

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

UNITED STATES OF AMERICA

v.

WILMAR RENE DURAN GOMEZ

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CRIMINAL NO. H-10-459

MOTION FOR INFORMATIVE OUTLINES OF AGGRAVATING FACTORS

Defendant Wilmar Rene Duran Gomez, through undersigned counsel, moves this Court for an order directing the government to provide informative outlines of the statutory and non-statutory aggravating factors it intends to introduce in the event of a penalty phase in this case.

I. Background

A. Indictment

This is a capital prosecution.¹ On January 1, 2017, a grand jury returned a second superseding indictment (SSI) charging Mr. Duran Gomez with one count of conspiracy to transport and harbor illegal aliens, under 8 U.S.C. § 1324(a)(1)(A)(v)(I); two counts of harboring an illegal alien, resulting in death, under 8 U.S.C. § 1324(a)(1)(A)(iii), (B)(i), (A)(v)(II), (B)(iv); two counts of kidnapping resulting in death, under 18 U.S.C. § 1201(a)(1); and two counts of hostage taking resulting in death, under 18 U.S.C. § 1203. ECF No. 314 at 1-12.

The SSI alleges six aggravating factors:

- Mr. Duran Gomez “committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victims”;

¹ Mr. Duran Gomez re-alleges and incorporates by reference the contents of Defendant’s Notice of Filing of Supplemental Authority in Support of All Motions on the Ground that “Death is Different.” ECF No. 328.

- Mr. Duran Gomez “knowingly created a grave risk of death to one or more persons in addition to the victims”;
- Mr. Duran Gomez “intentionally killed or attempted to kill more than one person in a single criminal episode”;
- Mr. Duran Gomez “committed the offense after substantial planning and premeditation to cause the deaths of [the victims]”;
- the victims were “particularly vulnerable due to infirmity”; and
- “the death or injury resulting in death, occurred during the commission or attempted commission of an offense under” the hostage-taking and kidnapping statutes.

ECF No. 314 at 12-13 (citing 18 U.S.C. § 3592(c)(1), (5), (6), (9), (11), (16)).

B. Notice of intent to seek the death penalty

In its Notice of Intent to Seek the Death Penalty (NOI), filed simultaneously with the first superseding indictment on October 4, 2012, the government identifies the above statutory aggravating factors as well as three non-statutory aggravating factors:

1. Mr. Duran Gomez “caused loss, injury, and harm to the victim and the victim’s family, including, but not limited to, the fact that the victim’s family suffered severe and irreparable harm.” ECF No. 137 at 7.
2. The victims “were particularly vulnerable as a consequence of being harbored . . . in a warehouse from which they were unable to extricate themselves and under circumstances that rendered them vulnerable.” ECF No. 137 at 7.
3. Mr. Duran Gomez “represents a continuing danger to the lives and safety of other persons . . . as evidenced by, at least,” three factors:
 - (a) Mr. Duran Gomez has allegedly “engaged in a continuing pattern of violence, attempted violence, and threatened violence, including, at least, the crimes alleged against [him] in the Indictment and a history of abusive and malicious conduct against others, including his girlfriends, a female employee, and even his mother.” ECF No. 137 at 5-6.
 - (b) Mr. Duran Gomez allegedly “demonstrated an utter lack of remorse over having committed the offense.” ECF No. 314 at 6.
 - (c) Mr. Duran Gomez has allegedly “demonstrated a low potential for rehabilitation as evidenced by [a] record of sadistic behavior and his

longstanding involvement in criminal activities leading up to the capital offenses charged in the Indictment.” ECF No. 137 at 6-7.

II. Argument

A. Relevant law

The Federal Death Penalty Act (FDPA) divides capital sentencing proceedings into two phases. *United States v. Snarr*, 704 F.3d 368, 378 n.1 (5th Cir. 2013). In the first phase, known as the “eligibility phase,” *id.*, the government “must prove, beyond a reasonable doubt, any one of the statutory intent factors provided in section 3591(a)(2) and any one of the statutory aggravating factors provided in section 3592(c),” *United States v. Bourgeois*, 423 F.3d 501, 506-07 (5th Cir. 2005).

If the jury finds the government has carried its burden with respect to both findings, sentencing proceeds to the “selection phase.” *Snarr*, 704 F.3d at 378 n.1. At this phase, the jury “may consider the existence of nonstatutory aggravating factors for which notice has been given by the government” as well as “evidence of any mitigating factor that [a juror] has found to exist by a preponderance of the evidence.” *United States v. Jones*, 132 F.3d 232, 240 (5th Cir. 1998). The jury must then “decide[] whether the aggravating factors sufficiently outweigh statutory or non-statutory mitigating factors to warrant a death sentence or, absent mitigating factors, whether the aggravators alone warrant that sentence.” *United States v. Davis*, 609 F.3d 663, 673 (5th Cir. 2010). If they do not, the jury may not impose a sentence of death.

