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 AND TO STRIKE THE DEATH PENALTY NOTICE AS INADEQUATE

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 and to strike the government's notice of intent to seek the death penalty herein as improper and inadequate.

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

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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©, 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).

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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;

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> 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

The Special Findings in the Indictment Should Be Stricken and the Death Penalty Notice must Be Dismissed Because it Fails to Provide the Notice Required by the Constitution and 18 U.S.C. 3593(A)

A. The Special Findings and the Death Notice Fail to Meet General Legal Requirements of Fair Notice and Should Be Dismissed

In any case where the government intends to seek the death penalty, notice is mandated by both statutory and constitutional provisions. First, 18 U.S.C. §3593(a)(2) requires that notice be filed "setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a death sentence." In addition, 18 U.S.C. §3591 incorporates the provisions of §3593, thereby also requiring that the government provide notice of the "mental state" factor it intends to prove. Finally, notice is also a bedrock principle under the Due Process Clause and the Sixth Amendment, each requiring that a defendant receive sufficient notice to enable him to prepare a defense. *See Simmons v. South Carolina*, 512 U.S. 154, 175 (1994) ("'[c]apital sentencing proceedings must of course satisfy the dictates of the Due Process Clause', and one of the hallmarks of due

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process in our adversary system is the defendants ability to meet the States case against him") (OConnor, J., concurring) (quoting *Clemons v. Mississippi*, 494 U.S. 738, 746 (1990)).

It is undisputed that the State does not provide constitutionally adequate notice for a guilt prosecution by simply alleging an abstract crime, unconnected to any time, place, victim, or other identifying circumstance. *Lincoln v. Sunn*, 807 F.2d 805, 812 (9th Cir. 1987), cert. denied, 498 U.S. 907 (1990). "Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are." *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974), citing *In re Gault*, 387 U.S. 1, 33-34 n. 54 (1967).

Due process thus requires that the defendant "be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given at the earliest practical time, and in any event sufficiently in advance of the hearing to permit preparation." *In re Gault*, 387 U.S. at 33. The notice "must set forth the alleged misconduct with particularity.'" *Id*. See also *Brock v. Roadway Express*, 481 U.S. 252, 264 (1987); *Bowman Transp. v. Arkansas-Best Freight Sys*, 419 U.S. 281, 288, n. 4 (1974)(notice must apprize defendant of "the factual material on which the [fact-finder] relies for decision so he may rebut it.").

The Supreme Court has long held that the minimum requirement for adequate notice is that the government's pleading must "contain[] the elements of the offense intended to be charged, and sufficiently apprise[] the defendant of what he must be prepared to meet. *Russell v. United States*, 369 U.S. 749, 763; 825 S.Ct. 1038 (1962) (internal quotations omitted). A pleading "not framed to apprise the defendant with reasonable certainty, of the nature of the

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accusation against him is defective, although it may follow the language of the statute." *Russell*, 369 U.S. at 765 (internal quotations and citations omitted). Further, if the pleading simply tracks the language of the statute, "it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Id*. at 765. *See also Hamling v. United States*, 418 U.S. 87, 117-18 (1974).

The Supreme Court has identified several reasons for these strict notice rules. First, as noted above, due process entitles the defendant to notice of the charges against him so that he can prepare his defense. Merely citing the statutory language is insufficient because it does not provide the "'facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged."' *Russell* 369 U.S. at 765 (citation omitted). In addition, the prosecutor gains an unfair advantage in being "free to roam at large--to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." *Id*. at 768. Furthermore, the lack of specific notice may hamper the ability of all parties to ensure that the defendant is not placed in jeopardy twice for the same offense. *Id*. at 765. Finally, the failure to allege specific acts in the pleading runs the risk that the jury will convict based on evidence that was not presented to the grand jury. See *Id*. at 770.

Although all of the foregoing cases deal with indictments, "there is ... a powerful analogy between charging instruments (i.e., indictments) and Death Notices. Both protect the fundamental fairness of proceedings at which criminal defendants are called upon to defend

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themselves. Both serve to set defendants on notice so that they can adequately prepare to defend themselves. Defendants have a right to receive both prior to trial. And violation by the government of those rights, if properly objected to, will invalidate the attendant proceedings." *United States v. Ferebe*, 332 F. 3d 722, 727, 736 (4th Cir. 2003).

