

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
v.)
)
)
GARY EYE and)
STEVEN SANDSTROM,)
)
 Defendants.)

Case No. 05-00344-01/02-CR-W-ODS

ORDER GRANTING GOVERNMENT’S MOTION FOR RECONSIDERATION

On March 17, 2008, the Court issued an Order that, *inter alia*, granted Defendants’ request to strike the Government’s proposed nonstatutory aggravator alleging they chose their victim based on his race. Pending is the Government’s Motion for Reconsideration (Doc. # 348), which is granted.

In granting the motion, the Court considered cases addressing whether and when aggravating factors can duplicate elements of the underlying offense. All of the cases relied upon involved *statutory* aggravators, and the Court agrees with the Government that this distinction is significant. While statutory aggravators must narrow the class of persons eligible for the death penalty, nonstatutory factors do not necessarily perform this function. Statutory factors determine whether the defendant is eligible for the death penalty; nonstatutory factors help the jury decide whether the defendant should be selected for that penalty. “What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.” Zant v. Stephens, 462 U.S. 862, 879 (1983) (emphasis omitted); see also Tuliaepa v. California, 512 U.S. 967, 976 (1994) (“our capital jurisprudence has established the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty.”). Obviously, the “circumstances of the crime” includes facts that qualify as elements. Indeed, the Supreme Court has approved of instructions telling the jury it may consider “the facts of

the crime” in making its decision, even if it means certain facts may be considered twice. Brown v. Sanders, 546 U.S. 212, 222 n.8 (2006).

For these reasons, the Court has reconsidered and changed its decision. The Government may submit, as a nonstatutory aggravating factor, the fact that Defendants chose their victim based on his race.

IT IS SO ORDERED.

DATE: April 7, 2008

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT