IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. **06-15845-BB**

United States of America,

Appellant,

- versus -

Adham Amin Hassoun,
Kifah Wael Jayyousi,
Jose Padilla,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

R. Alexander Acosta
United States Attorney
Attorney for Appellant
99 N.E. 4th Street
Miami, Florida 33132-2111
(305) 961-9114

Anne R. Schultz
Chief, Appellate Division

Lisa Tobin Rubio
Assistant United States Attorney

Of Counsel

United States v. Adham Amin Hassoun, Kifah Wael Jayyousi,

and Jose Padilla, Case No. 06-15845-BB

Certificate of Interested Persons

Undersigned counsel for the United States of America hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case:

R. Alexander Acosta

Jeanne Baker

Hon. Stephen T. Brown

Orlando do Campo

Michael Caruso

Hon. Marcia G. Cooke

John DePue

John Drennan

Brian K. Frazier

Joel Gershowitz

Hon. Daniel T. K. Hurley

Russell R. Killinger

United States v. Adham Amin Hassoun, Kifah Wael Jayyousi, and Jose Padilla, Case No. 06-15845-BB

Certificate of Interested Persons (continued)

Mark Maldonado

Anthony J. Natale

Andrew G. Patel

Julia A. Paylor

Stephanie K. Pell

Lisa Tobin Rubio

Anne R. Schultz

John Shipley

Madeleine R. Shirley

Kenneth M. Swartz

William W. Swor

_____

Lisa Tobin Rubio
Assistant United States Attorney

Statement Regarding Oral Argument

The United States of America respectfully requests oral argument in this case.

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Statement of Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 3731.[1]

[1] The Solicitor General of the United States of America has authorized this appeal prior to the filing of our initial brief.

Statement of the Issue

Whether the district court applied an incorrect legal analysis in dismissing Count 1 of the superseding indictment as multiplicitous of Counts 2 and 3, and, in any event, whether the court's dismissal order was an inappropriate remedy for the purported multiplicity.

Statement of the Case

1. Course of Proceedings and Disposition in the Court Below

On November 17, 2005, a grand jury in the Southern District of Florida returned an eleven-count superseding indictment charging appellees Adham Amin Hassoun, Kifah Wael Jayyousi, and Jose Padilla, as well as codefendants Mohammed Hesham Youssef and Kassem Daher,[2] with offenses arising out of their participation in a terrorist support cell (DE 141). Essentially, they are charged with conspiring to murder, maim, and kidnap and conspiring to provide (and providing) material support to the murder conspiracy.[3]

Specifically, Count 1 charges appellees with conspiring to murder, kidnap, and maim a person or persons in a foreign country, in violation of 18 U.S.C. § 956(a)(1)

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[2] These two defendants have not been arrested.

[3] We use the term "murder conspiracy" throughout the brief as a shorthand method of referring to the offense of conspiring to murder, maim, or kidnap in violation of 18 U.S.C. § 956(a).

and § 2 (*id*. at 4-17). Count 2 charges appellees with a conspiracy, in violation of 18 U.S.C. § 371,[4] to commit the substantive 18 U.S.C. § 2339A offense of "provid[ing] material support or resources, or conceal[ing] or disguis[ing] the nature, location, source, or ownership of material support and resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [a list of enumerated offenses]." The specified enumerated offense in this case is 18 U.S.C. § 956(a), which, as noted above, prohibits a conspiracy to murder, kidnap, or maim persons in a foreign country (*id*. at 17-18). Thus, Count 2 charges appellees with a conspiracy to provide material support for the Count 1 murder conspiracy. Count 3

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[4] Count 2 originally charged a conspiracy to provide material support in violation of the internal conspiracy provisions of 18 U.S.C. § 2339A as well as § 371. The § 2339A conspiracy offense did not exist until the Patriot Act was signed into law on October 26, 2001. Prior to that time, the only way to charge a conspiracy to violate § 2339A was by the use of the general conspiracy statute under § 371. The criminal conduct in this case straddles the effective date of § 2339A.

The district court ruled that Count 2 was duplicitous and granted appellees' motion (DE 195) to force the government to elect to proceed under only one of the conspiracy statutes contained in Count 2 (DE 535); *United States v. Padilla*, 2006 WL 2415946 (S.D. Fla. Aug. 18, 2006). Although the United States argued that election was not the appropriate remedy and that any duplicity problem could be cured by detailed jury instructions (DE 277), the United States complied with the court's order and elected to proceed on the § 371 charge (DE 540). The United States still disagrees with the district court's ruling that specific jury instructions could not have cured any duplicity problem. Nevertheless, the United States is not appealing that ruling. *See United States v. Mendoza*, 464 U.S. 154, 160-63, 104 S.Ct. 568, 572-74 (1984) (the government's decision not to appeal does not operate as collateral estoppel against the government in another case).

charges appellees with a substantive § 2339A material support offense based on the same § 956(a) murder conspiracy predicate (*id*. at 18-19). Thus, Count 3 charges the substantive offense of materially supporting the Count 1 murder conspiracy.

The remaining counts charge Hassoun alone with unlawful possession of a firearm, in violation of 18 U.S.C. §922(g)(5)(B) (Count 4); false statements, in violation of 18 U.S.C. § 1001(a) (Count 5); perjury, in violation of 18 U.S.C. § 1621(1) (Counts 7-10); and obstruction, in violation of 18 U.S.C. §1505 (Count 11) (*id*. at 19-30). The indictment also includes a forfeiture count (*id*. at 30).

Appellees moved to dismiss Count 1, arguing that it is multiplicitous of both Counts 2 and 3. Essentially, their argument was that all three counts rely on the same factual basis and charge the same ultimate agreement to murder, kidnap and maim persons in a foreign country (DE 391).

The United States responded that the statutory offenses at issue are distinct offenses that may be charged separately and that authorize separate punishment. The government emphasized that under *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932), the test to be applied in determining whether counts are multiplicitous is whether each statute requires proof of an element the other does not, without regard to whether the statutory violations may have arisen from a single conspiratorial agreement. As to Count 3, the government urged that conspiracy and

substantive counts are always distinct and should not be considered multiplicitous (DE 453).

At a hearing, appellees agreed that the *Blockburger* test applied, but argued that § 956(a) was akin to a lesser included offense of § 2339A, that it is "impossible to commit Count 2 without also committing Count 1," and therefore, that the offenses were the same (DE 558 at 19, 37, 38-49). The government countered that this interpretation of a § 2339A material support offense was incorrect because an individual who provides material support may, but need not, also be a member of the enumerated offense (here a § 956(a) conspiracy). The government stressed that the elemental analysis mandated by *Blockburger*, which ultimately is used to determine Congressional intent, must be applied in a strict, clinical fashion, without resort to the numerous possible factual permutations that might cloud the issue (*id*. at 26-34). For the same reason, the government opposed appellees' argument that § 956(a) was a lesser included offense of § 2339A (*id*. at 44). Additionally, the government argued that even if the counts were multiplicitous, and even if the jury convicted on the purportedly multiplicitous counts, there would be no error as long as appellees did not receive punishment on multiple counts (*id*. at 43-44).

In a later published opinion, the district court granted appellees' motion to dismiss Count 1 as multiplicitous of Counts 2 and 3 (DE 535); *United States v.*

Padilla, 2006 WL 2415946 (S.D. Fla. Aug. 18, 2006). Despite citing *Blockburger*, the district court abandoned *Blockburger*'s analysis, instead opting for a multiple-conspiracy, factual analysis similar to the "same conduct" test espoused in *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084 (1990), and later overruled in *United States v. Dixon*, 509 U.S. 688, 703-04, 113 S.Ct. 2849, 2860 (1993). In so doing, the district court relied on *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978). The district court reasoned that resort to a factual, rather than elemental, analysis was necessary because Counts 1 and 2 involve a single conspiratorial agreement, the purpose and object of which was to advance violent jihad, including supporting and participating in armed confrontations outside the United States. Noting that the manner and means of the conspiracy and overt acts are re-alleged in each count, the court found that the government had charged a single conspiracy offense multiple times in separate counts. 2006 WL 2415946 at *3-4. The court concluded that because the indictment was multiplicitous, it violated double jeopardy, and Count 1 had to be dismissed. *Id*. at 4.

The United States moved for reconsideration (DE 540). In addition to arguing that the district court had erred in concluding that the indictment was multiplicitous, the government argued that the court's chosen remedy of dismissal was premature (*id*. at 2-6). Rather, the remedy, should the jury convict a defendant on two counts the

court believed were multiplicitous, would be for the court to enter judgment on only one of the purportedly multiplicitous counts (*id*. at 4). Appellees opposed the motion (DE 555, 556), which the court denied (DE 571), after a hearing (DE 558:7-45). The United States timely appealed (DE 611).

2. Statement of the Facts

The charges in this case are rooted in the activities of Hassoun, Jayyousi, and Daher, three radical Islamic individuals who formed a North American support cell to promote violent jihad, or holy war, in various overseas locations (DE 141 ¶¶ 5-9). Hassoun, Jayyousi, and Daher sent money, supplies, and recruits to various terrorist organizations and radical Islamic militias for this purpose (DE 141 ¶¶ 5, 14). Two of these recruits, Youssef and Padilla, traveled overseas to fight in violent jihad (DE 141 ¶¶10-11). All charged individuals agreed to promote the murder, maiming, and kidnapping of individuals overseas, and further agreed to provide material support in various forms, including, but not limited to, personal participation in violent conflicts, to ensure the success of those goals. The defendants did in fact provide such material support (DE 141 ¶¶ 1-11, 13-92).

The North American support cell was affiliated with the Islamic Group ("IG"), a designated Egyptian terrorist organization dedicated to a violent radical Islamic agenda that would later become a hallmark of al Qaeda (DE 141 ¶¶ 3-5). The North American support cell further followed and supported Sheikh Omar Abdel Rahman,

an influential and high-ranking member of certain violent jihad groups (DE 141 ¶ 5). IG and al Qaeda shared a common purpose in promoting violent jihad (DE 141 ¶ 3). As a result, the North American support cell used the contacts and resources of IG and affiliated organizations, making them effective recruiters and supporters of jihad fighters (DE 141 ¶¶ 3-11).

As part of what became the IG/al Qaeda worldwide agenda, radical Islamic fighters participated in regional conflicts such as Algeria, Chechnya, Bosnia, Kosovo, Lebanon, and Somalia (DE 141 ¶ 3). Although the product of localized ethnic, nationalistic, or religious tensions, these flashpoints provided IG/al Qaeda with the chance to promote a larger religious struggle between radical Islam and the West (DE 141 ¶¶ 1, 3). For this reason, the North American support cell encouraged violence in these regions and sent war-fighting money and materiel to them (DE 141 ¶¶ 5, 14). Its activities culminated with the recruitment of Youssef and Padilla. Youssef fought in Kosovo and attempted to enter Chechnya, while Padilla applied to attend and attended an al Qaeda training camp in Afghanistan (DE 141 ¶¶ 10-11, 56-58, 83-85, 89-90).

3. Standards of Review

This Court reviews *de novo* a district court's legal determination that counts in an indictment are multiplicitous, but reviews for an abuse of discretion a district

court's order dismissing an indictment on multiplicity grounds. *United States v. Smith*, 231 F.3d 800, 807 (11th Cir. 2000); *United States v. Howard*, 918 F.2d 1529, 1532 (11th Cir. 1990).

Summary of the Argument

It is well settled that a single criminal transaction may result in separate punishable offenses if conviction on each charge requires proof of an element not required for conviction under the other statutory provisions. In dismissing Count 1 as multiplicitous of Counts 2 and 3, the district court began by correctly stating that the test for multiplicity turns on whether the *offense elements* in the various counts (which address the same factual transaction) are the same under the *Blockburger* test. But the court erred by changing the inquiry to ask whether the multiple conspiracy counts (that arise under different statutes) charge the same *agreement*.

Because the *Blockburger* inquiry turns on the *elements* of the charged offenses and not on whether the indictment alleges a single agreement, the district court's analysis was flawed. Under the correct analysis, Count 1, which charges a conspiracy to murder, kidnap, and maim persons in a foreign country, is not multiplicitous of Count 3, which charges the substantive violation of providing material support to the murder conspiracy charged in Count 1. A conspiracy and a substantive offense are always distinct under *Blockburger*.

Moreover, Count 1 contains elements that Counts 2 and 3 do not – the existence of a murder conspiracy and the defendant's agreement to participate in that conspiracy. At the same time, Counts 2 and 3 contain an element that Count 1 does not – providing material support for an illegal venture. Although § 2339A lists § 956 as an enumerated offense, it does not thereby mandate proof of its elements. To the contrary, a defendant may be liable for providing material support to terrorists without necessarily participating in the murder conspiracy. Accordingly, the elements of the offenses are distinct, and the district court erred in finding otherwise.

Because *Blockburger* establishes that the offenses are distinct, the district court's factual analysis was inappropriate. That analysis applies only where a conspiracy offense is charged multiple times in counts charging the *same* statutory violation or charging a lesser included offense. Neither circumstance exists here, and therefore, the district court erred in abandoning the clinical *Blockburger* elemental analysis.

In any event, even if the indictment were multiplicitous, the district court erred in dismissing Count 1 as a remedy. The preferred method of curing a conviction on a multiplicitous count is simply to impose a single penalty at sentencing. This is especially true in a case such as this, where double jeopardy is the only potential prejudice identified by the district court. Additionally, the possible danger that the

jury might be unfairly prejudiced merely by the proliferation of counts does not exist here, where only three counts are involved. Therefore, dismissal was, at the very least, premature.

Argument

The District Court Erred in Dismissing Count 1 as Multiplicitous of Counts 2 and 3, Because it Applied an Incorrect Legal Analysis And, in Any Event, Chose an Inappropriate Remedy for the Purported Multiplicity.

As discussed in more detail below, the district court improperly relied on *Marable* to conclude that the indictment is multiplicitous. Contrary to the district court's ruling, *Marable* and its progeny are only relevant once the court has concluded that the counts at issue are the same offense under *Blockburger*. *Marable* is not relevant to the antecedent question of whether the counts charge the same offense. Under proper application of the *Blockburger* test, it is irrelevant that the § 956(a) murder conspiracy and § 2339A material support counts may have arisen from the same conspiratorial agreement. Rather, *Blockburger* requires analysis of the statutory elements, not the factual allegations in the indictment, and the result of the analysis here is that a murder conspiracy under § 956(a) and material support offenses under § 2339A are separate offenses that may be charged simultaneously and separately punished.

A. The *Blockburger* Test

The multiplicity doctrine "assur[es] that the court does not exceed its legislative authorization by imposing multiple punishments for *the same offense*." *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221 (1977). In determining whether the crimes charged are *the same offense*, the Court must apply the *Blockburger* "same elements" test. Under *Blockburger*, a single physical act can constitute two different offenses if it violates two criminal statutes, each of which requires proof of an element that the other does not. If two offenses have distinct elements under *Blockburger*, it indicates that Congress intended to reach distinct societal interests in each statute.[5] Where Congress has determined that a single criminal act or course of

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[5] *See Albernaz v. United States*, 450 U.S. 333, 337, 101 S.Ct. 1137, 1141 (1981) (the *Blockburger* test operates as a method of statutory construction and serves as a means "of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction"); *Whalen v. United States*, 445 U.S. 684, 713-14, 100 S.Ct. 1432, 1439 n.8 (1980) (Rehnquist, J., dissenting) (noting that the *Blockburger* test is "nothing but a rough proxy" for determining whether separate societal interests are protected by the different statutes, "since, by asking whether two separate statutes each include an element the other does not, a court is really asking whether the legislature manifested an intention to serve two different interests in enacting the two statutes"), *quoted in United States v. Adams*, 1 F.3d 1566, 1574 (11th Cir. 1993).

conduct violates two distinct statutory provisions, both may be charged in the same indictment and separate penalties for each may be imposed.[6]

Because the purpose of the *Blockburger* test is to determine whether the legislature intended two statutes to be distinct offenses, the court must "focus[] on the statutory elements of the offense" rather than on the facts alleged in the indictment. *Albernaz v. United States*, 450 U.S. 333, 338, 101 S.Ct. 1137, 1142 (1981).[7] In other words, it is the statute itself, rather than the indictment under consideration, which establishes the elements of the offense. If each statute requires proof of an element

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[6] *See Missouri v. Hunter*, 459 U.S. 359, 368-69, 103 S.Ct. 673, 679 (1983) (in the context of concurrent (rather than consecutive) prosecutions, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended"). *See also Albernaz*, 450 U.S. at 337, 101 S.Ct. at 1141 (holding that a single course of conduct may give rise to distinct offenses which can be separately prosecuted and cumulatively punished); *United States v. Dowd*, 451 F.3d 1244, 1251, 1252 (11th Cir. 2006) ("The Double Jeopardy Clause . . . does not prevent the imposition of cumulative punishments where Congress intended to authorize such cumulative punishments").

[7] Although *Blockburger* uses the word "fact," the test is directed to examining the *elements* of the charged offense, not the facts. *See United States v. Dixon*, 509 U.S. 688, 703-04, 113 S.Ct. 2849, 2860 (1993) (reaffirming *Blockburger* "same elements" test, and rejecting "same conduct" test espoused in *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084 (1990)); *Dowd*, 451 F.3d at 1253 (The *Blockburger* test "'focuses on the statutory elements of the offenses, not on their application to the facts of the specific case before the court.'") (quoted authority omitted); *United States v. Adams*, 1 F.3d 1566, 1574 (11th Cir. 1993) (noting that the Court in *Whalen*, 445 U.S. at 694 n.8, 100 S.Ct. at 1439 n.8, stated that it was applying the *Blockburger* test to the statutory elements rather than to the facts alleged in the indictment).

that the other does not, "the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli v. United States*, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 1293 n. 17 (1975). By the same token, the determination whether two conspiracy counts allege the same offense or different offenses turns on the elements of the statutes that are alleged to have been violated, not on whether the counts are premised upon the same underlying agreement.

B. Under *Blockburger*, §§ 956(a) and 2339A Have Different Elements, Indicating that The Legislature Intended § 2339A to Operate as a Distinct Offense from its Enumerated Offenses.

As discussed in more detail below, the indictment passes the *Blockburger* "same elements" test because a murder conspiracy under § 956(a) and a material support conspiracy under § 2339A each require proof of an element that the other does not.[8] Therefore, the indictment is not multiplicitous.

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[8] To determine whether Congress intended two statutes to be distinct offenses, this Court generally looks first to the statutory language and legislative history. Then, if both are ambiguous, the Court applies *Blockburger* to determine whether two statutes are distinct offenses. *Williams v. Singletary*, 78 F.3d 1510, 1512-13 (11th Cir. 1996). *See also Garrett v. United States*, 471 U.S. 773, 779, 105 S.Ct. 2407, 2411 (1985) ("when the legislative intent is clear from the face of the statute or the legislative history, the expressed legislative intent is conclusive, and *Blockburger* does not apply).

In the instant case, the statutory language in § 2339A does not expressly state that it is to be punished separately from its enumerated offenses. *Compare* 18 U.S.C. § 924(c) (explicitly stating that the penalties for using or carrying a firearm during (continued...)

The elements of a § 956(a) murder conspiracy are: (1) that two or more persons agreed to murder, kidnap, or maim another person at a place outside the United States; (2) that the defendant knew of the unlawful purpose of the agreement and willfully joined it; (3) that the defendant was within the jurisdiction of the United States; and (4) that, during the existence of the agreement, one of the conspirators – but not necessarily the defendant – committed at least one overt act within the jurisdiction of the United States to effect any object of the agreement. *See United States v. Sattar*, 314 F.Supp.2d 279, 304 (S.D. N.Y. 2004) ("Sattar II").

The elements of a conspiracy in violation of § 371 to provide material support are: (1) that two or more persons agreed to provide or conceal material support or resources knowing or intending that the support or resources were to be used to prepare for or to carry out an enumerated offense (here, a conspiracy to murder, kidnap, or maim under § 956(a)); (2) that the defendant knowingly and willfully became a member of the material support conspiracy; (3) that one of the members of

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[8] (...continued)
and in relation to a crime of violence or drug trafficking offense shall be "*in addition to* the punishment provided for such crime of violence or drug trafficking crime") (emphasis added). Likewise, the legislative history is not explicit regarding Congress's intent to impose separate punishments. Therefore, we have proceeded directly to the *Blockburger* analysis which, as we discuss *infra*, plainly establishes Congress's intent that the murder and material support statutes penalize separate offenses.

the conspiracy knowingly committed at least one of the overt acts charged; and (4) that the overt act was committed to further some objective of the conspiracy. *United States v. Sattar*, 395 F.Supp.2d 79, 93 (S.D. N.Y. 2005) ("Sattar III").[9]

The elements of the substantive offense of providing material support under § 2339A are: (1) that the defendant provided or concealed material support or resources; and (2) that the defendant did so knowing or intending that the material support be used in preparation for or in carrying out a violation of an enumerated offense (here a § 956(a) murder conspiracy).

1. Counts 1 and 2

Under *Blockburger*, Counts 1 and 2 are separate offenses for which separate punishment is authorized. A murder conspiracy under § 956(a) and a material support conspiracy under § 2339A each requires proof of an element that the other does not. Because § 2339A requires proof of at least one element that § 956(a) does not – namely the agreement to provide material support – and because § 956(a) requires proof of at least one element that § 2339A does not – namely that the murder conspiracy existed and that the defendant be a member of it – application of the

[9] We have outlined the elements of a § 371 conspiracy because the government elected to proceed under that section in Count 2 as a result of the district court's duplicity ruling. *See supra* n.4. A conspiracy charged under § 2339A's own internal conspiracy provision does not require an overt act. *See Sattar* II, 314 F.Supp.2d at 307.

