

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.)
)
ERIC ROBERT RUDOLPH,)
Defendant.)

S
CR-00-~~M~~-0422-S

**MOTION TO DISMISS NOTICE OF SPECIAL FINDINGS AND GOVERNMENT'S
NOTICE OF INTENT TO SEEK THE DEATH PENALTY AND FOR OTHER
APPROPRIATE RELIEF**

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INTRODUCTION

Defendant ERIC ROBERT RUDOLPH is charged in a two count superseding indictment filed on June 26, 2003 with maliciously damaging, by means of an explosive, a building and property used in an activity affecting interstate and foreign commerce, which resulted in the death of Robert D. Sanderson and personal injury to Emily Lyons, in violation of Title 18, United States Code, Section 844(i)(count One), and with knowingly using a firearm, that is a destructive device, during and in relation to a crime of violence for which he may be prosecuted in a Court of the United States, and in the course of such conduct causing the death of Robert D. Sanderson through the use of said firearm, in violation of Title 18, United States Code, Section 924(c)(1)(Count Two).

The Superseding Indictment also contains a Notice of Special Findings, which states that with regard to Count One the Grand Jury has found that the defendant was 18 years of age or older at the time of the commission of the offense, and that the defendant acted with all four of the mental states required to establish eligibility for a death sentence. See, 18 U.S.C. §3591(a)(2). There is also a special finding that with regard to Count One, the defendant: (a) during the commission of an offense under Section 844(i), caused the death of and injuries resulting in the death of a person (18 U.S.C. § 3592(c)(1)); (b) in the commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense (18 U.S.C. § 3592(c)(5)); (c) committed the offense in an especially heinous, cruel and depraved manner in that it involved torture or serious physical abuse of the victims (18 U.S.C. § 3592(c)(6)); (d) committed the offense after substantial planning and premeditation to cause the death of another person and to commit an act of terrorism (18 U.S.C. §3592(c)(9)); and (e) intentionally attempted to kill more than one person in a single criminal episode (18 U.S.C. §3592(c)(16)).

In a Notice of Intent To Seek The Death Penalty (hereinafter “Notice”) filed on December 11, 2003, the government stated that it intends to seek the death penalty against Mr. Rudolph in the event of the defendant’s conviction of the offense charged in Count One of the superseding indictment pursuant to the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 *et seq.*

The death penalty notice in this case then alleges that Mr. Rudolph acted with all four of the mental states required to establish eligibility for a death sentence. See, 18 U.S.C. §3591(a)(2)¹; See also Tison v. Arizona, 481 U.S. 137, 157-158 (1987) (Eighth Amendment does not prohibit death penalty as disproportionate where defendant is a major participant in a felony that results in murder and his or her mental state is reckless indifference to human life).

The notice also alleges four statutory aggravating factors and two non-statutory aggravating factors. The four statutory aggravating factors are alleged as follows:

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1. The notice states as follows:

“ The Government proposes to prove the following statutory factors pursuant to 18 U.S.C. §3591(a)(2) and 3592(c), as charged in the Superseding Indictment Notice of Special Findings...

1. The Defendant, ERIC ROBERT RUDOLPH, intentionally killed Robert D. Sanderson (Title 18, U.S.C. § 3591(a)(2)(A)).
2. The Defendant, ERIC ROBERT RUDOLPH, intentionally inflicted serious bodily injury that resulted in the death of Robert D. Sanderson (Title 18, U.S.C. §3591(a)(2)(B)).
3. The Defendant, ERIC ROBERT RUDOLPH, 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 another person, who died as a direct result of the act (18 U.S.C. §3591(a)(2)(C)).
4. The Defendant, ERIC ROBERT RUDOLPH, intentionally and specifically engage in an act of violence, knowing that the act created a grave risk of death to other persons, such that participation in the act constituted a reckless disregard for human life and Robert D. Sanderson died as a direct result of the act. 18 U.S.C. §3591(a)(2)(D).”

“B Statutory Aggravating Factors Enumerated Under Title 18 U.S.C. § 3592(c)

1. **Death During the Commission of Another Crime** The Defendant, ERIC ROBERT RUDOLPH, during the commission of an offense under Title 18, United States Code, Section 844(i), caused the death of and injuries resulting in the death of Robert D. Sanderson (18 U.S.C. § 3592(c)(1)).

2. **Grave Risk of Death to Additional Persons.** The Defendant, ERIC ROBERT RUDOLPH, in the commission of the offenses charged in the Superseding Indictment, knowingly created a grave risk of death to Emily Lyons and other persons (18 U.S.C. § 3592(c)(5).

3. **Substantial Planning and Premeditation.** The Defendant, ERIC ROBERT RUDOLPH, committed the offense after substantial planning and premeditation to cause the death of another person and to commit an act of terrorism (18 U.S.C. §3592(c)(9)).

4. **Multiple attempted killings.** The Defendant, ERIC ROBERT RUDOLPH, intentionally attempted to kill more than one person in a single criminal episode (18 U.S.C. §3592(c)(16)).”

The two non-statutory aggravating factors are alleged as follows:

“Other, Non-Statutory, Aggravating Factors Identified under 18 U.S.C. § 3593(a)(2):

1. **Future Dangerousness of the Defendant.** The Defendant, ERIC ROBERT RUDOLPH, is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of others. In addition to the capital offense charged in Count I of the superceding Indictment and the statutory and non-statutory aggravating factors alleged in this Notice, the Defendant has demonstrated low rehabilitative potential, and or has demonstrated lack of remorse.

2. **Victim Impact Evidence.** The Defendant, ERIC ROBERT RUDOLPH, caused injury, harm and loss to the family of Robert D. Sanderson because of the victim’s personal characteristics as an individual human being and the impact of the death upon the victim’s family. The murder of Robert D. Sanderson has caused the victim’s family extreme emotional suffering, and the victim’s family has suffered severe and irreparable harm. The Defendant, ERIC ROBERT RUDOLPH, caused injury, harm and loss to Emily Lyons and her family because of the victim’s personal characteristics as an individual human being. The injury of Emily Lyons has caused her and her family extreme emotional suffering, and severe and irreparable harm.”

Defendant Rudolph urges this Court to dismiss the Notice of Special Findings and the

Notice of Intent to Seek the Death Penalty on the grounds that the Notices do not provide that notice required by the Constitution or by statute and the various factors listed in the Notices as bases for imposing the death penalty violate the Eighth Amendment. Moreover, the specific factors set forth in the notice must be dismissed because: 1) they do not narrow the class of murderers subject to the death penalty; 2) to the extent that they do perform a narrowing function they are unconstitutionally vague; 3) they are duplicative of the crime charged and of each other; and, 4) they violate additional the Fifth Amendment Rights to Due Process and against Self-Incrimination, as well as the Sixth and Eighth Amendments.

I.

AGGRAVATING FACTORS MUST GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY, MUST REASONABLY JUSTIFY IMPOSITION OF A MORE SEVERE SENTENCE ON THE DEFENDANT COMPARED TO OTHERS CONVICTED OF MURDER, MUST BE FOUND BY A GRAND JURY AND PROVEN AT JURY TRIAL UNANIMOUSLY AND BEYOND A REASONABLE DOUBT, AND MUST NOT BE VAGUE, OVERBROAD, OR DUPLICATIVE

To render a defendant eligible for the death penalty in a homicide case, the Supreme Court has mandated that “the trier of fact must convict the defendant of murder and find one ‘aggravating circumstance’ (or its equivalent) at either the guilt or penalty phase.” *Tuilaepa v. California*, 512 U.S. 967, 971-972 (1994). A constitutional 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. 862, 877 (1983).² The narrowing requirement dictates that

² In general, the requisite narrowing can be accomplished in two ways: “The legislature may itself narrow the definition of capital offenses . . . so that the jury finding of guilt responds to this concern,” or “the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.” *Lowenfeld v. Phelps*, 484 U.S. 231, 246 (1988).

an aggravating circumstance cannot be overbroad and “may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder.” *Tuilaepa v. California*, *supra*, 512 U.S. at 972; See also, *Jones v. United States*, 527 U.S. 373 (1999)[“An aggravating factor can be overbroad if the sentencing jury ‘fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty.”](plurality opinion); *Arave v. Creech*, 507 U.S. 463, 474 (1993)[“ If the sentencer fairly can conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm”].

The requirement that a constitutional aggravating circumstance must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder means that aggravating factor must be "sufficiently relevant to the question of who should live and who should die." *United States v. Davis*, 912 F.Supp. 938, 943 (E.D.La.1996); see *Arave*, 507 U.S. at 474, 113 S.Ct. 1534; *United States v. Friend*, 92 F.Supp.2d 534, 541 (E.D.Va.2000). The factor must be "focused on circumstances that are considered by a civilized society to be particularly relevant to the sentencing decision." *Friend*, 92 F.Supp.2d at 541 (internal quotations and citation omitted).

In addition, “the aggravating circumstance may not be unconstitutionally vague.” *Tuilaepa v. California*, *supra*, 512 U.S. at 972. The statute must “channel the sentencer’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death.’” *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990), quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

A statute’s aggravating factors play a critical role in channeling the sentencer’s discretion through clear and objective standards. An aggravating factor must set out a clear, principled way to distinguish those few cases in which the death penalty may be imposed from the many cases in which

it is not imposed. *Godfrey, supra*, pp. 428-429, 433. As the Supreme Court has instructed:

Although our precedents do not require the use of aggravating factors, they have not permitted a state in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance.

Stringer v. Black, 503 U.S. 222, 235-236 (1992).

Following these principles, the Court has struck down aggravating factors that are too vague to supply clear guidance, or that could be interpreted as applying to almost any murder. See, e.g., *Maynard v. Cartwright*, 486 U.S. 356 363-364 (1988) (holding Oklahoma's "especially heinous, atrocious, or cruel" aggravating factors unconstitutionally vague); *Godfrey, supra*, 446 U.S. 420 [holding Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravating factor unconstitutionally vague].

Jurisdictions differ in how they direct death penalty juries to deal with aggravating factors. In some jurisdictions, the finding of aggravating factors serves only to identify those defendants who may be subject to the death penalty, but plays no further role in the sentencing proceeding. See, *Zant v. Stephens*, 462 U.S. 862, 873-74 (1983). In others, jurors must weigh the aggravating and mitigating factors to determine the defendant's fate. See *Stringer, supra*, 503 U.S. 229, 235-36. In a jurisdiction with a weighing statute, like the federal statute here, "there is Eighth Amendment error when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose the death sentence." *Sochor v. Florida, supra*, 504 U.S. at 532. "Employing an invalid aggravating factor in the weighing process 'creates the possibility . . . of randomness,' by placing a 'thumb [on] the death's side of the scale,' thus 'creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty.'" *Id.*, at 532, quoting *Stringer, supra*, 503 U.S. pp. 232, 235, 236 (internal citations omitted).

It is also “ essential that the aggravating factor be measured ‘in perspective of the fundamental requirement of heightened reliability that is keystone to making ‘the determination that death is the appropriate punishment in a specific case.’ ” *United States v. Johnson*, 136 F. Supp. 2d 553, 558 (W.D. Va. 2001), quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)). The need for "heightened reliability" in making such a decision is driven by the fact that a death sentence is qualitatively different from any other sentence. 136 F. Supp. 2d at 558 “Heightened reliability comes into play in assessing overbreadth, vagueness, and relevance.” (Id.) As to overbreadth, the requirement of heightened reliability assures that the proposed factor imposes an "inherent restraint on the arbitrary and capricious infliction of the death sentence," and, in so doing, prohibits factors that apply to almost all murders. Id.; *Zant*, 462 U.S. at 878, 103 S.Ct. 2733 (citation omitted). As to vagueness, heightened reliability serves to underscore the requirement that the factor must genuinely narrow those eligible for the death penalty,, while also serving to foreclose an unacceptable risk of randomness in the sentencing process. See *Tuilaepa*, 512 U.S. at 974-75, 114 S.Ct. 2630; *Friend*, 92 F.Supp.2d at 542. Finally, as to relevance, heightened reliability controls the quality of the information given to the jury in the sentencing phase, thereby assuring that the sentencer only receives evidence which bears on the selection of who, among those eligible for death, should die and who should live. See Id. at 559; *Gregg v. Georgia*, 428 U.S. 153, at 192 (1976); *Friend*, 92 F.Supp.2d at 542.

Further, although the Supreme Court has not yet decided the issue (see *Jones v. United States*, supra, 527 U.S. 373 (1999)), the lower federal courts have unanimously determined that an aggravating circumstance may not be unconstitutionally duplicative, because it leads to double counting, and “ (s)uch double counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death penalty will be imposed arbitrarily and thus, unconstitutionally.” *United States v. McCullah*, 76 F.3d 1087,1111 (10th Cir. 1996), reh. denied

en banc, 87 F.3d 1136 (10th Cir.), cert. denied, 117 S.Ct. 1699 (1997); Accord *United States v. Webster*, 162 F.3d 308, 323 (5th Cir. 1998); *United States v. Jones*, 132 F.3d 232, 251 (5th Cir. 1998); *United States v. Tipton*, 90 F.3d 861, 899 (4th Cir.1996); *United States v. Glover*, 43 F. Supp. 2d 1217, 1217 (D. Kan. 1999); *United States v. Kaczynski*, 1997 WL 716487, *23; *United States v. McVeigh*, 944 F.Supp. 1478, 1489-90 (D.Col. 1996).³

Finally, and most recently, the Supreme Court and the lower federal courts have made clear that gateway mental state and aggravating factors, as elements of a capital crime, must be found by a grand jury and subsequently proven to a trial jury unanimously and beyond a reasonable doubt. See, *Sattazahn v. Pennsylvania*, __ U.S. __, 123 S.Ct. 732 (2003); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), overruling *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). See also, *United States v. Allen*, 357 F. 3d. 745, 748 (8th Cir. 2004)(“The government concedes that in light of *Ring*, ..., the Supreme Court would likely hold that at least one statutory aggravating factor specified in 18 U.S.C. § 3592(c) must be alleged in Allen's indictment.... We agree. Just as the aggravating factors essential to qualify a particular defendant as death eligible must be found by the jury under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring*, they too must be alleged in the indictment.”); *United States v. Higgs*, 353 F.3d 281, 297 (4th Cir.2003) (“any factor required to be submitted to the jury must be included in the indictment”); *United States v. Sampson*, 245 F. Supp. 2d 327, 332 (D. Mass. 2003)(“in light of *Ring*, the facts concerning a defendant's state of mind and aggravating factors that the Federal Death Penalty Act requires be proven for a defendant to be eligible for the death penalty must be treated procedurally as elements of the offense alleged...”);

³ Some courts, including a four-Justice plurality in *Jones v. United States*, 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999), have considered the possibility that certain aggravating factors may be duplicative in such fashion, only to uphold those factors as sufficiently distinct. (See *Jones*, 527 U.S. at 398-400, 119 S.Ct. 2090; *U.S. v. Webster*, 162 F.3d 308, 324-325 (5th Cir.1998), cert. denied, 528 U.S. 829, 120 S.Ct. 83, 145 L.Ed.2d 70 (1999).)

United States v. Lentz, 225 F. Supp. 2d 672 (E.D. Va. 2002) (“[B]ecause the mens rea requirements of § 3591(a)(2) and the statutory aggravating factors of § 3592(c) must be found before a defendant may be determined death penalty eligible, such facts are the functional equivalent of elements and must appear in the indictment.”); *United States v. Regan*, 221 F.Supp.2d 672, 679 (E.D.Va.2002) (“[I]n light of *Jones's* requirement that 'any fact ... that increases the maximum penalty for a crime must be charged in an indictment,' it appears to be a foregone conclusion that aggravating factors that are essential to the imposition of the death penalty must appear in the indictment.”)

As the Eighth Circuit stated most recently in *Allen*, a federal capital defendant is now “constitutionally entitled to a separate and independent determination by a grand jury that probable cause existed to find the death-qualifying facts in this case.” 357 F.3d at 756. “(T)he constitutional framework ... for ... capital crimes...(now) places two separate bodies of citizens between the accused and a state-sanctioned judgment”, and a capital defendant may not be denied “the first of a constitutionally-mandated two-tiered check on prosecutorial power--a protection which reaches paramount importance in a capital case.” *Id.* at 756-757.

II.

***RING V. ARIZONA* HAS RENDERED THE FEDERAL DEATH PENALTY ACT OF 1994 UNCONSTITUTIONAL AND THE ACT MAY NOT BE SAVED BY PROSECUTORIAL OR JUDICIAL "CONSTRUCTION" THAT CREATES A NEW CRIMINAL OFFENSE.**

A. The *Ring* Decision

On June 24, 2002, the Supreme Court decided *Ring v. Arizona*, 122 S.Ct. 2428 (2002). *Ring* applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to overrule *Walton v. Arizona*, 497 U.S. 639 (1990), which had upheld Arizona's capital sentencing scheme on the basis that aggravating circumstances were not "essential elements" of the offense. The key holding in *Ring*, so far as these proceedings are concerned, is that "Arizona's enumerated aggravating factors operate as 'the functional

equivalent of a greater offense'" 122 S.Ct. at 2443, quoting *Apprendi*, 530 U.S. at 494 n. 19 (2000).⁴

The *Ring* decision expanded on two other recent Supreme Court cases dealing with the identification of essential elements of a federal offense. In *Jones v. United States*, 526 U.S. 227, 252-52 (1999), the Court had held that all elements of a federal offense "must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt."⁵ In *Harris v. United States*, 122 S.Ct. 2406, 2419 (2002), the Court stated that "those facts setting the outer limits of a sentence and of the judicial power to impose it are elements of the crime for constitutional analysis."

In *Sattazahn v. Pennsylvania*, 123 S.Ct. 732 (2003) Justice Scalia, writing for three members of the Court, stated that before *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002), "capital-sentencing procedures were understood to be just that: sentencing proceedings." 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. *Id.* Justices Scalia, Thomas and Rehnquist held that whether it is called a sentencing hearing or not, the protections of a trial apply to proving elements of a capital crime.

The dissent agreed. 123 S.Ct. at 747, n. 6. Justice Ginsberg, writing for Justices Stevens, Souter and Breyer, stated, "This Court has determined, however, that for purposes of the Double Jeopardy

⁴ The FDPA and the Arizona capital system considered in *Ring* are similar in that under each scheme the statute defining the offense establishes death as a possible sentence, see, e.g., 18 U.S.C. §1958, and the further fact-finding and procedural steps necessary to establish the defendant's death eligibility are set out in an entirely separate statute. 18 U.S.C. §§3591-3598. As in the Arizona scheme analyzed in *Ring*, the act that a federal jury returns a guilty verdict in a case of capital murder does not, without more, allow for imposition of a death sentence.

⁵ *Ring* did not address the grand jury considerations since the case arose in a state court where the Fifth Amendment's Indictment Clause does not apply. *Hurtado v. California*, 110 U.S. 516 (1884).

Clause, capital sentencing procedures involving proof of one or more aggravating factors are to be treated as trials of separate offenses, not merely sentencing proceedings." *Id.* Therefore, seven members of the Supreme Court clearly stated that statutory aggravating circumstances are elements of capital murder. The Court was unanimous on one point: like it or not, statutory aggravating circumstances are capital elements.⁶

The *Ring* decision thus established that aggravating factors operate as elements of a grater offense of capital murder. It is plain, then, that in federal cases, where the Indictment Clause of the Fifth Amendment applies, all the elements of federal capital murder must be alleged by indictment. However, it is not for the courts to state what those elements are, and thereby "enact" a new criminal offense, or to engraft onto the Federal Death Penalty Act a process never contemplated by Congress, i.e., the involvement of a grand jury in distinguishing the few federal homicide defendants who must face the death penalty from the many who will not.

To the contrary, under the doctrine of separation of powers, which reserves exclusively to the Legislative Branch the task of legislating,⁷ as well as the non-delegation doctrine and the long-established federal constitutional rule prohibiting judge-made "common law" criminal offenses, the FDPA cannot, in the aftermath of *Ring*, be substantially rewritten by the government. Thus, the "doctrine of constitutional avoidance, as discussed *infra*, has no proper role to play in this analysis. A statute whose terms and structure are unambiguous and indicative of conscious congressional choices, is not properly subject to judicial construction in derogation of those legislative choices. It is one thing

⁶ See *Summerlin v. Stewart*, 341 F.3d 1082, 1105 (9th Cir. 2003), cert. granted, 124 S.Ct. 833 (2003) ("...*Ring* confirmed...there is a distinct offense of capital murder, and the aggravating circumstances that must be proven to a jury in order to impose a death sentence are elements of that distinct capital offense"). Contra, *Turner v. Crosby*, 339 F.3d 1247 (11th Cir.2003)

⁷ Article I, §1 of the United States Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."

for a federal court to "fill in the blanks" where a statute is susceptible of more than one interpretation, or silent on a particular issue; it is quite another for a court to strike down one section of a statute and then allow the government to decide what will go in its place.

B. The FDPA and Congress's Design for Federal Death Sentencing

Any death penalty statutory scheme must provide some method by which a request for imposition of the death penalty is initiated. The method selected by Congress when it enacted the FDPA was to vest the death penalty charging decision entirely in the prosecution. Specifically, the FDPA provides that a sentence of death may not be sought unless "the attorney for the Government believes that the circumstances of the offense are such that a sentence of death is justified . . ." 18 U.S.C. §3593(a). Where the Government attorney does believe death is warranted, the next step in the statutorily-prescribed process is for that attorney to serve and file a signed notice, stating, *inter alia*, that "the Government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified . . . and that the Government will seek a sentence of death . . ." 18 U.S.C. §3593(a)(1). Such notice is commonly referred to as the "death notice." The FDPA also requires proof – and allegations in the death notice – of at least one of four statutory "gateway" intent factors. 18 U.S.C. §3591(a)(2). In addition, the notice must set forth the statutory aggravating factors the Government proposes to prove if the defendant is convicted. The FDPA further permits the Government to serve notice of victim-impact evidence and various non-statutory aggravating factors. 18 U.S.C. §3593(a)-(d).

