

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

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

GOVERNMENT'S SUGGESTIONS IN OPPOSITION  
TO DEFENDANT EYE'S MOTION TO DISMISS  
COUNTS TWO, FOUR, AND SIX (Doc. 68)

Comes now the United States of America, by and through its undersigned counsel, and files its response in opposition to Defendant Eye's Motion requesting the dismissal of Counts Two, Four, and Six on grounds that they are allegedly multiplicitous of each other. This claim is without merit and therefore should be denied. As the defendant correctly points out in his motion, these three counts of the indictment all allege violations of Title 18, United States Code § 924(c), for knowingly using a firearm during and in relation to a crime of violence. Each of these allegations are tied to a separate and distinct predicate offense (i.e. a crime of violence), those allegations being contained in Counts One, Three, and Five of the indictment. Count One of the indictment alleges that Gary Eye and his co-defendant, Steven Sandstrom, violated the victim's civil rights by shooting at him in and around the area of 9<sup>th</sup> Street and Spruce Avenue. Count Three of the indictment alleges that Gary

Eye and his co-defendant, Steven Sandstrom, again violated the victim's civil rights a second time by shooting at him in and around the area of 9<sup>th</sup> Street and Brighton Avenue. Count Five of the indictment alleges that Gary Eye and his co-defendant, Steven Sandstrom, knowingly killed the victim to prevent him from communicating information about these crimes to a law enforcement officer of the United States.

Based upon the fact that there was two separate and distinct shootings that happened at different times and locations, Counts One and Three of the indictment are properly charged as independent offenses. Additionally, Count Five of the indictment also stands as an independent offense because (even though it stems from the second shooting which ultimately resulted in the death of the victim) the distinction between its elements and the elements of the civil rights offense as contained in Count Three are such that the test as set forth in the *Blockburger*<sup>1</sup> case is satisfied. Finally, since each of these three counts support an independent offense, it is equally permissible for each of three counts to serve as predicate offenses to three separate counts of firearms offenses pursuant to Title 18 U.S.C. § 924(c).<sup>2</sup>

---

<sup>1</sup> 284 U.S. 299, 304 (1932)

<sup>2</sup> It's the government's belief that the issues raised in the defendant's motion with regard to any possible punishment should he be convicted at trial are premature and therefore not ripe for consideration by the Court at this time.

Therefore, the defendant's motion should be denied and he and his co-defendant should be required to answer to all the charges as contained in the indictment.

#### DISCUSSION

1. The government correctly charged the two separate and distinct attacks on the victim as two independent counts in the indictment.

An indictment is multiplicitous, and therefore defective, if it charges the same crime in two separate counts. *United States v. Chipps, Sr.*, 410 F.3d 438, 447 (8<sup>th</sup> Cir. 2005). Therefore, whenever "the same statutory violation is charged twice, the question is whether Congress intended the facts underlying each count to make up a separate unit of prosecution." *Id.* In *Chipps*, the defendant was convicted of two counts of simple assault, one act which occurred inside of a residence and a second act that occurred outside. *Id.* In that case, after examining the statute and legislative history, the Court indicated that it was unable to determine what Congress intended the unit of prosecution to be and therefore the Court applied the rule of lenity in favor of the defendant and determined that assault was a course-of-conduct offense. *Id.* at 448-49. When dealing with a course of conduct offense, the key factor in deciding the number of counts to charge is determining how many courses of conduct a given defendant has undertaken. *Id.* at 449. This is done by applying the "impulse test" which provides that we "treat[] as one offense

all violations that arise from that singleness of thought, purpose or action, which may be deemed a single impulse." *Id.* (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 224 (1952)). In *Chipps*, the Eighth Circuit found that the defendant should not have been convicted of two counts of simple assault when both assaultive acts committed by the defendant where uninterrupted and therefore driven by a single impulse. *Id.*

The facts in our case are different. In this matter, William McCay was the victim of two separate and distinct attacks at the hands of these defendants. The first attack occurred at or around 9<sup>th</sup> Street and Spruce Avenue in Kansas City, Missouri; and the second attack occurred at or around 9<sup>th</sup> Street and Brighton Avenue in Kansas City, Missouri.<sup>3</sup> Where successive impulses are present, a defendant can be charged with multiple offenses. *United States v. Eisenberg*, 469 F.2d 156, 162 (8<sup>th</sup> Cir. 1972). Similarly, two separate impulses, even when driven by the same motivating factor, does not turn separate and distinct criminal offenses into a single offense. See

---

<sup>3</sup> In addition to these locations being several city blocks apart, additional discovery (that will be provided to the defendant thirty days prior to the start of trial) will provide additional facts clearly showing that these two attacks were not the product of a continuous, uninterrupted assault. In fact, the victim in this case had successfully gotten away after the first assault, only to be relocated and murdered by these defendants a short time later after they drove around the Northeast section of Kansas City, Missouri looking for him.

*Blockburger*, 284 U.S. at 302 (explaining that “[i]f successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.”) (internal citations omitted).

Therefore, the government correctly charged the two attacks on William McCay as two separate counts of the indictment (Count One and Count Three).

