

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :  
 :  
 v. :  
 : Case No. 3:99CR264(AHN)  
 :  
 LUKE JONES :

RULING ON DEFENDANT'S (1) MOTION TO STRIKE AGGRAVATING FACTORS; (2) MOTION TO STRIKE NON-STATUTORY AGGRAVATING FACTORS;  
(3) MOTION TO DISMISS ALL CHARGES AS A VIOLATION OF DOUBLE JEOPARDY; (4) MOTION TO DISMISS DEATH PENALTY BASED UPON VINDICTIVE PROSECUTION; (5) MOTION TO DISMISS NOTICE OF SPECIAL FINDINGS AND BAR THE DEATH PENALTY IN LIGHT OF PREJUDICIAL CONDUCT BEFORE THE GRAND JURY; (6) MOTION TO BAR APPLICATION OF THE DEATH PENALTY, TO DISMISS NOTICE OF SPECIAL FINDINGS, AND FOR OTHER RELIEF

Defendant Luke Jones, a.k.a. "Mega," has filed the following motions with respect to the above-referenced case: (1) motion to strike aggravating factors [# 1167]; (2) motion to strike non-statutory aggravating factors [# 1168]; (3) motion to dismiss all charges as a violation of double jeopardy [# 1444]; (4) motion to dismiss death penalty based upon vindictive prosecution [#1446]; (5) motion to dismiss notice of special findings and bar the death penalty in light of prejudicial conduct before the grand jury [# 1449]; and (6) motion to bar application of the death penalty, to dismiss notice of special findings, and for other relief [# 1120].

As discussed below, all motions are hereby denied.

#### THE INDICTMENT

In the Fifth Superseding Indictment, the government charged Jones with, among other things, narcotics trafficking, murder, attempted murder, conspiracy, and other racketeering offenses committed while functioning as an "Enterprise" with other defendants under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968.

Subsequently, the government issued a Sixth Superseding Indictment (the "Indictment") which charged Jones with committing two murders while functioning as an "Enterprise" under RICO with his brothers, Leonard Jones and Lance Jones. Count One charges Luke Jones with the murder of Monteneal Lawrence as a Violent Crime In Aid Of Racketeering ("VICAR") under 18 U.S.C. § 1959(a); Count Two charges Defendant Jones with the VICAR murder of Anthony Scott.

On August 22, 2002, the government filed an amended notice of intent to seek a sentence of death ("Amended Notice"). In that document, the government provided the following: (1) statutory threshold findings enumerated in 18 U.S.C. § 3591(a)(2) to permit the imposition of the death penalty in relation to Counts One and/or Two of the

Indictment; (2) statutory aggravating factors enumerated under 18 U.S.C. § 3592(c)(1) through (16); and (3) other non-statutory aggravating factors identified under 18 U.S.C. § 3593(a) and (c). As discussed further below, Jones has filed several motions to strike and to dismiss.

### DISCUSSION

#### I. Motion to Strike Statutory Aggravating Factors [# 1167]

Defendant Jones has moved to strike his manslaughter conviction dated November 7, 1986, in order to prevent its use as a statutory aggravating factor pursuant to 18 U.S.C. § 3592(c).<sup>1</sup> More specifically, Jones contends that this conviction is too remote in time to serve as a valid statutory aggravating factor in this capital prosecution. The court finds that this argument is without merit and lacks support in the case law.

In a death penalty prosecution brought under the Federal Death Penalty Act ("FDPA"), a jury may only impose a death sentence if it (1) returns a unanimous guilty verdict on the

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<sup>1</sup> The Amended Notice also indicates that Jones "committed the offense described in Count Two of the Superseding Indictment after substantial planning and premeditation to cause the death of a person. Section 3592(c)(9)." Amended Notice at 2. Jones has represented to the court that he has no principled basis for moving to dismiss this statutory aggravating factor.

underlying capital offense; (2) unanimously finds one of the mental states set forth in section 3591(a)(2); and (3) unanimously finds one of the statutory aggravating factors enumerated in section 3592(c). See 18 U.S.C. § 3593(e). The government's burden is to prove all of the above to a jury beyond a reasonable doubt.

