

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES OF AMERICA,)
Plaintiff,)
)
vs.) CR-00-N-0422-S
)
ERIC ROBERT RUDOLPH,)
Defendant.)

MOTION TO STRIKE THE DEATH PENALTY

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“From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored -- indeed, I have struggled -- along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question -- does the system accurately and consistently determine which defendants ‘deserve’ to die? -- cannot be answered in the affirmative. ... The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.

“Perhaps one day this Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital-sentencing scheme. I am not optimistic that such a day will come. I am more optimistic, though, that this Court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness ‘in the infliction of [death] is so plainly doomed to failure that it -- and the death penalty -- must be abandoned altogether.’ *Godfrey v. Georgia*, 446 U.S. 420, 442 (1980) (Marshall, J., concurring in the judgment). I may not live to see that day, but I have faith that eventually it will arrive. The path the Court has chosen lessens us all. I dissent. (U.S. 1994)”

Callins v. Collins, 510 U.S. 1141, 1145-1146, 1158-1159 (U.S. , 1994) (Justice Blackmun dissenting).

* * *

I. Relevant Factual Background.

On November 15, 2000, a federal grand jury in Birmingham, Alabama returned a two count indictment charging defendant Eric Robert Rudolph with: (1) a bombing resulting in death in violation of 18 U.S.C. § 844(i) and (2) the use of a destructive device during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1). On June 26, 2003, the indictment was amended to allege certain death qualifying factors pursuant to 18 U.S.C. § 3591(a) and certain aggravating factors pursuant to 18 U.S.C. § 3592(c). *See* App. 1 (amended indictment)¹.

The government has alleged that on or about January 29, 1998, Mr. Rudolph, bombed the New Women All Women Health Care Center, an abortion clinic in Birmingham, Alabama, and either intentionally or recklessly caused the death of one individual and the personal injury of another. On December 11, 2003, the government filed its Notice of Intent to Seek the Death Penalty. *See* App . 4. The special findings section alleges that defendant acted with specific states-of-mind and under factual circumstances matching specific statutory aggravating factors set forth in the Federal Death Penalty Act of 1994.

II. Relevant Legal Background.

A. The Supreme Court’s Modern Death - Penalty Jurisprudence: 1972 to the Present.

In 1972, no longer willing to tolerate the arbitrary and capricious imposition of capital punishment, a divided Supreme Court struck down all then-existing state death-penalty schemes as incompatible with the guarantees of the Eighth and Fourteenth Amendments to the United States Constitution. *Furman v. Georgia*, 408 U.S. 238 (1972). Each of the five justices who

¹ The abbreviation “App.” refers to the separately bound volume designated “Appendix to Motion to Strike the Death Penalty.” The number(s) following “App. at” indicate a page or pages in the Appendix.

concurring in the one-paragraph *per curium* opinion advanced separate reasoning. However, as the Court has since recognized for twenty years, the comparison drawn by Justice Stewart between receiving a sentence of death and being struck by lightning is the very essence of *Furman*.¹

“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders, . . . many just as reprehensible as these, the petitioners are among a capriciously selected handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”

Furman, 408 U.S. at 309-10 (Stewart, J., concurring) (internal citations and footnotes omitted).

Members of the Court also took note that the death penalty was often sought selectively, “feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority . . .” *Furman*, 408 U.S. at 255 (Douglas, J., concurring). Justice White, also concurring in the result, added the following observation on the

¹ The Court later observed as follows with respect to one of the key principles underlying its decision in *Furman*:

“A fair statement of the consensus expressed by the Court in *Furman* is that ‘where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.’”

Zant v. Stephens, 462 U.S. 862, 874 (1983) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion of Stewart, Powell and Stevens, JJ.)).

irrational operation of the death penalty: “[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not. *Furman*, 408 U.S. at 313 (White, J., concurring).

In response to *Furman*, many states with a long history of capital punishment and *de jure* segregation, primarily those in the deep South, rushed to enact new capital punishment schemes.² Four years after *Furman*, the issue of capital punishment came once again before the Court, this time in the cases of five men who had been prosecuted and sentenced to death (all in the South) under post-*Furman* statutes.³ On July 2, 1976, the Supreme Court issued opinions in those five cases. In three cases, the Court concluded that the states had successfully overcome the constitutional concerns articulated in *Furman*. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). The two remaining state schemes were struck down, principally because they mandated death sentences for particular classes of convicted murders without requiring “particularized consideration of all

² For a discussion of the South Carolina experience in this regard, see John H. Blume, “Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the ‘Modern’ Era of Capital Punishment in South Carolina,” 54 S.C. L. REV. 285 (2002).

³ Throughout the twentieth century, and to this day, the death penalty has been a primarily Southern phenomenon historically rooted in racial discrimination. Figures current as of March 27, 2003 show that since *Gregg* was decided in 1976, 877 executions have been carried out in this country. Of those, 690 - more than 80% - have taken place in the South, principally in what is sometimes referred to as “the death belt.” Two states - Virginia and Texas - account for a combined total of 388 executions, more than half of all post-*Gregg* executions nationwide. See App. at 11, Declaration of Kevin McNally. Mr. McNally’s Declaration is based on information that was current as of April 9, 2003, and which is dated and was included as part of his original Declaration. See also, http://www.capdefnet.org/fdprc/contents/summaries_of_cases/case_summ_frame.asp. Counsel have submitted Mr. McNally’s original Declaration but have substituted information current as of February 27, 2004. That information was obtained from Mr. McNally.

relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.” *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion); *see also Roberts v. Louisiana*, 428 U.S. 325 (1976).

In the twenty-six years since *Gregg*, the Supreme Court has decided well over 100 capital cases, spawning a complex and substantial body of death penalty jurisprudence. From that body of law, several core principles emerge: (1) death is a different kind of punishment and, therefore, every stage of a capital case must be subject to heightened standards of review and scrutiny; (2) a constitutional death-penalty scheme must provide for meaningful appellate review; (3) vague, duplicative, or all-encompassing aggravating factors are constitutionally invalid since such factors do not genuinely narrow the class of murders for which the death penalty is appropriate, or otherwise justify the imposition of a death sentence on one defendant as compared to others found guilty of murder; (4) no limitation may be placed on a defendant’s right to present evidence in mitigation of a sentence of death; and (5) in jurisdictions which employ a “weighing” scheme for selecting the penalty to be imposed upon a death-eligible defendant, the submission to a jury of a single invalid aggravating factor will lead to automatic reversal of the death sentence. Each of these principles will be discussed in more detail below.⁴

1. Death is different.

The first principle of capital jurisprudence - that “death is different” - informs and defines the entire body of law governing capital cases. Death penalty cases are not the same as other

⁴ For a primer on this area, see “Thirty-first Annual Review of Criminal Procedure,” 90 *Georgetown L.J.* 1045, 1838-1870 (2002). *See also* John H. Blume, “Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the ‘Modern’ Era of Capital Punishment in South Carolina,” 54 *S.C. L. REV.* 285 (2002).

cases and must be treated accordingly.⁵ Commencing with the 1976 quintet of cases that marked the beginning of the modern death penalty era, the Supreme Court has taken numerous opportunities to express its recognition of the differences between death and all other forms of punishment. For example, in the course of striking down North Carolina's initial post-*Furman* death-penalty scheme in *Woodson*, the Court observed that "[t]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson*, 428 U.S. at 305. The following year, in *Gardner v. Florida*, 430 U.S. 339 (1977), the proposition was reiterated:

"[D]eath is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

Gardner, 430 U.S. at 357-358.

The principle that "death is different" is not simply the dramatic recitation of an obvious truism. Rather, this concept forms the bedrock of a death-penalty jurisprudence that is defined by sharply increased judicial attention to every step of the process through which the irrevocable sanction of death is sought and carried out.⁶ The post-*Furman* Court has described this

⁵ In 1995, Justice Stevens, citing seven separate decisions, noted: "Our opinions have repeatedly emphasized that death is a fundamentally different kind of penalty from any other that society may impose." *Harris v. Alabama*, 513 U.S. 504, 516 n.1 (1995) (Stevens, J., dissenting).

⁶ Based on figures current as of late October 2003, there are presently 3,517 inmates under a sentence of death in this country. See, App. at 11. As noted earlier, there have been 877

jurisprudence as mandating a “heightened standard of reliability” for the entire process through which the sovereign attempts to marshal the legal and moral authority to kill one of its citizens. This heightened concern for reliability is “the natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.” *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). In *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985), the Court observed that “the qualitative difference of death from all other punishments *requires* a correspondingly greater degree of scrutiny of the capital sentencing determination.” (emphasis added). *See also, Monge v. California*, 524 U.S. 721, 731-732 (1998) (reiterating the “acute need for reliability in capital sentencing proceedings,” and observing that, “[t]he penalty phase of a capital case is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment . . .”).

2. A constitutional death-penalty scheme must provide for meaningful appellate review.

It is a fair summary of the overall thrust of the *Gregg-Jurek-Proffitt* trilogy that a capital sentencing scheme withstands constitutional challenge only to the extent that it (a) genuinely narrows the class of murderers for whom the ultimate penalty is available and (b) provides the heightened procedural safeguards necessary to avoid the evils identified in Furman, principally, the arbitrary, capricious and/or discriminatory imposition of the ultimate penalty. *See, e.g., Zant v. Stephens*, 462 U.S. at 890.

One vitally important procedural safeguard, and one which has been emphasized by the

executions since 1976. *Id.* This total includes three executions of federal prisoners: Timothy McVeigh (June 11, 2001); Juan Raul Garza (June 19, 2001); and Louis Jones (March 18, 2003). Mr. McVeigh was the first federal death row prisoner to be executed in the United States since 1963.

Court from the earliest post-*Furman* cases forward, is the availability of “meaningful appellate review.” *Pulley v. Harris*, 465 U.S. 37, 55 (1984) (Stevens, J., concurring). While *Pulley* ultimately held that a specialized form of capital appellate scrutiny known as “proportionality review” was not required by the Eighth and Fourteenth Amendments,⁷ the Court has been steadfast in its view that meaningful appellate review is an essential component of a constitutional death-penalty scheme. In *Zant* for example, the Court explained the basis of its original approval of Georgia’s capital-sentencing procedure in *Gregg* as

“rest[ing] primarily on two features of the scheme: That the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and that the State Supreme Court reviewed the record of every death-penalty proceeding to determine whether the sentence was arbitrary or disproportionate.”

Zant, 462 U.S. at 876.

In *Godfrey v. Georgia*, 446 U.S. 420 (1979), the Court discussed three independent criteria as indispensable to a finding that a particular capital scheme effectively and constitutionally channeled the sentencing authority’s discretion. Among these bedrock criteria was the availability of rational appellate review of the “process for imposing a sentence of death.” *Godfrey*, 446 U.S. at 428. In *Parker v. Dugger*, 498 U.S. 308, 321 (1991), the Court revisited and reaffirmed the importance of meaningful appellate review in determining the constitutionality of a death-penalty scheme: “We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.”

⁷ In *Pulley*, the Court defined capital proportionality review as an inquiry to determine whether a sentence of death in a particular case is disproportionate to the penalties imposed in similar cases. *Pulley*, 465 U.S. at 43, 44.

3. A constitutional death-penalty scheme may not employ aggravating circumstances that are vague, duplicative, overly broad, or which do not justify the imposition of a more severe sentence on the defendant as compared to others found guilty of murder.

The Federal Death Penalty Act (“FDPA”) prescribes a “weighing” scheme for capital sentencing. Under this scheme, a penalty phase jury first decides whether or not certain aggravating factors have been established beyond a reasonable doubt and then weighs the aggravating factors against any mitigating factors.⁸ 18 U.S.C. §3593(e). If the jury concludes that the aggravating factors sufficiently outweigh the mitigating factors, it is then authorized - but not required - to impose a sentence of death. *Id.*

Importantly, “[t]he use of ‘aggravating circumstances’ is not an end in itself, but a means of genuinely narrowing the class of death eligible persons and thereby channeling the jury’s discretion.” Lowenfield v. Phelps, 484 U.S. 231, 244 (1988). In light of the critical narrowing function performed by aggravating factors, it follows that if a particular factor is vague to the point of defying definition or, alternatively, could be interpreted by a particular sentencing authority (whether judge or jury) as applicable to any and therefore *all* murders, that factor fails to satisfy the constitutionally required narrowing purpose and is invalid. *See, Gregg v. Georgia*, 428 U.S. at 189 (“where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action”). *See*

⁸The weighing of aggravating factors against mitigating factors, while required by the FDPA and some state schemes, is not required by the Constitution. *See, e.g., Blystone v. Pennsylvania*, 494 U.S. 299 (1990). In fact, a number of states employ “non-weighing” systems in which death-eligibility occurs when the jury finds the existence of one or more statutory aggravating circumstances but the jury is left to select between death and any alternative sentence upon consideration of the aggravating and mitigating evidence. South Carolina is one such state. *See, S.C. Code §16-3-20.*

also, Kyron Huigens, "Rethinking the Penalty Phase," 32 ARIZ. ST. L.J. 1195 (2000).

The Supreme Court has consistently recognized that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. at 877. Most fundamentally, aggravating circumstances must be relevant to the task of distinguishing "those who deserve capital punishment from those who do not." *Arave v. Creech*, 507 U.S. 463, 474 (1993). For example, in *Godfrey v. Georgia*, *supra*, the defendant was sentenced to death upon a finding that the murder was "outrageously or wantonly vile, horrible or inhuman." *Godfrey*, 446 U.S. at 422. In striking down this aggravating circumstance and vacating the sentence of death, Justice Stewart's plurality opinion reasoned that the language of this particular aggravating circumstance failed to provide "inherent restraint on the arbitrary and capricious infliction of the death sentence" since virtually every murder could be said to fit those criteria. *Id.* at 428-429. Since the facts and circumstances of the murder in *Godfrey* did not stand out from those of other murders, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many in which it was not." *Id.* at 433. In *Tuilaepa v. California*, 512 U.S. 967, 972 (1994), the Court reiterated the two constitutional tests which aggravating factors must meet: (1) a valid aggravating factor must not apply to every defendant convicted of murder, but only to a rationally-selected subclass of murderers; and (2), the circumstances, as defined by the statute, must not be vague.