Ring has invalidated much of the FDPA's procedure governing how prosecutors go about the decision of targeting Defendant A for capital punishment while skipping over Defendant B or Defendant C. The government tacitly recognizes that because statutory intent and aggravating facts are now, under *Ring*, "essential elements" of an offense of capital murder, the Indictment Clause requires

that these elements be charged not by the prosecution but by the grand jury.⁸ The Government tacitly seeks to 'fix' the problem in the statute by bringing the grand jury into the charging process, notwithstanding the fact that the FDPA authorizes no such role and, indeed, sets forth a wholly different process.

C. Separation of Powers

While the government has tacitly recognized that, after *Ring*, the elements of federal capital murder must be found by a grand jury and included in the indictment, the government has not acknowledged the many other problems posed by *Ring*, including the issue of which aggravating factors and other essential facts must be included in the indictment, whether the grand jury must be informed of the life-or-death significance of the "aggravating" elements submitted to it for approval, whether the defendant must plead to those factors, whether the relaxed evidentiary standard of the FDPA remains applicable at trial and, if so, to the presentation of mitigating as well as aggravating evidence, and any procedural changes in the two phases of the trial.

The complex statutory and constitutional problems that *Ring* poses for the FDPA cannot be

⁸ As noted earlier, *Ring* does not discuss the grand jury issue since the case arose in the context of a state statute to which the Fifth Amendment's Indictment Clause does not apply. *Hurtado v. California*, 110 U.S. 516 (1884). *Ring* clearly established, however, that aggravating factors in a scheme such as the FDPA operate as elements of an offense that must, in the federal system, be alleged by way of indictment. This has been established in a consistent series of recent cases, commencing with *Jones v. United States*, 526 U.S. 227, 243 n. 6 (1999) (under the Due Process clause of the Fifth Amendment and jury trial guarantees of the Sixth Amendment, any fact other than prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt") and, most recently in *United States v. Cotton*, 122 S.Ct. 1781, 1783 (2002), holding that in federal prosecutions, any fact increasing the maximum punishment "must also be charged in the indictment." As indicated at page 9, *supra*, the Supreme Court in *Sattazahn v. Pennsylvania*, 123 S.Ct. 732 (2003) and numerous lower federal courts have now made clear that gateway mental state and aggravating factors, as elements of a capital crime, must be found by a grand jury and subsequently proven to a trial jury unanimously and beyond a reasonable doubt.

solved simply by a superceding indictment. This is so because *Ring*, dealing as it does with the definition of a "higher" criminal offense of capital murder, is not simply a decision about criminal procedures, but is first and foremost a decision involving substantive criminal law. Therefore, **Congress** – not the Executive or Judicial Branches – must correct the constitutional flaws in the statute and determine the elements of the new offense of federal capital murder and the procedures appropriate for the trial of such offenses.

The basis of all federal criminal law is the Congress's definition of criminal offenses, and its designation of the range of penalties applicable to each. Ever since *United States v. Hudson*, 11 U.S. 32 (1812)(Marshall, CJ), it has been clear that only Congress has this criminal law-making power. For an act to be made criminal, "the legislative authority of the Union must first make an act a crime, fix a punishment to it, and declare the Court that shall have jurisdiction of the offense." *Id.* at 34. Eight years after *Hudson*, Chief Justice Marshall stated that "[i]t is the legislature, not the court, which is to define a crime and ordain its punishment." *Id.* at 93. Stated otherwise, "[t]he power of punishment is vested in the legislative, not in the judicial department." *Id.* See also *Bousley v. United States*, 523 U.S. 614, 620-21 (1998)("For under our federal system it is only Congress, and not the courts, which can make conduct criminal"); *United States v. Lanier*, 520 U.S. 259, 267-268 n. 6 (1997)("Federal crimes are defined by Congress, not the courts . . .").

Ring definitely addressed (and answered in the affirmative, as had *Apprendi*, *Harris*, and *Jones*) the fundamental substantive criminal law question of whether a fact which increases the maximum punishment applicable to a crime actually creates a new and distinct crime by adding additional elements that must be alleged by indictment and found by a petit jury beyond a reasonable doubt. The Government cannot circumvent the legislative process by taking it upon itself to define the elements of a new offense. Neither may the government properly ask this court to ignore the core principles of our Constitution and create, by judicial "construction," the elements of a new criminal

offense.

D. The Non-delegation Doctrine

As a corollary to the separation of powers problems posed by the prosecution's proposed unilateral Ring fix for the FDPA, the non-delegation doctrine⁹ also precludes both the Executive and the Judiciary, whether acting individually or in tandem, from substituting its judgment for that of Congress in prescribing the elements and the procedures for application of a federal death penalty. As stated by Justice Scalia, dissenting in *Mistretta v. United States*, 488 U.S. 361, 415 (1989):

It is difficult to imagine a principle more essential to democratic Government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature.

* * *

That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of Government ordained by the Constitution.

The *Mistretta* majority ultimately found that Congress had not transgressed the non-delegation doctrine when it created the United States Sentencing commission and its ensuing guidelines. The *Mistretta* Court nevertheless reaffirmed the principle that "the integrity and maintenance of the system of government ordained by the Constitution" mandate that Congress generally cannot delegate its legislative power to another Branch." *Id.*, 488 U.S. at 371-72, quoting *Field v. Clark*, 143 U.S. 649, 692 (1892). In *Mistretta*, the Court concluded that the non-delegation doctrine had not been violated because, in creating the Commission, Congress had "[laid] down by legislative act an intelligible

⁹"The non-delegation doctrine originated in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989); U.S. CONST., ART. 1, §1.

principle to which the [Sentencing Commission] is directed to conform . . ." *Id.*, 488 U.S. at 372 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

Mistretta involved only the delegation of authority to determine sentencing factors within the limits of a legislatively determined "intelligible principle." It did not include the authority to determine the very elements of an offense, as would be the case under a hypothetical post-*Ring* FDPA.¹⁰ Plainly, Congress must have the opportunity to determine, in light of *Ring*, the precise elements of federal capital murder and how *Ring* has affected the legislative balancing which produced the FDPA in the first place.

E. The Implications of *United States v. Jackson*

As noted in defendant's motion to strike the death penalty at page 50, this is not the first time that the Government has attempted to enlist the federal judiciary in the re-construction of a constitutionality flawed federal death penalty. 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 this provision unconstitutionally burdened the rights of the accused to proof beyond a reasonable doubt and to a jury trial because avoidance of the death penalty could only follow a plea of guilty or a waiver of trial by jury. *Id.* at 581-82. In an effort to salvage the death-penalty provision, however, the Government

¹⁰ In *Touby v. United States*, 500 U.S. 160, 164 (1991), the Court upheld Congress's delegation to the Attorney General of the authority to temporarily classify a drug as a controlled substance in order to bring its use and/or distribution within reach of criminal prosecution. This delegation of authority was based on the advent of "designer drugs" which were only marginally different in chemical composition from drugs that were already controlled. The Court held that the intelligible Congressional principle at issue not only meaningfully constrained the Attorney General's discretion to define criminal conduct but that, in addition, "Congress ha[d] placed multiple specific restrictions on the Attorney General's discretion to define criminal conduct . . ." *Id.* at 167.

proposed a number of alternative "constructions" of the statute and cited ad hoc procedures developed by other district courts' remedies for the constitutional problems. *Jackson* rejected each approach in favor of legislative, not judicial, action.¹¹ *Id.* at 572-81.

In approaching the limits of judicial authority to construe legislation, even where such construction would "save" a statute from unconstitutionality, the *Jackson* Court pointed out that the kidnaping 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. Applying *Jackson's* analysis to the issue at hand, it may be seen that once the practice of having government attorneys allege aggravating factors and essential facts is found unconstitutional, the FDPA "sets forth no procedure" for charging these facts. As *Jackson* warned, "[t]o 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.

Then there is the question of what role the grand jury might play. It might be that, presented with the option, Congress, in light of the change of law from *Walton* to *Ring*, would choose to enact a comprehensive death penalty scheme that allocated a role to the grand jury similar to that implied by the government's superseding indictment. However, it is also entirely possible that Congress would choose to enact a wholly new and different scheme which fully defined the new offense of "capital murder," specified its elements, and set forth comprehensive procedures for grand jury consideration of those cases. Whatever Congress might do, however, this Court should not pause to analyze the

¹¹ 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." *Id.* 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 proposed reconstructions and adhered, instead, to the plain language of the statute as best evincing Congress's intent.

government's proposed fix. As in *Jackson*, "[i]t is unnecessary to decide here whether this conclusion would follow from the statutory scheme the Government envisions, for it is not the scheme that Congress enacted." *Id.* at 573 (emphasis added).

It is one thing to fill a minor gap in a statute – to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality.

Id. at 580. See also *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) (rejecting Government's suggestion that statute could be "construed" to allow judicial rather than executive obscenity determinations because "it is for Congress, not this Court, to rewrite the statute.").

F. The Drug Case/Carjacking Analogy and the Severability Cases

The Government may argue that the Supreme Court did not invalidate the federal carjacking statute in *Jones v. United States*, 526 U.S. 227 (1999) or the drug offense statute at issue in *United States v. Cotton*, 122 S.Ct. 1781 (2002), when it declared that factual issues previously considered to be "sentencing factors" were in fact essential elements of the criminal charge. Unlike the statutes involved in *Jones* and *Cotton*, however, the FDPA established a detailed, integrated scheme applicable to multiple federal crimes that carry a death sentence. It is now clear that the FDPA is not consistent with *Ring* and *Harris*, and cannot be fixed by the Government's invention of a "notice of Special Findings" section in a capital indictment.¹²

In *Cotton*, the defendant had not objected at trial to the omission of drug quantity from the indictment, and the Government conceded in the Supreme Court that under *Apprendi*, drug quantity

¹² None of the post-*Apprendi* drug cases involved multiple-offense, comprehensive sentencing schemes, such as the FDPA.

must be alleged in federal drug indictments. This concession had a limited effect in such cases, however, because while Congress has provided for the penalty ranges for drug law violations to increase with the quantity of the specified drug¹³, Congress was silent on whether it intended drug quantities to be elements of an offense or sentencing factors. Treating drug quantities as offense elements that must be alleged by indictment worked no change in the structure of the drug laws. The same was true with the federal carjacking statute involved in *Jones*.

However, it is clear that Congress never intended the aggravating factors in the FDPA to be offense elements. Instead, Congress explicitly treated them as sentencing factors. In those instances where the Supreme Court has been required to determine whether a statute sets forth elements of an offense, as distinct from sentencing factors, it has looked to Congressional intent. As recently stated in *Castillo v. United States*, 530 U.S. 120, 123 (2000) (emphasis added), "[t]he question before us is whether Congress intended the statutory references . . . to define a separate crime or simply to authorize an enhanced penalty." Accord *Jones*, 526 U.S. at 232-39. See also *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998); *Harris*, 122 S.Ct. at 2442.

In both *Harris* and *Almendarez-Torres*, the Court found the facts at issue to be sentencing factors; in *Castillo* and *Jones*, the facts at issue were found to be offense elements. But in both sets of cases, the Court relied on statutory, not constitutional, analysis. This is because the Constitution, while placing limits upon Congress's ability to designate certain facts as mere sentencing factors, gives the courts no power to recast statutes so that they fit within those limits. In *Harris*, the Supreme Court considered "the distinction the law has drawn between the elements of a crime and factors that influence a criminal sentence." 122 S.Ct. at 2410. The Court reaffirmed that the threshold question of

¹³ See, e.g., 21 U.S.C. §841(b)(1)(A) (possession of one kilogram or more of heroin exposes a defendant to a sentence of 10 years to life; possession of less than 50 grams of heroin exposes a defendant to a sentence of 0-20 years, 21 U.S.C. §841(b)(1)(C)).

statutory construction is whether Congress intended relevant facts to be offense elements or sentencing factors. *Id.*, at 2411. The Court explained that this distinction is significant because "[l]egislatures define crimes in terms of the facts that are their essential elements, and constitutional guarantees attach to these facts." *Id.*, at 2410. This Court's task in deciding what Congress intended in enacting the FDPA is not a difficult one. Relying on *Walton*, Congress obviously believed it was enacting sentencing factors and procedures. *Ring* has now declared essential facts and aggravating factors such as those created by the FDPA to be elements of a greater capital offense. What, exactly, are the elements of this crime? What grand jury procedures shall be employed? These are questions for Congress alone, and accordingly, the statute may not be "construed" but must simply be voided.

G. The Doctrine of Constitutional Avoidance

The doctrine of constitutional avoidance dictates that when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). The immediate and short answer to application of the doctrine to this case is that the FDPA is simply not "susceptible of two constructions."

In *Harris*, *supra*, the Court found the doctrine of constitutional avoidance had no application because, at the time Congress enacted §924(c), Supreme Court precedent allowed Congress to label as sentencing factors certain facts that increased the minimum punishment for a crime. As the Court explained:

The avoidance canon rests upon our "respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). The statute at issue in this case was passed when *McMillan [v. Pennsylvania]*, 477 U.S. 79 (1986) provided the controlling instruction, and Congress would have had no reason to believe that it was approaching the constitutional line by following that

instruction. We would not further the canon's goal of eliminating friction with our coordinate branch, moreover, if we alleviated our doubt about a constitutional premise we had supplied by adopting a strained reading of a statute that Congress had enacted in reliance on the premise. And if we stretched the text to avoid the question of *McMillan's* continuing vitality, the canon would embrace a dynamic view of statutory interpretation, under which the text might mean one thing when enacted yet another if the prevailing view of the Constitution later changed. We decline to adopt that approach.

Harris, 122 S.Ct. at 2413. Finding the doctrine of constitutional avoidance irrelevant to its analysis, the Court, in accord with Congress's intent, concluded that "brandishing" was a sentencing factor. See 122 S.Ct. at 2414. Moreover, the question of the continuing viability of *Walton* has already been answered in *Ring*.

The doctrine of constitutional avoidance is also inapplicable here, as it was in *Harris*, because in the case of the FDPA there is no ambiguity about Congress's choice. As stated in *Miller v. French*, 530 U.S. 327, 341 (2000)(quotations omitted), "where congress had made its intent clear, we must give effect to that intent." See also *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 841 (1986)(citations and internal questions omitted) (emphasis added), where the Court stated:

Federal statutes are to be so construed as to avoid serious doubts of their constitutionality. Where such serious doubts arise, a court should determine whether a construction of the statute is fairly possible by which the constitutional question can be avoided. It is equally true, however, that this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication; although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it.

Thus, the doctrine of constitutional avoidance is inapplicable because, at the time Congress enacted the FDPA, the Supreme Court had explicitly approved treating facts required for imposition of the death penalty as sentencing factors, *Walton v. Arizona*, 497 U.S. 639, 649 (1990), and Congress legislated in reliance on that status of the law. Congress made its intent clear in the FDPA – the allegation of aggravating factors is the province of government attorneys. The *Jones-Apprendi-Ring*

trilogy has now altered the status of the law. Aggravating factors (and other essential facts required by the FDPA) are now properly, and constitutionally, viewed as elements of an offense not yet enacted by Congress, and beyond the authority of this Court to create via a strained "construction" that amounts to legislation.

H. A Grand Jury Is Not Authorized to Return "Special Findings"

As noted previously, the superceding indictment in this case contains a section labeled, "Special Findings." Grand juries are not, under the FDPA, permitted to return "Special Findings."¹⁴ The Federal Rules of Criminal Procedure provide that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). In 1979, Rule 7 was amended specifically to allow notice of criminal forfeitures to be alleged by indictment. Fed R. Crim. P. 7(c)(2), Advisory Committee Notes. Obviously, nothing in the text of the Rule, and nothing in the Indictment Clause of the Fifth Amendment, contemplates or permits a grand jury to make "Special Findings" that allegedly serve the function of triggering a government attempt to execute a defendant.

The grand jury has historic functions that survive to this day. "Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions." *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972). Neither of those functions are served by returning "special findings," which are central to a punishment issue.

In this context, if a grand jury is to be more than a rubber stamp for the government, it must be

¹⁴ The term "special findings" is found in 18 U.S.C. §3593(d). That section contemplates that the trial jury will make findings regarding aggravating and mitigating factors at the sentencing hearing.

given both the duty and ability to authorize the punishment against a defendant.

The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense— all on the basis of the same facts. Moreover, the grand jury is not bound to indict in every case where a conviction can be obtained.

Vasquez v. Hillery, 474 U.S. 254, 263 (1986)(internal quotation and citation omitted). This indictment does not indicate that the grand jury knew that it was even charging the defendant with a capital crime, nor that it intended such a result to occur, and thus there is little basis for confidence that Mr. Rudolph's substantial rights under the Indictment Clause were safeguarded by the procedure selected by the government here.

Congress chose in the FDPA to require the government to allege aggravating factors (statutory and non-statutory) and to allege that the death penalty is justified in the defendant's case. If Congress were to rewrite the statute, why are we to assume that the grand jury would not be required to do the same? The government has chosen to rewrite only a portion of the statute – that providing for the charging of statutory aggravating factors – and has relieved the grand jury of other statutory tasks, including providing notice of non-statutory aggravating circumstances, considering mitigating circumstances, and most problematically, determining whether the death penalty is "justified." Could not Congress enact an entirely different scheme from the procedure employed by the government here?¹⁵

I. Non-statutory aggravating factors.

Also missing from the superceding indictment are the two alleged non-statutory aggravating

¹⁵ Although the Constitution may not require prosecutors to provide exculpatory or mitigating evidence to a grand jury, Congress could provide this protection in this context.

factors¹⁶ of future dangerousness and victim impact that are contained in the Notice of Intent to Seek Death Penalty . Under the FDPA, a sentencing jury can rely on those non-statutory aggravating factors in justifying a death sentence, although no grand jury ever reviewed them.

There is a substantial question whether the logic of *Ring* demands that nonstatutory, as well as statutory, aggravators be alleged in the indictment. Under the FDPA, nonstatutory aggravators are factual allegations that must, like statutory aggravators, be detailed in the Notice of Intention to Seek the Death Penalty and proved to the jury beyond a reasonable doubt. But unlike statutory aggravators, their content is specified not by statute but by the government, which can notice as an aggravator virtually any circumstance of the crime or aspect of the defendant's character or history relevant to the question of whether he deserves to be executed.¹⁷ Once determined and noticed by the government, nonstatutory aggravators also play a different role within the FDPA scheme than do statutory aggravators.

In the technical parlance of the Supreme Court's capital jurisprudence, statutory aggravators serve to "narrow" the class of convicted murders to those "eligible" for execution, while nonstatutory aggravators enter in the sentencing calculus only at the "selection" stage – that is, at the point at which the jury has to determine whether a capital defendant who is statutorily "eligible" for execution will in fact be sentenced to death. As in most capital statutes, under the FDPA the "selection" stage is structured by a "weighing" of all aggravators found by the jury, statutory and nonstatutory, against all mitigating circumstances. In other words, the jury must first find, unanimously and beyond a

¹⁶ This term was used by the Supreme Court in *Jones v. United States*, 527 U.S. 373, n. 2 (1999), and refers to the catch-all provision of 3592(c), which allows for proof of aggravating factors not identified by Congress in the FDPA. Jones did not address whether these factors needed to be pled.

¹⁷ Nonstatutory aggravators under the FDPA are described as "any other aggravating factor for which notice has been given." §3592(c).

reasonable doubt, whether each nonstatutory and statutory aggravating circumstance has been proved by the government, and only after that finding is made may that aggravating circumstance be entered into the weighing process that determines whether the defendant may be sentenced to death.¹⁸

What this structured sentencing process means, then, is that there are at least some cases in which the ultimate weighing of aggravators against mitigators, which determines whether the defendant may be executed, will turn on whether or not the jury finds one or more nonstatutory aggravating factors. In other words, there are cases in which a jury will find statutory aggravators that, standing alone, do not "sufficiently outweigh" the mitigating evidence to justify a sentence of death, but the combination of these found statutory aggravators along with the nonstatutory aggravators does "sufficiently outweigh" the mitigators to justify a death sentence. In these cases, it would appear that it is the jury's prior finding of the nonstatutory aggravator or aggravators, no less than its finding of the statutory aggravators, that (in the language of *Apprendi*) "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." Nor is this argument simply an exercise in formalism; as a practical matter, it is very frequently the government's evidence of one nonstatutory aggravator in particular – "victim impact evidence," that is, evidence of the impact of the crime on the victim's family – that is the single most important element in the jury's decision to sentence a defendant to death.

Under the logic of *Apprendi* then, in such cases the nonstatutory aggravators would also seem to serve as the "functional equivalent of elements" and, under the rationale explained above, the

¹⁸ See 18 U.S.C. §3593(e): "[T]he jury . . . shall consider whether 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, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence."

Indictment Clause should also apply. In such a scenario, the nonstatutory aggravators are analogous to the "predicate acts" necessary to establish a "pattern of racketeering" or the "series of violations" essential to a "Continuing Criminal Enterprise" [CCE] conviction. In *Richardson v. United States*, 526 U.S. 813 (1999), the Supreme Court held that a jury considering a CCE charge, in order to convict, must find that the defendant committed a "series of violations" and agree on which particular violations he committed. "Thus, if the Government charges that the defendant committed numerous related narcotics violations, it is not enough for each juror to find that the defendant committed a sufficient number of those violations (typically three) to constitute a series unless all jurors are unanimously agreed as to which particular underlying violations are involved." *Benevento v. United States*, 81 F. Supp.2d 490, 491, 493 (S.D. NY 2000) (holding *Richardson* retroactive).¹⁹

It is true that in two separate opinions, a judge of the Eastern District of Virginia has rejected the argument that *Ring* mandates that non-statutory aggravating factors must be charged by a grand jury, as has a federal district court judge in Iowa. See, *United States v. Johnson*, 239 F.Supp.2d 924, 935-46 (N.D.Iowa 2003); *United States v. Lentz*, 225 F.Supp.2d 672, 682-683; *United States v. Regan*, 221 F.Supp.2d 672, 679-81 (E.D.Va.2002). However, these cases assume wrongly that aggravating factors are not "elements" of a distinct capital offense, but only "the functional equivalent of elements", reasoning which is plainly inconsistent with the 2003 decision in *Sattazahn v. Pennsylvania*, 123 S.Ct. 732 (2003) . Moreover, these cases also assume that *Ring* has application only in the eligibility phase of a capital case, not in the selection phase. As the cases cited in the next section show, *Ring* is not so limited.

