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## CHAPTER 31

### FEDERAL DEATH PENALTY

Updated by

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#### 31.01 INTRODUCTION

Capital trials and appeals demand of a defense attorney several specialized skill sets. Capital work can require unique and lengthy proceedings, complicated interdisciplinary cooperation, and more preparation, resources, adaptability, and creativity than most noncapital work. As set forth in the AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993), and no less true today, “[d]ue to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings, counsel must make ‘extraordinary efforts on behalf of the accused.’”

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This chapter provides only an overview of defending a capital case—not an exhaustive manual for capital representation. A list of additional suggested resources is found at the end of this chapter. Attorneys faced with the possibility of appointment to a death-eligible case are urged to think inter-disciplinarily and creatively, and to consult with their local Federal Defender Office and the Federal Death Penalty Resource Counsel Project (FDPRC) for resources and legal support. *See* [www.capdefnet.org](http://www.capdefnet.org).

The FDPRC is available as a resource, and maintains a secure website with litigation guides, sample motions, instructions, affidavits, statistics from Federal Death Penalty Act cases, and other information. Additional specialized projects within the FDPRC—Capital Resource Counsel, Defense Initiated Victim Outreach and the Federal Mitigation Project, along with the Federal Capital Appellate Project, provide valuable resources to capital trial counsel. For an extensive outline of Federal Death Penalty Law, with citations to current cases, please refer to materials posted by the Federal Capital Appellate Resource Counsel Project on [capdefnet.org](http://capdefnet.org). If you have been appointed to a federal case that carries with it the potential punishment of death, you should log on to [www.capdefnet.org](http://www.capdefnet.org) and follow the prompts to apply for a password to obtain access to materials available to capital defense attorneys that are contained on the secure side of the website.

The first federal death penalty statute of the modern era was enacted in 1988, as part of Title 21 of the United States Code. *See* former 21 U.S.C. § 848, *et seq.* This statute provided for the possibility of capital punishment for homicides committed in relation to various drug trafficking offenses. It also provided a new sentencing scheme, including, *inter alia*, provisions for a bifurcated trial, jury sentencing, and aggravating and mitigating circumstances, as well as requirements that the Attorney General authorize a death penalty prosecution and that the Court follow the jury’s sentencing “recommendation.”

In 1994, the death penalty landscape was expanded dramatically with the passage of the Federal Death Penalty Act (FDPA), 18 U.S.C. § 3591, containing procedures largely paralleling those in Title 21.<sup>4</sup> Numerous criminal statutes, ranging from the killing of government officials, to killings committed on government property, to acts of terrorism, were amended or enacted to provide for the death penalty. Significantly, many of those statutes provided a framework in which the FDPA was implicated by the violation of a non-homicide offense, which “resulted” in death, such as bringing into the country or harboring aliens, “resulting in the death of any person.” *See* 8 U.S.C. § 1324(a)(1)(B)(iv). The statute containing the penalties for alien smuggling thus contains no intent requirement in the definition of this potential capital offense beyond those applicable to the smuggling offense itself, thus leaving the issue of intent for the capital offense to the FDPA.

Moreover, as discussed elsewhere in this Chapter, the intent factors in the FDPA are themselves broad enough, and the authority of local prosecutors in such matters narrow enough, that counsel appointed to a “death resulting” case must assume that, under the Department of Justice’s (DOJ) authorization protocols, the case will be submitted to the Department’s Capital Review Committee for consideration as to whether death shall be authorized. The DOJ’s authorization protocols are contained in the UNITED STATES ATTORNEY’S MANUAL at Chapter 9-10.000 *et seq.* (amended April 7, 2014).

The consequence of the statutory structure of the Federal Death Penalty Act and the DOJ’s authorization process is that nearly all indictments for an offense carrying the potential punishment of death must be treated by counsel from the outset as capital, with the associated commitment of personnel and financial resources. Counsel are urged to take all potential death penalty cases seriously, even when the local prosecutors state that they do not intend to seek the death penalty, or that they do not believe it is a death-worthy case. Moreover, counsel should always be aware of the legal ramifications of plea bargains in cases

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<sup>4</sup> The death penalty procedures in Title 21 were repealed in 2006, in favor of the Federal Death Penalty Act.

that do not allege a homicide, but where discovery or investigation discloses a death, which could form the basis of a future prosecution. *See, e.g., United States v. Jordan*, 509 F.3d 191 (4th Cir. 2007).

## 31.02 CAPITAL TRIAL REPRESENTATION

### 31.02.01 Appointment of Counsel in Capital Trials

Financially eligible persons charged with a federal capital offense are entitled to the prompt appointment of two attorneys, at least one of whom is learned in the law applicable to capital cases. 18 U.S.C. § 3005.<sup>5</sup> Appointed counsel may also, with prior court authorization, use the services of attorneys who work in association with them if required to meet time limits, at a reduced hourly rate. *See* GUIDELINES FOR THE ADMINISTRATION OF THE CRIMINAL JUSTICE ACT AND RELATED STATUTES (CJA GUIDELINES) § 620.10.10(c) (“[A]ppointed counsel may, with prior court authorization, use the services of attorneys who work in association with them, provided that the employment of such additional counsel (at a reduced hourly rate) diminishes the total cost of representation or is required to meet time limits.”).<sup>6</sup>

Furthermore, and importantly, a district court has the authority under § 3005 to appoint more than two counsel. *See, e.g., United States v. Moonda*, No. 1:06 CR 395, 2006 WL 2990517, at \*3 (N.D. Ohio Oct. 18, 2006) (ordering such appointment over government’s objection). *See also* Federal Death Penalty Resource Counsel website, *available at* [www.capdefnet.org](http://www.capdefnet.org) (providing the latest statistics on cases where three attorneys have been appointed to represent a death-eligible defendant).

In appointing counsel in federal capital prosecutions, the court is required to consider the recommendation of the federal public defender; or, if a district does not have a federal public defender organization, of the Administrative Office of the U.S. Courts. *See* CJA GUIDELINES § 620.30(a). The director of the Federal Death Penalty Resource Counsel Project is available and knowledgeable in making recommendations to the district courts regarding the appointment of learned counsel.

If the indictment charges capital-eligible offenses, and especially if the defense comes to learn that the U.S. Attorney’s Office (USAO) is considering whether to seek death authorization from the Attorney General, counsel should ask for appointment of “learned” capital defense counsel under all the authorities listed above. This can be done in the form of a Motion for Appointment of Learned Counsel, explaining to the court the death certification process set forth in USAM § 9-10.000 *et seq.*, and the fact that defense counsel’s strategy and investigative results can be an integral component of the Attorney General’s decision. Funding should also be requested for pre-authorization mitigation investigation.

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<sup>5</sup> Title 18 U.S.C. § 3599(a)(2), added in 2006, provides that a capital defendant is entitled to the appointment of “one or more attorneys,” and § 3599(d) explains that a court “with good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.” This should not be read to permit the appointment of only one capital defense attorney at trial, as 18 U.S.C. § 3005 still requires the appointment of two attorneys at trial. *See, e.g., United States v. Watson*, 496 F.2d 1125, 1129 (4th Cir. 1973) (“Defendant has an absolute statutory right to two attorneys under § 3005.”).

<sup>6</sup> Detailed recommendations concerning appointment and compensation of federal capital defense counsel were adopted by the Judicial Conference in 1998; these recommendations, and commentary (not adopted by the Judicial Conference), of the Defender Services Committee’s Subcommittee on Federal Death Penalty Cases make up Appendix I of the CJA GUIDELINES and can also be found on the judiciary’s web site, *available at* <http://www.uscourts.gov/services-forms/defender-services/defender-services-publications>.

Courts differ as to whether § 3005's right to the appointment of a second attorney applies prior to indictment, promptly after indictment for a death-eligible offense, or promptly after death authorization.<sup>7</sup> Courts also differ as to whether a defendant is entitled to a second attorney for a death-eligible offense under § 3005 even where the government declines to seek death or rescinds the death authorization.

The Fourth Circuit has held that the failure to appoint a second attorney is reversible error, not subject to harmless error analysis. *United States v. Boone*, 245 F.3d 352, 358-364 (4th Cir. 2001). In *Boone*, the Fourth Circuit noted that “§ 3005 applies upon indictment for a capital crime,”<sup>8</sup> and is “unequivocal in its terms.” *Id.* The *Boone* court recognized that “[p]rior to the government’s decision to seek or not to seek the death penalty, defense counsel can present mitigating factors counseling against imposition of death. . . . Thus, the appointment of a second lawyer helps the defendant during this preliminary process when that investigation into relevant factors and the presentment of information to the United States Attorney occurs. Surely, if the government decides not to seek the death penalty, then the penalty phase is won before trial, and a second lawyer has proven his worth.”<sup>9</sup> The Ninth Circuit, taking the narrower view, has held that “the purpose of the two-attorney right is to reduce the chance that an innocent defendant would be put to death because of inadvertence or errors in judgment of his counsel.”<sup>10</sup>

In many instances, district courts have appointed counsel for a potential capital defendant even before indictment and certainly prior to authorization. See Federal Death Penalty Resource Counsel website, [www.capdefnet.org](http://www.capdefnet.org), Litigation Issues, Section 3005 Litigation Guide (listing cases).

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<sup>7</sup> Compare *In re Sterling-Suarez*, 306 F.3d 1170 (1st Cir. 2002) (holding that “promptly” within the meaning of § 2005 means promptly after the indictment rather than after death authorization), with *United States v. Cheely*, 790 F. Supp. 901 (D. Alaska 1992), and *United States v. Storey*, No. 96-40018-01-DES, 1997 WL 51394 (D. Kan. Jan. 29, 1997). One district court has also found that the Sixth Amendment right to counsel attaches at commencement of the death-penalty authorization process, since it is a critical stage. Thus, it found that counsel’s failure to make any mitigation submission to DOJ during that process denied the defendant his right to counsel. It concluded that the appropriate remedy was to strike the death notice. *United States v. Pena-Gonzalez*, 62 F. Supp. 2d 358, 363-36 (D.P.R. 1999); *United States v. Bran*, No. 3:12CR131, 2012 WL 4507903, at \*2 (E.D. Va. Sept. 28, 2012) (“Effective preparation in a potential death penalty case includes preparing and presenting to the Department of Justice an explanation on why, in the defendant’s view, the death penalty should not be sought.”).

<sup>8</sup> *United States v. Boone*, 245 F.3d 352, 361 n.8 (4th Cir. 2001) (holding harmless error analysis inappropriate for violations of § 3005). But see *United States v. Robinson*, 275 F.3d 371, 383-84 (4th Cir. 2001) (declining to reverse conviction where counsel had been appointed but the appointment was terminated—without objection—after the government elected not to seek the death penalty). *Contra United States v. Casseus*, 282 F.3d 253, 256 (3d Cir. 2002) (holding that any error in the district court’s refusal to appoint death-penalty-qualified second counsel was harmless in light of the fact that during plea negotiations the defendants were not pressured by the possibility of death sentences and that the government announced prior to trial that it would not seek the death penalty; “after the government declared that it would not seek the death penalty, the appellants were no longer capital defendants”).

<sup>9</sup> *Boone*, 245 F.3d at 361.

<sup>10</sup> *United States v. Waggoner*, 339 F.3d 915, 918 (9th Cir. 2003). Circuits also differ as to whether two attorneys are still necessary under § 3005 once a case loses its capital status. See *United States v. Douglas*, 525 F.3d 225, 237 (2d Cir. 2008) (“Other Circuits had similarly held that § 3005 did not require the appointment of a second attorney where a sentence of death was precluded by the Supreme Court’s decision in *Furman* . . . So far as we are aware, only the Fourth Circuit has taken an opposite view[.]”) (referencing *Boone*, 245 F.3d at 358-61). See also, e.g., *Sterling-Suarez*, 306 F.3d at 1174-75 (stating no right to second counsel after case is no longer capital); *United States v. Grimes*, 142 F.3d 1342, 1347 (11th Cir. 1998) (“[A] defendant is not entitled to benefits he would otherwise receive in a capital case if the government announces that it will not seek the death penalty or the death penalty is otherwise unavailable by force of law.”); *United States v. Shepherd*, 576 F.2d 719, 729 (7th Cir. 1978) (“There is nothing in Congress’ action or inaction over the years to indicate that the two-counsel provision was intended to apply to any case in which a death sentence could not be imposed.”); *United States v. Weddell*, 567 F.2d 767, 770 (8th Cir. 1977) (“We conclude that this case, under *Furman v. Georgia* . . . lost its capital nature as charged in the indictment.”).

Title 18 U.S.C. § 3005 further provides that capital counsel “shall have free access to the accused at all reasonable hours.” This issue may become important to litigate depending upon the visitation conditions afforded counsel and the defense team with respect to their death-eligible client.

### **31.02.02 Capital Trial Attorney Qualifications**

As set forth above, 18 U.S.C. § 3005 requires at least one defense attorney in any federal capital case to be “learned in the law applicable to capital cases.” 18 U.S.C. § 3599 provides minimum qualifications for capital trial counsel as follows: at least one attorney must have been admitted to practice in the court of prosecution for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court. *See* 28 U.S.C. § 3599(b). Section 3599(d) permits the appointment of learned counsel who does not meet the criteria of § 3599(b) if there is “good cause,” and if the second attorney’s “background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possibly penalty and to the unique and complex nature of the litigation.”

The CJA GUIDELINES are slightly more detailed, advising federal defender organizations or the Administrative Office of the Courts, when consulted by the trial court, to consider, among other things, qualification standards endorsed by bar associations and other legal organizations, and counsel’s commitment to the defense of capital cases. *See* CJA GUIDELINES § 620.30(c)(1)-(5). Courts are to be mindful of the “highly specialized and demanding” nature of the litigation in their appointment decisions, and are advised that learned counsel should have *distinguished prior experience in federal death penalty cases, or in state death penalty cases* provided that, in combination with co-counsel, high-quality representation will be assured. *Id.*

Another source of guidance as to capital trial counsel’s qualifications is the AMERICAN BAR ASSOCIATION’S GUIDELINES FOR APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (ABA GUIDELINES), 31 HOFSTRA L. REV. 913 (2003).<sup>11</sup> This has been recognized by the Supreme Court as a “guide[] to determining what is reasonable,”<sup>12</sup> and should be taken into account by the federal defender organization or Administrative Office when consulted by a court. *See* CJA GUIDELINES § 620.30. The ABA GUIDELINES require appointed counsel to have “*demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases,*” and to have satisfied various capital-specific training requirements. *See* ABA GUIDELINES at 961 (Guideline 5.1) (emphasis added).

### **31.02.03 Capital Appellate and Post-Conviction Attorney Qualifications and Appointment**

Title 18 U.S.C. § 3599 provides:

Unless replaced by similarly qualified counsel upon the attorney’s own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including . . . appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

Section 3599(c) requires at least one appointed attorney, if appointed after judgment, to have been admitted to practice in the relevant court of appeals for at least five years, with at least three years experience in handling

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<sup>11</sup> Available at <http://www.abanet.org/deathpenalty>.

<sup>12</sup> *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

felony appeals in that court. Section 3599(d) allows the court to appoint additional attorneys post-judgment, just as for trial.

Although otherwise required by statute to continue representation throughout the entire course of a capital case, the better practice is appointment of new counsel for both direct appeal and federal habeas. The CJA GUIDELINES recommend that at least one attorney, who did not represent a defendant at trial, be appointed for the federal direct appeal. Courts making federal capital direct appeal appointments should consider attorneys' experience in federal criminal appeals and capital appeals, and the attorneys' willingness to continue post-conviction representation following the appeal, among other things. CJA GUIDELINES § 620.40. Courts are urged in the CJA GUIDELINES to continue the appointment of state post-conviction counsel, if qualified, when the case enters the federal system. CJA GUIDELINES § 620.70. But under no circumstances should capital trial counsel represent a defendant in federal post-conviction proceedings, because often constitutional errors must be framed as ineffective assistance of counsel claims and objective outside counsel must assess the viability of such claims. CJA GUIDELINES § 620.10.20 urges the appointment of at least two counsel for federal habeas proceedings, following both federal and state court convictions, "[d]ue to the complex, demanding and protracted nature of death penalty proceedings . . ." Attorneys' qualifications should be considered in light of their federal post-conviction and non-federal capital post-conviction experience. CJA GUIDELINES § 620.50.

#### **31.02.04 Standards of Capital Representation**

Capital representation involves a team approach, including at least two defense attorneys (one of whom is learned in the law of capital cases and at least one of whom is an experienced federal criminal practitioner), a mitigation specialist, a mental health expert, investigators and often various other experts. The ABA GUIDELINES make up the most thorough and accurate standards of capital representation available. These Guidelines include a duty of defense counsel "at every stage of the case" to take steps to achieve an agreed-upon life sentence, see ABA GUIDELINES at 1035 (Guideline 10.9.1), a duty "to conduct thorough and independent investigations relating to the issues of both guilt and penalty," *id.* at 1015 (Guideline 10.7), and important obligations concerning workload, *id.* at 996 (Guideline 10.3), relationship with the client, *id.* at 1005 (Guideline 10.5), make-up of the defense team, *id.* at 999 (Guideline 10.4), additional obligations of counsel representing a foreign national, *id.* at 1012 (Guideline 10.6), trial preparation duties specific to the needs of a capital case, *id.* at 1047 (Guideline 10.10.1), the duty to facilitate the work of successor counsel, *id.* at 1074 (Guideline 10.13), duties of trial counsel after conviction, *id.* at 1076 (Guideline 10.14), duties of post-conviction counsel, *id.* at 1079 (Guideline 10.15.1), duties of clemency counsel, *id.* at 1088 (Guideline 10.15.2), and others. Any attorney undertaking a capital case at any stage should be familiar with, and adhere to, the ABA GUIDELINES. Counsel should also feel free to contact the FDPFC for resources and legal support at any point. See [www.capdefnet.org](http://www.capdefnet.org).

#### **31.02.05 The Mitigation Function of Capital Representation**

As stated in the introduction to the AMERICAN BAR ASSOCIATION SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES:

A central—indeed, arguably *the* central—duty of counsel in a capital case is to humanize the client in the eyes of those who will decide his fate. Only an advocate who can present as complete a picture of the client as of the crime is in a position to urge effectively that:

- A case that is potentially capital not be prosecuted as such.
- A case that was originally filed capitally be otherwise disposed of.

- A case being tried capitally result in a not-guilty verdict on the capital charges.
- A capital case that reaches the penalty phase result in a sentence of less than death.
- A capital case whose outcome was a death sentence be overturned on direct appeal or—following a full re-evaluation, re-consideration, and re-presentation of the actual picture—at each step of post-conviction review.
- A capital conviction or sentence that has remained intact through all judicial proceedings be the subject of executive clemency.

As this list indicates, the task of imagining, collecting, and presenting what is generically called ‘mitigation’ evidence pervades the responsibilities of defense counsel from the moment of detention on potentially capital charges to the instant of execution.

Eric M. Freedman, *Introduction: Re-Statting the Standard of Practice for Death Penalty Counsel: The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 663, 664 (2008). The Supplemental Guidelines were compiled by “a diverse group of experts and organizations like the one assembled by the ABA for its 2003 [Guidelines] project,” and “help insure the implementation in fact of performance standards whose substance had long been agreed upon.” *Id.*

Capital counsel at every stage of a case should understand the role of mitigation and the life history investigation and must not neglect it. The mitigation investigation should be exhaustive, and should continue to be investigated by post-conviction counsel for further litigation and clemency petitions. At trial, a mitigation expert should be retained in addition to other fact investigators and mental health experts. Ideally, mitigation experts or specialists should not be asked to serve the dual roles of both investigator and an intellectual disability or other specialized mental health expert.

