THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. LEE JAMES CLINE, Defendant.	No. CR 19-0023-JCC DEFENDANT'S MOTION TO DISMISS INDICTMENT BASED ON GOVERNMENT'S FAILURE TO STATE AN OFFENSE **(Oral Argument Requested)** **Noted for: January 31, 2020**

Lee James Cline, through Assistant Federal Public Defender Greg Geist, respectfully moves this Court for an order dismissing the Indictment because it fails to state an offense. *See* Fed. Rule Crim. Proc. 12(b)(3)(B)(v). The Indictment fails to state an offense because it does not contain at least two predicate offenses that qualify to bolster the "habitual offender" designation for the charge of Domestic Assault by a Habitual Offender under 18 U.S.C. § 117(a). Because the alleged prior convictions are categorically overbroad and do not satisfy the elements of the charged offense, Mr. Cline is innocent and the Court must dismiss the Indictment.

A. Facts and Procedure

1. The instant offense alleged in the Indictment.

On January 31, 2019, the Court filed a single count Indictment. Dkt. 13. It alleged that Mr. Cline was a habitual offender who committed a domestic assault in violation of 18 U.S.C. § 117(a). Dkt. 13. Section 117(a) provides, in relevant part:

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> Any person who commits a domestic assault within…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…any assault . . . against a spouse or intimate partner . . . shall be fined under this title, imprisoned for a term of not more than 5 years, or both.

To find Mr. Cline guilty of the instant offense, the government must prove:

(1) a current domestic assault;

(2) Mr. Cline committed the domestic assault against a person who shares a child in common with Mr. Cline or who is similarly situated to a spouse,

(3) Mr. Cline committed the instant assault on Indian country, and

(4) Mr. Cline had at least two prior qualifying assault convictions, before the date of the instant offense, that were committed against a spouse or intimate partner.[1]

Mr. Cline remained in custody for the instant conduct from January 18, 2019 to March 25, 2019. On March 25, 2019, the Court denied Mr. Cline's motion for release. Dkt. 26. On May 8, 2019, Mr. Cline filed a motion to reopen the detention hearing. Dkt. 27. On May 20, 2019, this Court placed Mr. Cline on bond. Dkt. 32. Mr. Cline then entered inpatient treatment and subsequently started to reside at the Lummi Men's Reentry Center. He has been out of custody since his ordered release on May 20, 2019.

2. The prior offenses alleged in the Indictment.

The Indictment alleged that Mr. Cline "did assault Jane Doe, a person with whom he shares a child in common and who is or was similarly situated to a spouse" on October 8, 2018 and that he previously had been "convicted of at least two assaults against a spouse or intimate partner." Dkt. 13. The Indictment alleged three prior assault convictions against a spouse or intimate partner:

[1] The fourth element is the only element relevant to the instant motion to dismiss.

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1. "Battery – DV" with a conviction date of June 18, 2014 in violation of Section 20.02.050 of the Nooksack Code of Laws (Case No. 06/13-CR-031) (hereinafter referred to as 2014 Nooksack Battery).

The 2014 Nooksack Battery Criminal Complaint, dated March 14, 2011, alleged a violation of the "Nooksack Code of Laws Section 20.02.050 & 20A.01.040(c)&(e)" with an offense date of April 25, 2013.[2] Ex. 1 at 1. The Complaint alleged "the Defendant willfully struck another person or otherwise inflicted bodily injury on another person, to wit: the defendant hit/scratched/attempted to choke…a family or household member." Ex. 1 at 1. Even though the Complaint alleges "Battery (DV)," the Nooksack code for battery does not have a specific section for domestic violence battery. Ex. 1 at 1. Section 20.02.050, simply titled "Battery," does not require an assault against a person who shares a child with the defendant or against someone similarly situated to a spouse. Ex. 4 at 14.

On June 18, 2014, the Nooksack Tribal Court entered a Criminal Judgment against Mr. Cline for the 2014 Nooksack Battery, listed as "Battery DV," and placed him on one year of probation. Ex. 1 at 4.

