

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
(Filed Electronically)**

**CRIMINAL ACTION NO. 5:06CR-19-R
UNITED STATES OF AMERICA,**

PLAINTIFF,

vs.

STEVEN DALE GREEN,

DEFENDANT.

**REPLY TO UNITED STATES' RESPONSE TO MOTION
TO DECLARE FEDERAL DEATH PENALTY ACT
UNCONSTITUTIONAL AND TO DISMISS AGGRAVATORS**

Comes the defendant, Steven Dale Green, by counsel, and for his reply to the United States' response to his motion to declare the Federal Death Penalty Act (FDPA, 18 U.S.C. §3591) unconstitutional and to dismiss aggravators, states as follows:

**I. Substantial Planning and Premeditation Aggravator—18 U.S.C.
§3592(c)(9)**

The United States (Response, pp. 2-3) maintains that this aggravator is constitutional because the meaning of the word “substantial” is easily understood by jurors and it serves the constitutionally narrowing function required of statutory aggravators. It can hardly be denied that whether a defendant’s actions amounted to “substantial” planning is necessarily applied on a sliding scale because there is no specific or objective criteria by which to limit the scope of that aggravator. Two, different juries can consider the same evidence and arrive

at different conclusions about whether the defendant's planning was "substantial." The word "substantial" is inherently capable of leading to inconsistent, and therefore arbitrary, results because there is no logical way to differentiate between those murders which involve substantial planning and those that do not. Thus, the word "substantial" allows the jury to exercise unfettered discretion in determining whether the aggravator exists. The jury's unchanneled discretion necessarily results in an arbitrary and capricious decision. The Court should therefore declare the Substantial Planning and Premeditation Aggravator unconstitutional.

II. Heinous, Cruel, or Depraved Aggravator—18 U.S.C. §3592(c)(6)

Count 11 of the Indictment charges Mr. Green with the Aggravated Sexual Abuse of Abeer Kassem Hamza Al-Janabi.(R. 36, Indictment ¶¶ 28 and 29, p. 13) in violation of 18 U.S.C. §2241(a). Count 12 charges him with Aggravated Sexual Abuse with Children (Abeer Kassem Hamza Al-Janabi).(R. 36, Indictment ¶¶ 30 and 31, p. 14) in violation of 18 U.S.C. §2241(c). The United States has given notice that its seeks the death penalty for the unlawful killing of Abeer Kassem Hamza Al-Janabi, Hadeel Kassem Hamza Al-Janabi, Kassem Hamza Rachid Al-Janabi, and Fakhriya Taha Mohsine in the perpetration of aggravated sexual abuse. (R. 70, Notice of Intent to Seek Death Penalty, ¶¶ 5-8, p. 2). One of the statutory aggravating factors listed in the notice is that the offense was committed "in an especially heinous, cruel, or depraved manner." (18 U.S.C. §3592(c)(6)). This aggravator applies to the killing of the rape victim, Abeer Kassem Hamza Al-Janabi. (R. 70 Notice of Intent to Seek Death Penalty, p.4). Mr. Green respectfully submits that the use of the heinous, cruel, or depraved aggravator amounts to impermissible double counting and

should be stricken from the notice.

In order to be considered by the sentencer, “an aggravating factor cannot be unconstitutionally vague, overbroad, duplicative or irrelevant.” United States v. Grande, 353 F.Supp.2d 623, 630-631 (E.D.Va. 2005)(other citations omitted). Aggravators that essentially duplicate each other by overlapping present a constitutional issue because “[t]he concern is that aggravating factors ‘that duplicate each other may impermissibly skew a jury in favor of imposing the death penalty.’ United States v. Regan, 228 F.Supp.2d 742, 751 (E.D.Va.2002) (quoting United States v. Allen, 247 F.3d 741, 789-90 (8th Cir.2001)). Although the sentencer may review information that duplicates elements of the underlying offense as an aggravating factor, it is constitutional error for the same aggravating factor to be considered by the sentencer more than once, even if dressed in new clothing. *Id.* (citations omitted).” United States v. Grande, 353 F.Supp.2d at 631. See also United States v. Solomon, 513 F.Supp.2d 520, 526 (W.D.Pa.,2007).

