

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

2/3 FILED
04 APR 26 PM 4:13
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES OF AMERICA)
)
 v.) CR-00-N-0422-S
)
 ERIC ROBERT RUDOLPH,)
)
 _____)

**OMNIBUS MEMORANDUM OF THE UNITED STATES IN RESPONSE TO
DEFENDANT'S MOTION TO STRIKE THE DEATH PENALTY; MOTION TO
DISMISS NOTICE OF SPECIAL FINDINGS AND GOVERNMENT'S NOTICE OF
INTENT TO SEEK THE DEATH PENALTY AND FOR OTHER APPROPRIATE
RELIEF; AND MOTION TO DISMISS NOTICE OF SPECIAL FINDINGS AND
GOVERNMENT'S NOTICE OF INTENT TO SEEK THE DEATH PENALTY FOR
UNTIMELY FILING OF DEATH NOTICE**

ALICE H. MARTIN
UNITED STATES ATTORNEY

TABLE OF CONTENTS

BACKGROUND1

INTRODUCTION1

ARGUMENT2

I. The federal death penalty does not operate in an unconstitutionally arbitrary and capricious manner because it is rarely sought and imposed. (Defendant’s Motion to strike the death penalty, [hereinafter Capital Motion One] III. A)2

II. The alleged inability to discern a “principled basis” for distinguishing cases in which federal sentencing juries have imposed death or not does not render the FDPA unconstitutional. (Capital Motion One, III. B). 6

III. The defendant’s claim that continued enforcement of the FDPA will lead to the unconstitutional execution of a meaningful number of innocent people is without merit. (Capital Motion One, III. C). 9

IV. The relaxed evidentiary standard of the FDPA does not render the statute unconstitutional. (Capital Motion One, III. D) 17

A. There is a strong preference in federal case law favoring the admission of relevant evidence during the penalty phase of capital trials21

B. As the Supreme Court has made clear, relaxed evidentiary standards do not preclude courts from excluding constitutionally impermissible evidence at capital sentencing proceedings24

C. In enacting Section 3593(c), Congress exercised its lawful authority to adopt evidentiary rules for federal judicial proceedings.25

D. Section 3593(c) is constitutional, as it accords trial courts sufficient authority to exclude constitutionally improper evidence 27

E. Ring does not cast doubt on the constitutionality of section 3593(c).29

F. In the alternative, the FDPA need not be struck down in its entirety to cure the perceived defect in Section 3593(c) 33

V.	The FDPA is not an unconstitutional delegation of legislative authority. (Capital Motion One, III. E)	36
VI.	A mandatory proportionality review is not constitutionally required by the Eighth Amendment. (Capital Motion One, III. F)	39
	A. The Supreme Court has held that a proportionality review is not required in a death penalty case	39
	B. A proportionality review is not constitutionally required in a death penalty case under the FDPA in which non-statutory aggravating factors are considered.	40
VII.	The FDPA’s provisions for appellate review are constitutional. (Capital Motion One, III. G).	41
VIII.	The FDPA does not violate the Eighth Amendment prohibition of cruel and unusual punishment and is not a <i>per se</i> denial of due process . (Capital Motion One, III. H)	45
IX.	Death by lethal injection is not cruel and unusual punishment. (Capital Motion One, III. I)	46
X.	<u>Ring v. Arizona</u> did not render the FDPA unconstitutional (Defendant’s Motion to Dismiss Notice of Special Findings and Government’s Notice of Intent to Seek the Death Penalty and for Other Appropriate Relief. [hereinafter, Capital Motion Two], II, A-L)	46
	A. The <u>Ring</u> decision.	47
	B. The FDPA remains facially constitutional despite <u>Ring</u>	51
	C. The Government has properly included special findings in the Superseding Indictment	56
	1. The Government did not unconstitutionally “rewrite” the FDPA by superseding the Indictment	57
	2. No judicial “rewriting” of the FDPA is necessary	58
	3. The form of the superseding indictment is valid	59
	D. The FDPA’s relaxed evidentiary standard remains constitutional.	63

E.	No presumption of innocence problem exists	64
XI.	The Notice of Special Findings in the Superseding Indictment and the Death Penalty Notice Provide Sufficient Notice to the Defendant (Capital Motion Two, III, A-B)	66
A.	The Notice is sufficient	66
B.	Defendant’s motion for a bill of particulars should be denied	71
XII.	Alleging and Proving Multiple Gateway Intent Factors is Permissible (Capital Motion Two, IV)	75
A.	The assertion of all four mental states provides a narrowing function	75
B.	The allegation of multiple mental states does not promote a skewed consideration of the weighing process, because under the FDPA intent factors are not aggravating factors to be weighed against mitigating factors	79
C.	Defendant’s argument that he is without notice of requisite intent is without merit.	81
XIII.	The Statutory Aggravating Factors are Valid (Capital Motion Two, V, A-D)	82
A.	Death during commission of another offense.	82
B.	Grave risk of death to other persons	83
C.	Substantial planning and premeditation	84
D.	Kill or attempt to kill more than one in single criminal episode	85
XIV.	The Heinous, Cruel, or Depraved Factor Should be Dismissed (Capital Motion Two, VI)	86
XV.	The Non-Statutory Aggravating Factors are Valid (Capital Motion Two, VII, A-G)	86
A.	Non-statutory aggravating factors are valid	86
B.	Use of non-statutory factors is not an ex-post facto violation	90

C.	No statutory inconsistency precludes use of non-statutory aggravating factors	92
D.	The defendant is not entitled to a hearing to determine nationwide Consistency in use of non-statutory aggravators	94
E.	The future dangerousness factor is valid	94
F.	The victim impact factor is valid	96
XVI.	The Defendant is not Entitled to a Pretrial Hearing on the Sufficiency of the Evidence of the Aggravating Factors (Capital Motion Two, VIII)	99
XVII.	The Government’s Notice of Intent to Seek the Death Penalty was Timely Filed (Defendant’s Motion to Dismiss the Notice of Special Findings and Government’s Notice of Intent to Seek the Death Penalty for Untimely Filing of Death Notice)	101
A.	Background facts and dates.	101
B.	The law	102
1.	To establish that a death notice was not filed a reasonable time before trial, a defendant must make a post-trial showing of prejudice; the pre-trial remedy for inadequate preparation time is the grant of a continuance, which lies in the sound discretion of the trial judge.	103
2.	The Court in <u>Ferebe</u> erred in concluding that 18 U.S.C. § 3593(a) embodies a prophylactic rule that requires dismissal of death notice if it is not filed a reasonable time before trial	106
3.	Conclusion	110
	CONCLUSION	110

BACKGROUND

The United States of America, by and through its undersigned counsel pursuant to Title 18, United States Code, Section 3593(a), has notified the Court and the Defendant, ERIC ROBERT RUDOLPH, in the above-captioned case that the United States believes the circumstances of the offense charged in Count One of the Superseding Indictment are such that, in the event of the Defendant's conviction, a sentence of death is justified under Chapter 228 (Sections 3591 through 3598) of Title 18 of the United States Code, and that the United States will seek the sentence of death for this offense: the malicious damage, by means of an explosive, to a building and property used in an activity affecting interstate and foreign commerce, which prohibited conduct 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), which carries a possible sentence of death.

INTRODUCTION

Comes now the United States of America, by and through its undersigned counsel, and hereby responds to defendant Rudolph's three death penalty motions: motion to strike the death penalty, motion to dismiss notice of special findings and government's notice of intent to seek the death penalty and for other appropriate relief, and motion to dismiss notice of special findings and government's notice of intent to seek the death penalty for untimely filing of death notice.

As a threshold matter, the government notes that virtually all the arguments raised by the defendant have been uniformly rejected by the United States Supreme Court, courts of appeals, and district courts. See e.g. Jones v. United States, 527 U.S. 373 (1999); United

States v. Frank, 8 F. Supp. 2d 253, 260-61 (S.D.N.Y. 1998)(collecting ‘growing body’ of federal cases considering constitutional challenges to the two federal death penalty acts and “without exception” upholding their constitutionality); United States v. Sampson, 275 F.Supp.2d 49 (D. Mass. 2003); United States v. Regan, 228 F. Supp. 2d 742 (E.D. Va. 2002); United States v. Miner, 176 F. Supp. 2d 424 (W.D. Pa. 2002); United States v. Hammer, 25 F. Supp. 2d 518 (M.D. Pa. 1998); United States v. McVeigh, 944 F.Supp. 1478 (D. Colo. 1996).

ARGUMENT

I. The federal death penalty does not operate in an unconstitutionally arbitrary and capricious manner because it is rarely sought and imposed. (Motion to strike the death penalty [hereinafter Capital Motion One], III. A)¹

The defendant asserts that because the death penalty is sought and imposed in so few cases, the Federal Death Penalty Act [hereinafter FDPA] operates arbitrarily and capriciously in violation of the Eighth Amendment. To support this argument, the defendant primarily relies upon language from the concurring opinions in Furman v. Georgia, 408 U.S. 238 (1972). This argument is entirely meritless and has been rejected in at least three other federal cases.

Furman was a per curium decision in which the Supreme Court struck down state death penalty statutes. Although the numerous concurring opinions offer different analytical approaches, the Court subsequently explained the fundamental principle of Furman: where discretion is afforded to a *sentencing body*, that discretion must be suitably directed and

¹ Parenthetical inserts after each heading refer the Court to the portion of the defendant’s motion to which the section is intended to respond.

limited. See McCleskey v. Kemp, 481 U.S. 279, 302 (1987) citing Gregg v. Georgia, 428 U.S. 153, 189 (1976). Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant. McCleskey, 481 U.S. at 307. The statutes at issue in Furman offered no such guidance to the sentencing body and were therefore unconstitutional. In contrast to what the defendant argues, the Furman court was not concerned with the exercise of prosecutorial discretion to seek the death penalty but with the lack of guidance to sentencing juries or judges to determine the appropriate punishment. This lack of guidance created the possibility that the penalty would be imposed capriciously or, even worse, in a discriminatory manner.

In this case, the defendant has not attempted to demonstrate that the decision to seek the death penalty was motivated by any improper consideration or motive on the part of the government. Rather, he simply cites statistics to establish that the death penalty is rarely sought and obtained. This type of outcome analysis was explicitly rejected in Gregg v. Georgia, 428 U.S. at 199:

The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

Furthermore, in McCleskey, 481 U.S. at 307 n. 28, the Court also noted, “The Constitution is not offended by inconsistency in results based on the objective circumstances of the crime.”

The defendant’s attempt to graft selected quotes from various Furman concurring opinions onto the FDPA is misguided at best. The FDPA does not have the flaws of the statutes at issue in Furman. Those statutes did not set standards and guide the decision maker. Under the FDPA, the jury is carefully focused on the defendant and his crime and whether it may impose death. The sequence in which the jury must determine punishment was well described in United States v. Nguyen, 928 F. Supp. 1525, 1532 (D. Kan.

1996)(emphasis added):

First, the jury must decide whether [the defendant] had the requisite intent to commit the death eligible offense. 18 U.S.C. § 3591(a). If the jury **unanimously finds beyond a reasonable doubt** that intent is established, it moves to the next step in the penalty process. If the jury does not so find, the deliberations are over and the death penalty may not be imposed.

Assuming the jury finds the requisite intent, it must then consider the statutory aggravating factors alleged by the government in its notice to seek the death penalty. The statutory aggravating factors from which the government may choose are listed at 18 U.S.C. §§ 3592(c)(1)-(16). The jury must determine whether the government has proven at least one of the statutory factors alleged **beyond a reasonable doubt**. 18 U.S.C. § 3593(c). If the jury **unanimously** so finds, it moves to the next step of the penalty process. If not, the deliberations are over and the death penalty may not be imposed. 18 U.S.C. § 3593(d).

Assuming the jury finds at least one statutory aggravating factor, it must then consider that factor or factors, plus “any other aggravating factor for which notice has been provided,” 18 U.S.C. § 3593 (d) (“non-statutory aggravating factors”), and weigh them against any mitigating factors to determine whether the death penalty is appropriate. 18 U.S.C. § 3593(e).

Non-statutory aggravating factors, like their statutory counterparts, must be **unanimously found by the jury beyond a reasonable doubt**, while mitigating factors need only be established by a preponderance of the evidence. Further, any juror persuaded that a mitigating factor exists may consider it in reaching a sentencing decision; unanimity is not required. 18 U.S.C. § 3593(c),(d).

Other federal courts have also summarized the death penalty procedures under the FDPA. See e.g. Jones v. United States, 527 U.S. at 376-79. The FDPA essentially codified various Supreme Court decisions starting with Furman that required a capital punishment statute to contain two critical phases to be constitutional: (i) the eligibility phase, which genuinely narrows or channels the class of defendants eligible for the death penalty, such as murderers, by means of statutory aggravating factors that provide principled guidance to distinguish between those who received the death penalty and those who did not; and (ii) the selection phase, which individualizes the jury's capital sentencing decisions for those defendants who fall within the narrowed, eligible class of defendants, on the basis of the character of the defendant and the circumstances of the crime. Jones, 527 U.S. at 381; Buchanan v. Angelone, 118 S. Ct. 757, 761 (1998); Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988).

The manner in which the defendant has combined selected quotations from the Furman concurrences ignores that no case has declared the FDPA invalid on this basis. In fact, at least three courts have explicitly rejected this argument. In United States v. Hammer, the court upheld the FDPA stating:

The decision to prosecute, including the decision to seek the death penalty, rests with the prosecutor. See Wayte v. United States, 470 U.S. 598, 607, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985); United States v. Nguyen, 928 F. Supp. 1525, 1544-45 (D. Kan. 1996)(Belot, J.); United States v. Bradley, 880 F. Supp. 271, 279-81, 291 (M.D. Pa 1994)(Rambo, J.); United States v. Pretlow, 779 F. Supp. 758, 777 (D. N.J. 1991)(Raggi, J.). **The mere fact that the government has only sought the death penalty in a de minimis number of murder cases involving federal inmates is not sufficient to demonstrate that the prosecution of [the defendant] is arbitrary and capricious. More is required.** [The defendant] must show that the government is seeking the death penalty for an impermissible reason, such as race, religion, or in retaliation for exercising his right to trial by jury.

United States v. Hammer, 25 F. Supp. 2d at 546-47 (emphasis added).

In United States v. O’Driscoll, 203 F. Supp. 2d 334, 341 (M.D. Pa. 2002), the defendant argued that “because of the low number of capital prosecutions the government’s pursuit of the death penalty in [the defendant’s] case is arbitrary and capricious.” The court, relying on Hammer, again rejected the argument and upheld the FDPA.

Similarly, in United States v. Sampson, 275 F.Supp.2d at 88, the court held, “Because the decision in Furman was based on the exercise of unguided discretion by juries rather than on their infrequent imposition of the death penalty, the mere fact that the federal death penalty is often not sought and is more rarely imposed does not render it unconstitutional.”

II. The alleged inability to discern a “principled basis” for distinguishing cases in which federal sentencing juries have imposed death or not does not render the FDPA unconstitutional. (Capital Motion One, III. B).

The defendant next claims that an analysis of federal death penalty cases does not provide a principled basis for the imposition of the death penalty by various juries, and that, therefore, the FDPA is unconstitutional. In support of this claim, the defendant has submitted “thumbnail compilations” of federal cases in which defendants could have been exposed to the death penalty.² Some of these cases are facially similar to this case because, the defendant claims, they demonstrate the many ways in “which man can demonstrate his capacity for inhumanity to his fellow man” and involved the infliction of agony on victims and others. (Defendant’s motion, p. 26). He argues that because not all the people who committed these horrible crimes were exposed to the death penalty and executed, the FDPA

² Abbreviated case summaries are included in the defendant’s Appendix to Motion to Strike the Death Penalty.

is unconstitutional.

The only legal support the defendant can offer for his argument is a partial quotation from Eddings v. Oklahoma, 455 U.S. 104, 112 (1982): “that capital punishment be imposed fairly, and with reasonable consistency, or not at all.” (Defendant’s motion, pp. 24-25).

This quotation is taken entirely out of context. In Eddings, the Supreme Court reversed a state death sentence of the sixteen-year-old defendant because the trial court refused to consider as a mitigating circumstance the petitioner's unhappy upbringing and emotional disturbance, including evidence of turbulent family history and beatings by a harsh father. In reaching this conclusion the Supreme Court wrote:

Thus, the rule in Lockett followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By requiring that the sentencer be permitted to focus "on the characteristics of the person who committed the crime," Gregg v. Georgia, supra, at 197, 96 S. Ct., at 2936, the rule in Lockett recognizes that "justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." Pennsylvania v. Ashe, 302 U.S. 51, 55, 58 S. Ct. 59, 60, 82 L. Ed. 43 (1937). By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in Lockett recognizes that a consistency produced by ignoring individual differences is a false consistency.

Eddings, 455 U.S. at 112.

When considered in their proper context, the words upon which the defendant seizes undermines his argument. His cry for consistency is a plea for false consistency that would strip the decision makers of their ability to exercise discretion that benefits individual defendants.

In fact, the Supreme Court in McCleskey v. Kemp, 481 U.S. 279, 309 n. 28, rejected pleas for the kind of false consistency the defendant seeks:

The Constitution is not offended by inconsistency in results based on the objective circumstances of the crime. Numerous legitimate factors may influence the outcome of a trial and a defendant's ultimate sentence, even though they may be irrelevant to his actual guilt. If sufficient evidence to link a suspect to a crime cannot be found, he will not be charged. The capability of the responsible law enforcement agency can vary widely. Also, the strength of the available evidence remains a variable throughout the criminal justice process and may influence a prosecutor's decision to offer a plea bargain or to go to trial. Witness availability, credibility, and memory also influence the results of prosecutions. Finally, sentencing in state courts is generally discretionary, so a defendant's ultimate sentence necessarily will vary according to the judgment of the sentencing authority. The foregoing factors necessarily exist in varying degrees throughout our criminal justice system.

The same type of discretion endorsed by McCleskey exists in the federal system.

There are opportunities at each juncture for the prosecution or sentencing decision maker to exercise discretion that benefits a defendant. Absent a showing of arbitrariness or capriciousness, a defendant cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty. Id. at 307.

Furthermore, the precise argument made here was considered and rejected in

Sampson. The court held:

The evidence Sampson has submitted is not sufficient to prove that truly similar capital cases result in disparate sentences. The brief case summaries on which Sampson relies lack detail and focus almost exclusively on the crime. . . . They disclose nothing about the characteristics of the criminal except his race. . . . By ignoring the "individual differences" among criminals, Sampson invites the court to invalidate the FDPA because it does not produce "a false consistency" in the imposition of the death penalty. Eddings, 455 U.S. at 112, 102 S.Ct. 869. This is not permissible or appropriate.

Sampson, 275 F.Supp.2d at 88.

Based on the foregoing, the defendant's claim that the lack of a principled basis for determining the outcome of federal death penalty cases renders the FDPA unconstitutional is

without merit and not supported by his submission.

III. The defendant's claim that continued enforcement of the FDPA will lead to the unconstitutional execution of a meaningful number of innocent people is without merit. (Capital Motion One, III. C).

The defendant's next argument is also a facial attack on the constitutionality of the FDPA applicable to every death penalty prosecution. The defendant argues that, because of theoretical imperfections in the federal criminal justice system and the resulting possibility that an innocent defendant could someday be executed in the federal system, capital punishment is *per se* unconstitutional. This argument is premised on Judge Rakoff's analysis in United States v. Quinones, 205 F. Supp.2d 256 (S.D. N.Y. 2002), which was rejected by the United States Court of Appeals for the Second Circuit, United States v. Quinones, 313 F.3d 49 (2d Cir. 2002), and has been rejected by every other court to have considered it. E.g., United States v. Sampson, 275 F. Supp.2d at 72-86; United States v. Davis, 2003 WL 1837701 (E.D. La. April 9, 2003); United States v. Denis, 246 F. Supp. 2d 1250 (S.D. Fla 2002); United States v. Church, 217 F. Supp. 2d 700, 702 (W.D. Va. 2002); United States v. O'Driscoll, 203 F. Supp. 2d at 349.

The Second Circuit Court of Appeals appears to be the only appellate court to have addressed this argument. However, the Quinones court did not simply find that the argument was without substantive merit. Rather, the court found that the argument was legally precluded holding:

[T]he argument that innocent people may be executed – in small or large numbers – is not new; it has been central to the centuries-old debate over both the wisdom and the constitutionality of capital punishment, and binding precedents of the Supreme Court prevent us from finding capital punishment

unconstitutional based solely on a statistical or theoretical possibility that a defendant might be innocent.

Quinones, 313 F.3d 49, 63 (2002). Accord O'Driscoll, 203 F.Supp.2d at 349 ("O'Driscoll is charged with murder. In Gregg the Supreme Court held that the death penalty was an appropriate sanction for that offense."). While the government believes that the consensus among the courts, excepting only Judge Rakoff in the reversed Quinones case, fully supports a rejection of the defendant's argument, it will set forth below the rationale for an independent ruling by this Court.

The clear textual support for capital punishment in the Constitution, the role that the possibility of executing an innocent person has played in 200 years of capital punishment debate, the refusal of the Supreme Court to declare the death penalty unconstitutional on this basis, and the defendant's failure to show that the federal system suffers from the type of fallibility that he suggests exists in some states all show that his arguments would more appropriately be made to the legislative branch because they simply cannot rise to the level of a constitutional violation. See United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820)(Marshall, C.J.) ("the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment"). See also Gregg, 428 U.S. at 175 ("Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits").

Any consideration of the defendant's Quinones claim must begin with the unalterable fact that the text of the Constitution contemplates the death penalty as the ultimate

punishment in the federal criminal justice system. Three separate phrases in the Fifth Amendment, including the Due Process Clause relied upon by the defendant here, specifically contemplate capital punishment:

No person shall be held to answer for a **capital**, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .; nor shall any person be subject for the same offense to be twice put in jeopardy of **life** or limb; . . . nor be deprived of **life**, liberty, or property, without due process of law

U.S. Const. Amend. V (emphasis added). This text refutes any claim that due process requires a categorical ban on capital punishment in order to preserve a perpetual right to prove one's innocence in a capital case. See Gregg, 428 U.S. at 177 (“[i]t is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers.”) (joint opinion of Stewart, Powell, and Stevens, JJ.); Herrera v. Collins, 506 U.S. 390 (1993)(Constitution does not require states to allow capital defendants to assert untimely requests for new trials based on newly discovered evidence of innocence).

The historical record also shows that opponents of the death penalty have raised the specter of executing an innocent person for as long as the death penalty debate has raged and those arguments have been rejected.