Additionally, aggravating factors, especially where utilized in a weighing jurisdiction, may not be alleged in duplicative fashion. This is to avoid the effect of having the same conduct or circumstance found separately and weighed repeatedly. Duplicative aggravating factors, like invalid aggravating factors, have the undeniable tendency to "skew the weighing process and

create the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally.” *United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1996) (reversing death sentence imposed pursuant to 21 U.S.C. § 848(e)). In *Stringer v. Black*, 503 U.S. 222, 231 (1992), the Court observed that the difference between a “weighing state and a non-weighing state is not one of ‘semantics,’ . . . but of critical importance.” The risk is that an invalid aggravating factor may result in the placement of a “thumb [on] death’s side of the scale.” *Id.* at 243; *see also, Flamer v. Delaware*, 68 F.3d 736, 745-49 (3rd Cir. 1995) (*en banc*); *United States v. Jones*, 132 F.3d 232 (5th Cir. 1998), *aff’d on other grounds, Jones v. United States*, 527 U.S. 373 (1999).

The constitutionality of aggravating factors that are quite similar in language may rise or fall on how that language is construed, limited, and/or otherwise presented to the sentencing authority. For example, in *Proffitt* a death sentence imposed in Florida under an aggravating factor defined as “especially heinous, atrocious, or cruel” was held to be constitutional because, as construed and narrowed by the Florida Supreme Court, its inherent vagueness and overbreadth were corrected. By contrast, in *Maynard v. Cartwright*, 486 U.S. 356 (1988), an Oklahoma aggravating circumstance (virtually identical in language to the one upheld in *Proffitt*) was struck down as overly-broad and unconstitutionally vague since its potential reach had not been effectively narrowed through judicial construction or jury instructions. *See also, Shell v. Mississippi*, 498 U.S. 1 (1990) (trial judge’s attempt to limit the reach of Mississippi’s “especially heinous, atrocious, or cruel” aggravating factor was constitutionally insufficient).

4. No limitation may be placed on the right of the accused to present relevant mitigating evidence during the penalty trial.

A fourth aspect of a constitutional death-penalty scheme is that no limitation may be placed on the right of the accused to present for the sentencer’s consideration all relevant

mitigating evidence. In this regard, the Supreme Court has struck down state death penalty schemes, as applied to particular defendants or cases, where the same scheme had survived prior facial challenges. For example, in *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989), the Court declared the Texas death-penalty scheme unconstitutional as applied since, in the area of a capital defendant's mental retardation, it failed to provide the jury any meaningful opportunity "to consider and give effect to mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime."

The requirement that a defendant be permitted to present all relevant evidence in mitigation is rooted in *Lockett v. Ohio*, 438 U.S. 586 (1978). There, a plurality of the Court held that "in all but the rarest kind of capital cases," a sentencing authority may not "be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record . . . as a basis for a sentence less than death." *Lockett*, 438 U.S. at 113-114 (emphasis in original); *see also*, *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Court explained that a constitutional death-penalty scheme

"cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant."

McCleskey, 481 U.S. at 305-306. In *Green v. Georgia*, 442 U.S. 95 (1979), the Court held that a defendant must be allowed to proffer mitigating evidence even where it violates the state's rules of evidence.

Just five years ago, the importance of the *Lockett* line of cases was underscored by the Supreme Court in *Buchanan v. Angelone*, 522 U.S. 269 (1998), where Chief Justice Rehnquist,

writing for a majority, stated:

“[I]n the [penalty] phase, we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination.

* * *

“In the [penalty] phase, our cases have established that the sentencer may not be precluded from considering any constitutionally relevant mitigating evidence.”

Buchanan, 522 U.S. at 276 (citations omitted). More recently, in *Williams v. Taylor*, 529 U.S. 362 (2000), the Court noted that one purpose of mitigating evidence is to lessen what the Court termed a defendant’s “moral culpability,” even where such evidence “does not undermine or rebut the prosecution’s death-eligibility case.” *Williams*, 529 U.S. at 398. Mitigating evidence is so critical in capital cases that, as held in *Williams*, the failure of counsel to investigate, develop and present such evidence result in the denial of the assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments. Likewise, in *Wiggins v. Smith*, 123 S.Ct. 2527 (2003), the Court held that the defendant’s Sixth Amendment right to effective counsel was violated by counsel’s failure to investigate defendant’s background and present mitigating evidence of the extensive abuse he suffered. *Wiggins* also made clear that such a failure on the part of trial counsel is constitutionally prejudicial where “there is a reasonable probability that at least one juror would have struck a different balance.” *Wiggins*, 123 S.Ct at 2543.

5. In a weighing schemes like the FDPA’s, the presence of a single invalid aggravating factor mandates that a resulting death verdict be set aside.

As previously noted, the FDPA capital sentencing procedure is a weighing scheme. In *Stringer v. Black, supra*, the difference between capital punishment schemes which allow juries to weigh aggravating factors against mitigating factors and non-weighing, “guided-discretion”

schemes was described by the Court as of “critical importance.” *Stringer*, 503 U.S. at 231. Where an invalid aggravating factor has been improperly submitted and found, the delicate balancing process is upset, a circumstance that, in the language of *Stringer*, “creates the possibility . . . of randomness” and may fatally skew the process by placing “a thumb . . . on death’s side of the scale.” *Id.* at 243. The *Stringer* Court also identified dangers associated with the submission of invalid aggravating factors in a weighing jurisdiction: (1) the risk of the jury deciding that the defendant was more deserving of the death penalty given the sheer volume of aggravating factors; and (2) the creation through the same process of an overall jury bias in favor of a sentence of death. *Id.* at 235; *see also, Flamer v. Delaware*, 68 F.3d at 745-749 (with a protracted discussion of this issue).

Even in jurisdictions such as Alabama, Delaware, Florida, and Indiana, where judges (at least prior to the Supreme Court’s decision in *Ring v. Arizona*, 122 S.Ct. 2428 (2002)) have the authority to override a jury’s life or death recommendation, or where such verdicts may be merely advisory, the submission to the jury of an invalid aggravating factor will vitiate any sentence of death imposed by the judge no matter what the jury’s actual recommendation. *Harris v. Alabama, supra; Espinosa v. Florida*, 505 U.S. 1079 (1992). This is so because the judicial review function is not plenary and is necessarily influenced by the jury’s actions, even where the jury’s verdict is purely advisory.

B. The Federal Death Penalty Act of 1994.

After *Furman*, and in the absence of post-*Furman* corrective action by Congress, it was widely assumed that the capital provisions of existing federal criminal statutes were not

constitutional. As a result, all federal capital prosecutions ceased.⁹ Such remained the case until 1988, when Congress enacted the first post-*Furman* federal death penalty by authorizing capital punishment for murders occurring in the context of drug trafficking. 21 U.S.C. § 848(e). The reach of the federal death penalty was greatly expanded on September 13, 1994, when President Clinton signed into law the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 *et seq.*, the statutory scheme under which the government is proceeding in this case. The FDPA permits the death penalty to be considered in the following circumstances:

“§3591. Sentence of death - (a) A defendant who has been found guilty of - (1) any . . . offense for which a sentence of death is provided, if the defendant as determined beyond a reasonable doubt at the hearing under section 3593 - (A) intentionally killed the victim; (B) intentionally inflicted serious bodily injury that resulted in the death of the victim; (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act . . .”

18 U.S.C. §3591(a).

In order to set into motion what Justice Blackmun called “the machinery of death,”¹⁰ the

⁹ In practice, there had been a *de facto* moratorium on federal capital prosecutions for the decade prior to *Furman*. For an exhaustive history of the federal death penalty, including an overview of the FDPA, *see* R.K. Little, “The Federal Death Penalty: History and Some Thoughts About the Department of Justice’s Role,” 26 *FORDHAM URBAN L.J.* 347 (1999).

¹⁰ *See Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (“From this day forward, I no longer shall tinker with the machinery of death”) (Blackmun, J., dissenting from the denial of *certiorari* in a Texas death-penalty case and announcing his view that the death penalty is, as applied and administered, unconstitutional). Justice Blackmun had dissented in *Furman*.

government must serve and file a pretrial notice that the death penalty will be sought and specify in that notice those aggravating factors which the government will seek to prove if the case goes to a penalty trial. 18 U.S.C. §3593(a). If a defendant is found guilty of an offense of the kind enumerated in §3591, a separate sentencing hearing must be conducted. The death penalty hearing may take place before the trial judge or before a jury. A defendant may waive jury-sentencing, however, only if the government consents. 18 U.S.C. §3593(b)(3). A trial court may convene a separate penalty jury where the original jury has been discharged “for good cause.” 18 U.S.C. §3593(b)(2)(C).

The penalty hearing is, for all intents and purposes, a separate trial at which both sides may call witnesses and present “information.” The statute first requires the government to establish that the defendant is “eligible” for the death penalty. To do so, the government must convince the jury, unanimously and beyond a reasonable doubt, that at least one of the “intent” findings enumerated in §3591(a)(2)(A) - (D) exists. If the jury so finds, it must next unanimously find beyond a reasonable doubt that at least one of the statutory aggravating factors set forth in §3592(c)(1) through (16) also exists. 18 U.S.C. §3593(c). If the jury does not unanimously find, in sequence, that both statutory requirements have been established beyond a reasonable doubt, then the penalty trial is over and the court must impose a sentence other than death. If, however, the government successfully carries its burden of proof in establishing both the existence of an intent factor under §3591, and one or more of the §3592(c) aggravating factors, the jury may also consider whether the government has established any *non*-statutory aggravating factor – arguably limited to victim-impact – for which pre-trial notice was provided pursuant to 18 U.S.C. §3592.

In attempting to provide guidance as to what a jury may consider at a penalty trial,

Congress spoke in terms of “information,” not “evidence.” According to the statute, “information” may be presented to the jury, by either side, “regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”¹¹ 18 U.S.C. § 3593(c).

If the government meets its threshold burdens, the jury is required to consider mitigating factors. The statute provides seven specific mitigating factors and one *Lockett*-derived “catch-all” provision - that “other factors in the defendant’s background, record or character or any other circumstance of the offense mitigate against imposition of the death sentence.” 18 U.S.C. §3592(a)(8). Mitigating factors must be established by the defendant by a preponderance of the evidence, 18 U.S.C. § 3593(c), but the jury need not be unanimous, and any juror who finds the existence of a mitigating factor may consider it in the weighing prescribed in subsection §3593(e), regardless of the number of other jurors who concur as to the existence of that factor. 18 U.S.C. § 3593(d). *See also, Mills v. Maryland*, 486 U.S. 367 (1988). By contrast, findings as to the existence of aggravating factors must be made unanimously and beyond a reasonable doubt. 18 U.S.C. §3593(d).

¹¹ This is a variation on the language of Rule 403, F.R.E., which permits a court to exclude otherwise relevant evidence where its probative value is “*substantially* outweighed by the danger of unfair prejudice . . .” (emphasis added). In *United States v. Gilbert*, 120 F.Supp.2d 147 (D.Mass. 2000), Judge Ponsor took note of this distinction, commenting:

“The balance of probative value and unfair prejudice must be weighed more carefully in a death penalty case than in normal cases. Under the statute, the probative value need not be ‘substantially’ outweighed by prejudice, as F.R.EVID. 403 generally requires.”

Gilbert, 120 F.Supp.2d at 151.

Once the jury has completed its factual findings, it considers whether the aggravating factor or factors found to exist “sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death.” 18 U.S.C. §3593(e). The outcome of this weighing process is the final step in authorizing the jury to select death as the defendant’s punishment, should it be inclined to do so. Importantly, however, even where the jurors conclude that the aggravating factors are of sufficient weight to justify a death sentence, they remain entirely free to impose a sentence less than death.¹²

After considering all factors, the jury votes and returns its findings. Unless the jury unanimously recommends death or life without possibility of release, the Court must impose a sentence less than death, up to life without possibility of release. A jury unable to agree on a unanimous death verdict spares the defendant’s life.¹³ Whether the jury “recommends” a verdict of life or death, that decision is binding upon the court. 18 U.S.C. §3594. The FDPA does not provide for judicial override of the jury’s capital sentencing decision. *Id.*

No matter how the deliberations conclude, each juror is required to sign a certificate that their decision was not influenced by the “race, color, religious beliefs, national origin or sex of the defendant or of any victim . . .” 18 U.S.C. §3593(f). In the event of a death sentence, the

¹² This is reflected in the capital sentencing provisions of 21 U.S.C. § 848(k), which contain the following provision: “The jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.” Virtually all federal trial judges have given similar instructions in FDPA cases.

¹³ This was one of the holdings of the only FDPA case to reach the Supreme Court. *See Jones v. United States*, 527 U.S. 373 (1999) (If the jury reports itself unable to agree on penalty, the sentencing function reverts to the trial judge who may not impose a sentence of death; there is no re-trial).

defendant has a right of appellate review, 18 U.S.C. §3595, under which the reviewing court is permitted to grant relief from a sentence of death if: (1) the death sentence was “imposed under the influence of passion, prejudice, or any other arbitrary factor,” (2) “the admissible evidence and information adduced does not support the special finding of the existence of the required aggravating factor,” or (3) “the proceedings involved any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure.”¹⁴ 18 U.S.C. §3595(c)(2).

To date, death sentences imposed pursuant to the FDPA have been reviewed by the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits. *See, United States v. Higgs*, 353 F.3d 281 (4th Cir. June 4, 2003) (nine death sentences for one defendant affirmed); *United States v. Jackson*, 327 F.3d 27 (4th Cir. 2003) (affirming sentence of death); *United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000) (vacating sentence of death); *United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002) (affirming sentence of death); *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999) (reversing convictions and death sentences in first case indicted under FDPA); *United States v. Webster*, 162 F.3d 308 (5th Cir. 1998) (affirming sentence of death); *United States v. Hall*, 152 F.3d 381 (5th Cir. 1998) (affirming sentence of death); *United States v. Johnson*, 223 F.3d 665 (7th Cir. 2000) (affirming sentence of death); *United States v. Nelson*, 347 F.3d 701 (8th Cir. 2003) (affirming death sentence); *United States v. Quinones*, 313 F.3d 49 (2^d Cir. 2002) (reversing pre-sentence finding of unconstitutionality); *United States v. Ortis*, 315 F.3d 873 (8th Cir. 2002) (two death sentences for two defendants affirmed); *United States v.*

¹⁴The Third Circuit has held that the FDPA does not mandate an appeal from a sentence of death and that an appeal, once filed, may be withdrawn. *United States v. Hammer*, 226 F.3d 229 (3rd Cir. 2000).

Paul, 217 F.3d 989 (8th Cir. 2000) (affirming sentence of death); *United States v. Chanthadara*, 230 F.3d 1237 (10th Cir. 2000) (vacating sentence of death); *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998) (affirming sentence of death); *United States v. Battle*, 163 F.3d 1 (11th Cir. 1998) (affirming sentence of death).¹⁵

III. ARGUMENT.

A. The federal death penalty operates in an unconstitutionally arbitrary and capricious manner because it is so rarely sought or imposed.

1. Introduction: the Constitutional Premise of *Furman v. Georgia*.

The essence of the Supreme Court's *Furman* decision was captured in the concurring opinion of Justice Stewart:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders, . . . many just as reprehensible as these, the petitioners are among a capriciously selected handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Furman v. Georgia, 408 U.S. at 309-310 (Stewart, J., concurring) (citations and footnotes

¹⁵ It appears that no case brought pursuant to either of the two post-*Furman* federal death penalty statutes has been reviewed on its merits by the First, Third or Ninth Circuits. *Cf.*, *United States v. Quinones*, 313 F.3d 49 (2d Cir. 2002) (reversing district court's pre-trial order declaring FDPA unconstitutional), *op. on panel rehearing*, 317 F.3d 86 (2d Cir. 2003), reversed, *United States v. Quinones*, 313 F.3d 49 (2d Cir. 2002); *In re Sterling-Suarez*, 306 F.3d 1170 (1st Cir. 2002) (granting writ of mandamus to require appointment of two counsel where defendant is potentially exposed to federal death penalty); *United States v. Acosta-Martinez*, 252 F.3d 13 (1st Cir. 2001) (Constitution of the Commonwealth of Puerto Rico's prohibition on capital punishment does not bar federal death penalty prosecution); *United States v. Hammer*, 226 F.3d 229 (3rd Cir. 2000) (defendant sentenced to death under FDPA may withdraw appeal).

omitted). To this may be added Justice White's finding that "the death penalty is exacted with great infrequency even for the most atrocious crimes, and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring). In fact, the infrequency of death sentences was noted by each of the five concurring Justices in the *Furman* majority. See, *Furman*, 408 U.S. at 248 n.11 (Douglas, J., concurring); *id.* at 291-295 (Brennan, J., concurring);¹⁶ *id.* at 309-310 (Stewart, J., concurring); *id.* at 312 (White, J., concurring); and, *id.* at 354 n.124; 362-363 (Marshall, J., concurring).

The argument that the federal death penalty should be struck down because it is so infrequently sought or imposed should not be understood as an argument calling for its profligate use. Justice Brennan insightfully examined this issue in *Furman*:

"The States claim . . . that this rarity is evidence not of arbitrariness, but of informed selectivity. * * * Informed selectivity, of course, is a value not to be denigrated. Yet, presumably the States could make precisely the same claim if there were 10 executions per year, or five, or even if there were but one. That there may be as many as 50 per year does not strengthen the claim. When the rate of infliction is at that low level, it is highly implausible that only the worst criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in these terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of

¹⁶ Justice Brennan, positing a nation of 200 million that carries out 50 executions per year, noted that "when government inflicts a severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied." *Furman*, 408 U.S. at 294. "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system." *Id.* We are now a nation of 280 million people, and in the past fifteen years, there have been 31 federal defendants sentenced to death, three of whom have been executed.

those eligible. Certainly the laws that provide for this punishment do not attempt to draw that distinction; all cases to which the laws apply are necessarily ‘extreme.’”

Furman, 408 U.S. at 293-294 (Brennan, J., concurring).

At the time *Furman* was decided, as the opinion itself reflects, approximately 15-20% of convicted murderers and rapists were actually sentenced to death in those jurisdictions where the death penalty was available for such offenses. *Furman*, 408 U.S. at 386 n. 11 (Burger, C.J., dissenting) (citing four sources to support the statistic). Justice Powell, also dissenting, cited similar statistics. *Id.* at 435 n.19. Justice Stewart took Chief Justice Burger’s statistical analysis as lending support to his own ultimate conclusion that the death penalty was indeed, in the Eighth Amendment sense, “unusual.”

In *Furman*, arbitrariness and caprice were seen as the inevitable side-effects of a rarely-imposed punishment of death. Recall, also, Justice White’s observations, premised on his review of hundreds of state and federal death-penalty cases in what was then ten years on the Court: “[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.” *Furman*, 408 U.S. at 313 (White, J., concurring). *See also*, *Walton v. Arizona*, 497 U.S. 639, 658 (1990), *overruled on other grounds*, *Ring v. Arizona*, 122 S.Ct. 2428 (2002) (Scalia, J., concurring) (the key opinions in *Furman* “focused on the infrequent and seeming randomness with which, under the discretionary state systems, the death penalty was imposed”). In *Gregg*, the plurality reiterated this understanding of *Furman*, noting that “[i]t has been estimated that before *Furman* less than 20% of those convicted of murder were sentenced to death in those States that authorized capital punishment.” *Gregg*, 428 U.S. at 182 n. 26. This understanding was again repeated in *Woodson*, 428 U.S. at 295 n.31.

As discussed below, after more than fifteen years of experience, it is now apparent that the federal death penalty is sought and imposed far more rarely than in the cases examined by *Furman*. Being sentenced to death in the federal system is truly akin to being struck by lightning. Indeed, no principled distinction can be drawn between the cases, even among the most extreme¹⁷, in which death is imposed and those in which it is not.

2. Fifteen years of the federal death penalty.

Based on information current as of March of 2003, Federal Death Penalty Resource Counsel Kevin McNally¹⁸ concluded, based on the then-nearly 15 years' worth of data concerning the operation of the federal death penalty that since 1988 there have been more than 1,700 federal defendants exposed to a potential sentence of death. App. at 12. Of that number, a total of 278 defendants were actually authorized for capital prosecution; 225 of those authorized cases are now concluded. The overwhelming majority of those cases ended without a sentence of death being imposed. Of the 35 cases, involving 34 defendants,¹⁹ in which a federal jury actually imposed a sentence of death, four were reversed on appeal and one was set aside via executive

¹⁷ Timothy McVeigh was sentenced to death in the District of Colorado and subsequently executed for utilizing a truck bomb to blow up the Federal Building in Oklahoma City, killing 168 people and injuring hundreds more. In the Southern District of New York, two men associated with Usama bin Laden and al-Qaeda were spared the death penalty after being convicted of simultaneous terrorist attacks, utilizing truck bombs, that destroyed two American embassies in East Africa, killing 224, including 12 Americans, and injuring thousands. *See infra* at 25.

¹⁸ The affidavit of Kevin McNally is dated April 7, 2003. As explained in Footnote 3 herein, defense counsel have submitted Mr. McNally's original Declaration but have substituted the information one which Mr. McNally based his conclusions so as to render that information current as of February 27, 2004.

¹⁹ One defendant was re-sentenced to death after his original sentence was reversed on appeal. *United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000).

clemency. In March of 2003, there were 26 inmates on federal death row at Terre Haute in various stages of the direct appeal or post-conviction process. The following chart summarizes the overall federal death penalty experience, commencing with the 1988 enactment into law of the Anti-Drug Abuse Act of 1988:

**DISPOSITION OF POTENTIAL FEDERAL CAPITAL CASES
NOVEMBER 18, 1988 - MARCH 29, 2003 ²⁰**

| | |
|---|-------|
| Total Potential Cases | 1,784 |
| Cases Authorized for Capital Prosecution | 278 |
| Presently Pending Trial | 53 |
| Death Penalty Withdrawn, Plea Agreement | 84 |
| Death Penalty Vacated on Appeal, Withdrawn | 2 |
| Death Penalty Withdrawn, Other | 29 |
| Defendant Dies Before or During Trial | 3 |
| Trial: Acquittal or Non-capital Conviction | 9 |
| Trial: Jury or Judge Non-death Verdict | 55 |
| Trial: Sentence of Death | 34 |
| Executions | 3 |
| Clemency | 1 |
| On Federal Death Row, Active Death Sentence | 26 |

3. What these figures mean.

In *Furman*, the Court found the death penalty to be an arbitrary, capricious and decidedly

²⁰ These are the figures relied upon by Kevin McNally in his affidavit. App. at 9. A more recent but still slightly outdated version of this chart may be found at http://www.capdefnet.org/fdprc/contents/shared_files/docs/1_overview_of_fed_death_process.htm. The information on which the chart is based (more recent but still not as current as the information contained in the Appendix) may be obtained at http://www.capdefnet.org/fdprc/contents/summaries_of_cases/case_summ_frame.asp. A similar chart providing current information is located at App. 124.

“unusual” infringement of Eighth Amendment protections. The very infrequency with which the death penalty was sought and imposed served to guarantee arbitrary and capricious application of this ultimate penalty. *Furman* reached this conclusion based on the showing that fewer than 20% of defendants charged with capital crimes were actually sentenced to death. In the federal system, the figure is lower by a factor of ten. In fact, far fewer than 20% of those eligible for federal capital punishment are even *exposed* to the death penalty, by way of capital authorization, let alone actually sentenced to death. Taking the figure for actual death sentences returned against federal defendants by federal juries at 32, Mr. McNally concluded that approximately 2% (35 of 1,784) of all potentially death-eligible federal defendants are actually sentenced to death. In terms of actual federal executions to date - three - the figure is even smaller; approximately .0015%, or fewer than two out of 1,000.²¹

Under an analysis that was persuasive to the Court in *Furman*, the present federal death penalty is sought and imposed in an arbitrary, capricious and “unusual” manner. The penalty, accordingly, is unconstitutional and the notice of aggravating factors in this case must be dismissed.

B. The absence of a principled basis for distinguishing cases in which the federal death penalty is imposed from those in which it is not imposed renders the FDPA unconstitutional.

As developed in the preceding section, the Supreme Court has held that the Constitution will not tolerate sentences of death that are imposed arbitrarily or capriciously. In *Eddings v.*

²¹ The 1,784 baseline figure (McNally) includes 53 authorized cases that are pending trial. Based on historical data, it is reasonable to predict that a certain number of those cases will be resolved by plea agreement and that a certain number will proceed to trial, with very few resulting in death sentences. It is also reasonable to assume that some of the 26 federal prisoners under active sentence of death will succeed in appellate or post-conviction challenges to their convictions or sentences.

Oklahoma, 455 U.S. 104, 112 (1982), the Court referred to the “flipside” of this approach, insisting “that capital punishment be imposed fairly, and with reasonable consistency, or not at all.”

The reality of the federal death penalty in practice is that there is no consistency or predictability in the manner in which federal juries (and in one case, a federal judge) have imposed (or not imposed) the federal death penalty or, indeed, in which cases plead out and which proceed to trial. Included in the Appendix to this motion are summaries of the facts and circumstances of the present status or resolution of every authorized federal death penalty case since 1988,²² organized as follows:

- federal capital prosecutions awaiting trial, App. at 30;
- federal capital defendants who died before or during trial, App. 38;
- federal capital prosecutions which were dismissed by the judge for legal reasons, App. 39;
- federal capital prosecutions in which the Attorney General withdrew a notice of intent to seek the death penalty, App. 41;
- federal capital prosecutions ending in guilty pleas to a sentence other than death, App. 44;
- federal capital defendants who were found not guilty of the capital charge or were innocent, App. 54;
- federal capital defendants convicted of a lesser offense, App. 56;
- federal capital cases where the death penalty has been rejected by juries or judges, App. 57;
- federal capital cases resulting in a sentence of death, App. 65;

²² Except where indicated otherwise, this information is current as of February 27, 2004. Mr. McNally’s 2003 summaries have been updated.

- federal capital cases resulting in execution, App. 69²³ ; and,
- a listing of former federal death row inmates. App. 70.

A chart containing this same information is located at App. at 124.

One cannot read these descriptions of the many ways in which man can demonstrate his capacity for inhumanity to his fellow man without coming to the realization that *all* of the cases are by their own terms horrible, and *all* involved the infliction of agony on victims and survivors. Yet, for indiscernible reasons, some defendants were sentenced to death while the vast majority were not. If any basis can be distinguished, it is race and region.²⁴ Fairness and consistency are the opposite of arbitrariness and caprice. In the demonstrated absence of fairness and consistency, the federal death penalty must be set aside.

This argument is not refuted by simply pointing out the difficulties inherent in comparing cases. Selected summaries of the cases quickly put that overly simplistic argument to rest:

- *United States v. Timothy James McVeigh* (D.Colo.). The Oklahoma City bombing case. 168 dead. Hundreds injured. Tried, convicted, sentenced to death, executed.
- *United States v. Terry Nichols* (D.Colo.). McVeigh's co-defendant. Tried, convicted, sentenced to life.
- *United States v. Khalfan Mohamed and Rashed al`-Owhali* (S.D.N.Y.). Two defendants associated with Usama bin Laden and al Qaeda convicted in simultaneous terrorist truck-bombings in 1998 of two American embassies in East Africa. 224 killed, including 12 Americans; thousands injured. Tried, convicted, sentenced to life.
- *United States v. Theodore Kaczynski* (E.D.Ca.). The Unabomber. Three

²³ Although this page is dated April 4, 2003, the information is correct as of March 1, 2004.

²⁴As discussed *infra*, the invidiousness and irrationality of these factors is an additional reason that the federal death penalty is unconstitutional.

murders by mailbombs. Plea agreement. Sentenced to life.

- *United States v. Joseph Miner* (W.D.Pa.). Arson/pipebomb murder of pregnant girlfriend, her fetus, and three-year old daughter. Tried, convicted, sentenced to life.
- *United States v. Coleman Johnson* (W.D.Va.). Pipe-bomb used to kill pregnant girlfriend and their unborn child to avoid child support. Tried, convicted, sentenced to life.
- *United States v. Christopher Dean* (D.Vt.). Defendant sent pipebomb through the mail killing victim and disfiguring victim's mother. Plea agreement. Sentenced to life.
- *United States v. Billy Cooper* (S.D.Miss.). Car-jacking killing of two victims. Tried, convicted, sentenced to life.
- *United States v. Christopher Vialva and Brandon Bernard* (W.D. Texas). Carjacking double homicide. Tried, convicted, sentenced to death.
- *United States v. David Paul Hammer* (M.D.Pa.). Prison inmate guilty of strangling to death cellmate at USP/Allenwood. Sentenced to death.
- *United States v. Michael O'Driscoll* (M.D.Pa.). Prison inmate guilty of stabbing to death fellow inmate at USP/Allenwood. Same judge, same courtroom, and same defense attorneys as *Hammer*. Sentenced to life.
- *United States v. Storey* (D. Kansas). Prison inmate with Aryan Brotherhood ties kills fellow prisoner at USP/Leavenworth. Plea agreement. Sentenced to less than life sentence.
- *United States v. Douglas Black and Steven Riddle* (D.Colo.). Inmates at USP/Florence attacked two suspected "snitches," one killed, one injured. Plea agreements. Substantially less than life sentences.
- *United States v. Fu Xin Chen, Jai Wu Chen and You Zhong Peng* (E.D.N.Y.). Chinese gang members who kidnap, rape and murder victims held for ransom. Fu Xin Chen and Jai Wu Chen entered plea agreements. Attorney General withdrew death authorization shortly before Peng trial. Peng convicted after trial. All three sentenced to life.
- *United States v. Louis Jones* (N.D.Texas). Decorated Gulf War veteran with no prior record abducted, raped and killed young woman soldier. Tried, convicted, sentenced to death, executed.