### **31.02.06 Compensation for Attorneys and Experts in Capital Cases**

Compensation for capital defense counsel and for appointed experts is outlined in CJA GUIDELINES §§ 630 and 660, and 18 U.S.C. §§ 3599(f), (g)(1), (g)(2), and (g)(3). Counsel may obtain funding for “investigative, expert, or other services” if they are “reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence.” The showing of reasonable necessity may be made *ex parte*, after a showing is made concerning the need for confidentiality. 18 U.S.C. § 3599(f). Any such “proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.” *Id.* Obtaining proper funding so that the client’s life history and meaning thereof can be adequately investigated and explained—either to the local United States Attorney, the DOJ, or the jury—is a substantial responsibility that must not be neglected by trial counsel.

### **31.02.07 Representing Foreign Nationals**

Representing a foreign national in a capital proceeding carries unique concerns and additional responsibilities. *See* ABA GUIDELINES at 1012 (Guideline 10.6). The FDPFC can provide specific advice. Representing a foreign national in a capital case presents unique challenges for the defense team, including linguistic and cultural barriers as well as barriers of perception. These barriers can affect the attorney-client relationship, complicate the process of finding appropriate expert assistance, impede the gathering of evidence, and hamper life-history investigation and the development of mitigation. These cases can require more money and time for travel to the defendant’s country of origin. Enlisting consular help can be important in securing resources to adequately defend a foreign national. Some countries’ consular offices and capital-

specific legal assistance programs can be of great help in meeting all of the challenges entailed in representing a foreign national.

One key authority to be consulted when representing a foreign national include: Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596, U.N.T.S. 261, ratified by the United States in 1969 (VCCR), which codifies consular assistance rights and procedures by which a nation must be permitted to provide that assistance to its nationals in distress in other nations. Article 36(1)(b) states that if a person detained by a foreign country “so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State” of such detention and “inform the [detainee] of his righ[t]” to request assistance from the consul of his own state. 21 U.S.T. at 101. The requirement that the detaining state notify the detainee’s consulate “without delay” has been held to be satisfied where notice is provided within three working days. *See Medellin v. Texas*, 552 U.S. 491, 501-02 n.1 (2008) (*Medellin I*); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 362 (2006) (Ginsburg, J., concurring in judgment); *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 52, P 97 (Mar. 31). When the United States ratified the VCCR, it also agreed to be bound by the treaty’s optional enforcement mechanism, providing that disputes over interpretation or application of the treaty “shall lie within the compulsory jurisdiction of the International Court of Justice” (ICJ). VCCR, Optional Protocol Concerning the Compulsory Settlement of Disputes art. 1, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 (“Optional Protocol”).

The United States has since withdrawn from the Optional Protocol. From a legal standpoint, however, counsel should adequately raise and preserve any Art. 36 violations as early as possible and at every stage of the process, operating under the assumption that the VCCR creates individually enforceable rights for their clients – an area that has not been settled in the law. Counsel should also be prepared to show how any Art. 36 violations prejudiced the defendant. *See Leal Garcia v. Texas*, 131 S. Ct. 2866, 2868 (2011).

Counsel should also be cognizant that treaties other than the VCCR may have been violated with respect to their foreign national client and raise legal claims accordingly. The United States also has bilateral consular agreements with over fifty countries, some of which allow consular notification without the foreign national’s agreement. Foreign governments may wish to file supporting diplomatic protests to any rights violations. Additionally, many of these treaties forbid the death penalty as the cruel and unusual infliction of punishment and as an impermissible human rights violation. The ABA GUIDELINES include specific obligations for counsel representing a foreign national in Guideline 10.6.

Once notified, various consuls arrange for legal representation and provide services such as assisting in investigations and records-gathering abroad, providing culturally appropriate resources to explain the American legal system, and arranging for contact with families. *See ABA GUIDELINE 10.6, Commentary at 1013* (“As a practical matter, consuls are empowered to arrange for their nationals’ legal representation and to provide a wide range of other services. These include, to name a few, enlisting the diplomatic assistance of their country to communicate with the State Department and international and domestic tribunals (e.g., through amicus briefs), assisting in investigations abroad, providing culturally appropriate resources to explain the American legal system, and arranging for contact with families and other supportive individuals. As a legal matter, a breach of the obligations of the Vienna Convention or a bilateral consular convention may well give rise to a claim on behalf of the client.”). Consuls can help facilitate diplomatic pleas or protests from their government, and facilitate a trusting attorney-client relationship which may otherwise be hindered by a foreign national’s ignorance about the legal system, concepts of plea agreements, the need to make important decisions with the help of family members who still reside in the country of origin, or suspicion of appointed counsel for any number of reasons. *See generally*, James, Int’l Justice Project, *Bridging the Gap: Effective Representation of Foreign Nationals in U.S. Criminal Cases* 6 (3d Ed. 2007) (posted in Foreign Nationals, Clients Litigation Guide). Ways in which a consulate can aide in the mitigation defense function are detailed

at length in Kuykendall et al., *Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client*, 36 HOFSTRA L. REV. at 1001-1013.

Counsel undertaking capital representation of a foreign national have a unique obligation to undertake a culturally competent mitigation investigation, so that the client's life history can be properly investigated, explained and understood by the finders of fact.

### **31.02.08 Representing Mentally Ill Defendants**

The client's biological, psychological, and sociological history must be thoroughly investigated in all phases of capital litigation, and capital defense attorneys have the primary responsibility for ensuring that their clients' disabilities and impairments are accurately identified and understandably explained. Counsel should always keep an open mind concerning potential mental health-related claims and retain appropriate experts for further testing if necessary upon suspicion of psychiatric or neurological problems. Many intellectually disabled clients are not easily recognizable as such by counsel, for a host of reasons. It often takes investigation of the client's school and other life history records, and guidance by mental health specialists, to fully understand the client's limitations and impairments. In addition to claims of intellectual disability and insanity, considered separately at the end of this chapter, mental health evidence can serve as a powerful explanatory factor and thus powerful mitigation.

This topic is too broad, complex, and scientifically-evolving to be dealt with adequately in this Chapter. The Federal Death Penalty Resource Counsel Project maintains a guide concerning mental health litigation and a collection of expert testimony transcripts. The ABA GUIDELINES can also be of great help in understanding counsel's duties with regard to the investigation and presentation of their client's mental health issues—in fact, this issue is so important that the Guidelines recognize a mental health professional as a core member of the original defense team. Guideline 10.4 of the ABA GUIDELINES, entitled “The Defense Team,” instructs that in every death penalty prosecution, the defense counsel must assemble a defense team which includes “a. at least one mitigation specialist and one fact investigator; b. at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and c. any other members needed to provide high-quality representation.”

Just a few of the more common mental health issues to be investigated can include pre-natal exposures to drugs, alcohol or other toxins; exposures to pesticides, lead, metals, solvents, and other poisons or toxins; learning disabilities; intellectual disability; brain injuries; genetic or chromosomal abnormalities; autism-spectrum disorders; schizophrenia; psychotic or dissociative disorders; the impact of a background of severe trauma or even exposure to war on neurobiological development; post-traumatic stress disorders; polysubstance abuse; and the development and origin of personality disorders. Indeed, the complexity of human mental health issues is too broad to begin to list here. Counsel must seek the aid of qualified mental health experts *after* a thorough background and documentary investigation into their client's life history has begun; once that investigation has been adequately undertaken, counsel can then begin to identify and seek the consultation and assistance of relevant mental health experts in the fields applicable to their client's lives, backgrounds, and environmental and psychological exposures.

Defendants are entitled to mental health experts under *Ake v. Oklahoma*, 470 U.S. 68 (1985). Compensation is statutorily outlined in CJA GUIDELINES § 630, and 18 U.S.C. §§ 3599(f) and (g)(2). Funding requests for the assistance of mental health experts is often a subject of an ex parte motion filed with the district court and can also often be the subject of the budgeting process, now conducted in many cases in conjunction with the various Circuit Budgeting Attorneys. Discovery by the government of mental health mitigation is explained in the subsection on discovery later in this chapter.

The complex provisions of discovery and the vast litigation surrounding Rule 12.2 and its interplay with mental health evidence are detailed and are not the subject of this Chapter. Rule 12.2 must be read and followed in all cases involving potential mental health evidence to be presented at either phase of the capital trial. The FDPRC website on capdefnet.org should be consulted and all materials thereunder be considered and reviewed by counsel investigating a potential capital case.

### **31.03 PRE-TRIAL PROCEDURE**

#### **31.03.01 Capital Authorization Protocol**

The Department of Justice authorization procedures are found in § 9-10.000 *et seq.* of the UNITED STATES ATTORNEY'S MANUAL (April 2014) (USAM). The DOJ Death Penalty Guidelines and Procedures set forth criteria for local USAOs and the DOJ in determining whether to seek death; the procedures also outline steps to which USAOs and the DOJ are supposed to adhere in considering death penalty authorization requests.

Following the amendment of the protocols in April 2014, there are two kinds of submissions that are now called for by the United States Attorney or Assistant Attorney General: expedited and non-expedited. The revised protocols now call for mandatory pre-indictment review of all potential capital cases. *See* USAM § 9-10.060. This allows for an opportunity early in the litigation for the government to determine that a case shall not proceed capitally. The standards for expedited review of a case are set forth in § 9-10.070 and provide that expedited review of a case may be requested where the only evidence to support conviction is proffer protected, where there is insufficient evidence of intent or no statutory aggravating factors, where extradition from a foreign country is preconditioned on there being no death penalty, where the defendant is a potential cooperator, or in any other case where no defense input is required for a recommendation against seeking a death sentence. Under those factors, the United States Attorney General may determine that death shall not be sought in a particular case without the requirement of input from defense counsel.

Barring those expedited provisions, and under USAM § 9-10.080, local USAOs cannot seek death or file a death notice without prior written authorization from the Attorney General. § 9-10.080 provides that in any case in which the United States Attorney or Assistant Attorney General is contemplating requesting authorization, the United States Attorney or Assistant Attorney General *shall* give counsel for the defendant a reasonable opportunity to present information for consideration which may bear on the decision whether to seek the death penalty. A detailed evaluation memorandum must be prepared by the prosecutors and sent to DOJ in every death-eligible case, whether or not the USAO wishes to seek the death penalty. When a USAO does wish to seek death, that USAO must give notice to defense counsel, and opportunity to be heard, before requesting authorization from the Attorney General.

Thus, defense counsel has the opportunity to present facts, including mitigating factors, to the USAO for consideration. The death penalty analysis engaged in by the government includes an “analysis of intent factors, aggravating factors and mitigating factors, and a determination as to whether the aggravating factor(s) sufficiently outweigh all the mitigating factor(s) found to exist to justify a sentence of death.” USAM § 9-10.080(4). It is therefore imperative that defense counsel present a compelling argument with regard to the application and balancing of the aggravating factors and mitigating factors that apply in their case. This can only be done following a thorough investigation of all issues surrounding both guilt and penalty by defense counsel and their mitigation specialist, private investigator, and potentially by consulting a relevant mental health expert prior to the presentation at the Department of Justice.

A Capital Review Committee exists in the DOJ to review each death-eligible case and make a recommendation to the Attorney General as to whether death should be sought. The committee is appointed

by the Attorney General and includes representatives of the Deputy Attorney General and the Assistant Attorney General for the Criminal Division.

Defense counsel is provided an opportunity to present to the committee, orally or in writing, reasons why the death penalty should not be sought. The nature and format of the presentation is up to each individual defense team, given the needs and the status of their case. The reasons not to seek death could include the relatively un-aggravated nature of the offense, extraordinary mitigation, policy concerns, issues of comparative fault, or a balancing of applicable state and federal interests in the case, among other issues. One critical factor is also set forth in the USAM § 9-10.140(D)(9), and that is “whether the defendant has accepted responsibility for his conduct as demonstrated by his willingness to plead guilty and accept a life or near-life sentence without the possibility of release.” Thus, the client’s willingness to enter a plea and accept a sentence of life or near life is an important consideration to the DOJ in determining whether death should be sought in a given case.

The Attorney General conducts a review and makes the final decision. Decisions can be reconsidered whenever changed circumstances are brought to the attention of the DOJ, such as newly discovered evidence, non-capital dispositions for equally culpable co-defendants, or a client’s willingness to enter into a plea agreement.

Should a death notice be issued, the USAM speaks to withdrawal of the death notice, and provides specifically that “once the Attorney General has directed a United States Attorney or Assistant Attorney General to seek the death penalty, the United States Attorney may not withdraw a notice of intention to seek the death penalty filed with the district court unless directed by the Attorney General . . . The United States Attorney or Assistant Attorney General should base the withdrawal request on material changes in facts and circumstances of the case from those that existed at the time of the initial determination.” Furthermore, the USAM provides that “*absent extraordinary circumstances, the Department will not consider successive defense requests to withdraw the notice of intention to seek the death penalty*” (emphasis added). USAM § 9-10.160. Some courts have held that death penalty decisions of the attorney general are not judicially reviewable,<sup>13</sup> and that the DOJ procedures do not give rise to due process liberty interests.<sup>14</sup>

Counsel should, if possible, seek discovery before the decision is made whether to seek death or not,<sup>15</sup> and should, as discussed above, promptly move for the appointment of learned counsel under § 3005. Once the decision to seek death is made, or if it is reconsidered, the defense can also try to enforce DOJ compliance with their internal procedures under the doctrine set forth in *United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), although courts thus far have repeatedly rejected such motions.<sup>16</sup>

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<sup>13</sup> See *United States v. Lopez-Matias*, 522 F.3d 150, 155-56 & n.4 (1st Cir. 2008); *Nichols v. Reno*, 124 F.3d 1376, 1377 (10th Cir. 1997); *United States v. McVeigh*, 944 F. Supp. 1478, 1484 (D. Colo. 1996) (“The decision to seek the death penalty under the Act is a matter of prosecutorial discretion.”); *Walker v. Reno*, 925 F. Supp. 124, 128 (N.D.N.Y. 1995) (“The Attorney General’s decision whether or not to seek capital punishment in a particular prosecution is a presumptively unreviewable action firmly committed to agency discretion as a matter of law within the meaning of [the Administrative Procedures Act].”) (internal quotations omitted).

<sup>14</sup> *United States v. Thompson*, 579 F.2d 1184, 1188-89 (10th Cir. 1978).

<sup>15</sup> See capdefnet.org for a discussion of cases where pre-authorization discovery has been granted on grounds of fundamental fairness, due to the severity of charges and the magnitude of the particular case.

<sup>16</sup> See *United States v. Lopez-Matias*, 522 F.3d 150, 155-56 & n.4 (1st Cir. 2008) (finding no need to decide whether four days’ notice of chance to meet and present mitigation to Capital Case Review Committee was “reasonable opportunity” under the protocols and declining to address whether Capital Review Committee is “critical stage” under Sixth Amendment); *United States v. Lee*, 274 F.3d 485, 492-93 (8th Cir. 2001) (holding that the DOJ’s death penalty protocol is unenforceable by individuals). See also *Nichols v. Reno*, 124 F.3d 1376 (10th Cir. 1997) (stating the death penalty protocol is unenforceable by individuals); *United*

### 31.03.02 Capital Indictment

Indictment for any offense punishable by death has no statute of limitation. 18 U.S.C. § 3281. The government is required to have an indictment returned listing not only the capital offense with which a defendant is charged, but also the statutory aggravating factors the United States plans to prove in the penalty phase.<sup>17</sup> There are still differing opinions as to whether the threshold culpability requirements of 18 U.S.C. § 3591(a)(2) need be alleged in the indictment or not, but circuits are shifting toward such a requirement under *Ring v. Arizona*, 536 U.S. 584 (2002).<sup>18</sup>

Federal capital indictments, then, must include (often in a “special findings” section) findings by the grand jury of one or more of the threshold culpability requirements of § 3591 and one or more statutory aggravating factors under § 3592(c).<sup>19</sup> Without a finding of both, the defendant is not eligible for the death penalty.

Courts have held that the indictment need not include non-statutory aggravating factors or that probable cause existed to believe that aggravating factors sufficiently outweighed mitigating factors so as to justify a death sentence.<sup>20</sup> There is some question as to whether omission of a second or third statutory aggravating factor from the indictment, where at least one *was* charged, creates plain error where those additional statutory aggravating factors are submitted to the jury that were later added in the notice of intent

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*States v. Busher*, 817 F.2d 1409, 1411-12 (9th Cir. 1987) (holding that United States Attorneys’ Manual § 1-1.00, a disclaimer that the manual does not confer any rights, is effective).

<sup>17</sup> See, e.g., *United States v. Davis*, 380 F.3d 821 (5th Cir. 2004) (stating the government’s failure to present FDPA elements to grand jury for consideration in its charging decision, while nevertheless seeking death penalty, violated Indictment Clause); *United States v. Allen*, 406 F.3d 940 (8th Cir. 2005) (finding the FDPA provision, directing government to charge aggravating factors in notice of intent to seek death penalty rather than in indictment, remains constitutional even after Supreme Court’s *Ring v. Arizona*, 536 U.S. 584 (2002), decisions, requiring factors to be alleged in indictment, because the government could submit factors to grand jury for inclusion in indictment and still give post-indictment notice).

<sup>18</sup> Compare *United States v. O’Driscoll*, 203 F. Supp. 2d 334 (M.D. Pa. 2002) (determining intent factors need not be found by a grand jury), and *United States v. Bin Laden*, 126 F. Supp. 2d 290 (S.D.N.Y. 2001), *aff’d sub nom. In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93 (2d Cir. 2008) (holding that the threshold intent findings of 18 U.S.C. § 3591(a)(2) are not elements of the indicted capital offenses such that grand jury findings are needed), *United States v. Gabrion*, 648 F.3d 307, 329 (6th Cir. 2011), *modified on other grounds*, 719 F.3d 511 (6th Cir. 2013) (en banc) (finding government’s failure to submit the gateway or statutory aggravating factors to the grand jury and their omission from the indictment is subject to harmless-error analysis), *with* post-*Ring* cases: *United States v. Rodriguez*, 380 F. Supp. 2d 1041 (D.N.D. 2005) (stating the Fifth Amendment requires at least one statutory aggravating factor and the mens rea requirement to be found by the grand jury and charged in the indictment in order to impose death sentence under FDPA); *United States v. Haynes*, 269 F. Supp. 2d 970 (W.D. Tenn. 2003) (same); *United States v. Lentz*, 225 F. Supp. 2d 672 (E.D. Va. 2002). See also *United States v. Allen*, 247 F.3d 741 (8th Cir. 2001) (finding intent requirements need not be found by grand jury), *vacated and remanded by the Supreme Court for consideration in light of Ring*, 536 U.S. 584 (2002).

<sup>19</sup> See *United States v. Rodriguez*, 581 F.3d 775, 805 (8th Cir. 2009); *United States v. Honken*, 541 F.3d 1146, 1174 (8th Cir. 2008); *United States v. Mikos*, 539 F.3d 706, 715 (7th Cir. 2008); *United States v. Mitchell*, 502 F.3d 931, 993-94 (9th Cir. 2007); *United States v. Sampson*, 486 F.3d 13, 20-24 (1st Cir. 2007); *United States v. Brown*, 441 F.3d 1330, 1367 (11th Cir. 2006); *Allen*, 406 F.3d 940; *United States v. Le*, 327 F. Supp. 2d 601 (E.D. Va. 2004) (stating the FDPA not unconstitutional for stating that aggravating factors shall appear in death notice, because aggravating factors are also found by special findings of the grand jury).

