

**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 “SPECIAL FINDINGS” FROM THE
INDICTMENT; AND STRIKE THE NOTICE OF INTENT TO SEEK THE DEATH
PENALTY**

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, and *Ring v. Arizona*, 536 U.S. 584 (2002), to declare the Federal Death Penalty Act (FDPA) unconstitutional; dismiss the “special findings” from the indictment 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. 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 Federal Death Penalty Act Fails to Meet the Sixth Amendment Requirements of *Ring v. Arizona*, 536 U.S. 584 (2002)

1. The Operation of the Federal Death Penalty Act (FDPA)

Under the Federal Death Penalty Act (FDPA), 18 U.S.C. §3591-3599, if the government believes that the circumstances of an offense justify a death sentence, it “shall” at a “reasonable time” before trial, serve on the defendant a notice stating that death will be sought and “setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.” 18 U.S.C. §3593(a). Before a sentence of death may be imposed, the defendant must first be convicted of an offense for which death is a prescribed sentence. 18 U.S.C. §3593(b). Upon conviction of such an offense, a separate sentencing hearing must then be held. The hearing is held before the jury that determined guilt, before a separate jury under certain circumstances, or before the judge, 18 U.S.C. §3593(b). At that hearing, the government may present evidence

in support of the aggravating factors for which it has given notice, and the defendant may present evidence of mitigating factors. 18 U.S.C. §3593(c). To impose a death sentence at the conclusion of this hearing, the jury must make three findings. First, the penalty jury must find, unanimously and beyond a reasonable doubt, that the defendant had the requisite intent to commit the charged offense, as set forth in 18 U.S.C. §3591(a)(2)(A)-(D). Second, the jury must find (again, unanimously and beyond a reasonable doubt) that at least one of the statutory aggravating factors set forth in 18 U.S.C. §3592(c)(1) through (16) also exists. See 18 U.S.C. §3593(c). Once satisfied, these steps render the defendant eligible for a sentence of death.

The actual imposition of death depends on the third step in the process. Significantly, at this stage, the government may present both aggravating factors expressly listed in the statute (“statutory aggravating factors”) and any other non-statutory factors that qualify as aggravators for the jury to weigh against any mitigating factors presented by the defendant.

See 18 U.S.C. §3593(c). The jury is then charged with determining whether

all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death.

18 U.S.C. §3593(e). Then, “[b]ased upon this consideration,” the jury by unanimous vote ... shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence. *Id.* The FDPA requires the first and second findings to be made beyond a reasonable doubt. It does not require the third,

“weighing” finding to be made beyond a reasonable doubt.

2. The FDPA Fails to Meet the Requirements of the Sixth Amendment

The Indictment Clause of the Fifth Amendment provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury” Under the Indictment Clause, a defendant’s jeopardy is limited to offenses charged by a group of his fellow citizens acting independently of either prosecutor or judge. *Stirone v. United States*, 361 U.S. 212, 218 (1960). Any fact that must be proven to a jury beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), must also be charged in the indictment. *United States v. Cotton*, 535 U.S. 625, 627 (2002).

Apprendi holds that once the legislature has chosen to make particular factual findings the prerequisite for an increased maximum sentence—regardless of the substantive content of the findings or how the statutory scheme itself characterizes them—those findings are, “for constitutional analysis,” “elements of the crime.” *Harris v. United States*, 536 U.S. 545, 567 (2002). Certain procedural requirements follow as a matter of federal constitutional law. In a federal prosecution, those procedural requirements include that the prerequisite fact must be “charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.” *Jones v. United States*, 526 U.S. 227, 251-52 (1999). *Ring v. Arizona*, 536 U.S. 584 (2002), applied the rule of *Apprendi* and *Jones* to death penalty cases.

In this context, therefore, any “fact[] necessary to impose the maximum [punishment],” *Harris v. United States*, 536 U.S. at 566, must be treated as an element. Under the FDPA,

there are three facts that must be found before a death sentence may be imposed: (1) that the defendant acted with the requisite intent, (2) that there is at least one statutory aggravating factor, and (3) that the aggravating factors outweigh mitigating factors sufficiently to justify a sentence of death (or, in the absence of mitigating factors, that the aggravating factors in themselves are sufficient to justify a sentence of death).

There is agreement among the federal courts that the finding of the requisite mental state and the finding of at least one statutory aggravating factor are findings that, under *Ring*, must be treated as elements. Accordingly, they must be “charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.” *Jones, supra*. See *United States v. Allen*, 406 F.3d 940, 943 (8th Cir. 2005); *United States v. Robinson*, 367 F.3d 278, 284 (5th Cir.), *cert. denied*, 543 U.S. 1005 (2004); *United States v. Higgs*, 353 F.3d 281, 299 (4th Cir. 2003), *cert. denied*, 543 U.S. 999 (2004); *United States v. Quinones*, 313 F.3d 49, 53 n.1 (2nd Cir. 2002), *cert. denied*, 540 U.S. 1051 (2003). Two courts have also determined that non-statutory aggravating factors are also elements. See, *United States v. Mills*, 446 F.Supp.2d 1115 (C.D. Ca. 2006); *United States v. Green*, 372 F. Supp. 2d 168 (D.Mass. 2005). However, very few courts have addressed whether the third finding must be treated as an element.

Under state statutes that require similar “weighing” findings, at least four state courts have held, in light of *Ring*, that this finding must be treated as an element. The Missouri Supreme Court rejected the argument that such a jury determination “merely calls for the jury to offer its subjective and discretionary opinion rather than to make a factual finding.”