¹⁹ Likewise, RICO indictments include descriptions of predicate acts. "[C]ourts strictly require a RICO complaint to allege every essential element of each predicate act." Rakoff, J. & Goldstein, H. *RICO Civil and Criminal Law and Strategy*, §1.04[1][d][I] and §9.02[1] (2002).

J. Whether aggravating factors "sufficiently outweigh"

The grand jury's independence stems from its power to refuse to indict. See *Stinze v. United States*, 361 U.S. 212, 218 (1960) (grand jury belongs to no branch of institutional government). In the seventeenth century, a grand jury refused to indict the Earl of Shaftsbury, a supporter of the Protestant cause, on charges of treason. *Rex v. Shaftsbury*, 8 Howell's State Trials 759 (1681). The American equivalent was the Crown's unsuccessful attempt to indict John Peter Zenger for seditious libel after he published articles criticizing the English governor of New York. When Zenger was later charged by information, a petit jury found him "not guilty" in an early example of jury nullification. See Irons, Peter, *A PEOPLE'S HISTORY OF THE SUPREME COURT*, Viking 1999.

In the FDPA, Congress also required that the jury

. . . shall consider whether 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, 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). Therefore, eligibility for a death sentence requires more than just a finding of an aggravating factor. Under the FDPA, aggravating factors must sufficiently outweigh mitigating factors before a jury can decide whether a death sentence is justified. Nowhere does the indictment allege that aggravating factors outweigh mitigating factors, or that the death penalty is justified. A growing number of courts are holding that such factual issues are encompassed by *Ring*, even though they are part of the penalty selection process and not the eligibility process.²⁰

²⁰ See, *State v. Whitefield*, 107 S.W. 3d 253, 259 (Mo. 2003) ("The State contends that steps 2, 3, and 4 merely call for the jury to give its subjective opinion as to whether the death penalty is appropriate, however, not to make findings as to whether the factual predicates for imposing the death penalty are present. It urges that the principles set out in *Ring* are not offended even if the judge rather than the jury determines those three steps. This Court disagrees."; death sentence invalidated under *Ring*); *State v. Ring*, 204 Ariz. 534, 65 P.3d 915, 942-43 (2003) (*Ring II*) (rejecting the contention that the requirements that mitigating circumstances be considered and weighed against aggravators were not factual predicates for

The government's proposed procedure does not allow the grand jury to test the true mettle of the government's allegation (i.e., that the most serious offense has been committed), nor does it protect the citizenry from prosecutorial overreaching.

The government's resort to a superceding indictment listing "special findings" leaves too many unanswered questions. How can statutory factors be included in an indictment, but not non-statutory factors? Is the defendant to be called upon to plead to those factors? Does the lessened evidentiary standard remain applicable to all aggravating factors, to none of those factors, or to only the non-statutory factors? Are the rules of evidence now applicable to the hearing in which the government must prove the aggravating factors? Do they also apply to the defendant's presentation of mitigating evidence, or to his rebuttal of aggravating evidence? Is the jury to make findings as to some or all of the aggravating factors during the guilt/innocence phase? Or must there be a trifurcated, rather than a bifurcated trial? Perhaps all of these problems can be solved – but not by simply indicting "special findings", and not by the executive branch or the judiciary.

The FDPA is an integrated procedure governing many different issues. One provision appears, on its face, to be unconstitutional in light of *Ring*. But many aspects may be subject to amendment in light of *Ring*. The Supreme Court explained in *Jackson* that such judicial procedure-crafting is

imposition of the death penalty and invalidating death sentence under *Ring*); *Woldt v. People*, 64 P.3d 256,265 (Colo.2003)(describing the first three of these four steps as findings of fact that are "prerequisites to a finding by the three- judge panel that a defendant was eligible for death" and invalidating defendant's death sentence under *Ring*.); *Johnson v. State*, 59 P.3d 450, 460 (Nev.2002)(determined the requisite statutory finding that the mitigating circumstances are not sufficient to outweigh the aggravating circumstances is at least "in part a factual determination, not merely discretionary weighing" and invalidating defendant's death sentence under *Ring*.). See also, *United States v. Sampson*, 245 F. Supp. 2d at 335 n. 1 (noting that judge in a federal capital case had instructed the trial jury that "that the government had to prove beyond a reasonable doubt that the death penalty was justified.")

"fraught with the gravest difficulties" because it generates a proliferation of questions, leaving defendants "without the guidance that [they] ordinarily find in a body of procedural and evidentiary rules spelled out in advance of trial." *Id.* at 579-80. The many questions raised by the government's request for such procedure-crafting have no answers because "Congress . . . has addressed itself to none of these questions." *Jackson*, 380 U.S. at 579. Where Congress has not acted, "it would hardly be the province of the courts [or the executive] to fashion a remedy." *Id.* The Court's words equally apply here.

K. The Relaxed Evidentiary Standard

The FDPA states that the rules of evidence do not apply at a capital sentencing hearing. 18 U.S.C. §3593(c) provides, in pertinent part " Information is admissible 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 creating unfair prejudice, confusing the issues, or misleading the jury." As is argued in defendant's motion to strike the death penalty at pages 43-51, this section violates the Constitution. Although the Second Circuit recently ruled otherwise in *United States v. Fell*, 360 F.3d 135 (2d. Cir 2004) (2d Cir 2004), this decision, resting as it does on the assumption that the reliability test of the FDPA was sufficient to regulate the admission of testimonial statements at a penalty phase, cannot be reconciled with *Sattazahn*, let alone with the Supreme Court's decision one week after *Fell* in *Crawford v. Washington*, __U.S., __, 124 S. Ct. 1354, 2004 WL 413301 (U.S. March 8, 2004) in which the Court held that a testimonial statement, that was not previously subject to cross examination, may not be introduced against a criminal defendant, whether a judge finds them reliable or not.

It is hardly surprising that Congress failed to require adherence to the rules of evidence--

including constitutionally-compelled protections against unreliable hearsay testimony – when it enacted the FDPA, because when it did so it believed itself to be doing no more than fashioning sentencing procedures, and so was required to satisfy only the Eighth Amendment's constraints on sentencing, rather than the constitutional provisions relevant to proof of the "functional equivalent of an element." See *Ring*, 122 S.Ct. at 2443. Beyond its narrow holding, then, *Ring*, has introduced the question of what other protections flow to such "functional equivalents," a question with which federal courts are only beginning to grapple.

The Federal Rules of Evidence are applicable to all criminal trials. FED. R. EVID. 1101. All essential elements of an offense must be proven within the rules of evidence. But §3593(c) permits introduction of evidence at the penalty trial, notwithstanding the Federal Rules of Evidence. Information "may be excluded only if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." *Id.* This means that aggravating information can, according to the statute, be provided without complying with the Federal Rules of Evidence. As a result, the procedures for proving an aggravating factor or other essential elements in the all-important death penalty hearing, are less reliable than in all other federal criminal (or civil) trials. A relaxed evidentiary standard denies federal capital defendants procedural rights granted to defendants in even misdemeanor trials. Congress did not intend this result.

Previously, the Supreme Court has recognized that the mode of proof at the guilt or innocence stage of a trial is more demanding than sentencing. *Williams v. New York*, 337 U.S. 241, 246 (1949) ("Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations."). Congress enacted both federal capital sentencing schemes with this in mind. "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." *United States v. Pitera*,

795 F. Supp. 546 (E.D. N.Y. 1992) (distinguishing capital sentencing procedure from adjudication of guilt,, and quoting *Williams*, supra.).

If the elements of a capital offense are required to be pled by indictment, and proven beyond a reasonable doubt, then due process requires they be subject to the same manner of proof that every other essential element requires. See *In re Oliver*, 333 U.S. 257, 273 (1948). The Federal Rules of Evidence must apply to proof of statutory aggravating factors and other elements of the capital offense. The FDPA's abandonment of the rules of evidence at the capital sentencing hearing violates due process.

1. The Second Circuit's *Fell* Decision and the Effect of *Crawford v. Washington*

In *United States v. Fell*, 360 F.3d 135, (2d. Cir 2004), a Panel of the Second Circuit found that the reliability test of the Federal Death Penalty Act of 1994 ("FDPA"), was sufficient to regulate the admission of testimonial statements. One week after the Panel's opinion, the Supreme Court found that leaving the admission of a testimonial statement to an individual judge's determination of reliability violates the Confrontation Clause to the Sixth Amendment.

The Panel's error was to treat the procedures of the FDPA merely as a sentencing hearing. As the Panel itself recognized, "In *Ring*, the Supreme Court held that the aggravating factors necessary for imposition of the death penalty under Arizona's analogous state death penalty act *were elements of a capital crime*, such that they had to be submitted to a jury and proved beyond a reasonable doubt in conformity with the reasoning of *Apprendi*." 360 F.3d at 142 (emphasis added). Subjecting one element of a crime to a less exacting evidentiary standard than other elements is unprecedented in American and English law. The FDPA procedure is unconstitutional because determining an element of a crime during a sentencing hearing denies a defendant the protections of the guilt phase of trial.

In *Fell*, the statement at issue in the penalty phase was a confession taken by law enforcement officers from *Fell*'s now deceased co-defendant, Lee. *United States v. Fell*, 217 F.Supp. 2d 469, 485 (D. Vt. 2002). The government intended to use the statement at the sentencing hearing to prove aggravating factors alleged in the indictment. *Id.* The Panel upheld the district court's discretion to admit such a statement and concluded that Congress' prohibition of the Federal Rules of Evidence at a federal death penalty sentencing trial did not invalidate the FDPA because "under the FDPA Standard, 'judges continue their role as evidentiary gatekeepers and[, pursuant to the balancing test set forth in § 3593(c),] retain the discretion to exclude any type of unreliable or prejudicial evidence that might render a trial fundamentally unfair.'" 360 F.3d at 145. The Panel stated:

In the instant case, then, if the district court were to conclude that admission of statements by *Fell*'s deceased co-defendant would unfairly prejudice *Fell*, it would be obligated by the FDPA Standard to exclude them. We, of course, take no position on the question.

United States v. Fell, 360 F.3d at 145. One week later, the Supreme Court held that a testimonial statement, that was not previously subject to cross examination, may not be introduced against a criminal defendant, whether a judge finds them reliable or not. *Crawford v. Washington*, 124 S. Ct. 1354, 2004 WL 413301 (U.S. March 8, 2004). In light of *Crawford*, The Panel's instruction to the district court is an incorrect statement of law.

Pursuant to *Crawford*, the statement at issue in *Fell* is testimonial. 2004 WL 413301, at *10 ("Statements taken by police officers in the course of interrogations are also testimonial even under a narrow standard"). *Fell* never had the opportunity to cross examine Lee. The statement is therefore inadmissible to prove the government's case. *Id.*, at 1364. The district court may not admit the statement, even if the court finds no prejudice to *Fell*, and even if the court finds the statement is reliable.

However, beside from providing the district court with the wrong standard on remand, the Panel's opinion misunderstands the core of the district court's ruling: that the determination of a defendant's guilt cannot be left to a judge who is then allowed to implement his or her own standard of reliable evidence. *Crawford* clearly states that principle:

Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross examination.

Id, at 1370.

The FDPA has no procedural guarantees. It obviates all rules of evidence and leaves admissibility completely up to a judge. It is in conflict with the protections of constitutional law.

The Supreme Court's historical examination in *Crawford*, clearly indicated that the Framers never intended individual judges to decide what manner of evidence is reliable, and what evidence is not, when a criminal defendant is being tried:

We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands.

Id, at 1373.

The FDPA is exactly the type of procedure the Framers would not have trusted. One judge decides which evidence is reliable. Then other judges review those decisions. The weight each judge ascribes to a particular piece of evidence is as diverse as there are judges. That is a completely arbitrary and irrational standard, particularly in a capital case.

Moreover, it is a standard applied to only one element of capital murder, the statutory

aggravating factors. Such a procedure is completely unprecedented. Subjecting one element of a crime to a less exacting evidentiary standard than the other elements has no foundation in American or English law.

The entire basis for the Panel's decision to uphold the FDPA was based on two equally flawed premises. The first, was that a judge's determination of reliability is sufficient to protect a defendant from evidence that violates constitutional protections. The second, was that the FDPA is merely a sentencing hearing and therefore trial protections do not apply. Both propositions are inconsistent with *Ring*, *Sattazahn*, and now, *Crawford*.

The FDPA determines whether a defendant is guilty of aggravating factors during a sentencing hearing. See 18 U.S.C. §3591 et. seq. and *United States v. Jones*, 527 U.S. 373, 376-77 (1999). Proof of the aggravating factors is necessary before a defendant can be found guilty of capital murder. *Sattazahn v. Pennsylvania*, 123 S.Ct. 732, 739 (2003) ("...for purposes of the Sixth Amendment's jury-trial guarantee the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances'").

In every other kind of criminal case, a trial determines a defendant's guilt. A sentencing hearing selects a punishment for a guilty defendant. Therefore, a federal capital defendant is prosecuted for elements of capital murder without the trial protections available even to a person charged with a simple misdemeanor.

In federal capital trials, the following anomalies occur: At the guilt phase, a jury may only convict a defendant of a crime that is less than capital murder. *Sattazahn*, 123 S.Ct. at 739. After conviction of this lesser crime, the jury then enters a sentencing phase. 18 U.S.C. §3593 (d). Only then are the capital elements decided. 18 U.S.C. §3593 (c).

The hearing is not subject to the rules of evidence or the presumption of innocence. *Id.* The jury

receives the evidence of guilt along with other information supporting a death sentence. *Jones*, 527 U.S. at 376-77. This other information usually includes the effect on the victim's family and community, *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); predictions of the defendant's future dangerousness, *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994); the defendant's prior uncharged conduct, *Nichols v. United States*, 511 U.S. 738, 747 (1994); and examples of the defendant's bad character, *United States v. Watts*, 519 U.S. 148, 151 (1997); none of which is generally admissible at the guilt phase of the trial. As the *Fell* court aptly put the matter:

Facts relevant to sentencing are far more diffuse than matters relevant to guilt for a particular crime. Adjudications of guilt are deliberately cabined to focus on the particulars of the criminal conduct at issue and to avoid inquiries into tangential matters that may bear on the defendant's character. See *id.* By contrast, in determining the appropriate punishment, it is appropriate for the sentencing authority, whether jury or judge, to consider a defendant's whole life and personal make-up.

360 F. 3d at 143

The jury then deliberates upon two very different issues: whether the defendant is guilty of capital murder and whether a death sentence is appropriate. *Jones*, 527 U.S. 373 at 376-77. Although eligibility for the death penalty must be decided beyond a reasonable doubt, the selection of punishment may be decided by a preponderance of evidence. *Harris*, 536 U.S. at 558.

To the extent that capital elements are proven, it is a sentencing hearing in name only. Calling it a sentencing hearing does not resolve the discord caused by deciding the capital elements without traditional trial protections.

Even outside the particular facts of *Fell*, however, there are substantial unanswered questions about how Congress would choose to structure federal sentencing hearings in the absence of the relaxed evidentiary standard that suggest the difficulty that simply excising it would create. Would Congress want the relaxed evidentiary standard nevertheless to continue to be applied to mitigating factors, on the theory that *Ring* applies only to facts that increase, as opposed to reduce, the maximum

sentence? Would it want to attempt to fashion a different evidentiary standard for non-statutory aggravating circumstances, on the theory that these factors do not constitute the "functional equivalent of elements" like the statutory aggravators?

Given the complexity of the FDPA's multiple layers and disparate types of factual findings, the district court's reluctance in *Fell* to proceed in the absence of any legislative direction from Congress as to what evidentiary limitations and burdens to apply to which findings is understandable. The problem is compounded, moreover, because the simplest solution – applying the Federal Rules of Evidence to proof of all of factual findings in the sentencing hearing – potentially runs afoul of the constitutional requirement that the defendant be permitted the widest possible latitude in introducing mitigating evidence. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam)(application of capital sentencing hearing of state hearsay rule to exclude co-defendant's admission to killing of victim denied due process). For all of these reasons, in the aftermath of *Ring*, only Congress can select a method of determining the existence vel non of those aggravating factors on which the defendant's eligibility for execution depends.

L. The Presumption of Innocence Problem

The presumption of innocence is a basic tenet of American law. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). The presumption of innocence "is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895).

No presumption of innocence exists at a sentencing hearing. *Delo v. Lashley*, 507 U.S. 272, 278-279 (1993). By definition, a defendant may only be sentenced after guilt is determined. Sentencing considerations which are not elements "are thus not subject to the Constitution's indictment, jury and

proof requirements." *Harris v. United States*, 122 S.Ct. 2406, 2412 (2002).

In *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978), the defendant was convicted of robbery. At trial, he testified that he was not present at the victim's home at the time of the robbery. *Id.*, at 480. Although the trial court gave an instruction on reasonable doubt, the defendant's requested instruction on the presumption of innocence was denied. *Id.*, at 481. The Supreme Court found that failure to give the instruction denied the defendant due process of law. In reaching this conclusion, the Court weighed aspects of the trial that vitiated against the presumption of innocence: i.e., the prosecutor's argument condemning all defendants, the skeletal reasonable doubt instruction, and the swearing match between victim and defendant. *Id.*, at 486-489.

The FDPA is worse than the denial of a jury instruction in *Taylor v. Kentucky*, *supra*. Not only is a defendant without the presumption of innocence, but the jury is told the defendant is guilty. No instruction on reasonable doubt can remedy that defect. Even if an instruction on the presumption of innocence were given regarding the capital elements, it could not overcome the fact that the jury has already found the defendant guilty of a crime.

Congress did not intend that proof of guilt and punishment be commingled. Congress created a complex sentencing procedure called the Federal Death Penalty Act. There is nothing in the Act meant to affect the proof of guilt. The only procedure in the Act that occurs before conviction is when the Attorney General provides notice to the defendant that the death penalty will be sought. That requires no pleading or appearance in court. The very first sentence of the Act states, "A defendant who has been found guilty of—..." 18 U.S.C. § 3591 (a) (emphasis added). Trials assure that innocent persons are not convicted. Sentencing hearings assure appropriate sentences for guilty defendants. They are two different procedures with two different goals. The Federal Death Penalty Act, therefore, denies the defendant the presumption of innocence as to the sentencing elements of the offense, in stark

violation of the defendant's right to due process.

M. Conclusion

The problem with the FDPA goes well beyond the one statement at issue in *Fell*. Issues of guilt, aggravation, and death penalty appropriateness simply do not receive adequate constitutional protection at a federal sentencing hearing. 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 it is unconstitutional. See *City of Chicago v. Morales*, 527 U.S. 41, 55-56, n. 22 (1999). Only Congress has the authority to rewrite the law. *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

Congress could have done what Justice Scalia suggested in *Ring*: "plac[e] the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." *Ring*, 536 U.S. at 612 (Scalia, J., concurring). Congress did not. We can only assume Congress meant to meet constitutional requirements at the time they enacted the FDPA. See *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). Those requirements have now changed because of *Ring*, *Sattazahn*, and *Crawford*. We do not know which of these policy choices Congress would have made, in light of the new treatment of sentencing hearing findings as elements of a capital crime.

Accordingly, and for all of the foregoing reasons, this Court should declare the Federal Death Penalty Act unconstitutional under *Ring*, *Sattazahn*, and *Crawford*. Alternatively, and at the very least, the Court should dismiss the Notice of Special Findings and the Government's Notice of Intent to Seek the Death Penalty because of the grand jury's failure to find non-statutory aggravating factors and its failure to find that aggravating factors outweigh mitigating factors, and that the death penalty is justified.

III.

THE NOTICE OF SPECIAL FINDINGS IN THE SUPERSEDING INDICTMENT AND THE GOVERNMENT'S DEATH PENALTY NOTICE MUST BE DISMISSED BECAUSE THEY FAIL TO PROVIDE THE NOTICE REQUIRED BY THE CONSTITUTION AND BY 18 U.S.C. § 3593(A) AND FEDERAL RULE OF CRIMINAL PROCEDURE 7(c)(1)

A. The Notices In This Case Fail To Meet General Legal Requirements of Fair Notice And Should Be Dismissed

In any case in which the government intends to seek the death penalty, 18 U.S.C. §§ 3593(a)(1) and (2) require the government to file a notice “stating that the government believes that the circumstances of the offense are such that, if defendant is convicted, a sentence of death is justified under this chapter...” and “setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a death sentence.” When criminal charges are filed, Federal Rule of Criminal Procedure 7(c)(1) requires that the filing provide notice of the nature of the charges, consisting of a “plain, concise and definite written statement of the essential facts.” Notice is also a bedrock principle under the Due Process Clause and the Sixth and Eighth Amendments, and the notice required must be sufficient to enable the defendant to prepare his defense. See *Simmons v. South Carolina*, 512 U.S. 154, 175 (1994) (“‘Capital sentencing proceedings must of course satisfy the dictates of the Due Process Clause,’ and one of the hallmarks of due process in our adversary system is the defendant’s ability to meet the State’s case against him.”) (O’Connor, J., concurring), quoting *Clemons v. Mississippi*, 494 U.S. 738, 746 (1990); *United States v. Kurka*, 818 F.2d 1427, 1431 (9th Cir. 1987) (“The Sixth Amendment requires that a defendant be informed of ‘the nature and cause of the accusation.’”); *Stephens v. Borg*, 59 F.3d 932, 934 (9th Cir. 1995) (“The Sixth Amendment guarantees a criminal defendant the fundamental right to be clearly informed of the nature and cause of the charges in order to permit adequate preparation of a defense.”) .

The Supreme Court has often observed

No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Lankford v. Idaho, 500 U.S. 110, 121-23 (1991), quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring); see also, *Gray v. Netherland*, 518 U.S. 152, 167 (1996).

It is undisputed that the State does not provide constitutionally adequate notice for a guilt prosecution by simply alleging an abstract crime, unconnected to any time, place, victim, or other identifying circumstance. *Lincoln v. Sunn*, 807 F.2d 805, 812 (9th Cir. 1987), cert. denied, 498 U.S. 907 (1990). "Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are." *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974), citing *In re Gault*, 387 U.S. 1, 33-34 n. 54 (1967).

Due process thus requires that the defendant "be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given at the earliest practical time, and in any event sufficiently in advance of the hearing to permit preparation." *In re Gault*, 387 U.S. at 33. The notice "must 'set forth the alleged misconduct with particularity.'" *Id.* Accord, *Brock v. Roadway Express*, 481 U.S. 252, 264 (1987); *Bowman Transp. v. Arkansas-Best Freight Sys*, 419 U.S. 281, 288, n. 4 (1974)(notice must apprise defendant of "the factual material on which the [fact-finder] relies for decision so he may rebut it.").

