

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

UNITED STATES OF AMERICA,            )  
    Plaintiff,                                )  
  )  
                  v.                            )     Criminal No. 2:01-CR-12  
  )  
DONALD FELL,                                )  
    Defendant.                                )

DEFENDANT DONALD FELL’S MEMORANDUM ON EXTRANEOUS ACTS  
AT THE PUNISHMENT HEARING

I. INTRODUCTION

The government is completing its rebuttal case during the punishment phase. There are three witnesses remaining. Each will testify about prior acts of misconduct by the defendant that were not previously alleged by the government in its Superseding Indictment or Notice of Intent to Seek the Death Penalty. This memorandum will explain why that testimony is inappropriate rebuttal evidence.

II. FACTS

The government alleged three statutory aggravating factors and four non-statutory aggravating factors to support a death sentence for Donald Fell. The three statutory factors are that: (1) the murder occurred during a kidnapping; (2) the murder was heinous, cruel, or depraved; and (3) there were multiple killings. The non-statutory factors are that: (1) the abduction facilitated the defendant’s escape; (2) the murder prevented the victim from reporting defendant’s crimes; (3) the carjacking involved substantial premeditation; and (4) victim impact.

In its punishment case-in-chief, the government called witnesses who gave additional

information about the charged crimes and established victim impact. The government then rested.

The defense mitigation case had two facets: (1) Fell's development to age 15, and (2) his acclimation to incarceration at the Northwest Correctional Facility, and prospects for future behavior in prison. The government does not argue that its remaining witnesses rebut any specific information provided by the defendant in his mitigation case, but rather that the alleged misconduct addresses proposed mitigating factors previously submitted by the defendant.

The three remaining government witnesses are Bethany Brashears, Matthew Cunningham and John Kozerski. Brashears will say she was abducted by Fell and held against her will under threat of force. She has previously given several contradictory statements about what happened and who was at fault. At the time of the "kidnapping," she fled a juvenile center with Fell's girlfriend Lyn Roberts. She had a motive to lie about her absence, as it was against her interest to admit that she left the center without permission, remaining at large for several weeks.

Matthew Cunningham will say that Fell participated in robberies and threatened to kill Debra Fell. Cunningham did not believe Fell's threat. He said he was "talking shit."

John Kozerski was a teacher at Wilkes-Barre Vocational Technical School who will say Fell once stated he would stab him. However, Fell never took any action against Kozerski. The teacher has stated he did not feel threatened.

### III. ARGUMENT

1. Extraneous Acts. There is surprisingly little consensus about when uncharged prior acts of a defendant may be admitted at a capital punishment hearing. See Robertson v. California, 493 U.S. 879 (1989) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari)

(complaining that the Court had never settled the standard for admission of extraneous acts at a capital punishment hearing). Under the Federal Death Penalty Act of 1994 (FDPA), the matter has often been framed in terms of “reliability,” but those cases generally discuss acts charged as non-statutory aggravating factors, but not rebuttal evidence. See e.g. United States v. Davis, 912 F.Supp. 938, 950 (E.D. La.1996) (Berrigan, J.).

In United States v. Green, \_ F. Supp. 2d \_, 2005 WL 1308877 (D. Mass. June 2, 2005) (Gertner, J.), the only case discussing admission of extraneous acts after Blakely v. Washington, 124 S.Ct. 2531 (2004), the court found that extraneous acts that are used in support of a death sentence must be pleaded by indictment to insure they have at least been reviewed by a grand jury. The court stated:

The non-statutory aggravating factors that the government will ask the sentencing jury to weigh in determining whether to impose the death penalty include accusations of prior crimes, unrelated to the case at bar and never adjudicated in any other forum. They are uniquely prejudicial and, in our Constitution, uniquely privileged. At \*2.

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Together, *Apprendi*, *Ring*, and *Blakely* abandoned the Court's previous focus on the procedural protections required when a defendant is exposed to punishment above the statutory maximum. They emphasized the protections that must be accorded more generally to facts, including those factors traditionally characterized as *sentencing factors*, that are essential to punishment because they increase a defendant's punishment even *within* a statutory sentencing range. Plainly, prior unadjudicated crimes that the government offers to justify the imposition of the ultimate punishment fit within this category of essential factors. At \*3.

Judge Gertner found that there were insufficient protections against mere accusations thrust into the capital penalty phase:

But surely it cannot be said that a prior *unadjudicated* crime, entirely separate from the charged offense, comes with the substantial procedural safeguards accompanying a prior conviction, or factors intertwined with the trial of the charged offense. Indeed, in *Shepard v. United States*, — U.S. ----, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), the Supreme Court found that even prior convictions, if improperly substantiated, cannot be used to increase punishment. At \*8.

In Shepard, the Supreme Court refused to allow trial courts make reliability findings about the validity of prior convictions by conducting their own review of the facts. Judge Gertner found that assessing the reliability of unadjudicated conduct at capital sentencing hearings was even less justifiable. Id.

Analogously, as the Supreme Court stated in Crawford v. Washington, 541 U.S. 36, 67 (2004) :

We have no doubt the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands.

In Crawford, the Court was talking about testimonial statements, but the same reasoning applies. In other words, absent the protections of separate trials, extraneous acts are by their nature unreliable. The only way to approximate reliability is to require the government to charge the allegations by indictment and prove them beyond a reasonable doubt.

## 2. Presumption of Innocence.

The presumption of innocence is a basic tenet of American law and has been traced back to ancient Greece. Estelle v. Williams, 425 U.S. 501, 503 (1976). That presumption “is the

undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”Coffin v. United States, 156 U.S. 432, 453 (1895). A jury instruction that undermines the presumption of innocence is unconstitutional. Sandstrom v. Montana, 442 U.S. 510, 522-23 (1979).

In United States v. Gonzalez, \_\_ F. Supp. 2d \_\_, 2004 WL 1920492 (D. Conn. Aug. 17, 2004) (Arterton, J.), the court found that charging additional similar murders as non-statutory aggravating factors denied the defendant a presumption of innocence to those claims. The court reasoned that since the jury had already convicted the defendant of similar crimes the jury would assume he committed those murders also.

In this case, the Brashears incident is much like Gonzalez. Because Fell has been convicted of a kidnapping, it will be easier for the jury to assume he also abducted Brashears. With her conflicting versions, a motive to fabricate, and the unreliability of a young abused runaway, this evidence is simply too explosively prejudicial to be admitted.

Similarly, Matthew Cunningham’s allegation that Fell participated in robberies is unfairly prejudicial. Fell has been convicted of carjacking, which is essentially robbery. It will be impossible for Fell to rebut so vague a charge, and yet the jury is likely to believe it based upon the fact they have convicted him of similar conduct. It should be excluded.

3. Rebuttal Evidence. Rebuttal evidence in a capital case “must be reasonably tailored to the information the ... testimony is intended to rebut.” United States v. Stitt, 250 F.3d 878, 897-98 (4th Cir. 2001); see also Dawson v. Delaware, 503 U.S. 159, 167-68 (1992) (gang membership improper to rebut good character evidence).

In this instance, the government is not seeking to rebut any specific evidence the defendant

has introduced, but rather, seeks to address proposed mitigating factors. In particular, the government has stated the need to address factors related to Fell's lack of criminal history and the influence of Robert Lee.

As to the former, Fell interprets "criminal history" to be a term of art referring to an official criminal record. The term is used in the United States Sentencing Guidelines. It only refers to conduct for which some official action has been taken, whether it be a conviction, a charge or an arrest. Fell's official criminal record has already been introduced into evidence. If the Court were to find that "criminal history" includes all allegations, regardless of whether they have been proven or charged, then Fell concedes the proposed mitigating factor should be withdrawn. However, in either case, it provides no basis for the government to introduce prior acts of misconduct.

The latter factor appears to have provoked a misunderstanding. The term "influence" was never meant to imply dominance. Robert Lee influenced Donald Fell in the same way Donald Fell influenced Robert Lee. They were two persons acting in concert. The factor seeks to apportion culpability, not to shift it. If the defendant were acting with a large mob he would still be responsible for his conduct, but his culpability would be allotted accordingly. Therefore, rebuttal evidence that Lee was more submissive than Fell is not relevant.

There has also been evidence introduced by Fell that he will not be a danger in prison. The government attempted to rebut this evidence with examples in his disciplinary record. However, it would not be appropriate to allow acts of misconduct that occurred years ago, when Fell was not in custody, to rebut this point. In United States v. Gilbert, 120 F. Supp. 2d 147, 154-55 (D. Mass. 2000) (Ponsor, J.), the government argued that the defendant's status as a poisoner made her a

future danger in prison. The court rejected this reasoning because there was no correlation between her previous conduct and what she was capable of in a prison. The same is true here.

#### IV. CONCLUSION

The government seeks to introduce two types of prior acts. The first, are allegations so much like the charged crimes that the jury will assume Fell is guilty of them. The “kidnapping” of Brashears is offered because it reminds jurors of Mrs. King’s abduction. The “robberies” mentioned by Cunningham are allusions to the carjacking. Both extraneous acts are offered without the protections of notice or prior review by any official authority. They are by definition unreliable and prejudicial.

The second type of evidence is simply irrelevant to whether the defendant should die. Most teenagers make idle threats, sometimes even violent threats, against their own parents or teachers. Threats alone are not the type of conduct which, standing alone, should be the basis of whether someone lives or dies. There is no evidence that the defendant was either serious or capable of carrying out those threats at the time they were made. In fact, in both cases, the witness was unsure of Fell’s intent.

None of the government’s rebuttal evidence should be admitted. It is unfairly prejudicial and it rebuts nothing.

By:

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CERTIFICATE OF SERVICE

I, the undersigned, certify that a copy of this pleading was served upon Assistant United States Attorney William Darrow and Stephen Kelly on the 11th day of July, 2005.

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