The government’s discretion to define non-statutory aggravating factors is limited by several principles. For example, “due process requires that information submitted as aggravating genuinely narrow the class of persons eligible for the death penalty.” *Jones*, 132 F.3d at 240.

Second, “the district court functions as a gatekeeper to limit the admission of useless and impermissibly prejudicial information.” *Id.* “The Court’s screening of aggravating factors is essential in channeling, directing and limiting the sentencer’s discretion to prevent arbitrary and capricious imposition of the death penalty.” *United States v. Solomon*, 513 F. Supp. 2d 520, 526 (W.D. Pa. 2007).

Third, “the statute limits the scope of aggravating factors to those for which prior notice has been given by the prosecution.” *Jones*, 132 F.3d at 240. The FDPA provides that the government may rely on a given aggravating factor at the selection phase only if, “a reasonable time before the trial,” the government provides the defendant with notice of its intent to do so. § 3593(a); *see Bourgeois*, 423 F.3d at 507. “[A]t a minimum, due process requires a defendant to receive sufficient notice of aggravating factors to enable him to respond and to prepare his case in rebuttal.” *United States v. Wilson*, 493 F. Supp. 2d 364, 377 (E.D.N.Y. 2006); *see also, e.g., United States v. Kaczynski*, 1997 WL 34626785, at *18 (E.D. Cal. Nov. 7, 1997) (same); *United States v. Rodriguez*, 380 F. Supp. 2d 1041, 1057 (D.N.D. 2005) (calling defendant’s ability to defend his case a “hallmark[]” of due process).

Moreover, “[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” *Boyer v. Vannoy*, 863 F.3d 428, 446 (5th Cir. 2017). “This opportunity would hardly be ‘meaningful’ if the defense were forced to confront sentencing phase evidence without any notice of what that evidence might be.” *United States v. Llera Plaza*, 179 F. Supp. 2d 464, 472 (E.D. Pa. 2001); *see also, e.g., United States v. Duncan*, 2008 WL 656036, at *5 (D. Idaho Mar. 6, 2008)

(same). As one court has explained: “Absent further revelations by the government, Defendant may be forced to defend against these allegations for the first time during the prosecutor’s case-in-chief at sentencing. This raises the specter of unfair surprise and potentially prejudices Defendant’s ability to defend against the government’s efforts to impose the death penalty.” *Rodriguez*, 380 F. Supp. 2d at 1057.

Therefore, numerous courts have found that “[i]n order for the government’s evidence to be subjected to the crucible of meaningful adversarial testing, the [notices of intent], in conjunction with the indictment, must inform the defendants of the theories and facts that the government will use to establish each aggravating factor.” *Llera Plaza*, 179 F. Supp. 2d at 472; *see also, e.g., Duncan*, 2008 WL 656036, at *5. Citing the commands of due process, and relying on their “inherent authority,” courts frequently order the government to provide defendants, ahead of sentencing, with more than the bare minimum notice required by the FDPA. *E.g., United States v. Glover*, 43 F. Supp. 2d 1217, 1222 (D. Kan. 1999). These courts direct the government to provide additional information about the evidence it will use to establish its aggravating factors, consistent with the defendant’s right to a “meaningful” opportunity to meet the allegations against him. *E.g., United States v. Jacques*, 2011 WL 1675417, at *29 (D. Vt. May 4, 2011), *overruled in part on other grounds*, 684 F.3d 324 (2d Cir. 2012); *Glover*, 43 F. Supp. 2d at 1222; *United States v. Montgomery*, 10 F. Supp. 3d 801, 830 (W.D. Tenn. 2014) (listing cases); *Rodriguez*, 380 F. Supp. 2d at 1058; *Kaczynski*, 1997 WL 34626785, at *19; *Wilson*, 493 F. Supp. 2d at 376; *United States v. Karake*, 370 F. Supp. 2d 275, 280-81 (D.D.C. 2005); *United States v. Gooch*, 2006 WL 3780781, at *23 (D.D.C. Dec. 20, 2006); *United States v. Lujan*, 2008 WL 11359151, at *23 (D.N.M. June 26, 2008).

