

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

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,
DISMISS AGGRAVATORS AND DISMISS THE UNITED STATES'
DEATH PENALTY NOTICE**

Comes the United States, by counsel, for its response to the motion of the Defendant, Steven D. Green, to declare the Federal Death Penalty Act (FDPA), 18 U.S.C. § 3591 *et. seq.*, unconstitutional, to dismiss the statutory aggravating factors alleged in the indictment, and to dismiss the United States' notice of intent to seek the death penalty. Green's motion is without merit. A review of the defendant's motion reveals no cite to any case declaring the FDPA to be unconstitutional on any basis, including those alleged in Green's motion; no cite to any case dismissing aggravating factors for the reasons alleged by the defendant; and no cite to any case dismissing a notice by the United States of intent to seek the death penalty for the reasons alleged by the defendant. Consequently, Green's motion should be denied.

A. The Statutory Aggravating Factors are Valid

1. The Substantial Planning and Premeditation Factor is Valid.

The United States alleges in the indictment that the defendant committed murder "after substantial planning and premeditation." The terms employed track precisely the FDPA

substantial planning and premeditation aggravating factor as set forth in 18 U.S.C. § 3592(c)(9). Green contends that this aggravating factor fails to narrow the class of murders eligible for the death penalty and that it is so vague as to render it unconstitutional. Green's argument is plainly contrary to the prevailing law.

The test for whether a statutory aggravating factor is unconstitutionally vague is whether the factor "has a core meaning that criminal juries should be capable of understanding." *Jones v. United States*, 527 U.S. 373, 400 (1999) (citing *Tuilaepa v. California*, 512 U.S. 967, 973 (1994)). The goal is "[e]nsuring that a sentence of death is not so infected with bias or caprice." *Tuilaepa*, 527 U.S. at 973. The vagueness review is "quite deferential." *Id.*

Many federal courts have considered 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) and uniformly concluded that it sufficiently channels the jury's deliberations to withstand such an attack. *See United States v. Mitchell*, 502 F. 3d 931, 978 (9th Cir. 2007); *United States v. Bourgeois*, 423 F. 3d 501, 511 (5th Cir. 2005); *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), *aff'd*, 19 F.3d 1154 (1994). The logic of these cases compels the same result here. *See also United States v. O'Driscoll*, 203 F. Supp. 2d 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 core 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).

2. The Heinous, Cruel, or Depraved Conduct Factor is Valid.

The United States’ Notice of Intent to Seek the Death Penalty cited as an aggravating factor, pursuant to the express terms of 18 U.S.C. § 3592(c)(6), that the murder of Abeer Kassem Hamza Al-Janabi was committed in a heinous, cruel, and depraved manner in that it involved serious physical abuse to the victim. Green argues that “[e]very murder by definition involves ‘serious physical abuse’ – the killing of a human being – so that this factor is broad enough to subject every murder defendant to the death penalty and is thus unconstitutional.”¹ Green’s claim that this statutory aggravating factor is unconstitutionally vague is flatly contrary to the law. The Supreme Court has repeatedly upheld the constitutionality of this formulation as limited by the modifying or limiting phrase: “torture or serious physical abuse to the victim.”

In *Maynard v. Cartwright*, 486 U.S. 356, 363-65 (1988), the Supreme Court specifically noted that an aggravating factor that a murder was “especially heinous, atrocious, or cruel” would be constitutional if the requirement was imposed that the factor required “some kind of torture or serious physical abuse.” In *Walton v. Arizona*, 497 U.S. 639, 654-655 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court reiterated its express approval in *Cartwright* of a definition that limits “especially heinous, atrocious, or cruel” aggravating circumstances to murders involving some type of torture or

¹Defendant’s Motion at p. 12.

physical abuse. *See also Profitt v. Florida*, 428 U.S. 242, 255-256 (1976) ("especially heinous, atrocious, or cruel" provision construed as "the conscienceless or pitiless crime which is unnecessarily torturous to the victim" provided adequate guidance); *Gregg v. Georgia*, 428 U.S. 153 (1976) (language that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" not unconstitutional on its face).

