UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

United States	:	
	:	
v.	:	**No. 3:02cr7(JBA)**
	:	
Perez, et al.	:	

Ruling on Defendants' Joint Motion Challenging the Constitutionality of the Federal Death Penalty Statute [Doc. # 513], Ruling on Defendant Wilfredo Perez' Motion to Dismiss Aggravating Factors [Doc. # 506], and Partial Ruling on Motion of Defendant Fausto Gonzalez to Dismiss the Death Penalty Notice and Second Superceding Indictment [Doc. # 502].

Defendants Wilfredo Perez and Fausto Gonzalez are charged in connection with the murder of Theodore Casiano with a violation of 18 U.S.C. § 1958 for Conspiracy to Commit Murder-for-Hire and Murder-for-Hire (interstate travel); a violation of 18 U.S.C. § 1959 (VICAR Murder); and a violation of 18 U.S.C. § 924(c) and (j) (Causing Death by Use of a Firearm During a Crime of Violence). Perez is also charged under 18 U.S.C. § 1958 with Murder-for-Hire (interstate facility). The Government seeks the death penalty against these defendants. Defendants challenge the Federal Death Penalty Act in their Joint Motion Challenging the Constitutionality of the Death Penalty ("Joint Motion"), in the Motion of Defendant Wilfredo Perez to Dismiss Aggravating Factors ("Perez Motion"), and in the Motion of Defendant Fausto Gonzalez to Dismiss the Death Penalty Notice and Second Superceding Indictment ("Gonzalez Motion"). For the reasons discussed below,

the Joint Motion and the Perez Motion are denied. The Gonzalez motion is denied in part; the remaining issues he raises remain under advisement.

I. Background

The Federal Death Penalty Act ("FDPA"), 18 U.S.C. §§ 3591 et seq., enacted in 1994, establishes the procedures for the imposition of the death penalty for a variety of federal offenses. If a defendant is convicted of such an offense, the FDPA provides for a "separate sentencing hearing to determine the punishment imposed." 18 U.S.C. § 2593(b). During the penalty phase, the jury must make several findings before determining the sentence. First, to be eligible for the death penalty, a jury must find that the defendant had one of the predicate mental states specified in 18 U.S.C. § 3591(a)(2)(A)-(D).[1] A jury also must find beyond a reasonable doubt at least one of the statutory

[1] Under § 3591(a)(2), the jury must find beyond a reasonable doubt one of the following mental states of the defendant:

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury that resulted in the death of the victim;

(C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a result of the act; or

(D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act.

aggravating factors alleged by the government. See 18 U.S.C. § 3592(c) (listing 16 statutory aggravating factors). If a jury fails to find the requisite mental state or fails to find the existence of a statutory aggravating factor, a death sentence cannot be imposed. See 18 U.S.C. § 3593(e).

In addition, the statute allows the government to allege other aggravating factors even if not specified in the statute, so long as notice to the defendant is provided. A jury must weigh any statutory aggravating factor, along with "any other aggravating factor for which notice has been provided," 18 U.S.C. § 3593(d), against any mitigating factors to determine whether the death penalty is appropriate. See 18 U.S.C. § 3593(e). Aggravating factors must be proven beyond a reasonable doubt, and must be found by a unanimous jury. Mitigating factors, in contrast, must be established by the defendant under a lesser preponderance of the evidence standard, need not be found by a unanimous jury, and may be considered in the sentencing decision by any juror who has found the mitigating factor to exist. See 18 U.S.C. § 3593(d).

II. Discussion

In their joint motion, defendants argue that the Federal Death Penalty Act, 18 U.S.C. §§ 3592 et seq., is unconstitutional on its face, and offer a series of reasons, including the following: (a) defendants argue that there is growing evidence

that modern death penalty procedures fail to avoid death sentences for the factually and legally innocent; (b) the FDPA's incomprehensible sentencing scheme "deprives the jury of the ability to make a reasoned and informed choice between a death sentence and a life sentence;" (c) the FDPA fails to constitutionally narrow the class of persons eligible for the death penalty; (d) the relaxed evidentiary standard available to the government at the penalty trial renders any findings unreliable; (e) non-statutory aggravating factors do not constitutionally limit and guide the discretion of the jury; (f) Congress' delegation to federal prosecutors of the power to define aggravating factors represents an impermissible delegation of legislative power in violation of the separation of powers principle and the non-delegation doctrine; (g) permitting the Department of Justice to define the non-statutory aggravating circumstances after the crime but before trial violates the ban on ex post facto laws; (h) statutory inconsistencies preclude the use of non-statutory aggravating factors; (I) the FDPA authorizes the use of non-statutory aggravating factors without also providing for proportionality review; (j) the death penalty is under all circumstances Cruel and Unusual Punishment; and (k) the FDPA violates binding international law. Defendant Fausto Gonzalez also challenges the FDPA's requirement that factors determining the defendant's eligibility for the death penalty be

decided at a separate sentencing hearing following a finding of guilt as violative of the Fifth and Sixth Amendments. While some of these arguments are contrary to binding precedent and are raised only to preserve the issues for appeal,[2] the following

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[2]The defendants acknowledge that the Second Circuit, in United States v. Quinones, 313 F.3d 49 (2d Cir. 2002, pet. for rehearing denied 317 F.3d 86 (2d Cir. 2003), rejected the claim that growing evidence that innocent people are being executed requires abolition of the death penalty as violative of due process.

The defendants also recognize that their argument that capital punishment under all circumstances constitutes cruel and unusual punishment in violation of the Eighth Amendment is foreclosed by current Supreme Court precedent. See McCleskey v. Kemp, 481 U.S. 279, 300-03 (1987); Gregg v. Georgia, 428 U.S. 153, 168-87 (1976).

Since this motion was filed, the Second Circuit has also rejected the argument that the relaxed evidentiary standard under Section 3593(c) of the FDPA renders the penalty phase unconstitutional. See United States v. Fell, 360 F.3d 135 (2d Cir. 2004). In Fell, the Second Circuit explained that "[w]hile it is true that the [Federal Rules of Evidence] are inapplicable to death penalty sentencing proceedings under the FDPA, the FRE are not constitutionally mandated. Indeed, the FRE are inapplicable in numerous contexts, including ordinary sentencing proceedings before a trial judge. Moreover, the FDPA does not alter a district court's inherent obligation to exclude evidence the admission of which would violate a defendant's Constitutional rights. The admissibility standard set forth in § 3593(c) of the FDPA provides one means of complying with this responsibility." Id. at 137-38 (citation omitted).

In a supplemental memorandum, Gonzalez argues that Fell can be distinguished because, unlike Fell, he does not argue that the rules of evidence are constitutionally mandated, but rather that the FDPA's discretionary evidentiary rules diminish fundamental fair trial rights. As Fell found, however, nothing in the FDPA prevents the trial court from excluding evidence which would violate the defendants' Sixth Amendment right to confront witnesses against them or Fifth Amendment due process guarantees, or which lacks the indicia of reliability required by the Eighth Amendment. Fell is consistent with the Supreme Court's recent decision in Crawford v. Washington, 124 S.Ct. 1354 (2004), which held that "[w]here testimonial statements are at issue, the only

require more discussion.

