

**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 AND TO STRIKE THE
UNITED STATES' DEATH PENALTY NOTICE AS INADEQUATE**

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.*, unconstitutional¹ and to strike the United States' notice of intent to seek the death penalty as inadequate. Green's motion is without merit.

Green's motion raises two issues. First, Green claims that the notice he received via the United States' Notice of Intent to Seek the Death Penalty is insufficient. He provides no citation, however, to any case where a death penalty notice was dismissed on the grounds Green alleges in his motion.² Second, Green claims the United States has improperly alleged four

¹At the outset, the United States notes that Green's motion does not appear actually to move for a declaration that the Federal Death Penalty Act is unconstitutional - he provides neither argument nor legal support for that particular claim.

² The defendant does cite *United States v. Ferebe*, 332 F. 3d 722 (4th Cir. 2003), but the issue in that case involved the timing of the death notice's filing. The notice in this case was filed on July 3, 2007, for a trial currently scheduled to begin on April 13, 2009, so there is no timing issue here.

mental states in its notice of intent to seek the death penalty. This claim, too, is unsupported by any relevant case citation or legal authority.³ Consequently, Green's motion should be denied.

I. The Special Findings in the Indictment and the Notice of Intent to Seek the Death Penalty Provide the Notice Required by the Constitution.

A. The Special Findings in the Indictment and the Notice of Intent to Seek the Death Penalty Should Not be Dismissed.

Green asserts that the Special Findings in the Indictment and the United States' Notice of Intent to Seek the Death Penalty fail to meet the general legal requirements of fair notice and should be dismissed. Yet, in none of the cases cited by Green in support of his argument did a court dismiss either special findings or a death penalty notice on this basis. At best, the cases Green cites support a request for additional specificity, but even that request should be denied.

Green argues that the United States' Notice of Intent to Seek the Death Penalty fails to set forth the "gateway" mental states (FDPA, 18 U.S.C. § 3591(a)(2)(A-D)) with sufficient specificity to permit him to prepare his defense. Specifically, he contends that the United States has failed to allege the *factual basis* for these factors in the death notice. For the reasons stated below, Green's claim is unavailing.

Courts have addressed the sufficiency of the notice given by the United States in a number of death penalty cases. The Eleventh Circuit Court of Appeals expressly held in *United States v. Battle*, 173 F.3d 1343, 1347 (11th Cir. 1999), that the notice given to a defendant of the applicable aggravating factors in a death penalty case is *not* the same as notice of the specific evidence that the government intends to present at a sentencing hearing. *Id.*; *see also United*

³Green does cite *United States v. Tipton*, 90 F. 3d 861 (4th Cir. 1996), but he recognizes that *Tipton* involved the mental states as used in Title 21's former death penalty procedures, where the intent factors are weighed as aggravators; as opposed to the FDPA's procedures, where intent factors are threshold findings that do not get weighed as aggravators.

States v. LeCroy, 441 F.3d 914, 929-30 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2096 (2007); *United States v. Higgs*, 353 F.3d 281, 298 (4th Cir. 2003); *United States v. Nguyen*, 928 F. Supp. 1525, 1545-46 (D. Kan. 1996)(holding government’s notice of intent to seek the death penalty permissible even though it only listed the aggravating circumstances and provided no detail about the evidence the government intended to offer in support).

Green seeks to avoid the persuasive authority of *Battle* and *Nguyen* by claiming that their reasoning was “obviously abrogated by *Ring v. Arizona*.”⁴ but fails to note that *LeCroy* and *Higgs* were both decided after *Ring*. In *Higgs*, the Court cited *Battle* with approval, holding that the FDPA and the Constitution require only that the defendant receive notice of the aggravating factor, “not notice of the specific evidence that will be used to support it.” *Higgs*, 353 F. 3d at 325. Other courts have, post-*Ring*, rejected claims similar to Green’s. In *United States v. Grande*, 353 F. Supp. 2d 623 (E.D. Va. 2005), the court stated, “[a]s to Mr. Grande’s argument that the Court should strike this factor for not providing proper notice since it only tracks the language of the statute and does not describe the conduct at issue, the Court rejects this argument...” *Grande*, 353 F. Supp. 2d at 633 (citing *Higgs*). In *United States v. Jordan*, 357 F. Supp. 2d 889, 895 (E.D. Va. 2005), the Court approved the United States’ method of simply tracking the statutory language in setting forth intent and aggravating factors in both the special findings section of the indictment and in the notice of intent to seek the death penalty. *See also United States v. Solomon*, 513 F. Supp. 2d 520, 538 (W.D. Pa. 2007).

