

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

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UNITED STATES OF AMERICA,)
)
V.)
)
ERIC ROBERT RUDOLPH,)
)
Defendant.)

UNITED STATES DISTRICT COURT
N.D. OF ALABAMA

Case No. CR-00S-422-S

**DEFENDANT'S SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF DEATH PENALTY MOTIONS**

COMES NOW defendant, Eric Robert Rudolph, by and through counsel, and submits the following supplemental memorandum in support of his motion to strike the death penalty (Doc. 141, filed March 1, 2004), his motion to dismiss notice of special findings and government's notice of intent to seek the death penalty and for other appropriate relief (Doc. 166, filed March 31, 2004), and his motion to dismiss notice of special findings and government's notice of intent to seek the death penalty for untimely filing of death notice (Doc. 179, filed April 8, 2004). The government has responded to all three of these motions in an omnibus response (Doc. 196, filed on April 26, 2004). Because the briefing before the Court is already voluminous and adequately addresses each of the defendant's claims in detail, this supplemental memorandum will confine itself to the implications of *Blakely v. Washington*, 124 S. Ct. 2531 (2004) for defendant's constitutional challenges to the death penalty.

A. The Federal Death Penalty Act Denies Capital Defendants Trial Protections Available to All Other Defendants

As is argued in 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 (Doc. 166 at 29-36), the Federal Death Penalty Act (FDPA) is unconstitutional because it allows evidence of a defendant's character, propensity, prior uncharged conduct, impact on a victim's

family and community, as well as untested testimonial statements, to prove elements of capital murder. These defects cannot be remedied by a system that allows an individual judge to admit or exclude constitutionally prohibited evidence based solely upon his or her own sense of what is unfair prejudice.

1. The FDPA Combines Proof of Guilt With the Determination of Punishment.

The Supreme Court has recently held that a criminal defendant is not guilty of capital murder until a jury finds at least one statutory aggravating factor beyond a reasonable doubt. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 110-11 (2003). Another element of federal capital murder is that the jurors must find the defendant had the necessary mental state to have committed the crime. 18 U.S.C. § 3591. Under the FDPA, neither a finding of a statutory aggravating factor nor a culpable mental state is determined until a sentencing hearing. § 3591 et. seq.

2. The FDPA Sentencing Hearing Abandons All Rules of Evidence That Apply to Criminal Trials.

At a federal capital sentencing hearing, “*Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials.*” § 3593 (c). Instead, a judge may exclude evidence only if he or she decides that it is unfairly prejudicial, confusing, or misleading.

The FDPA contemplates an elastic hearing where anything may be admitted unless the judge finds that such admission would unfairly prejudice a party. Unlike any other criminal trial, a federal district judge may rely merely upon his or her discretion to admit evidence offered to prove elements of capital murder.

3. A Trial and a Sentencing Hearing are Inherently Different Proceedings.

Even in a non-capital case, a sentencing hearing is fundamentally different from a trial.

It permits evidence that is not admissible to prove guilt. Williams v. New York, 337 U.S. 241, 246 (1949). There is no presumption of innocence. Delo v. Lashley, 507 U.S. 272, 278-79 (1993). The selection of punishment may be decided by a preponderance of evidence. Harris v. United States, 536 U.S. 545, 558 (2002) . A judge may select the sentence. Spaziano v. Florida, 468 U.S. 447, 462-63 (1984). Therefore, a federal capital defendant is prosecuted for some elements of capital murder without the trial protections available even to a person charged with a simple misdemeanor.

In contrast, the guilt phase of a trial is restricted by formal rules of evidence and procedure. Williams, 337 U.S. at 246 (“Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations”). A defendant is presumed innocent. Estelle v. Williams, 425 U.S. 501, 503 (1976). The prosecution must prove all elements of the offense beyond a reasonable doubt. Jones v. United States, 526 U.S. 227, 243 (1999). A jury is required. Id. These protections are necessary even when proving facts that will only incrementally increase the potential sentence. Blakely v. Washington, 124 S.Ct. 2531, 2543 (2004).