The Eleventh Circuit has long held that the minimum requirement for adequate notice is that the government's pleading must "contain [] the elements of the offense intended to be charged, and sufficiently apprise[] the defendant of what he must be prepared to meet." *United States v. Bobo*, 344 F.3d 1076, 1083 (11th Cir. 2003), quoting, *Russell v. United States*, 369 U.S. 749, 763, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240 (1962) (internal quotations omitted). See also, *United States v. Sanchez*, 269 F.3d

1250, 1314 (11th Cir.2001) (en banc), cert. denied, 535 U.S. 942, 122 S.Ct. 1327, 152 L.Ed.2d 234 (2002). A pleading "not framed to apprise the defendant with reasonable certainty, of the nature of the accusation against him is defective, although it may follow the language of the statute." *Russell*, 369 U.S. at 765, 82 S.Ct. at 1047 (internal quotations and citations omitted); *United States v. Bobo*, 344 F.3d. at 1083. Furthermore, if the pleading tracks the language of the statute, "it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Id.* at 765, 82 S.Ct. at 1048; see also *Hamling v. United States*, 418 U.S. 87, 117-18, 94 S.Ct. 2887, 2907-08, 41 L.Ed.2d 590 (1974). When the pleading uses generic terms, it must state the offense with particularity. *Russell*, 369 U.S. at 765, 82 S.Ct. at 1047; *United States v. Bobo*, 344 F.3d. 1076, 1083.

The Supreme Court has identified several reasons for these strict notice rules. First, as pointed out above, due process entitles the defendant to notice of the charges against him so that he can prepare his defense. Merely citing the statutory language is insufficient because it does not provide the "facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." ' *Russell v. United States*, 369 U.S. 749, 765, 82 S.Ct. 1038, 1048, 8 L.Ed.2d 240 (1962) (citation omitted). In addition, the prosecutor gains an unfair advantage in being "free to roam at large--to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." *Id.* at 768, 82 S.Ct. at 1049. Furthermore, the lack of specific notice may hamper the ability of all parties to ensure that the defendant is not placed in jeopardy twice for the same offense. *Id.* at 765, 82 S.Ct. at 1047. Finally, the failure to allege specific acts in the pleading runs the risk that the jury will convict based on evidence that was not presented to the grand jury. See *id.* at 770, 82 S.Ct. at 1050-51.

Although all of the foregoing cases deal with indictments, "there is ... a powerful analogy

between charging instruments (i.e., indictments) and Death Notices. Both protect the fundamental fairness of proceedings at which criminal defendants are called upon to defend themselves. Both serve to set defendants on notice so that they can adequately prepare to defend themselves. Defendants have a right to receive both prior to trial. And violation by the government of those rights, if properly objected to, will invalidate the attendant proceedings.” See, *United States v. Ferebe*, 332 F. 3d 722, 727, 736 (4th Cir. 2003). See also, *United States v. Allen*, 357 F. 3d. 745, 749 (8th Cir. 2004)(“Where a statutory aggravating factor operates as the functional equivalent of an element, it too must be noticed in the indictment.”).

The Notice of Special Findings and the Notice of Intent to Seek the Death Penalty filed in this case are thus crucial documents, for they not only advise the defendant that he may face execution at the end of the case but they plead the grounds upon which the government will seek the death penalty. Therefore, as a matter of fundamental fairness and as guaranteed by the due process clause of the Fifth Amendment, the notice provision of the Sixth Amendment, and the requirement of heightened reliability implicit in the Eighth Amendments, the Notices, to constitute notice at all, must advise the defendant sufficiently of the nature of the allegations he faces so that he may defend against them.

“(A)t a minimum, due process requires a defendant to receive sufficient notice of aggravating factors to enable him to respond and to prepare his case in rebuttal” and “to allow the court to ensure the reliability of the evidence presented.” See, *United States v. Illera Plaza*, 179 F. Supp. 2d 464, 470-471 (E.D. Pa. 2001); see also, *United States v. Kaczynski*, 1997 WL 716487, p. 19 (E.D. CA 1997) (“due process requires a defendant to receive sufficient notice of aggravating factors to enable him to respond and to prepare his case in rebuttal.”). Further, “the Constitution requires that the defendants be given some notice of the type of evidence the government intends to introduce at the sentencing phase” and “the NOIs, in conjunction with the indictment, must inform the defendants of the theories

and facts that the government will use to establish each aggravating factor in this case.”

Id. at 472; see also, *United States v. Allen*, 357 F. 3d. 745, 750 (8th Cir. 2004)(allegation of an aggravating factor is “sufficient when it sets forth the facts that constitute the offense.”)²¹

In this case, for a number of reasons, the Notice of Special Findings and the government's death penalty notice are wholly insufficient either to apprise Mr. Rudolph of the nature of the gateway and aggravating factors upon which the government will rely to sentence him to death, or to enable him to prepare his defense to these allegations. First, the notices studiously avoid providing any meaningful notice of the factual basis for the crucial mental state gateway element required for death penalty eligibility under section 3591(a)(2) by alleging in shotgun fashion and in the generic language of the statute that the defendant is guilty under all conceivable theories. This court should not permit the Government to take this "shotgun" approach any more than it would permit such an approach in a run of the mill civil case. See, *Anderson v. District Bd. of Trustees of Cent. Florida Com. College*, 77 F.3d 364 (11th Cir. 1996)(“Anderson's complaint is a perfect example of ‘shotgun’ pleading, in that it

²¹ *Illerra-Plaza* disagreed with a very brief discussion in *United States v. Battle*, 173 F.3d 1343, 1347 (11th Cir.1999), which concluded that “(t)he Government is not required to provide specific evidence in its notice of intent.” As support for its conclusion, *Battle* relied exclusively on *United States v. Nguyen*, 928 F.Supp. 1525 (D.Kan.1996), in which a district court rejected the argument that a NOI was constitutionally defective because it failed to detail the evidence the government intended to offer in support of its aggravating factors. See Id. at 1545-46. The court in *Nguyen* reasoned that “(t)he factors in the death notice are not ‘elements of the offense charged such that they must be presented to a grand jury’” and that “Fed.R.Crim.P. 7, ...by its terms, applies only to “indictments and informations.” Id. at 1545. The reasoning of *Battle* and *Nguyen* is obviously abrogated by *Ring v. Arizona*, 122 S.Ct. 2428 (2002) upon which the Government in this case relied in including the Notice of Special Findings in the indictment itself. see also, *United States v. Allen*, 357 F. 3d. 745, 748 (8th Cir. 2004) and cases cited therein. As part of the indictment, the Special Findings are clearly governed by Fed.R.Crim.P. 7 and the constitutional notice rules set forth above. See, *United States v. Sampson*, 245 F. Supp. 2d 327, 333 (D. Mass. 2003)(“Because the intent and aggravating factors requirements of the Federal Death Penalty Act must now be treated procedurally as elements of an offense for which the death penalty is authorized, a grand jury must agree with the Department of Justice that it is permissible and appropriate that a defendant be exposed to the death penalty *and give him notice in the indictment of the alleged grounds for imposing it.*”)(emphasis added)

is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief. Under the Federal Rules of Civil Procedure, a defendant faced with a complaint such as Anderson's is not expected to frame a responsive pleading. Rather, the defendant is expected to move the court, pursuant to Rule 12(e), to require the plaintiff to file a more definite statement.”) The clear purpose of the notice rules as they apply to the gateway factors of section 3591(a)(2) is to provide a level of constitutionally meaningful notice as to the mental state with which the Government contends he acted. This cannot happen where the notices simply allege in the generic language of the statute that all mental states apply to his conduct.

Under the constitutional and statutory principles discussed above, the grand jury was required to return an indictment which specified with particularity the mental state that allegedly motivated the defendant's conduct and hence qualifies him for the sentence of death. Further, “ the defendant is entitled to know the underlying factual basis for each of the gateway factors.” *United States v. Glover*, 43 F. Supp. 2d 1217, 1233 (D. Kan. 1999). At a minimum, therefore, the grand jury was required to specify which of the four categories apply to the death for which it seeks to hold defendant responsible and to outline the factual basis for such contention.

In *United States v. Glover*, 43 F. Supp. 2d 1217, 1233 (D. Kan. 1999), the court found that it was within the inherent authority of the court to order disclosure of the information sought here. In light of *Ring* and *Allen*, however, this remedy is no longer sufficient to cure the defect in the indictment. Both notices should therefore be dismissed.

Second, in contravention of the rules set forth above, all of the statutory aggravating factors merely set forth the language of the statute in vague generic terms and contain no factual allegations. The first statutory aggravating factor, as alleged in the notices, merely repeats the statutory language of section 3592(c)(1) and, at least in the government's notice, does even specify which part of Section

844(i) is being alleged. Similarly, the second alleged statutory aggravating factor states that defendant knowingly created a grave risk of death to “other persons”--but does not specify which other persons, or provide other essential details concerning the scope of this factor. See, *United States v. Illera Plaza*, 179 F. Supp. 2d 464, 473 (E.D. Pa. 2001)(“The government's submissions to this court do not suggest the identities of the ‘additional persons’ put at risk during that murder. The government will therefore be ordered to submit an outline of the information it intends to use to establish the ‘grave risk of death to additional persons’ aggravating factor.”) Likewise, the third alleged statutory aggravating factor states that the defendant committed the offense “after substantial planning and premeditation to cause the death of another person and to commit an act of terrorism”, but does not identify the “person” or any conduct that supposedly supports this factor or the “other person” at issue.. The fourth alleged statutory aggravating factor is also deficient in failing to identify the “single criminal episode” being alleged or the persons Mr. Rudolph is alleged to have attempted to killed in this episode.

The notices concerning the alleged non-statutory aggravating factors are equally lacking in specificity. The first alleged non-statutory aggravating factor (“future dangerousness of the defendant”) uses such vague terms as “future dangerousness”, “criminal acts of violence in the future”, “a continuing and serious threat to the lives and safety of others” and “demonstrated low rehabilitative potential, and/or...lack of remorse”, so as to make the notices essentially meaningless. See, *United States v. Illera Plaza*, 179 F. Supp. 2d 464, 474 (E.D. Pa. 2001) and cases cited therein(“(G)iven the potential problems with the reliability of such evidence and the risk that it may mislead, courts have been careful to require the government to fully disclose all of the unadjudicated misconduct that it plans to introduce as sentencing phase evidence. The reasoning of these courts is sound, and the court will therefore order the government to submit an outline of the evidence it intends to introduce to support the non-statutory aggravating factor of ‘future dangerousness.’ This outline will include a

description of any unadjudicated act of misconduct that the government intends to prove.”); *United States v. Davis*, 912 F.Supp. 938, 946 (E.D.La.1996)(“ The term ‘low rehabilitative potential’ is too vague. Rehabilitative potential for what? The only relevant issue would be [defendant's] rehabilitative potential for becoming a non-threat to the health and safety of others.”)

The second alleged non-statutory aggravating factor (“victim impact evidence”) is similarly vague in using such general terms as “injury, harm, and loss”, “the family”, “personal characteristics”, “extreme emotional suffering” and “severe and irreparable harm.” The allegation that unspecified members of the families of the homicide and non-homicide victims have suffered unspecified injury, harm, and loss is so general as to violate due process. It fails to state which members of the families have suffered, the nature of their suffering, whether mental, physical, financial or emotional, or the manner, time and place in which the suffering manifested itself. The mere recitation of such a general concept does not provide sufficient notice to comport with due process. The notice provides no names, dates, places, or specific facts concerning the broad allegations set forth in these non-statutory aggravators.

The notice is utterly lacking in the information necessary for the defense to adequately prepare to defend against the victim impact factor. See, *United States v. Bin Laden*, 126 F. Supp. 2d 290, 304 (S.D. N.Y. 2001)(“An oblique reference to victims' ‘injury, harm, and loss,’ without more, does nothing to guide Defendants' vital task of preparing for the penalty phase of trial.”); *United States v. Cooper*, 91 F.Supp.2d 90, 111 (D.D.C.2000)(requiring government to include “more specific information concerning the extent and scope of the injuries and loss suffered by each victim, his or her family members, and other relevant individuals, and as to each victim's ‘personal characteristics’ that the government intends to prove”) *United States v. Glover*, 43 F.Supp.2d at 1224(“The court finds that the defendant is entitled to greater specificity as to the ‘serious physical and emotional injury the

government claims the defendant caused [the victim]."); see also, *United States v. Illera Plaza*, 179 F. Supp. 2d 464, 475 (E.D. Pa. 2001)("The government suggests no reason why, in this case, it would be unable to produce a summary of its victim impact evidence similar to the ones required by these three courts. Therefore, in order to allow the defendants to adequately prepare responses to sentencing phase evidence, and in order to allow the court to determine if a pre-sentencing hearing will be necessary to review that evidence, the government will be ordered to submit an outline of its proposed victim impact evidence.")

Fair notice has been a fundamental principle in our constitutional law for more than a century. In *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 23 L.Ed. 588 (1876), the Supreme Court held that portions of an indictment were invalid for lack of fair notice, even though the indictment set forth the elements of the offense in the language of the applicable statute, i.e., intentionally hindering particular citizens in their "free exercise and enjoyment of . . . the several rights and privileges granted and secured to them by the constitution and laws of the United States." *Id.* at 557. The indictment was defective because it did not specify which of the many constitutional rights had been taken from the alleged victims. The Court explained that when an offense "includes generic terms," the indictment must do more than repeat those terms; "it must state the species,--it must descend to particulars." *Id.* at 558.

In this case, the notices suffer from the same infirmities found fatal in *Cruikshank*. The notice repeats the general language set forth in the statutory aggravating factors and defines the non-statutory aggravating factors in vaguer, generic language. Especially in a capital case where the need for reliability is paramount, the notices falls far short of the notice required by our Constitution and federal laws.

Even in a non-capital trial, when the government intends to present evidence of "other crimes,

wrongs, or acts" of the defendant, the government is required to provide pretrial notice of the "general nature of any such evidence it intends to introduce at trial." Fed. R. Evid. 404(b). It is inconceivable that the federal death penalty statute should be interpreted as allowing the government to provide less notice of a defendant's alleged aggravating facts for the penalty phase of a capital trial, where a jury determines whether the defendant shall live or die. See *United States v. Glover*, 43 F. Supp.2d 1217 (D. Kan. 1999); *United States v. Beckford*, 962 F. Supp.2d 748, 754 (E.D. Va. 1997); *United States v. Kaczynski*, 1997 WL 716487, p. 20 (E.D. CA. 1997).

Because the notices in this case merely "generic," and not specific, factors, because they do not describe specifically the nature of and factual basis of the factors, and because they do not even give the times or places at which the factual elements of the alleged aggravating and gateway factors occurred, they are insufficient to provide Mr. Rudolph with the required notice under the long-established standards of both the Eleventh Circuit Circuit and the Supreme Court. Accordingly, the Notice of Special Findings in the superseding indictment and the government's death notice must be dismissed.

B. At A Minimum, The Government Should Be Required To Provide More Particularity In Its Notice Of Intention To Seek Death

Alternatively, in the event the notices are not dismissed, the Court should order a bill of particulars, or an equivalent procedure, pursuant to its inherent authority and Federal Rule Criminal Procedure 7(f), requiring the government to provide sufficient details concerning the nature of the gateway and aggravating factors alleged in the notice.²² A request for a bill of particulars requires no

²² To the extent that the notice required by section 3593(a) must be returned by a grand jury, see, *United States v. Allen*, 357 F. 3d. 745, 756-757 (8th Cir. 2004) *infra*, a bill of particulars cannot substitute for a valid indictment. *United States v. Cecil*, 608 F.2d 1294, 1296 (9th Cir. 1979).

showing of cause and is within the sound discretion of the trial court. *United States v. Dreitzler*, 572 F.2d 539, 553 (9th Cir. 1978). The test is “whether it is necessary that defendant have the particulars sought in order to prepare his defense and in order that prejudicial surprise will be avoided.” 1 Wright, Federal Practice and Procedure § 129, at 436 (1982) (footnote omitted). “A defendant should be given enough information about the offense charged so that he may, by the use of diligence, prepare adequately for the trial.” *Id.* at 436-37.

There is ample precedent for requiring that detailed notice of aggravating facts be given in some form. In *United States v. Glover*, supra, 43 F.Supp.2d 1217, (D. Kan. 1999), although the court was unconvinced that a bill of particulars, per se, was “necessarily the correct approach under these circumstances,” it nevertheless in the exercise of its inherent authority directed the government to amend its death notice to specifically articulate its factual allegations by setting out: (1) what act or acts the government contends constitute the knowing creation of a grave risk of death; (2) the specific facts regarding the “something of pecuniary value” and the facts supporting the allegation that the defendant had an “expectation of the receipt” of something of pecuniary value; (3) the specific facts regarding an allegation of “serious physical and emotional injury”, including whether the government is relying on post traumatic stress disorder; (4) specific facts regarding an allegation of causing permanent harm to the family of the victim, including which members of the family have suffered, the nature of their suffering, and the nature of the permanent harm [“For example, whether members of the family sought counseling or other medical treatment, such as hospitalization, and whether and to what extent members of the family suffered financial harm, are relevant considerations in discerning whether this factor is indeed ‘aggravating’ in this case.”]; (5) the specific facts regarding a substantial planning and premeditation factor; (6) the specific facts regarding a lack of remorse factor; and (7) the specific facts regarding a “continuing danger” factor, including as to any unadjudicated acts, “a written

list identifying the particular unadjudicated acts...as well as the dates of the unadjudicated acts... (and) the witnesses and exhibits the government intends to present to prove the unadjudicated acts.” *Id.*, at 1232-1233

Other courts have agreed with this approach. See, *United States v. Bin Laden*, 126 F. Supp. 2d 290, 305 (S.D. N.Y. 2001) (“(I)n the exercise of its Rule 7(f) discretion, the Court orders that the Government provide Defendants with a limited bill of particulars specifying the particularized categories of ‘injury, harm, and loss’ that will be proffered at sentencing, whether it be suffered by a victim or a victim's family. Beyond the subject matter of victim impact evidence, we also order that Defendants and the Court be informed of its quantity. In other words, how many victim-witnesses will be presented in support of a particular type of emotional injury? The Court envisions a document that is akin to an informative outline, but not a revelation of evidentiary detail or the Government's theory of its case.”) *United States v. Kaczynski*, supra, 1997 WL 716487 at 20 (government must provide a written description of all unadjudicated misconduct that it seeks to introduce during the sentencing phase as well as specific facts in support of a lack of remorse factor.).

Glover, of course, was a pre-*Ring* case, which did not address whether defects in a Notice of Special Findings in an indictment could be cured by ordering the government to provide greater specificity than was contained in a notice of intent to seek the death penalty. As stated in *United States v. Cecil*, 608 F.2d 1294, 1296 (9th Cir. 1979), it is an established rule that neither a bill of particulars nor an open file discovery policy can cure an invalid indictment. It is therefore the defendant's primary position that the notice defects in the indictment's Special Findings cannot be cured by greater specificity in the Notice of Intent to Seek the Death Penalty or in a bill of particulars.

If, but only if, the Court rejects this position does the defendant request the remedy adopted in *Glover*. More specifically, defendant requests in that event that the Court grant a bill of particulars or

otherwise order the government to provide written notice of the following: (1) with respect to each person or act or event referred to in the notices, identifying the name of each person and the date, place and general nature of each act or event; (2) specifying the general nature of the evidence it intends to rely on to support a finding that defendant, during the commission of an offense under section 844(i) caused the death of Robert Sanderson; (3) specifying the general nature of the evidence it intends to rely on to support a finding that defendant in the commission of the offense knowingly created a grave risk of death “to one or more persons in addition to the victim of the offense”; (4) specifying the general nature of the evidence it intends to rely on to support a finding that defendant “committed the offense after substantial planning and premeditation to cause the death of another person and to commit an act of terrorism” ; (5) specifying the general nature of the evidence it intends to rely on to support a finding that defendant “intentionally attempted to kill more than one person in a single criminal episode”; (6) specifying the general nature of the evidence it intends to rely on to support a finding that defendant “is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of others” and that he “ has demonstrated low rehabilitative potential, and or has demonstrated lack of remorse”; and (7) identifying and describing the general nature of the evidence purporting to show that the families of the two victims have suffered injury, loss, and harm as a result of the defendant’s actions.

IV.

THE MENTAL STATE GATEWAY FACTORS MUST BE DISMISSED BECAUSE THE GOVERNMENT DOES NOT IDENTIFY THE MENTAL STATE ON WHICH IT SEEKS TO AUTHORIZE A DEATH SENTENCE, BUT RATHER ASSERTS EVERY MENTAL STATE APPLICABLE TO ANY HOMICIDE THUS FAILING TO GIVE DEFENDANT NOTICE OF THE AGGRAVATING CIRCUMSTANCE HE MUST DEFEND AGAINST IN VIOLATION OF DUE PROCESS, PROMOTING A SKEWED WEIGHING OF AGGRAVATING CIRCUMSTANCES, AND FAILING TO NARROW THE CLASS OF DEFENDANTS SUBJECT TO CAPITAL PUNISHMENT IN VIOLATION THE EIGHTH AMENDMENT

The Federal Death Penalty Act provides that a death penalty cannot be considered in a capital

charge unless the jury finds beyond a reasonable doubt one of four *alternative* mental states regarding the homicide. 18 U.S.C. §3591(a)(2)(A)-(D). A jury must find that the defendant either:

- (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)(2)(A)-(D).

The superceding indictment and the government's Notice of Intent to Seek the Death Penalty both assert that the defendant acted with all four mental states. The assertion of all four mental states fails to provide the narrowing function this element of the crime was intended to provide, because the mental states cover virtually every mental state applicable to every murder.

The multiplication and duplication of the requisite mental state required to make this case eligible for the death penalty further promotes a skewed consideration of the aggravating circumstances in the weighing process required when the jury weighs aggravating circumstances against mitigating circumstances. 18 U.S.C. §3593(e)(1). Such double, triple, and/or quadruple counting of circumstances creates the risk that the death sentence will be imposed arbitrarily in violation of the Eighth Amendment to the United States Constitution. Therefore, at the very minimum, at least three of the mental states alleged by the government must be stricken as surplusage.