In Quinones, the Second Circuit showed that this claim has been made since colonial times³ and reviewed how death penalty opponents more recently used this same argument in

³ Sources cited by the Second Circuit in Quinones to demonstrate the historical use of the possibility of executing an innocent person by death penalty opponents included Jeremy Bentham, *The Rationale of Punishment* 186 (Robert Heward ed., 1830) (circa 1775); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *Stan. L.Rev.* 21, 22 (1987); Stuart Banner, *The Death Penalty: An American History* (2002) (opponents of capital punishment "began to argue that innocent people were often executed by mistake" as early as the mid-Nineteenth Century); Edwin M. Borchard, *Convicting the Innocent:*

their unsuccessful efforts to defeat passage of the FDPA.⁴ *Id.*, 313 F.3d at 63-64. The existence of a federal death penalty for most of the country's history, and Congressional passage of the FDPA in the face of the very argument the defendant makes here, shows that the opportunity of a criminal defendant to exonerate himself in perpetuity has simply never been of constitutional dimension. *See Quinones*, 313 F.3d at 364 ("[I]nformed, deliberative legislative action [in passing the FDPA] itself casts doubt on the assertion that the right to a continued opportunity for exoneration throughout the course of one's natural life is "rooted in

Errors of Criminal Justice (1932); E. Roy Calvert, *Capital Punishment in the Twentieth Century* 123-134 (5th red. Patterson Smith 1973) (1936); George R. Scott, *The History of Capital Punishment* 248-63 (1950); Jerome & Barbara Frank, *Not Guilty* 248-49 (1957); Charles L. Black, Jr., *Capital Punishment: The Inevitability of Caprice and Mistake* (1974).

⁴ Citations in *Quinones* to the Legislative history of the FDPA included 140 Cong. Rec. S10394-02 (Aug. 2, 1994) (Statement of Sen. Simon) (discussing generally "False Convictions and the Death Penalty" and placing on the record a 1994 USA Today article that noted "at least 85 instances in the past 20 years in which prosecutors--knowingly or unknowingly--relied on fabricated, mishandled, or tampered evidence to convict the innocent or free the guilty" and suggesting that "such miscarriages of justice are more common than we might like to believe"); 140 Cong. Rec. H2322-02, *H2330 (April 14, 1994) (Statement of Rep. Nadler) ("The death penalty, once imposed, can never be recalled.... We have no way of judging how many innocent persons have been executed, but we can be certain that there were some."); *Id.* at *H2327 (Statement of Rep. Mfume) ("a large body of evidence shows that innocent people are often convicted of crimes, including capital crimes, and that some of them have been executed. There have been, on the average, more than four cases per year in which an entirely innocent person was convicted of murder, and many of those persons were sentenced to death."); *Id.* at *H2326 (April 14, 1994) (Statement of Rep. Kopetski) ("Stanford Law Review documented hundreds of cases in which innocent individuals were sentenced to death, 23 of whom were wrongly executed. Let me repeat that, because it's a staggering number: 23 people lay dead who were later exonerated of wrongdoing."); 139 Cong. Rec. S15745-01, *S15766 (Nov. 16, 1993) (Statement of Sen. Levin) (noting "case after case after case in which people have been sentenced to death only later to be found innocent and released" and placing on the record an October 21, 1993, study by the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee that "describes 48 cases in the past 20 years where a convicted person has been released from death row either because their innocence was proven or because there was a reasonable doubt that was raised as to their guilt").

the . . . conscience of our people").

As important as historical information regarding capital punishment is in assessing the merits of the defendant's Quinones claim, there are far more important reasons for rejecting it. Whatever the founding fathers believed about the wisdom of capital punishment or whatever prompted the 1988 passage of the FDPA, the simple fact is that the Supreme Court has repeatedly refused to declare capital punishment unconstitutional on this basis. Because these decisions confirm that the defendant's Quinones claim has no constitutional basis, it must be rejected by this Court.

The Supreme Court acknowledged the fact that capital punishment extinguishes a defendant's right to exonerate himself in Furman. Although the court was squarely presented with this argument, only Justice Marshall was willing to declare the death penalty unconstitutional on this basis. Furman, 408 U.S. at 364-368 (Marshall, J. concurring). Thus, eight of the nine justices who participated in Furman refused to accept the argument the defendant makes in this case.

Any doubt about constitutionality of the death penalty despite the possibility of error in the criminal justice system was put to rest in Gregg and Herrera, 506 U.S. at 407-08, 411. In Gregg, the Court held that the death penalty is not a *per se* violation of the Eighth Amendment, thereby demonstrating that it is the manner in which death penalty legislation is drafted that will determine if it passes constitutional muster. Gregg reached this result in the face of arguments that the criminal justice system is fallible and that innocent people could be wrongfully executed. See 428 U.S. at 187 (joint opinion of Stewart, Powell, and Stevens, JJ.)("[t]here is no question that death as a punishment is unique in its severity and

irrevocability"). “The Gregg Court was therefore keenly aware of the argument asserted here, that execution terminates any asserted right to the opportunity for exoneration during one’s natural life.” Quinones, 313 F.3d at 66. Gregg nevertheless upheld the constitutionality of the death penalty statute in front of it, thereby rejecting the “Quinones claim.”

Even more to the point, of course, is Herrera v. Collins. In Herrera, the Supreme Court confirmed that a defendant has no perpetual constitutional right to exoneration. In Herrera, a Texas capital defendant filed a *habeas corpus* petition contending, based on newly discovered evidence, that he was “actually innocent,” and that his innocence rendered his execution unconstitutional. His claim was not cognizable in the Texas courts because Texas required that all new trial motions based on newly discovered evidence be filed within 30 days after sentence and Herrera’s petition was untimely. Herrera therefore argued that extinguishing his right to prove his innocence was a due process violation.

The Supreme Court disagreed. After reviewing the historical availability of such motions (state law generally requires the filing of such motions within a specified time), the Court held Herrera had no constitutional right to bring a motion for a new trial based on newly-discovered evidence of innocence after the period for such a motion had expired:

In light of the historical availability of new trials, our own amendments to Rule 33, and the contemporary practice in the States, we cannot say that Texas’ refusal to entertain petitioner’s newly discovered evidence eight years after his conviction transgresses a principle of fundamental fairness “rooted in the traditions and conscience of our people.” Patterson v. New York, 432 U.S., at 202 (internal quotation marks and citations omitted).

506 U.S. at 411. Thus, the Court found no historical basis for a rule requiring that new trial motions be permitted until a defendant is executed, let alone the blanket rule advocated by the

defendant – that no one eligible for the death penalty can ever be executed because of the *theoretical possibility* that grounds for a new trial motion could someday arise.⁵ As set forth above, every court (other than Judge Rakoff) has concluded that this possibility does not mean that the FDPA is unconstitutional.

Furthermore, to the extent that it remains a material issue, the Quinones claim should also be rejected because the defendant has failed to demonstrate the existence of an appreciable risk of wrongful conviction in federal capital cases. While consideration of this issue is not needed to reject the Quinones claim, the dearth of statistical or other evidence about the administration of the death penalty in the federal system also shows that this aspect of the defendant’s argument should be rejected.

In his Appendix, the defendant has provided the court with a broad range of information regarding the administration of the death penalty in the United States. To a great extent, this information (which has been compiled and analyzed by groups of death penalty opponents), focuses on practice in state courts and specific instances in which defendants have been exonerated after conviction.⁶ Based on this information, the defendant somehow concludes that the federal criminal justice system is necessarily fraught with legal and factual error and

⁵ The Herrera court recognized that “a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional,” 506 U.S. at 417, thus reinforcing that appropriate pursuit of such a claim must be based on the particular facts of specific cases rather than a facial attack on the FDPA.

⁶ Even Judge Rakoff recognized that the statistical information regarding the administration of the death penalty in Federal Court did not permit any conclusions about a supposed federal error rate in capital cases. See Quinones, 205 F.Supp. 2d at 266 (in discussing information regarding the federal system, Judge Rakoff noted that “the sample is too small, and the convictions too recent, to draw any conclusions therefrom”).

that “meaningful” numbers of innocent people will be executed under the FDPA unless it is declared to be unconstitutional.

The pertinent statistics fail to support defendant’s claim. Since the FDPA took effect in 1988, 32 people have been sentenced to death under its provisions. None of the convictions underlying these death sentences has been reversed, much less reversed for any reason implicating actual innocence. Three of the 32 individuals have been executed (Timothy McVeigh; convicted drug kingpin and murderer Juan Garza; and convicted murderer Louis Jones). The death sentences of five inmates have been reversed for reasons unrelated to guilt; of those five, the Government elected not to re-seek the death penalty for two. None of those cases involved an issue of “actual innocence.”

Only one defendant convicted under the FDPA has raised even a colorable “actual innocence” claim. The death sentence of this defendant, David Chandler, was commuted on January 19, 2001. Chandler had argued in post-conviction review that he received deficient representation at the punishment phase and that he was actually innocent of the crime. Although an appellate panel initially reversed Chandler's sentence based on his claim of ineffective assistance by punishment phase counsel, the Eleventh Circuit, sitting en banc, ultimately upheld his sentence. Neither the panel nor the en banc court concluded that Chandler was innocent of the offense. Chandler v. United States, 193 F.3d 1297 (11th Cir. 1999) and 218 F.3d 1305 (11th Cir. 2000), cert. denied, 531 U.S. 1204 (2001).

Good reasons exist for the inability of the defendant to point to a single federal case in which an innocent person has been executed under the FDPA. The substantial administrative review inside the Department of Justice before a Death Penalty Notice can even issue, the

extensive procedural protections that pervade the FDPA, the care with which federal judges handle such cases, and the experience and expertise of appointed federal death penalty counsel all show that, in the Federal System, death is indeed different in terms of the protections afforded defendants and the demands that the system places on all participants to ensure that the death penalty is sought and meted out only in appropriate cases. As other courts which have reviewed the same evidence have already concluded, there has been no demonstration that any innocent defendant – much less any "meaningful" number of defendants – has been sentenced to the death penalty under the FDPA. See Church, 217 F. Supp. 2d at 702 (the "federal experience with death penalty cases does not support an argument that the federal court system is likely to convict the truly innocent"); Denis, 246 F.Supp.2d 1250, 1253-54 (rejecting significance of statistics or anecdotes on state convictions in federal death penalty case).

Based on the foregoing, the government asserts that the argument concerning the constitutionality of the FDPA based on the possibility of the execution of innocent persons is legally precluded and factually unsupported.

**IV. The relaxed evidentiary standard of the FDPA does not render the statute unconstitutional.
(Capital Motion One, III. D)**

The defendant next claims that the relaxed evidentiary standard applicable to the sentencing phase under the FDPA renders the statute unconstitutional. Defendant's motion is based on the holding of a single decision out of the District of Vermont, United States v. Fell, 217 F. Supp. 2d 469 (D. Vt. 2002), which has since been vacated by the Second Circuit. United States v. Fell, __ F.3d __, 2004 WL 377314 (2nd Cir. Feb. 3, 2004). Additionally,

several other federal courts have considered and rejected this precise claim. See, e.g., United States v. Jones, 132 F.3d 232, 242 (5th Cir. 1998), aff'd sub nom Jones v. United States, 527 U.S. 373 (1999); United States v. Haynes, 269 F. Supp.2d 970, 976 (W.D. Tenn. 2003); United States v. Battle, 264 F. Supp.2d 924, 945 (N.D. Ga. 2003); United States v. Johnson, 239 F. Supp.2d 924 (N.D. Iowa 2003); United States v. Matthews, 246 F. Supp.2d 137, 141 (N.D. N.Y. 2002); United States v. Denis, 246 F. Supp.2d at 1255; United States v. Lentz, 225 F. Supp.2d 672, 683 (E.D. Va. 2002); United States v. Regan, 221 F. Supp.2d at 681-82; United States v. Llera Plaza, 179 F. Supp.2d 444, 452-453 (E.D. Pa. 2001); United States v. Miner, 176 F. Supp.2d at 435-436; United States v. Edelin, 134 F. Supp.2d 59, 68 (D. D.C. 2001); United States v. Cooper, 91 F. Supp.2d 90, 97-98 (D. D.C. 2000); United States v. Hammer, 25 F. Supp.2d at 547-48; United States v. Frank, 8 F. Supp.2d at 268; United States v. Spivey, 958 F. Supp. 1523, 1529 (D. N.M. 1997) (21 U.S.C. §848: court may “undoubtedly consider the reliability of any proffered information”); United States v. McVeigh, 944 F. Supp. at 1487; United States v. Nguyen, 928 F. Supp. at 1546-1547; United States v. Walker, 910 F. Supp. 837, 853 (N.D. N.Y. 1995) (Section 848(j) “sufficiently permits and requires the Court to ensure the reliability” of proffered sentencing information); United States v. Bradley, 880 F. Supp. 271, 290-291 (M.D. Pa. 1994) (reliability inquiry under Section 848(j) will allow judicial consideration of “many of the policies underlying the Federal Rules of Evidence . . . even though strict adherence to the Rules themselves is not required”); United States v. Pitera, 795 F. Supp. 546, 565 (E.D. N.Y. 1992) (reliability inquiry under Section 848(j) may be more exacting than hearsay rule requires); United States v. Pretlow, 779 F. Supp. 758, 771 (D. N.J. 1991); see also United States v. Allen, 247 F.3d 741, 759-760 (8th Cir. 2001), vacated on other

grounds, 122 S. Ct. 2653 (2002). Again, while the government believes that the consensus among the courts, excepting only the district court in Fell, fully supports a rejection of the defendant's argument, it will set forth below the rationale for an independent ruling by this Court.

Although providing that relevant sentencing "information" is admissible at the penalty phase of a federal capital trial "regardless of its admissibility under the rules governing the admission of evidence at criminal trials," 18 U.S.C. 3593(c) neither authorizes the admission of any evidence that the Constitution requires to be excluded nor prevents courts from excluding unconstitutional evidence if it is proffered. As a result, Ring v. Arizona, 536 U.S. 584 (2002), does not cast doubt on the constitutionality of Section 3593(c). Moreover, application of the district court's holding in Fell would run directly counter to the Supreme Court's repeatedly expressed strong preference for providing jurors in the death penalty sentencing proceedings with "the fullest information possible concerning a defendant's life and characteristics." Williams v. New York, 337 U.S. 241, 247 (1949).

Outside the context of the First Amendment, the constitutionality of a statute is subject to a facial challenge only if it can be demonstrated that "no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). It has not been established that the operation of the FDPA would necessarily result in the admission of constitutionally prohibited evidence in any federal capital case, much less that it would inevitably result in the admission of unconstitutional evidence in all federal capital penalty hearings. Cf. Deshawn E. v. Safir, 156 F.3d 340, 347-348 (2nd Cir. 1998) (constitutionality of police interrogation tactics not subject to facial challenge, as there was no showing that

elicitation of coerced confessions “necessarily happens in every case”).

To date, with over a decade of federal capital experience under the FDPA and its Title 21 counterpart (21 U.S.C. 848(e), *et seq.*), there is no indication that federal capital proceedings have been marked by the admission of unconstitutional evidence or have resulted in constitutionally unreliable outcomes. Rather, extant due process protections and Section 3593(c)’s own exclusionary provisions have effectively prevented the admission of sentencing information that is constitutionally unreliable or unfairly prejudicial.

Nor does Ring provide any basis for invalidating Section 3593(c), or for requiring application of the Federal Rules of Evidence as a precondition for the constitutionality of a capital sentencing hearing. Whatever constitutional implications Ring has for the introduction of evidence to prove death-eligibility factors, Section 3593(c) can accommodate them, just as it already accommodates due process requirements for capital sentencing. Nothing in Ring makes the Federal Rules of Evidence the test for compliance with constitutional guarantees.

Courts “are obligated” to construe statutes so as to avoid serious constitutional problems “where an alternative interpretation . . . is ‘fairly possible.’” INS v. St. Cyr, 533 U.S. 289, 299-300 (2001). “The avoidance doctrine canon rests upon [the Court’s] ‘respect for Congress, which [the Court] assume[s] legislates in light of constitutional limitations.’” Harris v. United States, 536 U.S. 545, 555 (2002)(quoting Rust v. Sullivan, 500 U.S. 173, 191 (1991)). Thus, while Section 3593(c) dispenses with non-constitutional evidentiary rules during the penalty phase of federal capital trials conducted under the FDPA in order to promote Eighth Amendment interests in individualized sentencing, the provision neither authorizes trial courts to admit constitutionally prohibited evidence nor precludes them from excluding such

evidence if it is offered; nor should Congress be assumed to have legislated otherwise.

Whatever constitutional implications Ring may have for the admissibility of evidence at capital sentencing hearings, Section 3593(c)'s evidentiary standard is – as every other court to consider the question has recognized – sufficiently elastic to accommodate due process demands and any other yet-to-be-determined constitutional requirements. Accordingly, defendant's argument that the FDPA is facially unconstitutional because of Section 3593(c)'s relaxed evidentiary standard is without merit.

A. There is a strong preference in federal case law favoring the admission of relevant evidence during the penalty phase of capital trials.

In Williams v. New York, 337 U.S. 241 (1948), a capital case, the Supreme Court long ago recognized that there were “sound practical reasons” for having “different evidentiary rules govern[] trial and sentencing procedures.” Id. at 246. Once a jury has resolved the “narrow issue of guilt,” the Court noted that “modern concepts of individualizing punishment” require that the trial judge select a sentence that is appropriate in kind and extent “to fit the offender and not merely the crime.” Id. at 247. In the Court's view, it was “[h]ighly relevant – if not essential” – to that selection process that a judge possess “the fullest information possible concerning a defendant's life and characteristics” and “not be denied . . . pertinent information by . . . rigid adherence to restrictive rules of evidence properly applicable to the trial.” Id. The Court thus “did not think” that the Constitution restricted sentencing judges to considering only “information received in open court,” or that “[t]he due process clause should . . . be treated as a device for freezing the evidential procedure for sentencing in the mold of trial procedure.” Id. at 251. Accordingly, the Court concluded that Williams' death sentence did

not violate due process merely because the trial judge had considered “material facts concerning [Williams’ criminal] background which though relevant to the question of punishment could not have been brought to the attention of the jury in its consideration of the question of guilt.” *Id.* at 244, 252.

The Supreme Court has repeatedly reaffirmed Williams’ core holding in capital and non-capital cases alike. *See, e.g., Harris v. United States*, 536 U.S. at 558; Apprendi v. New Jersey, 530 U.S. 466, 481-482 (2000); United States v. Watts, 519 U.S. 148, 151-152 (1997) (noting that Williams does not afford “any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing”); Dawson v. Delaware, 503 U.S. 159, 164 (1992); Payne v. Tennessee, 501 U.S. 808, 820-821 (1991) (noting that “the sentencing authority has always been free to consider a wide range of relevant material,” which remains true in the context of post-Furman capital sentencing); Spaziano v. Florida, 468 U.S. 447, 459 (1984) (noting that a capital sentencer “has a constitutional obligation to evaluate the unique circumstances of the individual defendant,” because, “despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding – a determination of the appropriate punishment to be imposed on an individual”); Lockett v. Ohio, 438 U.S. 586, 602-603 (1978) (plurality opinion).

Indeed, in Gregg v. Georgia, 428 U.S. 153 (1976), one of the formative post-Furman cases, the Supreme Court rejected a capital prisoner’s attack on the “wide scope of evidence and argument allowed” by Georgia’s capital sentencing statute and instead stated:

We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such hearings and to approve open and far-ranging argument. . . . So long as the evidence introduced and the

arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

Id. at 203-204 (joint opinion).⁷ See also, Schlup v. Delo, 513 U.S. 298, 326 n. 44 (1995) (Supreme Court’s decisions “permit reduced procedural protections at sentencing”); Romano v. Oklahoma, 512 U.S. 1, 7 (1994) (noting that the “traditional latitude” the States have to fashion capital sentencing statutes “extends to evidentiary rules at sentencing proceedings”); *id.* at 11-12 (rejecting the notion that the Eighth Amendment establishes “general evidentiary rules” that “govern the admissibility of evidence at capital sentencing proceedings”); Barefoot v. Estelle, 463 U.S. 880, 896-899 (1983) (rejecting categorical rule that psychiatric testimony regarding future dangerousness is too unreliable to be admissible at a capital sentencing hearing; rather, “relevant, unprivileged evidence should be admitted and its weight left to the factfinder”); Green v. Georgia, 442 U.S. 95, 97 (1979) (exclusion of mitigating evidence under state hearsay rule violated due process); Jurek v. Texas, 428 U.S. 262, 271 (1976) (joint opinion) (“A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed”); *id.* at 276 (“What is essential is that the jury have before it all possible information about the individual defendant whose fate it must determine”).

⁷ Although the quoted passage was part of an opinion joined by only Justices Stevens, White, and Stewart, it has subsequently been cited or quoted with approval in numerous opinions for a majority of the Court. See, e.g., Romano v. Oklahoma, 512 U.S. 1, 7-8 (1994); Payne v. Tennessee, 501 U.S. at 821; Zant v. Stephens, 462 U.S. 862, 886 (1983).

B. As the Supreme Court has made clear, relaxed evidentiary standards do not preclude courts from excluding constitutionally impermissible evidence at capital sentencing proceedings.

Although the Supreme Court has disdained strict evidentiary rules that inhibit the broad receipt of information essential to an individualized sentencing determination, the admissibility of relevant evidence at federal capital sentencing hearings is not immune from constitutional constraints. While the Supreme Court has never held that the Confrontation Clause applies to non-capital or capital sentencing proceedings, it has held that due process principles bar the admission and consideration of sentencing information that is unreliable or unfairly prejudicial. *See, e.g., Romano v. Oklahoma*, 512 U.S. at 12 (“[i]t is settled” that the Due Process Clause governs the admissibility of evidence at the sentencing phase of capital trials); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (same). *See also, Simmons v. South Carolina*, 512 U.S. 154, 161-162, 164-166 (1994) (plurality opinion).