⁴Defense Motion, p. 7.

B. The Alleged Mental States Provide Sufficient Notice.

The United States' Notice of Intent to Seek the Death Penalty provides, in pertinent part, that the United States will prove that Green acted with one of the requisite mental states set forth in 18 U.S.C. § 3591(a)(2)(A)-(D). Green argues that this is insufficient notice, and that the United States must identify or elect one applicable mental state which it intends to prove at trial. Failure to make such an election, Green claims, is grounds for striking the mental factors set forth as Special Findings in the Indictment⁵ and in the United States' Notice of Intent to Seek the Death Penalty.⁶

Green's claim that he does not have sufficient notice of the mental states is without merit. The notice given by the United States of the "gateway" mental states is more than sufficient. The United States' Notice of Intent to Seek the Death Penalty alleges each of the FDPA's four gateway mental states, which, as Green points out, tracks the language from the statute. Green's motion, however, ignores the fact that the Notice also specifically refers back to the Indictment in this case and, for good measure, describes each charged capital offense, stating the corresponding count in the Indictment. By focusing his attention exclusively on the Notice, Green seeks to avoid the larger picture.

Taking the Notice and the Indictment together,⁷ and ignoring the discovery also provided to the defendant, Green knows, for example, the following allegations relating to his criminal

⁵Indictment, ¶42(b)-(e).

⁶United States' Notice, ¶I, p. 3.

⁷*See, e.g., United States v. Solomon*, 513 F. Supp. 2d 520, 538 (W.D. Pa. 2007) ("The Court finds that the Superseding Indictment and the Notice of Intent in this matter fully advise the Defendant on the nature of the aggravating factors...").

conduct: where the offenses were committed (in and around Mahmoudiyah, Iraq); when they were committed (March 12, 2006); several overt acts leading up to the capital crimes (the joint action of multiple people, changing clothes, departing their assigned duty location, and walking to the victims' home); that he and others conspired to force one of the victims to engage in sexual activity against her will, by threatening her and placing her in fear of death or serious bodily injury; the names of all four victims; and what he did to those victims (sexual assault against one victim and murder of all four).

Further, the Indictment informs the defendant that the charged mental state with respect to Counts Three through Six was premeditation to commit murder. The Indictment also informs him of the United States' theory of felony-murder of the same victims with respect to Counts Seven through Ten, and, in Counts Thirteen through Sixteen, incorporates the mental state alleged in Counts Three through Six (premeditation).

Thus, Green cannot fairly claim that he is without notice of what mental states are alleged against him. In addition, as will be addressed in more detail below, applicable case law clearly provides that the United States may properly allege and prove all four gateway mental factors.

C. The Notice of Statutory Aggravating Factors is Sufficient.

Green argues that the statutory aggravating factors set forth in the United States' Notice of Intent to Seek the Death Penalty⁸ are vague, and contain no factual allegations. Green, however, is not entitled to evidentiary detail regarding the aggravating factors alleged against him. Green claims that two of the four statutory aggravators, that the offenses were committed

⁸United States' Notice, ¶ II A-D.

in “an especially heinous, cruel, and depraved manner, in that it involved torture and serious physical evidence,” and that the killings were “substantially planned and premeditated” fail to provide him with constitutionally sufficient notice. As with the threshold mental states alleged, the United States notes that the Indictment and Notice, read together, more than sufficiently apprise Green of the bases for both statutory aggravating factors about which he complains.

As is clear from the Notice, the heinous, cruel, and depraved factor is alleged only with respect to those capital counts alleging the killing of Abeer Kassem Hamza Al-Janabi (“Abeer”), and it specifies that she was subjected to serious physical abuse. The Indictment also alleges, and the Notice refers to that allegation, that Abeer was subjected to an aggravated sexual assault before her death. The connection between aggravated sexual assault and serious physical abuse should be obvious.

With respect to the aggravating factor of substantial planning and premeditation, again, Green is not entitled to evidentiary detail. And, again, the Indictment and Notice (setting aside the discovery provided to the defendant) provide more than sufficient notice pertinent to this factor, including the listing of several overt acts leading up to the capital crimes, such as the formation of a conspiracy, the follow-up joint action of accomplices, the changing of clothes before leaving the assigned duty location, and walking to the targeted home. Under the law, Green is entitled to nothing more.

D. The Notice of Non-statutory Aggravating Factors, Including The Victim Impact Notice, is Sufficient.

Green makes a related argument that the notice of non-statutory aggravating factors on which the United States will offer proof are insufficiently specific to provide him adequate notice to prepare his defense. Specifically, Green complains that the victim impact factor is

generically worded and therefore insufficient. Green's claim is not supported by the law.

