

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

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

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

9 Stewart then contended that Counts 2 and 3 were multiplicitous because they came  
10 from the same false answers to the same questions by an agent. *Id.* To analyze this  
11 argument, the Ninth Circuit compared the facts and results in two cases: *United States v.*  
12 *Olsow*, 836 F.2d 439 (9th Cir. 1987) and *United States v. Calas-Camacho*, 859 F.2d 788  
13 (9th Cir. 1988). In *Olsow*, the defendant denied on two separate occasions that he illegally  
14 received a Social Security check, which was endorsed and cashed. 836 F.2d at 440. The  
15 government charged him with two counts of making a false statement and he was convicted  
16 on both counts. The Ninth Circuit held that “the defendant’s identical responses to identical  
17 questions, even though both false, allowed for indictment on only one count.” *Id.* at 1013-14  
18 (citing *Olsow*, *id.* at 443).

19 But the decision was the opposite in the *Salas-Camacho* case. There, the defendant  
20 was crossing into the United States from Mexico. *Stewart*, 420 F.3d at 1014 (citing *Salas-*  
21 *Camacho*, 859 F.2d at 789. He told an customs inspector that he was not bringing anything  
22 with him from Mexico. The defendant was referred to a second inspector, who conducted a  
23 more thorough inquiry and he asked the same questions. Again, the defendant denied  
24 bringing anything back from Mexico. But that inspector learned through a computer search  
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1 that the defendant had a history of importing illegal steroids. *Id.* (citing *Salas-Camacho*).  
2 Based on that information, the defendant then admitted he had illegal steroids in his truck.  
3 Among other charges, the defendant was convicted of two counts of making false statements.  
4 The Ninth Circuit held that the two counts were not multiplicitous because the two inspectors  
5 had different duties: “the primary inspector to make a preliminary determination whether an  
6 entrant should be allowed over the border, and the secondary inspector to conduct a more  
7 searching examination, including, as in this case, a computer search to determine any prior  
8 violations.” *Stewart, id.*

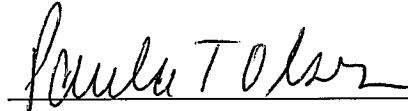
9 Based on these cases, the Ninth Circuit in *Stewart* held that the facts were closer to  
10 the *Olsow* case. Although the denials were made under different situations, they amounted  
11 to the same information and did not add anything new. *Id.*

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

23 Multiplicity also creates a psychological effect on the jury by suggesting that the  
24 alleged criminal activity is of greater scope and gravity than it actually is. *See e.g.*, 1 C.A.  
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1 Wright, Federal Practice and Procedure, §142 at 475 (2nd ed. 1982 and 1994 Supp.). The  
2 multiple counts overemphasizes the conduct and creates an unfair and prejudicial result. The  
3 government should either elect one count and dismiss the other, or the court should order the  
4 government to dismiss one count.

5 DATED this 18 day of January 2008.

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7 PAULA T. OLSON, WSB#11584

8 Attorney for Defendant Parker  
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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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