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Federal Capital Offenses: An Overview of Substantive and Procedural Law

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Summary

Murder is a federal capital offense if committed in any of more than 50 jurisdictional settings. The Constitution defines the circumstances under which the death penalty may be considered a sentencing option. With an eye to those constitutional boundaries, the Federal Death Penalty Act and related statutory provisions govern the procedures under which the death penalty may be imposed.

Some defendants are ineligible for the death penalty regardless of the crimes with which they are accused. Children and those incompetent to stand trial may not face the death penalty; pregnant women and the mentally retarded may not be executed. There is no statute of limitations for murder, and the time constraints imposed by the due process and speedy trial clauses of the Constitution are rarely an impediment to prosecution.

The decision to seek or forgo the death penalty in a federal capital case must be weighed by the Justice Department's Capital Review Committee and approved by the Attorney General.

Defendants convicted of murder are death-eligible only if they are found at a separate sentencing hearing to have acted with life-threatening intent. Among those who have, capital punishment may be imposed only if the sentencing jury unanimously concludes that the aggravating circumstances that surround the murder and the defendant outweigh the mitigating circumstances to an extent that justifies execution.

The Federal Death Penalty Act provides several specific aggravating factors, such as murder of a law enforcement officer or multiple murders committed at the same time. It also permits consideration of any relevant "non-statutory aggravating factors." Impact on the victim's family and future dangerousness of the defendant are perhaps the most commonly invoked non-statutory aggravating factors. The jury must agree on the existence of at least one of the statutory aggravating factors if the defendant is to be sentenced to death.

The Federal Death Penalty Act permits consideration of any relevant mitigating factor, and identifies a few, such as the absence of prior criminal record or the fact that a co-defendant, equally or more culpable, has escaped with a lesser sentence.

The Federal Death Penalty Act recognizes other capital offenses that do not necessarily involve murder: treason, espionage, large-scale drug trafficking, and attempted murder to obstruct a drug kingpin investigation. The constitutional standing of these is less certain or at least different.

This report is available in an abridged form as CRS Report R42096, *Federal Capital Offenses: An Abridged Overview of Substantive and Procedural Law*, without the footnotes, attributions of authority, or quotations found here.

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Introduction

Murder, committed under any of more than 50 jurisdictional circumstances, is a federal capital offense. So are treason, espionage, and certain drug kingpin offenses. The Federal Death Penalty Act and related provisions establish the procedure that must be followed before a defendant convicted of a federal capital offense may be executed.

Background

The death penalty has long been a sentencing option in this country.[1] Capital punishment was a feature of English law that the early colonists brought with them.[2] Once here, they often supplemented English law with provisions of their own. Although law among the colonies was hardly uniform beyond its English foundations, murder, rape, grand larceny, and various other property crimes appear to have been among the crimes punishable by death in each of the colonies.[3] In fact, "[a]t the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State."[4]

When the first Congress convened, it made federal capital offenses of murder within federal enclaves, treason, and piracy, as well as forgery and counterfeiting of federal certificates and public securities.[5] By the time of the Revised Statutes of 1878, the list of federal capital offenses included treason; and murder, arson, or rape in U.S. special maritime and territorial jurisdiction; piracy; insurance fraud involving the destruction of a vessel at sea; and the rescue of an individual under sentence of death.[6]

When the Supreme Court announced its decision in *Furman v. Georgia*,[7] the number of federal capital murder offenses had increased,[8] but the inventory of capital offenses that did not include death as an element had been reduced to rape,[9] treason,[10] and espionage.[11]

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[1] The terms "death penalty" and "capital punishment" are used interchangeably throughout this report.

[2] IV BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 9 (1769)(transliteration provided), quoting 1 HALE, PLEAS OF THE CROWN (at 13 in the 1778 ed.)("The practice of inflicting capital punishments, for offences of human institution, is thus justified by that great and good man, sir Matthew Hale: 'when offences grow enormous, frequent, and dangerous to a kingdom or state, destructive or highly pernicious to civil societies, and to the great insecurity and danger to the kingdom or its inhabitants, severe punishment and even death itself is necessary to be annexed to laws in many cases by the prudence of lawgivers'").