Indeed, the form and content of the victim impact factor is in complete accord with the pertinent provisions of the Federal Death Penalty Act. The language almost directly mirrors that used in section 3593(a), the provision authorizing the use of such evidence at the sentencing hearing:

The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family.

The courts have upheld similarly-drafted aggravating factors in other capital cases. In *Jones v. United States*, 527 U.S. 373 (1999), the Supreme Court affirmed a sentence of death under the Federal Death Penalty Act which was based in part on a victim impact non-statutory aggravating factor which read in its entirety: "[The victim's] personal characteristics and the effects of the instant offense on [the victim's] family "constitute an aggravating factor for the offense." *Jones*, 527 U.S. at 399. Employing a standard of review that is "quite deferential," the Court upheld the sentence, finding that this "loosely drafted" factor had a "core meaning" that was not unconstitutionally vague and was "inherently individualized" so as not to be unconstitutionally overbroad. *Id.*

Under 18 U.S.C. §3593(a), the United States must inform the defendant and the District Court of its intent to seek the death penalty in the event of a conviction and "the aggravating factor or factors that the government . . . proposes to prove as justifying a sentence of death." The statute clearly and unambiguously refers to "factors," not "evidence," that must be set forth in the notice. In *United States v. Chandler*, 996 F.2d 1073, 1089 (11th Cir. 1993), the court described a comparable notice provision in 21 U.S.C. § 848(h) as merely requiring that the government provide the defendant with "a list" identifying each aggravating factor on which it

intends to rely. *Id.* Likewise, in *United States v. Cooper*, 754 F. Supp. 617, 621 n.7 (N.D. Ill. 1990), the court upheld the sufficiency of death penalty notices that identified the aggravating factors with the same degree of specificity as the instant Notice. *See also, Solomon*, 513 F. Supp. 2d at 539 (the court rejected the defendant's request for a bill of particulars covering, *inter alia*, a victim impact factor worded similarly to that in the instant case.).

Some courts have required some type of additional notice,⁹ just as there is case support for the contrary position. In *United States v. Bin Laden*, 126 F. Supp. 2d 290 (S.D.N.Y. 2001), the court ordered a bill of particulars regarding victim impact evidence. The court relied on two considerations not present in this case:

First, given the lengthy estimated duration of the trial's liability phase, the interregnum between verdict and sentencing should be minimized where possible. Second, the extraordinary number of victims in this case (most all located abroad) necessitates that any adequate preparation for sentencing will entail substantial investments of Defendants' time and energy.

Bin Laden, 126 F. Supp. 2d at 304. In this case, there is no similarly lengthy duration of the "liability phase" of the case, nor is there an extraordinary number of victims. While the victims' family does live abroad, they are all members of one family, living in one country, which is a significant distinction between this case and *Bin Laden*. Accordingly, that decision is inapposite.

There are also cases supporting the proposition that the type of notice filed in this case is sufficient. For example, in *Nguyen*, 928 F. Supp. at 1550, the court held, "The death notice filed against Nguyen . . . fully complies with the statute. It states that the government intends to seek

⁹In *United States v. Cooper*, 91 F. Supp. 2d 90, 111 (D.D.C. 2000), the court required the United States to amend its notice "to include more specific information concerning the extent and scope of the injuries and loss suffered by each victim, his or her family members, and other relevant individuals, and as to each victim's 'personal characteristics' that the government intends to prove."

the death penalty and sets forth the aggravating factors that the government intends to prove. The statute requires no more.”

In this case, the government will offer victim impact testimony pertaining to a single family -- not three as in *Cooper*, 168 as in *McVeigh*, or an “extraordinary number” as in *Bin Laden*. Further, the fact that children suffer emotional harm from the murder of their parents and siblings, and that extended family members also suffer from the fallout of the murder of four family members, is obvious – additional notice regarding such harm would require evidentiary detail, to which Green is not entitled. Green’s request for a detailed pre-trial notice is not required by law, not necessitated by circumstances and should be denied.

E. Dismissal of the United States’ Notice is Unwarranted.

Finally, even if this Court were to decide that the United States’ Notice of Intent to Seek the Death Penalty was insufficient in any regard, the remedy would be to order additional notice, by way of an amendment to the Notice, or perhaps by the filing of a Bill of Particulars. The remedy requested by the defendant – dismissal of the Notice – is not remotely warranted and without support in the cases Green cites in his own motion in support of the assertion that the appropriate remedy is dismissal.