The Supreme Court's decision in *Jones v. United States*, 527 U.S. 373 (1999), also supports the constitutionality of 18 U.S.C. § 3592(c)(6). In *Jones*, the defendant kidnaped a young female private from an Army post, raped her, drove her to a secluded location, and then beat her to death with a tire iron. *Jones* at 376. The government alleged and proved two statutory aggravating factors – that the defendant caused the death of his victim during the commission of another crime, 18 U.S.C. § 3592(c)(1), and that the defendant committed the offense in an especially heinous, cruel and depraved manner in that it involved torture or serious physical abuse, 18 U.S.C. § 3592(c)(6). *Jones*, 527 U.S. at 377. The Fifth Circuit held that two non-statutory aggravating factors had been too vaguely worded, but concluded that the remaining statutory aggravating factors – including the 18 U.S.C. § 3592(c)(6) "heinous, cruel, or depraved" factor – sufficiently supported the jury's death sentence, and the Supreme Court affirmed. *Id.* at 404-05.

The central case cited by the defense, *Godfrey v. Georgia*, 446 U.S. 420 (1980), does not support Green's argument. In that case, the Supreme Court was construing the term "depravity of mind," a term of art under Georgia law which the Georgia Supreme Court had previously specifically defined to include torture or the commission of aggravated battery on the victim before the killing. *Id.* at 431. In *Godfrey*, however, the defendant had shot his wife and mother-

in-law, killing both instantly. *Id.* at 425. Under those facts, the Supreme Court held that the facts of the murders did not amount to the “depravity of mind” standard previously defined by the Georgia Supreme Court, and therefore it reversed the death sentence. *Id.* at 432-33. The *Godfrey* case has nothing to do with the federal statute, and nowhere does the opinion suggest that it is unconstitutional for a jury to consider serious physical abuse of a victim in its determination of whether to impose the death penalty.

Finally, every federal court that has considered a vagueness challenge to 18 U.S.C. § 3592(c)(6) has rejected it. *See Mitchell*, 502 F. 3d at 975-76; *Bourgeois*, 423 F. 3d at 511; *United States v. Jones*, 132 F.3d 232, 249-50 (5th Cir. 1998), *aff’d Jones v. United States*, 527 U.S. 373 (1999); *United States v. Webster*, 162 F.3d 308, 354 (5th Cir. 1998), *cert. denied*, 528 U.S. 829 (1999); *United States v. Hammer*, 25 F. Supp. 2d 518, 540-41 (M.D. Pa. 1998), *cert. denied*, 532 U.S. 959 (2001); *United States v. Frank*, 8 F. Supp. 2d 253, 277-78 (S.D.N.Y. 1998); *United States v. Nguyen*, 928 F. Supp. 1525, 1533-34 (D. Kan. 1996); *United States v. Chanthadara*, 928 F. Supp. 1055, 1057 (D. Kan. 1996). The federal courts that have considered similar challenges to the identically worded aggravating factor in continuing criminal enterprise cases, 21 U.S.C. § 848(n)(12), have also unanimously upheld its constitutionality. *See United States v. Bradley*, 880 F. Supp. 271, 289 (M.D. Pa. 1994); *United States v. Pitera*, 795 F. Supp. 546, 558 (E.D.N.Y. 1992); *United States v. Pretlow*, 779 F. Supp. 758, 773 (D. N.J. 1991); *United States v. Cooper*, 754 F. Supp. 617, 623 (N.D. Ill. 1990).