1. Juror Misunderstanding

After the Supreme Court struck down all existing capital punishment schemes in Furman v. Georgia, 408 U.S. 238 (1972), as arbitrary and capricious in the selection of who received the death penalty, the fundamental principle that has undergirded the modern, post-Furman death penalty jurisprudence is that of "guided discretion." The class of persons eligible for the death penalty must be sufficiently narrow that the juror's exercise of discretion in determining who is sentenced to death is not wholly arbitrary. With this principle in mind, the defendants cite several studies showing that there is "growing empirical evidence that despite elaborate instructional guidance, penalty phase jurors are confused about a number of instructional concepts, among them the meaning of 'mitigation,' 'aggravation,' 'weighing,' and 'life imprisonment without the possibility of parole.'" Def.'s Jt. Mem. [Doc. # 513] at 28. As a result, the defendants argue that the Supreme Court's "fundamental assumptions about capital jurors", which have driven the Court's approval of penalty phase proceedings as properly guiding jurors'

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indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Id. at 1374. As Fell notes, the evidentiary standard in the FDPA is but one way of achieving compliance with constitutional mandates; ultimately the Constitution must govern evidentiary decisions.

discretion, "are undermined . . . to such an extent that the entire federal death penalty scheme should be held violative of the Fifth and Eighth Amendments because a jury instructed pursuant to such a scheme cannot make a reasoned and informed choice between a death sentence and a life sentence without possibility of parole." Id. at 33-34. The defendants note that the Supreme Court in Simmons v. South Carolina, 512 U.S. 154, 169-70 (1994) (plurality opinion), relied on public opinion and juror surveys showing confusion about the term "life imprisonment" in finding that the trial court's failure to instruct the jury that the capital defendant was ineligible for parole constituted a due process violation.

The defendants argue that the problem of juror misunderstanding is particularly great in the context of the FDPA because some of the statutory aggravating factors, such as a crime characterized as "especially heinous," 18 U.S.C. § 3592(c)(6), or as involving "substantial planning and premeditation," 18 U.S.C. § 3592(c)(7), are overly broad, with language that is subject to manipulation. The nonstatutory aggravating factors are even more subject to manipulation, they argue.

The Government contends, however, that "our jury system is predicated on the fundamental truth that courts are capable of fashioning adequate and correct instructions on the applicable

law, which the jury will understand and follow." United States' Resp. to Jt. Mot. [Doc. # 521] at 6 (citing Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983)).

It is well established that "juries are presumed to follow their instructions." Zafiro v. U.S., 506 U.S. 534, 540-41 (quoting Richardson v. Marsh, 481 U.S. 200, 211 (1987)). "The rule that juries are presumed to follow their instruction is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." Richardson v. Marsh, 481 U.S. 200, 211 (1987). Thus, the Supreme Court has also recognized, that "while juries ordinarily are presumed to follow the court's instructions, . . . in some circumstances '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 and human limitations of the jury system cannot be ignored.'" Simmons, 512 U.S. at 171 (quotation omitted). In the death penalty context, the "pragmatic" assumption that jurors will follow their instructions may be called into question if there are real concerns about the ability of a jury to understand its instructions.

In this case, the empirical evidence presented by the defendants is too speculative to make assumptions about what a

properly instructed jury might understand or misunderstand in this case. None of the studies cited questioned federal juries which had been instructed under the FDPA, and none suggest that the common areas of confusion cannot be remedied through better instructions to the jury. At this pre-trial stage, the parties may offer suggestions on how common juror misconceptions about the terms "aggravating," "mitigating," or "weighing," or about other factors for their consideration, might be overcome in this case with more precise juror instructions. See, e.g. Gregg v. Georgia, 428 U.S. 153, 201 (1976) (finding Georgia's "outrageously or wantonly vile" aggravating factor not unconstitutionally vague per se, because the Georgia courts could narrow its meaning with instructions to the jury); Godfrey v. Georgia, 446 U.S. 420, 432 (1980) (plurality opinion) (invalidating death sentence because there was no evidence that the Georgia courts had provided a narrowing construction to the jury). There is no basis, however, for finding the FDPA "intrinsically incomprehensible" and therefore facially unconstitutional. See United States v. Davis, No. Cr. A. 01-282, 2003 WL 1837701, at * 12 (E.D. La. Apr. 9, 2003) (rejecting similar challenge to FDPA); United States v. Kee, No. S1 98 CR 778 (DLC), 2000 WL 863119 (S.D.N.Y. June 27, 2000).

2. Statutory Aggravating Factors

To be constitutional, a death penalty statute must

"genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); see also Tuilaepa v. California, 512 U.S. 967, 972 (1994) (aggravating circumstance "may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder"); Gregg, 428 U.S. at 196 (a death penalty statute must "narrow the class of murderers subject to capital punishment"). As the Supreme Court explained in Gregg, "Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S. at 189. The idea of guided discretion is given effect "if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." Id. at 192.

Aggravating factors must not only narrow the class of persons eligible for the death penalty, but also may not be unconstitutionally vague. See Tuilaepa, 512 U.S. at 972. When a vague or overbroad factor is used in the sentencing decision, it "creates an unacceptable risk of randomness, the mark of the

arbitrary and capricious sentencing process prohibited by Furman v. Georgia." Id. at 974-75 (citing Furman, 408 U.S. 238).

a. narrowing: The FDPA attempts to narrow the class of persons eligible for the death penalty in two principal ways. First, under the FDPA, a defendant may not be subject to the death penalty unless the government first proves that the defendant acted with a sufficient mental state, ranging from intent to kill, intent to inflict serious bodily harm that resulted in death, intent to participate in an act contemplating that a life would be taken, and intent to engage in an act of violence with "reckless disregard for human life." See 18 U.S.C. § 3591(a)(2)(A)-(D). As these mental states encompass virtually all murders, absent perhaps some types of felony murder, the narrowing function of this requirement is limited. The FDPA also requires, however, that the government prove beyond a reasonable doubt at least one of sixteen statutory aggravating factors before the death penalty may be imposed. See 18 U.S.C. § 3592(c). These statutory aggravating factors relate to the circumstances of the underlying crime or to the defendant's prior criminal convictions.

The defendants argue that these requirements are insufficient to narrow the class of persons eligible for the death penalty, as they are broad enough to apply to essentially any of the vast range of federal offenses where death is provided

for by statute. For example, defendants fault the statutory aggravating factor of "death during commission of" one of twenty federal offenses, ranging from destruction of aircraft or destruction of Government property by explosives, to hostage taking. In addition, the defendants contend that the statutory aggravating factor "substantial planning and premeditation," see 18 U.S.C. § 3592(c)(9), applies to virtually all premeditated killings, and in fact has been alleged as an aggravating factor by the government in the overwhelming majority of federal death penalty prosecutions. See Defendants' Joint Memorandum in Support of the Motion Challenging the Constitutionality of the Federal Death Penalty Statute [Doc. # 514] at 39 (citing Federal Death Penalty Resource Project data).

