

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JUAN R. PEDRO-VIDAL,
Defendant.

CRIMINAL NO. 16-778(GAG)

**MOTION FOR INFORMATIVE OUTLINES OF THE
NONSTATUTORY AGGRAVATING FACTORS**

The Defendant, by and through undersigned counsel, and pursuant to the Fifth, Sixth and Eighth Amendments to the United States Constitution, and the further points and authorities set forth *infra*, hereby moves this Honorable Court to order the Government to provide informative outlines of the non-statutory aggravating factors it intends to introduce in the event of a penalty phase in the above-styled case. The following is set forth in support:

INTRODUCTION

This is a capital prosecution.¹ The Government's *Notice of Intent to Seek a Sentence of Death Against Juan R. Pedro Vidal* (Doc. 484) alleges five statutory and four non-statutory aggravating factors. This motion is addressed **only** to the non-statutory factors, *to wit*:

D. Non-Statutory Aggravating Factors Identified under Title 18, United States Code,

¹ Defendant realleges and incorporates by reference the points and authorities in *Defendant's Amended Notice Of Filing Of Supplemental Authority In Support Of All Motions On The Ground That "Death Is Different"* (Doc. 519).

Section 3593(a)(2)

- a. Juan R. Pedro Vidal caused injury, harm and loss to J.G.R. and his family.
- b. Juan R. Pedro Vidal poses a continuing danger to others in that he is likely to commit criminal acts of violence in the future that would constitute a continuing and serious threat to the lives and safety of others.
- c. In committing the acts of violence charged in the indictment, Juan R. Pedro Vidal encouraged others to commit acts of violence.
- d. Juan R. Pedro Vidal committed the instant offense while engaged in the business of drug trafficking.

RELIEF REQUESTED

The Defendant seeks “informative outlines” - as described and discussed below - of each of these non-statutory aggravators, for the dual purposes of 1) providing adequate notice for defense investigation, preparation and mitigation of these factors, and 2) facilitating *meaningful* advance litigation of the admissibility of evidence related to said factors.

MEMORANDUM OF LAW

Non-statutory aggravating factors in general

In contrast to **statutory** factors, non-statutory aggravating factors were not enacted by Congress. Although prosecutors may draft them, “[t]he FDPA does not give the prosecution carte blanche in devising non-statutory aggravating factors”. *United States v. Perez*, No. 3: 02cr7(JBA), 2004 U.S. Dist. LEXIS 7500, at *38 (D. Conn. Apr. 29, 2004). Rather, “the government’s

discretion to argue [them] is limited.” *United States v. Hammer*, No. 4:96-CR-239, 2011 U.S. Dist. LEXIS 138039, at *12-13 (M.D. Pa. Dec. 1, 2011).

One of the ways in which “the submission of non-statutory aggravating factors to the jury is constrained ...” is that “[t]he district court functions as a gatekeeper to limit the admission of useless and impermissibly prejudicial information.” *United States v. Stone*, No. CR12-0072-JCC-GSA, 2014 U.S. Dist. LEXIS 20047, at *17 (E.D. Cal. Feb. 18, 2014). Another constraint is that “information submitted as aggravating [must] genuinely narrow the class of persons eligible for the death penalty”. *Id.* See also, *Runyon v. United States*, 228 F. Supp. 3d 569, 638 (E.D. Va. 2017)(“The purpose for an aggravating factor, either statutory or non-statutory, is to genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”).