<sup>20</sup> See *United States v. Lighty*, 616 F.3d 321, 368 (4th Cir. 2010); *United States v. Rodriguez*, 581 F.3d 775, 816 (8th Cir. 2009); *United States v. Brown*, 441 F.3d 1330, 1368 (11th Cir. 2006); *United States v. Purkey*, 428 F.3d 738 (8th Cir. 2005); *United States v. Higgs*, 353 F.3d 281, 298-99 (4th Cir. 2003); *United States v. Bourgeois*, 423 F.3d 501 (5th Cir. 2005); *United States v. LeCroy*, 441 F.3d 914, 922 (11th Cir. 2006).

to seek death.<sup>21</sup> Several circuits have held that aggravating factors inadequately alleged in an indictment create only harmless error.<sup>22</sup>

### 31.03.03 Notice of Intent to Seek the Death Penalty

The United States is required, reasonably in advance of trial, to give notice to the court and the defendant stating that “the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified,” and setting forth any aggravating factors the government proposes to prove at the sentencing hearing. 18 U.S.C. § 3593(a). This would include the government’s non-statutory aggravating factors. Non-statutory factors may include (for example) a pattern of crime or violent behavior, future dangerousness, lack of remorse, “the effect of the offense on the victim and the victim’s family, and may include oral testimony, a victim impact statement that identifies that victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim’s family, and any other relevant information.” 18 U.S.C. § 3593(a).<sup>23</sup> Although the notice must contain both non-statutory and statutory aggravating factors, this does not substitute for the requirement that the government list statutory aggravating factors in the indictment.<sup>24</sup>

Some courts have held that notice is not statutorily or constitutionally required to explain what conduct constitutes each of the non-statutory aggravating factors or provide detail about the evidence the government

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<sup>21</sup> *United States v. Jackson*, 327 F.3d 273, 289 (4th Cir. 2003) (“Thus, Jackson has not demonstrated that the omission of all of the aggravating factors was error, much less plain error.”).

<sup>22</sup> *United States v. Gabrion*, 648 F.3d 307, 329 (6th Cir. 2011) (“no rational grand jury could fail to find that the prosecution lacked probable cause on any of the aggravating factors, because the evidence of probable cause on those factors was strong.”), *modified on other grounds*, 719 F.3d 511 (6th Cir. 2013); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 110-11 & n.15 (2d Cir. 2008) (finding the indictment’s capital counts adequately alleged gateway mental state and several statutory aggravators, including substantial planning, accompanying felony, and multiple killings; no need to consider whether, had there been error, it would be subject to harm analysis); *United States v. Barnette*, 390 F.3d 775 (4th Cir. 2004) (finding harmless error where aggravating factors were inadequately alleged in indictment, where indictment provided factual structure from which factors could be found, and government served a formal notice of intent to seek death listing the statutory aggravating factors it intended to prove), *vacated on other grounds*, 546 U.S. 803 (2005) (vacating and remanding in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005)); *United States v. Davis*, 380 F.3d 821, 829-830 (5th Cir. 2004) (given overt acts found by grand jury in support of capital conspiracy count, it could not rationally have failed to find probable cause for gateway factors and statutory aggravating factor of substantial planning and premeditation had thus been submitted); *United States v. Robinson*, 367 F.3d 278, 289 (5th Cir. 2004) (determining grand-jury evidence overwhelmingly shows there was probable cause to charge defendant with the “grave risk of death” statutory aggravating factor); *United States v. Allen*, 406 F.3d 940, 946 (8th Cir. 2005) (en banc) (same).

<sup>23</sup> As noted by the Supreme Court in *Jones v. United States*, 527 U.S. 373 (1999), the term “nonstatutory aggravating factor” is used to refer to any aggravating factor that is not specifically described in 18 U.S.C. § 3592. Section 3592(c) provides that the jury may consider “whether any other aggravating factor for which notice has been given exists.” Pursuant to § 3592(a), when the government decides to seek the death penalty, it must provide notice of the aggravating factors that it proposes to prove as justifying a sentence of death. *Id.* at 378 n.2. In *Jones*, the non-statutory aggravating factors were the victim’s “young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas,” and her “personal characteristics and the effect of the instant offense on [her] family[.]” *Id.* at 378 n.3. Other examples of non-statutory aggravating factors include that the defendant “participated in the abduction of [the victim] to facilitate his escape from the area in which he and an accomplice had committed a double murder,” “participated in the murder . . . to prevent her from reporting the kidnapping . . . [and] after substantial premeditation to commit the crime of carjacking [.]” *United States v. Fell*, 531 F.3d 197, 207 n.3 (2d Cir. 2008) (unpublished).

<sup>24</sup> See, e.g., *LeCroy*, 441 F.3d at 921 (rejecting the argument that the FDPA violates the Indictment Clause because it requires notice of statutory—as well as non-statutory—aggravating factors in the form of a “notice,” because aggravating factors may be charged in an indictment *and* listed in a notice; noting also that “Every circuit court of appeals which has addressed this argument has rejected it); *Allen*, 406 F.3d at 949; *Barnette*, 390 F.3d at 788-90; *United States v. Robinson*, 367 F.3d 278, 290 (5th Cir. 2004).

intends to offer in support thereof,<sup>25</sup> but other courts have also held that the notice—in conjunction with the indictment—must inform a defendant of the theories and facts that the government will use to establish each aggravating factor to satisfy the Sixth Amendment’s guarantee of compulsory process and confrontation.<sup>26</sup> The intent factors, as well, may also require further explanation in the death notice.<sup>27</sup>

Although the notice may be amended for good cause,<sup>28</sup> the amended notice must also be given within reasonable time,<sup>29</sup> and circuits differ in this calculation.<sup>30</sup> According to trial statistics compiled by the Federal Death Penalty Resource Counsel Project, looking at the period of years from 2004 through 2014, for those cases which actually began trial, the average time between indictment and the trial date is approximately 36.5 months. The average time between indictment and the notice of intent to seek the death penalty is 16.1 months.

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<sup>25</sup> *United States v. Taylor*, 316 F. Supp. 2d 730 (N.D. Ind. 2004) (stating notice of intent to seek death satisfied requirements of FDPA despite claim that notice should have and did not explain what conduct constituted each of the non-statutory aggravating factors government intended to prove); *United States v. Nguyen*, 928 F. Supp. 1525 (D. Kan. 1996) (rejecting defendant’s argument that the government’s notice of intent to seek death was unconstitutional because it listed only the aggravating circumstances and provided no detail about the evidence the government intended to offer in support).

<sup>26</sup> *United States v. Llera Plaza*, 179 F. Supp. 2d 444 (E.D. Pa. 2001), *superseded on reconsideration on other grounds*, 188 F. Supp. 2d 549 (E.D. Pa. 2002). *See also United States v. Wilson*, 493 F. Supp. 2d 364, 377 (E.D.N.Y. 2006) (“There is no mention of providing notice of the specific evidence that will prove the factors. Nonetheless, courts have recognized that, ‘at a minimum, due process requires a defendant to receive sufficient notice of aggravating factors to enable him to respond and to prepare his case in rebuttal.’ *Llera Plaza*, 179 F. Supp. 2d at 471. ‘In evaluating whether due process is satisfied, the Death Penalty Notice must be considered in conjunction with the offenses as charged in the indictment, which can provide the requisite specificity to an otherwise insufficient notice.’ *Id.*”); *see also United States v. Stone*, No. CR12-0072-JCC, 2013 WL 5934349, at \*1-2 (E.D. Cal. Nov. 5, 2013) (agreeing to strike paragraph from death notice the factors that are “unconstitutionally vague,” including the defendant’s “moral culpability”; his “background and character,” and the “egregious nature and circumstances of the offense” as being described in insufficient detail); *United States v. Pleau*, No. CR 10-184-1 S, 2013 WL 1673109, at \*4, 6 (D.R.I. Apr. 17, 2013) (ordering the government to provide an outline of its victim impact evidence, and a bill of particulars listing the incidents upon which it intends to rely in proving the non-statutory aggravating factor, participation in other serious acts of violence and future dangerousness aggravating factors).

<sup>27</sup> *See, e.g., Rodriguez*, 380 F. Supp. 2d at 1058 (finding lack of specificity in notice of intent factors—i.e., use of generic language of the statute without facts particular to the case—requires the intent factors be stricken from the notice and a directive that the government file amended death notices articulating specific factual bases for the allegations in the indictment).

<sup>28</sup> *See United States v. Le*, 326 F. Supp. 2d 739, 741 (E.D. Va. 2004) (“Good cause focuses on the government’s diligence and, implicitly, on the government’s good faith, in promptly discovering the information that is the substance of the amendment and then in promptly seeking the amendment. The government’s failure to exercise reasonable diligence in seeking an amendment may, in some circumstances, amount to a lack of good faith. Yet, the absence of reasonable diligence does not necessarily connote bad faith; it does mean, however, that the requisite good cause is lacking.”). Good cause may not be required for all amendments to the notice. *See United States v. Battle*, 173 F.3d 1343, 1347 (11th Cir. 1999) (“The Government is not required to provide specific evidence in its notice of intent. So, when it seeks to amend that notice to add only specific evidence—and not new ‘factors,’ it does not need to show good cause; if anything, the Government is helping the defendant some by forewarning him of the evidence to be used against him.”).

<sup>29</sup> *See Le*, 326 F. Supp. 2d at 741 (“Good cause and timeliness are separate requirements that involve distinct inquiries.”).

<sup>30</sup> *United States v. Le*, 311 F. Supp. 2d 527, 534-35 (E.D. Va. 2004) (stating 113 days’ notice is reasonable, but amended notice with different aggravating factors filed 94 days in advance was not reasonable). *But see United States v. Ayala-Lopez*, 457 F.3d 107 (1st Cir. 2006) (finding amended notice filed two months before trial was not untimely because it did not make any substantive changes to the original notice); *United States v. Wilk*, 366 F. Supp. 2d 1178 (S.D. Fla. 2005), *aff’d*, 452 F.3d 1208 (11th Cir. 2006) (determining amended notice filed 20 days prior to trial was reasonable because it was substantively the same as the timely-filed original notice, only adding language relating to a new charge in a superseding indictment, and the superseding indictment did not change the notice of special findings). Some courts find good cause where there is no deliberate delay by the government and no prejudice (regarding preparation time) to the defendant. *See, e.g., United States v. Barnes*, 532 F. Supp. 2d 625, 629 (S.D.N.Y. 2008), *referencing United States v. Pretlow*, 770 F. Supp. 239, 242 (D.N.J. 1991).

The average time between the notice of intent to seek the death penalty and the trial date is approximately 20.4 months.<sup>31</sup>

Circuits differ as to what constitutes reasonable notice,<sup>32</sup> whether they allow interlocutory appeals from denials of motions to strike a notice of intent to seek death,<sup>33</sup> and whether failure to provide timely notice should be addressed by an objective analysis pretrial or a prejudice analysis post trial.<sup>34</sup> Circuits are also split as to whether a continuance is a sufficient remedy for an untimely notice.<sup>35</sup> Some courts have analyzed the timeliness of the government's notice by considering not the length between notice and trial, but rather the length between death-penalty eligibility and the filing of the notice.<sup>36</sup>

#### 31.03.04 Duty to Resolve Capital Cases as Early as Possible

The ABA GUIDELINES include a duty of defense counsel “at every stage of the case” to take steps to achieve an agreed-upon life sentence. ABA GUIDELINES at 1035 (Guideline 10.9.1). The USAM creates an avenue for defense counsel to do so even before the death authorization process has begun:

No final decision to seek the death penalty shall be made if defense counsel has not been afforded an opportunity to present evidence and argument in mitigation.

UNITED STATES ATTORNEY'S MANUAL § 9-10.130 (April 2014). The death penalty can be taken out of the picture as early as pre-indictment, and as late as during the trial or while the jury is deliberating on guilt. It

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<sup>31</sup> There can also be issues regarding a late-filing of a Notice of Intent, if a trial date has already been set. The leading case in this area is *United States v. Fereby*, 332 F.3d 722 (4th Cir. 2003), where the Fourth Circuit upheld the dismissal of a death notice that was not filed “a reasonable time before trial” as required by 18 U.S.C. § 3592(a).

<sup>32</sup> *United States v. Wilk*, 452 F.3d 1208, 1222 (11th Cir. 2006) (finding six months reasonable); *United States v. Ponder*, 347 F. Supp. 2d 256, 270 (E.D. Va. 2004) (determining notice filed within court-imposed filing deadline and approximately four months before possible trial date is reasonable); *Le*, 311 F. Supp. 2d at 534-35 (stating 113 days' notice reasonable, but amended notice with different aggravating factors filed 94 days in advance was not reasonable); *United States v. McGriff*, 427 F. Supp. 2d 253, 272 (E.D.N.Y. 2006) (finding twelve days' notice not objectively reasonable, but granting a continuance).

<sup>33</sup> *Ferebe*, 332 F.3d at 726 (allowing interlocutory appeals); *Ayala-Lopez*, 457 F.3d at 108 (assuming without deciding that such denials are immediately appealable); *United States v. Robinson*, 473 F.3d 487 (2d Cir. 2007) (not permitting interlocutory appeal); *Wilk*, 452 F.3d at 1220 (allowing interlocutory appeal); *United States v. Bass*, 266 F.3d 532 (6th Cir. 2001) (allowing interlocutory appeal by the government of a district court's dismissal of the Death Notice).

<sup>34</sup> *See, e.g., Robinson*, 473 F.3d at 487 (intimating strongly that a post-trial prejudice analysis would be a sufficient remedy for untimely notice); *Ferebe*, 332 F.3d 722 (refusing to adopt a post trial prejudice standard in favor of a pretrial objective standard). *See also United States v. Breedon*, 366 F.3d 369, 374 (4th Cir. 2004) (finding seven months' notice not objectively unreasonable, by considering a “nonexhaustive list of factors to consider in determining whether a death notice is filed an objectively reasonable time before trial: . . . (1) the nature of the charges presented in the indictment; (2) the nature of the aggravating factors provided in the Death Notice; (3) the period of time remaining before trial, measured at the instant the Death Notice was filed and irrespective of the filing's effects; and . . . (4) the status of discovery in the proceedings”) (quoting *Ferebe*, 332 F.3d at 737).

<sup>35</sup> *United States v. Cooya*, No. 4:08-CR-00070, 2012 WL 2321572 (M.D. Pa. June 19, 2012) (unpublished) (allowing government to supplement death notice to add victim impact as an aggravating factor; no prejudice to defendant where court was also delaying the start of trial by ten months); *United States v. Williams*, 318 F. App'x 571, 573 (9th Cir. 2009) (unpublished) (finding notice timely where, although filed less than three months before scheduled trial date, trial was continued so that it was not scheduled to begin until a year after notice was filed); *Wilk*, 452 F.3d at 1223, 1228 (holding a continuance is proper remedy); *Ferebe*, 332 F.3d at 737-38 (holding a continuance an improper remedy); *McGriff*, 427 F. Supp. 2d at 272 (stating twelve days' notice not objectively reasonable, but granting a continuance).

<sup>36</sup> *See, e.g., McGriff*, 427 F. Supp. 2d at 270 n.13 (considering an untimeliness claim where there was a long delay before notice was filed, and noting that the average length of such delay is eight months).

can result from plea-bargaining or persuasion of the USAO or DOJ that death is an inappropriate penalty in a particular case.

### **31.03.05 Victim Outreach**

Pursuant to the USAM, the “views of the victim’s family on seeking the death penalty and other victim impact evidence should be provided” in the prosecution memorandum that is submitted to the Attorney General. USAM § 9-10.080(A)(7) (April 2014). Rarely will it be the case, however, that defense counsel or other direct members of the defense team are the appropriate point of contact with a victim’s family members. Communication between survivors and defense teams can sometimes be facilitated by someone who is specially trained and knowledgeable about the trauma survivors have experienced, is respectful of their needs and interests, and is skilled at working with both survivors and defense teams. As the Commentary to ABA GUIDELINES 10.9.1 notes, “approaches to the victim’s family should be undertaken carefully and with sensitivity,” and “[defense counsel] may consider seeking the assistance of . . . a defense victim liaison . . . in the outreach effort”). The FDPRC works closely with national specialists trained in the field of victim outreach. More information about victim outreach is available from the FDPRC website, including a motion for appointment for a Defense Initiated Victim Outreach Specialist, to be filed under seal.

## **31.04 DISCOVERY IN CAPITAL CASES**

### **31.04.01 Special Statutory Provision for Venire and Witness Lists in Capital Case**

A person charged with any capital offense is statutorily entitled to a copy of the indictment and a list of veniremen and witnesses “to be produced on the trial for proving the indictment,” stating the “place of abode”<sup>37</sup> of each, at least three days before trial—except that neither need be furnished if the court finds by preponderance of evidence that it may jeopardize the life or safety of any person. 18 U.S.C. § 3432. Further, § 3432 is mandatory to the government, and “the trial cannot lawfully proceed until the requirement has been complied with.” *United States v. Young*, 533 F.3d 453, 462 (6th Cir. 2008) (quoting *Logan v. United States*, 144 U.S. 263, 304 (1892)).

### **31.04.02 Discovery of Mitigating Evidence**

Due process requires that the government disclose not only evidence that would be favorable to the defense at trial, but also evidence that would be favorable at sentencing, including evidence that would weaken aggravating factor evidence as well as evidence that would help establish mitigating factors. Mitigating evidence should be broadly discoverable under *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* itself was a case about discovery for capital sentencing. *See also Kyles v. Whitley*, 514 U.S. 419 (1995). The government’s discovery obligations under Rule 16(a)(1)(E)(i) also apply to “information material to defense preparation for the penalty phase.” *United States v. Tsarnaev*, No. CRIM.A. 13-10200-GAO, 2013 WL 6196279 (D. Mass. Nov. 27, 2013).

It may be particularly important for counsel to seek and argue for the provision of pre-authorization discovery, to aid in the presentation of mitigating factors—and the balancing of mitigating and aggravating factor evidence—to the DOJ in pursuit of a request for a non-capital disposition of the case. Several district

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<sup>37</sup> There is some debate as to whether “place of abode” means “township of residence” as opposed to street address. *Compare United States v. Frank*, 11 F. Supp. 2d 322, 326 n.6 (S.D.N.Y. 1998) (noting that some courts have interpreted “place of abode” to mean township, but that the government in *Frank* agreed to disclose addresses), *with United States v. Insurgents of Pennsylvania*, 2 U.S. 335, Whart. St. Tr. 102, 2 Dall. 335, 26 F. Cas. 499, 1 L. Ed. 404, No. 15,443 (C.C.D. Pa. 1795) (No. 15,443) (Patterson, J.) (rejecting list that specified only state or county rather than township). But the federal district judge in *United States v. Sampson*, 335 F. Supp. 2d 166 (D. Mass. 2004), noted that no cases could be found suggesting that the government’s initial witness list, which identified law enforcement witnesses by agency rather than home address, satisfied the statute. *Id.* at 177.

courts have required the provision of pre-authorization discovery. *United States v. Delatorre*, 438 F. Supp. 2d 892, 900-01 (N.D. Ill. 2006) (ordering government to produce all *Brady* information and Rule 16 discovery pre-authorization); *United States v. Diaz*, No. 05-0167 WHA (JL), 2005 WL 1575191, at \*10 (N.D. Cal. June 30, 2005) (ordering government to provide pre-authorization discovery due to the exigencies of capital litigation); *United States v. Rivera Clemente*, 2012 U.S. Dist. LEXIS 140728 (D.P.R. Sept. 19, 2012) (unpublished) (precluding government from seeking the death penalty because government's discovery violations prejudiced defendant in the authorization process).

