IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI	)	

STANDBY COUNSEL'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS NOTICE OF INTENT TO SEEK PENALTY OF DEATH

Pending before the Court is the defendant's Motion to Dismiss the Notice of Intent to Seek Penalty of Death in this case. In that motion, the defendant has argued that the government is unable to satisfy the requirements for death eligibility under the FDPA – that the defendant participated in an act which directly resulted in the deaths of the victims. Standby counsel file this Supplemental Memorandum in Support of the Motion to Dismiss in light of the Supreme Court's decision in *Ring v. Arizona*, ___ U.S. ___, 2002 U.S. LEXIS 4651, on June 24, 2002.

In *Ring*, the Supreme Court held that, under the Sixth Amendment to the United States Constitution, "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" 2002 U.S. LEXIS 4651 at *44 (*quoting Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)). Consequently, the Sixth Amendment "requires that they be found by a jury." *Id.*, 2002 U.S. LEXIS 4651 at *44.

The Arizona scheme required that, for the defendant to be death eligible, the sentencing judge was required to find at least one enumerated aggravating factor. *See id.*, 2002 U.S. LEXIS 4651 at

*17-18. At the sentencing hearing, the judge found two aggravating factors – "that Ring committed the offense in expectation of receiving something of 'pecuniary value, ... [and] that the offense was committed 'in an especially heinous, cruel or depraved manner.'" *Id.*, 2002 U.S. LEXIS 4651 at *21-22. It was the finding of those factors by a judge alone, consistent with Arizona law, which the Court found unconstitutional.[1]

It is clear that the government will concede that the FDPA is unconstitutional to the extent that it does not provide for indictment by the grand jury on aggravating factors. However, it is not for these prosecutors, or for that matter, the various United States Attorneys collectively, to rewrite the FDPA, nor is that the province of this or any court to do so. Rather, it is only Congress which has the power to amend the statutory scheme contained in the FDPA.[2] That is true because *Ring* is fundamentally a decision about the substance of criminal law, not merely procedures, requiring changes to the elements of death eligible offenses under federal law. It is also true because, as a result of those substantive changes, the procedures in the FDPA require amendment.

While the government has apparently recognized the need to indict the defendant on aggravating factors, it has not given any indication that it recognizes the numerous other problems posed by *Ring*, including questions about which aggravating factors must be included in the indictment, whether the defendant must plead to those factors, whether the lessened evidentiary standard remains

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[1] The FDPA and the Arizona capital scheme are similar in that each lists death as a theoretical sentence in the statute defining the offense, and then includes aggravating factors which are necessary to actually establish death eligibility in a separate statute.

[2] "All legislative Powers herein granted shall be vested in a Congress of the United States." Article 1, §1, United States Constitution

applicable to some or all aggravating factors, and, if so, to the presentation of mitigating evidence, and as to any changes in the two phases of the trial. As more fully explained below, the complex statutory and constitutional problems posed by *Ring* in relation to the FDPA are unlikely to be solved by the government's simplistic solution of a superceding indictment.

I. THE FEDERAL DEATH PENALTY ACT IS UNCONSTITUTIONAL

Left unaddressed by the Supreme Court in *Ring* was whether a grand jury must consider and indict as to the aggravating factors upon which the government will rely. The Court noted that the issue presented by Ring was "tightly delineated." *Id.*, 2002 U.S. LEXIS 4651 at 26 n.4. Among the related issues which the Court noted was not presented was whether "his indictment was constitutionally defective." *Id.* Of course, in *Ring*, the issue would have been whether the Fourteenth Amendment would require that the aggravating factors be included in the indictment. *See id.* Although the Court did not reach that issue, it noted parenthetically that the Fourteenth Amendment does not make the Fifth Amendment grand jury requirements applicable to the states. *Id.* (*citing Apprendi*, 530 U.S. at 477 n.3).

