

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA)
)
) Plaintiff,)
)
) v.) No. 05-CR-00344-01-02-W-ODS
)
) GARY EYE,)
) And)
) STEVEN SANDSTROM,)
)
) Defendants)

**DEFENDANTS' JOINT MOTION TO DISMISS COUNTS
ONE, THREE, AND FIVE OF THE INDICTMENT ON GROUNDS
THAT 18 USC, SECTION 245 IS UNCONSTITUTIONAL AND
THAT ALTERNATIVELY A KANSAS CITY MUNICIPAL STREET
IS NOT A FACILITY WITHIN THE MEANING OF THE STATUTE
IF IT IS CONSTITUTIONAL WITH SUGGESTIONS IN SUPPORT**

Defendants are charged with violating 18 U.S.C. §
245(b)(2)(B), and with aiding and abetting each other in the
commission of said offense. The statute provides:

Whoever, whether or not acting under color of law, by
force or threat of force willfully injures, intimidates
or interferes with, or attempts to injure, intimidate
or interfere with . . . any person because of his race,
color, religion or national origin and because he is or
has been . . . participating in or enjoying any
benefit, service, privilege, program, facility or
activity provided or administered by any State or
subdivision thereof . . . shall be [punished
accordingly]

Counts I, III, and V should be dismissed because they are

constitutionally defective on two grounds. First, the enactment of § 245(b)(2)(B) was an invalid exercise of Congress's power under the Commerce Clause because the statute regulates noneconomic, intrastate criminal activities that do not affect interstate commerce and that should be regulated by state law. Second, the alleged victim was not "participating in or enjoying any benefit, service, privilege, program, facility or activity" provided by the State because the statute does not reach the mere act of driving on a city roadway.

The enactment of 18 U.S.C. § 245(b)(2)(B) was not a valid exercise of Congress's Commerce Clause power. It is the defendants' position that § 245(b)(2)(B) is fatally flawed for the same reasons that the Supreme Court ruled the Gun-Free School Zones Act of 1990 ("the Act"), 18 U.S.C. § 922(q)(1)(A) unconstitutional. United States v. Lopez, 514 U.S. 549 (1995). Also, the federal civil remedy provision of the Violence Against Women Act ("the VAWA"), 42 U.S.C. § 13981, which the Supreme Court struck down in United States v. Morrison, 529 U.S. 598 (2000), further supports defendants' argument that the enactment of this statute was an invalid exercises of Congress's power under the Commerce Clause.

Assuming for the sake of argument the government can prove

the facts alleged in the indictment, the defendants maintain that their actions took place entirely in a city municipality on a public street or perhaps worse yet for the government's theory, in the front yard of a residence adjacent to the street and were purely local and did not affect interstate commerce.

In Lopez, the Court considered whether the possession of firearms in a school zone "substantially affected" interstate commerce. The Court delineated three categories of activities that Congress has the power to regulate under the Commerce Clause: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." 514 U.S. at 558-59. The Court focused its inquiry on the third category of activities, "those activities having a substantial relation to interstate commerce", and concluded that the possession of firearms in a school zone did not "substantially affect" interstate commerce. *Id.* at 559, 567.

The Supreme Court reasoned that the Act did not regulate "economic" activity: "Section 922(q) is a criminal statute that

by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." Id. at 561. Possession of a firearm in a school zone was not sufficiently related to interstate commerce to be a valid exercise of Congress's Commerce Clause power. "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." Id. The Court was unwilling to " . . .convert congressional authority under the

Commerce Clause to a general police power of the sort retained by the States." Id. at 567. The Court also relied on the fact that the Act contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce," id. at 561.

Relying heavily on Lopez, the Court in Morrison struck down 42 U.S.C. § 13981, a provision of the VAWA that provided a federal civil remedy for victims of gender-motivated violence. The Court noted that "a fair reading of Lopez shows that the noneconomic, criminal nature of the conduct at issue was central to [its] decision in that case." 529 U.S. at 610. It then concluded that:

Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt

a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

Id. at 613. The Court was concerned that Congress's regulation, pursuant to its Commerce Clause power, of noneconomic, intrastate activities would "completely obliterate the Constitution's distinction between national and local authority." Id. at 615. It therefore "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local." Id. at 617-18.

As in Lopez and Morrison, the question is plainly and simply whether the activities that § 245(b)(2)(B) regulates "substantially affect" interstate commerce. The answer is also simple.

The Supreme Court was concerned in Morrison that "Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority." Morrison, 529 U.S. at 615. The Court emphasized that "[t]he regulation and punishment of intrastate violence that is not

directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." Id. at 618. Section 245(b)(2)(B) regulates only a specific type of violence; namely, violence that interferes with federal civil rights on the basis of "race, color, religion or national origin."

Additionally the argument that Congress validly enacted § 245(b)(2)(B) pursuant to its authority under the Thirteenth Amendment is also faulty. But See United States v. Nelson, 277 F.3d 164 (2d Cir.), cert. denied, 123 S.Ct. 145 (2002); United States v. Bledsoe, 728 F.2d 1094 (8th Cir. 1984).

In Nelson, the court began its analysis of this issue by reviewing the Thirteenth Amendment in general. The Court noted that Section Two of the Thirteenth Amendment "clothed Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." 277 F.3d at 183. The government will likely argue that Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery.

The obvious question is whether Congress could rationally have determined that the acts of violence covered by § 245(b)(2)(B) impose a badge or incident of servitude on their

victims. The short answer is it does not. To suggest that defendants' conduct somehow enslaved the victim is to engage in ridiculous semantics. What this criminal statute does is to quite simply create a general, undifferentiated federal law of criminal assault. While the statute requires that victims be harmed because of their race or religion and because of their use of a public facility, it does not even have to be the primary moving force behind the crime. United States v. Bledsoe, 728 F.2d 1094 (8th Cir. 1984). It in effect criminalizes state assault offenses. Under this theory, virtually any street smart gang banger is subject to federal prosecution simply because of the use of the street term "nigga" which is a common place term among urban youth whether black or white.

Finally, assuming for argument purposes the constitutional arguments are rejected, defendants submit that a Kansas City public street is not a "facility" within the meaning of the statute. The plain meaning of this word suggests a building, structure, park, or fixed place or location where some specific activity takes place - not a municipal public street. See Bledsoe, supra, and United States v. Allen, 341 F.3d 870 (9th Cir. 2003).

WHEREFORE, Defendants move to dismiss Counts I, III and V for the reasons argument above.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was caused to be emailed to David Ketchmark, Assistant US Attorney, WDMo, Kansas City, Missouri and other counsel in the case via the electronic document filing system on March 14, 2006.

/s/

JOHN R. OSGOOD