Blockburger test establishes that Congress intended §§ 956(a) and 2339A to be distinct offenses. Although one may violate § 956(a) by providing or concealing material support and resources, which is more specifically criminalized by § 2339A, § 956(a) is not limited to agreements to employ that "device," and therefore such an agreement need not be proved to establish a § 956(a) violation. Additionally, although a § 2339A conspirator may also be a member of the § 956(a) conspiracy he is supporting, his membership in that conspiracy is not necessary to conviction under § 2339A. Therefore, the similarity (or even identity) of the facts underlying each charge is irrelevant. Consequently, both offenses may be charged in the instant case, even if they are based on the same course of conduct, and punishment may be imposed for each violation. Below we explain the differences in the statutes.

a. A Conviction under § 956(a) Requires Proof That the Defendant Has Joined a Conspiracy to Murder, Maim, or Kidnap, Whereas § 2339A Does Not.

The essence of a conspiracy offense is the agreement,[10] and the objects of the agreements required in §§ 956(a) and 2339A are quite distinct. Section 956(a) requires proof that the defendant agreed with others to murder, kidnap, or maim a person in a foreign country, whereas a material support conspiracy under § 2339A does not. The object of a § 2339A material support conspiracy is the substantive act

[10] *Braverman v. United States*, 317 U.S. 49, 53, 63 S.Ct. 99, 101 (1942).

of providing or concealing material support or resources, not the formation or carrying out of a § 956(a) murder conspiracy. Accordingly, it is not an element of a conspiracy to violate § 2339A that the defendant be a member of the § 956(a) conspiracy or have any interest in the success of that conspiracy. Rather, at most, he need only know or intend that the material support or resources he agrees to provide or conceal will be used to advance, or to prepare to advance, the conspiracy.

Although writing in another context, the Fourth Circuit recently commented on the relationship between § 2339A and § 956(a) when charged as its predicate offense. In *United States v. Khan*, 461 F.3d 477 (4th Cir. 2006), the defendants were charged with both § 2339A and § 956(a) conspiracies. The defendants attacked the § 2339A count not on multiplicity grounds, but on the ground that it was improper to charge the defendants with "conspiracies to conspire." *Id*. at 492. In rejecting this argument, the court noted the different objectives of the two offenses:

> Courts have recognized that one conspiracy can serve as the predicate for another conspiracy when the "[overarching] conspiracy and the predicate conspiracy are distinct offenses with entirely different objectives." . . . [T]he conspiracy to provide material support to terrorism represents a distinct offense with different objectives from the predicate conspiracy to kill a person.

Id. at 493. Although the court did not conduct a *Blockburger* analysis, the court's statement supports the idea that one who joins a § 956(a) conspiracy to murder, maim,

and kidnap is pursuing different objectives than one who conspires to provide support for the conspiracy.

This interpretation gives meaning to Congressional intent in adding § 2339A to the prosecutorial arsenal.[11] The true value of § 2339A is to target and take

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[11] The legislative debate regarding § 2339A reflects that Congress intended to cast a broad net to more easily prosecute individuals who materially support an enumerated offense, but who otherwise might not be liable under traditional conspiracy or aiding and abetting law. Thus, the Congressional debate on the need for a material support law includes the following explanation:

> It makes it easier for our Government to prosecute those persons who provide material support knowing that the support will be used in acts commonly associated with terrorism. It is designed to buttress existing Federal law and to make those who knowingly support these crimes accountable.
>
> * * *
>
> [W]e must somehow or another get at the roots of terrorism by giving our law enforcement authorities the ability to prosecute those persons who, while they may not actually carry out the activities themselves, enable the terrorists to operate here in the United States as well as elsewhere.

142 Cong. Rec. H2178 (daily ed. March 13, 1996) (statement of Rep. Hastings). *See also* H.R. Conf. Rep. No. 103-482 (1994), reprinted in 1994 U.S.C.C.A.N. 398, 475 (April 25, 1994) (explaining that § 2339A was intended to "provide a cause of action against those who knowingly provide assistance" but who would not be liable under general aiding and abetting principles because they do not possess the requisite specific intent).

This explanation suggests a Congressional intent to expand the prosecutorial (continued...)

preventative action against behind-the-scenes players at the earliest stage of the planning process. If an individual who provides material support must also be a member of the underlying § 956(a) conspiracy, then § 2339A would be superfluous – there would be no need for § 2339A, because the defendant could be prosecuted as a member of the underlying § 956(a) conspiracy, even if he is acting merely in a supportive capacity. *See Salinas v. United States*, 522 U.S. 52, 64, 118 S.Ct. 469, 477 (1997) (under general conspiracy law, a conspiracy may be comprised of individuals who perpetrate the crime as well as others who provide support or facilitate the crime, and the facilitators are as guilty as the perpetrators). But, in order to be liable as a § 956(a) conspirator, the defendant must have agreed to join the murder, maiming, and kidnaping conspiracy. A § 2339A conspirator, on the other hand, need only know or intend that his support help the § 956(a) conspiracy; but, he need not be a member of it. *See Linde v. Arab Bank, PLC*, 384 F.Supp.2d 571, 586, n.9 (E.D. N.Y. 2005) (noting that § 2339A requires only knowledge or intent that resources given to terrorists are to be used in the commission of terrorist acts, but does not require the

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[11] (...continued)
arsenal by separately punishing individuals who provide material support without regard to their actions in carrying out crime they ultimately are supporting. It does *not* suggest that Congress intended to exempt individuals who provide material support from concurrent liability for their actions if they additionally join in the predicate criminal act (which is the ultimate result of the court's ruling in this case).

specific intent to commit specific acts of terrorism). In other words, you can have § 2339A liability without participating in the § 956(a) conspiracy. The more remote the defendant is from the group's violent activities, the more difficult it becomes to prove that the defendant was a member of the murder conspiracy. Hence, the need for § 2339A, which was intended to reach actors who might not be within the conspiratorial net of the underlying § 956(a) conspiracy.

It is not unusual for facilitation-type offenses to be distinct offenses from the object crime. Thus, courts have held that the unlawful use of a telephone to facilitate a narcotics offense (21 U.S.C. § 843) and the underlying narcotics offense itself are separate offenses with distinct elements. *See e.g., United States v. Ward*, 696 F.2d 1315, 1319 (11th Cir. 1983); *United States v. Ramos*, 666 F.2d 469 (11th Cir. 1982); *United States v. Martinez*, 950 F.2d 222, 225 (5th Cir. 1991); *United States v. Counter*, 661 F.2d 374, 377 (5th Cir. 1981). Similarly, a violation of the Travel Act (18 U.S.C. § 1952(a)) to facilitate a narcotics offense and the underlying narcotics offense are separate offenses with distinct elements. *See e.g.*, *United States v. Rogers*, 788 F.2d 1472, 1476 (11th Cir. 1986), *overruled on other grounds*, *United States v. Cerceda*, 172 F.3d 806 (11th Cir. 1999); *United States v. Coldwell*, 898 F.2d 1005, 1010 (5th Cir. 1990). Here, as in those cases, the material support statute is a separate offense from its underlying crime.

b. A Conviction Under § 2339A Requires Proof That the Defendant Agreed to Provide or Conceal Material Support or Resources Whereas § 956(a) Does Not.

Just as one need not be a party to the agreement to murder, kidnap, or maim in order to violate the material support provisions, so too one does not have to agree to provide or conceal material support or resources in order to violate the murder conspiracy provisions. Although a person may participate in a § 956(a) murder conspiracy in a supportive capacity,[12] that is not a necessary element of the offense. Rather, § 956(a) prohibits agreements to murder, kidnap, or maim without regard to the particular means chosen by the defendant to participate in the conspiracy.[13] Accordingly, a defendant who joins a § 956(a) conspiracy need not provide support, much less "material support" as that term is defined in § 2339A(b)(1).[14] Such a

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[12] *See Salinas,* 522 U.S. at 64, 118 S.Ct. at 477.

[13] *See United States v. Lanier*, 920 F.2d 887 (11th Cir. 1991) (indictment charging in separate counts the same fraudulent scheme to bill the government for fuel oil that was never delivered, in violation of 18 U.S.C. §§ 286, 371, did not violate *Blockburger*; section 286 required proof of an agreement to defraud "through a particular device" of obtaining payment of a false claim, while § 371 reached agreements to defraud without regard to the "device" employed to achieve the object of the conspiracy).

[14] The term "material support or resources" includes "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, (continued...)

defendant's agreement to the ultimate goals of the murder conspiracy is a manifest necessity for conviction, and therefore, there is no materiality requirement – an agreement with the ultimate § 956(a) objective is required (i.e., the defendant must have the specific intent that the goal be accomplished), but materiality is not. On the other hand, a § 2339A conspirator must know or intend to render "material" support – an essential element of that section.

c. A Conviction under § 956(a) Requires Proof That a Conspiracy to Murder, Maim, or Kidnap Is in Existence, Whereas § 2339A Does Not.

To convict a defendant of a § 956 conspiracy, the government must prove that there actually is such a conspiracy in existence. To convict a defendant of a conspiracy to violate § 2339A, however, there does not need to be an existing conspiracy to commit overseas acts of murder and kidnaping. Rather, § 2339A reaches a defendant who provides material support without regard to whether the predicate offense has yet occurred.

The plain language of § 2339A provides that it is not only a crime to provide material support or resources with knowledge or intent they are to be used "in carrying out" a violation of § 956 (or the other enumerated offenses), but also to do

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[14] (...continued)
except medicine or religious materials." 18 U.S.C. § 2339A(b) (2001).

so knowing or intending that they are to be used "in preparation for" a § 956 conspiracy. The inclusion of "preparation for" the commission of the object crimes suggests that the statute applies to future violations – violations that are in the preparatory phase. Likewise, the language that the support is "to be used" for the specified offense connotes an orientation towards the future, such that providing material support "to be used . . . in carrying out" a violation does not inherently demand that the violation is ongoing at the time of the conspiracy to provide material support. Thus, the plain language of § 2339A permits prosecution of a defendant who provides material support to the formation of a murder conspiracy.[15] In other words, the enumerated § 956 conspiracy need not exist at the time the material support is provided. Accordingly, a § 2339A defendant can be liable if he knows or intends to facilitate the formation of a conspiratorial agreement to murder, maim, or kidnap.

Under this interpretation, the material support can be provided in anticipation of such a conspiracy being formed.[16] Thus, it would be sufficient, for example, if

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[15] *See e.g., United States v. Veal*, 153 F.3d 1233, 1253 (11th Cir. 1998) (in construing a statute, the Court first looks to the plain language of the statute; the Court deems the plain language of a statute conclusive as clearly expressing legislative intent, unless the resulting application would be "absurd" or "internal inconsistencies" must be resolved.).

[16] In such a case, § 2339A liability would be similar to liability for aiding and abetting a conspiracy, with the distinction that an aider/abettor must intend to (continued...)

several defendants raised funds to give to a conduit organization, knowing or intending that the funds would be used for *future* conspiracies to commit overseas acts of murder and kidnaping. In that situation, no actual § 956 conspiracy would exist, yet the material-support conspirators could be prosecuted for conspiring to violate § 2339A. Accordingly, there is no legal requirement to prove that a particular § 956 conspiracy exists in order to convict a defendant under § 2339A; what is needed is the provision of (or the agreement to provide) material support.[17]

On the other hand, a conviction under § 956 plainly requires the existence of the conspiracy to murder, maim or kidnap. Because a conviction under § 2339A does

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[16] (...continued)
facilitate the enumerated offense whereas the § 2339A actor need only know (but not necessarily intend) that his support will facilitate the enumerated offense.

[17] We note that in defining the elements of a substantive § 2339A offense, the *Sattar* III court stated that the government must prove that the enumerated § 956 conspiracy to kill have existed. 395 F.Supp.2d at 93. The *Sattar* III opinion does not discuss this argument in terms of the elemental *Blockburger* analysis, however, and does not represent a correct statement of the law in this regard. Likewise, the district court in *United States v. Awan*, 2006 WL 3050887 *10 (E.D.N.Y. Oct. 26, 2006), stated that "the existence of a § 956 conspiracy is an element the government must prove in order to establish an offense under § 2339A." The *Awan* court decided the issue in the context of rejecting a duplicity challenge, but it does not appear that the court confronted the argument raised here that the plain language of § 2339A does not require the proof that the predicate act have occurred (as opposed to proof that the material support was directed toward supporting the specified predicate act).

not require the conspiracy to yet be in existence, the offenses have distinct elements and are different offenses within the meaning of *Blockburger*.

d. § 956(a) Is Not a Lesser Included Offense of § 2339A.

For the same reasons that the statutes pass the *Blockburger* test (i.e., because they have different elements), § 956(a) is not a lesser included offense of § 2339A as appellees argued in the district court. A lesser included offense is one that is proven *ipso facto* by proof of the greater: one offense is a lesser included offense of another when the elements of the lesser offense are a subset of the greater offense so that it is impossible to commit the greater offense without also committing the lesser offense. *See Schmuck v. United States*, 489 U.S. 705, 716-22, 109 S. Ct. 1443, 1450-53 (1989); *Carter v. United States*, 530 U.S. 255, 260-61, 120 S. Ct. 2159, 2164 (2000). In other words, the lesser offense "requires no proof beyond that which is required for conviction of the greater." *Brown v. Ohio*, 432 U.S. 161, 168, 97 S.Ct. 2221, 2226-27 (1977).[18]

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[18] *See Williams*, 78 F.3d at 1516 (holding that the state crime of assault is completely subsumed within the crime of burglary with assault; because there is no element of assault that need not be proven to establish burglary with assault, the Double Jeopardy Clause does not authorize cumulative convictions or punishment). *See also Dixon*, 509 U.S. at 698, 113 S.Ct. at 2857 (describing the criminal offense underlying the contempt charges at issue there as a "'species of lesser-included offense'" and ultimately concluding that the contempt prosecution precluded, on double jeopardy grounds, a subsequent prosecution based on the same underlying (continued...)

But merely because one offense is a predicate crime for another does not make it a lesser-included offense. The bottom line is whether the offenses meet the *Blockburger* test. If they do, then one is not a lesser included of the other. If they do not, the opposite conclusion may be true.[19]

As we have already established, § 956(a) and § 2339A have distinct elements. Moreover, it is counterintuitive to suggest that the murder conspiracy charge (which carries a life sentence) is a lesser included offense of the material support charge (which carries a 15-year penalty). A lesser included offense must be both *lesser* and *included*: the included offense must have a subset of the elements of the greater offense as well as a lighter penalty. *Carter*, 530 U.S. at 261 n.2, 120 S.Ct. at 2164 n.2 (noting that"lesser offense" means "lesser in terms of magnitude of punishment" and a "lesser included offense" has elements which are a subset of the elements of the charged offense). *See also Rutledge v. United States*, 517 U.S. 292, 300, 116 S.Ct. 1241, 1247 (1996) (noting that the CCE offense was the "greater" offense both in

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[18] (...continued)
criminal offense as used in the contempt prosecution) (quoted authority omitted).

[19] *See e.g., Rutledge v. United States*, 517 U.S. 292, 300, 116 S.Ct. 1241, 1247 (1996) (holding that a conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846 is a lesser included offense of a continuing criminal enterprise ("CCE") under 21 U.S.C. § 848 because "a straightforward application of the *Blockburger* test leads to the conclusion that conspiracy as defined in § 846 does not define a different offense from the CCE offense defined in § 848").

terms of elements and penalties). Therefore, although § 956(a) is an enumerated offense for § 2339A, it is not a lesser included offense.[20]

2. Counts 1 and 3

The district court also erred in concluding that Counts 1 and 3 are multiplicitous, because a conspiracy and a substantive offense are always distinct:

> Traditionally the law has considered conspiracy and the completed substantive offense to be separate crimes. Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act. Unlike some crimes that arise in a single transaction, the conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act. Thus, it is well recognized that in most cases separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of that end. Indeed, the Court has even held that the conspiracy can be punished more harshly than the accomplishment of its purpose.

Iannelli v. United States, 420 U.S. 770, 777-78, 95 S.Ct. 1284, 1289-90 (1975) (internal citations omitted); *see Pinkerton v. United States,* 328 U.S. 640, 643, 66 S.Ct. 1180, 1182 (1946) ("[T]he commission of a substantive offense and a conspiracy . . . are separate and distinct offenses . . . and the plea of double jeopardy is no defense to a conviction for both offenses."); *Garrett v. United States*, 471 U.S. 773, 105 S.Ct. 2407 (1985) (for double jeopardy purposes, the substantive, predicate

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[20] *See e.g.*, *United States v. Rosenthal*, 793 F.2d 1214, 1234 (11th Cir. 1986) (a RICO conspiracy that includes a drug conspiracy as its predicate offense is a distinct offense from the predicate drug conspiracy, and both are subject to separate punishment), *modified on other grounds*, 801 F.2d 378 (11th Cir. 1986).

offenses, are separate offenses from the overarching continuing criminal enterprise offense). The rationale is that a conspiracy offense creates a danger distinct in character from the substantive offense which is its object. *Callanan v. United States*, 364 U.S. 587, 594, 81 S.Ct. 321, 325 (1961).

This rule is consistent with the *Blockburger* test because a conspiracy and a substantive offense each contains an element the other does not. The conspiracy, unlike the substantive offense, requires proof of an illegal agreement, and the substantive offense, unlike the conspiracy, requires proof that a choate crime actually was committed. Thus, in *Sattar* II, the court rejected the defendant's argument that the § 371 conspiracy count – which had as its object the provision of material support in violation of § 2339A – was multiplicitous of the substantive § 2339A count. *Sattar* II, 314 F.Supp.2d at 306 ("It is well established that a conspiracy and the substantive offense are separate crimes that may be charged separately.").

In the instant case, the district court did *not* find that Count 2 (the § 371 material support conspiracy) was multiplicitous of Count 3 (the substantive material support charge), which was the issue in *Sattar* II. Rather, the court concluded that the § 956(a) murder conspiracy was multiplicitous of the § 2339A substantive material

support offense. Given the undeniable distinction between these statutes, the district court's decision plainly was incorrect.[21]

C. The District Court's Fact-based Analysis Was Improper Because the Statutes at Issue Satisfy *Blockburger*, and Therefore, it Is Irrelevant That the Counts May Involve the Same Conspiracy.

The district court erred in focusing on the similarity of facts amongst the three counts rather than relying on a strict application of *Blockburger*. The district court's analysis was premised upon the *Marable* factors (discussed below), which are used to determine when there is more than one conspiracy that would permit the defendant to be convicted and punished for separate violations of the *same* statute. Because §§ 956(a) and 2339A are distinct offenses that meet the *Blockburger* test, the district court should have concluded that the indictment is not multiplicitous. Instead, the court erroneously employed a test applicable only where the statutes *fail* the *Blockburger* test (either because the counts charge the identical statutory offense or one count is a lesser included offense of another). In other words, even assuming the charges related to the same, single conspiracy, that conspiracy properly may form the basis of separate offenses under different statutes without violating double jeopardy.

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[21] At the hearing on the government's motion to reconsider, counsel for Padilla acknowledged that Counts 1 and 3 are *not* multiplicitous (DE 558:35). Defense counsel for Hassoun and Jayyousi disagreed (DE 558:39-40, 42).

In *Marable*, the defendant argued that the Double Jeopardy Clause barred his conviction for conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. § 846, which had followed an earlier conviction for conspiracy to possess and distribute heroin under § 846. The court explained that since both prosecutions were brought under the same statute, in order to determine whether the two cases involved distinct conspiracies it would compare the conspiracies according to:

> (1) time, (2) persons acting as co-conspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the government or any other description of the offense charged which indicates the nature and scope of the activity which the government sought to punish in each case, and (5) places where the events alleged as part of the conspiracy took place.

Id. at 154.

Likewise, the *Sattar* II court undertook a factual analysis in response to a multiplicity challenge to determine whether Count 1, which charged a conspiracy to defraud the United States in violation of § 371, was the same conspiracy as alleged in Count 4, which charged a conspiracy in violation of § 371 to provide and conceal material support under § 2339A to be used in preparation for and in carrying out a § 956(a) conspiracy (charged in Count 2). *Sattar* II, 314 F.Supp.2d at 286, 307. After analyzing the facts, the court held that the two conspiracy counts were based

on separate agreements, and therefore the counts were not multiplicitous even though they both charged § 371 conspiracy offenses. *Id*. at 308.

Similarly, this Court has applied the *Marable* fact-based inquiry where the criminal statutes charged were the *same* or *lesser included* offenses. *See United States v. Harvey*, 78 F.3d 501, 504-06 (11th Cir. 1996) (applying fact-bound inquiry where issue involved the subsequent prosecution of a CCE offense under § 848 after the defendant had been convicted of the *lesser included* drug conspiracy brought under § 846); *United States v. Nyhuis*, 8 F.3d 731, 735-38 (11th Cir. 1993) (same); *United States v. Benefield*, 874 F.2d 1503, 1506-08 (11th Cir. 1989) (applying fact-bound inquiry where the multiplicity issue involved separate narcotics trafficking conspiracy indictments brought under the *same* statute, 21 U.S.C. § 846, rather than separate conspiracy counts brought under *different* statutes). *See also Braverman v. United States*, 317 U.S. 49, 53, 63 S.Ct. 99, 101 (1942) (Court relied on a factual analysis in considering indictment charging defendant in separate counts with violating the *same* conspiracy statute, but with different objects – one count charged a § 371 conspiracy to violate one provision of the internal revenue laws, and a second count charged a § 371 conspiracy to violate another provision of the internal revenue

laws). However, where the indictment does not invoke the same statute or a lesser included offense, *Marable* is inapposite.[22]

Thus, in *United States v. Mulherin*, 710 F.2d 731 (11th Cir. 1983), this Court concluded that *Marable* was irrelevant to a conspiracy charged under distinct statutes. There, several defendants claimed that they could not be tried on a charge under 18 U.S.C. § 371 that they conspired to violate provisions of the National Firearms Act in view of their earlier acquittals of a drug conspiracy charge under 21 U.S.C. § 846, and they sought to have their double jeopardy argument evaluated under *Marable*. This Court rejected the defendants' reliance upon *Marable*. The Court explained that the conspiracies arose out of separate statutes, one of which – 21 U.S.C. § 846 – did not require proof of an overt act, while the other – 18 U.S.C. § 371 – did. *Id.* at 739.

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[22] We note that even in the Fifth Circuit, *Marable* has been limited to conspiracy offenses involving the identical statutes or lesser included offenses. *See e.g., United States v. Fisher*, 106 F.3d 622, 633 n.11 (5th Cir. 1997) (noting that the *Marable* test had been discredited, and applying the *Blockburger* test instead), *abrogated on other grounds, Ohler v. United States*, 529 U.S. 753, 755, 120 S.Ct. 1851, 1853 (2000); *United States v. Delgado*, 256 F.3d 264, 272 n.5 (5th Cir. 2001) (noting that, in a case involving subsequent prosecution for the identical statutory narcotics trafficking offense, *Marable* remains a viable method for determining whether the prosecutions involved the same or distinct conspiracies; the former would violate double jeopardy while the latter would not).

The Court added: "That much of the same evidence served "double duty" in proving the two offenses charged is of no consequence." *Id.* at 740.[23]

Accordingly, where there is a *single* conspiracy and the charged offenses meet the *Blockburger* test because they involve proof of distinct elements, there is no multiplicity problem.[24] Where separate conspiracy charges are brought under the same statute or as a lesser included offense, the *Blockburger* test, which compares the elements of different statutes, obviously does not apply (because the result of the test would, of course, be that the elements are the same),[25] and the applicable inquiry is whether there were two separate agreements to violate the same statute.[26]

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[23] *See e.g., Albernaz*, 450 U.S. at 336-37, 101 S.Ct. at 1140-41 (upholding the defendants' dual conviction under two specific conspiracy statutes – 21 U.S.C. §§ 846 (possession with intent to distribute narcotics) and 963 (importation of narcotics – even though the evidence established *only one conspiracy*); *Lanier*, 920 F.2d at 893 ("If each conspiracy statute requires an element not required by the other, then we should presume that Congress intended the two statutes to address two different crimes, even though there is *only one conspiracy*.") (emphasis added).

[24] The *Marable* Court itself recognized this proposition. *Marable*, 578 F.2d at 154 n.1 (noting that cases involving conspiracy offenses brought under separate conspiracy statutes are permissible).

[25] *See United States v. Loyd*, 743 F.2d 1555, 1562 (11th Cir. 1984) (noting that the *Blockburger* test is insufficient to analyze a double jeopardy challenge to successive conspiracy charges brought under the same statute).

[26] *See United States v. Broce*, 488 U.S. 563, 570-71, 109 S.Ct. 757, 763 (1989) ("A single agreement to commit several crimes constitutes one conspiracy,"
(continued...)

Following this reasoning, in the instant case, *Marable* does not apply because Counts 1 and 2 involve neither the identical statute nor a lesser included offense. Count 1, which charges § 956(a) murder conspiracy does not charge the identical statute as Count 2, which charges § 371 conspiracy to provide material support (a § 2339A object), and Count 1 is not a lesser included offense of Count 2. Because the statutes pass the *Blockburger* test, the analysis ends, and *Marable* is inapposite. Therefore, the district court erred in relying on *Marable* to find that the indictment is multiplicitous.

D. The District Court's Remedy for the Purportedly Multiplicitous Counts Was Inappropriate.

Moreover, even if the counts were multiplicitous, it was premature for the court to dismiss Count 1. Rather, the proper procedure was to allow the purportedly multiplicitous counts to go to the jury, and if the jury convicted on more than one multiplicitous count, to enter judgment on only one count.

Two dangers may arise from a multiplicitous indictment. The "principal danger" is that the defendant may receive multiple sentences for a single offense in violation of the Double Jeopardy Clause. *United States v. Smith*, 231 F.3d 800, 815

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[26] (...continued)
but "multiple agreements to commit separate crimes constitute multiple conspiracies.").

(11th Cir. 2000); *United States v. Langford*, 946 F.2d 798, 804 (11th Cir. 1991). In addition, a multiplicitous indictment may unfairly prejudice a defendant by suggesting that he has committed more than one offense. *Langford,* 946 F.2d at 802. In this case, the government should be permitted to proceed to trial on the indictment as charged because neither of these dangers exist.

First, double jeopardy is not violated by the mere *charging* of multiplicitous counts, and the government may proceed with prosecution simultaneously under two statutes even if only one conviction and punishment may be had. In such a case, the defendant's remedy is to receive only one punishment in the event that the jury returns guilty verdicts on both counts. *See Ball v. United States*, 470 U.S. 856, 861, 865, 105 S.Ct. 1673, 1671, 1674 (1985) (notwithstanding the conclusion that two firearms statutes (receiving and possessing) constituted the "same offense" and could not therefore be punished separately, "the Government may seek a multiple-count indictment against" the defendant and allow a properly instructed jury to consider both offenses); *Ohio v. Johnson*, 467 U.S. 493, 500, 104 S.Ct. 2536, 2541 (1984) (Double Jeopardy Clause does not prohibit prosecution of defendant, in a single case, under multiple statutes that constitute same offense); *United States v. Josephberg*, 459 F.3d 350, 355 (2d Cir. 2006) ("Where there has been no prior conviction or acquittal, 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.").[27] Therefore, the district court erred in holding that merely "[c]harging the Defendants with a single offense multiple times is violative of the Double Jeopardy Clause," and accordingly, the court erred in dismissing Count 1 (*see* DE 535 at 7). Because the district court premised its dismissal order on an error of law, the court abused its discretion in ordering dismissal. *See Arce v. Garcia*, 434 F.3d 1254, 1260 (11th Cir. 2006) ("A district court abuses its discretion when it misapplies the law in reaching its decision").

Second, this is not a case in which appellees are prejudiced merely by the proliferation of counts. *See United States v. Hearod*, 499 F.2d 1003, 1005 (5th Cir. 1974); *United States v. Kimbrough*, 69 F.3d 723, 730 (5th Cir. 1995). The district court made no finding that appellees would be prejudiced as a result of juror confusion by proceeding to trial on Counts 1 through 3, and there is no factual or legal basis in the record to support such a finding. The indictment in this case

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[27] This approach is proper because it recognizes the long-standing principle that the government has broad discretion regarding the conduct of criminal proceedings, including its power to select the charges to be brought in a particular case. *See generally*, *United States v. Goodwin*, 457 U.S. 368, 382, 102 S.Ct. 2485, 2493 (1982). Consequently, the government properly may elect to craft an indictment charging "a single crime in a variety of forms to avoid a fatal variance of the evidence" at trial. *United States v. Colson*, 662 F.2d 1389, 1392 (11th Cir. 1981); *United States v. Lentz*, 624 F.2d 1280, 1289 (5th Cir. 1980).

