IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA	:	
	:	SUPERSEDING
v.	:	1:08CR384-1
	:	
DEMARIO JAMES ATWATER	:	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE DEATH PENALTY ON THE BASIS OF INTRA-CASE DIS-PROPORTIONALITY

NOW COMES the United States of America, by and through Anna Mills Wagoner, United States Attorney for the Middle District of North Carolina, and responds in opposition to Defendant's Motion to Strike the Death Penalty on the basis of Intra-case Dis-proportionality.

On October 27, 2008, Defendant Atwater was charged in a four-count bill of indictment with carjacking resulting in death, in violation of 18 U.S.C. § 2119(3); carrying and using firearms during and in relation to carjacking, resulting in death, in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii), 924(c)(1)(B)(i) and (924)(j)(1); possession of firearms by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and possession of a short-barreled shotgun without having properly registered same, in violation of 26 U.S.C. §§ 5861(d) and 5871. Aiding and abetting was alleged as to each of the four counts. (DE #10)[1]. Defendant

[1] Unless otherwise noted, parenthetical citations refer to docket entries ("DE") in this Court in the above-captioned case.

was arraigned as to this indictment on December 2, 2008, and entered pleas of not guilty. (DEs, p.6).

On January 15, 2009, the Attorney General determined that the government would seek a sentence of death in the instant case.

On January 30, 2009, a superseding indictment was returned by the grand jury. This new indictment charged kidnapping resulting in death, in addition to the original four charges, in violation of 18 U.S.C. § 1201. The superseding indictment also alleged the gateway intent factors required under 18 U.S.C. § 3591(a)(2), as well as four of the statutory aggravating factors supporting imposition of the death penalty identified in 18 U.S.C. § 3592. (DE #18).

On February 13, 2009, the government filed notice of intention to seek the death penalty, in accordance with the directions of the Attorney General. (DE #22). The instant motion ensued.

In his motion to strike the death penalty, Defendant Atwater argues that the government's decision to seek death is arbitrary and capricious and in violation of both the Fifth and Eighteenth Amendments to the United States Constitution. Defendant Atwater claims that the government, in choosing not to charge an arguably equally culpable co-defendant in the killing of Ms. Carson, is acting in an arbitrary and capricious manner in seeking the death penalty in his case. (Defendant's motion, p.1).

DISCUSSION

1. The Department of Justice Death Penalty Protocol results in a consistent and reasoned determination being made to seek the death penalty in appropriate cases.

Defendant Atwater is eligible for the death penalty if convicted of charges related to the murder of Eve Marie Carson. The Department of Justice maintains internal procedures for determining whether to seek the death penalty in a particular case. These procedures are generally described in the United States Attorney's Manual. The Attorney General must approve in writing the seeking of the death penalty, typically in consultation with other entities in the Department. See USAM § 9-10.040. Initially, the United States Attorney's Office prosecuting the defendant must decide whether to recommend seeking the death penalty, and counsel for a defendant must be given "a reasonable opportunity to present any facts, including any mitigating factors" for consideration by the prosecutors. USAM § 9-10.050.

Next, the United States Attorney's Office is required to compile comprehensive information and opinions about the case, as well as any mitigation submission by the defendant. USAM § 9-10.080. A committee appointed by the Attorney General reviews all the information, and a defendant's counsel is provided a second opportunity to present, orally or in writing, "evidence and

argument in mitigation"; the committee makes a recommendation to the Attorney General through the Deputy Attorney General. USAM § 9-10.120. The committee is directed to follow certain standards in evaluating the evidence, including "to resolve ambiguity as to the presence or strength of aggravating or mitigating factors in favor of the defendant." USAM § 9-10.130.

The review procedures identified above ensure that the charging of capital cases in federal court is uniformly accomplished throughout the United States. Decisions to seek the death penalty are delegated to the Attorney General, as they have been since January 1995, when the aforementioned "death penalty protocol" was adopted by the Department of Justice.

2. Striking the death penalty would infringe upon the charging authority of the Executive Branch.

Granting Defendant Atwater's request to strike the death penalty would improperly intrude upon the government's charging authority. The jurisprudence of the United States Supreme Court accords protection from judicial review to the exercise of prosecutorial discretion in the absence of any improper motive. "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364

(1978)(holding that a prosecutor may properly, during plea negotiations, threaten to indict a defendant under a three strikes law if the defendant does not plead guilty to the pending charge, and then indict and convict the defendant under the three strikes law when the defendant refuses to plead guilty to the original charge).

> This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

Wayte v. United States, 470 U.S. 598, 607 (1985).