Taken as a whole, the FDPA requirements provide a principled basis on which to distinguish those persons eligible for the death penalty from all other persons convicted of murder. The statutory aggravating factors isolate particular aspects of the crime, or aspects of the defendant's criminal history, that Congress has deemed make the capital defendant's crime worse, and more deserving of the death penalty, than other murders. For example, defendants' argument that the first statutory aggravating factor, 18 U.S.C. § 3592(c)(1), is unduly expansive because it lists at least twenty federal offenses which may result in the death penalty if death results from the commission

of the offense is unavailing. Apart from the fact that this statutory aggravator is not at issue in this case, the enumerated offenses seem to share a distinguishing characteristic of being more extreme by their nature or context (e.g. terrorism; crimes against members of Congress, Cabinet officers, or Supreme Court Justices; treason; hostage taking; maritime violence; violence at international airports; kidnapping; crimes by prisoners in custody). In addition, the statutory aggravator of "substantial planning and premeditation" serves a narrowing function because "[w]hile many murders may involve some planning, not every murder involves 'substantial' planning." United States v. Frank, 8 F.Supp.2d 253, 278 (S.D.N.Y. 1998)). This Court thus concurs with the conclusion of every court thus far to consider this matter, and finds the FDPA sufficiently narrows the class of persons subject to the death penalty. See, e.g. United States v. Allen, 247 F.3d 741, 761 (8th Cir. 2001), vacated and remanded on other grounds, 536 U.S. 953 (2002); United States v. Jones, 132 F.3d 232, 241, 248-49 (5th Cir. 1998), aff'd on other grounds, 527 U.S. 373 (1999); United States v. Davis, No. Cr. A. 01-282, 2003 WL 1837701, at *12 (E.D. La. Apr. 9, 2003); United States v. Bin Laden, 126 F.Supp.2d 290 (S.D.N.Y. 2001); United States v. Kaczynski, No. CR-S-96-259GEB GGH, 1997 WL 716487, at *18 (E.D. Cal. Nov. 7, 1997); United States v. Cooper, 91 F.Supp.2d 90, 97 (D.D.C. 2000)).

b. vagueness challenge: Defendant Wilfredo Perez has also challenged more particularly the "substantial planning" aggravating factor on grounds that the modifier "substantial" is unconstitutionally vague. See Defendant Wilfredo Perez' Motion to Dismiss Aggravating Factors [Doc. # 506]. Perez argues that the factor "fails adequately to inform juries what the must find to impose the death penalty." Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988).

In assessing a vagueness challenge to an aggravating factor, the "basic principle [is] that a factor is not unconstitutional if it has some 'common-sense core of meaning . . . that criminal juries should be capable of understanding.'" Tuilaepa, 512 U.S. at 973 (quoting Jurek v. Texas, 428 U.S. 262, 279 (1976)). Applying this principle, the Supreme Court has struck aggravating factors describing a murder as "especially heinous, atrocious, or cruel," see Maynard, 486 U.S. at 363-64, or as "outrageously or wantonly vile, horrible and inhuman," see Godfrey, 446 U.S. at 427-33, because, without more direction, jurors' discretion remained unconstitutionally open-ended. Aggravating factors which "leave the sentencer without sufficient guidance for determining the presence or absence of the factor" are unconstitutionally vague. Espinosa v. Florida, 505 U.S. 1079, 1081 (1992).

Here, defendant Perez makes three key arguments in support

of his contention that the word "substantial" does not provide a clear and objective standard for channeling the jury's discretion. He argues first that courts have offered significantly varied interpretations of this term, demonstrating that it is understood and applied inconsistently and arbitrarily. For example, the Tenth Circuit in United States v. McCullah, 76 F.3d 1087, 1110 (10th Cir. 1996), cert. denied, 520 U.S. 1213 (1997), found that the term meant "considerable in quantity: significantly large." Id. (quoting Webster's Ninth New Collegiate Dictionary 1176 (1991)). The Fourth Circuit in United States v. Tipton, 90 F.3d 861, 896 (4th Cir. 1996), cert denied 520 U.S. 1253 (1997), however, found that "substantial" required merely "more than the minimum amount sufficient to commit the offense." The Fourth Circuit's interpretation, Perez argues, so dilutes the meaning of "substantial" that it may be applied to virtually all murders.

This Court need not be concerned with whether the Fourth Circuit's interpretation of the phrase is correct or constitutional, because the plain meaning of "substantial," in this context, is clear. "Substantial" planning or premeditation is that which is "considerable in amount, value and the like; large." Webster's New International Dictionary (2d ed. 1959); see also Oxford English Dictionary (2d ed. 1989) (defining substantial as "of ample or considerable amount, quantity, or

dimensions."). Perez, moreover, has suggested one further refinement of the "substantial planning and premeditation" phrase that the Court finds satisfies many of defendants' remaining concerns about vagueness and overbreadth. As the Florida Supreme Court found in a related context, this phrase may be defined to mean that "the defendant had a careful plan or prearranged design to commit murder before the fatal incident." Jackson v. State, 648 So.2d 85, 87 (Fla. 1994). Defined in such a manner, the aggravating factor is clear, specific, and objective.

The context here is distinguishable from that at issue before the Georgia Supreme Court in Arnold v. State, 236 Ga. 534, 541 (Ga. 1976), in which the Court found that "substantial criminal history" was unconstitutionally vague. While an examination of a defendant's criminal history would involve an unwieldy and subjective review of separate offenses of varying degrees of seriousness, with different sentences, committed over a span of years, an examination of the planning involved in the commission of the crime at hand is more determinate. To determine whether the planning was "substantial," the jury need only consider the elements of the offense, the minimum intent necessary to convict the defendant of that offense, and whether the defendant's actual planning and premeditation was "considerable," or "large" in relation to that which would be necessary to commit the underlying offense. When used in this

context, "substantial" has a "common sense core of meaning." Tuileapa, 512 U.S. at 973.

Second, defendant Perez argues that the "substantial planning and premeditation factor" invites the jury to compare the amount of planning in the case before them to the amount of planning in a "normal" murder, which is beyond the scope of their experience or expertise. This type of comparative analysis is not required, however. As the Tenth Circuit noted, "'substantial' planning does not require 'considerably more planning than is typical' but rather it means 'considerable' or 'ample for the commission of the crime.'" McCullah, 76 F.3d at 1110-11; see also Tipton, 90 F.3d at 896 ("The district court instructed . . . that 'substantial planning means planning that is considerable, or ample for the commission of a crime at issue in this case: murder.'").

Finally, Perez argues that the grand jury's Notice of Special Findings in the Second Superceding Indictment fails to make clear whether the evidence of "substantial planning and premeditation" was limited to that of Perez, or whether it extends to others involved in the conspiracy. The Notice of Special Findings states that "Wilfredo Perez . . . committed the offense after substantial planning and premeditation to cause the death of Theodore "Teddy" Casiano." See Second Superceding Indictment [Doc. # 349] at 7. By the plain meaning of this

phrase, the grand jury found that Perez himself engaged in substantial planning and premeditation. There are no grounds for adopting a more strained interpretation of the grand jury's finding, as this finding in no way suggests that other conspirators besides Perez engaged in the "substantial planning" in question. The aggravating factor enhances Perez's culpability and makes Perez eligible for the death penalty, not the other conspirators, and the inclusion of other conspirators in this finding would thus raise serious constitutional questions.

