

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

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UNITED STATES OF AMERICA,

22-50066

Plaintiff,

UNITED STATES' OBJECTION TO  
DEFENDANT'S MOTION TO DISMISS  
AND REQUEST FOR HEARING

vs.

DONALD KILLS WARRIOR,

Defendant.

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Comes now the United States of America, by and through Assistant United States Attorney Heather Sazama, and objects to the Defendant's motion to dismiss and request for hearing, filed at Doc. 89 in 5:19-cr-50163 and Doc. 36 in 5:22-cr-50066. The motions to dismiss should be denied and the hearing on his motions should be canceled.

**1. Jurisdiction is well-established in this case.**

The facts establishing jurisdiction in this case are not in dispute. The Defendant has a 2009 federal felony conviction for Abusive Sexual Contact, in violation of 18 U.S.C. §§ 2244(a)(5), 2246(3), and 1153. *See United States v. Kills Warrior*, 5:07-cr-50166-KES, at Doc. 65. The Defendant agrees. *See* 5:22-cr-50066, Doc. 36, at 3; 5:19-cr-50163, Doc. 89, at 3. His prior conviction is for a "sex offense" within the meaning of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250(a), and 34 U.S.C. § 20911. The prior conviction was not appealed, vacated, or otherwise overturned in any way. *See* 5:07-cr-50166-KES. Thus, the Defendant is a person required to register as a sex offender under SORNA. Here, the indictment charges him with a violation of

18 U.S.C. § 2250(a). The district courts of the United States have original jurisdiction over all federal offenses, pursuant to 18 U.S.C. § 3231. Thus, jurisdiction is properly established, and Fed. R. Crim. P. 12(b)(2) offers the Defendant no avenue for relief.

Defendant's real argument is that jurisdiction was not proper in the prior criminal case, 5:07-cr-50166-KES, that resulted in his conviction for a sex offense. Under Fed. R. Crim. P. 12(b)(2), a motion that the court lacks jurisdiction "may be made at any time *while the case is pending*." (emphasis added). The last activity in file 5:07-cr-50166 occurred nearly a decade ago, when the Defendant was unsatisfactorily terminated from supervised release. *See* 5:07-cr-50166-KES, Doc. 103. That case is not "pending," so the Defendant filed his motion to dismiss in the instant case instead. He did not avail himself of the criminal appeals process or file a habeas corpus action relating to his prior conviction, but is now attempting to collaterally attack it. Defendant's motion to dismiss under Fed. R. Crim. P. 12(b)(2) is unfounded and should be denied.

**2. The institution of prosecution and indictment are sound.**

The Defendant cites Fed. R. Crim. P. 12(b)(3) as a secondary basis for his motion to dismiss—specifically, that there is a defect in the institution of the prosecution of this case and a defect in the indictment. He has, however, failed to identify a defect in either the institution of the prosecution or the indictment in this case. Fed. R. Crim. P. 12(b)(3)(A) states the available grounds to assert a defect in the institution of a prosecution as the following *exhaustive* list:

- (i) improper venue;
- (ii) preindictment delay;
- (iii) a violation of the constitutional right to a speedy trial;
- (iv) selective or vindictive prosecution; and

(v) an error in the grand-jury proceeding or preliminary hearing.

Fed. R. Crim. P. 12(b)(3)(A). Defendant's motion cites none of the available grounds for challenging the institution of prosecution.

Further, although the Defendant generally asserts there is a defect in the indictment, he fails to identify one. Fed. R. Crim. P. 12(b)(3)(B) states the available grounds to assert a defend in the charging document as the following *exhaustive* list:

- (i) joining two or more offenses in the same count (duplicity);
- (ii) charging the same offense in more than one count (multiplicity);
- (iii) lack of specificity;
- (iv) improper joinder; and
- (v) failure to state an offense.

Fed. R. Crim. P. 12(b)(3)(B). Defendant's motion cites none of the available grounds for relief due to a defect in the charging document. No basis for dismissing this case has been stated under Fed. R. Crim. P. 12(b)(3). The motion to dismiss based on Fed. R. Crim. P. 12(b)(3) should be denied.