And, although the Supreme Court has repeatedly reaffirmed *Williams*’ core holding that sentencing information may be received without regard to rigid rules of evidence, it has qualified *Williams* in some respects. In *Williams*, the Court ruled that it was constitutionally permissible for the trial judge to have considered confidential information assembled by the probation officer concerning the defendant’s background and the prognosis for recidivism in deciding that death was the appropriate sentence. The Court in *Gardner* held that this particular aspect of *Williams* was no longer good law. As the Court in *Gardner* stated, “it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause.” 430 U.S. at 358. The Court thus held that a due process violation occurs “when a death sentence is imposed, at least in part, on the basis of information which

[the defendant] has no opportunity to deny or explain.” *Id.* at 362. See also, id. at 364 (White, J., concurring) (consideration of “secret” information at capital sentencing hearing inconsistent with the “need for reliability” that is required in capital cases). Accordingly, Williams’ broad language endorsing the consideration of sentencing information, irrespective of its type or source, has not prevented the Court from vacating death sentences when constitutionally impermissible evidence has been wrongly admitted at capital sentencing hearings. See Gardner, 430 U.S. at 358 (secret evidence that the defendant had no opportunity to explain or rebut); Dawson, 503 U.S. at 165-168 (irrelevant associational evidence that implicated First Amendment values). See also, Payne, 501 U.S. at 825 (“In the event that [victim impact] evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause . . . provides a mechanism for relief”); *id.* at 831 (O’Connor, J., concurring) (because “[t]rial courts routinely exclude evidence that is unduly inflammatory,” possibility that victim impact evidence “may in some cases be unduly inflammatory does not justify a prophylactic, constitutionally based rule that this [type] of evidence may never be admitted”).⁸

C. In enacting Section 3593(c), Congress exercised its lawful authority to adopt evidentiary rules for federal judicial proceedings.

Section 3593(c) is not unconstitutional because it dispenses with the Federal Rules of

⁸ The Court in Payne did not disturb prior case law prohibiting, on Eighth Amendment grounds, characterizations by and opinions of a victim’s family members concerning the crime, the defendant, or the appropriate punishment. See id. at 830, n. 2; *id.* at 833 (O’Connor, J., concurring); *id.* at 835, n. 1 (Souter, J., concurring). In United States v. Bernard, 299 F.3d 467, 480 (5th Cir. 2002), a federal capital case tried under the FDPA, the Fifth Circuit recently held that testimony of the victim’s mother characterizing the codefendants and their crime was constitutionally impermissible.

Evidence at the penalty phase of federal capital trials. By finding constitutional infirmity with the FDPA's dispensing with the Federal Rules of Evidence, the district court's holding in Fell, if left unchecked, would transform the rules of evidence into constitutional doctrine, which they are not. The Supreme Court has repeatedly recognized that, subject to constitutional constraints, Congress has the authority to prescribe whatever rules of evidence for the federal courts it deems appropriate. See Dickerson v. United States, 530 U.S. 428, 437 (2000) ("Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence . . . that are not mandated by the Constitution"); Steadman v. SEC, 450 U.S. 91, 95 (1981); Vance v. Terrazas, 444 U.S. 252, 265-266 (1980) (recognizing as "undoubted" "the traditional powers of Congress to prescribe rules of evidence . . . in the federal courts"); Tot v. United States, 319 U.S. 463, 467 (1943). The Federal Rules of Evidence are a "nonconstitutional source[]" for controlling the admissibility of evidence in federal proceedings. See Dowling v. United States, 493 U.S. 342, 352 (1990).⁹

Congress acted well within this oft-recognized authority in enacting Section 3593(c). Section 3593(c)'s relaxed evidentiary standard does not implicate constitutional concerns. It merely provides that relevant information may be presented at federal capital sentencing

⁹ The concerns animating the district court in Fell arose from the government's stated intention to use in the sentencing phase hearsay evidence that otherwise would be barred by the Federal Rules of Evidence, see Fell, 217 F. Supp. 2d at 485. Fell's necessary consequence, therefore, is to elevate the present form of the hearsay rule to constitutional stature. However, the Supreme Court has made clear that the Federal Rules of Evidence's hearsay provisions are non-constitutional in dimension. See Williamson v. United States, 512 U.S. 594, 600 (1994) (recognizing authority of Congress to expand the admissibility of evidence under the hearsay rules, subject to constitutional constraints). See also White v. Illinois, 502 U.S. 346, 366 (1992)(Thomas, J and Scalia, J., concurring) ("Neither the language of the [Confrontation] Clause nor the historical evidence appears to support the notion that the Confrontation Clause was intended to constitutionalize the hearsay rule and its exceptions.")

hearings irrespective of its admissibility under the non-constitutional evidentiary rules that apply at criminal trials. Nothing in Section 3593(c)'s relaxed evidentiary standard authorizes the admission of evidence that is barred by constitutional standards, prevents trial courts from excluding evidence that is constitutionally prohibited, or supplants or modifies any constitutional rule respecting the admission of evidence.

The Federal Rules of Evidence are not dictated by the Constitution. Therefore, Congress could permissibly have chosen to dispense with them altogether at criminal trials, relying instead on constitutional norms and common law practices to regulate the reception of evidence. Accordingly, there is no constitutional violation because Congress provided that relevant information is admissible at federal capital sentencing hearings, even if the information might not satisfy the formal evidentiary rules applicable at other criminal proceedings. See Matthews, 246 F. Supp.2d at 141 (expressly rejecting Fell); Lentz, 225 F. Supp.2d at 682; Regan, 221 F. Supp.2d at 681; United States v. DesAnge, 921 F. Supp. 349, 355 (W.D. Va. 1996).

D. Section 3593(c) is constitutional, as it accords trial courts sufficient authority to exclude constitutionally improper evidence.

As the Supreme Court's capital jurisprudence makes clear, "heightened reliability" and individualized sentencing are indispensable components of a valid capital sentencing scheme. Indeed, the use of "relaxed evidentiary standards at the capital sentencing phase have met with Supreme Court approbation precisely because of the constitutional need for heightened reliability," as "[t]he constitutional corollary to the mandate of reliability is that capital sentencing must be an individualized proceeding" – a requirement that is "actively facilitated

by an unfettered sentencing hearing.” Llera Plaza, 179 F. Supp.2d at 452. Section 3593(c) accommodates both these objectives. See United States v. Jones, 132 F.3d at 241 (noting dual goals in upholding the constitutionality of Section 3593(c)).

In order to ensure that federal capital jurors have access to the broadest possible relevant information regarding the circumstances of the crime and the character and background of the accused, Section 3593(c) provides that the government and the defendant alike may present “any information relevant” to the determination of sentence at a capital sentencing proceeding – specifically including information pertaining to the existence or non-existence of any aggravating or mitigating factors – “regardless of its admissibility under the rules governing the admission of evidence at criminal trials.” In so doing, Section 3593(c) not only allows the government to present relevant information that would be precluded under the evidentiary rules applicable at the guilt-innocence phase – for example, prior untoward conduct that directly reflects on a capital defendant’s character and future criminal propensities – but “also works to the defendant’s advantage in helping to prove mitigating factors and disprove aggravating factors.” United States v. Allen, 247 F.3d 741, 759-760 (8th Cir. 2001), vacated on other grounds, 122 S. Ct. 2653 (2002). Nevertheless, although Section 3593(c) dispenses with rigid evidentiary rules, trial courts retain broad discretion under the statute to exclude information “if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.” Id.

The practical effects of Section 3593(c)’s exclusionary provision are “not inconsequential.” Frank, 8 F. Supp.2d at 268. Under that provision – which is broader in scope than the analogous exclusionary provision in Federal Rule of Evidence 403, see, e.g.,

United States v. Jones, 132 F.3d at 241 n. 7 – reliability is the linchpin to admissibility, United States v. Davis, 904 F. Supp. 554, 561 (E.D. La 1995), so that trial courts are both “authorize[d] and require[d] . . . to make evidentiary rulings that ensure that the jury’s findings are based on constitutionally reliable information.” DesAnges, 921 F. Supp. at 355. The Fifth Circuit has likewise recognized that Section 3593(c)’s “relaxed evidentiary standard does not impair the reliability and relevance of information at capital sentencing hearings,” as its exclusionary provision effectively “prevent[s] [an] evidentiary free-for-all.” United States v. Jones, 132 F.3d at 242. Indeed, apart from the district court in Fell, all other federal courts that have considered Section 3593(c)’s relaxed evidentiary standard or the similar evidentiary standard in Section 848(j) have reasonably construed those statutes as striking a constitutionally proper balance between the needs for “heightened reliability” and individualized sentencing by ensuring the exclusion of constitutionally unreliable or unfair sentencing information. See cases cited at section IV, supra.

E. Ring does not cast doubt on the constitutionality of section 3593(c).

After Ring, as before it, courts conducting capital sentencing hearings under the provisions of the FDPA have authority to exclude sentencing information that the Constitution requires be excluded. Simply put, “Congress did not eliminate the constitutional baseline for the admissibility of evidence” in enacting Section 3593(c). Matthews, 246 F. Supp.2d at 144.

The Supreme Court in Ring addressed only the standard of proof applicable to the determination of eligibility-defining statutory aggravating factors and the identity of the factfinder that must make that determination. Ring did not directly or indirectly address the evidentiary standards that apply at capital sentencing hearings, nor did it consider whether the

Confrontation Clause applies at capital sentencing hearings with regard to proof of the statutory aggravating factors and mental culpability factors that increase the maximum penalty to which a convicted defendant is exposed from life imprisonment to death. See Szabo v. Walls, 313 F.3d 392, 398 (7th Cir. 2002). But this much is clear: Ring “did not require that the Federal Rules of Evidence be imposed on the penalty phase” of capital trials or mandate that relaxed evidentiary standards, like that contained in Section 3593(c), be altered. Lentz, 225 F. Supp.2d at 682; Regan, 221 F. Supp.2d at 681.

Nevertheless, in view of the Ring Court’s characterization of the statutory aggravating factors that define eligibility for the death penalty as the “functional equivalent of an element” of a substantive capital offense, 536 U.S. at 609, it is conceivable that, as an implication of Ring, the constitutional limitations on the admissibility of penalty phase evidence establishing the existence of such aggravating factors may be substantially the same as the constitutional limits on evidence introduced at the guilt-innocence phase to prove the elements of a substantive capital offense. See Szabo v. Walls, 313 F.3d at 398 (without “attempt[ing] to predict how the Supreme Court jurisprudence will develop,” noting that “Apprendi and Ring may portend more changes” in capital jurisprudence).

Whatever Ring’s constitutional implications for evidentiary standards may be, Section 3593(c) can accommodate those constitutional implications, just as it now accommodates the admissibility requirements imposed by the Due Process Clause. Further, any constitutional implications that Ring may have regarding the evidentiary standards applicable at capital sentencing hearings are necessarily confined to the proofs pertaining to the existence of the statutory aggravating factors and mental culpability factors that define eligibility for the death

penalty; the rule announced in Apprendi and extended in Ring, by its plain terms, has no relevance to the establishment of the myriad sentencing factors – like non-statutory aggravating factors or mitigating factors – that might affect the selection of an appropriate sentence within the available statutory maximum, but do not increase the statutory maximum or define eligibility for the death penalty. See Harris, 536 U.S. at 566. Indeed, in Apprendi, the Supreme Court affirmatively cited Williams in reiterating that evidence that is disparate in its “sources and types” may properly be considered in determining an appropriate sentence “within the range prescribed by statute.” 530 U.S. at 481. Every federal court to assess the validity of the FDPA’s relaxed evidentiary standard (or the similar standard in Section 848(j)) in light of Ring has concluded that Section 3593(c) retains its constitutional validity.

Not only does Section 3593(c) satisfy the “more-is-better” informational preference contained in the Supreme Court’s Eighth Amendment jurisprudence – a preference applicable with full force with regard to the proof of mitigating factors and non-statutory aggravating factors affecting only the sentencing selection process – but, as the courts correctly observed in Lentz and Regan, Section 3593(c)s’ exclusionary provision, when “[c]oupled with the constitutionally heightened reliability required at capital sentencing[,] . . . sufficiently permits and requires the Court to ensure the reliability of the information offered at sentencing.” Lentz, 225 F. Supp.2d at 683; Regan, 221 F. Supp.2d at 682.

Hence, “[a]ssuming that the Confrontation Clause applies to the determination of the *mens rea* requirements and the statutory aggravating factors in the penalty phase” of a capital trial, any “Sixth Amendment . . . concerns are alleviated” and the integrity of the fact-finding process protected by the latitude afforded by Section 3593(c)’s admissibility standard. Id. As

the courts in Lentz and Regan explained:

[A] [c]ourt can ensure that the reliability requirements of the [Confrontation] [C]lause are considered within the scope of [Section] 3593(c). Specifically, “where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied,” . . . and the evidence may be deemed sufficiently probative to be admitted under [Section] 3593(c). Whereas, if such evidence does not fall within a firmly rooted exception, the evidence may be deemed too prejudicial to be admitted under [Section] 3593(c). Thus, [Section] 3593(c) can absorb the requirements of the Confrontation Clause and is constitutional in this regard.

Id. (internal citation omitted). Accord, Johnson, 239 F. Supp.2d at 946 (court retains sufficient authority under Section 848(j) “to impose . . . any standards of admissibility or fairness dictated by the Fifth and Sixth Amendments”) (emphasis in original); Matthews, 246 F. Supp.2d at 146, (holding, in rejecting Fell, that the “standards contained in . . . § 3593(c) are sufficient to enable trial courts to exclude evidence at the sentencing phase that would run afoul of the constitutional right to a fair trial, including evidence that might deprive a defendant of his right to confrontation or cross-examination.”). See also, McVeigh, 944 F. Supp. at 1487 (to the extent that Section 3593(c)’s evidentiary standard raises Confrontation Clause and due process concerns, the statute is “saved” by the fact “that the [penalty] hearing is governed by the trial judge who has considerable discretion in controlling the presentation of the ‘information’ to the jury in both content and form”). By dispensing with the Federal Rules of Evidence at capital sentencing hearings, Congress did not deprive federal capital defendants of their Fifth Amendment right to be sentenced on the basis of constitutionally reliable evidence and (assuming that Ring requires it) their Sixth Amendment right to confront and cross-examine any witnesses or evidence presented to establish the existence of the eligibility-defining statutory aggravating factors and mental culpability factors.

The mere possibility that constitutionally unreliable information might be admitted in some federal capital case falls far short of justifying a declaration that Section 3593(c) is facially unconstitutional. Rather, as the Supreme Court indicated in Payne v. Tennessee, concerns about the admission of evidence of doubtful trustworthiness should be resolved on a case-by-case basis, not by issuing sweeping constitutional pronouncements or formulating wholesale prophylactic rules. See 501 U.S. at 825; id. at 831 (O'Connor, J. concurring). Thus, whatever implications Ring may have for the admissibility of evidence at a capital sentencing hearing, Ring does not require the facial invalidation of the FDPA, as its relaxed evidentiary standard permits the admission of relevant information that is constitutional and precludes the admission of information that is not.

F. In the alternative, the FDPA need not be struck down in its entirety to cure the perceived defect in Section 3593(c).

For reasons set out above, it is wholly unnecessary for this Court to resolve the issue of severability. Should the Court reach the question, however, the Court need not invalidate the FDPA in its entirety.

"[A] court should refrain from invalidating more of the statute than is necessary. . . . '[W]henver an Act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.'" Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (internal citations omitted). See also, Velazquez v. Legal Services Corp., 164 F.3d 757, 773 (2nd Cir. 1999) (with respect to a partially-infirm congressional enactment, "it is best to invalidate the smallest possible portion of the statute"), aff'd, 531 U.S. 533 (2001). Thus, "[u]nless it is

evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.” Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191 (1999), (quoting Champlain Refining Co. v. Corporation Comm'n of Oklahoma, 286 U.S. 210, 234 (1932)). Nor does “the absence of a severability clause . . . raise a presumption against severability.” Alaska Airlines, 480 U.S. at 686.

There is nothing to suggest that Section 3593(c)’s relaxed evidentiary standard was critical to the enactment of the FDPA or that Congress would not have enacted the remaining portions of the FDPA if it were not able to enact the relaxed evidentiary standard. Section 3593(c) largely replicates the relaxed evidentiary standard contained in the Title 21 capital provisions, which were enacted in 1988 with minimal debate. See R. Little, The Federal Death Penalty: History And Some Thoughts About The Department Of Justice's Role, 26 *Fordham Urb. L. Rev.* 347, 381, 395-396 (1999). The FDPA was the culmination of congressional efforts to adopt a constitutionally-viable capital sentencing regime, consistent with the fine-tuned constitutional guidelines announced by the Supreme Court, that would “substantially increase the availability of the death penalty for federal offenders.” Id. at 385-388, 391. Nothing in that legislative purpose evinces any indication that Congress regarded Section 3593(c) as an indispensable linchpin of the FDPA’s capital sentencing scheme or any intention that the very viability of the FDPA should turn on Section 3593(c)’s relaxed evidentiary standard, which was undoubtedly adopted in reliance on the Supreme Court’s assurance in Gregg that such a standard was both constitutional and desirable. Had the Court ruled otherwise in Gregg, there is no reason to think that Congress would have refrained from

enacting the FDPA because of an inability to include a relaxed evidentiary standard. Even in the absence of a relaxed evidentiary standard caused by constitutional invalidation, the remaining provisions of the FDPA would be “fully operative as law,” Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. at 191, with federal capital sentencing hearings conducted according to the same evidentiary rules applicable in other federal criminal trials.

Any perceived constitutional flaw, to the extent it is real, could be remedied through the exclusion of evidence admitted to establish the existence of statutory aggravating factors and mental culpability factors that does not comply with standard evidentiary rules or constitutional norms. Indeed, as shown above, Section 3593(c)’s exclusionary provision has been consistently construed as according trial judges the authority to exclude penalty phase evidence that is unreliable or otherwise constitutionally impermissible.

Excising Section 3593(c)’s evidentiary standard as it pertains to statutory aggravating factors and mental culpability factors would not substantially alter the operation of the FDPA. Notwithstanding any conceivable implications of Ring regarding evidentiary standards, Section 3593(c)’s relaxed evidentiary standard would be unaffected as to the mitigating evidence a defendant could present at a capital penalty hearing, or the information that the government could offer in support of non-statutory aggravating factors and in rebuttal. Far from effecting significant change, such an evidentiary regime would largely conform to current federal capital practice.

If the Constitution demands curtailment of the government’s ability to use information not admissible under standard evidentiary rules to prove death-eligibility factors, that can be done without rewriting the statute or significantly altering the evidentiary scheme prescribed

by Congress. Even in such a circumstance, the FDPA would remain “fully operative as a law.” Champlain Refining Co., 286 U.S. at 234. It would still serve “Congress' objective,” New York v. United States, 505 U.S. 144, 187 (1992), of maintaining a death penalty system that affords a defendant all constitutionally-mandated leeway to adduce “any relevant circumstance that could cause [the sentencer] to decline to impose the [death] penalty.” McCleskey v. Kemp, 481 U.S. at 306. The relaxed evidentiary standard provision is not so intertwined with the remainder of the [FDPA] that the Court would have to rewrite the law in order for it to operate.

V. The FDPA is not an unconstitutional delegation of legislative authority. (Capital Motion One, III. E)

Defendant’s next argument is that allowing prosecutors to choose non-statutory aggravating factors for use at the penalty phase constitutes an unconstitutional delegation of legislative authority, thereby also rendering the FDPA unconstitutional in all cases. This claim, too, has been repeatedly rejected by federal courts. E.g., United States v. Higgs, 353 F.3d 281, 321 (4th Cir. 2003); United States v. Paul, 217 F.3d 989, 1001 (8th Cir. 2000), cert. denied, 122 S. Ct. 71 (2001); United States v. Tipton, 90 F.3d 861, 895 (4th Cir. 1996), cert. denied, 520 U.S. 1253 (1997); United States v. McCullah, 76 F.3d 1087, 1106 (10th Cir. 1996), cert. denied, 520 U.S. 1213 (1997); United States v. Jones, 132 F.3d 232, 240 (5th Cir. 1998), aff’d, 527 U.S. 373 (1999); United States v. Miner, 176 F. Supp. 2d at 430-32; United States v. Edelin, 134 F. Supp. 2d at 74-75; United States v. McVeigh, 944 F. Supp. at 1485-6; United States v. Pitera, 795 F. Supp. at 563.

The argument fails because the FDPA is not a delegation of legislative authority. The

function of the prosecutor in identifying and presenting non-statutory aggravating factors is "an exercise in advocacy derived from the executive's discretion to prosecute, not the legislature's power to fix punishment." Pitera, 795 F. Supp. at 563. Thus, "[i]n identifying non-statutory aggravating factors pursuant to § 848(j), the prosecution plays virtually the same role in a capital sentencing proceeding as it does in a non-capital one." Id. at 562. See also Mistretta v. United States, 488 U.S. 361, 390 (1989) (in upholding the United States Sentencing Guidelines against a claim that they resulted from an improper delegation of legislative authority by Congress to the judicial branch, court pointed out that the federal sentencing function has long been a "peculiarly shared responsibility" rather than "the exclusive constitutional province of any one Branch").

The use of non-statutory aggravating factors under the FDPA is thus intended to ensure that the prosecutor brings all relevant information to the sentencer's attention and that the sentencer makes "an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant, 462 U.S. at 879. Because that use involves no delegation of legislative authority to the prosecutor, it does not implicate the non-delegation doctrine. See Spivey, 958 F. Supp. at 1531-32; DesAnges, 921 F. Supp. at 354; Walker, 910 F. Supp. at 851; Bradley, 880 F. Supp. at 284.

Even if the FDPA's provision for the presentation of non-statutory aggravating factors were held to involve a delegation of legislative authority to the Executive Branch, that delegation is not improper. See McCullah, 76 F.3d at 1106; United States v. Tipton, 90 F.3d at 895; United States v. Johnson, 1997 WL 534163 at *4 (N.D. Ill. Aug. 20, 1997); United States v. Pretlow, 779 F. Supp. at 765-67; United States v. Davis, 904 F. Supp. 554, 559 (E.D. La.

1995) (Davis I). In comparison to the far more extensive delegation of authority to fix sentences that was approved in Mistretta, the Executive's exercise of the authority "delegated" in the FDPA is sufficiently informed by "intelligible principles" to pass constitutional muster. See United States v. Henry, 136 F.3d 12, 16 (1st Cir. 2000) (Congress can delegate legislative authority "as long as Congress sets forth an 'intelligible principle' to which the executive or judicial branch must conform"). Those principles include: (1) the requirement that such factors be substantively limited to the circumstances of the crime and the character of the accused; (2) the availability of judicial review; and (3) the requirement of notice. Spivey, 958 F. Supp. at 1532; Pretlow, 779 F. Supp. at 767-68; see also Davis I, 904 F. Supp. at 559; Pitera, 795 F. Supp. at 562-63 ("even if this limited exercise of prosecutorial discretion were deemed to constitute a legislative delegation, its exercise is sufficiently circumscribed, both by the statute and by judicial review, to ensure against overbroad application"); United States v. Jones, 132 F.3d at 239 (discussing four factors that limit Executive discretion in formulating non-statutory aggravating factors for presentation to the jury in the penalty phase). In particular, the trial court's ability to exercise control over the non-statutory factors on which the government seeks to rely will ensure that "the aggravating factors serve the purpose of selection of the defendant for the special penalty with individual consideration to his character and particular conduct in the offense." McVeigh, 944 F. Supp. at 1486. Accord Pretlow, 779 F. Supp. at 767-68. The defendant's contention that Congress impermissibly delegated its authority by allowing prosecutors to rely on non-statutory aggravating factors must therefore be rejected.

