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August 9, 2013

Hon. Lyle Cayce, Clerk  
U.S. Court of Appeals for the Fifth Circuit  
600 S. Maestri Place  
New Orleans, LA 70130

**Re: *United States v. Abdo*, No. 12-50836**

Dear Mr. Cayce,

Pursuant to the Court's order of July 24, 2013, in the above-captioned case, the United States respectfully submits this letter brief addressing the following supplemental questions raised by the Court:

The contention is made that the two 18 U.S.C. §924(c)(1) firearm offenses in Counts 3 and 5 are based on a single firearm and are multiple convictions for the offense. Was it plain error for the district court to enter judgments of conviction and sentences on Counts 3 and 5 for the firearms offenses, and if so, may the court simply dismiss one of them – and if so, on which count?

The government's answers to these questions are set forth below.

**1. The District Court Did Not Plainly Err In Sentencing Abdo For Separate Convictions Under 18 U.S.C. § 924(c)(1) in Counts 3 and 5.**

Abdo contends (Opening Br. 46-50, Supp. Br. 2-7) that the district court plainly erred in imposing sentences for two counts of conviction for possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1), on the ground that the two counts were multiplicitous. That contention lacks merit. Abdo was properly convicted and sentenced for two violations of Section 924(c)(1) in the circumstances of this case, which involved two separate decisions to continuously possess a firearm in furtherance of separate predicate offenses involving distinct, non-simultaneous criminal acts.

*A. Standard of Review and Applicable Law*

As Abdo concedes (Opening Br. 46), Abdo did not raise in district court any claim that the Section 924(c)(1) counts were multiplicitous. The standard of review is therefore plain error. *United States v. Meshack*, 225 F.3d 556, 575 (5th Cir. 2000).

Under Section 924(c)(1), “any person who, during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall . . . be sentenced to a term of imprisonment of not less than 5 years.” 18 U.S.C. § 924(c)(1)(A)(i). The statute further requires that, “[i]n the case of a second or subsequent conviction under this subsection,” a sentence of “not less than 25 years” of imprisonment be imposed. 18 U.S.C. § 924(c)(1)(C).

*B. Abdo’s Convictions in Counts 3 and 5 Were Based On Separate Decisions To Possess a Firearm in Furtherance of Separate Predicate Offenses*

An indictment is multiplicitous when a single offense is alleged in more than one count. *United States v. Dixon*, 273 F.3d 636, 641 (5th Cir. 2001). To determine whether an indictment is multiplicitous, the Court considers “whether separate and distinct prohibited acts, made punishable by law, have been committed.” *United States v. Planck*, 493 F.3d 501, 503 (5th Cir. 2007). When the same statutory violation is charged twice, the question is whether the facts underlying each count were intended by Congress to constitute separate “unit[s] of prosecution.” *Id.* at 503-04.

In *United States v. Phipps*, 319 F.3d 177 (5th Cir. 2003), this Court held that the unit of prosecution for Section 924(c)(1) is neither the isolated use, carriage, or possession of the firearm nor the predicate offense, but the *combination* of a use, carriage, or possession with the predicate offense to which it relates. *Id.* at 185. Because this case involved two such combinations, separate convictions and sentences under Section 924(c)(1) are appropriate here.

There is no dispute that Abdo’s two Section 924(c)(1) convictions in Counts 3 and 5 rested on two separate predicate offenses: (1) attempted use of a weapon of mass destruction, in violation of 18 U.S.C. § 2332a(a)(2)(D) (Count 1); and (2) attempted murder of officers or employees of the United States, in violation of 18 U.S.C. § 1114(3).<sup>1</sup> Abdo has not (and could not) contend that these two predicate offenses are themselves multiplicitous.