Whitfield v. State, 107 S.W.3d 253, 259 (Mo. 2003). The *Whitfield* Court surveyed the views of several other state supreme courts to consider the question, and ultimately adopted their reasoning that, under *Ring*, a statutorily required finding that aggravation outweighs mitigation must be proved by the prosecution beyond a reasonable doubt to the satisfaction of a jury. *Id.* 107 S.W.3d at 259-261 (citing *Woldt v. People*, 64 P.3d 256, 265 (Colo. 2003); *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002); and *State v. Ring*, 65 P.3d 915, 943 (Ariz. 2003) (on remand from the United States Supreme Court)). See also, Note, *The Evolving Meaning of the Fifth and Sixth Amendments: Sentencing Effects of Aggravating Factors as Elements of the Crime*, 80 Notre Dame L. Rev. 403, 436-37 (November 2004) (any time a jury must determine “that the aggravating factors outweigh the mitigating factors” before the defendant may be sentenced to death, “the weighing determination acts as the functional equivalent of an element,” and under *Ring* the jury would “have to agree, *beyond a reasonable doubt*, that the totality of the aggravating circumstances outweighs the totality of the mitigating circumstances”) (emphasis supplied).

The reasoning of the Supreme Courts of Missouri, Nevada, Colorado, and Arizona on this issue is supported by the Supreme Court’s most recent discussion of the requirements of *Ring*. In *Booker v. United States*, 543 U.S. 220 (2005), the Court made clear that a defendant has “[a] right to have the jury find the existence of any particular fact *that the law makes essential to his punishment.*” *Id.* at 232 (citing *Blakely v. Washington*, 542 U.S. 296, 301 (2004)) (emphasis supplied). As noted above, under 18 U.S.C. §3593(e) the jury’s determination that the aggravating factors outweigh the mitigating factors is “essential to”

imposing a death sentence. Under *Ring*, this finding is therefore required to be made by the jury *beyond a reasonable doubt* before a death sentence is legally available. *See also Blakely*, 542 U.S. at 303-304 (“the relevant ‘statutory maximum’ [for purposes of *Ring*] is not the maximum sentence a [jury] may impose after finding additional facts, but the maximum [it] may impose *without* any additional findings”) (emphasis in original).

Booker and *Blakely* thus make clear that, for Sixth Amendment purposes, whether a defendant is legally exposed to a particular enhanced sentence is a question that depends on whether imposition of that sentence is conditioned on an additional, statutorily-mandated finding of fact. Under the FDPA, the jury has no legal authority to recommend a death sentence unless and until it concludes that the aggravating factors proved by the government outweigh the mitigating factors proved by the defense. Congress’s decision to condition the availability of a death sentence on that factual determination makes it the type of finding governed by *Ring*.

It should be noted that other courts have reached a different conclusion on the weighing issue, at least prior to *Blakely* and *Booker*. *See, e.g., United States v. Haynes*, 269 F. Supp. 2d 970, 980 (W.D.Tenn. 2003); *Brice v. State*, 815 A.2d 314, 322 (Del. 2003); *Torres v. State*, 58 P.3d 214, 216 (Okla. Crim. App. 2002). And, a few courts have rejected this argument as to the FDPA since *Booker* and *Blakely*. *See United States v. Purkey*, 428 F.3d 738, 750 (8th^h Cir. 2006) (rejecting the argument because the weighing finding is not “an elemental fact for which a grand jury must find probable cause,” but rather a “consideration”); *United States v. Sampson*, 486 F.3d 13 (1st Cir. 2007). The inquiry is not, as these cases hold,

what facts must be found before the defendant is death eligible, but rather what fact-finding must the jury undertake before an actual sentence of death can be imposed. Under the FDPA, a death sentence cannot be imposed until and unless the jury finds that all the aggravating factors statutory and non-statutory outweigh the mitigation or are sufficient to justify a death sentence in the absence of mitigation. Consequently, these courts have failed to acknowledge that in the absence of a finding that aggravation outweighs mitigation, the “default sentence” under the statutory schemes in question, as under the FDPA, is life imprisonment.

In *United States v. Natson*, 444 F. Supp.2d 1296, 1304 (M.D. Ga. 2006), the court considered this issue and concluded:

That [i]f the Court were mapping its own course through ‘*Apprendi* Land,’ it would be inclined to find that the jury's factual determination that the aggravating factors outweigh the mitigating factors must be made beyond a reasonable doubt. The Court, of course, does not write upon a blank slate and must predict what the Court of Appeals would do based upon existing precedent.

Attempting to predict what the Eleventh Circuit would do with this issue, the court relied upon *United States v. Brown*, 441 F.3d 1330, 1367 (11th Cir.2006), which rejecting a contention that the FDPA was unconstitutional on its face under the Indictment Clause because it does not expressly require the government to charge non-statutory aggravating factors in the indictment.¹ The district court reasoned that “the Eleventh Circuit would likely hold that the final balancing phase findings do not expose the defendant to the death penalty,

¹ As indicated above, at least two courts have disagreed with the reasoning of *Brown* and have held that non- statutory aggravating factors are elements under *Ring*, *Booker* and *Blakely*. See, *United States v. Mills*, 446 F.Supp.2d 1115 (C.D. Ca. 2006); *United States v. Green*, 372 F. Supp. 2d 168 (D.Mass. 2005).