Requiring the government to provide advance notice serves the additional function of facilitating a trial court's "gatekeep[ing]" function. Jones, 132 F.3d at 240. By mandating disclosure up front, the court can make reasoned, deliberate choices as it "screen[s]" the government's aggravation evidence, which is "essential in channeling, directing and limiting the sentencer's discretion to prevent arbitrary and capricious imposition of the death penalty." *Solomon*, 513 F. Supp. 2d at 526; *see also United States v. Hammer*, 2011 WL 6020157, at *3 (M.D. Pa. Dec. 1, 2011) (same).

The additional information typically takes the form of an "informational outline," *Hammer*, 2011 WL 6020157, at *2, or "informative outline," *United States v. Bin Laden*, 126 F. Supp. 2d 290, 304 (S.D.N.Y. 2001); *see United States v. Diaz*, 2007 WL 4169973, at *3 n.1 (N.D. Cal. Nov. 20, 2007) ("In the interest of protecting defendants' right to prepare an adequate defense, most federal district decisions have required an informative outline of the underlying facts the government plans to use to prove the aggravating factors indicated in Section 3593(a)."). This outline informs the defendant of "the general nature of the evidence [the government] will seek to introduce in support of the threshold findings and specified aggravating factors." *Hammer*, 2011 WL 6020157, at *3; *see also United States v. O'Reilly*, 2007 WL 4591856, at *5 (E.D. Mich. Dec. 28, 2007) (explaining that informative outline provides defendant with "more specific information" about the government's proposed aggravating factors).

Moreover, the government cannot avoid providing an informative outline simply by arguing that its sentencing information has been disclosed in discovery—especially when, as in this case, the discovery is voluminous:

Contrary to the government's suggestion, the fact that the precise acts and/or events may have been disclosed in the course of discovery does not obviate the need for a

more specific notice. Even if the government has provided Defendant with documents detailing specific acts, the government has not yet indicated which acts and/or events it intends to use at sentencing. In fact, the characterization of the discovery provided as extensive lends further support for requiring the government to identify the particular acts upon which it will rely. Extensive discovery could make it difficult for Defendant to ascertain which precise discovery will be used against him.

Rodriguez, 380 F. Supp. 2d at 1057-58; *see also Kaczynski*, 1997 WL 34626785, at *19 (same); *Diaz*, 2007 WL 4169973, at *5 (“Merely referring to a range of several hundred pages (or thousands in some cases) in discovery is not an informative outline. . . . [T]oo much is left to guesswork. Notice means notice. It does not mean a scavenger hunt for clues in discovery, including in redacted pages.”).

B. Request for informative outline

Under the Sixth Amendment, criminal defendants are entitled to the effective assistance of counsel at capital sentencing proceedings. *See Mays v. Stephens*, 757 F.3d 211, 215-16 (5th Cir. 2014). In measuring counsel’s performance,

the Supreme Court has counseled that the [American Bar Association] Guidelines for counsel in death penalty cases provide the governing “norms.” *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989)). In particular, the Court in *Wiggins* referenced the ABA Guideline which governs the investigatory duties of counsel with respect to the penalty phase of a capital trial, quoting its requirement that counsel must ““discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.”” *Wiggins*, 539 U.S. at 524 (quoting ABA Guidelines 11.4.1(C), p. 93). Since *Wiggins*, these Guidelines have been revised to be even more exacting insofar as they require counsel “to seek information that . . . rebuts the prosecution’s case in aggravation,” Guideline 10.11(A), and to “determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and *what evidence will be offered in support thereof*.” *Id.* at 10.11(H).

Karake, 370 F. Supp. 2d at 278 (some citations omitted) (emphasis in *Karake*).

Armed with this information, defense counsel should investigate whether the government's evidence "can be excluded, rebutted, or undercut." Guideline 10.11 cmt. "Where possible, counsel should move to exclude aggravating evidence as inadmissible, and, if that fails, rebut the evidence or offer mitigating evidence that will blunt its impact." *Id.*; *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005) ("We long have referred to these ABA Standards as guides to determining what is reasonable."). Counsel cannot perform this function—and therefore cannot provide the constitutionally required effective assistance—without advance notice of the government's evidence.

Together, the SSI and the NOI identify six statutory and three non-statutory aggravating factors on which the government intends to rely at sentencing. ECF No. 137 at 5-7; ECF No. 314 at 13-14. The SSI's descriptions of the statutory factors are limited to a bare recitation of the language of § 3592(c), and the NOI's descriptions of the non-statutory factors contain only the most basic of factual allegations. Because these pleadings do not provide sufficient information to satisfy Mr. Duran Gomez's due process right to advance notice—and because the Court cannot exercise its gatekeeper function based on these bare-bones pleadings—the Court should order the government to produce an informative outline as to each aggravating factor.

