

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
AT PADUCAH**

**CRIMINAL ACTION NO. 5:06 CR-00019-R**

**UNITED STATES OF AMERICA**

**PLAINTIFF**

**v.**

**STEVEN D. GREEN**

**DEFENDANT**

**UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO DECLARE  
FEDERAL DEATH PENALTY ACT UNCONSTITUTIONAL BECAUSE IT IS  
APPLIED ARBITRARILY AND VIOLATES EVOLVING STANDARDS OF DECENCY**

Comes the United States of America, by counsel, for its response to the motion of the Defendant, Steven D. Green, to declare the Federal Death Penalty Act, 18 U.S.C. § 3591 *et. seq.*, unconstitutional on grounds that it is applied arbitrarily and capriciously, and violates evolving standards of decency recognized by society and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Defendant argues that the federal death penalty is applied in such an arbitrary, capricious, and random manner that it cannot be deemed to pass Constitutional muster in light of the Supreme Court's guidance in *Furman v. Georgia*, 408 U.S. 238 (1972), on application of the prohibition against cruel and unusual punishment contained in the Eighth Amendment to the death penalty. Green asks that the United States' Notice of Intent to Seek the Death Penalty be struck.

**A. The federal death penalty does not operate in an unconstitutionally arbitrary and capricious manner simply because it is rarely sought and imposed.**

Green asserts that because the death penalty is sought and imposed in so few cases, the Federal Death Penalty Act (FDPA) operates arbitrarily and capriciously in violation of the Eighth Amendment. To support this argument, he relies primarily upon language from the concurring opinions in *Furman v. Georgia*, 408 U.S. 238 (1972). This argument is entirely without merit and has been rejected in other federal cases. *See, e.g., United States v. Mitchell*, 502 F. 3d 931, 983 (9<sup>th</sup> Cir. 2007); and *United States v. Sampson*, 486 F. 3d 13, 23-25 (1<sup>st</sup> Cir. 2007).

*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 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 found by the Supreme Court to be unconstitutional for that reason. The Supreme Court was concerned in *Furman* 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 United States. 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*, 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 United States Court of Appeals for the First Circuit, in *Sampson*, 486 F. 3d at 23-25, reviewed the exact claim raised by the defendant in the present case. There, as here, the defendant centered his argument that the death penalty is arbitrary around a quote from Justice Stewart’s concurring opinion in *Furman*. The Court in *Sampson* rejected that argument:

This argument mistakes the nature of the arbitrariness concern in the Supreme Court’s jurisprudence. In the thirty-four years since *Furman* was decided, the Court has made clear that its decision was not based on the frequency with which the death penalty was sought or imposed. Rather, the primary emphasis of the Court’s death penalty jurisprudence has been the requirement that the discretion exercised by juries be guided so as to limit the potential for arbitrariness.

*Id.*

The United States Court of Appeals for the Ninth Circuit, in *Mitchell*, 502 F. 3d 931, 983, facing this same claim by a defendant, likewise rejected it:

Mitchell argues that the death penalty is infrequently sought or imposed under the FDPA, making it an ‘unusual’ penalty in violation of the Eighth Amendment. That federal executions are rare, however, does not render the FDPA unconstitutional. The relevant question - whether capital punishment in the abstract violates the Eighth Amendment - was answered in the negative by *Gregg*.

*Id.* (omitting internal footnote and citation).

Green’s attempt to graft selected quotes from various *Furman* concurring opinions onto the FDPA is misguided at best. The FDPA does not have the same deficiencies as 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 determine 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. 373, 376-79 (1999). The FDPA essentially codified various Supreme Court decisions starting with *Furman* that required a capital punishment statute to contain two critical phases in order to pass constitutional muster: (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*, 522 U.S. 269, 275 (1998); *Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988). In short, Green's *Furman*-based argument regarding arbitrariness has been flatly rejected by every federal court addressing the claim,<sup>1</sup> and should likewise be rejected by this Court.