### 31.04.03 Bill of Particulars

Some courts believe that a death penalty notice need only list aggravating factors, and is not required to provide details of the evidence that the government intends to use to show those factors.<sup>38</sup> Similarly, intent factors may be listed in the indictment without any further detail. For this reason, defense attorneys should request a bill of particulars regarding the specific nature of listed aggravating factors (such as a pattern of violent conduct, or significant criminal history, or that the defendant constitutes a future threat to society), and of intent factors listed in the indictment under the Sixth Amendment rights to counsel and confrontation, and the Fifth Amendment right to due process of law.<sup>39</sup> For specific district court cases discussing the bill of particulars in the context of the death penalty notice, see the materials posted by the Federal Capital Appellate Resource Counsel Project on [www.capdefnet.org](http://www.capdefnet.org). The same result may also be obtained in certain courts through a motion to strike the death notice, with relief being a directive from the court that the government amend the notice with more detail.<sup>40</sup>

### 31.04.04 Selective Death Authorization Claim

Counsel may choose to seek discovery of the death authorization process as part of a selective prosecution claim, but this discovery will not be permitted without relevant evidence that similarly situated defendants were treated differently—raw statistics are not sufficient.<sup>41</sup> Such discovery might include: materials related to the prosecution; policies or manuals used in the judicial district to determine whether to charge the defendant federally; a list of all death-eligible defendants in that district (including race of defendant, race of the victim(s) and the ultimate disposition); all materials submitted to the Attorney General for death-eligible prosecutions, captions and case numbers of such cases, a description of the offense charged, and the ultimate disposition of the case; all standards, policies, practices or criteria employed by the DOJ to

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<sup>38</sup> See, e.g., *United States v. Duncan*, No. CR07-23-N-EJL, 2008 U.S. Dist. LEXIS 17495, at \*14-16, 2008 WL 656036, at \*6 (D. Idaho Mar. 6, 2008) (“Though other courts have directed the Government to supplement its notices to add case specific facts, the Court finds the Notices in this case provide the Defendant the notice required by the Constitution.”); *Taylor*, 316 F. Supp. 2d 730 (determining notice of intent to seek death satisfied requirements of FDPA despite claim that notice should have and did not explain what conduct constituted each of the non-statutory aggravating factors government intended to prove); *Nguyen*, 928 F. Supp. 1525 (rejecting defendant’s argument that the government’s notice of intent to seek death was unconstitutional because it listed only the aggravating circumstances and provided no detail about the evidence the government intended to offer in support).

<sup>39</sup> See, e.g., *Wilson*, 493 F. Supp. 2d at 375-76 (explaining that courts have inherent authority to order production of more particular information concerning notices of special findings and notices of intent to seek death penalty); *United States v. Karake*, 370 F. Supp. 2d 275, 279-80 (D.D.C. 2005) (“[I]t has been uniformly recognized that if the death [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.”); *Llera Plaza*, 179 F. Supp. 2d at 471-72 (concluding that the Constitution requires the government to provide some notice of type of evidence it intends to introduce at sentencing phase in order to provide defendant a meaningful opportunity to present his defense).

<sup>40</sup> See *supra* Section 31.03.03, “Notice of Intent to Seek the Death Penalty.”

<sup>41</sup> *United States v. Bass*, 536 U.S. 862 (2002) (per curiam) (citing *United States v. Armstrong*, 517 U.S. 456, 465 (1996)).

guard against the influence of race in the death penalty protocol; correspondence between the DOJ and the USAOs regarding such policies or requesting identification of death-eligible defendants; and a list of all non-negligent homicide cases throughout the United States in which one or more offenders were arrested and charged, and in which the facts would have rendered the offender eligible for the death penalty.<sup>42</sup> Selective death authorization claims could also be brought on the basis of the defendant's religion, and could be framed as an equal protection challenge as well as on the basis of citizenship status.

### **31.04.05 Discovery by the Government of Mental Health Mitigation**

Federal Rule of Criminal Procedure 12.2 was amended in 2002 to cover cases in which a capital defendant intends to introduce expert mental health evidence at trial or in a capital sentencing hearing. This rule, and the Fifth and Sixth Amendments, protect the defense mental-health investigation from pretrial discovery except to a very limited extent. When a government rebuttal mental health examination is permitted, Rule 12.2 and the Fifth and Sixth Amendments narrowly circumscribe that examination so that it does not exceed that of the testimony that the defense intends to introduce.

The court does have the power to compel a defendant to undergo psychological examination by the government as a prerequisite to introducing mental health testimony as part of mitigation.<sup>43</sup> This includes the "impaired capacity" and "disturbance" statutory mitigating factors, and any mental health non-statutory mitigating factor or an intellectual disability claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). However, the results of government mental health testing should not be revealed to attorneys for the government until after the guilt phase of the trial, once the defense has renewed its intention to present mental health mitigation. Defense counsel should also request to be present during the government's evaluation. For a collection of the cases interpreting Rule 12.2 and its substantial litigation, and a much more thorough discussion of the Rule, counsel should refer to the Federal Capital Appellate Resource Counsel Project's materials posted on the secure side of [www.capdefnet.org](http://www.capdefnet.org) or contact Resource Counsel for the same.

## **31.05 TRIAL PROCEDURE**

### **31.05.01 Federal Death Penalty Act**

The 2004 Federal Death Penalty Act (FDPA) provided procedures for implementing the federal death penalty, spanning 18 U.S.C. §§ 3591-3599. These provisions are applicable to any defendant found guilty of 18 U.S.C. § 794 (espionage), § 2381 (treason), or § 3591(b) (continuing criminal drug enterprise involving large quantities or obstruction of justice by attempted murder), and to any defendant found guilty of a number of death-eligible homicides,<sup>44</sup> who can also satisfy further mens rea requirements contained in 18 U.S.C.

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<sup>42</sup> *Bass*, 266 F.3d at 534-35, *overruled by United States v. Bass*, 536 U.S. 862 (2002).

<sup>43</sup> *See, e.g., United States v. Webster*, 162 F.3d 308 (5th Cir. 1998).

<sup>44</sup> Death-eligible homicides include the following: destruction of aircraft, motor vehicles, or related facilities resulting in death (18 U.S.C. §§ 32-34); first degree murder committed during a drug-related drive-by shooting (18 U.S.C. § 36); killing committed at an airport serving international civil aviation (18 U.S.C. § 37); retaliatory murder of a member of the immediate family of law enforcement officials (18 U.S.C. § 115(b)(3)) (by cross-reference to 18 U.S.C. § 1111); civil rights offenses resulting in death (18 U.S.C. §§ 241, 242, 245, 247); killing of a member of Congress, an important executive official, or a Supreme Court Justice (18 U.S.C. § 351) (by cross-reference to 18 U.S.C. § 1111); death resulting from offenses involving transportation of explosives, destruction of government property, or destruction of property related to foreign or interstate commerce (18 U.S.C. § 844(d), (f)(3), (i)); murder committed by the use of a firearm during a crime of violence or a drug-trafficking crime (18 U.S.C. § 924(j) (by cross-reference to 18 U.S.C. § 1111); killing committed in a Federal Government facility (18 U.S.C. § 930) (by cross-reference to 18 U.S.C. § 1111); genocide (18 U.S.C. § 1091); first-degree murder (18 U.S.C. § 1111); killing of a federal judge or law enforcement official (18 U.S.C. § 1114) (by cross-reference to 18 U.S.C. § 1111); killing of a foreign official (18 U.S.C. § 1116) (by cross-reference to 18 U.S.C. § 1111); murder by a federal prisoner (18 U.S.C. § 1118) (by cross-reference to 18 U.S.C. § 1111);

§ 3591(a)(2), being that the defendant either: (A) intentionally killed the victim; (B) intentionally inflicted serious bodily injury that resulted in the death of the victim; (C) 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, other than one of the participants in the offense, and the victim died as a direct result of the act; or (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act.

Mitigating and aggravating factors are listed in 18 U.S.C. § 3592, with subsection (b) listing three aggravating factors for espionage and treason, subsection (c) listing sixteen aggravating factors for homicide, and subsection (d) listing eight aggravating factors for criminal drug enterprise offenses. Section 3593 provides for a special hearing to determine whether a sentence of death is permissible, depending upon whether at least one of the mens rea requirements (if applicable) and at least one statutory aggravating factor has been found beyond a reasonable doubt, and further whether death is justified after deliberations weighing any statutory or non-statutory aggravating factors found beyond a reasonable doubt and any statutory or non-statutory mitigating factors found by a preponderance of the information. Mitigating factors need not even be specifically argued by the defense; jurors are free to add and consider any additional mitigating factors they find relevant, and only one juror need find a mitigating factor in order to consider it in the weighing process. Aggravating factors, on the other hand, must be limited to those alleged by the government, and must be found unanimously by the jury.

The jury is required to return special findings concerning aggravating and mitigating factors and must then “consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death.” 18 U.S.C. § 3593(e). “Based upon this consideration, the jury by unanimous vote . . . shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.” *Id.*

The FDPA thus requires five distinct determinations by the capital sentencing jury. Some of these determinations must be made unanimously and found beyond a reasonable doubt, some unanimously but without any standard of proof, and some by any one juror by a preponderance of the evidence. These determinations include the following: (1) whether a mens rea requirement exists beyond a reasonable doubt,

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murder of a U.S. national in a foreign country (18 U.S.C. § 1119) (by cross-reference to 18 U.S.C. § 1111); murder by an escaped federal prisoner already sentenced to life imprisonment (18 U.S.C. § 1120) (by cross-reference to 18 U.S.C. § 1111); murder of a state or local law enforcement official or other person aiding in a federal investigation, and murder of a state correctional officer during interstate transfer or while serving a federal sentence (18 U.S.C. § 1121) (by cross-reference to 18 U.S.C. § 1111); murder during kidnapping (18 U.S.C. § 1201) (if involving interstate travel or use of mail or other interstate or foreign commerce facility); killing during hostage taking (18 U.S.C. § 1203); killing of a court officer or juror (18 U.S.C. § 1503) (by cross-reference to 18 U.S.C. § 1111); killing with the intent of preventing testimony by a witness, victim, or informant (18 U.S.C. § 1512) (by cross-reference to 18 U.S.C. § 1111); retaliatory killing of a witness, victim, or informant (18 U.S.C. § 1513) (by cross-reference to 18 U.S.C. § 1111); mailing of injurious articles resulting in death (18 U.S.C. § 1716); assassination or kidnapping resulting in the death of the President or Vice President (18 U.S.C. § 1751) (by cross-reference to 18 U.S.C. § 1111); murder for hire (18 U.S.C. § 1958) (if involving interstate travel or use of mail or other interstate or foreign commerce facility); murder involved in a racketeering offense (18 U.S.C. § 1959); willful wrecking of a train resulting in death (18 U.S.C. § 1992); bank-robbery-related killing (18 U.S.C. § 2113); death resulting from a carjacking (18 U.S.C. § 2119); murder related to human trafficking, exploitation of aliens, child molestation, and numerous other offenses involving transmission of information about minors for purposes of sexual exploitation and production of child pornography (18 U.S.C. § 2245); death resulting from the sexual exploitation of children (18 U.S.C. § 2251); death resulting from prohibited offenses against maritime navigation (18 U.S.C. § 2280); terrorist killing of a U.S. national in another country (18 U.S.C. § 2332(a)(1)); death resulting from the use of weapons of mass destruction (18 U.S.C. § 2332a); killing by acts of terrorism transcending national boundaries (18 U.S.C. § 2332b); death resulting from torture committed outside the United States (18 U.S.C. § 2340A); and death resulting from aircraft piracy (49 U.S.C. § 46502).

by unanimous vote; (2) whether a statutory aggravating factor exists beyond a reasonable doubt, by unanimous vote; (3) whether any other alleged statutory or non-statutory aggravating factors exist beyond a reasonable doubt by unanimous vote, and whether any mitigating factors—alleged or not—exist by a preponderance of the information in the mind of any individual juror; (4) whether the aggravating factors sufficiently outweigh the mitigating factors by unanimous vote, or whether the aggravating factors alone are sufficient to justify a death sentence by unanimous vote; and (5) whether, by unanimous vote, the defendant should be sentenced to death.<sup>45</sup> If the jury cannot reach a unanimous vote as to the specific sentencing recommendation, the judge may *not* impose a death sentence. The jury should therefore be instructed that a non-unanimous sentencing vote is a decision for life.

Upon recommendation by the jury of a sentence of either death or life without the possibility of release, the court is required to sentence the defendant accordingly. 18 U.S.C. § 3594. If the jury cannot reach a unanimous sentencing recommendation, the sentence shall be a term of years or life without the possibility of release; if the sentencing jury has been waived by the defendant with the consent of the government (18 U.S.C. § 3593(b)(3)), the judge may impose a sentence of death, life without the possibility of release, or a lesser term of years, after engaging in the same statutory inquiries and weighing processes prescribed by the FDPA.

The FDPA exempts from the death penalty any defendant who was under age eighteen at the time of offense, 18 U.S.C. § 3591, and exempts from execution any woman who is pregnant and any person “who is mentally retarded,” or “who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person.” 18 U.S.C. § 3596. Section 3598 also exempts from the death penalty any person subject to the criminal jurisdiction of an Indian tribal government when the Federal jurisdiction for the offense is predicated solely on Indian country and the offense occurred within the boundaries of Indian country, unless the governing tribe has elected to give the FDPA effect over land and persons subject to its criminal jurisdiction.

With regard to mitigating factors, the FDPA requires the sentencer to consider “any mitigating factor,” including impaired capacity, duress, minor participation, whether equally culpable defendants will not be punished by death, no prior criminal record or significant prior history of criminal conduct, commission of the offense under severe mental or emotional disturbance, victim consent to the criminal conduct, and “other factors in the defendant’s background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence.” 18 U.S.C. § 3592(a).

Statutory aggravating factors for espionage and treason are: prior espionage or treason offense; grave risk to national security; and grave risk of death. 18 U.S.C. § 3592(b). Statutory aggravating factors for homicide are: death during commission of another crime; previous conviction of violent felony involving firearm; previous conviction of offense for which a sentence of death or life imprisonment was authorized; previous conviction of other serious offenses; grave risk of death to additional persons; heinous, cruel, or depraved manner of committing offense; procurement of offense by payment; pecuniary gain; substantial planning and premeditation; conviction for two felony drug offenses; vulnerability of victim; conviction for

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<sup>45</sup> Some death-eligible homicide offenses, by strict interpretation, require the sentence to be either death or life (see 18 U.S.C. § 1111, first-degree murder, and all other homicides cross-referenced to § 1111, providing for punishment “by death or by imprisonment for life”), while others also provide for a lesser term of years. *See, e.g.*, 18 U.S.C. § 2119(3) (death resulting from carjacking); 18 U.S.C. § 2340A (death resulting from torture outside the United States); 18 U.S.C. § 2332a(a) (death resulting from use of weapons of mass destruction); 18 U.S.C. § 2332b(c) (death resulting from acts of terrorism transcending national boundaries). There are some peculiar specific sentencing provisions, as that in 18 U.S.C. § 1958 (use of interstate commerce facilities in the commission of murder-for-hire), providing for a sentence of “death or life imprisonment, or shall be fined not more than \$250,000, or both.” *See also* 18 U.S.C. § 1959(a)(1) (providing punishment for racketeering-related murder as “death or life imprisonment, or a fine under this title, or both[.]”). The statutory language does not provide for a sentence of a lesser term of years, while it seemingly provides for a fine-only sentence. Argument should be made in any capital case that a sentence of a lesser term of years is appropriate under the FDPA, notwithstanding the language of the particular homicide statute at issue.

serious federal drug offenses; continuing criminal enterprise involving drug sales to minors; high public officials; prior conviction of sexual assault of child molestation; multiple killings or attempted killings. 18 U.S.C. § 3592(c). Statutory aggravating factors for continuing drug enterprise are: previous conviction of offense for which a sentence of death or life imprisonment was authorized; previous conviction of other serious offenses; previous serious drug felony conviction; use of firearm; distribution to persons under twenty-one; distribution near schools; using minors in trafficking; and lethal adulterant. 18 U.S.C. § 3592(d).

### 31.05.02 Retroactive Application

Courts differ as to whether the FDPA can be applied to crimes perpetrated prior to the enactment of the act, sometimes distinguishing between the FDPA's creation of substantive crimes and procedural provisions.<sup>46</sup> The government may not seek the death penalty for crimes occurring before the enactment of either the ADAA in 1988 or the FDPA in 1994. Also, the government may not rely on a statutory aggravating factor added by Congress after the charged killing. *See United States v. Higgs*, 353 F.3d 281, 301 (4th Cir. 2003).

### 31.05.03 Bifurcation or Trifurcation of the Penalty Phase

The FDPA requires a separate hearing for the sentencing phase of capital trials. Once a defendant is found guilty, he then faces a sentencing hearing at which the jury determines whether he is eligible for a death sentence and, if so, whether he should be sentenced to death. *See* 18 U.S.C. § 3593(b), (c). District courts have begun granting motions to bifurcate the penalty phase further into either two or even three segments, even though the FDPA does not explicitly provide for this. The penalty phase can be separated into a stage for the intent findings under 18 U.S.C. § 3591 and a second stage for the rest of the sentencing procedure. Alternatively, it can be further separated to isolate the statutory aggravation findings under § 3592(b), (c), or (d), and the rest of the sentencing hearing (findings of non-statutory aggravating factors, mitigating factors, and the weighing process of § 2393(e)). Another option is to join the intent findings under § 3591 and the statutory aggravating factors of § 3592 in a single “eligibility” stage, with the remaining findings and weighing process of § 2393(e) falling in a separate “selection” stage. This latter option is perhaps both the simplest and most effective type of bifurcation, separating the sentencing procedure in accordance with the two functional stages of constitutional capital sentencing as described by the Supreme Court<sup>47</sup> and their separate constitutional treatment.<sup>48</sup> The decision whether to seek bifurcation or trifurcation is complex, there are

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<sup>46</sup> *See United States v. Hager*, 530 F. Supp. 2d 778 (E.D. Va. 2008) (procedural provisions of FDPA may be applied retroactively); *United States v. Higgs*, 353 F.3d 281, 301 (4th Cir. 2003) (Ex Post Facto Clause forbade reliance on “multiple killing” aggravator, which was not added to FDPA as a statutory aggravating factor until April 1996, three months after murders were committed); *United States v. Church*, 151 F. Supp. 2d 715 (W.D. Va. 2001) (imposition of death would violate the Ex Post Facto Clause as the federal death penalty was known to be unenforceable at the time of the crimes at issue; FDPA is not ameliorative and instead imposes greater punishment than was available at time of crime); *United States v. Safarini*, 257 F. Supp. 2d 191 (D.D.C. 2003) (FDPA contains no express legislative intent of retroactive application; provisions of the FDPA creating new substantive crimes cannot be applied retrospectively).

<sup>47</sup> *See Buchanan v. Angelone*, 522 U.S. 269, 275 (1998) (“our cases have distinguished between two different aspects of the capital sentencing process, the eligibility and the selection phase. *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. *Id.* at 971. In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant. *Id.* at 972.”).

<sup>48</sup> *See Angelone*, 522 U.S. at 275-76 (“It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury’s discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition. In contrast, in the selection phase, we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination”) (citing *Tuilaepa*, 512 U.S. at 971-73; *Romano v. Oklahoma*, 512 U.S. 1, 6-7 (1994); *McCleskey v. Kemp*, 481 U.S. 279, 304-306 (1987)). *See also United States v. Johnson*, 764 F. 3d 937, 946 (8th Cir. 2014) (Bye, J., dissenting) (“Bifurcating the sentencing phase is done to allay concerns over the relaxed evidentiary rules governing the

disparate opinions on the issue, and counsel are encouraged to consult with the Federal Death Penalty Resource Counsel Project on the various factors involved in making this decision.

### 31.05.04 Evidentiary and Procedural Rules

Courts have held that the Federal Rules of Criminal Procedure apply to capital sentencing hearings.<sup>49</sup> But the Federal Rules of Evidence do not control the admission of evidence in a capital penalty phase hearing, 18 U.S.C. § 3593(c), at which the court may exclude evidence only “if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.” *Id.* This evidentiary standard has survived constitutional challenges thus far.<sup>50</sup> The terms of the statute serve to protect the defendant’s rights to a greater extent than the standard articulated in Fed. R. Evid. 403 by providing that information should be excluded if its probative value is “outweighed,” with no qualification that it be outweighed “substantially,” by the danger of unfair prejudice. In *United States v. Lee*, 274 F.3d 485, 494 (8th Cir. 2001); the court noted that the Federal Death Penalty Act “erects very low barriers to the admission of evidence at capital sentencing hearings.”

Determining whether there is a threat of unfair prejudice is a fact-specific inquiry. Unadjudicated prior offenses will often be the subject of such objections,<sup>51</sup> although they are not inherently prejudicial,<sup>52</sup> as will victim impact evidence. Objections can also be raised under the Equal Protection Clause when evidentiary standards of capital sentencing hearings fall below that of noncapital trials<sup>53</sup>—because capital sentencing hearings have now taken on many characteristics of a trial on guilt or innocence, including protections under the 6th Amendment and due process.

