UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Crim. No.13-10200-GAO**
	)	
DZHOKHAR A. TSARNAEV,	)	
Defendant	)	

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

The United States of America, by and through its undersigned counsel, respectfully opposes defendant's motion to dismiss.

INTRODUCTION

Defendant, Dzhokhar Tsarnaev ("Tsarnaev"), has moved to dismiss numerous counts of the indictment that he characterizes as "surplus." He claims that those counts are a tactical measure "designed to put a thumb on the scales of justice in favor of the death penalty." He also argues that those counts violate the Double Jeopardy Clause of the U.S. Constitution. As shown below, defendant's characterization of the counts as a "tactical measure" is nonsense, and his Double Jeopardy argument is wholly without merit.

The number of charges in the indictment reflects the number of crimes Tsarnaev committed –- nothing more. The evidence will

show that Tsarnaev committed deadly crimes of mass destruction, deadly crimes of terrorism, deadly crimes of bombing, and multiple acts of murder. Having done so, he can hardly blame the government for the number of capital charges in the indictment. If he is "prejudiced" by the number of capital charges in the Indictment, it is prejudice he has brought upon himself. The government is not obligated to limit the number of charges simply to spare Tsarnaev the consequences of his own actions.

The charges in the Indictment do not violate the Double Jeopardy Clause. In an effort to combat armed violent crime in general and terrorism in particular, Congress has enacted many statutes over the years to address every facet of the problem and ensure that offenders do not escape punishment. Despite overlap among the statutes, it is clear that Congress intended to authorize multiple penalties for offenders who violate more than one statute. The Supreme Court has long held that Congress may authorize as many penalties as it deems necessary to address a particular evil. So long as Congress has authorized them, multiple penalties, even for violations arising from the same underlying transaction, do not violate the Double Jeopardy clause.

ARGUMENT

Counts 1, 2, 4, 6, 7, 9, 11, 12, and 14 (the Marathon bombing counts)

There is no merit to Tsarnaev's argument that Congress did not authorize multiple punishments for violations of 18 U.S.C. §§ 2332a, 2332f, and 844(i) that arise from the same act or transaction. "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." Blockburger v. United States, 284 U.S. 299, 304 (1932). The Court adopted this test over 100 years ago and has used it ever since as the nearly exclusive method for determining whether Congress intended to authorize multiple punishments for multiple offenses arising from the same act. See Grady v. Corbin, 495 U.S. 508, 517 & n.8 (1990). (The only exceptions are those rare cases where Congress expressly authorizes or forbids multiple punishments.) Tsarnaev concedes that sections 2332a, 2332f, and 844(i) each requires proof of a fact that the others do not. See Deft. Mot. at 10-11. That concession effectively ends the inquiry and disposes of Tsarnaev's argument. Cf. United States v. Mann, 701

F.3d 274, 285 (8th Cir. 2012) (holding that section 2332a and 844(i) charges arising from the same underlying facts were not multiplicitous).

Tsarnaev attempts to minimize the differences among the statutes by referring to their differing elements as mere "jurisdictional 'hooks,'" see Deft. Mot. at 11, but he cannot diminish the legal significance of particular elements simply by disparaging them. Although Tsarnaev may consider jurisdictional elements less important than other elements, it would hardly be appropriate to impute the same low opinion of federal jurisdictional requirements to Congress. Tsarnaev also contends that the section 2332a, 2332f, and 844(i) violations in this case "rest on the same factual elements," Deft. Mot. at 10, but that has no legal significance for Double Jeopardy analysis. The Blockburger test "emphasizes the elements of the two crimes. 'If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" Brown v. Ohio, 432 U.S. 161, 166 (1977) (quoting Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975)). Indeed, Blockburger itself held that two of the violations charged in that case were not multiplicitous even though they were based on the exact same act (a single sale of drugs). See 284 U.S. 303-304.

In any event, Tsarnaev simply ignores, or dismisses, other important differences among the statutes. Use of a weapon of mass destruction is an element of section 2332a but not of the other two statutes. Committing violence against "a place of public use" is a necessary element of section 2332f but not of the other two. And damaging or destroying a building is a necessary element of section 844, whereas the other two statutes do not require the occurrence of any damage or destruction at all.