The alternative statutory mental states, when read in order of their statutory listing, subsume some of the other mental states they precede. This is not true when the mental states are considered in the opposite order of their listing. The assertion that the defendant acted with all four mental states at the same time arbitrarily duplicates and multiplies one of the statutory aggravating factors into four.

This is precisely the duplicative and cumulative charge ruled unconstitutional in *United States*

v. McCullah, 76 F.3d 1087 (10th Cir. 1996), cert. denied, 520 U.S. 1213 (1997). In *McCullah*, the district court submitted the aggravating mental state factor requiring a finding that McCullah intentionally engaged in conduct intending that the victim be killed (18 U.S.C. §848(n)(1)(C)) and also submitted the substantially overlapping aggravating mental state that the defendant intentionally engaged in conduct he knew created a grave risk of death which in fact resulted in death (18 U.S.C. §848(n)(1)(D)). The Tenth Circuit declared:

Such double counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally. When the same aggravating factor is counted twice, the "defendant is essentially condemned 'twice for the same culpable act,'" which is inherently unfair. While the federal statute at issue is a weighing statute which allows the jury to accord as much or as little weight to any particular aggravating factor, the mere finding of an aggravating factor cannot but imply a qualitative value to that factor. When a sentencing body is asked to weigh a factor twice in its decision, a reviewing court cannot "assume it would have made no difference of the thumb had been removed from death's side of the scale." . . . We hold that the use of duplicative aggravating factors creates an unconstitutional skewing of the weighing process which necessitates a reweighing of the aggravating and mitigating factors.

United States v. McCullah, 76 F.3d at 1111-1112.

Again, in *United States v. Tipton*, 90 F.3d 861 (4th Cir.1996) the Fourth Circuit held it was error for the trial court to instruct the jury that it must find "at least one" of the statutory intent elements listed 18 U.S.C. Section 848. Under Section 848, the four intent elements (which are similar to the ones enumerated in the FDPA) are aggravating factors and are considered with other aggravating factors when weighed by the jury against mitigating factors. The jury in *Tipton*, which recommended a death sentence, found that all four intent circumstances existed and then weighed all four with the other aggravating factors found to exist. The Fourth Circuit held that "[t]o allow cumulative findings of these intended alternative circumstances, all of which do involve different forms of criminal intent, runs a clear risk of skewing the weighing process in favor of the death penalty and thereby causing it to

be imposed arbitrarily, hence unconstitutionally." *Id.* at 899. The Court noted that a proper instruction would have advised the jury that it could only find one of the intent factors as a basis for its findings.²³

The mental state requirement of 18 U.S.C. §3591(a)(2) indisputably constitutes an element of the capital charges, since the death penalty can never be considered unless one of the mental states is found beyond a reasonable doubt. *United States v. Sampson*, 245 F. Supp. 2d 327, 332 (D. Mass. 2003)(“in light of *Ring*, the facts concerning a defendant's state of mind and aggravating factors that the Federal Death Penalty Act requires be proven for a defendant to be eligible for the death penalty

²³ The Court in *United States v. Cooper*, 91 F. Supp. 2d 90 (D.C. C. 2000) refused to apply *Tipton* to a FDPA case because, according to the Court, “(t)he FDPA differs from the ADA in that the intent elements are not aggravating factors to be weighed against mitigating factors. If the jury finds one or all four of the factors, there is no risk of skewing because the jury finds intent, and then starts with a clean slate in evaluating separate aggravating factors.” *Id.* at 110. The court’s view simply does not conform to the reality of a jury deciding a capital case under the FDPA. No death qualified jury in such a case, having convicted the defendant and then found four extremely aggravated and overlapping mental states is capable of the mental gymnastics necessary “to start with a clean slate”, especially since the other aggravating and mitigating factors are weighed in the same proceeding. As stated in *Bruton v. United States* (1968) 391 U.S. 123, 135, “there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical human limitations of the jury system cannot be ignored.” *Id.* at 135. Indeed, it has been pointed out that a massive empirical study of capital jury decision making shows quite persuasively that “many jurors reached a personal decision concerning punishment before the sentencing stage of the trial, before hearing the evidence or arguments concerning the appropriate punishment, and before the judge's instructions for making the sentencing decision. Moreover, most of the jurors who indicated a stand on punishment at the guilt stage of the trial said they were ‘absolutely convinced’ of their early stands on punishment and adhered to them throughout the course of the trial....The study also disclosed that many ‘early pro-death jurors presumed that overwhelming proof of guilt justified imposition of the death penalty. *Id.* at 1497. More than half of the jurors were of the view that “death was the only acceptable punishment for ... repeat murder, premeditated murder and multiple murder.” *Summerlin v. Stewart*, 341 F.3d 1082, 1105 (9th Cir. 2003)(Rawlinson, J., dissenting), cert. granted, 124 S.Ct. 833 (2003), citing, William J. Bowers, Marla Sandys, and Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors’ Pre-dispositions, Guilt--Trial Experience, and Premature Decision Making*, 83 Cornell L.Rev. 1476, 1477 (1998) and other studies. These studies strongly refute any suggestion that a capital jury that has found the defendant guilty of a murder and then found multiple aggravating mental states will start the weighing process with a clean slate.

must be treated procedurally as elements of the offense alleged..."); *United States v. Lentz*, 225 F. Supp. 2d 672 (E.D. Va. 2002)("[B]ecause the mens rea requirements of § 3591(a)(2) and the statutory aggravating factors of §3592(c) must be found before a defendant may be determined death penalty eligible, such facts are the functional equivalent of elements and must appear in the indictment.") In this case, however, the grand jury and the government assert that the defendant acted with all four mental states combined. This unauthorized conjunctive listing of the mental states promotes an arbitrary multiplication of one factor up to four times in violation of the Eighth Amendment.

The objection here should not be confused with the materially different Texas capital punishment scheme at issue in *Lowenfield v. Phelps*, 484 U.S. 231 (1988). In *Lowenfield*, the Court found that Texas juries narrowed the class of murders by findings made during the guilt phase. *Lowenfield*, 484 U.S. at 246. Under §3591, the class of death eligible defendants is not narrowed merely by the type of murder committed, but by the finding of statutory mental state and aggravating circumstances which are then balanced against mitigating circumstances. Under such a weighing statute, the duplicitous use of aggravating factors does not perform the narrowing function. See *Tennessee v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992) (holding that because a Tennessee statute that did not narrow the class at the definitional stage, use of felony murder as aggravating factor when offense was felony murder was unconstitutional) (distinguishing *Lowenfield*, 484 U.S. 231, 247)(1988), cert. granted, 113 S.Ct. 1840 (1993), cert. dismissed 114 S.Ct. 651 (1993). See also *Richard v. Lewis*, 113 S.Ct. 528 (1992)("[I]n a 'weighing' [jurisdiction], where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if [there are] other, valid aggravating factors . . ."). Submitting four overlapping mental state factors prompts the jury to multiply the aggravating nature of the crime according to the number of different mental state formulations the

government submitted to them.

The government's omnibus assertion that the defendant acted with every mental state listed in §3591(a)(2)(A)-(D) asserts an overly-broad restatement of the constitutionally required culpable mental state necessary for execution. See *Tison v. Arizona*, 481 U.S. 137, 158 (1987) ("major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Edmund culpability requirement."); *Edmund v. Florida*, 458 U.S. 782 (1982) (holding that death is disproportionate for the felony murderer who does not kill, attempt to kill, or intend that a killing take place). The mental states alleged in the notices must be stricken because they fail to narrow the juror's discretion. A death-eligibility circumstance must not be so broad that it could "apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder." *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). See also *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988)(aggravating circumstance that "an ordinary person could honestly believe" described every murder invalid). A death-eligibility factor that applies to every defendant convicted of a crime for which death is a possible punishment provides no principled basis for distinguishing those who deserve capital punishment from those who do not. See *Arave v. Creech*, 507 U.S. 463, 474 (1993). The broad range of mental states included in §3591(a)(2)(A)-(D) apply in some form to virtually every homicide. It does not, therefore, provide a principled means to distinguish among murders or murderers.

Finally as indicated above, the superceding indictment and the government's notice further deny defendant and his counsel reasonable notice of the element of the charge against which he will be required to defend himself. This violates the defendant's rights under the Fifth and Sixth Amendment rights to due process, the indictment clause, and the right to prepare a defense to the government's charge. See *United States v. Glover*, 43 F. Supp.2d 1217, 1222 (D. Kan. 1999). The government's

allegation of all the mental states essentially conceals this requisite element by means of a shell game and denies the defendant notice of this element. *Id.*

V.

THE STATUTORY AGGRAVATING FACTORS MUST BE DISMISSED BECAUSE THEY ARE DUPLICATIVE OF THE CRIME CHARGED, DO NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY, ARE VAGUE AND OVERBROAD OR ARE NOT FACTUALLY SUPPORTED

- A. **The first statutory aggravating factor set forth in the indictment—“The defendant...during the commission of an offense under 18 U.S.C. § 844(i), as alleged herein, caused the death of and injuries resulting in death of a person”- should be dismissed as vague, duplicative and as not factually supported²⁴**

An aggravating factor that merely duplicates the capital crime violates the Eighth Amendment because it fails to genuinely narrow the class of persons who should be selected for the death penalty. A jury finding of an aggravating factor that merely replicates the underlying crime does not in any way distinguish one sentenced to death from one sentenced to a term of imprisonment. Under a weighing statute, such as the federal statute here, employing duplicative aggravating factors also unfairly pre-weighs the scales in favor of death, because the jury must necessarily find the existence of the aggravator when finding the defendant guilty of the capital crime.

Here, the government seeks the death penalty in the event that Mr. Rudolph is convicted of count one, maliciously damaging, by means of an explosive, a building and property used in an activity affecting interstate and foreign commerce, which resulted in the death of Robert D. Sanderson. The first aggravating factor duplicates this offense. As a result, if the jury finds Mr. Rudolph guilty of

²⁴ The government’s notice must also be dismissed for the same reason and also because it impermissibly attempts to broaden the language of the indictment by omitting the phrase “as alleged herein” and substituting the vague language “a person” with the name “Robert D. Sanderson”. Any language in the death notice which is different than the indictment should be stricken because a notice, like a bill of particulars cannot substitute for a valid indictment. *United States v. Cecil*, 608 F.2d 1294, 1296 (9th Cir. 1979).

count one, it would automatically find the existence of one statutory aggravating factor.

For this reason, in *United States v. McVeigh*, 944 F. Supp. 1478 (D. Col. 1996), Judge Matsch agreed with the defendants and prohibited the government from using the crimes charged in the indictment pursuant to Sections 844(f) and 2332a as aggravating factors under section 3592(c)(1) :

"Because the Court has held that the weighing process is highly sensitive to the influence of aggravating factors that might unfairly tip the scales in favor of death, the government may not introduce those offenses as aggravating factors that duplicate the crimes charged in the indictment. To allow the jury to weigh as an aggravating factor a crime already proved in a guilty verdict would unfairly skew the weighing process in favor of death."

Id. at 1489-90; cf. *Lowenfield v. Phelps*, 484 U.S. 231 (1988) (in non-weighing statute, no Eighth Amendment violation where aggravating factor duplicates charged crime).

In *United States v. Kaczynski*, supra, 1997 WL 716487 (E.D. Ca. 1997), the court also dismissed the section 3592(c)(1) aggravating factor which was duplicative of the underlying offense of 18 U.S.C. § 844(d). The court concluded:

The federal death penalty statute, in contrast to the statute involved in *Lowenfield*, does not narrow those eligible for the death penalty by narrowly defining the substantive crimes. Instead, it narrows the class of those eligible through the mental state findings and the statutory aggravating factors. Unlike in *Lowenfield*, where the aggravating circumstances did not play a part in the constitutionally required narrowing process, the statutory aggravating factors here do perform a narrowing function. If this function is to be accomplished, the simple repetition of the crime of which a defendant has already been convicted cannot properly be used as an aggravating factor. Since the statute requires the jury to find only one statutory aggravating factor, the narrowing function of these aggravating factors would be completely undermined if the mere commission of the charged offense could suffice.

Id. at 22

"To allow the jury to weigh as an aggravating factor a crime which they had already necessarily found beyond a reasonable doubt would unfairly tip the scale toward death." *Id.* at *23. State courts have also found that "double-counting" the elements of a crime as an aggravating factor is unconstitutional. See *Middlebrooks v. Tennessee*, 840 S.W.2d 317 (Tenn. 1992); *State v. Cherry*, 257 S.E.2d 551

(N.C. 1979). For the reasons stated in *McVeigh* and *Kaczynski*, the Court should dismiss the first alleged statutory aggravating factor as duplicative of the crime charged in count one.²⁵

Moreover, the first alleged statutory factor does not apply to this case. To fall within the scope of the aggravating factor set forth in 18 U.S.C. §3592(c)(1), a death must occur "during the commission of or attempted commission of" one of several enumerated offenses, in this case, maliciously damaging a building used in an activity affecting interstate and foreign commerce by explosive in violation of section 844(i). This language was not meant to apply to cases where the defendant's intent was to kill and damaging the building by explosive was merely the means to commit the crime, rather than an independent felony. In such cases, the death did not occur during the commission of the explosive offense, but was the object of the offense.

In *People v. Green*, 27 Cal.3d 1, 164 Cal. Rprt. 1, 609 P.2d 468 (1980), the California Supreme Court reached the same conclusion in interpreting its state death penalty statute:

". . . it was not enough for the jury to find the defendant guilty of a murder and one of the listed crimes; the statute also required that the jury find the

²⁵ Some courts have disagreed with the analysis of *McVeigh* and *Kaczynski*. See, *United States v. Johnson*, 136 F.Supp. 2d 553, 559 (W.D. Va. 2001); *United States v. Frank*, 8 F.Supp.2d 253, 277 (S.D.N.Y.1998); *United States v. Bin Laden*, 126 F.Supp.2d 290, 301 (S.D.N.Y.2001). These cases wrongly assume that what is being advocated is "total separation of the nature of the underlying crime from sentencing consideration"(*Johnson*, 136 F.Supp. 2d at 560) On the contrary, the point is that to be constitutional, the offense itself must be narrowed. One way in which the federal statute attempts to satisfy this requirement is through the mental state gateway factors which of course deal with the circumstances of the crime. Even these cases recognize that information which necessarily duplicates elements of the underlying offense may be taken into account " so long as that factor is not duplicative of another aggravating factor." (*Johnson*, 136 F.Supp. 2d at 559). See also *United States v. Glover*, supra, 43 F.Supp.2d at 1222 (where government notice alleges duplicative statutory aggravating factors the government must make an election of factors " sufficiently in advance of trial to allow ...reasonable notice."). Here, the government has alleged the circumstances of the crime under the gateway factors, under 18 U.S.C. § 3592(c)(1), 18 U.S.C. § 3592(c)(5), 18 U.S.C. §3592(c)(9)), 18 U.S.C. §3592(c)(16), and again under the non-statutory factor of future dangerousness based in part on "the capital offense charged in Count I". Such duplicative use is prohibited even under the most restrictive view of the duplication principle.

defendant committed the murder 'during the commission of or attempted commission of that crime. . . . In other words, a valid conviction of a listed crime was a necessary condition to finding a special circumstance, but it was not a sufficient condition: the murder must also have been committed 'during the commission' of the underlying crime.

* * *

". . . we infer that the purpose of the Legislature was to comply insofar as possible with what it understood to be the mandate of *Furman* and *Gregg* et al. At the very least, therefore, the Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not. The Legislature declared that such a distinction could be drawn, inter alia, when the defendant committed a 'willful, deliberate and premeditated' murder 'during the commission' of a robbery or other listed felony. . . . The provision thus expressed a legislative belief that it was not unconstitutionally arbitrary to expose to the death penalty those defendants who killed in cold blood in order to advance an independent felonious purpose, e.g., who carried out an execution-style slaying of the victim of or witness to a holdup, a kidnapping, or a rape.

"The Legislature's goal is not achieved, however, when the defendant's intent is not to steal but to kill and the robbery is merely incidental to the murder--'a second thing to it,' as the jury foreman said here--because its sole object is to facilitate or conceal the crime. . . . To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other listed felonies would be to revive 'the risk of wholly arbitrary and capricious action' condemned by the high court plurality in *Gregg*. . . . We conclude that regardless of chronology such a crime is not a murder committed "during the commission" of a robbery within the meaning of a statute."

27 Cal.3d at 59-62, 164 Cal. Rptr. at 37-39 (emphasis added); see also *People v. Thompson*, 27 Cal.3d 303, 321-25, 165 Cal. Rptr. 289, 298-300, 611 P.2d 883 (1980) (same). For the same reason, because it is alleged that the defendant intentionally killed a person, and the means of such death was the damaging of a building, then regardless of chronology, the killing was not "during the commission" of a section 844(i) violation.

Finally, as indicated above, the use in the indictment of the term "a person" is constitutionally vague. See, *United States v. Illera Plaza*, 179 F. Supp. 2d 464, 473 (E.D. Pa. 2001).

B. The second statutory aggravating factor set forth in the indictment—“The defendant... in the commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense”— should be dismissed as duplicative and vague²⁶

This aggravating factor violates the death penalty statute and the Fifth and Eighth Amendments because it is duplicative and vague.

A finding of the second aggravating factor, that the defendant knowingly created a grave risk of death to additional persons beyond the victim, duplicates both the first alleged statutory aggravating factor and the mental state preliminary factor set forth in 18 U.S.C. § 3591(a)(2)(D). The gist of the first alleged aggravating factor is that maliciously damaging, by means of an explosive, a building and property used in an activity affecting interstate and foreign commerce justifies a sentence of death, rather than life imprisonment. Given the potential lethal nature of explosives, any case where a defendant is convicted of maliciously damaging a building by explosives will almost always involve a "grave risk of death to one or more persons in addition to the victim of the offense." Thus, the first and second alleged aggravating factors simply place two different labels on the identical conduct.

In weighing statutes, aggravating factors that are duplicative or substantially overlap one another are constitutionally invalid. "Such double counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." *United States v. McCullah*, 76 F.3d 1087, 1111, *aff'd on denial of reh'g*, 87 F.3d 1136 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1699 (1997). "While the federal statute at issue is a weighing statute which allows the jury to accord as

²⁶ For the same reason, the government's notice must also be dismissed. Here again, the government has improperly attempted to broaden and fix the indictment by changing the vague language "one or more persons in addition to the victim" to "Emily Lyons and other persons." This language does nothing to cure the vagueness problem with the indictment which, in any event, could not be remedied by the notice.

much or as little weight to any particular aggravating factor, the mere finding of an aggravating factor cannot but imply a qualitative value to that factor." *McCullah*, 76 F.3d at 1112. Where a sentencer is asked to weigh a factor twice in its decision, "a reviewing court cannot 'assume it would have made no difference if the thumb had been removed from death's side of the scale.'" *Id.* (quoting *Stringer*, 503 U.S. at 232). See also *United States v. Bin Laden*, 126 F.Supp.2d 290, 299 (S.D.N.Y.2001)("We hold that an aggravating factor that is necessarily and wholly subsumed by a different aggravator within the same death penalty notice is invalid per se and should not be submitted to the penalty jury for sentencing consideration." Because the first two aggravating factors duplicate one another, they produce an unconstitutional skewing of the weighing process towards death.

In addition, the second alleged statutory aggravating factor also impermissibly duplicates two of the "preliminary" mental state factors set forth in the death penalty notice, which states as follows:

"The defendant... 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 *another* person, who died as a direct result of the act."

"The defendant... intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to *other* persons, such that participation in the act constituted a reckless disregard for human life and Robert D. Sanderson died as a direct result of the act."²⁷

²⁷ It should be noted that the government has impermissibly broadened these mental state factor beyond that charged in the indictment. Thus, the indictment alleges pursuant to 18 U.S. C. Section 3591(a)(1)(C) that "The defendant... 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*, who died as a direct result of the act." This allegation is vague and incomplete and must be dismissed because it omits the necessary element "other than one of the participants" and does not clearly specify that it is a person other than the victim who is being jeopardized. Similarly, the indictment alleges pursuant to 18 U.S. C. Section 3591(a)(1)(D)) that "The defendant... intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to *a person*, and constituted a reckless disregard for human life and *the victim* died as a direct result of the act." The language of the indictment is both vague and incomplete and must be dismissed because it omits the statutory language "other than one of the participants in the offense" and "such that participation in the act". (18 U.S. C. Section 3591(a)(1)(D)). Any language in the death notice which is different than the indictment should

This factor completely subsumes the second alleged statutory aggravating factor that charges that "[t]he defendant, in commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense." See 18 U.S.C. §3592(c)(5) (emphasis added). This double counting of aggravating evidence in the federal statute tends "to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." *McCullah*, 76 F.3d at 1111. This is true even though the mental state factors in section 3591(a)(2) are not formal aggravating factors. A jury will likely still treat its finding on the mental state factors as aggravation when weighing all the aggravating and mitigating circumstances to determine the appropriate sentence. A jury instructed to make two duplicative findings regarding whether a defendant "knowingly created a grave risk of death to one or more persons in addition to the victim of the offense" will likely give this factor more weight than it warrants.

Furthermore, an aggravating factor's duplication of a mental state "preliminary" factor impermissibly skews the weighing process towards death. Before the jury considers whether any of the alleged statutory (or non-statutory) aggravating factors are present, the jury considers whether the defendant acted with one of the mental states required under section 3591(a)(2). Only if and after the jury finds beyond a reasonable doubt one of the requisite mental states, does the jury consider whether the government has established beyond a reasonable doubt the existence of aggravating factors. Where an aggravating factor duplicates one of the jury's earlier mental state findings, the jury necessarily will have found that the aggravating factor has been established before it starts weighing the relevant factors in reaching its decision on life or death. By giving the government an improper head-start in this manner, the second alleged statutory aggravating factor unconstitutionally skews the jury's

also be stricken because a notice, like a bill of particulars cannot substitute for a valid indictment. *United States v. Cecil*, 608 F.2d 1294, 1296 (9th Cir. 1979).

weighing process towards death.

