

UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SERGIO ELIZARRARAS-
SEPULVEDA,

Defendant.

No. CR06-4056-MWB

**REPORT AND RECOMMENDATION
ON MOTION TO DISMISS ONE
COUNT OF INDICTMENT**

The defendant Sergio Elizarraras-Sepulveda has filed a motion (Doc. No. 11) asking the court to dismiss one count of the two-count indictment. On June 21, 2006, the defendant was indicted on two counts of illegally possessing a firearm and ammunition. Count 1 alleges he possessed the gun and ammunition while he was “an alien who was illegally and unlawfully in the United States,” in violation of 18 U.S.C. § 922(g)(5). Count 2 alleges he possessed the same gun and ammunition while “being an unlawful user of controlled substances,” in violation of 18 U.S.C. § 922(g)(3). (Doc. No. 2)

The defendant claims the two counts are multiplicitous in light of the recent holding in *United States v. Richardson*, 439 F.3d 421 (8th Cir. 2006). In *Richardson*, the defendant was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), and with being a drug user in possession of the same firearm in violation of 18 U.S.C. § 922(g)(3). The defendant argued that because both charges arose from a single act of possessing a firearm, they should be merged into a single offense for purposes of sentencing. In overruling its prior decisions on the issue, the Eighth Circuit held as follows:

We now . . . join all the other Circuits that have addressed this issue to hold that Congress intended the “allowable unit of prosecution” to be an incident of possession regardless of whether a defendant satisfied more than one § 922(g)

classification, possessed more than one firearm, or possessed a firearm and ammunition. *See Bell v. United States*, 349 U.S. 81, 81, 75 S. Ct. 620, 99 L. Ed. 905 (1955) (describing the unit of prosecution test). . . . [Citations from 1st, 2d, 3d, 4th, 5th, 6th, 7th, 9th, 10th, 11th, & D.C. Circuits omitted.]

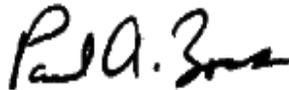
Richardson, 439 F.3d at 422-23.

The Government has not resisted the motion. Therefore, on both substantive and procedural grounds, the undersigned respectfully recommends the defendant's motion to dismiss one count of the Indictment be granted. *Id.*; *see* LR 7.1(f). The undersigned further recommends the Government be ordered either to elect between the two Counts or to supersede to include both theories in a single count.

Any party who objects to this report and recommendation must serve and file specific, written objections by **August 16, 2006**. Any response to the objections must be served and filed by **August 21, 2006**.

IT IS SO ORDERED.

DATED this 9th day of August, 2006.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT