

1 [COUNSEL LISTED ON SIGNATURE PAGE]

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

HARRISON ULRICH JACK; LO CHA THAO
aka Locha Thao; LO THAO, aka President Lo
Thao, aka Xia Lo Thao; YOUA TRUE VANG,
aka Joseph Youa Vang, aka Colonel Youa True
Vang; HUE VANG, aka Chue Hue Vang;
CHONG YANG THAO; SENG VUE; CHUE LO;
NHIA KAO VANG; DAVID VANG, aka Dang
Vang; JERRY YANG, aka Thao Nou Yang; and
THOMAS YANG, aka Pao Yang

Defendants.

Case No. 2:07-CR-0266 FCD

**DEFENDANTS' MOTION TO
COMPEL ELECTION BETWEEN
MULTIPLICITOUS COUNTS**

Judge: Hon. Frank C. Damrell, Jr.
Date: September 20, 2010
Time: 11:00 a.m.

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NOTICE OF MOTION AND MOTION

TO: BENJAMIN B. WAGNER, U.S. ATTORNEY, S. ROBERT TICE-RASKIN,
ELLEN V. ENDRIZZI, AND JILL THOMAS, ASSISTANT U.S. ATTORNEYS:

PLEASE TAKE NOTICE that on September 20, 2010, at 11:00 a.m., or as soon thereafter as the matter may be heard, Defendants jointly, through counsel, will and hereby do move this Court, pursuant to Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure, to compel an election between Count Three (18 U.S.C. § 2332g) and Count Four (18 U.S.C. §§ 844(d), (n)) of the First Superseding Indictment (the “Superseding Indictment”), and between the Neutrality Act violation alleged in Count One (18 U.S.C. § 960) and Count Two (18 U.S.C. § 956) of the Superseding Indictment, because the conspiracies charged in those Counts are multiplicitous. All Defendants have joined this Motion.

This Motion is based on this Notice of Motion and the attached Memorandum of Points and Authorities, the files and records in this case, and any other evidence or argument that may properly be presented to the Court.

1 **I. INTRODUCTION**

2 The Court should require the government to elect between Counts Three and Four, and
3 between the Neutrality Act violation alleged in Count One and Count Two, because the
4 conspiracies charged in those Counts are multiplicitous.

5 Despite alleging a single conspiratorial agreement, the Superseding Indictment attempts to
6 divide that agreement into several conspiracies, making it appear as though Defendants
7 committed numerous crimes and grossly inflating the punishment they could face if found guilty
8 by a jury. However, Counts Three and Four are multiplicitous because Count Three, which
9 charges a conspiracy to receive and possess a specific type of explosive device, does not require
10 proof of any element that is not also a part of the violation charged in Count Four, which charges
11 a conspiracy to receive and transport explosives generally. Similarly, Count Two, charging a
12 conspiracy to kill and maim people in a foreign country and to damage property in a foreign
13 country with which the United States is “at peace,” does not require proof of any element that is
14 not also required to prove the alleged conspiracy under Count One to violate the Neutrality Act,
15 which effectively prohibits a specific type of conspiracy to kill and maim people and to damage
16 property (a military expedition or enterprise) in a foreign country with which the United States is
17 “at peace.” As such, Defendants may not be punished for both Counts Three and Four, or for
18 both the Neutrality Act violation alleged in Count One and Count Two.

19 Furthermore, because allowing the government to prosecute the multiplicitous charges in
20 the Superseding Indictment would severely undermine Defendants’ right to a fair trial by falsely
21 suggesting to the jury that Defendants have committed numerous crimes based on the same
22 conduct, the Court should exercise its discretion to compel the government to elect between the
23 multiplicitous charges.

24 **II. THE SUPERSEDING INDICTMENT**

25 The Superseding Indictment alleges that Defendants participated in a plot to purchase and
26 acquire weapons and supply them to insurgents in Laos to overthrow the government of Laos.
27 (*See* Superseding Indictment at 8, filed on Sept. 17, 2009 [Docket # 460].) Based on a single
28 alleged course of conduct, the Superseding Indictment charges Defendants with five Counts.

