

**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.

**MOTION TO DECLARE THE FEDERAL DEATH PENALTY ACT
UNCONSTITUTIONAL, DISMISS AGGRAVATORS AND DISMISS
THE GOVERNMENT'S DEATH PENALTY NOTICE**

Comes the defendant, Steven Dale Green, by counsel, and moves the Court pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States to declare the Federal Death Penalty Act (FDPA) unconstitutional; dismiss the statutory aggravators herein; and strike the government's notice of intent to seek the death penalty.

Statement of the Case

The defendant, Steven Dale Green, was a Private First Class (PFC) in the United States Army stationed in Iraq on March 12, 2006, when he is alleged to have committed the crimes charged in the indictment herein. (R. 1. 36 Indictment). The indictment reflects that Green is subject to the death penalty for the crimes alleged in Counts 3-10 and Counts 13-16. The indictment charges as follows:

Count 1 charges Green with conspiring to murder Abeer Kassem Hamza Al-Janabi, Hadeel Kassem Hamza Al-Janabi, Kassem Hamza Rachid Al-Janabi, and Fakhriya Taha Mohsine. 18 U.S.C. §1111 and 18 U.S.C. §1117, and 18 U.S.C. §3261(a)(2).

Count 2 charges him with conspiring to commit aggravated sexual abuse against Abeer Kassem Hamza Al-Janabi. 18 U.S.C. §371, 18 U.S.C. §2241(a), and 18 U.S.C. §3261(a)(2).

Counts 3-6 charge Green with the premeditated murders of the four aforementioned persons. 18 U.S.C. §1111, 18 U.S.C. §3261(a)(2), and 18 U.S.C. §(2).

Counts 7-10 charge Green with felony murder in connection with the deaths of the four aforementioned persons. 18 U.S.C. §1111, 18 U.S.C. §3261(a)(2), and 18 U.S.C. §2.

Count 11 charges Green with aggravated sexual abuse against Abeer Kassem Hamza Al-Janabi. 18 U.S.C. §2241(a), 18 U.S.C. §3261(a)(2), and 18 U.S.C. §2.

Count 12 charges Green with aggravated sexual abuse of a child (Abeer Kassem Hamza Al-Janabi) who was between the ages of 12 and 16. 18 U.S.C. §2241(c), 18 U.S.C. §3261(a)(2), and 18 U.S.C. §2.

Counts 13-16 charge Green with using a firearm during a crime of violence against the four aforementioned persons. 18 U.S.C. §§924(c)(1)(A) and 924(j)(1), 18 U.S.C. §3261(a)(2) and 18 U.S.C. §2.

Count 17 charges Green with obstruction of justice. 18 U.S.C. §1512(c)(1).

The indictment also sets forth the following special findings as to Counts, 3 -10, and 13-16:

Paragraph 42(a) alleges that Green was over the age of 18 at the time of the offenses. 18 U.S.C. §3591(a).

Paragraphs 42(b-e) set forth various mental states (“Gateway Factors”) underlying the perpetration of the alleged crimes. 18 U.S.C. §3591(a)(2)(A)-(D).

Paragraphs 42(f)-(I) set forth the following statutory aggravating circumstances with respect to Counts 3-10:

The offenses were committed in a heinous, cruel, and depraved manner in that they involved torture and serious physical abuse, 18 U.S.C. §3592(c)(6);

The offenses were committed after substantial planning and premeditation to cause death, 18 U.S.C. §3592(c)(9);

The victims described in Counts 3, 4, 7, and 8 were particularly vulnerable due to youth, 18 U.S.C. §3592(c)(11); and

The defendant intentionally killed or attempted to kill more than one person in a single criminal episode, 18 U.S.C. §3592(c)(16).

On July 3, 2007, the prosecution filed notice of intent to seek the death penalty as to Counts 3-10 and 13-16. (R. 70 Notice of Intent to Seek Death Penalty) and cited the following statutory and non-statutory aggravators:

Counts 3, 7, and 13 were committed in a heinous, cruel, and depraved manner in that they involved serious physical abuse to Abeer Kassem Hamza Al-Janabi, 18 U.S.C. §3592(c)(6);

Counts 3-10 and 13-16 were committed after substantial planning and premeditation to cause death, 18 U.S.C. §3592(c)(9);

Abeer Kassem Hamza Al-Janabi (Counts 3, 7, and 13) and Hadeel Kassem Hamza Al-Janabi were particularly vulnerable due to youth, 18 U.S.C. §3592(c)(11); and

The defendant intentionally killed more than one person in a single criminal episode, 18 U.S.C. §3592(c)(16).

The death penalty notice also listed the following non-statutory aggravators:

Witness Elimination - The defendant killed the victim and witnesses of the alleged rape “to eliminate” them as possible witnesses;

Victim Impact Evidence - The defendant caused injury, harm and loss to the family of each victim as evidenced by his or her “personal characteristics as a human being and the impact of [his or her] death on [his or her] family;” In addition, the injuries caused by the defendant extend to “the two minor children orphaned as a result of their parents’ death and to those presently caring for the children.”

The government also gave notice that in support of imposing the death penalty it intended to rely on all evidence admitted during the guilt phase of the trial. (R. 70 Notice of Intent to Seek Death Penalty).

