

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA           §  
  
                  vs.                           §       **CRIMINAL NO. B-14-876-01**  
  
KEVIN LYNDEL MASSEY               §

**MOTION TO DISMISS COUNTS ONE & FOUR OF INDICTMENT**

The United States of America, through its United States Attorney KENNETH MAGIDSON, files this motion pursuant to Rule 48(a), Federal Rules of Criminal Procedure, to dismiss Counts One and Four of the Indictment in the above-styled and numbered cause as to defendant, **KEVIN LYNDEL MASSEY**. The defendant was found guilty and convicted on Counts Two and Three of the Indictment on September 30, 2015. Pursuant to U.S. Berry, 977 F.2d 915 (5<sup>th</sup> Cir., 1992), the United States requests the Court grant this motion and dismiss Counts One and Four of the Indictment against the above-named defendant.

Respectfully submitted,

KENNETH MAGIDSON  
UNITED STATES ATTORNEY

***s/ William Hagen*** \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I, hereby certify that on **January 13, 2016**, a copy of this Motion to Dismiss Counts One and Four of the Indictment was sent to defense counsel, Louis Sorola, via Notification of Electronic filing.

***s/ William Hagen*** \_\_\_\_\_  
WILLIAM HAGEN  
Assistant United States Attorney

Westlaw.

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▷

United States Court of Appeals,  
Fifth Circuit.  
UNITED STATES of America, Plaintiff–Appellee,  
v.  
James BERRY, Jr., Defendant–Appellant.

No. 92–4123  
Summary Calendar.  
Nov. 5, 1992.

Defendant was convicted in the United States District Court for the Eastern District of Texas, at Beaumont, Joe J. Fisher, J., of three counts of unlawful possession of firearm by felon, one count of similar possession of ammunition, and one count of carrying firearm in relation to drug-trafficking crime. Defendant appealed. The Court of Appeals, Politz, Chief Judge, held that: (1) any error in admitting defendant convicted felon's spontaneous confession to ownership of weapons and drugs without hearing to determine voluntariness of confession was not preserved for appeal; (2) defendant convicted felon's multiple convictions and sentences for three counts of unlawful possession of firearm by felon and one count of similar possession of ammunition violated double jeopardy; and (3) issue of multiplicity of sentences challenged as violative of double jeopardy was more efficiently addressed on direct appeal where the only question raised was legal question of multiplicity, and was not more properly presented in collateral proceeding.

Affirmed in part; vacated and remanded in part.

West Headnotes

[1] Criminal Law 110 ↪ 1036.1(2)

110 Criminal Law  
110XXIV Review  
110XXIV(E) Presentation and Reservation in  
Lower Court of Grounds of Review

110XXIV(E)1 In General  
110k1036 Evidence  
110k1036.1 In General  
110k1036.1(2) k. Time of Objection. Most Cited Cases

Criminal Law 110 ↪ 1036.1(5)

110 Criminal Law  
110XXIV Review  
110XXIV(E) Presentation and Reservation in  
Lower Court of Grounds of Review  
110XXIV(E)1 In General  
110k1036 Evidence  
110k1036.1 In General  
110k1036.1(3) Particular Evidence

110k1036.1(5) k. Confessions, Declarations, and Admissions. Most Cited Cases

Before failure to hold hearing to determine that defendant's confession was voluntary can be raised as issue on appeal, there must have been timely and coherent objection at trial from which it appears that *Jackson v. Denno* hearing was being requested. 18 U.S.C.A. § 3501.

[2] Criminal Law 110 ↪ 1043(1)

110 Criminal Law  
110XXIV Review  
110XXIV(E) Presentation and Reservation in  
Lower Court of Grounds of Review  
110XXIV(E)1 In General  
110k1043 Scope and Effect of Objection  
110k1043(1) k. In General. Most Cited Cases

Objection to admission of defendant's confession that failed to present trial court with sufficient basis to identify and correct purported infirmity of not holding hearing to determine voluntariness of confession would not preserve for appeal error in failing to hold hearing, and in such cases, only

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plain error would warrant relief on appeal.