An additional important constraint is that proper notice be given. See, *Stone, supra*, at 17 (“The submission of non-statutory aggravating factors to the jury is constrained in four ways. First, the statute limits the scope of aggravating factors to those for which prior notice has been given by the prosecution.”). To comply with due process, such notice must be “meaningful”. See, *e.g.*, *Campos v. INS*, 70 F. Supp. 2d 1296, 1308-09 (S.D. Fla. 1998)(“It is axiomatic that the most minimal ‘fair procedures’ required by due process include a meaningful notice.”), *Whiting v. United States*, 231 F.3d 70, 75 (1st Cir. 2000)(“due process is about notice sufficient to ensure a meaningful opportunity to be heard.”), *Lindholm v. Astrue*, Civil Action No. 10-11935-DJC, 2012 U.S. Dist. LEXIS 19815, at *22 (D. Mass. Feb. 16, 2012)(“Due process requires more than mere notice; rather ‘meaningful notice’ is required before a hearing will comport to the requirements of due process.”), *Schwinn Cycling & Fitness v. Benonis (In re Schwinn Bicycle Co.)*, 210 B.R. 747, 760 (Bankr. N.D. Ill. 1997)(“the Fifth Amendment requires meaningful notice to afford due

process. It is universally agreed that adequate notice lies at the heart of due process.”)

Informative outlines

District Courts throughout the country routinely order the Government to provide the exact type of “informative outlines” requested here. In *United States v. Hammer*, No. 4:96-CR-239, 2011 U.S. Dist. LEXIS 138032, at *5-8 (M.D. Pa. Dec. 1, 2011), the District Court succinctly explained why:

The Court has the discretion to order the government provide greater specificity regarding the factors outlined in its Notice of Intent. There are two reasons that the Court may order the Government to provide an informational outline.

First, a court may order the government provide an Informational Outline in order **to allow the defendant to adequately prepare for the sentencing proceeding**. While many of the safeguards incident to criminal prosecutions do not apply to sentencing proceedings, due process must be satisfied. **Due process requires that a defendant receive sufficient notice of aggravating factors to enable him to respond and prepare his case in rebuttal**. In evaluating whether due process is satisfied, the Notice of Intent must be considered in conjunction with the offense as charged in the indictment.

Second, a court may order the government provide an Informational Outline **to ensure the evidence presented at trial complies with the mandates of 18 U.S.C. § 3593(c) and the Constitution** ... The Court's screening of aggravating factors is essential to channeling, directing and limiting the sentencer's discretion in order to prevent arbitrary and capricious imposition of the [*8] death penalty.

Other courts have granted requests for greater specificity regarding the intent and aggravating factors **to ensure a defendant is able to adequately prepare for sentencing proceedings and to allow the court to ensure the reliability of the evidence presented**.

(emphasis added)

In addition to defense preparation and “reliability” determinations, informative outlines are also appropriate to assist the Court in **other** challenges to aggravating factors. See, *e.g.*, discussion *supra* regarding the Court’s gatekeeping role, 18 U.S.C. . § 3593 (in penalty phase, “information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice,

confusing the issues, or misleading the jury.”), and *United States v. Savage*, No. 07-550-03, 2014 U.S. Dist. LEXIS 129940, at *9 n.6 (E.D. Pa. Sep. 17, 2014)(“...the Notice of Intent lacked the factual support necessary to assess the constitutionality of this aggravating factor as applied to Counts 2-3, 5-7, and 10-16, and we ordered the Government to provide an informational outline”).

To make **informed** determinations *vis a vis* the admissibility of the alleged non-statutory aggravation, the Court must have significantly more information than provided in the *Notice of Intent*.

Defense counsel’s unique duties and obligations in a capital case

Defendant likewise requires such information to meaningfully investigate, prepare, research applicable legal principles, and draft appropriate motions challenging that evidence. To do otherwise amounts to ineffective assistance of counsel. The *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) “continue to stand as the single most authoritative summary of the prevailing professional norms in the realm of capital defense practice ... [and] ... are the defining architecture for any measure of effective performance [of counsel]. *The ABA Guidelines and the Norms of Capital Defense Representation*, Russell Stetler, W. Bradley Wendel, Hofstra Law Review, Vol. 41:635 (2013).

“Effective performance” regarding non-statutory aggravating factors is clearly defined: First, “counsel should 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**” Guideline 10.11 (h)(emphasis added). Towards that goal, “[c]ounsel should use available discovery mechanisms to ascertain the aggravating and rebuttal evidence the prosecution

intends to introduce, and then thoroughly investigate to determine whether this evidence can be excluded, rebutted, or undercut”. Commentary to Guideline 10.11.

