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 COUNSELS' REPLY SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS NOTICE OF INTENT TO SEEK PENALTY OF DEATH

Aggravating Factors That Establish Death Eligibility Must Be Essential Elements of a Capital Offense, But Are Not Under the FDPA, Rendering the Act Unconstitutional

The defendant has previously filed a Motion to Dismiss Notice of Intention to Seek Sentence of Death. In addition, standby counsel have filed a Supplemental Memorandum in support of that motion, in light of the Supreme Court's decisions in *Ring v. Arizona*, 122 S.Ct. 2428 (2002) and *Harris v. United States*, 122 S.Ct. 2406 (2002), and before them, *Jones v. United States*, 526 U.S. 227 (1999) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The government has responded to both the motion and the Supplemental Memorandum.

Given the holdings in *Ring* and *Harris* that aggravating factors (in death penalty cases) or other facts which make a defendant eligible for a greater punishment than that to which he would otherwise be subject are "elements" of a "greater offense," it would appear that the factors alleged in the Notice of Special Findings should be treated as elements of greater offenses, *i.e.*, as four death eligible capital murder conspiracies. That *Ring* refers to them as "equivalent to elements" is of no moment. On the same day *Ring* was decided, the Supreme Court omitted the words "equivalent to" when it referred to facts which increased the maximum punishment to which the defendant was

exposed. Nothing in *Ring* or *Harris* or, for that matter, in *Apprendi* or *Jones*, suggests that such factors are of any less constitutional significance than other offense elements.

The government's position is internally inconsistent. On the one hand, it contends in its *Opposition to Standby Counsel's Supplemental Memorandum at 14 n.6* that it has created no new offenses. On the other hand, it admits that the aggravating factors included in the Notice section of the indictment, which were not included in the charges contained in the original indictment, "establish[] that Counts One, Two, Three and Four are capital eligible." *Id. at 8*. If, indeed, the aggravating factors are necessary to make these charges capital eligible offenses, *i.e.*, they are facts necessary to raise the possible punishment to death, with which proposition counsel agree, they plainly are offense elements within the meaning of *Ring, Harris, Jones* and *Apprendi*.

The government's argument unhinges the results in those cases from their constitutional moorings. While the actual holding in *Ring* is that a defendant is entitled to a jury trial as to factors which establish death eligibility, the explicit basis for that holding is that Arizona's aggravating factors in its death penalty scheme were *elements* of the capital eligible offense. The Supreme Court explained in both *Ring* and *Harris* that facts which increase the maximum penalty faced by the defendant create a new, "greater offense." Indeed, in *Harris*, 122 S.Ct. at 2414-19, the Court noted *repeatedly* that any fact which increases the maximum possible penalty above that authorized by the findings implicit in the jury's verdict of guilt has historically been, and is still, an element of the offense. *See id*. at 2419 ("Read together, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)] and *Apprendi* mean that those facts setting the outer limits of a sentence and of the judicial power to impose it *are elements of the crime for constitutional analysis*") (emphasis added); *Harris*, 122 S.Ct. at 2418 (*quoting Apprendi*, 530 U.S. at 483, no. 10) ("'The judge's role in sentencing is constrained

at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense'"); *Harris*, 112 S.Ct. at 2416 (the principle "by which history determined what facts were elements . . . defined elements as 'fact[s] legally essential to the punishment to be inflicted'") (*quoting United States v. Reese*, 92 U.S. 214, 232 (1876) (Clifford, J., dissenting)). It is simply impossible to argue after *Ring* and *Harris* that the facts alleged in the government's Notice of Special Factors are not elements of the offense, since, as surely the government must concede, they "are facts that expose [this] defendant to a punishment greater than that otherwise legally prescribed . . .," *i.e.*, the death penalty.

The government's reliance on *United States v. Cotton*, 122 S.Ct. 1781 (2002), is misplaced. In arguing that *Cotton* endorses the proposition that all that is required is a jury verdict, the government conveniently ignores the determinative fact that Cotton had not objected at trial to the omission of drug quantity from the indictment.[1] Thus, the significance of *Cotton* is simply that a jury verdict supported by overwhelming evidence cures an *Apprendi*-type defect in the indictment *if the defendant does not object to that defect. See also United States v. Hooker*, 841 F.2d 1225, 1227-29 (4th Cir. 1988) (en banc) (holding that indictment must explicitly include all elements of the offense, but stating that failure of indictment to do so can not first be raised after direct appeal) (*citing United States v. Roberts*, 296 F.2d 198 (4th Cir. 1961); *Hagner v. United States*, 285 U.S. 427, 428 (1932)).