Counts 3 and 5 also rest on two separate decisions to possess the firearm for two separate purposes in furtherance of the two distinct predicate offenses. Count 5 rested on Abdo’s possession of the .40 caliber handgun for the purpose of shooting U.S. soldiers with it, in furtherance of his Count 2 conviction for attempted murder, which specifically alleged that Abdo intended to shoot U.S. soldiers with a firearm. As the trial evidence established, Abdo initially began trying to buy a gun for that purpose in Kentucky on July 3, 2011. Appellee Br. 32-33; Trial Transcript, Docket Entry 170 (“Tr.”), 72-75. His intent from the outset was to murder U.S. soldiers with the gun. Tr. 49-59. He finally succeeded in purchasing a gun, using his

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<sup>1</sup> Abdo was also convicted of two additional Section 924(c) convictions based on his possession of a destructive device in furtherance of the predicate offenses charged in Counts 1 and 2. Abdo has not challenged those convictions as multiplicitous, presumably because he possessed components that could readily have been assembled into multiple destructive devices.

roommate's identity, on July 7, 2011 in Tennessee. Tr. 46, 171, 176-77. He then took the gun with him to Texas and continued to possess it, for the purpose of using it to shoot U.S. soldiers following the bomb attack he was planning, until he was arrested on July 27, 2011. Appellee Br. 33.<sup>2</sup>

The other count, Count 3 (predicated on the Count 1 conviction for attempted use of a weapon of mass destruction), was not based on Abdo's decision to acquire and possess the firearm for the purpose of using it during his planned attack. Count 3 rested instead on Abdo's later decision to keep the gun with him in his backpack (rather than store it in his hotel room with the explosives and other bomb components) on July 27, 2011, in order to protect himself and prevent interference from alert citizens or law enforcement as he shopped for bomb parts and military uniforms in furtherance of his attempt to use a weapon of mass destruction. Tr. 581-82 (closing argument setting forth government's separate "protection" theory underlying Count 3 and "murder weapon" theory underlying Count 5). Thus, the two Section 924(c)(1) counts involve separate decisions on separate occasions to possess a firearm for separate purposes. The fact that both possessions continued through July 27, 2011, resulting in Abdo's continuing possession of the gun both for protective purposes and as the future murder weapon, does not require merging those separate acts into a single unit of prosecution.

### C. *Phipps Is Distinguishable*

1. Abdo contends (Supp. Br. 2-6) that his sentence based on separate Section 924(c)(1) convictions is foreclosed by this Court's decision in *Phipps*. Abdo is incorrect. *Phipps* involved the "use" prong of Section 924(c)(1) and does not govern the circumstances of this case, in which Abdo was prosecuted under the "possession" prong for separate decisions on separate occasions to possess a firearm for separate purposes.

In *Phipps*, the defendants brandished a firearm in order to simultaneously force their victim to surrender her car and abduct her. 319 F.3d at 186. They then promptly discarded the firearm before driving away with the victim. *Id.* at 189. They were convicted of two Section 924(c)(1) violations, one based on the car-jacking and the other on the kidnapping. This Court noted initially that Section 924(c) is ambiguous as to the unit of prosecution. The Court accordingly applied the rule of lenity to conclude that the two Section 924(c) convictions were

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<sup>2</sup> It is true that Count 5 alleges that Abdo possessed the firearm on or about July 27, 2011 and does not specifically allege that Abdo's possession of the firearm in furtherance of his plan to kill U.S. soldiers began weeks earlier. However, the proof at trial made clear that Abdo's possession of the firearm for that purpose began well before July 27. Even if that proof amounted to a variance between the evidence and the indictment, it was not prejudicial because Abdo had ample notice that the government intended to introduce evidence of his attempts to buy a firearm in Kentucky and Tennessee, conduct which Abdo admitted to the FBI soon after his arrest. Tr. 45-51.

multiplicitous because there was only a single “use” of the firearm. *Id.* at 186-89; *see also United States v. Walters*, 351 F.3d 159, 173 (5th Cir. 2003) (relying on *Phipps* in holding that defendant could “be convicted of only a single section 924(c)(1) conviction for his single use of [a] single bomb”).<sup>3</sup> In reaching its conclusion, the *Phipps* Court “stress[ed] that [the] holding is limited by the unusual fact that defendants gave the firearm to [an accomplice] immediately after using it. Had, for example, they kept the firearm and used it to restrain or intimidate [the victim] later, we might have affirmed their multiple convictions.” 319 F.3d at 188-89.