B. The Non-Statutory Aggravating Factors are Valid

1. The Defendant's Essential Conclusion Regarding Constitutional Limits on Non-Statutory Aggravating Factors is Wrong.

Green begins the second section of his motion by enumerating various procedures and rules applicable to capital sentencing hearings - a recitation of the applicable law with which the United States generally has no quarrel. However, the United States does take exception with, and must draw this Court's careful attention to, one error that carries through all the defendant's claims regarding non-statutory aggravating factors.²

Green's motion includes a lengthy quote from *United States v. Davis*, 904 F. Supp. 554, 559 (E.D. La. 1995), in which the court discussed statutory and non-statutory aggravating factors, first recognizing that statutory factors determine whether a defendant can be eligible for the death penalty, and then stating that statutory aggravating factors "ultimately become indistinguishable from non-statutory factors in the final weighing by the jury." *Id.* Thus, the *Davis* court recognized different stages in the sentencing process: first the jury must determine, by use of statutory aggravating factors, whether the defendant is eligible for the death penalty; then, if he is eligible, the jury must decide, by weighing ALL factors – statutory and non-statutory aggravators as well as all mitigators – whether to impose the death sentence. These sentencing stages are commonly referred to as the eligibility phase and the selection phase.

The distinction between the phases is critical. The *Apprendi* line of cases, made applicable to capital cases by *Ring*,³ dictates that findings of fact that expose a defendant to a greater punishment must be treated as the functional equivalent of elements of the offense, for

²Defendant's Motion, p. 18.

³*Ring v. Arizona*, 536 U.S. 584 (2002).

purposes of applying constitutional procedural protections (*e.g.*, inclusion in the indictment, findings made by a unanimous jury, and proof beyond a reasonable doubt). In a capital case, the defendant becomes exposed to, or eligible for, the greatest punishment – the death penalty – after a jury unanimously decides beyond a reasonable doubt that he committed the murder charged plus at least one statutory aggravating factor. If the jury so finds, the defendant may be sentenced to death. In selecting whether to actually impose that sentence, the jury considers the offense committed, the statutory aggravating factors found, and all non-statutory aggravating factors and mitigating factors. The jury weighs all those factors and then chooses the punishment they deem most appropriate.⁴

Thus, as the *Davis* court understood, statutory aggravating factors narrow the class of murderers and thereby establish *eligibility* for the death penalty and, after a defendant is rendered eligible, those same statutory factors are added to the mix of all aggravating and mitigating factors in the weighing process, during which the jury *selects* the appropriate punishment. Further, in terms of the weight accorded to any factor during the *selection* phase, there is no distinction between statutory and non-statutory factors – the weight to be accorded any factor is entirely up to the jury.

But the mere fact that statutory and non-statutory factors are “indistinguishable” in terms of weight during the *selection* phase in no way implies that non-statutory factors are the equivalent of statutory factors for the *eligibility* phase. In fact, as will be repeatedly noted, *infra*, court after court has recognized that statutory factors, because they determine eligibility for the death sentence, are treated as the functional equivalent of elements of the offense, and so must

⁴A comprehensive explanation of the FDPA’s procedures was set forth in *United States v. Henderson*, 485 F. Supp. 2d 831, 85-51 (S.D. Ohio 2007).

be charged in the indictment and must be proven beyond a reasonable doubt to a unanimous jury. Contrarily, non-statutory factors, because they are used only to help the jury select an appropriate sentence from within the established punishment range, are not treated as elements and, therefore, are not subject to the same constitutional procedural requirements.

The defendant, however, seizes on only that portion of the *Davis* quote wherein the court notes that statutory and non-statutory factors become “indistinguishable” in the final weighing process. From that one word, taken out of context, the defendant builds the house of cards that supports the remainder of his motion. He does so by stating, in conclusory fashion, that because the factors become “indistinguishable,” “they are subject to the same stringent requirements.”⁵ The defendant then proceeds to list four such requirements, including that both statutory and non-statutory factors “must: (1) adequately channel the sentencer’s discretion by *narrowing the category of convicted defendants eligible to receive the death penalty...*”⁶

After listing the four requirements he asserts apply equally to statutory and non-statutory aggravating factors, the defendant concludes with a string citation to four cases.⁷ A careful review of those cases reveals that they do, in fact, support the defendant as to his listed requirements, numbered 2 (the factors must be relevant), 3 (the factors must be consistent with heightened reliability standards) and 4 (the factors must not be vague, duplicative, overbroad, etc.). However, *nothing in those cases*, or, in fact, in any case cited anywhere in the defendant’s brief, supports his first stated requirement, to wit: that non-statutory factors narrow the category

⁵Defendant’s Motion, page 18.

