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

UNITED STATES OF AMERICA,	)	
	)	Criminal No. 2:09-cr-04
Plaintiff,	)	
	)	**UNITED STATES' RESPONSE TO**
v.	)	**DEFENDANT'S MOTION TO DISMISS**
	)	
ROMAN CAVANAUGH JR.,	)	
	)	
Defendant.	)	

The United States of America, by Lynn C. Jordheim, Acting United States Attorney for the District of North Dakota, and Janice M. Morley, Assistant United States Attorney, hereby submits this response to the Defendant's Motion To Dismiss the Indictment. The Defendant, Roman Cavanaugh Jr., hereinafter "Cavanaugh," argues that: (1) Title 18, United States Code, Section 117(a)(1) is unconstitutional as it is not a valid exercise of Congress's power under the interstate commerce clause; (2) The Indictment is fatally defective as it fails to list an essential element of the offense; and (3) Cavanaugh did not have legal counsel for previous convictions, and, therefore, they are unconstitutional.

1. CONGRESS WAS WELL WITHIN ITS AUTHORITY IN PASSING TITLE 18, UNITED STATES CODE, SECTION 117

Cavanaugh seeks dismissal of the Indictment alleging 18 U.S.C. § 117 is unconstitutional in light of United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000). Cavanaugh asserts that "absent any economic activity in the regulation or any jurisdictional nexus between the activity and interstate

economic activity, the regulation of intrastate non-economic activity by congress is unconstitutional." See Cavanaugh's Motion to Dismiss, page 4.

The United States alleges that 18 U.S.C. § 117 is constitutional. A nexus between the activity and interstate commerce is not always required. Congress was well within its authority in passing legislation to protect victims from repeated acts of domestic abuse. Cavanaugh's allegation that Congress was overreaching in passing legislation to protect repeat victims of domestic abuse is without merit. Lopez and Morrison do not declare non-economic intrastate activities to be categorically beyond the reach of the Federal Government. Gonzalez v. Raich, 545 U.S. 1, 38-39 (2005). Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. Id. at 34 (citations omitted).

The Eighth Circuit has previously addressed the issue of whether there must always be a nexus between interstate commerce or economic activity for a statute to be held constitutional. In United States v. Peltier, 446 F.3d 911 (8th Cir. 2006), the Eighth Circuit determined that 18 U.S.C. § 1114 was not an unconstitutional exercise of Congress's power under the commerce clause as Congress had the power to prohibit the killing of government officers engaged in their official duties. The Eighth Circuit opined:

> Congress's power under the commerce clause is in any event irrelevant to this case, because there is power elsewhere in the Constitution that plainly authorizes Congress to pass the statute in question. Congress may "make all Laws which shall be necessary and proper for carrying into Execution the

> [Congressional] Powers" enumerated in the Constitution, "and all other Powers vested by [the] Constitution in the Government of the United States. U.S. Const. art. I, § 8, cl. 18."

Id. at 914. "A statute like § 1114 is necessary in order to insure uniformly vigorous protection of federal personnel." Peltier, 446 F.3d at 914. See also United States v. Feola, 420 U.S. 671, 684 (1975) (18 U.S.C.§ 111 was necessary in order to insure uniformly vigorous protection of federal personnel.)

Similarly, in United States v. Emery, 186 F.3d 921 (8th Cir. 1999), Emery argued that 18 U.S.C. § 1512 was unconstitutional. The Eighth Circuit disagreed stating "Mr. Emery's arguments are without merit, because the statute in question does not derive its authority from Congress's authority over interstate commerce, but from Congress's power to maintain the integrity of federal proceedings and investigations." Emery, 186 F.3d. at 924-25. "[N]either the constitutionality of the statute, the jurisdiction of the federal court, nor the sufficiency of the indictment depends on the effects of the proscribed acts on interstate commerce. Id.

Congress was within its authority in passing 18 U.S.C. § 117. Cavanaugh's Motion to Dismiss must be denied.

2. THE INDICTMENT SUFFICIENTLY SETS FORTH THE CHARGED OFFENSE

Cavanaugh alleges the Indictment "fails to state the essential element of the offense, specifically, prior convictions for "any sexual abuse or serious violent felony

against a spouse or intimate partner." (emphasis added)."" See Cavanaugh's Motion to Dismiss, page 5.

Rule 7(c)(1) of the Federal Rules of Criminal Procedure sets forth the nature and contents of an Indictment:

> The indictment . . . must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. . . . A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment . . . must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated.

Fed. R. Crim. P. 7(c)(1).