Here, however, the Fourteenth Amendment is not the issue. Rather, the question is whether the grand jury requirement of the Fifth Amendment requires that the aggravating factors upon which the government intends to rely in seeking the death penalty against Mr. Moussaoui be the subject of grand jury consideration and indictment. That question plainly must be answered affirmatively. The very premise of the Court's decision in *Ring* is that, however denoted by the particular statutory scheme, aggravating factors are "the functional equivalent of elements of the offense." Consequently, those factors must be presented to the grand jury and included in the indictment. *See Jones v. United*

States, 526 U.S. 327, 229 n.6 (1999) (*cited in Ring*, 2002 U.S. LEXIS 4651 at *31)); *Hamling v. United States*, 418 U.S. 87, 117 (1974) (holding that indictment must set forth "those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished"). *See also*, *United States v. Williams*, 152 F.3d 294, 299 (4th Cir. 1998) ("To pass constitutional muster, an indictment must "... indicate the exact elements of the offense and fairly inform the defendant of the exact charges, ...").

It is clear that, in light of *Ring* and its necessary implications, the FDPA is unconstitutional on its face. The FDPA does not define aggravating factors as elements of the capital offense and, consequently, does not provide for grand jury consideration of aggravating factors, or for the inclusion of such factors in the indictment. Rather, it treats aggravating factors strictly as "sentencing factors," committing to "the attorney for the government" the sole responsibility for determining which statutory aggravating factors will be included in the Notice of Intent to Seek a Penalty of Death and even what the nonstatutory aggravating factors will be. It, therefore, commits to the government the ability to determine upon what factors a sentence of death may be predicated, 18 U.S.C. § 3593(a); *Jones v. United States*, 527 U.S. 373, 377 n.2 (1999), subject only to the court's determination of constitutional adequacy. *See, e.g.*, *United States v. Friend*, 92 F. Supp.2d 534, 541-42 (E.D.Va. 2000) (*discussing inter alia Tuilaepa v. California*, 512 U.S. 967, 972 (1994); *Arave v. Creech*, 507 U.S. 463, 474 (1993)). Committing to the prosecution the power to determine what are the "elements" of a capital offense is plainly incompatible with the constitutional rule set forth in *Ring*.

A. *RING* ESTABLISHED A RULE OF SUBSTANTIVE CRIMINAL LAW WHICH ONLY CONGRESS CAN APPLY TO THE FDPA

While the government is correct in recognizing that, after *Ring*, aggravating factors in a federal capital prosecution must be approved by the grand jury and included in the indictment, it is incorrect in believing that it can cure the constitutional defects in the statute and in this case by *sua sponte* returning to the grand jury for a superseding indictment. Because *Ring* is, first and foremost, a decision of substantive constitutional criminal law, rather than simply a decision about criminal procedures, it is the legislative branch, *i.e.*, Congress, not the executive or judicial branch, which must correct the constitutional flaws in the statute.

The essence of criminal law is the establishment and definition of criminal offenses and the penalties applicable to them. Ever since the landmark case of *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (Marshall, CJ), it has been clear that only Congress is vested with this power. For an act to be criminal, "the legislative authority of the Union must first make an act a crime, fix a punishment to it, and declare the Court that shall have jurisdiction of the offense." "...[N]o one doubts the *power of Congress* to 'create, define, and punish, crimes and offenses, whenever they shall deem it necessary and proper by law to do so." Simply put, "'the power of punishment is vested in the legislative, not in the judicial department.'" *United States v. Laub*, 253 F. Supp. 433, 456 (E.D.N.Y. 1966) (*quoting United States v. Wiltberger*, 5 Wheat. (18 U.S). 76, 95 (1820)). *See also Bousley v. United States*, 523 U.S. 614, 620-21 (1998) ("For under our federal system it is only Congress, and not the courts, which can make conduct criminal") (*citing United States v. Lanier*, 520 U.S. 259, 267-68 n.6 (1997); *Hudson*, 11 U.S.

(7 Cranch) at 34). "It requires no further citation to support the equally cardinal principle that the power of punishment is not vested in the executive department." *Laub*, 253 F. Supp. at 456.

The *Ring* Court noted that, in *Jones*, 526 U.S. at 229, it had concluded that the federal carjacking statute, which included higher maximum penalties based on the degree of injury inflicted, defined "three distinct offenses" rather than "a single crime with a choice of three maximum punishments." *Ring*, 2002 U.S. LEXIS 4651 at *30-31. As a result, the Court had concluded that the "facts ... necessary to trigger the escalating maximum penalties fell within the jury's province to decide." *Id.*, 2002 U.S. LEXIS 4651 at *31.