The government indicates that it will seek to prove as a statutory aggravating factor that Jones "has previously been convicted of a State offense punishable by a term of imprisonment of more than one year, involving the use of a firearm (as defined in 18 U.S.C. § 921) against another person. Section 3592(c)(2)." Amended Notice at 2. In support of this representation, the government has submitted a copy of a state Judgment of Conviction dated November 7, 1986, that substantiates Jones's conviction for Manslaughter in the First Degree, in violation of Conn. Gen. Stat. § 53a-55(a)(1), and the concomitant fifteen-year sentence.

In light of the government's submission, the court rejects Jones's argument and finds that Jones's Manslaughter conviction is appropriately alleged as a statutory aggravating factor within the meaning of the FDPA. Jones has not cited any authority to support his claim that this conviction is too temporally remote under the FDPA to be considered as an

aggravating statutory factor. The court further notes that no provision in the FDPA exempts crimes committed by juveniles from being used as an aggravating factor. Accordingly, Jones's motion to strike the use of his prior Manslaughter conviction as a statutory aggravating factor is denied.

## II. Motion to Strike Non-Statutory Aggravating Factors [# 1168]

Next, Jones has moved to strike the government's proposed non-statutory aggravating factors, including prior acquitted criminal conduct, future dangerousness, narcotics trafficking activity, and the impact on Jones's victims. After careful review of the authorities cited with respect to the latter three factors (i.e., future dangerousness, narcotics trafficking activity, and victim impact), the court finds that these arguments are without merit and lack support in the case law.<sup>2</sup>

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<sup>2</sup> The court notes that the government, in its brief and at oral argument, referred to evidence that it would present during the penalty phase regarding Jones's future dangerousness in prison. The court also notes that Jones's lack of remorse may be used as evidence supporting a finding of future dangerousness. See United States v. Bin Laden, 126 F. Supp. 2d 290, 303-04 (S.D.N.Y. 2001) ("Lower courts have uniformly upheld future dangerousness as a non-statutory aggravating factor in capital cases under the [FDPA], including instances where such factor is supported by evidence of low rehabilitative potential and lack of remorse.")

The use of prior acquitted criminal conduct as a non-statutory aggravating factor, however, merits further discussion. At oral argument, the government disclosed that if this prosecution were to proceed to the penalty phase, the government intends to offer cooperating witnesses who shall testify that Jones claimed responsibility for at least one murder of which he was previously acquitted in state court.<sup>3</sup> In response, Jones counters that the FDPA and his due process rights bar the government from introducing evidence of prior acquitted conduct during the sentencing phase of trial. More specifically, although the government must prove the non-statutory aggravating factors to the jury beyond a reasonable doubt, the government must establish that Jones committed the alleged prior-acquitted acts only by a preponderance of the evidence. Jones maintains that it is fundamentally unfair to allow the government to subject him to the death penalty, in essence, by retrying him for acquitted criminal offenses under this lower evidentiary standard.

The court is not unmoved by Jones's arguments and continues to harbor concerns about permitting the government

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<sup>3</sup> The government represented at oral argument that there were two state homicide offenses at issue, one for murder and one for attempted murder. Both offenses are wholly distinct from the VICAR murders charged in the Indictment.