[3] E.g., 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 1700-1781, 135-37 (1782) (murder, rape, highway robbery, arson, burglary); CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY, 56-61 (1814) (murder, arson, treason, rape, robbery, burglary, witchcraft); see also, Rankin, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA, 129, 149, 159, 167, 204-204, 204, 219 (1965)(noting that capital offenses in colonial Virginia included arson, burglary, robbery, horse stealing, murder, treason and rape); Goebel, LAW ENFORCEMENT IN COLONIAL NEW YORK, 95 (1970)("In the main, the common law rules regarding what were capital offenses were observed").

[4] *Gregg v. Georgia*, 428 U.S. 153, 177 (1976).

[5] Act of April 30, 1790, §§1, 3, 8, 14, 15, 1 Stat. 112-115 (1790).

[6] Rev. Stat. §§5323, 5331, 5339, 5345, 5365, 5366, 5368, 5369, 5372, 5385, 5387, 5400 (1878).

[7] *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972).

[8] E.g., 18 U.S.C 34 (1970 ed.)(relating to the destruction of aircraft or motor carriers), 351(a)(1970 ed.)(relating to congressional assassination), 844(d)(1970 ed.)(relating to explosives offenses), 1111 (1970 ed.)(in U.S. special maritime and territorial jurisdiction), 1114 (1970 ed.)(federal law enforcement officers), 1201(a)(1970 ed.)(relating to kidnapping), 1751 (1970 ed.)(relating to presidential assassination); 49 U.S.C. 1472(i)(1970 ed.)(relating to air piracy).

[9] 18 U.S.C. 2031 (1970 ed.).

After *Furman*, where the Supreme Court found unconstitutional imposition of capital punishment pursuant to procedures then required under state and federal law, Congress made procedural adjustments to revive the death penalty as a sentencing option first in air piracy cases,[12] then in drug kingpin homicide cases,[13] and finally as a general matter in the Federal Death Penalty Act.[14] Now federal capital offenses are confined to espionage,[15] treason,[16] certain drug kingpin offenses (that do not involve murder),[17] and murder under various jurisdictional circumstances.[18]

Post-*Furman* Jurisprudence

The Federal Death Penalty Act reflects the constitutional boundaries identified in *Furman* and subsequent related Supreme Court decisions. The opinion for the Court in *Furman v. Georgia* runs less than a page. It simply states: "The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[19] Division among the members of the Court accounted for the brevity. Each of the Justices wrote either a concurring or dissenting opinion. Three Justices thought capital punishment was per se cruel and unusual.[20] Two others felt that the then existing sentencing procedures failed to equitably separate the wheat from the chaff: the system did not ensure imposition of the death penalty, the most severe punishment, uniformly in the most deserving cases and only in the most deserving cases.[21] The remaining four Justices dissented on three grounds. Like two members of the majority, they could not say that the death penalty was

(...continued)

[10] 18 U.S.C. 2381 (1970 ed.).

[11] 18 U.S.C. 794 (1970 ed.).

[12] P.L. 93-366, §104, 88 Stat. 409 (1974).

[13] P.L. 100-690, §7001, 102 Stat. 4387 (1988).

[14] P.L. 103-322, §§60001-600026, 108 Stat. 1959 (1994). Procedures under air piracy and drug kingpin murder provisions, subsequently replaced by the Federal Death Penalty Act, are beyond the scope of this report.

[15] 18 U.S.C. 794.

[16] 18 U.S.C. 2381.

[17] 18 U.S.C. 3591(b). As discussed below, *Furman* and the cases that followed may call into question the constitutionality of capital punishment as a sentencing option for any offense that does not involve a murder.

[18] Capital offenses under the various territorial codes, the Uniform Code of Military Justice, and the Military Commissions Act are beyond the scope of this report. A list of federal capital offenses is appended.

[19] *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972)(here and hereafter internal citations are routinely omitted). The Court considered *Furman* together with two capital rape cases, one from Georgia, *Jackson v. Georgia*, and the other from Texas, *Branch v. Texas*. Its opinion applied to all three, *Furman v. Georgia*, 408 at 238*.

[20] *Id.* at 240 (Douglas, J., concurring)("I vote to vacate each judgment, believing that the exaction of the death penalty does violate the Eighth and Fourteenth Amendments"); *id*. at 305 (Brennan, J. concurring)("Today death is a unique and unusually severe punishment. When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offense to human dignity"); *id*. at 370 (Marshall, J., concurring)("To arrive at the conclusion that the death penalty violates the Eighth Amendment, we have had to engage in a long and tedious journey").