"An indictment is sufficient if it: (1) contains the elements of the charged offense and fairly informs the defendant of the charge against which he must defend; and (2) enables him to plead double jeopardy as a bar to further prosecution." United States v. Diaz-Diaz, 135 F.3d 572, 575-76 (8th Cir. 1998)(citations omitted). "Unless an indictment is so defective that by no reasonable construction can it be said to charge the offense for which the defendant was convicted, it will be upheld." Id. at 576. "When the issue is whether an element of an offense has been omitted from an indictment, moreover, our inquiry is whether the omission is one of substance or one of form only." Id.

In the instant case, the Indictment charges Cavanaugh with committing the offense of Domestic Assault by a Habitual Offender on or about July 7, 2008. The Indictment sets forth the statutory citation, namely 18 U.S.C. § 117(a)(1)[1].

Title 18, United States Code, Section 117, Domestic Assault by an Habitual Offender, provides:

> (a) In general.--Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction--
> (1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner; or
> (2) an offense under chapter 110A,...
> (b) Domestic assault defined.--In this section, the term "domestic assault" means an assault committed by a current or former spouse, parent, child, or guardian of the victim, **by a person with whom the victim shares a child in common**, by a person who is cohabitating with or **has cohabitated with the victim as a spouse**, parent, child, or guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim (emphasis added).

The elements are set forth in the Indictment. Though the terms "spouse and intimate partner" do not appear in the Indictment, the nature of the relationship between Cavanaugh and the victim is delineated with particularity from the statute's own language in subdivision (b).

The essential elements of a violation of 18 U.S.C. § 117(a)(1), in the present case, are: (1) Cavanaugh committed a domestic assault, (2) The offense was committed within the exterior boundaries of the Spirit Lake Indian Reservation, (3) Cavanaugh has at least

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[1]The Indictment is attached as Exhibit 1.

two separate prior convictions in Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction, and (4) an assault against a spouse or intimate partner.

Should the Court determine the omission of the terms "intimate partner" makes the Indictment defective, it is not fatal. This is an omission of form only. The Indictment includes language defining the fact that Cavanaugh and the victim share a child in common, and therefore were intimate partners. The Indictment also indicates that Cavanaugh and the victim cohabitated, and that they were similarly situated to a spouse. Cavanaugh was provided with sufficient information in the Indictment to defend against the charge and plead double jeopardy as enunciated in Diaz-Diaz, 135 F.3d at 575-76.

Cavanaugh has copies of all of the investigative reports and discovery material supporting the underlying basis for the habitual offender charge. The Indictment specifically indicates the federal criminal statute which Cavanaugh is charged with violating and describes with particularity the act which allegedly constituted the offense. If Cavanaugh believes the Indictment lacks specificity, the appropriate course of action is to seek a Bill of Particulars. United States v. Cartano, 534 F.2d 788, 791 (8th Cir. 1976), citing United States v. Glup, 482 F.2d 1288, 1290 (8th Cir. 1973).

The Indictment fully and fairly apprises Cavanaugh of the charge against which he must defend and enables him to plead double jeopardy as a bar to further prosecution. It is not fatally defective nor does it suffer from vagueness and legal impossibility. There is no omission of substance, therefore, the Indictment is not subject to dismissal.

3. UNCOUNSELED MISDEMEANOR DOMESTIC ABUSE CONVICTIONS FROM TRIBAL COURT QUALIFY AS PREDICATE OFFENSES FOR THE PROSECUTION OF DOMESTIC ASSAULT BY AN HABITUAL OFFENDER

Cavanaugh argues that using the tribal convictions to support the Federal charge is a violation of his Due Process rights because Cavanaugh was not afforded the right to counsel in tribal court. Cavanaugh directs the Court to the Gun Control Act to support his contention that uncounseled predicate offenses should not be considered. Cavanaugh further argues "that the statutory construction of 18 U.S.C. § 177[sic] is similar to 18 U.S.C. 922(g)(9). Therefore, Congress's requirement under 922(g) that uncounseled convictions are not considered convictions should also apply to § 117." See Cavanaugh's Motion to Dismiss, page 8.

Cavanaugh is attempting to bootstrap the qualifiers found in the Gun Control Act to the Domestic Assault by an Habitual Offender statute, requiring that a person convicted of a misdemeanor crime of domestic violence be represented by counsel during the underlying proceedings. The relevant portion of Title 18, United States Code, Section 921(a)(33)(B)(i), states that a person shall not be considered to have been convicted of a misdemeanor crime of domestic violence unless -- "the person was represented by counsel in the case, *or* the person knowingly and intelligently waived the right to counsel in the case." 18 U.S.C. § 921(a)(33)(B)(i) (emphasis added).

