

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2007

4 (Argued: September 6, 2007 Decided: February 6, 2008)

5 Docket No. 06-1462-cr(L), 06-2566-cr(con), 06-3284-cr(con)

6 -----
7 UNITED STATES OF AMERICA,

8 Appellant,

9 - v -

10 HUMBERTO PEPIN, ALSO KNOWN AS HOMBERTO PEPIN TAVERAS, ALSO KNOWN
11 AS TONY, HUMBERTO PEPIN TAVERAS,

12 Defendant-Appellee.

13 -----
14 Before: WALKER, CALABRESI, and SACK, Circuit Judges.

16 Appeal from orders of the United States District Court
17 for the Eastern District of New York (Jack B. Weinstein, Judge)
18 excluding (1) from the penalty phase of a capital trial, evidence
19 of child abuse by the defendant and evidence relating to the
20 defendant's previous conviction for child endangerment, and (2)
21 from both the guilt and penalty phases of the trial, evidence of
22 post-mortem dismemberment of the victims. We affirm as to the
23 orders related to the admission of evidence of child abuse and
24 the child endangerment conviction, but vacate as to the order
25 barring all evidence related to post-mortem dismemberment.

26 Affirmed in part; vacated in part.

1 DAVID L. LEWIS (Louis M. Freeman,
2 Freeman Nooter & Ginsberg, of counsel),
3 New York, NY, for Defendant-Appellee.

4 LEE J. FREEDMAN, Assistant United States
5 Attorney for the Eastern District of New
6 York (Roslynn R. Mauskopf, United States
7 Attorney, Peter A. Norling, Assistant
8 United States Attorney, of counsel),
9 Brooklyn, NY, for Appellant.

10 SACK, Circuit Judge:

11 The defendant, Humberto Pepin,¹ awaits trial on (1) one
12 count of obstruction of justice, and (2) two counts of murder
13 committed while engaged in drug trafficking. The government
14 seeks the death penalty as to the latter.

15 The government proffered as evidence supporting a "non-
16 statutory aggravating factor" of "future dangerousness," Pepin's
17 "engage[ment] in a continuing pattern of violence," including
18 "child abuse," for the jury to consider at the penalty phase.
19 Notice of Intent to Seek a Sentence of Death dated October 20,
20 2005, United States v. Taveras, No. 04-cr-156 (E.D.N.Y.),
21 ("Notice"), at 4, 12. The district court (Jack B. Weinstein,
22 Judge) granted a motion by Pepin to preclude such evidence at the
23 penalty phase on grounds that such matters were unrelated to
24 "future dangerousness" or the crimes charged in the indictment.

25 The government then sought to amend its Notice to
26 include, as a separate non-statutory aggravating factor, "moral

¹ The defendant has been referred to in and by the district court as Humberto Pepin Taveras. See, e.g., United States v. Taveras, 436 F. Supp. 2d 493 (E.D.N.Y. 2006). On appeal, though, he is referred to as Humberto Pepin. We therefore use the latter name.

1 condemnation," to be supported by the defendant's prior
2 conviction for child endangerment and related behavior. The
3 court concluded that "[s]ubstantively, the amendment cannot
4 stand." United States v. Taveras, 436 F. Supp. 2d 493, 502
5 (E.D.N.Y. 2006). All evidence the government might adduce to
6 support the proposed factor would therefore be excluded for
7 essentially the reasons that the same evidence had been excluded
8 as support for a "future dangerousness" factor.

9 Finally, after Pepin raised the issue of the
10 admissibility of photographs of the victims' dismembered bodies,
11 the district court, sua sponte, issued an order precluding all
12 evidence as to dismemberment at either the guilt phase or the
13 penalty phase of the trial.

14 We affirm as to the orders related to the admission of
15 evidence of Pepin's alleged child abuse and of his child-
16 endangerment conviction at the penalty phase, but vacate the
17 order barring all evidence related to dismemberment at the guilt
18 phase.

19 **BACKGROUND**

20 In a superseding indictment dated October 20, 2005,
21 filed in the United States District Court for the Eastern
22 District of New York,² Pepin was charged with, inter alia, (1)
23 one count of obstruction of justice, in violation of 18 U.S.C.
24 § 1512(b)(3), and (2) two counts of murder committed while Pepin

² Pepin was first indicted in the Eastern District on February 20, 2004.

1 was engaged in drug trafficking, in violation of 21 U.S.C.
2 § 848(e)(1)(A).³ If convicted on either or both of the latter
3 two charges, Pepin is subject to a minimum sentence, under 21
4 U.S.C. § 848(e)(1)(A), of 20 years' imprisonment and a maximum
5 penalty of death.⁴ The government seeks the death penalty.

6 Because this is a capital case, the Federal Death
7 Penalty Act ("FDPA"), 18 U.S.C. § 3591 et seq., provides the
8 procedures to be employed at sentencing. The district court is
9 required by the FDPA, among other things, to "conduct a separate
10 sentencing hearing to determine the punishment to be imposed."
11 18 U.S.C. § 3593(b). The hearing will ordinarily be held "before
12 the jury that determined the defendant's guilt." 18 U.S.C.
13 § 3593(b)(1).

14 [T]he jury . . . shall consider whether all
15 the aggravating factor or factors found to

³ The superseding indictment also charged Pepin with a
firearm-related murder under 18 U.S.C. § 924(j)(1), but the
district court granted Pepin's motion to dismiss that charge.
The dismissal is not before us.

⁴ That statute provides in part:

any person engaging in . . . an offense
punishable under section 841(b)(1)(A) of this
title . . . who intentionally kills or
counsels, commands, induces, procures, or
causes the intentional killing of an
individual and such killing results, shall be
sentenced to any term of imprisonment, which
shall not be less than 20 years, and which
may be up to life imprisonment, or may be
sentenced to death.

21 U.S.C. § 848(e)(1)(A).

1 exist sufficiently outweigh all the
2 mitigating factor or factors found to exist
3 to justify a sentence of death, or, in the
4 absence of a mitigating factor, whether the
5 aggravating factor or factors alone are
6 sufficient to justify a sentence of death.
7 Based upon this consideration, the jury by
8 unanimous vote . . . shall recommend whether
9 the defendant should be sentenced to death,
10 to life imprisonment without possibility of
11 release or some other lesser sentence.

12 18 U.S.C. § 3593(e).

