Murder or Attempted Murder of a Member of Congress and Other Federal Officials and Employees: Implications in Federal Criminal Law and Procedure of Events in Tucson

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Summary

Jared Lee Loughner was arrested for the attempted murder of Representative Gabrielle Giffords, the murder of United States District Court Judge John Roll, and the murder or attempted murder of several federal employees. The arrest brings several features of federal law to the fore.

Federal crimes of violence are usually violations of the law of the state where they occur; an offender may be tried in either federal or state court or both. Ordinarily, federal crimes must be tried where they occur, but in extraordinary cases a defendant's motion for a change of venue may be granted. In capital cases, the decision to seek the death penalty rests with the Attorney General. Should a defendant elect to assert an insanity defense, he must provide pretrial notification. In the face of that notice, the court may order an examination to determine the defendant's competence to stand trial. Federal law affords victims, including families of the deceased or incapacitated, the right to confer with prosecutors, and to attend the trial and other public judicial proceedings.

Defendants, convicted of a murder for which the prosecution seeks the death penalty, are entitled to a jury determination of whether they acted with the intent necessary to qualify for the death penalty and whether the balance of aggravating and any mitigating factors are sufficient to warrant the jury's recommendation that the defendant be put to death. Defendants, convicted of attempted murder or some other noncapital offense, are sentenced by the court without the benefit of a jury. Sentencing in such cases begins with the federal Sentencing Guidelines, from whose recommendations a sentencing court may depart only with reasonable justification.

Comparable provisions of state law are beyond the scope of this report.

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Introduction

Jared Lee Loughner was arrested on January 10, 2011, on a complaint charging him with attempting to kill a Member of Congress and of killing and attempting to kill federal officers and employees in the performance of the their official duties in violation of 18 U.S.C. 351(c), 1114, 1111, and 1113.[1] What follows is a description of the federal procedures and attendant legal provisions generally associated with the prosecution of such cases. Comparable attributes of state law are beyond the scope of this report.

Pretrial

Federal and State Prosecution: Double Jeopardy

If probable cause exists to believe that Mr. Loughner committed the offenses charged, he may be prosecuted under state or federal law or both. Ordinarily, federal crimes of violence are also crimes under the laws of the state in which they occur. Nevertheless, at first glance, the Constitution's double jeopardy ban might be thought to preclude prosecution by both state and federal authorities.[2] The ban, however, only applies when the same defendant is prosecuted for the same crime *by the same sovereign*.[3] Following the Oklahoma City bombing, Timothy McVeigh and Terry Nichols were prosecuted and convicted in federal court.[4] Mr. Nichols, who unlike Mr. McVeigh had not been sentenced to death following his federal conviction, was subsequently tried and convicted for the bombing and resulting deaths in Oklahoma state court.[5]

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[1] U.S. Dept. of Justice, *Federal Complaint Filed Against Jared Lee Loughner*, available at http://www.justice.gov/opa/pr/2011/January/11-opa-022.html. Section 351(c) outlaws attempts to murder a Member of Congress; section 1114 outlaws murder of federal officers or employees during or on account of the performance of their duties; section 1111 sets the penalties for violations of section 1114; section 1113 outlaws attempted murder of federal officers or employees.

Mr. Loughner was initially indicted for attempting to murder a Member of Congress and for attempting to murder federal employees in the performance of their duties, U.S. Dept. of Justice, *Jared Lee Loughner Indicted*, available at http://www.justice.gov/opa/pr/2011/January/11-opa-072.html. He was charged in a superseding 49-count indictment with attempted assassination of a Member of Congress (18 U.S.C. 351); murder of a federal employee (18 U.S.C. 1114); attempted murder of a federal employee (18 U.S.C. 1113), using a firearm in relation to a crime of violence (18 U.S.C. 924(d)); using a firearm to cause a death (18 U.S.C. 924(j); injuring a participant in a federally protected activity (18 U.S.C. 245(b)(1)(B)); and killing a participant in a federally protected activity (18 U.S.C. 245(b)(1)(B)). Available at http://www.justice.gov/usao/az/press_releases/2011/PR_03042011_Loughner_SupersedingIndictment.pdf.