**[3] Criminal Law 110 ↪ 1043(2)**

110 Criminal Law  
110XXIV Review  
110XXIV(E) Presentation and Reservation in  
Lower Court of Grounds of Review  
110XXIV(E)1 In General  
110k1043 Scope and Effect of Objec-  
tion

110k1043(2) k. Necessity of Spe-  
cific Objection. Most Cited Cases

Any error in admitting defendant convicted felon's spontaneous confession to ownership of weapons and drugs without hearing to determine voluntariness of confession was not preserved for appeal, where defense counsel made what was essentially generic objection to confession that was not sufficient to put court on notice that defendant complained of admission of confession without benefit of hearing.

**[4] Criminal Law 110 ↪ 1036.1(5)**

110 Criminal Law  
110XXIV Review  
110XXIV(E) Presentation and Reservation in  
Lower Court of Grounds of Review  
110XXIV(E)1 In General  
110k1036 Evidence  
110k1036.1 In General  
110k1036.1(3) Particular Evid-  
ence

110k1036.1(5) k. Confes-  
sions, Declarations, and Admissions. Most Cited  
Cases

Admission of defendant convicted felon's spon-  
taneous confession to ownership of weapons and  
drugs without hearing to determine whether confes-  
sion was voluntary was not plain error in prosecu-  
tion that led to convictions for unlawful possession  
of firearm, unlawful possession of ammunition, and  
carrying firearm in relation to drug-trafficking crime.

**[5] Double Jeopardy 135H ↪ 1**

135H Double Jeopardy  
135HI In General

135Hk1 k. In General. Most Cited Cases  
Double jeopardy clause serves interests of pro-  
tecting against prosecution for same offense after  
acquittal, prosecution of same offense after convic-  
tion, and multiple punishments for same offense.  
U.S.C.A. Const.Amend. 5.

**[6] Double Jeopardy 135H ↪ 131**

135H Double Jeopardy

135HV Offenses, Elements, and Issues Fore-  
closed

135HV(A) In General

135Hk131 k. In General. Most Cited Cases  
When defendant challenges subsequent prosecu-  
tion on double jeopardy grounds, inquiry focuses  
on proof required in second proceeding, and second  
prosecution is constitutionally barred if offenses  
have identical statutory elements, one is lesser-  
included offense of the other, or government must  
prove conduct in subsequent prosecution that con-  
stitutes offense for which defendant has already  
been prosecuted. U.S.C.A. Const.Amend. 5.

**[7] Double Jeopardy 135H ↪ 136**

135H Double Jeopardy

135HV Offenses, Elements, and Issues Fore-  
closed

135HV(A) In General

135Hk132 Identity of Offenses; Same Of-  
fense

135Hk136 k. "Same Evidence" Test;  
Sufficiency of Evidence of One Offense to Sustain  
Conviction for the Other. Most Cited Cases

Where double jeopardy challenge arises from  
single prosecution, question is whether multiple  
punishments are authorized despite commonality of  
elements of proof, and in that context, *Blockburger*  
analysis is simply rule of statutory construction and  
guide to determine whether legislature intended

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multiple punishments. U.S.C.A. Const.Amend. 5.

**[8] Double Jeopardy 135H ↪146**

135H Double Jeopardy  
135HV Offenses, Elements, and Issues Foreclosed

135HV(A) In General  
135Hk139 Particular Offenses, Identity of  
135Hk146 k. Drugs and Narcotics.

Most Cited Cases

Conviction under statute proscribing use or carrying of firearm during drug-trafficking offense for double jeopardy purposes was distinct from other offenses of which defendant was convicted, of unlawful possession of firearm by felon and unlawful possession of ammunition; carrying firearm during drug offense involved distinct element of drug trafficking and did not require proof of prior felony conviction, and was crime treated by Congress as separate and apart from threat posed by felon in possession of firearm. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 924(c).