**VI. A mandatory proportionality review is not constitutionally required by the Eighth Amendment.
(Capital Motion One, III. F)**

The defendant argues that the death penalty cannot be constitutionally imposed without a proportionality review requiring the appellate court to determine whether or not the death sentence is unacceptable in a particular case because it is disproportionate to the punishment imposed on others convicted of the crime. While such a review is “plainly a valuable process,” it is not constitutionally mandated. Llera Plaza, 179 F. Supp.2d at 456. The Fourth Circuit Court of Appeals recently rejected this argument in United States v. Higgs, 353 F. 3d at 320 (4th Cir. 2003).

A. The Supreme Court has held that a proportionality review is not required in a death penalty case.

The Supreme Court case to address the propriety of and ultimately reject the required use of the proportionality review in death penalty cases is Pulley v. Harris. The issue in Pulley was whether the Eighth Amendment required “the state appellate court . . . to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner.” 465 U.S. at 43-44. The court held, “There is no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it.” Pulley, 465 U.S. at 50. Courts addressing the necessity of proportionality review in death penalty cases have uniformly followed Pulley in declining to require such a review. See McCleskey v. Kemp, 481 U.S. at 306; Buell v. Mitchell, 274 F.3d 337, 368 (4th Cir. 2001)(“Buell's contentions regarding inadequate appellate review of the proportionality of death sentences under the Ohio statute

fail because no proportionality review is constitutionally required.”); Martinez v. Johnson, 255 F.3d 229, 241 (5th Cir. 2001); Greer v. Mitchell, 264 F.3d 663, 691 (6th Cir. 2001); United States v. Allen, 247 F.3d at 760, vacated on other grounds, 122 S. Ct. 2653 (2002); O’Driscoll, 203 F. Supp.2d at 342; Regan, 221 F. Supp.2d at 665; Llera Plaza, 179 F. Supp.2d at 456; Minerd, 176 F. Supp.2d at 433; Cooper, 91 F. Supp. 2d at 99; Frank, 8 F. Supp. 2d at 273; Hammer, 25 F. Supp.2d at 524; McVeigh, 944 F. Supp. at 1486; Nguyen, 928 F. Supp. at 1537; Bradley, 880 F. Supp. at 284; Pitera, 795 F. Supp. at 559; Pretlow, 779 F. Supp. at 768.

B. A proportionality review is not constitutionally required in a death penalty case under the FDPA in which non-statutory aggravating factors are considered.

Defendant attempts to distinguish Pulley by referring to Zant v. Stephens, 462 U.S. 862 (1983), claiming that the system addressed in Zant, like the FDPA, permits the consideration of non-statutory aggravating factors. The defendant’s argument mirrors one summarized and rejected by another district court: “the constitutionality of permitting a jury to consider non-statutory aggravating factors is conditional on the presence of the other safeguards emphasized by the Zant court, the most crucial of which [the defendant] believes was the proportionality review.” Pretlow, 779 F. Supp. at 769. In Zant, the court noted that compliance with the Georgia statute providing for a mandatory appellate review, including a proportionality review, ensured that the death penalty would not be arbitrarily imposed. However, the court in Pretlow determined that reliance on Zant was misplaced and that the court in Pulley (decided one year later) sufficiently distinguished Zant:

While emphasizing the importance of mandatory appellate review under the Georgia statute, we did not hold [in Zant] that without comparative proportionality review the statute would be unconstitutional. To the contrary,

we relied on the jury's findings of aggravating circumstances, not the State Supreme Court's finding of proportionality, as rationalizing the sentence. Thus, the emphasis was on the constitutionally necessary narrowing function of statutory aggravating circumstances. Proportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required.

Pretlow, 779 F. Supp. at 769 (quoting Pulley, 465 U.S. at 50).

Therefore, the Pretlow court held that Zant cannot "be construed as requiring proportionality review whenever a jury is permitted to consider non-statutory aggravating factors." Id. See also McVeigh, 944 F. Supp. at 1486 (unpersuaded by the attempted distinction, the court stated, "[T]he function of aggravating factors, **whether or not statutorily required**, is to provide assurance that the jury arrives at a rational decision, after following an assessment process adequately designed to measure the variables involved in the crime and the circumstances of the perpetrator, to select him as deserving the maximum punishment." (emphasis added)). Other courts have addressed and summarily dismissed the attempted distinction of Pulley based on this line of argument. See O'Driscoll, 203 F. Supp. 2d at 343 (collecting cases); Frank, 8 F. Supp. 2d at 273; Nguyen, 928 F. Supp. at 1537; Bradley, 880 F. Supp. at 284; Pitera, 795 F. Supp. at 559.

Thus, a proportionality review is not constitutionally required in any death penalty case, including those falling under the FDPA.

**VII. The FDPA's provisions for appellate review are constitutional.
(Capital Motion One, III. G)**

The defendant also contends that the FDPA is unconstitutional because it fails in Section 3595 to provide for meaningful appellate review of death sentences. The defendant is asking this court to declare the FDPA unconstitutional in the abstract because it allegedly

eliminated plain error review of capital cases. Defendant contends that the language of Section 3595(c)(2)(C) eliminates plain error analysis from death penalty appeals for issues other than the issues enumerated in Section 3595(c)(2)(A) and (B). However, the United States Supreme Court in Jones v. United States, 527 U.S. 373 (1999), conducted plain error review of alleged errors in the FDPA.¹⁰ Therefore, it is not clear that the premise underlying the defendant's argument regarding inadequate review is even correct.

Secondly, because the actual extent of appellate review under section 3595 and the interplay between its various provisions and other independent sources of appellate review can only be assessed in the context of a real appeal raising actual grounds of alleged error, this aspect of the defendant's argument is not ripe. E.g., Sampson, 275 F. Supp.2d at 95 ("This court finds that the issues concerning the constitutional adequacy of the appellate review provided by the FDPA are not all ripe for resolution. If Sampson is convicted and is sentenced to death, the First Circuit will decide the scope of its review."); Llera Plaza, 179 F. Supp.2d at 461 (pretrial challenge to review procedures dismissed on ripeness grounds); Regan, 228 F. Supp. 2d at 746 (same). See also United States v. Cuff, 38 F. Supp.2d 282, 285 (In dismissing pretrial attack on FDPA's appellate review procedures, court concluded that "harm attributable to the nature and extent of the appellate review process is simply too speculative at this time for the Court to reach the question on the merits").

If the Court considers this issue now, the defendant's claim must be rejected. Although the Supreme Court has often alluded to the importance of meaningful appellate review in

¹⁰ See also McCullah, 76 F.3d at 1106-14; United States v. Flores, 63 F.3d 1342, 1366-76 (5th Cir. 1995); Chandler, 996 F.2d at 1086, 1097, 1099 n.7.

upholding the validity of various state capital sentencing schemes, see, e.g., Parker v. Dugger, 498 U.S. 308, 321 (1991); Clemons v. Mississippi, 494 U.S. 738, 749 (1990), it has never invalidated a capital sentencing scheme on this basis. See Gregg, 428 U.S. at 195; Proffitt v. Florida, 428 U.S. 242, 258 (1976). However structured, appellate review procedures are "meaningful" if they are sufficient to "promote[] reliability and consistency," Clemons, 494 U.S. at 749, and "ensur[e] that the death penalty is not imposed arbitrarily or irrationally." Parker, 498 U.S. at 321.

The expansive appellate review provisions contained in Section 3595 plainly meet this test. Section 3595(a) expressly contemplates the parallel pursuit of a conventional appeal from the underlying judgment of conviction. Section 3595(b) requires a reviewing appellate court to "review the entire record" of the capital trial and sentencing proceeding. Section 3595(c) mandates that appellate courts "shall address all substantive and procedural issues raised on the appeal of a sentence of death," and requires that a death sentence be vacated if the court determines that the sentence "was imposed under the influence of . . . any . . . arbitrary factor" or that the evidence failed to "support the special finding of the existence of the required [statutory] aggravating factor." Thus, under Section 3595, "[t]he federal procedure of review of a sentence of death is exhaustive" Davis, 904 F. Supp. at 563. See also Chandler, 996 F. 2d at 1083 (recognizing that analogous appellate review provisions contained in 21 U.S.C. § 848(q) "serve to emphasize the serious nature of capital cases and the importance of careful review").

Section 3595(c)(2)(C) also provides that an appellate court "shall remand" if it finds that the capital proceedings "involved any other legal error requiring reversal of the sentence

that was properly preserved for appeal under the rules of criminal procedure." Contrary to the claims advanced by the defendant, this provision does not dilute appellate review or render the statute unconstitutional. By its terms, section 3595(c)(2) is limited to legal errors "other" than those pertaining to the evidentiary sufficiency of the special findings or the existence of "arbitrary factors" influencing the imposition of a death sentence. Federal courts have consistently construed similar language in 21 U.S.C. § 848(q)(3) pertaining to the latter two categories of errors as sufficiently broad to "require review of any error of law occurring during the sentencing phase of the trial." Pretlow, 779 F. Supp. at 761-64, 769; see also Walker, 910 F. Supp. at 844-45; Bradley, 880 F. Supp. at 282-83; Pitera, 795 F. Supp. at 566-67. Thus, just as "no aspect of a capital sentencing hearing is impervious to appellate review" under Section 848(q)(3), there is "no basis for thinking that [a] court of appeals will be limited in its power fully to review any sentence imposed" under Section 3595. Pitera, 795 F. Supp. at 567. As Fed. R. Crim. P. 52(b) independently preserves for appeal "[p]lain errors or defects affecting substantial rights" that "were not brought to the attention of the [district] court," there is also no basis for the defendant's claim that section 3595(c) somehow precludes plain error review. See Jones v. United States, 527 U.S. 373 (1999)(reviewing claimed error in penalty phase jury instructions to which no objection was taken under plain error review); Minerd, 176 F. Supp. 2d at 432 (there is nothing in the [FDPA] that precludes plain error review, should the court of appeals so choose"); Nguyen, 928 F. Supp. at 1548 ("Nothing suggests that the court of appeals would not review for plain error [in a capital case] pursuant to Fed.R.Crim.P. 52(b)").

Thus, contrary to the assertion made by the defendant, Section 3595 does not diminish a

capital defendant's appellate rights. Rather, Section 3595 provides additional procedural rights to ensure meaningful appellate review of a death sentence. Accordingly, there is no merit to the defendant's claim that Section 3595 violates equal protection by "singl[ing] out one class of inmates for diminished appellate review." See McVeigh, 944 F. Supp. at 1485 (rejecting equal protection challenge to appeal provisions of Section 3595); Nguyen, 928 F. Supp. at 1548 (same); Bradley, 880 F. Supp. at 283 (rejecting similar claim under Section 848).

**VIII. The FDPA does not violate the Eighth Amendment prohibition of cruel and unusual punishment and is not a *per se* denial of due process .
(Capital Motion One, III. H)**

The defendant argues that the death penalty is unconstitutional under any and all circumstances as a *per se* violation of the Eighth Amendment's proscription against cruel and unusual punishment and a denial of due process. This claim is contrary to Supreme Court precedent as was recently recognized in United States v. Higgs, 353 F. 3d at 333. See Gregg, 428 U.S. at 168-87 (holding that the death penalty is not *per se* cruel and unusual punishment and explaining that capital punishment is an essential function as an expression of society's moral outrage at particularly offensive conduct); McCleskey v. Kemp, 481 U.S. at 296-97, 300-01, 306-07, 307 n.28 (rejecting the various claims that the death penalty violates the Constitution under all circumstances); see also Jones, 132 F.3d at 242 (and authorities cited therein); Frank, 8 F. Supp.2d at 273-74 (and authorities cited therein).¹¹ Accordingly, the

¹¹ Accord United States v. O'Driscoll, 203 F. Supp 2d at 349; United States v. McVeigh, 944 F. Supp. at 1484; United States v. Battle, 979 F. Supp. 1442, 1470 (N.D. Ga. 1997), *aff'd*, 173 F.3d 1343 (11th Cir. 1999); United States v. Chanthadara, 928 F. Supp. 1055, 1059 (D. Kan. 1996); United States v. Davis, 904 F. Supp. at 563; United States v. Glover, 43 F. Supp. 2d 1217, 1231 (D. Kan. 1999); United States v. Kaczynski, 1997 WL 716487 (E.D. Cal. Nov. 7, 1997); United States v. Nguyen, 928 F. Supp. at 1547 (D. Kan. 1996).

defendant's claim should be rejected.

IX. Death by lethal injection does not constitute cruel and unusual punishment. (Capital Motion One, III. I)

In this claim, the defendant merely “reserves the right to argue” at some future time that execution by lethal injection constitutes cruel and unusual punishment. The government will respond to any such claim if it is ever raised by the defendant.

X. Ring v. Arizona did not render the FDPA unconstitutional. (Defendant's Motion to Dismiss Notice of Special Findings and Government's Notice of Intent to Seek the Death Penalty and for Other Appropriate Relief [hereinafter, Capital Motion Two], II, A-L)

The defendant begins his Ring argument by noting that the FDPA assigns to government attorneys, rather than the grand jury, the responsibility for deciding when to seek the death penalty. Defendant also cites how the FDPA provides for aggravating factors to appear in a written notice rather than in a grand jury indictment. Defendant asserts that such provisions render the statute incompatible with the Fifth Amendment's Indictment Clause.

Next, defendant argues that the superceding indictment returned in this case, which includes special findings by the grand jury of the mental culpability and statutory aggravating factors, is an impermissible “fix” by the government of the aforesaid constitutional deficiency in the FDPA. Specifically, he asserts that under the Separation of Powers and Non-delegation doctrines only Congress can define a new crime of capital murder and correct the alleged constitutional flaws in the statute (which he contends the government has done in the superceding indictment). He further contends that the FDPA cannot be “saved” by judicial construction. Finally, defendant challenges the form of the superceding indictment returned in this case. He contends that a grand jury is not authorized to return “special findings” and that

the special findings here are deficient because they do not include non-statutory aggravating factors or an allegation that the aggravating factors sufficiently outweigh any mitigating factors to justify a sentence of death.

For the reasons set forth below, all of defendant's arguments lack merit. Indeed, every federal court which has considered these same arguments since Ring was decided has flatly rejected them. See United States v. Sampson, 2003 WL 352416 at *11, No. CR.01-10384-MLW, (D. Mass. Feb. 18, 2003); United States v. Johnson, 239 F. Supp.2d 924, 942 (N.D. Iowa 2003); United States v. Denis, 2002 WL 31730863 at *3, No. 99-714-CR-MORENO (S.D. Fla. Dec. 3, 2002); United States v. Regan, 221 F. Supp.2d 672, 679-81 (E.D. Va. 2002); United States v. Lentz, 225 F. Supp.2d 672, 677-82 (E.D. Va. 2002); United States v. Church, 218 F. Supp.2d 813, 815 (W.D. Va. 2002); United States v. O'Driscoll, 2002 WL 32063818 at *2, No. 4:CR-01-277 (M.D. Pa. Aug. 22, 2002). Accordingly, this Court should do the same.

A. The Ring decision

Analysis of the issues raised in this part of defendant's brief must begin with the Supreme Court's decision in Ring, because the Supreme Court did not declare the FDPA unconstitutional. Rather, in Ring, the Supreme Court held that Arizona's death penalty statute was unconstitutional because it provided that a judge alone could decide whether a defendant should be sentenced to death after making findings rendering the defendant eligible for the death penalty in violation of the Sixth Amendment right to trial by jury. Ring, 122 S. Ct. at 2432. The Court specifically held that "[c]apital defendant[s] . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Id. Of course, the FDPA complies with Ring because the statute provides for a

jury to determine the aggravating factors, unless both the defendant and the government agree otherwise. See 18 U.S.C. § 3593(b).

Left unanswered by Ring, however, is whether the Indictment Clause of the Fifth Amendment requires aggravating factors to be charged in the indictment for a defendant to be eligible for the death penalty.¹² Because the Fifth Amendment right to grand jury indictment does not extend to state prosecutions, Hurtado v. California, 110 U.S. 516 (1884), the defendant in Ring did not raise the issue of indictment, and it was not specifically addressed by the Court.¹³ However, the Court’s ruling that aggravating factors are the “functional equivalent” of elements of the offense, which require jury determination, may one day lead the Court to find that the Indictment Clause mandates charging aggravating factors in the indictment. See Ring, 122 S. Ct. at 2439 (“If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.”); id. at 2443 (“Because Arizona’s enumerated aggravating factors operate as the ‘functional equivalent of an element of a greater offense,’ . . . the Sixth Amendment requires that they be found by a jury.”).

On the same day as the Ring decision, the Supreme Court also decided Harris v. United States, 122 S. Ct. 2406 (2002), in which the Court reaffirmed its previous ruling in MacMillan v. Pennsylvania, 477 U.S. 79 (1986), that mandatory minimum sentencing factors need not be

¹² The Indictment Clause of the Fifth Amendment provides in pertinent part as follows: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger”

¹³ Indeed, in footnote 4, the Court noted that “Ring does not contend that his indictment was constitutionally defective.” Ring, 122 S. Ct. at 2437 n. 4.

alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt, as long as the factors do not increase the maximum possible sentence. Harris, 122 S. Ct. at 2420. At the same time, however, the Court made clear in Harris that a crime has not been properly alleged, “unless the indictment and the jury verdict include[s] all the facts to which the legislature [has] attached the maximum punishment.” Id. at 2417. In discussing the significance of the Indictment Clause, the Court stated: “grand and petit juries . . . form a ‘strong and two-fold barrier . . . between the liberties of the people and the prerogative of the [government].’” Id. at 2418 (quoting Duncan v. Louisiana, 391 U.S. 145, 151 (1968)). However, “[i]f the grand jury has alleged, and the trial jury has found, all the facts necessary to impose the maximum, the barriers between the government and defendant fall.” Id. at 2419.

The decisions in Ring and Harris trace their pedigree to Jones v. United States, 525 U.S. 227 (1999).¹⁴ In Jones, the Supreme Court held that, “under the Due Process Clause of the Fifth Amendment and the notice 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.” Jones, 526 U.S. at 243 n. 6. The Court noted that the reason for such a requirement is to ensure that safeguards exist as to “the formality of notice, the identity of the factfinder, and the burden of proof.” Id.

The only Circuit Court to address this issue prior to Ring rejected the argument that

¹⁴ Apprendi v. New Jersey, 530 U.S. 466 (2000), follows in this progeny as well; however, like Ring, Apprendi did not implicate the Indictment Clause because it involved a state prosecution. See Apprendi, 530 U.S. at 477 n. 3.

aggravating factors set forth in the FDPA must be included in the indictment.¹⁵ In United States v. Allen, 247 F.3d 741, 761-64 (8th Cir. 2001), the Eighth Circuit held that the rule in Apprendi did not require that aggravating factors and mental culpability factors be alleged in the indictment. The Eighth Circuit first held that the indictment at issue “sufficiently alleged a capital offense against Allen upon which he could be tried and, if convicted, could be sentenced to death,” as each of the substantive capital offenses charged in that case facially authorized the death penalty for its violation. Id. at 762. Hence, the Eighth Circuit concluded, “the Fifth Amendment’s Indictment Clause [was] satisfied.” Id. However, four days after Ring was decided, the Supreme Court vacated the Eighth Circuit’s decision in Allen and remanded the case back to the Eighth Circuit for further consideration in light of its decision in Ring. See Allen v. United States, – S. Ct. –, 70 U.S.L.W. 3798, 2002 WL 1393602 (June 28, 2002).

Defendant erroneously asserts that the Supreme Court held in Ring that aggravating factors operate as elements of a greater offense. Defendant simply reads too much into Ring. As the district court in Lentz recently noted, “Ring held that Arizona’s enumerated aggravating factors operate as ‘the *functional equivalent of an element* of a greater offense,’ but did not require that such factors become actual elements of a new substantive offense.” Lentz, 225 F. Supp.2d at 679 (quoting Ring, 122 S. Ct. at 2443) (emphasis in original). As the functional equivalent of elements, statutory aggravating factors “must be treated *procedurally* as elements

¹⁵ Recently, in United States v. Robinson, 2004 WL 790307 (5th Cir.)(page cites not available), the Fifth Circuit held that the failure to include the gateway intent and statutory aggravating factors in the indictment was harmless error; and in United States v. Bernard, 299 F.3d 467, 488 (5th Cir. 2002), the Fifth Circuit held that, even if it was error not to include aggravating factors in the indictment, it was not plain error.

of the offense alleged Therefore, they ‘...must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.’” Sampson, 2003 WL 352416 at *5 (quoting Ring, 122 S. Ct. at 2439) (emphasis added). Accord Lantz, 225 F. Supp.2d at 679 (noting that Jones, Apprendi and Ring “merely require additional procedural protections in the determination of the existence of facts that may increase punishment.”); Johnson, 239 F. Supp.2d at 939 (same).

B. The FDPA remains facially constitutional despite Ring.

Defendant asserts that Ring’s implicit requirement that aggravating factors be pled by indictment has rendered the FDPA unconstitutional because it does not provide for such a process. (Capital Motion Two, at 13). Defendant cites, for example, how the FDPA assigns responsibility for deciding when to seek the death penalty to Department of Justice attorneys, not to the grand jury. See 18 U.S.C. § 3593(a). Defendant also cites how the FDPA provides for aggravating factors to appear in a written notice rather than a grand jury indictment. Id. Contrary to defendant’s assertions, however, the FDPA does not, by its terms, offend the Fifth Amendment’s Indictment Clause. Accordingly, this argument lacks merit.

The Indictment Clause of the Fifth Amendment serves two functions. First, it acts as a check on prosecutorial power by entitling “a defendant to be in jeopardy only for offenses charged by a group of his fellow citizens acting independently of either the prosecutor or the judge.” United States v. Field, 875 F.2d 130, 133 (7th Cir. 1989) (citing Stirone v. United States, 361 U.S. 212, 217-19 (1960)). See also United States v. Cotton, 122 S. Ct. 1781, 1786 (2002). “Second, it entitles a defendant to be apprised of the charges against him, so that he knows what he must meet at trial.” Field, 875 F.2d at 133. See also Apprendi, 530 U.S. at 478 (“The defendant’s ability to predict with certainty the judgment from the face of the felony

indictment flowed from the invariable linkage of punishment with the crime.”). “[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.” Hamling v. United States, 418 U.S. 87, 117 (1974).