Tsarnaev is simply wrong in arguing that, to the extent section 2332f was designed to "supplement" other terrorist bombing statutes and "close any loopholes" they might contain, it was necessarily "intended to provide an alternative, not an additional, means of punishing bombings." Deft. Mot. at 12. That argument is foreclosed by Gore v. United States, 357 U.S. 386 (1958). Gore involved a single sale of drugs that violated three separate statutes. Id. at 398. The defendant argued that because those statutes reflected "a unitary congressional purpose to outlaw nonmedicinal sales of narcotics," Congress must also have intended to "punish [an offender] only as for a single offense when these multiple infractions are committed through a single sale." Id. at 399. Justice Frankfurter, writing for the Court, rejected that argument, explaining:

> We agree with the starting point, but it leads us to the opposite conclusion. Of course the various enactments by Congress extending over nearly half a century constitute a network of provisions, steadily tightened and enlarged, for grappling with a powerful, subtle and elusive enemy. If the legislation reveals anything, it reveals the determination of Congress to turn the screw of the criminal machinery —- detection, prosecution and punishment —- tighter and tighter. The three penal laws for which petitioner was convicted have different origins both in time and in design. . . . It seems more daring than convincing to suggest that three different enactments, each relating to a separate way of closing in on illicit distribution of narcotics, passed at three different periods, for each of which a separate punishment was declared by Congress, somehow or other ought to have carried with them an implied indication by Congress that if all these three different restrictions were disregarded but, forsooth, in the course of one transaction, the defendant should be treated as though he committed only one of these offenses.

Id. at 390-391.

Gore's reasoning applies here with equal force. Like narcotics traffickers, terrorists are a "powerful, subtle and elusive enemy" that Congress has sought to combat with an increasing "variety of enactments." And, like the statutes in Gore, the ones at issue here "have different origins in time and in design." Section 844, which punishes destruction of property through explosives or fire, was enacted as part of the Organized Crime Control Act of 1970. Section 2332a, which takes aim at

weapons of mass destruction, was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994. And section 2332f, enacted in 2002, was intended specifically "to criminalize the act of terrorist bombing aimed at public or governmental facilities, or public transportation or infrastructure facilities." H. Rep. No. 307, 107th Cong., 1st Sess. 7 (2001). These statutes, like the ones in Gore, are properly understood as "separate way[s] of closing in on" terrorism. And like the drug trafficker in Gore, whose single sale of drugs violated three different drug laws, Tsarnaev's conduct was sufficiently broad and far-reaching to violate three separate violent crime statutes. The logic and holding of Gore compel the conclusion that Congress intended to punish such conduct with three separate penalties.

Finally, Tsarnaev argues that the government has "overload[ed]" him with charges, Deft. Mot. at 9, suggesting that his conduct simply does not warrant the number of charges in the indictment. We disagree. Each of the charged crimes focuses on a different harm and reflects an important dimension of Tsarnaev's alleged conduct. A weapon of mass destruction is unusually dangerous and frightening regardless of its target (which could be an isolated individual). An attack on a place of public use, in contrast, is calculated to sow terror in the

general population regardless of the weapon used in the attack. And the malicious destruction of property adds a dimension of fear and suffering to victims even if the weapon is ordinary and the destroyed property is non-public. The charges in this case do no more than fairly and accurate reflect the acts that gave rise to them.

Counts 3, 5, 8, 10, 13, 15, 16, 17, 18 (the murders of Krystle Marie Campbell, Lingzi Lu, Martin Richard, and Sean Collier)

Tsarnaev contends that criminals who commit multiple violent crimes while armed are subject to only one enhanced penalty under section 924(c) if the charges "are based upon the same, simultaneous conduct." Deft. Mot. at 5. In other words, he argues that each section 924(c) charge must be based not only on a separate violent crime but on a separate use of a firearm corresponding to that crime. (That is what it means as a practical matter to say that section 924(c) charges may not be based upon "the same, simultaneous" conduct.) Tsarnaev's contention is contrary to the language and purpose of the statute and to the overwhelming weight of case law. It should therefore be rejected.