⁶Defendant’s Motion, page 18) (emphasis added).

⁷Defendant’s Motion, page 19.

of defendants eligible for the death penalty. *See Henderson*, 485 F. Supp. 2d at 831 (“Thus, Defendant’s argument that the nonstatutory factors are overbroad to the extent they fail to narrow the class of death-eligible defendants is not well taken by this court because it confuses the purposes of statutory factors and nonstatutory aggravating factors.”).

Green’s unsupported conclusion that non-statutory factors must narrow the class of defendants eligible for the death penalty fuels all his follow-up errors,⁸ as will be addressed in turn, *infra*.

2. Non-Statutory Factors Do Not Perform the Narrowing Function.

The defendant claims, contrary to the plain language of the FDPA and all the pertinent case law, that the United States cannot 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 United States 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. Fields*, ___ F. 3d ___, 2008 WL 483281 (10th Cir. 2008); *United States v. Mitchell*, 502 F. 3d 931 (9th Cir. 2007); *United States v. Barrett*, 496 F. 3d 1079 (10th Cir. 2007); *United States v. Sampson*, 486 F. 3d 13 (1st Cir. 2007); *United States v. Fields*, 483 F. 3d 313 (5th Cir. 2007); *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

⁸ Throughout his motion, the defendant cites cases referring to the constitutional narrowing requirement that exists in capital cases. However, without exception, every case he cites with respect to narrowing was discussing statutory aggravating factors, not non-statutory factors. It is the sleight-of-hand argument he engaged in on page 18 of his motion, in which he concluded that statutory and non-statutory factors were equivalent, that apparently led the defendant to justify his repeated citation of cases which do not support his argument.

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, 877 (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 the 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 or 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.” *Nguyen* 928 F. Supp. at 1538. Relying in part on the Supreme Court’s 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.

Nguyen, 928 F. Supp. at 1538 (quoting *Zant*, 462 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, 826-27 (1991); *Zant*, 462 U.S. at 878-79.

The defendant’s suggestion that the United States’ presentation of non-statutory aggravation would be “restricted only by the imagination of the prosecutor” (Defendant’s Motion, p. 20) is unfounded and has been explicitly rejected. See *United States v. Mitchell*, 502

F. 3d 931, 978-79 (9th Cir. 2007). 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.” *United States v. 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.

3. Non-Statutory Aggravating Factors Do Not Constitute an Unlawful Delegation of Legislative Authority.

Green’s next argument, also based on his conflation of the roles of statutory and non-statutory aggravating factors,⁹ 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.*, *Mitchell*, 502 F. 3d at 978-79; *United States v. Barrett*, 496 F. 3d 1079, 1108 (reviewing the former death penalty procedures in 21 U.S.C. § 848, *et. seq.*); *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. Jones*,

⁹Green relies again on the same false premise he sought to establish earlier in support of his argument that the non-statutory aggravators must be dismissed. He begins by repeating the assertion that statutory and non-statutory aggravating factors are “indistinguishable.” (Defendant’s Motion, page 20-21). He then asserts that because they are indistinguishable, both are the equivalent of elements of the offense and, as such, must be defined by Congress. (Defendant’s Motion, page 21).

132 F.3d 232, 240 (5th Cir. 1998), *aff'd*, 527 U.S. 373 (1999); *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. 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.

Green's 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 FPDA 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; *DesAnge*, 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.