but that he is exposed to that penalty when the jury finds beyond a reasonable doubt that he had the requisite mens rea along with the existence of one statutory aggravating factor.”*Id.*

Although the court thus rejected defendant’s constitutional challenge, the court added:

The Court observes, however, that this rationale expressed by the Eleventh Circuit in *Brown* does not necessarily preclude a contrary conclusion. *Brown* could be reconciled with a holding that *Apprendi* requires that the final balancing phase fact finding be done using a beyond a reasonable doubt standard. In *Brown*, the finding at issue was a non-statutory aggravating factor, the existence of which is not a prerequisite for imposing the death penalty. The only aggravating factor that must be found for imposition of the death penalty is a statutory one. Therefore, it is correct that a finding of the existence of a non-statutory aggravating factor is not necessary to expose the defendant to the sentence of death; *whereas a finding that the aggravating factors outweigh the mitigating ones in the final balancing phase is absolutely necessary before a defendant can be sentenced to death-which would support the conclusion that such a finding should be made beyond a reasonable doubt.*

444 F. Supp.2d at 1304 n. 10 (emphasis added)

Accordingly, because the finding that aggravation outweighs mitigation is “essential to” a death sentence, *see Booker*, the Sixth Amendment requires that it be proven by the prosecution beyond a reasonable doubt. The failure of the FDPA to require that this finding be made beyond a reasonable doubt makes the FDPA constitutionally defective.

B. the Death Notice Should Be Dismissed Because the Government Has Not Obtained an Indictment Consistent with the Requirements of the Fifth and Sixth Amendment

1. The Indictment of Mr. Green

As noted in the Statement of the Case, Mr. Green has been charged with a seventeen-count indictment which reflects that Counts 3-10 and Counts 13 -16 subject him to the death penalty. (R. 36 Indictment). The indictment (Paragraphs 41 and 42) also contains a Notice of

Special Findings as to the aforementioned counts. The Notice of Special Findings alleges some of the facts necessary for imposition of the death penalty. For example, it includes that Mr. Green was 18 years old at the time of the offense; that the offense was committed with the four mental states set forth in 18 U.S.C. §3591(a)(2); that the offenses were committed in an especially heinous, cruel and depraved manner, in that they involved torture and serious physical abuse; that the offenses were committed after substantial planning and premeditation to cause death; and that two of the victims, were vulnerable due to age. (R. 36 Indictment ¶¶41-42). The indictment, however, does not state that these special findings should subject Mr. Green to the death penalty or otherwise indicate that the grand jury intended to return an indictment charging him with a capital crime.

2. The Grand Jury Was Not Given the Choice of Holding Mr. Green to Answer for a Capital Crime Because it Was Unaware of the Consequences of the Special Findings

The Fifth Amendment provides that “no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” As the Supreme Court has explained:

[T]he grand jury is a central component of the criminal justice process. The Fifth Amendment requires the Federal Government to use a grand jury to initiate a prosecution.... The grand jury, like the petit jury, ‘acts as a vital check against the wrongful exercise of power by the State and its prosecutors.’ It controls not only the initial decision to indict, but also significant decisions such as how many counts to charge and whether to charge a greater or lesser offense, *including the important decision to charge a capital crime.*

Campbell v. Louisiana, 523 U.S. 392, 398 (1998) (citations omitted) (emphasis supplied).

See also Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (power to charge capital or noncapital

offense lies in hands of grand jury); Fed. R. Crim. P. 7(a) (“[a]n offense which may be punished by death shall be prosecuted by indictment”).

When Congress adopted the Bill of Rights, only the indicting grand jury, by choosing the offense to charge, could make the offense punishable by death. In 1789 Congress sought to ratify the Fifth Amendment, and also passed the first federal criminal laws. Those laws that authorized the death penalty mandated it; they left no other sentencing option. *See generally* Rory Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice’s Role*, 26 Fordham Urb. L.J. 347, 361-63 and n.65 & 66 (1999).² This practice was consistent with that of the states, which at the time the Bill of Rights was adopted in 1791, followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses. *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976). Thus, the intent of the framers of the Fifth Amendment was that the grand jury retain the power to choose which defendants would receive a sentence of death upon conviction.

The grand jury’s historical role in choosing which defendant would receive a death sentence upon conviction is well documented. *See* Wayne R. LaFave, *et al.*, 1 *Criminal Procedure* 1.5(b) (2nd ed.) (noting that grand juries played a critical role in reducing the number of offenses for which capital punishment could be imposed by downgrading charges to non-capital offenses); Andrew Hirsch, *The Rise of the Penitentiary* (1992) (“[a]t the indictment stage, grand juries often refused to charge person with capital crimes. They simply downgraded indictments to non-capital charges of their own devising...”). The Supreme

² An example of one such law provided that “such person or persons on being thereof convicted [of willful murder] shall suffer death.” An Act for the Punishment of Certain Crimes against the United States, ch. 9, ' 3, 1 Stat. 112, 113 (1790).