3. Non-statutory aggravating factors

The defendants argue that Section 3592(c) authorizes the government to unilaterally expand the list of aggravating factors, which "would inject into capital proceedings precisely the uncertainty and disparate case results that Furman found to violate the Eighth Amendment." Defs.' Jt. Mem. [Doc. # 514] at 42. They point out that the statute offers no instruction to prosecutors on how to select non-statutory aggravating factors, and sets no limits on what may be deemed to be "aggravating." The defendants conclude that "[t]o permit different prosecutors, in each individual case, to create and select the factors that may be placed on 'death's scale,' injects the very arbitrariness and capriciousness into the sentencing process that Furman sought to eradicate." Defs.' Jt. Mem. [Doc. # 514] at 43.

The Government argues, however, that the defendants have

failed to recognize the critical distinction between statutory and non-statutory aggravating factors. The purpose of statutory aggravating factors, according to the Government, is to narrow the class of death-worthy individuals from all other persons convicted of murder. The Government contrasts this purpose with that of the non-statutory aggravating factors, which need not serve a narrowing function, since they are meant only to provide jurors with information to allow them to make an individualized determination. The Government's argument is based most notably on Zant v. Stephens, 462 U.S. 862 (1983). As the Supreme Court reasoned in Zant, 462 U.S. at 878-79 (1983):

> [S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.

See also Barclay v. Florida, 463 U.S. 939, 957 (1983) (finding "no constitutional defect in a sentence based on both statutory and nonstatutory aggravating circumstances"); California v. Ramos, 463 U.S. 992, 1008 (1983) ("Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death

is the appropriate punishment."). Thus, according to the Government, permitting the jury to consider non-statutory aggravating factors promotes the constitutional goal of "individualized determination."

There is a well-recognized tension in the case-law between Furman's requirement of "guided discretion," and the concern for "individualized decision-making" identified in later cases.[3] The Supreme Court first made clear the importance of an individualized determination in Woodson v. North Carolina, 428 U.S. 280 (1976), when it rejected North Carolina's mandatory death penalty statute. Subsequently, in Lockett v. Ohio, 438 U.S. 586, 604 (1978), the Supreme Court held that the Eighth Amendment required that the sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for the sentence less than death." (emphasis in original). Essential to the decision was

[3] See, e.g. Walton v. Arizona, 497 U.S. 639, 671-73 (Scalia, J. concurring in part and concurring in the judgment) (arguing that the Court's line of cases requiring individualized decision-making is inconsistent with the requirement of Furman); Callins v. Collins, 510 U.S. 1141, 1129-30 (1994) (Blackman, J., dissenting from petition for writ of certiorari) (concluding that "the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness-individualized sentencing," and that therefore "[f]rom this day forward, I no longer shall tinker with the machinery of death.")

the notion that the "respect due the uniqueness of the individual" required an individualized inquiry into whether a defendant who had been deemed eligible for and deserving of the death penalty should nonetheless be spared.

Supreme Court decisions both before and after Zant have made clear that the constitutional requirement of individualized decision-making is met if a jury is able to consider any aspect of the defendant's history or circumstances of the crime in mitigation. See, e.g., Tuilaepa, 512 U.S. at 971-72 ("What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime. That requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime.") (citations and internal quotation marks omitted); Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990) ("requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence"). The Supreme Court has never found, however, that such an expansive admission of aggravating information about the defendant is constitutionally required. In cases since Zant, the Supreme Court has continued to approve statutes that do not permit consideration of non-statutory aggravating factors. See, e.g. Tuilaepa, 512 U.S. at 969 (approving California death

penalty statute).

As Zant and the other 1983 decisions conclude, consideration of non-statutory aggravating factors, although not constitutionally required, is permitted in the interests of individualized decision-making. But Zant in no way suggests that a Court must allow a jury to consider any non-statutory aggravating factor named by the Government, regardless of its relevance to the question of why the defendant should be sentenced to death, or regardless of the reliability of the evidence offered in support. Indeed, four core constitutional principles have emerged from the Supreme Court's death penalty jurisprudence: to be constitutional, aggravating factors must not be (1) vague, (2) overbroad, (3) irrelevant, or (4) unreliable. See, e.g. United States v. Bin Laden, 126 F.Supp.2d 290, 298 (S.D.N.Y. 2001) (distilling four requirements from review of caselaw); see also Godfrey, 446 U.S. at 433 (aggravating factor of "outrageously or wantonly vile, horrible or inhuman," found unconstitutionally vague); Dawson v. Delaware, 503 U.S. 159, 166 (1992) (stipulation of defendant's membership in white racist prison gang found "not relevant to the sentencing proceeding in this case"); Gardner v. Florida, 430 U.S. 349, 362 (1977) (use of pre-sentence report which was not disclosed to defendant or his counsel in capital case found unreliable, violating defendant's due process rights). These requirements must be met for both

statutory and non-statutory aggravating factors, particularly where, as under the FDPA, the jury is called upon to "weigh" all aggravating factors against any mitigating factors. In Stringer v. Black, 503 U.S. 222 (1992), for example, the Supreme Court noted with regard to a vagueness challenge that "[a] vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Id. at 235. Likewise, in determining what non-statutory aggravating factors are sufficiently relevant and reliable, the fact that the FDPA is a "weighing" statute must be taken into account. See id. at 232 ("[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.").

The Government cites Zant for the proposition that non-statutory aggravating factors do not need to serve a narrowing function. Zant does not establish such a categorical rule, and its approval of the use of non-statutory aggravators as part of individualized decision-making need not be so expanded. The

Georgia statute reviewed in Zant, unlike the FDPA, was not a "weighing" statute, and thus under Georgia's scheme, after finding a defendant "death-eligible," jurors have virtually unlimited discretion in determining whether or not the defendant would be "selected" for the death penalty. Under the FDPA's sentencing scheme, however, discretion continues to be guided even after the jury finds the requisite mental state and statutory aggravating factors that render a defendant "death eligible," because at the "death selection" phase, jurors are specifically instructed to weigh aggravating factors against mitigating factors. In this scheme, non-statutory aggravating factors are relevant only to the extent that they demonstrate why a person deserves a sentence of death — in other words, only to the extent they serve some narrowing function. C.f. Barclay v. Florida, 463 U.S. 939, 958 (1983) (plurality opinion) (approving death sentence in a "weighing" jurisdiction only after finding that the Florida Supreme Court concluded that the sentence would be the same if the sentencer gave no weight to the invalid non-statutory factor); Stringer v. Black, 503 U.S. 222, 232 (1992).

The FDPA expressly permits the exclusion of information if its "probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury," 18 U.S.C. § 3593(c), and in no way restricts judges from making determinations about the vagueness, overbreadth, relevance and

reliability of the non-statutory aggravating factors sought to be placed before the jury. As a result, the FDPA's allowance of non-statutory aggravating factors does not render the statute unconstitutional. Instead, the non-statutory aggravating factors alleged in each particular case must be evaluated on their own merit to ensure that they are not unconstitutionally vague, overbroad, insufficiently relevant to the decision of who should live and who should die, or unreliable.