1 Relevant to this Motion, Count One charges Defendants with conspiracy to violate the Neutrality
2 Act, in violation of 18 U.S.C. §§ 371, 960; Count Two charges Defendants with conspiracy to kill
3 and maim individuals in a foreign country, and to damage and destroy property in a foreign
4 country with which the United States is “at peace,” in violation of 18 U.S.C. § 956; Count Three
5 charges all Defendants except Seng Vue, Dang Vang, and Thomas Yang with conspiracy to
6 receive and possess an explosive and incendiary rocket and missile designed to destroy aircraft, in
7 violation of 18 U.S.C. § 2332g; and Count Four charges Defendants with conspiracy to receive
8 and transport explosives in interstate and foreign commerce, in violation of 18 U.S.C. §§ 844(d),
9 (n). Each of the above Counts is based on the factual allegations set forth in paragraphs 1 through
10 20 and 23 through 24 of the Superseding Indictment, which are incorporated by reference into
11 each Count. (*See* Superseding Indictment at 2-21, 22, 23, 25.)

12 **III. ARGUMENT**

13 **A. The Superseding Indictment Charges Multiplicitous Counts.**

14 An indictment is multiplicitous when it charges multiple counts for a single offense,
15 threatening a defendant with multiple punishments for one crime and thus raising double jeopardy
16 concerns. *United States v. Stewart*, 420 F.3d 1007, 1012 (9th Cir. 2005). The test for
17 determining whether separate counts charge multiple offenses or only one is whether “each
18 separately violated statutory provision requires proof of an additional fact which the other does
19 not.” *Id.* (citation omitted); *see also Blockburger v. United States*, 284 U.S. 299, 304 (1932).
20 Under this test — known as the *Blockburger* test — an indictment is found to be multiplicitous
21 typically because one charged offense is a lesser included offense of another charged offense.
22 *See Rutledge v. United States*, 517 U.S. 292, 297 (1996). In *Rutledge*, for example, the Supreme
23 Court considered whether a conspiracy under 21 U.S.C. § 846 was a lesser included offense of a
24 continuing criminal enterprise under 21 U.S.C. § 848. The Court found it “perfectly clear that the
25 [continuing criminal enterprise] offense requires proof of a number of elements that need not be
26 established in a conspiracy case.” *Id.* at 298. However, the Court explained that “[t]he
27 *Blockburger* test requires us to consider whether the converse is also true — whether the § 846
28 conspiracy offense requires proof of any element that is not a part of the [continuing criminal

1 enterprise] offense.” *Rutledge*, 517 U.S. at 298. The Court concluded that it did not, holding that
2 the “in concert” element of the continuing criminal enterprise requires proof of a conspiracy that
3 would automatically violate § 846. *Id.* at 300.

4 Here, application of the *Blockburger* test demonstrates that Count Three is a lesser
5 included offense of Count Four, and that Count Two is a lesser included offense of the conspiracy
6 to violate the Neutrality Act charged in Count One.

7 **1. Counts Three And Four Are Multiplicitous.**

8 Count Three alleges that Defendants conspired with each other and others to knowingly
9 acquire, transfer, receive, possess, and export an explosive and incendiary rocket and missile in
10 interstate and foreign commerce and outside of the United States by a national of the United
11 States, in violation of 18 U.S.C. § 2332g. (Superseding Indictment at 24.) Section 2332g(a)
12 provides in pertinent part:

- 13 (1) . . . it shall be unlawful for any person to knowingly produce,
14 construct, otherwise acquire, transfer directly or indirectly, receive,
15 possess, import, export, or use, or possess and threaten to use—
16 (A) an explosive or incendiary rocket or missile that is guided by
17 any system designed to enable the rocket or missile to—
18 (i) seek or proceed toward energy radiated or reflected from an
19 aircraft or toward an image locating an aircraft; or
20 (ii) otherwise direct or guide the rocket or missile to an
21 aircraft;
22 (B) any device designed or intended to launch or guide a rocket
23 or missile described in subparagraph (A)

19 18 U.S.C. § 2332g(a). Section 2332g(b) states in pertinent part:

- 20 Conduct prohibited by subsection (a) is within the jurisdiction of
21 the United States if—
22 (1) the offense occurs in or affects interstate or foreign commerce;
23 (2) the offense occurs outside of the United States and is committed
24 by a national of the United States; . . . or
25 (5) an offender aids or abets any person over whom jurisdiction
26 exists under this subsection in committing an offense under this
27 section or conspires with any person over whom jurisdiction exists
28 under this subsection to commit an offense under this section.