to effectively retry a capital defendant for such prior acquitted offenses during the sentencing phase of a capital case. Nevertheless, in light of the absence of controlling authority that either permits or proscribes this practice in the death penalty context, the court is unwilling at this juncture to preclude the government's use of evidence of this prior acquitted conduct. It is well-settled law that an essential element of any capital sentencing scheme is to provide the jury with "all possible relevant information about the individual defendant whose fate it must determine," Jurek v. Texas, 428 U.S. 262, 276 (1976), and that the jury in capital cases must have access to all relevant and reliable evidence concerning the defendant, see Hatch v. Oklahoma, 58 F.3d 1447, 1465-66 (10<sup>th</sup> Cir. 1995). Furthermore, the court is cognizant that prior acquitted conduct may be introduced at sentencing proceedings as long as the government establishes the conduct by a preponderance of the evidence. See Watts v. United States, 519 U.S. 148, 157 (1997). Thus, in light of the lack of controlling authority on this discrete legal question, the court denies Jones's motion to strike the use of prior criminal conduct as a non-statutory aggravating factor.<sup>4</sup>

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<sup>4</sup> However, if this case were to proceed to the penalty phase, the court would consider revisiting this issue in light of any new or supervening authority.

III. Motion to Dismiss Indictment Pursuant to Double Jeopardy Claim [# 1444]

Jones contends that the Indictment should be dismissed because prosecution of the RICO and VICAR offenses subjects him to double jeopardy in violation of the Fifth Amendment. More specifically, he argues that because the sentencing court considered Jones's involvement in a narcotics-trafficking conspiracy during his sentencing for a federal firearms offense, the government is barred from prosecuting him on the pending RICO and VICAR offenses. This claim is without merit and contrary to established case law.

On September 22, 2000, Jones entered a guilty plea on the charge of Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(1). At sentencing, this court determined that an upward departure under § 4A1.3 of the Sentencing Guidelines was appropriate because Second Circuit case law allows consideration of a defendant's other criminal involvement in order to determine "whether or not [the defendant] would be a repeat offender." See Sentencing Transcript at 32. Since the court determined that "the possibility that [Jones] would be a recidivist or repeat offender [was] very, very, very high," the court sentenced him to the statutory maximum 10-year term of imprisonment. Id. at 33.

Jones contends that the government's prosecution of the current Indictment now violates his right to be free from double jeopardy because the court previously considered the same narcotics trafficking conspiracy for upward departure on the firearms offense. The court, however, disagrees and finds that its previous consideration of Jones's conduct was not a legal finding, but rather an acknowledgement of Jones's background relevant to sentencing.

In a sentencing proceeding, the court does not seek to determine the defendant's guilt or innocence for a particular crime, but rather considers factors relevant to the punishment for an already convicted crime. See, e.g., United States v. Carmona, 873 F.2d 569, 574 (2d Cir. 1989). Moreover, in deciding the sentence within the applicable guideline range, the judge may properly consider any data "shedding light on the defendant's background, history, and behavior" that have a sufficient indicia of reliability. See Watts, 519 U.S. at 152 (stating that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted). Thus, when the court considered facts relevant to Jones's involvement in drug trafficking with respect to his sentencing on the firearms offense, the court formed no legal conclusion solely about the

defendant's guilt regarding that uncharged conduct. Rather, the court formed a legal conclusion solely about the correct punishment for the firearms offense. See, e.g., United States v. Piteo, 726 F.2d 53, 54 (1984).<sup>5</sup> Accordingly, the court denies Jones's motion to dismiss the Indictment on double jeopardy grounds.

IV. Motion to Dismiss Death Penalty Based Upon Claim of Vindictive Prosecution [# 1446]

Next, Jones seeks to dismiss the death penalty based upon a claim of vindictive prosecution. More specifically, he asserts that he is being penalized for exercising his constitutional rights because he was previously acquitted in state court on murder charges. This claim is also without merit and contrary to established case law.

A claim of vindictive prosecution is based on the premise that "penalizing those who choose to exercise constitutional rights would be patently unconstitutional." United States v.

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<sup>5</sup> The court also notes that United States v. Mespouledé, 597 F.2d 329 (2d Cir. 1979), is inapposite to the instant case. There, the defendant argued that an offense already tried and acquitted by a jury could not be used to prove a subsequent conspiracy charge. Id. at 333. Here, a fact finder did not weigh the evidence on Jones's involvement in the narcotics trafficking conspiracy to determine its accuracy beyond a reasonable doubt. Furthermore, a final judgment was never rendered against him for that conspiracy.