1. Statutory aggravating factors

The SSI enumerates six separate statutory aggravating factors. None of the allegations provides notice adequate to satisfy due process.

a. Heinous, cruel, and depraved conduct

The government alleges that Mr. Duran Gomez "committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the

victim,” ECF No. 314 at 13, but provides no details of the alleged torture or physical abuse, nor identifies any of the evidence it intends to rely on to establish this aggravator.

Other district courts have ordered the government to produce an informative outline with regard to the “heinous, cruel, and depraved” aggravator. *E.g.*, *United States v. Con-Ui*, 2016 WL 9331115, at *17 (M.D. Pa. Jan. 28, 2016) (ordering, with respect to “heinous, cruel, and depraved” factor that government “provide an outline indicating the portions of the videotape it intends to introduce and the photographs it intends to introduce, and also if it intends to call any other witnesses or present witnesses or evidence other than the videotape, photographs, and autopsy report”); *United States v. Diaz*, 2007 WL 196752, at *4 (N.D. Cal. Jan. 23, 2007) (“The government provided no factual support for this statutory factor in its notice. As with the foregoing statutory factors, the government must provide an informative outline of the factual basis on which it intends to establish the ‘heinous, cruel, or depraved manner’ aggravating factor during the penalty phase.”). This Court should do the same.

b. Grave risk of death to one or more persons

The SSI also alleges Mr. Duran Gomez “knowingly created a grave risk of death to one or more persons in addition to the victims.” ECF No. 314 at 13 (citing § 3592(c)(5)). But the SSI does not identify who that additional person or those additional persons are, or how Mr. Duran Gomez “knowingly” placed them at grave risk of death. Without this information, Mr. Duran Gomez cannot meaningfully prepare to defend against the government’s allegation, and the Court cannot consider any evidentiary challenges to the government’s case.

This Court should order the government to produce an informative outline as to the “grave risk of death” aggravator. *See, e.g.*, *Llera Plaza*, 179 F. Supp. 2d at 473 (ordering production of

informative outline where “neither the indictment nor the NOIs specify which ‘additional persons’ the defendants are alleged to have put at risk during their alleged crimes”); *Diaz*, 2007 WL 196752, at *4 (ordering informative outline because “[t]he government did not explain in its briefs or at oral argument who was put at grave risk, what the grave risk was, or how the defendant ‘knowingly’ created the risk”); *United States v. Savage*, 2013 WL 1934531, at *12 (E.D. Pa. May 10, 2013) (“Nowhere in the Revised Notice of Intent or in the Indictment does the Government allege any individuals, other than the victims, who were exposed to ‘grave risk’ during the commission of the charged murders. . . . The Government shall submit an outline of the evidence it intends to use at the sentencing phase with respect to this aggravating factor.”).

c. Intentionally killing more than one person

The government also seeks a death sentence based on § 3592(c)(16): “The defendant intentionally killed or attempted to kill more than one person in a single criminal episode.” ECF No. 314 at 13. This allegation provides insufficient notice because it does not indicate whether the government will attempt to prove that Mr. Duran Gomez “attempted to kill” anyone other than Abelardo Sagastume and Hector LNU. The SSI does not indicate whether the government will be pursuing both the “intentionally killed” and “intentionally . . . attempted to kill” prongs of this factor, or just the former. If the government intends to prove both, it must identify whom it alleges Mr. Duran Gomez attempted to kill.

It must also identify what evidence it intends to rely on to prove Mr. Duran Gomez “intentionally” killed or attempted to kill a victim. The NOI’s statutory intent factors allege that Mr. Duran Gomez exhibited a “reckless disregard” for human life and that he “intend[ed] that lethal force would be used” by some unspecified person. ECF No. 137 at 3. But the NOI does not allege

that he, himself, intended to cause anyone's death. If the government plans to rely on § 3592(c)(16), it must provide additional information so that Mr. Duran Gomez can defend against this accusation and this Court can rule on any objections he may raise.

d. Substantial planning and premeditation

The government alleges that Mr. Duran Gomez “committed the offense after substantial planning and premeditation to cause the deaths of [the victims],” ECF No. 314 at 13 (citing § 3592(c)(9)), but does not provide any details about the purported planning and premeditation. Given that the statutory intent factors identified in the NOI do not entail premeditated action, it is unclear what basis the government has for alleging Mr. Duran Gomez acted with premeditation. Mr. Duran Gomez cannot meaningfully contest this factor—and the Court cannot screen the evidence pertaining to it—without additional information about how the government intends to prove “substantial planning and premeditation.” The Court should direct the government to produce an informative outline with respect to this factor. *See, e.g., Hammer*, 2007 WL 6020157, at *3 (ordering the government “to provide Defendant with Informational Outlines of the information it plans to present in support of . . . the statutory aggravating factor of substantial planning and premeditation.”).