[21] *Id*. at 309-10 (Stewart, J., concurring)("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed"); *id.* at 313 (White, J., concurring)("[T]he death penalty is exacted with greater infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); see also, *id*. at 364, 365-66 (Marshall, J., concurring)("[C]apital punishment is imposed discriminatorily against certain identifiable classes of people.... [T]he burden of capital punishment falls upon the poor, the ignorant, and the under-privileged members of society").

per se cruel and unusual.[22] They felt the decision was incompatible with appropriate judicial constraint and the deference due the legislative prerogatives.[23] And, they argued that the unfair, arbitrary, capricious standard advanced by three members of the majority was a due process standard which the Court the year before had found posed no impediment to implementation of state capital sentencing statutes.[24]

Furman drew two responses. Some states sought to remedy arbitrary imposition of the death penalty by making capital punishment mandatory. Some states and Congress narrowed the category of cases in which the death penalty might be a sentencing option and crafted procedures designed to guide jury discretion in capital cases in order to equitably reduce the risk of random imposition. The Court in *Woodson* rejected the first approach,[25] and in *Gregg* endorsed the second.[26]

The Court has subsequently noted that *Furman* and *Gregg* "establish that a ... capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime."[27]

With respect to eligibility for the death penalty, the Court declared "that capital punishment must 'be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.'"[28] "Applying this principle, [the Court] held in *Roper* and *Atkins* that the execution of juveniles and mentally

[22] *Id.* at 429, 442 (Powell, J., with Burger, Ch.J., Blackmun and Rehnquist, JJ., concurring)("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.... One must conclude, contrary to petitioners' submission, that the indicators most likely to reflect the public's view—legislative bodies, state referenda and the juries which have the actual responsibility—do not support the contention that evolving standards of decency require total abolition of capital punishment").

[23] *Id.* at 465-66 (Rehnquist, J., with Burger, Ch.J., Blackmun and Powell, JJ., concurring)("The Court's judgments today strike down a penalty that our Nation's legislators have thought necessary since our country was founded. My Brothers Douglas, Brennan, and Marshall would at one fell swoop invalidate laws enacted by Congress and 40 of the 50 states legislatures and would consign to the limbo of unconstitutionality under a single rubric penalties for offenses as murder, piracy, mutiny.... Whatever its precise rationale, today's holding necessarily brings into sharp relief the fundamental question of the role of judicial review in a democratic society.... The very nature of judicial review ... makes the courts the least subject to Madisonian check in the event that they shall, for the best of motives, expand judicial authority beyond the limits contemplated by the framers. It is for this reason that judicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review. The court's holding in these cases has been reached, I believe, in complete disregard of that implied condition").

[24] *Id.* at 398-99 (Burger, Ch.J., with Blackmun, Powell, and Rehnquist, JJ., dissenting)("The decisive grievance of the [Stewart and White] opinions—not translated into Eighth Amendment terms—is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice; the problem is not that too few have been sentenced to die, but that the selection process has followed no rational pattern. This claim of arbitrariness is not only lacking in empirical support, but also it manifestly fails to establish that the death penalty is a 'cruel and unusual' punishment. The Eighth Amendment was included in the Bill of Rights to assure that certain types of punishments would never be imposed, not to channelize the sentencing process. The approach of these concurring opinions has no antecedent in the Eighth Amendment cases. It is essentially and exclusively a procedural due process argument. This ground of decision is plainly foreclosed as well as misplaced. Only one year ago, in McGautha v. California, the Court upheld the prevailing system of sentencing in capital cases. The Court concluded: 'In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.' 402 U.S., at 207").

[25] *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

[26] *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

[27] *Kansas v. Marsh*, 548 U.S. 163, 173 (2006).