“Counsel ... should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible”. Guideline 10.11 (i). “Counsel should carefully research applicable state and federal law governing the admissibility of evidence in aggravation. 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”. Commentary to Guideline 10.11.

In order to fulfil our duties pursuant to these Guidelines, we must have far more information than supplied by the *Notice of Intent*.

Potential reconsideration of the death penalty authorization

The requested informative outlines are also essential to Defendant’s ability to investigate, develop, litigate and then present a compelling case for reconsideration of the Attorney General’s decision to seek the death penalty.

Although it is difficult to change such a decision, the fact that the Attorney General has authorized a capital prosecution is not necessarily set in stone. Section 9-10.160 of the United States Attorneys’ Manual is entitled “*Withdrawal of the Notice of Intention to Seek the Death Penalty*”, and specifies the procedure to be followed when such a request is made, either by defense counsel, or by the Government. When such a request is made, the Manual requires the Review Committee on Capital Cases to “limit the evaluation to determining if the changed facts and circumstances, had they been known at the time of the initial determination, would have resulted in a decision not to seek the death penalty”. Certainly, if non-statutory aggravating factors are stricken, limited, or mitigated, this might constitute “changed facts and circumstances” which

would increase the chances of a successful decertification request. Although relatively rare, such outcomes have occurred numerous times throughout the country, including in this District in several cases where undersigned counsel directly participated. See, *e.g.*, *United States v. Luis Gines Perez and Ricardo Melendez Perez*, D. PR CR No. 98-164 (DRD), *United States v. Jose Rodriguez Marrero and Nicholas Pena Gonzalez* D. PR CR No. 97-284 (JAF), *United States v. Rodney Lopez-Matias and Eduardo Riera-Crespo*, D. PR No. 06-368 (JAF).

In the next sections, we apply the above principles to the non-statutory factors alleged in the *Notice of Intent*.

a. VICTIM IMPACT EVIDENCE

The Government's *Notice of Intent* alleges victim impact. The *Notice* provides no detail or specifications whatsoever, other than "Juan R. Pedro Vidal caused injury, harm and loss to J.G.R. and his family". "An oblique reference to victims' injury, harm, and loss, without more, does nothing to guide Defendants' vital task of preparing for the penalty phase of trial." *United States v. Bin Laden*, 126 F. Supp. 2d 290, 304 (S.D.N.Y. 2001). See also, *United States v. Casey*, No. 05-277 (ADC), 2013 U.S. Dist. LEXIS 202372, at *3 (D.P.R. Mar. 1, 2013)(then-Chief Judge Delgado finding that "defendant rightly asserts that the United States has provided only a bare-bones statement that '[t]he victim's family has suffered severe and irreparable harm' in support of the victim impact factor. As other courts have found before, the Court finds that defendant is entitled to greater specificity as to the harm which [the] family has suffered ...").

The type of "oblique reference" or "bare-bones statement" condemned in *Bin Laden* and *Casey* is particularly harmful because victim impact evidence is very often the most powerful and prejudicial evidence in the penalty phase of a capital case. See, *Johnson and Johnson, infra*. Until 1991, the Supreme Court believed victim impact evidence, **in any form**, was so inherently

prejudicial that it was categorically inadmissible in death penalty cases. *Booth v. Maryland*, 482 U.S. 496 (1987)(holding that “the introduction of a VIS [victim impact statement] at the sentencing phase of a capital murder trial violates the Eighth Amendment”).

Then, in *Payne v. Tennessee*, 501 U.S. 808 (1991), the Court reversed itself, and held that **some** types of victim impact evidence did not offend the Constitution. However, the post-*Payne* experience confirms that despite the best efforts of trial courts to minimize its highly emotional (and prejudicial) nature, victim impact evidence can be - and often is - utterly devastating. In the words of Judge Mark Bennett, former Chief Judge of the Northern District of Iowa:

I cannot help but wonder if *Payne v. Tennessee* (citation omitted) which held that victim impact evidence is legitimate information for a jury to hear to determine the proper punishment for capital murder, would have been decided the same way if the Supreme Court Justices in the majority had ever sat as trial court judges in a federal death penalty case and had observed first hand, rather than through review of a cold record, the unsurpassed emotional power of victim impact testimony on a jury. **It has now been over four months since I heard this testimony in the Honken trial and the juror's sobbing during the victim impact testimony still rings in my ears...** (S)uch potent, emotional evidence is a quintessential example of information likely to cause a jury to make a determination... on the improper basis of inflamed emotion and bias-sympathetic or antipathetic, depending on whether one is considering the defendant or the victims' families...

United States v. Johnson, 362 F. Supp. 2d 1043, 1107 (N.D. Iowa, 2005)(emphasis added)

Some five years later, Judge Helen G. Berrigan, former Chief Judge of the Eastern District of Louisiana “concur[red] in the observations of ... Judge Bennett” after noting that “[t]he transcript alone cannot capture the emotional impact that permeated the courtroom with [victim impact] testimony”. *United States v. Johnson*, 713 F. Supp. 2d 595, 623-624, 2010 U.S. Dist. LEXIS 58143, *63-65 (E.D. La. 2010).

In *United States v. Casey*, *supra* - a death penalty case tried in this District in 2013 - then-Chief Judge Delgado recognized this compelling aspect of victim impact evidence, holding that “[t]he 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 ...

Thus, acting in an abundance of caution, the Court finds that disclosure of information regarding the type of victim impact evidence to be presented during the penalty phase is appropriate” (emphasis added).

For this reason and others, “there is a trend among the federal courts in the Sixth Circuit and elsewhere **of requiring the Government to provide additional information related to the victim-impact factor.**” *United States v. Montgomery*, 10 F. Supp. 3d 801, 830-831 (W.D. Tenn. 2014) (emphasis added). See also, *United States v. Pleau*, 2013 U.S. Dist. LEXIS 55023, *13, 2013 WL 1673109 (D.R.I. Apr. 17, 2013)(“Pleau requests that the government provide him with an outline of its proposed victim impact evidence and with its proposed exhibits. **Similar requests have been granted by other federal district courts**”)(emphasis added).

Indeed, numerous District Courts have required the Government to provide “informative outlines” of its proposed victim impact evidence, for the two important reasons discussed in *Hammer, supra*: 1) to enable the defense to meaningfully prepare, and 2) to facilitate advance review and litigation of the propriety and extent of the testimony. We will address each of these considerations in turn:

Meaningful preparation

District Courts have recognized the importance of an informative outline of victim-impact evidence to proper defense preparation. See, *e.g.*, *United States v. Wilson*, 493 F. Supp. 2d 364, 378 (E.D.N.Y. 2006)(“The category of ‘victim impact’ is vast. The Defendant is entitled to have some sense of how this will be proved an aggravating factor ... Therefore, the Defendant's motion is granted, and the Government is directed to provide to the Defendant ... specifics on the nature, extent, and scope of the harm suffered by the victims' family members whom the Government

alleges to have suffered severe and irreparable harm.”)(citations omitted), *United States v. Glover*, 43 F. Supp. 2d 1217, 1225 (D. Kan. 1999)(“The court finds that the defendant is entitled to greater specificity regarding this factor, to wit, which members of the family have suffered, the nature of their suffering, and the nature of the ‘permanent harm.’ For example, 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, are relevant considerations in discerning whether this factor is indeed ‘aggravating’ in this case”), *United States v. Stone*, 2013 U.S. Dist. LEXIS 70000, *18-19 (E.D. Cal. May 16, 2013)(“The Court agrees ... that a more particularized outline of the victim-impact evidence on which the Government plans to rely is warranted here ... to enable effective preparation for trial. The Court ORDERS the Government ... to identify the evidence it will rely on to prove this aggravating factor”), *United States v. Duncan*, 2008 U.S. Dist. LEXIS 17495, *20, 2008 WL 656036 (D. Idaho Mar. 6, 2008)(“Therefore, the Court finds that additional information on this factor is necessary in order to afford the Defendant sufficient notice to prepare for and respond to the presentation of this information. Accordingly, the Court will direct the Government to submit an outline of its proposed victim impact evidence which summarizes the extent and scope of the injuries and loss suffered by each victim, his or her family members, and other relevant individuals...”), *United States v. Jacques*, 2011 U.S. Dist. LEXIS 48540, *93-94 (D. Vt. May 4, 2011)(“This Court agrees with the approach taken in these cases and orders the Government to provide the defendant and the Court with a written outline of the victim impact evidence it intends to offer”), *United States v. Karake*, 370 F. Supp. 2d 275, 280, 2005 U.S. Dist. LEXIS 9706 (D.D.C. 2005)(“it has been uniformly recognized that if the death penalty [notice] provides insufficient notice to the defendant, the Court retains inherent authority to require the government to provide more specifics

in order to give the defendant the opportunity to prepare for the penalty phase, as well as to provide the court with some frame of reference for ruling on objections to the death penalty notice)(emphasis added), *United States v. Plaza*, 179 F. Supp. 2d 464, 475 (E.D. Pa. 2001)(“**in order to allow the defendants to adequately prepare responses to sentencing phase evidence**, and in order to allow the court to determine if a pre-sentencing hearing will be necessary to review that evidence, the government will be ordered to submit an outline of its proposed victim impact evidence”)(emphasis added).

Advance litigation

Various Courts throughout the country have also noted the “difficulties” presented by determining the proper scope and extent of victim impact evidence as a factor favoring informational outlines. See, *e.g.*, *United States v. Hammer*, 2011 U.S. Dist. LEXIS 138036, *9-10 (M.D. Pa. Dec. 1, 2011)(noting “... the difficulties inherent in determining the proper scope of victim impact testimony as one of the factors which led the court to “require the Government provide to the defense an Informational Outline of the evidence it plans to introduce in support of the non-statutory aggravating factor of victim impact”), *United States v. Cooper*, 91 F. Supp. 2d 90, 111 (D.D.C. 2000)(“Neither *Payne*, nor the FDPA, nor the state of the present record provides the Court with guidance on the proper scope and limit of victim impact evidence ... Absent more information, the Court is not in a position at this juncture to evaluate [victim impact] evidence. Indeed, the government's notice of intent contains no specific information concerning the evidence it seeks to introduce. The Court agrees with *Cooper* that the notice of intent fails to give sufficient notice to the defendant on this issue. Therefore, the 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. Savage*, 2013 U.S. Dist. LEXIS 66772, *31-34, 2013 WL 1934531 (E.D. Pa. May 10, 2013)(“Absent more information from the Government, the Court is not in a position to consider Defendant's specific constitutional and evidentiary challenges to the victim impact evidence. Accordingly, the Government shall provide to Defendants any victim impact statements, and to the extent a statement is not available, an outline of the specific evidence about which that victim will testify. Upon receipt of the informational outlines from the Government, Merritt may renew specific objections to the victim impact evidence”), *United States v. Jacques, supra* (“ ... once the Government provides a more detailed outline of the victim impact evidence it intends to introduce, as required by this order, this Court may exclude any portion [of] that evidence ‘if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.’”), *United States v. Pleau, supra*, at 55023 (ordering the Government to provide an “outline of its victim impact evidence” and noting that “at that time, Pleau will have the opportunity to object to any particular area of victim impact evidence on the grounds that it is more prejudicial than probative”), *United States v. Solomon*, 513 F. Supp. 2d 520 (W.D. Pa. 2007)(Ordering “... the Government to outline the type and scope of the ‘devastating effect’ 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”, and stating that “[t]he Court ... will carefully review the victim impact evidence, as set forth above, to ensure the exclusion of evidence that is more prejudicial than probative”). See also, *United States v. Karake, supra* (“it has been uniformly recognized that if the death penalty [notice] provides insufficient notice to the defendant, the Court retains inherent authority to require the government to provide more specifics in order to give the defendant the opportunity to prepare for the penalty phase, **as well as to**