e. Victim vulnerability

The government further alleges that the victims in this case were “particularly vulnerable due to infirmity.” ECF No. 314 at 13 (citing § 3592(c)(11)). Nowhere does the SSI explain, however, in what ways the victims were infirm—for example, because of age, health, physical size, or other condition. And it fails to describe how that infirmity rendered them “particularly vulnerable,” i.e., more vulnerable than a typical victim. Because “evidence of

victim vulnerability and victim impact in a particular case is inherently individualized,” *United States v. Green*, 2008 WL 4000870, at *19 (W.D. Ky. Aug. 26, 2008), more detailed information is crucial to Mr. Duran Gomez’s ability to contest this aggravator and the Court’s ability to decide admissibility challenges. *E.g.*, *Savage*, 2013 WL 1934531, at *9 (“Because the nexus is not clear, the Government will be required to submit an offer of proof outlining the evidence they intend to show in support of this [vulnerable victim] aggravating factor as it applies to all of the victims.”).

f. During the commission of another offense

Finally, the SSI alleges the victims’ deaths “occurred during the commission or attempted commission of an offense under Title 18, United States Code, Section 1203, hostage taking; and Title 18, United States Code, Section 1201, kidnapping.” ECF No. 314 at 13-14 (citing 18 U.S.C. § 3592(c)(1)). But the SSI provides no information about the government’s theory of how Mr. Duran Gomez’s alleged crimes caused the victims’ deaths—e.g., whether they died during an attempted kidnapping, a completed hostage-taking, etc. And it does not explain what part of the alleged kidnapping or hostage-taking actually led to the victims’ deaths. This Court should order the government to provide additional details in an informative outline. Without them, Mr. Duran Gomez cannot prepare for sentencing, and this Court cannot perform its “gatekeeper” role. *Jones*, 132 F.3d at 240.

2. Non-statutory aggravating factors

a. Victim vulnerability

The government’s list of non-statutory aggravators, like its list of statutory aggravators, contains an allegation of victim vulnerability. Specifically, the NOI alleges “[t]he victims were particularly vulnerable as a consequence of being harbored by [Mr. Duran Gomez] in a warehouse

from which they were unable to extricate themselves and under circumstances that rendered them vulnerable.” ECF No. 137 at 7.² This allegation fails to give Mr. Duran Gomez sufficient notice of what the government will attempt to prove at sentencing. The NOI does not explain how the government will show that the victims were “unable to extricate themselves” from the warehouse, or what the government means by this phrase. The phrase “unable to extricate themselves” is sufficiently vague and indeterminate that Mr. Duran Gomez cannot meaningfully defend against such an accusation absent additional information.

To the extent the remainder of the government’s vulnerable-victim allegation—“under circumstances that rendered [the victims] vulnerable”—is meant to signify something other than the victims’ inability to extricate themselves from the warehouse, it is completely uninformative. It is true in every case that victims will be vulnerable if they are subject to conditions that “render them vulnerable.” This truism fails to give Mr. Duran Gomez sufficient notice of what the government will attempt to show at sentencing.

To remedy these deficiencies, the Court should order the government to produce and disclose an informative outline. *See Llera Plaza*, 179 F. Supp. 2d at 472 (noting the opportunity to present a complete defense “would hardly be ‘meaningful’ if the defense were forced to confront sentencing phase evidence without any notice of what that evidence might be”). Mr. Duran Gomez’s due process right to notice, and this Court’s performance of its gatekeeper role, depend on access to such an outline.

² Mr. Duran Gomez objects to the government’s attempt to double-count victim vulnerability as two separate aggravators, and will plan to address this issue in a separate motion.

b. Victim impact evidence

The NOI also alleges the existence of “significant victim impact evidence concerning the effects of the offenses on the victims.” ECF No. 137 at 7. The NOI explains:

As reflected by the victim’s personal characteristics as a human being and the impact of the offenses on the victim and his family, [Mr. Duran Gomez] caused loss, injury, and harm to the victim and the victim’s family including, but not limited to, the fact that the victim’s family suffered severe and irreparable harm.

ECF No. 137 at 7.