Here, the heinous, cruel, or depraved aggravator improperly duplicates the sexual offenses alleged in Counts 11 and 12. It also is one of the bases on which the United States seeks the death penalty. (R. 70, Notice of Intent to Seek Death Penalty, ¶¶ 5-8, p. 2). The purpose of an aggravating circumstance is to narrow the class of persons eligible for the death penalty, Zant v. Stephens, 462 U.S. 862, 874 (1983), but the repetitious use of the rape as the heinous, cruel, or depraved aggravator undermines that objective because the same act is employed to serve multiple purposes. Moreover, double counting of aggravators tends to skew the weighing process required by 18 U.S.C. §3593(e). See Stringer v. Black, 503 U.S. 222, 232 (1992)(“when the sentencing body is told to weigh an invalid factor in its

decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.”).

In United States v. McVeigh, 944 F.Supp. 1478, 1489-1490 (D.Colo.,1996), the court stated, “Because the Court [in Stringer v. Black, *supra*] has held that the weighing process is highly sensitive to the influence of aggravating factors that might unfairly tip the scales in favor of death, the government may not introduce those offenses as aggravating factors that duplicate the crimes charged in the indictment. To allow the jury to weigh as an aggravating factor a crime already proved in a guilty verdict would unfairly skew the weighing process in favor of death.” This observation is applicable in Mr. Green’s case because the heinous, cruel, or depraved aggravator overlaps with the essential elements of Counts 11 and 12 as well as ¶¶ 5-8 of the Notice of Intent to Seek Death Penalty and thereby allows the sentencing body to consider the aggravator more than once. (R. 70, Notice of Intent to Seek Death Penalty, ¶¶ 5-8, p. 2). The heinous, cruel, or depraved aggravator, in effect, is subsumed into the alleged crimes and murders for which notice was given.(R. 70, Notice of Intent to Seek Death Penalty, ¶¶ 5-8, p. 2).

The alleged rape of Abeer Kassem Hamza Al-Janabi is used as a independent crime, an aggravating circumstance, and a ground on which to seek the death penalty for the murders of all four members of the Al-Janabi family. Such multiple use of the rape amounts to the unconstitutional double counting of an aggravator. The Court is therefore urged to rule that the heinous, cruel, or depraved aggravator cannot be used by the United States.

III. Witness Elimination—Non-Statutory Aggravator

In its Response (p. 8) to Mr. Green’s Motion to Dismiss Aggravators, the United

States argues that unlike statutory aggravators, “non-statutory facts, because they are only used 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.” (See also United States’ Response (pp. 16 and 18) (R. 70, Notice of Intent to Seek Death Penalty, ¶¶ 5-8, p. 2). To the extent that the United States implies that there is a difference between the burden of proof for statutory and non-statutory aggravators, it is incorrect.

The authority for non-statutory aggravating factors can be found in 18 U.S.C. §§ 3593(c) and (d). Section 3593(c) states, “[a]t the sentencing hearing, information may be presented as to any matter relevant to the sentence, including any ... aggravating factor permitted or required to be considered under section 3592.” Section 3593(d) provides that the jury “[s]hall return special findings identifying any aggravating factor or factors set forth in section 3592 found to exist and any other aggravating factor for which notice has been provided under subsection (a) found to exist.” “The primary purpose of the nonstatutory aggravating factors, as opposed to the listed statutory aggravating factors which do fulfill the role of limiting and guiding a jury's discretion in making the eligibility decision, is to allow for the individualized determination of whether a death sentence is justified for a particular defendant; that is, they help to inform the selection decision.” United States v. Allen, 247 F.3d 741, 757 (8th Cir. 2001) *cert. granted*, judgment vacated, and case remanded for reconsideration in light of Ring v. Arizona, 536 U.S. 584 (2002), Allen v. United States, 536 U.S. 953 (2002) on remand United States v. Allen, 357 F.3d 745 (8th Cir.2004). Although statutory and non-statutory aggravators may serve different functions

the quantum of proof necessary to establish either category is the same.

First, the statute, 18 U.S.C. §3593(c), provides, “The burden of establishing any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt.” There is no reason to believe that the statute differentiates between statutory and non-statutory aggravators. Second, case law makes clear that the reasonable doubt standard applies to non-statutory aggravators. “Non-statutory aggravating factors, like their statutory counterparts, must be unanimously found by the jury beyond a reasonable doubt...” United States v. Taylor, 316 F.Supp.2d 730, 733 (N.D.Ind.,2004); United States v. Pitera, 795 F.Supp. 546, 552 (E.D.N.Y.,1992) (“non-statutory aggravating factors must be proved to the jury's unanimous satisfaction beyond a reasonable doubt”); United States v. Gilbert, 120 F.Supp.2d 147, 150 (D.Mass.2000)(“As with the statutory aggravating factors, the Government must prove the nonstatutory aggravators beyond a reasonable doubt.”); United States v. Edelin, 180 F.Supp.2d 73, 75 (D.D.C. 2001)(same); United States v. Beckford, 964 F.Supp. 993, 997, fn. 3(E.D.Va.,1997)(same); United States v. Fell, 372 F.Supp.2d 753, 763 (D.Vt.,2005)(“non-statutory aggravating factors must be proven by the government beyond a reasonable doubt”); United States v. Sampson, 335 F.Supp.2d 166, 189 -190 (D.Mass.,2004) (jury instructed it would “have to decide whether the government has proven any of what are called non-statutory aggravating factors beyond a reasonable doubt.”); United States v. Mills, 446 F.Supp.2d 1115, 1120 (C.D.Cal.,2006)(“In order to warrant consideration of an aggravating factor in selecting a penalty, the government must establish that factor-whether statutory or non-statutory-beyond a reasonable doubt.”). See also Jones v. United States, 527