[28] *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008).

retarded persons are punishments violative of the Eighth Amendment because the offender had a diminished personal responsibility for the crime."[29]

Moreover, the Eighth Amendment cannot accept imposition of the death penalty where it is disproportionate to the crime itself as, at least in some instances, "where the crime did not result, or was not intended to result, in death of the victim. In *Coker*, for instance, the Court held it would be unconstitutional to execute an offender who had raped an adult woman.... And in *Enmund*, the Court overturned the capital sentence of a defendant who aided and abetted a robbery during which a murder was committed but did not himself kill, attempt to kill, or intend that a killing would take place. On the other hand, in *Tison*, the Court allowed the defendants' death sentences to stand where they did not themselves kill the victims but their involvement in the events leading up to the murders was active, recklessly indifferent, and substantial."[30]

Imposition of the death penalty as punishment for a particular crime will be considered cruel and unusual when it is contrary to the "evolving standards of decency that mark the progress of maturing society."[31] Those standards find expression in legislative enactments, prosecution practices, jury performance, and execution records, viewed in light of "the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose."[32]

Once a defendant has been found to be a member of a capital punishment eligible class, the question becomes whether he is among that limited number within that class for whom the death penalty is an appropriate punishment. The Court, after *Gregg*, found acceptable sentencing schemes that reserved capital punishment for those cases in which the jury's consideration involved one or more aggravating factors and any mitigating factors. If an aggravating factor is not already required for eligibility, one must be found in the course of the individualized selection assessment.[33] Aggravating factors must satisfy three requirements. "First the circumstance may not apply to every defendant convicted of the murder; it must apply only to a subclass of defendants convicted of murder. Second, the aggravating circumstance may not be constitutionally vague."[34] Third, the aggravating circumstance may not be statutorily or constitutionally impermissible or irrelevant.[35]

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[29] *Id.*, citing *Roper v. Simmons*, 543 U.S. 551, 571-73 (2005), and *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

[30] *Kennedy v. Louisiana*, 554 U.S. at 420-21, citing, *Coker v. Georgia*, 433 U.S. 584 (1977), *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987).

[31] *Kennedy v. Louisiana*, 554 U.S. at 419, quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

[32] *Kennedy v. Louisiana*, 554 U.S. at 421.

[33] *Brown v. Sanders*, 546 U.S. 212, 216 (2006), citing *Furman v. Georgia*, 3408 U.S. 238 (1972) and *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994) (Since *Furman*, "we have required States to limit the class of murderers to which the death penalty may be applied. This narrowing requirement is usually met when the trier of fact finds at least one statutorily defined eligibility factor at either the guilt or penalty phase. Once the narrowing requirement has been satisfied, the sentencer is called upon to determine whether a defendant thus found eligible for the death penalty should in fact receive it").

[34] *Tuilaepa v. California*, 512 U.S. at 972, citing *Arave v. Creech*, 507 U.S. 463, 474 (1993) and *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). The defect in a facial vague aggravating circumstances may be cured by a clarifying jury instruction and binding appellate court construction, *Bell v. Cone*, 543 U.S. 447, 454 (2005).

[35] *Brown v. Sanders*, 546 U.S. at 220 (emphasis of the Court)("An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances").

As for mitigating evidence, evidence must be received and considered "if the sentencer could reasonably find that it warrants a sentence less than death."[36] The Constitution insists "that the jury be able to consider and give effect to a capital defendant's relevant mitigating evidence.... [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances."[37]

The Eighth Amendment also condemns execution in a cruel and unusual manner.[38] It proscribes any method of execution which presents an "objectively intolerable risk" that the method is "sure or very likely to cause serious illness and needless suffering."[39] The federal and state capital punishment statutes all require, or at least permit, execution by lethal injunction.[40] In *Baze*, the Court rejected an Eighth Amendment challenge which failed to show that the lethal injunction procedure at issue was sure or very likely to cause needless suffering.[41]

Existing Federal Law

Existing federal law affords capital cases special treatment. There is no statute of limitations for capital offenses,[42] but there is a preference for the trial of capital cases in the county in which they occur.[43] The Attorney General must ultimately approve the decision to seek the death penalty in any given case.[44] Defendants in capital cases are entitled to two attorneys, one of whom "shall be learned in the law applicable to capital cases."[45] Defendants are entitled to notice when the prosecution intends to seek the death penalty,[46] and at least three days before the trial, to a copy of the indictment as well as a list of the government's witnesses and names in the jury pool.[47]

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[36] *Tennard v. Dretke*, 542 U.S. 274, 285 (2004), quoting *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990).

[37] *Tennard v. Dretke*, 542 U.S. at 285, quoting *Boyde v. California*, 494 U.S. 370, 377-78 (1990), and *Payne Tennessee*, 501 U.S. 808, 822 (1991).