In his Motion to Dismiss Aggravating Factors, defendant Wilfredo Perez has specifically challenged the non-statutory aggravating factor that the Government has alleged against him. He is charged with committing the offense in connection with his role as "leader of the Perez Organization," which Perez argues is not relevant to the decision of whether he should be selected for the death penalty, and fails to provide a clear and objective standard for the jury. The Government argues, however, that the leadership aggravator satisfies the constitutional requirements. First, the Government argues that the factor has a common-sense core of meaning, because it will require the jury to make findings that there was a racketeering enterprise, that the defendant was the leader of this enterprise, and that the defendant aided and abetted the murder to further his leadership position. Second, the Government argues that this factor is not overbroad, because not every potential death penalty defendant is

the leader of a racketeering enterprise. Third, the Government contends that the factor is relevant to the selection of the death penalty because "leadership" is a reasoned basis for enhanced culpability. As the Government states, "because defendant Wilfredo Perez held authority over other members in the enterprise, he was more culpable than them because he alone held the power to determine the fate of Teddy Casiano's life." United States' Response to Defendant Wilfredo Perez's Motion to Strike Aggravating Factors [Doc. # 522] at 12. Finally, the Government argues that the leadership factor is reliable, and does not create the risk of unfair prejudice, because it seeks only to hold more responsible those persons who are in a position of authority.

Enhanced sentencing for defendants in a leadership position is a standard practice under the federal Sentencing Guidelines, and is recognition of a leader's greater culpability for the acts that subordinates carry out at the leader's behest. In a murder conspiracy, the ability of a leader to use others at his or her disposal to carry out the murder, and the cold remoteness of taking another’s life in this manner, is reasonably viewed as more dangerous and worse than other murders. If, as Perez notes, the jury were permitted to find the presence of the leadership aggravator merely because of a temporal connection between Perez's leadership of the organization and the commission of the

offense alleged, then there would be serious concerns about the relevance of the leadership factor. But the Government does not purport to use a mere temporal connection as the basis for this aggravator, and the jury will not be so instructed. To establish this aggravating factor, the Government will need to prove that Perez aided and abetted the murder in question to further his position as leader of a racketeering enterprise, and that the murder took place at Perez's direction. So construed, the factor is sufficiently determinate, relevant, and reliable for the jury to consider in making its sentencing determination.[4]

4. Non-delegation doctrine

The defendants argue that the virtually limitless discretion that prosecutors have to define aggravating factors constitutes

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[4]Perez also argues that because the grand jury merely found that Perez "committed the offense in connection with his role as the leader of the Perez organization," the Court's narrowing construction of this finding would in fact materially alter the finding, and thus run afoul of Ring, Apprendi, and their progeny. In Ring v. Arizona, 536 U.S. 584, 601 (2002), the Supreme Court found that factors which raise "the ceiling of the sentencing range available," as opposed to simply presenting the jury with a basis for their "choice between a greater and a lesser penalty," must be treated as elements of the offense. As Apprendi thus stated, "[t]he indictment must contain an allegation of every fact which is legally essential to the punishment inflicted." Apprendi v. New Jersey, 530 U.S. 466, 490 n. 15 (2000). Unlike statutory aggravating factors, however, non-statutory aggravating factors do not make a defendant eligible for the death penalty, and thus do not increase the maximum punishment to which a defendant is exposed. As a result, non-statutory aggravating factors are not subject to the requirements of Ring and its progeny. See infra.

an unconstitutional delegation of legislative power to the executive branch, in violation of Article I, § 1 of the U.S. Constitution. Rooted in the principle of separation of powers, the non-delegation doctrine requires that Congress "lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." Mistretta v. United States, 488 U.S. 361, 372 (1989)(upholding Congress's delegation of authority to create sentencing guidelines where Congress had delineated the goals to be achieved, and boundaries of the authority delegated). The defendants argue that "[d]efining what constitutes criminal conduct and setting appropriate sanctions for that conduct is a quintessential legislative decision," and that in delegating this authority in Section 3592(c) by allowing prosecutors to select any other aggravating factor not identified in the statute, Congress gave the Executive no guidance and set no boundaries. Defs.' Jt. Mem. [Doc. # 514] at 44. They argue that the unchecked ability of prosecutors to select non-aggravating factors is particularly problematic because the federal death penalty scheme is a "weighing statute," in which jurors must shift the balance toward death if they find that the factor exists. The defendants acknowledge that the Supreme Court has indicated that states may use non-statutory aggravating factors, see Barclay, 463 U.S. 939; Zant, 462 U.S. 862, and that several

lower courts have found the FDPA is not an unconstitutional delegation of legislative authority, but state that the Supreme Court has never addressed whether the use of such factors in the FDPA violates federal separation of powers principles.

The Government argues first that "[t]he selection of non-statutory aggravating factors is an act of advocacy, not legislation." United States' Response to Defendants Joint Motion Challenging the Constitutionality of the Federal Death Penalty Statute [Doc. # 521] at 23. The Government also argues that "even if Congress had delegated its legislative power, the shift would be permissible, since prosecutorial discretion to select non-statutory aggravating factors remains circumscribed (1) by the notice requirement, (2) by the Supreme Court's death penalty jurisprudence, (3) by the role of the district court as gatekeeper in excluding impermissibly prejudicial information, and (4) by the requirement that the jury unanimously find at least one statutory aggravating factor before considering any non-statutory aggravators." Id.

Virtually every circuit court considering the FDPA or other federal death penalty statute has viewed the prosecution's selection of non-statutory aggravating factors as an act of delegated legislative authority, not mere advocacy. See Jones, 132 F.3d at 239; Allen, 247 F.3d at 758-59; United States v. McCullah, 76 F.3d 1087, 1106 (10th Cir. 1996); but see United

States v. Tipton, 90 F.3d 861, 895 (4th cir. 1996) (assuming, without deciding, that the authorization of non-statutory aggravating factors constituted a delegation of legislative function).

Assuming, therefore, that the selection of non-statutory aggravating factors is a delegation of legislative power, the use of non-statutory aggravating factors does not violate separation of powers principles. Delegation is proper so long as Congress provides an "intelligible principle" to which the delegated authority must conform. See Mistretta, 488 U.S. at 372; Touby v. United States, 500 U.S. 160, 165 (1991) (quoting J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)). Here, the Fifth and Eighth Circuits have pointed to "at least four limitations on a prosecutor's discretion with respect to nonstatutory aggravating factors. A jury must find the existence of at least one statutory aggravating factor before it can even consider proposed nonstatutory factors, a prosecutor can only argue those nonstatutory aggravating factors for which the defendant has been given prior notice, a nonstatutory aggravating factor itself must conform with due process jurisprudence, and a district judge is required to screen out any irrelevant and unduly prejudicial information a prosecutor may try to introduce to the jury in order to prove a nonstatutory aggravating factor." Allen, 247 F.3d at 758-59; see also Jones, 132 F.3d at 239-40.