Moreover, this factor is unconstitutionally vague because there is no clear meaning to the term "grave risk" of death and the "other person" is not identified. When reviewing the adequacy of an aggravating factor, a court must first "determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer." *Walton v. Arizona*, 497 U.S. 639, 654 (1990). If so, the court determines whether the courts have defined the vague term, and if they have done so, whether their construction is constitutionally sufficient. *Id.*

Here the term "grave risk" of death provides no guidance to a sentencer. How does a grave risk differ from a standard risk of death? Because Congress and the courts have not attempted to reduce the ambiguity in this factor by giving the term "grave risk" a limiting construction, this statutory aggravating factor must be dismissed as unconstitutionally vague. And as indicated above, the failure to identify a person in connection with this factor renders it constitutionally vague. See, *United States v. Illera Plaza*, 179 F. Supp. 2d 464, 473 (E.D. Pa. 2001) ("The government's submissions to this court do not suggest the identities of the 'additional persons' put at risk during that murder. The government will therefore be ordered to submit an outline of the information it intends to use to establish the 'grave risk of death to additional persons' aggravating factor.").

C. The third statutory aggravating factor set forth in the indictment—"The defendant ...committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism" – should be dismissed as duplicative and vague²⁸

The statutory aggravating factor of "substantial planning and premeditation" must be stricken

²⁸ The government notice should be dismissed for the same reason and also because it improperly attempts to broaden the allegation by changing "a person" to "another person" and by changing "cause death...*or* commit an act of terrorism" to "cause death...*and* commit an act of terrorism."

for four reasons. First, evidence of "planning and premeditation" by itself is patently inadequate to narrow the class of murders eligible for the death penalty, since "almost every murder," involves some planning and premeditation. *Godfrey, supra*, 420 U.S. at 428-29. Second, the modifying phrase "substantial" does not cure this problem, for, even as it has been construed by the federal courts, it "fails adequately to inform juries what they must find to impose the death penalty." *Maynard v. Cartwright*, 486 U.S. at 361-62. Third, the federal courts have been unable to fashion a construction of "substantial" for this factor that would be both narrowing and specific. Fourth, this factor improperly duplicates the mental gateway factor, the circumstance of the crime factor, and the future dangerousness factor to the extent that it is based on "the statutory...aggravating factors alleged in (the) notice."

1. "[P]lanning and Premeditation" Does Not Genuinely Narrow the Class of Murders Subject to the Death Penalty.

As stated, a statutory aggravating factor must genuinely narrow the class of murders which may be subject to the death penalty. *Zant*, 462 U.S. at 877; *Godfrey*, 446 U.S. at 428-29. That is, it must be a factor that is not present in "almost every murder." *Godfrey*, 446 U.S. at 428-29. The concepts of "planning and premeditation" are part of every intentional murder; they do not genuinely narrow the class of murders subject to the death penalty. All that planning means is "carrying out plans," and a plan can be just a "method of achieving something." Webster's Third New International Dictionary 1729 ("plan"), 1731 ("planning"). Accordingly, any murder that has a "method," which is to say virtually every one, is planned.

Premeditation provides no greater limitation. Premeditation, of course, was a part of first-degree murder at common law and remains so under federal law. See 18 U.S.C. §1111. In its capacity as a common-law element, it required little, if anything, more than the decision to kill. See 2 W.

LaFave & A. Scott, Substantive Criminal Law, § 7.7 at 237 (1986)(It is "often said that premeditation and deliberation require only a 'brief moment of thought' or a 'matter of seconds'"). Even in common usage, "premeditate" means simply "to think on and revolve in the mind beforehand," Webster's Third New International Dictionary 1789, and virtually every murderer "thinks on" his crime before committing it; otherwise, it would not be murder. See *United States v. Spivey*, 958 F. Supp. at 1531 (D.N.M. 1997)("virtually all murders require some planning and premeditation"). Thus, these terms do not perform the constitutionally required function of narrowing the class of murderers subject to the death penalty.

2. The Word "Substantial" Does Not Provide the Clear, Specific, and Objective Standards Required to Narrow the Class of Murderers Subject to the Death Penalty and to Channel the Jury's Discretion in Doing So.

Because the terms "planning and premeditation" by themselves do nothing to narrow the class of all murders, this aggravating factor must be stricken unless the word "substantially" narrows their meaning in a way that actually "channel[s] the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." *Arave v. Creech*, supra, 507 U.S. at 471 (emphasis added), quoting *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) and *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion). The word "substantial" cannot carry this burden because it provides no guidance to a court or a jury as to "how much" or "what kind of" planning and premeditation are necessary to rise to the level "substantial." The word gives a questioning juror no clue as to how complicated a plan the defendant must have formulated before committing the offense or how long he must have thought about the crime before committing it. Accordingly, some jurors will require a defendant to have employed some complicated mechanism to produce death and others will find "substantial" planning and

premeditation in taking the gun out of the desk drawer. The lack of any "clear," "objective," and "specific" guidance to jurors permits the imposition of the death penalty in an arbitrary way.

For this reason, the Supreme Court of Georgia has held the word "substantial" unconstitutionally vague in circumstances precisely similar to these. *Arnold v. State*, 236 Ga. 534, 541, 224 S.E.2d 386, 392 (Ga. 1976). Georgia had an aggravating factor making anyone with a "substantial criminal history" eligible for the death penalty. *Id.* The Court held that the word "substantial," which it read to mean "of real ... importance" was unconstitutionally vague because its application was "highly subjective." *Id.*; See also *Arave v. Creech*, supra, 507 U.S. at 471 [standard must be "objective"]. The Court noted that the word "substantial" might be sufficiently clear in other contexts, but that "the fact that we are here concerned with the imposition of a death sentence compels a different result." *Arnold v. State*, 224 S.E.2d at 392. This, too, is a death penalty case, and the word "substantial" here is no less "subjective" in application than it was in *Arnold*. Accordingly, this aggravating factor must be stricken.

3. The Opinions Of Courts Which Have Upheld This Factor Show That It Fails To Narrow The Class Of Murderers Subject To The Death Penalty, Is Unconstitutionally Vague, Or Both.

The Circuits that have upheld the constitutionality of this provision have construed "substantial" in a way that in fact does not narrow the term as required by the Eighth Amendment. Moreover, even as construed by these courts, the word "substantial" remains unconstitutionally vague. Accordingly, even as construed, the term "substantial planning and premeditation" violates the Fifth and Eighth Amendments.

The initial problem with the judicial construction of this aggravator is that it does not even perform the required narrowing function. In *United States v. McCullah*, supra, 76 F.3d 1087, 1110, for

example, the court upheld this aggravating factor on the ground that "substantial" means simply "ample for commission of the crime;" ample, of course, means anything "more than adequate." Webster's Third New International Dictionary 74. And the Fourth Circuit, in *United States v. Tipton*, 90 F.3d at 896, agreed, holding that "substantial" meant only "more than the minimum amount sufficient to commit the offense."²⁹ Under these interpretations of "substantial," any murder, other than one undertaken with the "minimum" possible planning and premeditation, would be subject to the death penalty. But this cannot be constitutional, for it would permit jurors to impose the death penalty for an amount of planning and premeditation that barely exceeds what is essential to commit a homicide at all, indeed for an amount present in "almost every murder."³⁰ *Godfrey*, supra, at 428-29. The word substantial can be applied in this impermissible way in violation of the Eighth Amendment..

Moreover, the limits of the word "substantial" are so vague that it is likely to be applied with great inconsistency, even arbitrariness. The federal cases discussed above do not explain why the concept "substantial," even as they construe it, is not subject to arbitrary application. Their construction of the word leaves it entirely to the discretion of jurors to decide what the "minimum"

²⁹ *Tipton* and *McCullah* also used the word "considerable," which *Tipton* explained means "more than merely adequate," as a synonym for "substantial." *Tipton*, 90 F.3d at 896; *McCullah*, 76 F.3d at 1111. Since this term is the equivalent of "ample" and "more than the minimum amount sufficient," we deal with those phrases.

³⁰ As noted above, the minimum amount of planning and premeditation necessary to commit a murder is extremely small. It is well-settled that premeditation can occur in a matter of seconds, see, e.g., *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988) [premeditation may occur "moment or instant before killing"], and a "plan" may be as little as picking up a nearby weapon. Almost every murder has more than these amounts. For example, the murderer who goes to the next room to get a gun has done "more than the minimum amount sufficient," to commit the murder, but still less than is present than in almost every murder. A construction that permits jurors to convict on the ground of "ample" premeditation, or "more than adequate" premeditation, or "more than the minimum" premeditation, solves neither the narrowing nor the vagueness problems. It leaves jurors free to decide what an "adequate" or "minimum" amount is, and to decide in their sole discretion, that some greater amount exceeds that minimum, even though the greater amount is found in "almost every" murder.

amount of planning and premeditation for a murder is.³¹ It also leaves entirely to the jurors the determination of how much more than this minimum is necessary to rise to a "substantial" level. Some juries will doubtless feel, like the Fourth Circuit, that anything more than the absolute minimum will permit a verdict of death; others may require truly careful and complex planning and lengthy forethought before death will be imposed. Nothing in the word, however, says which of these interpretations would be correct. The Eighth Amendment requires that an aggravating factor "channel" the jurors' discretion; this factor does not.³²

This vagueness is further demonstrated by the fact that the standard the courts have gleaned from it deviates widely from other common usages of the word "substantial." The Supreme Court itself has noted that the meaning of a "substantial" amount of something is "a large degree" of that thing. *Victor v. Nebraska*, 511 U.S. 1, 19 (1994).³³ But it is not ordinary or natural usage to call any

³¹ Such a determination is more properly a legislative one than one for a jury. It is Congress's job, not the job of individual jurors, to define the "minimum" amount of premeditation and planning typical of almost every murder.

³² The literal language of the cases has yet another problematic interpretation. *Tipton* and *McCullah* both speak of more than the minimum planning "sufficient to commit the offense," or "ample to commit the crime." On their face, these statements require more planning and premeditation than what is sufficient to commit the offense or crime charged. That is, the plain language of the opinions literally requires that the defendant have engaged in superfluous planning and premeditation of his crime that was greater than necessary to commit it. If *Tipton* and *McCullah* actually mean to require a showing of superfluous planning and premeditation, then even a very great amount of planning would not meet the standard in some cases. If, for example, the crime was killing the President in the Oval Office -- a place inaccessible to would-be murderers -- quite a large amount of planning would be necessary to commit the crime. In that case, a large amount of planning would not be "more than the minimum" necessary, and this aggravating factor would not apply.

³³ The word "substantial" also has an inherent ambiguity, since it can mean simply "something that exists." *Victor*, 511 U.S. at 19. But the courts to have considered the matter have concluded that definition does not apply to the aggravating factor here, see, e.g., *Tipton*, 90 F.3d at 895, although a juror might assume that it did.

amount of something, even an amount barely above the minimum, a "large degree" of that thing. Indeed, amounts close to the minimum would most plausibly be called a "small degree." Moreover, the standard adopted by cases such as *Tipton* is quite similar to "more than minimal planning" under the Sentencing Guidelines. See U.S.S.G. § 1B1.1(f) ["More than minimal planning" is "more planning than is typical for commission of the offense in a simple form"]. But this dilution of the word "substantial" is unwarranted, for "substantial" plainly means a greater amount than does "more than minimal." See *McCarthy v. Manson*, 554 F.Supp. 1275, 1306 (D.Conn. 1982) (Cabranes, J.) (prejudice "while not substantial" was, nevertheless, "more than minimal"), aff'd, 714 F.2d 234 (2d Cir. 1983). It seems clear that the word "substantial" must fall well above such words as "more than the minimum amount sufficient," "ample," "minimal," or "more than minimal," on any scale of magnitude, but how far above has not, and cannot, be described in clear terms. The very inability of the courts to fashion a specific constitutional definition of this factor shows that its meaning remains a "highly subjective" matter for each juror, *Arnold v. State*, 224 S.E.2d at 392, and that it is unconstitutionally vague.³⁴

Some states with similar aggravating factors have construed them in a way that does much to eliminate this vagueness. In Florida, for example, the State Supreme Court, when faced with an aggravating factor requiring "cold, calculated, and premeditated" actions by a defendant, held the factor unconstitutionally vague on its face. *Jackson v. State*, 648 So. 2d 85, 87 (Fla. 1994). The Court required that in the future, juries be told that they must determine that "the killing was the product of

³⁴One case has, without much discussion, held this factor constitutional because there is a "common sense core" of meaning to "substantial." *United States v. McVeigh*, 944 F. Supp. at 1490. But this is not so. It is belied in the first place by the inability of courts to say what that core is. Moreover, this overlooks the fact that if there is a "common sense core" to the term, that core itself is apparently unconstitutional. As that "core" was construed by two Circuit Courts of Appeal, the Fourth and Tenth, it makes the term apply to conduct that is present in "almost every murder," and therefore violates the Eighth Amendment.

cool and calm reflection" and "that the defendant had a careful plan or prearranged design to commit murder before the fatal incident." *Id.* at 89. But Congress has not limited the word "substantial" in the aggravator in any way, or indicated how it would do so. Accordingly, this Court may not provide a limiting construction for it.

It is no answer for the government to say that the word "substantial" has been held not vague in other contexts. The Georgia Supreme Court in *Arnold v. State*, *supra*, explained one reason why: "[T]he fact that we are here concerned with the imposition of a death sentence compels a different result." 224 S.E.2d at 392; *see also Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (Scalia, J.) [noting "several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides"]. A second reason is that the Eighth Amendment requires the word "substantial" to perform a constitutionally required "narrowing" function not present in non-capital cases. Thus, because the word "substantial" must perform different, and constitutionally more significant, functions in a capital case than it does in non-capital cases, the non-capital cases, which do not take into account Eighth Amendment interests, cannot govern here.

The Eighth Amendment interests in this case require both that the concept of "plann[ed] and premeditated" be limited, to narrow the class of death-eligible murders, and that it be limited in a clear, specific, objective way. Simply tacking the word "substantial" on to the phrase does neither thing, and this aggravating factor accordingly violates the Fifth and Eighth Amendments.

D. The fourth statutory aggravating factor set forth in the indictment—"The defendant ...intentionally attempted to kill more than one person in a single criminal episode" – should be dismissed as duplicative and vague³⁵

³⁵ The government notice should be dismissed for the same reason. Here, the government exactly duplicates the language of the indictment.

This statutory aggravating factor is obviously and improperly duplicative of the first, second, and third statutory aggravating factors, the mental state gateway factors, and the future dangerousness factor to the extent it is based on “the statutory... factors...alleged in the notice.” For reasons already discussed, the reference to an unspecified “person” is also unconstitutionally vague.

VI.

THE TORTURE STATUTORY AGGRAVATING CIRCUMSTANCE ALLEGED IN THE SUPERSEDING INDICTMENT BUT NOT IN THE NOTICE OF INTENT TO SEEK THE DEATH PENALTY MUST BE DISMISSED AS SURPLUSAGE

The Notice of Special Findings in the Superseding Indictment alleges a statutory aggravating circumstance which is not alleged in the government’s notice : “The defendant...committed the offense in an especially heinous, cruel “heinous, cruel or depraved manner” factor under Section and the torture factor .

In *United States v. Lentz*, 225 F. Supp. 2d 672, 681 (E.D. Va. 2002), the court considered several challenges to an superseding indictment which contained statutory aggravating factors identical to those earlier alleged in the government’s notice of intent to seek the death penalty. On one issue, the court ruled that:

(T)he form chosen by the Government in presenting these facts in the superseding indictment--the "Notice of Special Findings"--is permissible. Neither the Fifth Amendment nor Fed.R.Crim.P. 7 prohibit the presentation of such information in this manner. Although a defendant may strike surplusage from an indictment, see Fed.R.Crim.P. 7(d), the holdings of *Jones*, *Apprendi*, and *Ring* establish that the mens rea requirements and statutory aggravating factors are neither immaterial nor irrelevant to Defendant's punishment. See, e.g., *United States v. Poore*, 594 F.2d 39, 41 (4th Cir.1979) ("The purpose of Rule 7(d) is to protect a defendant against prejudicial allegations that are neither relevant nor material to the charges made in an indictment..."). Thus, this contention is not well taken.

The result, however, must be different where, as here, a notice of intent to seek the death penalty is filed after the Notice of Special Findings and indicates a clear intention to abandon specific aggravating factors alleged in the indictment. Any other result would render the government’s death

notice meaningless. See, *United States v. Rudolph*, 245 F. Supp. 2d at 336 (“Contrary to Rudolph’s contention, the notice by the Department of Justice is not rendered redundant if the grand jury’s indictment includes allegations concerning the defendant’s state of mind and aggravating factors that the Federal Death Penalty Act requires be proven for the defendant to be eligible for the death sentence. The Department of Justice’s notice may omit at least one of the statutory aggravating factors and also may describe additional non-statutory aggravating factors that the government will seek to prove to justify a sentence of death.”).

Under this reasoning, the heinous, cruel and depraved factor and the torture factor should be stricken pursuant to Fed.R.Crim.P. 7(d) as surplusage.

**VII.
THE NON-STATUTORY AGGRAVATING FACTORS ALLEGED IN THE
GOVERNMENT’S DEATH PENALTY NOTICE MUST BE DISMISSED**

A. Constitutional and Statutory Limits on Non-Statutory Aggravating Circumstances

The Federal Death Penalty Act of 1994 allows the government to use both statutory and non-statutory aggravating factors as the basis for imposing the death penalty. The Act includes no specific guidance as to what constitutes an appropriate non-statutory aggravating factor. The statute that enumerates statutory aggravating circumstances only states in an unnumbered paragraph, “The jury . . . may consider whether any other aggravating factor for which notice has been given exists.” 18 U.S.C. §3592(c). The government is required to give notice of its proposed aggravating factors pursuant to 18 U.S.C. §3593(a), but that statute does not identify what constitutes non-statutory aggravating circumstances other than to mention the admissibility of victim impact evidence. Under 18 U.S.C. §3593(c), the jury is allowed to hear “information” as to “any matter relevant to the sentence, including any mitigating or aggravating factor ” and the government may present “any

information relevant to an aggravating factor . . ." The statute provides that information may be admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials, yet even relevant information "may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. §3593(c).

As the Second Circuit most recently emphasized, "'heightened reliability' is essential to the process of imposing a death sentence." *United States v. Fell*, ___ F.3d ___, 2004 WL 377314 (2d. Cir. 2004). Because of the need for heightened reliability, "the balancing test set forth in the FDPA is, in fact, more stringent than its counterpart in the FRE, which allows the exclusion of relevant evidence 'if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.' Fed.R.Evid. 403 (emphasis added). Thus, the presumption of admissibility of relevant evidence is actually narrower under the FDPA than under the FRE." (Id.) Under the stringent FDPA standard, "'judges continue their role as evidentiary gatekeepers and[, pursuant to the balancing test set forth in § 3593(c),] retain the discretion to exclude any type of unreliable or prejudicial evidence that might render a trial fundamentally unfair.'" (Id.) These principles impose substantial responsibility on the trial court to decide the admissibility of non-statutory aggravating circumstances. *United States v. Davis*, 912 F.Supp. 938,944 (E.D. La. 1996).

Non-statutory aggravating factors play a specialized role in the jury's decision-making process. In theory, the first decision a jury must make as it moves toward a death verdict is whether any of the preliminary intent factors set out at §3591(a)(2) are present in the case. If the government fails to prove beyond a reasonable doubt that one or more of the §3591(a)(2) intent factors are present, the jury goes no further and the death penalty may not be imposed. If however, the government succeeds in establishing a §3591(a)(2) intent factor the jury in theory proceeds to its second decision-point, namely

whether one or more of the specific statutory aggravating factors set out in §3592(c)(1) through (15) has been established to the jury's unanimous satisfaction. Only if the government establishes, in sequence, both the existence of a §3591(a)(2) intent factor and one or more of the §3592(c) aggravating factors may the jury in theory consider any non-statutory aggravating factors for which notice has been given.

In practice, however, this model breaks down because the jury is asked to decide all these questions in one proceeding which is not necessarily constrained by the rules of evidence, *Fell* notwithstanding. As explained in *Davis*, 904 F.Supp. at 559,

The federal statute at issue here ... 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.

For the reasons that follow, the particular “hodge-podge” of non-statutory factors drawn up by the government prosecutors in this case cannot withstand constitutional and statutory scrutiny under the guidelines set forth above.³⁶

B. Non-Statutory Aggravating Factors Do Not Constitutionally Limit and Guide the

³⁶ In his motion to strike the death penalty, defendant has argued that the non-statutory aggravating factors must be dismissed because (1) 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; and (2) A weighing scheme may not constitutionally utilize non-statutory aggravating factors without also providing for mandatory proportionality review and, therefore, the FDPA is unconstitutional. (Motion to Strike Death Penalty, pp 52-60). Defendant reasserts those same arguments in support of the present motion.

Discretion of the Jury, Thus Permitting Wholly Arbitrary and Capricious Death Sentences in Violation of the Eighth and Fourteenth Amendments.

As indicated above, the Eighth Amendment requires 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." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)(opinion of Stewart, Powell, and Stevens, JJ.). In particular, the Supreme Court's Eighth Amendment jurisprudence since *Gregg* has explained that while sentencers may not be prevented from considering any relevant information offered as a reason for sparing a defendant's life, the decision to impose death must be guided by "carefully defined standards that must narrow a sentencer's discretion." *McClesky v. Kemp*, 481 U.S. 279, 304 (1987). By simultaneously promoting both individualized sentencing decisions and uniform application of the death penalty, these two principles are designed to provide a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. 238, 313 (1972)(White, J., concurring).

By contrast, construing section 3592(c) as authorizing the government to unilaterally expand the list of aggravating factors on a case-by-case basis would inject into capital proceedings precisely the uncertainty and disparate case results that *Furman* found to violate the Eighth Amendment. The statute provides no guidance to prosecutors in determining how to define or select non-statutory aggravating circumstances factors in a particular case. Under such a scheme, the factors that would persuade jurors in any given case to impose death would not be limited to "clear and objective" criteria, *Gregg*, 428 U.S. at 197, but would be restricted only by the imagination of the prosecutor. Particularly in conjunction with the evidentiary free-for-all created by the scope of "information" admissible at the penalty phase, the statute's standard-less procedure creates an impermissible risk that the death penalty will be imposed arbitrarily and capriciously, in violation of the Eighth Amendment.