[2] "... [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb...." U.S. Const. Amend. V.

[3] "It is black-letter law that an act defined as a crime by both national and state sovereignties is 'an offense against the peace and dignity of both and may be punished by each.'" *United States v. Lanza*, 260 U.S. 377, 382, 43 S.Ct. 141, 67 L.Ed. 314, T.D. 3433 (1922). This dual-sovereignty doctrine allows for a federal prosecution even after a prior state prosecution for the same conduct. *E.g.*, *Abbate v. United States*, 359 U.S. 187, 195-96, 79 S.Ct. 666, 3 L.Ed. 2d 729 (1959)," *United States v. Gerhard*, 615 F.3d 7, 25 (1st Cir. 2010); see also, *United States v. Enas*, 255 F.3d 662, 665-66 (9th Cir. 2001)("The Double Jeopardy Clause, however, contains a significant exception. Multiple prosecutions are permissible when they are carried out by separate sovereigns").

[4] See *United States v. Nichols*, 132 F.Supp.2d 931 (D.Colo. 2001)(denying a motion to vacate the conviction).

[5] See *Nichols v. Jackson*, 55 P.3d 1044 (Okla. 2002)(post-conviction request to seal certain records).

Consequences of Seeking the Death Penalty

First degree murders committed in violation of 18 U.S.C. 1114 are punishable by death or imprisonment for any term of years or for life.[6] The decision to seek the death penalty rests ultimately with the Attorney General.[7] A number of procedural consequences flow from the prosecutor's decision to seek the death penalty.

Notice

When the prosecutor believes the circumstances justify the death penalty, he must notify the court and the defendant prior to trial or prior to the court's acceptance of the defendant's guilty plea, if the defendant elects to forgo a trial.[8] Federal law permits imposition of the death penalty when authorized by statute as in the case of the first degree murder of a federal official or employee during the performance of his duties.[9] In such cases, imposition of the death penalty requires a finding of at least one aggravating factor.[10] The statutory list of aggravating factors includes instances, for example, when (1) the death occurred during the course of an assault on a Member of Congress or some other designated felony; (2) the homicide was committed in a particular heinous, cruel, or depraved manner; (3) a federal judge was a victim of the offense; (4) the defendant killed or attempted to kill more than one person in a single criminal episode; or (5) when "any other aggravating factor for which notice has been given exists."[11]

Indictment

The Constitution affords defendants charged with a federal felony or capital offense the right to grand jury indictment.[12] Although a defendant charged only with noncapital offenses may waive the right to grand jury indictment, capital offenses will ordinarily be prosecuted by indictment.[13] When the prosecutor intends to seek the death penalty, the indictment must include the aggravating factors upon which the government intends to rely.[14]

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[6] 18 U.S.C. 1114, 1111.

[7] U.S. Dept. of Justice, *U.S. Attorneys Manual* §9-10.040. Guidelines in the U.S. Attorneys Manual outline the procedure for review and recommendations relating to the decision to seek the death penalty in a capital case, *id.* at §§9-10.010 *et seq.*, available at http://www.justice.gov/usao/reading_room/foiamanuals.html.

[8] 18 U.S.C. 3593(a).

[9] 18 U.S.C. 3591(a)(2)(A).

[10] 18 U.S.C. 3593(e), 3594.

[11] 18 U.S.C. 3592(c), (c)(1), (c)(6), (14), (16).

[12] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ..." U.S. Const. Amend. V.

[13] F.R.Crim. P. 7(b); *Matthews v. United States*, 622 F.3d 99, 101-103 (2d Cir. 2010)(a defendant may waive indictment under a plea agreement in a capital case when the agreement limits his sentence to a term of imprisonment).

[14] "In the wake of *Ring* [*Ring v. Arizona*, 536 U.S. 584 (2002)], Supreme Court precedent now firmly establishes that the mental culpability and aggravating factors required by the FDPA [18 U.S.C. 3591-3599] must—in addition to being included in the government's notice to seek the death penalty—be presented to a grand jury, charged in the indictment, and proved beyond a reasonable doubt. But as we shall explain, even though this eliminates a background assumption against which the FDPA was framed, it does not render the statute unconstitutional," *United States v. Sampson*, 486 F.3d 13, 21 (1st Cir. 2007)(citing cases from other circuits in accord); cf., *United States v. Mitchell*, 502 F.3d 931, 973-80 (9th Cir. 2007).