Another frequent cause for an admissibility objection is photographs of the victim. In ruling on admissibility of photographs, courts should be cognizant not only of the evidentiary balancing test of

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jury’s determination of eligibility”); *United States v. Henderson*, 485 F. Supp. 2d 831, 850-851 (S.D. Ohio 2007); *United States v. Natson*, 444 F. Supp. 2d 1296, 1309 (M.D. Ga. 2006); *United States v. Johnson*, 362 F. Supp. 2d 1043, 1110 (N.D. Iowa 2005); *United States v. Bodkins*, No. CRIM.A. 4:04CR70083, 2005 WL 1118158, at \*7 (W.D. Va. May 11, 2005).

<sup>49</sup> See *United States v. Lee*, 89 F. Supp. 2d 1017 (E.D. Ark. 2000), *order rev’d on other grounds*, 274 F.3d 485 (8th Cir. 2001), *reh’g and reh’g en banc denied* (Feb. 5, 2002).

<sup>50</sup> See *United States v. Snarr*, 704 F.3d 368 (5th Cir. 2013); *United States v. Gabrion*, 648 F.3d 307, 345 (6th Cir. 2011), *modified on other grounds*, 719 F.3d 511 (6th Cir. 2013) (en banc); *United States v. Mitchell*, 502 F.3d 931, 979-980 (9th Cir. 2007); *United States v. Fulks*, 454 F.3d 410 (4th Cir. 2006); *United States v. Cheever*, 423 F. Supp. 2d 1181 (D. Kan. 2006); *Lentz*, 225 F. Supp. 2d 672; *Bin Laden*, 126 F. Supp. 2d 290; *United States v. Miner*, 176 F. Supp. 2d 424 (W.D. Pa. 2001); *United States v. Frank*, 8 F. Supp. 2d 253 (S.D.N.Y. 1998); see also *United States v. Jones*, 132 F.3d 232 (5th Cir. 1998) (holding that the relaxed evidentiary standard does not impair reliability of capital sentencing, and in fact contributes to the doctrine of individualization).

<sup>51</sup> See, e.g., *United States v. Gonzalez*, No. 3:02CR7 (JBA), 2004 U.S. Dist. LEXIS 16907, 2004 WL 1920492 (D. Conn. Aug. 17, 2004).

<sup>52</sup> See *United States v. Lee*, 274 F.3d 485, 494 (8th Cir. 2001) (citing *Williams v. New York*, 337 U.S. 241 (1949)); *Eaton v. Angelone*, 139 F.3d 990, 998 (4th Cir. 1998).

<sup>53</sup> The Fifth Circuit has rejected an Equal Protection challenge to this discrepancy based on “the . . . strong interest in ensuring that all relevant evidence concerning the capital defendant is placed before the jury so that it can consider the evidence when answering the special issues.” *Williams v. Lynaugh*, 814 F.2d 205, 208 (5th Cir. 1987). The Supreme Court has not ruled on the issue, but Justices Marshall and Brennan commented in strong dissent to a denial of certiorari: “I can think of no constitutionally legitimate reason why evidence of unadjudicated offenses should be admissible in capital cases but not in other cases. The decision of the court of appeals sanctions a reduction of procedural protection for the very reason that the defendant’s life is at stake.” *Williams v. Lynaugh*, 484 U.S. 935, 939 (1987) (Marshall and Brennan, JJ., dissenting to denial of certiorari).

§ 3593(c), but also of due process concerns of the case more generally. A defendant's due process rights are violated when, in view of the totality of the circumstances, he or she has not received a fundamentally fair trial.<sup>54</sup> Such a violation can arise from the cumulative effect of a number of pieces of evidence in combination—such as the photographs combined with the effect of victim impact testimony.<sup>55</sup> Concerning an objection to admission of photographs, there is helpful language from a dissent to denial of certiorari by Justice Marshall,<sup>56</sup> but little helpful language from courts of appeals.<sup>57</sup>

Similar objections should also be made to the admissibility of bloody clothing,<sup>58</sup> which in addition to being unfairly prejudicial can also present a danger of introducing inappropriate victim impact information from family members seated in the gallery, and to in-life photographs or video clips of the victim. Video clips have been permitted when brief and probative of some aspect of the victim's life, but they can be excluded for the potential to cause unfair prejudice or arouse undue sympathy.<sup>59</sup>

### 31.05.05 Victim Impact Evidence

Victim impact evidence is statutorily permitted in federal capital trials, when included in the death notice as a non-statutory aggravating factor or to rebut mitigating evidence offered by the defendant. 18 U.S.C. § 3593(a) permits evidence “concerning the effect of the offense on the victim and the victim's family,” which

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<sup>54</sup> See, e.g., *United States v. Sampson*, 335 F. Supp. 2d 166, 183 (D. Mass. 2004) (citing *Spears v. Mullin*, 343 F.3d 1215, 1225-26 (10th Cir. 2003)).

<sup>55</sup> See *United States v. Sampson*, 335 F. Supp. 2d 166, 183 (D. Mass. 2004) (“In the present case, the photographs might individually have been admissible, but might have amounted to a denial of due process when considered together. Similarly, the photographs themselves might not have caused a due process violation, but could, in combination with other types of evidence that involve the danger of unfair prejudice, have contributed to a due process violation. Therefore, the court was required to consider the other evidence in this case, including the type and amount of victim impact evidence, when deciding which photographs to admit”) (citing *United States v. Rivera*, 900 F.2d 1462, 1477 (10th Cir. 1990) (“Courts have also found fundamental unfairness when error is considered in conjunction with other prejudicial circumstances within the trial, even though such other circumstances may not individually rise to the level of error”)).

<sup>56</sup> *Mann v. Oklahoma*, 488 U.S. 877, 877 (1988) (Marshall, J., dissenting from denial of cert.) (“The petitioner argues convincingly that the photographic evidence created an impermissible risk that his death sentence was based on considerations that are ‘totally irrelevant to the sentencing process,’ because it focused the jury’s attention on the postmortem decomposition of the victim’s body rather than on ‘the character of the [defendant] and the circumstances of the crime.’”) (citations omitted).

<sup>57</sup> See *United States v. Sarracino*, 340 F.3d 1148, 1169 (10th Cir. 2003) (rejecting a challenge that the body of the victim had changed between the time of the crime and the time of the photograph, the court wrote, “The bloodied head and face of the victim gives an *indication*, although admittedly an imperfect one, of how the victim must have appeared to the defendants at the end of the fight. Without these photos, the prosecution would have been handicapped in its ability to convey the nature and extent of the beating to the jurors.”); *United States v. Amey*, 70 F.3d 1273, 1995 WL 696680, at \*4 (6th Cir. Nov. 20, 1995) (“the actual presentation of the evidence at trial was accomplished in such a manner as to inform the jury that the disfigurement of the victim’s body was due in part to the autopsy procedures, and in part to decomposition and to rodent mutilation”).

<sup>58</sup> See, e.g., *United States v. Sampson*, 335 F. Supp. 2d 166, 184-85 (D. Mass. 2004) (“In the context of this case, the court ruled that the shirts were inadmissible under the 18 U.S.C. § 3593(c) standard and the due process clause. Courts have often admitted the bloody clothing of the victim in homicide prosecutions. See, e.g., Annotation, ‘Admissibility, in Homicide Prosecution, of Deceased’s Clothing Worn at Time of Killing,’ 68 A.L.R.2d 903, § 2 [a] . . . (1959) (‘In homicide prosecutions, the general rule is that the clothing worn by the victim at the time of the killing is admissible in evidence, even where its introduction may be prejudicial to the accused, if it tends to shed light upon a material inquiry in the case’). However, in the context of this capital case, there were unique considerations that indicated that exclusion was appropriate.”).

<sup>59</sup> See *United States v. McVeigh*, 153 F.3d 1166, 1221 n.47 (10th Cir. 1998) (noting that the district court prohibited the introduction of wedding photographs and home videos).

“may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim’s family, and any other relevant information.” *Id.*

But objections may be raised under the constitutional holding of *Payne v. Tennessee*, 501 U.S. 808 (1991), in which the Supreme Court—although permitting this type of evidence—recognized the risk that such evidence can be unduly inflammatory. Unduly inflammatory testimony should be excluded by trial courts under both *Payne* and the evidentiary standard of 18 U.S.C. § 3593(c). Specifically, victim impact witnesses may not characterize or give their opinions on the crime, may not characterize or give opinions on the defendant, and may not express an opinion on the appropriate sentence.<sup>60</sup> The appropriate number and type of victim impact witnesses is not prescribed, and varies greatly between trials.<sup>61</sup> The appropriateness of victim impact evidence concerning uncharged murders alleged as non-statutory aggravating factors is an open question.<sup>62</sup>

### 31.05.06 Waiver of Jury Trial on Penalty

The FDPA prohibits a defendant from waiving a jury trial on the issue of punishment without the government’s consent; this provision has withstood constitutional challenge in district courts thus far.<sup>63</sup>

### 31.05.07 Motion for Separate Guilt and Penalty Phase Juries

Based on research showing a prejudice of death-qualified jurors to vote for guilt, motions can be brought seeking separate guilt and penalty phase juries. Support can also be found in Justice Marshall’s dissent to *Lockhart v. McCree*, 476 U.S. 162 (1986), in which the Court found no constitutional violation with a unitary capital jury. As Justice Marshall explained, “any suggestion that the current system of death

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<sup>60</sup> See *Booth v. Maryland*, 482 U.S. 496, 508 (1987), *overruled as to a specific portion of the holding by Payne v. Tennessee*, 501 U.S. at 822; *Payne*, 501 U.S. at 830 n.2 (“*Booth* also held that the admission of a victim’s family members’ characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case”); see also *United States v. Bernard*, 299 F.3d 467, 479-480 (5th Cir. 2002) (court is troubled that one victim’s mother addressed defendants during her victim-impact statement and warned them that heaven and hell are real); *United States v. Mitchell*, 502 F.3d 931, 989 (9th Cir. 2007) (testimony that characterized defendant as being disrespectful of Navajo Culture was error, though not prejudicial); *United States v. Barrett*, 496 F.3d 1079, 1100 (10th Cir. 2007) (no error where sentence from a note written by victim’s daughter was briefly projected on a screen); *United States v. Barnett*, 390 F.3d 775, 800 & n.7 (4th Cir. 2004) (no due process violation from outburst by victim’s mother during her testimony in which, addressing defendant by name, she said he knew victim was joy of my life, how can you kill my baby?); *Hain v. Gibson*, 287 F.3d 1224, 1237-38 (10th Cir. 2002); *Robison v. Maynard*, 943 F.2d 1216 (10th Cir. 1991); *United States v. Lighty*, 616 F.3d 321, 361 (4th Cir. 2010) (during penalty phase closing arguments, the AUSA twice informed the jurors that the victim’s family was asking for a sentence of death; “there is little doubt that the statements were improper” both because the statements were without record support and because the evidence is inadmissible under *Booth* and *Payne*).

<sup>61</sup> See *United States v. Allen*, 247 F.3d at 741, 779 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 953 (2002) (eleven victim impact witnesses taking up eighty pages of transcript); *United States v. Chanthadara*, 230 F.3d 1237 (10th Cir. 2000) (allowing three family members—the victim’s widow and their two children); *United States v. Bernard*, 299 F.3d 467, 478 (5th Cir. 2002) (no error in allowing the reading of five victim impact statements, four from the victims’ parents and one by a friend and former coworker of the two victims); *United States v. Barnette*, 211 F.3d 803, 818 (4th Cir. 2000) (no error in permitting seven family members to testify regarding the deaths of two people).

<sup>62</sup> See *United States v. Sampson*, 335 F. Supp. 2d 166, 193 (D. Mass. 2004) (“it is not clear that the FDPA authorizes victim impact evidence relating to uncharged murders, and no FDPA case seems to have included such evidence”).

<sup>63</sup> See *United States v. Henderson*, 485 F. Supp. 2d 831 (S.D. Ohio 2007); *United States v. Miner*, 176 F. Supp. 2d 424, 442 (W.D. Pa. 2001); *United States v. Foster*, No. CRIM. CCB-02-0410, 2004 WL 225084 (D. Md. Jan. 27, 2004); *United States v. Cooper*, 91 F. Supp. 2d 90 (D.D.C. 2000).

qualification ‘may be in the defendant’s best interests, seems specious unless the state is willing to grant the defendant the option to waive this paternalistic protection in exchange for better odds against conviction.’” *Id.* at 205 (Marshall, J., dissenting) (citing Finch & Ferraro, *The Empirical Challenge to Death-Qualified Juries: On Further Examination*, 65 NEB. L. REV. 21, 69 (1986)). Unfortunately, district courts that have thus far granted such motions have been swiftly reversed based on the plain test of the FDPA.<sup>64</sup>

### 31.05.08 Burdens and Presumptions in the Penalty Phase

*Ring v. Arizona* extended the *Apprendi v. New Jersey*, 530 U.S. 466 (2000), doctrine to cover aggravating factors in capital sentencing. *Ring*, 536 U.S. at 607-09. Thus, both under *Ring* and under the statutory scheme, the threshold intent factors and any alleged aggravating factors (statutory and non-statutory) must all be found unanimously by the jury and beyond a reasonable doubt. Mitigating factors must be found by a preponderance of information, and the jury may not be required (by way of instruction, closing argument, or verdict form) to find mitigating factors unanimously. *Mills v. Maryland*, 486 U.S. 367 (1988). At least two courts have held that bifurcation of the penalty phase does not violate the presumption of innocence with regard to aggravating factors because juries are presumed to follow instructions concerning the government’s burden at the penalty phase.<sup>65</sup>

Courts have split as to whether the government’s statutory and constitutional burden extends past the eligibility stage (of intent factors and statutory aggravating factors) and into the selection stage (the weighing portion of the jury’s sentencing deliberation).<sup>66</sup> These motions are supported by the statutory imposition of a non-death sentence where the jury is unable to unanimously agree on a sentence of death.

If bifurcation of the selection and eligibility stages is granted, it becomes all the more important to argue that the government’s burden of proof beyond a reasonable doubt extends beyond the determinations of intent and the existence of any statutory or non-statutory aggravating factors and includes the determinations that aggravation sufficiently outweighs mitigation and that justice requires a sentence of death. District courts have thus far split on whether the first burden is to be proven beyond a reasonable doubt and whether the second burden exists at all.<sup>67</sup> These two burdens can be linguistically combined in a proposed instruction and defended on the existence of the first burden alone: “that the government must prove beyond

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<sup>64</sup> See *United States v. Green*, 407 F.3d 434, 443-44 (1st Cir. 2005) (circuit court issued writ of mandamus to prevent separate jury for trial and sentencing; declining, though, to issue “advisory mandamus” opinion about district court’s alternative suggestion that it would defer death-qualification until after jury had found defendant guilty of death-eligible crime); *United States v. Young*, 376 F. Supp. 2d 787, 791-92 (M.D. Tenn. 2005) (approving separate juries), *vacated and remanded by United States v. Young*, 424 F.3d 499 (6th Cir. 2005) (denying right of defendant to waive unitary jury); *United States v. Green*, 343 F. Supp. 2d 23 (D. Mass. 2004) (approving separate juries), *rev’d by United States v. Green*, 407 F.3d 434 (1st Cir. 2005) (rejecting separate juries); see also *United States v. Williams*, 400 F.3d 277, 281-83 (5th Cir. 2005) (rejecting right to waive unitary jury).

<sup>65</sup> See *United States v. Fell*, 372 F. Supp. 2d 753, 757-58 (D. Vt. 2005); *United States v. Perez*, No. 3: 02CR7(JBA), 2004 WL 935260, at \*19 (D. Conn. Apr. 29, 2004).

<sup>66</sup> Compare *United States v. Chandler*, 996 F.2d 1073, 1091-92 (11th Cir. 1993) (“That the jury need only be instructed that the aggravating factors sufficiently outweigh the mitigating factors is entirely appropriate. A capital sentencing scheme is constitutional even if it does not require that a specific burden of proof govern the jury’s weighing process”), with *Sampson*, 335 F. Supp. 2d at 239 n.42.

<sup>67</sup> *Sampson*, 335 F. Supp. 2d at 237 (“The lower courts are split on whether to instruct that the government must prove beyond a reasonable doubt that the death penalty is justified. The defendant cited cases in which the instruction was given and the government cited cases in which it was not. Judge Sand’s model jury instructions contain “beyond a reasonable doubt” language while the Eighth Circuit’s model jury instructions do not. See LEONARD B. SAND, ET AL., MODERN FEDERAL JURY INSTRUCTIONS, INST. 9A-19 at 91-78 to -79; MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE 8TH CIRCUIT, INST. 12.11”).

a reasonable doubt that the aggravating factors so sufficiently outweigh the mitigating factors that justice mandates a sentence of death.” At least one court has given such an instruction.<sup>68</sup> Regarding the first burden alone, several courts have imposed it,<sup>69</sup> and in at least one case, the government has conceded the point.<sup>70</sup>

Another way to frame the allocation of burdens at the penalty phase is to place with the defendant appropriate presumptions—both the presumption of innocence regarding aggravating factors and the presumption that the aggravating factors do not outweigh the mitigating factors at the selection stage. More simply put, this latter presumption could also be phrased as a *presumption that a life sentence is appropriate unless the government proves otherwise beyond a reasonable doubt*, and finds constitutional support in the Eighth Amendment<sup>71</sup> and due process.<sup>72</sup>

<sup>68</sup> See *Sampson*, 335 F. Supp. 2d at 239-40 (“The law never requires that any or all of you find that the death sentence is justified. Any one of you may decline to impose the death penalty. If you decide that the prosecution has not proven beyond a reasonable doubt that the death penalty is justified, you do not have to give a reason for that decision”); *id.* at 240 (“If each and every one of you find that the prosecution has proven beyond a reasonable doubt that the aggravating factors found to exist sufficiently outweigh the mitigating factors found to exist to make death the appropriate penalty . . . [y]ou will have thus decided that Mr. Sampson will be executed for that crime, and that is the sentence that I will impose.”).

<sup>69</sup> See *Sampson*, 335 F. Supp. 2d at 239 n.42; see also *United States v. Pitera*, Case No. CR 90-0424 (E.D.N.Y. 1992) (instruction given by district court), *aff’d* 5 F.3d 624 (2d. Cir. 1993).

<sup>70</sup> *Sampson*, 335 F. Supp. 2d at 238-39 (“However, on December 16, 2003, the government changed its position and stated that it had no objection to a reasonable doubt instruction so long as it provided both a ‘floor’ and a ‘ceiling.’ That is, the government withdrew its objection to jurors being instructed that the weighing process carries a reasonable doubt burden provided that the court did not permit the defendant to argue that the jurors should impose a stricter burden on the government. . . . Relying on the government’s revised position and viewing it as prudent, the court incorporated a reasonable doubt standard in the instructions relating to the weighing process. However, the court also instructed jurors that they had the discretion to decide what was ‘sufficient’ for themselves.”).

<sup>71</sup> Because in a capital sentencing hearing the stakes are undeniably higher than in a legal proceeding of any other sort, the need to “impress[] on the [sentencer] the necessity of reaching a subjective state of certitude” is all the greater. *In re Winship*, 397 U.S. 358, 364 (1970). The Court has recognized an ever-present margin of error in legal fact-finding and concluded, where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. *Id.* at 364 (quoting *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958)). In light of the Supreme Court’s repeated emphasis on the death penalty’s qualitative difference from all other penalties, and the settled doctrine of heightened reliability in capital sentencing, there can be no doubt that if presumptions are necessary in proceedings that do not result in the defendant’s death, they are all the more necessary in proceedings that *can* result in the defendant’s death. See *Sumner v. Shuman*, 483 U.S. 66, 72 (1987) (“Heightened reliability is demanded by the eighth amendment in the determination whether the death penalty is appropriate in a particular case”); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.”).