**[9] Double Jeopardy 135H ↪140**

135H Double Jeopardy  
135HV Offenses, Elements, and Issues Foreclosed

135HV(A) In General  
135Hk139 Particular Offenses, Identity of  
135Hk140 k. Weapons Offenses. Most

Cited Cases

Defendant convicted felon's multiple convictions and sentences for three counts of unlawful possession of firearm by felon and one count of similar possession of ammunition violated double jeopardy; defendant was convicted for possession of guns only, without allegation or proof of other elements, statutory proscription was intended to suppress arming of felons, so proscription was based on status of offender and not number of guns possessed, and although government could charge and try defendant for multiple offenses, there could not be simultaneous convictions and sentences, and judgment should be entered on only one of the stat-

utory offenses. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 922.

**[10] Criminal Law 110 ↪1042.3(1)**

110 Criminal Law  
110XXIV Review  
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E) In General  
110k1042.3 Sentencing and Punishment

110k1042.3(1) k. In General. Most Cited Cases

(Formerly 110k1042)

Criminal defendant may complain of nonconcurrent multiple sentences on appeal despite failure to complain of multiple indictments as violative of double jeopardy. U.S.C.A. Const.Amend. 5.

**[11] Sentencing and Punishment 350H ↪1129**

350H Sentencing and Punishment  
350HV Sufficiency and Construction of Sentence Imposed

350HV(C) Construction

350HV(C)2 Punishment

350Hk1128 Concurrent or Consecutive

Terms

350Hk1129 k. In General. Most

Cited Cases

(Formerly 110k1216(2))

Sentence is not "concurrent" where mandatory special assessments are separately imposed on each conviction.

**[12] Double Jeopardy 135H ↪140**

135H Double Jeopardy  
135HV Offenses, Elements, and Issues Foreclosed

135HV(A) In General

135Hk139 Particular Offenses, Identity of  
135Hk140 k. Weapons Offenses. Most

Cited Cases

Even if defendant convicted felon's sentences

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for three counts of unlawful possession of firearm by felon and one count of similar possession of ammunition that arose out of same criminal act were deemed to run concurrently, convictions which were violative of double jeopardy could not be affirmed; the separate convictions had potential adverse consequences apart from concurrent sentences. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 922.

**[13] Criminal Law 110 ↪ 1134.33**

110 Criminal Law  
110XXIV Review  
110XXIV(L) Scope of Review in General  
110XXIV(L)4 Scope of Inquiry  
110k1134.33 k. Defenses. Most Cited Cases  
(Formerly 110k1134(3))

**Criminal Law 110 ↪ 1462**

110 Criminal Law  
110XXX Post-Conviction Relief  
110XXX(B) Grounds for Relief  
110k1459 Defenses  
110k1462 k. Double Jeopardy. Most Cited Cases  
(Formerly 110k1134(3))

Issue of multiplicity of sentences challenged as violative of double jeopardy was more efficiently addressed on direct appeal where the only question raised was legal question of multiplicity, and was not more properly presented in collateral proceeding. U.S.C.A. Const.Amend. 5.

\*917 Douglas M. Barlow, court-appointed, Beaumont, Tex., for defendant-appellant.

D.R. Smith, Asst. U.S. Atty., Bob Wortham, U.S. Atty., Beaumont, Tex., for plaintiff-appellee.

Appeal from the United States District Court For the Eastern District of Texas.

Before POLITZ, Chief Judge, GARWOOD and

SMITH, Circuit Judges.

POLITZ, Chief Judge:

James Berry, Jr., a convicted felon, was convicted and sentenced for three counts of unlawful possession of a firearm by a felon, one count of similar possession of ammunition, and one count of carrying a firearm in relation to a drug-trafficking crime. Concluding that the convictions and sentences imposed on the firearm/ammunition counts violate double jeopardy standards, we vacate same and remand for resentencing thereon. The drug-related count is unaffected.

*Background*

Berry, a convicted felon,<sup>FN1</sup> occupied an apartment in Jonathan's Inn Motel in Groves, Texas which was searched pursuant to a valid search warrant. The search yielded two .38 caliber handguns (one found in Berry's jacket, the other in his car) with ammunition, a Marlin 30/30 for which Berry apparently did not possess ammunition, and a photograph of Berry holding two of the weapons. In addition to the weapon charges, Berry was convicted for possessing a handgun during the commission\*918 of a drug-trafficking offense. Testimony at trial reflected that 16 "rocks" of cocaine were found in the pocket of a pair of Berry's pants. Berry timely appealed, complaining of the district court's failure to hold a hearing to determine whether his confession was given voluntarily, and of his multiple convictions and sentences on the possession charges.