- *United States v. Corey Johnson, James Roane, and Richard Tipton* (E.D.Va.). Eleven drug-related murders. Tried, convicted, sentenced to death.
- *United States v. Dean Anthony Beckford* (E.D.Va.). Six drug-related murders. Tried, convicted, life sentence.
- *United States v. Clarence Heatley and John Cuff* (S.D.N.Y.). 14 drug-related murders. Plea agreement. Sentenced to life.
- *United States v. Thomas Pitera* (E.D.N.Y.). Seven drug-related murders in organized crime context. Victims tortured and bodies dismembered. Tried, convicted, sentenced to life.
- *United States v. German Sinisterra and Arboleda Ortiz* (W.D.Mo.). One drug-related murder and one attempted murder. Tried, convicted, sentenced to death.
- *United States v. Kevin Grey and Rodney Moore* (D.D.C.). Thirty-one drug-related murders. Tried, convicted, sentenced to life.
- *United States v. Daryl Johnson* (N.D.Ill.). Two drug-related murders. Tried, convicted, sentenced to death.
- *United States v. Peter Rollock* (S.D.N.Y.). Eight drug-related murders, including some ordered by defendant while incarcerated. Plea agreement. Sentenced to life.
- *United States v. Tommy Edelin* (D.D.C.). Fourteen drug-related murders. Tried, convicted, sentenced to life.
- *United States v. Reynaldo Villarreal and Baldemar Villarreal* (E.D.Texas). Drug-related murder of law enforcement officer. Tried, convicted, sentenced to life.
- *United States v. Juan Raul Garza* (S.D.Tex.). Three drug-related murders. Tried, convicted, sentenced to death, executed.
- *United States v. Anthony Jones* (D.Md.). Six drug-related murders. Tried, convicted, sentenced to life.
- *United States v. Chevy Kehoe and Daniel Lee* (D.Ark.). Three murders in connection with activities of white supremacist organization. Tried and convicted together. Kehoe was considered more culpable yet sentenced to life. Lee was sentenced to death.

- *United States v. Gurmeet Singh Dhinsa* (E.D.N.Y.). Millionaire Sikh businessman hired killers of two employees cooperating with authorities in criminal investigation of defendant. Tried, convicted, sentenced to life.
- *United States v. Trinity Ingle and Jeffrey Paul* (W.D.Ark.). Murder of elderly retired National Parks employee. Victim shot while bound and gagged. At separate trials, Ingle was convicted and sentenced to life; Paul was convicted and sentenced to death.
- *United States v. Kristen Gilbert* (D.Mass.). VA nurse murdered four patients and attempted to murder three more. Tried, convicted, sentenced to life.
- *United States v. LaFawn Bobbitt and Rashi Jones* (E.D.Va.). Fatal shooting of bank teller during robbery. Security guard also shot and blinded. Tried, convicted, sentenced to life.
- *United States v. Bille Allen and Norris Holder* (W.D.Mo.). Fatal shooting of bank teller during robbery. Tried, convicted, and both sentenced to death.

Ultimately, the full force of this argument derives from the cumulative effect of examining, in their entirety, the case-by-case summaries of authorized cases compiled in the Appendix. By definition, since all of these cases were authorized by the Attorney General of the United States for capital prosecution, these are (or should be) the worst of the worst the federal system has to offer. Indeed, it is likely there is not a crime on the list as to which a prosecutor could not (or would not) argue in summation, “If this case doesn’t call for the death penalty, what case does?” And yet, in case after case - indeed, in the overwhelming *majority* of such cases - juries returned life verdicts²⁵ or plea agreements were offered and accepted. If one cannot discern

²⁵ “ Federal capital juries have rejected the death penalty for 20 of the last 21 defendants who have completed trial and 38 of the last 43 since the year 2000. Since the reinstatement of the federal death penalty there have been 32 death sentences, 60 life sentences, 2 convictions of lesser offenses and 8 acquittals after trials involving 102 defendants. The 20 defendants are: 1) *United States v. Bass* (E.D. MI CR No. 97-80235); 2 & 3) *United States v. Martinez & Alejandro* (D. PR CR No. 99-044 (SEC)), 4) *United States v. Haynes* (W.D. TN CR No. 01-CR-20247-ALL), 5) *United States v. Davis* (E.D. LA CR No. 01-CR-282-ALL); 6) *United States v.*

a principled basis for distinguishing between cases where death is imposed and cases where death is not, the death penalty falls as arbitrary and capricious. Defendant challenges the Government to articulate a principled distinction - should one exist.

C. Continued enforcement of the FDPA will lead to the unconstitutional execution of a meaningful number of innocent people.

1. The *Quinones* decision.

On July 1, 2002, the Hon. Jed S. Rakoff, U.S.D.J., sitting in the Southern District of New York, issued an opinion finding that the risk of executing the innocent was of sufficient constitutional magnitude that the federal death penalty could not be enforced. *United States v. Quinones*, 205 F.Supp.2d 256 (S.D.N.Y. 2002) (*Quinones II*).²⁶ While we recognize that this

Denis (S.D. FL CR No. 99-00714 CR (KING)); 7) & 8) *United States v. Matthews and Tucker* (N.D. NY CR No. 00-CR-269-ALL); 9) *United States v. Regan* (E.D. VA CR No. 01-CR-405-ALL); 10) *United States v. O'Driscoll* (M.D. PA CR No. 4:CR-01-277), 11) *United States v. Britt* (N.D. TX CR No. 00-CR-260-ALL), 12) *United States v. Waldon* (M.D. FL CR No. 3:00-CR-436-J25-TJC), 13) *United States v. Haskell* (W.D. MO CR No. 00-CR-395-ALL), 14) *United States v. Ealy* (W.D. VA CR No. 00-CR-104-ALL), 15) *United States v. Cooper* (S.D. MS CR No. 01-CR-8-ALL), 16) *United States v. Miner* (W.D. PA CR No. 99-215), 17 & 18) *United States v. Moore and Gray* (D. DC CR No. 1:00CR00157); 19) *United States v. Wills* (E.D. VA CR No.99-00396); 20) *United States v. Lyon* (W.D. KY CR No. 4:99-CR-11-M). Source: Federal Death Penalty Resource Counsel Project, 2003.”

“Juries in 15 of the last 16 federal capital trials have declined to impose the death penalty, despite a more aggressive pursuit of this punishment by the Justice Department. Since President George Bush took office, 15% of the capital trials have resulted in death sentences, compared to 46% of cases in which the death penalty was sought from 1988 to 2000. Legal experts believe that overreaching by prosecutors and some jurors' growing unease with the death penalty may account for the trend. Former U.S. Attorney Alan Vinegrad noted, ‘It reflects that the tide is turning in this country with regard to attitudes about the death penalty. There has been so much publicity about wrongfully convicted defendants on death row that people sitting on juries are reluctant to impose the ultimate sanction.’ (New York Times, June 15, 2003).” Reported at <http://www.deathpenaltyinfo.org/article.php?scid=29&did=147#fedreport>.

²⁶ In an earlier opinion in the same case, Judge Rakoff announced his tentative findings on this issue and permitted the government a further opportunity to be heard on the issue. *United States v. Quinones*, 196 F.Supp.2d 416, 420 (S.D.N.Y. 2002) (*Quinones I*).

decision was reversed on appeal, *United States v. Quinones*, 313 F.3d 49 (2d Cir. 2002), we believe that the reasoning of the District Court Judge Radkoff still has merit and should be followed by this Court²⁷.

The District Court first stated that DNA testing has shown the “remarkable degree of fallibility in the basic fact-finding processes on which we rely in criminal cases.” *Id.* at 264. The court noted that while DNA testing is only available in a small number of cases, wrongful convictions in capital cases may still occur as a result of the unreliability of the primary techniques developed and used by the judicial system, and that the possibility of exoneration is nonexistent once a prisoner has been executed. *Id.* at 265. Thus, the court held that current trial methods could only result in “the fully foreseeable execution of numerous innocent persons.” *Id.*

Summarizing his findings in *Quinones II*, Judge Rakoff wrote:

[T]he best available evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed and that, on the other hand, convincing proof of their innocence often does not emerge until long after their convictions. It is therefore fully foreseeable that in enforcing the death penalty a meaningful number of innocent people will be executed who otherwise would eventually be able to prove their innocence. It follows that implementation of the Federal Death Penalty Act not only deprives innocent people of a significant opportunity to prove their innocence, and thereby

While the district court’s decision in *Quinones II* was later reversed by the Second Circuit on the ground that the Due Process Clause does not require that prisoners be afforded the remainder of their natural lives to establish their innocence, *see United States v. Quinones*, 313 F.3d 49 (2d Cir. 2002), many of the observations and conclusions drawn by Judge Rakoff remain persuasive and, in defendant’s view, worthy of this Court’s consideration.

²⁷ While the decision of another federal circuit court of appeals may constitute “persuasive” authority for the courts of the Eleventh Circuit, it is by no means “binding.” *Pilkington v. United Airlines*, 112 F.3d 1532, 1541 (U.S. App. 1997).

violates procedural due process, but also creates an undue risk of executing innocent people and thereby violates substantive due process.

Quinones II at 257.²⁸ This Court is urged to follow Judge Rakoff's reasoning and analysis and to reach the same result.

2. The risk of executing the innocent.

Only the most naive would take the position that the American system of justice is free from the possibility of error.²⁹ Counsel have filed, in support of this motion, many of the same exhibits that were supplied to Judge Rakoff for his analysis in *Quinones*³⁰. Those exhibits demonstrate that again and again completely innocent people have not only been convicted wrongfully, but also have been sentenced to death. *See, e.g.*, affidavit of Richard Dieter. App. 78. Some have come perilously close to execution.³¹ In most cases, those wrongfully

²⁸ There is an additional reason, not discussed in Judge Rakoff's opinions, for concern over the time between sentence and execution in the federal system as that time period bears on the opportunity to establish innocence. In the state systems, condemned prisoners may resort to direct and collateral state court review of their convictions and sentences of death - a process that may consume many years - before entering the federal system via habeas corpus, as provided by 28 U.S.C. § 2254. In the federal system, there is one round of direct appeal and one round of post-conviction challenge, as allowed by 28 U.S.C. § 2255, and that is all.

²⁹ In J. Dwyer, P. Neufeld, and B. Scheck, *Actual Innocence* (Doubleday 2000), the authors tracked the cases of numerous innocent people convicted of crimes and identified the following eight factors most commonly found in wrongful conviction cases: (1) mistaken eyewitness testimony; (2) false confessions; (3) falsified scientific testing; (4) "snitch" witnesses who lied for advantage; (5) junk science; (6) police and prosecutorial misconduct; (7) lackluster or impaired performance by defense counsel; and (8), systemic racial bias. *See also* S. Turow, *Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty* (Farrar, Straus and Giroux 2003). It may hardly be said that the federal system is free from any of these factors.

³⁰ Counsel have omitted many of the media articles reporting the fact and effect of the capital conviction and subsequent release of innocent individuals.

³¹ Anthony Porter, who had been on death row in Illinois, was within two days of execution when the process was stayed because doubts had arisen over whether he was mentally-

condemned had their inaccurate convictions and sentences repeatedly reviewed and affirmed at many and various levels of the state and federal court systems before the truth emerged.

The federal system is not immune from these problems. As noted in the affidavit of Kevin McNally submitted in *Quinones*, App. 88, there were significant doubts about the innocence of David Ronald Chandler, the very first person in the country to have been sentenced to death in the era of the “modern” (post-1988) federal death-penalty. Mr. Chandler was originally sentenced to death in 1991. In 1999, the Eleventh Circuit vacated his death sentence on grounds of ineffective assistance of counsel at the penalty phase. *Chandler v. United States*, 193 F.3d 1297 (11th Cir. 1999). However, that panel opinion was vacated by a 6-5 vote of the Court sitting *en banc*, and the sentence of death was re-affirmed. *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000) (*en banc*). After the Supreme Court denied *certiorari* review, President Clinton, on January 20, 2001, commuted Mr. Chandler’s death sentence to one of life imprisonment, noting that “the defendant’s principal accuser later changed his testimony, casting doubt on the defendant’s guilt.” W.J. Clinton, “My Reasons for the Pardons,” *N.Y. Times*, 2/18/01³². The McNally affidavit also documents the proposition that federal prosecutors have, to date, “filed . . . at least 20 capital charges against the legally or factually innocent . . .” *Id.* at ¶ 5.

Moreover, it is not simply that the system of capital punishment in this country is fraught

retarded. While the execution was stayed, a group of journalism students at Chicago’s Northwestern University took up the case and eventually located a man who confessed to the crime. See D. Holt and F. McRoberts, *Porter Fully Savors 1st Taste of Freedom*, Chicago Tribune, Feb. 6, 1999, at 1.

³² In commuting the sentence, President Clinton cited Attorney General Reno’s serious concerns about whether Mr. Chandler was actually innocent of the crime for which he had been prosecuted and condemned to death

with factual error, it is also fraught with legal error. Professor James Liebman of Columbia University studied the rate of error in state and federal capital cases and found that in an astonishing 68% of the cases, death-penalty prosecutions were subject to outcome-determinative legal error. J. S. Liebman, *et al.*, *A Broken System: Error Rates in Capital Cases, 1973-1995* (2000) (located at <http://justice.policy.net/cjedfund/jpreport/>; see also, J. S. Liebman, *et al.*, *A Broken System, Part II: Why There Is So Much Error In Capital Cases, And What Can Be Done* (2002).³³ In the federal system, three of the 32 cases where death sentences have been imposed in the federal court system have been set aside on appeal.³⁴

In *Quinones II*, Judge Rakoff reached the logically unassailable conclusion that the number of DNA exonerations - *i.e.*, cases where scientific evidence was available to establish innocence conclusively - means that there is more than an appreciable risk that the innocent will be executed (and have been) “given what DNA testing has exposed about the unreliability of the primary techniques developed by our system for the ascertainment of guilt . . .” *Quinones II*, 205 F.Supp.2d at 264-265. Responding earlier to the government’s argument that the availability of pre-trial DNA testing had magically “solved” the problem of the wrongfully-convicted defendants, Judge Rakoff stated as follows:

“This completely misses the point. What DNA testing has proved,

³³In *Quinones II*, Judge Rakoff described the Liebman study as “the most careful and comprehensive study in this area, and one based, moreover, almost exclusively on public records and court decisions.” 205 F.Supp.2d at 268. Judge Rakoff also noted that the Liebman study had been cited by Justice Breyer in his concurring opinion in *Ring v. Arizona*, who described the study as one that has generally been favorably received by scholars. *Id.* at n. 16.

