IN UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	Case No. 2:09-CR-04
Plaintiff,	)	
	)	
vs.	)	**DEFENDANT'S REPLY TO**
	)	**UNITED STATES' RESPONSE**
	)	**TO MOTION TO DISMISS**
ROMAN CAVANAUGH, JR.,	)	
	)	
Defendant.	)	

The Defendant, Roman Cavanaugh, Jr., through his attorney, Alexander F. Reichert, hereby brings this reply to the United States' response to Defendant's motion to dismiss pursuant to the Federal Rules of Criminal Procedure, Rule 6(b)(1) and 28 U.S.C. § 1867(e), and asks that the Court grant his motion to dismiss the indictment. This motion is supported by the following argument.

ARGUMENT

1. THE CASE SHOULD BE DISMISSED BECAUSE STATUTE 18 U.S.C. § 117(A)(1) IS UNCONSTITUTIONAL AS IT IS NOT A VALID EXERCISE OF CONGRESS'S POWER UNDER THE INTERSTATE COMMERCE CLAUSE.

The federal government is one of enumerated powers. M'Culloch v. Maryland, 17 U.S. 316, 405 (1819). In order for federal courts to enforce 18 U.S.C. § 117(A)(1), that statute would have to be a valid exercise of Congressional authority, which it is not.

As has been shown in defendant's motion to dismiss, the statute is unconstitutional. The United States' reply fails to prove otherwise.

The United States points to an Eighth Circuit case involving a statute prohibiting the killing of government officers engaged in their official duties. United States v. Peltier, 446 F.3d 911 (8th Cir. 2006). The court disposed of that case procedurally by noting that Rule 35(a) was an inappropriate vehicle for contesting the constitutionality of a statute. Id. at 914. Thus, any statement by the court in the case regarding constitutionality is dicta. Furthermore, the court noted that protecting government officers engaged in their official duties was "necessary and proper for carrying into Execution" the enumerated powers of the federal government. Id. (quoting U.S. Const. art. I, § 8, cl. 18).

Although it is dicta, that statement at least connects the statute at issue in Peltier to the powers of the federal government. Protection of government officials in the execution of their duties is arguably necessary and proper for carrying out the powers of the government. Punishment of people in general for violence against domestic partners is not at all necessary and proper for carrying out the powers of the federal government. In fact, that was almost exactly the issue in Morrison, wherein the Supreme Court invalided a federal statute punishing violence against women. United States v. Morrison, 529 U.S. 598 (1995). The Supreme Court's on point holding in Morrison controls.

The United States' mere mention that a court, in dicta, opined that a statute on a completely different matter is constitutional is unpersuasive. Furthermore, the Feola case, coming decades before Lopez and Morrison, actually argues against the

government's position here in the very footnote wherein the Court found the statute constitutional. The court noted:

> [A] mere general policy of deterring assaults would probably prove to be an undesirable or insufficient basis for federal jurisdiction; but where Congress seeks to protect the integrity of federal functions and the safety of federal officers, the interest is sufficient to warrant federal involvement.

United States v. Feola, 420 U.S. 671, 677 (1975) (footnote 2). As in the Eighth Circuit case above, Feola involved assault on federal officers performing their official duties. Id. at 673. The Court stressed the importance of the integrity of federal functions and the safety of federal officers in justifying the statute. Id. at 677 (footnote 2). Before even mentioning this, though, the Court took pains to point out how a statute deterring assaults would probably be unconstitutional. Id.

This comment, in a way predicting the ruling in Morrison twenty years in advance, brings into sharp detail the problem with the government's argument. The proper analysis for constitutionality is that given in defendant's motion to dismiss, using Lopez, Morrison, and Raich. The Supreme Court itself highlighted the fundamental distinction between this analysis and the necessary and proper clause exceptions involved in cases involving the protection of government officials acting in their official capacity. The instant case, involving domestic violence, is properly analyzed like the Violence Against Women Act in Morrison, using a commerce clause analysis.

The government's only other citation is very similar to the previous two. United States v. Emery, 186 F.3d 921 (8th Cir. 1999). In Emery, the defendant was convicted of killing a federal informant. Id. at 921. The Eighth Circuit held that congress was using

its "power to maintain the integrity of federal proceedings and investigations." Id. at 925. As in the other cases cited by the government, this involved Congress proscribing activity which directly impacted the ability of the federal government (and in particular the judiciary) to function. As the Supreme Court pointed out in Feola, that is fundamentally different from Congress regulating assaults in general. Feola, 420 U.S. at 677 (footnote 2).

The recurring theme of the cases cited by the government is the federal government attempting to make sure it can carry out its duties. The necessary and proper clause states merely that congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers . . ." U.S. Const. Art. I. § 8 cl. 13. Killing government officials and informants while they are performing their official duties impairs the ability of the federal government to act under the Constitution, and therefore proscribing such acts involves powers necessary and proper to carrying out the enumerated powers and is thus constitutional. Passing a statute which punishes someone for domestic abuse has no nexus whatsoever to the functioning of the federal government and therefore using the necessary and proper clause is an incorrect analysis. The government pointedly did not even bother to argue there was a connection between the statute involved here, 18 United States Code Section 117(A)(1), and the functioning of the federal government. There is no such connection. The statute punishes domestic assault, and as such is an unconstitutional attempt at exercising Congress's power under the interstate commerce clause or the necessary and proper clause. It should therefore be struck down.

2. THE CASE SHOULD BE DISMISSED BECAUSE THE INDICTMENT IS FATALLY DEFECTIVE AS IT FAILS TO LIST AN ESSENTIAL ELEMENT OF THE OFFENSE: "AGAINST A SPOUSE OR INTIMATE PARTNER."