2. Assault in the Third Degree with a conviction date of May 7, 2015, in violation of RCW 9A.36.031(2) (Case No. 14-1-01239-2, Whatcom County Superior Court) (hereinafter referred to as Third Degree Assault).

In the Judgment and Sentence, the Whatcom County Superior Court sentenced Mr. Cline, in relevant part, for committing "Assault in the Third Degree, Domestic Violence" under "RCW 9A.56.200(1)(a)(iii)." Ex. 2 at 14. RCW 9A.56.200(1)(a)(iii) is an offense for robbery, not assault. The Warrant of Commitment indicates a conviction for third degree assault, without reference to a code section. Ex. 2 at 23.

The Whatcom County prosecuting attorney charged a Third Degree Assault offense in a First Amended Information filed on May 7, 2015. Ex. 2 at 3. The First

[2] Nooksack Criminal Code section 20A.01.040 does not exist in the most recent version of the Nooksack Code.

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Amended Information alleged that Mr. Cline acted with "criminal negligence" when he "cause[d] bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering to another, contrary to RCW 9A.36.031(1)(f)." Ex. 2 at 3. Additionally, the First Amended Information stated that Mr. Cline committed the assault "against a family or household member, contrary to RCW 10.99.020." Ex. 2 at 3. Mr. Cline pled guilty to the Third Degree Assault charge on May 7, 2015. Ex. 2 at 5-13.

3. "Battery – DV" with a conviction date of July 12, 2018 in violation of Section 20.02.050 of the Nooksack Code of Laws (Case No. 2018-CR-A-006) (hereinafter referred to as 2018 Nooksack Battery).

The 2018 Nooksack Battery Amended Criminal Complaint, dated June 14, 2018, alleged two violations of Nooksack Code of Laws Section 20.02.050, with offense dates of June 10, 2018 (Count 1) and June 12, 2018 (Count 2). Ex. 3 at 1-2. On July 12, 2018, the Tribal Court issued a Judgment, which sentenced Mr. Cline for a violation of Count 1. Ex. 3 at 3-4. Count 1 alleged Mr. Cline "did willfully strike another person, a family or household member, or otherwise inflict bodily harm to wit: Defendant struck C.T., Defendant's partner, in the head with a glass…bottle." Ex. 3 at 1. As a Class B offense, the maximum penalty was 6 months in jail and / or a $2500 fine. Ex. 3 at 1.

B. This Court must use the categorical approach to determine whether the predicate offenses, listed in the Superseding Indictment, qualify as matches to support the instant offense.

1. The legal framework for prior offenses alleged under 18 U.S.C. § 117.

a. Overbreadth and Divisibility

This Court must use the categorical approach to determine whether the predicate offenses, listed in the Indictment, qualify as matches to support the instant offense

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because 18 U.S.C. § 117 refers to generic crimes, regarding the alleged prior convictions, rather than the particular facts or conduct of the alleged priors.[3]

Courts apply the "categorical approach to determine whether a state statute of conviction falls within a specified class of federal offenses." *United States v. Reinhart*, 893 F.3d 606, 610 (9th Cir. 2018). Under the categorical approach, courts use a three-step test. First, courts "examine the statute of conviction to determine whether it categorically qualifies as a predicate offense for federal sentencing purposes" with a sole focus on "whether the elements of the crime of conviction sufficiently match the elements of the generic federal definition." *United States v. Arriaga-Pinon*, 852 F.3d 1195, 1198-1199 (9th Cir. 2017). Second, courts determine "whether [the statute of conviction] contains a single, indivisible set of elements." *Arriaga-Pinon*, 852 F.3d at 1199. Finally, if the statute of conviction is divisible, courts utilize the modified categorical analysis "to look beyond the statutory text to a limited set of documents to determine the elements of the state offense of which the defendant was convicted when some alternative elements of the state crime would match the federal, generic crime, and other alternative elements would not." *Rendon v. Holder*, 764 F.3d 1077, 1083 (9th Cir. 2014). If the statute is indivisible, courts may not use the modified categorical approach, which permits the courts to review a limited class of documents. *Descamps v. United States*, 570 U.S. 254, 257 (2013).