³⁴ See, *United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000) (vacating sentence of death); *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999) (reversing convictions and death sentences in first case indicted under FDPA); *United States v. Chanthadara*, 230 F.3d 1237 (10th Cir. 2000) (vacating sentence of death);

beyond cavil, is the remarkable degree of fallibility in the basic fact-finding processes on which we rely in criminal cases. In each of the 12 cases of DNA-exoneration of death row inmates referenced in *Quinones*, the defendant had been found guilty by a unanimous jury that concluded there was proof of his guilt beyond a reasonable doubt; and in each of the 12 cases the conviction had been affirmed on appeal, and collateral challenges rejected, by numerous courts that had carefully scrutinized the evidence and the manner of conviction. Yet, for all this alleged 'due process,' the result in each and every one of these cases, was the conviction of an innocent person who, because of the death penalty, would shortly have been executed [some came within days of being so] were it not for the fortuitous development of a new scientific technique that happened to be applicable to their particular cases.

Quinones II, 205 F.Supp.2d at 264.

3. The real question: How many innocent people is it acceptable to execute in order to preserve the government's ability to execute others who are undoubtedly guilty?

This is the crux of the matter. No one familiar with the studies and cases regarding the numbers of demonstrably innocent people convicted and sentenced to death can argue that it is anything but overwhelmingly probable that some of the 877 people executed in this country since 1976, and some of the more than 3,500 who wait on our death rows,³⁵ and some of the thousands executed prior to 1976, were overwhelmingly likely to be wholly innocent of wrongdoing. The real question is whether that is a price worth paying for the "privilege" of having a system of capital punishment. Counsel respectfully suggest that executing the occasional innocent person is, by an order of magnitude, too great a price to pay for the ability to execute many capriciously-selected, truly guilty human beings. Concluding his July 8, 2001 op-ed in the Boston Globe, Judge Ponsor stated:

³⁵These figures are current as of October 25, 2003 based on Mr. McNally's Declaration. App. at 11.

“I love our system, and I am proud to serve in it. As I believe this trial demonstrated, no structure of law anywhere or at any time, has tried so earnestly to protect the rights of those involved in it. But I have a hard time imagining anything as complicated as a capital trial being repeated very often, even by the best system, without an innocent person eventually being executed. * * * The simple question - not for me as a judge, but for all of us as citizens - is: Is the penalty worth the price?”

App. at 77. To allow what the late Justice Blackmun termed “the machinery of death” to grind onward, in the face of incontrovertible proof that our system convicts and condemns the innocent to death, is to render complicit in the deaths of innocents past and present all who lend a hand to and thereby enable that deadly and ignoble work to continue.

The Supreme Court has stated that the execution of an innocent person would violate the Constitution. See *Herrera v. Collins*, 506 U.S. 390 (1993). Presently, an ever-growing number of innocent prisoners are being discovered on and released from death rows across the country. To date, more than 110 have been freed. As discussed *supra*, after analyzing over 4,500 appeals of capital cases, Professor Liebman’s recent study found that “the overall rate of prejudicial error in the American capital punishment system was 68%. Liebman, *et al.*, *A Broken System: Error Rates in Capital Cases 1973-1995*, at i (2000) (emphasis in original). The authors also found that “for cases whose outcomes are known, an astonishing 82% of retried death row inmates turned out not to deserve the death penalty; 7% were not guilty.” James S. Liebman, *et al.*, *Technical Errors Can Kill*, Nat’l L.J., Sept. 4, 2000, at A16. The Supreme Court has written that “we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated.” *Atkins v. Virginia*, 536 U.S. 304, 320 (2002). Although “none of the 31 persons so far sentenced to death under the Federal Death Penalty Act has been subsequently exonerated . . . , the sample is too small, and the convictions too recent to draw conclusions

therefrom.” *Quinones*, 205 F. Supp. 2d at 266. Moreover, five of those 31 death sentences have been reversed. *Id.* The question thus becomes how many of those who will be executed must be innocent to offend contemporary views of justice and thereby render the FDPA unconstitutional.

In the first Federal Death Penalty Act prosecution in Boston, Massachusetts, *United States v. Sampson*, [Ms. No. Cr. No. 01-10384-MLW, February 4, 2004; 2004 U.S. Dist. LEXIS 1527] (D. Mass. 2004), the federal district court allowed the federal capital prosecution of Gary Lee Sampson to proceed and rejected his claim that the FDPA was unconstitutional. In his decision, Judge Mark Wolf of the Federal District Court in Boston expressed serious and conscientious reservations about the risks of executing the innocent:

“[Defendant] has, however, persuaded the court that this is a serious question, that future developments could strengthen this argument, and that courts will have a duty to monitor carefully future legislation and jury verdicts concerning the death penalty in deciding what is likely to be the constantly recurring question of whether the risk of executing innocent individuals renders the death penalty generally, or the FDPA particularly, unconstitutional. See § VII, *infra*.

“More specifically, in 1993, a majority of the Justices of the Supreme Court stated that the execution of an innocent person would violate the Constitution. See *Herrera v. Collins*, 506 U.S. 390, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993). This court agrees.

“The risk of executing the innocent has long been recognized. However, in the past decade substantial evidence has emerged to demonstrate that innocent individuals are sentenced to death, and undoubtedly executed, much more often than previously understood. In that period, DNA testing has established the actual innocence of at least a dozen inmates who had been sentenced to death. These developments have prompted the reinvestigation of many other capital cases, resulting in the release of more than 100 innocent individuals from the nation's death rows.

“In deciding in 2002 that it is no longer constitutional to execute the mentally retarded, the Supreme Court wrote that ‘we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated.’ *Atkins*, 536 U.S. at 320 n.25. The government correctly asserts that the Supreme Court was addressing convictions obtained in state courts, rather than under the FDPA. The government contends that similar errors could not occur in federal

courts.

“The government's confidence that the FDPA will never lead to the execution of innocent individuals is not shared by the only federal judge to have conducted the trial of an FDPA case in Massachusetts. Judge Michael Ponsor presided in the trial of Kristen Gilbert, a nurse convicted of murdering four of her patients and attempting to murder three others. After the jury's 2001 verdict decided that she should be sentenced to life in prison, Judge Ponsor wrote that ‘the experience left me with one unavoidable conclusion: that a legal regime relying on the death penalty will inevitably execute innocent people - not too often, one hopes, but undoubtedly sometimes.’ Appendix ("A-") -90, Michael Ponsor, "Life, Death, and Uncertainty," Boston Globe, July 8, 2001, at D2.

“There are compelling reasons to believe that Judge Ponsor's prediction is prophetic. Federal judges, like state judges, are human and, therefore, fallible. Jurors in federal cases are essentially the same citizens who serve as jurors in state cases. In addition, many federal cases, including this one, result from investigations conducted primarily, if not exclusively, by state and local law enforcement.

“The instant case illustrates the potential for serious imperfections in a federal capital case. Since Sampson surrendered, his counsel has proclaimed that he would rely heavily on Sampson's telephone call to the FBI as a mitigating factor in the effort to persuade a jury not to sentence Sampson to death. Anderson, among others, was promptly questioned by the FBI and later by the Department of Justice Inspector General concerning Sampson's claim that he had called the FBI. Anderson repeatedly denied receiving the call, including in a sworn interview and affidavit given on October 30, 2001. In December 2001, Anderson acknowledged that he received Sampson's call after being informed that he had failed a polygraph examination concerning it. If Anderson's perjury had not been discovered, a jury in this case would have been deprived of evidence that might determine whether Sampson lives or dies. [footnote omitted]

“Important errors are, however, not always identified prior to death sentences being imposed, at times because of misconduct by state and federal investigators. It is now clear that in 1967 Joseph Salvati and several other individuals were unfairly convicted because the FBI had withheld information that its informants, rather than the defendants, had murdered Edward Deegan, and had allowed its informants to testify falsely against the innocent men. Several of the defendants, including Peter Limone, were sentenced to death. While those death sentences were reduced to life in prison following the invalidation of the death penalty by Furman, two of the wrongfully convicted men died in prison. Salvati, who was originally sentenced to life in prison, received a commutation and was released in 1997. Limone was released in 2001, after his wrongful conviction had been demonstrated. See *United States v. Flemmi*, 195 F. Supp. 2d 243, 251 (D.

Mass. 2001).

“The deliberate misconduct by federal investigators that was so belatedly revealed with regard to the Deegan murder is neither ancient history nor unique to Boston. Daniel Bright was, in 1996, convicted of murder by the state of Louisiana and sentenced to death. Several months ago, a federal judge found that the FBI had evidence that another person had claimed to have committed the murder, but the FBI violated the government's constitutional duty to disclose that evidence to Bright before his trial, and later lied to the federal judge about its existence. *See Bright v. Ashcroft*, 259 F. Supp. 2d 494 (E.D. La. 2003) and 259 F. Supp. 2d 502 (E.D. La. 2003).

“The government misconduct concerning Salvati and Bright are not isolated occurrences. A recent study of capital cases from 1973 to 1995 reported that one of the two most common errors prompting the reversal of state convictions in which the defendant was sentenced to death was the improper failure of police or prosecutors to disclose ‘important evidence that the defendant was innocent or did not deserve to die.’ James S. Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* at ii (2000). As indicated earlier, the performance of state and local police is important to the operation of the FDPA because many cases, including this one, have initially been investigated by them and later brought in federal court, at times in an effort to achieve a death sentence that is not available under state law.

“Serious errors appear to be common in capital cases. After analyzing more than 4500 appeals of capital cases, the same study found that ‘the overall rate of prejudicial error in the American capital punishment system was 68%.’ *Id.* at i (emphasis in original). As the authors later wrote:

‘For cases whose outcomes are known, an astonishing 82% of retried death row inmates turned out not to deserve the death penalty; 7% were not guilty. The process took nine years on average. Put simply, most death verdicts are too flawed to carry out, and most flawed ones are scrapped for good. One in 20 death row inmates is later found not guilty.’

A-284, James Liebman, et al., "Technical Errors Can Kill," *Nat'l L.J.*, Sept. 4, 2000, at A16.

“In view of the foregoing, this court agrees with Judge Ponsor, among others, that the FDPA, like the state death penalty statutes, will inevitably result in the execution of innocent people. Since a majority of the Supreme Court stated in 1993 that the execution of an innocent person would be unconstitutional, the critical question is how many of those who will be executed must be innocent to offend contemporary standards of decency and, therefore, render the FDPA

unconstitutional.

* * *

“In view of the foregoing, this court agrees with the trial judges in *Quinones* and *United States v. Gilbert*, 120 F. Supp. 2d 147 (D. Mass. 2000) that the FDPA, like the state death penalty statutes, will inevitably result in the execution of innocent people. As described earlier, a majority of the Justices who decided *Herrera* stated that the execution of an innocent person would be unconstitutional. See 506 U.S. at 419 (O'Connor, J. and Kennedy, J., concurring), 430 (Blackmun, J., Stevens, J., Souter, J., dissenting). The question, therefore, is whether the FDPA is unconstitutional because it will result in the execution of innocent people.”

United States v. Sampson, 275 F. Supp. 2d 49, 56-58, 81-82 (U.S. Dist. 2003). The real question is when will a federal district judge and a federal appellate court have both the courage and wisdom to recognize that the *probability* that application of the FDPA *will result in the execution of an innocent person* is a sufficient concern to declare the act unconstitutional.

Death is final but the process of determining who is to be executed is fraught with error that lingers. Affirming the concerns of both Judge Ponser and Judge Wolf (and numerous other federal judges) are four recent developments. First, in *Banks v. Dretke*, [Ms. No. 02-8286, February 24, 2004; 2004 U.S. LEXIS 1621] ___ U.S. ___ (2004), the United States Supreme Court reversed a Texas death penalty conviction based on the misconduct of the prosecution in suppressing and concealing exculpatory evidence at the penalty phase of trial³⁶. The Court, in a 7-2 decision, sent a stinging rebuke to the Fifth Circuit about its practice in capital cases. Justice Ginsburg's opinion holds that the failure to disclose key evidence requires the writ to issue as to the sentence. The Court's order of remand also ordered a determination as to whether the underlying conviction could stand.

³⁶ *Banks v. Dretke* removes any doubt that *Brady v. Maryland*, 373 U.S. 83 (1963) does in fact apply to the penalty phase of a capital case.

Additional recent developments that support the **fact** that innocents will continue to be executed under the death penalty are the following. Second, according to a report by the U.S. House Committee on Government Reform, an F.B.I. policy to protect Boston informants who were known murderers resulted in the Bureau allowing at least two innocent men to be sent to death row. *See, Everything Secret Degenerates: The FBI's Use of Murderers as Informants*, Report of the House Committee on Government Reform, November 20, 2003. *See* http://www.fas.org/irp/congress/2003_rpt/. Third, In February of 2003, Stephen "The Rifleman" Flemmi was allowed to plead guilty to 10 murders, drug trafficking, racketeering and extortion, as federal prosecutors agreed not to seek the death penalty against him in exchange for his cooperation with ongoing crime investigations. Flemmi was the mobster who played a central role in a scandal that exposed the Boston FBI's overly cozy relationship with its underworld informants. App. at 126. Fourth, two years after the execution of Timothy McVeigh, the FBI has ordered a formal review of the 1995 Oklahoma City bombing investigation to determine whether Mr. McVeigh may have had more accomplices in the worst domestic terrorist attack in U.S. history. *See, The Washington Post*, Saturday, February 28, 2004, p. A22. App. at 125.

“The review of evidence and documents will also try to determine whether FBI agents in a separate investigation of white supremacist bank robbers may have failed to alert the Oklahoma City investigation of a possible link between the robbers and McVeigh, and allowed some of that evidence to be destroyed.

“The Associated Press reported Wednesday that documents never introduced at McVeigh’s trial indicated that FBI agents destroyed evidence and failed to share other information that raised the possibility that a gang of white supremacist bank robbers may have assisted McVeigh.”

App. at 125. Even if the question of Mr. McVeigh’s guilt remains settled, the question of the actual role he played in the bombing remains unsettled and not fully answered.