Court has acknowledged this historical role, writing in *Vasquez*, 474 U.S. at 263, that “the Grand Jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. *In the hands of a grand jury lies the power to charge a greater or lesser offense; numerous counts or a single count; and perhaps the most significant of all, a capital offense or a noncapital offense....*”

In this case, it cannot be ascertained if the grand jury was informed of the consequences of the Special Findings, *i.e.*, that by returning the indictment, Mr. Green would be held to answer to an offense punishable by death. Certainly nothing on the face of the indictment shows that the grand jury was aware that it was being asked to determine if Mr. Green should be held to answer for a capital offense. Moreover, there is nothing in the record to establish whether the grand jury was instructed. “[W]hen deciding whether or not to indict, you should not be concerned about punishment in the event of conviction.” See Model Grand Jury charge, Paragraph 10, (Approved by the Judicial conference of the United States, March 2005) - see Administrative Office of the US Courts Website - www.uscourts.gov/jury/charge. Thus, it cannot be determined with any degree of certainty that the grand jury procedure was one that complied with the Fifth Amendment.

The Supreme Court, in a related context, has not countenanced such disregard for the Fifth Amendment. In *Smith v. United States*, 360 U.S. 1, 9 (1959), the Court reversed a kidnapping conviction initiated by information even though it was a capital offense. The Court stated:

[t]he Fifth Amendment made the [grand jury indictment] rule mandatory in federal prosecutions in recognition of the fact that the intervention of a grand jury was a substantial safeguard against oppressive and arbitrary proceedings.... [T]o permit the

use of informations where ... the charge states a capital offense, would ... make vulnerable to summary treatment those accused of ... our most serious crimes. *Id.* (citations omitted).

Similarly, to permit the government to obtain from a grand jury an indictment alleging the elements of a capital offense, but not informing the grand jury that by finding those elements it was holding the defendant to answer to a capital crime, makes vulnerable those accused of the most serious crimes. If the grand jury is not informed of the capital nature of the offense, it cannot express the conscience of the community or perform its constitutionally assigned role as a "barrier ... between the liberties of the people and the prerogative of the [government]." *Harris v. United States*, 536 U.S. 545, 564 (2002) (grand and petit juries "form a 'strong and two-fold barrier'").

The grand jury's constitutional and historical role in deciding whether a defendant should face the death penalty is perhaps more critical now than ever. Few checks exist on the federal government's power to pursue the ultimate punishment against one of its citizens and fewer opportunities exist for the local community to express its desires about the appropriateness of the death penalty in any given case. Prosecutorial decision making in capital cases is centralized at the Department of Justice in Washington, D.C. Local federal prosecutors have little, if any, control over whether they will seek the death penalty against a defendant. Instead, the Attorney General makes all such decisions, often overriding the recommendations of local prosecutors and refusing to allow a defendant to plead guilty in exchange for a sentence of life imprisonment without the possibility of release. See Kevin McNally, *Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DePaul L. Rev. 1615, 1631-1637 (2004) (of 103 defendants Attorney General Ashcroft

approved for federal capital prosecution, 41 (40%) were defendants against whom the local United States Attorney did not request death authorization). As a result of the unilateral discretion of the Attorney General, local prosecutors have little, if any, opportunity to truly speak for the community that they serve.

Nor is the petit jury in a capital case a meaningful barrier between “the liberties of the people and the prerogative of the [government].” *Harris*, 536 U.S. at 564. This is because petit jurors, to-date, have been “death-qualified.” Individuals with scruples against the death penalty, no matter how many exist in a given community, have not been permitted to sit in judgment in a capital case. Instead, capital juries consist exclusively of individuals who believe that the death penalty is an appropriate punishment and who express a willingness to impose it. Empirical evidence shows that such “death-qualified” jurors are more prone to believe government witnesses, generally evaluate evidence differently than other jurors, and give little meaning to the presumption of innocence, *i.e.*, death qualified jurors are more conviction prone.³ The death-qualifying process also tends to exclude women and African-Americans from jury service. *Id.* The net effect of death qualification is that capital jurors do not represent the conscience of the local community or its rich diversity. At best, they represent only those members of the community who share similar views on the death penalty - often white men. Jurors that represent such a small segment of the community are ill-

³ See Jesse Nason, Mandatory Voir Dire Questions in Capital Cases: A Potential Solution to the Biases of Death Qualification, 10 Roger Williams U. L. Rev. 211, 219 (2004) (summarizing research on how death-qualified jurors may presume guilt, resolve ambiguities against the defendant, more readily accept the government’s version of events, distrust defense witnesses, fill evidentiary gaps with their beliefs that defendant committed the crime; and were more likely to infer premeditation). See also *United States v. Green*, 324 F. Supp. 2d 311, 329 (D. Mass. 2004) (citing studies that raise problem with whether death-qualified juries are more conviction prone).

equipped to act as a barrier between the "liberties of the people" and the power of a government, particularly a government so centralized that it often forces local prosecutors to take a capital case to trial against their will.⁴

In conclusion, the Constitution and the Bill of Rights sets up a carefully crafted system of checks and balance. Under the Fifth Amendment, the grand jury, like the petit jury, is supposed to "act[] as a vital check against the wrongful exercise of power by the State and its prosecutors." *Campbell v. Louisiana*, 523 U.S. 392, 398 (1998) (citations omitted). Unless the grand jury is aware of its capital charging power and the consequences of returning an indictment with "special findings" like those in this case, it cannot perform its constitutionally assigned function and make "*the important decision to charge a capital crime.*" *Id.* Because the grand jury did not perform its constitutionally assigned role of deciding whether Mr. Green should be held to answer for a capital crime, the death notice should be dismissed and the indictment's "special findings" stricken.