Given the time required for a thorough Justice Department review before deciding to seek the death penalty, the (continued...)

Counsel

The defendant in capital cases is entitled, upon request, to the assignment of two counsel, at least one of whom is "learned in the law applicable to capital cases."[15] The right attaches at least upon indictment.[16] Most appellate courts have concluded that the government's decision not to seek the death penalty extinguishes the statutory right.[17] In addition to counsel, the court may authorize payment for investigative, expert, and other services "reasonably necessary" for the defense of an indigent defendant.[18]

Venue and Jury Impartiality

The Sixth Amendment guarantees the criminally accused "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[19] In doing so, it reinforces the declaration which appears earlier in Article III: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trials shall be held in the State where the said Crimes shall have been committed."[20]

In order to secure trial by an impartial jury in a high profile case, an accused may feel compelled to not be tried in, or by a jury of, the place where the crime occurred. In rare instances, the proximity, extent, and character of pretrial media coverage may be such that the courts will presume that trial by an impartial jury in a particular location is impossible.[21] The Federal Rules of Criminal Procedure acknowledge such a possibility by providing that "Upon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair trial there."[22] The anticipated trial of Timothy McVeigh in

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aggravating factors may appear first in a superseding indictment that replaces the initial indictment.

[15] 18 U.S.C. 3005.

[16] *In re Sterling-Suarez*, 306 F.3d 1170, 1173-175 (1st Cir. 2002).

[17] E.g., *United States v. Waggoner*, 339 F.3d 915, 916-19 (9th Cir. 2003); *United States v. Douglas*, 525 F.3d 225, 235-38 (2d Cir. 2008); *United States v. Casseus*, 282 F.3d 253, 256 (3d Cir. 2002); *contra, United States v. Robinson*, 275 F.3d 371, 384 (4th Cir. 2001).

[18] 18 U.S.C. 3599.

[19] U.S. Const. Amend. VI.

[20] U.S. Const. Art. III, §2, cl. 3.

[21] "We overturned a 'conviction obtained in a trial atmosphere that [was] utterly corrupted by press coverage....' A presumption of prejudice, our decisions indicate, attends only the extreme case," *Skilling v. United States*, 130 S.Ct. 2896, 2915 (2010)(quoting *Murphy v. Florida*, 421 U.S. 794, 798-99 (1975)); see also *Daniels v. Woodford*, 428 F.3d 1181, (9th Cir. 2005)("To support a change of venue motion, Daniels must demonstrate either actual or presumed prejudice.... Prejudice is presumed only in extreme instances 'when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime.' Three factors should be considered in determining presumed prejudice: (1) whether there was a 'barrage of inflammatory publicity immediately prior to trial, amounting to a huge ... wave of public passion'; (2) whether the news accounts were primarily factual because such accounts tend to be less inflammatory that editorials or cartoons; and (3) whether the media accounts contained inflammatory or prejudicial material not admissible at trial")(quoting Ainsworth v. Calderon, 138 F.3d 787, 795 (9th Cir. 1998)).

[22] F.R.Crim.P. 21(a).

Oklahoma after the Oklahoma City bombing presented such a case.[23] His actual trial in Denver did not.[24]

Exceptional cases of extraordinary circumstances aside, however, the courts will ordinarily seek other means to secure trial by an impartial jury—granting continuances, instructing prospective jurors to avoid further pretrial publicity, imposing secrecy orders upon the participants, and questioning potential jurors thoroughly to ensure their impartiality (voir dire)—before granting a request for a change of venue as a last resort.[25]

Media Relations

Justice Department guidelines generally describe the types of information which prosecutors may release concerning a criminal case and the types of prejudicial information which they should not.[26] Local Rules of Criminal Procedure of the U.S. District Court for Arizona contain similar provisions applicable to prosecutors and defense counsel alike and authorize the court to make special efforts in "widely publicized or sensational criminal case[s]."[27]