The most important limitation that Congress placed on the use of non-statutory factors is that they must be "aggravating." While defendants minimize this requirement, the plain dictionary meaning of "aggravating" is a narrow one--"making worse or more heinous." See Webster's New International Dictionary 49 (2d ed. 1959). In the context of a capital trial, aggravating factors are those which make the defendant's conduct "worse or more heinous" than other murders. The FDPA does not give the prosecution "carte blanche in devising non-statutory aggravating factors." Jones, 132 F.3d at 239. Indeed, as the Fifth Circuit stated when discussing limits on the use of non-statutory aggravators, "due process requires that information submitted as aggravating genuinely narrow the class of persons eligible for the death penalty." Id. at 240 (citation omitted). Several district courts have similarly construed narrowly the FDPA's allowance of non-statutory aggravating factors. For example, in United States v. Davis, 912 F.Supp. 938 (E.D. Louisiana 1996), the district court found that statutory aggravating factors:

> provide the framework of relevancy for the nonstatutory factors as well. The ultimate purpose is the same–to provide information to the jury that is relevant to their deciding which convicted capital offenders should be sentenced to death and which should not. If a factor would not have been severe enough, ergo 'relevant' enough, to warrant consideration of the death penalty in the first place, then it likewise should not be a factor in tipping the scale for death in the last analysis.

Id. at 944(citations omitted).

Similarly, in United States v. Gilbert, 120 F.Supp.2d 147, 150-51 (D. Mass. 2000), the district court found that "aggravating factors in death penalty cases must be 'particularly relevant to the sentencing decision,' not merely relevant, in some generalized sense, to whether defendant might be considered a bad person." (citing Gregg, 428 U.S. at 192).

The appropriateness of non-statutory aggravating factors can also be assessed by reference to the statutory factors. As the district court in Davis noted, "[r]oughly half of the statutory factors deal with circumstances of the offense which make the crime itself clearly more heinous. . . . The other half of the statutory aggravating factors deal with the prior criminal history of the defendant, relying almost exclusively on criminal convictions of either very serious or repetitive felony offenses. Each of the statutory factors was intended by Congress to be substantial enough to sustain the death penalty for a particular offender." Davis, 912 F.Supp. at 944. Non-statutory factors, to be "aggravating," must carry similar gravity. So construed, the statute provides an "intelligible principle" for the exercise of Congress's delegated authority, and therefore does not violate the non-delegation doctrine.

5. Ex Post Facto Clause

Article I, Section 9, clause 3 of the United States Constitution provides that "No . . . ex post facto law shall be

passed." Ex post facto laws, as defined by the Supreme Court, are those which "'retroactively alter the definition of crimes or increase the punishment for criminal acts.'" California Dept. of Corrections v. Morales, 514 U.S. 499, 504 (1995) (quoting Collins v. Youngblood, 497 U.S. 37, 41 (1990)). Here, defendants argue that the use of non-statutory aggravating factors in the FDPA violates the ex post facto clause of the Constitution, because the prosecution is able "to manufacture out of whole cloth aggravating circumstances to be applied retroactively to crimes committed before the aggravating circumstances are identified." See Defs.' Jt. Mem. [Doc. # 514] at 48.

In Ring v. Arizona, 536 U.S. 584 (2002), the Supreme Court made clear that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact–no matter how the State labels it–must be found by a jury beyond a reasonable doubt." Id. at 602. Thus, aggravating factors which serve to make a defendant eligible for the death penalty raise "the ceiling of the sentencing range available," as opposed to simply presenting the jury with a basis for their "choice between a greater and a lesser penalty." Id. at 601 (citation and internal quotation marks omitted). Under the FDPA, statutory aggravating factors serve this role of increasing the maximum punishment to which a defendant is exposed, but non-statutory aggravating factors do not. 18 U.S.C. § 3593 (e)

provides as follows:

> If, in the case of . . .(2) an offense described in section 3591(a)(2), an aggravating factor required to be considered under section 3592(c) is found to exist . . . the jury, or if there is no jury, the court, shall consider 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. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.

Thus, under the FDPA, a defendant cannot be exposed to the death penalty if the jury does not find at least one statutory aggravating factor. Once at least one statutory aggravator is found, however, the jury must balance the statutory aggravators, along with any other non-statutory aggravating factor, against any mitigating factors to determine the appropriate sentence. In this scheme, the non-statutory aggravating factors come into play only after death is found to be an appropriate maximum punishment, and serve as factors to be considered as the jury decides between this maximum and the lesser penalty of life imprisonment.

Because non-statutory aggravating factors do not increase the maximum punishment to which a defendant is exposed, they do not violate the Ex Post Facto Clause.

6. Statutory inconsistences

The defendants argue that 18 U.S.C. § 3591 prevents the

government from using non-statutory aggravating factors, and nullifies the general catch-all provision in § 3592 that allows non-statutory factors. Section 3591 states that a defendant "shall be sentenced to death, if, after consideration of the factors set forth in section 3592 . . . it is determined that imposition of a sentence of death is justified." Section 3592(c) lists sixteen statutory aggravating factors and then provides that the jury "may consider whether any other aggravating factor for which notice has been given exists." 18 U.S.C. § 3592(c). Defendants interpret the phrase "factors set forth in section 3592" narrowly, and argue that non-statutory factors are not "set forth" in § 3592, and therefore may not be considered.

Though the statutory language is undeniably imprecise, § 3591 can be reconciled with the statutory provision for the use of non-statutory aggravating factors. The district court in United States v. Llera Plaza, 179 F.Supp.2d 444, 459 (E.D. Penn. 2001), has provided a well reasoned statutory analysis, which this Court now adopts. As Llera Plaza explained:

> Other sections of the FDPA confirm that the phrase "the factors set forth in section 3592," as used in § 3591(a), should be interpreted to include only statutory aggravating factors." For example, elsewhere in the statute, the sentencer is directed to "return special findings identifying any aggravating factor or factors set forth in section 3592 found to exist and any other aggravating factor for which notice has been provided under subsection (a) found to exist." § 3593(d) (emphasis added). In this context, it is clear that the phrase "factor or factors set forth in section 3592" refers only to statutory aggravating factors, since it is explicitly distinguished from the

> phrase "any other aggravating factor for which notice has been provided," referring to non-statutory aggravating factors. In addition, the FDPA also mandates that "[i]f no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law." § 3593(d) (emphasis added). Here again, the phrase "factor set forth in section 3592" clearly refers only to statutory aggravating factors; the FDPA is uniformly understood to preclude the sentencer from imposing the death penalty if it has not found, beyond a reasonable doubt, that at least one statutory aggravating factor exists. See, e.g., Allen, 247 F.3d at 758; Cooper, 91 F.Supp.2d. at 95. Consistency therefore demands that in reading § 3591(a), the phrase "the factors set forth in section 3592" must be taken to comprehend only statutory aggravating factors. However, this is not to say that the defendants are correct that § 3591(a) undermines the government's authority, under the catch-all sentence of § 3592(c), to articulate and attempt to establish non- statutory aggravating factors. To reiterate, § 3591(a) authorizes the sentencer to impose the death penalty if it finds such a sentence justified "after consideration of the factors set forth in section 3592." Section 3591(a) thus affirmatively directs the sentencer to include statutory factors in its calculus; however, it does not prohibit the sentencer from including non-statutory aggravating factors as well--or, for that matter, mitigating factors. Simply because consideration of one type of factor is mandated does not mean that consideration of other types of factors is precluded.
>
> To construe § 3591(a) so narrowly as to nullify the catch-all sentence of § 3592(c) authorizing the use of non-statutory aggravating factors would violate "the longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous." Beck v. Prupis, 529 U.S. 494, 506 (2000); see also United States v. Menasche, 348 U.S. 528, 538-539 (1955). The defendants' argument does not, therefore, present a compelling challenge to the government's authority to articulate non-statutory aggravating factors under the FDPA.

