Honorable J. Kelly Arnold

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, vs. THEREON PARKER, Defendant.	No. CR07-5656JKA DEFENDANT PARKER'S MOTION TO DISMISS COUNT II OR III DUE TO MULTIPLICITY Noted: February 1, 2008

Defendant Theron Parker moves for an order of dismissal of either Count II or Count III based on the doctrine of multiplicity.

An indictment is multiplicitous when it charges multiple counts for a single offense, producing two penalties for one crime and thus raising double jeopardy questions. *See United States v. Stewart*, 420 F.3d 1007 (9th Cir. 2004) (holding that two charges based on making false statements to FBI agent were multiplicitous, requiring reversal of one count); *United States v. Smith*, 424 F.3d 992 (9th Cir. 2005) (discussing doctrine in conspiracy case). On the

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other hand, two counts within an indictment are not multiplicitous if "each separately violated statutory provision **requires proof of an additional fact which the other does not**." *Id.* (emphasis added; citations omitted).

The *Stewart* decision is an excellent example of the application of the doctrine of multiplicity. Stewart was charged with two counts of threatening to kill a judge an done count of soliciting a third party to kill the judge. Because these counts required proof of a fact that the other did not, the Ninth Circuit upheld the district court's denial of Stewart's motion to dismiss Count 1 or 4 on the ground of multiplicity.

Stewart then contended that Counts 2 and 3 were multiplicitous because they came from the same false answers to the same questions by an agent. *Id.* To analyze this argument, the Ninth Circuit compared the facts and results in two cases: *United States v. Olsowy*, 836 F.2d 439 (9th Cir. 1987) and *United States v. Calas-Camacho*, 859 F.2d 788 (9th Cir. 1988). In *Olsowy,* the defendant denied on two separate occasions that he illegally received a Social Security check, which was endorsed and cashed. 836 F.2d at 440. The government charged him with two counts of making a false statement and he was convicted on both counts. The Ninth Circuit held that "the defendant's identical responses to identical questions, even though both false, allowed for indictment on only one count." *Id.* at 1013-14 (citing *Olsowy*, *id.* at 443).

But the decision was the opposite in the *Salas-Camacho* case. There, the defendant was crossing into the United States from Mexico. *Stewart*, 420 F.3d at 1014 (citing *Salas-Camacho*, 859 F.2d at 789. He told an customs inspector that he was not bringing anything with him from Mexico. The defendant was referred to a second inspector, who conducted a more thorough inquiry and he asked the same questions. Again, the defendant denied bringing anything back from Mexico. But that inspector learned through a computer search

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that the defendant had a history of importing illegal steroids. *Id.* (citing *Salas-Camacho*). Based on that information, the defendant then admitted he had illegal steroids in his truck. Among other charges, the defendant was convicted of two counts of making false statements. The Ninth Circuit held that the two counts were not multiplicitous because the two inspectors had different duties: "the primary inspector to make a preliminary determination whether an entrant should be allowed over the border, and the secondary inspector to conduct a more searching examination, including, as in this case, a computer search to determine any prior violations." *Stewart, id.*

Based on these cases, the Ninth Circuit in *Stewart* held that the facts were closer to the *Olsowy* case. Although the denials were made under different situations, they amounted to the same information and did not add anything new. *Id.*

Here, as in the *Olsowy* case, the government charged all defendants for the identical conduct in two separate charges. In Count II, the government charges all defendants for violating the Marine Mammal Protection Act, 16 U.S.C. §§1372(a)(2) and 1375. In Count III, the defendants are charged with engaging in unauthorized whaling in violation of 16 U.S.C. §§916(c) and (f). Both counts relate to the identical conduct — the alleged whale hunt in question. Both statutes require the same evidence, that is, the taking, hunting, or capturing a whale. Evidence to convict one count will convict the other count without the additional of any other facts. As a result, Counts II and III are for the same conduct, produces two penalties for the same conduct, and violates Mr. Parker's double jeopardy rights. Accordingly, the government should be required to elect one and dismiss either Count II or Count III should be dismissed.

Multiplicity also creates a psychological effect on the jury by suggesting that the alleged criminal activity is of greater scope and gravity than it actually is. *See e.g.,* 1 C.A.

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Wright, Federal Practice and Procedure, §142 at 475 (2nd ed. 1982 and 1994 Supp.). The multiple counts overemphasizes the conduct and creates an unfair and prejudicial result. The government should either elect one count and dismiss the other, or the court should order the government to dismiss one count.

DATED this 18 day of January 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record. I faxed a copy of this document to Probation Officer hereby certify that no other parties are to receive notice.

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