Argument

A. The Alleged Aggravating Factors must Be Dismissed

1. A Death Notice Statute Must Adequately Channel the Sentencer’s Discretion by Narrowing the Category of Convicted Defendants Eligible to Receive the Death Penalty and Minimizing the Risk of Arbitrary and Capricious Action

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court invalidated all existing death penalty statutes for violating the protections of the Eighth and Fourteenth Amendments to the United States Constitution. Although each of the five justices joining the *per curiam* opinion advanced somewhat different reasoning, the fundamental principle underlying *Furman* was that a death penalty scheme is unconstitutional when it permits the imposition of death sentences in an arbitrary and capricious manner. As the Court later explained, “[a] fair statement of the consensus expressed by the Court in *Furman* is that ‘where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.’” *Zant v. Stephens*, 462 U.S. 862,

874 (1983) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (Stewart, Powell and Stevens, JJ.)); *see also Woodson v. North Carolina*, 428 U.S. 280, 302 (1976) (“[c]entral to the limited holding in *Furman* was the conviction that the vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth Amendments”) (Stewart, Powell, and Stevens, JJ., concurring).

It has become clear since *Furman* that, to be constitutional, a death penalty statute must “genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Zant*, 462 U.S. at 877. The statute must “channel the sentencer’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process for imposing a sentence of death.’” *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)).

A death penalty statute’s aggravating factors play a critical role in channeling and narrowing the sentencer’s discretion. In this regard, the Supreme Court has emphasized the importance of clear and specific aggravating factors:

Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance.

Stringer v. Black, 503 U.S. 222, 235 (1992). Following these principles, the Court has struck down aggravating factors that are too vague to supply clear guidance or which could be interpreted as applying to almost any murder. See *Maynard v. Cartwright*, 486 U.S. 356 (1988) (holding Oklahoma’s “especially heinous, atrocious, or cruel” aggravating factor unconstitutionally vague); *Godfrey*, 446 U.S. at 428-429 (holding Georgia’s “outrageously or wantonly vile, horrible or inhuman” aggravating factor unconstitutional because ordinary juror could find it present in “almost every murder”).

2. The Statutory Aggravating Factor that the Killings Occurred After Substantial Planning and Premeditation to Cause Death Should be Dismissed as Duplicative and Vague

The statutory aggravating factor of "substantial planning and premeditation" must be stricken for three reasons. First, evidence of “planning and premeditation” by itself is patently inadequate to narrow the class of murders eligible for the death penalty, since “almost every murder” involves some planning and premeditation. See *Godfrey v. Georgia*, 420 U.S. at 428-429. Second, the modifying phrase “substantial” does not cure the problem, for, even as it has been construed by the federal courts, it “fails adequately to inform juries what they must find to impose the death penalty.” *Maynard v. Cartwright*, 486 U.S. at 361-362. Third, the federal courts have been unable to fashion a construction of substantial for this factor that would be both narrowing and specific.

a. Planning and Premeditation does not Genuinely Narrow the Class of Murders Subject to the Death Penalty

As stated, a statutory aggravating factor must genuinely narrow the class of murders which may be subject to the death penalty. *Zant*, 462 U.S. at 877; *Godfrey*, 446 U.S. at 428-

429. That is, it must be a factor that is not present in “almost every murder.” *Godfrey*, 446 U.S. at 428-429. The concepts of “planning and premeditation” are part of every intentional murder; they do not genuinely narrow the class of murders subject to the death penalty. “Planning” means only “carrying out plans,” and a plan can be just a “method of achieving something.” *Webster's Third New International Dictionary*, p. 1729 (plan), p. 1731 (“planning”). Accordingly, any murder that has a “method,” which is to say virtually every one, is planned.

“Premeditation” provides no greater limitation. Premeditation, of course, was a part of first-degree murder at common law and remains so under federal law. *See* 18 U.S.C. §1111. In its capacity as a common-law element, if required little, if anything, more than the decision to kill. *See* 2 W.LaFave & A. Scott, *Substantive Criminal Law*, §7.7 at 237 (1986) (it is “often said that premeditation and deliberation require only a ‘brief moment of thought’ or a ‘matter of seconds’”). Even in common usage, “premeditate” means simply “to think on and revolve in the mind beforehand,” *Webster's Third New International Dictionary*, p.1789, and virtually every murderer “thinks on” his crime before committing it; otherwise, it would not be murder. *See United States v. Spivey*, 958 F.Supp. 1523, 1531 (D.N.M. 1997) (“virtually all murders require some planning and premeditation”). Thus, these terms do not perform the constitutionally required function of narrowing the class of murderers subject to the death penalty.

b. The Word “Substantial” does not Provide the Clear, Specific, and Objective Standard Required to Narrow the Class of Murders Subject to the Death Penalty

Because the terms “planning and premeditation” by themselves do nothing to narrow the class of all murders, this aggravating factor must be stricken unless the word “substantially” narrows their meaning in a way that actually “channel[s] the sentencer's discretion by *clear* and *objective* standards that provide *specific* and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death.” *Arave v. Creech*, 507 U.S. 463, 471 (1993) (emphasis supplied), quoting *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) and *Godfrey v. Georgia*, 446 U.S. at 428 (1980). The word “substantial” cannot carry this burden because it provides no guidance to a court or a jury as to “how much” or “what kind of” planning and premeditation are necessary to rise to the level “substantial.” The word gives a questioning juror no clue as to how complicated a plan the defendant must have formulated before committing the offense or how long he must have thought about the crime before committing it. Accordingly, some jurors will require a defendant to have employed some complicated mechanism to produce death and others will find “substantial” planning and premeditation in taking the gun out of the desk drawer. The lack of any “clear,” “objective,” and “specific” guidance to jurors permits the imposition of the death penalty in an arbitrary way.