The courts are loath to deny the press and the public access to judicial proceedings and records, particularly those that have historically been publicly available.[28] Yet in the face of substantial countervailing interests, they will close proceedings and seal records.[29]

In the Timothy McVeigh prosecution, the court took several steps in the name of jury impartiality among others. It prohibited (1) court personnel from disclosing without court approval any information related to the case that was not part of the public record; and (2) attorneys appearing in the cases and anyone associated with them from public statements or leaking information concerning (a) the defendants' criminal record, character, or reputation; (b) the results of any tests that the defendants had taken or refused to take, or any statements that the defendants had made or refused to make to authorities; (c) the identity of any prospective witnesses or the specifics or

[23] *United States v. McVeigh*, 918 F.Supp. 1467, 1469 (W.D.Okla. 1996). Mr. McVeigh was accused of murdering 168 men, women, and children, with injuring hundreds of others, and with causing over $650 million in property damage.

[24] *United States v. McVeigh*, 153 F.3d 1166, 11779-184 (10th Cir. 1998).

[25] "There have been very few cases in which a change of venue has been granted under Rule 21(a).... It should be remembered that a change of venue is not the only remedy for prejudice. Where it is possible that the prejudice will decrease with time, a continuance may be ordered.... a denial of a motion to transfer under Rule 21(a) may be, and quite commonly is, without prejudice to renewal at the trial. The courts consider that the existence of prejudice can better be determined by voir dire examination of potential jurors than by affidavits and speculation about the effect of publicity," Wright & Henning, 2 FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 434, 433, 437-38 (4th Cir. 2009).

[26] 28 C.F.R. §50.2.

[27] D.Ariz. Loc.R. LRCrim. 57.2.

[28] *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986)("[T]he qualified First Amendment right to access to criminal proceedings applies to preliminary hearings as they are conducted in California"); *In re Copley Press, Inc.*, 518 F.3d 1022, 1027 (9th Cir. 2008) ("[T]he public has a qualified right to read the transcripts of those portions of the hearings on the motion to seal [plea agreement documents] that were open to the public").

[29] *Gannett Co. v. DePasquale*, 443 U.S. 368, 394 (1979)("[W] are asked to hold that the Constitution itself gave the petition [newspaper] an affirmative right to access to this pretrial [suppression] proceeding, even though all the participants in the litigation agreed that it should be closed to protect the fair trial rights of defendants.... [W]e hold that the Constitution provides no such right"); *In re Copley Press, Inc.*, 518 F.3d at 1029 (internal citations omitted)("In addition to the public's First Amendment right, the pubic also has a 'common law' right to 'to inspect and copy public records and documents,' including the documents at issue here. However, this right 'is not absolute' and doesn't apply to 'documents which have traditionally been kept secret for important policy reasons'").

creditability of their anticipated testimony; (d) the prospect or specifics of any anticipated or negotiated plea bargain; or (e) any speculation of the guilt, strength of evidence, or merits of the case.[30]

The court also placed under seal (a) portions of Mr. Nichols's suppression motion; (b) certain FBI notes relating to its interview of Mr. Nichols; (c) portions of the defendants' motions for severance;[31] (d) the information relating to the compensation for defense services provided prior to trial; (e) transcripts of material witness proceedings; (f) motions and orders relating to Mr. McVeigh's conditions of confinement; and (g) proposed questionnaires for prospective jurors.[32]

In the Jared Loughner prosecution, the court only authorized the disclosure of sealed search warrant material after the final indictment had been filed.[33]

Insanity Defense

The insanity defense is an affirmative defense which the defendant must establish by clear and convincing evidence.[34] It is available as a federal criminal defense, when at the time of the commission of the offense, the defendant "as a result of a severe mental disease or defense, was unable to appreciate the nature and quality or the wrongfulness of his acts."[35]

A defendant must notify the prosecutor, if he wishes to assert the insanity defense at trial or to introduce expert evidence of a mental disease or defect at trial or at his capital sentencing hearing.[36] Notice of a defendant's intent to claim an insanity defense triggers the obligation of the court to refer the defendant for a psychiatric examination upon the motion of the prosecutor.[37]