The superceding indictment filed in this case satisfies the requirements of the Indictment Clause. “When it returned a true bill, the grand jury performed its check on prosecutorial power by determining that probable cause exists to find that the specified mental culpability and aggravating factors exist. The superceding indictment informs [defendant] that he is charged with a capital offense and specifies the factors that, if proven, will render him eligible for a death sentence.” Fell, 217 F. Supp.2d at 484. In terms of the Indictment Clause, defendant cannot demonstrate anything else he is entitled to which the superceding indictment has not provided.

Defendant nevertheless argues that the provisions of the FDPA conflict with or contradict the grand jury process which the government followed here. However, “[a]lthough the FDPA does not expressly provide for grand jury indictment on the eligibility factors, ‘nothing in the statute is inconsistent with such a role for the grand jury.’” Fell, 217 F. Supp.2d at 484 (quoting Church, 218 F. Supp.2d at 815. See also O’Driscoll, 2002 WL 32063818 at *2. “That the FDPA is silent concerning the grand jury’s role in charging death-eligibility factors does not suggest that Congress intended to forbid grand jury participation or to exclude these factors from an indictment.” Fell, 217 F. Supp.2d at 484.

Allowing the grand jury to decide there is probable cause for charging statutory

aggravating factors in the indictment does not conflict with the role that the FDPA assigns to Department of Justice attorneys as defendant alleges. See Sampson, 2003 WL 352416 at *9 (“The statutory roles of the Department of Justice, the judge, and the jury are not altered.”). Nor does the fact that the FDPA provides for the death-eligibility factors to appear in a written notice “preclude a grand jury’s deliberating and voting to indict on these factors.” Fell, 274 F. Supp.2d at 484. Indeed, in Lentz, the court observed that “there is nothing unusual about the omission of a provision in the Act mandating that the mens rea requirements and statutory aggravating factors appear in the indictment. The sufficiency of an indictment is not articulated in the statute identifying the substantive crime, but is provided for in Fed. R. Crim. P. 7(c).” 225 F. Supp. 2d at 681.¹⁶

Despite defendant’s assertions to the contrary, the Court need not read the FDPA as conflicting with the Indictment Clause. Indeed, the Court is required to make every effort to read the statute in harmony with the Clause because “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” Hooper v. California, 155 U.S. 648, 657 (1895); see also Salinas v. United States, 522 U.S. 52, 59-60 (1997) (counseling courts to construe statutes to avoid constitutional infirmity). Thus, “if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ [this Court is] obligated to construe the statute to avoid such problems.” INS v. St. Cyr., 533 U.S. 289, 299-300 (2001) (quoting Crowell v.

¹⁶ Nor is the Department of Justice’s notice rendered redundant by a grand jury indictment of the statutory mental culpability and aggravating factors. As the court in Sampson noted, “The Department of Justice’s notice may ... describe additional non-statutory aggravating factors that the government will seek to prove to justify a sentence of death.” 2003 WL 352416 at *9.

Benson, 285 U.S. 22, 62 (1932)). Additionally, the party challenging a statute bears the burden of demonstrating its unconstitutionality. Lujan v. G & G Fire Sprinklers, Inc., 121 S. Ct. 1446, 1452 (2001). Finally, all acts of Congress are presumed to be a constitutional exercise of legislative power until the contrary is clearly established. Gibbs v. Babbitt, 214 F.3d 483, 504 (4th Cir. 2000).

With the return of the superceding indictment, which demonstrates that the charged offense is capital-eligible, the procedures set forth in the FDPA can now be followed to the letter. The government has already filed the notice required by 18 U.S.C. § 3593(a) setting forth the aggravating factors upon which it intends to rely during the penalty phase as a basis for a death sentence. If defendant is convicted, the Court will conduct a penalty phase following the remaining procedures set forth in Section 3593. In short, there is absolutely no conflict between the Indictment Clause and the FDPA.¹⁷

Indeed, this very same procedure has been followed and approved by courts in drug trafficking cases since the Supreme Court's decision in Apprendi. For example, 21 U.S.C. § 841(b) provides for enhanced penalties for drug traffickers based upon the weight of the drugs involved in the offense. Even though the enhancements are identified as "penalties" within the statute, after Apprendi they are deemed the functional equivalent of elements of the offense to be charged in the indictment and proved to the jury beyond a reasonable doubt. United States v. Promise, 255 F.3d 150, 156 (4th Cir. 2001) (*en banc*). Since Apprendi, indictments charging

¹⁷ As the FDPA can be construed in a way that satisfies the requirements of the Indictment Clause, and such a construction is not inconsistent with Congressional intent at the time the statute was enacted (*see infra* at 17-18), defendant's argument that the doctrine of constitutional avoidance does not apply here clearly fails.

drug offenses now allege drug quantity to ensure compliance with both the Fifth and Sixth Amendments.

Efforts to declare the drug statute unconstitutional based on its failure to explicitly provide for indictment of drug quantity have failed. The Eleventh Circuit in United States v. Woodruff, -- F.3d --, 2002 WL 1446932 (11th Cir. July 3, 2002), and United States v. Candelario, 240 F.3d 1300, 1311 n. 16 (11th Cir. 2001), as well as every other circuit to address the issue, has rejected claims that the statute is unconstitutional in light of Apprendi. See United States v. Buckland, 289 F.3d 558, 562-68 (9th Cir. 2002) (*en banc*); United States v. Mendoza-Paz, 286 F.3d 1104, 1110 (9th Cir. 2002); United States v. Outen, 286 F.3d 622, 635-36 (2nd Cir. 2002); United States v. Chernobyl, 255 F.3d 1215, 1219 (10th Cir. 2001); United States v. Martinez, 252 F.3d 251, 256 n. 6 (6th Cir. 2001); United States v. Brough 243 F.3d 1078, 1079-80 (7th Cir. 2001); United States v. Slaughter, 238 F.3d 580, 582 (5th Cir. 2000) (*per curiam*), *cert. denied*, 121 S. Ct. 2015 (2001); United States v. McAllister, 272 F.3d 228, 233 (4th Cir. 2001); United States v. Chong, 285 F.3d 343, 346 (4th Cir. 2002); *see also*; United States v. Valdez-Santana, 279 F.3d 143, 147 (1st Cir. 2002) (declaring 21 U.S.C. § 952(a) constitutional). Moreover, in United States v. Cotton, 122 S. Ct. 1781 (2002), the Supreme Court recently held that Apprendi attacks upon § 841(b) are to be analyzed under the “plain error doctrine” when the defendant fails to raise Apprendi in the district court – a far cry from declaring the statute facially unconstitutional.

Defendant’s efforts to distinguish this case from the post-Apprendi drug cases are unsuccessful. (See Capital Motion Two, at 18-20). The FDPA on its face complies with Apprendi at least as much as § 841 because the statute specifically provides for a jury to

determine the aggravating factors, unless both the defendant and the government agree otherwise. 18 U.S.C. § 3593(b).¹⁸ Moreover, just as the drug statute is silent with regard to treating drug quantities as the equivalent of elements which must be pled by indictment, the FDPA is silent with respect to requiring aggravating factors to be alleged in the indictment. And just as that silence did not render the drug statute unconstitutional, “the mere fact that the [FDPA] is silent regarding whether sentencing factors must be treated as elements in order for those factors to increase the defendant’s statutory maximum sentence does not make the statute inconsistent with the constitutional requirement that those factors receive that treatment.” United States v. McAllister, 272 F.3d 228, 233 (4th Cir. 2001). Defendant further contends that, unlike the drug statute, requiring statutory aggravating factors to be alleged by indictment alters the fundamental structure of the FDPA. In fact, the effect on both laws is the same: none.¹⁹ For all of the foregoing reasons, the Court should reject defendant’s argument that the FDPA is facially unconstitutional because it does not expressly provide for indictment of aggravating factors.

C. The Government has properly included special findings in the Superseding Indictment.

Defendant claims that including special findings in the superseding indictment is impermissible. For the reasons that follow, all of defendant’s arguments in support of this claim lack merit.

¹⁸ Additionally, the government has the burden of establishing the existence of any aggravating factors beyond a reasonable doubt. 18 U.S.C. § 3593(c).

¹⁹ For this reason as well, defendant’s severability argument fails.

1. The government did not unconstitutionally “rewrite” the FDPA by superceding the indictment.

Defendant first argues that by superceding the indictment to allege mental culpability and statutory aggravating factors, the government violated the Separation of Powers and Non-delegation doctrines because the definition of a crime is a legislative act reserved for Congress, not the Executive or Judicial Branches.

The defendant’s argument is flawed. Under Ring, aggravating factors are **not** elements of a distinct capital offense, but the “*functional equivalent* of an element.” Ring, 122 S. Ct. at 2443 (emphasis added). As explained earlier, Jones, Apprendi and Ring address issues of criminal procedure; thus, aggravating factors arguably must now be treated procedurally as elements of the offense alleged: meaning, they “...must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” Id. at 2439. Because the superceding indictment does not define a new and distinct criminal offense as defendant contends, but rather simply provides the additional layer of procedural protection required by Ring, defendant’s separation of powers and non-delegation doctrine arguments fail.²⁰ Moreover, as also discussed earlier, the FDPA is *silent* regarding the grand jury’s role with respect to aggravating factors. Thus, contrary to defendant’s argument, no redrafting has occurred by virtue of the superceding indictment, nor is any required. All that is required is an understanding that the FDPA permits the grand jury to indict on death penalty eligibility factors, as has been done in this case.

²⁰ Additionally, it was Congress that determined the facts that increase the defendant’s maximum punishment, also known as the FDPA’s gateway intent and statutory aggravating factors. The Executive Branch did not create or define these facts.

2. No judicial “rewriting” of the FDPA is necessary.

Defendant next argues that it would be unconstitutional for the Court to construe the FDPA in the manner proposed by the Government to permit the return of the superceding indictment. (Capital Motion Two, at 16). In support of this argument, defendant relies on United States v. Jackson, 390 U.S. 560 (1968). There, the Supreme Court considered a statute which authorized only a jury to return a verdict of death. Id. at 572. The Court found that the statute imposed an impermissible burden on the constitutional right to a jury trial because there would be no jury if a defendant pled guilty or was tried by a judge. Id. The government argued, however, that the judge had the power to convene a special jury for the limited purpose of addressing the death penalty. Id. The Supreme Court rejected this proposed construction of the statute, in part because the power to impanel such a jury had not been recognized in the federal system when the statute was enacted. Id. at 578. The Supreme Court stated, however, that:

If the power to impanel such a grand jury had been recognized elsewhere in the federal system when Congress enacted the Federal Kidnapping Act, perhaps Congress’ total silence on the subject could be viewed as a tacit incorporation of this sentencing practice into the new law. But the background against which Congress legislated was barren of any precedent for the sort of sentencing procedure we are told Congress implicitly authorized.

Id.

As the district court in Sampson recently concluded in rejecting the same argument based on Jackson, the situation with the FDPA is totally different. See Sampson, 2003 WL 352416 at *10. “[T]he fact that the Fifth Amendment requires that a grand jury charge elements of an offense was clearly established in 1994 when the [FDPA] was enacted.” Id.

(citing Russell v. United States, 369 U.S. 749, 763 (1962), and Hamling v. United States, 418 U.S. 87, 117 (1974)). “It is reasonable to assume that the fact that the statute does not attempt to prohibit the grand jury from performing its traditional function reflects Congress’ tacit understanding that the grand jury could and would do so in a death penalty case if Walton were ever reversed.” Sampson, 2003 WL 352416 at *10. “The statute in Jackson was also invalidated because the interpretation advocated by the government would not merely have required the court to ‘fill a minor gap,’ but instead would have required the court to ‘create from whole cloth a complex and completely novel procedure.’” Id. “In contrast, the [FDPA], the Federal Rules of Criminal Procedure, and the common law governing grand jury practice give [defendant] the guidance that defendants ordinarily find in a body of procedural and evidentiary rules spelled out in advance of trial, that the Supreme Court found lacking in Jackson.” Id. (internal quotations and citations omitted).

Since the return of the superceding indictment requires no judicial “rewriting” of the FDPA, and it is clear that Congress had “reason to create a statute that would not only be constitutional when enacted, but would also remain constitutional in light of future developments,” Sampson, 2003 WL 352416 at *8, defendant’s arguments based on Jackson fail.

3. The form of the superceding indictment is valid.

The defendant also challenges the form in which the statutory aggravating factors are alleged in the superceding indictment. (Capital Motion Two, at 22). Those factors appear in the superceding indictment in a section labeled, “Notice of Special Findings.” Specifically, defendant argues that “[g]rand juries are not, under the FDPA, permitted to return ‘Special

Findings.” (Ibid.). He also argues that “missing from the superceding indictment are the two alleged non-statutory aggravating factors,” (Id. at 23), as well as an allegation that “aggravating factors outweigh mitigating factors, or that the death penalty is justified.” (Id. at 27). Defendant claims that these alleged deficiencies warrant striking the “special findings” from the superceding indictment. For the reasons that follow, however, all of defendant’s arguments fail.

The sufficiency of an indictment is not articulated in the statute identifying the substantive crime but rather is provided for in the Federal Rules of Criminal Procedure. Rule 7 expressly provides for the grand jury’s involvement in charging federal capital crimes. See Fed. R. Crim. P. 7(a)(1)(A). The Rule further provides that “[t]he 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). After Ring, the mental culpability and statutory aggravating factors specified in the FDPA are “essential facts” of a capital case. Thus, the Rule clearly contemplates inclusion of such factors in an indictment and the grand jury’s consideration of them. While the Rule does not explicitly empower the grand jury to make “special findings,” as the government has labeled the capital-eligibility factors in the superceding indictment, this is an issue of mere formality in pleading with which Rule 7 dispenses. See id. (“[the indictment] need not contain a formal commencement, a formal conclusion or any other matter not necessary to [the statement of the essential facts constituting the offense charged].”).

Additionally, it is well-understood that the grand jury was born in the Common Law, and many of its traditions and practices have evolved from the usages of Common Law. See,

e.g., United States v. Williams, 504 U.S. 36, 47-54 (1992); United States v. Costello, 350 U.S. 359, 362-64 (1956). The grand jury “is a constitutional fixture in its own right” and therefore “belongs to no branch of the institutional Government.” United States v. Williams, 504 U.S. at 47. Because of its “functional independence,” the grand jury has the inherent authority to initiate investigations, examine witnesses and to conduct its deliberations. Id. at 48. “Given the grand jury’s operational separateness,” the Supreme Court has been averse to “prescribing modes of grand jury procedure.” Id. at 49-50; Costello, 350 U.S. at 362 (“[English] [g]rand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules.... And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules”).

In light of the grand jury’s constitutional stature, its Common Law roots, its independence and its tradition of control over its own proceedings, this Court should reject any attempt by defendant to circumscribe the grand jury’s authority to return capital-eligibility findings – at least in the absence of some clear manifestation of Congressional intent otherwise. Defendant has pointed to no law or rule prohibiting a grand jury from making special findings. On the contrary, Rule 7 of the Federal Rules of Criminal Procedure clearly contemplates such findings in the capital context. Consequently, defendant’s claim that the grand jury which returned the superseding indictment against him lacked authority to make special findings of the mental culpability and statutory aggravating factors fails.

Defendant nevertheless contends that the superseding indictment is deficient because it fails to allege any of the non-statutory aggravating factors identified in the Government’s Notice of Intent to Seek the Death Penalty or that the aggravating factors outweigh any

mitigating factors and that a sentence of death is justified. With regard to defendant's first argument, he confuses the completely different functions performed by statutory and non-statutory aggravating factors. Unlike mental culpability and statutory aggravating factors, which determine death-eligibility, non-statutory aggravating factors aid the death-selection process. See United States v. Johnson, 1997 WL 534163 at *6, No. 96-CR-379 (N.D. Ill. Aug. 20, 1997) ("[S]tatutory aggravating factors narrow the class of defendants eligible for the death penalty whereas non-statutory factors serve the separate 'individualizing' function that ensures the jury has before it all possible relevant information about the individual defendant whose fate it must determine."); United States v. Pitera, 795 F. Supp. 546, 559 (E.D.N.Y. 1992) ("Non-statutory aggravating factors are considered only after a defendant's membership in this narrow class [of persons eligible for the death penalty] is established beyond a reasonable doubt and only as a part of the jury's individualized sentencing consideration."), aff'd, 986 F.2d 499 (2nd Cir. 1992). Thus, non-statutory aggravating factors do not increase punishment and, therefore, are not subject to the Indictment Clause.²¹

Equally spurious is defendant's complaint that the second superseding indictment fatally neglects to charge that the aggravating factors outweigh any mitigating factors. While a sentencing jury must unanimously conclude that aggravating factors "sufficiently outweigh" mitigating factors "to justify a sentence of death," 18 U.S.C. § 3593(e), that balancing function is again part of the death-selection process, not the death-eligibility determination. Accordingly, just as with non-statutory aggravating factors, the omission from the superceding

²¹ The superceding indictment does not allege any non-statutory aggravating factors for this very reason.

indictment of any allegation that aggravating factors outweigh mitigating factors does not offend the Indictment Clause.

D. The FDPA's relaxed evidentiary standard remains constitutional.

Defendant attempts to bolster his argument from Capital Motion One that the FDPA is facially unconstitutional because it provides for a relaxed evidentiary standard at the capital sentencing hearing. (Capital Motion Two, at 29). Under 18 U.S.C. § 3593(c), “[the] defendant may present any information relevant to a mitigating factor,” and “[t]he government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a).” Section 3593(c) further defines the standard for admitting relevant evidence at the sentencing hearing:

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.

Defendant contends that this relaxed evidentiary standard is unconstitutional in light of Ring's ruling that statutory aggravating factors are the “functional equivalent” of substantive offense elements.

In between his filing of his capital motions, the Second Circuit issued its opinion in United States v. Fell, 360 F.3d 135 (2d. Cir. 2004), reversing the district court opinion the defendant relied upon in his first capital motion. Now, recognizing that his earlier argument has been deprived of its primary support, the defendant sets out to demonstrate that the Second Circuit was wrong in Fell.

The basis for his attack on the Second Circuit's decision is that it cannot be reconciled

with Sattazahn v. Pennsylvania, ___ U.S. ___, 123 S.Ct. 732 (2003), or the more recent Crawford v. Washington, ___ U.S. ___, 124 S.Ct. 1354, 2004 WL 413301 (March 8, 2004). However, his attack is unavailing. He fails to adequately explain his claim that the Second Circuit failed to account for the Supreme Court's decision in Sattazahn, even though Sattazahn had been decided well before the Second Circuit issued Fell. The defendant also fails to adequately explain how the Crawford decision changes anything about the court's ability under the FDPA to exclude evidence that violates a defendant's confrontation right. The mere fact that the Fell court ruled admissible a particular type of evidence just prior to a Supreme Court opinion changing course on the admissibility of that type of evidence, in no way diminishes or alters the fundamental holding of Fell - that the FDPA's provisions regarding the admission of evidence can accommodate the exclusion of any evidence that violates a defendant's constitutional rights, including the right to confront witnesses.

In sum, Section 3593(c) neither authorizes the admission of any evidence that the Constitution requires be excluded nor prevents courts from excluding unconstitutional evidence if it is offered. Nothing in Crawford alters this fact.

E. No presumption of innocence problem exists

The defendant asserts that the FDPA creates a presumption of innocence problem rendering it unconstitutional because the defendant will have been found guilty of a crime prior to entering the sentencing phase of trial. This claim is without merit.

As an initial matter, "even at the guilt phase, the defendant is not entitled automatically to an instruction that he is presumed innocent of the charged offense." Delo v. Lashley, 507 U.S. 272 (1993), citing Kentucky v. Whorton, 441 U.S. 786 (1979). Given this rule, it is hard

to conceive that he would be entitled automatically to such an instruction at the sentencing phase, as a constitutional matter. As such, there is no basis for declaring the FDPA unconstitutional for creating a “presumption of innocence problem.”

“An instruction is constitutionally required only when, in light of the totality of the circumstances, there is a “genuine danger” that the jury will convict based on something other than the State’s lawful evidence, proved beyond a reasonable doubt.” Ibid. (citing Whorton, 441 U.S., at 789, quoting Taylor v. Kentucky, 436 U.S. 478, 488 (1978)). The Supreme Court specifically noted that the holding of Taylor, relied upon by the defendant in the instant case, was limited to the facts of that case. Whorton, at 789. The totality of the circumstances within a given case must be viewed in order to determine whether a presumption of innocence instruction is constitutionally required, including “all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors.” Ibid.

The defendant here offers no reason to assume such a “genuine danger.” If his case reaches a sentencing phase (at which point this issue would become ripe), the evidence submitted by the Government will be lawful and controlled by this Court. The jury will also be instructed that they cannot find any factor alleged by the Government unless they are unanimously convinced of it beyond a reasonable doubt, based on the admitted evidence. The mere fact that the defendant will already have been found guilty of an offense at the guilt phase does not affect the procedures used in the sentencing phase to ensure that the jury’s decisions are based only on competent evidence, lawfully admitted, and proved beyond a reasonable doubt.

For these reasons, there is no presumption of innocence problem, much less one of constitutional dimension.

**XI. The Notice of Special Findings in the Superseding Indictment and the Death Penalty Notice provide sufficient notice to the defendant.
(Capital Motion Two, III, A-B)**

A. The Notice is sufficient.

Defendant claims that he is without constitutionally sufficient notice to defend himself in this case. He attempts to support his claim by citing several cases addressing the requirements of charging instruments. The Government does not dispute that the defendant is entitled to adequate notice. However, the defendant here has received more than adequate notice.

On June 26, 2003, a superseding indictment was returned specifically apprising the defendant that he must face two criminal counts. Count One, the capital count in this case, advises him of the statute he violated (18 U.S.C. § 844(i)), the method he used (explosives), the name of the building he damaged, the specific street address for that building, the date of the crime, and the names of the deceased victim, Robert D. Sanderson, and the surviving victim, Emily Lyons.

The indictment also included a “Special Findings” section, which incorporated by reference the allegations contained in Count One, and informed the defendant that he acted with the criminal intent level constitutionally required for capital eligibility, and further delineating the statutory aggravating factors that make him eligible for the death penalty. He was therefore on notice as early as June 2003 that the government had charged him with a capital offense.

On December 11, 2003, the Government filed a notice of intent to seek the death penalty, as required by 18 U.S.C. § 3593, informing the defendant that the Government would, in fact, seek the death penalty. As required by statute, this notice informed the defendant of the intent and aggravating factors the government would seek to prove to support a death sentence. “The government is not required to provide specific evidence in its notice of intent.” United States v. Battle, 173 F.3d 1343, 1347 (11th Cir. 1999).

