IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 12-231 (RC)**
	:	
v.	:	
	:	
JAMES F. HITSELBERGER,	:	
	:	
Defendant.	:	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION
TO COMPEL ELECTION BETWEEN MULTIPLICIOUS COUNTS

The United States of America, by and through its undersigned attorneys, respectfully submits this opposition to Defendant's Motion To Compel Election Between Multiplicious Counts (the "Motion"). In support of its opposition, the United States relies on the following points and authorities, and such other points and authorities as may be cited at a hearing on this motion.

I. Background

The facts underlying this prosecution have been set forth in greater detail in other pleadings. The information most pertinent to this motion is the following:

The acts underlying the Superseding Indictment took place between February and April 2012. The defendant was charged by complaint in this matter on August 6, 2012, and subsequently indicted by the grand jury on October 26, 2012. He was charged with two counts of unlawful retention of national defense information, in violation of 18 U.S.C. § 793(e), for incidents alleged to have occurred on or about April 11, 2012, and March 8, 2012.

Count 1 charged the defendant with unlawful retention of two documents dated April 11, 2012, and April 9, 2012. These documents were seized from the defendant's person on the morning of April 11, 2012. Count 2 charged the defendant with unlawful retention of a

document dated March 8, 2012. This document was seized from the defendant's living quarters on the evening of April 11, 2012. It was the single page of a five-page classified situation report, and the classification markings in the header and footer had been cut off. The government's evidence will show that Hitselberger received an e-mail on March 8, 2012, to his classified account with the document as an attachment.

On February 28, 2013, a superseding indictment was returned by the grand jury that charged the defendant with an additional count of unlawful retention of national defense information, in violation of 18 U.S.C. § 793(e), for an incident alleged to have occurred on or about February 13, 2012 (Count 3). The document charged in Count 3 was seized from the Hoover Institute at Stanford University on April 24, 2012. Based on e-mail correspondence and mailing records, Hitselberger sent it to the Hoover Institute sometime between March 17, 2012, and April 4, 2012. The superseding indictment also charged three counts of unauthorized removal of a public record, in violation of 18 U.S.C. § 2071(a) (Counts 4 through 6).

I. Argument

A. Legal Standard

Because the Double Jeopardy Clause of the Constitution bars multiple punishments for the same offense, where an indictment charges the same offense in more than one count, it may cause a problem termed "multiplicity." United States v. Mahdi, 598 F.3d 883, 887 (D.C. Cir. 2010). See United States v. Harris, 959 F.2d 246, 250 (D.C.Cir.1992); United States v. Johnson, 130 F.3d 1420, 1424 (10th Cir. 1997) ("Multiplicity refers to multiple counts of an indictment which cover the same criminal behavior."). "'[W]here 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,' " i.e., whether either is a lesser included offense of the other. United States v. Weathers, 186 F.3d 948, 951 (D.C. Cir. 1999) (quoting Blockburger v. United States, 284 U.S. 299, 304, (1932)). "The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately." Blockburger v. United States, 284 U.S. 299, 302 (1932) (citing Wharton's Criminal Law (11th Ed.) s. 34). However, courts from this Circuit have also held that the "the ultimate question is one of legislative intent, and Blockburger is not always controlling." United States v. McLaughlin, 164 F.3d 1, 14 (D.C. Cir. 1998). Cases involving multiple charges under a single statutory provision "are often referred to as 'unit of prosecution' cases, as they consider whether the conduct at issue was intended to give rise to more than one offense under the same provision." Id. at 14. "[S]uccessive prosecutions based on the same 'fact situation' are barred by double jeopardy if the separate charges could have been joined and no significant additional fact was required in the second prosecution." Rashad v. Burt, 108 F.3d 677, 680 (6th Cir. 1997).

Under 18 U.S.C. § 793(e):

> Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . shall be fined under this title or imprisoned not more than ten years, or both.

B. Counts 1 And Two Of The Indictment Are Not Multiplicious.

The defense posits that there is no evidence that the defendant possessed the document charged in Count 2 prior to April 11, 2012, Motion at 2; but the Indictment is so framed, and