Prior to *Ring*, the Eleventh Circuit concluded in *United States v. Battle*, 173 F.3d 1343, 1347 (11th Cir. 1999), that "[t]he Government is not required to provide specific evidence in its notice of intent." As support for its conclusion, *Battle* relied exclusively on *United States v. Nguyen*, 928 F.Supp. 1525 (D.Kan.1996), in which a district court rejected the argument that a death notice was constitutionally defective because it failed to detail the evidence the government intended to offer in support of its aggravating factors. *Id*. at 1545-46. The court in *Nguyen* reasoned that "[t]he factors in the death notice are not 'elements of the offense charged such that they must be presented to a grand jury, and that Fed.R.Crim.P. 7, ... by its terms, applies only to indictments and informations.'" *Id*. at 1545. The reasoning of *Battle* and *Nguyen* is obviously abrogated by *Ring v. Arizona*, upon which the government in this case relied in including the Notice of Special Findings in the indictment itself. As part of the indictment, the special findings are clearly governed by Fed.R.Crim.P. 7 and the constitutional notice rules set forth above. *See United States v. Sampson*, 245 F. Supp. 2d 327, 333 (D. Mass. 2003)("[b]ecause the intent and aggravating factors requirements of the Federal Death Penalty Act must now be treated procedurally as elements of an offense for which the death penalty is authorized, a grand jury must agree with the Department of Justice that it is permissible and appropriate that a defendant be exposed to the death penalty *and give*

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him notice in the indictment of the alleged grounds for imposing it") (emphasis supplied) .

Accordingly, as the court explained in *United States v. Llera Plaza*, 179 F. Supp.2d 464, 471 (E.D. Pa. 2001),

> 18 U.S.C. 3593(a) does not require the government to produce the details of its sentencing phase evidence.... However, the court agrees ... that the Constitution requires that the defendants be given some notice of the type of evidence the government intends to introduce at the sentencing phase.

To the same effect is *United States v. Rodriquez*, 380 F. Supp. 2d 1041 (D.N.D. 2005) where the court concluded that "the Supreme Court has recognized that a defendant's ability to defend against the case presented by the prosecutor, which includes advocating for a particular punishment, is one of the 'hallmarks' of due process. .... Therefore, the Court has determined that formulating some procedure to require the government's disclosure of its underlying factual basis for certain allegations in the indictment and notice of intent to seek a sentence of death is appropriate." Accord, *United States v. Cooper*, 91 F.Supp.2d 90, 101 (D.D.C.2000); *United States v. Glover*, 43 F.Supp.2d 1217 (D.Kan.1999); *United States v. Kaczynski*, 1997 WL 716487, p. 20 (E.D.Cal. Nov. 7, 1997).

The "Special Findings" and the Notice of Intent to Seek the Death Penalty filed in this case are thus crucial documents, for they not only advise the defendant that he may face execution at the end of the case but they plead the grounds upon which the government will seek the death penalty. Thus, as a matter of fundamental fairness and as guaranteed by the Due Process Clause of the Fifth Amendment, the notice provision of the Sixth Amendment,

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and the requirement of heightened reliability implicit in the Eighth Amendment, the Notices, to constitute notice at all, must advise the defendant sufficiently of the nature of the allegations he faces so that he may defend against them.

"(A)t a minimum, due process requires a defendant to receive sufficient notice of aggravating factors to enable him to respond and to prepare his case in rebuttal" and "to allow the court to ensure the reliability of the evidence presented." See, *Illera Plaza*, 179 F. Supp. 2d at 470-471; see also, *Kaczynski*, 1997 WL 716487, p. 19 (E.D. CA 1997) ("due process requires a defendant to receive sufficient notice of aggravating factors to enable him to respond and to prepare his case in rebuttal.").[1]

Furthermore, "the Constitution requires that the defendants be given some notice of the type of evidence the government intends to introduce at the sentencing phase" and "the NOIs, in conjunction with the indictment, must inform the defendants of the theories and facts that the

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[1] As explained in *United States v. Kaczynski*, 1997 WL 716487, p. 20 (E.D. CA 1997):