Additionally, and significantly, the defendant has been provided an enormous amount of discovery in this case. Discovery material pertaining to the Birmingham bombing alone consisted of: 40 3" binders pertaining to evidence; 16 3" binders containing photographs; copies of more than 17,400 reports of interviews (FBI 302s), these along with other documents, lab reports and photographs were scanned onto compact discs containing approximately 160,000 pages of information; numerous audio and video tapes; and access to examine all physical evidence, more than 6,000 1As, and telephone records.

Defendant will also have the opportunity to preview nearly all the evidence supporting the aggravating factors prior to the start of the sentencing hearing, because most of that evidence will necessarily have been introduced during the guilt phase to prove the charges. Specifically, the guilt phase evidence will include evidence of the defendant’s criminal intent, the planning and preparation he undertook before committing his crime, and the exact method in which he carried out his plan.

As for the specific aggravating factors alleged in the death penalty notice, they are more than sufficient to enable the defendant to prepare a defense. The first factor alleged is that the death occurred during the commission of a violation of 18 U.S.C. § 844(i). That precise

violation is alleged in detail in the indictment and includes the name of the deceased victim. This factor could not be more specific. The second factor alleges that the defendant knowingly created a grave risk of death to one or more persons. No penetrating investigation is required to understand that exploding a bomb on a public street while people are nearby creates a grave risk of death to those people. More precisely, the indictment and the notice provide the name of one such victim, Emily Lyons. The third factor is that the defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism. Again, it should be fairly obvious from the nature of the crime alleged and the voluminous discovery provided that the bomb used by this defendant did not materialize from thin air, was not inadvertently placed outside the entrance of the clinic, and did not magically detonate. Planning and premeditation are the hallmarks of this crime. It is also difficult to conceive that the fourth aggravating factor can be seen as deficient in terms of notice. It alleges that the defendant intentionally killed or attempted to kill more than one person in a single criminal episode. The defendant's motion pedantically asserts that this factor fails to identify the single criminal episode alleged, wholly ignoring that the two-count indictment alleges only a single course of criminal activity, to wit: using an explosive device to damage a building used in interstate commerce, and causing death and personal injury in so doing. The indictment even names the two victims, one of whom was killed and the other seriously injured.

The notice also alleges two non-statutory aggravating factors: that the defendant poses a risk of future dangerousness and that his crime caused harm to the two victims and their families. Both factors place the defendant on notice of what the government intends to prove.

The fact that he has engaged in extreme, planned violence, that he has demonstrated a lack of remorse for that conduct, and that he has poor potential for rehabilitation suffice to inform him of the nature of this factor. The victim impact factor specifically notifies the defendant of the names of the two victims. That these victims and their families have suffered harm is self-evident.

Clearly, the indictment and the notice sufficiently inform the defendant of the charges he must defend against, as well as the nature of the aggravating factors he faces in the sentencing phase. With the discovery he has been provided and the opportunity he will have to preview most of the specific evidence of the aggravating factors during the guilt phase of trial, he cannot reasonably complain of surprise at the sentencing phase.

Defendant, in essence, claims that the Government must give defendant notice of all the evidence it will introduce at the penalty phase. These contentions should be rejected.

Under 18 U.S.C. §3593(a), the government must inform the defendant and the district court of its intent to seek the death penalty in the event of a conviction and "the aggravating factor or factors that the government . . . proposes to prove as justifying a sentence of death." (emphasis added). The statute clearly and unambiguously refers to "factors", not "evidence", that must be set forth in the notice. In United States v. Chandler, 996 F.2d 1073, 1089 (11th Cir. 1993), *cert. denied*, 512 U.S. 1227 (1994), the court described a comparable notice provision in 21 U.S.C. §848(h) as merely requiring that the government provide the defendant with "a list" identifying each aggravating factor on which it intends to rely. Likewise, in United States v. Cooper, 754 F. Supp. 617, 621 & n.7, 635-37 (N.D. Ill. 1990), the court upheld the sufficiency of death penalty notices that identified the aggravating factors with the same degree

of specificity as the instant Notice. See also United States v. Bradley, 880 F. Supp. 271, 283-284, 286-87 (M.D. Pa. 1994). The Notice does place “boundaries” on what the Government will introduce - evidence relevant to establish the factors listed in the Notice.

Nothing in the Constitution requires the government to provide a detailed description before trial of the aggravating factors upon which it will rely at a capital sentencing hearing. Courts have often held that the enumeration of aggravating factors in a state's capital sentencing statute itself accords a capital defendant sufficient notice as to the factors on which the prosecution might be expected to rely in seeking the death penalty, without further need of a case-specific listing of aggravating factors. See Clark v. Dugger, 834 F.2d 1561, 1566 (11th Cir. 1987) (collecting cases), cert. denied, 485 U.S. 982 (1988); Spinkellink v. Wainwright, 578 F.2d 582, 609-610 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979). There is similarly no requirement that the prosecution provide capital defendants in advance with a road-map of the theory of its case in aggravation or the evidence that it will present to prove the existence of the aggravating factors on which it will rely. See Cooper, 754 F. Supp. at 621; Williams v. Commonwealth, 450 S.E.2d 365, 372 (Va. 1994), cert. denied, 115 S. Ct. 2616 (1995). A Notice of Intent to Seek the Death Penalty filed pursuant to §3593(a) which lists only aggravating circumstances without giving additional detail is constitutionally specific and sufficient. Nguyen, 928 F.Supp. at 1545-46. The instant Notice identifies the four statutory aggravating factors by reference to the statutory citation and in language that tracks the statute; the notice also identifies two other non-statutory aggravating factors with comparable specificity. Accordingly, the Notice is legally sufficient.

Defendant’s specific complaints about the adequacy of the Notice ring hollow in view

of the linkage between the factors and the indictment, the detail provided in the Notice itself, and the liberal discovery provided in this case. With over 160,000 pages of discovery materials provided to defendant (Birmingham case only), to date, defendant has within his possession the basis for all of the evidence that the Government may offer at the penalty phase. For example, defendant possesses reports of interviews (FBI 302s) of numerous individuals who are familiar with defendant's background.

The terms used in the Notice certainly make it clear to defendant that he will not be facing claims of factors other than those set forth in the Notice, without the Government seeking leave to amend the Notice. Nothing in the statute or the Constitution requires the Government to lead defendant by the hand through the discovery materials and explain to him the Government's theory of how each piece of evidence might relate to the factors in the Notice, any more than the Government is required to provide defendant with an advance transcript of its closing argument in the penalty phase.

B. Defendant's motion for a bill of particulars should be denied.

The defendant has been given notice of the government's intention to seek the death penalty and specific notice of the aggravating factors upon which it intends to rely. In his motion, he asks the Government to plead not only the notice but additional details, evidence and theories of the Government's case which would be equivalent to interrogatories under the Federal Rules of Civil Procedure. As the subsequent case law makes clear, the overall thrust of defendant's motions is contrary to the established purposes of a bill of particulars.

The granting of a bill of particulars is wholly within the discretion of the trial court.

United States v. Stephenson, 924 F.2d 753, 761-62 (8th Cir.), cert. denied, 502 U.S. 813

(1991); United States v. Arenal, 768 F.2d 263, 268 (8th Cir. 1985); United States v. Key, 717 F.2d 1206, 1210 (8th Cir. 1983); United States v. Cooper, 577 F.2d 1079, 1089 (6th Cir. 1978), cert. denied, 439 U.S. 868 (1978). The purposes of a bill of particulars are:

[T]o inform the defendant of the nature of the charge against him with sufficient precision to enable him to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable him to plead his acquittal or conviction in bar of another prosecution for the same offense when the indictment itself is too vague, and indefinite for such purposes.

United States v. Ayers, 924 F. 2d 1468, 1483 (9th Cir. 1991) (quoting United States v. Birmley, 529 F.2d 103, 108 (6th Cir. 1976). These specific purposes indicate that a bill of particulars is not a device to obtain disclosure of evidentiary details of the government's legal theories. United States v. Gabriel, 715 F.2d 1447, 1449 (10th Cir. 1983); United States v. Burgin, 621 F.2d 1352, 1359 (5th Cir. 1980); cert. denied, 449 U.S. 1015 (1980). Similarly, it is not a proper purpose of the bill of particulars to inquire into the government's legal or evidentiary theories regarding the means by which the defendant committed the aggravating circumstance. United States v. Leonelli, 428 F. Supp. 880, 882 (S.D.N.Y. 1977); United States v. Gabriel, 715 F.2d 1447, 1449 (10th Cir. 1983). A bill of particulars should not be granted where it is intended to provide the defendant with details of the government's case against him in advance of trial, United States v. Kilrain, 566 F.2d 979, 985 (5th Cir. 1978), cert. denied, 439 U.S. 819 (1978); or to compel the disclosure of a government witness list, United States v. Little, 562 F.2d 578, 581 (8th Cir. 1977); United States v. Largent, 545 F.2d 1039, 1043-44 (6th Cir. 1976), cert. denied, 429 U.S. 1098 (1977); or to limit the evidence which may be presented at trial or evidence of which the government may be unaware at the time of the

court's decision on a motion for a bill of particulars. Indeed, a bill of particulars is only necessary where the defendant lacks the particulars needed to avoid prejudicial surprise and to prepare his defense. Wright, Federal Practice and Procedure, Section 129 at 436 (1982). The defendant is not faced with such a need.

A bill of particulars is a supplemental pleading and is not equivalent to interrogatories under the Federal Rules of Civil Procedure. Notwithstanding the demands of defendant, it never properly becomes an account of who, when, why, where, how and, most importantly, with what the government proposes to prove its charges. United States v. Armocida, 515 F.2d 49, 54 (3rd Cir.), cert. denied, 423 U.S. 858 (1975); United States v. Brennan, 134 F. Supp. 42, 52-53 (D. Minn. 1955); Stillman v. United States, 177 F.2d 607, 615 (9th Cir. 1949). As stated in United States v. Malinsky, 19 F.R.D. 426, 428 (S.D.N.Y. 1956):

The purpose of a bill of particulars is to inform the defendant as to the crime for which he must stand trial, not to compel the disclosure of how much the government can prove and how much it cannot nor to foreclose the government from using proof it may develop as the trial approaches. (emphasis added).

Defendant relies on United States v. Glover, 43 F. Supp.2d 1217 (D. KS. 1999), in support of his claim for a bill of particulars. Of note, in Glover, the motion for a bill of particulars was denied. *Id.* at 1232.

Glover does not change the law with respect to bills of particulars in the death penalty context. The principles discussed by the authorities cited herein apply to death penalty notice in the federal system. United States v. Walker, 910 F. Supp 837, 855-856 (N.D. N.Y. 1995). District courts faced with similar requests have routinely denied them. See United States v. Nguyen, 928 F. Supp. at 1549; United States v. Cooper, 754 F. Supp. 617, 621 (N.D. Ill. 1990),

aff'd, 19 F.3d 1154 (7th Cir. 1994).

The government has formally notified the defendant of its intention to seek the death penalty and the notice is more than sufficient to protect the defendant against the danger of prejudicial surprise. In addition, the government has provided liberal discovery in this case, providing far more than the matters mandated by Fed. R. Cr. Pro. 16. It is clear that the notice, together with the voluminous discovery information already provided, suffices to protect the defendant against the danger of unfair surprise. The specificity of the notice and the government's disclosure gives defendant sufficient information about the aggravating circumstances to enable him to prepare a defense.

Weighing against the defendant's motion is the significant detriment to the government caused by a bill of particulars in that it would strictly limit the government's proof at trial. United States v. Haskins, 345 F.2d 111, 114 (6th Cir. 1965). Such a restriction is unnecessary in this case because defendant has not demonstrated a need for a bill of particulars. More importantly, defendant's request essentially seeks to use a bill of particulars for the purpose all cited authority agrees it should not: discovery.

The government believes that the discovery procedure in effect in this case, coupled with the procedural rules, statutory requirements and the dictates of Brady v. Maryland and related cases, satisfy all statutory as well as due process concerns. The Supreme Court has noted, "it has been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge." United States v. Agurs, 96 S.Ct. 2392, 2402, n.21.

Finally, the government is concerned that granting this motion, in spite of the

government's good faith in providing such ample discovery, could result in foreclosing the government from presenting relevant evidence at trial.

The government urges the court to deny the defendant's request insofar as it exceeds the requirements of Rule 16, 18 U.S.C. §§3432 and 3500, and Brady v. Maryland, 373 U.S. 83 (1963).

**XII. Alleging and proving multiple gateway intent factors is permissible.
(Capital Motion Two, IV)**

Defendant moves to dismiss the Superseding Indictment and the Government's Notice of Intent to Seek the Death Penalty based upon the following arguments: 1) defendant contends that the assertion of all four mental states, pursuant to 18 U.S.C. § 3591 (a)(2)(A)-(D), fails to provide the narrowing function this element of the crime was intended to provide; 2) at least three of the mental states must be stricken, because the allegation of all four mental states promotes a skewed consideration of the aggravating circumstances in the weighing process required when the jury weighs aggravating circumstances against mitigating circumstances; and 3) the assertion of all four mental states denies him reasonable notice of the charge the Government is going to bring and against which he must defend. Defendant's arguments are without merit.

A. The assertion of all four mental states provides a narrowing function.

Defendant argues that alleging each of the mental states does not serve a narrowing function, because virtually every mental state applicable to murder is covered. Defendant's argument ignores the totality of the narrowing functions of the FDPA and is essentially the same argument that was raised and rejected in United States v. Webster, 162 F.3d. 308, 355 (5th

Cir. 1998), and United States v. Miner, 176 F.Supp.2d. 424, 440-441 (W.D.Pa. 2001).

Defendant's argument also ignores the practical reality that while the Government has pre-trial expectations of what the evidence may be in the case, the determination of the applicable mental state pursuant to § 3591(a)(2)(A)-(D) is contingent upon the evidence adduced at trial and subject to a number of factors, including defendant's decision whether or not to testify.²² In this respect, the Government does not know exactly what the evidence will be at trial and cannot at this time predict with certainty the applicable intent element.

As a preliminary matter, a capital sentencing scheme 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); See also McClesky v. Kemp, 481 U.S. 279, 303 (1987). The narrowing function may be accomplished in either of 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." Lowenfield v. Phelps, 484 U.S. 231, 246 (1988). The FDPA follows the second approach.

In Tuilaepa v. California, 512 U.S. 967 (1994), the Supreme Court set forth several

²² Title 18 U.S.C. § 3591(a)(2) imposes upon the Government the burden of proving beyond a reasonable doubt, at a sentencing hearing pursuant to 18 U.S.C. § 3593, precisely what the Government has alleged in the "Special Findings" portion of the indictment and the Government's Notice of Intent. The best way to comply with section 3591(a)(2) is to actually use the language of the statute in the jury instruction. United States v. Paul, 217 F.3d 989, 997 (8th Cir. 2000). The "Special Findings" portion of the indictment uses the language of the statute as does Instruction 12.06(1)(A - D) of the Manual of Model Criminal Jury Instructions for the District Courts Of The Eighth Circuit.

requirements for aggravating factors serving as a predicate for the death penalty: “First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder Second, the aggravating circumstance may not be unconstitutionally vague.” Id. at 972.

Notwithstanding defendant’s argument, the FDPA meets these requirements. After returning a conviction on a criminal offense which authorizes death as a possible punishment, the jury may impose a death sentence only if it unanimously finds one of the mental states set forth in § 3591(a)(2) and one of the statutory aggravating factors enumerated in § 3592(c). See 18 U.S.C. § 3593(e)(2). The intent element satisfies the rule articulated by the Supreme Court that the death penalty may be imposed only on those who possess a sufficiently culpable mental state. Tison v. Arizona, 481 U.S. 137, 157-58 (1986); Enmund v. Florida, 458 U.S. 782, 799 (1982). The intent requirement also performs a narrowing function by limiting the class of persons against whom the death penalty can be imposed. United States v. Flores, 63 F.3d 1342, 1371-72 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996); United States v. Kaczynski, 1997 WL 716487, at *17 (E.D. Cal. Nov. 7, 1997) (unpublished).

Defendant nonetheless contends that the intent elements do not sufficiently narrow the class of persons eligible for the death penalty, because “[t]he mental states cover virtually every mental state applicable to murder.” Defendant attacks only the first narrowing procedure of the FDPA, however, and ignores the second. After a jury finds one of the intent states listed in § 3591(a)(2), it still may not impose the death sentence unless it also finds at least one of the statutory aggravating factors in § 3592(c). Thus, the mental states requirement acts as a “gatekeeper”, but it is the statutory aggravators which perform the requisite narrowing

function.

Nevertheless, 18 U.S.C. § 3591(a) does narrow the class of death eligible defendants to those murderers who both undertake felony participation and demonstrate a reckless indifference to human life. Satisfaction of these elements only begins the death penalty inquiry; it does not and cannot establish death penalty eligibility by itself. United States v. Webster, 162 F.3d. 308, 355 (5th Cir. 1998). The statutory scheme narrows the class of death eligible defendants at two different points of the penalty phase. First, under § 3591(a)(2)(A)-(D), the jury must find the defendant acted with intent. These gatekeeping factors are not aggravators to be weighed against mitigating factors, but serve as a preliminary, threshold qualifier. United States v. Miner, 176 F. Supp.2d. 424, 440-441 (W.D. Pa. 2001). Secondly, the FDPA further narrows the jury's discretion by requiring that it find at least one statutory aggravating factor before proceeding to balance aggravating and mitigating factors. This narrows the class of death eligible defendants a second time. The jury cannot recommend the death penalty without finding both intent under 18 U.S.C. § 3591(a)(2)(A)-(D), and at least one statutory aggravating factor under 18 U.S.C. § 3592(c). Id.

The assertion of all four mental states provides a narrowing function in that the Government is still required to prove beyond a reasonable doubt that the defendant acted with felonious intent and reckless indifference to human life prior to any determination of the existence of an aggravating factor. Prior to submission of this case to the jury, the District Court may require the Government to elect the applicable mental states or those mental states for which sufficient evidence exists.

B. The allegation of multiple mental states does not promote a skewed consideration of the weighing process, because under the FDPA intent factors are not aggravating factors to be weighed against mitigating factors.

Despite the clear language of the FDPA and numerous cases to the contrary, the defendant still argues in his motion, that “[t]he multiplication and duplication of the requisite mental state required to make this case eligible for the death penalty promotes a skewed consideration of the aggravating circumstances in the weighing process required when the jury weighs aggravating circumstances against mitigating circumstances.” Defendant goes on to request that, at a minimum, three of the alleged mental states must be stricken as surplusage. Defendant’s argument should be denied.

The impermissible duplication concerns in death penalty cases arising under 21 U.S.C. § 848(e) (“ADAA”)²³ are not present in this case. It is clear that the FDPA differs from the ADAA 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. United States v. Cooper, 91 F. Supp.2d 90, 109-110 (D. D.C. 2000)(quoting United States v. Webster, 162 F.3d 308, 355 (5th Cir. 1998): “[Section] 3591(a) does not set forth aggravating factors, but rather serves as a preliminary qualification threshold. The fact that the defendant could satisfy more than one of these via the same course of action does not, therefore, constitute impermissible double counting.”); Accord, United States v. Minerd, 176 F. Supp.2d 424, 445 (W.D. Pa. 2001).

²³The defendant’s motion repeatedly cites to this death penalty provision as 18 U.S.C. § 848, instead of 21 U.S.C. § 848.

To the extent this case arises under the FDPA and not the ADAA, defendant's reliance upon United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996), cert. denied, 520 U.S. 1213 (1997), and United States v. Tipton, 90 F. 3d 861 (4th Cir. 1996), is misplaced. Simply put, intent factors are specifically used as aggravating factors in the ADAA and are, therefore, weighed in the sentencing determination. The intent factors are *not* aggravating factors in the FDPA and are specifically *not* weighed by the jury in the sentencing determination. There can be no risk, then, under the FDPA, that the sentencing decision will be skewed by a finding of more than one intent factor. Moreover, even where intent factors are used in the weighing process, it does not appear that the government would be foreclosed from alleging more than one intent factor. Rather, a proper instruction would advise the jury that they could find only one of the intent factors as a basis for its finding. See United States v. Cooper, 91 F.Supp.2d 90, 109-110 (D.D.C. 2000) (citations omitted).

The Manual of Model Criminal Jury Instructions for the District Courts of The Eighth Circuit, 12.06 - Finding of Requisite Mental State is instructive. Note 2 states that 18 U.S.C. §3591(a)(2) does not define the mental states set forth in (A) - (D) as aggravating factors which are weighed in determining whether to impose the death penalty, and therefore, the concerns about impermissible duplication as set forth in cases related to 21 U.S.C. 848(n)(1) where mental states are defined as aggravating factors, are not present. The Committee does suggest, however, that to avoid any concern over stacking the deck in favor of the death penalty, the trial court should instruct only on those mental states clearly supported by the evidence. Instruction 12.06, Note 2. The issue of impermissible duplication can be addressed at the instruction conference prior to final submission of the case to the jury at the end of the penalty

phase.

C. Defendant's argument that he is without notice of requisite intent is without merit.

Defendant argues that the assertion of all four mental state circumstances denies him reasonable notice of the charge the government is going to bring and against which he must defend, thereby violating Defendant's Fifth and Sixth Amendment rights. Defendant is on notice the Government will prove that he committed an intentional killing. Defendant fails to provide any authority that requires the government to elect a single intent factor it will prove at trial. The court in United States v. Cooper, 91 F.Supp.2d 90, 109-110 (D.D.C. 2000), considered and rejected a similar argument, based upon Fifth and Eighth Amendment concerns. In rejecting the notice argument, Cooper distinguished the FDPA procedures from ADAA procedures. In Cooper, the court stated it might be more inclined to agree with Cooper's argument if the jury were permitted to find more than one of the intent factors present in § 3591(a)(2), and then allowed to weigh those factors as aggravating circumstances. Cooper, 91 F.Supp.2d at 109-110. Based upon the distinctions between the FDPA and the ADAA, previously set forth, defendant's argument is without merit.

Defendant's reliance upon United States v. Glover, 43 F.Supp.2d 1217, 1222 (D. Kan. 1999) is misplaced. In Glover the court directed the Government to give more specific notice of a statutory aggravating factor that, if found by the jury, would be used in the weighing process. That is not the case here. Defendant's argument that the Government is engaged in a "shell game" ignores the reality that the Government will not know how the evidence of defendant's intent will be developed at trial until the close of the evidence. Evidence of

defendant's intent depends not only upon evidence the Government intends to present, but may depend upon evidence defendant does or does not present and the actual testimony of the witnesses.

