

**UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION**

<b>UNITED STATES OF AMERICA,</b>	)	<b>CR 16-30164</b>
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>BRIEF SUPPORTING</b>
	)	<b>MOTION TO DISMISS</b>
	)	
	)	
<b>MARWAN SADEKNI,</b>	)	
	)	
	)	
<b>Defendant.</b>	)	

**COMES NOW** the Defendant, Dr. Marwan Sadekni, by and through his attorneys of record, May, Adam, Gerdes, and Thompson, LLP, and hereby submits, pursuant to the Federal Rules of Criminal Procedure Rule 12(b)(2), this motion to dismiss.

## FACTUAL BACKGROUND

Defendant, Dr. Marwan Sadekni (“Dr. Sadekni”) was indicted as a result of two incidents that allegedly occurred on or about January 23, 2015 and February 25, 2015, at the Indian Health Service, Rosebud Service Unit of the Rosebud Hospital, located in Rosebud, South Dakota, on the Rosebud Sioux Indian Reservation. Dr. Sadekni is a physician, and at the time of the alleged incidents, was working as a contracted physician for the Indian Health Service on the Rosebud Sioux Indian Reservation. Dr. Sadekni is a non-Indian. The incidents concerned alleged assaults on a physician’s assistant, Michelle Knepper, who is also a non-Indian. Accordingly, the Indictment does not allege that either is an Indian. The alleged incidents all took place within the Indian Health Service Hospital in Rosebud (“Rosebud Service Unit”) in Indian county.

Dr. Sadekni has been indicted under 18 U.S.C. § 7 and 113(a)(4). Dr. Sadekni has filed a Motion to Dismiss, pursuant to Fed. R. Crim. Proc. 12(b)(2), asserting lack of jurisdiction. This Brief in Support of Dr. Sadekni's Motion to Dismiss will demonstrate that the United States lacks jurisdiction over this matter, and, therefore, this matter should be dismissed from Federal court.

### ARGUMENT

Title 18 U.S.C. § 7(3) allows for territorial jurisdiction of the United States over:

Any lands reserved or acquired for the use of the United States, *and under the exclusive or concurrent jurisdiction thereof*, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

18 U.S.C.S. § 7(3) (emphasis added).

The test for jurisdiction in 18 U.S.C. § 7(3) possesses two prongs: (1) the lands must be “reserved or acquired for the use of the United States” and (2) the lands must be “under the exclusive or concurrent jurisdiction thereof.” *United States v. Erdos*, 474 F.2d 157, 160 (4th Cir. 1973); *United States v. Morton*, 314 F. Supp. 2d 509, 513 (D. Md. 2004); *United States v. King*, 781 F. Supp. 315, 317 (D.N.J. 1991).

Although the Eighth Circuit has not interpreted whether “reserved or acquired for the use of the United States” requires fee ownership of the land at issue, the relevant case law from other jurisdictions seems to indicate that leasehold interests are sufficient to meet the first prong of this test. *See United States v. Erdos*, 474 F.2d 157, 160 (4th Cir. 1973); *United States v. Morton*, 314 F. Supp. 2d 509, 513 (D. Md. 2004); *United States v. King*, 781 F. Supp. 315, 317 (D.N.J. 1991). Accordingly, Dr. Sadekni is not contesting the fact that the Rosebud Service Unit has been

reserved or acquired for the use of the United States for purposes of the first prong of the 18 USC §7(3).<sup>1</sup> Thus, the remainder of this brief focuses on the second prong of the jurisdictional test; that the lands must be “under the exclusive or concurrent jurisdiction” of the United States.

It is well-established that the state has exclusive criminal jurisdiction over non-Indians for crimes committed against non-Indians on tribal land. *United States v. McBratney*, 104 U.S. 621 (1881); *Draper v. United States*, 164 U.S. 240 (1896); *see also* OFFICE OF THE UNITED STATES ATTORNEYS, CRIMINAL RESOURCE MANUAL, CRM 689. JURISDICTIONAL SUMMARY, <https://www.justice.gov/usam/criminal-resource-manual-689-jurisdictional-summary>. In order for the United States to acquire either exclusive or concurrent jurisdiction over land in which the United States possesses an interest from a state in which the land is situated, the United States must “indicate acceptance of jurisdiction on behalf of the Government by filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated.” 40 U.S.C. § 3112(b). Furthermore, “[i]t is conclusively presumed that jurisdiction has not been accepted until the Government accepts jurisdiction over land as provided in [§3112].” *Id.* § 3112(c).