13 Charged Murders and Post-Homicide Conduct

14 In support of the charges contained in the October 20,
15 2005, superseding indictment, the government states that it
16 intends to prove "through witness testimony, Pepin's statements
17 to law enforcement officers, photographs of his victims after
18 they were recovered, and autopsy reports and photographs," Gov't
19 Br. at 3, the following facts:

20 Pepin was born in the Dominican Republic. In or about
21 1981, he entered the United States illegally, eventually settling
22 in New York City. At all relevant times, he sold drugs from an
23 apartment in the Bronx which he rented for that purpose. See
24 id.; Written Statement of Humberto Pepin Taver[a]s to Yonkers
25 Police Detective Geiss dated October 15, 2002⁵ (the "Pepin
26 Statement") (stating that the apartment was on Sherman Avenue in
27 the Bronx).

28 The Rosario Killing. José Rosario was one of Pepin's
29 sources for drugs. The two of them had an arrangement under

⁵ In the statement, Pepin says that Yonkers Detective Wilson Gonzalez was also present.

1 which Rosario robbed dealers of their drugs and then supplied
2 those drugs to Pepin. Pepin then sold them, sharing the proceeds
3 with Rosario. Gov't Br. at 4. In or about September 1992, a
4 Pepin associate known as "Nelo" told Pepin that Rosario had
5 instructed him, Nelo, to kill Pepin. Id.

6 On or about September 17, 2002, Rosario visited Pepin's
7 Bronx apartment where Pepin, in the presence of George Loyola,
8 one of Pepin's drug sellers, shot Rosario several times. Pepin
9 then ordered Loyola at gunpoint to help Pepin carry Rosario's
10 body into the bathroom. They placed the body in the bathtub and
11 left the bathroom. Pepin returned shortly thereafter when he
12 heard noises suggesting that Rosario might still be alive. Pepin
13 cut Rosario's neck so that he would bleed to death and the blood
14 would drain from the tub. Id.

15 Loyola and Pepin left the Bronx apartment. Pepin went
16 home where his girlfriend, Julia Mendez, was waiting. Pepin told
17 Mendez that he had killed Rosario. He then ordered her to make
18 dinner for him. Afterward, Pepin forced Mendez to come with him
19 to the Bronx apartment, stopping en route to purchase a knife.
20 Id.

21 Pepin's cousin, Apolinar Taveras, and Loyola joined
22 Pepin at the Bronx apartment. Unable to coerce Loyola to assist
23 him, Pepin dismembered Rosario's body by himself, using the knife
24 he had just purchased. He placed the body parts into garbage
25 bags. Pepin then forced Loyola to accompany Pepin to Yonkers,

1 where Pepin dumped the bags. Rosario's remains were discovered
2 soon thereafter.⁶ Id. at 4-5.

3 The Madrid Killing. More than two years later, on
4 October 4, 1994, Pepin was arrested by Federal Drug Enforcement
5 Administration agents following a search of another apartment

⁶ On October 15, 1992, Pepin, incarcerated in the Otisville [N.Y.] Federal Correctional Facility, gave this version of the events to at least one Yonkers, New York, detective:

I walked into the bedroom, when I came out of the bedroom I had a 22 cal pistol. . . . [Rosario] was still seating [sic] on the couch I told him I was going to kill him. [Rosario] started to rise up off of the couch, I then pointed the gun at him and I shot him, I think 4 times, one was in the right eye I think, one was in the neck, one in the chest, and I am not sure where the other shot went. . . . [M]yself and George [Loyola] dragged [Rosario] into the bathroom and put him in the tub. I put a cut into his neck so the blood would drain out. I then left to go to my house When I got home I ate and I told . . . Julia [Mendez] that I killed [Rosario] and that I had to go back and cut up his body. . . . Julia asked me if I needed any help. I told her that I did. I then left with [her]. . . . I bought a large knife in the hardware store which is on Sherman Ave. . . . When I got to the apartment George [Loyola] asked me if my cousin Apolinar Taver[a]s could help us. I told him yes and for him to get him. . . . A short time later we all cut up [Rosario] who was in the tub. I know how to cut up a body because in my country I worked as a butcher. I cut [Rosario] up by the joints, I cut off his head at the neck, I cut off his arm at the shoulder, his torso, his legs, his knees. I cut him up at the joints. We then placed him into separate garbage bags, I believe it was around 4 P.M. . . . [M]yself and George [Loyola] and Apolinar . . . came back when it was dark[,] . . . drove to Yonkers and I dumped the garbage bags in a park.

Pepin Statement at 1-2.

1 that Pepin was renting. The search resulted in the seizure of
2 drugs and Pepin's indictment in the United States District Court
3 for the Southern District of New York on federal drug charges.
4 Pepin was released pending trial on a bond signed by Carlos
5 Madrid, another Pepin associate, as a surety. Id. at 6.

6 Sometime thereafter, Pepin and Mendez went to Madrid's
7 home in Queens, where Pepin asked Madrid for money. Madrid gave
8 Pepin twenty dollars, far less than Pepin had sought. On the way
9 home, Pepin's BMW struck a guardrail. Upset, Pepin told Mendez
10 that Madrid was "going to have to pay." Id.

11 By October 1995, Mendez, by then separated from Pepin,
12 had moved into her sister's residence. Pepin and Mendez were
13 nonetheless attempting to reconcile. On or about October 9,
14 1995, Pepin picked Mendez up at her sister's home, saying that he
15 wanted to take Mendez to dinner. Instead, he drove her to his
16 house. Id.

17 When they arrived, Pepin ordered Mendez into the
18 bedroom. He told her that he was waiting for Madrid because that
19 day Madrid was "going to pay for what he did." Id. He told her
20 to play video games with the television sound turned up. He then
21 left the bedroom, locking Mendez inside. Id.

22 Pepin had asked Madrid to the house on the pretext that
23 he, Pepin, wanted to buy drugs from Madrid. When Madrid arrived
24 with the drugs, Pepin brought Madrid into the bedroom to say
25 hello to Mendez. The two men then left the room. Id. at 7.
26 Shortly thereafter, Mendez heard several loud noises. They were,

1 it turned out, the sound of Pepin hitting Madrid over the head
2 with a blunt instrument. Pepin also stabbed Madrid with a knife.
3 The injuries Pepin inflicted on Madrid were fatal.