[38] *Baze v. Rees*, 553 U.S. 35, 49-50 (2008).

[39] *Id*. at 50.

[40] ALA. CODE §15-18-82.1; ARIZ. REV. STAT. ANN. §13-757; ARK. CODE ANN. §5-4-617; CAL. PENAL CODE §3604; COLO. REV. STAT. ANN. §18-1.3-1202; CONN. GEN. STAT. ANN. §54-100; DEL. CODE ANN. tit.11 §4209; FLA. STAT. ANN. §922.105; GA. CODE §17-10-38; IDAHO CODE §19-2716; IND. CODE ANN. §35-38-6-1; KAN. STAT. ANN. §22-4001; KY. REV. STAT. ANN. §431.220; LA. REV. STAT. ANN. §15:569; MASS. GEN. LAWS ANN. ch.279 §60; MISS. CODE ANN. §99-19-51; MO. ANN. STAT. §546.720; MONT. CODE ANN. §46-19-103; NEB. REV. STAT. §83-966; NEV. REV. STAT. §176.355; N.H. REV. STAT. ANN. §630:5; N.Y. CORR. LAW §658; N.C. GEN. STAT. §15-187; OHIO REV. CODE ANN. §2949.22; OKLA. STAT. ANN. tit.22 §1014; ORE. REV. STAT. ANN. §137.473; 61 PA. CONS. STAT. ANN. §4304; S.C. CODE ANN. §24-3-530; S.D. COD. LAWS §23A-27A-32; TENN. CODE ANN. §40-23-114; TEX. CRIM. PRO. CODE ANN. Art. 43.14; UTAH CODE ANN. §77-18-5.5; VA. CODE §53.1-233;WASH. REV. CODE ANN. §10.95.180; WYO. STAT. §7-13-904; cf., 18 U.S.C. 3596(a), 28 C.F.R. §26.3(a)(4).

[41] *Baze v. Rees*, 553 U.S.. at 41; see also, *Glossip v. Gross*, 135 S.Ct. 2726, 2733-734, 2737-738 (2015)(al)("[A]nti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences.... Unable to acquire either sodium thiopental or pentobarbital, some States have turned to midazolam.... The challenge in *Baze* failed.... Petitioners' arguments here fail for similar reasons. First, petitioners have not proved that any risk posed by midazolam is substantial when compared to known and available alternative methods of execution. Second, they have failed to establish that the District Court committed clear error when it found that the use of midazolam will not result in severe pain and suffering").

[42] 18 U.S.C. 3281.

[43] 18 U.S.C. 3235.

[44] U.S. Department of Justice, *United States Attorneys Manual* (USAM), §§9-10.010 to 9-10.200 (April 2014 ed.), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam.

[45] 18 U.S.C. 3005.

[46] 18 U.S.C. 3593(a).

[47] 18 U.S.C. 3432.

Defendants have twice as many peremptory jury challenges in capital cases as in other felony cases and prosecutors more than three times as many.[48]

Should the defendant be found guilty of a capital offense, the *Furman/Gregg*-inspired sentencing procedures set forth in the Federal Death Penalty Act come into play. The death penalty may be imposed under its provisions only after (1) the defendant is convicted of a capital offense;[49] (2) in the case of murder, the defendant has been found to have acted with one of the required levels of intent;[50] (3) the prosecution proves the existence of one or more of the statutory aggravating factors;[51] and (4) the imbalance between the established aggravating factors and any mitigating factors justifies imposition of the death penalty.[52]

Statute of Limitations and Related Matters

"An indictment for any offense punishable by death may be found at any time without limitation."[53] This provision applies when the offense is statutorily punishable by death, even if the prosecution elects not to seek the death penalty or the jury fails to recommend it.[54]

Prosecutorial options are somewhat more limited than this statement might imply. In rare cases, due process may preclude a stale prosecution even in the absence of a statute of limitations. The due process delay proscription only applies where the delay is the product of prosecutorial bad faith prejudicial to the defendant: "[A]pplicable statutes of limitations protect against the prosecution's bringing stale criminal charges against any defendant, and, beyond that protection, the Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense."[55]

Moreover, the statute of limitations only marks time from the commission of the crime to accusation, in the form of either arrest or indictment. Deadlines between accusation and trial are the province of the constitutional and statutory speedy trial provisions. Here too, the limits are not particularly confining in most instances. "The Sixth Amendment ... Speedy Trial Clause is written with such breadth that, taken literally, it would forbid the government to delay the trial of an 'accused' for any reason at all. [The] cases, however, have qualified the literal sweep of the provision by specifically recognizing the relevance of four separate enquiries: whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and

[48] F.R.Crim.P. 24(b).