The arbitrariness this procedure injects into the weighing process mandated by the statute, see 18 U.S.C. §3593(e), is clear. The government's unconstrained ability to allege various non-statutory aggravators injects impermissible randomness into the process. To permit different prosecutors, in each individual case, to create and select the factors that may be placed on "death's scale," injects the very arbitrariness and capriciousness into the sentencing process that *Furman* sought to eradicate.

C. Permitting the Department of Justice to Define Non-Statutory Aggravating Circumstances After the Crime But Before Trial Violates the Ban on Ex Post Facto Laws

Article I, Section 9, clause 3 of the United States Constitution states: "No . . .ex post facto law shall be passed." Section 3592 permits the prosecution to manufacture out of whole cloth aggravating circumstances to be applied retroactively to crimes committed before the aggravating circumstances are identified. "A defendant's right to notice and to fair warning of the conduct that impacts upon his liberty [or his life] is a basic principle long recognized by the Supreme Court." *Coleman v. McCormick*, 874 F.2d 1280, 1288 (9th Cir. 1989), cert. denied 493 U.S. 944 (1989). The statutory scheme which the government hopes to use to deprive Mr. Rudolph of his life "makes more burdensome the punishment for a crime, after its commission" *Beazell v. Ohio*, 269 U.S. 167 (1925). See *Lindsey v. Washington*, 301 U.S. 397 (1937)(statutory change from discretionary to mandatory death penalty held barred by ex post facto clause when retroactively applied). Defendant acknowledges the Eight Circuit has rejected this argument, by reasoning that aggravating circumstances are not elements but sentencing considerations. *United States v. Allen*, 247 F.3d at 759. Defendant submits, nevertheless, that the non-statutory aggravating circumstances a jury finds at the prosecutor's urging are just as necessary to a jury's finding that the death penalty shall apply as are statutory aggravating circumstances, since a jury may not find the statutory aggravating circumstances

grounds for a death sentence standing alone.

D. Statutory Inconsistencies Preclude the Use of Non-statutory Aggravating Factors

Section 3591 states that the defendant "shall be sentenced to death if, after consideration of the factors set forth in section 3592 . . . it is determined that imposition of a sentence of death is justified." §3591. Thus, §3591 requires that before an aggravating factor can be considered as a basis for a death sentence, it must be "set forth in section 3591." The catch-all phrase in §3592(c), which states that "the jury . . . may consider whether any other aggravating factor for which notice has been given exists," contradicts §3591's requirement that aggravating factors be "set forth" in §3592. Because §3591 provides specific limitations on the ability of the government to seek death, it nullifies the general catch-all provision under §3592 and prohibits the use of non-statutory aggravators.

E. Because of the Breadth of Discretion Conferred on the Prosecution to Allege Non-statutory Aggravating factors, the Court Should at least Grant a Hearing to Consider Whether the Government Has, throughout the Nation, Alleged Non-statutory Factors Consistently and Whether the Factors in this Case as Alleged are Consistent with the Government's General Practice

The cases have stated that "judicial scrutiny" is an essential element in assuring the constitutionality of non-statutory aggravating factors. *United States v. Pretlow*, 779 F. Supp. at 767. It has been said that since "Congress did not impose policy limitations or give clear guidance to prosecuting attorneys, " the court's authority to control the scope of the sentencing proceeding is crucial. *United States v. McVeigh*, 944 F. Supp. at 1486. Moreover, it is clear that there is a great danger that nonstatutory factors with shifting contours such as "future dangerousness," "lack of remorse," "lack of rehabilitative potential," or "victim impact" may be alleged, or not alleged, in a completely ad hoc manner depending on the predilections of the individual prosecutor in the case.

Accordingly, Mr Rudolph requests a hearing to show that the federal government has alleged non-statutory aggravating factors in an inconsistent manner, and that, as a factual matter, the application of such factors is arbitrary, rendering the statutory scheme unconstitutional.

F. The Future Dangerousness Factor Should Be Dismissed

The government's first non-statutory aggravating factor alleges that "(t)The Defendant, ERIC ROBERT RUDOLPH, is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of others. In addition to the capital offense charged in Count I of the superceding Indictment and the statutory and non-statutory aggravating factors alleged in this Notice, the Defendant has demonstrated low rehabilitative potential, and or has demonstrated lack of remorse."

This non-statutory aggravator is invalid for a number of compelling reasons. The concept of "future dangerousness" is a broad "generic" concept that requires some kind of explanation before it has meaning. It is not clear whether the government is alleging some past pattern of violence or when or where past violent acts allegedly occurred, whether it is alleging some kind of psychological disposition on the part of the defendant, or whether it is alleging actual threats to others that the defendant has made. If the government intends to allege one type or another of "future dangerousness" to comply with the requirements of due process, it must at least allege some concrete facts with dates and times -- or provide a minimal outline of its theory -- so that the defense may know the nature of the claim. For now, the defendant has only the vague notice to go on, which, as indicated above, impermissibly refers in conclusory terms to vague generic concepts. For the reasons which follow, neither the overall concept of future dangerousness, nor the specific subparts of the theory presumably alleged in this case have any constitutional or statutory validity.

1. Congress Did Not Intend the "Future Dangerousness" Factor to Be Considered Separately.

Many death penalty sentencing schemes provide that evidence that a defendant may be a danger in the future may be admitted in aggravation. See, e.g., *Jurek v. Texas*, 428 U.S. 262, 274-76 (1976) [upholding use of future dangerousness provision in Texas statute]. Because Congress chose not to include such a "future dangerousness" provision within the enumerated aggravating factors, Congress intended that this general factor not be considered as a separate aggravating factor. Cf. *West Coast Truck Lines v. Arcata Comm. Recycling*, 846 F.2d 1239, 1244 (9th Cir. 1988) ["When some statutory provisions expressly mention a requirement, the omission of that requirement from other statutory provisions implies that Congress intended both the inclusion of the requirement and the exclusion of the requirement."]

Instead of adopting a general "future dangerousness" provision, Congress chose to set forth several specific statutory aggravating factors regarding the defendant's past conduct that are closely correlated with a defendant's likelihood of committing violent crimes in the future. Those factors include a prior felony conviction involving use or attempted or threatened use of a firearm under § 3592(c)(2), a prior conviction for an offense carrying a maximum penalty of life imprisonment or death under § 3592(c)(3), two or more prior felony convictions for offenses involving serious bodily injury or death under § 3592(c)(4), two or more prior felony convictions for distributing a controlled substance under § 3592(c)(10), and a prior conviction for sexual assault or child molestation under § 3592(c)(15). Inclusion of these criminal history factors was based upon the notion that the commission of prior crimes correlates strongly with the likelihood of recidivism, or a defendant's "continuing danger." See U.S.S.G. Chapter 4 -- Part A, Introductory Commentary [criminal history factors are "consistent with the extant empirical research assessing correlates of recidivism and patterns of career

criminal behavior."] Since Congress was doubtless concerned with the future dangerousness of violent offenders, and since it adopted several aggravating factors directly related to this notion but refrained from promulgating the defendant's "continuing danger" as a factor to be weighed separately, it clearly did not intend that a non-statutory factor of the defendant's "future dangerousness " be permissible, whether it be vaguely alleged , as in this case, or broken down into components such as "specific threats of violence", "continuing pattern of violence", "lack of remorse" or "contemporaneous convictions for more than one murder".

Mr. Rudolph does not fall within any of the statutory aggravating factors that Congress promulgated to correlate with future dangerousness. Given the absence of the Congressionally chosen factors, the government cannot simply create a new aggravating factor meeting this same concern by alleging the general aggravating factor "future dangerousness." Congress implicitly rejected the use of such a broad aggravating factor and it cannot be adopted now by the government.

2. The only possible issue is danger while incarcerated.

Even if "future dangerousness" constituted a relevant, authorized non-statutory aggravating circumstance, the factor can satisfy the Fifth and Eighth Amendments only if it is interpreted to permit evidence that the defendant poses a continuing danger to the lives and safety of others while serving a sentence of life imprisonment without release. *United States v. Peoples*, 74 F. Supp. 2d 930, 932 (W.D. Mo. 1999); *United States v. Glover*, 43 F. Supp. 2d 1217, 1227 n. 6 (D. Kan. 1999). Under the 1994 federal death penalty statute, the jury has the option of sentencing the defendant "to death, to life imprisonment without possibility of release or some other lesser sentence." 18 U.S.C. §3593(e). The commission of a murder carries a base offense level of 43 under the United States Sentencing Guidelines, which translates into one sentence: "life" in prison. U.S.S.G. Ch. 5 Pt. A; Application

Note 3.

In *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995), *rh'g denied sub nom. United States v. Garza*, 77 F.3d 481, cert. denied, 519 U.S. 825 (1996), the defendant argued that the prosecution improperly relied on defendant's future dangerousness because it knew that anything less than a life sentence was unlikely. *Id.* at 1368. Under the provisions of the applicable death penalty law in Flores's case, the defendant could have received a sentence of less than life imprisonment even if the jury recommended a sentence of life imprisonment without possibility of release. 63 F.2d at 1367-68; 21 U.S.C. §848(k) & (l). Nonetheless, the Fifth Circuit, in dicta, explained that the government's future dangerousness evidence should be restricted to defendant's danger while in prison in any case where there is little likelihood that a defendant would ever be released. The Fifth Circuit rejected *Garza's* objection because the government focused its argument on the danger he would pose while in prison. *Flores*, 63 F.3d at 1368-69. The Fifth Circuit continued:

This does not mean that district courts should allow the government to freely hammer away on the theme that the defendant could some day get out of prison if that eventuality is legally possible but actually improbable. . . . If the court knows a twenty-year sentence is highly unlikely, it should in its discretion, preclude the government from arguing that the defendant may be free to murder again two decades hence. . . .

Id.

3. If every capital defendant is a danger in the future, then this factor is meaningless and should be stricken

In any case, it has become so routine for the Department of Justice since 1995 to allege the non-statutory aggravating circumstance of future danger as to make the factor worthless as a distinguishing criteria for the application of the death penalty. Furthermore, given the facilities available to the Bureau of Prisons (e.g., the "Supermax" facility in Florence, Colorado), any future danger can be neutralized by the Government. Thus, it does not constitute a rational basis on which to

impose the death penalty.

4. Government Alleges "Future Dangerousness" Based on No Evidence Relevant or Admissible to Prove Future Dangerousness in Prison

Even if Congress had intended to permit a broad "future dangerousness" aggravator, the "relevant" evidence permitted must serve to prove future dangerousness "in prison." The government vaguely alludes in the notice to "the capital offense charged in Count I...and the statutory and non-statutory aggravating factors" which, in addition to being improperly duplicative of the other aggravating factors and the charged crimes, also focus on defendant's actions outside of prison at the time of the alleged crimes. The facts of an alleged crime committed outside of prison are not relevant to prove "future dangerousness" in prison. *United States v. Peoples*, 74 F. Supp. 2d 930, 932 (W.D. Mo. 1999). "Future dangerousness" under the Federal Death Penalty Act cannot be measured in the same manner as if a defendant were to be "uncaged." *Id.* "[L]ife in prison without parole, a firmly fixed federal requirement, must mean that the focus of dangerousness analysis is on prison conditions." *Id.*; *United States v. Glover*, 43 F.Supp.2d 1217, 1227 n. 6 (D. Kan. 1999) ("prison staff and inmates have the same right to be protected from inmate killers as do persons who live and work in free society.").

The purported evidence the government asserts under the general heading "Future Dangerousness" is not relevant to prove future dangerousness in prison on the face of the pleadings. *United States v. Peoples*, 74 F.Supp.2d at 930. None of the alleged incidents on which the government purports to rely bear any relevance to the danger a defendant would pose in prison.

5. Reliance Upon A Notion of "Lack of Remorse" Violates Mr. Rudolph's Fifth and Sixth Amendment Rights and Permits Unreliable Jury Findings.

The notice cites "lack of remorse" as a component of the allegation of future dangerousness.

The death penalty Notice does not cite a single instance in which the defendant affirmatively demonstrated any lack of remorse. On its face, therefore, this factor is apparently based solely upon Mr. Rudolph's failure to admit that he committed the offenses charged, his silence in the face of the government's accusations, and his failure to make any expressions of remorse. Under these circumstances, use of "lack of remorse" as an aggravating "sub-factor" violates both Mr. Rudolph's Fifth Amendment right to remain silent and his Sixth Amendment right to trial because it imposes an impermissible penalty upon the exercise of those rights. *Lesko v. Lehman*, 925 F.2d 1527, 1543-45 (3d Cir. 1991). Moreover, use of lack of remorse as an aggravating consideration violates the Eighth Amendment because it is inherently unreliable. Accordingly, it should be disallowed

The Fifth Amendment provides that "No person ... shall be compelled in any criminal case to be a witness against himself" A criminal defendant thus has a right to remain silent in the face of accusation, and he may not be punished for exercising this right. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977)[government "may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself"]; *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)[defendant has right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence"]. A prosecutor's comment on the accused's silence is forbidden. *Griffin v. California*, 380 U.S. 609, 615 (1965).

Penalties on the exercise of the Sixth Amendment right to a "speedy and public trial" are also impermissible. The Second Circuit has applied the same analysis set forth in *Griffin*, *supra*, in a Sixth Amendment trial context. *Agard v. Portuondo*, 117 F.3d 696, 709-10 (2d Cir. 1997) ["*Griffin v. California*, 380 U.S. at 614, principles are appropriately applied to a case involving Sixth Amendment rights"].

In a capital case, permitting the jury to weigh the accused's lack of remorse against him, in deciding whether to impose the death penalty, substantially penalizes the exercise of his Fifth Amendment right to remain silent and Sixth Amendment right to trial. To make a sincere showing of remorse, after all, a defendant must first admit guilt of the capital offense with which he is charged and thereby waive his privilege against self-incrimination, in essence pleading guilty. To permit "lack of remorse" -- the absence of an admission of guilt and expression of contrition for it -- to be a factor weighing in favor of the death penalty directly permits the jury to punish the defendant for exercising his right not to admit guilt and go to trial. To burden a defendant's exercise of his rights under the Fifth and Sixth Amendments by making that exercise a basis for imposing the death penalty clearly violates the constitution. *United States v. Jackson*, 390 U.S. 570, 582-83 (1968).

This conclusion is entirely consistent with the general sentencing law in the federal courts. Insofar as remorse is considered in sentencing, it can, under current law, be the basis for leniency, but not for increasing punishment. The Second Circuit has clearly held, for example, that it is error for a court to enhance a defendant's punishment because he did not admit his guilt and went to trial. *United States v. Cruz*, 977 F.2d 732, 733-34 (2d Cir. 1992). And lack of remorse by itself is not a basis for an upward departure. *United States v. Whitehead*, 912 F.2d 448, 452 (10th Cir. 1990)[lack of contrition "should not normally be a factor justifying a departure"].³⁷ The court may, however, grant leniency for admissions of guilt evidencing sincere remorse by reducing punishment below the degree that would

³⁷ A defendant's lack of remorse for the commission of prior crimes, for which he has already been convicted and sentenced may be considered as part of the basis for an upward departure based a defendant's criminal history and his "propensity to commit future crimes." *United States v. Whitehead*, *supra*, 912 F.2d at 452. That is much different, however, from considering lack of remorse for commission of the instant offense. The "lack of remorse" in the former circumstances consists not in the failure to express contrition for commission of a crime, but rather in the repeated commission of similar crimes after having been caught and punished for them in the past. As simple evidence for a criminal history departure, this implicates no Fifth Amendment rights.

otherwise be imposed on the basis of "acceptance of responsibility." U.S.S.G. § 3E1.1; See, United States v. Cojab, 978 F.2d 341, 343 (7th Cir. 1992). Thus, remorse, the expression of contrition for the commission of a crime, may be considered in sentencing only as a factor permitting the reduction of a sentence below the level that would otherwise have been imposed. Its absence may not be considered as a basis for increasing a sentence, much less for imposing the penalty of death. Pope v. State, 441 So.2d 1073, 1078 (Fla. 1984)[because of danger to exercise of constitutional rights, "[a]ny convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor."]³⁸

Consideration of "lack of remorse" is unconstitutional as well for its disproportionate impact on innocent defendants. A defendant who is actually innocent will simply be unable to express remorse for doing something he did not do. Nonetheless, if wrongfully convicted, he will be more likely to be sentenced to death since there will always be this factor weighing against him. And it is no response to this to say that innocent defendants will never be sentenced to death. Since 1973, at least 69 persons have been released from death row after evidence of their innocence emerged. Richard C. Dieter, Innocence And The Death Penalty: The Increasing Danger of Executing the Innocent, July 1997 (sequel to a 1993 Staff Report of the Subcommittee on Civil and Constitutional Rights, Judiciary Committee, U.S. House Of Representatives).³⁹ Juries in death penalty cases should not be allowed to

³⁸ In light of the serious constitutional concerns underlying use of this aggravating factor, it is not surprising that a number of states prohibit its use. See, e.g., State v. Brown, 320 N.C. 179, 198-99, 358 S.E.2d 1, 15 (1987); McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); People v. Thompson, 45 Cal. 3d 86, 123-24, 753 P.2d 37, 59-60, 246 Cal. Rptr. 245, 267-68 (1988).

³⁹ Such events do not occur only in the South. Last year, the New York Times reported that two men who had been convicted of murdering a police officer in Manhattan five years ago, a crime currently punishable by death, had just been

weigh a factor in favor of death that will apply in the case of every innocent person, thus making the innocent more likely to be executed.

This does not mean, of course, that a defendant's remorse plays no role at all in sentencing or that the government may never argue that the defendant lacks remorse. For example, where a court grants a reduction of sentence for "acceptance of responsibility," it may determine the degree of that reduction based on an assessment of the relative level of the defendant's remorse. *United States v. Jones*, 997 F.2d 1475, 1476-1480 (D.C. Cir. 1993)(reh. en banc); *United States v. Jacobson*, 15 F.3d 19, 23 (2d Cir. 1994). Similarly, the government may argue that a defendant lacks remorse to counter his claim that his remorse constitutes a factor in mitigation. And, as stated, to the extent the "lack of remorse" in question is shown only by serious recidivism, it may be considered as part of an enhancement for excessive criminal history or future dangerousness. See n. 16, supra. But, in the circumstances here, the government may not constitutionally rely on simple lack of remorse to enhance the sentence above its usual level, and it especially may not do so when the enhancement the government seeks is the death penalty. See *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) [death sentence "cannot be predicated ... on 'factors that are constitutionally impermissible'"], quoting *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

The "lack of remorse" factor also violates the Eighth Amendment because, in a capital prosecution, there is a "heightened need for reliability," and allowing the jury to place lack of remorse on the scales in favor of death creates an unacceptable risk that the defendant's sentence will not be reliably obtained, in violation of the Eighth Amendment and principles of due process of law. In *Pope v. State*, 441 So. 2d 1073 (Fla. 1984), the Florida Supreme Court barred evidence of a defendant's lack

exonerated. A major part of the original evidence against the two men had been the confession of one. David M. Halbfinger, Records Detail a False Murder Confession, N.Y. Times, Jan. 7, 1998 at B1.

of remorse as aggravation in a penalty phase of a capital case to avoid just such "mistaken" sentences.

In doing so, it noted:

"Unfortunately, remorse is an active emotion and its absence, therefore, can be measured or inferred only from negative evidence. This invites the sort of mistake which occurred in the case now before us -- inferring lack of remorse from the exercise of constitutional rights."

441 So. 2d at 1078.⁴⁰ In *United States v. Davis*, 912 F.Supp. 938 (E.D. La. 1996), the court also found

lack of remorse an unreliable factor:

"Lack of remorse is a subjective state of mind, difficult to gauge objectively since behavior and words don't necessarily correlate with internal feelings. In a criminal context, it is particularly ambiguous since guilty persons have a constitutional right to be silent, to rest on a presumption of innocence and to require the government to prove guilt beyond a reasonable doubt.

Id. at 946. Because it is so "ambiguous" and difficult to assess, the lack of remorse factor results in an impermissible degree of unreliability in a death penalty proceeding and is accordingly an impermissible aggravating factor.

Given the constitutional infirmities of this aggravating consideration, the unreliability it injects into the proceeding, and its duplication of other aggravating factors, it is not surprising that a number of courts have stricken it from a capital case. In *United States v. Davis*, for example, the court prohibited the assertion of "lack of remorse" as an "independent nonstatutory aggravating factor" because, on the facts there, it was difficult to assess and undermined the defendant's Fifth and Sixth

⁴⁰ Even in non-capital cases, some state courts preclude evidence of lack of remorse to enhance a defendant's sentence where the defendant has entered a denial of guilt. See *Arizona v. Tinajero*, 935 P.2d 928, 935 (Az. Ct. App. 1997) ["When a convicted person maintains his innocence through sentencing, as Tinajero did here, his failure to acknowledge guilt 'is irrelevant to a sentencing determination' and 'offends the Fifth Amendment privilege against self-incrimination.'" citation omitted]; *People v. Holguin*, 213 Cal.App.3d 1308, 1319, 262 Cal. Rptr. 331, 337 (1989)[defendant's lack of remorse may not be used as a sentencing factor where the defendant has denied guilt and the evidence of guilt is conflicting].

Amendment rights. 912 F.Supp. at 946.⁴¹ In *United States v. Walker*, 910 F.Supp. 837, 855 (N.D.N.Y. 1995), the court held that highly prejudicial statements that the government claimed showed lack of remorse, but that were subject to competing inferences, could not be the basis for an independent aggravating factor because in this context they were much more prejudicial than probative and because of the "triviality" of the government's arguments, which would "not bear the weight of being singled out ... and presented to the jury as non-statutory aggravating factors."⁴² Finally, in *United States v. Nguyen*, 928 F.Supp. 1525 (D. Kan. 1996), the court denied a motion to strike this aggravator, but cautioned the government that its evidence must be "more than mere silence," must be relevant, must be reliable, and "its probative value must outweigh any danger of unfair prejudice." *Id.* at 1542. The bare allegation made by the government in this case cannot meet the standards set by the Constitution or by these cases, and this Court should prohibit use of lack of remorse as a component of any aggravating factor in this case.