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<sup>1</sup>In addition to the decisions of the First Circuit and the Ninth Circuit in *Sampson* and *Mitchell*, respectively, at least two district court opinions directly rejected the same arbitrariness claim Green makes. *See United States v. Hammer*, 25 F.Supp. 2d 518, 546-47 (MD.Pa. 1998); and *United States v. O'Driscoll*, 203 F.Supp. 334, 341 (M.D. Pa. 2002).

**B. The Federal Death Penalty Act does not violate evolving standards of decency.**

Green next argues that the federal death penalty is unconstitutional because it violates evolving standards of decency under the Eighth Amendment. His argument is foreclosed by controlling Supreme Court precedent.

In sum, we cannot say that the judgment of the ... legislature that capital punishment may be necessary for some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate ... the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

*See Gregg*, 428 U.S. at 186-87. While the Supreme Court in *Gregg* was addressing the constitutionality of Georgia's death penalty, the recognition given by the Supreme Court to the role of the state legislature in *Gregg*, applies equally to the role of Congress in its enactment of the FDPA.

In addressing the claim that the FDPA violates evolving standards of decency, the Court in *Mitchell* stated, “[w]hether contemporary values dictate a different answer today is for the Supreme Court to decide; the Eighth Amendment does not authorize this court to overrule Supreme Court precedent ‘even where subsequent decisions or factual developments may appear to have significantly undermined the rationale for [an] earlier holding.’” *Mitchell*, 502 F. 3d at 982, quoting *Roper v. Simmons*, 543 U.S. 551, 594 (2005) (O’Connor, J., dissenting).

Although Green’s claim is foreclosed by controlling precedent, the United States notes that the very cases upon which he relies undermine his argument, at least by implication. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court held that evolving standards of decency rendered unconstitutional the execution of mentally retarded defendants. In *Roper*, 543

U.S. 551 (2005), the Supreme Court held that the same considerations of evolving standards of decency rendered unconstitutional the execution of juveniles. Thus, as recently as 2002 and 2005, the Supreme Court removed from exposure to the death penalty two distinct classes of defendants, the mentally retarded and juveniles. Of course, if the defendant's argument was correct, and evolving standards of decency have rendered the death penalty unconstitutional for everyone, there would have been no need to carve out exceptions for these two classes.

**C. The federal death penalty is not fundamentally unfair.**

Green next claims that an analysis of the underlying facts in federal death penalty cases indicates that the death penalty has not been applied in a principled or consistent manner by federal juries, and that, therefore, the FDPA is unconstitutional. In support of this claim, the defendant submitted "thumbnail compilations" of self-selected federal cases in which defendants could have been exposed to the death penalty. Other than a generic review of substantive and procedural due process cases, 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."<sup>2</sup>

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:

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<sup>2</sup> Defense Motion re Arbitrary; Evolving Standards; Fundamentally Unfair, p. 21.

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 relies undermines his argument. His cry for consistency is a plea for false consistency that would strip the decision makers (*i.e.*, the jurors in most cases) of the ability to exercise their discretion to the benefit of individual defendants.

In fact, the Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279, 307 n. 28 (1987), 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 authority 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. *McCleskey*, 481 U.S. at 307.

Furthermore, the precise argument made here was considered and rejected by both the district and circuit courts in *Sampson*. The district 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.

*United States v. Sampson*, 275 F. Supp. 2d 49, 88 (D. Mass. 2003); *see also Sampson*, 486 F. 3d at 24-25.

Based on the foregoing, Green's claim that the federal death penalty is unconstitutional because there is an alleged inconsistency in outcomes is without merit and is not supported by his submission.

WHEREFORE, for the foregoing reasons, the United States respectfully requests that the defendant's Motion To Declare The Federal Death Penalty Act Unconstitutional Because It Is Arbitrary; Violates Evolving Standards Of Decency; And Is Applied In A Fundamentally Unfair Manner be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 21, 2008, I electronically filed the foregoing response with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to Scott T. Wendelsdorf, Federal Defender, Patrick J. Bouldin, Assistant Federal Defender, and Darren Wolff, counsel for the defendant, Steven D. Green.

/s/ Marisa J. Ford

Marisa J. Ford

Assistant U.S. Attorney