4. Combining Trial and Sentencing In a Capital Trial is Unfair.

Under the FDPA, the trial of guilt and sentencing are intermingled. The following anomalies occur: At the guilt phase, a jury may only convict a defendant of a crime that is less than capital murder. Sattazahn, 537 U.S. at 110-11. After conviction of this lesser crime, the jury then enters a sentencing phase. 18 U.S.C. § 3593 (d). Only then are the capital elements decided. § 3593 (c).

The hearing is neither subject to rules of evidence nor the presumption of innocence. Id. The jury receives evidence of guilt along with other information supporting a death sentence.

United States v. Jones, 527 U.S. 373, 376-77 (1999). This other information usually includes the effect on the victim's family and community, Payne v. Tennessee, 501 U.S. 808, 827 (1991); predictions of the defendant's future dangerousness, Simmons v. South Carolina, 512 U.S. 154, 161 (1994); the defendant's prior uncharged conduct, Nichols v. United States, 511 U.S. 738, 747 (1994); examples of the defendant's bad character, United States v. Watts, 519 U.S. 148, 151 (1997); and hearsay (including testimonial statements), Williams, 337 U.S. at 244-47; none of which is generally admissible at the guilt phase of the trial.¹

The jury then deliberates upon two very different issues: (1) whether the defendant is guilty of capital murder and (2) whether a death sentence is appropriate. Jones, 527 U.S. at 376-77. Although eligibility for the death penalty must be decided beyond a reasonable doubt, the selection of punishment may be decided by a preponderance of evidence. Harris, 536 U.S. at 558.

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

¹ Williams, 337 U.S. at 246-47:

“In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined.”

The determination of elements is logically a part of the guilt phase of trial, Ring v. Arizona, 536 U.S. 584, 613 (2002) (Scalia, J., concurring), and requires the rules of a trial. To borrow a phrase from Justice Scalia, whether it is called a trial, a sentencing hearing “or Mary Jane,” id. at 610, if the effect is to prove elements of the offense, trial protections should apply.

5. The Federal Rules of Evidence Must Apply to All Elements of a Federal Crime.

The government insists that “[t]he Federal Rules of Evidence are not dictated by the Constitution.” (Omnibus Response at 27). This is only partly true. Some of the Federal Rules of Evidence have a constitutional basis but others do not. The issue is not whether any particular set of rules is constitutionally required. The point is that a set of rules that protects defendants in all other federal trials cannot be abandoned in the single instance when the defendant is facing the most serious crime, a capital offense.

Before the Supreme Court’s decisions in Ring and Sattazahn, it was possible to say that the relaxed evidentiary standards approved by the Court for capital sentencing hearings applied to statutory aggravating circumstances, Gregg, 428 U.S. at 204, and that no presumption of innocence was necessary. Delo, 507 U.S. at 278. It is now clear that a defendant is eligible for the death penalty only after he has been convicted of all the elements of capital murder, including at least one statutory aggravating circumstance. Sattazahn, 537 U.S. at 110-11.

At common law, a judge was required to impose sentences specifically sanctioned by criminal statutes. Apprendi v. New Jersey, 530 U.S. 466, 479 (1999). In other words, punishments were mandatory. Most of those common law punishments were a mandatory sentence of death. McGautha v. California, 402 U.S. 183, 197-98 (1971). There was nothing like what is today called a sentencing hearing.

At common law, all evidence against a defendant was admitted during the guilt phase of

trial, subject to rules of evidence. The idea that a judge could decide which evidence to allow based upon the judge's own sense of reliability or fairness, would have seemed incredible to the Framers of the Constitution. There is a long history, from the common law, of using rules of evidence to prove a defendant's guilt:

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

Brinegar v. United States, 338 U.S. 160, 174 (1949).

