IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	
KABONI SAVAGE	:	NO. 07-550-03
STEVEN NORTHINGTON	:	NO. 07-550-05

SURRICK, J. **MAY 15, 2013**

MEMORANDUM

Presently before the Court is Defendant Steven Northington's Motion to Strike the Federal Death Penalty Notice (ECF No. 370), and his Motion for Discovery to Support the Motion to Strike the Federal Death Penalty Notice (ECF No. 369), and Defendant Kaboni Savage's Motion to Strike the Revised Notice of Intent to Seek the Death Penalty (ECF No. 379). For the following reasons, Defendants' Motions will be denied.

I. BACKGROUND

On May 9, 2012, a federal grand jury returned a seventeen-count Fourth Superseding Indictment (the "Indictment") against Defendants Kaboni Savage, Robert Merritt, Steven Northington, and Kidada Savage. On March 14, 2011, the Government filed a Notice of Intent to seek the death penalty ("Notice") against Kaboni Savage and Northington. (ECF Nos. 196, 198.) A revised Notice of Intent was filed against Kaboni Savage on February 15, 2012. (ECF No. 361).

Trial was held from February 4, 2013 to May 6, 2013. On May 13, 2013, the jury returned a guilty verdict against Kaboni Savage for conspiracy to participate in the affairs of a racketeering ("RICO") enterprise, in violation of 18 U.S.C. § 1962(d) (Count 1), twelve counts

of murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1) (Counts 2-7, 10-15), conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5) (Count 9), retaliating against a witness, in violation of 18 U.S.C. § 1513(a) (Count 16), and using fire to commit a felony, in violation of 18 U.S.C. § 844(h)(1) (Count 17). The jury found Northington guilty for conspiring to participate in a RICO enterprise (Count 1), and for two counts of murder in aid of racketeering (Counts 5, 7)[1]

On February 20, 2012, Northington filed a Motion for Discovery to Support the Motion to Strike the Federal Death Penalty Notice (Northington Disc. Mot., ECF No. 369) and a Motion to Strike the Federal Death Penalty Notice (Northington Mot., ECF No. 370). On February 21, 2012, Kaboni Savage filed a Motion to Strike the Revised Notice of Intent to Seek the Death Penalty. (Savage Mot., ECF No. 379.) The Government filed a response to these Motions on April 16, 2012. (Gov't's Resp., ECF No. 467.)

II. DISCUSSION

Savage argues that the Government's revised Notice should be dismissed because it was imposed on the impermissible basis of race in violation of his right to equal protection under the Fifth Amendment, and in violation of his right to be free from cruel and unusual punishment under the Eighth Amendment. (Savage Mot. 1.) Northington challenges the Notice on the basis that the death penalty is being imposed arbitrarily. (Northington Mot. 1-5.) In addition, both Savage and Northington request that this Court grant discovery of information relating to the capital charging practices of the Attorney General. (Savage Mot. 9-19; Northington Disc. Mot. 2-5.)

[1] Count 8 has been dismissed pursuant to an agreement between Defendants and the Government. (See ECF No. 855).

A. Savage's Motion to Strike the Notice of Intent to Seek the Death Penalty

Savage argues that the death penalty is being imposed in a racially discriminatory manner in violation of his right to equal protection under the Fifth Amendment.[2] In order to prevail on an equal protection claim, the defendant must prove "the existence of purposeful discrimination" and that such discrimination "had a discriminatory effect on him." *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (internal quotation marks omitted). To prove discriminatory effect "the proffered evidence must show that similarly situated individuals of a different race were treated differently." *United States v. Bin Laden*, 126 F. Supp. 2d 256, 261 (S.D.N.Y. 2000) (citing *United States v. Armstrong*, 517 U.S. 456, 466 (1996)). Ultimately, the defendant must demonstrate that the "decisionmakers in *his* case acted with discriminatory purpose." *McCleskey*, 481 U.S. at 292 (emphasis in original).

Savage relies in part on statistical evidence to show a racially disproportionate pattern of the imposition of the death penalty in federal cases. According to Savage, as of April 6, 2011, the Attorney General authorized the federal government to seek the death penalty against 472 defendants, and of those defendants 241 (51%) were black, while 123 (26%) were white, 87 (18%) were Latino, and 21 (5%) were designated as "other." (Savage Mot. 2 (citing Kevin McNally, *Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DePaul L. Rev. 1615, 1617 (2004).) Savage also represents that of the three death penalty cases that proceeded to disposition by jury in the Eastern District of Pennsylvania, all three have involved black defendants. (*Id*. at 3.) As a result of the racial disparity indicated by these statistics, Savage argues that the Government's Notice must be stricken.

[2] Northington makes a cursory reference to the influence of race on prosecutorial discretion, but the majority of his argument is focused on the arbitrary imposition of the death penalty. We will address this argument later in this Memorandum. (*See* Northington Mot. ¶ 5.)