*Phipps* is readily distinguishable. First, as the *Phipps* Court itself recognized, that case involved application of the “use” prong of Section 924(c)(1), and not the separate “possession” prong. 319 F.3d at 186 n.7 (recognizing the distinction between the “use” and the “possession” prongs, and acknowledging that “we speak [here] only of use, not of carriage or possession”). A “use” of a firearm is by nature a discrete event, but possession may persist over time and space, as it did in this case. *Cf. Planck*, 493 F.3d at 505 (upholding conviction on multiple counts of possession of child pornography where the defendant possessed the pornography in “three separate places -- a laptop and desktop computer and diskettes -- and, therefore, committed three separate crimes”). Thus, the Court’s holding that a single, discrete “use” of the firearm would not support multiple counts does not necessarily prohibit multiple offenses involving continuous possession, particularly in light of the Court’s statement that the outcome might have been different if the defendants had not promptly discarded the firearm after brandishing it but instead had continued using it. *See Phipps*, 319 F.3d at 188-89. The outcome here should be different for essentially the same reason. Abdo did not commit a single, discrete “possession” of the firearm. Rather, he decided at different times and in different places to possess the firearm for different purposes in furtherance of distinct predicate crimes, and then continued to possess the firearm for both of those purposes until the day he was arrested. Nothing in *Phipps* contradicts the conclusion that continuous possession of a firearm for multiple purposes in furtherance of two separate predicate offenses, which involve distinct, non-simultaneous criminal conduct, properly supports two Section 924(c)(1) convictions.

Moreover, this case does not raise the concerns that led this Court in *Phipps* to find that punishment for multiple offenses would be inappropriate. *Phipps* emphasized that Congress in Section 924(c) targeted “the choice” to use a firearm and that defendants who only made one choice to use one firearm a single time should face only a single count. 319 F.3d at 187. Here, by contrast, each of Abdo’s two Section 924(c)(1) convictions is predicated on a separate choice

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<sup>3</sup> *But see United States v. Sandstrom*, 594 F.3d 634, 656-58 (8th Cir. 2010) (upholding separate Section 924(c) convictions based on a single use of a firearm and where predicate offenses (killing the victim because of his race, in violation of 18 U.S.C. § 245(b)(2)(B), and killing him to obstruct justice, in violation of 18 U.S.C. § 1512(a)(1)(C)) involved simultaneous conduct because “[Section] 924(c)(1) permits multiple convictions for the single use of a firearm based on multiple predicate offenses.”); *United States v. Kahn*, 461 F.3d 477, 493 n.9 (4th Cir. 2006) (holding that each of the defendant’s four predicate convictions may support a consecutive Section 924(c) sentence “without requiring the court first to enumerate ‘uses’ of firearms”).

to possess a firearm in furtherance of distinct predicate offenses. With respect to the Count 5 conviction, Abdo initially chose to possess a firearm in order to use it to kill U.S. soldiers while he was still in Tennessee, and he then chose to take that firearm to Texas and to continue possessing it for that purpose until he was arrested. With respect to Count 3, Abdo made the separate choice to keep the loaded firearm with him in his backpack, rather than leaving it in the hotel room with the other bomb components, in order to protect himself as he traveled about making final preparations for the attack. Those separate choices support separate Section 924(c)(1) convictions under the *Phipps* rationale.

The two out-of-circuit cases relied on by the *Phipps* Court are also distinguishable. *United States v. Wilson*, 160 F.3d 732 (D.C. Cir. 1998), was, like *Phipps*, a case arising under the “use” rather than the “possession” prong of Section 924(c). *Id.* at 748-49. *Wilson* held that two convictions under Section 924(c) were multiplicitous where there was only a single “use” of a firearm to kill a witness. The court reasoned that, even though the two predicate offenses (killing a witness in violation of 18 U.S.C. § 1512 and murder while armed in violation of D.C. Code §§ 22-2101, -3202) were separate offenses for double jeopardy purposes, they supported only one conviction under Section 924(c) because they were distinguished only by different *mens rea* requirements rather than by different conduct. *Id.* at 749.