charges only a handful of counts; Counts 1 through 3 charge the essence of the offenses, and the remaining counts charge Hassoun alone with obstruction and perjury offenses. Moreover, because Counts 1 through 3 reallege the same overt acts and factual information, the jury could not become confused as to whether appellees had committed multiple, different criminal acts, as opposed to having violated separate criminal statutes based on those acts. *Hearod*, 499 F.2d at 1005. Additionally, the same evidence would be admissible to prove all three counts. Thus, there could be no prejudicial spillover of evidence that might confuse the jury into believing that appellees participated in separate incidents.[28] Even so, in the rare case in which a large number of multiplicitous counts creates the risk of a prejudicial compromise verdict, at most it "might justify requiring the government to elect among

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[28] *See United States v. Lilly*, 983 F.2d 300, 305-06 (1st Cir. 1992) (no prejudicial juror confusion when same evidence would have been introduced to prove two multiplicitous charges); *United States v. Nash*, 115 F.3d 1431, 1438 (9th Cir. 1997) (defendant not entitled to new trial based on conviction on multiplicitous bank fraud counts because government would have introduced exactly same evidence had indictment contained only one bank fraud count); *United States v. Colton*, 231 F.3d 890, 910 (4th Cir. 2000). *See also Langford,* 946 F.2d at 802 (noting the possibility of prejudice but rejecting the defendant's argument that he was unfairly prejudiced by the multiplicitous charging of three counts rather than one where the same evidence would have been admissible in a prosecution on a single count); *United States v. Pierce*, 733 F.2d 1474, 1475 (11th Cir. 1984) (proceeding to trial on two multiplicitous counts did not threaten to generate adverse psychological effect on jury); *United States v. Smith*, 591 F.2d 1105, 1108 (5th Cir. 1979) (defendant not prejudiced by mere charging of single gun count in four separate counts).

or consolidate counts at trial, [but] it does not justify dismissing well-pleaded counts in an indictment." *United States v. Webber*, 255 F.3d 523, 527 (8th Cir. 2001).

Under similar circumstances, the Second Circuit reversed the pretrial dismissal of allegedly multiplicitous counts in *United States v. Ketchum*, 320 F.2d 3, 8 (2d Cir. 1963),[29] and, more recently, in *Josephberg*, 459 F.3d 350.[30] In *Ketchum*, the Second Circuit concluded that pretrial dismissal of allegedly multiplicitous counts by a district court was inappropriate. In that case, the defendant was charged with, among other counts, eight counts of illegally accepting payments in relation to two government contracts. The district court dismissed seven of those counts before trial on the defendant's claim that the counts were multiplicitous.[31] On appeal, the Second Circuit reversed, concluding that the district court's pretrial dismissal of the counts

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[29] Citing *Ketchum*, the Eighth Circuit in *United States v. Webber*, 255 F.3d 523, 527 (8th Cir. 2001), also concluded that it would be inappropriate for a district court to order certain counts of an indictment dismissed before trial based on a multiplicity challenge.

[30] Whether it is premature for a district court to dismiss allegedly multiplicitous counts of an indictment before trial appears to be an issue of first impression in this Circuit.

[31] The district court in *Ketchum* indicated that it was dismissing the counts as "duplicitous" but it is clear that the use of that term was mistaken. *See United States v. Schlei*, 122 F.3d 944, 976 (11th Cir. 1997) (duplicity refers to charging two separate and distinct offenses in one count). It is apparent that the district court in *Ketchum* actually intended to dismiss the counts as multiplicitous.

was not an appropriate remedy. *Id*. Instead, it left open the possibility that, in some limited circumstances, the government might be called on during trial or before sentencing to elect to dismiss certain counts found to be multiplicitous. *Id.*

More recently, in *Josephberg*, the Second Circuit concluded that a district court's dismissal of allegedly multiplicitous counts of an indictment before trial was "at best premature." 459 F.3d at 355. In that case, the defendant was charged with certain tax evasion charges, as well as a charge for obstructing the administration of tax laws. Before trial, the defendant moved to dismiss the obstruction count as multiplicitous of the tax evasion counts. The district court granted the motion, finding that the indictment did not pass the *Blockberger* test. The government filed an interlocutory appeal from the dismissal order.

Without reaching the issue of whether the obstruction count indeed was multiplicitous of the tax evasion counts, the Second Circuit reversed the district court's dismissal order as premature. *Id*. The court concluded that any multiplicity issues could be resolved following the jury's verdict and before sentencing, as the double jeopardy issue would not be triggered unless the jury found the defendant guilty of more than one count that was allegedly multiplicitous of another count. *Id*. In so holding, the *Josephberg* court relied exclusively on Supreme Court precedent. *See id*. at 355 (citing *Ball v. United States*, 470 U.S. 856, 860, 105 S. Ct. 1668, 1671

(1985); *Ohio v. Johnson*, 467 U.S. 493, 500, 104 S. Ct. 2536, 2541 (1984); *United States v. Batchelder*, 442 U.S. 114, 124-25, 99 S. Ct. 2198, 2204 (1979)). The court noted that this precedent plainly permits the government to choose what charges to file and emphasized that "'a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution.'" *Josephberg,* 459 F.3d at 355 (quoting *Batchelder*, 442 U.S. at 125, 99 S. Ct. at 2205).

Based on the Second Circuit's reasoning in *Ketchum* and *Josephberg*, it was premature under the circumstances of this case for the district court to dismiss Count 1 of the indictment before trial, even if the district court were correct that the indictment is multiplicitous. Because appellees' double jeopardy protections are not implicated at this stage of the proceedings, and in the absence of any finding or proof of potential juror confusion, neither dismissal nor pretrial election are appropriate remedies, even if the Court disagrees with our multiplicity analysis. Instead, the trial should proceed on all charges, leaving further resolution of any multiplicity claims until after the jury's verdict.

Conclusion

For the foregoing reasons, it is respectfully submitted that the order of the district court dismissing Count 1 of the superseding indictment should be reversed.

Respectfully submitted,

R. Alexander Acosta
United States Attorney

By: _____
Lisa Tobin Rubio
Assistant United States Attorney

Anne R. Schultz
Chief, Appellate Division

Of Counsel

Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,344 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I hereby certify that an original and 6 copies of the foregoing Brief for the United States were mailed to the Court of Appeals via Federal Express this 20th day of November 2006, and that, on the same day, the foregoing brief was electronically uploaded to the Eleventh Circuit Court of Appeals' Internet web site at www.ca11.uscourts.gov (see attached Brief Upload Result Page), and mailed via Federal Express and electronic mail to:

Kenneth M. Swartz, Esq. Swartz & Lenamon New World Tower, Suite 2100 100 North Biscayne Boulevard Miami, Florida 33132 **ken@swartzlawyer.com** Jeanne Baker, Esq. Grove Forest Plaza, Suite 202 2937 S.W. 27th Avenue Miami, Florida 33133-3703 **jbaker@fourdefenders.com** Counsel for Defendant Adham Amin Hassoun William W. Swor, Esq. 645 Griswold Street, Suite 3060 Detroit, Michigan 48226 **wwswor@wwnet.net** Counsel for Defendant Kifah Wael Jayyousi	Michael Caruso, Esq. Anthony J. Natale, Esq. Orlando do Campo, Esq. Federal Public Defender's Office 150 West Flagler Street, Suite 1700 Miami, Florida 33130 **anthony_natale@fd.org** **michael_caruso@fd.org** **orlando_do_compo@fd.org** Andrew G. Patel, Esq. 111 Broadway, Suite 1305 New York, New York 10006 **agpatel@aol.com** Counsel for Defendant Jose Padilla

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Lisa Tobin Rubio
Assistant United States Attorney