As an initial matter, it is unclear to whom this allegation refers. The NOI references “the victim”—i.e., a single person—rather than plural “victims.” Presumably that is because the government has not yet identified one of the two victims in this case. Even assuming that the government is referring to the impact of the loss on Mr. Sagastume’s family, the allegation in the NOI is inadequate. “That the range of human suffering—whether physical, emotional, or economic—is vast goes without saying.” *Bin Laden*, 126 F. Supp. 2d at 304; *see also Wilson*, 493 F. Supp. 2d at 378 (“The category of ‘victim impact’ is vast.”); *Green*, 2008 WL 4000870, at *21 (same). Accordingly, an “oblique reference to victims’ ‘injury, harm, and loss,’ without more, does nothing to guide [Mr. Duran Gomez’s] vital task of preparing for the penalty phase of trial.” *Bin Laden*, 126 F. Supp. 2d at 304. It also necessarily hamstring this Court’s performance of its gatekeeping role in considering any objections Mr. Duran Gomez raises.

Faced with similarly conclusory notices, courts in other cases have ordered the government to “more specifically articulate the nature of this aggravator.” *Glover*, 43 F. Supp. 2d at 1225. The *Glover* court, for example, directed the government to specify “which members of the [victim’s] family have suffered, the nature of their suffering, and the nature of the ‘permanent harm,’” e.g., “whether members of the family sought counseling or other medical treatment, such as

hospitalization, and whether and to what extent members of the family suffered financial harm.” *Id.*; see also, e.g., *United States v. Cooper*, 91 F. Supp. 2d 90, 111 (D.D.C. 2000) (“[T]he government shall amend its notice of intent . . . to include more specific information concerning the extent and scope of the injuries and loss suffered by each victim, his or her family members, and other relevant individuals, and as to each victim’s ‘personal characteristics’ that the government intends to prove.”); *United States v. Pleau*, 2013 WL 1673109, at *4 (D.R.I. Apr. 17, 2013) (ordering government to “provide an outline of its victim impact evidence”); *United States v. Talik*, 2007 WL 4570704, at *9 (N.D. W. Va. Dec. 26, 2007) (same); *Llera Plaza*, 179 F. Supp. 2d at 475 (same); *Duncan*, 2008 WL 656036, at *8 (same); *Green*, 2008 WL 4000870, at *20 (same); *O’Reilly*, 2007 WL 4591856, at *5 (same); *Williams*, 2013 WL 1335599, at *40 (same).

“The propriety of providing a defendant with such information is further underscored by the particular danger of eliciting an emotional reaction inherent in victim impact evidence.” *Casey*, 2013 WL 12190487, at *2 (D.P.R. Mar. 1, 2013); see also *Jackson v. Dretke*, 450 F.3d 614, 621-22 (5th Cir. 2006) (noting that victim impact evidence can be particularly prejudicial (citing *Payne v. Tennessee*, 501 U.S. 808 (1991))). Victim impact testimony has “unsurpassed emotional power . . . on a jury.” *United States v. Johnson*, 362 F. Supp. 2d 1043, 1107 (N.D. Iowa 2005). One federal judge has described such testimony as “the most forceful, emotionally powerful, and emotionally draining evidence that [he has] heard in any kind of proceeding in any case, civil or criminal, in [his] entire career as a practicing trial attorney and federal judge spanning nearly 30 years.” *Id.*

Given the “heightened degree of reliability” required of fact-finding in capital cases, *United States v. Bernard*, 299 F.3d 467, 475 (5th Cir. 2002), courts have recognized that defendants in

death cases have a special need to know of the government's aggravating evidence well in advance of sentencing:

[T]he mantra that "death is different" really applies here. Presenting information about victim impact to a jury that has convicted a defendant of a capital crime is different than presenting such information to a judge months after a trial is completed and at a time when the parties (and jury) are no longer exhausted from trial and no longer have frayed nerves from deliberations.

Gooch, 2006 WL 3780781, at *23; *see also Montgomery*, 10 F. Supp. 3d at 830 (same). This Court, like those courts, should therefore "order the Government to outline the type and scope of the 'loss, injury, and harm' suffered by each victim, his or her family members, and other individuals as relevant, and the 'personal characteristics' of each victim that it intends to prove." *Gooch*, 2006 WL 3780781, at *23.

c. Future dangerousness

Finally, the NOI alleges Mr. Duran Gomez "represents a continuing danger to the lives and safety of other persons in that he demonstrates a continuing pattern of violence, exhibits low rehabilitative potential, and/or shows a lack of remorse." ECF No. 137 at 5.