Green seeks to avoid the rationale of all the cases holding against him by noting that those cases pre-dated *Ring*.¹⁰ However, his argument relies on the erroneous conflation of statutory and non-statutory factors with which he began his argument that the non-aggravating factors should be dismissed. Under *Ring*, those factors that render a defendant eligible for the death penalty, *i.e.*, the statutory aggravating factors, are the functional equivalent of elements of the crime and so must be defined by Congress. By conflating the functions of statutory and non-statutory factors, the defendant argues that non-statutory factors are also the equivalent of elements and so must also be defined by Congress. As discussed, *supra*, non-statutory aggravators do not make a defendant eligible for the death penalty, so they cannot be said to be the equivalent of elements. Therefore, they need not be defined by Congress, so Green's claim must fail.

4. The Use of Non-Statutory Aggravating Factors Does Not Violate the Ex Post Facto Clause.

The defendant's argument that allowing the United States to identify non-statutory aggravating factors violates the prohibition on *ex post facto* laws 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

¹⁰While it is true that the cases the defendant relies upon in his motion pre-date *Ring*, the United States has cited three post-*Ring* circuit court cases: *Mitchell*, 502 F. 3d at 978-79; *United States v. Barrett*, 496 F. 3d 1079, 1108 (reviewing the former death penalty procedures in 21 U.S.C. § 848, *et. seq.*); and *United States v. Higgs*, 353 F. 3d 281, 321 (4th Cir. 2003).

defendant is charged, appear in the applicable criminal statutes cited in the Indictment, which were in place before Green committed the crimes for which he was charged.

The central failing underlying Green's argument, as with other portions of his argument that the non-statutory aggravating factors should be dismissed, is his fundamental misunderstanding of the nature of such factors. His arguments are all premised on the mistaken notion that non-statutory aggravators help define the crime in that they expose the defendant to a greater punishment. But, as has been repeatedly established, *supra*, he is entirely wrong – statutory aggravating factors expose the defendant to a greater punishment, and thus are treated as the functional equivalent of elements of the offense. Non-statutory aggravators, quite simply, do not perform this same function, and thus do not receive the same Constitutional treatment. *See, e.g., United States v. Mitchell*, 502 F. 3d 931, 973-79 (9th Cir. 2007) (describing FDPA procedures as requiring that gateway intent and statutory aggravating factors be found unanimously and beyond a reasonable doubt to render the defendant eligible for the death penalty and, only after eligibility was thus established, a review by the jury of non-statutory aggravating factors and mitigating factors as part of the process of selecting the appropriate punishment; thereby making it clear that gateway intent and statutory aggravating factors must be viewed as functional equivalents of elements of the crime, whereas non-statutory aggravating factors serve a different purpose and so are not the equivalent of elements; and that non-statutory aggravating factors, unlike statutory factors, need not be included in the indictment precisely because they do not perform the function of increasing the defendant's sentence exposure.); *United States v. Brown*, 441 F. 3d 1330 (11th Cir. 2006) (holding that non-statutory aggravating factors need not be included in the indictment because they do not increase the range of punishment and, therefore, do not act as the functional equivalent of elements of the offense.); *accord, United States v.*

Purkey, 428 F. 3d 738, 749-50 (8th Cir. 2005); *United States v. Bourgeois*, 423 F. 3d 501, 507-08 (5th Cir. 2005); *see also 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.”).

Because non-statutory aggravating factors plainly do not expose the defendant to any increased punishment, they do not help define the crime and they do not violate the Ex Post Facto Clause.

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 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).

Green’s claim that “[t]here is no principled basis on which to distinguish non-statutory aggravators from statutory aggravators”¹¹ for purposes of *Ring* is simply wrong. This argument is also based on the same essential misunderstanding of the role of non-statutory factors that permeates his entire motion. As described, *supra*, non-statutory aggravating factors are not the functional equivalent of elements of the offense (unlike threshold intent and statutory aggravating factors) because they simply are not needed to make a defendant eligible for the death penalty. Once a jury finds at least one intent factor and at least one statutory aggravating factor beyond a reasonable doubt, the defendant is eligible to be sentenced to death, regardless of what findings may be made with respect to non-statutory factors. Conversely, if the jury fails to find at least one intent factor and at least one statutory aggravating factor, then the defendant cannot be