4 About fifteen minutes later, Pepin entered the bedroom
5 and told Mendez to buy garbage bags and cleaning supplies and to
6 avert her eyes from the kitchen area as she left. Mendez
7 nonetheless looked into the kitchen as she passed and saw a pair
8 of legs in a puddle of blood. On her return, the door leading to
9 the kitchen was closed. Mendez returned to the bedroom. Id. at
10 7-8.

11 Pepin dismembered Madrid's body and placed the body
12 parts in trash bags. Mendez later saw Pepin placing a bag in the
13 trunk of Madrid's automobile. Id. at 8.

14 Pepin and Mendez left together -- Pepin driving
15 Madrid's car; Mendez driving Pepin's. Pepin dumped most of the
16 bags containing the body parts, but at least one -- with Madrid's
17 severed head inside it -- was left in the automobile, which Pepin
18 unsuccessfully attempted to burn. Soon thereafter, authorities
19 recovered the remains. Id.

20 Child Abuse Allegations

21 The government seeks to present evidence during the
22 penalty phase of Pepin's trial -- if there is one -- regarding
23 Pepin's treatment of Mendez's children.

24 According to the government, Mendez moved in with Pepin
25 in 1989, along with her son and daughter from a prior
26 relationship. At the time, the girl was eight years old. Pepin

1 confined the children to a single room of their apartment, made
2 them use a bucket as a latrine, and frequently prevented Mendez
3 from providing food to them. The government also contends that
4 Pepin vaginally and anally raped Mendez's daughter on many
5 occasions, beat her when she informed Pepin, truthfully, that she
6 was pregnant, and carved his name into her chest using a needle.
7 Id. at 9-10.

8 On January 2, 1997, the Bronx County District
9 Attorney's office charged Pepin with rape, sodomy, assault,
10 possession of a weapon, and endangering the welfare of a child.
11 Pepin later pleaded guilty to a misdemeanor charge of endangering
12 the welfare of a child in satisfaction of all charges against
13 him. He served nine months in prison and was then deported to
14 the Dominican Republic. Id. at 10.

15 Less than six months later, Pepin was arrested
16 attempting to re-enter the United States. He was subsequently
17 convicted on federal charges of illegal re-entry, bail jumping,
18 and drug trafficking. Id. While in prison on those charges, he
19 wrote a letter to a Yonkers police officer admitting that he had
20 had sexual relations with Mendez's daughter but denying that he
21 did so against her will. Id.⁷ (citing letter, date obscure, from
22 Pepin, in Otisville, to "Señor John Geiss.").

23 District Court Ruling as to Evidence of Child Abuse

⁷ The letter is in Spanish. The record contains copies of the original and an English translation.

1 On October 20, 2005, the government filed a superseding
2 Notice of Intent to Seek a Sentence of Death, pursuant to 18
3 U.S.C. § 3593(a), in which "future dangerousness" was proffered
4 as a "non-statutory aggravating factor" as follows:

5 The defendant HUMBERTO PEPIN TAVERAS is
6 likely to commit criminal acts of violence in
7 the future that would constitute a continuing
8 and serious threat to the lives and safety of
9 others, as evidenced by, at least, one or
10 more of the following:

11 a. Continuing Pattern of Violence

12 The defendant HUMBERTO PEPIN TAVERAS has
13 engaged in a continuing pattern of
14 violence, attempted violence, and
15 threatened violence, including, at
16 least, (a) the crimes charged in the
17 Indictment, (b) the crimes for which the
18 defendant has been previously convicted,
19 (c) child abuse, (d) domestic abuse and
20 (e) threatening and attempting to kill
21 John Doe, a witness against the
22 defendant.

23 Notice at 3-4, 11-12 (emphasis added).⁸

24 On February 28, 2006, the district court issued a
25 Memorandum and Order that, inter alia, excluded at the penalty
26 phase all evidence related to allegations of acts of violence and
27 abuse against the child and the adult women set forth in the
28 Notice as non-statutory aggravating factors. The court found the
29 evidence to be unduly prejudicial under Federal Rule of Evidence
30 403. United States v. Taveras, 04-cr-156, 2006 WL 473773, at *6,
31 2006 U.S. Dist. LEXIS 7408, at *17-*18 (E.D.N.Y. Feb. 28, 2006)
32 ("Memorandum and Order on Challenges to Death Penalty") ("Taveras
33 I"). The court concluded:

⁸ Prior versions of the Notice contained the same text.

1 [F]or Rule 403 reasons and others
2 [previously] explained orally [by the court],
3 evidence of the aggravating factors of sexual
4 crimes committed on a minor and a sexual
5 assault on an adult will not be permitted.
6 They do not relate to the homicidal
7 characteristics which form the basis of the
8 prosecution and they might well be overvalued
9 in light of recent publicity on sexual
10 assaults on children in this geographic area.

11 Id., 2006 U.S. Dist. LEXIS 7408, at *17-*18.

12 On March 16, 2006, the court, relying on 21 U.S.C.
13 § 848(j) (repealed),⁹ revisited its decision excluding evidence
14 of Pepin's violence against adult women and decided to allow it.
15 But the court reaffirmed its decision to exclude evidence as to
16 child abuse, which it explained in greater detail. United States
17 v. Taveras, 424 F. Supp. 2d 446 (E.D.N.Y. 2006) ("Taveras II").
18 Noting that there was a "great likelihood that defendant, if
19 convicted and spared death, will spend the rest of his life in
20 prison," id. at 463, the court viewed evidence of sexual and
21 physical abuse against minors as irrelevant to future
22 dangerousness because of the unlikelihood of his release into the
23 community, id. The court also concluded that admission of such
24 evidence would confuse the jury, id., and, "[s]ince the
25 government bears the burden of proving these charges beyond a
26 reasonable doubt, proof would require a diversionary trial within

⁹ 21 U.S.C. § 848(j) provided, in pertinent part:

[I]nformation may be excluded if its
probative value is substantially outweighed
by the danger of unfair prejudice, confusion
of the issues, or misleading the jury.

Id.