provide the court with some frame of reference for ruling on objections to the death penalty notice)(emphasis added), *United States v. Plaza*, *supra* (“in order to allow the defendants to adequately prepare responses to sentencing phase evidence, **and in order to allow the court to determine if a pre-sentencing hearing will be necessary to review that evidence**, the government will be ordered to submit an outline of its proposed victim impact evidence”)(emphasis added).

b. FUTURE DANGEROUSNESS

The Notice of Intent alleges - without specification of any kind - that “Juan R. Pedro Vidal poses a continuing danger to others in that he is likely to commit criminal acts of violence in the future that would constitute a continuing and serious threat to the lives and safety of others”.

For the same reasons as “victim impact” (defense preparation and assisting the Court in determining admissibility), barebones future dangerousness allegations have also required informative outlines. See, *e.g.*, *United States v. Sanders*, No. 10-00351, 2014 U.S. Dist. LEXIS 84439, at *3-4 (W.D. La. June 9, 2014)(“Government is hereby ordered to file a bill of particulars with further specification regarding ... the non-statutory aggravating factor of future dangerousness ... 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.”), *United States v. Hammer*, *supra*, at 9 (“In order to ensure that Defendant's due process rights are protected and that the Court can properly screen the information the parties will introduce at the sentencing proceeding, the Court will order the Government to provide Defendant with Informational Outlines of the information it plans to present in support of ... the non-statutory factor[] of future dangerousness ...”), *United States v. Savage*, *supra*, at 63-64 (“we have seen no evidence that touches upon Northington's potential for future dangerousness in the prison setting,

low rehabilitative value, or lack of remorse. Accordingly, with respect to Northington, the Government shall provide an outline of the evidence it intends to introduce in support of this aggravating factor”), *United States v. Plaza, supra*, at 474 (“The reasoning of these courts is sound, and the court will therefore order the government to submit an outline of the evidence it intends to introduce to support the non-statutory aggravating factor of ‘future dangerousness’ ...”).

c. ENCOURAG[ING] OTHERS TO COMMIT ACTS OF VIOLENCE

This non-statutory aggravator is subject to challenge for at least two reasons.

First, it likely repeats an element of the offense, and also the threshold intent factor alleged against Defendant. Defendant was not alleged to have been present at the scene of the murder, and his liability – if at all – likely depends upon an “aider and abetter” theory. As the First Circuit recently noted, “[i]n outlawing aiding and abetting, Congress used language that comprehends all assistance rendered by words, acts, **encouragement**, support, or presence.” *United States v. Stepanets*, 879 F.3d 367, 375 (1st Cir. 2018)(emphasis added). Therefore, it appears that Defendant’s alleged “encourage[ing] others to commit acts of violence” is an essential element of the offense **as to him**.

Then, the threshold intent factor alleges Defendant “intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person ... and J.G.R. died as a direct result of the act”. As far as we are aware from the discovery, the only “act, contemplating that the life of a person would be taken”, is the alleged “encouragement” to “dispose” of the victim(s). Therefore, it appears that “encourag[ing] others to commit acts of violence” is also an essential element of the threshold intent factor.

In United States v. Casey, No. 05-277 (ADC), 2012 U.S. Dist. LEXIS 181354, at *7 (D.P.R. Dec. 20, 2012), then-Chief Judge Delgado acknowledged that although “[t]he Supreme

Court has yet to hold that duplicative aggravating factors are unconstitutional ... many courts which have addressed the issue have found that aggravating factors which ‘necessarily subsume’ one another are impermissibly duplicative.” Unless the Government provides more detail as to this non-statutory aggravator, it will be impossible to meaningfully litigate whether it is improperly duplicative.