In this case, the predicate offenses for which Abdo was convicted are distinguished not only by different *mens rea* elements but by different conduct elements, as well as the specific allegation in Count 2 involving Abdo’s plan to shoot the surviving victims with the firearm. In addition, the D.C. Circuit has, in a subsequent case, made clear that multiple Section 924(c)(1) convictions are appropriate in these circumstances. *See United States v. Kelly*, 552 F.3d 824, 830 & n.5 (D.C. Cir. 2009) (holding that defendant was properly charged with two separate Section 924(c)(1) counts based on possession of the same gun on the same day and distinguishing *Wilson* because the predicate offenses (conspiracy and substantive drug counts) involved “distinct conduct”). That conclusion is further supported by the Supreme Court’s decision in *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999), which held that the predicate crimes under Section 924(c)(1) are “essential conduct elements” of the offense. *Id.* at 279-80. Where, as here, the “essential conduct elements” of the predicate offenses are distinct, Section 924(c)(1) allows for separate convictions.

The *Phipps* Court also relied on *United States v. Finley*, 245 F.3d 199 (2d Cir. 2001). In that case, the defendant was charged with both drug distribution and drug possession with intent to distribute after an undercover officer purchased drugs from the defendant (the distribution count) and, in the raid that followed immediately, law enforcement officials discovered the remainder of the defendant’s stash (the possession count). Because the police also discovered that the defendant had stored a firearm near his distribution operation, the defendant was charged in two counts with using a firearm in furtherance of drug trafficking crimes (the possession with intent to distribute and the distribution). *See id.* at 201-02. The Second Circuit invalidated one of the two Section 924(c) convictions because the “predicate offenses were simultaneous or nearly so,” they “consisted of virtually the same conduct with the same criminal motivation,” and the defendant “only chose to ‘possess’ the firearm once.” *Id.* at 207.

All three of those factors are different in this case. First, Abdo's predicate offenses were not simultaneous in the same sense as *Finley's* simultaneous possession of drugs, because Count 1 involved the first phase (detonating a pressure cooker bomb) of Abdo's planned attack, while Count 2 also included the subsequent, second phase (the shooting of the survivors). Abdo's predicate offenses therefore involved "separate, and separately culpable" conduct. *Walters*, 351 F.3d at 172-73. Second, Abdo acted on related but distinct "criminal motivation" in committing the predicate offenses, because Count 2 included the additional criminal intent associated with the post-blast shooting of the soldiers and civilians who were not killed by the bomb. Third, as argued above, Abdo made separate choices to possess the firearm for separate purposes in furtherance of the separate predicate offenses. Thus, the rationale of *Finley* does not apply in cases, such as this one, that do not involve "simultaneous predicate offenses consisting of virtually the same conduct." *Id.* at 207.<sup>4</sup>

Finally, application of the *Phipps* rule to the circumstances here, where a defendant continuously possesses a firearm in furtherance of separate predicate offenses that are not simultaneous, would lead to anomalous results. A defendant who continuously possessed a firearm throughout a lengthy crime spree (for example, a bank robber who kept a firearm in the getaway car during a string of separate robberies) would be liable for only a single Section 924(c)(1) count. Nothing in Section 924(c) or its legislative history indicates that Congress would have intended that outcome.