Llera Plaza, 179 F.Supp.2d at 459.

7. Absence of proportionality review

The defendants argue that the fact that the FDPA authorizes

the use of non-statutory aggravating factors without also providing for proportionality review renders it unconstitutional. Defendants acknowledge that in Pulley v. Harris, 465 U.S. 37, 50-51 (1984), the Supreme Court concluded that "[t]here is no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it." See also McCleskey v. Kemp, 481 U.S. 279, 306 (1987) ("Where the statutory procedures adequately channel the sentencer's discretion, such proportionality review is not constitutionally required."). The defendants argue, however, that Pulley v. Harris is not dispositive of the issue of whether proportionality review is required when nonstatutory aggravating factors are put before the jury. In particular, defendants argue that one year before Pulley, the Supreme Court's decision in Zant, 462 U.S. at 890, to allow a jury to consider non-statutory aggravating factors, was constrained by the existence of "mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality." Although the Court in Pulley found that comparative proportionality review is not "required in every case in which the death penalty is imposed," it did not hold that comparative proportionality review is never required under the Eighth Amendment. The Supreme Court was clear, in fact, that it did not decide this issue, stating

simply: "Assuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review, the 1977 California statute is not of that sort." Pulley, 465 U.S. at 51. As defendants note, unlike the FDPA and Georgia's capital punishment scheme in Zant, the California death penalty statute upheld in Pulley did not allow the use of nonstatutory aggravating factors to be considered by a jury.

Nonetheless, as Pulley makes equally clear, the critical constitutional concern is whether the capital sentencing scheme adequately safeguards against arbitrary death sentences, not whether proportionality review exists per se. The issue here, therefore, is whether mandatory proportionality review is necessary in the context of the FDPA, because the FDPA's allowance of consideration of non-statutory aggravating factors creates an undue risk of arbitrary sentencing.

The Court agrees with the Government's contention that the FDPA provides sufficient safeguards to prevent the arbitrary application of the death penalty, including its provision for "meaningful appellate review." For example, the statute directs the appeals court to review the entire record of the case, including the evidence submitted at trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned, and

determine (1) whether the sentence of death was imposed "under the influence of passion, prejudice, or any other arbitrary factor;" (2) whether "the admissible evidence and information adduced does not support the special finding of the existence of the required aggravating factor;" and (3) whether "the proceedings involved any legal error requiring reversal of the sentence." 18 U.S.C. § 3595 (c). Moreover, nothing in the FDPA prohibits the appeals courts from engaging in a proportionality review, should the appeals court determine this to be a constitutional necessity in light of the non-statutory aggravating factors alleged. Thus, the appellate procedures provide adequate protection against arbitrary and capricious sentencing, and the FDPA does not run afoul of the Constitution because it fails to require such proportionality review.[5] See also Allen, 247 F.3d at 760 (holding "that the FDPA has sufficient safeguards--notably the requirements that a jury find beyond a reasonable doubt the existence of one statutory aggravating factor and at least one of four requisite levels of

[5]Appellate review under the FDPA is not mandatory, as a defendant can waive his right to appeal, or can lose his right to appeal by filing after the 30 day deadline. The defendants have not made a separate argument that mandatory appellate review, apart from comparative proportionality review, is constitutionally required. Such a challenge would present standing and ripeness concerns at this stage of the proceedings. See Whitmore v. Arkansas, 495 U.S. 149 (1990); see also U.S. v. Frank, 8 F.Supp.2d 253 (S.D.N.Y. 1998).

specific intent on the part of a defendant, not to mention various other procedural protections--such that proportionality review is not required in order for the FDPA to pass constitutional muster"); U.S. v. Higgs, 353 F.3d 281, 321 (4th Cir. 2003); Jones, 132 F.3d at 240-41.

8. International Law

Defendants argue that the death penalty violates the International Covenant on Civil and Political Rights ("ICCPR") and the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"). In particular, defendants argue that (1) the long delays between sentencing and execution and the conditions of confinement violate Article VII of the ICCPR; (2) the death penalty constitutes an arbitrary deprivation of life in violation of Article VI, Section 1 of the ICCPR; (3) the discriminatory manner in which the death penalty is imposed violates Article II, Section 1, Article XIV, Section 1, and Article XXVI of the ICCPR, along with Articles V and VI of the CERD; (4) the lack of proportionality review violates Article XXVI of the ICCPR and Article 5(a) of the CERD; and (5) the imposition of the death penalty on those who have not actually killed violates Article VI, Section 2 of the ICCPR. Defendants also point to the evolving international consensus against the death penalty, noting that in 1948, only eight countries had abolished the death penalty, but by 1998, 61 countries had

abolished the death penalty and 102 countries had functionally abolished the death penalty.

In ratifying the ICCPR, however, the United States specifically reserved the right to impose capital punishment subject only to U.S. Constitutional restraints. See International Covenant on Civil and Political Rights (ICCPR), opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by United States on Sept. 8, 1992). In particular, the United States stated upon ratification that "the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." See U.S. Senate Resolution of Advice and Consent to Ratification of the ICCPR, 138 Cong. Rec. S4781, S4783 (daily ed. Apr. 2, 1992). Moreover, the United States also qualified its ratification of the ICCPR in its reservation that "the United States considers itself bound by article 7 to the extent that `cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." Id. Thus, the United States has made clear its intention to follow only

U.S. Constitutional mandates in its application of capital punishment, and it is not bound by any contrary interpretation of the ICCPR in this respect.

Moreover, with respect to the ICCPR and the CERD, the United States expressly declared upon ratification that "the provisions of the Convention are not self-executing." See International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the U.N. General Assembly Dec. 21, 1965, 660 U.N.T.S. 195 (ratified by the United States June 24, 1994); U.S Senate Resolution of Advice and Consent to Ratification of the CERD, 140 Cong.Rec. S7634-02 (June 24, 1994); see also U.S. Senate Resolution of Advice and Consent to Ratification of the ICCPR, 138 Cong. Rec. S4781, S4783 (daily ed. Apr. 2, 1992) (declaring that "the provisions of articles 1 through 27 of the Covenant are not self-executing."). The United States thus clarified that the ICCPR and the CERD did not create a private right of action enforceable in U.S. courts. See Flores v. Southern Peru Copper Corp., 343 F.3d 140, 163 (2d Cir. 2003) ("Self-executing treaties are those that 'immediate[ly] creat[e] rights and duties of private individuals which are enforceable and [are] to be enforced by domestic tribunals.' Non-self-executing treaties 'require implementing action by the political branches of government or ... are otherwise unsuitable for judicial application.'") (quoting Stefan A. Riesenfeld,

Comment: The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?, 74 Am. J. Int'l L. 892, 896-97 (1980); Lori Fisler Damrosch, The Role of the United States Senate Concerning "Self- Executing" and "Non-Self-Executing" Treaties, 67 Chi. - Kent L. Rev. 515, 516 (1991)). This Court, therefore, has no authority to decide Perez's claims under the ICCPR and CERD.