Under the categorical approach, "'(i)f the [predicate] offense criminalizes the same or less conduct than the federal generic definition of the crime, then it is a

[3] Courts employ the categorical approach in a number of circumstances similar to Mr. Cline's instant case, including review of the Armed Career Criminal Act (*United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016)), Career Offender (*United States v. Lee*, 821 F.3d 1124 (9th Cir. 2016)), 18 U.S.C. § 924(c) (*United States v. Davis*, 139 S.Ct. 2319 (June 24, 2019)), 18 U.S.C. § 16 (*Sessions v. Dimaya*, 138 S.Ct. 1204 (April 17, 2018)), 21 U.S.C. § 851 (*United States v. Graves*, 925 F.3d 1036 (9th Cir. May 30, 2019)), and whether a prior state conviction relates to possession of child pornography (*Reinhart*, 893 F.3d at 615).

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categorical match to the federal generic offense. But where a [prior] statute of conviction criminalizes more conduct than the federal generic offense, it does not qualify as a categorical match' and is considered overbroad." *Reinhart*, 893 F.3d at 610 (citing *United States v. Sullivan*, 797 F.3d 623, 635 (9th Cir. 2015)).

To determine overbreadth, a court may "only look to the statutory definition" of a defendant's prior convictions, and not to "the particular facts underlying those convictions." *Descamps*, 570 U.S. at 260; *Taylor v. United States*, 495 U.S. 575, 602 (1990). In other words, courts may only look at the elements of the prior convictions and not the specific conduct of the underlying offense.

Once it is determined that the predicate statute is overbroad, the next step is to determine if the statute is divisible. *Reinhart*, 893 F.3d at 610-611. A statute is divisible when it "lists multiple, alternative elements, and so effectively creates several different . . . crimes." *Reinhart*, 893 F.3d at 618 (quoting *Rendon*, 764 F.3d at 1083). If a predicate statute is divisible, it means that a jury needed to agree unanimously on which alternatives of the predicate statute a defendant committed to return a verdict on the conviction. *United States v. Robinson*, 869 F.3d 933, 938 (9th Cir. 2017). "[I]f a jury could return a conviction *without* agreeing on which particular statutory alternative applied, then the statute is indivisible . . . ." *Robinson*, 869 F.3d at 938. (emphasis in original).

If the statute is divisible, then the modified categorical approach applies and the courts may "look beyond the statutory text to a limited set of documents to determine whether the petitioner was necessarily convicted of all the elements of the federal generic offense." *Reinhart*, 893 F.3d at 618 (quoting *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1006-1008 (9th Cir. 2015)). But a court's ability to review documents is limited to the "terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was

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confirmed by the defendant, or to some comparable judicial record of this information." *Shepard v. United States*, 544 U.S. 13, 26 (2005). When the prior case resolved with a guilty plea, the "later court determining the character of an admitted [offense] is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16.

C. The 2014 Nooksack Battery and 2018 Nooksack Battery convictions may not serve as predicate offenses.

1. The Nooksack definition of battery is overbroad, when compared to the federal generic definition of assault, under the categorical approach.

The first step in the categorical analysis is to determine whether the prior convictions punish more conduct than the generic federal definition for assault. Under the categorical approach, the two Nooksack convictions are broader and punish more conduct than generic federal assault.

In reference to the definition of "assault" in the federal statute, the common law definition applies. *United States v. Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976). The Ninth Circuit previously applied the common law definition of assault to another similar federal assault statute – 18 U.S.C. § 113. *United States v. Lamott*, 831 F.3d 1153, 1156 (9th Cir. 2016). Federal generic assault, through the common law definition, is "committed by either a willful attempt to inflict injury upon the person of another, or by a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." *Dupree*, 544 F.2d at 1051.