¹¹ Defendant’s Motion, page 24.

sentenced to death no matter how many non-statutory aggravating factors are found. Thus, the distinction between statutory and non-statutory aggravating factors is not only principled, it is well-established. *See, e.g., United States v. Brown*, 441 F. 3d 1330, 1368 (11th Cir. 2006) (noting that “non-statutory aggravating factors, although relevant to determining whether a jury *decides* to impose the death penalty, do not make a defendant statutorily eligible for any sentence that could not be otherwise imposed in their absence;” and quoting *United States v Purkey*, 428 F. 3d 738, 749-50 (8th Cir. 2005): “[Non-statutory aggravating factors] are neither sufficient nor necessary under the FDPA for a sentence of death.”) (emphasis in original).

5. Victim Impact Evidence is Constitutional and Admissible.

Green next argues that the “victim impact” aggravating factor set forth in the United States Notice of Intent to Seek the Death Penalty is not properly aggravating because it would apply to every murder and it fails to narrow the class of murderers for whom the death penalty is available.

Again, Green’s arguments are foreclosed by Supreme Court precedent. *See Jones v. United States*, 527 U.S. 373, 401 (1999) (in reviewing a federal death penalty case under the FDPA, the Court held, “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.”) (emphasis in original).

While acknowledging the Supreme Court’s ruling in *Payne v. Tennessee*, 501 U.S. 808 (1991), that victim impact evidence is constitutionally permissible at a sentencing hearing;¹² and

¹²Although the ruling in *Payne* is not disputed, a review of the Supreme Court’s opinion might help to inform this Court’s decisions on the matters that are disputed. The opinion explained that the scales in a capital trial are “unfairly weighted” when “virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own

the ruling in *Jones*, where use of victim impact under the FDPA was approved; and the plain language of 18 U.S.C. § 3593(a), where Congress explicitly provides for the inclusion of victim impact evidence; Green nevertheless insists that victim impact is not a permissible factor under the FDPA because it does not describe an aggravating circumstance “other” than the crime itself and that it is not, in any event, aggravating because it does not make the crimes that Green is charged with “worse” than every other murder.¹³

Green’s arguments are without merit. He bases his argument that victim impact does not describe “other” aggravation on a portion of 18 U.S.C. § 3592(c), where the statute provides that the sentencing authority “may consider whether any other aggravating factor for which notice has been given exists.”¹⁴ This language is part of the concluding sentence to § 3592(c), and is immediately preceded within that section by a list of the sixteen statutory aggravating factors set forth by Congress. Therefore, the reference to “other” aggravating factors quite plainly means any aggravating factor not included in the list of the sixteen statutory factors. Even a cursory

circumstances, [but] the State is barred from either offering ‘a quick glimpse of the life’ which a defendant ‘chose to extinguish,’ . . . or demonstrating the loss to the victim’s family and to society which has resulted from the defendant’s homicide.” *Payne v. Tennessee*, 501 U.S. at 822. To prevent that unfairness, the Court acknowledged that the prosecution has a “legitimate interest in counteracting mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family,” *Id.* at 825. The Court concluded that the “human cost” of capital murder is “morally both defensible and appropriate to consider such evidence when penalizing a murderer.” *Id.* at 839.

¹³Defendant’s Motion, p. 25.

¹⁴*Id.* at pp. 25-26.

glance at § 3592(c) reveals that victim impact is not included among the sixteen factors and, therefore, necessarily falls into the “other” category.

Green’s argument that victim impact evidence is not aggravating flies in the face of all legal authority, including the Supreme Court (*Payne* and *Jones*), every circuit court to have considered the use of victim impact evidence,¹⁵ and the plain language of the FDPA.