The plain language of 18 U.S.C. § 117 unambiguously provides that tribal court convictions are to be counted as predicate offenses. The qualifying language Cavanaugh is attempting to impose does not appear in 18 U.S.C. § 117. Had Congress intended

qualifiers in the Domestic Assault by an Habitual Offender statute, they would have included language similar to the language in § 921(a)(33)(B)(i). Congress intended to punish habitual offenders of domestic abuse and intended tribal court convictions to apply as predicate offenses. The statute is silent as to the issue of counsel or waivers of counsel. A plain view of the language reveals no ambiguity.

A. Plain view of 18 U.S.C. § 117.

"The starting point in any question of statutory interpretation is the language of the statute itself." United States v. Milk, 281 F.3d 762, 766 (8th Cir. 2002) (citing United States v. McIntosh, 236 F.3d 968, 971 (8th Cir. 2001)). Where the language of a statute "is unambiguous, the statute should be enforced as written unless there is clear legislative intent to the contrary." Milk. 281 F.3d at 766, citing McIntosh, 236 F.3d at 972. Because the text of 18 U.S.C. § 117 does not include a requirement that the person was represented by counsel in the prior domestic abuse convictions, or that the person knowingly and intelligently waived the right to counsel, this distinction should not be read into the statute. See Id. "Courts are obligated to refrain from embellishing statutes by inserting language that Congress has opted to omit." Milk, 281 F.3d at 766 (quoting Root v. New Liberty Hosp. Dist., 209 F.3d 1068, 1070 (8th Cir. 2000)). There is no ambiguity in 18 U.S.C. § 117. The plain language is clear. Cavanaugh's repeated acts of domestic violence against the same victim warrant this federal felony charge and the violence towards his victim are exactly the behavior this statute was intended to stop.

Cavanaugh's misdemeanor domestic abuse tribal court convictions are sufficient predicate offenses.

The legislative intent behind the statute supports the foregoing position. This law came into effect January 5, 2006, as part of the "Restoring Safety to Indian Women Act." In the Statements on Introduced Bills and Joint Resolutions, Senator John McCain indicated the purposes of § 117 were:

> (1) To obtain data on the rates of domestic violence perpetrated upon Indian women in Indian country.
> (2) To close existing gaps in Federal criminal laws to enable Federal, State, and tribal law enforcement, prosecution agencies, and courts to address incidents of domestic violence.
> (3) To address the public safety concerns experienced by tribal police officers that arise in responding to incidents of domestic violence.
> (4) To prevent the serious injury or death of Indian women subject to domestic violence.

151 Cong. Rec. S4874, (May 10, 2005)(statement of Sen. McCain).

McCain stated that this bill is intended to remove the obstacles at all levels and to enhance the ability of each agency to respond to acts of domestic violence when they occur. Additionally, McCain stated:

> This bill would create a new Federal offense aimed at the habitual domestic violence offender and allow tribal court convictions to count for purposes of Federal felony prosecution when the perpetrator has at least two separate Federal, State, or tribal convictions for crimes involving assault, sexual abuse or a violent felony against a spouse or intimate partner. This statute gives federal prosecutors the ability to intervene in the cycle of violence by charging repeat offenders before they seriously injure or kill someone.

151 Cong. Rec. S4873, (May 10, 2005)(statement of Sen. McCain).

Congress was aware of the gap between tribal and federal law. This statute was written so habitual domestic abuse offenders are faced with a felony, and prosecuted before these victims are seriously injured or killed.

B. Cavanaugh acknowledged his right to representation of counsel during his tribal court proceedings.

Cavanaugh alleges it would be a violation of his due process rights to use tribal convictions to support the current charge because he was not afforded the right to counsel in tribal court. See Cavanaugh's Motion to Dismiss, page 6. Cavanaugh's assertion that he was not afforded the right to counsel is a slight, but significant, misstatement of facts. While the Spirit Lake Nation does not provide court-appointed defense counsel, defendants are made aware of their right to obtain counsel in accordance with the Indian Civil Rights Act and 25 U.S.C. § 1302(6).

The right to an attorney in tribal court is guaranteed by the Indian Civil Rights Act (ICRA), but only at the expense of the defendant.

> No Indian tribe in exercising powers of self-government shall -
> ...
> (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense.

