UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	**:**	
	:	
v.		**12-CR-231 (RC)**
	:	
JAMES HITSELBERGER	**:**	

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

Mr. James Hitselberger, the defendant, through undersigned counsel, respectfully submits the following in reply to the Government's Response to Defendant's Motion to Compel Election Between Multiplicious Counts [Dkt. #48].

The government does not dispute that it cannot charge the retention of information contained in separate documents on the same date in relatively the same location as separate offenses, but argues that because the indictment alleges that Count One occurred on April 11, 2012 and Count Two occurred on March 8, 2012, the charges are not multiplicious. According to the government, it must be afforded the opportunity to prove the documents were possessed on separate occasions. Where the undisputed evidence demonstrates that the offenses occurred on the same date -- and therefore are multiplicious -- the government should not be afforded this opportunity. The government's evidence is that the document charged in Count Two was found on April 11, 2012. The government proffers evidence that the document was attached to an email sent to Mr. Hitselberger on March 8, 2012, but offers no evidence (and implicitly admits that it has no evidence) that Mr. Hitselberger had unauthorized possession of the document

outside of his work area at any time before April 11, 2012. The government should not be permitted to charge a single offense in multiple counts by simply inserting a date when it admittedly has no proof of unlawful possession on that date.

The government also erroneously argues that the failure to require election prior to trial would result in no prejudice to Mr. Hitselberger. Forcing a defendant to proceed to trial on multiplicious counts is prejudicial because it "creat[es] the impression of more criminal activity on his part than in fact may have been present." *United States v. Carter*, 576 F.2d 1061 (3d Cir. 1978). Even if, as the government argues, a multiplicity problem can be cured after trial, the proper remedy for a multiplicity objection raised pretrial is to require the government to elect between counts. *See United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952).

Conclusion

For the foregoing reasons and the reasons set forth in Mr. Hitselberger's motion, the Court should require the government to elect which of the two multiplicious unlawful retention of national defense information counts it will elect to proceed upon at trial, Count One or Count Two.

Respectfully submitted,

A. J. KRAMER
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/s/

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