1 a trial that would have minimal relevance to the future danger
2 posed by defendant to those with whom he is, if convicted, likely
3 to spend the rest of his life -- adult guards and male inmates,"
4 id. at 463-64. The court continued:

5 More importantly, the evidence would be
6 likely to so inflame the passions of the
7 jurors as to inhibit their careful
8 consideration of the future dangerousness
9 factor. Wide attention to a recent spate of
10 sexual assaults against minors would make it
11 almost impossible for a jury to disconnect
12 its anger at the prevalence of the crimes
13 from the issue of future dangerousness of
14 this defendant. Defendant's contentions that
15 the relationship was consensual would confuse
16 the issues by directing the jury's energies
17 towards divining the nature of the
18 relationship between the two rather than the
19 need to protect society from future crimes of
20 defendant, the basis of the future
21 dangerousness factor. Introduction of this
22 evidence would not produce the heightened
23 reliability required of a capital sentence.

24 Id. at 464.

25 On or about March 23, 2006, the government, undaunted,
26 sought to file another superseding Notice of Intent to Seek a
27 Sentence of Death. Notice of Intent To Seek Sentence of Death
28 dated March 22, 2006, United States v. Taveras, No. 04-CR-156
29 (E.D.N.Y.), accompanying motion for leave to file the amended
30 Notice filed on March 23, 2006. This time, instead of adverting
31 to child abuse as an indication of future dangerousness, the
32 proposed superseding Notice set forth as a separate non-statutory
33 aggravating factor Pepin's previous conviction for child
34 endangerment and related behavior. Id. at 5-6. The proposed
35 superseding Notice added the assertion that "[b]eyond raping the

1 child, the defendant repeatedly falsely imprisoned the child,
2 deprived her of food and water, and beat her. On one occasion,
3 the defendant carved his nickname, 'Tony,' on the child's chest."
4 Id. These facts, the proposed superseding Notice said,
5 "demonstrate[] that the defendant merits moral condemnation by
6 the community." Id. at 6.

7 On May 4, 2006, at a status conference, the district
8 court invoked its discretion, not under 21 U.S.C. § 848(j)
9 (repealed) as it had previously done, but under 18 U.S.C.
10 § 3593(c), which governs admissibility of evidence at the penalty
11 phase of capital trials. Section 3593(c) provides, in part, that
12 "[i]nformation is admissible regardless of its admissibility
13 under the rules governing admission of evidence at criminal
14 trials except that information may be excluded if its probative
15 value is outweighed by the danger of creating unfair prejudice,
16 confusing the issues, or misleading the jury."¹⁰ The court
17 decided that "[the government's] amendment is permitted but [it
18 will] be allowed no evidence on it." Hearing Transcript, May 4,
19 2006, at 29.

20 The court further explained its position in an "Omnibus
21 Pretrial Memorandum and Order" dated June 29, 2006. United

¹⁰ By contrast, Federal Rule of Evidence 403, which applies during the guilt phase, provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Id. (emphasis added). The analogous language in 18 U.S.C. § 3593(c) omits the word "substantially."

1 States v. Taveras, 436 F. Supp. 2d 493 (E.D.N.Y. 2006) ("Taveras
2 III"). "The new proposed notice would not add new allegations,
3 but merely reorganize them in response to this court's ruling"
4 excluding evidence as to child abuse. Id. at 502. Although the
5 motion to amend was procedurally "unobjectionable" because the
6 government's application was made in good faith and Pepin was not
7 prejudiced by it, id., "[s]ubstantively, the amendment cannot
8 stand. Nothing in the government's motion justifies [the
9 court's] departure from [its] previous ruling excluding this same
10 evidence. See [Taveras II], 424 F. Supp. 2d at 463-64. The more
11 stringent standard of admissibility provided for by title 18's
12 FDPA strengthens the basis for the ruling that this evidence is
13 inadmissible." Taveras III, 436 F. Supp. 2d at 502-03.¹¹

14 District Court Ruling as to Evidence
15 of Post-Mortem Dismemberment

16 In Taveras III, the district court also excluded all
17 evidence of post-mortem dismemberment of the victims in both the
18 guilt and penalty phases of trial. The court indicated that if
19 one looked at the guilt phase alone, the dismemberment evidence
20 would be permitted. "These details form part of the res gestae,
21 the narrative that the government rightly seeks to tell at the
22 guilt phase of a trial. Old Chief v. United States, 519 U.S.

¹¹ Although not entirely clear to us, it appears that the court was not denying the motion to file the amended notice. It was adhering to its earlier oral decision to permit the amendment to the Notice of Intent to Seek a Sentence of Death, but ordering all evidence as to the child endangerment conviction excluded. See Hearing Transcript, May 4, 2006, at 29. The precise characterization of the order in this regard does not, however, affect our consideration of this appeal.

1 172, 187 (1997). Their probative value would not be
2 'substantially outweighed by the danger of unfair
3 prejudice' Fed. R. Evid. 403." Id. at 514.

4 But, the court ruled, any such evidence was inadmissible in the
5 penalty phase because it would "short-circuit" the process
6 "carefully choreographed" by section 3593 for determining the
7 appropriate sentence "by tending to rush the jury into an
8 emotional conclusion." Id. at 515.

9 "It is of vital importance to the defendant
10 and to the community that any decision to
11 impose the death sentence be, and appear to
12 be, based on reason rather than caprice or
13 emotion." Gardner v. Florida, 430 U.S. 349,
14 358 (1977). The court has a duty to minimize
15 the "risk [of] a verdict impermissibly based
16 on passion, not deliberation." Payne v.
17 Tennessee, 501 U.S. 808, 836 (1991) (Souter,
18 J., concurring).

19 Id. (brackets in original).

20 The court then decided that despite its conclusion that
21 the dismemberment evidence would have been allowed under Federal
22 Rule of Evidence 403 if the court's concern was solely whether
23 its probative value was substantially outweighed by the danger of
24 unfair prejudice at the guilt phase of the trial, the need to
25 exclude the evidence at the penalty phase required its exclusion
26 at the guilt phase, too. "Since one jury will hear both the
27 penalty and guilt phases, such evidence also will not be received
28 at the guilt phase." Id. at 515-16.

29 Instead, the court said, it "expected" the parties to
30 "stipulate that: After killing Rosario, defendant returned home,
31 ate dinner, and then returned to the apartment with Julia Mendez.

1 Defendant wrapped the body, drove it to Yonkers with Loyola, and
2 dumped it. After killing Madrid, defendant wrapped the body,
3 placed it in Madrid's car, drove the car to Queens, and set it on
4 fire." Id. at 516. "This ruling sacrifices some of the
5 probative force of the government's proposed evidence. Yet it is
6 necessary to preserve defendant's right to capital proceedings
7 that are properly channeled and focused on the issue for which
8 the evidence is offered -- i.e., future dangerousness." Id.
9 Reference to dismemberment during voir dire was also prohibited.
10 Id.