25 18 U.S.C. § 2332g(b).

26 Count Four alleges that Defendants conspired with each other and others to receive and
27 transport explosives in interstate and foreign commerce with the knowledge and intent that the
28

1 explosives would be used to kill, injure, and intimidate any individual, and to unlawfully damage
2 or destroy property, in violation of 18 U.S.C. §§ 844(d) and (n). (Superseding Indictment at 25-
3 26.) Section 844(d) provides in part:

4 Whoever transports or receives, or attempts to transport or receive,
5 in interstate or foreign commerce any explosive with the knowledge
6 or intent that it will be used to kill, injure, or intimidate any
7 individual or unlawfully to damage or destroy any building, vehicle,
 or other real or personal property, shall be imprisoned for not more
 than ten years, or fined under this title, or both

8 18 U.S.C. § 844(d). Section 844(n) makes it unlawful to conspire to commit an offense under
9 § 844(d). 18 U.S.C. § 844(n).¹

10 Here, while the § 844 violation charged in Count Four requires proof of an element that
11 need not be established for the § 2332g violation charged in Count Three,² the converse is not
12 also true. Both statutory violations require proof of a conspiracy.³ The “explosive[s]” regulated
13 by § 844 include the “explosive or incendiary rocket[s] or missile[s]” regulated by § 2332g. *See*
14 18 U.S.C. § 844(j).⁴ Proof of receipt in interstate or foreign commerce under § 844 would

15 ¹ Section 844(n) provides in pertinent part: “Except as otherwise provided in this section, a
16 person who conspires to commit any offense defined in this chapter [18 USCS §§ 841 et seq.]
17 shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed
18 for the offense the commission of which was the object of the conspiracy.” 18 U.S.C. § 844(n).

19 ² For a conviction under §§ 844(d), (n), the government must prove knowledge and intent that the
20 explosives would be used to kill, injure, and intimidate, and to damage and destroy property,
21 while § 2332g requires proof that Defendants acted “knowingly.”

22 ³ *Compare* 18 U.S.C. § 2332g(b)(5) (“Conduct prohibited by subsection (a) is within the
23 jurisdiction of the United States if . . . an offender . . . conspires with any person over whom
24 jurisdiction exists under this subsection to commit an offense under this section.”) *with* 18 U.S.C.
25 § 844(n) (“a person who conspires to commit any offense defined in this chapter [18 USCS §§
26 841 et seq.] shall be subject to the same penalties (other than the penalty of death) as the penalties
27 prescribed for the offense the commission of which was the object of the conspiracy”).)

28 ⁴ Section 844(j) defines the term “explosive” as follows:

 For the purposes of subsections (d), (e), (f), (g), (h), and (i) of this
 section and section 842(p) [18 USCS § 842(p)], the term
 “explosive” means gunpowders, powders used for blasting, all
 forms of high explosives, blasting materials, fuzes (other than
 electric circuit breakers), detonators, and other detonating agents,
 smokeless powders, other explosive or incendiary devices within
 the meaning of paragraph (5) of section 232 of this title [18 USCS §
 232], and any chemical compounds, mechanical mixture, or device
 that contains any oxidizing and combustible units, or other

(Footnote continues on next page.)

1 necessarily entail proof of acquisition, transfer, receipt, and possession in or affecting interstate or
2 foreign commerce under § 2332g. Similarly, transport in interstate or foreign commerce under
3 § 844 and export in interstate or foreign commerce under § 2332g are practical equivalents. *Cf.*
4 *United States v. Wilson*, 721 F.2d 967, 971 (4th Cir. 1983) (finding that “export under § 2778 and
5 transport in foreign commerce under § 924(b) are practical equivalents”). Finally, § 2332g’s
6 “knowingly” *mens rea* requirement is subsumed under § 844’s more specific requirement of
7 “knowledge or intent that [the explosive] will be used to kill, injure, or intimidate” 18
8 U.S.C. §§ 844(d), 2332g(a).

9 Accordingly, because the § 2332g violation charged in Count Three does not require proof
10 of any element that is not also a part of the § 844 violation charged in Count Four, Count Three is
11 a lesser included offense of Count Four and Defendants may not be punished for both. *See*
12 *Rutledge*, 517 U.S. at 300.