As an initial matter, the NOI as a whole is deficient because it does not indicate how the government will attempt to show Mr. Duran Gomez would be dangerous in a prison context. Because the only available punishments in this case are death or life in prison without parole, the government may rely on future dangerousness only if it can demonstrate Mr. Duran Gomez would be dangerous in prison. *See Montgomery*, 10 F. Supp. 3d at 840 ("[T]he Government cannot argue that the jury should consider Defendant's potential future dangerousness in non-prison settings."); *Cooper*, 91 F. Supp. 2d at 111 ("[T]he government's evidence should be limited to Cooper's future dangerousness within the context of serving a life sentence in the custody of the Bureau of

Prisons.”); *Llera Plaza*, 179 F. Supp. 2d at 487-88 (“[I]f there is a sentencing phase, the jury will be instructed that it is to evaluate the defendants’ ‘future dangerousness’ in the context of life imprisonment, and the government will be requested to limit its sentencing phase evidence to that which is relevant to a context of life imprisonment.”). The government should therefore be required to produce an informative outline describing the evidence that suggests future dangerousness in a prison context. Such an outline will provide Mr. Duran Gomez a meaningful opportunity to present a complete defense, as well as empower this Court to act as a gatekeeper against admission of “useless and impermissibly prejudicial information.” *Jones*, 132 F.3d at 240.

In addition, the NOI is insufficiently specific with respect to each of the three components of future dangerousness that it identifies.

i. Continuing pattern of violence

As to Mr. Duran Gomez’s supposed “continuing pattern of violence,” the NOI alleges he has engaged in acts of violence that include, “at least,” (1) the crimes in the indictment, (2) kicking an ex-girlfriend in the stomach, (3) “frequently” beating and physically abusing a different ex-girlfriend, (4) pressing a gun to the head of a female employee, and (5) grabbing his mother by the hair and dragging her from the bedroom of their apartment to the living room. ECF No. 137 at 6. These allegations are inadequate for several reasons.

First, the NOI’s use of “at least” leaves open the possibility that the government will attempt to introduce evidence of other acts of violence. If the government intends to do so, it should be required to disclose, ahead of trial, what those acts are. See *United States v. Lujan*, 530 F. Supp. 2d 1224, 1271 (D.N.M. 2008) (“By using the term ‘at least,’ the [future dangerousness] factor creates ambiguity as to whether the Government will present evidence of additional sub-factors.

The Government must therefore submit an informative outline of the general nature of the evidence it plans to use to prove future dangerousness.”).

Second, even with respect to the specified acts of violence, the NOI provides virtually no details, such as the names of the ex-girlfriends and the female employee, and fails to provide any information on the dates or locations of the alleged instances of abuse.

Evidence of “a defendant’s unadjudicated prior criminal activity” requires careful scrutiny. Given “the potential problems with the reliability of such evidence and the risk that it may mislead, courts have been careful to require the government to fully disclose all of the unadjudicated misconduct that it plans to introduce as sentencing phase evidence.” *Llera Plaza*, 179 F. Supp. 2d at 474. Early disclosure of this kind allows courts to “assess the reliability of the evidence” and “evaluate the time and complexity involved in its presentation.” *United States v. Davis*, 912 F. Supp. 938, 949 (E.D. La. 1996); *see also United States v. Sanders*, 2014 WL 2612502, at *1 (“In particular, the Government must specify the acts it intends to rely upon to establish that Defendant ‘engaged in a continuing pattern of violence, attempted violence, and threatened violence, against his former wife and stepson’ and any other unadjudicated misconduct evidence it intends to use against Defendant during the penalty phase of trial in order to more fully enable Defendant to prepare his case, as well as to provide the Court with some frame of reference for ruling on objections to the death penalty notice.”); *Glover*, 43 F. Supp. 2d at 1227-28 (“[T]he government is directed to amplify its notice by providing a written list identifying the particular unadjudicated acts that it will seek to introduce during sentencing on this factor, as well as the dates of the unadjudicated acts . . . [and] list the witnesses and exhibits the government intends to present to prove the unadjudicated acts.”); *see also Kaczynski*, 1997 WL 34626785, at *19 (ordering the

government to produce “a written description of all unadjudicated misconduct that it seeks to introduce during sentencing on [future dangerousness].”); *Hammer*, 2011 WL 6020157, at *3 (ordering government to provide defense with “Informational Outlines of the information it plans to present in support of . . . the non-statutory factor[] of future dangerousness.”).