For this reason, the Supreme Court of Georgia has held the word “substantial” unconstitutionally vague in circumstances similar to these. *Arnold v. State*, 236 Ga. 534, 541, 224 S.E.2d 386, 392 (Ga. 1976). Georgia had an aggravating factor making anyone with a

“substantial criminal history” eligible for the death penalty. *Id.* The Georgia Supreme Court held that the word “substantial”, which it read to mean “of real ... importance”, was unconstitutionally vague because its application was “highly subjective.” *Id.* See also *Arave v. Creech*, 507 U.S. at 471 (standard must be “objective”). The Court noted that the word “substantial” might be sufficiently clear in other contexts, but that “the fact that we are here concerned with the imposition of a death sentence compels a different result.” *Arnold v. State*, 224 S.E.2d at 392. In the context of Mr. Green’s case, the word “substantial” is no less “subjective” in application than it was in *Arnold*.

c. The Opinions of Courts Which have Upheld this Factor Show that it Fails to Narrow the Class of Murders Subject to the Death Penalty, and is Therefore Unconstitutionally Vague

The courts that have upheld the constitutionality of this provision have construed the word “substantial” in a way that does not narrow the term as required by the Eighth Amendment. Moreover, even as construed by these courts, the word “substantial” remains unconstitutionally vague. Accordingly, even as construed, the phrase “substantial planning and premeditation” violates the Fifth and Eighth Amendments.

The initial problem with the judicial construction of this aggravator is that it does not perform the required narrowing function. In *United States v. McCullah*, 76 F. 3d 1087, 1111 (10th Cir. 1996), *rehg denied en banc*, 87 F. 3d 1136 (10th Cir.), *cert. denied*, 520 U.S.1213 (1997), for example, the court upheld this aggravating factor on the ground that “substantial” means simply “ample for commission of the crime.” “Ample” means anything “more than adequate.” *Webster's Third New International Dictionary*, p. 74. In *United States v. Tipton*,

90 F.3d 861, 896 (4th Cir. 1996) the court held that “substantial” meant only “more than the minimum amount sufficient to commit the offense.” Under these interpretations of “substantial,” any murder, other than one undertaken with the “minimum” possible planning and premeditation, would be subject to the death penalty. But this cannot be constitutional, for it would permit jurors to impose the death penalty for a degree of planning and premeditation that barely exceeds what is essential to commit a homicide at all, indeed for a degree present in “almost every murder.” *Godfrey*, 446 U.S. at 428-429.

Moreover, the limits of the word “substantial” are so vague that it is likely to be applied with great inconsistency, even arbitrariness. The federal cases discussed above do not explain why the concept “substantial,” even as they construe it, is not subject to arbitrary application. Their construction of the word leaves it entirely to the discretion of jurors to decide what the “minimum” amount of planning and premeditation for a murder is. It also leaves entirely to the jurors the determination of how much more than this minimum is necessary to rise to a “substantial” level. Some juries will doubtless feel, like the court in *Tipton, supra*, that anything more than the absolute minimum will permit a verdict of death; others may require truly careful and complex planning and lengthy forethought before death will be imposed. Nothing in the word, however, says which of these interpretations would be correct. The Eighth Amendment requires that an aggravating factor “channel” jurors’ discretion more consistently than is possible with the word “substantial.”

This vagueness is further demonstrated by the fact that the standard the courts have used deviates widely from other common usages of the word “substantial.” The Supreme

Court itself had noted that the meaning of a “substantial” amount of something is “a large degree” of that thing. *Victor v. Nebraska*, 511 U.S. 1, 19 (1994). But it is not ordinary or natural usage to call *any* amount of something, even an amount barely above the minimum, a “large degree” of that thing. Indeed, amounts close to the minimum would most plausibly be called a “small degree.” The standard adopted by cases such as *Tipton* is thus quite similar to “more than minimal planning” under the Sentencing Guidelines. See U.S.S.G. § 1B1.1(f) (“[m]ore than minimal planning” is “more planning than is typical for commission of the offense in a simple form”). But this dilution of the word “substantial” is unwarranted, for “substantial” plainly means a greater amount than does “more than minimal.” See *McCarthy v. Manson*, 554 F.Supp. 1275, 1306 (D.Conn. 1982) (Cabranes, J.) (prejudice “while not substantial” was, nevertheless, “more than minimal”), *aff’d*, 714 F.3d 234 (2nd Cir. 1983). It seems clear that the word “substantial” must fall well above such words as “more than minimum amount of sufficient,” “ample,” “minimal,” or “more than minimal,” on any scale of magnitude, but how far above has not, and cannot, be described in clear terms. The inability of the courts to fashion a specific constitutional definition of this factor shows that its meaning remains a “highly subjective” matter for each juror, *Arnold v. State*, 224 S.E.2d at 392, and that it is unconstitutionally vague.

Some states with similar aggravating factors have construed them in a way that does much to eliminate this vagueness. For example, in *Jackson v. State*, 648 So. 2d 85, 87 (Fla. 1994) the court, when faced with an aggravating factor requiring cold, calculated, and premeditated actions by a defendant, held the factor unconstitutionally vague on its face. The

court required that in the future, juries be told that they must determine that “the killing was the product of cool and calm reflection” and “that the defendant had a careful plan or prearranged design to commit murder before the fatal incident.” *Id.* at 89. But Congress has not limited the word “substantial” in this aggravation in any way, or indicated how it would do so. Accordingly, this Court may not provide a limiting construction for it.

The Eighth Amendment requires that the concept of “planning and premeditation” be limited, to narrow the class of death-eligible murders, and that it be limited in a clear, specific, objective way. Simply tacking the word “substantial” on to the phrase achieves neither objective, and this aggravating factor accordingly violates the Fifth and Eighth Amendments.

3. The Heinous, Cruel, and Depraved Aggravating Circumstance is Unconstitutionally Vague on its Face. The Torture or Serious Physical Abuse Factor Fails to Adequately Narrow the Class of Murders Eligible for the Death Penalty

The statutory aggravating factor alleging that the crime was “especially heinous, cruel or depraved,” is unconstitutionally vague on its face, *Walton v. Arizona*, 497 U.S. 639 (1990), and the statutory limitation of the term “serious physical abuse” cannot save it, since that purported “limitation” does not narrow the class of murderers to which the factor applies. Every 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. *Godfrey v. Georgia*, 446 U.S. at 428-429 (factor which could be applied to “almost every murder” violates Eighth Amendment).

