

**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
DUE TO IMPROPER SENTENCING PROCEDURES**

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 due to improper sentencing procedures.

In his thirty-page motion¹ to declare the Federal Death Penalty Act unconstitutional due to improper sentencing procedures, Green argues that the United States' notice of its intent to seek the death penalty in this case should be struck by the Court because of the conclusions of a sociological study known as the Capital Jury Project.² Green argues that data collected by the

¹The Joint Criminal Local Rules applicable to federal practice in the United States District Courts for the Eastern and Western Districts of Kentucky provide that supporting and opposing memoranda may not exceed twenty-five pages without leave of Court. LCrR 12.1(e)

²The Capital Jury Project (CJP) is a consortium of university-based research studies on the decision-making of jurors in death penalty cases. It was founded in 1991 and is supported by the National Science Foundations. The goal of the CJP is to determine whether jurors' sentencing decisions conform to the Constitution and do not reflect the arbitrary decision-making condemned by the United States Supreme Court when it found the death penalty unconstitutional in *Furman v. Georgia*. The CJP is a continuing research program with findings based on a standard protocol of interviews with jurors who have served in cases where a defendant was eligible for capital punishment.

CJP establishes, among other things, that juries in capital cases (i) make their decision about the appropriate punishment before evidence is presented in the penalty phase at trial; (ii) are biased by the jury selection process itself and predisposed to return the death penalty at the conclusion of the penalty phase; and (iii) do not understand or follow the jury instructions given to them by the Court during the penalty phase of the trial. Green offers a hodgepodge of quotes from inapposite cases in support of his argument.

Green begins by setting forth the well-established legal principle that the Constitution requires a capital jury's sentencing discretion to be channeled by clear and objective standards which provide specific and detailed guidance for the jury and render the capital sentencing process one which can be rationally reviewed. Specifically, Green cites *Godfrey v. Georgia*, 446 U.S. 420 (1980), and *Maynard v. Cartwright*, 486 U.S. 356 (1988), for the unremarkable proposition that particular aggravating factors may not be vague.³ He then quotes *Stringer v. Black*, 503 U.S. 222 (1992), in an effort to explain why aggravating factors should not be vague.

Of course, there is no dispute that aggravating factors cannot be vague.⁴ Rather, Green seeks to extrapolate from this principle an overarching legal rule that anything that could potentially confuse a juror must be unconstitutional. For support, he turns to CJP findings alleging that some jurors were apparently confused about various procedures when they sat on capital juries. Green then presumes, without explicitly justifying the presumption, that fault for the juror's alleged confusion lies in vague sentencing procedures. Therefore, he argues that vague procedures result in a violation of the Constitution. But, in the end, *Godfrey*, *Maynard*

³Defendant's Motion re Improper Sentencing Procedures, p. 5.

⁴ The defendant makes no attempt, in this motion, to argue that the aggravating factors alleged against him are vague (he makes that allegation in a separate motion).

and *Stringer* do not address findings of the CJP or claims similar to Green's of generically vague or confusing sentencing procedures. Rather, the Supreme Court simply employs a well-established legal doctrine relating to claims of Constitutional vagueness to analyze specific aggravating factors. As such, these cases do nothing to illuminate the allegations made in Green's motion.

The defendant repeats this pattern of argument throughout his motion: he cites cases setting forth a well-established legal principle; he attempts to discern some broader implication from that principle and tries to support it with CJP findings; and he concludes in each instance that the CJP findings demonstrate a Constitutional violation of the principle set forth in the cases cited.

As he did with the assertion that the aggravating factors considered by the jury cannot be vague, he next cites several cases for the proposition that juries must not be prevented from considering mitigating evidence.⁵ He does so in support of his argument that capital juries reach conclusions about punishment before they hear evidence in mitigation. By failing to consider the mitigating evidence, Green argues that juries act unconstitutionally. But Green does not allege, nor could he, that the FDPA in any way prevents juries from hearing and considering mitigating evidence. Instead, he simply argues that the CJP findings show that some jurors failed to give proper consideration to mitigation (at least according to the standards established by the CJP authors) and draws the conclusion that this failure violates the Constitutional requirement that jurors not be prevented from considering mitigation.

⁵Defendant's Motion re Improper Sentencing Procedures, p. 11.

The defendant then turns to Supreme Court jurisprudence establishing the standards governing jury selection in capital cases (*Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Wainwright v. Witt*, 469 U.S. 412 (1985); and *Morgan v. Illinois*, 504 U.S. 719 (1992)). However, he fails to provide any legal authority undermining the holdings of those cases. Rather, he cites constitutionally-based selection standards and claims that the CJP demonstrates that those standards fail to weed out jurors the defendant believes harbor a pro-death bias. To the extent, then, that any of these cites is relevant to his claim, his claim is plainly foreclosed by controlling Supreme Court precedent.

Green next cites *Caldwell v. Mississippi*, 472 U.S. 320 (1985), for the proposition that jurors may not be misled into believing that some other authority will have the ultimate responsibility for imposing a death sentence.⁶ He points to CJP findings purporting to show that jurors place the responsibility for their death verdicts elsewhere (such as on the defendant, whose commission of the murder, after all, precipitated the trial) and concludes that the Constitution is violated when jurors are misled about their responsibility in this regard. However, he fails to allege that anything in the FDPA misleads juries, so, again, he cites a case without making a corresponding legal point pertinent to his claim.

Finally, Green cites two more Supreme Court cases (*Simmons v. South Carolina*, 512 U.S. 154 (1994); and *Shafer v. South Carolina*, 532 U.S. 36 (2001)), for the proposition that juries should not be misled about non-capital sentencing options, in particular whether a non-capital sentence would lead to a defendant's eventual release from prison on parole.⁷ Again,

⁶Defendant's 's Motion re Improper Sentencing Procedures, p. 21.

⁷*Id.*, pp. 24-25.

Green makes no attempt to show that the FDPA in any way misleads jurors about parole eligibility. Nor does he show why this Court could not instruct the jury in order to avoid potential misunderstanding. He merely presumes that, because the CJP asserts that some jurors misunderstood sentence lengths, the Constitutional proscription against misleading jurors about parole eligibility must have been violated.

In short, Green argues that sentencing procedure in capital cases is inherently unconstitutional. In support, he has cited a handful of cases which set forth well-established principles of capital jurisprudence and attempts to connect those principles to various findings from the CJP. He fails, however, to make any link between the Federal Death Penalty Act and the cases he cited. In fact, absent from the entire thirty-page motion is a single citation to any case, at any level, declaring the death penalty unconstitutional based on CJP findings.

Because the motion is devoid of pertinent case authority, the United States will not respond further, other than to note that Green's arguments are of a type which should be directed to a different audience. The type of information he supplies is most suitable for consideration by a legislative body.

For the foregoing reasons, the United States respectfully requests that the motion of the Defendant to declare the Federal Death Penalty Act unconstitutional due to improper sentencing procedures 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
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