> Absent further revelations by the government, Defendant may be forced to defend against these allegations for the first time during the prosecutor's case-in-chief at sentencing. This raises the specter of unfair surprise and potentially prejudices Defendant's ability to defend against the government's efforts to impose the death penalty. Contrary to the government's suggestion, the fact that the precise acts and/or events may have been disclosed in the course of discovery does not obviate the need for a more specific notice. Even if the government has provided Defendant with documents detailing specific acts, the government has not yet indicated which acts and/or events it intends to use at sentencing. In fact, the characterization of the discovery provided as extensive lends further support for requiring the government to identify the particular acts upon which it will rely. Extensive discovery could make it difficult for Defendant to ascertain which precise discovery will be used against him.

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government will use to establish each aggravating factor in this case." *Id*. at 472.

In the present case, the Special Findings and the governments death penalty notice are insufficient either to apprise Mr. Green of the nature of the gateway and aggravating factors upon which the government will rely to sentence him to death, or to enable him to prepare his defense to these allegations.

B. The Alleged Mental State does not Provide Sufficient Notice

At the outset, the notices do not provide any meaningful notice of the factual basis for the crucial mental state "gateway" element required for death penalty eligibility under 18 U.S.C. §3591(a)(2). Instead, the notices merely set out the generic language of the statute that the defendant is guilty under all conceivable theories. The court should not permit the Government to take this "shotgun" approach any more than it would permit such an approach in a run of the mill civil case. See e.g. *Anderson v. District Bd. of Trustees of Cent. Florida Com. College*, 77 F.3d 364 (11th Cir. 1996)("Anderson's complaint is a perfect example of shotgun' pleading, in that it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief. Under the Federal Rules of Civil Procedure, a defendant faced with a complaint such as Anderson's is not expected to frame a responsive pleading. Rather, the defendant is expected to move the court, pursuant to Rule 12(e), to require the plaintiff to file a more definite statement.")

The government has failed to allege any factual basis for the mental state factors. This is not adequate notice. *See Rodriquez*, 380 F. Supp. 2d at 1058 (request for information regarding the specific acts the government intends to rely upon to prove the threshold findings

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of 18 U.S.C. §§ 3591(a)(2)(C) and (D) "is justified to fulfill Defendant's objective of meaningful notice to adequately prepare a defense and meet the allegations against him."); *Glover*, 43 F. Supp. 2d at 1233 ("the defendant is entitled to know the underlying factual basis for each of the gateway [mental state] factors").

The clear purpose of the notice rules as they apply to the gateway factors of 18 U.S.C. §3591(a)(2) is to provide a level of constitutionally meaningful notice as to the mental state with which the Government contends he acted. This cannot happen where the notices simply allege in the generic language of the statute that all mental states apply to his conduct. Moreover, by alleging all four mental states set forth under 18 U.S.C. §3591(a)(2), rather than identifying the applicable one, the government has added nothing to the bare notice already provided by the statute itself. Accordingly, the mental state factors must be stricken from the indictment and the death notice.

C. The Generic Statutory Aggravating Factors Fail to Provide Adequate Notice

The statutory aggravating factors merely set forth the language of the statute in vague, generic terms and contain no factual allegations. For instance, in the indictment and in the Death Notice, it is alleged that the offense was committed in "an especially heinous, cruel, and depraved manner, in that it involved torture and serious physical evidence." That is constitutionally insufficient notice. *See Rodriquez*, 380 F. Supp. 2d at 1058 (request for information regarding the specific acts the government intends to rely upon to prove that the defendant killed in an especially heinous, cruel, and depraved manner, involving torture and serious physical abuse "is justified to fulfill Defendant's objective of meaningful notice to

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adequately prepare a defense and meet the allegations against him."). The same is true with respect to the allegation that the killings were "substantially planned and premeditated." The generic use of that aggravator fails to provide constitutionally sufficient notice. *See Rodriquez*, 380 F. Supp. 2d at 1058. (request for information regarding the specific factual basis the government intends to rely upon to prove the substantial planning and premeditation aggravating factor of 18 U.S.C. § 3592(c)(9). " is justified to fulfill Defendant's objective of meaningful notice to adequately prepare a defense and meet the allegations against him.").