These recent incidents are indicative of the monumental problems inherent in the death

penalty and echo Judge Ponsor's question: "Is the penalty worth the price?" App. at 77. Again, while death is certainly final, does the death penalty process itself contain any degree of certainty?

The execution of innocent individuals under the FDPA implicates a defendant's Fifth and Eighth Amendment rights. The former raises the question of whether the increasing evidence that innocent individuals have been convicted and sentenced to death should result in the recognition of a defendant's constitutional right to continue to attempt to prove his innocence throughout his natural life. The latter question is whether that evidence renders the FDPA cruel and unusual punishment. The test for whether the FDPA violates the Eighth Amendment is whether that statute offends contemporary standards of decency. *Morales*, 527 U.S. at 79 n.3 (emphasis omitted) (Scalia, J. dissenting). The "evolving standards of decency" must be ascertained from "objective factors to the maximum possible extent." *Atkins*, 536 U.S. at 312.

Opinion polls provide guidance when determining contemporary standards. *Atkins*, 536 U.S. at 316 n.21. A May 2003 Gallup Poll showed that 73% of Americans believe that our nation's death penalty statutes have resulted in the execution of an innocent person in the past five years. Jeffrey M. Jones, Gallup News Service, May 19, 2003. Only a slight majority (53%) prefer the death penalty to life in prison without parole (44%) for convicted murderers. *Id.* However, recent FDPA cases indicate that there is a disparity between the opinions of the American people and their willingness to impose the death penalty in particular cases. In 23 of the last 27 FDPA trials the defendant was not sentenced to death. These facts are evidence that citizens acting as jurors, rather than voters, fear the risk of being personally responsible for executing the innocent. This disparity exists despite the fact that jurors who express an unwillingness to impose the death penalty are typically excluded from capital cases. The

Supreme Court has stated that the decisions of citizens as jurors are ““a significant and reliable index of contemporary values.”” *Atkins*, 536 U.S. at 323 (Rehnquist, C.J. dissenting) (quoting *Coker*, 433 U.S. at 596 (plurality opinion) and *Gregg*, 428 U.S. at 181). The fact that juries continue rejection of the death penalty, even in the most egregious federal cases, is substantial evidence that the FDPA is not compatible with contemporary standards of decency.

The above discussion presents sufficient objective evidence that the FDPA offends contemporary standards and is, therefore, unconstitutional.

D. For the reasons set forth in *United States v. Fell*, 217 F. Supp.2d 469 (D.Vt. 2002), the FDPA is unconstitutional.

In *United States v. Fell*, 217 F.Supp.2d 469 (D.Vt. 2002), the court held: (1) The aggravating findings required by the FDPA are equivalent to elements, and must receive the same constitutional protections as other elements of an offense; (2) Providing less protection to proof of those capital elements than to any other element violates due process. (3) The portion of the statute that permits less protection to proof of the capital elements is not severable from the rest of the FDPA.³⁷

Certainly, elements of a capital crime cannot be given fewer protections than those of noncapital crimes. Such a procedure is without precedent, and doing so would contradict all of the Supreme Court’s previous Eighth Amendment case law. *See Murray v. Giarratano*, 492 U.S. 1, 8-9 (1989) (“We have recognized on more than one occasion that the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death The finality of the death penalty requires ‘a greater degree of reliability’ when

³⁷ The government’s appeal of the district court’s ruling in *Fell* has been briefed and argued, and is presently pending before the Second Circuit.

it is imposed”). Apart from history and legal principle, it is also irrational. There is no conceivable basis for providing a lower standard of admissibility solely for those elements that expose a defendant to the death penalty. The fact that particular criminal procedures are not in themselves compelled by the Due Process Clause does not mean that their disparate application is insulated from Due Process review.

Before the Supreme Court’s decisions in *Ring v. Arizona*, 122 S.Ct. 2428 (2002), and *Sattazahn v. Pennsylvania*, 123 S.Ct. 732 (2003), it was possible to say that the relaxed evidentiary standards approved by the Supreme Court for capital sentencing hearings properly applied to the FDPA. It is now clear that proof of a culpable mental state, and at least one statutory aggravating factor, are elements of a capital crime, and not mere sentencing considerations. Due process requires that proof of those elements receive the same protection as proof of any other element.³⁸

Under the procedures prescribed by the FDPA however, elements necessary to establish a capital crime cannot receive the same protection as the underlying murder elements. This is because proof of the capital elements is combined with proof of traditional sentencing evidence during a single hearing, in which the rules of evidence do not apply. Consequently, the constitutional issue is whether relaxed evidentiary standards may be applied selectively to only some elements of a capital crime, those very elements designated to accomplish the critical task of determining whether the case should be capital.

³⁸ “Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.” *Brinegar v. United States*, 338 U.S. 160, 174 (1949).

Recently, in *Sattazahn v. Pennsylvania*, Justice Scalia, writing for three members of the Court, held that before *Apprendi* and *Ring*, “capital-sentencing procedures were understood to be just that: *sentencing proceedings*.” *Sattazahn*, 123 S.Ct. at 739. Justice Scalia then explained that, until the elements of the greater offense of capital murder are proven, a defendant is only exposed to the underlying, lesser offense of murder. It directly follows that whatever label is placed on the proceeding in which their existence is determined, all of the protections of a criminal trial apply when the government attempts to prove the elements of a capital offense.

Although Part III of Justice Scalia’s opinion in *Sattazahn* was joined only by Justice Thomas and Chief Justice Rehnquist, the dissent did not disagree on this point. Justice Ginsberg, (joined by Justices Stevens, Souter, and Breyer) observed that “[t]his Court has determined . . . that for purposes of the Double Jeopardy Clause, capital sentencing proceedings involving proof of one or more aggravating factors are to be treated as trials of separate *offenses*, not merely sentencing proceedings.” *Sattazahn*, 123 S.Ct. at 747 n.6 (Ginsberg, J., dissenting).

1. The effect of *Ring* and *Sattazahn* on the FDPA.

Under *Ring* and *Sattazahn*, it is now clear that the intent factors and aggravating factors designated by the FDPA for consideration at the sentencing phase of a federal capital trial must be treated as elements of the capital offense. However, the FDPA in effect mandates that a jury decide some of the elements of the charged capital offense during the guilt-or-innocence trial, and delay consideration of the rest of the elements until the sentencing hearing. As discussed below, the important differences between the two phases prescribed by the FDPA make this approach irrational and unworkable.

There is a substantive difference between relevance at trial and relevance at a sentencing hearing. Relevance at trial relates only to evidence that is probative of the elements of the crime

and the elements of the defense. *Huddleston v. United States*, 485 U.S. 681, 689 (1988)

(relevancy exists as a relation between an item of evidence and the matter to be proven).

Evidence concerning the appropriate punishment is not relevant to proving the elements of an offense.

In a federal capital case one of the required elements is that the defendant had the necessary mental state for commission of capital murder. 18 U.S.C. §3591(a)(2). “The defendant’s intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense element.” *Apprendi v. New Jersey*, 530 U.S. 466, 493 (2000). A second required capital element is proof of an aggravating factor listed in §3592(c). *See Sattazahn, supra*.

a. Relevance at trial.

There are strict rules prohibiting evidence during trial which is not relevant to proving the charged crime. For instance, evidence that shows a defendant’s propensity to commit crime generally is prohibited at trial. *See, e.g., United States v. Young*, 248 F.3d 260, 271 (4th Cir. 2001); *United States v. Queen*, 132 F.3d 991, 995 (4th Cir. 1997); Rule 404, F.R.E. However, such evidence is admissible at a sentencing hearing conducted under the FDPA.

Likewise, at a trial, “similar acts evidence is to be considered only for the proper purpose for which it was admitted.” *Huddleston, supra*, at 691; F.R.E. 404(b). However, under the FDPA, propensity evidence is welcome throughout the sentencing hearing. *See United States v. Allen*, 247 F.3d 741, 789-790 (8th Cir.), *vacated on other grounds*, 122 S.Ct. 2653 (2002) (other criminal acts are allowed).

Evidence of impact on family members is never admissible at the guilt stage of trial. *See, e.g., United States v. Copple*, 24 F.3d 535, 545-546 (3d Cir.), *cert. denied*, 513 U.S. 989 (1994)

(error to admit victims' testimony about harm to their health and savings during trial). Defense counsel have been found to be ineffective for failure to object to the admission of victim impact evidence during the trial. *Sager v. Maas*, 907 F.Supp 1412 (D. Oregon), *affirmed*, 84 F.3d 1212 (9th Cir. 1996). However, at a penalty hearing under the FDPA victim impact evidence is allowed. *Payne v. Tennessee*, 501 U.S. 808 (1991).

Furthermore, hearsay is not allowed to prove a defendant's guilt at trial. *See e.g. Moore v. United States*, 429 U.S. 20 (1976) (informant's hearsay statement was not admissible to support conviction). It is allowed, however, in a sentencing proceeding conducted pursuant to the FDPA.

b. Relevance at sentencing hearing.

In contrast to the objectives at a guilt-or-innocence trial, the purpose of a sentencing hearing is to give the fact-finder complete information about a defendant, and the effects of the offense for which he stands convicted. *Williams v. New York*, 337 U.S. 241 (1949). Except for certain recognized constitutional boundaries, rules restricting the admissibility of evidence at trial do not apply at a capital sentencing proceeding.

Evidence of the victim's religious activities has been permitted. *United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002). Surviving family members have been allowed to read emotionally stirring poems. *United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000). In *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998), the government was allowed to present evidence of family members' last contacts with the deceased victims, the trauma of efforts to discover the victims' fates, the impact on learning of their deaths, the histories of the victims, the innocence of child victims, and the overall impact on the surviving families. *See also United States v. Battle*, 173 F.3d 1343, 1350-1351 (11th Cir. 1999).

Psychiatric evidence that the defendant will commit future crimes is admissible. *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Simmons v. South Carolina*, 512 U.S. 154, 162-163 (1994); *Jurek v. Texas*, 428 U.S. 262, 272-273 (1976). Lay witness testimony of future dangerousness is also admissible. See *Johnson v. Texas*, 509 U.S. 350, 355-356 (1993). Even the defendant's "low rehabilitative potential" may be introduced. *United States v. Spivey*, 958 F.Supp. 1523, 1535 (D.N.M. 1997).

Unlike anywhere else in federal criminal law, the FDPA combines trial and sentencing evidence at a single proceeding. The jury hears all the evidence at once and decides the issues during a single deliberation. No distinction is made between the evidence offered to prove the capital elements and the evidence offered regarding the appropriate punishment. No instructions are given either to guide the jury's deliberations in this regard or to limit what may be considered when deciding the capital elements.

2. The rules of evidence assure reliability.

"That the death-eligibility factors are the functional equivalents of elements, which must be proven to a jury beyond a reasonable doubt, begs the question, what of other fair trial guarantees?" *Fell*, 217 F.Supp.2d at 485. "Does this relaxed evidentiary standard withstand due process and Sixth Amendment scrutiny, given the Supreme Court's concern for heightened reliability and procedural safeguards in capital cases?" *Id.* The court answered its own questions: "Every crime set forth in the United States Code is defined in terms of elements, and every element must not only be proven to a jury beyond a reasonable doubt, but be proven by evidence found to be reliable by application of the Federal Rules of Evidence." *Id.* at 488.

The Federal Rules of Evidence apply in all federal criminal trials. Rule 1101, F.R.E.. They are rules of limitation a purpose of which is to restrict the types and quality of evidence that

a proponent may introduce. The government is always the proponent of evidence when proving elements of a crime. The defendant is always the opponent. Therefore, when the government seeks to prove capital elements, it benefits from the absence of rules of evidence, while the defendant suffers by their absence. Judge Raggi said it well in *United States v. Pitera*, 795 F.Supp. 546 (E.D.N.Y. 1992):

“The Federal Rules of Evidence are critical to the conduct of criminal trials to enable “truth [to] be ascertained and proceedings [to be] justly determined.” Fed.R.Evid. 102. But the focus of a trial is singular: “whether a defendant is guilty of having engaged in criminal conduct of which he has been specifically accused.” * * * An individualized consideration of sentence by contrast, necessitates a broader inquiry into all aspects of the defendant’s life and the crime committed. A simple example best illustrates why the concerns of the two proceedings are not best served by the Federal Rules of Evidence. At trial, a jury generally cannot consider evidence of a defendant’s past criminal conduct in deciding whether he has committed the charged offense. Fed.R.Evid. 404(b). That precise evidence is however, deemed highly probative at sentencing.”

Pitera, 795 F.Supp. at 564-565.

In *Pitera*, the court rejected the application of the Federal Rules of Evidence during a capital sentencing hearing. Pursuant to *Walton v. Arizona*, 497 U.S. 639 (1990), that was a proper ruling in 1992. Proof of a culpable mental state (or any aggravating factor) was not considered to be an element of a capital case and, for that reason, did not have the protection of the elements. It was not until *Ring* that it became clear that capital elements and traditional sentencing considerations were incompatibly entangled in one proceeding by the FDPA. Today, the very same reasoning of *Pitera* would produce an opposite conclusion.

3. The FDPA is unconstitutional in all cases.

If there is no procedure that will allow the FDPA to operate as it is written, and no

discrete portion that may be severed, then the Act is unconstitutional. Only Congress has the authority to rewrite the law.

a. Accommodations do not work.

As a practical matter, problems of relevance and prejudice are often addressed by limiting instructions. However, a limiting instruction given during the sentencing hearing would be improper for two reasons. First, it could not possibly work. A jury hearing all of the sentencing evidence at one proceeding could not be relied upon to mentally set it aside while considering the capital elements, regardless of the care with which an instruction to do so might be crafted or delivered. *Cf., e.g., Bruton v. United States*, 391 U.S. 123 (1968) (limiting instruction could not cure prejudice of admitting co-defendant's confession). That offends even the most hardened advocate of the fictitious principle behind the "curative instruction."

Second, such a restriction is exactly opposite of what Congress intended for the sentencing hearing. Congress wanted the jury to get the full story about the defendant and the crime before imposing punishment. The Supreme Court has specifically held that the Eighth Amendment gives a capital defendant wide latitude to introduce evidence mitigating against the death penalty. *Lockett v. Ohio*, 438 U.S. 586 (1978).