The Supreme Court recently held that any fact increasing the maximum sentence is an element of the crime. Blakely, 124 S.Ct. at 2536. The result is that a defendant who once had sentencing enhancements decided by the judge may, in many cases, have the right to have a jury decide even minor sentencing issues based on proof beyond a reasonable doubt.²

This means that a non-capital defendant may now have greater protection defending a increase of a few months in custody, than a capital defendant has defending a charge of capital murder. This makes no sense and defies any notion of the higher reliability required for capital cases.

Although the panel in United States v. Fell, 360 F.3d 135 (2d. Cir. 2004), cert. pet. filed August 16, 2004, No. 04-5898, mentioned the need for higher reliability in capital cases, there was no explanation of how an individual judge, applying mere discretion, could possibly be

² “The Federal Rules of Evidence also specifically do not apply to sentencing. Presumably, if sentence-enhancing facts must now be charged and proven to a jury beyond a reasonable doubt, constitutional evidentiary safeguards will apply. Thus, both the standard of proof required and the evidentiary procedures in applying the [Federal Sentencing] Guidelines violate the Supreme Court's holdings in Apprendi and its progeny.” United States v. Croxford, ___ F.Supp. 2d ___, 2004 WL 1521560 (D. Utah July 7, 2004) (Cassell, D.J.).

more reliable than rules of evidence. A less reliable procedure violates the Eighth Amendment. Murray v. Giarrantano, 492 U.S. 1, 8-9 (1989).

B. The “Selection Phase” of the FDPA Sentencing Hearing Violates *Blakely v. Washington* by Failing to Require that the Jury Make All Findings Essential to Imposition of the Death Penalty by a Beyond a Reasonable Doubt Standard.

As discussed in motion to strike the death penalty, the FDPA sentencing hearing is essentially comprised of two phases: the “eligibility phase” and the “selection phase.” Before the jury may proceed to the selection phase, it must first find upon proof beyond a reasonable doubt that: (1) the defendant possessed one of four culpable mental states listed at 18 U.S.C. § 3591(a)(2)(A)-(D); and (2) the existence of at least one statutory aggravating factor set forth at 18 U.S.C. § 3592(c)(1)-(16).

When selecting the defendant’s sentence, the FDPA requires the sentencing jury to make two additional factual findings, each of which is also a prerequisite to the imposition of a death sentence. Section 3593(e) provides that after the jury finds the presence of a culpable mental state and at least one statutory aggravating factor, it

“shall consider whether all the aggravating factor or factors found to exist *sufficiently outweigh* all the mitigating factors found to exist *to justify* a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are *sufficient to justify* a sentence of death. Based upon this consideration, the jury ... shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.”

18 U.S.C. § 3593(e). Therefore, as a precondition to authorizing death, the selection-phase jury must find that: (1) the aggravating factor or factors “sufficiently outweigh the mitigating factors”; and (2) the death sentence is justified.³ *See, id.*

³ The jury's determination that the death sentence is justified is indeed a factual finding separate from the weighing determination. The jury retains the freedom to impose a sentence less than death even if it finds that the aggravating factors outweigh the mitigating factors. *See United*

Although these factual determinations are necessary to recommend imposition of the death penalty,⁴ the FDPA does not require the jury to make these findings upon proof beyond a reasonable doubt. *Cf.* 18 U.S.C. § 3593(e). Instead, the statute labels the requisite burden of proof as a sufficiency of the evidence. This lesser standard of proof violates the United States Supreme Court's recent decision in Blakely v. Washington, 124 S. Ct. 2531 (2004).

In Blakely, the Supreme Court held that an enhanced sentence imposed under Washington State's sentencing guidelines violated the defendant's right to a jury trial under the Sixth Amendment to the United States Constitution. Blakely, 124 S. Ct. at 2538. The Court in Blakely followed the rule it announced in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved *beyond a reasonable doubt*." 530 U.S. at 490 (emphasis added). Blakely, however, clarified the Court's definition of statutory maximum: "'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." Blakely, 124 S. Ct. at 2537 (emphasis in original).

