

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

6 copies (New)
Trenkler
Sutor
Wallace
Kardach

UNITED STATES OF AMERICA)

v.)

THOMAS A. SHAY)
ALFRED W. TRENKLER)

CRIMINAL NO. 92-10369-Z

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS MULTIPLICITOUS COUNTS

The Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States mandates that no person shall be "subject for the same offence to be twice put in jeopardy of life and limb." U.S. Const. amend. V. "An indictment countervails this principle when it charges a defendant in more than one count with committing a single offense." United States v. Lilly, 983 F.2d 300, 302 (1st Cir. 1992). The two vices of a multiplicitous indictment are that the defendant is exposed to multiple punishments for a single offense, and that the jury may be improperly prejudiced by the false indication that the defendant has committed more than one offense. United States v. Reed, 639 F.2d 896, 904 (2d Cir. 1981); United States v. Langford, 946 F.2d 798, 802 (11th Cir. 1991).

The indictment is multiplicitous, in that it charges a single violation of 18 U.S.C. § 844 (d) as two separate counts (Counts II and III) and a single violation of 18 U.S.C. § 844 (i) as two separate counts (Counts IV and V). Counts II and III each

charge that on October 28, 1991, the defendants "did receive in interstate commerce certain explosive materials . . . with the knowledge and intent that said explosive materials would be used to kill, injure and intimidate Thomas L. Shay, and cause damage and destruction to his real and personal property, including a 1986 Buick." Counts IV and V each charge that on October 28, 1991, the defendants "knowingly and maliciously attempted to damage and destroy, by means of fire and explosive, a 1986 Buick automobile which was owned by Thomas L. Shay and used in interstate commerce and in activities affecting interstate commerce." Count II differs from Count III, and IV from V, in the result of the alleged violations--Jeremiah Hurley's death in Counts II and IV, and Francis Foley's personal injury in Counts III and V.

Where a single violation of a single statute is charged in more than one count, whether the counts are multiplicitous is resolved by determining what Congress intended the "allowable unit of prosecution" under the statute to be. Sanabria v. United States, 437 U.S. 54, 69-70 & n.24 (1978). The "allowable unit of prosecution" is determined from the words of the statute and its legislative history. Id. at 70; Lilly, 983 F.2d at 303-04.

According to 18 U.S.C. § 844 (d), its elements are:

- 1) transportation or receipt in interstate commerce
- 2) of any explosive
- 3) with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property.

18 U.S.C. § 844 (d); United States v. Carlson, 561 F.2d 105, 108 (1st Cir. 1977). According to 18 U.S.C. § 844 (i), its elements are that the defendant:

- 1) maliciously
- 2) attempted to destroy a vehicle
- 3) used in interstate commerce or in an activity affecting interstate commerce
- 4) by means of fire or an explosive.

18 U.S.C. § 844 (i).

In addition to enumerating their elements, sections 844 (d) and (i) each provide that whoever violates the section:

shall be imprisoned for not more than ten years, or fined not more than \$10,000, or both; and if personal injury results to any person including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years or fined not more than \$20,000, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

This portion of the statute can only be read as a sentencing consideration, providing for a higher maximum punishment for a single receipt or attempt to destroy, based on whether injury or death results, rather than an additional element of the crime. The courts have interpreted it as a "punishment enhancer." See, e.g., United States v. Bos, 917 F.2d 1178, 1182-83; United States v. Schwanke, 598 F.2d 575, 579 (10th Cir. 1979). It is not even necessary to allege the target of a violation of § 844 in the indictment, because the target is not an element of the crime. Carlson, 561 F.2d at 108. An allegation of injury resulting from

a violation of § 844 is mere surplusage. Schwanke, 598 F.2d at 579. In cases where injury or death resulted from one fire or explosion to more than one person, the defendant has been charged and sentenced for one crime. See United States v. Jimenez-Rivera, 842 F.2d 545 (1st Cir. 1988) (where multiple deaths resulted from one fire, defendant was sentenced for one violation of § 844(i)); United States v. Metzger, 778 F.2d 1195 (6th Cir. 1985) (where two deaths resulted from same explosion, defendant was charged with one count of violating § 844(d) and one count of violating § 844 (i)).