After *Ring* and *Sattazahn*, a trial judge in a federal capital case has a Hobson's choice. On one hand, the judge could restrict the sentencing hearing pursuant to the Federal Rules of Evidence, thereby treating the capital crime elements like other elements of the charge. On the other hand, the judge could allow the type of relaxed evidentiary standards prescribed by the FDPA. In the former instance, the judge has explicitly violated the statute. In the latter, the judge has violated the defendant's right to due process of law by allowing inadmissible evidence

to be considered along with the capital elements. There is no solution within the current FDPA.³⁹

There is no reason to believe that compelling testimony about an offense's effect on the victim's family, or evidence of a defendant's future dangerousness, would not influence a jury's decision to convict on the capital elements. Additionally, whenever a capital defendant presents mitigating evidence, the government may rebut that evidence. That rebuttal evidence will also be considered by the jury at the same time they consider the capital elements and the nonstatutory aggravating evidence. There is no separation, nor can there be, in a single proceeding. Therefore, any time a capital defendant puts on mitigating evidence he not only risks the impact of rebuttal evidence (which is not subject to the restrictions of the rules of evidence) on the sentence-selection decision, he also faces the hazard that the rebuttal evidence will influence the jury to convict him of the capital elements.

The district court in *Fell* accurately summed up the problem: "Rather than squinting at the formerly clear line between guilt and punishment, when examining the federal death penalty statute it would be better to accept the need for bifocals, and acknowledge that the proceeding it authorizes has both features of a traditional trial and features of a traditional sentencing." *Fell*, 217 F.Supp.2d at 483.

b. The evidentiary provision of the FDPA is not severable.

In *United States v. Jackson*, 390 U.S. 570 (1968), the Supreme Court considered Fifth and Sixth Amendment challenges to a sentencing provision that authorized the death penalty only upon a jury's recommendation. The Court held that the provision unconstitutionally burdened

³⁹ As the court stated in *Fell*, "In effect, the government would approve death eligibility as the federal criminal justice system's sole exception to the practice of requiring that offense elements be proven by admissible evidence comporting with due process and fair trial guarantees. This makes no sense." *Fell*, 217 F.Supp.2d at 488.

the rights of the accused to proof beyond a reasonable doubt and to a jury trial, because the defendant could only avoid a potential death sentence by a plea of guilty or a waiver of jury trial. *Id.* at 581-582. To save the death penalty portion of the statute, the government proposed a number of alternative constructions of the statute and cited procedures developed by other district courts as cures for the constitutional problems.⁴⁰ *Jackson* rejected each approach in favor of legislative, not judicial, action. *Id.* at 572-581.

The *Jackson* Court pointed out that the kidnapping statute “sets forth no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or one who pleads guilty.” *Id.* at 571. As the *Jackson* opinion explained, “To accept the Government’s suggestion that the jury’s sentencing role be treated as merely advisory would return to the judge the ultimate duty that Congress deliberately placed in other hands.” *Id.* at 576.

Like the scheme invalidated in *Jackson*, there is no workable alternative procedure to cure the FDPA’s defects. Section 3593(c) expressly contradicts any effort to reconcile the sentencing hearing admissibility standard with the Federal Rules of Evidence by stating unequivocally that in this hearing “[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials.” Any attempt to impose rules of evidence during the sentencing hearing will violate the FDPA’s mandate for a relaxed evidentiary standard, and continue to leave individual evidentiary decisions about proof of the capital elements to the discretion of the judge, instead of submitting them to the rules of evidence that

⁴⁰ For example, the government proposed a construction of the statute under which “even if the trial judge accepts a guilty plea or approves a jury waiver, the judge remains free . . . to convene a special jury for the limited purpose of deciding whether to recommend the death penalty.” *Jackson*, 390 U.S. at 572. The government also suggested that the Court might save the statute by reading it to make imposition of the death penalty discretionary on the part of the sentencing judge. *Id.* at 575. The Court rejected these proposals.

apply to the other elements of the crime. This violates due process.

In this case, the government is likely to seek to introduce victim impact evidence, character evidence, psychiatric evidence, and hearsay from an array of sources. There is no way the jury could consider that evidence while constitutionally determining the existence of the mental state or aggravating circumstance elements alleged in the indictment. It would also be impossible for this Court to fashion an instruction capable of properly limiting the jury's consideration of evidence only to those issues for which it is probative.

Finally, severance of capital elements from sentence-selection factors would require this Court to step beyond the limits imposed by Article III and perform a quintessentially legislative function to fix the statute. This Court cannot know whether Congress would want to apply the Federal Rules of Evidence only to the statutory aggravating circumstances and § 3591(a)(2) culpability findings or whether it would want to apply them to the other findings as well, such as mitigating circumstances and nonstatutory aggravating factors. Congress could have done what Justice Scalia suggested in *Ring* and “plac[e] the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.” *Ring*, at 2445 (Scalia, J., concurring). Congress did not. We do not know which of these alternatives - each of which is fraught with practical complexities on one side and potential constitutional problems on the other - Congress would have selected in light of the Sixth Amendment mandate recognized in *Ring*.

In sum, the FDPA allows evidence about the defendant's character, future dangerousness, victim impact, and hearsay. The rules of evidence prohibit the admission of such evidence in all criminal trials, and allowing its introduction to prove elements of a crime violates due process of law. Because there is no way to separate proof of elements and punishment when they are presented in a single hearing, and because there is no portion of the FDPA that can be severed to

accomplish that goal, the sentencing scheme prescribed by the Act is unconstitutional on its face.

E. Congress may not delegate to the Executive Branch the legislative task of determining what should, and should not, constitute aggravating factors in a comprehensive death-penalty scheme.

Since *Furman*, the Supreme Court has made it clear that the states have been free to experiment with a variety of approaches to capital-punishment schemes, so long as their experiments do not violate the Constitution. *See, e.g., Harris v. Alabama*, 513 U.S. 504 (1995); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990); *Spaziano v. Florida*, 468 U.S. 447, 464 (1984). It remains unsettled, however, whether the Supreme Court would approve a death penalty scheme which allows non-statutory aggravating circumstances to be weighed by a penalty jury and, if so, whether such a scheme could be constitutional absent a provision for strict proportionality review. In this case, it is not necessary to reach that question, since a federal death penalty scheme presents constitutional considerations that are not present in a state scheme.

The notice of aggravating factors filed in this case contains two allegations described as “non-statutory aggravating factors.” The government’s Notice of Intent to Seek the Death Penalty alleges (1) Mr. Rudolph’s “future dangerousness” and (2) “victim impact evidence” as “non-statutory aggravating factors.” App. at 6-7. This attempt by the Executive Branch to use non-statutory aggravating factors violates Article I, §1 of the United States Constitution, which provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” From this provision, the Supreme Court has derived the doctrine that Congress may not constitutionally delegate its legislative power to another branch of government. In *Mistretta v. United States*, 488 U.S. 36 (1989), the Court observed that, “the non-delegation doctrine originated in the principle of separation of powers that underlies our tripartite system of Government.” *Id.* at 371. In *Touby v. United States*, 500 U.S. 160 (1991), the issue was whether

Congress could delegate to the Attorney General the authority to temporarily classify as a drug a controlled substance in order to bring its use and/or distribution within reach of criminal prosecution. *Id.* at 164. The statutory provision under review had been added by Congress in 1984 to combat the problem of so-called “designer drugs” whose chemical properties differed only slightly from those on existing controlled substance schedules. Since the process of adding a drug to the list of controlled substances typically took six to twelve months, the 1984 amendment allowed the Attorney General to bypass, for a strictly limited period of time, several of the stringent requirements for permanently scheduling a drug as a controlled substance. *Id.* Summarizing its prior views of the non-delegation doctrine, the Court in *Touby* stated:

We have long recognized that the non-delegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches. *Mistretta* at 372. Thus, Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors. So long as Congress “lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power.” *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

Touby, 500 U.S. at 165.

In *Touby*, the petitioners conceded that Congress had set forth an “intelligible principle” which acted to constrain the Attorney General’s discretion in temporarily scheduling designer drugs.⁴¹ The Court summarized the arguments which proceeded from that concession as follows:

“Petitioners suggest, however, that something more than an ‘intelligible principle’ is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions. They contend that regulations of this sort pose a heightened risk to individual liberty and that Congress must

⁴¹Defendant in this case makes no such concession.

therefore provide more specific guidance. Our cases are not entirely clear as to whether or not more specific guidance is in fact required. We need not resolve the issue today. We conclude that § 201(h) passes muster even if greater congressional specificity is required in the criminal context.”

Touby, 500 U.S. at 165-66 (citations omitted). Thus, for the purposes of its decision, the Court assumed that greater congressional specificity – something more than an “intelligible principle” – is required in a criminal context. Critically, however, the Court went on to hold not only that the intelligible congressional principle at issue meaningfully constrained the Attorney General’s discretion to define criminal conduct, but also that “Congress ha[d] placed multiple specific restrictions on the Attorney General’s discretion to define criminal conduct. These restrictions satisfy the constitutional requirements of the non-delegation doctrine.” *Id.* at 167.

In this case, by contrast, the extraordinary authority delegated by Congress to the Attorney General – literally the power over who lives or dies – does not even meet the “intelligible principle” threshold. Instead, Congress has provided nothing whatsoever to guide the Attorney General in the selection of “any other aggravating factors” the government, virtually at its whim, believes will provide a basis for the death penalty. The language of the statute literally provides no guidance, but cedes wholly to the Attorney General the authority to seek a death penalty, in part, on the basis of “any other aggravating factors” which the government seeks to prove as the basis for the death penalty.

In *United States v. Davis*, 904 F.Supp. 554 (E.D.La. 1995), the district court examined this non-delegation doctrine argument, and found it troubling:

“The defendants . . . raise an additional concern which makes the analysis less simple. In *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), the United States Supreme Court upheld a death sentence even though one of the aggravating factors found by the jury to apply was held by the court to be

unconstitutionally vague. Significant to the decision was that the state statute at issue used aggravating factors only to narrow the class eligible for the death penalty. The jury was not additionally instructed to weigh aggravating factors against mitigating factors. The federal statute at issue here likewise uses the statutory aggravating factors as the threshold to find an offender death eligible. However, the federal procedure also calls on the jury to consider any non-statutory aggravating factors and mitigating factors and ultimately decide whether the aggravating factors “sufficiently outweigh” the mitigating factors to justify a death sentence. 18 U.S.C. § 3593(e). Thus, while the statutory factors provide the threshold for death penalty consideration, they ultimately become indistinguishable from non-statutory factors in the final weighing by the jury. In the same pot with the carefully crafted factors enunciated by Congress go the potential hodge-podge of other factors drawn up by the individual government prosecutors. Since this is a weighing statute and since non-statutory and statutory aggravating factors are to be equally considered in that balancing, this Court does conclude that allowing the prosecutors to designate additional factors is in fact a delegation of legislative authority. See also *United States v. Pretlow*, 779 F. Supp. 758 (D.N.J. 1991).”

Davis, 904 F.Supp. at 559. Ultimately, however, the Court concluded that the delegation was proper.⁴²

Because allowing the Attorney General to engage in standardless promulgation of non-statutory aggravating factors is unconstitutional violation of the non-delegation doctrine, and because the dangers it poses are exacerbated by the FDPA’s use of a weighing scheme, the non-statutory factors alleged against defendant must all be dismissed.

F. A weighing scheme may not constitutionally utilize non-statutory aggravating factors without also providing for mandatory proportionality review and, therefore, the FDPA is unconstitutional.

⁴² As of yet, no court has accepted this delegation argument with regard to the use of non-statutory aggravating factors in the federal death penalty. See *United States v. Jones*, 132 F.3d 232, 239-40 (5th Cir. 1998), *aff’d on other grounds*, *Jones v. United States*, 527 U.S. 373 (1999); *Davis*, 904 F.Supp. at 559; see also *United States v. bin Laden*, 126 F.Supp.2d 290, 297 (S.D.N.Y. 2001).

The FDPA is a “weighing” statute which requires jurors to weigh aggravating factors and mitigating factors and return a sentence of death only if “all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death . . .” 18 U.S.C. §3593(e). The FDPA does not provide for proportionality review. This failure to provide for proportionality review, while simultaneously permitting the use of non-statutory aggravating factors in the context of a “weighing” statute, renders the FDPA unconstitutional; alternatively, the non-statutory aggravating factors must be dismissed.

The term “proportionality review,” as used in death penalty jurisprudence, was defined in *Pulley v. Harris*, 465 U.S. 37 (1984), as follows:

“This sort of proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime.”

Pulley, 465 U.S. at 43. In *Pulley*, the Court ultimately concluded that the Eighth Amendment, applicable to the states through the Fourteenth Amendment, did not require state appellate courts, in all cases, “to compare the [death] sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner.” *Id.* at 44. *Pulley*, however, does not define the universe when it comes to the role of proportionality review in examining the constitutionality of any particular capital punishment scheme.

In order to comprehend fully the place of non-statutory aggravating factors in a capital punishment scheme, it is critical to understand the Supreme Court’s decision in *Zant v. Stephens*, 462 U.S. 862 (1983). In that case, a Georgia sentencing jury, *guided by a “non-weighing” capital punishment scheme*, imposed the death penalty after finding three statutory aggravating

circumstances. On direct appeal, the Georgia Supreme Court invalidated, on vagueness grounds, one of the three statutory aggravating circumstances but, nonetheless, upheld the sentence of death. The court reasoned that, in light of the particular structure of Georgia's "guided discretion" statute, the fact that one of the statutory aggravating factors found by the sentencing jury was later declared invalid did not require that the death sentence be vacated since the statutory factor was one which the jury could have considered anyway as a *non*-statutory factor. *Zant v. Stephens*, 456 U.S. at 866.

The particular statutory aggravating factor found by the Georgia Supreme Court to be unconstitutional was that the individual had "a substantial history of serious assaultive criminal convictions." *Id.* at 868. In support of that factor, the penalty jury had heard extensive testimony regarding the defendant's prior criminal record. His primary argument on appeal was that the information about his record had been improperly placed before the jury in support of the subsequently invalidated statutory aggravating factor. Responding to this argument, the Court in *Zant* noted that Georgia's capital punishment scheme did not involve "weighing."⁴³ In order to impose the death penalty, the penalty jury had to find the existence of at least one of ten specific *statutory* aggravating factors. However, the penalty jury was also authorized to consider any other *non-statutory* aggravating factors present as well as all mitigating circumstances. As a check on complete arbitrariness, a death sentence could not be imposed unless at least one of the statutory aggravating factors was found. Additionally, as is the case with the federal statute, a Georgia jury was never required to impose a death sentence and could decline to do so without specifying its reasoning. *Zant*, 462 U.S. at 871 n.13.

⁴³ This is an extremely important distinction between the statute reviewed in *Zant* and the statute at issue in this case. The FDPA is very clearly of the weighing genre.