Competence to Stand Trial

The Constitution does not permit the criminal trial of a mentally incompetent defendant.[38] It requires that a defendant have the mental capacity "to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in the preparing of his defense."[39] The claim of incompetence to commit the offense in the form of an insanity defense notice raises the question of a defendant's competence to stand trial. Consequently, the Federal Rules authorize the court, in the face of such a claim, to order a psychiatric examination of the accused.[40] If the court determines, after a hearing, that the defendant lacks the competence to stand trial, it may

[30] *United States v. McVeigh*, 931 F.Supp. 756, 760 (D. Colo. 1996).

[31] *United States v. McVeigh*, 119 F.3d 806, 809 (10th Cir. 1997).

[32] *United States v. McVeigh*, 918 F.Supp. 1452, 1465-467 (W.D.Okla. 1996).

[33] *United States v. Loughner*, ___ F.Supp.2d ___, ___ (D.Ariz. Mar. 9, 2011)(recognizing a qualified First Amendment right of media access upon issuance of a final indictment to search warrants, supporting affidavits, and inventory of seized material).

[34] 18 U.S.C. 17(b).

[35] 18 U.S.C. 17(a).

[36] F.R.Crim.P. 12.2.

[37] F.R.Crim.P. 12.2(c)(1)(B), 18 U.S.C. 4242.

[38] *Indiana v. Edwards*, 554 U.S. 166, 170 (2008); *United States v. No Runner*, 590 F.3d 962, 964-65 (9th Cir. 2009).

[39] *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *Maxwell v. Roe*, 606 F.3d 561, 564 (9th Cir. 2010).

[40] F.R.Crim.P. 12.2(c)(1)(A), 18 U.S.C. 4241(b).

commit him to the custody of the Attorney General for medical treatment.[41] Under narrow circumstances, such treatment may include involuntary medication designed to render a defendant competent to stand trial.[42]

The court in the Jared Loughner prosecution granted the government's motion for a psychiatric examination to determine the defendant's competence to stand trial.[43] On May 25, 2011, the court found the defendant incompetent to be tried at the time.[44]

Victims' Rights

Pretrial victims' rights consist primarily of a right to notice, the right to confer, a right to attend, and a right to be heard. For purposes of the federal victim rights statute, a victim is "a person directly and proximately harmed as a result of the commission of a federal offense," and includes "[i]n the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime's estate, family members, or any other persons appointed as suitable by the court."[45] On its face, the definition does not include victims of state crimes.

The statute affords victims the right to "reasonable, accurate, and timely" notice of, and generally not to be excluded from, any public judicial proceedings involving the offense.[46] Victims enjoy a reasonable right to confer with prosecutors.[47] In capital cases, the U.S. Attorneys Manual instructs United States Attorneys to consult with families of victims concerning the decision to seek the death penalty and to notify them of the Attorney General's decision.[48] Victims also have a right to be reasonably heard at public judicial proceedings involving the acceptance of an offender's plea.[49] These rights preclude a court approved failure to notify victims until after a plea agreement has been executed,[50] but they do not give victims the right to veto a proposed plea agreement.[51]

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[41] 18 U.S.C. 4241, 4246.

[42] *Sells v. United States*, 539 U.S. 166, 180-81 (2003)(emphasis in the original)(To approve such involuntary treatment, "[f]irst, a court must find that *important* governmental interests are at stake. The Government's interest in bringing to trial an individual accused of a serious crime is important.... Second, the court must conclude that involuntary medication will *significantly further* those concomitant state interests. It must find that administration of the drugs is substantially likely to render the defendant competent to stand trial.... Third, the court must conclude that involuntary medication is *necessary* to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results.... Fourth, as we have said, the court must conclude that administration of the drugs is *medically appropriate, i.e.*, in the patient's best medical interest in light of his medical condition").

[43] *United States v. Loughner*, ___ F.Supp.2d ___, ___ (D.Ariz. Mar. 21, 2011).

[44] *Loughner ruled unfit for trial*, Wash. Post, May 26, 2011, at A1.