whether the government is able to prove earlier retention of the document charged in Count 2 is a question for the jury. Cf. United States v. Yakou, 428 F.3d 241, (D.C. Cir. 2005) (upholding "unusual circumstance" of a district court's resolving a sufficiency of evidence issue pretrial where facts were undisputed and dismissal of indictment was based on a question of law, but noting that there is otherwise no criminal law equivalent of the civil motion for summary judgment). Because the government has charged Counts 1 and 2 on separate dates – and because the record indeed contains evidence that the defendant received and unlawfully retained the document charged in Count 2 before April 11, 2012 – these charges are not multiplicitous. See United States v. Moser, 453 Fed. Appx. 762, *5 (10th Cir. 2011) (where Indictment charged separate concealment of different property interests on different dates, counts were not multiplicitous); United States v. Williams, 527 F.3d 1235 (11th Cir. 2008) (indictment charging multiple counts of wire fraud based on seven separate wire transmissions made on different dates and in different amounts of federal funds into account controlled by defendant was not multiplicitous); United States v. Conley, 291 F.3d 464, 470–71 (7th Cir.2002); United States v. Pieper, 854 F.2d 1020, 1027 (7th Cir. 1988) (where separate counts involve distinct facts such as separate dates, methods, and sums, counts were not multiplicitous).

Indeed, the evidence here weighs against the conclusion that the defendant's retention of the documents charged in Count 1 and of the document charged in Count 2, resulted from the same incident or transaction, or that their possession was simultaneous and undifferentiated. See United States v. Wilder, 2008 WL 2004256 *2 (E.D. Wis. 2008). For comparison, in United States v. Curls, 219 Fed. Appx 746 (10th Cir. 2007), the defendant was convicted at trial of two counts of unlawful possession of a firearm based on his possession of the same weapon on June 7, 2005 (in a home), and again on June 8, 2005 (in a vehicle). In ruling, the court noted that

while individual acts were punishable separately, a course of conduct was not. Id. at 752. The court found that the two counts were not multiplicitous because possession of the weapon in question was interrupted by the defendant's own testimony at trial that he had handed the gun to another person on June 7, 2005. In Hitselberger's case, not only were the documents charged in Counts 1 and 2 not located at the same time or stored in the same place – like the weapon in Curls – but moreover, Count 1 charges unauthorized retention of different documents – containing distinct national defense information – than the document charged in Count 2. Thus, there is even greater reason here than in Curls to find that Counts 1 and 2 are not multiplicitous. See United States v. Howell, 199 Fed. Appx. 697 (10th Cir. 2006) (upholding separate drug convictions for drugs located in defendant's mobile home at 6:30 p.m. and in trunk of vehicle in which defendant was driving as she approached mobile home at 9:30 p.m. the same day); United States v. Blakeney, 753 F.2d 152, 155 (D.C. Cir. 1985) (convictions for possession of marijuana at defendant's home located during search warrant, and possession of marijuana at defendant's workplace located while effecting arrest warrant for the defendant, were separate and distinct); Compare with United States v. Keen, 96 F.3d 425, 432-433 (9th Cir. 1996) (firearm and ammunition charges are multiplicitous when there is no evidence that the two were possessed or stored separately); United States v. Johnson, 909 F.2d 1517, 1518-1519 (D.C. Cir. 1990) (possession of PCP and PCP laced marijuana by defendant at the same time and place constituted only one action of possession); United States v. Phillips, 962 F.Supp. 200, 201 (D.C. 1997) (ordering the government to compel election between multiple charges based on single act of carrying a firearm).

Vigorous discussion of multiplicity may be found in the felon-in-possession arena where courts have repeatedly addressed issues posed by multiple charges under 18 U.S.C. § 922(g) in

the same Indictment. Courts have held that "simultaneous possession of several firearms by a convicted felon constitutes a single offense." United States v. Marino, 682 F.2d 449, 454 (3d Cir. 1982). See United States v. Verrecchia, 196 F.3d 294, 297-298 (1st Cir. 1999) (same). However, possession of weapons that are acquired at different times or stored in different locations have been upheld as separate charges that do not implicate the Double Jeopardy Clause. See United States v. Keen, 104 F.3d 1111, 1112, 1118 & n.11 (9th Cir. 1996) (guns acquired at different times or stored in different places may be punished as multiple violations); United States v. Gann, 732 F.2d 714, 717, 721 (9th Cir. 1984) (guns "stored separately" in a bedroom closet and a car may be charged separately).

Similarly, Hitselberger is charged with retaining classified documents in violation of 18 U.S.C. § 793(e), which contained distinct information, were acquired at separate times, and were stored in separate locations. As charged in Count 1, on April 11, 2012, he removed classified documents from a Restricted Access Area (RAA) by printing the documents, storing them in his backpack, and leaving the RAA with the documents. The documents were located on the defendant's person outside of the RAA at approximately 11:30 a.m. It is noteworthy that when the defendant was stopped outside of his work spaces, he was asked to produce the documents he was seen printing from the computer. He handed over one document and then, when prompted, relinquished a second document. The evidence indicates that the defendant handed over at this time all of the classified materials that he had just printed and secreted in his backpack. No facts indicate that the third document that NCIS Agents subsequently located in his living quarters later that evening, had been printed by Hitselberger at the same time as the other two documents that he stored in his backpack earlier that day.