There is no serious question that the “especially heinous, cruel or depraved” aggravating factor alone is unconstitutionally vague. *Walton v. Arizona*, 497 U.S. at 654.

Because of this, 18 U.S.C. § 3592(c)(9) limits the reach of that factor to crimes that were "heinous, cruel or depraved *in that [they] involved torture or serious physical abuse to the victim.*" *Id.* (emphasis supplied). This limitation cannot save the aggravating factor, however. Under the terms of the statute, a finding of "torture" is not required, and the finding of "serious physical abuse" by itself would suffice to establish this factor. 18 U.S.C. §3592(c)(9) (crime must involve either "torture *or* serious physical abuse" (emphasis added). Moreover, this finding alone can be the basis for imposition of the death penalty. 18 U.S.C. § 3593(d) (only one statutory aggravating factor need be found to exist before death may be imposed). But since every murder by definition involves the infliction of "serious physical abuse," that factor does not narrow the class of murderers eligible for the death penalty, and accordingly it violates the Eighth Amendment. *Godfrey*, 446 U.S. at 428-429.

To be valid, a statutory aggravating factor must "genuinely narrow the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. at 877-878 ("[S]tatutory aggravating circumstances play a constitutionally *necessary function* at the stage of legislative definition: "they circumscribe the class of persons eligible for the death penalty." (emphasis supplied). The "serious physical abuse" factor does not perform this narrowing function. Every murder involves "serious physical abuse" to a victim: thus, if this aggravating factor is permissible, every murderer would face the death penalty. Since this factor does nothing to limit the murderers who may be subjected to the death penalty, it may not serve as a statutory aggravating factor, and the Court must strike it. *Zant*, 462 at 878; *Godfrey*, 446 U.S. at 428-429 (factor invalid if ordinary juror could find it in "almost every murder").

This conclusion is consistent with the Supreme Court's holdings on the subject. In *Godfrey v. Georgia*, 446 U.S. at 428-429, the Court held the aggravating factor "outrageously or wantonly vile, horrible and inhuman" invalid because "a person of ordinary sensibility could fairly characterize almost every murder" in this way. The Court noted, however, that in some cases, the Georgia courts had limited this factor to mean "torture" or "serious physical abuse" amounting to "aggravated battery," which in Georgia consisted of "maliciously caus[ing] bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof." 446 U.S. at 432-433 & n. 13. The Court's opinion did not reach the validity of such a factor, since it had not been applied in *Godfrey*, and did not say that the term "serious physical abuse" alone would have been sufficiently specific to survive constitutional scrutiny.

In *Maynard v. Cartwright*, 486 U.S. 356, 357 (1988), the Court noted the possibility that the Oklahoma courts had made the vague "heinous, atrocious and cruel" aggravating factor constitutional by limiting its meaning to what the Court characterized as "torture or serious physical abuse," but it merely remanded the case to state court and did not explore the actual nature of the limitation it described in this way. In fact, the limitation applied by the Oklahoma courts, while characterized in shorthand as a "torture or serious physical abuse" factor, is much more specific and limited than that. The factor has been limited to require actual "evidence of conscious physical suffering of the victim prior to death." *Duvall v. Reynolds*, 139 F.3d 768, 793 (10th Cir. 1998) cert. denied 525 U.S. 933 (1998) quoting *Stafford v. State*, 832 P.2d 20, 23 (Okla.Crim.App. 1992). This goes well beyond the mere

requirement of "serious physical abuse" in 18 U.S.C. § 3592(c)(9), which could arise from the fact of any killing, to require "conscious" "suffering" that occurs "prior to death."

Finally, in *Walton v. Arizona, supra*, the Court noted that a "physical abuse" construction of the notion of "cruelty" in the Arizona statute was proper since the state courts had limited it to "suffering of the victim [that] was intended by or foreseeable to the killer." *Id.* 497 U.S. at 654. As in the earlier cases, the phrase "serious physical abuse" means something more than the serious physical abuse inherent in any killing. It requires at least a showing that the victim experienced "suffering," which must by definition occur before death and when the victim is conscious, and that this suffering was "intended by or foreseeable to" the killer.

Congress has placed none of the above limitations upon the words "serious physical abuse" and, accordingly, that factor is invalid. Congress has not specifically required an aggravated assault as in Georgia, actual conscious suffering, acts occurring before death, the specific intent to cause the "abuse," simple foreseeability, or no intent at all. Moreover, Congress has not indicated which of these numerous limitations it would choose. Where neither the words of the statute themselves nor the legislative history of the provision indicates what limitation Congress would place upon them, it is not for the courts to invent a limiting construction. *Federal Election Comm'n v. NCPAC*, 470 U.S. 480, 499 (1985) (where there is "no indication in the statute or the legislative history" that supports the application of any particular limiting construction, court may not formulate one). Accordingly, the Court must strike this aggravating factor from the death notice.