"In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found *all the facts which the law makes essential to the punishment*"

Id. (emphasis added, internal citation omitted).

States v. Haynes, 265 F. Supp. 2d 914,915 (W.D. Tenn. 2003) . Thus, notwithstanding a finding that the aggravating factors outweigh the mitigating factors, the jury may find that a death sentence is *unjustified*.

⁴ In this sense, the additional factual findings made during selection are, functionally, "eligibility" requirements.

The FDPA makes the jury's finding that (1) aggravators outweigh mitigators and (2) death is justified "essential to the [ultimate] punishment." *Id.* A federal district court cannot order a defendant's execution without a jury recommendation in favor of death. 18 U.S.C. § 3594. Therefore, the rule of Apprendi requires that these essential facts not only be submitted to a jury, but also be proved beyond a reasonable doubt. *See Blakely*, 124 S. Ct. at 2537; Ring v. Arizona, 536 U.S. 584, 602 (2002) (applying Apprendi to capital sentencing proceedings).

Indeed, in Johnson v. State, 59 P.3d 450 (2002), the Supreme Court of Nevada agreed that Apprendi/Ring applied to the weighing determination embodied in the State's capital sentencing statute. *See, Johnson*, 59 P.3d at 460. The statutory provision at issue in Johnson permitted a panel of three district judges to conduct the required capital penalty hearing when a jury was unable to reach a unanimous sentencing verdict. *Id.* The Nevada court concluded that this provision violated Ring because it allowed judges to make two distinct factual determinations necessary to the imposition of the death penalty in Nevada:

"The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance *and further finds* that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found. This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and we conclude that it is in part a factual determination, not merely discretionary weighing ... [W]e conclude that Ring requires a jury to make this finding as well: 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."

Johnson, 59 P.3d at 460 (emphasis in original).

Nevada is not the only jurisdiction to conclude that the weighing of aggravating factors against mitigating factors constitutes a factual determination. At least two other state supreme courts concur. *See, Missouri v. Whitfield*, 107 S.W.3d 253, 256, 259 (Mo. 2003) (en banc) (applying Ring because, *inter alia*, the step in Missouri's capital sentencing statute that instructs

jury to weigh mitigating factors against aggravating factors requires a factual determination); Woldt v. Colorado, 64 P.3d 256, 266 (Colo. 2003) (en banc) (same). Under Blakely, these factual determinations must be made by a jury upon proof beyond a reasonable doubt.

Because the “sufficiency” burden of proof employed by the FDPA at section 3593(e) does not comport with the reasonable doubt standard required by Blakely/Ring/Apprendi, section 3593(e) violates the Sixth Amendment.

CONCLUSION

WHEREFORE, for any or all of the foregoing reasons, and for all of the reasons stated in Mr. Rudolph’s motion to strike the death penalty, his motion to dismiss notice of special findings and government’s notice of intent to seek the death penalty and for other appropriate relief, and his motion to dismiss notice of special findings and government’s notice of intent to seek the death penalty for untimely filing of death notice, it is respectfully requested that this Court enter an order granting these motions and dismissing the Notice of Special Findings in the superseding indictment and dismissing the Government’s Notice of Intent to Seek the Death Penalty.⁵

Dated: September 20, 2004

Respectfully Submitted,

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Michael Burt

⁵ The defendant brings to the Court’s attention an erroneous citation in the motion to dismiss notice of special findings and government’s notice of intent to seek the death penalty and for other appropriate relief. At page 99, the defendant cites to Gardner v. Florida, 428 U.S. 908 (1976). The correct citation is 430 U.S. 349 (1977).

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served upon the following by mailing the same by first class United States mail, properly addressed and postage prepaid, on this 20 day of September 2004 to:

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