The government should be required to “amplify its notice” through an informative outline.

ii. Low likelihood of rehabilitation

The NOI alleges Mr. Duran Gomez “has demonstrated a low potential for rehabilitation as evidenced by [a] record of sadistic behavior and his longstanding involvement in criminal activities leading up to the capital offenses charged in the Indictment.” ECF No. 137 at 6-7. It then lists Mr. Duran Gomez’s two alleged convictions: for obstruction of justice and for aggravated assault with a deadly weapon in 2002.

This allegation does not identify the victim of the alleged assault, nor does it describe when or where the assault supposedly occurred. To the extent the government intends to introduce evidence of “sadistic behavior” other than this alleged assault, the NOI also fails to identify that conduct. Mr. Duran Gomez cannot attempt to rebut this allegation without such additional information, nor can this Court rule on any potential objections.

As for the obstruction-of-justice conviction, the government is using this conviction as both an overt act in the conspiracy count, *see* ECF No. 314 at 6-7, and also as part of the future-dangerousness aggravator. The government sought and obtained this obstruction-of-justice conviction while it investigated the current capital charges, and the alleged obstruction related to the murder investigation. As a result, various aspects of that obstruction conviction bear directly on the propriety of its use in this case, including the manner in which the government pursued the

obstruction charges, information it provided to Mr. Duran Gomez’s counsel in that case, and representations it made regarding the likelihood of additional charges. This information is all highly relevant to whether use of that obstruction conviction as aggravation for this case comports with constitutional requirements.

iii. Lack of remorse

To support its lack-of-remorse allegation, the NOI identifies only a single alleged statement by Judith Lopez, a co-defendant in the 2006 obstruction case. This summary statement is inadequate.

“Lack of remorse is a subjective state of mind, difficult to gauge objectively since behavior and words don’t necessarily correlate with internal feelings.” *Glover*, 43 F. Supp. 2d at 1226. Without knowing exactly what evidence the government intends to introduce, therefore, Mr. Duran Gomez cannot prepare to rebut his alleged statements—which may, in context, reflect states of mind that are less “difficult to gauge.”

Moreover, lack of remorse is “particularly ambiguous” in a criminal context because “guilty persons have a constitutional right to be silent, to rest on a presumption of innocence and to require the government to prove their guilt beyond a reasonable doubt.” *Id.* Lack-of-remorse evidence therefore “has a substantial possibility of encroaching on [a] defendant’s constitutional right to remain silent.” *Cooper*, 91 F. Supp. 2d at 113. In light of this “substantial possibility,” Mr. Duran Gomez must be able to move before trial to exclude any lack-of-remorse evidence that “implicate[s] his] constitutional right to remain silent.” *United States v. Nguyen*, 928 F. Supp. 1525, 1542 (D. Kan. 1996). He cannot do so, however, unless he has notice of the exact evidence the government intends to introduce to establish lack of remorse. The government should therefore be required to

produce an informative outline on this aggravating factor. *See, e.g., Kaczynski*, 1997 WL 34626785, at *20.

III. Conclusion

To protect Mr. Duran Gomez's right to notice and to ensure this Court can properly perform its gatekeeping role, the Court should order the government to produce an informative outlining detailing the evidence it intends to use to establish statutory and non-statutory aggravating factors in the event of a penalty phase in this case.

In addition, Mr. Duran Gomez respectfully requests this Court schedule a hearing at which it can assess the reliability and potential for prejudice of the evidence the government intends to offer. *See* 18 U.S.C. § 3593(c) (providing that at capital sentencing hearing, "information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury"); *e.g., Hammer*, 2011 WL 6020157, at *3 ("[R]equiring the government to explain in greater detail the evidence it intends to introduce at trial will put the parties and the court in a better position to assess the need for a hearing to evaluate that evidence."); *Glover*, 43 F. Supp. 2d at 1227 ("After the government has fully specified the factual basis and the evidence it intends to use to prove this factor, the court will consider whether a pretrial evidentiary hearing is warranted."); *Llera Plaza*, 179 F. Supp. 2d at 475 (ordering government to produce informative outline so court could "determine if a pre-sentencing hearing will be necessary to review that evidence").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Motion for an Informative Outline** was delivered via electronic filing to the Assistant United States Attorneys in this cause on May 6, 2019.

/s/ Neal Davis, III

NEAL DAVIS, III

CERTIFICATE OF CONFERENCE

I hereby certify that the undersigned, Neal Davis, III have spoken with the Assistant United States Attorneys in this cause, Jill Stotts and James Nelson, who state they are opposed to the filing of this motion.

/s/ Neal Davis, III

NEAL DAVIS, III