The Supreme Court in *McCleskey* clearly established that statistical evidence, of the type cited by Savage, is insufficient to prove discriminatory purpose to support an equal protection claim. *McCleskey*, 481 U.S. at 297 (concluding that a statistical study was "clearly insufficient to support an inference that any of the decision makers in [the defendant's] case acted with discriminatory purpose."); *Bin Laden*, 126 F. Supp. 2d at 260 ("At its core, therefore, *McCleskey* stands for the notion that, by themselves, systemic statistics cannot prove racially discriminatory intent in support of an equal protection claim by a particular capital defendant."); *see also United States v. Sampson*, 486 F.3d 13, 26 (1st Cir. 2007) ("Bare statistical discrepancies are insufficient to prove a Fifth Amendment violation with respect to the implementation of a statute. This principle is firmly established by *McCleskey*"); *United States v. Barnes*, 532 F. Supp. 2d 625, 634-36 (S.D.N.Y. 2008) (holding that the defendant could not establish an equal protection violation using statistical evidence from a United States Department of Justice Report); *United States v. Edelin*, 134 F. Supp. 2d 59, 82-89 (D.D.C. 2001) (finding statistical studies insufficient to support the defendant's claim of racial discrimination in the government's capital charging practices). The statistical discrepancies offered by Savage are precisely the type of systemic statistical evidence rejected by the Supreme Court in *McCleskey*. The statistical evidence offered by Savage fails to establish that the decisionmakers in *his* case acted with discriminatory purpose.

In further support of his Motion, Savage seeks to establish discriminatory effect by highlighting three cases where similarly situated individuals of a different race were treated differently. Savage cites to three organized crime cases where the Government chose not to pursue the death penalty against white defendants accused of killing government witnesses or informants. (Savage Mot. 7-9.) Savage's comparison to these cases is unavailing.

According to Savage, in *United States v. Hernandez*, No. 00-6273 (S.D. Fl.), members of the Gambino crime family were accused of killing an individual who was mistaken as an FBI informant. (*Id.* at 8.) The United States did not seek the death penalty. (*Id.*) In *United States v. Robert Bloome*, No. 98-841 (E.D.N.Y.), according to Savage, four white defendants were accused of killing two individuals, one of whom was a possible witness to the defendants' drug trafficking activities. (*Id.*) Again, the government did not pursue the death penalty against those defendants. (*Id.*) Finally, Savage cites *United States v. Joseph Merlino*, No. 99-363 (E.D. Pa.). (*Id.*) According to Savage, the *Merlino* defendants "committed multiple killings, with one of the victims being fatally shot the morning his brother, a government witness and ex-mobster, was about to testify." (*Id.*)

None of these cases offers a compelling comparison to the allegations in the case at bar. The Fourth Superseding Indictment charges Savage with twelve separate counts of murder in aid of racketeering. Four of those murders involved children killed in a firebombing. The sheer number of victims involved in the instant case, and the heinous nature of six of the deaths is certainly sufficient to distinguish this case from the aforementioned cases. Savage has failed to demonstrate that the decisionmakers in *his* case have acted with purposeful discrimination. His Fifth Amendment claim must be denied. [3]

Similarly, Savage cannot prevail on his claim under the Eighth Amendment. Savage has failed to make any specific challenges under the Eighth Amendment. Rather, he makes a conclusory assertion, without providing any caselaw or factual support, that the imposition of the death penalty constitutes a violation of his right to be free from cruel and unusual punishment.

[3] We note that Savage fails to provide proper case citations for the three cases he argues are comparable. Regardless of the accuracy of the purported facts of the cases he provides, we find he has failed to meet his burden with respect to his allegations of purposeful discrimination.

Despite Savage's lack of specificity, it would appear that his Eighth Amendment claim is foreclosed by the Supreme Court's decision in *McCleskey*. There, the Court rejected the defendant's Eighth Amendment argument that the imposition of the death penalty was "excessive" due to the purported influence of racial considerations on capital sentencing decisions. *McCleskey*, 481 U.S. at 308. The Court reasoned that:

> Apparent disparities in sentencing are an inevitable part of our criminal justice system . . . . As this Court has recognized, any mode for determining guilt or punishment has its weaknesses and the potential for misuse. Specifically, there can be no perfect procedure for deciding in which cases governmental authority should be used to impose death. Despite these imperfections, our consistent rule has been that constitutional guarantees are met when the mode for determining guilt or punishment itself has been surrounded with safeguards to make it as fair as possible. Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious.

Id. at 312-13 (internal citations and quotation marks omitted).

We too decline to assume an invidious purpose in this case. The statistical evidence and the case comparisons offered by Savage provide no basis for attributing the discrepancies in federal capital prosecutions to impermissible racial discrimination on the part of the decisionmakers in Savage's case. Prosecutorial discretion is critical to our criminal justice system. It will not be disturbed without "exceptionally clear proof" of abuse. *McCleskey*, 481 U.S. at 297. Savage has failed to provide exceptionally clear proof of abuse of that discretion, and accordingly his Motion to Strike must be denied.