The government argues that the indictment, in charging the Defendant, set forth a statutory citation including the appropriate elements. See Response Brief, P. 4. That is irrelevant to the insufficiency of the indictment. In United States v. Denmon, the indictment cited the statute under which the defendant was charged. United States v. Denmon, 483 F.2d 1093, 1094 (8th Cir. 1973). Nevertheless, the court found the indictment fatally defective due to the omission of an essential element of the offense. Thus, the mere reference by citation to the statute under which someone is being charged does not cure a fatally defective indictment.

A proper indictment must list all "essential elements" of the crime with which the defendant is being charged, and as the government itself admits, one of those "essential elements" is "an assault against a spouse or intimate partner." See Response Brief, P. 6. Omitting "against a spouse or intimate partner" is clearly a substantive omission. Being convicted of an assault that happens to be against a domestic partner is different from being convicted of an assault against a domestic partner. So the indictment can hardly be said to fairly apprise Defendant that he must defend against a charge of being convicted of assaults against a spouse or intimate partner when that indictment has no mention of that fact.

Therefore, the indictment does not fully or fairly apprise Defendant of the charge against which he must defend and is fatally defective and should be dismissed.

3. THE INDICTMENT SHOULD BE DISMISSED BECAUSE THE DEFENDANT DID NOT HAVE LEGAL COUNSEL OFFERED TO BE PROVIDED FOR HIM BEFORE PREVIOUS CONVICTIONS, AND THEREFORE, THEIR USE TO IMPRISON THE DEFENDANT IS UNCONSTITUTIONAL.

The government argues two things: that the statute, 18 United States Code Section 117, is clear on its face with respect to congressional intent on right to counsel, and that Defendant's waiver of the right to counsel he would pay for himself constituted a knowing and intelligent waiver of his right to counsel. Both of these arguments fail.

The terse language of the statute, not even referring to the right to counsel, cannot be said unambiguously to dispense with such a fundamental right by omission, especially as it cannot do so explicitly. Congress mentioned the necessity of honoring a Defendant's right to counsel in the similar Felon in Possession statute. See 18 U.S.C. § 921(a)(33)(B)(i)(I). Constitutionality aside, the public policy choice of Congress in wanting to ensure indigent defendants are not punished with imprisonment without having benefit of counsel is clearly one which should apply to such a similar statute. Silence on the matter does not constitute lack of ambiguity or congressional intent to subvert the constitution.

The government argues that the Defendant waived his right to counsel in tribal court, where defendants are not offered the right to counsel unless they pay the expenses themselves. See Response Brief, Pp. 10-11. The government asserts that this waiver is "valid" as a knowing and intelligent waiver of a defendant's right to counsel. Id. at 11. Merely following tribal law and the Indian Civil Rights Act is alleged to provide sufficient protection to qualify as constitutional under the United States Constitution.

Back in the 1960s, the Supreme Court held that courts were required by Fourteenth Amendment incorporation to supply counsel to indigent criminal defendants. Gideon v. Wainwright, 372 U.S. 335, 342 (1963). The Court found the Sixth Amendment right to counsel fundamental to Due Process. Id. It noted: "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Id. at 344. Gideon involved a felony trial, though that will be seen later not to have been the end of the right to counsel for indigents.

Thereafter, the Indian Civil Rights Act of 1968 was passed. In the section dealing with the right to counsel, the right was merely given as ". . . at his own expense to have the assistance of counsel for his defense . . ." 25 U.S.C. § 1302(6). Tribal courts were then incapable of punishing defendants with anything harsher than six months imprisonment. 25 U.S.C. § 1302(7) (1968). This would classify all tribal convictions as misdemeanors. In the time since Gideon, several state courts had held that incorporation of the Sixth Amendment right to counsel applied only to trials "for non-petty offenses punishable by more than six months imprisonment." See, e.g., State ex rel Argersinger v. Hamlin, 236 So.2d 442, 443 (Fla. 1970). The Supreme Court reversed, holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). Therefore, Argersinger extended the protections of Gideon to misdemeanors.

The Indian Civil Rights Act has never been amended to add the Constitutional requirement that counsel be provided for any indigent defendant who ends up imprisoned for an offense in Tribal court. Whether intentional or the result of oversight, this violates the United States Constitution, as interpreted in Gideon and Argersinger. Thus, any waiver like that in this case, which merely waives the right to counsel at one's own expense, cannot count as a knowing and intelligent of one's Sixth Amendment right to counsel.

Further, this error is compounded when, as here, a federal court is itself imposing incarceration based upon constitutionally infirm convictions. As the Supreme Court has long held, these convictions would be invalid in federal or state court. Johnson v. Zerbst, 304 U.S. 458, 468 (1938). The North Dakota Supreme Court (like many others) has held that all courts under its jurisdiction must obtain a valid waiver of counsel on the record or appoint counsel for an indigent defendant regardless of the penalty to be imposed, if enhancement of punishment for a subsequent conviction is not to be precluded. State v. Orr, 375 N.D. 171, 179 (1985). Here, that enhancement is imprisonment and felony prosecution, a holding the Supreme Court's constitutional jurisprudence forbids. The indictment should therefore be dismissed.

CONCLUSION

For all the reasons stated above, the Defendant respectfully requests that the court dismiss the indictment in the above-captioned case.

Dated this 28th day of October, 2009.

REICHERT ARMSTRONG

/s/

ALEXANDER F. REICHERT
(ND ID #05546)
218 South 3rd Street
Grand Forks, ND 58201
(701) 787-8802
ATTORNEY FOR DEFENDANT