The Nooksack Criminal Code defines its version of battery in section 20.02.050. According to the Nooksack Criminal Code, "(a)ny person who willfully strikes another

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person or otherwise inflicts bodily harm, or who by offering violence causes another to harm himself shall be guilty of a Class B offense." Ex. 4 at 8.

The Nooksack definition of battery is broader than the federal definition of assault for several reasons. One portion of the Nooksack statute requires an "offering" of "violence" that "causes another to harm himself."[4] The Nooksack definition of battery does not require certain elements listed in the federal generic definition of assault, which calls for either a willful attempt to inflict injury on another person or a threat to inflict injury on another with an apparent present ability to inflict the injury that causes reasonable apprehension of immediate bodily harm.

Unlike the federal generic assault definition, a Nooksack Battery may be committed by "offering violence," without restriction. For example, the Nooksack code criminalizes any offer of violence, including offers of violence against an animal or property. The Nooksack Battery code extends to nonbodily harm. But federal generic assault requires the infliction of injury on a person or a threat to inflict injury on a person. Because Nooksack Battery permits an offer of violence toward an animal or property, it criminalizes more conduct and is broader than federal generic assault.

Additionally, the Nooksack Battery offer of violence element does not require an apparent present ability to inflict injury or for another person to have a reasonable apprehension of immediate bodily harm, as required by the federal generic assault definition. The Nooksack code allows a conviction for an offer of violence even if the

[4] Had the Nooksack Code intended to criminalize a "threat" in the code, rather than offering violence, it would have included that term. The Nooksack Code specifically defines "threat" at section 20.00.080(x) in its "Definitions" section. A "threat" requires the "intent immediately to use force against any person who is present at the time." Ex. 4 at 5. A "threat" is a communication "to cause injury in the future…or to cause physical damage to the property of a person." Ex. 4 at 5. A "threat" may be a communication to cause injury – including physical damage to property – at any point in the future and need not be apparent or cause apprehension of immediate bodily harm. Therefore, even a threat, as defined by the Nooksack code, is overly broad and criminalizes more conduct than federal generic assault.

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offender does not have an apparent present ability to inflict injury. In addition, the Nooksack code permits a conviction for an offer of violence that does not cause a reasonable apprehension of bodily harm. The Nooksack code is overbroad because it contains neither the apparent present ability nor the immediacy requirements contained in the federal generic assault definition.

For another reason, the Nooksack code is broader than the federal assault definition because it permits a conviction when the victim inflicts the injury upon their own body. There is no requirement for the accused to inflict the injury or cause the harm. But a federal generic assault requires the offender to inflict or threaten to inflict the injury upon the victim. The Nooksack Battery section is not the only section in its criminal code that penalizes one person for another person's self-inflicted harm or injury. Nooksack Criminal Code section 20.02.030 makes it a crime for "(a)ny person, who knowingly causes, aids or encourages another person to commit or attempt to commit suicide." Ex. 4 at 7. The Nooksack Battery section is not the only section in its criminal code that permits a conviction for self-inflicted injuries. For example, Nooksack Criminal Code section 20.02.040 makes it a crime when "(a)ny person…attempts to take his own life." Ex. 4 at 8.

The Nooksack Battery section is overbroad based on how 18 U.S.C. § 117 and the Indictment define a victim compared to how the Nooksack code defines a victim. Section 117(b) requires an "assault…against a spouse or intimate partner." The Indictment, consistent with the statute, alleges prior convictions for "at least two assaults against a spouse or intimate partner." Dkt. 13. Clearly, the federal statute requires prior assaults committed against a spouse or intimate partner. But the Nooksack Battery law permits an assault to be perpetrated against anyone, including a stranger, and it is not limited to a spouse or intimate partner. Because the Nooksack Battery section does not limit who may be a victim, while the federal assault statute

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limits victims of the predicate offenses to only a spouse or intimate partner, the Nooksack Battery offenses are overbroad.