11 The government appeals from the orders excluding
12 evidence of child abuse or evidence related to the child
13 endangerment conviction from the penalty phase, and the order
14 excluding post-mortem dismemberment evidence from both the guilt
15 and penalty phases of trial. On September 6, 2007, we granted
16 the government's motion for a stay of the trial pending our
17 resolution of this appeal.

18 DISCUSSION

19 I. Jurisdiction

20 We have jurisdiction to consider this appeal under 18
21 U.S.C. § 3731. See, e.g., United States v. Chevere, 368 F.3d 120
22 (2d Cir. 2004) (hearing government's challenge to pre-trial
23 evidentiary ruling on interlocutory appeal).¹²

¹² 18 U.S.C. § 3731 provides in pertinent part:

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding

1 II. Standard of Review

2 "[W]e review evidentiary rulings for abuse of
3 discretion." United States v. Sewell, 252 F.3d 647, 650 (2d
4 Cir.), cert. denied, 534 U.S. 968 (2001); see also Awadallah, 436
5 F.3d at 131 ("We review the exclusion of evidence pursuant to
6 Rule[] 403 . . . for abuse of discretion."); United States v.
7 Salameh, 152 F.3d 88, 110 (2d Cir. 1998) (per curiam) (concluding
8 that Fed. R. Evid. 403 determinations may be overturned "'only if
9 there is a clear showing that the court abused its discretion or
10 acted arbitrarily or irrationally'" (quoting United States v.
11 Valdez, 16 F.3d 1324, 1332 (2d Cir. 1994))), cert. denied sub
12 nom. Abouhalima v. United States, 525 U.S. 1112 (1999).

13 Although we have not squarely addressed the question
14 before, we see no reason to apply a different standard of review
15 to a district court's ruling that information proffered by the
16 government as evidence is inadmissible at the penalty phase of a

evidence . . . in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

This statute permits the government, under certain circumstances, to mount a pre-trial appellate challenge to a district court's decision rejecting trial evidence proffered by the government. But for the statute, in the event of an acquittal, the government would have no post-trial remedy for an erroneous evidentiary ruling, however serious the error, because of the operation of the Fifth Amendment's double-jeopardy bar. See United States v. Wilson, 420 U.S. 332, 335-40 (1975).

1 capital prosecution under section 3593(c). The other circuit
2 courts to reach this issue have taken a similar approach,
3 deciding that, absent constitutional or other legal errors, a
4 district court's section 3593(c) rulings are reviewed for abuse
5 of discretion. See United States v. Hall, 152 F.3d 381, 397-98
6 (5th Cir. 1998) ("[T]he district court has considerable
7 discretion in controlling the presentation of the 'information'
8 to the jury in both content and form." (internal quotations
9 omitted)); United States v. McVeigh, 153 F.3d 1166, 1214 (10th
10 Cir. 1998) ("We review a district court's determination that
11 evidence is not relevant to a mitigating factor for abuse of
12 discretion."); United States v. Johnson, 223 F.3d 665, 674 (7th
13 Cir. 2000) ("The [section 3593(c)] balancing is committed to the
14 discretion of the district judge, not here abused." (citing Hall,
15 152 F.3d at 397)).

16 Our review must, however, "be de novo on the question
17 whether, in exercising its discretion to admit evidence, the
18 district court applied the proper legal test." Borawick v. Shay,
19 68 F.3d 597, 601 (2d Cir. 1995) (citing A/S Dampskibsselskabet
20 Torm v. Beaumont Oil Ltd., 927 F.2d 713, 716 (2d Cir. 1991)),
21 cert. denied, 517 U.S. 1229 (1996).

22 The government is understandably wary of our reviewing
23 the district court's rulings under the deferential abuse of
24 discretion standard. It therefore attempts to phrase its
25 arguments as challenges to the legal bases for the district
26 court's rulings, which we would review de novo. The government

1 does not so much as mention the abuse of discretion standard
2 until the second footnote of its reply brief. We nonetheless
3 review the court's orders both for errors of law and abuse of
4 discretion.¹³

5 III. The Exclusion of Evidence of Child Abuse
6 and the Child Endangerment Conviction

7 A. Errors of Law

8 18 U.S.C. § 3593(c) provides, in pertinent part:

9 **Proof of mitigating and aggravating**

10 **factors.** . . . At the sentencing hearing,
11 information may be presented as to any matter
12 relevant to the sentence, including any
13 mitigating or aggravating factor permitted or
14 required to be considered under section 3592.
15 Information presented may include the trial
16 transcript and exhibits if the hearing is
17 held before a jury or judge not present
18 during the trial, or at the trial judge's
19 discretion. The defendant may present any
20 information relevant to a mitigating factor.
21 The government may present any information
22 relevant to an aggravating factor for which
23 notice has been provided [by a notice to seek
24 the death penalty]. Information is
25 admissible regardless of its admissibility

¹³ We ordinarily adhere to the rule that "[i]ssues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal." Norton v. Sam's Club, 145 F.3d 114, 117 (2d Cir.), cert. denied, 525 U.S. 1001 (1998). And "[w]e generally do not consider issues raised in a reply brief for the first time because if an appellant raises a new argument in a reply brief an appellee may not have an adequate opportunity to respond to it." In re Harris, 464 F.3d 263, 268-69 n.3 (2d Cir. 2006) (internal quotation marks and citations omitted). But we think that, in this case, the issues we address were indeed raised by the government, even though it asserted what was, in large measure, the wrong standard of review. There is no doubt, moreover, that the defendant had an opportunity to respond. His first words to us on this subject are: "The standard governing appellate review of the [district] court's evidentiary rulings is 'abuse of discretion.'" Def.-Appellee Br. at 18.

1 under the rules governing admission of
2 evidence at criminal trials except that
3 information may be excluded if its probative
4 value is outweighed by the danger of creating
5 unfair prejudice, confusing the issues, or
6 misleading the jury. . . . The government
7 and the defendant shall be permitted to rebut
8 any information received at the hearing, and
9 shall be given fair opportunity to present
10 argument as to the adequacy of the
11 information to establish the existence of any
12 aggravating or mitigating factor, and as to
13 the appropriateness in the case of imposing a
14 sentence of death. . . . The burden of
15 establishing the existence of any aggravating
16 factor is on the government, and is not
17 satisfied unless the existence of such a
18 factor is established beyond a reasonable
19 doubt. The burden of establishing the
20 existence of any mitigating factor is on the
21 defendant, and is not satisfied unless the
22 existence of such a factor is established by
23 a preponderance of the information.