B. Northington's Motion to Strike the Notice of Intent to Seek the Death Penalty

Northington challenges the Notice on the basis that the death penalty is arbitrarily imposed in violation of his Fifth, Sixth, Eighth, Tenth, and Fourteenth amendment rights. (Northington Mot. 1.) Northington offers little legal or factual support for his position, but like Savage, provides the court with statistical evidence relating to the frequency with which the

death penalty is sought and imposed. (*Id*. at 3-4.) Without citing his source, Northington states that only eight defendants in the Eastern District of Pennsylvania since 1994 have been authorized for the federal death penalty, out of the over one thousand death penalty eligible defendants. (*Id.* at 3.) Northington also references "Bureau of Justice" statistics, which reflect that over nine thousand murders occurred in the communities that make up the Eastern District of Pennsylvania between 1988 and 2009. (*Id*. at 4.) He claims that, of these murders, eight thousand were committed in the city of Philadelphia, and over 99.9 percent of these were prosecuted in state court. (*Id*.) Northington asserts that "nothing distinguishes these defendants from the untold number of defendants charged with murder, within the County of Philadelphia and the district at large." (*Id*.)

Northington relies primarily on the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman*, the Court struck down state death penalty statutes on the grounds that those discretionary statutes were discriminatory and unconstitutional in their operation. *Id*. at 256-57. The court recognized that "'the extreme rarity with which applicable death penalty provisions are put to use raise a strong inference of arbitrariness.'" *Id.* at 249 (quoting Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 Harv. L. Rev. 1773, 1783 (1970)). However, since the Court's decision in *Furman*, the Court has explained that its decision was not concerned with the frequency with which the death penalty was sought and imposed. Rather, as other courts that have addressed this issue have recognized, the central focus of the Supreme Court's capital jurisprudence "has been the requirement that the discretion exercised by juries be guided so as to limit the potential for arbitrariness." *Sampson*, 486 F.3d at 23. For example, in *Gregg v. Georgia*, the Supreme Court stated that "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of

whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 428 U.S. 153, 189 (1976).

Other federal courts confronted with this issue have consistently rejected the notion that the infrequent imposition of the death penalty constitutes arbitrary prosecution in violation of defendants' constitutional rights. *Sampson*, 486 F.3d at 24. ("Nor does the frequency with which the federal death penalty is sought render the FDPA unconstitutional."); *United States v. Mitchell*, 502 F.3d 931, 983 (9th Cir. 2007) ("That federal executions are rare, however, does not render the FDPA unconstitutional."); *United States v. O'Driscoll*, 203 F. Supp. 2d 334, 341 (M.D. Pa. 2002) ("The mere fact that the government has only sought the death penalty in a small number of murder cases involving federal inmates is not sufficient to demonstrate that the prosecution of [the defendant] is arbitrary and capricious."); *United States v. Hammer*, 25 F. Supp. 2d 518, 546-47 (M.D. Pa. 1998) (same). In sum, the scarcity with which the federal government seeks the death penalty is insufficient to establish that it is being arbitrarily imposed in the case at bar.

C. Motions for Discovery to Support Motion to Strike

Both Savage and Northington request discovery relating to the capital charging practices of the United States Attorney General. (Savage Mot. 9; Northington Disc. Mot.) In order to establish that they are entitled to discovery, Defendants must show some evidence of both discriminatory effect and discriminatory intent. *United States v. Bass*, 536 U.S. 862, 863 (2002) (citing *Armstrong*, 517 U.S. at 465). To establish discriminatory effect, Defendants must make a "credible showing" that similarly situated individuals of a different race were treated differently. *Armstrong*, 517 U.S. at 470.

Northington did not even attempt to identify any such similarly situated defendants.[4] As previously explained, while Savage offered three cases of what he argued represented similarly situated white defendants not subject to the death penalty, we found those cases to be easily distinguished from the instant convictions. (*See supra* Section II.A.) We need not repeat that analysis here. Accordingly, as neither Defendant has shown that similarly situated individuals of a different race were treated differently, we will deny Defendants' requests for discovery.

III. CONCLUSION

For the foregoing reasons, Defendants' Motions will be denied.

An appropriate Order will follow.

BY THE COURT:

/s/R. Barclay Surrick
U.S. District Judge

[4] Northington does not present the Court with any similarly situated individuals. Rather, he offers the same statistical evidence already discussed.

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ORDER

AND NOW, this 15th day of May, 2013, upon consideration of Defendant Steven Northington's Motion to Strike the Federal Death Penalty Notice (ECF No. 370), and his Motion for Discovery to Support the Motion to Strike the Federal Death Penalty Notice (ECF No. 369), and Defendant Kaboni Savage's Motion to Strike the Revised Notice of Intent to Seek the Death Penalty (ECF No. 379), it is hereby **ORDERED** that the Motions are **DENIED**.

IT IS SO ORDERED.

BY THE COURT:

/s/R. Barclay Surrick
U.S. District Judge