[45] 18 U.S.C. 3771(e).

[46] 18 U.S.C. 3771(a)(2), (3). Victims also have the right to be protected from the accused, "to proceedings free from unreasonable delay," 18 U.S.C. 3771(a)(1), (7).

[47] 18 U.S.C. 3771(a)(5).

[48] *U.S. Attorneys Manual*, §9-10,070.

[49] 18 U.S.C. 3771(a)(4).

[50] *In re Dean*, 527 F.3d 391, 393-96 (5th Cir. 2008).

[51] *In re W.R. Huff Asset Management Co.*, 409 F.3d 555, 564 (2d Cir. 2005); *United States v. BP Products North American Inc.*, 610 F.Supp. 2d 655, 727 (S.D.Tex. 2009).

Discovery

Both the prosecution and the defense enjoy pretrial discovery rights. The government's failure to advise the defendant of exculpatory evidence or of evidence that undermines the testimony of its witnesses may undo the defendant's conviction.[52] The prosecution has other disclosure obligations under the Federal Rules, including providing the defense with earlier statements of the defendant in its possession.[53] Each side has an obligation to present, upon request, a summary of expert witness testimony upon which they intend to rely.[54]

Trial

Rules govern the general attributes and procedures of a federal criminal trial. For example, the federal rules ban cameras from the courtroom.[55] They assure the defendant the right to be present at every stage of the trial, a right he may waive by choice or persistent disruptive behavior.[56] They supply the evidentiary standards within which a trial must be conducted.[57] Yet application of the rules and control of a federal criminal trial rests primarily with the trial judge. "[T]he trial judge has the responsibility to maintain decorum in keeping with the nature of the proceeding; 'the judge ... is the governor of the trial for the purpose of assuring its proper conduct.'"[58]

Victims' Rights

Traditionally, witnesses—even victims—could only be present at trial while they were testifying, lest their testimony be influenced by what they heard before they took the stand.[59] Federal law now gives victims, even if they are also witnesses, "[t]he right not to be excluded from [trial], unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding."[60] In capital cases, the right is reinforced by another statutory prohibition—one against victim exclusion from a trial simply because the victim might provide an impact statement during a subsequent sentencing proceeding.[61]

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[52] *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972); *United States v. Struckman*, 611 F.3d 560, 570 n.4 (9th Cir. 2010); *Libberton v. Ryan*, 583 F.3d 1147, 1162-163 (9th Cir. 2009); see also *United States v. McVeigh*, 954 F.Supp. 1454 (D.Colo. 1997).

[53] F.R.Crim.P. 16.

[54] *Id.*

[55] F.R.Crim.P. 53("Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom").

[56] F.R.Crim.P. 43.

[57] F.R.Evid.

[58] *United States v. Young*, 470 U.S. 1, 10 (1985).

[59] VI WIGMORE ON EVIDENCE §§1837-1842 (1940 ed.).

[60] 18 U.S.C. 3771(4); see also *In re Mikhel*, 453 F.3d 1137, 1140 (9th Cir. 2006)(a trial court may bar a victim-witness only upon a showing by clear and convincing proof that the victim-witness's testimony will be materially altered as a consequence of attendance).

[61] 18 U.S.C. 3510(b)("Notwithstanding any statute, rule, or other provision of law, a United States district court shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim (continued...)

Sentencing

Capital Punishment

Special procedures apply after a defendant is found guilty of a federal capital offense. A sentencing hearing is held before a jury to determine whether the defendant should be sentenced to death.[62] First, in a murder case, the jury must determine whether the defendant acted with the intent necessary to qualify for imposition of the death penalty.[63] If it does so, the penalty may be imposed only if the jury also finds one or more of a series of aggravating factors and finds that the aggravating factor or factors outweigh any mitigating factors to an extent justifying a sentence of death.[64] As noted earlier, the statutory list of aggravating factors includes instances, for example, when (1) the death occurred during the course of an assault on a Member of Congress of some other designated felony; (2) the homicide was committed in a particular heinous, cruel, or depraved manner; (3) a federal judge was a victim of the offense; (4) the defendant killed or attempted to kill more than one person in a single criminal episode; or (5) when "any other aggravating factor for which notice has been given exists."[65] Mitigating factors include, for example, (1) the defendant's impaired capacity; (2) the absence of a significant prior criminal record; (3) commission of the offense "under severe mental or emotional disturbance."[66] Mitigating factors may also be found "in the defendant's background, record, or character or any other circumstance of the offense."[67]