B. THE NON-STATUTORY AGGRAVATING FACTORS MUST BE DISMISSED.

1. Constitutional and Statutory Limits on Non-Statutory Aggravating Circumstances

The FDPA allows the government to use both statutory and non-statutory aggravating factors as the basis for imposing the death penalty. The Act includes no specific guidance as to what constitutes an appropriate non-statutory aggravating factor. The provision that enumerates statutory aggravating circumstances only states in an unnumbered paragraph, “The jury ... may consider whether any other aggravating factor for which notice has been given exists.” 18 U.S.C. §3592(c). The government is required to give notice of its proposed aggravating factors pursuant to 18 U.S.C. §3593(a), but that statute does not identify what constitutes non-statutory aggravating circumstances other than to mention the admissibility of victim impact evidence. Under 18 U.S.C. §3593(c), the jury is allowed to hear “information” as to “any matter relevant to the sentence, including any mitigating or aggravating factor,” and the government may present “any information relevant to an aggravating factor...” The statute provides that information may be admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials, yet even relevant information “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). In *United States v. Fell*, 360 F.3d 135, 143 (2nd Cir. 2004), the court emphasized, “‘heightened reliability’ is essential to the process of imposing a death sentence.” Because of the need for heightened reliability,

the balancing test set forth in the FDPA is, in fact, more stringent than its counterpart in the FRE, which allows the exclusion of relevant evidence if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Fed.R.Evid. 403 (emphasis added). Thus, the presumption of admissibility of relevant evidence is actually narrower under the FDPA than under the FRE.

Id. at 145. Under the stringent FDPA standard, “judges continue their role as evidentiary gatekeepers and [, pursuant to the balancing test set forth in 3593(c),] retain the discretion to exclude any type of unreliable or prejudicial evidence that might render a trial fundamentally unfair.” *Id.* These principles impose substantial responsibility on the trial court to decide the admissibility of non-statutory aggravating circumstances. *United States v. Davis*, 912 F.Supp. 938, 944 (E.D.La 1996).

Non-statutory aggravating factors play a specialized role in the jury's decision-making process. In theory, the first decision a jury must make as it moves toward a death verdict is whether any of the preliminary intent factors set out at in 18 U.S.C. §3591(a)(2) are present in the case. If the government fails to prove beyond a reasonable doubt that one or more of the 18 U.S.C. §3591(a)(2) intent factors are present, the jury goes no further and the death penalty may not be imposed. If however, the government succeeds in establishing a 18 U.S.C. §3591(a)(2) intent factor the jury in theory proceeds to its second decision-point, namely whether one or more of the specific statutory aggravating factors set out in 18 U.S.C. §3592(c)(1) through (16) has been established to the jury's unanimous satisfaction. Only if the government establishes, in sequence, both the existence of a 18 U.S.C. §3591(a)(2) intent factor and one or more of the 18 U.S.C. §3592© aggravating factors may the jury in theory

consider any non-statutory aggravating factors for which notice has been given.

In practice, however, this model breaks down because the jury is asked to decide all these questions in one proceeding which is not necessarily constrained by the rules of evidence, *Fell* notwithstanding. As explained in *United States v. Davis*, 904 F.Supp. 554, 559 (E.D.La. 1995).

The federal statute at issue here ... uses the statutory aggravating factors as the threshold to find an offender death eligible. However, the federal procedure also calls on the jury to consider any non-statutory aggravating factors and mitigating factors and ultimately decide whether the aggravating factors sufficiently outweigh the mitigating factors to justify a death sentence. 18 U.S.C. §3593(e). Thus, while the statutory factors provide the threshold for death penalty consideration, they ultimately become indistinguishable from non-statutory factors in the final weighing by the jury. In the same pot with the carefully crafted factors enunciated by Congress go the potential hodge-podge of other factors drawn up by the individual government prosecutors.

For the reasons that follow, the non-statutory factors drawn up by the government in this case cannot withstand constitutional and statutory scrutiny under the guidelines set forth above.

Because statutory factors "ultimately become indistinguishable from non-statutory factors in the final weighing by the jury" they are subject to the same stringent requirements and must: (1) adequately channel the sentencer's discretion by narrowing the category of convicted defendants eligible to receive the death penalty, and minimizing the risk of arbitrary and capricious action; (2) must be "particularly relevant to the sentencing decision"; (3) meet the "heightened standard of reliability" the Supreme Court has required in death penalty cases;

and (4) not be vague, duplicative, or overbroad, or confuse, prejudice, or mislead the jury. *United States v. Fell*, 372 F.Supp.2d 753, 763 (D. Vt. 2005) vacated *United States v. Fell*, 360 F.3d 135, 143 (2nd Cir. 2004) . See also *United States v. Taveras*, 424 F.Supp.2d 446 (E.D. N.Y. 2006) *aff'd in part sub nom. United States v. Pepin*, ___ F.3d ___ (2nd Cir. 2008) (2008 WL 313806 (2-6-08)); *United States v. Karake*, 370 F. Supp. 2d 275, 279 (D. D. C.2005); *United States v. Bin Laden*, 126 F. Supp. 2d 290 (S.D.N.Y. 2001).

2. Non-Statutory Aggravating Factors do not Constitutionally Limit and Guide the Discretion of the Jury, thus Permitting Wholly Arbitrary and Capricious Death Sentences in Violation of the Eighth and Fourteenth Amendments.

As indicated above, the Eighth Amendment requires that “where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” *Gregg v. Georgia*, 428 U.S. at 189. The Supreme Court’s Eighth Amendment jurisprudence since *Gregg* has explained that while sentencers may not be prevented from considering any relevant information offered as a reason for sparing a defendant’s life, the decision to impose death must be guided by “carefully defined standards that must narrow a sentencer’s discretion.” *McClesky v. Kemp*, 481 U.S. 279, 304 (1987). By simultaneously promoting both individualized sentencing decisions and uniform application of the death penalty, these two principles are designed to provide a “meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.” *Furman v. Georgia*, 408 U.S. at 313 (White, J., concurring).