U.S. 373, 377-378 (1999). Thus, there can be no question that the Government must prove non-statutory aggravators beyond a reasonable doubt.

An additional constitutional issue is presented because, as applied to Mr. Green's case, the witness-elimination aggravator is overbroad. "An aggravating factor can be overbroad if the sentencing jury 'fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty.'" Jones v. United States, 527 U.S. 373, 401(1999) quoting Arave v. Creech, 507 U.S. 463, 474 (1993)(emphasis in original). The murder of any person necessarily results in elimination of a witness. That is true whether the crime committed is murder or a lesser degree of homicide and is no less true, where as here, there are multiple victims. The witness elimination aggravator should be dismissed because it applies "to *every* defendant eligible for the death penalty."

IV. Victim Impact Evidence—Non-Statutory Aggravator

The United States maintains that the general notice it provided on this aggravator is adequate. (United States's Response, pp. 22-24). The notice, however, provides very sparse information; and the generalities which it sets forth are those experienced by every family who has suffered the loss of a loved one to violent crime. Insofar as victim impact evidence is authorized by 18 U.S.C. §3593(a), the Court should require the Government to provide, at a minimum, "an informative outline" of the "personal characteristics" of each victim that it intends to prove. United States v. Solomon, 513 F.Supp.2d 520, 535 (W.D.Pa.,2007). Other courts have followed suit.

In United States v. Bin Laden, 126 F.Supp.2d 290, 304 (S.D.N.Y.,2001) in which

the court noted that “[a] oblique reference to victims’ ‘injury, harm, and loss,’ without more, does nothing to guide Defendants’ vital task of preparing for the penalty phase of trial.” Consequently, the court found that “defendant is entitled to greater specificity as to the ‘serious physical and emotional injury the government claims the defendant caused [the victim].” *Id.* In United States v. Cooper, 91 F.Supp.2d 90, 110 -111 (D.D.C.,2000), the Government gave notice that it would introduce victim impact evidence that consisted of each victim’s “personal characteristics as an individual human being and the impact of his death upon those persons.” the District Court observed that “the government’s notice of intent contains no specific information concerning the evidence it seeks to introduce.” *Id.* at 111. The generality of that notice rendered it insufficient and the Government was ordered to provide the defense with “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’...” *Id.* See also United States v. Glover, 43 F.Supp.2d 1217, 1225 (D.Kan.,1999) (“the defendant is entitled to greater specificity regarding this factor, to wit, which members of the family have suffered, the nature of their suffering, and the nature of the ‘permanent harm.’”); United States v. Wilson, 493 F.Supp.2d 364, 378 (E.D.N.Y.,2006)(Government ordered to provide “specifics on the nature, extent, and scope of the harm suffered by the victims’ family members whom the Government alleges to have suffered severe and irreparable harm.”); United States v. Llera Plaza, 179 F.Supp.2d 464, 475 (E.D.Pa. 2001) (“in order to allow the defendants to adequately prepare responses to sentencing phase evidence, and in order to allow the court to determine if a pre-sentencing hearing will be necessary to review that evidence, the

government will be ordered to submit an outline of its proposed victim impact evidence”).

The Government’s notice of victim impact evidence is at least as general as that shown in the aforementioned cases. The Court should therefore order the Government to provide a more detailed summary of the victim impact evidence that it intends to introduce.

Conclusion

Accordingly, the defendant, Steven Dale Green, respectfully tenders the forgoing reply in support of his Motion to Dismiss Aggravators.

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CERTIFICATE

I hereby certify that on April 18, 2008, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following: Marisa J. Ford, Esq., Assistant United States Attorney; James R. Lesousky, Esq., Assistant United States Attorney; and Brian D. Skaret, Esq., Attorney at Law.

/s/ Scott T. Wendelsdorf