The *Ring* Court was compelled to address in detail the apparent conflict between its decisions in *Apprendi* and *Walton v. Arizona*, 497 U.S. 639 (1990), in which the Court had upheld the same capital sentencing scheme challenged in *Ring*, where the sentencing judge, rather than a jury, had to make the factual findings upon which death eligibility was predicated. *See, Ring*, 2002 U.S. LEXIS 4651 at *27-28. Ultimately, the Court held that *Walton* was incompatible with *Apprendi* and it, therefore, overruled *Walton*. *See Ring*, 2002 U.S. LEXIS 4651 at *37, 44. In reaching that conclusion, the Court repeatedly noted that its decision was animated by the principle that sentencing factors which increase maximum punishments, however denoted, establish distinct offenses with distinct elements, *see Ring*, 2002 U.S. LEXIS 4651 at *30-39, just as it had concluded in *Jones*. Quoting *Apprendi*, 530 U.S. at 494 n.19, the Court stated that a "sentence enhancement" which increases "the maximum authorized statutory sentence ... is the functional equivalent of an element *of a greater offense* than the one covered by the jury's guilty verdict." *Ring*, 2002 U.S. LEXIS 4651 at *39 (emphasis added). The Court adopted Justice O'Connor's view, also expressed in *Apprendi*, that

Arizona's capital murder statute "'authorizes a maximum punishment of death *only in a formal sense*.'" *Ring*, 2002 U.S. LEXIS 4651 at 37 (emphasis added) (*quoting Apprendi*, 530 U.S. at 541 (O'Connor, J., dissenting)). *See also*, *Ring*, 2002 U.S. LEXIS 4651 at *39 (*quoting Apprendi*, 530 U.S. at 495) ("'Merely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense'").

Thus, *Ring* is not simply a case about rules of criminal procedure. Rather, it addresses the fundamental criminal law question of whether a fact which increases the maximum punishment applicable to a crime actually creates a new and distinct crime, one which, as noted above, is "a greater offense than the one covered by the jury verdict."

If, as must be concluded from the *Ring* trilogy,[3] the aggravating factors under the FDPA are elements of a greater offense than that with which this defendant -- and, indeed, presumably every federal capital defendant -- has been charged, and if, as the government apparently concedes, the FDPA is unconstitutional after *Ring*,[4] then it is undeniable, under the doctrine of Separation of Powers, that *only Congress* can cure the constitutional defects in the statute.[5] Thus, the government here *can*

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[3] *Ring*, *Apprendi* and *Jones*.

[4] This concession is consistent with the government's position in *United States v. Cotton*, 112 S.Ct. 1781, 1785 (2002), where it conceded that, in light of *Apprendi*, it was error not to include in an indictment drug quantities which raised the maximum possible punishment.

[5] Indeed, in *Ring* itself, 2002 U.S. LEXIS 4651 at *41, the Court noted that it had *"suggest[ed]"* in *United States v. Lopez*, 514 U.S. 549, 561-62 (1995), that the "addition to [the] federal gun possession statute of [an] 'express jurisdictional element' requiring connection between [the] weapon and interstate commerce would render [the] statute constitutional under [the] Commerce Clause." That suggestion, of course, was directed to the legislature, for the Court knew that the judicial

not redefine the elements of the offenses created by Congress with which the defendant has been charged by simply returning to the grand jury in an attempt to expand the scope of the indictment. Only Congress can create the greater offenses the prosecution here envisions.

That Congress did not envision that, with passage of the FDPA, it was creating new, death eligible, "greater offenses" is apparent.[6] Most obviously, it abandoned application of the Rules of Evidence to the establishment of the aggravating factors. *See* 18 U.S.C. § 3593(c) (allowing for admission of "information" notwithstanding rules of evidence). It is inexplicable why, if Congress contemplated that it was creating and defining the elements of greater offenses, rather than simply providing sentence enhancements, that it would have made the Rules of Evidence applicable to some elements of the offense (*i.e.*, those in the definition of the lesser offenses), but not those in the greater (death eligible) offenses. Moreover, Congress certainly knew that, if they were elements of an offense, the aggravating factors would have to be passed upon by the grand jury and included in the indictment. *See, e.g.*, *Morrissette v. United States*, 342 U.S. 246, 263 (1952) (Congress presumed to be aware of state of the law at time it acts); *Edelman v. Lynchburg College*, 122 S.Ct. 1145, 1151-52 (2002) (same), yet it included no such provisions in the FDPA and, in direct conflict with such a procedure, provided only for aggravating factors fashioned by the prosecution and included in a mere notice.