By contrast, construing 18 U.S.C. §3592(c) as authorizing the government to

unilaterally expand the list of aggravating factors on a case-by-case basis injects into capital proceedings precisely the uncertainty and disparate case results that *Furman* found to violate the Eighth Amendment. The statute provides no guidance to prosecutors in determining how to define or select non-statutory aggravating circumstances factors in a particular case. Under such a scheme, compounded by the evidentiary free-for-all, the factors that might persuade jurors in any given case to impose death are not limited to “clear and objective” criteria, *Gregg*, 428 U.S. at 197, but are restricted only by the imagination of the prosecutor. Particularly in conjunction with the evidentiary free-for-all created by the scope of “information” admissible at the penalty phase, the statute’s standardless procedure creates an impermissible risk that the death penalty will be imposed arbitrarily and capriciously, in violation of the Eighth Amendment.

The arbitrariness this procedure injects into the weighing process mandated by the statute is clear. The government’s unconstrained ability to allege various non-statutory aggravators injects impermissible randomness into the process. To permit different prosecutors, in each case, to create and select the factors that may be placed on “death scale,” *Stringer v. Black, supra*, injects the very arbitrariness and capriciousness into the sentencing process that *Furman*, sought to eradicate.

3. Non-Statutory Aggravating Factors Constitute an Unlawful Delegation of Legislative Authority.

The non-statutory aggravating factors charged by the government in this case should be stricken because they represent an unconstitutional delegation of legislative authority to the executive branch. As reviewing courts have recognized, non-statutory factors become

indistinguishable from statutory factors in the jury's ultimate consideration of whether to impose the death penalty; and, therefore, the government's authority to determine these factors derives from Congress's power to define crimes and determine punishment. Because both the statutory and non-statutory aggravating factors are equivalent to elements of a crime, they must be defined by Congress.

Under Article I, Section 1 of the Constitution, congress may not delegate its legislative authority to other branches of government. *Mistretta v. United States*, 488 U.S. 371 (1989)(upholding Congress's delegation of authority to the Federal Guidelines Commission to promulgate the sentencing guidelines). Congress may "legislate[] in broad terms leaving a certain degree of discretion to executive or judicial actors" if Congress articulates an "intelligible principle" to guide the executive or judicial branches. *Toulby v. United States*, 500 U.S. 160, 165 (1991)(citing *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)); *United States v. DesAnge*, 921 F.Supp. 349, 354 (W.D. Va. 1996).

Some courts have simply held that the prosecutors discretion to charge non-statutory aggravating factors is not an unlawful delegation of legislative power because non-statutory aggravating factors do not affect either the class of capital crimes or capital defendants and merely help fully inform the jurors "before it decides whether the defendant will live or die." *DesAnge*, 921 F. Supp. At 354. *See also, United States v. Pitera*, 795 F. Supp. 546 (E.D.N.Y. 1992); *United States v. Bradley*, 880 F. Supp. 271 (M.D. Pa. 1994). These courts fail, however, to recognize the significance of the fact that non-statutory factors ultimately play the same role in the jury's determination of whether to impose a death sentence as

statutory factors.

In *United States v. Davis*, 904 F. Supp. 554 (E.D. La. 1995), the court considered that *Zant v. Stephens*, 462 U.S. 862 (1983) upheld a death sentence even though one aggravating factor was vague. The *Davis* court noted the key to *Zant v. Stephens*, however, was that the aggravating factors were used only to narrow the class of those eligible for death and were not part of the jury's weighing; while in contrast, "the federal procedure also calls on the jury to consider non-statutory aggravating factors and mitigating ultimately decide whether aggravating factors 'sufficiently outweigh' the mitigating factors to justify a death sentence. *Davis*, 904 F.2d at 559 (citing 18 U.S.C. §3593 (e)). Thus, non-statutory factors ultimately become indistinguishable from the statutory aggravating factors in the jury's final weighing of whether to impose life or death. *Davis*, at 559. The *Davis* court noted that "in the same pot with the carefully crafted factors enunciated by Congress go the hodge-podge of other factors drawn by individual government prosecutors." *Davis* at 559.

In *United States v. Pretlow*, 779 F. Supp. 758, 766 (D.N.J. 1991), the court emphasized that the executive has no inherent authority to identify non-statutory aggravating factors because it is the duty of Congress to define and punish crimes. U.S. Const. Art. I, section 8; Art III, section 8; *Chapman v. United States*, 500 U.S. 453 (1991); *United States v. Wiltberger*, 6 Wheat, 76, 95 (1820)("It is the legislature, not the court, which is to define a crime and ordain its punishment").

Thus, the courts in *Davis* and *Pretlow* held that the authority to charge non-statutory aggravating factors necessarily involved a delegation of legislative authority. *Davis*, at 559;

Pretlow, at 766. These courts also upheld the delegation as lawful on the reasoning that the requirement that the factors relate to the circumstances of the crime or the defendant was a sufficient “intelligible principle” to guide the exercise of discretion. *Davis*, at 559; *Pretlow*, at 766.

These decisions upholding the delegation as lawful, however, predated the decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which held that aggravating factors in capital cases function as elements of the greater crime. The Court held that “the dispositive question . . . ‘is not one of form, but of effect’: if the government makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt.” *Ring*, 536 U.S. at 602. After *Ring*, in *Blakely v. Washington*, 542 U.S. 296 (2004), the Court, held that all facts “which the law makes essential to the punishment” be subject to Sixth Amendment protections. *Blakely*, 542 U.S. at 303 (citation omitted).

In the plain terms, non-statutory as well as statutory aggravating factors constitute facts which are essential to the jury in weighing and determining whether a given defendant will face a death sentence or a life sentence. As such, the non-statutory aggravating factors are equivalent to elements of the charged crime and must be defined by Congress rather than the executive branch.

4. Permitting the Department of Justice to Define Non-Statutory Aggravating Circumstances After the Crime but Before Trial Violates the Ban on Ex Post Facto Laws.