D. The Alleged Non-Statutory Aggravating Factors Do No Provide Sufficient Notice

The generic allegations in the Death Notice concerning the alleged non-statutory aggravating factors are equally lacking in specificity:

1. The Victim Impact Allegations Are Too Vague

The "victim impact evidence" non-statutory aggravating factor is substantially vague in using such general terms as "personal characteristics" and "family." With the exception of the two minor children referenced in Section III B5 of the Notice of Intent to seek the Death Penalty (R. 70 Notice of Intent to Seek the Death Penalty), the allegations that unspecified members of the families of a homicide victim have suffered unspecified injury, harm and loss is so general as to violate due process. It fails to state, for example, which members of the families have suffered and the nature of their suffering.

Several courts have found such generic language inadequate because it does nothing to guide the defendants penalty phase preparation or assist the court in performing the crucial task of limiting the scope of victim impact evidence or determining if it is indeed aggravating.

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For example, in *Glover*, 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. 43 F. Supp. 2d at 1224. The 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 said:

> [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. S*ee also Rodriquez*, 380 F. Supp. 2d at 1058. (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;" *Illera Plaza*, 179 F.Supp.2d at 475 ("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. Bin Laden*, 126 F. Supp.2d 290, 304 (S.D.N.Y. 2001) ("[a]n oblique reference to victims injury, harm, and loss,

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without more, does nothing to guide Defendants' vital task of preparing for the penalty phase of trial"); *Cooper*, 91 F. Supp.2d at 111 (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 victims personal characteristics that the government intends to prove").

E. The Death Notice Must be Dismissed due to These Insufficiencies

The lack of adequate notice as to the mental state threshold and victim impact aggravating factor alleged in the death notices becomes clear when contrasted to what is usually required at a non-capital trial. Even in a non-capital case, when the government intends to present evidence of "other crimes, wrongs, or acts" of the defendant, the government is required to provide pretrial notice of the "general nature of any such evidence it intends to introduce at trial." Fed. R. Evid. 404(b). The FDPA should not be interpreted as allowing the government to provide less notice of alleged aggravators for the penalty phase of a capital trial, where a jury determines whether the defendant shall live or die. The death notices in this case fail to provide notice sufficient to permit the defendant to know what he must be prepared to meet and are therefore invalid under the Due Process Clause of the Fifth Amendment and the Sixth and Eighth Amendments. *See State v. Ortiz*, 639 P.2d 1020, 1033 (Ariz. 1981) (due process in death penalty sentencing hearing requires prosecution to disclose aggravating circumstances and evidence prosecution will use).

Alternatively, in the event the notices are not dismissed, the court should require the government to provide sufficient details and information concerning the nature of the mental

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state and aggravating factors alleged in the notice. *See e.g. United States v. O'Driscoll*, 203 F. Supp. 2d 334, 341, 353 (M.D. Pa. 2002) (ordering government to provide defendant and court with a written statement describing the proposed testimony of each victim impact witness it intends to call during the penalty phase of the trial); *United States v. Llera Plaza*, 179 F. Supp.2d 464, 475 (E.D. Pa. 2001) (ordering government to submit outline of proposed victim impact evidence); *Glover*, 43 F. Supp. 2d at 1224-1228 (requiring government to set forth factual basis for various alleged aggravating factors); *Bin Laden*, 126 F. Supp. 2d at 304 (ordering government to provide bill of particulars specifying alleged injury, harm, and loss and identifying number of victim impact witnesses to be called); *Cooper*, 91 F. Supp. 2d at 111 (requiring government to provide information concerning the scope of injuries and loss suffered by each family member and the personal characteristics of the victim it intended to prove). Requiring the government to provide more information about its anticipated evidence not only ensures that the defendant has a fair opportunity to object or rebut the government's evidence, but will also facilitate this Court's duty to monitor the government's evidence and ensure that it is relevant, probative, reliable, and otherwise admissible under the provisions of 18 U.S.C. § 3593.