25 U.S.C. § 1302(6). See also United States v. Bird, 287 F.3d 709, 713 (8th Cir. 2002).

The verbiage in the Spirit Lake Nation Law & Order Code is consistent with 25 U.S.C. § 1302(6). At 3-5-101 it states:

> **Arraignments**. As soon as reasonably possible after arrest, but not more than 72 hours thereafter, or within the period designated on the citation, the defendant shall again be informed of his rights under the Spirit Lake Law and Order Constitution and under federal law, **including the right to counsel at the defendant's own expense**. If the defendant desires, but does not presently have a spokesperson, he will be given a reasonable time to secure a spokesperson before entering a plea.

Spirit Lake Nation Law & Order Code 3-5-101 (2003)(emphasis added)[2].

During his tribal court proceedings, Cavanaugh was made aware of his right to counsel, and he acknowledged this right by signing a Statement of Rights form for each of the tribal court proceedings identified as predicate offenses in the Indictment[3]. In doing so, he acknowledges his right to an attorney at his own expense. The subsequent plea without counsel is a valid waiver of his right to secure counsel.

Cavanaugh does not question the validity of the tribal court misdemeanor domestic abuse convictions, nor does he assert he was denied the opportunity to obtain counsel. The assertion he was not afforded the right to counsel is a misstatement of the facts.

It is well settled that constitutionally valid misdemeanor convictions may be used to enhance subsequent sentences. An uncounseled criminal conviction in which the defendant validly waived his or her right to counsel can be used to enhance a sentence as

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[2]Section 3-5-101 of the Spirit Lake Nation Law & Order is attached as Exhibit 2.

[3]See paragraph 2 of the Statement of Rights form signed by Cavanaugh and on file at Spirit Lake Tribal Court for each of the predicate offenses attached as Exhibit 3.

long as the right to counsel was validly waived or not otherwise constitutionally required. See United States v. Early, 77 F.3d 242, 245 (8th Cir. 1996). See also Nichols v. United States, 511 U.S. 738, 748-49 (1994) (uncounseled DUI conviction constitutionally valid because no prison term was imposed and therefore could be considered to calculate criminal history score).

In United States v. Ant, 882 F.2d 1389 (9th Cir. 1989), the Ninth Circuit held that the use of Ant's uncounseled tribal court conviction for the same alleged act was not admissible in the subsequent federal court proceeding because without the assistance of counsel, Ant pled guilty in tribal court. Since the evidence did not support a finding of waiver, the Ninth Circuit determined it was constitutionally infirm.

Ant is distinguishable from the case at hand in that here, the predicate offenses are separate offenses. Moreover, Cavanaugh acknowledged his right to obtain counsel, signed his Statement of Rights form, and pled guilty, waiving his opportunity to secure counsel.

In support of this argument, Cavanaugh sites United States v. Benthurum. Cavanaugh states: "According to United States v. Benthurum, a person cannot have been considered to have been convicted of an offense unless the person was represented by counsel in the case. 343 F.3d 712 (5th Cir. 2003)." See Cavanaugh's Motion to Dismiss, page 6. The United States has reviewed this case and is unable to locate the reference Cavanaugh relies upon.

In Benthurum, the Fifth Circuit vacated and remanded the District Court's decision to grant Benthurum's motion for judgment of acquittal, holding that the question of voluntariness of a waiver, in the predicate offense, was one of law, not of fact. The predicate offense was a misdemeanor attempted assault with bodily injury conviction; the victim was his wife. The Fifth Circuit held that the District Court had erred when it submitted the issue of validity of waiver to the jury. The Fifth Circuit further held that Benthurum knowingly and intelligently waived his right to counsel. Benthurum's guilty verdict on eight counts of 18 U.S.C. § 922(g)(9) was reinstated, and the judgment of acquittal was vacated. Cavanaugh's reliance on Benthurum is misplaced.

Cavanaugh's misdemeanor convictions in tribal court complied with tribal law under the Spirit Lake Code and with the ICRA. Cavanaugh acknowledged his right to an attorney at his own expense, in accordance with the Spirit Lake Tribal Code. He was aware he was entitled to an attorney, and waived his right to secure legal counsel. Congress intended misdemeanor tribal court convictions to qualify as predicate offenses based upon a plain review of 18 U.S.C. § 117. Given the plain language of the statute and, absent any contrary legislative history, it is clear that Cavanaugh's valid, uncounseled tribal court convictions qualify as predicate offenses under § 117.

CONCLUSION

Based upon the foregoing, the United States requests this Court deny Cavanaugh's Motion to Dismiss in all respects.

Dated this 14th day of October 2009.

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I hereby certify that on October 14, 2009, the following document:

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

Alexander Reichert

I further certify that a copy of the foregoing documents will be mailed by first class mail, postage paid, to the following non-ECF participants:

Dated: October 14, 2009

/s/ Vicki L. Thompson
Vicki L. Thompson
Office of United States Attorney