Unlike in the circumstances of drug cases, for example, upon which the government relies, the FDPA provides a detailed, integrated scheme applicable to capital cases which is not consistent with *Ring* and *Harris* in many aspects and which can not be fixed by the government's invention of

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[1] *Cotton* is thus a plain error case.

a Notice of Special Findings section in a capital indictment.[2] Counsel do not here repeat the innumerable problems with the FDPA that will not be solved by the government's quick fix. They merely note that those problems are not solved by the government's sarcastic comments and inflammatory rhetoric.

More fundamental, however, is the fact that Congress never intended the aggravating factors in the FDPA to be offense elements. Rather they were treated as sentencing elements. Because it lacks power to define elements of a crime, when the Court has been required to determine whether a statute sets forth offense elements or sentencing factors, it has looked to congressional intent: "The question before us is *whether Congress intended* the statutory references . . . to define a separate crime or simply to authorize an enhanced penalty." *Castillo v. United States*, 530 U.S. 120, 123 (2000) (emphasis added). *Accord Jones*, 526 U.S. at 232–39 (1999); *Almendarez-Torres*, 523 U.S. 224, 228 (1998); *Harris*, 122 S.Ct. at 2442. Thus, in *Harris* and *Almendarez-Torres*, the Court found the facts at issue to be sentencing factors, in *Castillo* and *Jones*, offense elements. But in both sets of cases, the Court proceeded by exhaustive statutory, not constitutional, analysis. That is because the Constitution, though it places limits upon Congress' ability to designate certain facts as sentencing factors, accords courts no power to recast statutes so that they might fit within those limits.

In *Harris*, the Supreme Court exhaustively considered "the distinction the law has drawn between the elements of a crime and factors that influence a criminal sentence." 122 S.Ct. 2410. The Court reaffirmed that the threshold question of statutory construction is whether Congress intended

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[2] Not surprisingly, the government does not suggest that any of the post-*Apprendi* drug cases upon which it relies involved such separate sentencing schemes, like the FDPA.

relevant facts to be offense elements or sentencing factors. 122 S.Ct. at 2411. The Court explained that this distinction is significant because "*[l]egislatures define crimes in terms of the facts that are their essential elements***,** and constitutional guarantees attach to these facts." 122 S.Ct. at 2410 (emphasis added).

The *Harris* Court then considered the canon of constitutional avoidance. Under this doctrine, when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter." *United States ex rel. Attorney General, v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). *See also Jones*, 526 U.S. at 239–40. The Court found the doctrine of constitutional avoidance *had no application* because, at the time Congress enacted § 924(c), Supreme Court precedent allowed Congress to label as sentencing factors facts which increased the minimum punishment for a crime. As the Court explained:

> The avoidance canon rests upon our "respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). The statute at issue in this case was passed when *McMillan* [*v. Pennsylvania*, 477 U.S. 79 (1986)] provided the controlling instruction, and Congress would have had no reason to believe that it was approaching the constitutional line by following that instruction. We would not further the canon's goal of eliminating friction with our coordinate branch, moreover, if we alleviated our doubt about a constitutional premise we had supplied by adopting a strained reading of a statute that Congress had enacted in reliance on the premise. And if we stretched the text to avoid the question of *McMillan*'s continuing vitality, the canon would embrace a dynamic view of statutory interpretation, under which the text might mean one thing when enacted yet another if the prevailing view of the Constitution later changed. We decline to adopt that approach.

122 S.Ct. at 2413. Finding the doctrine of constitutional avoidance irrelevant to its analysis, the Court, in accord with Congress' intent, concluded that "brandishing" was a sentencing factor. *See* 122 S.Ct. at 2414.

As counsel have previously demonstrated in their Supplemental Memorandum, it is clear that Congress intended the "aggravating factors" set forth at § 3592(c) to be just that, "factors", *i.e.* sentencing factors, not elements. Indeed, the plain language of the statute declares that the facts enumerated at § 3592(c)(1)–(16) are factors to be considered in determining sentence, not elements of a crime. *See United States v. Cooper*, 91 F. Supp.2d 90, 104 (D. D.C. April 14, 2000) (holding intent elements are aggravating factors not elements and need not be alleged in indictment); *United States v. Kaczynski*, 1997 WL 716487 *2 (E.D. Cal. 1997) (holding aggravating factors are not elements and need not be alleged in indictment).

Finally, the doctrine of constitutional avoidance is inapplicable here as it was in *Harris*. It is inapplicable, first, because there is no ambiguity about Congress' choice: "Where Congress has made its intent clear, we must give effect to that intent." *Miller v. French*, 530 U.S. 327, 341 (2000) (quotations omitted).

> Federal statutes are to be so construed as to avoid serious doubt of their constitutionality. Where such serious doubts arise, a court should determine whether a construction of the statute is fairly possible by which the constitutional question can be avoided. *It is equally true, however, that this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication; although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it.*

Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 841 (1986) (citations and internal quotations omitted) (emphasis added).