Title 18, United States Code, Section 924(c) provides in relevant part:

> [A]ny person who, during and in relation to

> any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall [be subject to an enhanced penalty].

Section 924(c)'s purpose is to impose an enhanced penalty on criminals who arm themselves when committing violent crimes. See United States v. Pena-Lora, 225 F.3d 17, 32 (1st Cir. 1990) ("Congress enacted subsection 924(c) principally as a sentencing enhancement mechanism for application to persons convicted of underlying crimes of violence committed through the use of firearms."). In recognition of that purpose, virtually every Circuit has held that the number of section 924(c) violations an individual commits depends not on the *number of uses* he makes of a firearm while committing a crime (since he is armed either way), but rather on the *number of violent crimes* he commits while armed. See United States v. Rentz, 735 F.3d 1245, 1249 (10th Cir. 2013) ("Congress intended to punish an armed offender with a separate section 924(c) count for each underlying violent crime."); United States. v. Rodriguez, 525 F.3d 85, 111-112 (1st Cir. 2008) (same) (collecting similar cases from the D.C., 2nd, 5th, 6th, 7th, 9th, 10th, and 11th Circuits); United States v. Diaz, 592 F.3d 467, 471-475 (3rd Cir. 2010); United States v. Khan, 461 F.3d 477, 493-94 (4th Cir. 2006); see also United States v.

Boidi, 2006 WL 456004, at *3 (D. Mass 2006) (O'Toole, J.). Because these decisions hold that the unit of prosecution for section 924(c) offenses is the predicate crime rather than a particular use of the firearm, they are fundamentally at odds with Tsarnaev's proposed construction of the statute.

The statute's plain language supports the conclusion that each armed violent crime gives rise to a separate 924(c) violation even if there is only a single use of the firearm. That language defines a section 924(c) offense as the use of a firearm "during and in relation to *any crime of violence* or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States" (emphasis added). Congress surely understood that many armed offenders commit more than one violent crime in the course of a single criminal episode; yet it used language that, on its face, mandates an enhanced punishment for each of those crimes without anywhere suggesting that each crime must involve a separate use of the firearm. It would be wrong to read a limitation into the statute that Congress chose not to include. See Dean v. United States, 556 U.S. 568, 571 (2009) (holding that enhanced penalty under section 924(c) in cases where "the firearm is discharged" applies even if the firearm goes off accidentally, because the statute "does not require that the discharge be done knowingly or intentionally,

or otherwise contain words of limitation, [and] . . . we ordinarily resist reading words or elements into a statute that do not appear on its face") (internal quotation marks and citation omitted).

A comparison between section 924(c) and its sister provision, section 924(e), further illuminates Congress's intent. Section 924(e) mandates an enhanced penalty for certain gun offenders who have "three previous convictions . . . for a violent felony or a serious drug offense," but only if those three prior offenses were "committed on occasions different from one another." All courts agree that this means the three previous convictions must represent three "'episodes' of felonious criminal activity that are distinct in time." United States v. Towne, 870 F.2d 880, 889 (2nd Cir.)(collecting cases), cert. denied, 490 U.S. 1101 (1989).

Section 924(e) demonstrates that when Congress wants to ensure that sentence-enhancing predicates are not based on "the same, simultaneous" conduct, it knows how to do so, and does so expressly. The fact that sections 924(c) and 924(e) are subsections of the same statute compels the conclusion that Congress deliberately omitted from section 924(c) any requirement that the predicate offenses arise from separate criminal episodes. Russello v. United States, 464 U.S. 16, 23

(1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

Tsarnaev's proposed construction of the statute would also undermine its purpose, which, according to the bill's sponsor, was to guarantee that armed offenders serve a prison sentence. See 114 Cong.Rec. 22231 (daily ed. July 19, 1968) (section 924(c)'s purpose is "to persuade the man who is tempted to commit a Federal felony to leave his gun at home. Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail.") (statement of Rep. Poff); see also id. at 22237 ("[A]ny person who commits a crime and uses a gun will know that he cannot get out of serving a penalty in jail") (statement of Rep. Rogers). Tsarnaev's argument that a defendant who commits multiple armed violent crimes in a single criminal episode may be charged with only one section 924(c) count based on only one of those violent crimes would lessen the likelihood of conviction and thus undermine the guarantee of prison time. It makes no sense to conclude that Congress intended its words to be applied in a way that would undermine its stated aim.