In addition to the doctrine of heightened reliability, the Eighth Amendment’s proscription of mandatory death sentences also indicates the presumed appropriateness of non-death sentences over death sentences. In order for a death sentence to be imposed, mitigating evidence must be given effect, regardless of the sufficiency of the evidence in aggravation. See, e.g., *Sumner v. Shuman*, 483 U.S. 66 (even life-felons cannot receive automatic death sentences for murder); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (death sentence unconstitutional where, even though aggravating circumstances are sufficient to uphold a death sentence, mitigating evidence was not given a vehicle to be given effect by the jury); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (death sentence unconstitutional where non-statutory mitigating factors were barred, regardless of the sufficiency of aggravation); *Lockett*, 438 U.S. 586 (death sentence is unconstitutional where mitigation is barred or not given effect, regardless of the sufficiency of aggravation).

<sup>72</sup> The penalty phase of a capital trial is in effect a second trial. *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003) (plurality). That the government must prove statutory and non-statutory aggravating factors beyond a reasonable doubt, to the jury’s unanimous satisfaction, is now settled constitutional and statutory law. See 18 U.S.C. § 3593(c); *Ring*, 536 U.S. 584. In the non-capital opinion on which *Ring* was based, Justice Stevens had explained, “At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without ‘due process of law[.]’” *Apprendi*, 530 U.S. at 477. As death is

### 31.05.09 Scope of Mitigation

As the Court stated in *McCleskey v. Kemp*:

In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence. "[T]he sentencer ... [cannot] be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S., at 604 . . . (plurality opinion of Burger, C.J.) (emphasis in original; footnote omitted). *See Skipper v. South Carolina*, 476 U.S. 1 . . . (1986). Any exclusion of the "compassionate or mitigating factors stemming from the diverse frailties of humankind" that are relevant to the sentencer's decision would fail to treat all persons as "uniquely individual human beings." *Woodson v. North Carolina*, . . . 428 U.S., at 304 . . . .

481 U.S. 279, 304 (1987) (emphasis in original) (footnote omitted).

The Supreme Court presumes that capital sentencing jurisdictions provide for a "wide scope of evidence and argument allowed at presentence hearings." *Gregg v. Georgia*, 428 U.S. 153, 203-04 (1976). It is "desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Id.* at 204. This was one of the predominant reasons given for affirming Georgia's statutory scheme in *Gregg*.<sup>73</sup>

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unquestionably the government's most extreme deprivation, due process protections should apply with even more force—certainly not with any less.

Due process thus requires a presumption to anchor every jury determination (for which the government carries a burden of proof beyond a reasonable doubt: statutory aggravating factors (both those under § 3591 and § 3592), non-statutory aggravating factors, and that justice demands the defendant be executed.

In *Deck v. Missouri*, 544 U.S. 622 (2005), the Supreme Court held that while procedural protections concerning the presumption of innocence are "less obvious" in a capital sentencing proceeding because "the defendant's conviction means that the presumption of innocence no longer applies[,] there are "related concerns." *Id.* at 632-33. And "[a]lthough the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the 'severity' and 'finality' of the sanction, is no less important than the decision about guilt." *Id.* at 632.

In *Deck*, allowing the defendant to appear at his sentencing trial in shackles amounted to placing a "thumb on death's side of the scale," *id.* at 633,—a phrase consistently used to describe the risk of unconstitutional bias in favor of the death penalty. *See Brown v. Sanders*, 546 U.S. 212, 231-32 (2006) (Stevens, J., dissenting) ("Using the metaphor of a 'thumb on death's side of the scale,' we have identified the error as the 'possibility not only of randomness but also of bias in favor of the death penalty.'") (quoting *Stringer v. Black*, 503 U.S. 222, 236 (1992)).

A presumption that a death sentence is not mandated by justice, a concern "related" to the presumption of innocence because identically rooted in the government's burden of proof beyond a reasonable doubt, is the only way to absolutely avoid a "thumb on death's side of the scale."

<sup>73</sup> *See also Tennard v. Dretke*, 542 U.S. 274, 385 (2004) ("a State cannot bar 'the consideration of ... evidence if the sentencer could reasonably find that it warrants a sentence less than death'") (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440-41 (1990)); *Payne*, 501 U.S. at 822 ("virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances") (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1981)); *Penry*, 492 U.S. at 316 (The Court's approval of Texas's statutory scheme in *Jurek v. Texas*, 428 U.S. 262 (1976), was premised "on the assurance that the Texas Court of Criminal Appeals would interpret the [special issues] to allow the jury to consider whatever mitigating circumstances a defendant may be able to show"); *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988) ("[S]ince *Jurek* was decided, this Court has gone far in establishing a constitutional entitlement of capital defendants to appeal for leniency in the exercise of juries' sentencing

Still, some courts have successfully limited mitigation. Although the non-death sentences of codefendants is a statutory mitigating factor, some federal courts have ruled that evidence of death-eligible offenses committed by co-conspirators carries too great a danger of misleading and confusing a jury,<sup>74</sup> and courts have excluded mitigation concerning proportionality of a defendant's case in comparison to other capital cases.<sup>75</sup>

### 31.05.10 Residual Doubt

The Supreme Court has “*not* interpreted the Eighth Amendment as providing a capital defendant the right to introduce at sentencing evidence designed to cast ‘residual doubt’ on his guilt of the basic crime of conviction,” *Oregon v. Guzek*, 546 U.S. 517, 525 (2006) (emphasis in original) (describing *Franklin v. Lynaugh*, 487 U.S. 164), but neither has it declared that no right exists. It has never actually reached this discrete question—having twice skirted the issue, concluding that it “face[d] a situation where we need not resolve whether such a right exists.” *Guzek*, 546 U.S. at 525. It has indicated, however, that the right to present residual doubt evidence is “quite doubtful[,]” *id.*, despite the Court’s own recognition of the soundness of residual doubt as a capital sentencing strategy,<sup>76</sup> and reliance in part on this argument from a state (considering it an interest of justice) defending the use of a single jury in both the guilt and penalty phases of the capital trial.<sup>77</sup>

District courts have split on the admission of both residual doubt evidence and residual doubt argument. Some courts have not only permitted the argument, but have specifically instructed the jury to consider residual doubt as mitigating.<sup>78</sup> Researchers have identified residual doubt as the most powerful

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discretion.”); *Sumner v. Shuman*, 483 U.S. 66, 85 (1987) (“Although a sentencing authority may decide that a sanction less than death is not appropriate in a particular case, the fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a lesser sentence.”).

<sup>74</sup> See *United States v. Feliciano*, 998 F. Supp. 166, 173 (D. Conn. 1998).

<sup>75</sup> See *United States v. Regan*, 221 F. Supp. 2d 659, 660-61 (E.D. Va. 2002) (proportionality evidence relating to the harm done in other espionage cases could not be mitigating because it lacked probative value and there was a significant danger of confusing the issues and misleading the jury).

<sup>76</sup> See *Rompilla v. Beard*, 545 U.S. 374, 386 (2005) (“The obligation to get the file was particularly pressing here owing to . . . Rompilla’s sentencing strategy stressing residual doubt. Without making efforts to learn the details and rebut the relevance of the earlier crime, a convincing argument for residual doubt was certainly beyond any hope.”); *McCree*, 476 U.S. at 181.

<sup>77</sup> *McCree*, 476 U.S. at 181; see also *United States v. Gray*, 173 F. Supp. 2d 1, 17 (D.D.C. 2001) (“The Supreme Court has recognized the Government’s legitimate interest in empanelling a single jury to hear both phases of the trial, the ‘possibility that a defendant might benefit at the sentencing phase from any residual doubts about the evidence at the guilt phase that the jury might have had,’ and the cost to judicial resources in requiring the defense and Government to present the same evidence in both phases of the trial.”) (quoting *Buchanan v. Kentucky*, 483 U.S. 402, 417 (1987)). This portion of *Lockhart* was, however, minimized by the Supreme Court in *Franklin v. Lynaugh*, 487 U.S. at 173-74.

<sup>78</sup> See, e.g., *United States v. Bodkins*, 2005 WL 1118158 (W.D. Va. 2005); *United States v. Foster*, No. CRIM. CCB-02-0410, 2004 WL 868649, at \*1 (D. Md. Apr. 9, 2004) (“While the Constitution does not require that the jury be permitted to consider residual doubt as a mitigating factor, see *Franklin v. Lynaugh*, 487 U.S. 164, 108 S. Ct. 2320, 2327, 101 L. Ed.2d 155 (1988), neither does the Constitution forbid such consideration. Further, even if residual doubt is not considered to fall within the traditional definition of a mitigating factor, see *id.* at 2327; cf. [ *United States v.*] *Davis*, 132 F. Supp. 2d [455,] [] 458, 464 n.1 [(E.D. La. 2001)], the statutory list of factors in 18 U.S.C. § 3592 is not exclusive. See *id.* at 464. Residual doubt as to guilt is a powerful, and appropriate, factor for a jury to consider before imposing the ultimate and irrevocable sanction of death. . . . Accordingly, the jury will be instructed that they may consider residual doubt as a mitigating factor concerning the murder of Robert McManus”); *United States v. Davis*, 132 F. Supp. 2d 455 (E.D. La. 2001); *United States v. Honken*, 378 F. Supp. 2d 1040, 1041 (N.D. Iowa 2004) (court would allow defense to present evidence, and would instruct jury, on lingering doubt as mitigating factor); *United States v. Bodkins*, 2005 WL 1118158, at \*9 (W.D. Va. 2005) (residual doubt is proper mitigating factor and court would charge jury on it if evidence

mitigating fact in the minds of capital jurors,<sup>79</sup> and nearly every Court of Appeals has recognized its reasonableness and effectiveness as a strategy for defense lawyers in capital sentencing, even since *Guzek*.<sup>80</sup> The government, in fact, still argues the importance of residual doubt when defending against a defense motion for separate guilt and penalty phase juries.<sup>81</sup> The fact remains, however, that many courts exclude residual doubt as a mitigator based on the government's argument that there is no *right* to the residual doubt mitigator.<sup>82</sup>

### 31.05.11 The Heinous, Cruel, or Depraved Aggravating Factor

Challenges should be made to the statutory factor that the crime was especially heinous, cruel, or depraved. The Supreme Court, prior to enactment of the FDPA, stated that, "A person of ordinary sensibility could fairly characterize almost every murder as outrageously or wantonly vile, horrible and inhuman."<sup>83</sup> Limiting instructions can cure the error inherent in this aggravating factor, but they must be sufficient in ensuring that the jury does not believe that this aggravating factor could fairly apply to all death-eligible

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reasonably supported it); *United States v. Foster*, 2004 WL 868649, at \*1 (D. Md. 2004) (jury will be instructed on residual doubt as a mitigating factor).

<sup>79</sup> See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 COLUM. L. REV. 1538, 1563 (1998) ("The best thing he can do, all else being equal, is to raise doubt about his guilt."); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 28 (1988) ("[t]he existence of some degree of doubt about the guilt of the accused was the most often recurring explanatory factor in the life recommendation cases studied"); see also Jennifer Treadway, "Residual Doubt" in *Capital Sentencing: No Doubt it is an Appropriate Mitigating Factor*, 43 CASE W. RES. L. REV. 215 (1992); Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41 (2001).

<sup>80</sup> See, e.g., *Chandler v. United States*, 218 F.3d 1305, 1320 & n.28 (11th Cir. 2000) ("We have accepted that residual doubt is perhaps the most effective strategy to employ at sentencing."); *Tarver v. Hopper*, 169 F.3d 710, 715-16 (11th Cir. 1999) ("A lawyer's time and effort in preparing to defend his client in the guilt phase of a capital case continues to count at the sentencing phase. Creating lingering doubt has been recognized as an effective strategy for avoiding the death penalty. . . . So, the efforts of Tarver's lawyer, during trial and sentencing, to create doubt about Tarver's guilt may not only have represented an adequate performance, but evidenced the most effective performance in defense to the death penalty."); *Smith v. Gibson*, 197 F.3d 454, 463 (10th Cir. 1999) ("But residual doubt has been recognized as an extremely effective argument for defendants in capital cases.") (internal quotes omitted); *Williams v. Woodford*, 384 F.3d 567, 624 (9th Cir. 2004) (residual doubt is an acceptable penalty phase strategy); *Keith v. Mitchell*, 466 F.3d 540, 541 (6th Cir. 2006) (implying that counsel's failure to argue residual doubt contributed to his deficiency); *Gillard v. Mitchell*, 445 F.3d 883, 894 (6th Cir. 2006) (faulting counsel for failing to ask for a residual doubt instruction despite residual doubt being the sole mitigating strategy at sentencing); *Martinez v. Quarterman*, 481 F.3d 249, 256 (5th Cir. 2007) ("this circuit has held that arguing residual doubt may be a reasonable, even highly beneficial, strategy in a capital case"); *Moore v. Johnson*, 194 F.3d 586, 618 (5th Cir. 1999) (same).

<sup>81</sup> See *Young*, 376 F. Supp. 2d at 798-800.

<sup>82</sup> See, e.g., *United States v. Rodriguez*, 581 F.3d 775, 813-815 (8th Cir. 2009) (no error in refusing to instruct jury to consider, as mitigator, residual doubt); *United States v. Jackson*, 549 F.3d 963, 981-82, n.24 (5th Cir. 2008) (capital defendant is not entitled to have sentencing jury instructed on residual doubt); *United States v. Eye*, 2008 U.S. Dist. LEXIS 40215 (W.D. Mo. 2008) (noting that, "The Court concludes, and Defendants do not seriously dispute, that criminal *defendants* do not have a constitutional right to have the jury instructed that residual doubt about guilt is a mitigating factor," and ultimately concluding that it was not Congress's intention in passing the FDPA that residual doubt be included as a mitigating factor); *United States v. Caro*, 483 F. Supp. 2d 513 (W.D. Va. 2007) (rejecting a residual doubt instruction).

<sup>83</sup> *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980).

murders,<sup>84</sup> and the FDPA prescribes only two means through which this aggravating factor may be proven: torture or serious physical abuse. 18 U.S.C. § 3592(c)(6).

But the district court may also provide a definition of “torture” or “serious physical abuse.” Proposed “serious physical abuse” definitions should limit the focus to the defendant’s intent and state of mind,<sup>85</sup> but several courts have held that the victim need not be conscious or alive at the time the serious physical abuse was inflicted.<sup>86</sup> And while “torture” necessarily implies that the victim is conscious to experience pain, it is open for debate whether the pain can be mental as well as physical, and whether it requires intent of the defendant.<sup>87</sup>

### 31.05.12 Vulnerable Victim Aggravating Factor

It is an open question whether the vulnerable victim aggravating factor necessarily includes a requirement that the vulnerability have some nexus to the victim’s death, and whether it includes a knowledge requirement on the part of the defendant.<sup>88</sup>

### 31.05.13 Future Dangerousness

Future dangerousness/future threat is a frequent non-statutory aggravating factor—asserted, for example, by the government in 77% of all federal capital cases between 2005 and 2007.<sup>89</sup> The government will typically provide notice not just of its intention to rely on this non-statutory aggravating factor, but also the underlying conduct and characteristics of the defendant or the crime that make the defendant a future threat.

The Supreme Court has not squarely addressed the constitutionality of this kind of future dangerousness factor. *But see Simmons v. South Carolina*, 512 U.S. 154, 165 n.5 (1994) (in dicta, the Court

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<sup>84</sup> For an example of a limiting instruction, see *United States v. Sampson*, 335 F. Supp. 2d 166, 203 n.19 (D. Mass. 2004) (“‘Heinous’ means shockingly atrocious. In this case, a killing may be found to be especially heinous only as a result of any serious physical abuse that’s proven. ‘Cruel’ means the defendant intended to inflict a high degree of pain. In this case, a killing may be found to be especially cruel only as a result of any serious physical abuse that is proven. ‘Depraved’ means that the defendant relished the killing or showed indifference to the suffering of the victim. Once again, in this case, a killing may be found to be especially depraved only as a result of any serious physical abuse that is proven”).

<sup>85</sup> See MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE 8TH CIRCUIT, Instruction 12.07F; 1 Leonard B. Sand et al, *Modern Federal Jury Instructions*, Inst. A-11 at 9A-45 to -48.

<sup>86</sup> See *United States v. Taveras*, 488 F. Supp. 2d 246, 251 (E.D.N.Y. 2007) (victim must be alive); *United States v. Pitera*, 795 F. Supp. 546, 557-558 (E.D.N.Y. 1992); *United States v. Preglow*, 779 F. Supp. 758, 773-74 (D.N.J. 1991); 1 LEONARD B. SAND, ET AL., MODERN FEDERAL JURY INSTRUCTIONS, INST. 9A-11 (victim must be alive, but victim need not be conscious of the abuse at the time it was inflicted) (citing *Pretlow*, 779 F. Supp. at 773, and *United States v. Pitera*, 795 F. Supp. 546, 558 (E.D.N.Y. 1992)). *But see United States v. Chanthadara*, 230 F.3d 1237, 1261-1263 (10th Cir. 2000); *United States v. Jones*, 132 F.3d at 250 n.12, *aff’d*, 527 U.S. 373 (1999) (allowed consideration of abuse that occurred after the victim died).

<sup>87</sup> See *United States v. Sampson*, 335 F. Supp. 2d 166, 206-08 (D. Mass. 2004) (discussing different definitions of torture and whether or not intent is a requisite finding).

<sup>88</sup> See *Sampson*, 335 F. Supp. 2d at 212-14 (imposing a nexus requirement but not a knowledge requirement); see also *United States v. Johnson*, 136 F. Supp. 2d 553, 560 (W.D. Va. 2001); *United States v. Mikos*, 539 F.3d 706 (7th Cir. 2008); *United States v. Paul*, 217 F.3d 989, 1001 (8th Cir. 2000).

<sup>89</sup> See Mark D. Cunningham, Thomas J. Reidy, Jon R. Sorensen, *Assertions of “Future Dangerousness” at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence*, Law and Human Behavior, pre-published online 18 September 2007.

observes: “Of course, the fact that a defendant is parole ineligible does not prevent the State from arguing that the defendant poses a future danger. The State is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff”).

Case law concerning future dangerousness mainly comes from state capital litigation. The Supreme Court affirmed the factor several times in the 1970s beginning with the landmark case *Jurek v. Texas*,<sup>90</sup> but recently several state defense communities have launched challenges against the factor. Doubts about the reliability of future-dangerousness predictions in capital cases have grown. A Fifth Circuit judge, surveying the literature in 2000, noted that there was virtual consensus in the scientific community that even psychiatrists cannot reliably predict dangerousness. *Flores v. Johnson*, 210 F.3d 456, 463 (5th Cir. 2000) (Garza, J., concurring). Two circuits have rejected generalized claims that the future-danger aggravator is constitutionally unreliable. See *United States v. Hager*, 721 F.3d 167, 200 (4th Cir. 2013); *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007). There is a considerable amount of published resources—both from the psychological and legal communities—criticizing the use future dangerousness evidence, and objections should incorporate this research.<sup>91</sup>

#### 31.05.14 Vagueness and Overbreadth of Aggravating Factors

Aggravating circumstances (both statutory and non-statutory) may not constitutionally be vague or overbroad.<sup>92</sup> An aggravator is vague if it lacks some common-sense core of meaning that criminal juries should be capable of understanding, and a factor is overbroad if the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty.<sup>93</sup> Jury instructions can alleviate vagueness of a particular factor, saving it from being stricken as unconstitutional.<sup>94</sup>

Aggravating circumstances can also be stricken for being irrelevant,<sup>95</sup> or as unfairly prejudicial, confusing, misleading, or unreliable.<sup>96</sup>

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<sup>90</sup> 428 U.S. 262 (1976)

<sup>91</sup> See, e.g., Meghan Shapiro, *An Overdose of Dangerousness: How “Future Dangerousness” Catches the Least Culpable Capital Defendants and Undercuts the Rationale for their Executions*, 35 AM. J. CRIM. L. 145 (2008); Cunningham, M.D., Sorensen, J.R. & Reidy, T.J., *Assertions of ‘Future Dangerousness’ at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence*, LAW AND HUMAN BEHAVIOR, pre-published online 18 Sept. 2007; Mark D. Cunningham, *Dangerousness and Death: A Nexus in Search of Science and Reason*, 61 AM. PSYCHOLOGIST 828, 834 (2006); Mitzi Dorland & Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision Making*, 29 L. & PSYCHOL. REV. 63, 64 n.12 (2005); Cunningham, M. D., Reidy, T.J. & Sorensen, J.R., *An Actuary Model for Assessment of Prison Violence Risk Among Maximum Security Inmates*, Assessment, Vol. 12, No. 1 (March 2005); Edens, J.F., Buffington-Vollum, J.K., Keilen, A., Roskamp, P. & Anthony, C., *Predictions of Future Dangerousness in Capital Murder Trials: Is it Time to ‘Disinvent the Wheel,’* 29 LAW & HUM. BEHAVIOR 55 (2005); see also suggested resources at the end of this chapter.