Second, the doctrine of constitutional avoidance is inapplicable because, at the time Congress enacted the FDPA, as counsel have previously noted, the Supreme Court had explicitly approved treating facts required for imposition of the death penalty as sentencing factors. *See Walton v. Arizona* 497 U.S. 639, 649 (1990).

Notably, the Supreme Court has once before considered whether a federal death penalty provision that violated the Fifth and Sixth Amendments could be remedied by judicial reconstruction. In *United States v. Jackson*, 390 U.S. 570 (1968), the Supreme Court considered Fifth and Sixth Amendment challenges to a sentencing provision that authorized the death penalty only upon a jury's recommendation. The Court held that the provision unconstitutionally burdened the rights to proof beyond a reasonable doubt and to jury trial because it did not authorize imposition of the death penalty upon a plea of guilty or trial to the court. *Id.* at 581–82. In an effort to salvage the provision, the government proposed a number of interpretations of the statute and cited *ad hoc* procedures developed by district courts as "cures" for the constitutional problems. *Jackson* rejected each approach as requiring legislative, not judicial, action.[3] *Id.* at 572–81. It explained that "[t]o accept the Government's suggestion that the jury's sentencing role be treated as merely advisory would return to the judge the ultimate duty that Congress deliberately placed in other hands." *Id.* at 576.

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[3] For example, the government proposed a "construction" of the statute under which "even if the trial judge accepts a guilty plea or approves a jury waiver, the judge remains free . . . to convene a special jury for the limited purpose of deciding whether to recommend the death penalty." *Id.* at 572. The government also suggested that the Court might save the statute by reading it to make imposition of the death penalty discretionary on the part of the sentencing judge. *Id.* at 575. The Court rejected these proposed reconstructions and adhered to its view of the statute which made the death penalty mandatory upon the jury's recommendation.

The Court rejected the government's creation *because it was "not in fact the scheme that Congress enacted." Id.* at 573 (emphasis added). *See* also *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) (striking down statute permitting Postmaster General to make determination that material was obscene and rejecting government's argument that the provision be construed to require decision by a judge, explaining that "it is for Congress, not this Court, to rewrite the statute").

Jackson is precisely on point. To allow the government here to simply return to the grand jury and ask it to indict aggravating factors in a never-before-seen "notice" section, would be to do what *Jackson* forbade. Congress, relying on *Walton*, created a scheme in which the prosecutor has sole discretion in determining whether to charge a capital offense and which aggravating factors to charge. Allowing the government to seek indictment of Congressionally defined sentencing factors would give "to the [grand jury] the ultimate duty that Congress deliberately placed in other hands," *i.e.*, those of the government attorney.[4] The fact that it renders the FDPA unconstitutional should be no more of an obstacle to this court reaching the correct constitutional result in the case of the "so-called 20th hijacker" than it was to the Supreme Court in *Jackson*.[5]

CONCLUSION

For the foregoing reasons, in addition to those presented in the Motion to Strike Notice of Intent to Seek Penalty of Death, and the Supplemental Memorandum in Support of Motion to Dismiss

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[4] If the aggravating factors are not elements of the offense, the grand jury has no business investigating or finding them, since the authority of the grand jury is limited to determining "if there is probable cause to believe that a crime has been committed . . . .," *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972) and "whether criminal proceedings should be instituted against any person." *United States v. Calandra*, 414 U.S. 338, 343-33 (1974).

[5] The Supreme Court's decision in *Jackson*, like its decision in *Ring*, presumably is one of those "get out of death penalty free" cases that the government holds in such contempt.

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 Mr. Moussaoui.

Respectfully submitted,

STAND-BY COUNSEL

/S/
Frank W. Dunham, Jr.
Federal Public Defender
Eastern District of Virginia
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0808

/S/
Judy Clarke
Federal Defenders of
Eastern Washington and Idaho
10 N. Post, Suite 700
Spokane, WA 99201
(703) 600-0855

/S/
Gerald T. Zerkin
Assistant Federal Public Defender
Eastern District of Virginia
830 E. Main Street, Suite 1100
Richmond, VA 23219
(804) 565-0880

/S/
Alan H. Yamamoto
108 N. Alfred Street
Alexandria, VA 22314
(703) 684-4700

/S/
Edward B. MacMahon, Jr.
107 East Washington Street
P.O. Box 903
Middleburg, VA 20117
(540) 687-3902

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Standby Counsel's Reply Supplemental Memorandum in Support of Motion to Dismiss Notice of Intent to Seek Penalty of Death was served upon AUSA Robert A. Spencer, AUSA David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 by placing a copy BY HAND in the box designated "USAO" in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia and facsimile and via first class mail to Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, VA 22314 this 25th day of July, 2002.

/S/

Frank W. Dunham, Jr.