FN1. Berry previously was convicted of theft in Texas state court.

*Analysis*

1. *Voluntariness of confession*

[1][2][3][4] Berry challenges the admission of his spontaneous confession of ownership of the weapons and drugs because there was no hearing held to determine that the confession was voluntary. Although Berry had the right to such a hearing in the trial court,<sup>FN2</sup> he cannot advance that right

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in a vacuum as the basis for reversible error. Before that issue may be raised on appeal there must have been a timely and coherent objection at trial. <sup>FN3</sup> It must appear from the objection that a *Jackson v. Denno* <sup>FN4</sup> hearing was being requested. As is ordinarily the case with trial errors, an objection which fails to present the trial court with a sufficient basis to identify and correct the purported infirmity will not preserve error for appeal.<sup>FN5</sup> In such cases only plain error, defined as error which would affect the fairness, integrity, or public reputation of the judiciary were it left uncorrected,<sup>FN6</sup> will warrant relief on appeal. Berry cannot establish, indeed he has not even alleged, that such an error has occurred herein.

FN2. 18 U.S.C. § 3501.

FN3. *United States v. Espinoza-Seanez*, 862 F.2d 526, 535 (5th Cir.1988) (“it [must] be made sufficiently clear to the court that a ... hearing is being requested”).

FN4. The initial conclusive recognition of the right was in *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

FN5. See Fed.R.Evid. 103(a)(1) (“Error may not be predicated upon a ruling which admits ... evidence unless ... a timely objection or motion to strike appears of record, stating the specific ground of the objection, if the specific ground was not apparent from the context.”) (emphasis supplied); *Wigmore on Evidence* § 18, at 818 (Tillers Rev.1983) (“The cardinal principle (no sooner by courts repeated than ignored by counsel) is that a general objection, if overruled, cannot avail the objector on appeal.”); *Weinstein's Evidence* ¶ 103[02], at 103–28 (1992); 1 *McCormick on Evidence* § 52, at 204–05 (Strong ed. 1992).

FN6. *United States v. Goldfaden*, 959 F.2d 1324 (5th Cir.1992).

In the instant case defense counsel made what was essentially a generic objection to the confession. This was not sufficient to put the court on notice that Berry complained of the admission of the confession without the benefit of a hearing. We find no plain error; this first assignment of error is without merit.

## 2. Multiple convictions and sentencing

The claimed error in the multiple convictions and resentencing on the weapons charges poses a different matter. The relevant statute, 18 U.S.C. § 922(g) provides that it is “unlawful for any person ... who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year ... to possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” Berry's conviction was premised on one episode of possession of firearms and ammunition but he was convicted and sentenced separately for each weapon and the ammunition possessed. This raises serious questions of double jeopardy.

[5][6][7] At the threshold we briefly scan the parameters of the fifth amendment's proscription of successive jeopardy. As the Supreme Court recently explained,<sup>FN7</sup> the double jeopardy clause serves three interests, protecting against: (1) prosecution of the same offense after acquittal; (2) prosecution of the same offense after conviction; and (3) multiple punishments for the same offense. The guarantee is implicated in two distinct contexts, depending on whether the defendant previously has been prosecuted. When the defendant questions a \*919 subsequent prosecution, the inquiry focuses on the proof required in the second proceeding—a second prosecution is constitutionally barred if the offenses have identical statutory elements, one is the lesser included offense of the other,<sup>FN8</sup> or if the government must prove conduct in the subsequent prosecution that constitutes an offense for which the defendant has already been prosecuted.<sup>FN9</sup> But where, as here, the challenge arises from a single

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prosecution, the question is whether multiple punishments are authorized despite the commonality of the elements of proof.<sup>FN10</sup> In this context the *Blockburger* analysis is “simply a rule of statutory construction, a guide to determine whether the legislature intended multiple punishments.”<sup>FN11</sup>

FN7. *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990).