[49] 18 U.S.C. 3591.

[50] 18 U.S.C. 3591(a)(2).

[51] 18 U.S.C. 3593(c), (d).

[52] 18 U.S.C. 3593(e).

[53] 18 U.S.C. 3281.

[54] *United States v. Gallaher*, 624 F.3d 934, 940-41 (9th Cir. 2010); *United States v. Payne*, 591 F.3d 46, 58-9 (2d Cir. 2010), citing in accord, *United States v. Ealy*, 363 F.3d 292, 296-97 (4th Cir. 2004) and *United States v. Edwards*, 159 F.3d 1117, 1128 (8th Cir. 1998).

[55] *United States v. Gouveia*, 467 U.S. 180, 192 (1984), citing, *United States v. Lovasco*, 431 U.S. 783, 788-90 (1977); and *United States v. Marion*, 404 U.S. 307, 322-24 (1971); cf., *United States v. Jackson*, 549 F.3d 963, 969 (5th Cir. 2008)(" ... [T]he defendant bears the burden of providing that the pre-indictment delay cause substantial, actual prejudice and was intentionally undertaken by the government for the purpose of gaining some tactical advantage over the accused").

whether he suffered prejudice as the delay's result."[56] The Speedy Trial Act[57] provides a more detailed time table, but one that comes with a number of extensions and exclusions.[58] All in all, time before trial is rarely a matter of the essence in a capital case.

Venue and Vicinage

The Constitution provides that "the trial of all crimes ... shall be held in the state where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed,"[59] and that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."[60]

Capital cases should be tried in the county in which they occur, when possible.[61] Section 3236 directs that federal murder and manslaughter cases be tried where the death-inflicting injury occurs regardless of where the victim dies.[62] Section 3237, on the other hand, permits multi-district crimes to be tried where they are begun, continued, or completed and declares that offenses involving the use of the mails, transportation in interstate or foreign commerce, or importation into the United States may be tried in any district from, through, or into which commerce, mail, or imports travel.[63]

The limited available case law suggests that where the two sections are in conflict, multi-district Section 3237 applies. That is, the specific murder-manslaughter instruction of Section 3236 applies only with regard to "unitary" murder offenses, such as murder by a federal prisoner; it

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[56] *Doggett v. United States*, 505 U.S. 647, 651 (1992), citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *United States v. Richardson*, 793 F.3d 612, 623-24 (6th Cir. 2015); *United States v. Moreno*, 789 F.3d 72, 78 (2d Cir. 2015); *United States v. Hicks*, 779 F.3d 1163, 1167 (10th Cir. 2015); *United States v. Claxton*, 766 F.3d 280, 293 (1st Cir. 2014).

[57] 18 U.S.C. 3161-3174.

[58] E.g., 18 U.S.C. 3161(b),(h)("(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.... (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence: (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to - (A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant; ... (H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court").

[59] U.S. Const. Art. III, §2, cl. 3.

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

[61] "The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience," 18 U.S.C. 3235.

[62] "In all cases of murder or manslaughter, the offense shall be deemed to have been committed at the place where the injury was inflicted, or the poison administered or other means employed which caused the death, without regard to the place where the death occurs," 18 U.S.C. 3236; *United States v. Reff*, 479 F.3d 396, 401 (5th Cir. 2007).

[63] "(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed. Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves," 18 U.S.C. 3237(a).

does not apply to "death resulting" cases, cases where murder is a sentencing element rather than a substantive element of the offense, such as in cases of a violation of 18 U.S.C. 924(c)(use of a firearm during and relating to the commission of crime of violence), the sentence for which is determined in part by whether death resulted from the commission of the offense.[64]