NCIS Agents located the document charged in Count 2 on the same day at approximately 7:30 p.m. The document located in Hitselberger's room was entirely distinct from the two documents that he had printed earlier that day and stored in his backpack. First, the document contained different national defense information than that contained in the documents charged in Count 1 of the Indictment; second, it was stored on his desk in his living quarters, and not in his backpack; third, it was located approximately 8 hours after the first two documents; fourth, the defendant received the March 8, 2012, document, in connection with an email sent to his SIPRnet account on or about March 8, 2012, as opposed to the two documents located in his backpack, which he received as attachments to emails sent to his SIPRnet account on or about April 9, 2012, and April 11, 2012; fifth, as discussed above, the government's evidence indicates that the defendant did not have this document in his possession when he was inside the RAA or when he was stopped outside the RAA, because he handed over all of the classified material that he had in his backpack to his superiors when they directed him to do so.

The government's circumstantial evidence that the defendant unlawfully retained the March 8, 2012, document on a date before April 11, 2012, is further supported by the evidence underlying Count 3 of the Indictment. As charged there, Hitselberger retained a fourth classified document – dated February 13, 2012 – which he sent to the Hoover Institute sometime after February 18, 2012. In other words, the evidence indicates that the defendant unlawfully retained national defense information on various dates; stored the information in various locations; and took different actions with the documents that he retained, to include, storing information in his backpack, storing information in his room and altering the document by removing its headers and footers, and mailing the information on to other recipients.

B. If The Court Rules that Counts 1 and 2 Of The Indictment Are Duplicitous, It Should Not Address The Need For A Remedy Until After Trial.

"Duplicity is not fatal because the government can elect charges prior to submission to the jury, or the jury could agree beyond a reasonable doubt which offense the defendant committed." Wright, Federal Practice and Procedure: Criminal 3d § 142 n.16. Because the primary cause for concern with multiplicitous counts is that the defendant may receive twice the punishment for a single offense, the issue may be remedied after trial. United States v. Cook, 2007 WL 3020081, at *1 (D.D.C. 2007) ("[H]arm, if it exists in this case, can be remedied after trial should the jury return a verdict on all counts. There is no prejudice to defendant in allowing all of the counts to go to the jury, as both sides agree that the pairs of counts are based on exactly the same facts."); see also United States v. Clark, 184 F.3d 858, 872 (D.C.Cir. 1999) ("detect[ing] no prejudice" in allowing multiplicitous counts to be tried where the evidence "was identical").

Election between Counts 1 and 2 at this stage would be premature, because if "the jury convicts on no more than one of the multiplicitous counts, there has been no violation of the defendant's right to be free from double jeopardy, for he will suffer no more than one punishment." United States v. Josephberg, 459 F.3d 350, 355 (2d Cir. 2006). Therefore, if the Court rules that Counts 1 and 2 of the Superseding Indictment are multiplicitous, the defendant's claim would be "better sorted out post-trial," United States v. Hubbell, 177 F.3d 11, 14 (D.C.Cir.1999), after the defendant knows the counts on which he has been convicted.

A. Conclusion

For the foregoing reasons, the Court should deny the defendant's Motion.

Respectfully submitted,

RONALD C. MACHEN JR.
United States Attorney

_____/s/_____
MONA N. SAHAF
Assistant United States Attorney
National Security Section
555 4th Street, NW, 11th Floor
Washington, D.C. 20530
Tel: (202) 252-7080
D.C. Bar 497854
mona.sahaf@usdoj.gov

JAY I. BRATT
Assistant United States Attorney
National Security Section
555 4th Street, NW, 11th Floor
Washington, D.C. 20530
Tel: (202) 252-7789
Illinois Bar No. 6187361
jay.bratt2@usdoj.gov

DEBORAH CURTIS
Trial Attorney
Counterespionage Section
National Security Division
UNITED STATES Department of Justice
600 E Street, NW, 10th Floor
Washington, D.C. 20530
Tel: (202) 233-2113
deborah.curtis@usdoj.gov

CERTIFICATE OF SERVICE

On this 5th day of April 2013, a copy of the foregoing was served on counsel of record for the defendant, Ms. Mary Petras, via the Court's Electronic Filing System.

/s/
Mona N. Sahaf
Assistant United States Attorney