IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO.: 4:17CR00866-RBH
	)	
BRANDON MICHAEL COUNCIL	)	

DEFENDANT'S MOTION FOR NEW SENTENCING TRIAL AND/OR FOR JUDGMENT OF ACQUITTAL AS TO SENTENCING

Defendant Brandon Council, through his counsel, hereby respectfully moves this Court for a new sentencing trial and/or judgment of acquittal as to his death sentences, pursuant to Federal Rules of Criminal Procedure 29(c) and 33(b)(2).[1] The Court's order of October 10, 2019, extended the time in which to file this motion until November 4, 2019. *See* Dkt. No. 865. The motion renews and elaborates on two issues that Mr. Council previously raised unsuccessfully before this Court:

(1) Whether two of the government's aggravating factors, that Mr. Council committed the murders of two bank tellers for "pecuniary" gain (*i.e.*, to accomplish a robbery of the bank where they were working) and that the murders were "not necessary to successfully complete the bank robbery," were inherently contradictory

[1] By allowing post-trial motions to overturn a jury "verdict," Rules 29 and 33 permit challenges to death verdicts at sentencing as well as guilty verdicts at trial. *See United States v. Lawrence*, 555 F.3d 254, 261-263 (6th Cir. 2009); *United States v. Lee*, 274 F.3d 485, 493-494 (8th Cir. 2001); *United States v. Runyon*, 652 F. Supp. 2d 716, 718 (E.D. Va. 2009).

and that the court therefore erred in submitting them to the jury to both be found and weighed in favor of a death verdict?

(2) Whether the Federal Death Penalty Act, 18 U.S.C. § 3596, and this Court's final judgment, by providing for "implementation of the [death] sentence in the manner prescribed by the law of the State in which the sentence is imposed," impermissibly delegate federal authority to determine the form of Mr. Council's punishment, since that authority was assigned exclusively to Congress by Article I, and to this Court by Article III of the United States Constitution?

Mr. Council's attention to these issues is not intended to waive others that may have occurred over the course of the proceedings, which might be argued later.

I. Mr. Council's death sentences should be set aside and resentencing ordered because the court erred in allowing the jury to find and weigh two inherently contradictory aggravating factors.

In the indictment's special findings, the grand jury alleged the aggravating factor, listed in the Federal Death Penalty Act, that Mr. Council "'committed the offense in the expectation of the receipt of anything of pecuniary value.'" Dkt. #16 at 5, *quoting* 18 U.S.C. 3592(c)(8). As the government acknowledged (*see, e.g.*, Dkt. #289 at 19-20), this statutory aggravating factor required that the murders, and not simply the bank robbery, have been committed by Mr. Council for a pecuniary "motivation." *United States v. Barnette*, 390 F.3d 775, 784-785 (4th Cir. 2004), *vacated on other grounds*, 546 U.S. 803 (2005). *Accord United States v. Bernard*, 299 F.3d 467, 483-484 (5th Cir. 2002); *United States v. Chanthadara*, 230 F.3d 1237,1263-1264 (10th Cir. 2000). *See also United States v. Lawrence*, 735 F.3d 385, 412 (6th

Cir. 2013); *United States v. Bolden*, 545 F.3d 609, 615-616 (8th Cir. 2008); *United States v. Mitchell*, 502 F.3d 931, 974-975 (9th Cir. 2007); *United States v. Brown*, 441 F.3d 1330, 1369-1372 (11th Cir. 2006).

The government's notice of intent to seek the death penalty against Mr. Council again alleged the FDPA "pecuniary value" aggravating factor. Dkt. # 81 at 3. But it also alleged, as an additional non-statutory aggravating factor crafted by the prosecutors, that Mr. Council had committed the murders, "without provocation or resistance from the victims, in spite of the fact that such violence was not necessary to successfully complete the robbery of the CresCom bank." That Mr. Council's motivation in shooting the tellers was *not* to complete the bank robbery, the death notice alleged, made the victims wholly "innocent," and evidenced his "particular cruelty and callous disregard for human life." *Id.* at 5.

In a pretrial motion challenging the government's dual reliance on these two aggravators, the defense homed in on their inherently contradictory nature, complaining that the non-statutory "not necessary to the robbery" aggravator was in "conflict" with the FDPA's "pecuniary" motivation one. Dkt. #251 at 10-11. But the government responded that the two aggravating factors were "not in conflict." Dkt. #289 at 19-20. And the Court followed suit, denying the challenge because it "disagrees with Defendant's interpretation of these aggravators." Dkt. #413 at 10.

Accordingly, at Mr. Council's capital sentencing, the government told the jurors in closing argument that they should find and weigh the aggravating factor that Mr. Council was motivated by "pecuniary gain" because "he did it for easy

money," "he wanted easy money," and "he did this for money." But the government also advocated for the "innocent victims" aggravator by arguing to jurors the exact opposite: that Mr. Council knew he could complete the robbery without harming the tellers (who posed "no obstacles"), but murdered them anyway, for some other reason or reasons. "When you know you don't have to do that and you choose anyway, that makes this crime worse." (10/2/19 Transcript). The jury found and weighed both these aggravating factors and, on that basis, returned a death verdict. (Dkt. #856 at 3-4, 12; #857 at 3-4, 12).