Numerous courts, including the United States Supreme Court, have recognized that the Federal government must assert jurisdiction in the manner prescribed in § 3112 (or its previous version 40 U.S.C. § 255) in order to assert jurisdiction under 18 U.S.C. § 7(3). *See Adams v. United States*, 319 U.S. 312, 315 (1943) (finding federal court lacked jurisdiction on a federally-owned military camp where the government had not asserted jurisdiction over the camp, and finding state statutes authorizing jurisdiction were not enough to demonstrate federal jurisdiction).

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<sup>1</sup> However, as the matter relates to jurisdiction, the Court may address that issue *sua sponte*.

without an affirmative assertion of jurisdiction); *United States v. Gilatta*, 580 F.2d 156 (5th Cir. 1978) (recognizing requirement that United States must assert jurisdiction, but finding assertion not required on a facility built prior to 1940, the year § 255 was enacted); *United States v. King*, 781 F. Supp. 315, 315 (D.N.J. 1991) (finding lack of jurisdiction over federal parking garage when federal government had not followed § 3112 and providing extensive history of the jurisdictional statute). Copious searching has failed to reveal a filed notice of acceptance, and a presumption exists that no notice of acceptance has been filed. *Id.* § 3112(c). Even if it had, section 3112(b) requires that state consent to loss of its jurisdiction in federal lands. Accordingly, South Dakota's statutes on the United States acquiring jurisdiction should be noted. South Dakota Codified Laws § 1-1-1.1 states:

By appropriate executive order, the Governor may accept on behalf of the state, retrocession of full or partial jurisdiction, criminal or civil, over any roads, highways or other lands in federal enclaves *excluding Indian reservations and federal enclaves outside the boundaries of an Indian reservation established for Indian use*, within the state where such retrocession has been offered by appropriate federal authority. Documents concerning such action shall be filed in the office of the secretary of state and in the office of the register of deeds of the county wherein such lands are located.

SDCL § 1-1-1.1 (emphasis added). In short, South Dakota law creates a prohibition of the governor from accepting retrocession of full or partial jurisdiction on Indian reservations, which aligns with existing case law demonstrating that Indian reservations are not federal enclaves so as to take jurisdiction away from the state over non-Indians. *See Carcieri*, 398 F.3d at 34.

Dr. Sadekni and Ms. Knepper are non-Indians. The alleged incidents occurred on tribal land within the reservation at the Rosebud Service Unit, which is operated by the United States through Indian Health Services and was built after 1940. In order for the United States to assert exclusive or concurrent jurisdiction over the Rosebud Service Unit, the Federal government must

have filed a notice of acceptance with South Dakota's Governor or followed prescribed South Dakota statutory requirements for asserting jurisdiction. 40 U.S.C. § 3112(b). That has not happened. The United States, therefore, cannot assert jurisdiction over this matter under 18 U.S.C. § 7 because it has failed to demonstrate the second prong of the jurisdictional requirement; that the Rosebud Service Unit is under the exclusive or concurrent jurisdiction of the United States as it relates to non-Indians. Without 18 U.S.C. § 7, the United States has no jurisdiction over this matter, because the United States lacks criminal jurisdiction over crimes committed by non-Indians against non-Indians on the reservations. *See McBratney*, 104 U.S. 621; *Draper*, 164 U.S. 240. Because the United States lacks jurisdiction over this matter, the state has exclusive jurisdiction, and the Court must dismiss this matter from Federal court.

### CONCLUSION

For the forgoing reasons, Defendant submits that this Court must dismiss this matter for want of jurisdiction.

Dated this 10<sup>th</sup> day of January, 2017.

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CERTIFICATE OF SERVICE

Terra M. Fisher, of May, Adam, Gerdes & Thompson LLP, hereby certifies that on the 10<sup>th</sup> day of January, 2017, she electronically filed and served a true and correct copy of the Brief Supporting Motion to Dismiss in the above-captioned matter to the following at their last-known address:

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