Perhaps the clearest evidence that demonstrates the overbreadth of the Nooksack Battery code is contained in the "Findings of Fact, Conclusions of Law, Decision and Order" in *Nooksack Indian Tribe v. Josette Johnson*, Case No. 2017-CR-A-010 (Nooksack Tribal Court Jan. 26, 2018). Ex. 5. At a bench trial, the court found the defendant not guilty of a battery charge under 20.02.050. Ex. 5 at 1, 7-8. Counsel learned, through discovery, that no case has proceeded to a jury trial under 20.02.050 and there have only been two court trials under the battery section in Nooksack Tribal Court. *Johnson* is the only case that contains a written order. The other case was dismissed without an order.

The defendant in *Johnson* was found not guilty for shoving another person because "it [was] not possible to determine beyond a reasonable doubt that a battery occurred." Ex. 4 at 7. To try to prove a battery occurred, the prosecution called the victim's boyfriend. Ex. 4 at 1. He testified that the defendant shoved his girlfriend. Ex. 4 at 2. The defense called the defendant and the defendant's daughter. Ex. 4 at 2, 3. They claimed the defendant did not shove the victim. Ex. 4 at 2, 4. A review of the written order demonstrates that the victim did not testify.

The court's analysis centered on whether the shove occurred. The court – without hearing any testimony from the alleged victim – had "no doubt that [the alleged victim] was distressed due to the meeting between [the alleged victim's boyfriend] and the Defendant, Ms. Josette Johnson." Ex. 4 at 6. The court concluded that it could not make the determination that a shove occurred and "(a)s a result, it [was] not possible to determine beyond a reasonable doubt that battery occurred." Ex. 4 at 7.

In its decision, the court implied that a simple shove – and not a strike – would have been sufficient for a battery conviction. The court did not enter into an analysis of

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whether or not the defendant willfully attempted or threatened to inflict an injury upon the alleged victim. One takeaway from the *Johnson* case is that a push or shove, without an attempt or threat to inflict injury, is enough for a battery conviction in Nooksack Tribal Court. Therefore, a harmful or offensive touching is enough for a battery conviction in Nooksack Tribal Court. Under the standards set by the plain meaning of 20.02.050, combined with the *Johnson* decision, Nooksack Battery is overbroad.

2. Even if the Nooksack Battery code is divisible, the two Nooksack predicates are overbroad under the modified categorical approach.

Without conceding the point, even if this Court finds the Nooksack Battery code is divisible and proceeds to the modified categorical approach, the *Shepard* documents fail to prove convictions for batteries against a spouse or intimate partner. The Criminal Complaint for the 2014 Nooksack Battery lists "a family or household member" as the victim. Ex. 1 at 1. A "family or household member" covers a large number of people and need not be a spouse or intimate partner. For example, a family member could be a cousin and a household member could be an au pair. The Amended Criminal Complaint for the 2018 Nooksack Battery lists a "partner" as the victim. Ex. 3 at 1. A "partner" covers a larger set of people than an "intimate" partner. For example, a partner could be a business partner.

Additionally, as noted above through the *Johnson* case, any battery offense under the Nooksack code may be a harmful or offensive touching. A harmful or offensive touching covers more conduct, and is broader, than the federal generic assault definition. Therefore, the Nooksack Battery convictions are broader, even if the Court utilizes the modified categorical approach.

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D. The Third Degree Assault conviction may not serve as a predicate offense.

1. Washington Third Degree Assault is overbroad.

RCW 9A.36.031(1)(f) states that "(a) person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree . . . (w)ith criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." But the court sentenced Mr. Cline for a third degree assault, with reference to the incorrect code section or without reference to a specific section at all. Ex. 2 at 14, 23.