The majority of Circuits have interpreted section 924(c) consistent with its language and purpose and have rejected Tsarnaev's reading of the statute. See United States v. Mejia, 545 F.3d 179, 183-84, (2nd Cir. 2008) (upholding two section 924(c) convictions based on a single drive-by shooting that injured two victims and was charged as two assaults); United States v. Casiano, 113 F.3d 420, 424 (3rd Cir. 1997) (holding that section 924(c) convictions are not multiplicitous even if they "arise [not only] out of the same criminal episode . . . [but] out of the same act); Khan, 461 F.3d at 493 (rejecting argument "that it was error for the district court to sentence the[] [defendants] separately for each separate 18 U.S.C. § 924(c) firearms offense because those offenses all related to the same criminal episode," and holding instead that "[as] long as the underlying crimes are not identical under the Blockburger analysis, then consecutive section 924(c) sentences are permissible"); United States v. Burnette, 170 F.3d 567, 572 (6th Cir. 1999) ("It is now firmly established that the imposition of separate consecutive sentences for multiple section 924(c) violations occurring during the same criminal episode are lawful."); United States v. Angeles, 484 F. App'x 27, 34-35 (6th Cir. 2012) ("[P]redicate offenses need not occur at different times in order to support multiple § 924(c) convictions. . . .

Rather, the fact that each offense requires proof of facts not required by the other offense appears to be sufficient to show that the predicate acts are separate."); United States v. Sandstrom, 594 F.3d 634 (8th Cir. 2010) (holding that multiple section 924(c) counts were not multiplicitous "because the defendants 'used' the firearm at issue in both counts to commit separate offenses, even though the offenses occurred simultaneously"); United States v. Beltran-Moreno, 556 F.3d 913, 916 (9th Cir. 2009) ("'[I]f the elements of the two predicate offenses are different, each may form the basis of a firearm count notwithstanding that both offenses stem from the same set of facts.'") (quoting United States v. Castaneda, 9 F.3d 761, 765 (9th Cir. 1993)); United States v. Angilau, 717 F.3d 781, 789 (10th Cir. 2013) (holding that multiple section 924(c) charges were not multiplicitous, even though "[t]he factual event underlying [them] . . . was exactly the same," because the predicate crimes were "separate offenses under Blockburger").

The decisions that have adopted Tsarnaev's reading of the statute are poorly reasoned and unpersuasive. They all essentially find that the statute is ambiguous with respect to the unit of prosecution and that the rule of lenity therefore requires the most parsimonious interpretation possible. See United States v. Wilson, 160 F.3d 732, 749 (D.C. Cir. 1998)

(concluding that section 924(c) is an "ambiguous statute" and the "rule of lenity [therefore] lead[s] us to vacate one of [defendant's] section 924(c) convictions."); United States v. Phipps, 319 F.3d 177, 183 (5th Cir. 2003) ("[S]ection 924(c)(1) is ambiguous, so we apply the rule of lenity and decide that the statute does not authorize multiple convictions for a single use of a single firearm based on multiple predicate offenses."); United States v. Cureton, 739 F.3d 1032, 1043 (7th Cir. 2014) (adopting reasoning of Wilson and Phipps).