Article I, Section 9, Clause 3 of the United States Constitution states: “No . . .*ex post*

facto law shall be passed.” 18 U.S.C. §3592 permits the prosecution to manufacture out of whole cloth aggravating circumstances to be applied retroactively to crimes committed before the aggravating circumstances are identified. “A defendant's right to notice and to fair warning of the conduct that impacts upon his liberty [or his life] is a basic principle long recognized by the Supreme Court.” *Coleman v. McCormick*, 874 F.2d 1280, 1288 (9th Cir. 1989), cert. denied 493 U.S. 944 (1989). The statutory scheme which the government hopes to use to deprive Mr. Green of his life “makes more burdensome the punishment for a crime, after its commission...” *Beazell v. Ohio*, 269 U.S. 167 (1925). See *Lindsey v. Washington*, 301 U.S. 397 (1937)(statutory change from discretionary to mandatory death penalty held barred by *ex post facto* clause when retroactively applied). In *Ring v. Arizona*, 536 U.S. at 609, the Court held that for Sixth Amendment purposes, aggravating factors are the functional equivalent of elements of a capital offense. There is no principled basis on which to distinguish non-statutory aggravators from statutory aggravators for purposes of *Ring*. The non-statutory aggravating circumstances a jury finds at the prosecutor's urging are just as necessary to a jury's finding that the death penalty shall apply as are statutory aggravating circumstances, since a jury may not find the statutory aggravating circumstances by themselves to provide a sufficient basis upon which to impose a death sentence. As elements of a capital offense, non-statutory aggravators are subject to the prohibition against *ex post facto* laws.

5. The Victim Impact Non-Statutory Aggravator does not Sufficiently Narrow the Class of Murders for Whom the Death Penalty is Available

In addition, the factor, as charged, must be dismissed because it does not meet the

statutory criteria for a non-statutory aggravator that it be an “aggravating” circumstance “other” than the crime itself and the remaining aggravating circumstances. 18 U.S.C. § 3592(c) [jury may find “any other aggravating factor for which notice has been given.” All that this alleged aggravating factor cites is that there was “injury, harm, and loss to [the victim’s] family.” But every murder of a family member causes “injury, harm, and loss” to the victim’s family, and that harm is in every case irreparable, since a death has occurred. This aggravating factor does not add anything to the crime or to the other aggravating factors charged. It is thus, as pled, not even “aggravating” since it does not make this crime any “worse” than every other murder. *Webster’s Third New International Dictionary* 41 [defining “aggravate” to mean “to make worse”]. But see *Jones v. United States*, 428 U.S. 262 (1999).

This factor does nothing to narrow the class of murders for whom the death penalty is available since victim impact evidence automatically flows from the commission of any offense under 18 U.S.C. § 3591. Allowing the prosecutor to select non-statutory aggravating factors relating to the circumstances of the crime on a case-by-case basis means that there is no murder for which such a non-statutory factor could not be alleged. In essence, all the prosecutor is alleging is that a murder was committed. This non-statutory factor must, therefore, be dismissed as it does nothing to narrow the class of persons eligible for the death penalty. The factor fails to “channel the sentencer’s discretion by ‘clear and objective’ standards that provide ‘specific and detailed guidance,’ and that ‘make rationally reviewable the process of imposing a sentence for death.’” *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990)(quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)).

If the system of non-statutory aggravating factors is to be held constitutional at all, it is because the trial court exercises its authority to keep the factors within statutory, constitutional bounds. See *United States v. McVeigh*, 944 F.Supp. 1478, 1486 (D.Col. 1996)(trial court has the authority to exercise control over the non-statutory factors on which the government seeks to rely). The minimum standard that the court should apply is that the factor, as pled, is both “aggravating” and “other” than the factors pled in the indictment or the death notice. 18 U.S.C. § 3592(c). See also *United States v. Cuff*, 38 F.Supp.2d 282, 288 (S.D. NY 1999)[use of a firearm is not a proper non-statutory aggravator because “(a) predicate to fulfilling the constitutional conditions for an aggravating factor is that the disputed factor be an aggravating factor in the first place.”]

The government is entitled to offer evidence of the harm to the family, of course, to the extent it is relevant. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); see 18 U.S.C. §3593(a). And, in a case in which the government pleads a factor that is in fact "aggravating," that is, "worse" than just murder, Congress has provided that it may include this as a factor. 18 U.S.C. § 3593(a) ["factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the ... victim's family"]. But Congress has not stated that this is a valid factor in every murder. Any such factor pled must meet the rest of the explicit criteria of the statute -- that the factor be "other" and that it be "aggravating." In this case, the government has failed to meet this minimum pleading requirement, and the factor must be dismissed.

6. The Victim Impact Evidence Should be Excluded under the Eighth Amendment's Heightened Standard of Reliability and Under 18 U.S.C. §3593

“An aggravating factor must meet the ‘heightened standard of reliability’ the Supreme Court has required in death penalty cases” and “any aggravating factor should be excluded if it is based on evidence whose probative value is outweighed by the danger of unfair prejudice to the defendant, confusion of the issues, or a likelihood that the jury will be misled. See 18 U.S.C. §3593(c). *United States v. Fell*, 372 F. Supp. 2d at 763 citing *Ford v. Wainwright*, 477 U.S. 399, 411(1986).