2. The civil rights homicide (Count Three) and the obstruction of justice by killing a potential federal witness (Count Five) counts of the indictment are separate and distinct violations of two different statutes and therefore are properly charged as independent counts of the indictment.

The single act of killing the victim in this case both factually and legally supports both Count Three and Count Five of this indictment. “A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.” *Id.* at 304 (internal citations omitted). This language has formed the basis of what has commonly been referred to as the *Blockburger* test and it is the test that is applied to determine whether or not two crimes are the same for double jeopardy purposes. *United States v. Gamboa*, 439 F.3d 796, 809 (8<sup>th</sup> Cir. 2006). The proper application of the *Blockburger* test requires an examination of not only the

statutory elements of the two offenses, but also an examination of the specific language of the two charges as contained in the indictment. *Id.*

An application of the *Blockburger* test in this case makes it abundantly clear that Count Three and Count Five of the indictment are separate and distinct offenses that each require proof of different facts and elements to result in a conviction. Count Three alleges a violation of Title 18, United States Code, § 245(b)(2)(B), which provides, in relevant part:

Whoever \* \* \* by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with \* \* \* any person because of his race, color, religion or national origin and because he is or has been \* \* \* participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof shall be subject to criminal penalties.

To obtain a conviction on Count Three, the government will have to prove: (1) that he acted willfully; (2) he used force or threats of force; (3) that he intended to injure or interfere with victim William McCay; (4) that he acted because of McCay's race; and (5) that he acted because McCay was enjoying a facility provided or administered by the State of Missouri or the City of Kansas City; and (6) that William McCay's death resulted from the offense.

In contrast, Count Five of the indictment alleges a violation of Title 18, United States Code, § 1512(a)(1)(C), (a)(3)(A) which provides in relevant part:

Whoever kills or attempts to kill another person, with intent to . . . prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense shall be punished as provided in paragraph (3).<sup>4</sup>

To obtain a conviction on Count Five, the government will have to prove: (1) the defendant killed or attempted to kill a person; (2) the defendant was motivated by a desire to prevent the communication between any person and law enforcement authorities concerning the commission or possible commission of an offense; (3) that the offense was actually a federal offense; and (4) the killing was done willfully, deliberately, and with premeditation and malice aforethought.

Examining these two counts under the *Blockburger* test it is simply impossible to arrive at any other conclusion than the fact that these are separate and distinct offenses that clearly require proof of numerous different elements before a finding of guilt could be returned. This fact is further driven home by the

---

<sup>4</sup> Paragraph (3) provides that "in the case of murder (as defined in section 1111), the death penalty or imprisonment for life" is the authorized punishment. Therefore, Count Five of the indictment contains additional language alleging the defendants unlawfully killed William McCay willfully, deliberately, and with premeditation and malice aforethought.

fact that Congress enacted these two statutes to address divergent concerns: § 245 focusing on civil rights violations; and § 1512 focusing on obstruction of justice.

3. Based upon the fact that each predicate offense contained in Counts One, Three, and Five of the indictment are not multiplicitous, the corresponding 924(c) violations contained in Counts Two, Four, and Six are proper to submit to the jury for its deliberation.

Based upon the fact that Counts One, Three, and Five of the indictment properly charge the defendant with separate and distinct offenses, it rationally follows that the corresponding 924(c) counts of the indictment are also proper and the government should be allowed to proceed on all these counts. As mentioned *supra* in footnote number one, it is the government's belief that any discussion or time spent on potential sentencing issues at this stage of the proceeding would be premature and a waste of judicial resources. In the event the defendant is convicted on multiple counts of the indictment, these issues are ones that would be more appropriately handled at the time of sentencing. Therefore, the government has chosen not to address the speculative issues of concurrent vs. consecutive sentences and the possible implication of multiple 924(c) convictions at this time.<sup>5</sup>

---

<sup>5</sup> Should the Court desire, the government will be happy to provide supplemental briefing on these issues at any time the Court deems appropriate.

CONCLUSION

Based upon the above stated facts and arguments, the defendant's motion to dismiss counts on multiplicitous grounds should be denied.

Respectfully submitted,

Bradley J. Schlozman  
United States Attorney

Wan J. Kim  
Assistant Attorney General  
Civil Rights Division

By                    */s/ David M. Ketchmark*

David M. Ketchmark #46929  
Assistant United States Attorney

*/s/ D. Michael Green*  
D. Michael Green #36738  
Assistant United States Attorney

Charles Evans Whittaker Courthouse  
400 East Ninth Street, Fifth Floor  
Kansas City, Missouri 64106  
Telephone: (816) 426-2605

and

*/s/ Paige M. Fitzgerald*  
Paige M. Fitzgerald  
Trial Attorney  
Criminal Section  
Civil Rights Division

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on April 14, 2006, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

John Osgood  
305 Midland Bank Bldg.  
740 NW Blue Parkway  
Lee's Summit, MO 64086

John Gromowsky  
1125 Grand Blvd.  
Suite 900  
Kansas City, MO 64106

/s/ David M. Ketchmark  
David M. Ketchmark #46929  
Assistant United States Attorney