6. Victim Impact Evidence Should Not Be Excluded.

The arguments Green makes in this section of his motion, and the cases cited in support of those arguments, do not actually match the relief requested, that is: that victim impact evidence be excluded under the Eighth Amendment and the FDPA. Rather, Green merely sets forth the standard to be employed by the trial court in assessing the admissibility of any evidence during the sentencing phase of trial; provides a lengthy quote from a district court opinion in which the judge questions the wisdom of the Supreme Court’s holding in *Payne*; and then concludes by citing to a handful of district court opinions requiring the government to provide more specific notice for the victim impact factors alleged in those cases. Nowhere does the defendant cite a case, or even make an argument, that victim impact evidence must be excluded under the Eighth Amendment or the FDPA.

To the extent Green’s argument could be construed as a request for more specificity as to the victim impact proof to be offered by the United States , it should be denied. Green has been given notice of the United States’ intention to seek the death penalty and specific notice of the

¹⁵See, e.g., *United States v. Fields*, ___ F. 3d ___, 2008 WL 483281 (10th Cir. 2008); *United States v. Mitchell*, 502 F. 3d 931 (9th Cir. 2007); *United States v. Barrett*, 496 F. 3d 1079 (10th Cir. 2007); *United States v. Fulks*, 454 F. 3d 410 (4th Cir. 2006); *United States v. Brown*, 441 F. 3d 1330 (11th Cir. 2006); *United States v. Allen*, 247 F.3d 741, 778 (8th Cir. 2001) *cert. denied*, 539 U.S. 916 (2003); *United States v. Chanthadara*, 230 F.3d 1237, 1273-74 (10th Cir. 2000), *cert. denied*, 534 U.S. 992 (2001).

aggravating factors, statutory and non-statutory, upon which it intends to rely. The Indictment identifies the victims and outlines the specific conduct that Green committed that warrants application of the threshold intent factors and statutory aggravators in this case. And the Notice of Intent To Seek the Death Penalty sets forth the aggravating factors that the United States intends to prove at trial, including the victim impact factor. Nothing more is required. *See* 18 U.S.C. § 3593(a); *see also United States v. LeCroy*, 441 F.3d 914, 929-30 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2096 (2007) (holding that Government satisfies its constitutional and statutory obligations of notice once it informs defendant of aggravators it intends to prove at trial); *United States v. Higgs*, 353 F.3d 281, 298 (4th Cir. 2003) (holding same); *United States v. Battle*, 173 F.3d 1343, 1347 (11th Cir. 1999) (holding “the Government is not required to provide specific evidence in its notice of intent”); and *United States v. Cooper*, 754 F. Supp. 617, 621 n.7 (N.D. Ill. 1990) (holding that death notice, under provisions of Ant-Drug Abuse Act, informed defense of aggravating factors, which is more than the Constitution requires).

Although Green does not specifically request a bill of particulars under Rule 7(f) of the Federal Rules of Criminal Procedure, his motion seems to imply such a request. The granting of a bill of particulars is wholly within the discretion of the trial court. *See United States v. Mitchell*, 744 F.2d 701, 705 (9th Cir. 1984). 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)). A bill of particulars is thus not a device to obtain disclosure of

evidentiary details of the United States' legal theories. *See United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir. 1979); *United States v. Nguyen*, 928 F. Supp. 1525, 1551-52 (D. Kan. 1996) (FDPA case). Similarly, a bill of particulars should not be used to seek more detail about aggravating factors alleged by the United States. *See United States v. Solomon*, 513 F. Supp. 2d 520 (W.D. Pa. 2007); *United States v. O'Driscoll*, 203 F. Supp.2d 334, 348-49 (M.D. Pa. 2002); *United States v. Miner*, 176 F. Supp.2d 424, 448-49 (W.D. Pa. 2001). Indeed, full discovery obviates the need for a bill of particulars, *see Giese*, 597 F.2d at 1180, as does an indictment that offers enough detail to tell the defendant the essential facts of the crime charged. *See United States v. Federbush*, 625 F.2d 246 (9th Cir. 1980).