The prejudicial impact of victim impact evidence was noted in *United States v. Johnson*, 362 F. Supp. 2d 1043, 1107 (N.Dist. Iowa 2005) *aff'd in part* 495 F.3d 951 (8th Cir. 2007):

I can say, without hesitation, that the ‘victim impact’ testimony presented in [the co-defendant's] trial was the most forceful, emotionally powerful, and emotionally draining evidence that I have heard in any kind of proceeding in any case, civil or criminal, in my entire career as a practicing attorney and federal judge spanning nearly 30 years. Indeed, I cannot help but wonder if *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), which held that victim impact evidence is legitimate information for a jury to hear to determine the proper punishment for capital murder, would have been decided the same way if the Supreme Court Justices in the majority had ever sat as trial court judges in a federal death penalty case and had observed first hand, rather than through review of a cold record, the unsurpassed emotional power of victim impact testimony on a jury. It has now been over four months since I heard this testimony in the Honken trial and the juror's sobbing during the victim impact testimony still rings in my ears.

This is true even though the federal prosecutors in Honken used admirable restraint in terms of the scope, amount, and length of

victim impact testimony. To pretend that such evidence is not potentially unfairly prejudicial on issues to which it has little or no probative value is simply not realistic, even if the court were to give a careful limiting instruction. Rather, such potent, emotional evidence is a quintessential example of information likely to cause a jury to make a determination on an unrelated issue on the improper basis of inflamed emotion and bias-sympathetic or antipathetic, depending on whether one is considering the defendant or the victims' families.

362 F. Supp. 2d at 1107.¹

Because of the overwhelmingly prejudicial impact of this evidence, courts must be vigilant to ensure that victim impact evidence stays within proper bounds. For example, in *United States v. Glover*, 43 F.Supp.2d 1217, 1224 (D. Kan. 1999), the court found inadequate a notice which alleged as victim impact that the defendant caused “serious physical and emotional injury to Christy Lewis” and “permanent harm to the family of John Brewer.” The

¹ See also, e.g., Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements*, 10 Psychol. Pub. Pol’y & L. 492 (2004) (exploring the extent to which victim impact statements are prejudicial to death sentence determinations); Niru Shanker, *Getting a Grip on Payne and Restricting the Influence of Victim Impact Statements in Capital Sentencing: The Timothy McVeigh Case and Various State Approaches Compared*, 26 Hastings Const. L.Q. 711, 740 (199) (“Thanks in part to poorly articulated parameters in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)], victim impact testimony in capital sentencing walks a fine line between allowing particularized attention to the damage caused by the crime on the one hand, and leaving the jury to be inundated with prejudicial outpourings irrelevant to the defendant’s guilt on the other.”); Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 Ariz. L. Rev. 143, 145 (1999) (“The state of law seven years since Payne, have been realized. Highly prejudicial victim impact evidence is now routinely before capital juries, with precious little in the way of substantive limits, procedural controls, or guidance in how it is to be used in assessing the ‘deathworthiness’ of defendants”); Amy K. Phillips, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 Am. Crim. L. Rev. 93, 101-113 (1997) (arguing that capital juries have a tendency to consider improper factors in sentencing, even in the absence of victim impact statements, so that victim impact statements exaggerate the extent to which improper factors influence capital sentencings).

court ordered the government to specify, for example, whether Lewis suffered normal trauma or post traumatic stress disorder. As to the impact upon the family allegation, the court stated:

[T]he 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.’ For example, whether members of the family sought counseling or other medical treatment, such as hospitalization, and whether and to what extent members of the family suffered financial harm, are relevant considerations in discerning whether this factor is indeed ‘aggravating’ in this case.

Id. 43 F.Supp.2d at 1224. See *United States v. Rodriquez*, 380 F. Supp. 2d 1041, 1058 (D.ND. 2005)(requests for information concerning the nature of the evidence the government intends to rely upon to prove the non-statutory aggravating factor regarding victim impact, and for “an outline of the proposed victim impact evidence from each witness” were “justified to fulfill Defendant's objective of meaningful notice to adequately prepare a defense and meet the allegations against him.”); *United States v. Illera Plaza*, 179 F. Supp.2d 464, 475 (E.D. Pa. 2001) (“The government suggests no reason why, in this case, it would be unable to produce a summary of its victim impact evidence similar to the ones required by [other] courts. Therefore, 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.”); *United States v. Cooper*, 91 F. Supp.2d 90, 111 (D.DC. 2000) (requiring government to amend 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").

7. The Witness Elimination Non-Statutory Aggravator does not Sufficiently Narrow the Class of Murders for Whom the Death Penalty is Available.

In Mr. Green's case, the government has given notice that it intends to use witness elimination as a non-statutory aggravator. (R. 70 Notice of Intent to Seek Death Penalty, p. 5, Section IIIA). The government alleges Mr. Green killed the victims "in order to eliminate [them] as possible witnesses to his crimes." *Id.* As noted previously, "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). A statutory aggravating factor must genuinely narrow the class of murders which may be subject to the death penalty. *Zant v. Stephens*, 462 U.S. at 877; *Godfrey*, 446 U.S. at 428-429. That is, it must be a factor that is not present in "almost every murder." *Godfrey*, 446 U.S. at 428-429. An aggravating circumstance is constitutionally invalid "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty." *Arave v. Creech*, 507 U.S. at 474. Those principles are no less applicable to non-statutory aggravators and the defendant incorporates by reference the arguments previously made in this memorandum. .

The use of the witness elimination non-statutory aggravator does not narrow the class of defendant eligible for capital punishment because the aggravator can be applied in "almost every murder," *Godfrey*, 446 U.S. at 428-429. Thus, it does not it suitably direct and limit the

discretion vested in the sentencer, *Zant v. Stephens*, 462 U.S. at 874. Accordingly, the use of witness elimination as a non-statutory aggravator is constitutionally impermissible.

CONCLUSION

For the reasons stated above, the defendant, Steven Dale Green, e respectfully moves the Court declare the Federal Death Penalty Act unconstitutional and to dismiss the aggravating factors and the death notice.

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CERTIFICATE

I hereby certify that on February 15, 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.

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