Similarly, as stated above, one of the constraints on non-statutory aggravating factors is that they must “genuinely narrow the class of persons eligible for the death penalty”. See *United States v. Stone, supra*, *Runyon v. United States, supra*. Without more information, it is impossible to meaningfully assess whether this non-statutory aggravator fulfills that purpose.

In order to properly investigate, research and perfect appropriate challenges, Defendant must have an informative outline of exactly what the Government means by this aggravator.

d. COMMIT[ING] THE INSTANT OFFENSE WHILE ENGAGED IN THE BUSINESS OF DRUG TRAFFICKING

Congress determined that conviction for certain drug offenses was a proper aggravating factor for death penalty purposes. See, e.g., 18 U.S.C. 3592 (c)(10)(“The defendant has previously been convicted of 2 or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance”), 18 U.S.C. 3592 (c)(12)(“The defendant had previously been convicted of violating title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 for which a sentence of 5 or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.”).

Defendant has never been charged with, much less convicted of, a drug offense. The Government is therefore alleging an “unadjudicated” offense, which can be highly problematic. In general, “[t]he admissibility of unadjudicated conduct during the penalty phase has troubled jurists

for some time.” *United States v. Lujan*, 603 F.3d 850, 862 (10th Cir. 2010). “While unadjudicated conduct may be admissible, it must be carefully monitored to avoid constitutional deficiencies”. *United States v. Grande*, 353 F.Supp.2d 623, 634 (E.D.Va., 2005). See also, *United States v. Corley*, 519 F.3d 716, 724 (7th Cir. 2008)(noting that although it can be admissible, “that does not mean that such conduct may be considered in all cases.”).

The Government has steadfastly denied that the alleged victims were connected with a violent drug organization. An informative outline of this aggravator is necessary to Defendant’s trial preparation, and also to the Court’s determination of the reliability, relevance, probative value vs. prejudice, and general admissibility of such evidence.

CONCLUSION

As a former Chief Judge of this District once recognized, “[b]ecause the death penalty is such a severe sanction, heightened administrative, statutory, and jurisprudential safeguards have been created to ensure that a defendant is afforded a full and comprehensive opportunity to present his defense.” *United States v. Gomez-Olmeda*, 296 F. Supp. 2d 71, 84 (D.P.R. 2003).

For the foregoing reasons, informative outlines of the non-statutory aggravating factors are essential to the Defendant’s investigation, preparation and mitigation; research and drafting of appropriate challenges; and to the Court’s “gatekeeper” role. Without such outlines, he will be denied a “full and comprehensive opportunity to present his defense.”

Respectfully submitted, via ECF, this 14th day of September, 2018.

ERIC ALEXANDER VOS
Chief Defender
District of Puerto Rico

S/Steve Potolsky

Steven M. Potolsky, Esq.
Steven M. Potolsky, P.A.
1348 Beach Blvd.
#50973
Jacksonville Beach, FL 32250
E-mail: stevepo@bellsouth.net

and

100 SE 2nd St Ste 3550
Miami, FL 33131
Office: (305) 530-8090
Fax: (305) 358-5917

S/Joannie Plaza-Martinez

Joannie Plaza-Martinez, Esq.
Assistant Federal Public Defender
USDC – PR 215604
241 F.D. Roosevelt Ave.
San Juan, PR 00918
Tel: (787) 281-4922
Fax: (787)281-4899
EMAIL: Joannie_Plaza@fd.org

S/ John J. Connors

John J. Connors, Esq.
Assistant Federal Public Defender
USDC-Government No. G01305
241 F.D. Roosevelt Ave.
Hato Rey, P.R. 00918-2441
(787) 281-4922/ Fax (787) 281-4899
E-mail: John_Connors@fd.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the Assistant United States Attorney and counsel for all co-defendants.

s/ Steve Potolsky

STEVEN M. POTOLSKY, ESQ.