But as we have shown, section 924(c) is not ambiguous: its language, history, purpose, and the differences between it and section 924(e) all shed light on its meaning. That leaves no room for the rule of lenity. As the Supreme Court has repeatedly explained, "[t]he simple existence of some statutory ambiguity . . . is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree." Muscarello v. United States, 524 U.S. 125, 138, (1998); see also Smith v. United States, 508 U.S. 223, 239 (1993) ("The mere possibility of articulating a narrower construction [of a statute] . . . does not by itself make the rule of lenity applicable"). Instead, "[t]he rule of lenity applies only if, after seizing everything from which aid can be derived . . . , we can make no more than a guess as to what Congress intended."

United States v. Wells, 519 U.S. 482, 499 (1997) (internal quotation marks and citations omitted); United States v. Morales, 687 F.3d 697, 701 (6th Cir. 2012)(holding that "rule of lenity [is] a tiebreaker of last resort that is appropriate only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute."); United States v. Brown, 740 F.3d 145, 150 (3rd Cir. 2014) (same); United States v. DiCristina, 726 F.3d 92, 104 (2nd Cir. 2013). That is obviously not the case here.

It would also be inappropriate to apply the rule of lenity to section 924(c) because Congress, in enacting and amending that statute, has plainly intended the very opposite of leniency. The statute's chief purpose, as noted earlier, is to guarantee prison time for armed offenders. When Congress first passed it as part of the Gun Control Act of 1968, it created a penalty that could not be suspended, could not result in probation, and that increased for a second or subsequent offense. See Pub. L. No. 90-618, § 102, 82 Stat. 1223. In 1971, Congress added the requirement that the sentence must run consecutively to the sentence for the underlying crime. See Pub. L. 91–644. When the Supreme Court, applying the rule of lenity, held that Congress did not intend this last requirement to apply if the underlying crime itself contained a firearm-

based sentence-enhancement, see Simpson v. United States, 435 U.S. 6, 12-13 (1978), Congress swiftly amended the statute to correct that misunderstanding. See Pub. L. No. 98-473, § 1005(a), 98 Stat. 2138-2139.

Two years later, in 1986, Congress added a ten-year mandatory-minimum sentence for use of a machine gun or silencer, see Pub. L. No. 99-308, § 104(a)(2), 100 Stat. 456-457, and in 1988, it replaced the mandatory-minimum sentences for certain recidivists and for the use of certain types of guns to 20 years', 30 years', and life imprisonment, respectively, see Pub. L. No. 100-690, § 6460, 102 Stat. 4373. After the Supreme Court held that "use" of a firearm "during and in relation to a drug trafficking crime" did not include "the action of a defendant who puts a gun into place to protect drugs or to embolden himself," Bailey v. United States, 516 U.S. 137 (1995), Congress promptly repudiated that lenient understanding of the statute as well, spelling out that liability extends to "anyone who, in furtherance of . . . [a predicate] crime, possesses a firearm." See Pub. L. 105–386, § 1(a)(1). Congress also added a seven-year mandatory-minimum sentence if the firearm was brandished and a ten-year mandatory-minimum sentence if it was discharged.

This history makes clear that applying the principle of lenity to section 924(c) is not an appropriate way of

effectuating Congressional intent. In Gore, supra, which posed the question of whether Congress intended to authorize multiple punishments for a single sale of drugs, the Supreme Court rejected the rule of lenity as a guide to determining Congressional intent. After noting that Congress, "over nearly half a century," had enacted "a network of provisions, steadily tightened and enlarged," for combating drug trafficking, 357 U.S. at 390, the Court concluded: "Both in the unfolding of the substantive provisions of law and in the scale of punishments, Congress has manifested an attitude not of lenity but of severity toward violation of the narcotics laws," rendering the rule of lenity inapplicable. Id. at 391. The same is true of Congress's attitude toward gun violence, and section 924(c) should be read accordingly. See Smith v. United States, 508 U.S. 223, 240 (1993) (holding that bartering a gun for drugs constitutes a "use" of the gun for section 924(c) purposes in part because "a more restrictive reading of the phrase 'uses . . . a firearm' would undermine the statute's purpose).