24 Id. Section 3593(c) therefore provides the legal standard upon
25 which the district court could exclude what it deemed to be
26 unduly prejudicial evidence at the penalty phase of trial. See
27 United States v. Fell, 360 F.3d 135, 140-41 (2d Cir.), cert.
28 denied, 543 U.S. 946 (2004).¹⁴ The gravamen of the government's
29 legal argument is that despite the statute's instruction that
30 "information may be excluded if its probative value is outweighed
31 by the danger of creating unfair prejudice, confusing the issues,

¹⁴ In several instances, the district court does not appear to apply § 3593(c) in its analysis, instead discussing evidence in light of 21 U.S.C. § 848(j), now repealed. However, § 848(j)'s language utilized the less stringent "substantially outweighed" wording similar to that in Fed. R. Evid. 403. Because the test in section 3593(c) gives the court greater power to exclude prejudicial evidence than does the test in section 848(j) or Rule 403, the district court's conclusion would not likely have been different had it applied section 3593(c) from the outset, as the court acknowledges. See Taveras III, 436 F. Supp. 2d at 500-01.

1 or misleading the jury," section 3593(c) as a whole mandates the
2 district court's admission, in the penalty phase of this case, of
3 evidence as to child abuse or the child endangerment conviction,
4 or both. We conclude that it does not.

5 It is true, as the government points out, Gov't Br. at
6 31, that in United States v. Fell, we noted, "the Supreme Court
7 has . . . made [it] clear that in order to achieve [the required]
8 'heightened reliability[]' [in the penalty phase of a capital
9 case], more evidence, not less, should be admitted on the
10 presence or absence of aggravating and mitigating factors."
11 Fell, 360 F.3d at 143 (citing Gregg v. Georgia, 428 U.S. 153,
12 203-04 (1976)). But it hardly follows from that general
13 observation that relevant evidence is always permitted.
14 Acceptance of that reasoning would eviscerate the trial court's
15 ability to exclude unduly prejudicial material from the penalty
16 hearing inasmuch as any decision to exclude necessarily means
17 less evidence, not more.

18 In upholding the constitutionality of section 3593(c)
19 in Fell, we noted that the requirement of a fundamentally fair
20 trial

21 is certainly met [by section 3593(c)], given
22 that the balancing test set forth in the FDPA
23 is, in fact, more stringent than its
24 counterpart in the [Federal Rules of
25 Evidence], which allows the exclusion of
26 relevant evidence "if its probative value is
27 substantially outweighed by the danger of
28 unfair prejudice, confusion of the issues, or
29 misleading the jury." Fed. R. Evid.
30 403 Thus, the presumption of
31 admissibility of relevant evidence is

1 actually narrower under the FDPA than under
2 the FRE.

3 Fell, 360 F.3d at 145 (first emphasis added). We then pointed
4 out that:

5 The FDPA does not eliminate [the] function of
6 the judge as gatekeeper of constitutionally
7 permissible evidence; nor does it alter or
8 eliminate the constitutional baseline for the
9 admissibility of evidence in a criminal
10 trial. To the contrary, under the FDPA
11 [s]tandard, judges continue their role as
12 evidentiary gatekeepers and, pursuant to the
13 balancing test set forth in § 3593(c), retain
14 the discretion to exclude any type of
15 unreliable or prejudicial evidence that might
16 render a trial fundamentally unfair.

17 Id. (citations, internal quotation marks, and brackets omitted).
18 Fell does not support the government's contention.

19 Citing Gregg v. Georgia, supra, and Williams v. New
20 York, 337 U.S. 241 (1949), the government also insists that "to
21 be constitutional, a capital sentencing procedure must be
22 individualized and based on the fullest possible information
23 about the defendant." Gov't Br. at 33. But Gregg did not hold
24 that the government is entitled to present to the jury "the
25 fullest possible information about the defendant" regardless of
26 what that information might be. It concluded that a Georgia
27 capital trial scheme much like the FDPA was constitutional, in
28 part because it "provides for a bifurcated proceeding at which
29 the sentencing authority is apprised of the information relevant
30 to the imposition of sentence and provided with standards to
31 guide its use of the information." Gregg, 428 U.S. at 195. The
32 proceedings before us meet that standard, whatever the district
33 court's ruling was on the admissibility of evidence of child

1 abuse. Similarly, the Williams Court approved a sentencing
2 judge's ability, in determining that a death sentence was
3 warranted, to consider evidence of other crimes of which the
4 defendant had not been convicted but in which he had been
5 implicated. Williams, 337 U.S. at 244.¹⁵ The ability of the
6 court to admit such evidence at the penalty phase is not at issue
7 here. While both Gregg and Williams might be read to suggest
8 that the district court was permitted to admit evidence related
9 to child abuse and the conviction for child endangerment
10 consistent with the requirements of due process, they plainly do
11 not require the district court to do so as a matter of law.

12 The other arguments the government makes on this score
13 are of a similar stripe. For example, the government tells us
14 that the Ninth Circuit "upheld a sentencing jury's consideration
15 of the defendant's lewd and lascivious conduct conviction . . .

¹⁵ The Court stated:

A sentencing judge . . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant -- if not essential -- to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

Williams, 337 U.S. at 247.

1 and his unadjudicated rape of an adult." Gov't Br. at 36 (citing
2 McDowell v. Calderon, 107 F.3d 1351, 1366, amended and superseded
3 in part by 116 F.3d 364, vacated in part, 130 F.3d 833 (9th Cir.
4 1997) (en banc), cert. denied, 523 U.S. 1103 (1998)). And, it
5 asserts, "[o]ther courts have admitted information about prior
6 violent acts such as rape, assault and child abuse to inform the
7 jury's decision regarding future dangerousness." Gov't Br. at 38
8 (citing McDowell, 107 F.3d at 1366; Hogue v. Scott, 874 F. Supp.
9 1486, 1509-11, 1524 (N.D. Tex. 1994), aff'd, 131 F.3d 466 (5th
10 Cir. 1997), cert. denied, 523 U.S. 1014 (1998)). That may be so.
11 But it does not follow that the district court in this case and
12 on this record was required by law to rule that the prejudicial
13 effect of the evidence in question did not outweigh its probative
14 value.