<sup>92</sup> See *Tuilaepa*, 512 U.S. at 972; *Arave v. Creech*, 507 U.S. 463, 474 (1993); see also *United States v. Jones*, 132 F.3d 232, 250 (5th Cir. 1998) (concerning non-statutory aggravating factors).

<sup>93</sup> See *United States v. Grande*, 353 F. Supp. 2d 623 (E.D. Va. 2005); *United States v. Rivera*, 405 F. Supp. 2d 662 (E.D. Va. 2005).

<sup>94</sup> See *Le*, 327 F. Supp. 2d 601.

<sup>95</sup> See *United States v. Davis*, 912 F. Supp. 938, 943 (E.D. La. 1996).

<sup>96</sup> See *Cheever*, 423 F. Supp. 2d at 1207 (concerning a motion to strike a non-statutory aggravating factor unreliable or irrelevant); *United States v. Friend*, 92 F. Supp. 2d 534, 541 (E.D. Va. 2000) (concerning a motion to strike a statutory aggravating circumstance as unfairly prejudicial, confusing, or misleading).

### **31.05.15 Duplicity of Aggravating and other Factors**

The fact that a defendant can satisfy more than one of the intent requirements of § 3591(a)(2) by a single course of conduct does not raise constitutional concern,<sup>97</sup> and neither does duplicity between the intent factors and elements of the underlying offense,<sup>98</sup> or duplicity of aggravating factors with elements of the underlying offense.<sup>99</sup> Duplicity between two or more aggravating factors (whether statutory or non-statutory), however, constitutes impermissible double-counting, which in the FDPA's weighing system puts the defendant at an unconstitutional disadvantage.<sup>100</sup>

### **31.05.16 Dismissal of Death Penalty at Close of Penalty Phase Due to Insufficient Evidence of Aggravating Factors**

A motion should be made to dismiss the death penalty at the close of the penalty phase due to insufficient evidence of statutory aggravating factors under both Fed. R. Crim. P. 29(a) and the heightened reliability doctrine. *See United States v. Sampson*, 335 F. Supp. 2d 166, 199-201 (D. Mass. 2004) (finding Rule 29 inapplicable to capital penalty phase but conducting the same analysis under the court's inherent power and the heightened reliability doctrine). The imposition of death in the absence of evidence to establish an aggravating factor beyond a reasonable doubt would violate the defendant's due process rights.<sup>101</sup> Because the Courts of Appeals must review death sentences for the sufficiency of evidence, it makes sense for the district court to do so as well.

### **31.05.17 Presentence Report and Sentencing Guidelines**

If the jury recommends a death sentence or a sentence of life imprisonment, the judge is required to impose their recommendation; however, if the capital count provides for a sentence less than life and the jury either returns a sentence of a term of years or cannot reach a sentencing determination, the judge may impose either a sentence of a term of years or of life. In those circumstances, some courts rely on presentence reports in making their final sentencing determination.

The Federal Sentencing Guidelines provide for a sentence of life when a capital-eligible defendant is not sentenced to death.<sup>102</sup> This information can be included in jury instructions concerning non-death sentencing options.

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<sup>97</sup> *See Webster*, 162 F.3d 308.

<sup>98</sup> *See Miner*, 176 F. Supp. 2d 424.

<sup>99</sup> *See Deputy v. Taylor*, 19 F.3d 1485, 1502 (3d Cir. 1994) ("federal courts of appeals have consistently held that a sentencing jury can consider an element of the capital offense as an aggravating circumstance even if it is duplicitous").

<sup>100</sup> *See United States v. Jones*, 132 F.3d 232, 250-51 (5th Cir. 1998) (citing *United States v. McCullah*, 76 F.3d 1087, 1111 (10th Cir. 1996)), *aff'd on different grounds by Jones v. United States*, 527 U.S. 373 (1999); *United States v. McCullah*, 76 F.3d at 1111-12.

<sup>101</sup> *See Jackson v. Virginia*, 443 U.S. 307, 318 (1979); *Smith v. Armontrout*, 888 F.2d 530, 538 (8th Cir. 1989) ("By analogy with *Jackson*, due process would forbid a verdict of death unless the evidence was sufficient to convince a rational trier of fact, beyond a reasonable doubt, of the existence of at least one aggravating circumstance.").

<sup>102</sup> U.S.S.G. § 2A1.1, U.S.S.G. & Application Note 2(A) ("In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. A downward departure would not be appropriate in such a case.").

## 31.06 JURY SELECTION

### 31.06.01 Unique Legal Doctrine

Selection of the jury may well be the most important aspect of capital defense, second to the ability to negotiate a non-capital disposition prior to trial. Not only is the selection of individuals for the jury vitally important, but the questions asked of them during voir dire are likely to become persuasive tools during the jury's sentencing deliberations.

In addition to *Witherspoon v. Illinois*,<sup>103</sup> a 1968 case that held that people with general reservations or religious/conscientious scruples about capital punishment could not automatically be excluded from a capital jury, two doctrines play a prominent role: death-qualification under *Wainwright v. Witt*,<sup>104</sup> and life-qualification under *Morgan v. Illinois*.<sup>105</sup>

The *Witt* doctrine allows the government to ask jurors whether they would be able to impose a death sentence, while the *Morgan* doctrine allows the defense to determine whether jurors would be able to impose a life sentence upon conviction of a capital offense, or whether death would be the only available punishment for a particular juror having convicted a defendant of a capital crime.

A juror may not be excluded for cause based on opposition to the death penalty *unless* his or her views would prevent or substantially impair his or her ability to impartially find the facts and apply the law at a capital sentencing hearing. See *Uttecht v. Brown*, 551 U.S. 1, 17 (2007); *Wainwright v. Witt*, 469 U.S. 412, 414, 421-426 (1985); *Adams v. Texas*, 448 U.S. 38, 44-48 (1980). If a district court, over defense objection, removes a juror because of his or her death-penalty views without this standard being met, it is automatic reversible error as to the death sentence. *Gray v. Mississippi*, 481 U.S. 648, 661-663 (1987).

The Supreme Court has held, as a matter of due process, that just as the government is permitted to excuse for cause certain anti-death-penalty jurors, so a capital defendant is entitled to do the same with certain jurors if their views in favor of capital punishment or against mitigation would prevent or impair their ability to follow instructions at a sentencing hearing and impose a life sentence. *Morgan v. Illinois*, 504 U.S. 719, 729, 736-38 (1992).

To give the *Morgan* doctrine teeth, it is necessary to persuade the court to allow probing questions as to *when* a juror would *not* vote for death—while jurors may honestly say that they would not always vote for death, when asked the further question they may explain that they would not vote death in cases of self-defense, accident, mistaken identity, heat of passion, or insanity, while they would vote for death in all other instances.<sup>106</sup> It is necessary to fight for such probing voir dire not only to strike (for cause) those jurors who *would* automatically impose a death sentence, but also to balance out the unavoidable effects of the government's death-qualification: jurors during sentencing deliberations persuading a hold-out life-voting juror to vote for a death sentence because they told the court during voir dire that they would vote for a death sentence if “required” to by the law. Thorough life-qualification during voir dire, accompanied by accurate

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<sup>103</sup> 391 U.S. 510 (1968).

<sup>104</sup> 469 U.S. 412 (1985).

<sup>105</sup> 504 U.S. 719 (1992).

<sup>106</sup> See John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases: Presenting Mitigation: Competent Capital Representation: The Necessity of Knowing and Heeding what Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1058-59 (2008).

and thorough jury instructions, can empower the life-voting jurors to feel confident that the law never “requires” death, and that they did *not* promise the court during voir dire that they *would* vote for a death sentence in any particular situation.

Courts sometimes apply *Witt* far more broadly than *Morgan*—for instance, reading *Witt* to allow government questioning specific to the facts of the case, but prohibiting the defense from doing the same thing under *Morgan*.<sup>107</sup> This leads to unequal results that should be challenged. Challenges can also be made to the death-qualification practice altogether, as tilting the jury first toward guilt and then toward death,<sup>108</sup> although this argument has been somewhat foreclosed by the Supreme Court.<sup>109</sup>

### 31.06.02 Unique Practical Concerns

Defense counsel’s duty to conduct effective voir dire extends beyond simply finding the veniremen who should be struck for cause under *Morgan*. Juror interviews have found certain attitudes on issues are more likely to result in a death sentence, including: a strong belief in free will; an emphasis on personal responsibility; skepticism about the criminal justice system’s ability to deal with prisoners (including a belief that life without parole does not foreclose release); identification with the victim; perception of the defendant as remorseless; and the belief that the only way to right the “moral balance” for certain types of crimes is to take the defendant’s life.<sup>110</sup>

On the other hand, jurors more receptive to the idea of mitigation tend to see individuals as shaped by their environment and are thus more open to expert testimony suggesting that the defendant’s actions were influenced by mental illness or life events; they are more open to the idea that people can change for the better, including adapting to prison, and tend to believe an individual may do good in the world even after causing great harm; they may be religious or exhibit strong inclinations towards a life sentence expressed in terms of “redemption;” they view favorably the idea of “hope;” they believe that a “moral balance” can be regained by a sentence less than death, especially if the defendant is still capable of achieving some good in prison.<sup>111</sup> Counter-intuitively, jurors who share some level of the defendant’s mitigation history may sometimes be the strongest advocates for death in his jury room.<sup>112</sup>

Ultimately, the only valid way to select a juror is based upon the juror’s actual answers to the questions posed to him or her, as opposed to any preconceived ideas or stereotypical notions as to what a juror may or may not believe. Another consideration in voir dire is that defense counsel should take the opportunity, as his or her first communication with the jury, to emphasize the law’s acceptance as mitigation of the type of evidence that will be presented in the case. Defense counsel can begin empowering jurors and helping them understand that just because they find a piece of mitigation difficult to articulate does not mean that their

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<sup>107</sup> See John Holdridge, *Selecting Capital Jurors Uncommonly Willing to Condemn a Man to Die: Lower Courts’ Contradictory Readings of Wainwright v. Witt and Morgan v. Illinois*, 19 MISS C. L. REV. 283 (1999).

<sup>108</sup> See Susan D. Rozell, *The Utility of Witt: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 677 (2002).

<sup>109</sup> *Buchanan*, 483 U.S. 402 (exclusion of jurors under *Witherspoon* and *Witt* do not violate the fair cross section requirement of the Sixth Amendment, or violate any constitutional rights of a noncapital defendant tried jointly with a death-eligible codefendant); *McCree*, 476 U.S. at 173 (the fact that capital jurors may be conviction-prone does not violate the constitution).

<sup>110</sup> See *id.* at 160.

<sup>111</sup> See *id.* at 161.

<sup>112</sup> See *id.* at 161-62.

reaction is “emotional” or “unlawful.” Rather, giving effect to values impossible to capture in words is at the heart of mitigation and the core of what the law requires.

Defense counsel must teach jurors to respect the views of their fellow jurors and, correspondingly, to expect their fellow jurors to respect their individual, moral determination as to the appropriate punishment in a capital case.

Further, it is important to emphasize and select jurors who do not treat mitigating evidence, such as mental illness, as if it were aggravating evidence. Conducting searching voir dire is crucial on this issue under *Morgan*.

The Federal Death Penalty Resource Counsel Project has amassed a large amount of material that is available on capital jury selection principles at capdefnet.org, including transcripts of actual voir dire conducted in various federal capital trials. Resource Counsel with the FDPRC Project are available to provide assistance to defense teams in many capacities during the process of jury selection. Additional juror data and scholarly research can be very helpful in formulating a questioning strategy for capital voir dire.<sup>113</sup>

### 31.06.03 Questionnaires and Jury Experts

District courts typically permit use of juror questionnaires. Questionnaires may cover preliminary information only, or they may probe further into the life-qualification issue. Examples of juror questionnaires that have been submitted in the trial of cases under the Federal Death Penalty Act are available at capdefnet.org. A jury selection expert is often appointed to help sort through the questionnaires and advise counsel on the exercise of peremptory strikes. “Each side has 20 peremptory challenges when the government seeks the death penalty.” FED. R. CRIM. P. 24(b)(1).

### 31.07 PENALTY PHASE INSTRUCTIONS

Penalty phase instructions are an extremely important component of the capital trial. Normally they are submitted to the judge pretrial and should be relied upon during life qualification in voir dire. The FDPRC maintains a model set of instructions that can be easily adapted, as well as motions in support of various instructions and other similar resources.

If the penalty phase has been bifurcated by the judge, separate sets of instructions should be proposed and filed with the court for each of the eligibility and the selection stages, as should special verdict forms for each stage. The most important thing to remember in designing a special verdict form is avoidance of any need for the jury to vote on a life sentence. Instead, the form should ask whether they have unanimously voted for death: yes or no.

The FDPRA does not include the language from the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(k), that “[t]he jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.” Section 3593(e) nowhere

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<sup>113</sup> See, e.g., Matthew Rubenstein, *Overview of the Colorado Method of Capital Voir Dire*, *The Champion* (November 2010), John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases: Presenting Mitigation: Competent Capital Representation: The Necessity of Knowing and Heeding what Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035 (2008); John H. Blume, Sheri Lynn Johnson & A. Brian Threlkeld, *Probing ‘Life Qualification’ Through Expanded Voir Dir*, 29 HOFSTRA L. REV. 1209 (2001); Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOKLYN L. REV. 1011 (2001).

defines “sufficiently,” in calling on each juror to determine whether the aggravators “sufficiently outweigh” the mitigators.

Thus, the FDPA sentencing scheme is just as discretionary as § 848(k)’s “death is never required” formulation. Hence, the large majority of district courts in FDPA cases, emphasizing the highly discretionary nature of the jury’s ultimate sentencing decision, have continued to instruct that a death sentence is never required. *See, e.g., United States v. Jones*, 527 U.S. 373, 384 (1999) (jury instructed that “regardless of your findings with respect to aggravating and mitigating factors, you are never required to recommend a death sentence”); 1 LEONARD B. SAND, ET AL., MODEL FEDERAL JURY INSTRUCTIONS-CRIMINAL, INST. 9A-19 & Comment (2008) (while FDPA does not contain same explicit “mercy” provision as ADAA, “it is strongly suggested that the court impress upon the jury that it is never obligatory to impose the death penalty. Thus, the instruction states that, ‘no juror is ever required by the law to impose a death sentence’”). *But see United States v. Montgomery*, 635 F.3d 1074, 1098-99 (8th Cir. 2011); TENTH CIRCUIT CRIMINAL PATTERN JURY INSTRUCTIONS, INST. 3.02 (2005) (“If you determine that the factors do justify a death sentence, that sentence must be imposed.” [But, regardless of findings on aggravating and mitigating factors], “the result of the weighing process is never foreordained. For that reason, a jury is never required to impose a sentence of death”).

Instructions, accompanying motions and affidavits, and sample verdict forms are available from the FDPRC. This section of the Project website is a very important section, filled with a wealth of materials and jury verdict forms from actual FDPA trials, and should be consulted by all counsel preparing for the trial of a FDPA case.

## 31.08 CAPITAL APPEALS

### 31.08.01 Direct Appeal

If a death sentence is imposed, the defendant is entitled to review by the court of appeals under 18 U.S.C. § 3595, in which the court of appeals must review “the entire record in the case,” including the trial evidence, the sentencing information and procedures, and the special sentencing findings returned by the jury. 18 U.S.C. § 3595(a). The court of appeals must address all substantive and procedural issues raised on the appeal of a sentence of death, and whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, as well as whether the evidence supports the special finding of the existence of an aggravating factor. 18 U.S.C. § 3595(b). The appeal is not mandatory, however, and may be waived. At least one circuit has held that a defendant may not be compelled to appeal.<sup>114</sup>

If the record reveals that the sentence was imposed under the influence of passion, prejudice, or any arbitrary factor, if admissible evidence did not support the finding of the aggravating factor, or if there was any other legal error requiring reversal of the sentence, the court of appeals may either remand for resentencing or imposition of a non-death sentence. 18 U.S.C. § 3595(c). Courts of appeals must employ a harmless error review with the burden of proving harmlessness on the government beyond a reasonable doubt. 18 U.S.C. § 3595(c). The court of appeals must issue a written opinion. 18 U.S.C. § 3595(c)(3). The FDPA has not been found to be unconstitutional for failing to provide proportionality review.<sup>115</sup>

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<sup>114</sup> *See United States v. Hammer*, 226 F.3d 229, 235-37 (3d Cir. 2000).

<sup>115</sup> *Pulley v. Harris*, 465 U.S. 37, 43 (1984) (appellate proportionality review not constitutionally required); *United States v. Umana*, 750 F.3d 320 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2856 (2015); *United States v. Ebron*, 683 F.3d 105, 155-56 (5th Cir. 2012); *United States v. Mitchell*, 502 F.3d 931, 980-81 (9th Cir. 2007) (FDPA not unconstitutional for failing to require appellate proportionality review); *United States v. Higgs*, 353 F.3d at 320-21 (same); *United States v. Jones*, 132 F.3d 232, 241 (5th Cir. 1998) (same).

### **31.08.02 Collateral Appeals from State and Federal Death Sentences**

Federal capital defendants may also pursue collateral appeals under 28 U.S.C. § 2255. State capital defendants may pursue federal collateral appeals under 28 U.S.C. § 2254. Subsequent federal collateral appeals for both federal and state defendants are governed by 28 U.S.C. § 2244. Claims pursuant to *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007), are not, however, governed by § 2244. Relief may also be sought from federal death sentences under the DNA ACT.

### **31.08.03 Applications for Stays of Execution**

If an execution is approaching, it is necessary to file an application for stay of execution accompanying any emergency petition. Emergency filings and stay requests to a court of appeals are governed by local Circuit Rules. Most likely, local rules will require a phone call to the clerk's office and the government attorney in addition to the filing. Whether specified by local rules or not, it is prudent to write "THIS IS A CAPITAL CASE; DEFENDANT IS SCHEDULED FOR EXECUTION IN \_\_\_\_ DAYS/HOURS" prominently on the first page of the filing. Some circuits require a certification by counsel for the reason for delay in filing.

Requests for stays of execution to the U.S. Supreme Court must also accompany any emergency petition for writ of certiorari, governed by Sup. Ct. R. 23.

### **31.08.04 Clemency Petitions**

Clemency petitions are often the last avenue for relief from a death sentence, and may be filed with the office of the United States Pardon Attorney. The Pardon Attorney office promulgates its own rules for filing. It makes a recommendation, which must be approved by the Deputy Attorney General before being forwarded to the President, who makes the ultimate decision in all cases. Attorneys appointed by a federal court in § 2254 appeals may file clemency petitions in the state of conviction, in accordance with state rules. 18 U.S.C. § 3599(e) provides that federally appointed counsel "shall represent the defendant throughout every subsequent stage . . . and proceedings for executive or other clemency as may be available to the defendant."

### **31.08.05 Civil Rights Suits**

It may become necessary to file a civil rights suit on behalf of one or more state capital defendants under 42 U.S.C. § 1983, regarding conditions of death row or execution protocols of the states. Suits concerning federal protocols should be considered for federal capital inmates as well; the DOJ maintains a written Execution Protocol which should be obtainable via a Freedom of Information Act request.