The First Amended Information lists RCW 10.99.020, which refers to RCW 26.50.010 for the definition of "(f)amily or household members." Ex. 2 at 3; RCW 10.99.020(3). But RCW 10.99.020 is irrelevant to the instant analysis because "the legislature specifically stated that the purpose of the Domestic Violence Act, Chapter 10.99 RCW, was not to establish new crimes . . . ." *State v. Goodman*, 108 Wash.App. 355, 359 (2001). "RCW 10.99 created no new crimes but rather emphasized the need to enforce existing criminal statutes in an evenhanded manner to protect the victim regardless of whether the victim was involved in a relationship with the aggressor." *Roy v. City of Everett*, 118 Wash.2d 352, 358 (1992).Therefore, there is no need to analyze the definitions for "family or household members" or "dating relationship" in RCW 26.50.010.

The first portion of the categorical analysis requires the Court to determine whether the predicate statute, RCW 9A.36.031, is overbroad. RCW 9A.36.031 is overbroad because it may be committed "(w)ith criminal negligence." *See* RCW 9A.36.031(1)(d); RCW 9A.36.031(1)(f). Washington third degree assault has a broader mental state element compared to the federal generic assault definition. RCW § 9A.08.010(1)(d) defines criminal negligence:

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> A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

"When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly." RCW 9A.08.010(d)(2). By the very definition listed in the Washington code, committing an offense with criminal negligence is a broader mental state than the other listed mental states. Federal generic assault has a mental state that requires a willful act. An act committed recklessly is broader and covers more conduct than an act performed with a willful mental state.

Additionally, a Washington assault may be committed through "an intentional touching . . . that is harmful or offensive regardless of whether any physical injury is done to the person." *State v. Smith*, 159 Wash.2d 778 (Wash. 2007); *United States v. Robinson*, 869 F.3d 933, 938 n.7 (9th Cir. 2017). An intentional touching that is harmful or offensive is broader and covers more conduct than the conduct involved with a federal generic assault, which requires a willful attempt to inflict injury or a threat to inflict injury. Therefore, the offenses listed in RCW 9A.36.031(1)(a)-(c), (e), and (g)-(k) are overbroad compared to federal generic assault.

2. Washington third degree assault is indivisible.

The next step in the analysis requires the Court to determine whether the predicate statute is indivisible. If it is indivisible, the analysis ends and the predicate statute is overbroad.

The Washington third degree assault statute is indivisible. RCW 9A.36.031 lists 11 alternative means of committing a third degree assault. "The legislature has codified four degrees of criminal assault. Between the crimes of first, second, and third degree

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assault, the legislature has delineated a total of 17 alternative means of commission." *Smith*, 159 Wash.2d at 784.

"(A) court may not look behind the elements of a generally drafted statute to identify the means by which a defendant committed a crime." *Mathis v. United States*, 136 S.Ct. 2243, 2255 (2016) (referencing *Descamps*, 570 U.S. at 258). If the statute lists means of committing the offense, "the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution." *Mathis*, 136 S.Ct. at 2256.

Just as in *Mathis*, "a state court decision definitively answers the question" of whether the statute lists elements or means. *Id*. The Washington Supreme Court stated that the "legislature has delineated . . . alternative means of commi[tting]" third degree assault.[5] *Smith*, 159 Wash.2d at 784. The Washington third degree assault statute lists means, rather than elements. Therefore, this Court "has no call to decide which of the statutory alternatives was at issue" for Mr. Cline's Washington Third Degree Assault conviction. *Mathis*, 136 S.Ct. at 2256. Because the third degree assault statute is overbroad and indivisible, it may not be used as a predicate for the instant prosecution under 18 U.S.C. § 117(a).

E. Conclusion

For the above stated reasons, this Court should grant the instant motion because the Indictment fails to state an offense.

DATED this 23rd day of January 2020.

Respectfully submitted,

s/ *Gregory Geist*
Assistant Federal Public Defender
Attorney for Lee James Cline

[5] For similar reasons, the Ninth Circuit Court of Appeals found that the Washington second degree assault statute, RCW 9A.36.021, was indivisible because the statute listed alternative means rather than elements of the offense.

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