15 There was no error of law.

16 B. Abuse of Discretion

17 When reviewing the exercise of a district court's
18 discretion in the context of admissibility of evidence under
19 Federal Rule of Evidence 403, we will not disturb the court's
20 conclusion "so long as [it] has conscientiously balanced the
21 proffered evidence's probative value with the risk for
22 prejudice," and our intervention is limited only to those cases
23 where the court's decision is "arbitrary or irrational."
24 Awadallah, 436 F.3d at 131 (citing United States v. Han, 230 F.3d
25 560, 564 (2d Cir. 2000)); see also id. (quoting Hester v. BIC
26 Corp., 225 F.3d 178, 181 (2d Cir. 2000) ("A district court's

1 evidentiary rulings will be disturbed only if they are
2 'manifestly erroneous.'" (quoting Luciano v. Olsten Corp., 110
3 F.3d 210, 217 (2d Cir. 1997))). We perceive no reason why the
4 same degree of deference does not apply when a district court has
5 excluded government-proffered evidence under 18 U.S.C. § 3593(b)
6 in the penalty phase of a capital trial.

7 In the case before us, the district court explained at
8 different times, and in some detail, its decision to exclude
9 evidence as to child abuse and the prior child endangerment
10 conviction. According to the court: "[This evidence does] not
11 relate to the homicidal characteristics which form the basis of
12 the prosecution," Taveras I, 2006 WL 473773, at *6, 2006 U.S.
13 Dist. LEXIS 7408, at *18; it "might well be overvalued in light
14 of recent publicity on sexual assaults on children in this
15 geographic area," id., 2006 U.S. Dist. LEXIS 7408, at *18; there
16 is a "great likelihood that defendant, if convicted and spared
17 death, will spend the rest of his life in prison" and therefore
18 his dangerousness to minor children and women is of little
19 relevance, Taveras II, 424 F. Supp. 2d at 463; it is possible
20 that admission of the evidence would necessitate a "diversionary
21 trial within a trial" as to whether Pepin's sexual relationship
22 with Mendez's daughter was consensual and whether he abused her,
23 id. at 463-64; it is likely that the evidence would "so inflame
24 the passions of the jurors as to inhibit their careful
25 consideration of the future dangerousness factor," id. at 464.
26 When the government amended its Notice of Intent to Seek a

1 Sentence of Death to add the child endangerment conviction as a
2 means of putting much the same evidence before the jury under the
3 rubric of "moral condemnation," the court further observed that
4 it had earlier failed to have admitted as evidence of "future
5 dangerousness," and that "[n]othing in the government's motion
6 justifies departure from the court's previous ruling excluding
7 this same evidence," Taveras III, 436 F. Supp. 2d at 502-03. The
8 district court thus made "a 'conscientious assessment' of whether
9 unfair prejudice substantially outweighs probative value."
10 Salameh, 152 F.3d at 110 (quoting United States v. Birney, 686
11 F.2d 102, 106 (2d Cir. 1982)). We cannot conclude that its
12 analysis bespeaks an "arbitrary or irrational" exercise of
13 discretion, Awadallah, 436 F.3d at 131, or results in an
14 evidentiary ruling that is "manifestly erroneous," Hester, 225
15 F.3d at 181. We therefore affirm as to these orders.

16 We pause to note that this evidentiary challenge is
17 unusual because it is made, properly under 18 U.S.C. § 3731, by
18 way of pre-trial interlocutory appeal rather than being brought
19 post-trial, post-verdict, and post-judgment. Nonetheless, the
20 fair and proper conduct of a trial must be, and is, primarily in
21 the hands of the trial judge. The standard of review, whether
22 before trial or after, is, therefore, abuse of discretion. See,
23 e.g., Awadallah, 436 F.3d at 131 (applying abuse of discretion
24 review in a pre-trial appeal by the government to a district
25 court's evidentiary ruling pursuant to 18 U.S.C. § 3731). Even
26 were we to disagree with its conclusion as to the admissibility

1 of child abuse evidence, then, we would not simply substitute our
2 judgment for that of the district court.

3 IV. The Exclusion of Evidence
4 of Post-Mortem Dismemberment

5 The government's challenge to the exclusion from both
6 the guilt and penalty phases of all evidence regarding the
7 victims' post-mortem dismemberment raises somewhat different
8 issues.

9 The parties offer different accounts of the reasoning
10 behind the district court's decision to exclude the dismemberment
11 evidence from the guilt phase of the trial. The government
12 argues, in essence, that the district court found the evidence
13 admissible under Rule 403, but went on to exclude it nonetheless,
14 because the evidence was not independently admissible during the
15 penalty phase. The defense contends that the district court
16 based its ruling on Rule 403 alone, which permits a judge to
17 consider both the defendant's willingness to stipulate and the
18 potential for prejudice in the penalty phase in conducting the
19 requisite balancing. Thus, under the government's view, we would
20 review the decision de novo as a question of law, while under the
21 defendant's view, we would only ask whether the application of
22 Rule 403 constituted an abuse of discretion. While both are
23 reasonable characterizations of the district court's order in
24 Taveras III, we find it unnecessary to choose between them.
25 Whether the district court applied a novel rule of law or relied
26 on Rule 403, we conclude that its order with respect to the
27 dismemberment evidence at the guilt phase must be vacated.

1 A. Errors of Law

2 First, as the district court acknowledged, Federal Rule
3 of Evidence 403, providing that "evidence may be excluded if its
4 probative value is substantially outweighed by the danger of
5 unfair prejudice" (emphasis added), governs admissibility
6 of evidence at the guilt phase. Taveras III, 436 F. Supp. 2d at
7 513. As we have noted, a district court ordinarily has somewhat
8 less latitude to exclude probative evidence based on unfair
9 prejudice at the guilt phase, under Rule 403, than it does where
10 the evidence is offered only at the penalty phase and where the
11 court's exercise of discretion is, therefore, governed by the
12 more stringent evidentiary standard of 18 U.S.C. § 3593(c).
13 Inasmuch as the question before us is the admissibility of
14 dismemberment evidence at the guilt phase, it would appear that
15 Rule 403 applies here. If so, the district court can exclude
16 such evidence only if the danger of unfair prejudice
17 "substantially outweighs" its probative value under Rule 403, not
18 if the one merely "outweighs" the other as section 3593(c)
19 permits.