13 **2. The Neutrality Act Violation Charged In Count One And Count**
14 **Two Are Multiplicitous.**

15 Application of the *Blockburger* test also demonstrates that proof of all elements of the
16 Neutrality Act offense alleged in Count One would automatically entail proof of all the elements
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18 (Footnote continued from previous page.)

19 ingredients, in such proportions, quantities, or packing that ignition
20 by fire, by friction, by concussion, by percussion, or by detonation
of the compound, mixture, or device or any part thereof may cause
an explosion.

21 18 U.S.C. § 844(j). Section 232, incorporated into section 844(j), provides:

22 The term “explosive or incendiary device” means (A) dynamite and
23 all other forms of high explosives, (B) any explosive bomb,
grenade, missile, or similar device, and (C) any incendiary bomb or
24 grenade, fire bomb, or similar device, including any device which
(i) consists of or includes a breakable container including a
25 flammable liquid or compound, and a wick composed of any
material which, when ignited, is capable of igniting such flammable
26 liquid or compound, and (ii) can be carried or thrown by one
individual acting alone.

27 18 U.S.C. § 232(5).
28

1 of Count Two. Count One alleges that Defendants conspired to violate the Neutrality Act, in
2 violation of 18 U.S.C. §§ 371 and 960. Section 960 provides:

3 Whoever, within the United States, knowingly begins or sets on
4 foot or provides or prepares a means for or furnishes the money for,
5 or takes part in, any military or naval expedition or enterprise to be
6 carried on from thence against the territory or dominion of any
7 foreign prince or state, or of any colony, district, or people with
8 whom the United States is at peace, shall be fined under this title or
9 imprisoned not more than three years, or both.

10 18 U.S.C. § 960.

11 Count Two alleges that Defendants conspired to kill and maim people, and to damage
12 property in a foreign country, in violation of 18 U.S.C. § 956. Section 956(a)(1) makes it
13 unlawful to conspire to kill, kidnap, or maim a person in a foreign country:

14 Whoever, within the jurisdiction of the United States, conspires
15 with one or more other persons, regardless of where such other
16 person or persons are located, to commit at any place outside the
17 United States an act that would constitute the offense of murder,
18 kidnapping, or maiming if committed in the special maritime and
19 territorial jurisdiction of the United States shall, if any of the
20 conspirators commits an act within the jurisdiction of the United
21 States to effect any object of the conspiracy, be punished as
22 provided in subsection (a)(2).

23 18 U.S.C. § 956(a)(1). Section 956(b) makes it unlawful to conspire to destroy certain property
24 in a foreign country with which the United States is “at peace”:

25 Whoever, within the jurisdiction of the United States, conspires
26 with one or more persons, regardless of where such other person or
27 persons are located, to damage or destroy specific property situated
28 within a foreign country and belonging to a foreign government or
29 to any political subdivision thereof with which the United States is
30 at peace, or any railroad, canal, bridge, airport, airfield, or other
31 public utility, public conveyance, or public structure, or any
32 religious, educational, or cultural property so situated, shall, if any
33 of the conspirators commits an act within the jurisdiction of the
34 United States to effect any object of the conspiracy, be imprisoned
35 not more than 25 years.

36 18 U.S.C. § 956(b).

37 Proof of all the elements of a conspiracy to violate the Neutrality Act automatically proves
38 a conspiracy to violate section 956. Both offenses require proof of a conspiracy. Both require an
39 act committed within the United States, and any of the acts described in the Neutrality Act —

1 beginning, providing or preparing a means for, furnishing the money for, or taking part in —
2 would suffice to prove “an act . . . to effect any object of the conspiracy” under § 956. *See* 18
3 U.S.C. §§ 956(a), (b), 960. Furthermore, conspiring to organize and undertake a military
4 expedition or enterprise under § 960 includes conspiring to kill and maim people and to damage
5 property under § 956 because a military expedition or enterprise presupposes killing and maiming
6 people and damaging property. Otherwise, the expedition or enterprise would be peaceful, not
7 military, in character, which would fail to show a violation of the Neutrality Act. *See, e.g.,*
8 *United States v. Lumsden*, 26 F. Cas. 1013, 1015 (C.C.S.D. Ohio 1856) (conviction under
9 predecessor to § 960 required proof that “the expedition or enterprise was in its character
10 military,” *i.e.*, “that the design, the end, the aim, and the purpose of the expedition or enterprise,
11 was some military service, some attack or invasion of another people or country, state or colony,
12 as a military force”; “a hostile intention connected with the act of beginning or setting on foot the
13 expedition”). Lastly, the Neutrality Act’s requirement that the military expedition or enterprise
14 be conducted against a foreign country with which the United States is “at peace” is subsumed
15 under § 956(a)(1)’s requirement that the contemplated killing and maiming take place “outside
16 the United States,” and is virtually identical to § 956(b)’s requirement that the intended damage
17 be to property in a foreign country with which the United States is “at peace.”