FN8. *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980).

FN9. *Grady v. Corbin*. For a more extensive treatment of this and other closely related aspects of double jeopardy see our recent decision in *United States v. DeShaw*, 974 F.2d 667 (5th Cir.1992).

FN10. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

FN11. *Grady v. Corbin*, 495 U.S. at 517, 110 S.Ct. at 2091 (internal quotations omitted).

[8] We first consider the conviction under 18 U.S.C. § 924(c), use or carrying of a firearm during a drug-trafficking offense. This offense involves an element distinct from any other offense charged, drug trafficking, and does not require proof of a prior felony conviction. This obviously is a crime Congress treated as separate and apart from the threat posed by a felon in possession of a firearm.<sup>FN12</sup> Congress, therefore, has clearly expressed its will and defined both events as separate units of prosecution despite their close relation.<sup>FN13</sup> Berry's conviction and the five year sentence mandated by section 924(c) are therefore appropriate and are affirmed.<sup>FN14</sup>

FN12. As further evidence of congressional intention to apply the section in conjunction with other substantive offenses, we note that the section itself declares that the punishment imposed shall be “in addition

to the punishment imposed for such crime of violence ...” 18 U.S.C. § 924(c).

FN13. *Cf. Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955) (purported multiple violations of the Mann Act).

FN14. *Cf. United States v. Allison*, 953 F.2d 870, 875 (5th Cir.1992) (felon in possession and use of firearm in commission of a felony).

[9] Berry's multiple convictions and sentences for violation of 18 U.S.C. § 922(g)(1), however, are not so readily dispatched. Berry was convicted for possession of the guns only, there was no allegation or proof of other elements such as a separate act of transportation in interstate commerce,<sup>FN15</sup> that the guns were procured by misrepresentation,<sup>FN16</sup> that Berry was illegally in the country,<sup>FN17</sup> or that one of the weapons was illegally altered.<sup>FN18</sup> The evil Congress sought to suppress by section 922 was the arming of felons; the section is based on the status of the offender and not the number of guns possessed.<sup>FN19</sup> For the same reasons, we cannot conclude that Congress intended the simultaneous possession of ammunition to stand as a distinct unit of prosecution.<sup>FN20</sup>

FN15. *E.g., United States v. Musgrove*, 581 F.2d 406 (4th Cir.1978) (allowing multiple punishments in such circumstances).

FN16. *E.g., United States v. Goodheim*, 686 F.2d 776 (9th Cir.1982); *United States v. Gomez*, 603 F.2d 147 (10th Cir.), *cert. denied*, 444 U.S. 969, 100 S.Ct. 460, 62 L.Ed.2d 382 (1979) (allowing multiple punishments).

FN17. *United States v. Munoz-Romo*, 947 F.2d 170 (5th Cir.1991), *vacated*, 506 U.S. 802, 113 S.Ct. 30, 121 L.Ed.2d 4 (1992).

FN18. *United States v. Parker*, 960 F.2d



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498 (5th Cir.1992).

FN19. *Barrett v. United States*, 423 U.S. 212, 218, 96 S.Ct. 498, 502, 46 L.Ed.2d 450 (1976) (principal purpose was to keep firearms away from “persons Congress classified as potentially irresponsible and dangerous”); *United States v. Szalkiewicz*, 944 F.2d 653 (9th Cir.1991); *United States v. Causey*, 609 F.2d 777 (5th Cir.1980); *United States v. Smith*, 591 F.2d 1105 (5th Cir.1979). See also *United States v. Rosenbarger*, 536 F.2d 715 (6th Cir.1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2920, 53 L.Ed.2d 1060 (1977); *United States v. Kinsley*, 518 F.2d 665 (8th Cir.1975).

FN20. *United States v. Throneburg*, 921 F.2d 654 (6th Cir.1990); *United States v. Evans*, 854 F.2d 56 (5th Cir.1988); *United States v. Pelusio*, 725 F.2d 161 (2d Cir.1983); *United States v. Oliver*, 683 F.2d 224 (7th Cir.1982).