That dual finding, which resulted from the court's pretrial determination that there was no conflict between these aggravating factors, violated Mr. Council's rights to due process and to a reliable sentencing determination, as protected by the Fifth and Eighth Amendments. No rational jury could have found both these aggravators, since they were inherently contradictory. Thus, at least one of the two was improperly found and weighed. *See United States v. Gaddis*, 424 U.S. 544, 549 (1976). This irredeemably tainted Mr. Council's death sentence. *See Stringer v. Black*, 503 U.S. 222, 232 (1992) (though there were other, properly found aggravators, improperly found one put "thumb on the scale" in favor of a death verdict). Indeed, neither aggravation finding can now be salvaged: Because jurors were invited to find both contradictory factors, they were freed from the important task of determining Mr. Council's motivation. Jurors did not need to stop to consider, let alone determine, whether he killed the victims to complete the bank robbery or for some

other reason, though this question bore significantly on his culpability. That determination belonged to the jury in the first instance, and cannot be made instead by this Court in picking and choosing just one of the two findings to invalidate. *See Milanovich v. United States*, 365 U.S. 551, 554-55 (1961).

II. The FDPA and the Court's judgment unconstitutionally delegate the authority to determine the form of Mr. Council's punishment.

Unlike state capital statutes, the FDPA does not prescribe the actual punishment to be inflicted, *i.e.*, how a condemned defendant's death is to be caused. Instead, it provides only that a sentence of death be implemented "in the manner prescribed by the law of the State in which the sentence is imposed." And if that state lacks capital punishment, the FDPA directs the sentencing court to "designate another State" that does, and provides for the execution to be carried out in the "manner prescribed by [its] law." 18 U.S.C. § 3596(a).

After Mr. Council's jury returned death verdicts on October 3, 2019, the Court unexpectedly and over defense objection determined to sentence him to death immediately rather than setting a date for formal sentencing. Before it did so, the defense unsuccessfully interposed the non-delegation argument presented in this motion.[2] (10/3/19 Transcript). The written judgment by the Court that followed tracked the language of the FDPA, ordering the "implementation of the sentence in

[2] Decisions from other district courts have accepted the government's suggestion that such issues are not ripe until the death verdict. *See, e.g., United States v. Caro*, 2006 WL 1594185, *4 (W.D. Va. 2006); *United States v. Smith*, 2019 WL 1450315, *2 (D. Alaska 2019); *United States v. Montgomery*, 2007 WL 1031282, *10 (W.D. Tenn. 2007).

the manner prescribed by the law of the State in which the sentence is imposed. *See* 18 U.S.C. Sec. 3596(a)." Dkt. #860 at 5.

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." § 1. "Accompanying that assignment of power to Congress is a bar on its further delegation," including "to another branch," such as the judiciary. *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (Opinion of Kagan, J.). *See also id.* at 2130-31 (Alito, J., concurring); *id.* at 2131 (Gorsuch, J., dissenting).

Prior to *Gundy*, it was unquestioned that a delegation of federal power by Congress was constitutional as long as the statute in question layd down "an intelligible principle" to which the delegatee "is directed to conform." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). Applying this test, at least one circuit has upheld Section 3596's delegation to the judiciary of the authority to set the punishment to be inflicted on a condemned prisoner to cause his death, on theory that Congress's directive to use the law of the sentencing state satisfies the "intelligible principle" test. *United States v. Battle*, 173 F.3d 1343, 1350 (11th Cir. 1999). *See also United States v. Tipton*, 90 F.3d 861, 901-03 (4th Cir. 1996) (denying relief from death sentence imposed under pre-FDPA death penalty statute, though statute did not specify method of execution and gap had been filled by Attorney General's regulation for use of lethal injection).

But in *Gundy*, Justice Gorsuch, writing in dissent for himself, the Chief Justice, and Justice Thomas, rejected the "intelligible principle" test as having "no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked." 139 S. Ct. at 2140. Instead, the dissent would have substituted a much stricter test that would allow a delegation Congressional authority only if it authorizes another branch either to merely "fill up the details," engage in fact-finding to determine application of a rule, or carry out responsibilities inherent in that branch's (executive or judicial) power. *See id.* at 2137-38. Here, the FDPA's delegation of the quintessentially Legislative authority to set the punishment that will be employed to cause death satisfies none of these exceptions. Though Justice Gorsuch wrote in dissent in *Gundy,* a fourth member of the Court, Justice Alito, said he too would be inclined to reconsider the "intelligible principle" test when the Court was at full strength — which it was not in that case, since it was argued before Justice Kavanaugh took the bench.

Not only does the FDPA work an unconstitutional delegation of Congressional authority to another branch to set the available form of punishment to be inflicted for Mr. Councils' crimes. Section 3596 and this Court's accompanying judgment also work an unconstitutional delegation of federal authority to the State of South Carolina. Presently, South Carolina provides for execution by lethal injection or electrocution, at the election of the condemned prisoner. *See* Code of Laws of South Carolina 1976 Annotated, § 24-3-530. But if on some future date before Mr. Council's court challenges are exhausted, the state legislature amends its capital

statute to provide for a different form of capital punishment — such as, for example, asphyxiation by nitrogen gas, the firing squad, or anything else, no matter how novel or problematic, that presumably would, by the operation of the judgment, become the new punishment ordered by this Court for Mr. Council. Thus, this Court has unconstitutionally delegated its exclusive Article III power to determine Mr. Council's punishment to the State of South Carolina. *See Loving v. United States*, 517 U.S. 748, 768 (1996) (Congress may delegate to Executive or independent agency some authority over what conduct will be criminalized "so long as Congress . . . fixes the punishment").

* * *

Accordingly, for these reasons, the Court should order a new sentencing trial and/or judgment of acquittal as to Mr. Council's death sentences, pursuant to Federal Rules of Criminal Procedure 29(c) and 33(b)(2).

Respectfully submitted,

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