The prosecution of those who have violated federal law is "a core executive constitutional function," United States v. Armstrong, 517 U.S. 456, 465 (1996), and a "special province" of the Executive Branch, Heckler v. Chaney, 470 U.S. 821, 832 (1985).

The defense argues that the discretionary decision not to charge or not to seek increased penalties renders the equally

discretionary decision to seek the death penalty against Defendant Atwater a violation of the Constitution. That is not the law.

> First, the petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict.
>
> The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.

Gregg v. Georgia, 428 U.S. 153, 199 (1976).

Ten years after the Court's observations about the properly broad scope for the exercise of prosecutorial discretion in Gregg, the Court decided McCleskey v. Kemp, 481 U.S. 279 (1987), in which the petitioner attacked the death penalty with statistical evidence that it was imposed more frequently depending upon the race of the victim or defendant. The Supreme Court directly addressed the law governing the prosecution's decision to seek the death penalty against McCleskey, who was black, and who asserted statistical

evidence that decisions to seek the death penalty were often influenced by race:

> [T]he policy considerations behind a prosecutor's traditionally "wide discretion" suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, "often years after they were made." Moreover, absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.

481 U.S. at 296-97 (internal citations and footnotes omitted).

The Supreme Court in McCleskey went on to discuss the assertion that the death penalty statute was unconstitutional because discretion might mean that some other similar defendants would not receive death sentences.

> McCleskey's argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system. Discretion in the criminal justice system offers substantial benefits to the criminal defendant. Not only can a jury decline to impose the death sentence, it can decline to convict or choose to convict of a lesser offense. Whereas decisions against a defendant's interest may be reversed by the trial judge or on appeal, these discretionary exercises of leniency are final and unreviewable. Similarly, the capacity of prosecutorial discretion to provide individualized justice is "firmly entrenched in American law." As we have noted, a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case. Of course, "the power to be lenient [also] is the power to discriminate," but a capital punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice."

481 U.S. at 311-12 (internal citations and footnotes omitted). The Ninth Circuit, in addressing the issue, noted that in addition to the practical difficulties inherent in such judicial review, the separation of powers doctrine prevented such review.

> Such judicial entanglement in the core decisions of another branch of government - especially as to those bearing directly and substantially on matters litigated in federal court - is inconsistent with the division of responsibilities assigned to each branch by the Constitution. The Office of the United States Attorney cannot function as prosecutor before the court while also serving under its general supervision. The court, in turn, cannot both supervise the exercise of prosecutorial discretion and act as an impartial arbiter of the cases presented to it. In the end, the type of intense inquiry that would enable a court to evaluate whether or not a prosecutor's charging decision was made in an arbitrary fashion would destroy the very system of justice it was intended to protect.

United States v. Redondo-Lemos, 955 F.2d 1296, 1300 (9th Cir. 1992), overruled en banc on other grounds, 48 F.3d 1508 (9th Cir. 1995), rev'd, 517 U.S. 456 (1996).

The Fourth Circuit has considered the matter in the non-capital context related to judicial comments concerning a government investigation. In United States v. Derrick, 163 F.3d 799, 824-25 (4th Cir. 1998), cert. denied, 526 U.S. 1133 (1999), the Fourth Circuit noted that "the caselaw is legend from the Supreme Court and the courts of appeals that the investigatory and prosecutorial function rests exclusively with the Executive." Citing with approval: Wayte, 470 U.S. at 607("Such factors as the

strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."); Heckler, 470 U.S. at 832 (noting that the prosecutor's decision not to indict "has long been regarded as the special province of the executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"); United States v. Giannattasio, 979 F.2d 98, 100 (7th Cir. 1992)("[a] judge in our system does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them"); and Redondo-Lemos, 955 F.2d at 1299 ("[i]t would raise serious separation of powers questions - as well as a host of virtually insurmountable practical problems - for the district court to inquire into and supervise the inner workings of the United States Attorney's office.")

The case of In re Morris, 363 F.3d 891, 896 (9th Cir. 2004), addressed a similar argument made regarding arguably culpable defendants being treated differently:

> [h]ere, however, there is no need for any court to undertake an investigation as to why the prosecution singled out Morris for the death penalty when it pursued little to no penalty against his equally guilty, and apparently violent, co-defendants. This case is a case of mitigating evidence. In such a case, the jury must be instructed that it may consider, as a mitigating factor, the fact that the prosecution pursued

> substantially more lenient punishment against Morris's equally guilty co-perpetrators.
>
> Permitting the jury to consider such circumstances as a mitigating factor would address the Due Process concerns raised in *Redondo-Lemos* without bringing in any separation-of-powers issues. It would not require the courts to investigate the internal charging decisions of the prosecutor.