Sanders, 211 F.3d 711, 716 (2d Cir. 2000). An indictment will be dismissed if there is a finding of actual vindictiveness or if there is a presumption of vindictiveness that has not been rebutted by objective evidence justifying the prosecutor's action. Id. at 716. A finding of actual prosecutorial vindictiveness requires direct evidence, such as a statement by the prosecutor. United States v. Johnson, 171 F.3d 139, 140-41 (2d Cir. 1999). To establish actual vindictive motive, a defendant must prove objectively that the prosecutor's charging decision was a direct and unjustifiable penalty that resulted "solely from the defendant's exercise of a protected legal right." Sanders, 211 F.3d at 716-17. The decision as to whether to prosecute generally rests within the broad discretion of the prosecutor, and a prosecutor's pretrial charging decision is presumed legitimate. Id. at 716.

To demonstrate actual vindictiveness, the Second Circuit has held that a defendant must show that (1) the prosecutor harbored genuine animus toward the defendant, or was prevailed upon to bring the charges by another with animus such that the prosecutor could be considered a "stalking horse," and (2) the defendant would not have been prosecuted but for the animus. Id. at 717 (quoting United States v. Koh, 199 F.3d 632, 640 (2d Cir. 1999)). In addition, the Second Circuit has held

that the presumption of prosecutorial vindictiveness does not apply to situations where, as here, the two prosecutions at issue are conducted by separate sovereigns. Johnson, 171 F.3d at 141 & n.1. Such circumstances do not present a "realistic likelihood" of prosecutorial vindictiveness, id. at 141, because "the fact that the prosecutions of the defendants are by two different sovereigns, each acting independently under its own laws and in its own interest . . . renders inapplicable the concept of prosecutorial vindictiveness." United States v. Ng, 699 F.2d 63, 68 (2d Cir. 1983).

Jones has failed to meet his high burden of showing that the government brought this proceeding out of prosecutorial vindictiveness. In support of this claim, Jones has attached the affidavit of Attorney Jonathan Gable which details a conversation involving John Smriga, a prosecutor for the State of Connecticut, who allegedly stated that "he would beg the federal authorities to get involved in this matter [involving Jones' state murder charges] every chance he got." Gable Aff. Exh. 1 at 2. Although Attorney Smriga's statement indicates that he welcomed the federal authorities' involvement, this affidavit - even assuming the truth thereof - does not show that the government was prevailed upon to bring the instant charges out of animus for Jones. See Koh, 199 F.3d at 640

(notifying U.S. Attorney of illegal activities does not constitute "prevailing upon" such that the U.S. Attorney acted as State's "stalking horse").

Similarly, Jones's claim fails under a presumption of vindictiveness theory. The Second Circuit has held that prosecution by separate sovereigns for the same conduct does not give rise to a presumption of vindictive prosecution. Ng, 699 F.2d at 68 (rejecting argument that appearance of vindictiveness was created when government brought charges after defendants had pleaded guilty to similar charges in state court arising out of the same facts). In this case, there is no dispute that the government exercised its discretion as a separate sovereign in deciding to proceed with Jones's capital case. Thus, the court denies Jones's motion to dismiss the death penalty based upon a claim of vindictive prosecution.

V. Motion to Dismiss Notice of Special Findings and Bar the Death Penalty Based Upon Alleged Prosecutorial Misconduct Before the Grand Jury [# 1449]

Next, Jones contends that the government caused prejudice to his due process rights because the grand jury which returned the Indictment was not informed (1) that it was being asked to indict him on capital offenses; and (2) that the

findings contained in the Amended Notice were death-penalty eligibility factors. He further asserts that, as a result, the government should be barred from prosecuting this case as a capital offense.