In short, multiple section 924(c) violations based on separate predicates are not multiplicitous even if they arise from the same underlying events. But even assuming, for the sake of argument, that the challenged offenses *are* multiplicitous, the proper remedy in this case would not be to

require the government to elect among multiplicitous counts before trial, but rather to require that it do so after trial (but before sentencing). As the court explained in United States v. Pires, 642 F.3d 1 (1st Cir. 2011):

> There is no inflexible rule that the exclusive remedy for multiplicitous counts is election between them. See Ball v. United States, 470 U.S. 856 (1985). Requiring election is one option, but not the only option; the court may, for example, simply vacate both the conviction and the sentence as to all but one count, essentially merging the offending counts. See, e.g., id.; United States v. Lilly, 983 F.2d 300, 306 (1st Cir. 1992). This flexible approach makes good sense because "the Double Jeopardy Clause does not protect against simultaneous prosecutions for the same offense, so long as no more than one punishment is eventually imposed." United States v. Josephberg, 459 F.3d 350, 355 (2nd Cir. 2006) (per curiam).

Id. at 16.

To allow the government to proceed to trial on only one section 924(c) count, when the several 924(c) counts in the indictment are based on different predicate offenses, would needlessly undermine the legislative goal of ensuring that armed offenders receive the punishment required by section 924(c). That is because the evidence at trial might prove one predicate offense but not the others. If the section 924(c) count allowed to go to trial was linked to a predicate that could not be

proved, Tsarnaev would escape a section 924(c) conviction altogether. The Court should avoid that risk with respect to any counts deemed multiplicitous by choosing the option presented in Pires of allowing a trial on all of the section 924(c) and simply vacating any multiplicitous convictions after trial. This approach would not prejudice Tsarnaev, who makes no claim that the allegedly multiplicitous counts will prejudice the jury's deliberations during the guilt-phase of his trial, only the penalty-phase. See Deft. Mot. at 3.

Counts 24, 26, 28, 30 (the Watertown bombings)

Tsarnaev's multiplicity argument is even less compelling with respect to the section 924(c) counts predicated on his use of four separate explosive devices in Watertown on April 19, 2013. Putting aside the argument's legal defects, which are discussed above, the argument's factual premise is faulty with respect to these counts, because the Watertown section 924(c) charges are not based on "the same, simultaneous" conduct. Each of the Watertown section 924(c) charges is based on a separate section 2232a predicate linked to the use of a different explosive device over a period of 10-15 minutes.

The cases Tsarnaev cites do not support his argument that these counts are multiplicitous. Pena-Lora involved two section 924(c) violations arising from a single predicate offense, see

Pena-Lora, 225 F.3d at 32, and United States v. Johnson, 25 F.3d 1335 (6th Cir. 1994), involved "predicate offenses involving simultaneous possession of different controlled substances," id. at 1338. To the government's knowledge, no court has ever held that multiple section 924(c) charges based on separate predicates, each of which involves the separate use of a different firearm at a different time, are multiplicitous.

Multiple counts (all of the section 924(c) charges)

Each of the section 924(c) counts charges that Tsarnaev both "used and carried" a firearm "during and in relation to" a crime of violence and "possessed" a firearm "in furtherance of" a crime of violence. The government submits that these are alternative means of violating section 924(c) and thus may be alleged in a single count. See Fed. R. Crim. P. 7(c)(1). We acknowledge, however, that the Circuits are split on whether these are in fact alternative means of violating section 924(c) or separate crimes. Compare United States v. Haynes, 582 F.3d 686, 703–04 (7th Cir.2009) (separate means); United States v. Arreola, 467 F.3d 1153, 1157-1159 (9th Cir. 2006) (same) with United States v. Woods, 271 F. App'x 338, 343 (4th Cir. 2008) (separate crimes); United States v. Combs, 369 F.3d 925, 933 (6th Cir. 2004) (same); United States v. Brown, 560 F.3d 754, 766-767 (8th Cir. 2009) (same); United States v. Brooks, 438 F.3d 1231,

1237 (10th Cir. 2006) (same; dicta). The First Circuit expressly reserved judgment on the issue in United States v. Ayala-Lopez, 493 F. App'x 120, 127 n.2 (1st Cir. 2012).