A federal death sentence is subject to appellate review.[68] If upheld, the defendant is committed to the custody of the Attorney General for execution.[69] The sentence of death, however, may not be

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may, during the sentencing hearing, testify as to the effect of the offense on the victim and the victim's family or as to any other factor for which notice is required under section 3593(a)"). Note that the statute does not speak of trial witnesses who are victims. *United States v. McVeigh*, 958 F.Supp. 512, 515 (D. Colo. 1997).

[62] 18 U.S.C. 3593(b). The court may conduct the hearing without a jury, if the prosecutor and defendant agree, 18 U.S.C. 3592(b)(3).

[63] 18 U.S.C. 3591(a)(2)("A defendant who has been found guilty of ... (2) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593 – (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, shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense").

[64] 18 U.S.C. 3593(e); e.g., *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007).

[65] 18 U.S.C. 3592(c), (c)(1), (c)(6), (14), (16).

[66] 18 U.S.C. 3592(a)(1), (5), (6).

[67] 18 U.S.C. 3592(a)(8).

[68] 18 U.S.C. 3595.

[69] 18 U.S.C. 3596.

carried out if the defendant lacks the mental capacity, as a result of mental disability, "to understand the death penalty and why it was imposed."[70]

Noncapital Sentencing

In a capital case when the jury finds the defendant eligible for the death penalty but fails to unanimously recommend the death penalty, the court sentences the defendant to "life imprisonment without possibility of release or some other lesser sentence."[71] When the prosecution elects not to seek the death penalty and when the defendant is convicted of a noncapital offense, the court sentences the defendant, without benefit of a jury.[72]

Although the federal Sentencing Guidelines are no longer binding, noncapital sentencing begins there.[73] The Guidelines provide a series of sentencing ranges beneath the statutory maximum for the offense of conviction, calibrated to reflect the seriousness of the offense and the extent of the defendant's criminal record.[74] A sentencing court, with reasonable justification, may sentence a defendant outside the applicable Guideline recommended sentencing range.[75]

Victims' Rights

Victims have a right to be reasonably heard during the capital sentencing hearing.[76] Victims of a federal crime of violence are also entitled to an order of restitution, covering the cost of medical expenses, rehabilitation costs, and, in the case of a homicide, funeral expenses.[77] Victims do not have a right to attend the execution of a defendant convicted of murdering a family member, although they may do so at the discretion of the Director of the Bureau of Federal Prisons and, to a more limited extent, at the discretion of the Warden.[78]

[70] 18 U.S.C. 3596(c). The Eighth Amendment precludes execution of the mentally retarded or the insane, *Atkins v. Virginia*, 536 U.S. 304, 318-21 (2002); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

[71] 18 U.S.C. 3593(e), (d).

[72] 18 U.S.C. 3551.

[73] *Gall v. United States*, 552 U.S. 38, 49 (2007)("[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range").

[74] United States Sentencing Commission, GUIDELINES MANUAL, Ch.1, Pt. A (2010).

[75] *Gall v. United States*, 552 U.S. at 51 (When reviewing a sentence, the appellate court "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the §355(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentencing – including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed.... If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness").

[76] 18 U.S.C. 3771(a)(4); see also F.R.Crim.P. 32(i)(4)(B).

[77] 18 U.S.C. 3771(a)(6), 18 U.S.C. 3663A.

[78] 28 C.F.R. §26.4(d), (c)(4)(i). A limited number of media representatives may also attend, but the execution may not be televised or broadcast, 28 C.F.R. §26.4(c)(4)(ii), (f); see *Entertainment Network Inc. v. Lappin*, 134 F.Supp.2d 1002 (S.D. Ind. 2001)(denying declaratory and injunctive relief to permit the broadcasting of Timothy McVeigh's execution).

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