The court, however, has reviewed in camera the relevant portions of the grand jury transcript related to this issue and is satisfied that the grand jury knew that it was being asked to indict Jones on capital offenses that would make him eligible for the death penalty. Consequently, because Jones could not have suffered prejudice with respect to his due process rights, the court finds that the government committed no constitutional violation before the grand jury. Thus, the court denies Jones's motion to bar the death penalty in light of prejudicial conduct before the grand jury.

VI. Motion to Bar the Application of the Death Penalty, Dismiss "Special Findings," and for Other Relief [# 1120]

Jones challenges the constitutionality of the FDPA on numerous grounds, primarily with reference to the Supreme Court's recent rulings in Ring v. Arizona, 536 U.S. 584 (2002), and Sattazahn v. Pennsylvania, 537 U.S. 101 (2003). More specifically, he contends that Ring and Sattazahn, when read in concert, undermine the constitutionality of the FDPA's statutory procedure that mental state and statutory

aggravating factors be tried at a separate sentencing hearing after a finding of guilt on the underlying offense. Stated differently, Jones argues that the FDPA violates his Fifth and Sixth Amendment rights because it requires a jury to consider aggravating factors at a separate sentencing hearing after a finding of guilt, as opposed to during the government's case-in-chief.

Notwithstanding the creative nature of Jones's argument, the court finds that neither Ring nor Sattazhan support his position. In Ring, the Court held that because aggravating circumstances make a defendant eligible for the death penalty and effectively "operate as the functional equivalent of an element of a greater offense," a jury must find the existence of any aggravating circumstance beyond a reasonable doubt. Ring, 536 U.S. at 609. Sattazhan involved a state capital defendant who was serving a life sentence because the jury, after finding him guilty on the murder charge, deadlocked on whether to impose the death penalty. 537 U.S. at 104. A state appeals court then reversed defendant's conviction and remanded for a new trial. Id. After the second jury returned a guilty verdict and voted unanimously to impose the death penalty, the Supreme Court ruled that the defendant was not entitled to double jeopardy protection during his second

capital sentencing proceeding because the first jury had neither acquitted him nor imposed the death penalty at the first trial. Id. at 112-13.

Applying these holdings to the instant case, the court finds that the government's prosecution of Jones under the FDPA does not run afoul of either Ring or Sattazhan. Contrary to Jones's position, neither case imposes a requirement that all elements of VICAR murder, plus one or more aggravating factors, be tried at the guilt phase before advancing to the sentencing portion of the capital trial. Much to the contrary, Ring simply holds that a jury, as opposed to a sentencing judge, must find the existence of any aggravating circumstance beyond a reasonable doubt. Similarly, Sattazhan's ruling regarding whether a defendant is entitled to double jeopardy protection during a subsequent capital sentencing proceeding does nothing to disturb the bifurcated nature of the FDPA. In other words, neither Ring nor Sattazhan proscribes the FDPA's procedure in which the jury first determines guilt on the capital offense before proceeding to the sentencing phase and consideration of aggravating factors.

Finally, Jones urges this court to adopt the reasoning of the United States v. Fell, 217 F. Supp. 2d 469, 477 (D. Vt.

2002). In that case, a federal district court in Vermont found the FDPA to be unconstitutional because it does not mandate adherence to the Federal Rules of Evidence during the sentencing phase of a capital case. This issue is moot here, however, because the government has represented to the court that it intends to observe the Federal Rules of Evidence during both the guilt and penalty phases of trial.

The court has carefully considered Jones's remaining arguments attacking the constitutionality of the FDPA and finds that they are without merit. Thus, the court denies Jones's motion to bar the application of the death penalty, to dismiss notice of special findings, and for other relief.

CONCLUSION

For the foregoing reasons, Jones's motions to strike and to dismiss as discussed above are hereby DENIED.

SO ORDERED this \_\_\_\_\_ day of October, 2003, at Bridgeport, Connecticut.

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Alan H. Nevas  
United States District Judge