

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF GEORGIA  
BRUNSWICK DIVISION

FILED  
U.S. DISTRICT COURT  
BRUNSWICK DIV.  
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UNITED STATES OF AMERICA,

Plaintiff,

Case No. 2:18cr22

vs.

STEPHEN M. KELLY, S.J.,

Defendant.

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**MOTION TO SET ASIDE CONVICTION ON ONE COUNT**

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Defendant urges this Court to set aside the conviction of either count two or three because in combination these convictions constitute multiple convictions for the same conduct and thus violate the constitutional protections against double jeopardy.

On October 24, 2019, defendant was found guilty of four counts. This motion challenges the conviction of defendant on both counts two and three. Count Two was destruction of property on a naval installation in violation of 18 USC 1363. Count Three was depredation of government property in violation of 18 USC 1361.

The Fifth Amendment to the U.S. Constitution protects against double jeopardy.

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Among other protections, the Double Jeopardy Clause protects against multiple

punishments for the same offense.

“The Double Jeopardy Clause “protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense... Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring 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 (June 16, 1977).

The analysis of whether an act can constitute two different crimes starts with Blockburger v U.S., 284 U.S. 299 (January 4, 1932). That court noted:

“The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Gavieres v. United States, 220 U. S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489, and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in Morey v. Commonwealth, 108 Mass. 433: ‘A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.’” At 304.

The Blockburger test was recently affirmed in this Circuit by U.S. v Davis, 854 F3d 1276 (11<sup>th</sup> Cir, April 20, 2017).

When, as here, there is no legislative history to shed light on congressional intent, it is the duty of the court to examine the elements of each offense to determine whether Congress intended to authorize cumulative punishments. U.S. v Davis, at 1286.

Before trial, these arguments were made by defendants to the Magistrate and Court in this matter and were denied.

However, since the time the pretrial motions were raised and denied, the facts in this case have changed.

The actions of the government at trial underscore and illustrate the nature of the impermissible double jeopardy in this matter.

Notably, the government did not present to the jury different evidence to support the conviction on each of these counts. There was no attempt to indicate that some of the damage was of government property and some of the damage was of property of the naval installation. The government never even argued to the jury that there was different evidence to support convictions on each of these counts. In its closing, the government asked the jury to convict on both counts, saying that depredation was just another way of saying damage.

The indictment in this matter makes the double jeopardy apparent. Count two allows the government to prosecute a person for destruction of property on a naval base in violation of 18 USC 1363. Count three allows the government to prosecute a person for damage to property of the U.S. pursuant to 18 USC 1361.

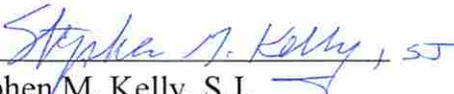
A similar matter came to the attention of U.S. District Judge Amul Thapar, who presided over a federal prosecution of a Plowshares case in Knoxville, TN. See U.S. v Walli, et al, #12-cr-107, Eastern District of Tennessee.

In that prosecution, three Catholic peace activists went onto the Y-12 nuclear weapons facility and were originally charged with three counts. Count One was 18 U.S.C 1363, damage to property on special jurisdiction etc. Count Two was 18 U.S.C. 1361, depredation of U.S. property. Count three was trespass onto national security property. When defendants refused to plead guilty, the U.S. filed a superseding indictment dropping the trespass charge and adding a charge of sabotage, 18 U.S.C. 2155. (The superseding indictment, Document 55, dated December 4, 2012, is attached). Counsel argued that 18 U.S.C. 1361 and 18 U.S.C. 1363 were essentially double punishments for the same action. After a hearing with Judge Thapar, the government voluntarily dismissed the 18.U.S.C.1363 count. (See Document 133, May 1, 2013

– attached).<sup>1</sup>

If the government had offered proof that the defendants damaged government property outside the base and inside the base, or any evidence to distinguish government property from property on a naval installation, violations of these two statutes would be appropriate basis for convictions. But the government offered no such proof and thus the convictions on one of these counts must be set aside as a violation of the Fifth Amendment protection against Double Jeopardy.

Respectfully submitted this 7th day of November, 2019.

  
Stephen M. Kelly, S.J.  
*Pro Se Defendant*

Glynn County Detention Center  
100 Sulphur Springs,  
Brunswick, GA 31520

CERTIFICATE OF SERVICE

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<sup>1</sup> In the Walli case, defendants were convicted of both damage to property and sabotage. Their convictions for sabotage were reversed by the U.S. Sixth Circuit in U.S. v Walli, 785 F3d 1080 (Sixth Cir. May 8, 2015) and defendants were immediately released from prison.

I hereby certify that on the 7th day of November 2019, I served upon all parties a copy of the foregoing **MOTION TO SET ASIDE CONVICTION ON ONE COUNT** by having said motion delivered to the clerk of the Court and once stamped and accepted, scanned by the clerk after which a notice of electronic filing (NEF), will be was generated and sent to all parties.

Dated this 7th day of November 2019.

  
Stephen M. Kelly, S.J.  
*Pro Se Defendant*

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