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branch, like the executive branch, had no authority to redefine the elements of the relevant offense.

[6] Congress's intent in this regard is informative, although, for the reasons set forth in *Ring*, it is not determinative. It was, of course, free to include death penalty enhancers in a separate "sentencing" statute. The Supreme Court did not find objectionable Arizona's system because its statutory scheme, like the federal scheme, was structured in that fashion. That is precisely the sort of arbitrary distinction that the Court rejected in holding that death penalty aggravating factors are elements of the offense regardless of how they are characterized by the legislature.

Without question, Congress, acting in the context of *Walton*, rather than *Jones*, *Apprendi* and *Ring*, did not contemplate that it was creating new, greater offenses.

The fact that Congress did not intend the scheme which the prosecutors would create by simply going to the grand jury to obtain yet another superceding indictment provides strong support for the conclusion that only Congress can cure the constitutional infirmities of the FDPA.[7]

> Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. *Garcia v. United States*, 469 U.S. 70, 75 [ ] (1984); *United States v. Turkette*, 452 U.S. 576, 580 [ ] (1981). "[O]nly the most extraordinary showing of contrary intentions" in the legislative history will justify a departure from that language. *Garcia*, 469 U.S. at 75[ ]. This proposition is not altered simply because application of a statute is challenged on constitutional grounds. Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. *Heckler v. Mathews*, 465 U.S. 728, 741- 742 [ ] (1984). Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution. *United States v. Locke*, 471 U.S. 84, 95-96 [ ](1985). Proper respect for those powers implies that "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 [ ] (1985)**.**

United States v. Albertini, 472 U.S. 675, 679 (1985). *See also Department of Housing and Urban Dev. v. Rucker*, 122 S. Ct. 1230, 1235-36 (2002) (stating that the canon of constitutional avoidance "has no application in the absence of statutory ambiguity"). Thus, the

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[7] Since only Congress can cure the defects in the statute, the government would have no lawful basis for returning to the grand jury to address the problems created by *Ring* and, thereby, create an opportunity to exploit the defendant's delusional and self-destructive desire to testify before the grand jury.

court cannot interpret § 3593(a) to allow for indictment by grand jury, since doing so would ignore the ordinary meaning of the language used in the statutory provisions.

B. ONLY CONGRESS CAN CURE THE UNCONSTITUTIONALITY OF THE FDPA EVEN IF THERE ARE ONLY PROCEDURAL DEFECTS

Assuming *arguendo* that the constitutional defects in the FDPA are properly cast as procedural, rather than substantive, irregularities, the conclusion remains that it is beyond the authority of the executive or judicial branches to cure those defects by amending its indictment in the absence of appropriate amendment to the Act by Congress. The changes necessitated by *Ring* are too many and too interrelated to allow for the "quick fix" envisioned by the government. Indictment by the grand jury as to aggravating factors would leave unaddressed the question of which aggravating factors should be passed upon by the grand jury and included in the indictment, the statutory factors alone or both the statutory and nonstatutory factors.[8] So, too, the government's 'solution' to the FDPA's constitutional infirmities would leave unaddressed other implications of presenting the aggravating factors to the grand jury while keeping the statute itself intact, including, *inter alia*: whether, if aggravating factors are included in the indictment, the defendant is to be called upon to plead to those factors; whether the lessened evidentiary standard remains applicable to all aggravating factors, to none of those factors, or to only the nonstatutory factors; whether, if the Rules of Evidence are now applicable to the hearing in which the government must prove the aggravating factors, they also apply to the defendant's presentation of mitigating evidence, or to his rebuttal of aggravating evidence; whether the jury is to

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[8] The constitutional answer to this question is not addressed in *Ring*. The question remains after *Ring* whether it applies only to eligibility factors or to both eligibility and selection factors. *See Buchanan v. Angelone*, 522 U.S. 269 (1997) (discussing difference between such factors).

make findings as to some or all of the aggravating factors during the guilt/innocence phase, or whether there must be a trifurcated, rather than a bifurcated, trial. None of these difficult questions can be answered by the government's intended unilateral solution to the immediate problems posed by *Ring*.

