

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
(Filed Electronically)**

**CRIMINAL ACTION NO. 5:06CR-19-R
UNITED STATES OF AMERICA,**

PLAINTIFF,

vs.

STEVEN D. GREEN,

DEFENDANT.

**MOTION TO DISMISS AND/OR PRECLUDE SENTENCING
ON MULTIPLE COUNTS THAT ARE BASED ON THE SAME MURDERS**

Comes the defendant, Steven Dale Green, by counsel and pursuant to 18 U.S.C. §924(j)(1), 18 U.S.C. §1111 and the Fifth and Eighth Amendments to the United States Constitution, and moves the Court to (1) dismiss and/or preclude sentencing on counts 3-6 (§1111 premeditated murder) and counts 7-10 (§1111 felony murder); alternatively to (2) dismiss and/or preclude sentencing on counts 13-15 (§924(c), (j)); and, alternatively to (3) permit sentencing on one murder count per victim.

Relevant Background

The United States' Notice of Intent to Seek the Death Penalty [Dkt. 70] seeks a sentence of death on each of 12 counts in the indictment. In essence, this case involves the murders of 4 individuals, which the government has charged 12 times - each murder is charged under §1111 as a premeditated murder (counts 3, 4, 5, and 6), under §1111 as a felony murder (counts 7, 8, 9 and 10) and under §924(j) as a firearm murder (counts 13, 14, 15, and 16). Thus the murder of each individual was charged in three counts - as a premeditated murder, a felony murder and a firearm murder. Mr. Green has now been convicted of all 12 of these counts.

Multiple punishments cannot be imposed under the §1111 and 924(j) counts

A person may only be punished for multiple crimes based on the same conduct if each crime requires proof of a fact that the other does not, *see Blockburger v. United States*, 284 U.S. 299 (1932), or if Congress has clearly expressed its intent to impose cumulative punishment for the same conduct under different statutory provisions, *see Garrett v. United States*, 471 U.S. 773, 778 (1985) (“Where the same conduct violates two statutory provisions, the first step in the double jeopardy analysis is to determine whether the legislature--in this case Congress--intended that each violation be a separate offense.”). Thus, in a single prosecution charging a defendant with violations of multiple statutes, only if the statutes make clear that Congress intended to impose cumulative punishments, is the court authorized to impose those punishments. *See, e.g., id.* at 779; *Missouri v. Hunter*, 459 U.S. 359 at 368-69 (1983); *Albernaz*, 450 U.S. 333, 344 (1981) (“Where Congress intended ... to impose multiple punishments, imposition of such sentences does not violate the Constitution.”). However, if Congress did not clearly intend multiple punishments, they are precluded unless each offense requires proof of at least one fact that the other does not. *Blockburger*, 284 U.S. at 304 (“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”).

Here, the government seeks capital sentencing on each of 3 counts for each murder victim - a premeditated murder, a felony murder and a firearm murder. However, the firearm murder, charged under §924(j)¹, subsumes the premeditated and felony murder §1111 counts applicable to each victim,

¹ *See United States v. Ostrander*, 411 F.3d 684, 692 (6th Cir. 2005) (“A violation of §924(j) is thus a violation of §924(c) that results in a murder caused by a firearm.”)

and as a result the counts merge, and multiple punishments are not permitted. This is so because §924(j)(1) incorporates the definition of murder in §1111, thus entirely subsuming the §1111 counts for each victim.² Multiple punishments would be permitted under §924(j)(1) and §1111 had the government charged an underlying crime of violence *other than the murder*, however, it did not. Congress could not have intended multiple punishments for the §1111 murders and the firearm murders, given that it defines the murder under §1111. In addition, because of the reliance on §1111 to define the §924(c)/(j) murder, both the premeditated murder(s) and the felony murder(s) are lesser included offenses with identical elements subsumed by §924(j)(1). As a result, multiple punishments are precluded both under the statute and by the Double Jeopardy Clause, and the only counts that can go to the sentencing jury are counts 13-16.³

Alternatively, the court must strike the §924 counts

Section 924(c) provides the sentencing consequences for using or carrying a firearm during and in relation to a crime of violence “[e]xcept to the extent that a greater minimum is otherwise provided by law.” Here, if the court rejects the multiple punishments argument made above and permits the jury to consider the §1111 counts, both the felony murder and premeditated murder counts (4 each) carry minimum terms of life in prison, and thus greater minimum sentences than §924(j) which provides a possibility of any term of years, life or death. Consequently, the “except clause” in §924(c)(1)(A) precludes sentencing under that provision because of the greater minimum sentence

² Section 924(j)(1) specifically provides that “A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall (1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life...”

³ In addition, the felony murder and premeditated murder counts arise out of the same statutory provision, and should not be the basis for multiple punishments.

provided under §1111. *See United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008) (mandatory minimum sentence under §924(c)(1)(A) was inapplicable where the defendant was subject to a longer mandatory minimum sentence for a career criminal firearm possession violation) and *United States v. Williams*, 558 F.3d 166, 175 (2d Cir.2009) (mandatory minimum sentence under Section 924(c)(1)(A) is also inapplicable where the defendant is subject to a longer mandatory minimum sentence for a drug trafficking offense that is part of the same criminal transaction or set of operative facts as the firearm offense); *but see United States v. Black*, 2009 WL 1011741 (D. Me. April 15, 2009), noting circuit split including *United States v. Jolivette*, 257 F.3d 581, 587 (6th Cir.2001) (holding that armed bank robbery statutes that do not impose mandatory minimum sentences do not trigger the “except clause” and adopting *United States v. Alaniz*, 235 F.3d 386 (8th Cir. 2000) in dicta).⁴

In addition, with regard to the §924 counts, the government has charged the murder which is the subject of the §1111 premeditated murder counts, as the predicate crime of violence for the firearm murder. It makes little sense to permit the predicate crime of violence for §924(c)(1)(A) to be the §924(j)(1)/1111 murder - as this essentially charges the defendant with use of a firearm during a murder to commit a murder. Should the court deny the motion to preclude multiple punishments on the §1111 and 924 counts, it should also strike the 924 counts on this basis.

All 12 capital counts cannot go to the jury

Finally, regardless of the ruling on the arguments made above, this court must permit only one capital count per victim to go to the jury. The triple exposure for each of the 4 deaths skews the

⁴ *See United States v. Alaniz*, 235 F.3d 386, 386 (8th Cir.2000) (“except clause” only applies to a “greater minimum sentence” for the various types of firearm-related conduct proscribed in § 924(c)(1)(A)). Here, however, the firearm related conduct would be the murders.

deliberative process in favor of death in violation of the 8th amendment.

Conclusion

For the foregoing reasons, the defendant requests that the court (1) preclude sentencing on the §1111 counts, or alternatively (2) preclude sentencing on the §924(c)/(j) counts based on the “except clause”, or alternatively (3) force an election of one count per victim for purposes of capital sentencing.

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Certificate of Service

I hereby certify that on May 11, 2009, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following: Marisa J. Ford, Esq., Assistant United States Attorney.

/s/ Scott T. Wendelsdorf