1983).

The cases relied upon by 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 Mr. 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 Mr. Peltier was never charged or sentenced under the "Indian Crimes Act," this Court lacked jurisdiction to sentence him and the sentences are illegal.

**CONCLUSION**

For the reasons set forth above and in Mr. Peltier's principal brief, this Court's sentence of Mr. Peltier is illegal and this Court should grant him the relief requested by this Motion.

LEONARD PELTIER  
By His Attorneys,

By \_\_\_\_\_  
Barry A. Bachrach  
Bowditch & Dewey LLP  
311 Main Street  
P. O. Box 15156  
Worcester, MA 01615-0156  
(508) 926-3403

January 24, 2005

CERTIFICATE OF SERVICE

I, Barry A. Bachrach, hereby certify that I have served a copy of the foregoing by mailing same this 24<sup>th</sup> day of January, 2005 to the following:

Drew H. Wrigley, U.S. Attorney  
United States Attorney's Office  
655 1<sup>st</sup> Ave., North  
Suite 250  
Fargo, ND 58102-4932

Scott J. Schneider, Assistant U.S. Attorney  
P. O. Box 699  
Bismarck, ND 58502-0699

\_\_\_\_\_  
Barry A. Bachrach