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	)	

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE "NOTICE OF SPECIAL FINDINGS" FROM SUPERSEDING INDICTMENT

Not surprisingly, the government misconstrues Defendant's Motion to Strike "Notice of Special Findings" From Superseding Indictment. It is not the defendant who has taken inconsistent positions concerning the government's misguided attempt to salvage an unconstitutional statute, but the government that has attempted to hedge its bets by arguing that the statutory aggravating factors are not really elements of the offense under *Ring v. Arizona*, 122 S. Ct. 2428 (2002), while at the same time running to the grand jury on the heels of *Ring* to obtain a new indictment which, for the first time since adoption of the Federal Death Penalty Act ("FDPA"), includes a Notice of Special Findings or any reference to aggravating factors. To the extent the government perceives any inconsistency in the position taken by the defendant, it is there only because *the government* has itself been unable to make up its mind.[1]

[1] One need not look beyond the four corners of the government's Response for evidence of its commitment to inconsistency. As discussed below, on page two it states that the allegations in the Notice are "'legally essential *to the charge* in the indictment . . .'" (emphasis added). However, on page four it insists inclusion of the Notice "is permissible" because "aggravating factors are neither immaterial nor irrelevant to Defendant's *punishment*,'" (*quoting United States v. Regan*, ___, F. Supp.2d ___, 2002 WL 31101768 at *7 (E.D. Va. 2002)). Which is it, one must wonder, the crime charged or the punishment?

The defendant's position is unambiguous: in light of *Ring*, the FDPA is unconstitutional because it treats facts which raise the maximum possible punishment as sentencing factors, not offense elements. Given the government's apparent inability to grasp the essential points of that argument, and its implications, it is worth succinctly reiterating them here:

1. The definition of elements of the offense is a matter of substantive criminal law which is entirely committed to Congress.

2. As a constitutional matter, facts that raise the maximum possible punishment for criminal conduct necessarily are elements of a greater offense, regardless of how they are denoted by the legislature.

3. Under the FDPA, the mental state threshold and statutory aggravating factors[2] raise the maximum possible punishment for a number of potentially capital offenses.

4. As the structure and content of the FDPA makes clear, it was Congress' intent to treat those factors as sentencing factors rather than as offense elements.

5. Congress' intent to treat facts as sentencing factors or offense elements, if it is clear, is determinative.

6. Neither the Executive nor Judicial Branch may interfere with Congress' intent to treat particular facts as sentencing factors, rather than as offense elements.

7. The FDPA is unconstitutional because, contrary to the dictates of *Ring*, it treats facts which increase the maximum penalty to death as sentencing factors rather than offense elements.

8. It would violate the plain intent of Congress for the government or this Court to treat the aggravating factors in the FDPA as offense elements. The FDPA, therefore, cannot be relied upon to create a death eligible offense.

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[2] For simplicity's sake, the defendant hereafter refers to the mental state threshold and statutory aggravating factors collectively as the "statutory aggravating factors."

9. Since the statutory aggravating factors are the functional equivalent of elements of a greater (*i.e.*, death eligible) offense which Congress did not intend to create, the grand jury may not indict on such an offense.

10. If the statutory aggravating factors in the FDPA are properly treated as sentencing elements, consistent with the intent of Congress, there is no reason nor authority for the grand jury to include them in an indictment.

11. The government may not amend the FDPA by substituting a newly created procedure, *i.e.*, determination by a grand jury of aggravating factors and their inclusion as a Notice of Special Findings in an indictment, when the FDPA provides for a different procedure, *i.e.*, the determination by the attorney for the government of those factors and their inclusion in a Notice provided by that attorney. Nor may the government or Court change other provisions in the FDPA, such as the lower evidentiary standard.

There is nothing in the defendant's most recent Motion to Strike that is in the least inconsistent with these positions. The defendant *has not* asserted that the Notice should be stricken from the Indictment because the aggravating factors *actually* are offense elements under the FDPA. To the contrary, he continues to assert that Congress *intended* them to be sentencing factors and, therefore, they may not be treated otherwise by the government or this Court. However, consistent with *Ring*, he asserts that they are the "functional equivalent" of offense elements, *i.e.*, even though they are not offense elements, because Congress did not intend them to be, they serve the *function* of offense elements, because they set forth facts which increase the maximum punishment for the defendant's alleged conduct. *See, e.g., Fugate v. Wetherington*, 301 F.3d 1287,1288 (11th Cir. 2002) (civil rights action "seeking relief . . . from a sentence of death constitutes the 'functional equivalent' of a second habeas

petition' . . . " and, therefore, while it is not such a petition, it is "'subject to the law applicable to [such] petitions'") (internal citations omitted).[3]

The constitutional rights applicable to offense elements, therefore, are also applicable to their equivalents. *See United States v. Promise*, 255 F.3d 150, 157 n.6 (4th Cir. 2001) (en banc) (rejecting government's argument, based on language in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that sentencing factors in drug statutes that raise maximum penalties do not implicate all constitutional rights which attach to offense elements, *including the right to indictment by a grand jury*, because they are merely "functional equivalents" of such elements), *cert. denied*, 122 S. Ct. 2296 (2002). While this principle provides the government with the obvious *necessity* to obtain an indictment that includes the aggravating factors (having lost its "functional equivalency" argument in *Promise)*, it does not provide it with the legal authority or justification for doing so, since it cannot change the procedures set forth in the FDPA. *See United States v. Jackson*, 390 U.S. 570 (1968). The Notice must be struck, therefore, even though it leaves the government holding an empty death penalty bag.