If a suit would require a stay of execution to proceed, it is unlikely a district court will consider the suit. Nonetheless, challenges to the method of execution are cognizable in 42 U.S.C. § 1983 petitions and stays *can* issue for that purpose. *See Hill v. McDonough*, 547 U.S. 573 (2006); *Nelson v. Campbell*, 541 U.S. 637 (2004). Keep in mind that challenges to the method of execution can also be made pre-trial and post-trial, and that challenges would need to distinguish the Supreme Court's ruling on the prevailing method of execution in *Glossip v. Gross*, 135 S. Ct. 2726, *reh'g denied*, 136 S. Ct. 20 (2015); *see also Baze v. Rees*, 553 U.S. 35, 61 (2008). The federal method of execution is variable, governed by "the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death[.]" 18 U.S.C. § 3596(a).

When considering filing a § 1983 suit for another purpose, remember that if the relief sought by the suit would disturb the judgment of conviction or sentence, it will be considered a habeas petition under

28 U.S.C. §§ 2255, 2254, or 2244. For this reason defendants must be very careful when filing a § 1983 petition prior to a first collateral appeal petition.

### **31.08.06 Fed. R. Civ. P. 60(b) Motions – “Relief from a Judgment or Order”**

Appeals under Fed. R. Civ. P. 60(b) also run the risk of being viewed as a collateral appeal, but if used properly can lead to a stay of execution and ultimately to penalty phase relief. *See Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007). Rule 60(b) motions must first be filed with the federal district court and are reviewed by the Court of Appeals for abuse of discretion.

### **31.08.07 Extraordinary Writs**

When no other judicial avenues of relief are open to a defendant, 28 U.S.C. § 2241 and Supreme Court Rule 20 allow for the filing of an “extraordinary writ,” also referred to by the Supreme Court as an “original writ,” though not to be confused with the Supreme Court’s original jurisdiction. The “original writ” is accepted by the Supreme Court in *Felker v. Turpin*, 518 U.S. 651 (1996), although none has ever been granted. Exhaustion and other requirements of 28 U.S.C. §§ 2254, 2255, and 2244 may still apply.

Additional support for the filing of applications for extraordinary writs to the United States Supreme Court and “ancient” writs to all Federal Courts can be found in 28 U.S.C. § 1651, the “All Writs Act.” One such writ, the writ of *Audita Querela*, is an underutilized potential avenue of relief from death sentences. Although abolished in the civil context by Fed. R. Civ. P. 60, several circuits have recognized its availability to review final judgments in criminal cases when matters arise subsequent to judgment or a prior existing defense surfaces that was previously unavailable due to circumstances outside the defendant’s control.<sup>116</sup> *Audita Querela* may be appropriate, for instance, to relieve a defendant of a death sentence based in part on “future dangerousness,” where unreliable expert testimony was used at trial, relevant expert testimony was excluded, or the years since final judgment have disproved the jury’s dangerousness prediction.<sup>117</sup>

## **31.09 ATKINS CLAIMS**

*Atkins v. Virginia*, 536 U.S. 304, 321 (2002) and 18 U.S.C. § 3596(c) prohibit the execution of a person who is mentally retarded. The scientific and legal communities now use the term “intellectually disabled” rather than “mentally retarded”; though, for the purposes set out in the caselaw, the terms are interchangeable. *See Hall v. Florida*, 134 S. Ct. 1986 (2014). Intellectual disability can be much more difficult to identify than is commonly thought, and defense counsel should arrange for IQ and other testing to determine whether their

<sup>116</sup> *See* 7 Am. Jur. 2d *Audita Querela* § 1 (2007); *see also Humphreys v. Leggett*, 50 U.S. 297, 313 (1850) (it is a writ “of a most remedial nature, and invented lest in any case there should be an oppressive defect of justice, where a party who has a good defense is too late in making it in the ordinary forms of law[.]”); *Stone v. Seaver*, 5 Vt. 549, 554 (1833) (“[A]n audita querela is founded upon facts not appearing on the record and not before the Court who rendered the judgment”); *United States v. Richter*, 510 F.3d 103, 104 (2d Cir. 2007) (per curiam) (*Audita Querela* is “available in limited circumstances with respect to criminal convictions . . . if the absence of any avenue of collateral attack would raise serious constitutional questions about the laws limiting those avenues, then a writ of *audita querela* would lie”); *id.* at \*3 (“We have previously indicated that a writ of *audita querela* ‘might be deemed available if [its] existence were necessary to avoid serious questions as to the constitutional validity of . . . § 2255[.]’”) (quoting *Triestman v. United States*, 124 F.3d 361, 380 n.24 (2d Cir. 1997)); *United States v. LaPlante*, 57 F.3d 252, 253 (2d Cir. 1995); *United States v. Fonseca-Martinez*, 36 F.3d 62 (9th Cir. 1994); *United States v. Johnson*, 962 F.2d 579 (7th Cir. 1992); *United States v. Reyes*, 945 F.2d 862 (5th Cir. 1991); *United States v. Holder*, 936 F.2d 1 (1st Cir. 1991); *United States v. Ayala*, 894 F.2d 425 (D.C. Cir. 1990).

<sup>117</sup> *See* Meghan Shapiro, *An Overdose of Dangerousness: How Future Dangerousness Catches the Least Culpable Capital Defendants and Undercuts the Rationale for their Executions*, 35 AM. J. CRIM. L. 145 (2008).

client may have intellectual disability, but only after first conducting a thorough life history investigation and gathering of documentary evidence and with guidance from a specialist in the field of intellectual disability.

Capital defense counsel should review the FDPRC intellectual disability litigation guide, “A Practitioner’s Guide to Defending Capital Clients Who Have Mental Retardation,” (2010) (available on the secure FDPRC website), which covers clinical definitions, effects of the disorder, screening, investigation, diagnoses, legal definitions and procedure, interrogation and false or coerced confession issues, courtroom and custodial behavior, and international issues, among other topics.

The FDPA provides no statutory definition or procedure for the determination of intellectual disability. Instead, the FDPA courts and the Supreme Court in *Hall* have relied on the standards established in the medical and scientific community, particularly by the American Association on Mental Retardation, which has since changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD), and by the American Psychiatric Association. For a defendant to be adjudicated intellectually disabled and therefore ineligible for the penalty of death under those standards, he or she must meet three general criteria: (1) “significantly subaverage intellectual functioning,” (2) “deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances),” and (3) onset during the developmental period, i.e., before age eighteen. *Hall v. Florida*, 134 S. Ct. at 1994.

This issue may arise in federal capital trials as well as federal habeas litigation. For examples of appropriate definitions, see *Hall v. Florida*, 134 S. Ct. at 1994, and *Brumfield v. Cain*, 135 S. Ct. 2269, 2277-79 (2015).

With regard to the process for raising an *Atkins* claim prior to or during the trial, at least one district court has placed the inquiry in front of the jury for them to determine unanimously, listing mental retardation as a mitigating factor on the special penalty phase verdict form; however, the defense made no request for a pre-trial hearing in that case;<sup>118</sup> others have held a pre-trial hearing on the defendant’s intellectual disability “in the interests of judicial economy,”<sup>119</sup> one of these further holding that if the court fails to find intellectual disability the defendant may again assert it before the jury at trial,<sup>120</sup> and one has even made a post-trial finding of fact in the record.<sup>121</sup> The Supreme Court has indicated that the Constitution does not dictate who the fact-finder should be for a claim of intellectual disability. *Schriro v. Smith*, 546 U.S. 6, 7-8 (2005). The Court in *Schriro v. Smith* reversed the Ninth Circuit’s order directing Arizona courts to conduct a jury trial on the issue of mental retardation,<sup>122</sup> thus giving strength to those Circuits that have held mental retardation need not be

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<sup>118</sup> See *United States v. Cisneros*, 385 F. Supp. 2d 567, 570 (E.D. Va. 2005).

<sup>119</sup> *United States v. Smith*, 790 F. Supp. 2d 482 (E.D. La. 2011); *United States v. Lewis*, No. 1:08 CR 404, 2010 WL 5418901 (N.D. Ohio Dec. 23, 2010); *United States v. Hardy*, 762 F. Supp. 2d 849 (E.D. La. 2010); *United States v. Davis*, 611 F. Supp. 2d 472, 506 (D. Md. 2009); *United States v. Shields*, No. 2:04-cr-20254, ECF #557 (W.D. Tenn. May 11, 2009) (unpublished); *United States v. Nelson*, 419 F. Supp. 2d 891, 903 (E.D. La. 2006); *United States v. Williams*, 1 F. Supp. 3d 1124 (D. Haw. 2014); *United States v. Montgomery*, No. 2:11-CR-20044-JPM-1, 2014 WL 1516147 (W.D. Tenn. Jan. 28, 2014) (unpublished); *United States v. Salad*, 959 F. Supp. 2d 865 (E.D. Va. 2013); *United States v. Jimenez-Bencevi*, 934 F. Supp. 2d 360 (D.P.R. 2013); *United States v. Wilson*, 922 F. Supp. 2d 334 (E.D.N.Y. 2013); *United States v. Candelario-Santana*, 916 F. Supp. 2d 191 (D.P.R. 2013); *United States v. Northington*, No. 07-550-05, ECF # 1042 (E.D. Pa. Feb. 1, 2013) (under seal); *United States v. Umana*, No. 3:08CR134, 2010 WL 1052271 (W.D.N.C. Mar. 19, 2010).

<sup>120</sup> *United States v. Hardy*, 644 F. Supp. 2d 749 (E.D. La. 2008).

<sup>121</sup> See *United States v. Webster*, 162 F.3d 308, 351 (5th Cir. 1998) (“After entering a sentence of death on the verdict, the court filed a finding entitled Factual Finding Regarding Mental Retardation[.]”).

<sup>122</sup> *Schriro v. Smith*, 546 U.S. 6 (2005).

determined exclusively by a jury.<sup>123</sup> As for the burden and standard of proof, at least two Courts of Appeals have found that the government bears no burden to disprove mental retardation beyond reasonable doubt,<sup>124</sup> and several district courts have placed the burden on the defense by preponderance of evidence.<sup>125</sup>

In *United States v. Hardy*, 644 F. Supp. 2d 749, 750 (E.D. La. 2008), the court concluded that, though Hardy failed to establish his mental retardation by a preponderance of the evidence at the pretrial hearing, he would still be allowed to present evidence and argue his alleged mental retardation to the jury. In *United States v. Williams*, No. CRIM. 06-00079 JMS, 2014 WL 1669107 (D. Haw. Apr. 25, 2014), the court noted that the defendant could present evidence of mental retardation to the jury as mitigation at the sentencing hearing, but not as a determinant of eligibility for the death penalty itself. Another district court held that the defendant would be precluded from presenting mental retardation as a mitigating factor for the jury to decide, having lost the issue at a pre-trial hearing. *United States v. Sablan*, 461 F. Supp. 2d 1239, 1242 (D. Colo. 2006).

The variance between circuits and state jurisdictions on everything from the definition of intellectual disability to the procedural process, burdens of proof, jury instructions, bifurcation at the penalty phase, and application of evolving scientific principles (such as the *Flynn* effect, the practice effect, and appropriate IQ testing for foreign nationals) and their application makes *Atkins* issues ripe for continued constitutional challenges.

Responsible capital practitioners are encouraged to fully investigate the issue under the guidance of appropriate intellectual disability experts and to assume for purposes of investigation that each client has an intellectual disability unless and until that condition is appropriately ruled out.

### 31.10 FORD/PANETTICLAIMS

*Ford v. Wainwright* prohibits the execution of inmates who are insane: “Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.” 477 U.S. 399, 410 (1986). Executing the insane “simply offends humanity . . . [and] provides no example to others.” *Id.* at 407. “[I]t is uncharitable to dispatch an offender into another world, when he is not of a capacity to fit himself for it”; “madness is its own punishment,” and it serves no retributive purpose. *Id.* at 407-08 (internal quotation marks and citations omitted).

The *Ford* standard has been further developed in each circuit, and was revisited by the Supreme Court in *Panneti v. Quarterman*, 551 U.S. 930 (2007), a case in which the defendant’s mental illness “deprive[d] him of ‘the mental capacity to understand that [he] is being executed as a punishment for a crime.’” 551 U.S. at 954 (quoting Brief for Petitioner at 31). The defendant in *Panetti* “suffer[ed] from a severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and

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<sup>123</sup> See *In re Johnson*, 334 F.3d 403 (5th Cir. 2003); *United States v. Webster*, 421 F.3d 308, 312 (5th Cir. 2005); *United States v. Sablan*, 461 F. Supp. 2d 1239, 1241 (D. Colo. 2006); *United States v. Nelson*, 419 F. Supp. 2d 891, 892 (E.D. La. 2006).

<sup>124</sup> See *United States v. Umana*, 750 F.3d 320, 359 (4th Cir. 2014); *United States v. Webster*, 392 F.3d 787, 791-92 (5th Cir. 2004); *Walker v. True*, 399 F.3d 315, 326 (4th Cir. 2005).

<sup>125</sup> See *Montgomery*, 2014 WL 1516147, at \*4; *Williams*, 2014 WL 869217, at \*9-10; *Wilson*, 922 F. Supp. 2d at 342-43; *Lewis*, 2010 WL 5418901, at \*1; *Davis*, 611 F. Supp. 2d at 474; *Hardy*, 644 F. Supp. 2d at 751; *Nelson*, 419 F. Supp. 2d at 893-894; *Candelario-Santana*, 916 F. Supp. 2d at 192; *Sablan*, 461 F. Supp. 2d 1239, 1241; *Shields*, slip op. at 2. See also Congressional Research Service Report to Congress, *The Death Penalty: Capital Punishment Legislation in the 110th Congress*, at 13 (Sept. 7, 2007) (available on FDPRC website) (“The limited available case law suggests—with some exception—that the determination of the issue may be assigned to the court (rather than the jury) to be established by the defendant under a preponderance of the evidence standard prior to trial.”).

purpose of the punishment to which he has been sentenced.” *Id.* at 960. The Supreme Court found that the Fifth Circuit’s definition of competency—awareness “that he [is] going to be executed and why he [is] going to be executed,” *id.* at 956 (quoting *Panetti v. Dretke*, 448 F.3d 815, 819 (5th Cir. 2006))—too restrictive, but failed to set down a rule governing all competency determinations. *Id.* at 960-61.

Title 18 U.S.C. § 3596(c) also proscribes execution of a person who, “as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person.” This statutory prohibition has also been found to bar the government from seeking death at trial, warranting a pretrial hearing on the defendant’s mental capacity.<sup>126</sup>

*Ford* claims cannot be waived or procedurally defaulted, so they should be raised as they arise, even if that is very late in the appellate process. There is good language from the Supreme Court indicating that the claims must be heard despite the statutory bar on successive habeas petitions,<sup>127</sup> whether the *Ford* claim was previously raised or not.<sup>128</sup> The abuse-of-the-writ doctrine cannot be a barrier to a *Ford* claim, either.<sup>129</sup>

### 31.11 SUGGESTED RESOURCES

Federal Death Penalty Resource Counsel Project Resources and legal support, *available at* <http://www.capdefnet.org/>.

#### 31.11.01 American Law Reports

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Fern L. Kletter, J.D., *Validity, Construction and Application of Federal Espionage Act, 18 U.S.C.A. Sections 793 to 794*, 59 A.L.R. Fed. 2d 303 (2011).

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Ann K. Wooster, J.D., *Claims of Ineffective Assistance of Counsel in Death Penalty Proceedings—United States Supreme Court Cases*, 31 A.L.R. Fed. 2d 1 (2008).

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<sup>126</sup> See *United States v. Sablan*, 461 F. Supp. 2d 1239 (D. Colo. 2006).

<sup>127</sup> *Panetti*, 551 U.S. at 945 (“Congress did not intend the provisions of AEDPA addressing ‘second or successive’ petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe.”); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998) (inmate not required to seek authorization for a successive habeas petition before filing a *Ford* claim in federal district court, despite having raised a *Ford* claim in his first federal habeas petition).

<sup>128</sup> Compare *Panetti*, 551 U.S. at 943-47 (refusing to treat application as a successive petition where the *Ford* claim was not raised in the original petition), with *Martinez-Villareal*, 523 U.S. at 644-46 (refusing to treat application as a successive petition where the *Ford* claim was raised previously in the original petition).

<sup>129</sup> See *Barnard v. Collins*, 13 F.3d 871, 878 (5th Cir. 1994) (“[O]ur research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner’s competency-to-be-executed claim on grounds of abuse of the writ”); see also *Panetti*, 551 U.S. at 947 (“There is, in addition, no argument that petitioner’s actions constituted an abuse of the writ, as that concept is explained in our cases”).

James L. Buchwalter, J.D., *Validity, Construction, and Application of Aggravating and Mitigating Provisions of Death Penalty Statutes, Supreme Court Cases*, 21 A.L.R. Fed. 2d 1 (2007).

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Marjorie A. Caner, J.D., *Propriety of Imposing Capital Punishment on Mentally Retarded Individuals*, 20 A.L.R. 5th 177 (1994) (updated weekly).

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Richard P. Shafer, *Provision of Counsel in Federal Capital Cases Under 18 U.S.C.A. § 3005 and Predecessor Statute*, 191 A.L.R. Fed. 1 (2004).

Richard P. Shafer, *Validity, Construction, and Operation of Department of Justice's "Death Penalty Protocol,"* 190 A.L.R. Fed. 133 (2003).

John E. Theuman, *Propriety of Carrying Out Death Sentences Against Mentally Ill Individuals*, 111 A.L.R. 5th 491 (2003).

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Colleen R. Courtade, *Propriety, Under Federal Constitution, of Evidence or Argument Concerning Deterrent Effect of Death Penalty*, 78 A.L.R. Fed. 553 (1986).

Joan T. Buckley, J.D., *Victim Impact Evidence in Capital Sentencing Hearings-Post-Payne v. Tennessee*, 79 A.L.R. 5th 33 (2000).

### **31.11.02 Legal Encyclopedias**

WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE CAPITAL PUNISHMENT* § 26.1(b) (3d ed. 2008).

3 Charles Alan Wright, Nancy J. King, Susan R. Klein & Sarah N. Welling, *Federal Practice and Procedure Death Penalty* § 528.1 (3d ed. 2008).

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### **31.11.03 Manuals, Handbooks, and Guidelines**

DEPARTMENT OF JUSTICE UNITED STATES ATTORNEY'S MANUAL, § 9-10.010 to 9-10.200 (April 2014).

GUIDELINES FOR THE ADMINISTRATION OF THE CRIMINAL JUSTICE ACT AND RELATED STATUTES, *available at* <http://www.uscourts.gov/rules-policies/judiciary-policies/criminal-justice-act-cja-guidelines>.

MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT, MODEL DEATH PENALTY INSTRUCTIONS (2014), *available at* <http://www.juryinstructions.ca8.uscourts.gov>.

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LEONARD B. SAND ET AL., *MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL VOLUMES* (Matthew Bender 2011) (available at LexisNexis).

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NAACP LDF, *Death Row USA*, available at <http://www.naacpldf.org/content.aspx?article=297> (tallies national numbers and lists cases with constitutional challenges nationwide).

American Judicature Society Capital Case Data Project, available at [www.ajs.org/jc/death/jc\\_death.asp](http://www.ajs.org/jc/death/jc_death.asp) (annual summaries of cases across the U.S. in which death sentences were imposed since January of 2004).

Nancy King, Fred L. Cheesman II & Brian Ostrom, *Final Technical Report: Habeas Litigation in U.S. District Courts; an Empirical Study of Habeas Corpus Cases Filed by State Prisoners under the Antiterrorism and Effective Death Penalty Act of 1996* (August 2007), available at <http://www.law.vanderbilt.edu/article-search/article-detail/download.aspx?id=1639>.

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Center on Wrongful Convictions at the Northwestern University School of Law, *Mistake and Perjured Eyewitness Identification Testimony in U.S. Capital Cases: An Analysis of Wrongful Convictions Since Restoration of the Death Penalty Following Furman v. Georgia* (2001).

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