18 Therefore, because the § 956 conspiracy alleged in Count Two does not require proof of
19 any element that is not also a part of the § 960 conspiracy violation alleged in Count One, Count
20 Two is a lesser included offense of Count One, and Defendants may not be punished for both.
21 *See Rutledge*, 517 U.S. at 300.

22 **B. The Court Should Compel The Government To Elect Between The**
23 **Multiplicitous Counts.**

24 The Court has discretion to compel the government to elect between the multiplicitous
25 charges in the Superseding Indictment before trial. *See, e.g., United States v. Johnson*, 130 F.3d
26 1420, 1426 (10th Cir. 1997); *see also* Wright & Leopold, Federal Practice and Procedure:
27 Criminal 4th § 145 at 98-99 (2008) (stating that defendant can move to have prosecution elect
28 between multiplicitous counts). A court should exercise its discretion to compel such an election

1 where a defendant would suffer prejudice from allowing the government to present multiplicitous
2 charges to the jury. *See, e.g., United States v. Alexander*, Crim. No. 06-60074-01, 2008 U.S. Dist.
3 LEXIS 38544, at *5 (W.D. La. May 12, 2008) (ordering government to elect between
4 multiplicitous counts based on prejudice to defendant); *United States v. Clarridge*, 811 F. Supp.
5 697, 707 (D.D.C. 1992) (same); *United States v. Phillips*, 962 F. Supp. 200, 202 (D.D.C. 1997)
6 (same).

7 Courts have recognized that allowing the government to prosecute multiplicitous charges
8 may prejudice a defendant by “falsely suggest[ing] to a jury that a defendant has committed not
9 one but several crimes.” *United States v. Johnson*, 130 F.3d 1420, 1426 (10th Cir. 1997). “Once
10 such a message is conveyed to the jury, the risk increases that the jury will be diverted from a
11 careful analysis of the conduct at issue, and will reach a compromise verdict or assume that
12 defendant is guilty on at least some of the charges.” *Id.* (internal citation and quotation marks
13 omitted). That risk is manifest here. Presented with the alleged conspiracy to transport and
14 receive explosives under §§ 844(d), (n) and the alleged conspiracy to receive and possess missile
15 systems under § 2332g (not to mention Count One’s alleged conspiracy to violate 26 U.S.C.
16 § 5861 and 22 U.S.C. § 2778, which covers the same explosive devices), there is a great risk that
17 a jury would simply assume that Defendants must be guilty on some of the charges and reach a
18 compromise verdict. The same risk exists with respect to the Neutrality Act conspiracy alleged in
19 Count One and the conspiracy to kill, maim, and injure people, and to damage property, alleged
20 in Count Two.

21 The Ninth Circuit has recognized that a defendant may also be prejudiced based on the
22 varying strength of the evidence on each multiplicitous count:

23 We recognize . . . that the filing of multiple charges may be
24 prejudicial where the evidence of guilt as to some of the alleged
25 offenses may be weak or inconclusive. Under such circumstances,
26 there is a risk that the jury may have returned a verdict of guilty on
counts as to which it may have otherwise formed a reasonable
doubt, solely because of the strength of the evidence on the
remaining counts.

27 *United States v. Sherman*, 821 F.2d 1337, 1340 (9th Cir. 1987).

1 Where, as here, allowing the government to prosecute multiplicitous charges would
2 subject Defendants to substantial prejudice, and where the Superseding Indictment has divided a
3 single course of conduct into multiple charges, the Court should exercise its discretion to compel
4 the government to elect between the multiplicitous charges.

5 **IV. CONCLUSION**

6 For the foregoing reasons, Defendants respectfully request that the Court compel the
7 government to elect between the multiplicitous charges in the Superseding Indictment.

8 Dated: May 19, 2010

Respectfully submitted,

MORRISON & FOERSTER LLP

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