As noted in footnote 1 above, the government also argues that the aggravating factors are properly included in the Indictment because they are "'legally essential *to the charge* in the indictment . . . '" (Government's Response at 2) (emphasis added) (citations omitted). To what "charge" is the government referring? None of the

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[3] *See also Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (extending suspect's right to custodial warnings when 'interrogated' to actions by police "that they know are reasonably likely to elicit an incriminating response from the suspect," because such conduct is the "functional equivalent" of interrogation); *TWFS, Inc. v. Schaefer*, 242 F.3d 198, 205 (4th Cir. 2001).

"charges" set forth in Counts One through Four include the aggravating factors set forth in the Notice. Indeed, as the defendant has previously pointed out, the government did not include these factors in any of the counts of the indictment.[4] The answer, of course, is simple, although, for good reason, it is nowhere to be found in the government's pleading. The aggravating factors are essential to a "charge" that Congress never created and that does not exist -- death eligible greater offenses of those charged in Counts One through Four.[5]

Contrary to the government's argument, the defendant does understand *Ring*, *Apprendi*, *Jones* and *Harris v. United States*, 122 S. Ct. 2406 (2002) perfectly well. The real problem lies in the government's stubborn refusal to acknowledge the principle that this Court is bound by Congress' intent. If Congress *intended* the aggravating factors to be *sentencing* factors, they cannot be converted into elements of an offense which only Congress can create. Since, as the defendant has demonstrated conclusively in his prior pleadings, Congress did intend them to be sentencing factors, they cannot be

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[4] Indeed, the government's argument appears to resurrect a suggestion previously made by Standby Counsel, and rejected by the Court, that by including the Notice in the indictment, the government had actually created ten counts, including Counts One through Four without the Notice, and the same Counts with the Notice.

[5] It is inexplicable how the government can argue on page two of their Response that the aggravating factors are essential to an unidentified *charge* in the indictment, but then insist two pages later that it is Standby Counsel who "misunderstand *Ring* and *Jones [v. United States*, 526 U.S. 227 (1999)] by saying that the aggravating factors are either elements of a 'greater [death eligible] offense' or a sentencing factor [sic] . . . . " If, indeed, they are "essential" to a "charge" *and* they are essential to death eligibility, as the government would have to concede, how can they be anything but "elements of a 'greater [death eligible] offense?'"

treated as elements of some unidentified "charge," as the government claims to be doing here.[6]

The difficulty with the government's position -- that the question is one of substance rather than form -- is not in the principle itself, but in the government's failure to consider that principle in combination with the equally unassailable principle of Congressional intent. When those principles are considered together, the significance of *Ring* becomes clear and, quite frankly, not very complicated: Due Process dictates that aggravating factors that make a defendant death eligible be treated as offense elements because they are the "functional equivalent" of elements; but Congress' intent determines how they must *actually* be treated. Since the Constitution dictates one result -- that they be treated as offense elements -- but Congress plainly intended a different result -- that they be treated as sentencing factors -- the FDPA is unconstitutional under *Ring*. Thus, by conceding that the aggravating factors are the functional equivalents of offense elements of a death eligible charge it does not even try to identify, the government effectively, if inadvertently, concedes the unconstitutionality of the statute.

The defendant realizes that the government needs the aggravating factors to be part of a death eligible crime. That necessity, however, does not entitle it to assume the power of Congress to create and redefine offenses.[7] The FDPA is a sentencing

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[6] Notably, the government has never even attempted to demonstrate that Congress intended the aggravating factors contained in the FDPA to be offense elements.

[7] It has difficulty understanding the defendant's argument simply because, (continued...)

statute, not a substantive offense statute, *because Congress intended it to be that way.* Obtaining an indictment as to the mythical death eligible offense envisioned by the government does not create an offense not created by Congress; nor does it change the fact that the aggravating factors are merely sentencing factors, which have no place in an indictment, either historically or under the specific scheme created by the FDPA. Consequently, the government's Notice must be stricken from the Indictment. Moreover, even if the Notice is not stricken, its presence remains superfluous: it cannot create a new crime, it is no substitute for the Notice provided in the statute and it cannot save the FDPA from unconstitutionality.

Conclusion

Accordingly, for the foregoing reasons, and any others adduced at a hearing on this motion, standby counsel, on behalf of pro se defendant Zacarias Moussaoui, move this Court to strike as surplusage the Notice of Special Findings in the Second Superseding Indictment.

Respectfully submitted,

ZACARIAS MOUSSAOUI
By Standby Counsel

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[7] (...continued)
as it made clear months ago, it cannot fathom the possibility that the FDPA is unconstitutional or that capital defendants will receive a "get out of death penalty free card." *See* Government's Opposition to Standby Counsel's Supplemental Memorandum in Support of Motion to Dismiss Government's Notice of Intent to Seek a Sentence of Death at 6.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Memorandum in Support of Motion to Strike "Notice of Special Findings" From Superseding Indictment was served upon AUSA Robert A. Spencer, AUSA David Novak and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by placing a copy BY HAND in the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia and UPON APPROVAL FROM THE COURT SECURITY OFFICER via first class mail to Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, VA 22314 this 25th day of October 2002.

/S/
Gerald T. Zerkin