**XIII. The statutory aggravating factors are valid.
(Capital Motion Two, V, A-D)**

A. Death during commission of another offense.

Defendant claims that the first statutory aggravating factor alleged, that the defendant committed the murder during the course of an offense enumerated in 18 U.S.C. § 3592(c)(1), must be dismissed because it duplicates the capital crime charged. He derives primary support for his argument from two cases: United States v. McVeigh, 944 F. Supp. 1478 (D. Colo. 1996), and United States v. Kaczynski, 1997 WL 716487 (E.D. Cal. 1997).

While McVeigh and Kaczynski, two early cases interpreting the FDPA, do support the defendant's argument, several more recent cases declined to follow the reasoning of these two courts. These other courts reasoned that Congress made a permissible legislative determination that a killing occurring during the course of another, specific crime, is a circumstance appropriate for a jury's sentencing determination (e.g., that a killing resulting from the defendant's use of a bomb to damage or destroy a public building is more aggravated than a killing occurring in a less inherently dangerous manner); that the jury, in any event, will only be weighing the circumstances of the crime once, so no duplication issue actually exists; and that preventing the jury from considering the circumstances of the crime as aggravation defies common sense. See United States v. Jones, 132 F. 3d 232, 248-249 (5th Cir. 1998); United States v. Bin Laden, 126 F. Supp.2d 290, 301 (S.D. N.Y. 2001); United States v.

Johnson, 136 F. Supp.2d 553, 559 (W.D. Va. 2001); and United States v. Frank, 8 F. Supp.2d 253, 275-276 (S.D. N.Y. 1998).

The Government urges this Court to follow the better reasoning of those more current cases upholding the validity of the 18 U.S.C. § 3692(c)(1) factor.

B. Grave risk of death to other persons.

The test for whether a statutory aggravating factor is unconstitutionally vague is whether the factor “has a core meaning that juries should be capable of understanding.” Jones v. United States, 527 U.S. 373, 400 (1999), citing Tuilaepa v. California, 512 U.S. 967, 793 (1994). The goal is “ensuring that a sentence of death is not so infected with bias or caprice.” Ibid. The vagueness review is “quite deferential.” Ibid.

Defendant claims that the aggravating factor that he knowingly created a grave risk of death to one of more persons in addition to the victim of the offense is duplicative and vague, and must therefore be dismissed.

He first claims that this factor duplicates the “death during the commission of an enumerated offense” factor, in that the latter wholly subsumes the former. This claim is readily refuted simply by reading both factors as written. Nothing about the “enumerated offense” factor requires any proof whatsoever that the defendant knowingly created a grave risk of death to other people. It is entirely possible to damage a building used in interstate commerce without creating a grave risk of death. Conversely, nothing in the grave risk of death factor requires proof of the use of fire or an explosive device, or that the device be used to damage a building used in interstate commerce. These factors simply do not duplicate one another.

The defendant also asserts that this factor impermissibly duplicates one of the gateway intent factors. Duplication is not even hypothetically an issue unless the duplicated factors both get weighed by the jury. The intent factors are not aggravating factors under the FDPA and do not get weighed by the jury, so there simply is no duplication problem.

The defendant also argues that this factor is vague. The only federal case he cites is United States v. Llera-Plaza, 179 F. Supp.2d 464,473 (E.D. Pa. 2001), but this case held only that the government had to submit an outline of the information it would use to prove this factor in a case in which the existence and identities of the “additional” persons placed at a grave risk of death had never been made known to the defense. As such, this case is readily distinguishable, as the defendant here has been notified of the identity of at least one “additional” person who was exposed to a grave risk of death - Emily Lyons. Additionally, nothing in Llera-Plaza lends any credence to the defendant’s argument that this factor is unconstitutionally vague.

Several other cases have upheld the use of this factor. See United States v. Robinson, 2004 WL 790307 (5th Cir. 2004)(page cites currently unavailable); U.S. v. Foster, 2004 U.S. Dist. LEXIS at *7 (D. Md.); United States v. Minerd, 176 F. Supp.2d 424, 439-40 (W.D. Pa. 2001); Bin Laden, at 300; McVeigh, at 1489-90.

C. Substantial planning and premeditation.

The Government alleges that the defendant committed murder “after substantial planning and premeditation.” The terms employed track precisely the FDPA substantial planning and premeditation aggravating factor denoted in 18 U.S.C. § 3592(c)(9). The defendant contends that this factor is so vague as to render it unconstitutional. His contention

is plainly contrary to the prevailing law.

Every court that has addressed a vagueness challenge to the "substantial planning and premeditation" aggravating factor in § 3592(c)(9) and its analog under 21 U.S.C. § 848(n)(8) has concluded that it sufficiently channels the jury's deliberations to withstand such an attack. See United States v. Tipton, 90 F.3d 861, 895-96 (4th Cir. 1996); United States v. McCullah, 76 F.3d 1087, 1110-11 (10th Cir. 1996); United States v. Flores, 63 F.3d 1342, 1373-74 (5th Cir. 1995); United States v. Bin Laden, 126 F. Supp.2d at 296; United States v. Frank, 8 F. Supp.2d 253, 278 (S.D.N.Y. 1998); United States v. Cooper, 754 F. Supp. 617, 623-24 (N.D. Ill. 1990). The logic of these cases compels the same result here. See also United States v. O'Driscoll, 203 F. Supp 334, 344-45 (M.D. Pa. 2002); United States v. McVeigh, 944 F. Supp. 1478, 1490 (D. Colo. 1996) (summarily rejecting vagueness challenge to the use of the word "substantial" in Section 3592(c)(9), finding that "substantial is one of those everyday words having a common sense meaning that jurors will be able to understand."). Moreover, the factor adequately serves the constitutionally required narrowing function because "[n]ot every murder involves substantial planning and premeditation." United States v. Minerd, 176 F. Supp.2d at 438-39 (holding that substantial planning and premeditation factor provides "common sense core of meaning" such that it is not unconstitutionally vague).

D. Kill or attempt to kill more than one in single criminal episode.

The defendant summarily asserts that the aggravating factor alleging that he intentionally killed or attempted to kill more than one person in a single criminal episode is duplicative of the other three statutory aggravating factors, the gateway intent factors, and the future dangerousness non-statutory aggravating factor. He is wrong on all assertions.

Unlike the first statutory aggravating factor, this factor does not require any showing that the defendant damaged a building used in interstate commerce by fire or explosive. Unlike the grave risk of death factor, this factor requires proof of intentional killing and attempted killing of multiple victims, and unlike the substantial planning and premeditation factor, this factor requires proof of multiple intended victims, and is silent as to any need for planning and premeditation, much less substantial planning and premeditation. Thus, it cannot be said that this factor is wholly subsumed by any of the other alleged statutory aggravating factors.

As discussed above, the gateway intent factors are not aggravating factors and are not weighed by the jury in determining the appropriate sentence. As such, they are not implicated in any alleged, impermissible duplication.

The future dangerousness factor requires proof that the defendant will be a danger to others in the future, and it involves proof that he has a low rehabilitative potential and that he has demonstrated a lack of remorse. None of these requirements is involved in proving that he intentionally killed or attempted to kill more than one person in a single criminal episode.

Additionally, at least three cases have held that the “grave risk of death” factor and the “intentionally killed or attempted to kill more than one person” factor are not duplicative. See United States v. Robinson, 2004 WL 790307 (5th Cir.)(page cites not yet available); Bin Laden, at 300; McVeigh, at 1489-90. See also, United States v. Minerd, 176 F. Supp.2d 424 (W.D. Pa. 2001)(in a pipe-bomb case involving two deaths, charged as a violation of 18 U.S.C. § 844(i), the court denied many of the same challenges the defendant makes in the instant case: substantial planning and premeditation is valid, at p. 439; any overlap between the charged

offense and the gateway intent factors is permissible, at p. 440; alleging all four intent factors is permissible because they are not aggravating factors and are not weighed by the jury, at p. 445; the “death during enumerated offense” aggravating factor is valid, at p. 446; the “grave risk of death” factor is valid and does not impermissibly duplicate an intent factor, at p. 447; and the “multiple killings or attempted killings in a single criminal episode” factor is valid, at pp. 447-48).

**XIV. The heinous, cruel, or depraved factor should be dismissed.
(Capital Motion Two, VI)**

In the superseding indictment, the Government alleged the statutory aggravating factor that the killing was committed in a heinous, cruel, or depraved manner. The Government chose not to include this factor in the notice of intent to seek the death penalty. Accordingly, the Government does not intend to pursue this factor at trial and has no objection to the defense request to strike it from the indictment as surplusage.

**XV. The non-statutory aggravating factors are valid.
(Capital Motion Two, VII, A-G)**

A. Non-statutory factors do not perform the narrowing function.

Defendant claims, contrary to the plain language of the FDPA and all the pertinent case law, that the Government can not constitutionally allege non-statutory aggravating factors.

The FDPA, in section 3592(c), authorizes the jury to consider non-statutory aggravating factors as long as the Government provides notice of the factors it intends to present. Courts have repeatedly endorsed the use of non-statutory aggravating factors under the FDPA. See, e.g., United States v. Cooper, 91 F. Supp. 2d 90, 100 (D. D.C. 2000); United States v. Frank, 8 F. Supp.2d 253, 265 (S.D. N.Y. 1998) (“[T]he use of such non-statutory aggravating factors –

far from injecting arbitrariness into the process – is to be encouraged.”); United States v. Chanthadara, 928 F. Supp. 1055, 1057 (D. Kan. 1996).

These decisions are in complete accord with Supreme Court cases holding that the Constitution allows consideration of non-statutory aggravating factors “relevant to the character of the defendant or the circumstances of the crime,” Barclay v. Florida, 463 U.S. 939, 967 (1983), after the sentencer first finds at least one statutory aggravating factor that narrows the class of defendants eligible for the death penalty, Zant v. Stephens, 462 U.S. 862, 878 (1983). The central tension in the Supreme Court’s death penalty jurisprudence involves balancing the need for a heightened degree of reliability in capital cases, see Lockett v. Ohio, 438 U.S. 586, 604 (1978), against the equally important need for a capital jury to have before it “all possible relevant information,” Jurek v. Texas, 428 U.S. 262, 276 (1976). This balance must be kept in mind when assessing defendant’s challenge to the use of non-statutory aggravating factors.

Contrary to the defendant’s understanding, the function of the non-statutory aggravating factors is to provide relevant information for capital sentencing, not to narrow the class of defendants eligible for the death penalty. Congress already narrowed the class of defendants eligible for the death penalty through the statutory elements of the charged offense and the FDPA’s intent and statutory aggravating factors, which must be found unanimously before the jury can consider the non-statutory aggravators. See 18 U.S.C. § 3593. If the jury proceeds beyond this stage, the focus appropriately shifts to providing it with all possible relevant evidence to enable it to tailor its verdict to the individual before it. See, e.g., United States v. Davis, 912 F. Supp. 938, 943 (E.D. La. 1996) (after the necessary threshold findings of intent

and at least one statutory aggravating factor, “the jury is then to consider other information and factors, both in further aggravation and in mitigation of the penalty. This additional information is to assist the jury in making its ultimate decision. Here, the goal is to individualize the sentence as much as possible.”); United States v. Kaczynski, 1997 WL 716487, at *5 (E.D. Cal. Nov. 7, 1997) (unpublished); United States v. Nguyen, 928 F. Supp. 1525, 1532 (D. Kan. 1996).

The Supreme Court has flatly rejected the notion that non-statutory aggravating factors in state sentencing schemes are constitutionally suspect. Numerous courts have extended that reasoning to the FDPA. For example, the Nguyen court expressly rejected the argument that “allowing the government to define non-statutory aggravating circumstances violates the Eighth Amendment because it will result in arbitrary and capricious sentencing.” 928 F. Supp. at 1538. Relying in part on the Supreme Court’s apposite ruling in Zant, the court held:

[T]he Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among [the narrowed class of persons eligible for the death penalty], those defendants who will actually be sentenced to death.

928 F. Supp. at 1538 (quoting Zant, 461 U.S. at 878).

To the contrary, “as long as that information is relevant to the character of the defendant or the circumstances of the crime,” consideration of non-statutory aggravating factors serves the useful purpose – much like the consideration of non-statutory mitigating circumstances – of ensuring an individualized sentencing determination that minimizes the risk of arbitrary and capricious action. Barclay v. Florida, 463 U.S. 939, 967 (1983) (Stevens, J., concurring); see also Simmons v. South Carolina, 512 U.S. 154, 163-64 (1994); Payne v. Tennessee, 501 U.S.

808, 820-827 (1991); Zant, 462 U.S. at 878-79.

Defendant's suggestion that the Government "[w]ould be restricted only by the imagination of the prosecutor" is unfounded (Capital Motion Two, at 76). The FDPA requires that any information proffered at the penalty phase "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), and makes clear that any such factors must be "sufficiently relevant to the consideration of who should live and who should die." Davis, 912 F. Supp. at 943. Furthermore, the "heightened reliability doctrine" applicable to capital sentencing also governs "the admissibility of non-statutory aggravating factors." United States v. Bradley, 880 F. Supp. at 285. These limitations sufficiently circumscribe the Government's discretion regarding the use of non-statutory aggravating factors to pass constitutional muster, including due process requirements.

B. Use of non-statutory factors is not an ex post facto violation.

Defendant's argument that allowing the Government to identify non-statutory aggravating factors violates the prohibition on ex post facto laws and bills of attainder in Article I, Section 9, of the Constitution is without merit. As the Supreme Court has made clear, the Ex Post Facto Clause is implicated only by "laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.'" California v. Morales, 514 U.S. 499, 504 (1995) (quoting Collins v. Youngblood, 497 U.S. 37, 43 (1990)). The definition of the crimes, including the statutory aggravating factors, and the punishments available for the offenses with which the defendant is charged appear in the applicable criminal statutes cited in the superseding indictment, which were in place before defendant committed the crime for

which he was charged.

Because non-statutory aggravating factors are not part of the definition of the crimes, their use does not violate the Ex Post Facto Clause. See, e.g., United States v. Higgs, 535 F.3d 281, 321-322 (4th Cir. 2003) (“[n]onstatutory aggravating factors and mitigating factors are weighed by the jury to make the individualized determination to impose the death sentence upon a defendant who has already been found eligible. They do not increase the possible punishment or alter the elements of the offense.”); United States v. Frank, 8 F. Supp.2d 253, 2267 (S.D. N.Y. 1998) (“In individualizing the sentencing decision, the jury’s attention is necessarily directed to facts that come into existence with the commission of the crime. This is an essential feature of all sentencing and does not violate the Ex Post Facto Clause.”); Nguyen, 928 F. Supp. at 1538 (“The fact that the government alleged non-statutory aggravating factors [under Section 3592(c) of the FDPA] does not change the definition of the crimes, nor the quantum of punishment available.”); accord Bradley, 880 F. Supp. at 284 (“Permitting the government to assert additional non-statutory aggravating factors neither increases the possible punishment, nor alters the elements of the underlying crime.”); Kaczynski, 1997 WL 716487, at *6 (“Nonstatutory aggravating factors, like procedural changes in a sentencing scheme, simply alter the method employed in determining whether the death penalty should be imposed.”).

Likewise, the courts that have considered the argument that non-statutory factors amount to bills of attainder have rejected it out of hand. The Supreme Court has defined a bill of attainder as “a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.” Selective Serv.

Sys. v Minnesota Pub. Interest Research Group, 468 U.S. 841, 846-47 (1984) (quotation and citation omitted). Of course, by allowing for non-statutory aggravating factors in the FDPA, Congress has not determined guilt nor inflicted punishment on any identifiable individual. Furthermore, no capital defendant is subject to a non-statutory aggravating factor until he has been adjudicated guilty of a capital offense in the guilt/innocence phase of a trial and the jury has found the requisite intent state and at least one statutory aggravating factor at the sentencing phase. As the court in United States v. Glover so succinctly put it, “[b]ecause . . . [the defendant] has not met the definition of bill of attainder, his argument must be rejected.” 43 F. Supp.2d 1217, 1230 (D. KS. 1999). See also United States v. Llera Plaza, 179 F. Supp.2d 444, 455-56 (E.D. Pa. 2001) (rejecting defendant’s argument that non-statutory aggravating factors violate Article I, Section 9, of Constitution).

C. No statutory inconsistency precludes use of non-statutory aggravating factors.

Defendant also contends that the language of section 3591(a) contradicts the language of section 3592(c) because section 3591(a) expressly provides for jury consideration only of the factors set forth in Section 3592(c), and specific non-statutory aggravating factors are not set forth. No such inconsistency exists.

Section 3591(a) provides that a defendant who has been found guilty of a death- eligible offense:

shall be sentenced to death, if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of death is justified

18 U.S.C. § 3591(a).

Section 3592(c) provides:

In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

[subsections (1)-(16) constituting the list of statutory aggravating factors]

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

18 U.S.C. § 3592(c) (emphasis added). Defendant argues, in essence, that the specific limitations on the ability of the government to seek death in 3591(a) nullifies the broader catch-all provision as highlighted in 3592(c) above, and thus prohibits the use of non-statutory aggravating factors.

This same argument was rejected by the court in United States v. Nguyen, 928 F. Supp. 1525, 1536 (D. KS. 1996). The Nguyen court noted the canon of statutory construction requiring that where possible a statute be construed to give meaning to all of its provisions and so that no portion is rendered inoperable. Nguyen, 928 F. Supp. at 1536. See Beck v. Prupis, 529 U.S. 494, 506 (2000) (“terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous.”). Applying that canon to the FDPA, Nguyen concluded that the argument presently advanced by defendant constituted a “strained and hyper-literal” attempt to render substantial portions of 3592 inoperative which was in no way necessitated by the language of the statute itself. Nguyen, 928 F. Supp. 2d at 1536. More recently, the district court in United States v. Llera Plaza, 179 F. Supp. 2d 444 (E.D. Pa. 2001), expanded the Nguyen court’s analysis to further detail how the reading of the FDPA proposed

by defendant here would needlessly render inoperative substantial portions of § 3593 which make express reference to the consideration of non-statutory aggravating factors in the sentencing phase. 179 F. Supp. 2d at 458-59.

The FDPA unequivocally provides for the use of non-statutory aggravating factors in Section 3592(c). The defendant's argument is a "strained and hyper-literal reading of § 3591(a)" and should be rejected. Nguyen, 928 F. Supp at 1536.

D. The defendant is not entitled to a hearing to determine nationwide consistency in use of non-statutory aggravators.

The defendant requests a hearing to determine in advance of trial whether the Government's use of non-statutory aggravating factors has been consistent nationwide. He cites two cases that do not discuss, much less support, his request (Capital Motion Two, at 78). The defendant can cite no case granting such a hearing, no doubt because the function of non-statutory aggravating factors is not to narrow the class of death-eligible murders, but to enable the jury to individualize the punishment decision for a particular defendant.

E. The future dangerousness factor is valid.

Defendant challenges the non-statutory aggravating factor of future dangerousness on a variety of grounds, including that the factor is not authorized by Congress, is limited to future dangerousness while incarcerated, fails to narrow the class of defendants eligible for the death penalty, duplicates the charged murder, and improperly incorporates Defendant's lack of remorse and low rehabilitative potential as supporting evidence.

The FDPA authorizes the government to present future dangerousness as a non-statutory aggravating factor. United States v. Allen, 247 F.3d 741, 788 (8th Cir. 2001), vacated

and remanded on other grounds, 122 S. Ct. 2653 (2002). The factor by its terms has a “core meaning” that jurors are capable of understanding, so it is not vague.

The jury’s consideration of future dangerousness need not be limited to danger to guards and other inmates, but rather may encompass risk to society at large despite any imposition of life imprisonment without the possibility of release. Allen, 247 F.3d at 788-89; United States v. Kee, 2000 WL 863119, *8 (S.D. N.Y. June 27, 2000).

Defendant’s lack of remorse and low rehabilitative potential is properly considered as evidence supporting a finding of future dangerousness. See United States v. O’Driscoll, 203 F. Supp.2d 334, 345 (M.D. Pa. 2002), citing United States v. Davis, 912 F. Supp. 938, 945 (E.D. La. 1996) and United States v. Bin Laden, 126 F. Supp.2d 290, 303-304 (S.D. N.Y. 2001)(“[L]ower courts have uniformly upheld future dangerousness as a non-statutory aggravating factor in capital cases under the [Federal Death Penalty Act], including instances where such factor is supported by evidence of low rehabilitative potential and lack of remorse.”).

Use of the charged murder as part of the evidence of Defendant’s propensity for violence does not entail impermissible “double counting.” Defendant’s “double counting” argument fails in light of the decisions of various courts holding that application of an aggravating factor that is identical to or duplicates an element of the substantive offense charged does not render the sentence unconstitutional. Lowenfield v. Phelps, 484 U.S. 231, 245-46 (1988); Snell v. Lockhart, 14 F.3d 1289, 1304-05 (8th Cir.), cert. denied, 513 U.S. 960 (1994); see United States v. Tipton, 90 F.3d 861, 898 n.19 (4th Cir. 1996), cert. denied, 520 U.S. 1253 (1997); Deputy v. Taylor, 19 F.3d 1485, 1502 (3d Cir.), cert. denied, 512 U.S. 1230

(1994); United States v. McCullah, 76 F.3d 1087, 1108 (10th Cir.), reh'g denied, 87 F.3d 1136 (1996), cert. denied, 520 U.S. 1213 (1997); Edelin, 134 F. Supp.2d, at 78; United States v. Nguyen, 928 F. Supp. 1525, 1538-39 (D. KS. 1996), aff'd, 155 F.3d 1219 (10th Cir. 1998), cert. denied, 525 U.S. 1167 (1999).

For the reasons set forth in connection with the discussion of Jones, supra, the fact that the government has alleged this factor in a number of other death penalty cases does not render the factor overbroad or otherwise invalid. Additionally, non-statutory aggravating factors need not narrow the class of death-eligible defendants, as that function is performed by the statute of conviction and the finding of at least one statutory aggravating factor.

For all these reasons, Defendant's motion to strike future dangerousness as an aggravating factor should be denied.

F. The victim impact factor is valid.

Defendant's argument that the victim impact factor is impermissible is foreclosed by Payne v. Tennessee, 501 U.S. 808 (1991), in which the Supreme Court overruled its prior decisions in South Carolina v. Gathers, 490 U.S. 805 (1989), and Booth v. Maryland, 482 U.S. 496 (1987), and held that the victim's personal characteristics and the impact of the murder on the victim's family may be considered in capital sentencing. In line with Payne, Congress has expressly determined that victim impact is a relevant sentencing factor in federal capital proceedings. Section 3593(a)(2) states that:

The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information.