The allegations in the Indictment and the Notice of Intent to Seek the Death Penalty are sufficient to place Green on notice of the essential facts that inform the Government's application of the victim impact factor. Accordingly, this Court should follow the other courts that have rejected a defendant's efforts to obtain a bill of particulars upon claiming that the indictment and/or notice of intent to seek the death penalty were insufficiently detailed. *See United States v. Regan*, 228 F. Supp.2d 742, 754 (E.D. Va. 2002); *O'Driscoll*, 203 F. Supp.2d at 349; *Miner*, 176 F. Supp.2d at 449; *Nguyen*, 928 F. Supp. at 1545-46; *but see Solomon*, 513 F. Supp. 2d at 535 (while the court rejected a request for a Bill of Particulars, it required the Government to provide an outline of the type of victim impact evidence it intended to offer, though not a revelation of evidentiary detail); *United States v. Wilson*, 493 F. Supp.2d 364, 378 (E.D.N.Y. 2006) (requiring bill of particulars concerning specifics of victim impact); *United States v. Walker*, 910 F. Supp. 837, 856 (N.D.N.Y. 1995) (requiring limited bill of particulars as to prior unadjudicated conduct).

A defendant is entitled to some notice of the *charges* against him, and the factors that could subject him to capital punishment, but he is not entitled to advance notice of the *evidence*

that will support those factors at a capital sentencing hearing. *See LeCroy*, 441 F.3d at 929 (citing *Gray v. Netherland*, 518 U.S. 152, 166-70 (1996)); *Higgs*, 353 F.3d at 325; *Battle*, 173 F.3d at 1347; *Regan*, 228 F. Supp.2d at 754. An indictment and notice of intent to seek the death penalty are the mechanisms the United States uses to meet its constitutional and statutory obligations before the trial.

7. The Witness Elimination Non-Statutory Aggravating Factor is Valid.

Green's argument on this point is wrong on the law and the facts. His legal argument relies on the same misunderstanding of the nature of non-statutory aggravating factors that has been previously addressed, *supra*. The United States will not reiterate that argument again, except to note that non-statutory aggravating factors do not perform the function of narrowing the class of murders which may be subject to the death penalty, so any argument premised on that belief is without merit.

The defendant is also factually wrong in asserting that the witness elimination factor "can be applied in 'almost every murder.'"¹⁶ While it is undoubtedly true that a murder necessarily eliminates the victim from ever becoming a witness, it does not follow that every murderer is motivated to commit his crime specifically to eliminate witnesses. The possible motives to commit murder are too various to enumerate, but considering just a few makes clear that witness elimination as a motive does not apply to "almost every murder." Some murderers are motivated to kill their victims for financial gain or some for revenge. One who commits a crime, such as rape, and who chooses to kill any potential witness to that crime, has a motive different in kind from those described, in that he chooses to kill not for profit, revenge, or thrill, but to protect

¹⁶ Defense Motion, page 30.

himself from possible future prosecution. Clearly, then, the motive to kill in order to eliminate witnesses does not apply to “almost every murder,” and a defendant’s motive for killing is plainly a circumstance of the crime and a relevant consideration in determining whether to sentence the defendant to death.

Therefore, because Green’s argument on this claim is without merit, it should be denied.

For all the foregoing reasons, the United States respectfully requests that defendant’s Motion to Declare the Federal Death Penalty Act Unconstitutional, Dismiss Aggravators and Dismiss the United States’ Death Penalty Notice, should be denied.

Respectfully submitted,

DAVID L. HUBER
United States Attorney

/s/ Marisa J. Ford
Marisa J. Ford
James R. Lesousky.
Assistant U.S. Attorneys
510 W. Broadway, 10th Floor
Louisville, KY 40202
(502) 582-5911
marisa.ford@usdoj.gov

/s/ Brian D. Skaret
Brian D. Skaret
United States Department of Justice
Domestic Security Section
950 Pennsylvania Ave., NW, Ste. 7645
Washington, DC 20530
(202) 353-0287
brian.skaret@usdoj.gov

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