2. Abdo also contends (Supp. Br. 3-6) that the Section 924(c) counts were multiplicitous because, even if he had succeeded in carrying out the predicate offenses, there would have been only a single use of the firearm. That is incorrect. If Abdo's plan had succeeded, he would have "used" the firearm multiple times, both to protect himself while placing and detonating the bomb and in shooting as many of the surviving victims as possible. Thus, Abdo's offenses, in which he intended to discharge the firearm multiple times against separate victims, contemplated multiple "uses" of the firearm. See *United States v. Mejia*, 545 F.3d 179, 205-06 (2d Cir. 2008) ("[A]lthough [the defendant] now describe[s] the shootings as a 'single incident,' the jury found [him] culpable of the shooting of three separate individuals. Although those separate shootings are clustered in time and space, that clustering does not somehow merge them into one predicate

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<sup>4</sup> The Second Circuit subsequently emphasized the limited application of *Finley*, stating that, in *Finley*, the court was "responding to the unique manner in which a single course of conduct involving controlled substances, such as continuing possession of a large quantity of contraband, gives rise to multiple possible offenses, such as possession, possession with intent, and so forth." *United States v. Mejia*, 545 F.3d 179, 206 (2d Cir. 2008). Thus, *Finley* addresses a "unique" scenario, not present here, where a defendant is charged with two substantive drug-trafficking crimes related to the simultaneous possession of drugs. Similarly, this Court's decision in *Phipps* addressed an "unusual," "extraordinary," and "rare" scenario – a single discrete use of a firearm followed by immediately discarding it – that is not present in this case. 319 F.3d at 188-89.

crime.”). In any event, even if Abdo’s plan contemplated only a single “use,” he was not convicted under the “use” prong of Section 924(c)(1). Rather, Abdo was convicted under the “possession” prong for possessing the firearm in furtherance of two separate predicate offenses. In that circumstance, there is no requirement that the predicate offenses contemplate separate “uses” (or any “uses”) of the firearm.

*C. Abdo Cannot Satisfy the Plain-Error Standard*

To obtain relief on a claim not properly preserved in the district court, Abdo would have to establish, *inter alia*, that any error was “clear” or “obvious.” *United States v. Olano*, 507 U.S. 725, 734 (1993); *see also United States v. Dixon*, 273 F.3d 636, 642 (5th Cir. 2001) (applying plain error review to unpreserved claim of multiplicitous sentences). Abdo cannot meet that standard, because it is not “plain” or “obvious” that the *Phipps* analysis under the “use” prong should be extended to the “possession” prong and applied to the facts here.

**2. Assuming The District Court Plainly Erred In Sentencing Abdo For Two Separate Section 924(c)(1) Counts, The Court Should Dismiss Count 5 and Affirm the Judgment in All Other Respects**

This Court has long recognized that the proper remedy for multiplication of punishment is to remand for resentencing with instructions that the count elected by the government be dismissed. *United States v. Privette*, 947 F.2d 1259, 1263 (5th Cir. 1991) (citing *United States v. Olivares*, 786 F.2d 659, 664 (5th Cir. 1986)); *Walters*, 351 F.3d at 173 (remanding for resentencing with instructions that, after the government chooses which Section 924(c) count to dismiss, the court resentence on the remaining count); *see also United States v. Bradsby*, 628 F.2d 901, 906 (5th Cir. 1980) (ordering same procedure for multiplicitous conspiracy counts). That remedy is appropriate in light of the possibility in some cases that the district court’s discretion in sentencing on some counts was affected by the mandatorily consecutive sentence on the multiplicitous Section 924(c)(1) count.

In the circumstances of this case, however, such a remand is not necessary. The district court sentenced Abdo to concurrent sentences of life and 240 months on Counts 1 and 2, as well as mandatorily consecutive sentences of 360 months and life imprisonment on the Section 924(c)(1) counts that Abdo has not challenged (Counts 4 and 6). Appellee Br. 14. In these circumstances, there is no indication that the district court’s sentence on the other counts (60 months on Count 3 and 300 months on Count 5) would be affected by a dismissal of either of the Section 924(c)(1) counts that Abdo challenges as multiplicitous. Accordingly, in the event that this Court finds plain error here, the Court should dismiss Count 5 and affirm the district court’s judgment and sentence as to the other counts. *See Wilson*, 160 F.3d at 749-50 (vacating one of defendant’s Section 924(c) convictions as multiplicitous while affirming the judgment with respect to all other counts).

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing letter brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on August 9, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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