

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

FILED

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

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

CR -00-S-0422-S

**MEMORANDUM OF THE UNITED STATES IN RESPONSE TO
DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
DEATH PENALTY MOTIONS**

COMES NOW the United States of America, by and through its counsel,
Alice H. Martin, United States Attorney for the Northern District of Alabama, and
Michael W. Whisonant and William R. Chambers, Jr., Assistant United States
Attorneys, and hereby responds to defendant Rudolph's Supplemental
Memorandum In Support Of Death Penalty Motions.

Defendant's Supplemental Memorandum In Support Of Death Penalty
Motions purports to "confine itself to the implications of *Blakely v. Washington*,
124 S. Ct. 2531 (2004) for defendant's constitutional challenges to the death
penalty." (Supplemental Memorandum at 1.) The ruling in *Blakely*, however, is
entirely inapposite to capital sentencing hearings under the Federal Death Penalty

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Act. It does nothing at all to advance the defendant's arguments, which can be fully examined, and rejected, by application of the *Apprendi/Ring* rationale discussed at length in the Government's omnibus death penalty brief.¹

The *Apprendi/Ring* line of cases hold, in essence, that the constitutional protections that adhere to the proof of offense elements adhere equally to the proof of any fact that increases the maximum available sentence. Thus, *inter alia*, such facts must be proven to a jury beyond a reasonable doubt. *Blakely* merely refined the meaning of "maximum sentence" in the limited context of sentencing guidelines, holding that the prescribed guideline maximum could not be exceeded by a judge determining additional facts by a preponderance of the evidence; rather, consistent with *Apprendi/Ring*, a jury must find those facts beyond a reasonable doubt. A capital sentencing hearing under the FDPA, of course, does not involve sentencing guidelines, so the *Blakely* refinement regarding guideline ranges and maximum sentences, while having significant ramifications for non-capital sentencing, is meaningless in the capital sentencing arena.

¹Indeed, the defendant raised an almost identical issue in his earlier motion, captioned "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" (at pp. 23 and 27), in which he argued that *Apprendi/Ring* required the inclusion in the Superseding Indictment of the allegations that aggravating factors outweighed mitigating factors and that a sentence of death was justified. The Government responded to this claim in its omnibus death penalty memorandum, at pages 60-63.

Instead, the defendant's argument is best understood as being, simply, a belated attempt to extend the *Apprendi/Ring* rationale to the jury process of weighing aggravating factors against mitigating factors to determine whether a sentence of death is justified. Under the FDPA, this determination is made by the jury, but 18 U.S.C. § 3593(e) does not require this determination to be made beyond a reasonable doubt. The defendant argues that the weighing process and determination of whether a death sentence is justified is actually a determination of fact that must be made by a jury beyond a reasonable doubt before he becomes eligible for the death penalty. To support this argument, the defendant relies on three state cases.² His argument, however, fails in that it relies on three state cases while ignoring seven others reaching the opposite conclusion, and federal precedent indicates a contrary conclusion.

Defendant's Memorandum cites to the decisions of the Supreme Courts of Nevada, Missouri, and Colorado, for the proposition that *Ring* requires jury determinations beyond a reasonable doubt for parts of the weighing process.³ While defendant cites to these cases ostensibly supporting his view, he fails to cite

²Each of these state cases was decided prior to *Blakely*, supporting the conclusion that defendant's current argument is not actually predicated on *Blakely*.

³The cases cited by defendant are *Johnson v. State*, 59 P.3d 450 (Nev. 2002); *Missouri v. Whitfield*, 107 S.W.3d 253 (Mo. 2003); and *Woldt v. Colorado*, 64 P.3d 256 (Colo. 2003).

the decisions of the Supreme Courts of Alabama, California, Delaware, Florida, Illinois, Oklahoma, or Maryland, all of which reached the opposite conclusion.⁴ *Oken v. State*, 835 A.2d 1105 (Md. 2003), is a particularly thorough analysis of the United States Supreme Court's capital jurisprudence, the *Apprendi/Ring* rationale, and the reasons why the weighing process and determination of the appropriate sentence is not a finding of fact and does not fall afoul of *Apprendi/Ring*.

Secondly, the defendant's argument is inconsistent with the holdings of every federal capital case to have been decided since *Ring*. The Government will not rehash that long list of cases here - they have already been thoroughly addressed in the Government's omnibus reply - but will rather reiterate the rationale guiding all those cases: *Apprendi/Ring* requires that "[i]f 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," *Ring*, 536 U.S. 584, 609; and the death penalty under the FDPA is an authorized punishment upon conviction of a capital offense, the

⁴See, *Ex Parte Hodges*, 856 So.2d 936 (Ala. 2003), *cert. denied*, *Hodges v. Alabama*, 124 S. Ct. 465 (2003); *People v. Prieto*, 30 Cal.4th 226 (Cal. 2003), *cert. denied*, *Prieto v. California*, 124 S. Ct. 542 (2003); *Brice v. State*, 815 A.2d 314 (Del. 2003); *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002); *People v. Ballard*, 206 Ill.2d 151 (Ill. 2002), *cert. denied*, *Ballard v. Illinois*, 124 S. Ct. 81 (2003); *Torres v. State*, 58 P.3d 214 (Ok. 2002), *cert. denied*, *Torres v. Oklahoma*, 38 U.S. 928 (2003); and *Oken v. State*, 835 A.2d 1105 (Md. 2003), *cert. denied*, *Oken v. Maryland*, 124 S. Ct. 2084 (2004).

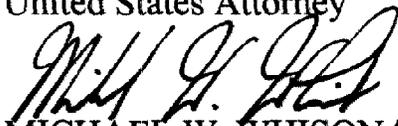
finding of one of the required mental states under 18 U.S.C. § 3591, and the finding of at least one statutory aggravating factor under 18 U.S.C. § 3592. Once those findings of fact have been made, the defendant is eligible to receive the death penalty. Thus, any further findings, whether they involve non-statutory aggravating factors, mitigating factors, or the weighing of the two, serve merely to help the jury select among the available punishments - they do not increase the maximum punishment and, therefore, do not fall under the purview of *Apprendi/Ring*.

In the two federal cases that have come closest to analyzing the claim in the instant case, the courts held that indictments need not include any allegation that the aggravating factors outweigh the mitigating factors, because this weighing is not part of the determination as to whether the defendant is eligible to receive the death penalty, but rather is part of the process of selecting the appropriate sentence within the authorized range. Thus, held these courts, the *Apprendi/Ring* requirement applying the Constitution's protections (in these cases, the pertinent protection was the Indictment Clause) to any fact that increases the maximum sentence, does not apply to the weighing process. See *United States v. Maxwell*, 2003 U.S. Dist. LEXIS at *24-*25 (W.D. Tenn.) and *United States v. Johnson*, 239 F. Supp. 2d 924, 943 (N.D. Iowa 2003).

WHEREFORE, because the defendant's claim is unsupported by *Blakely*, unsupported by the weight of state cases, and inconsistent with prevailing federal case law, his claim should be denied.

Respectfully submitted this the 7th day of October, 2004.

ALICE H. MARTIN
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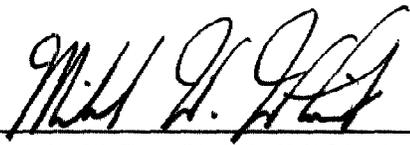
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served on the defendant by mailing a copy of same this the 7th day of October, 2004, by First Class, United States mail, postage prepaid, to his attorneys of record,

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