The simple fact is that the FDPA is an integrated procedure governing many different aspects of the application of capital punishment in federal court, only one aspect of which appears, on its face, to be unconstitutional in light of *Ring*, but many aspects of which may be subject to amendment in light of *Ring*. As demonstrated above, it is not up to prosecutors, or to the courts, to try to fill the procedural void created by *Ring* by constructively amending the FDPA, particularly where, as here, they propose to create new procedures where there is an extant, albeit partially unconstitutional statutory scheme created by Congress. The power to establish procedures for the determination of the aggravating factors to be applied in any given case, and the numerous other aspects of the statutory scheme implicated by *Ring*, belongs to Congress.

It must be recognized that, as a corollary to the Separation of Powers problems posed by the prosecution's proposed unilateral *Ring* fix for the FDPA, as discussed above, the non-delegation doctrine[9] precludes the executive branch or the judiciary, whether acting individually, or in tandem, from substituting their judgment for that of Congress in relation to prescribing procedures for application of the federal death penalty.

> It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional

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[9] "The nondelegation doctrine originated in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

> delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature.
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> * * *
>
> That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.

Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). In *Mistretta*, the majority concluded that the nondelegation doctrine had not been violated in connection with the creation of the United States Sentencing Commission and its resulting guidelines. In so doing, however, the Court reaffirmed the principle that "'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." 488 U.S. at 371-72 (*quoting Field v. Clark*, 143 U.S. 649, 692 (1892)). It concluded that the nondelegation doctrine had not been violated only because, in creating the Commission, Congress had "[laid] down by legislative act an intelligible principle to which the [Sentencing Commission] is directed to conform, ..." 488 U.S. at 372 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)); *Mistretta*, 488 U.S. at 374.

Of course, *Mistretta* involved only the delegation of authority to determine sentencing factors within the limits of a legislatively determined "intelligible principle." It certainly did not include the authority to determine elements of an offense, as would be the case under the FDPA if it were

ultimately determined that nonstatutory aggravating factors qualify as elements post-*Ring*.[10] Plainly, Congress must determine whether, in light of *Ring*, such factors must be submitted to the grand jury, rather than simply being determined by the Executive Branch, as Congress has provided under the FDPA. *See* 18 U.S.C. § 3592(c) ("The jury ... may consider whether any other aggravating factor for which notice has been given exists"). Of course, this court need not resolve this issue now, but neither may it tolerate the prosecution's usurpation of the power of Congress to address the reformulation of the statutory scheme it, not the Executive Branch, designed – a scheme designed in such detail that it even specifies the right of each party to rebut the evidence of the opposing party and the order of argument by counsel. *See* 18 U.S.C. § 3593(c).

If, indeed, Congress could not delegate to the Executive Branch the power to rewrite the FDPA, which it clearly could not, the Executive Branch, including these prosecutors, surely can not arrogantly assume that power for themselves by substituting new procedures for those provided by Congress.[11]

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[10] In *Touby v. United States*, 500 U.S. 160, 164 (1991), the Court upheld Congress' delegation to the Attorney General of the authority to *temporarily* classify a drug as a controlled substance in order to bring its use and/or distribution within reach of criminal prosecution. This delegation of authority was based on the advent of "designer drugs" which were only marginally different in chemical composition from drugs that were already controlled. The Court held that the intelligible congressional principle at issue not only meaningfully constrained the Attorney General's discretion to define criminal conduct but that, in addition, "Congress ha[d] placed multiple specific restrictions on the Attorney General's discretion to define criminal conduct, ..." *Id.* at 167.

[11] This is true even though they surely could get away with it when their only obstacle is a pro se alien defendant who surely would not know any better.

CONCLUSION

For the foregoing reasons, in addition to those presented in the defendant's Motion to Strike Notice of Intent to Seek Penalty of Death, the Court should strike the death penalty in this case and prohibit the government from seeking the death penalty against the defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Standby Counsel's Supplemental Memorandum in Support of Motion to Dismiss Notice of Intent to Seek Penalty of Death was served via hand delivery upon AUSA Robert A. Spencer, AUSA David J. Novak, and AUSA Kenneth M. Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314, and via first class mail upon Zacarias Moussaoui, c/o The Alexandria Detention Center, 2100 Mill Road, Alexandria, VA 22314 this 10th day of July, 2002.

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