IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 05-CR-00344-01-W-ODS
	)	
GARY EYE,	)	
	)	
Defendant.	)	

MOTION TO DISMISS COUNTS TWO, FOUR, AND SIX OF THE INDICTMENT ON GROUNDS THAT SAID COUNTS ARE MULTIPLICIOUS WITH THE PARENT CIVIL RIGHTS COUNTS AND WITH EACH OTHER AND FURTHER THAT SAID COUNTS ARE VIOLATIVE OF DUE PROCESS UNDER THE 5TH AMENDMENT AND CRUEL AND EXCESSIVE PUNISHMENT UNDER THE 8TH AMENDMENT WITH SUGGESTIONS IN SUPPORT

Counts II, IV and VI of the indictment are 924(c) firearms counts. Each count is predicated on one of the three theories advanced by the Grand Jury as to how the defendants violated the deceased's civil rights. Count I alleges a dangerous weapon was used while violating his civil rights; Count III charges the same crime but alleges that the use of the weapon resulted in the victim's death; and, Count V charges the weapon was discharged and resulted in death during the commission of premeditated murder.

The grand jury could have and probably should have charged all three theories alleged in Counts I, III, and V (parent counts) in a single count in accordance with the dictates of Rule 7(c)(1)which provides that a charge may allege one or more ways

that the defendant committed the offense. This would make particular sense in this case where Counts I and III are clearly lesser included offenses of Count V and, assuming evidence is presented to support such, will be the basis for lesser included offense instructions.

The basic test for multiplicity in an indictment has been stated by the Supreme Court in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932), as follows:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.

Also see United States v. Knife, 592 F.2d 472 (8th Cir. 1979)

Because Counts I, III and V are themselves multiplicious, it follows that any accompanying 924(c)firearms charge which under other circumstances might subject the defendant to enhanced punishments must be limited to a single punishment.

Based on the punishment warnings set out in the indictment, the Grand Jury indictment suggests that if the Court fails to require the government to elect between the three parent counts or fails at the very minimum to treat them as multiplicious for sentencing and instead treats them as valid separate convictions then the enhanced punishment provisions of 924 (c) kick in.

This is illogical, unconstitutional and a clear perversion of congressional intent and is prohibited by the clear language in Blockburger and further violates the 5th and 8th Amendments of the US Constitution.

The double jeopardy clause protects against multiple punishments for the same crime, North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969), and at least one court has held that possession of a firearm for an uninterrupted period constitutes a single violation of §§ 922(g) and 924(e). See United States v. Jones, 533 F.2d 1387 (6th Cir. 1976) (possession of one firearm on three separate occasions constituted a continuing course of conduct and defendant could only be convicted on one count), cert. denied, 431 U.S. 964, 97 S.Ct. 2919, 53 L.Ed.2d 1059 (1977) Also see United States v. Wilson, 962 F.2d 621 (7th Cir. 1992.)

Similar multiplicity arguments have arisen in this and other Circuits in the context of a charge of armed bank robbery and use of a firearm in the commission of that offense. Generally, the Courts have ignored the Blockburger test and held that Congress intended for such enhanced punishment. United States v. Allen, 247 F.3d 741 (8th Cir. 2001) attempts to justify this use of the statutes and explains it thusly:

> Examining the two statutes at issue, it is clear from the face of 18 U.S.C. § 2113(a) and (e) (Count I) and 18 U.S.C. § 924 (c)(1) and (j)(1) (Count II) that Count II requires proof of two facts which Count I does not - namely, that a firearm was used or carried

> during the commission of a violent crime and that a murder occurred by use of the firearm. The more difficult question is whether Count I requires proof of a different fact than Count II. It is not exactly clear how predicate offenses are to be treated for purposes of Blockburger

The same interrelationship exists here in this case between the civil rights counts and the firearms counts. Here if defendant is convicted of all counts the statute contains a mandatory enhanced prison term of 60 years of consecutive time for what amounts to a single predicate offense arising out of one transaction. This has been held to be permissible where there are indeed two distinct predicate offenses that are themselves not multiplicious. United States v. Bennett, 908 F.2d 189 (7th Cir.), cert. denied, 112 L.Ed.2d 544 (1990); United States v. Nabors, 901 F.2d 1351, 1358 (6th Cir.), cert. denied, 112 L.Ed.2d 154 (1990); United States v. Foote, 898 F.2d 659, 668 (8th Cir.), cert. denied, 112 L.Ed.2d 81 (1990); United States v. Rawlings, 821 F.2d 1543, 1545 (11th Cir. 1987). None of these cases involved a situation akin to the instant case where the predicate offenses were themselves all based on a single transaction.

If the bank robbery cases are indeed a correct application of the law, a big if frankly in light of the thoughtful dicta in Allen, supra, then the most that defendant should be subjected to is a single 10 year consecutive sentence inasmuch as the

predicate transaction is a single transaction no matter how many ways the grand jury might charge it.

Finally, defendant submits that the use of any 924 (c) enhancement in unconstitutional under these facts in light of Blockburger, supra and violates the 5th and 8th Amendments of the United States Constitution.

WHEREFORE, defendant moves the Court to dismiss counts Two, Four and Six of the Indictment based on the above arguments or alternatively rule that the government must elect between Counts I, III and V prior to submission of the case to the jury and further find that only a single 924(c) enhancement can be applied.

Respectfully submitted,

/s/
John R. Osgood
Attorney at Law, #23896
Commercial Fed Bnk- Suite 305
740 NW Blue Parkway
Lee's Summit, MO 64086

Office Phone: (816) 525-8200
Fax: 525-7580

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was caused to be emailed to David Ketchmark, Assistant US Attorney, WDMo, Kansas City, Missouri and other counsel in the case via the electronic document filing system on March 14, 2006.

/s/
JOHN R. OSGOOD