20 According to the government, the district court
21 excluded the evidence at the guilt phase, even after finding it
22 admissible under Rule 403, because it was not independently
23 admissible during a potential penalty phase. This decision, it
24 argues, is both contrary to section 3593(c) and unsupported by
25 any authority.

1 As the district court was keenly aware, a court has two
2 separate sets of responsibilities with respect to evidence that a
3 single jury may consider twice, once when deciding between guilt
4 and acquittal, the other when deciding between life and death.
5 Insofar as the district court fashioned a novel rule governing
6 evidence at the guilt phase of a capital trial, it was clearly
7 attempting to meet both responsibilities rather than one at the
8 expense of the other. Nevertheless, if and to the extent that
9 the district court excluded evidence from the guilt phase solely
10 because it was excluded at the penalty phase, we conclude that it
11 erred as a matter of law.

12 We do not think that the district court, in making its
13 Rule 403 determinations, is required to ignore its subsequent
14 obligation to apply the section 3593(c) standard at the penalty
15 phase. To rule that only evidence independently admissible at
16 the penalty phase is admissible during the guilt phase, however,
17 would impermissibly allow the section 3593(c) admissibility
18 standard to govern evidentiary rulings not only at the penalty
19 phase, but throughout the entire proceeding.

20 B. Abuse of Discretion

21 Although acknowledging once again the degree of
22 deference we pay to a district court's ruling on the
23 admissibility of evidence, we also conclude that the order
24 excluding all evidence as to post-mortem dismemberment, to the
25 extent that it relies on Rule 403, was an abuse of discretion.

1 The issue at the guilt phase will be whether the
2 killings of Rosario and Madrid by Pepin were "intentional." See
3 Taveras III, 436 F. Supp. 2d at 514. The importance of
4 dismemberment evidence to the prosecution was cogently stated by
5 the district court:

6 [A]spects of the photographs and testimony --
7 particularly the precise manner in which the
8 bodies were dismembered -- are . . . highly
9 probative of [the] mental state [in issue].

10 At the guilt phase, such evidence would be
11 pertinent. To secure a conviction on the
12 capital charges, the prosecution must
13 convince the jury beyond a reasonable doubt
14 that defendant "intentionally kill[ed] or
15 counsel[led], command[ed], induce[d],
16 procure[d], or cause[d] the intentional
17 killing of an individual and such killing
18 result[ed]." 21 U.S.C. § 848(e)(1)(A).
19 Defendant has indicated that he does not
20 intend to contest that he killed Madrid and
21 Rosario, lessening the need for witness
22 testimony on the fact of the killing. A
23 stipulation to the victims' deaths at
24 defendant's hands would thus be an
25 alternative source of proof. See Old Chief
26 v. United States, 519 U.S. [172,] 184
27 [(1997)] ("[T]he Rule 403 'probative value'
28 of an item of evidence . . . may be
29 calculated by comparing evidentiary
30 alternatives."). Yet the government must
31 prove not merely the fact of the killing, but
32 defendant's intent.

33 Evidence that defendant calmly dismembered
34 the victims' bodies shortly after killing
35 them would tend to show that the killings
36 were not accidental -- that is, that he was
37 calm, collected, and rational shortly before
38 the killings. The precise manner in which
39 defendant disposed of the bodies -- using a
40 knife and drawing on his skill as a butcher
41 to cut at the joints -- suggests not a
42 panicked reaction to accidental death but a
43 considered effort to hide a criminal act.
44 These details form part of the res gestae,
45 the narrative that the government rightly
46 seeks to tell at the guilt phase of a trial.

1 Old Chief v. United States, 519 U.S. [at]
2 187 . . . (1997). Their probative value
3 would not be "substantially outweighed by the
4 danger of unfair prejudice" Fed. R.
5 Evid. 403.

6 Id. (some brackets added).

7 Even after factoring in the potential for unfair
8 prejudice at the penalty phase, we conclude that in light of its
9 importance in the context of the case as a whole -- its "res
10 gestae," as the district court termed it, id. -- the fact that
11 Pepin dismembered the bodies of the deceased is potentially too
12 important a factor in the jury's determination as to Pepin's
13 guilt vel non of the crimes of which he is accused for it to be
14 excluded altogether at the guilt phase. We assume without
15 deciding that the evidence may later be excludable and therefore
16 excluded under section 3593(c) during the penalty phase of the
17 trial conducted before the same jury, and that the jury would
18 thus have had access to information that should not be before it
19 for purpose of evaluating the sentence to be imposed. But it
20 would be odd, indeed, if the very gruesomeness of the killings of
21 which Pepin has been charged were to disjoint and abbreviate the
22 prosecution's presentation of the case against him, thus
23 disadvantaging the government in its ability to establish to the
24 jury beyond a reasonable doubt that Pepin committed an
25 intentional homicide in the first place. The importance of the
26 dismemberment evidence to the proper prosecution of the case,
27 combined with the possibility of curative instructions at the
28 penalty phase, if necessary, convince us that evidence of the

1 dismemberments and their context must be allowed at the guilt
2 phase.

3 We do not mean to suggest that all evidence of
4 dismemberment must be admitted at the guilt phase. But the
5 blanket ban of dismemberment evidence from the guilt phase was an
6 abuse of discretion, and we therefore vacate the order of the
7 district court effecting such a ban.

8 The government also asks us to decide that evidence of
9 dismemberment must be permitted at the penalty phase. We decline
10 to do so. Much will have happened between now and then,
11 particularly the likely use of evidence of dismemberment at the
12 guilt phase. We cannot know with anything approaching certainty
13 what the precise issue before the court will be if and when it
14 actually is framed. We therefore vacate the order now in force
15 barring dismemberment evidence from the penalty phase. Should
16 these proceedings enter a penalty phase, we leave it to the
17 district court at that time -- in light of the views expressed in
18 this opinion and in the district court's sound discretion -- to
19 enter an order as to the admissibility of such evidence.

20 **CONCLUSION**

21 For the foregoing reasons, the orders of the district
22 court are affirmed, except its order with respect to evidence of
23 dismemberment at the guilt and penalty phases of trial, which is
24 vacated. The order of this Court staying the trial is vacated
25 effective upon issuance of the mandate. Each party shall bear
26 his or its own costs.