3. The Government Did Not Obtain an Indictment Alleging All of the Elements of a Capital Crime

Even if the grand jury had been aware that its "special findings" would hold Mr. Green to answer for a capital crime, the indictment should be dismissed because the government did not present the third element necessary for the grand jury to make the decision as to whether Mr. Green should be subject to the death penalty, *i.e.*, whether the

⁴ Public opinion polls "consistently show that opposition to capital punishment runs around 45% to 55% for black Americans, while for whites it is much lower, ranging from 17% in 1992 to 24% in 2000. That is opposition to the death penalty is about twice as high among black Americans as among white, and a much larger majority of whites than blacks support the death penalty." Rory Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DePaul L. Rev. 1591, 1596 (2004).

aggravating factors outweigh the mitigating factors sufficiently to justify a sentence of death. The failure of the grand jury to examine all relevant factors to determine if the death penalty was justified conflicts with the framers' intent, discussed above, that the grand jury retain the power to decide which defendants should receive a sentence of death upon conviction. Moreover, as shown above, it violates Mr. Green's Fifth and Sixth Amendment rights to have all elements of the crime submitted to the grand jury for its consideration. *See Jones v. United States*, 526 U.S. at 251-52.

C. *Ring v. Arizona* Has Rendered the Federal Death Penalty Act of 1994 Unconstitutional and the Act May Not Be Saved by Prosecutorial or Judicial "Construction" That Creates a New Criminal Offense.

1. Introduction

As indicated above, the *Ring* decision established that mental state and statutory and even non-statutory aggravating factors operate as elements of a greater offense of capital murder. It is plain, then, that in federal cases, where the Indictment Clause of the Fifth Amendment applies, all the elements of federal capital murder must be alleged by indictment. However, it is not for the courts to state what those elements are, and thereby "enact" a new criminal offense, or to engraft onto the Federal Death Penalty Act a process never contemplated by Congress, i.e., the involvement of a grand jury in distinguishing the few federal homicide defendants who must face the death penalty from the many who will not.

On the contrary, under the doctrine of separation of powers, which reserves exclusively to the Legislative Branch the task of legislating, Article I, as well as the non-delegation doctrine and the long-established federal constitutional rule prohibiting judge-made "common law" criminal offenses, the FDPA cannot, in the aftermath of *Ring*, be substantially rewritten

by the government. Thus, the "doctrine of constitutional avoidance" has no proper role to play in this analysis. A statute whose terms and structure are unambiguous and indicative of conscious congressional choices, is not properly subject to judicial construction in derogation of those legislative choices. It is one thing for a federal court to "fill in the blanks" where a statute is susceptible of more than one interpretation, or silent on a particular issue. It is quite another for a court to strike down one section of a statute and then allow the government to decide what will go in its place.

Ring has invalidated much of the FDPA's procedure governing how prosecutors go about the decision of targeting Defendant A for capital punishment while skipping over Defendant B or Defendant C. The government tacitly recognizes that because statutory intent and aggravating facts are now, under *Ring*, "essential elements" of an offense of capital murder, the Indictment Clause requires that these elements be charged not by the prosecution but by the grand jury. The Government tacitly seeks to fix the problem in the statute by bringing the grand jury into the charging process, notwithstanding the fact that the FDPA authorizes no such role and, indeed, sets forth a wholly different process.

The complex statutory and constitutional problems that *Ring* poses for the FDPA cannot be solved simply by a superceding indictment. This is so because *Ring*, dealing as it does with the definition of a "higher" criminal offense of capital murder, is not simply a decision about criminal procedures, but is first and foremost a decision involving substantive criminal law. Therefore, Congress, not the Executive or Judicial Branches, must correct the constitutional flaws in the statute and determine the elements of the new offense of federal capital murder and the procedures appropriate for the trial of such offenses.

2. The Implications of *United States v. Jackson*

In *United States v. Jackson*, 390 U.S. 570 (1968), the Supreme Court considered Fifth and Sixth Amendment challenges to a sentencing provision that authorized the death penalty only upon a jury's recommendation. The Court held that this provision unconstitutionally burdened the rights of the accused to proof beyond a reasonable doubt and to a jury trial because avoidance of the death penalty could only follow a plea of guilty or a waiver of trial by jury. *Id.* at 581-82. In an effort to salvage the death-penalty provision, however, the Government proposed a number of alternative "constructions" of the statute and cited *ad hoc* procedures developed by other district courts' remedies for the constitutional problems. *Jackson* rejected each approach in favor of legislative, not judicial, action. *Id.* at 572-81.

In approaching the limits of judicial authority to construe legislation, even where such construction would "save" a statute from unconstitutionality, the *Jackson* Court pointed out that the kidnaping statute "sets forth no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or one who pleads guilty." *Id.* at 571. Applying *Jackson's* analysis to the issue at hand, it may be seen that once the practice of having government attorneys allege aggravating factors and essential facts is found unconstitutional, the FDPA "sets forth no procedure" for charging these facts. As *Jackson* warned, "[t]o accept the Government's suggestion that the jury's sentencing role be treated as merely advisory would return to the judge the ultimate duty that Congress deliberately placed in other hands." *Id.* at 576.

Then there is the question of what role the grand jury might play. It might be that,

presented with the option, Congress, in light of the change of law from *Walton v. Arizona*, 497 U.S. 639 (1990), to *Ring*, would choose to enact a comprehensive death penalty scheme that allocated a role to the grand jury similar to that implied by the government's indictment. However, it is also entirely possible that Congress would choose to enact a wholly new and different scheme which fully defined the new offense of "capital murder," specified its elements, and set forth comprehensive procedures for grand jury consideration of those cases. Whatever Congress might do, however, this Court should not pause to analyze any proposed fix by the government. As in *Jackson*, "[i]t is unnecessary to decide here whether this conclusion would follow from the statutory scheme the Government envisions, for it is not the scheme that Congress enacted." *Id.* at 573.