In reviewing the above-described scheme, the United States Supreme Court concluded that evidence of the defendant's prior criminal record could have been placed properly before the sentencing jury in any event under a theory that the jury was allowed to consider non-statutory aggravating factors in reaching its decision, including the nature and extent of defendant's prior criminal record. *Zant*, 462 U.S. at 886-888. The Court's conclusion was reached on the basis of the Georgia Supreme Court's own interpretation of its death penalty scheme coupled with the United States Supreme Court's views, expressed in *Gregg v. Georgia*, 428 U.S. 153 (1976), that nothing in the constitution prohibits a state from allowing a wide variety of evidence and argument at penalty-phase hearings.⁴⁴ *Id.* at 203-04.

Thus, while *Zant* seems superficially to stand for the proposition that non-statutory aggravating factors may be considered by a penalty jury, the opinion must be confined to the statutory scheme in which it arose. The Court's reasoning, was, in essence: (1) the presence of two valid statutory aggravating factors sufficiently narrowed the class of murderers eligible for the death penalty; and (2) the invalid statutory factor found by the jury could not be viewed as constitutionally prejudicial since the evidence underlying the factor was properly before the jury in any event. There was also a third critical factor:

“Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality.”

Zant, 462 U.S. at 890 (emphasis added). The Court also expressly reserved judgment concerning

⁴⁴ This is a second critical distinction between the Georgia statute and the FDPA scheme. The federal death-penalty statute, by its terms, limits the government's penalty-phase evidence to specified statutory aggravating factors and such other non-statutory aggravating factors as to which the government puts a defendant on notice. Juries are not free, in effect, to make up aggravating factors as they go along.

the significance it would attach to a finding that a particular statutory aggravating circumstance was invalid in the context of a sentencing scheme where the judge or jury “is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.”⁴⁵ *Id.*

The FDPA scheme is of the weighing variety and does not provide for capital proportionality review. In *Zant*, the Court was clearly concerned about the potential for arbitrary death sentences in a jurisdiction which permitted a jury to consider non-statutory aggravating factors. An important constitutional check on that potential for arbitrariness was mandatory proportionality review.

One year after *Zant*, the Court decided *Pulley v. Harris* where, as noted, the Court concluded that proportionality review was not required in every state court death sentence review. *Pulley* did not involve, however, a system which permitted the use of non-statutory aggravating factors. Under the California statute at issue in *Pulley*, if the jury which heard the guilt-phase portion of the trial returned a guilty verdict on a capital count, it was also required to report with its verdict whether “special circumstances” identified in the statute had also been proved beyond a reasonable doubt. *Pulley*, 465 U.S. at 51. In the event one or more special

⁴⁵ Obviously, very different considerations are present if the statutory scheme requires a jury to weigh the significance of aggravating factors. Under those circumstances, it is the weighing and balancing which performs the narrowing function. Thus, in a 1990 decision involving Mississippi’s weighing scheme, the Court answered the open question in *Zant* and concluded that a jury’s finding of an invalid aggravating factor *always* requires reversal of the death sentence and a new sentencing hearing where the jury was required to weigh aggravating and mitigating circumstances. *Clemons v. Mississippi*, 494 U.S. 738 (1990). This doctrine has been followed consistently since *Clemons*. See, e.g., *Stringer v. Black*, 503 U.S. 222 (1992); *Espinosa v. Florida*, 505 U.S. 1079 (1992); *Richmond v. Lewis*, 506 U.S. 40 (1992). These are not always easy issues to resolve. In *Flamer v. Delaware*, 68 F.3d 736 (3d Cir. 1995) (*en banc*), the Court divided badly over the seemingly straight-forward question of whether Delaware was or was not a weighing state.

circumstances were found, the trial proceeded to a separate penalty trial at which the jury received additional evidence and ultimately was required to deliberate anew on a list of relevant factors set forth in the statute. A death verdict required the trial judge to review that finding and permitted him or her to set it aside after independently determining whether the evidence in fact supported the jury's findings. *Id.* at 52.

While *Pulley* stands for the proposition that proportionality review is not constitutionally required in every case, *Zant* stands just as clearly for the proposition that in a system – such as Georgia's and the federal death penalty scheme – which permits a jury to consider non-statutory aggravating factors, proportionality review is a necessary check on the arbitrary imposition of a death verdict. Thus, the federal statute's failure to provide for proportionality review, while simultaneously permitting the use of non-statutory aggravating factors, renders it unconstitutional.⁴⁶

G. By omitting “plain-error” review, Congress has failed to provide for meaningful appellate review, and the FDPA is therefore is unconstitutional.

As noted earlier, meaningful appellate review is an indispensable component of a constitutional death penalty scheme. Such review provides a necessary check on the arbitrary and capricious infliction of the death penalty. *Parker v. Dugger*, 498 U.S. at 321 (“We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally”); *see also Clemons v. Mississippi*, 494 U.S. 738, 749 (1990) (“this Court has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency”).

⁴⁶ These arguments have not been accepted in other federal death penalty cases. Those cases are collected in *United States v. O'Driscoll*, *supra*, 203 F.Supp.2d 334, 343 (M.D.Pa. 2002).

In enacting the FDPA, Congress actually curtailed the scope of appellate review and, thereby, rendered the statute unconstitutional. The relevant section reads as follows:

“(b) Review. – The court of appeals shall review the entire record on the case, including –

- (1) the evidence submitted during the trial;
- (2) the information submitted during the sentencing hearing;
- (3) the procedures employed in the sentencing hearing; and
- (4) the special findings required under section 3593(d).

“(c) Decision and disposition. –

- (1) The court of appeals shall address all substantive and procedural issues raised on the appeal of a sentence of death, and shall consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor and whether the evidence supports an aggravating factor required to be considered under section 3592.
- (2) Whenever the court of appeals finds that –
 - (A) The sentence of death was imposed under the influence passion, prejudice, or any other arbitrary factor;
 - (B) the admissible evidence and information adduced does not support the special finding of the existence of the required aggravating factor; or
 - (C) the proceedings involved any other legal error requiring reversal of the sentence *that was properly preserved for appeal under the rules of criminal procedure,*

the court shall remand the case for reconsideration under section 3593 or imposition of a sentence other

than death.”

18 U.S.C. §3595 (emphasis added).

By its plain language, the above-quoted provision precludes plain-error analysis by a court of appeals reviewing a capital case. *See* Rule 52(b), F.R.A.P. The doctrine of plain error is available in all criminal appeals and gives an appellate court the option of noticing obvious errors that were not brought to the attention of the district court. *See, e.g., United States v. Frady*, 456 U.S. 152, 163 n.13 (1982); *Silber v. United States*, 370 U.S. 717 (1962) In *United States v. Olano*, 507 U.S. 725 (1993), the Court held that an appellate court may reverse under plain error where: (1) there is an error; (2) the error is “obvious;” (3) the error affects substantial rights; and (4), the error “seriously affects the fairness, integrity or public reputation of the judicial proceedings.” *Id.*

By failing to allow for plain-error review, the FDPA ignores the line of Supreme Court cases requiring meaningful appellate review as a pre-condition to a finding that a death-penalty scheme is constitutional. It also ignores the fact that the Supreme Court has repeatedly recognized that “death is different” and, in recognition of that difference, has required heightened standards of reliability to justify death verdicts. A death-verdict cannot be considered reliable if it was brought about by an error that was obvious, affected substantial rights and seriously affected the fairness, integrity or public’s view of the judicial proceedings, even if that error was not raised before the district court.

By limiting the scope of appellate review to two areas, evidentiary sufficiency and the absence of wholly arbitrary factors, Congress accomplished its political agenda of facilitating executions, but failed in the process to comply with the commands of the Supreme Court. Additionally, for Congress to have singled out death-sentenced federal prisoners for diminished

appellate review violates equal protection since Congress may not single out one class of inmates for such diminished review while leaving open existing remedies to all other federal prisoners. *Cf., Lindsey v. Normet*, 405 U.S. 56, 77 (1972). An individual's interest in his or her own life is fundamental. Thus, in the absence of some compelling governmental interest, this distinction may not stand.

A statute that requires an appellate court to affirm a death verdict which was returned as a result of plain error in the proceedings below is antithetical to concepts of heightened reliability, meaningful appellate review, and equal protection. Thus, an order should be entered declaring the statute unconstitutional.

H. The death penalty is cruel and unusual punishment and a *per se* denial of due process and is, therefore, unconstitutional.

Defendant recognizes, as he must, that every present member of the United States Supreme Court accepts the proposition that the death penalty, under some circumstances, is constitutional.⁴⁷ This may remain the rule of law in this nation for many years. Nevertheless, defendant contends that the death penalty is unconstitutional in all cases, and as applied to him, for the following reasons: (1) the death penalty is racist to its very core and represents an intellectually dishonest congressional response to the public's frustration over the inability of elected officials to do anything meaningful about crime; (2) the death penalty has in the past, and

⁴⁷ In *Schiro v. Farley*, 510 U.S. 222 (1994), Justice Ginsburg, the newest member of the Court, voted with the majority in upholding a sentence of death. Justice Stevens, however, continues to express grave doubts regarding the constitutionality of the death penalty. In *Herrera v. Collins*, 506 U.S. 390 (1993), he joined with former Justice Blackmun to voice "disappointment over this Court's obvious eagerness to do away with any restriction on the State's power to execute whomever and however they please," and expressed "doubt about whether, in the absence of such restrictions, capital punishment remains constitutional at all," describing the execution sanctioned by the Court in *Herrera* as "perilously close to simple murder." *Herrera*, 506 U.S. at 446

inevitably will in the future, lead to the execution of innocent people; (3) the process by which individuals are selected for capital prosecution vests an unacceptable level of unreviewable discretion in prosecuting authorities; and (4) evolving standards of decency will eventually convince the American public that it is wrong and immoral to kill people in an effort to teach people it is wrong and immoral to kill people.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court reiterated its authority to review the constitutionality of the death penalty in light of “the evolving standards of decency that mark the progress of a maturing society.” *Atkins*, 536 U.S. at 308, quoting from *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). In *Callins v. Collins*, 510 U.S. 1141 (1994), Justice Blackmun, four months prior to his retirement from the Supreme Court, dissented from the denial of *certiorari* in a Texas death-penalty case and expressed at great length why twenty years of experience on the Supreme Court had convinced him that this nation’s death penalty schemes – even if theoretically permissible and constitutional – are, in practice and reality, incapable of fair and even-handed application and therefore retain many of the arbitrary and capricious features, including race, ostensibly struck down in *Furman* and “corrected” by *Gregg* and its progeny. Justice Blackmun stated:

“From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored – indeed, I have struggled – along with a majority of this Court, to develop procedural and substantive rules that would lend more than the appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved, I feel morally and intellectually obligated simply to conclude that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question – does the system accurately and consistently determine which defendants “deserve” to die? – cannot be answered in the

affirmative. It is not simply that the Court has allowed vague aggravating circumstances to be employed [citation omitted], relevant mitigating evidence to be disregarded [citation omitted], and vital judicial review to be blocked [citation omitted]. The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.”

Callin, 510 U.S. at 1145-1146.

In a 1995 *en banc* opinion from the Third Circuit, reviewing sentences of death imposed in Delaware, Judge Lewis, joined by Judges Mansmann and McKee, expressed their agreement with Justice Blackmun’s conclusions:

“Although I have concluded that the errors in both trials were not harmless and would, accordingly, reverse the death sentences as to both Bailey and Flamer and remand for reweighing, the tortuous analytical route it has taken both the majority and me to set out our respective views in these cases compels me to add that I believe they perfectly illustrate - perhaps epitomize - why, in the words of Justice Blackmun, we should “no longer tinker with the machinery of death.” *See Callins v. Collins*, 127 L. Ed. 2d 435, 114 S. Ct. 1127 (Blackmun, J., dissenting).

“To be sure, Justice Blackmun was correct. I realize that I sit on a court charged with the responsibility of applying the law as it is interpreted by the Supreme Court, and in circumstances such as these, by the highest court of a state. That is precisely what the majority and I have sought to do, despite our disagreement. But there are times when it becomes appropriate for a judge to reflect upon the law that he or she is called upon to apply, and to express views, genuine and unfeigned, that reveal a sincere and earnest belief. And in doing so here, I can only say that more than any I have seen, these cases exemplify the extent to which death penalty jurisprudence has become so complex and theoretically abstract that the only way to try to understand the reasons for and impact of its many subtle distinctions is to resort to carefully crafted hypotheticals. Something is terribly wrong when a body of law upon which we rely to determine who lives and who dies can no longer, in reality, reasonably and logically be comprehended and applied; when, in examining a statutory scheme and analyzing instructions and interrogatories, we are left to reach conclusions by

piling nuance upon nuance; when we cannot even agree upon the appropriate standard of review in cases in which lives hang in the balance. Yet this is how cluttered and confusing our nation's effort to exact the ultimate punishment has become. This cannot be what certain fundamental principles of liberty and due process embodied in our Constitution, principles upon which I need not elaborate here, are all about.

“It does not dilute my profound respect for the highest court in the land, an admiration and honor that knows no bounds, to voice an apprehension, sincerely felt, that much more guidance in this serious moral dilemma must be forthcoming. Elusive and complicated distinctions, replete with incomprehensible subtleties of the highest order, must not be the talisman that decides whether one should live or die. Until this guidance is forthcoming, the plaintive voice of Justice Blackmun, truly crying in the wilderness, should continue to haunt and remind us that ‘the desired level of fairness has [not] been achieved.’”

Flamer v. Delaware, 68 F.3d 736, 772 (32d Cir. 1995) (*en banc*) (Lewis, J., dissenting).

This Court should declare the Federal Death Penalty Act of 1994 unconstitutional.

I. Death by lethal injection constitutes cruel and unusual punishment.

Should Mr. Rudolph be convicted and sentenced to death by lethal injection, he respectfully reserves the right to argue that such punishment constitutes cruel and unusual punishment in violation of the U.S. Constitution.

IV. CONCLUSION.

WHEREFORE, for any or all of the foregoing reasons, Mr. Rudolph requests this Court to enter an order declaring the Federal Death Penalty Act unconstitutional and striking the death penalty as a possible punishment in this case.

IV. CONCLUSION.

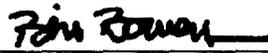
WHEREFORE, for any or all of the foregoing reasons, Mr. Rudolph requests this Court to enter an order declaring the Federal Death Penalty Act unconstitutional and striking the death penalty as a possible punishment in this case.

Respectfully submitted,

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BY: 
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March 1, 2004

CERTIFICATE OF SERVICE

I do hereby certify that I have served upon the attorney for the government the defendant's Motion to Strike the Death Penalty and accompanying Appendix by hand delivery of one copy of the same delivered to:

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Robert J. McLean
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This the 1st day of March, 2004.



William M. Bowen