II. The United States Properly Alleges Four Mental States in its Notice of Intention to Seek the Death Penalty.

Green moves to strike that portion of the United States’ Notice of Intent to Seek the Death Penalty that alleges the mental states set forth in 18 U.S.C. § 3591 (a)(2)(A)-(D), claiming that a defendant cannot logically possess four different mental states and that, even if he could,

allowing the United States to prove all four would skew the process toward death.¹⁰ Green is wrong on both claims.

The four mental states listed in the statute set forth four levels of intent relating to the charged capital offenses, graded from an intentional killing (§ 3591(a)(2)(A)) to intentional participation in an act of violence with a reckless disregard for human life (§ 3591(a)(2)(D)). These factors, at least one of which must be proven beyond a reasonable doubt to establish the defendant's eligibility for capital punishment, are meant to codify the Eighth Amendment culpability rules from *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). Multiple intent factors may be alleged without compromising standards for adequate notice. See *United States v. Cheever*, 423 F. Supp.2d 1181, 1200-01 (D. Kan. 2006). In order to be rendered eligible for the death penalty, the United States must prove that the defendant possessed at least one of the four listed intents. This is not to say that a particular defendant's conduct can match only one factor. If, for example, a defendant used a firearm to shoot a victim, intending all the while to kill that victim, it can equally be said the defendant intended to kill the victim (§ 3591(a)(2)(A)); intentionally inflicted serious bodily injury that resulted in the death of the victim (§ 3591(a)(2)(B)); intentionally participated in an act contemplating that the victim's life would be taken or that lethal force would be used against the victim (§ 3591(a)(2)(C)); and intentionally and specifically engaged in an act of violence knowing the act created a grave risk of death to the victim in reckless disregard for human life

¹⁰Defense Motion, p. 16.

(§ 3591(a)(2)(D)). Simply stated, the defendant's conduct could fit any of the four intent factors and it is up to the jury to decide whether the conduct satisfies any one, or more, of the alleged factors.

The mere fact that the jury can find that the defendant's conduct fits more than one intent category does not in any way make that finding unlawful. Green's only attempt to claim that such a result would be unlawful is to quote from a case, *United States v. Tipton*, 90 F. 3d 861 (4th Cir. 1996), *cert. denied*, 520 U.S. 1253 (1997), that interpreted Title 21 death penalty procedures, as opposed to the Title 18 procedures at issue here. Recognizing, as he must, that citing to *Tipton* was pointless in this circumstance, Green also cites to a later Fourth Circuit decision reviewing the Title 18 procedures and holding that it is not error to submit all four factors to the jury. *See United States v. Jackson*, 327 F. 3d 273 (4th Cir.), *cert. denied*, 540 U.S. 1019 (2003).

The impermissible duplication, or "skewing," concerns in death penalty cases arising under 21 U.S.C. § 848(e) ("ADAA") are not present in this case. It is clear that the FDPA differs from the ADAA in that the intent elements are not aggravating factors to be weighed against mitigating factors. If the jury finds one or all four of the factors, there is no risk of skewing because the jury finds intent, and then starts with a clean slate in evaluating separate aggravating factors. *United States v. Cooper*, 91 F. Supp. 2d 90, 109-110 (D.D.C. 2000) (quoting *United States v. Webster*, 162 F.3d 308, 355 (5th Cir. 1998): "[Section] 3591(a) does not set forth aggravating factors, but rather serves as a preliminary qualification threshold. The fact that the defendant could satisfy more than one of these via the same course of action does not, therefore, constitute impermissible double counting."); *Accord, United States v. O'Reilly*, 2007 WL 2420830 at *3 (E.D. Mich. Aug. 23, 2007); *United States v. Henderson*, 461 F. Supp.

2d 133, 135 (S.D.N.Y. 2006); *United States v. Miner*, 176 F. Supp. 2d 424, 445 (W.D. Pa. 2001).

Having had his claim repudiated by *Jackson* and *Cooper*, Green simply rejects the rationale underlying those decisions by stating that “[t]his view simply does not conform to the reality of a jury deciding a capital case under the FDPA.”¹¹ Defendant’s perfunctory dismissal of directly applicable and persuasive legal authority, supported by nothing more than an inapposite cite to *Bruton v. United States*, 391 U.S. 123 (1968), and a quote from an “empirical study,” offer the Court no basis to do anything other than to deny Green’s motion.

WHEREFORE, for the foregoing reasons, the United States respectfully requests that the defendant’s Motion To Declare The Federal Death Penalty Act Unconstitutional and to Strike the Death Penalty Notice as Inadequate be denied.

Respectfully submitted,

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¹¹Defense Motion, p. 17.

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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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