In the instant case it is likely the defense will request, in the event of a guilty verdict, that the statutory mitigating factor found at 18 U.S.C. § 3592(b)(4) be submitted to the jury in the sentencing phase. This factor allows the jury to consider in mitigation that "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death." Co-defendant Lovette, at 17 years of age, is ineligible for the death penalty. See Roper v. Simmons, 543 U.S. 551 (2005)(execution of individuals who were under 18 years of age at the time of their capital crimes is prohibited under the Eighth and Fourteenth Amendments, abrogating Stanford v. Kentucky, 492 U.S. 361 (1989)). The submission of this statutory mitigating factor would alert the jury to the facts and circumstances raised in the instant motion.

Defendant Atwater's cite to United States v. Littrell, 478 F. Supp. 2d 1179 (C.D. Cal. 2007), offers little support to his argument. In Littrell, the defendant was one of forty defendants charged in a capital murder indictment targeting the Aryan Brotherhood. The two leaders of the group were the subjects of a four-month trial in which they were found guilty of first degree

murder. The jury was, however, unable to reach unanimous verdicts as to punishment and so each man was sentenced to life. In Littrell, the district court found that:

> In light of these facts no rational decision-maker could conclude that Gary Joe Littrell's conduct was so reprehensible, and his moral culpability so great, that he should face execution when the leaders of the organization, the men who ordered Mr. Littrell to kill, and several men who have committed identical crimes to Mr. Littrell in furtherance of the Aryan Brotherhood will not face similar punishment.

Id. at 1192. First, there can be no argument that Defendant Atwater is somehow less culpable than a defendant who has received a life sentence, the facts in Littrell. Even if such an argument could be made, courts have repeatedly rejected challenges to the conviction and punishment by death of arguably less-culpable co-defendants (who are sentenced to death when more culpable defendants have not been). As such, it is not likely a constitutional violation when the government simply seeks the death penalty under such circumstances. See Pulley v. Harris, 465 U.S. 37, 50-51 (1984)("there is ... no basis in our cases for holding that the comparative proportionality review ... is required in every case in which the death penalty is imposed and the defendant requests it.")

Littrell appears to be the only case where a district court has stricken a death notice as arbitrary and capricious after a more culpable defendant received a life sentence. See United States

v. Taylor, 648 F. Supp. 2d 1237, 1243 (D.N.M. 2008); United States v. Sablan, ___ F. Supp. 2d ___, 2007 WL 4116117 at *6 (D.Colo. 2007) (attached) (refusing to follow Littrell reasoning in striking death notice, citing to government charging decisions not being subject to judicial review in the absence of an improper motive and the fact that courts have rejected challenges of the conviction and punishment by death of arguably less culpable defendants).

3. Seeking the death penalty in the instant case is not an arbitrary and capricious act.

The "arbitrary and capricious" concerns raised by Defendant Atwater from the case of Furman v. Georgia, 408 U.S. 238 (1972), are also misguided:

> [such an] argument mistakes the nature of the arbitrariness concern in the Supreme Court's jurisprudence. In the thirty-four years since Furman was decided, the Court has made clear that its decision was not based on the frequency with which the death penalty was sought or imposed. Rather, the primary emphasis of the Court's death penalty jurisprudence has been the requirement that the discretion exercised by juries be guided so as to limit the potential for arbitrariness.

United States v. Sampson, 486 F.3d 13, 23 (1st Cir. 2007), cert. denied, 128 S. Ct. 2424 (2008). Together, Furman and Gregg require that a death penalty statute "(1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the

circumstances of his crime." Kansas v. Marsh, 548 U.S. 163, 173-74 (2006).

4. Co-defendant Lovette remains a viable defendant for federal prosecution.

Defendant Atwater cites hearsay sources liberally in making his argument for intra-case dis-proportionality, including news reports, search warrants, and motions filed by defense attorneys. While the accuracy of the information contained therein cannot be verified, these arguments ignore one basic fact: the United States has until March 4, 2013, to charge Lawrence Lovette with offenses related to the killing of Eve Marie Carson. The fact that he is not charged presently does not have any bearing upon whether he might be charged on a later date.[2]

CONCLUSION

For the reasons identified herein, the United States respectfully requests that this Court deny Defendant's Motion to Strike the Death Penalty on the basis of Intra-case Dis-proportionality.

[2] Lovette is a juvenile under federal law, having allegedly committed the offenses involving Ms. Carson when he was 17 years of age. See 18 U.S.C. § 5031. As such, Lovette could only be prosecuted federally if the United States first filed a juvenile information and certification, and a district judge later ordered that he be tried as an adult.

This the 16th day of March, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will notify the attorneys of record herein.

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