\*920 In such an instance, the government may charge and try a defendant for multiple offenses, but there may not be simultaneous convictions and sentences for “should the jury return guilty verdicts for each count, ... the district judge should enter judgment on only one of the statutory offenses.”<sup>FN21</sup>

FN21. *Ball v. United States*, 470 U.S. 856, 865, 105 S.Ct. 1668, 1673, 84 L.Ed.2d 740, 748 (1985).

If in doubt of its ability to prove possession of any of the weapons involved, the government properly could have sought to prove possession of all. Moreover, had the government evidence that Berry obtained the guns at different times or stored them in separate places, then it could have sought to prove that.<sup>FN22</sup> But simultaneous convictions and sentences for the same criminal act violates the double jeopardy clause. We perforce must vacate those sentences, as we explained in *United States v.*

*Lemons*.<sup>FN23</sup>

FN22. *United States v. Hodges*, 628 F.2d 350 (5th Cir.1980).

FN23. 941 F.2d 309, 318 (5th Cir.1991) (proper procedure is to vacate and remand for the government to dismiss the duplicitous convictions, not to retry the case).

[10][11][12] The government maintains that because the sentences are to run concurrently Berry's failure to object to the indictment bars his objection to the multiple convictions. The government misperceives our precedents. We apply a rule which allows the criminal defendant to complain of non-concurrent multiple sentences on appeal despite a failure to complain of the multiple indictments.<sup>FN24</sup> A sentence is not concurrent where, as here, mandatory special assessments are separately imposed on each conviction.<sup>FN25</sup> In any event, Berry's convictions could not be affirmed even if his sentences are deemed to run concurrently because, as the Supreme Court made clear and detailed in *Ball*, “the separate conviction apart from the concurrent sentence, has potential adverse consequences.”

FN24. *United States v. Cauble*, 706 F.2d 1322 (5th Cir.1983), cert. denied, 465 U.S. 1005, 104 S.Ct. 996, 79 L.Ed.2d 229 (1984). See also *Causey v. United States*, 609 F.2d at 778.

FN25. *Ray v. United States*, 481 U.S. 736, 107 S.Ct. 2093, 95 L.Ed.2d 693 (1979).

[13] Finally, the government claims that the issue of the multiplicity of the sentences is more properly presented in a collateral proceeding. We do not agree. When the only question raised is the legal question of multiplicity, the more efficient route of addressing the question is on direct appeal.<sup>FN26</sup>

FN26. E.g., *United States v. Galvan*, 949 F.2d 777 (5th Cir.1991); *United States v.*

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*Munoz-Romo*, 947 F.2d 170 (5th Cir.1991)  
, *vacated*, 506 U.S. 802, 113 S.Ct. 30, 121  
L.Ed.2d 4 (1992).

*Conclusion*

Berry's failure to object at trial precludes plenary review of the district court's failure to hold a hearing to determine if his confession was voluntary. We find no plain error in the court's failure to hold a hearing outside the presence of the jury. The multiple convictions and sentences for a single offense, on the other hand, are unconstitutional. On remand the government must select the conviction upon which it will seek sentencing for the possession by a felon charges. The others must be dismissed.

The conviction and sentence on the possession of a weapon in relation to a drug-trafficking offense is AFFIRMED; the convictions and sentences on the possession of a weapon and ammunition by a felon charges are VACATED and the matter is REMANDED for further proceedings consistent herewith.

C.A.5 (Tex.),1992.  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA           §  
  
          vs.                               §     **CRIMINAL NO. B-14-876-01**  
  
KEVIN LYNDEL MASSEY               §

**ORDER**

Upon consideration of the Government’s Motion to Dismiss Counts One and Four of the Indictment, it is hereby ordered that Counts One and Four of the Indictment in the above-styled and numbered cause be dismissed as to defendant, **Kevin Lyndel Massey**. The defendant was found guilty and convicted on Counts Two and Three of the Indictment on September 30, 2015.

**IT IS ORDERED** that Counts One and Four of the Indictment be Dismissed as to defendant, **Kevin Lyndel Massey**.

SIGNED on this \_\_\_\_\_ day of JANUARY, 2016.

\_\_\_\_\_  
ANDREW S. HANEN  
United States District Judge