It is one thing to fill a minor gap in a statute to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality.

Id. at 580. See also *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) (rejecting Government's suggestion that statute could be "construed" to allow judicial rather than executive obscenity determinations because "it is for Congress, not this Court, to rewrite the statute.").

3. The Relaxed Evidentiary Standard

The FDPA states that the rules of evidence do not apply at a capital sentencing hearing. 18 U.S.C. §3593(c) provides, in pertinent part, that information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. This section violates the

Constitution. Although the Second Circuit ruled otherwise in *United States v. Fell*, 360 F.3d 135 (2d. Cir 2004), this decision, resting as it does on the assumption that the reliability test of the FDPA was sufficient to regulate the admission of testimonial statements at a penalty phase, cannot be reconciled with *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), let alone with *Crawford v. Washington*, 541U.S. 36 (2004), in which the Court held that a testimonial statement, that was not previously subject to cross examination, may not be introduced against a criminal defendant, whether a judge finds them reliable or not. It is hardly surprising that Congress failed to require adherence to the rules of evidence including constitutionally compelled protections against unreliable hearsay testimony when it enacted the FDPA, because when it did so, it believed itself to be doing no more than fashioning sentencing procedures, and so was required to satisfy only the Eighth Amendment's constraints on sentencing, rather than the constitutional provisions relevant to proof of the "functional equivalent of an element." See *Ring*, 536 U.S. at 609. Beyond its narrow holding, then, *Ring*, has introduced the question of what other protections flow to such "functional equivalents," a question with which federal courts are only beginning to grapple.

The Federal Rules of Evidence are applicable to all criminal trials. Fed. R. Evid. 1101. All essential elements of an offense must be proven within the rules of evidence. But 18 U.S.C. §3593(c) permits introduction of evidence at the penalty trial, notwithstanding the Federal Rules of Evidence. Information "may be excluded only if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." *Id.* This means that aggravating information can, according to the statute, be provided without complying with the Federal Rules of Evidence. As a result, the procedures for

proving an aggravating factor or other essential elements in the all-important death penalty hearing, are less reliable than in all other federal criminal (or civil) trials. A relaxed evidentiary standard denies federal capital defendants procedural rights granted to defendants in even misdemeanor trials. Congress did not intend this result.

Previously, the Supreme Court has recognized that the mode of proof at the guilt or innocence stage of a trial is more demanding than sentencing. *Williams v. New York*, 337 U.S. 241, 246 (1949) ("Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations."). Congress enacted both federal capital sentencing schemes with this in mind. "The Federal Rules of Evidence are critical to the conduct of criminal trials to enable truth [to] be ascertained and proceedings [to be] justly determined." Fed. R. Evid. 102." *United States v. Pitera*, 795 F. Supp. 546 (E.D. N.Y. 1992) (distinguishing capital sentencing procedure from adjudication of guilt, and quoting *Williams*, supra.).

If the elements of a capital offense are required to be plead by indictment, and proven beyond a reasonable doubt, then due process requires they be subject to the same manner of proof that every other essential element requires. See *In re Oliver*, 333 U.S. 257, 273 (1948). The Federal Rules of Evidence must apply to proof of statutory and non-statutory aggravating factors and other elements of the capital offense. The FDPA's abandonment of the rules of evidence at the capital sentencing hearing violates due process.

a. The Second Circuit's *Fell* Decision and the Effect of *Crawford v. Washington*

In *United States v. Fell*, 360 F.3d 135, (2d. Cir 2004), the Second Circuit found that the reliability test of the Federal Death Penalty Act of 1994 ("FDPA"), was sufficient to

regulate the admission of testimonial statements. On March 8, 2004, one week after the opinion in *Fell*, the Supreme Court found in *Crawford v. Washington*, 541 U.S. 36 (2004), that leaving the admission of a testimonial statement to an individual judge's determination of reliability violates the Confrontation Clause to the Sixth Amendment.

The Second Circuit's error was to treat the procedures of the FDPA merely as a sentencing hearing. As the Panel itself recognized, in *Ring*, the Supreme Court held that the aggravating factors necessary for imposition of the death penalty under Arizona's analogous state death penalty act *were elements of a capital crime*, such that they had to be submitted to a jury and proved beyond a reasonable doubt in conformity with the reasoning of *Apprendi*. 360 F.3d at 142 (emphasis added). Subjecting one element of a crime to a less exacting evidentiary standard than other elements is unprecedented in American and English law. The FDPA procedure is unconstitutional because determining an element of a crime during a sentencing hearing denies a defendant the protections of the guilt phase of trial.

In *Fell*, the statement at issue in the penalty phase was a confession taken by law enforcement officers from Fell's then deceased co-defendant, Lee. *United States v. Fell*, 217 F.Supp. 2d 469, 485 (D. Vt. 2002). The government intended to use the statement at the sentencing hearing to prove aggravating factors alleged in the indictment. *Id.* The Second Circuit upheld the district court's discretion to admit such a statement and concluded that Congress' prohibition of the Federal Rules of Evidence at a federal death penalty sentencing trial did not invalidate the FDPA because "under the FDPA Standard, judges continue their role as evidentiary gatekeepers and [pursuant to the balancing test set forth in 18 U.S.C. § 3593(c)] retain the discretion to exclude any type of unreliable or prejudicial evidence that

might render a trial fundamentally unfair...” *Id.* 360 F.3d at 145. The Second Circuit stated:

In the instant case, then, if the district court were to conclude that admission of statements by Fell's deceased co-defendant would unfairly prejudice Fell, it would be obligated by the FDPA Standard to exclude them. We, of course, take no position on the question.

United States v. Fell, 360 F.3d at 145. But the Supreme Court held a week later in *Crawford* that a testimonial statement that was not previously subject to cross examination may not be introduced against a criminal defendant, whether a judge finds it reliable or not. In light of *Crawford*, The Second Circuit's instruction to the district court is an incorrect statement of law.

Pursuant to *Crawford*, the statement at issue in *Fell* is testimonial. *Crawford*, 541 U.S. at 52 (Statements taken by police officers in the course of interrogations are also testimonial even under a narrow standard). *Fell* never had the opportunity to cross examine Lee. The statement is therefore inadmissible to prove the government's case. *Crawford*, 541 U.S. at 51-52. The district court may not admit the statement, even if the court finds no prejudice to *Fell*, and even if the court finds the statement is reliable.

Besides providing the district court with the wrong standard on remand, the Second Circuit's opinion misunderstands the core of the district court's ruling: that the determination of a defendant's guilt cannot be left to a judge who is then allowed to implement his or her own standard of reliable evidence. *Crawford* clearly states that principle:

Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross

examination.

Id. 541 U.S. at 61. The FDPA has no procedural guarantees. It obviates all rules of evidence and leaves admissibility completely up to a judge. It is in conflict with the protections of constitutional law.

The Supreme Court's historical examination in *Crawford*, clearly indicated that the Framers never intended individual judges to decide what manner of evidence is reliable, and what evidence is not, when a criminal defendant is being tried:

We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands.

Id. 541 U.S. at 67. The FDPA is exactly the type of procedure the Framers would not have trusted. One judge decides which evidence is reliable. Then other judges review those decisions. The weight each judge ascribes to a particular piece of evidence is as diverse as the judges themselves. That is a completely arbitrary and irrational standard, particularly in a capital case. Moreover, it is a standard applied to only one element of capital murder, the statutory aggravating factors. Such a procedure is completely unprecedented. Subjecting one element of a crime to a less exacting evidentiary standard than the other elements has no foundation in American or English law.

The entire basis for the Panel's decision to uphold the FDPA was based on two equally flawed premises. The first, was that a judge's determination of reliability is sufficient to protect a defendant from evidence that violates constitutional protections. The second, was

that the FDPA is merely a sentencing hearing and therefore trial protections do not apply.

Both propositions are inconsistent with *Ring*, *Sattazahn*, and now, *Crawford*.

The FDPA determines whether a defendant is guilty of aggravating factors during a sentencing hearing. See 18 U.S.C. § 3591 et. seq. and *United States v. Jones*, 527 U.S. 373, 376-77 (1999). Proof of the aggravating factors is necessary before a defendant can be found guilty of capital murder. *Sattazahn v. Pennsylvania*, 537 U.S. at 111 (Opinion of Scalia, J.) ("...for purposes of the Sixth Amendment's jury-trial guarantee the underlying offense of murder' is a distinct, lesser included offense of murder plus one or more aggravating circumstances"). In every other kind of criminal case, a trial determines a defendant's guilt. A sentencing hearing selects a punishment for a guilty defendant. Therefore, a federal capital defendant is prosecuted for elements of capital murder without the trial protections available even to a person charged with a simple misdemeanor.

In federal capital trials, the following anomalies occur: At the guilt phase, a jury may only convict a defendant of a crime that is less than capital murder. *Sattazahn*, 537 U.S. at 111. (Opinion of Scalia, J.) After conviction of this lesser crime, the jury then enters a sentencing phase. 18 U.S.C. § 3593(d). Only then are the capital elements decided. 18 U.S.C. § 3593 (c). The hearing is not subject to the rules of evidence or the presumption of innocence. *Id.* The jury receives the evidence of guilt along with other information supporting a death sentence. *Jones*, 527 U.S. at 376-77. This other information usually includes the effect on the victim's family and community, *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); predictions of the defendant's future dangerousness, *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994); the defendant's prior uncharged conduct, *Nichols v. United States*, 511 U.S.

738, 747 (1994); and examples of the defendant's bad character, *United States v. Watts*, 519 U.S. 148, 151 (1997), none of which is generally admissible at the guilt phase of the trial. As the *Fell* court aptly put the matter:

Facts relevant to sentencing are far more diffuse than matters relevant to guilt for a particular crime. Adjudications of guilt are deliberately cabined to focus on the particulars of the criminal conduct at issue and to avoid inquiries into tangential matters that may bear on the defendant's character. See *id.* By contrast, in determining the appropriate punishment, it is appropriate for the sentencing authority, whether jury or judge, to consider a defendant's whole life and personal make-up.

360 F. 3d at 143

The jury then deliberates upon two very different issues: whether the defendant is guilty of capital murder and whether a death sentence is appropriate. *Jones*, 527 U.S. 373 at 376-77. Although eligibility for the death penalty must be decided beyond a reasonable doubt, the selection of punishment may be decided by a preponderance of evidence. *Harris*, 536 U.S. at 558.

To the extent that capital elements are proven, it is a sentencing hearing in name only. Calling it a sentencing hearing does not resolve the discord caused by deciding the capital elements without traditional trial protections.