II. THE GOVERNMENT IMPROPERLY ALLEGES FOUR MENTAL STATES IN THE DEATH NOTICE

The indictment (Paragraph 42(b - e) (R. 36 Indictment) and death notice (Section IA-D) (R. 70 Notice of Intent to Seek the Death Penalty) allege that Mr. Green committed the offenses with all four of the mental states set forth in 18 U.S.C. § 3591(a)(2)(A)-(D). That provision of the notice should be stricken because a person cannot simultaneously possess

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four different mental states. Even if the notice is not flawed for its illogic in alleging different mental states or for inadequate notice, the jury should not be allowed to find all of these mental states, because to do so impermissibly skews the process toward death. Although the mental state factors set forth in section 3591(a)(2) are not aggravating factors under the statute, a jury will likely treat findings on the mental state factors as aggravation related to the circumstances of the offense when weighing the aggravating and mitigating factors to determine the appropriate sentence. The presence of more than one factor will therefore arbitrarily skew the sentencing process in favor of death.

In *United States v. Tipton*, 90 F.3d 861 (4th Cir.1996), the Fourth Circuit held it was error for the trial court to instruct the jury that it must find at least one of the statutory intent elements listed in 21 U.S.C. § 848(n)(1). Under Section 848, the four intent elements (which are similar to the ones enumerated in the FDPA) are aggravating factors and are considered with other aggravating factors when weighed by the jury against mitigating factors. The jury in *Tipton*, which recommended a death sentence, found that all four intent circumstances existed and then weighed all four with the other aggravating factors found to exist. The Fourth Circuit held that "[t]o allow cumulative findings of these intended alternative circumstances, all of which do involve different forms of criminal intent, runs a clear risk of skewing the weighing process in favor of the death penalty and thereby causing it to be imposed arbitrarily, hence unconstitutionally." *Id.* at 899. The court noted that a proper instruction would have advised the jury that it could only find one of the intent factors as a basis for its findings.

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In *United States v. Cooper*, 91 F. Supp. 2d 90 (D.D.C. 2000), the court refused to apply *Tipton* to an FDPA case because,

> [t]he FDPA differs from the ADAA [21 U.S.C. 848(e)-(p)] in that the intent elements are not aggravating factors to be weighed against mitigating factors. If the jury finds one or all four of the factors, there is no risk of skewing because the jury finds intent, and then starts with a clean slate in evaluating separate aggravating factors.

Id. at 110. *Accord United States v. Jackson*, 327 F.3d 273 (4th Cir. 2003) (no error in submitting factors to jury when not used in weighing process).

This view simply does not conform to the reality of a jury deciding a capital case under the FDPA. A death-qualified jury that has convicted the defendant and then found four aggravated and overlapping mental states is incapable of the mental gymnastics necessary "to start with a clean slate," especially since the other aggravating and mitigating factors are weighed in the same proceeding. As stated in *Bruton v. United States*, 391 U.S. 123, 135 (1968), "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical human limitations of the jury system cannot be ignored." Indeed, an empirical study of capital jury decision making shows that

> many jurors reached a personal decision concerning punishment *before* the sentencing stage of the trial, *before* hearing the evidence or arguments concerning the appropriate punishment, and *before* the judge's instructions for making the sentencing decision. Moreover, most of the jurors who indicated a stand on punishment at the guilt stage of the trial said they were absolutely convinced of their early stands on punishment and adhered to them throughout the course of the trial.

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William J. Bowers, Marla Sandys and Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Pre-dispositions, Guilt--Trial Experience, and Premature Decision Making*, 83 Cornell L.Rev. 1476, 1477 (1998) (emphasis supplied). This and similar studies strongly refute any suggestion that a capital jury that has found the defendant guilty of a murder and then found multiple aggravating mental states will start the weighing process with a clean slate.

The government labels the mental states as proportionality factors in the death notice, which reflects an understanding that such factors are essential to ensure that the death penalty is not grossly disproportionate to the crime. *See Tison v. Arizona*, 481 U.S. 137 (1987). In order for the statutory mental state requirement to carry out its constitutional function, the mental state must be alleged with specificity. Accordingly, this Court should require the government to elect which mental state to submit to the jury upon conviction, thereby best serving the purpose of 18 U.S.C. § 3591.

Conclusion

For these reasons, the defendant, Steven Dale Green, respectfully moves the Court for an order dismissing the "special findings" from the indictment, and striking the notice of intent to seek the death penalty due to constitutionally insufficient 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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