We are surprised by Tsarnaev's argument that the section 924(c) counts are duplicitous, i.e. that they "join in a single count . . . two or more distinct and separate offenses." United States v. Canas, 595 F.2d 73, 78 (1st Cir.1979); for if they are, then the government is entitled to seek a superseding indictment that splits each section 924(c) count into separate "use and carry" and "possess in furtherance of" counts, each mandating a separate mandatory-minimum consecutive sentence. We urge the Court to hold that the counts are not duplicitous and, as a precaution, to give an appropriate unanimity instruction at trial in order to insulate the verdicts from any potential infirmity. See United States v. Karam, 37 F.3d 1280, 1286 (8th Cir. 1994) ("The principal vice of a duplicitous indictment is that the jury may convict a defendant without unanimous agreement on the defendant's guilt with respect to a particular offense."), cert. denied, 513 U.S. 1156 (1995); United States v. Pietrantonio, 637 F.3d 865, 869 (8th Cir. 2011) ("[A] duplicitous indictment . . . may be cured by a limiting instruction requiring the jury to unanimously find the defendant guilty of at least one distinct act."); United States v. Webster, 231 F.

App'x 606, 607 (9th Cir. 2007) ("A specific unanimity instruction may cure duplicity in the indictment."); United States v. Swantz, 380 F. App'x 767, 768 (10th Cir. 2010) ("There is . . . a simple cure for duplicity. The court can instruct the jury that it must unanimously agree on one of the alternative charges, thereby safeguarding the defendant's right to a unanimous verdict.").

Counts 2, 3, 4, 5 (the section 924(c) counts based on section 2332a counts)

There is no merit to Tsarnaev's argument that the section 924(c) offenses predicated on the use of bombs at the Marathon are lesser included offenses of those predicates. "By definition, a lesser-included offense does not contain each and every element of the greater offense, but only 'a subset of the elements of the charged offense.'" United States v. Gray, 2013 WL 6038485, at *18 (11th Cir. 2013) (quoting Schmuck v. United States, 489 U.S. 705, 716 (1989)). A section 924(c) violation, in contrast, does include each and every element of the predicate offense. See, e.g., United States v. Crump, 120 F.3d 462, 466 (4th Cir. 1997) ("In accordance with the views of all the circuits considering the question, we hold that a defendant's conviction under section 924(c)(1) does not depend on his being convicted —- either previously or contemporaneously

—- of the predicate offense, *as long as all of the elements of that offense are proved and found beyond a reasonable doubt*.") (emphasis added); United States v. Willoughby, 27 F.3d 263, 266 (7th Cir.1994) (same); United States v. Reyes, 102 F.3d 1361, 1365 (5th Cir. 1996) ("[P]roof of the defendant's guilt of a predicate offense is an essential element of a conviction under § 924(c)(1).").

In any event, Congress could not have made it clearer that section 924(c) creates an offense separate from the predicate crime, and that a defendant may be prosecuted and punished for both. Section 924(c)(1)(D) expressly provides: "Notwithstanding any other provision of law. . . no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." That is true even if the crime of violence "provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." 18 U.S.C. § 924(c)(1)(A), As the Second Circuit has explained, "while the commission of a crime of violence . . . is a necessary predicate for a conviction under section 924(c) . . . we cannot consider the underlying violent felony to be a

'lesser' offense. . . . [because] Congress obviously did not intend the crime of violence to be merged into the firearm offense." United States v. Khalil, 214 F.3d 111, 120 (2nd Cir. 2000).

Although Tsarnaev appears to believe it is unfair to sentence him for both a section 2332a violation and a corresponding section 924(c) violation, Congress obviously did not share that belief. Indeed, in the same bill in which Congress enacted section 2332a, Public Law 103-322, Congress substantively amended section 924(c), see id. §§ 110510(b), 110102(c)(2), 110105(2), but it did not see fit to exempt section 2332a (or any other crime of violence) from its ambit.

CONCLUSION

WHEREFORE, the government respectfully requests that the Court deny Tsarnaev's Motion to Dismiss in its entirety.

Respectfully submitted,

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