18 U.S.C. §3592(a)(2).

Payne corrected the “affront to the civilized members of the human race” caused by the Booth bar to victim impact evidence, which resulted in capital sentencing hearings in which “a parade of witnesses may praise the background, character and good deeds of defendant . . . but nothing may be said which bears upon the character of, or the harm imposed, upon the victim[.]” 501 U.S. at 826, quoting Tennessee v. Payne, 791 S.W. 2d 10, 19 (Tenn. 1990). The Payne court found nothing unfair in allowing a jury to bear in mind the harm a defendant’s killing caused while it considers defendant’s mitigating evidence. 501 U.S. at 826. Payne recognized that victim impact evidence “is designed to show . . . each victim’s ‘uniqueness as an individual human being,’ whatever the jury might think the loss to the community resulting from his death might be.” Id., at 823.

The victim impact evidence noticed by the government performs this precise function - it informs the jury of the loss to the community resulting from Robert Sanderson’s death. His characteristics, his talents, his personality, who he was and what he did in life, as well as the extent and scope of the injury and loss suffered by his family are integral to demonstrating his “uniqueness as an individual human being.” It is understandable that defendant would seek to preclude the jury from learning this information. But, in order for the jury to properly address defendant’s moral culpability and blameworthiness, it “should have before it the sentencing phase evidence of the specific harm” defendant caused. Id., at 825. That specific harm is contained in the government’s victim impact evidence.

Moreover, the defendant’s overbreadth argument is without merit. Defendant’s argument suggests that “victim impact” could apply to every murder defendant. However, the

Supreme Court itself has held as follows:

Of course, every murder will have an impact on the victim's family and friends and victims are often chosen because of their vulnerability. It might seem, then, that the factors [] apply to every eligible defendant and thus fall within the Eight Amendment's proscription against overbroad factors. But that cannot be correct . . . Even though the concepts of victim impact and victim vulnerability may well be relevant in every case, evidence of victim vulnerability and victim impact in a particular case is inherently individualized. And such evidence is surely relevant to the selection phase decision, given that the sentencer should consider all of the circumstances of the crime in deciding whether to impose the death penalty.

Jones v. United States, 527 U.S. 373, 401-402 (1999) (emphasis in original). In light of this holding, the defendant's argument that this factor is "overbroad" must fail. Indeed, courts have routinely rejected the very challenge to victim impact evidence that the defendant raises here. United States v. Chanthadara, 230 F.3d 1237, 1273-74 (10th Cir. 2000); United States v. Miner, 176 F. Supp. 2d 424, 448 (W.D. Pa. 2001); United States v. Edelin, 134 F. Supp. 2d 59, 78-79 (D. D.C. 2001); United States v. Frank, 8 F. Supp. 2d 253, 280 (S.D.N.Y. 1998).

Defendant also argues that the Government is precluded from offering victim impact evidence relating to the injuries suffered by Emily Lyons as a result of the defendant's criminal conduct. His argument ignores the simple fact that Ms. Lyons' injuries are part and parcel of the harm caused by the defendant's commission of the capital offense charged in this case. Her injuries were not caused by some unrelated attempted murder, nor were they caused by any conduct other than that charged in the capital offense.

Defendant also ignores that at least two federal death penalty cases have permitted injured survivors to testify about victim impact. See Bin Laden, at 300; United States v. O'Driscoll, 2003 WL 1401819, *2 (M.D. Pa.) (not reported in F. Supp.2d) (referring with

approval to fact that three injured survivors, among others, testified about victim impact in McVeigh).

Instead, the defendant inserts citations to Woodson v. North Carolina, 428 U.S. 280, 305 (1976), and Gardner v. Florida, 428 U.S. 908 (1976), ostensibly to support his assertion that 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.” Capital Motion Two, at 99. The use of these cites is so perplexing that it must simply have been an oversight by the defendant. Neither case addresses victim impact evidence at all, much less evidence from surviving victims. Indeed, the Gardner cite is not to an opinion at all, but rather to the grant of a petition for a writ of certiorari on the issue of whether the non-disclosure of a portion of a pre-sentence investigative report results in ineffective assistance of counsel.

**XVI. The defendant is not entitled to a pretrial hearing on the sufficiency of the evidence of the aggravating factors.
(Capital Motion Two, VIII)**

The defendant seeks a pretrial hearing to determine the sufficiency of the evidence supporting the government’s statutory and non-statutory aggravating factors. This Court should deny the request as not warranted under applicable law. To rule otherwise would unfairly tip the procedural tables in favor of the defense, by granting the defense the strategic advantage of wide-ranging discovery of the government’s case, without conferring on the government any similar broad right of discovery with respect to the defense case as a whole.

The parties stand in similar footing insofar as neither, under present rules, is entitled to comprehensive discovery of the opponent’s case at sentencing. Battle, 173 F.3d at 1347; Gray v. Netherland, 518 U.S. at 166-70 (no constitutional right to advance notice of the

Government's evidence in aggravation at a capital sentencing hearing). Further, the FDPA invests the jury with the authority to determine whether the government has proven each aggravating factor it alleges. The defendant has no constitutional right to demand that this Court second-guess this jury determination before it has even occurred by inquiring into the sufficiency of the evidence prior to trial. Slaughter v. Parker, 187 F. Supp. 2d 755, 790 (W.D. Ky. 2001) ("There is no constitutional requirement that the existence of an aggravating factor be determined prior to the start of trial."); see also United States v. Frank, 8 F. Supp.2d 253, 279 (S.D. N.Y. 1998). As a general rule, "summary judgment does not exist in criminal cases." United States v. Thomas, 150 F.3d 743, 747 (7th Cir. 1998); cf. Fed. R. Crim. P. 29 (providing for motions for judgment of acquittal following the parties' evidentiary presentations at guilt/innocence trials).

A pretrial hearing about the sufficiency of the evidence the government will present to prove the aggravating factors will also prolong the proceedings unnecessarily. Much of the evidence will be previewed prior to sentencing without a pretrial hearing, as it will be introduced during the guilt phase of the trial. See United States v. Kee, 2000 WL 863119, *9 (S.D. N.Y. June 27, 2000) ("The Court also denies [the defendant's] request for a pre-trial hearing to rule on the sufficiency of the evidence to support the alleged aggravating factors. . . . most of the proof will be presented during the guilt phase of the trial."). Moreover, the Court can adequately perform its function as an evidentiary gatekeeper during the penalty phase itself. Section 3593(c) charges the trial court with the task of excluding unduly prejudicial evidence, a task that can be performed as easily during the penalty phase of the trial as at a pretrial hearing.

This Court should follow the lead of the decisions in Frank and Kee and deny the defendant's request for a pretrial hearing of the sufficiency of the evidence supporting the aggravating factors.

XVII. The government's Notice of Intent to Seek the Death Penalty was timely filed. (Defendant's Motion to Dismiss the Notice of Special Findings and Government's Notice of Intent to Seek the Death Penalty for Untimely Filing of Death Notice)

A. Background facts and dates.

The defendant was originally indicted on November 12, 2000, while he was a fugitive. He was arrested on May 31, 2003, made his initial appearance in the United States District Court for the Western District of North Carolina on June 2, 2003, and was arraigned in this Court on June 3, 2003. Defense counsel were appointed that same day.

The Government obtained a Superseding Indictment on June 26, 2003, and the defendant was arraigned on July 11, 2003.

Pursuant to Department of Justice policy, the United States Attorney must submit potential capital cases to the Department for the Attorney General's decision whether to seek the death penalty. The Department's review process affords defense counsel an opportunity to meet with Department attorneys to present mitigation information and argue against seeking the death penalty prior to the Attorney General's decision. The defense counsel in this case availed themselves of that opportunity, after requesting delays to provide them time to investigate mitigation and prepare a presentation. The meeting was held on November 17, 2003.

On December 11, 2003, the Attorney General directed the filing of a notice of intent to seek the death penalty, which was filed that same day, nearly eight months prior to the

scheduled start of trial.

On the day trial is set to begin, August 2, 2004, the defense counsel will have been on the case for 14 months and they will have had constructive notice that the death penalty was an option in this case for 13 months. They made a mitigation presentation to the Department eight-and-a-half months before trial, and they received formal notice that the Government would seek the death penalty, as well as the precise factors upon which the Government would rely, nearly eight months before trial.²⁴

B. The law.

Contrary to the defendant's arguments, a violation of the Section 3593 reasonable notice requirement does not require pre-trial dismissal of the death notice. Moreover, a "right not to be tried" can only be derived from an "explicit statutory or constitutional guarantee that trial will not occur," Midland Asphalt Corp. v. United States, 489 U.S. 794, 800 (1989); it cannot be inferred from the wording of Section 3593.

²⁴ The defendant cites four cases dealing with the issue of timely filing of a death notice: United States v. Colon-Miranda, 985 F. Supp. 31 (D. P.R. 1997); United States v. Ferebe, 332 F. 3d 722 (4th Cir. 2003); United States v. Hatten, 276 F. Supp.2d 574 (S.D. W. Va. 2003); and United States v. Breeden, 2003 WL 22019060 (W.D. Va. 2003). It may be instructive to consider the times between the filing of the notice and the trial in each case. In Colon-Miranda, the notice could not have been filed more than 12 days before trial, because the Attorney General had not even decided whether to seek the death penalty at that point; in Ferebe, the Attorney General had authorized seeking the death penalty three-and-a-half years before trial, but the United States Attorney did not file the notice until approximately one month before trial (the exact date of the trial had not been set – only the month – so a more precise count of the days between notice and trial is not possible; in Hatten, notice was filed 36 days before trial; and in Breeden, notice was filed six months and 25 days before trial. The Breeden court denied the defense motion, finding that the notice was filed a reasonable time before trial.

- 1. To establish that a death notice was not filed a reasonable time before trial, a defendant must make a post-trial showing of prejudice; the pre-trial remedy for inadequate preparation time is the grant of a continuance, which lies in the sound discretion of the trial judge.**

The requirement that a notice of intent to seek the death penalty be filed a reasonable time before trial exists to ensure that the defendant “can prepare for the post-conviction sentencing hearing and to ensure an appropriate voir dire that comports with applicable Supreme Court cases.” 137 Cong. Rec. S. 749 (January 14, 1991) (statement of Sen. D’Amato). “[I]t is a procedural guarantee ensuring that the defendant has a sufficient time for preparation between the government’s death penalty notice and trial.” See United States v. Ferebe, 332 F.3d 722, 747 (4th Cir. 2003)(dissenting opinion).

In pre-Ring v. Arizona, 536 U.S. 584 (2002), federal practice, the notice of intent to seek the death penalty functioned much as an indictment, identifying the aggravating factors that the government would rely upon to establish the defendant’s eligibility for the death penalty, as well as the non-statutory aggravating factors. However, as the Supreme Court in Ring subsequently made clear, the aggravating factors that render a defendant eligible for the death penalty “operate as the functional equivalent of an element of a greater [capital] offense,” Id., 536 U.S. at 609, and as such, they must not only be identified in the death notice, they must also be included in the indictment. United States v. Cotton, 535 U.S. 625, 627 (2002) (in federal prosecutions, any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must also be charged in the indictment). See also Harris v. United States, 526 U.S. 545, 562-67 (2002); United States v. Higgs, 353 F.3d 281, 297 (4th Cir. 2003) (“The principles of Apprendi and

Ring dictate that any factor required to be submitted to the jury must be included in the indictment.”).

Inclusion of the statutory aggravating factors in the indictment ensures that a federal capital defendant has the notice required by the Constitution of the elements or “functional equivalent of elements” of the offense against which he may be required to defend. The death notice serves to inform the defendant that the government will in fact seek the death penalty in reliance on the statutory factors alleged in the indictment and further serves notice of the non-statutory aggravating factors upon which the government intends to rely. It is only with both the inclusion of the statutory aggravating factors in the indictment and the filing of the death notice that the capital charging process is complete.

Contrary to the conclusions of the Court in United States v. Ferebe, 332 F.3d 722 (4th Cir. 2003), there is no more reason to dismiss the death penalty prosecution to remedy a claim of inadequate preparation time than there would be to dismiss an indictment on such a basis. The clear remedy in both contexts is to move for a continuance of the trial date.

The time between the filing of the death notice and trial can only be inadequate if it impairs the defendant’s ability to defend against the aggravating factors of which he was first informed by the death notice. But like any claim of inadequate time to prepare a defense, the remedy is to grant a continuance to allow that preparation to occur. The decision whether to grant a continuance lies within the discretion of the trial judge, Ungar v. Sarafite, 376 U.S. 575, 589 (1964), and can only be reviewed post-trial for an abuse of discretion. United States v. Kosko, 870 F.2d 162, 163 (4th Cir. 1989); United States v. Rogers, 755 F.2d 533, 539 (7th Cir. 1985); United States v. Reed, 658 F.2d 624, 627 (8th Cir. 1981); see also Morris v. Slappy,

461 U.S. 1, 11 (1983). In order to establish an abuse of discretion, a party must ordinarily make a showing of actual prejudice resulting from the trial court's ruling. See Rogers, 755 F.2d at 539; Reed, 658 F.2d at 627 (In reviewing denial of a motion for continuance which is based on inadequate preparation for trial, the appellate court considers 'the amount of time granted for preparation, the conduct of counsel at trial, and whether prejudice appears from the record.'").

Because Section 3593(a) exists to ensure a capital defendant adequate preparation time for the death penalty trial and capital sentencing hearing, the prejudice analysis must necessarily focus on the preparation denied or adversely affected, which can only be assessed in light of the defense actually presented at trial. In this, a post-judgment assessment of an alleged violation of Section 3593 is not unlike the review on appeal of alleged speedy trial violations. The pivotal issue in both instances is whether, as a consequence of the timing of the trial, the defendant was unable to adequately prepare his defense. Barker v. Wingo, 407 U.S. 514, 532 (1972)(Prejudice should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect, the most important of which is to limit the possibility that the defense will be impaired). As the Supreme Court concluded in United States v. MacDonald, 435 U.S. 850 (1978), a pre-trial attempt to assess the prejudice derived from a purported speedy trial violation would tend to be speculative. Id. at 858. "[T]here exists no . . . divorce between the question of prejudice to the conduct of the defense (which so often is central to an assessment of a speedy trial claim) and the events at trial." Id. at 859.

2. The Court in Ferebe erred in concluding that 18 U.S.C. § 3593(a) embodies a prophylactic rule that requires dismissal of a death notice if it is not filed a reasonable time before trial..

In an opinion most notable for the absence of supporting authority, the Ferebe court created out of whole cloth an analysis premised on the conclusion that Section 3593(a) establishes a “prophylactic” right not to stand trial for a death sentence except upon reasonable notice, which under the Ferebe analysis is measured by the trial date in effect at the time of the filing of the notice. From this premise purportedly flowed a number of consequences. First, in the view of the Ferebe panel majority, because Section 3593(a) creates an “indefeasible right not to stand trial for a capital offense except upon reasonable notice, . . . the underlying right [would] be lost if review is postponed until after trial.” Id., 332 F.3d at 728-29. Accordingly, a denial of a motion to strike a death notice as untimely is a reviewable collateral order. Id. at 730. Second, the “period of time remaining before trial [is] measured at the instant the Death Notice [is] filed and irrespective of the filing's effects.” Id. at 736. Under Ferebe, the trial date cannot be continued to accommodate the additional evidentiary, procedural and substantive issues resulting from the decision to seek the death penalty. If a trial court establishes a trial date for a non-capital trial based on the assumption that the trial date will be continued if there is a decision to seek the death penalty, the timeliness of the death notice will nonetheless be measured with respect to the non-capital trial date.

The flaws in the Ferebe analysis are manifest. First, the death penalty notice statute does not support the conclusion that the defendant is given a substantive right not to stand trial for a capital offense. See Ferebe, 332 F.3d at 747 (Niemeyer, J., dissenting). Section 3593(a) provides:

(a) Notice by the government.--If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice –

(1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and

(2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

18 U.S.C. § 3593(a). As construed by Ferebe, the conclusion that Section 3593(a) creates a prophylactic right follows from the fact that the notice must be filed a “reasonable time before trial,” rather than “before trial.”

[Section 3593] requires, *as a prophylactic*, reasonable notice *before trial*. And its indisputable purpose is to ensure that the accused will not be required to stand trial for his life without having received adequate notice before that trial that he *is* to stand trial for capital offense (in addition to ensuring that an accused will not receive the death penalty without having received such notice). That Congress intended to protect the accused from having to endure a capital trial for which he was provided inadequate notice to prepare his defense is plain from the fact that it required the Death Notice be given a "reasonable time" before the trial, not merely "before" trial.

332 F.3d at 727. Upon this flimsy distinction entirely rides the Fourth Circuit’s conclusions that the remedy for the tardy filing of a death notice is dismissal of the capital prosecution, that the denial of a motion to dismiss a death notice is the proper subject of an interlocutory appeal, and that the right afforded by the statute cannot be protected by a post-trial prejudice analysis.

The house of cards that the Ferebe panel majority constructs on the requirement that the

notice be filed a “reasonable time before trial” rather than “before trial” simply cannot stand. The import given to this distinction simply does not logically follow from the language of the statute.

Second, the construction given to this statutory provision by the Ferebe panel majority is contrary to the explanation of the provision by Senator D’Amato, which makes it clear that the provision was enacted to ensure that the capital defendant have adequate time to prepare for trial and that the voir dire is conducted in accordance with constitutional requirements. In contrast, the Ferebe analysis has the illogical effect of making a federal capital prosecution hinge upon factors entirely unrelated to the facts of the offense and the appropriateness of a death sentence for a particular offender. Whether a defendant will face a capital sentencing proceeding would depend on when a death notice is filed with respect to what could be the quite arbitrary setting of a trial date. Ferebe allows the Federal judiciary to control, through the setting of a trial date, whether a defendant, against whom the executive branch has made a reasoned decision to seek the death penalty, will in fact be tried for the death penalty-eligible offense. It simply defies logic to suppose, on the basis of the so-called distinction identified by the Ferebe panel majority, that Congress sought to insert such arbitrary underpinnings to the ultimate determination of who should live or die.

Finally, and most importantly for the analysis here, a “right not to be tried” can only rest on an “explicit statutory or constitutional guarantee that trial will not occur.” Midland Asphalt Corp. v. United States, 489 U.S. at 800. The requirement that the notice be filed a “reasonable time before trial” simply does not constitute an explicit guarantee of a right not to be tried. The Supreme Court distinguishes a “right not to be tried,” which can only be derived from an

explicit statutory or constitutional guarantee, from “a right whose remedy requires dismissal of the charges.” Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 874 (1998). To conclude as the panel majority did in Ferebe, then “virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a ‘right not to stand trial,’” and the Court has been “emphatic in recognizing that the jurisdiction of the court of appeals should not, and cannot, depend on a party’s agility in so characterizing the right asserted.” Id. at 872-73. Even assuming, for the sake of argument, that the reasonable notice requirement of Section 3593 constitutes “a right whose remedy requires dismissal of the [capital] charges,” that would be an insufficient basis to confer a “right not to stand trial.” Id. at 872.

The procedural guarantee of 18 U.S.C. § 3593(a)—that a defendant will have an adequate time to prepare for a death penalty trial and sentencing—can no more appropriately be translated into a “right not to stand trial” than any one of a myriad other statutory guarantees that a defendant will have an opportunity to prepare. Id. at 746 (dissenting opinion), citing 18 U.S.C. § 3432 (requiring pre-trial notice of indictments and lists of jurors and witnesses in a capital case); Fed.R.Crim.P. 12.1(b) (requiring pretrial notice by the government of witnesses to be called to rebut an alibi defense); Fed.R.Crim.P. 16(a) (requiring government pretrial disclosure of evidence); Fed.R.Crim.P. 26.1 (requiring pretrial notice of the use of foreign law). Moreover, the protection afforded by reasonable notice requirement of Section 3593 is surely of no greater moment than “pretrial guarantees such as the pretrial rights of disclosure of Brady material, Jencks material, alibi rebuttal witnesses, and the like, [which] do not include a right to interlocutory appeals.” Ferebe, 332 F.3d at 747 n.1 (dissenting opinion).

3. Conclusion.

Nothing about the time schedule in this case has been in any way unreasonable to the defense. Formal filing of a death notice almost eight months before the date this case is set for trial (August 2, 2004) simply cannot be construed as failing to meet the FDPA requirement that notice be filed a "reasonable" time before trial.

For the foregoing reasons, the defendant's motion to dismiss the death penalty for untimely filing of a notice should be denied.

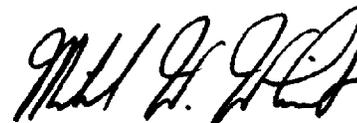
CONCLUSION

WHEREFORE, for the foregoing reasons, the United States respectfully requests this Court to deny in their entirety the defendant's three motions to strike the death penalty.

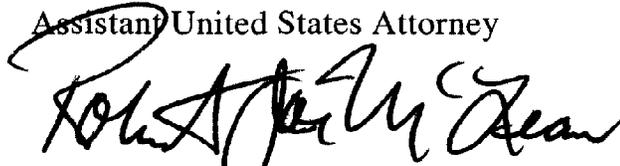
Respectfully submitted this the 26th day of April, 2004.



ALICE H. MARTIN
United States Attorney



MICHAEL W. WHISONANT
Assistant United States Attorney

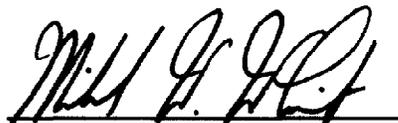


ROBERT JOE McLEAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that the undersigned Assistant United States Attorney this day caused a copy of the foregoing has been served on the defendant by placing same in the United States mail, postage prepaid, to his attorneys of Record: Mr. Richard Jaffee, Jaffee, Strickland & Drennan, 2320 Arlington Avenue, Birmingham, Alabama 35205; Mr. William Bowen, White, Dunn & Booker, 2025 3rd Avenue North, Suite 600, Birmingham, Alabama 35203; and Mr. Emory Anthony, 2015 1st Avenue North, Birmingham, Alabama 35203; Ms. Judy Clark, Federal Defenders of San Diego, Inc., 225 Broadway, Suite 900, San Diego, California, 92101; Mr. Michael Burt, Law Offices of Michael Burt, 600 Townsend St., Suite 329-E, San Francisco, California, 94103.

Done this 26th day of April, 2004.

A handwritten signature in black ink, appearing to read "Michael W. Whisonant", written over a horizontal line.

MICHAEL W. WHISONANT
Assistant United States Attorney