

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

UNITED STATES OF AMERICA,

Case No. 2:18-cr-22

vs.

ELIZABETH MCALISTER

Defendant.

MOTION TO DISMISS INDICTMENT

COMES NOW, the Defendant, who moves this Honorable Court to dismiss the indictment (Doc. 1) pursuant to Rule 12 (b)(3)(A)(iv) and (B)(ii) and (v) of the Federal Rules of Criminal Procedure for the following reasons:

1. The government is engaging in selective prosecution of the Defendant in that its prosecution was based on discriminatory decision making and/or has a discriminatory effect on the Defendant's protected religious freedom to symbolic denuclearization under the Religious Freedom Restoration Act. Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 506 (1962). The prosecution for the symbolic denuclearization by this Defendant operates as a "practical denial" of the equal protection of the law. Yick Wo v. Hopkins, 118 U.S. 356, 373, 6 S.Ct. 1064, 1073 (1886).

2. The government is charging the same offense in Counts 1 - 4 of the indictment which constitutes multiplicity related specifically to alleged trespass and destruction of government property. "A multiplicitous indictment violates double jeopardy principles by

giving the jury more than one opportunity to convict the defendant for the same offense.” United States v. Jones, 601 F.3d 1247, 1258 (11th Cir. 2010). The test enunciated to evaluate double jeopardy challenges and described below, is also used “to determine whether an indictment is multiplicitous, verifying that each count requires an element of proof that the other counts do not require.” United States v. Williams, 527 F.3d 1235, 1241 (11th Cir. 2008). Count 1, subparts a, b, and c, are the same exact element of proof required for counts 2 through 4.

3. The indictment is duplicitous as to Count 1 in that it charges two or more separate and distinct offenses. United States v. Schlei, 122 F.3d 944, 977 (11th Cir. 1997). As a general rule, duplicitous conspiracy charges are impermissible. Kotteakos v. United States, 328 U.S. 750 (1946); United States v. Orzechowski, 547 F.2d 978, 986 (7th Cir, 1976), cert. denied, 431 U.S. 906 (1977). The rationale for dismissing a single conspiracy count which in fact contains multiple conspiracies is based on the concept of impermissible variance of proof at trial. See Stirone v. United States, 361 U.S. 212 (1960). Duplicitous indictments can prevent jurors from acquitting on a particular charge because they decide to convict on another charge which is improperly lumped together in a single count. Where such a situation occurs, it is also impossible to determine whether all twelve jurors unanimously agree that the defendant has committed even one of the separate offenses contained within the duplicitous count. United States v. UCO Oil Company, 546 F.2d 833 (9th Cir, 1976), cert. denied, 430 U.S. 966 (1977). A duplicitous charge further prejudices the defendant at trial because evidentiary rulings permitting evidence to come in as to one of the separate offenses may be inadmissible on another. United States v. Pavloski, 574 F.2d 933, 936 (7th Cir, 1978); United States v. UCO Oil Company, supra, at 835. Where a count charges two distinct conspiracies carrying different penalties or charges two substantive

offenses which differ in the maximum allowable punishment, it is duplicitous. United States v. Ramos, 666 F.2d 469, 473 (11th Cir. 1982)(recognizing that "an accusation that involve[es] charges under two distinct statutes carrying separate penalties and involving difference evidence . . . [is to be] stricken as duplicitous.) Count 1 of the indictment asserts a violation of more than one federal statute, namely, 18 U.S.C. § 1382; 18 U.S.C. §1361 and 18 U.S.C. § § 371 and 2. (Doc. 1, Count 1) Each has a different penalty and maximum allowable punishment. 18 U.S.C. § 1382 carries a maximum penalty of not more than six months imprisonment (See, Doc. 2- Penalty Certification); 18 U.S.C. § 1361 carries a maximum penalty of not more than 10 years imprisonment; and 18 U.S.C. § 371 carries a maximum penalty of not more than five (5) years imprisonment. (See, Doc. 2 – Penalty Certification).

3. The indictment fails to state an offense against the Defendant. See, Hamdan v. Rumsfeld, 548 US 557 (2006); See e.g. U.S. v. Flores, 289 US 137, 159 (1933) (Federal statutes must be interpreted and applied consistently with international law); Jordan J. Paust, International Law as Law of the United States, p.p. 99, 120, 124-25 (2d ed. 2003); The Paquete Habana, 175 U.S. 677, 700 (1900).

The Defendant relies upon the additional arguments and authorities set forth in the Legal Memorandum filed in support of this Motion to Dismiss.

WHEREFORE, the Defendant respectfully moves for dismissal of this indictment.

Respectfully, submitted this 2 day of July, 2018.

/s William P. Quigley

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Certificate of Service

I certify that this document was served on all parties by filing it electronically on
July 2, 2018.

/s William P. Quigley

William P. Quigley