B. Motion of Defendant Fausto Gonzalez to Dismiss the Death Penalty Notice and Second Superceding Indictment

In his motion to dismiss the death penalty notice and second superceding indictment, defendant Fausto Gonzalez raises an additional facial challenge to the constitutionality of the FDPA. This ruling will address the motion's facial challenge to the FDPA,[6] while Gonzalez's as-applied challenges remain under consideration.

Gonzalez argues that the FDPA's requirement of a separate

[6]In a supplemental memorandum of law, Gonzalez raises the additional argument that the Government's pursuit of the death penalty against Perez and Gonzalez, but not other equally culpable members of this alleged conspiracy, and not other similarly situated defendants in drug-trafficking related murder prosecutions, undermines the Sentencing Reform Act's, 18 U.S.C. § 3551 et seq., goal of reducing disparities in federal sentencing. The Government, however, has sufficiently distinguished its allegations of Perez's and Gonzalez's involvement in the murder here from that of the other co-conspirators, as Perez is alleged to be the leader who ordered Casiano's murder and Gonzalez is alleged to be the shooter. Gonzalez, moreover, has provided no factual foundation for his more general challenge to the Department of Justice's selection process for seeking the death penalty.

penalty phase runs afoul of the Fifth and Sixth Amendments of the Constitution because it "denies the defendant the presumption of innocence and his right to be found guilty only upon proof beyond a reasonable doubt of all elements of the charged offense, including the requisite mental state and aggravating factors." Memorandum of Law in Support of Motion to Dismiss the Death Penalty Notice and Second Superceding Indictment [Doc. # 503] at 8. The FDPA bifurcates the liability and the penalty phases of the capital trial, requiring findings about the defendant's mental state and the statutory aggravating factors to be made at a "separate sentencing hearing." 18 U.S.C. § 3593(b). Gonzalez argues, however, that once the jury has deliberated and found the defendant guilty, that jury does not continue to presume the defendant innocent, and thus cannot properly apply the constitutionally required reasonable doubt standard to the mental state and aggravating factors.

Gonzalez argues that the Supreme Court's decision in Ring changed the constitutional landscape in ways Congress did not foresee when it passed the FDPA in 1994. Under Ring and its progeny, any sentencing factor which increases the maximum penalty for an offense from life in prison to death, must be treated as an element of the offense and found by a jury beyond a reasonable doubt. See Ring, 536 U.S. at 602 ("If a State makes an increase in a defendant's authorized punishment contingent on

the finding of a fact, that fact–no matter how the State labels it–must be found by a jury beyond a reasonable doubt."); Sattazahn v. Pennsylvania, 527 U.S. 101, 111 (2003) ("aggravating circumstances that make a defendant eligible for the death penalty operate as the functional equivalent of an element of a greater offense.")(quotation omitted); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). Gonzalez contends that a jury after deliberation on the liability evidence would be incapable of considering the aggravating factors in the penalty phase in the same manner, and with the same presumptions, as they considered the elements of the underlying offense during the liability phase. Instructing the jury about these presumptions at the penalty phase would be insufficient, Gonzalez states, because the "purpose of the trial stage . . . is to convert a criminal defendant from a person presumed to be innocent to one found guilty beyond a reasonable doubt." Herrera v. Collins, 506 U.S. 390, 399 (1993). Because the FDPA requires the bifurcation of liability phase and the penalty phase, Gonzalez argues that it cannot pass constitutional muster.

The Government argues, however, that Ring and its progeny are "limited to an important but simple point: the Fifth and

Sixth Amendments serve as procedural safeguards for 'the formality of notice, the identity of the factfinder, and the burden of proof.'" United States' Response to Defendant Fausto Gonzalez's Motion to Dismiss the Death Penalty Notice and Second Superseding Indictment [Doc. # 531] at 3 (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999)). Thus, the Government argues, while Ring heightened constitutional protection of the procedures by which aggravating factors are proven, it did not create new substantive elements of an offense. See Coleman v. United States, 329 F.3d 77, 84 (2d Cir. 2003) (concluding that this line of cases "dictates only who must decide certain factual disputes and under what standard of proof they must be decided. It does not determine which facts are 'elements' of a crime nor refer to any substantive norms.").

The FDPA provides for a jury to be the factfinder at the penalty phase, that aggravating factors be proven beyond a reasonable doubt, and that jury findings on these factors be unanimous. See 18 U.S.C. § 3593. The FDPA therefore satisfies the requirements of Ring, and this Court finds no basis for expanding Ring beyond its clear holding. In fact, the statute at issue in Ring itself called for a bifurcated penalty proceeding, and the Supreme Court did not indicate a concern with this aspect of the trial.

Defendants central argument is that the separate sentencing

hearing under the FDPA elevates form over substance, because the presumption of innocence, once lost, cannot be reimagined by the jury after deliberation is completed. But there is a well-established presumption that juries will follow the court's instructions, see, e.g. Richardson v. Marsh, 481 U.S. 200, 211 (1987), and Gonzalez provides no basis to challenge this presumption beyond reflections on one view of human nature. Because the jury will not have deliberated about the aggravating factors at the liability phase, the loss of the presumption of innocence about the elements of underlying offense that occurs once the jury reaches a decision on guilt need not inexorably transfer to the jury's later consideration of aggravating factors, particularly when the jury is properly instructed about the burden of proof at the penalty phase. Moreover, because the sentence enhancing factors enumerated in the FDPA are all either specific to the underlying crime at issue, or depend on proof of a previous conviction, see 18 U.S.C. § 3591(a)(2); 18 U.S.C. § 3593(c), there is little risk that the jury will base its decision on inappropriate character or propensity assumptions about the defendant.

The alternative of including the sentence enhancing factors at the liability phase, moreover, raises its own constitutional concerns. As the Supreme Court noted in Gregg, 428 U.S. at 191-92, "When a human life is at stake and when the jury must have

information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in Furman." Because Ring did not purport to overturn the Supreme Court's long-expressed approval of bifurcated death penalty proceedings, this Court finds that FDPA's provision for the separate penalty proceeding does not run afoul of the Constitution.

III. Conclusion

For the foregoing reasons, Defendants' Joint Motion Challenging the Constitutionality of the Federal Death Penalty Statute [Doc. # 513] and Defendant Wilfredo Perez's Motion to Dismiss Aggravating Factors [Doc. # 506] are hereby DENIED. Defendant Fausto Gonzalez's Motion to Dismiss the Death Penalty Notice and Second Superceding Indictment [Doc. # 502] is DENIED in part.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 29th day of April, 2004.