6. The Sub-Factor of "Low Rehabilitative Potential" Must Be Stricken Because It Is Not a Valid Reason to Sentence a Person to Death, Rather than Life Imprisonment

The low potential for rehabilitation factor should not be used at all as an aggravating circumstance, even as part of another factor, because it is not a valid reason to sentence a person to death, rather than life imprisonment. A defendant's potential for rehabilitation and adjustment has

⁴¹ The court permitted the government to show evidence of lack of remorse, other than the defendant's silence, as part of its "future dangerousness" aggravator. 912 F.Supp. at 946.

⁴² In these cases, the government had at least specified affirmative acts by the defendant that it claimed evidenced lack of remorse. *United States v. Davis*, 912 F.Supp. 938, 946 (E.D. La. 1996); (defendant expressed "jubilation" over the death of the victim); *United States v. Walker*, 910 F.Supp. 837, 855 (N.D.N.Y. 1995) (defendant stated in jail that he had "killed the motherfucker"). The government has not done even that here.

been held to be a proper mitigating factor. See *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (Florida statute erred in prohibiting consideration of defendant's non-statutory mitigating evidence, including potential for rehabilitation). Evidence of a defendant's lack of rehabilitative potential would be admissible in the appropriate case to rebut a defendant's proposed mitigating factor. But the absence of mitigating evidence of defendant's potential to be rehabilitated cannot also be used as a basis for finding an aggravating factor. See e.g., *People v. Bonin*, 46 Cal. 3d 659, 700, 250 Cal. Rptr. 687, 709, 758 P.2d 1217 (1988) (absence of mitigating evidence does not constitute an aggravating factor); *People v. Siripongs*, 45 Cal. 3d 548, 583, 247 Cal. Rptr. 729, 750, 754 P.2d 1306 (1988) (same), cert. denied, 488 U.S. 1019 (1989). An analogy may help illustrate this principle further: the government may be able to present evidence that a defendant did not suffer from any mental illness to rebut a defendant's purported mental health mitigating factor, but the government could not use evidence of a defendant's lack of mental illness as an aggravating factor. See *Zant v. Stephens*, 462 U.S. 862, 885 (1986)(constitutionally impermissible to "attach[] the 'aggravating' label . . . to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness.").

In fact, Congress has declared that imprisonment is not intended to promote rehabilitation. 18 U.S.C. §3582(a)("recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation"). Given that rehabilitation is not a proper purpose of imprisonment, it necessarily follows that a defendant's "low potential for rehabilitation" cannot be a valid justification for not choosing a sentence of life imprisonment. The prosecution's attempt to classify a matter that is irrelevant to the life or death decision as an aggravating factor violates the Eighth Amendment and Due Process Clause. See *Zant v. Stephens*, 462 U.S. at 885 (death penalty statute may not "attach[] the aggravating label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process").

Even if this factor was not invalid for other reasons, it is unconstitutionally vague and promotes an arbitrary, whimsical decision in selecting execution or life imprisonment. "Rehabilitative potential for what?" *United States v. Davis*, 912 F. Supp. 938, 946 (E.D.La. 1996). What does "low potential" for rehabilitation mean and how does it differ from "medium" potential. "Low potential" fails to provide sufficiently clear, objective standards to guide the jury in its penalty determination and pass constitutional scrutiny. Similarly what does "rehabilitation" encompass behind prison walls? To be a "model citizen," to not violate BOP regulations or the law, or to not kill again?

The "low potential" for rehabilitation must be stricken even though it is alleged only as a part of the future dangerousness factor, particularly in regard to a sentence of life without release. The government has cited no evidence of the defendant's "low rehabilitative potential". The government's Notice provides no meaningful notice of what this aggravating circumstance means or the evidence on which it will base it.

7. The factor must be stricken because it attempts to lessen the government's burden on the "elements" of the allegation of future dangerousness

The FDPA requires the government to prove aggravating factors beyond a reasonable doubt, to the unanimous satisfaction of a jury. 18 U.S.C. § 3593(c) and (d). In the notice of aggravating factors, the government has alleged the following:

The defendant, Eric Robert Rudolph, *is likely* to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of "others."

Parsing this allegation, there appear to be three components: (1) future acts of criminal violence; (2) amounting to a continuing and serious threat; (3) to the lives and safety of "others". Threats to commit violence aren't part of the allegations. Moreover, the violence that Mr. Rudolph is "likely" to commit has to amount to a "serious threat" to the "lives and safety" of others interacting

with him in the context of imprisonment for this factor to have any meaning.

The defense also objects to the government being permitted to prove, beyond a reasonable doubt, that something is "likely." How can something be "likely" beyond a reasonable doubt? If this aggravating factor is to remain in the case at all, it must be recast to hold the government to proving, beyond a reasonable doubt, that Mr. Rudolph will, unless executed, commit serious acts of violence in the future.

8. The factor must be stricken because it is based on highly unreliable predictions of future dangerousness

Predications of future dangerousness are notoriously unreliable. This is so whether the prediction is attempted by an expert or a layperson. In this case, the government proffers no expert testimony on the issue but, instead, will rely upon a group of 12 lay persons to decide whether Mr. Rudolph will "commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of others"

Based on the current state of the "science" of predicting future violence, it is doubtful that expert testimony on this subject would survive a *Daubert* challenge. As pointed out in the opening sentences of a very recent law review article on this topic:

For nearly twenty years we have known that psychiatrists cannot predict whether a person who has committed a violent act will be violent in the future. Neither can lay people. The very best anyone can do is speculate. Even the most scientific examinations based on a thorough examination, diagnosis of mental symptoms, past patterns of behavior, and probalistic assessment are wrong nearly as often as they are right. The most common courtroom predictions – frequently based solely on hypotheticals – are wrong twice as often as they are right.

Erica Beecher-Monas, Edgar Garcia-Rill, "Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World," 24 *Cardozo L.Rev.* 1845, 145-46 (May 2003) (footnotes omitted). The

article also points out an interesting congruence: generally speaking, experts and lay people and clinicians had few differences of opinion about assessments of dangerousness, "and that neither had much accuracy." *Id.* at 145 n.2, quoting Vernon L. Wuinsey, et al., Violent Offenders: Appraising and Managing Risk 62 (1998). See also, John Monahan, "Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility," 57 Wash. & Lee L.Rev. 901 (2000).

If, as the literature suggests, neither professionals nor lay people "get it right" when it comes to an assessment of future dangerousness, a sentence of death predicated on a finding of future danger would be the product of what amounts to little more than a guessing game. Accordingly, unless the government is prepared to demonstrate at a hearing, or otherwise, that a jury of lay persons is capable of accurately distinguishing those defendants convicted of capital murder who present a future danger from those who do not, this court should strike the factor from the notice and bar the government from endeavoring to prove future dangerousness.

9. Conclusion

Mr. Rudolph will not here repeat the arguments made above about the vagueness of the concept of future danger and of the concomitant risk that a jury might consider any defendant willing to take a life as potentially a future danger. However, it is worth reiterating that, ruling in a similar context in *United States v. Gilbert*, 120 F.Supp.2d 147 (D.Mass. 2000), Judge Ponsor made the following observations:

Threatening words and warped bravado, without affirmative acts, are simply too slippery to weigh as indicators of character; too attenuated to be relevant in deciding life or death; and whatever probative value they might have is far outweighed by the danger of unfair prejudice and confusion of the issues.

Id. at 155.

The same is true in this case, where absolutely no specific acts are alleged in support of this factor.

It is defendant's core position that the ability to predict future dangerousness is beyond the ken of juries and, therefore, any finding of future dangerousness would fail the basic test of a penalty trial, i.e. that the conclusions reached in support of a death sentence are based on reliable evidence. *Ford v. Wainwright*, 477 U.S. 399 (1986); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *United States v. Fell*, 360 F.3d 135, 142 (2d. Cir. 2004). On a second and more basic level, it appears that the evidence offered by the government falls far short of establishing that Mr. Rudolph will in the future commit "criminal acts of violence . . . that would be a continuing and serious threat to the lives and safety of prison officials and inmates" This factor should be dismissed.

G. The Victim Impact Non-Statutory Aggravating Factor Is Impermissible

1. The factor as alleged is unconstitutionally vague

The Notice alleges as a second non-statutory aggravating factor that " The Defendant, ERIC ROBERT RUDOLPH, caused injury, harm and loss to the family of Robert D. Sanderson because of the victim's personal characteristics as an individual human being and the impact of the death upon the victim's family. The murder of Robert D. Sanderson has caused the victim's family extreme emotional suffering, and the victim's family has suffered severe and irreparable harm. The Defendant, ERIC ROBERT RUDOLPH, caused injury, harm and loss to Emily Lyons and her family because of the victim's personal characteristics as an individual human being. The injury of Emily Lyons has caused her and her family extreme emotional suffering, and severe and irreparable harm."

This allegation that unspecified members of the family of the alleged victims has suffered " injury, harm and loss " is so general as to violate due process. It fails to state which members of

which family have suffered, the nature of their suffering, whether mental, physical, or emotional, or the manner, time and place in which the suffering manifested itself. The mere recitation of such a general concept does not provide sufficient notice under the standards long set out by the Supreme Court to comply with due process. See, *United States v. Bin Laden*, 126 F. Supp. 2d 290, 304 (S.D. N.Y. 2001)(“An oblique reference to victims' ‘injury, harm, and loss,’ without more, does nothing to guide Defendants' vital task of preparing for the penalty phase of trial.”); *United States v. Cooper*, 91 F.Supp.2d 90, 111 (D.D.C.2000)(requiring government to include “more specific information concerning the extent and scope of the injuries and loss suffered by each victim, his or her family members, and other relevant individuals, and as to each victim's ‘personal characteristics’ that the government intends to prove”) *United States v. Glover*, 43 F.Supp.2d at 1224(“The court finds that the defendant is entitled to greater specificity as to the ‘serious physical and emotional injury the government claims the defendant caused [the victim].”); see also, *United States v. Illera Plaza*, 179 F. Supp. 2d 464, 475 (E.D. Pa. 2001)(“The government suggests no reason why, in this case, it would be unable to produce a summary of its victim impact evidence similar to the ones required by these three courts. Therefore, in order to allow the defendants to adequately prepare responses to sentencing phase evidence, and in order to allow the court to determine if a pre-sentencing hearing will be necessary to review that evidence, the government will be ordered to submit an outline of its proposed victim impact evidence.”). As pled, this factor must be dismissed on vagueness grounds.

2. The Victim Impact Non-Statutory Aggravating Factor Alleged in Nearly Every Capital Prosecution and in the Notice Does Not Sufficiently Narrow the Class of Murderers for Whom the Death Penalty is Available

In addition, the factor, as charged, must be dismissed because it does not meet the statutory criteria for a non-statutory aggravator – that it be an “aggravating” circumstance “other” than the crime

itself and the remaining aggravating circumstances. 18 U.S.C. § 3592(c) [jury may find "any other aggravating factor for which notice has been given" (emphasis supplied)]. All that this alleged aggravating factor cites is that there was some "injury, harm and loss" which caused "extreme emotional suffering, and severe and irreparable harm." But every murder of a family member causes "severe" and "extreme" harm to the family, and that harm is in every case irreparable, since a death has occurred. This aggravating factor does not add anything to the crime or to the other aggravating factors charged.⁴³ It is thus, as pled, not even "aggravating" since it does not make this crime any "worse" than every other murder. Webster's Third New International Dictionary 41 [defining "aggravate" to mean "to make worse"]. But see, *Jones v. United States*, 428 U.S. 262 (1999).

This factor does nothing to narrow the class of murders for whom the death penalty is available since victim impact evidence automatically flows from the commission of any offense under §3591. At the evidentiary hearing Mr. Rudolph requests on this subject, he will show that the government alleges this factor in 4 of 5 capital prosecutions.⁴⁴ Allowing the prosecutor to select non-statutory aggravating factors relating to the circumstances of the crime on a case-by-case basis means that there is no murder for which such a non-statutory factor could not be alleged. In essence, all the prosecutor is alleging is that a murder was committed. This non-statutory factor must, therefore, be dismissed as it does nothing to narrow the class of persons eligible for the death penalty. The factor fails to

⁴³ As members of the Supreme Court emphasized in Payne v. Tennessee, it is foreseeable in every murder that the victim will have a family that will suffer harm. See Payne, 501 U.S. at 838 ["Every defendant knows, if endowed with the mental competence for criminal responsibility, ... that the person to be killed probably has close associates, 'survivors,' who will suffer harms and deprivations from the victim's death."] (Souter and Kennedy, JJ., concurring).

⁴⁴ The Federal Death Penalty Resource Project has evidence to show that of 116 defendants authorized after 1995, 93 (80%) faced an allegation of the aggravating circumstance of victim impact.

"channel the sentencer's discretion by 'clear and objective' standards that provide 'specific and detailed guidance," and that 'make rationally reviewable the process of imposing a sentence for death.'" *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990)(quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)).

If the system of non-statutory aggravating factors is to be held constitutional at all, it is because the trial court exercises its authority to keep the factors within statutory, constitutional bounds. See *United States v. Allen*, 247 F.3d at 758-759; *United States v. McVeigh*, *supra*, 944 F.Supp. 1478, 1486 (trial court has the authority to exercise control over the nonstatutory factors on which the government seeks to rely). The minimum standard that the court should apply is that the factor, as pled, is both "aggravating" and "other" than the factors pled in the indictment or the death notice. 18 U.S.C. §3592(c). See also *United States v. Cuff*, *supra*, 38 F.Supp.2d 282, 288 [use of a firearm is not a proper non-statutory aggravator because "(a) predicate to fulfilling the constitutional conditions for an aggravating factor is that the disputed factor be an aggravating factor in the first place."]

The government is entitled to offer evidence of the harm to the family, of course, to the extent it is relevant. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); see 18 U.S.C. §3593(a). And, in a case in which the government pleads a factor that is in fact "aggravating," that is, "worse" than just murder, Congress has provided that it may include this as a factor. 18 U.S.C. §3593(a) ["factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the ... victim's family"]. But Congress has not stated that this is a valid factor in every murder. Any such factor pled must meet the rest of the explicit criteria of the statute -- that the factor be "other" and that it be "aggravating." In this case, the government has failed to meet this minimum pleading requirement, and the factor must be dismissed.

Finally, it should be noted that *Payne v. Tennessee* did not consider the circumstances under which the use of "victim impact" evidence as an independent factor aggravating a murder and counted

separately in a weighing statute, is permissible.⁴⁵ If the harm shown by victim impact evidence is simply the harm implicit in any murder, it violates the Eighth Amendment, as well as the statute, to permit the jury to weigh it once again in deciding whether to impose the death penalty.

3. The Supreme Court's Decision in Payne Does Not Contemplate The Introduction of Evidence About the Impact On A Surviving Victim of A Non-Capital Crime

The government's allegation that "(t)he Defendant, ERIC ROBERT RUDOLPH, caused injury, harm and loss to Emily Lyons and her family because of the victim's personal characteristics as an individual human being. The injury of Emily Lyons has caused her and her family extreme emotional suffering, and severe and irreparable harm" raise a separate issue with respect to victim impact evidence. Neither *Payne v. Tennessee* nor any other decision of the United States Supreme Court addresses the issue of whether victim impact evidence relating to a different victim may be introduced in the penalty phase of a capital trial consistent with either the Eighth Amendment or the due process clause. The reasoning in *Payne* indicates that evidence concerning the impact of the capital crime on Emily Lyons is not a proper aggravating factor.

In *Payne v. Tennessee*, the Supreme Court objected to *Booth v. Maryland*, 482 U.S. 496, because its prohibition on victim impact evidence "barred [the state] from either offering 'a glimpse of the life' which defendant 'chose to extinguish,' [citation omitted], or demonstrating the loss to the victim's family and to society which have resulted *from the defendant's homicide*." (*Payne v. Tennessee*, supra, 501 U.S. at p. 822.) (emphasis added). This reasoning suggests that the scope of

⁴⁵ *Payne* considered only an evidentiary question, whether two categories of impact evidence -- "information revealing the individuality of the victim and the impact of the crime on the victim's survivors" -- were admissible at a death penalty hearing. 501 U.S. at 835 (Souter, J., concurring).

permissible victim impact evidence does not extend beyond the effects of the capital murder.

The Supreme Court's decision in *Payne* alters the balance and permit some evidence of the life the defendant has extinguished and the impact of this loss on the victim's family. The relevant weights on these scales are the defendant's background and other mitigating evidence and some information about the person who has been lost to society and to his family. The admission of the testimony of a surviving victim alters the balance, unpredictably and unfairly, in favor of death and undermines the reliability of the penalty decision. (*Woodson v. North Carolina*, supra, 428 U.S. at p. 305; *Gardner v. Florida* (1976) 428 U.S. 908.) The defendant must attempt to persuade a jury that, notwithstanding the terrible acts for which the jury has already found him guilty, there are facts about his life which should convince the jury to spare his life. The introduction of live testimony from surviving victims about the impact upon each of those victim's lives will make it impossible to maintain the rational decision making process about life and death issues required under the United States Constitution in order to justify the imposition of the death penalty.

This case exemplifies this point. The jury in the penalty phase of this case will be called upon to decide whether Mr. Rudolph should receive a death sentence or life . The decision about the level of punishment defendant is to receive for any conviction of the alleged attempted murder of Emily Lyons was delegated by law to this Court and not the jury. However, the introduction of the highly inflammatory evidence regarding Ms. Lyons' horrific injuries will encourage the jury to impose a death sentence for this aggravated crime. Testimony from her and her family will open the penalty phase in a manner bound to inflame the jury deciding defendant's fate. The testimony will not simply give the jury a "glimpse of the life" the defendant has chosen to extinguish. (*Payne v. Tennessee*, supra, 501 U.S. at p. 825.) Instead, the prosecutor will be able to use victim impact evidence to convince the jury to give defendant the death penalty not just because of Mr Sanderson's death but also

because of the attempted murder of Ms. Lyons and the pain and suffering caused by her injuries. The victim impact testimony in this area will improperly diverted the jury from their statutorily and constitutionally mandated task. Cf., *Spears v. Mullin*, 343 F.3d 1215 (10th Cir. 2003)(right to a fundamentally fair sentencing proceeding was violated by the prosecutor's introduction of gruesome photos of the crime scene at the penalty trial); *People v. Love* (1960) 53 Cal.2d 843 (same).

Finally, Section 3593(a) is clear that what is authorized under the statute is victim impact evidence about “the offense”, which in the context of Chapter 228 to refer to the capital eligible offense, not a non-capital crime.

Therefore, for all of the foregoing reasons, the victim impact aggravating factor alleged in the notice must be dismissed in its entirety or, at the very least, as it relates to Ms. Lyons.

VIII.
AT A MINIMUM, THE COURT SHOULD ORDER A PRE-TRIAL EVIDENTIARY HEARING TO RULE ON THE SUFFICIENCY OF THE AGGRAVATING FACTORS.

At a minimum, an evidentiary hearing is necessary to allow this Court to rule prior to trial on the sufficiency of the alleged aggravating circumstances, particularly the unsupported claims that there was substantial planning and premeditation, that the killing and attempted murder had an impact on the victim’s family, and that the defendant constitutes a future danger. These aggravating circumstances are not supported by the evidence.

The court’s role at this stage of the proceedings is accurately stated in *United States v. Frank*, supra, 8 F.Supp.2d 253, 265:

(t)he FDPA ensures that the Government will not violate...constitutional and statutory rules in any particular prosecution by requiring that a defendant have notice of the factors on which the government intends to rely, and by providing a gate-keeping role for the district court. Thus, the Government may not employ simply any non-statutory factor of its choice. Instead, having chosen non-statutory factors it believes appropriate

to the case, the Government must submit such factors to the defendant and to the court. If the court determines that any of the factors are inappropriate or run afoul of the Supreme Court's death penalty jurisprudence, the factor will be excluded.

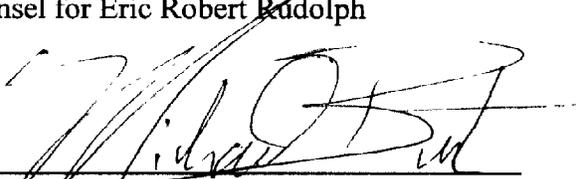
Although the court in *Frank* declined to do so, there is authority from other jurisdictions respecting a trial court's power to determine prior to trial that an alleged aggravating circumstance is not supported by the evidence. See *State v. Ogden*, 880 P.2d 845, 849-850 (N.M. 1994) [Supreme Court of New Mexico reversed a trial court's dismissal of the aggravating circumstance noticed by the state, but approved the procedure by which trial courts may conduct such a pretrial review]. See *State v. McCrary*, 478 A.2d 339 (N.J. 1984); *State v. Watson*, 312 S.E.2d 448 (N.C. 1984); *Ghent v. Superior Court*, 153 Cal. Rptr. 720 (Cal. Ct. App. 1979); See generally, *Smith v. Commonwealth*, 634 S.W.2d 411, 413-414 (Ky. 1982) [trial judge was not "required to entertain an exercise in futility and preside over a hearing of any duration when it will ultimately" decide that a death penalty recommendation would be disproportionate]; *Perry County Fiscal Court v. Commonwealth* 674 S.W.2d 954, 956 (Ky. 1984) ["a trial court has the authority to relieve the jury of any consideration of the death penalty where it has determined prior to the penalty stage of the trial that such penalty would be unconstitutionally disproportionate or for an equally significant reason"].⁴⁶

⁴⁶ The Court should also hold a hearing to determine whether the non-statutory aggravating factors are being applied by the government consistently, as required by the Eighth Amendment.

CONCLUSION

WHEREFORE, for any or all of the foregoing reasons, Mr. Rudolph requests this Court to enter an order dismissing the Notice of Special Findings in the superseding indictment and dismissing the Government's Notice of Intent to Seek the Death Penalty.

Respectfully submitted,
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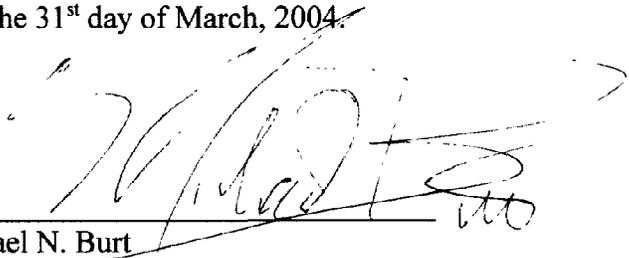
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CERTIFICATE OF SERVICE

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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This the 31st day of March, 2004.



Michael N. Burt