### **3. The Defendant's motion violates D.S.D. L.R. 47.1C.**

According to District of South Dakota Local Rule 47.1C, every motion raising a question of law is to be accompanied by "a brief containing the movant's legal arguments, the authorities in support thereof, and the Federal Rule of Criminal Procedure on which the movant relies." D.S.D. L.R. 47.1C. On its face, the Defendant's motion establishes its insufficiency: "This motion is not meant to be a complete recitation of the facts, authority, and argument supporting Defendant's request for relief." 5:22-cr-50066, Doc. 36, at 1; 5:19-cr-50163, Doc. 89, at 1. The Defendant's motion is deficient, and he has not filed the brief required by D.S.D. L.R. 47.1C. The government is hard-pressed to

respond to the motion to dismiss, or to prepare for a hearing, where no factual or legal support has been set forth in the record and the Defendant's legal arguments are unknown.

**4. The Defendant is not entitled to a hearing to “personally present” his claims.**

There is no legal authority for the proposition that a defendant who is represented by counsel is entitled to a hearing to “personally identify for the Court” the legal and factual grounds in support of a motion, as his motion indicates. Although Defendant's attorney of record filed the motion for him, it appears to be both (a) frivolous, and (b) filed based on the Defendant's personal insistence, after “multiple prior attorneys” apparently declined to make such a filing and the Defendant “has not been able to get his counsel to file such a motion or present his arguments.” See Doc. 36. By way of example, current defense counsel of record is the Defendant's *fifth* court-appointed attorney in File 5:19-cr-50163, and his *eighth* court appointed attorney in one of his pending supervised release revocation files. See 5:12-cr-50167. The instant motion to dismiss is, for all intents and purposes, a pro se motion.

This court has “no obligation to entertain pro se motions filed by a represented party.” *Abdullah v. United States*, 240 F.3d 683, 686 (8th Cir. 2001); and see *United States v. Agofsky*, 20 F.3d 866, 872 (8th Cir.) (holding that a court commits “no error” in refusing to rule on pro se motions raised by a represented party), *cert. denied*, 513 U.S. 909 (1994). Until counsel clearly and completely states the Defendant's arguments and legal authorities, such that the United States is able to meet them, a hearing is unlikely to result in “a clear

record for the Court and for the Eighth Circuit Court of Appeals, if necessary.” 5:22-cr-50066, Doc. 36, at 2; 5:19-cr-50163, Doc. 89, at 2.

**5. Defendant is attempting to attack his prior conviction for a sex offense.**

Though his motion is entitled a motion to dismiss, the Defendant also moves to vacate “all convictions and other forms of adjudication in files 12-50167 and 16-50058.” 5:22-cr-50066, Doc. 36, at 1; 5:19-cr-50163, Doc. 89, at 1. The majority of his motion is devoted to his desire to collaterally attack his prior conviction. *Id.* at 3-6. He cites no legal authority in support of the proposition that a defendant may file a pretrial motion in one case to vacate a separate, closed criminal case. Nothing in the Federal Rules of Criminal Procedure permits a defendant to challenge the legitimacy of a past conviction by filing a pretrial motion in a subsequent prosecution. Further, the Federal Rules of Criminal Procedure do not contemplate a “motion to vacate.” A “motion to vacate” is, of course, properly brought in a habeas corpus action pursuant to 28 U.S.C. § 2255.

Defendant’s motions to dismiss in the pending cases are his untimely attempt to challenge the legitimacy of his prior conviction for Abusive Sexual Contact, in File 5:07-cr-50116-KES. Defendant has no available remedies to challenge his prior conviction. He did not challenge the Court’s exercise of jurisdiction over him in that case while the matter was pending. He did not appeal his conviction, nor did he file a habeas corpus action. There is no legal precedent in either the United States Supreme Court or the Eighth Circuit Court of Appeals to support the notion that he has been subjected to double jeopardy based on a federal prosecution subsequent to a tribal prosecution. *United States*

*v. Lara*, 541 U.S. 193 (2004), and its progeny stand for the opposite proposition entirely. This Court should not entertain the Defendant's untimely attempts to collaterally challenge his prior conviction for a sex offense.

### **CONCLUSION**

For all the foregoing reasons, the United States respectfully requests this Court deny the Defendant's motions to dismiss and decline to permit him to "personally identify" his legal arguments and authorities, where his legal counsel has failed to do so.

Dated this 31st day of January, 2023.

ALISON J. RAMSDELL  
United States Attorney

*/s/ Heather Sazama*

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