UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CRIMINAL ACTION NO. 5:06 CR-00019-R

UNITED STATES OF AMERICA **PLAINTIFF**

v.

STEVEN D. GREEN **DEFENDANT**

UNITED STATES' RESPONSE TO DEFENDANT'S
MOTION TO DISMISS AND/OR PRECLUDE SENTENCING
ON MULTIPLE COUNTS THAT ARE BASED ON THE SAME MURDERS

The United States hereby responds to defendant's Motion to Dismiss and/or Preclude Sentencing on Multiple Counts that are Based on the Same Murders. In essence, the defendant contends that the premeditated murder, felony murder, and firearm charges are multiplicitous and violate Double Jeopardy. Accordingly, he attempts to force election of counts at sentencing. For the reasons set forth below, and any other authority adduced at a hearing on this matter, the defendant's motion should be denied.

As a threshold matter, Green has waived this issue because he did not object prior to trial. *See* Fed.R.Crim.P. 12(b)(2) (requiring that defenses and objections based on defects in an indictment be raised before trial or they are waived); *United States v. Prescott*, 42 F.3d 1165, 1167 (8th Cir. 1994) (holding that failure to raise pretrial objection to alleged duplicitous counts in the indictment constitutes waiver of the defense); *United States v. Shephard*, 4 F.3d 647, 650 (8th Cir. 1993) (holding that Fed.R.Crim.P. 12(b)(2) requires that challenges based on multiplicitous counts in an indictment and related Double-Jeopardy problems be raised before trial or they are waived).

In any event, as to the merits of Green's Double Jeopardy claim, in a single trial where separate and consecutive sentences are imposed for the same underlying circumstances, the Double Jeopardy Clause merely prevents a sentencing court from imposing greater punishment than a legislature intended. *See Missouri v. Hunter*, 459 U.S. 359, 368 (1983). Imposition of multiple punishments for the same underlying circumstances does not violate the Constitution as long as Congress intended it. *See Albernaz v. United States*, 450 U.S. 333 (1981).

The Supreme Court has consistently used the test from *Blockburger v. United States*, 284 U.S. 299 (1932), as the initial starting point for determining legislative intent. *See Albernaz*, 450 U.S. at 345 n. 3 (explaining that "the established test for determining whether two offenses are the 'same offense' is the rule set forth in *Blockburger* "). Under *Blockburger*, "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 one, is whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304.

Examining the elements of premeditated murder and felony murder, it is clear that premeditated murder contains proof of a fact that felony murder does not – premeditation. And felony murder requires proof of a fact that premeditated murder does not – aggravated sexual abuse. Although premeditated murder and felony murder are part of the same criminal statute (18 U.S.C. 1111), under *Blockburger* they are different crimes and convictions based on this charging scheme do not raise multiplicity or doubly jeopardy issues. *See United States v. Narcia*, 776 F. Supp. 491, 495-96 (D. Ariz. 1991) (citing *Watson v. Jago*, 558 F.2d 330, 334-35 (6th Cir. 1977)).

With respect to Green's convictions on the firearms' charges, in comparing the elements of felony murder and premeditated murder to the Section 924(c) offenses, it is clear that the Section 924 counts require proof of two facts that the murder counts do not – namely, that a firearm was used or carried during the commission of a violent crime and that a murder occurred by use of the firearm. However, the murder counts under Section 1111 do not require proof of a different fact than the Section 924 counts. Thus, the murder counts fail the *Blockburger* test.

But that is not the end of the Court's inquiry. There is no multiplicity or Double Jeopardy violation here, because, as the Sixth Circuit held in *United States v. Johnson*, 22 F.3d 106 (6th Cir. 1994), Congress evinced a clear intent to impose multiple punishments for the underlying crime – in this case murder under Section 1111 – and a 924(c)/924(j) conviction. The Supreme Court itself has recognized that "the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history." *Garrett v. United States*, 471 U.S. 773, 779 (1985) (citing *Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Albernaz* 450 U.S. at 340 (1981); *Whalen v. United States*, 445 U.S. 684, 691-692 (1980)). And in *Johnson*, the Sixth Circuit held that "Congress wanted to make sure in § 924(c) that all federal crimes of violence committed with a firearm are enhanced. . . . Congress intended to impose additional punishment for the same conduct, and the Double Jeopardy Clause does not proscribe multiplying the punishment in this way." *Johnson*, 22 F.3d at 107, citing *Albernaz*, 450 U.S. 344 ("where Congress intended . . . to impose multiple punishments, imposition of such sentences does not violate the Constitution"). Rather, the sentencing scheme that Congress intended in creating predicate-offense crimes trumps *Blockburger* and, indeed, this is well-established law. If it were not, predicate-offense crimes like RICO, CCE, and 924(c) would have failed long ago.

The Sixth Circuit recognizes that Section 924(c) includes and overlaps the conduct proscribed in Section 1111 but requires courts to utilize a separate punishment structure in order to ensure that such offenders receive a harsher punishment. *Johnson*, 20 F.3d at 107-08; *see also United States v. Allen*, 247 F.3d 741 (8th Cir. 2001) ("no doubt that Congress intended to impose multiple, cumulative punishments under § 924(c)"). The fact that Green was convicted of Section 924(j) in addition to Section 924(c) does not change the analysis. Section 924(j) is not a separate crime, but rather an additional aggravating punishment for the scheme already set out in § 924(c). *Allen*, 247 F.3d at 741; *United States v. Curtis*, 324 F.3d 501 (7th Cir. 2003).

WHEREFORE, the United States respectfully submits that defendant's Motion to Dismiss and/or Preclude Sentencing on Multiple Counts that are Based on the Same Murders be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 12, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to Scott T. Wendelsdorf, Federal Defender, and Patrick J. Bouldin, Assistant Federal Defender, counsel for defendant, Steven D. Green.

/s/ Marisa J. Ford
Assistant United States Attorney