Even outside the particular facts of *Fell*, however, there are substantial unanswered questions about how Congress would choose to structure federal sentencing hearings in the absence of the relaxed evidentiary standard that suggest the difficulty that simply excising it would create. Would Congress want the relaxed evidentiary standard nevertheless to continue to be applied to mitigating factors, on the theory that *Ring* applies only to facts that increase, as opposed to reduce, the maximum sentence? Would it want to attempt to fashion a different

evidentiary standard for non-statutory aggravating circumstances, on the theory that these factors do not constitute the "functional equivalent of elements" like the statutory aggravators?

Given the complexity of the FDPA's multiple layers and disparate types of factual findings, the district court's reluctance in *Fell* to proceed in the absence of any legislative direction from Congress as to what evidentiary limitations and burdens to apply to which findings is understandable. The problem is compounded, moreover, because the simplest solution applying the Federal Rules of Evidence to proof of all of factual findings in the sentencing hearing potentially runs afoul of the constitutional requirement that the defendant be permitted the widest possible latitude in introducing mitigating evidence. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam)(application of capital sentencing hearing of state hearsay rule to exclude co-defendant's admission to killing of victim denied due process).

For all of these reasons, in the aftermath of *Ring*, only Congress can select a method of determining the existence of those aggravating factors on which the defendant's eligibility for execution depends.

4. The Presumption of Innocence Problem

The presumption of innocence is a basic tenet of American law. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). The presumption of innocence "is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895).

No presumption of innocence exists at a sentencing hearing. *Delo v. Lashley*, 507 U.S. 272, 278-279 (1993). By definition, a defendant may only be sentenced after guilt is

determined. Sentencing considerations which are not elements "are thus not subject to the Constitution's indictment, jury and proof requirements." *Harris v. United States*, 122 S.Ct. 2406, 2412 (2002).

In *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978), the defendant was convicted of robbery. At trial, he testified that he was not present at the victim's home at the time of the robbery. *Id.*, at 480. Although the trial court gave an instruction on reasonable doubt, the defendant's requested instruction on the presumption of innocence was denied. *Id.*, at 481. The Supreme Court found that failure to give the instruction denied the defendant due process of law. In reaching this conclusion, the Court weighed aspects of the trial that vitiated against the presumption of innocence: i.e., the prosecutor's argument condemning all defendants, the skeletal reasonable doubt instruction, and the swearing match between victim and defendant. *Id.*, at 486-489.

The FDPA is worse than the denial of a jury instruction in *Taylor v. Kentucky*, *supra*. Not only is a defendant without the presumption of innocence, but the jury is told the defendant is guilty. No instruction on reasonable doubt can remedy that defect. Even if an instruction on the presumption of innocence were given regarding the capital elements, it could not overcome the fact that the jury has already found the defendant guilty of a crime.

Congress did not intend that proof of guilt and punishment be commingled. Congress created a complex sentencing procedure called the Federal Death Penalty Act. There is nothing in the Act meant to affect the proof of guilt. The only procedure in the Act that occurs before conviction is when the Attorney General provides notice to the defendant that the death penalty will be sought. That requires no pleading or appearance in court. The very first

sentence of the Act states, "A defendant who has been found guilty of..." 18 U.S.C. 3591 (a). Trials assure that innocent persons are not convicted. Sentencing hearings assure appropriate sentences for guilty defendants. They are two different procedures with two different goals. The Federal Death Penalty Act, therefore, denies the defendant the presumption of innocence as to the sentencing elements of the offense, in stark violation of the defendant's right to due process.

The problem with the FDPA goes well beyond the one statement at issue in *Fell*. Issues of guilt, aggravation, and death penalty appropriateness simply do not receive adequate constitutional protection at a federal sentencing hearing. If there is no procedure that will allow the FDPA to operate as it is written, and no discrete portion that may be severed, then it is unconstitutional. See *City of Chicago v. Morales*, 527 U.S. 41, 55-56, n. 22 (1999). Only Congress has the authority to rewrite the law. *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

Congress could have done what Justice Scalia suggested in *Ring*: "plac[e] the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." *Ring*, 536 U.S. at 612 (Scalia, J., concurring). Congress did not. We can only assume Congress meant to meet constitutional requirements at the time they enacted the FDPA. See *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). Those requirements have now changed because of *Ring*, *Sattazahn*, and *Crawford*. We do not know which of these policy choices Congress would have made, in light of the new treatment of sentencing hearing findings as elements of a capital crime.

Accordingly, and for all of the foregoing reasons, this Court should declare the Federal

Death Penalty Act unconstitutional under *Ring*, *Sattazahn*, and *Crawford*. Alternatively, and at the very least, the Court should dismiss the Notice of Special Findings and the Governments Notice of Intent to Seek the Death Penalty because of the grand jury's failure to find statutory and non-statutory aggravating factors and its failure to find that aggravating factors outweigh mitigating factors, and that the death penalty is justified.

Conclusion

For these reasons, the defendant, Steven Dale Green, respectfully requests that the Court (1) declare the Federal Death Penalty Act unconstitutional for failure to comply with *Ring v. Arizona*, (2) strike the "special findings" from the indictment, and dismiss the death notice, because the government interfered with the grand jurys performance of its Fifth Amendment duties and responsibilities, and (3) dismiss various aspects of the governments death notice for failing to meet the requirements of the Federal Death Penalty Act and the United States Constitution.

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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.

/s/ Scott T. Wendelsdorf