The legislative history of section 844 indicates that it was the intention of Congress to increase the maximum punishment provided by then existing law for a single receipt, explosion, or attempt to destroy, and that that maximum would apply in a situation where more than one person was injured or killed as a result of that single violation. Representative Brotzman proposed "a \$25,000 fine and 25 years in prison . . . [w]here persons are injured as a result of an explosion. Explosives Control: Hearings on H.R. 16699, 16743, 17154, 18573 Before Subcommittee No. 5 of the Committee on the Judiciary, July 30, 1970 (statement of Donald E. Brotzman, U.S. Representative from Colorado) (emphasis added). Representative Cramer also spoke in favor of increasing "maximum penalties . . . from 10 to 20 years." Id. (statement of William C. Cramer, U.S. Representative from Florida) (emphasis added). Representative Goldwater remarked, "If personal injuries occur, the penalty would be

raised from 10 years and/or a \$10,000 fine to 20 years and/or a \$20,000 fine." Id. (statement of Barry M. Goldwater, Jr., U.S. Representative from California) (emphasis added).

As a punishment enhancer, this portion of the statutory sections does not inform the "allowable unit of prosecution." The government cannot make two crimes out of one by elevating what is intended as a sentencing enhancer to the status of an element of the crime. "The Double Jeopardy Clause is not such a fragile guarantee that . . . its limitations [can be avoided] by the simple expedient of dividing a single crime into . . . discrete bases of liability not defined as such by the legislature." Sanabria, 437 U.S. at 72 (citations omitted).

The "allowable unit of prosecution" under section 844(d) in this case is the receipt of explosives with the requisite knowledge or intent. Under section 844 (i), it is the malicious attempt to destroy an automobile. There is alleged one receipt in interstate commerce and one attempt to destroy an automobile. "[Where the impulse is single, but one indictment lies." Blockburger v. United States, 284 U.S. 299, 302 (1932). See also United States v. Chaney, 559 F.2d 1094, 1096 (7th Cir. 1977) (indictment was multiplicitous in charging separate counts under §§ 844 (i) and (h)(1) where "only one basic incident was involved and . . . the explosive in each count referred to a single explosive").¹

¹ In Bell v. United States, 349 U.S. 81 (1955), the United States Supreme Court held that a defendant who had simultaneously transported two women in violation of the Mann Act, which

If Congress had intended to punish each result of a "receipt" or "attempt to destroy" separately, it could have said so clearly by, for example, making it a federal crime to cause the death of a person by means of an explosive received in interstate commerce, and making it another federal crime to cause personal injury by that means. The allowable units of prosecution would then have been causing a death and causing personal injury. Congress did not define such crimes. Rather,

criminalized knowing transportation of "any woman or girl for the purpose of prostitution," could not be charged in separate counts for the transportation of each woman, since the allowable unit of prosecution was "transportation." Id. at 82-83. See also Braverman v. United States, 317 U.S. 49, 53 (1942) (one agreement cannot be charged as several conspiracies because it envisages the violation of several statutes); Sanabria, 437 U.S. at 70-71 (one violation of statute prohibiting "participation in a gambling business" regardless of fact the business engaged in both horse betting and numbers betting); Lilly, 983 F.2d at 303-04 (defendant who fraudulently assigned twenty-nine mortgages in pursuit of one scheme to defraud could be charged with only one violation of the bank fraud statute, which criminalizes a "scheme"); United States v. Jewell, 827 F.2d 586, 587 (9th Cir. 1987) (only a single conflict of interest may be charged, regardless of the number of times defendant signed invoices for payment); United States v. Dixon, 921 F.2d 194, 196 (8th Cir. 1990) (only one count of possession may be charged regardless of number of packages possessed, where packages were possessed at same location at same time).

it criminalized the acts of receiving and of attempting to destroy.² The multiplicitous counts must therefore be dismissed.

Respectfully submitted,

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² Even if the punishment enhancement section makes the intentions of Congress ambiguous, which defendants contend it does not, "the doctrine of lenity" must be applied to "resolve statutory ambiguity in favor of criminal defendants." United States v. Lilly, 983 F.2d 300, 305 n.10 (1st Cir. 1992).