Justice Department Review

The decision to seek or not to seek the death penalty is ultimately that of the Attorney General.[65] Under the procedure established in the United States Attorneys Manual, the United States Attorney where the trial is to occur files a recommendation with the Justice Department, ordinarily after conferring with the victim's family and in the case of a recommendation to seek the death penalty with defense counsel.[66] The recommendation is referred to the Capital Review Committee.[67] The Committee's task is to ensure that the decision to seek the death penalty reflects fairness, national consistency, statutory compliance, and law enforcement objectives.[68] It makes its recommendation to the Attorney General through the Deputy Attorney General.[69]

Appointment of Counsel

Capital defendants are entitled upon request to the assignment of two attorneys for their defense.[70] There is some uncertainty over whether they are to be appointed immediately following indictment for a capital offense or whether they need only be appointed "promptly" sometime prior to trial;[71] and whether the right expires with the decision of the government not to seek the death penalty.[72] The federal appellate courts are divided over whether a lower court's erroneous

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[64] *United States v. Barnette*, 211 F.3d 803, 814 (4th Cir. 2000); *United States v. Gotti*, 660 F.Supp.2d 512, 515-16 (S.D.N.Y. 2009), citing, *United States v. Saaverdra*, 223 F.3d 85, 91 (2d Cir. 2000).

[65] USAM §9-10.130.

[66] USAM §§9-10.080, 9-10.100. In some districts, the United States Attorney has established a separate committee to review the decision to pursue or forego the death penalty before he makes a recommendation, see *United States v. McGriff*, 427 F.Supp.2d 253, 257 (E.D.N.Y. 2006).

[67] USAM §9-10.130.

[68] USAM §§9-10,130, 9-10.140.

[69] USAM §9-10.130.

[70] 18 U.S.C. 3005.

[71] *Id.* ("Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel; and the court before which the defendant is to be tried, or a judge thereof, shall promptly, upon the defendant's request, assign 2 such counsel ... "); *In re Sterling-Suarez*, 306 F.3d 1170, 1173 (1st Cir. 2002)(" ... counsel is to be appointed reasonably soon after the indictment and prior to the time that submissions are to be made to persuade the Attorney General not to seek the death penalty"); *United States v. Tsarnaev*, 951 F.Supp.2d 209, 211 (D.Mass. 2013)("Here, the defendant is charged in a criminal complaint as opposed to an indictment. Accordingly, the defendant's request to appoint learned counsel under *section* 3005 is premature"(emphasis added to indicate the court elected not to capitalize the word "section"); *United States v. Shepperson*, 739 F.3d 176, 178-80 (4th Cir. 2014)(appointment is required only if and when the defendant requests).

[72] *United States v. Pesante-Lopez*, 582 F.Supp.2d 186, 188 (D.P.R. 2008)("The majority of circuit courts of appeals that have treated the issue agree that a capital defendant loses his right to a second attorney under §3005 should his or her exposure to the death penalty cease. See United States v. Waggoner, 339 F.3d 915 (9th Cir. 2003)(holding that the government's determination not to seek the death penalty extinguished defendant's statutory right to learned counsel); United States v. Casseus, 282 F.3d 253, 256 (3d Cir. 2002)(concluding that the government's decision not to pursue the death penalty eliminated defendant's right to two attorneys); 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 (7th Cir. 1978)(holding that the defendant was not entitled to representation by two (continued...)

refusal to appoint a second attorney in a capital case is presumptively prejudicial or if the defendant must still show that the error was prejudicial.[73]

The trial court may authorize the payment of attorneys, investigators, experts, and other professional services reasonably necessary for the defense of indigent defendants charged with a capital offense.[74] This does not entitle the accused to the attorney or expert of his choice or to a jury-selection expert.[75] Moreover, removal of the defendant's attorney in a compensation dispute is not appealable until after the trial.[76]

Pre-trial Notice of Intent to Seek the Death Penalty

Section 3593 obligates the prosecutor to advise the defendant and the court, "a reasonable time before trial" or before the acceptance of a plea, of the government's intention to seek the death penalty.[77] The Fourth and Eleventh Circuits have held that a failure to provide timely notice may preclude the effort of a prosecutor to seek the death penalty. More exactly, they have held (1) that

(...continued)

attorneys when a Supreme Court decision rendered a death penalty sentence impossible as a matter of law); United States v. Weddell, 567 F.2d 767 (8th Cir. 1977)(reaching the same conclusion as the Seventh Circuit). Thus far, only the Fourth Circuit Court of Appeals has come to a different conclusion, holding that a capital defendant's statutory right to learned counsel is absolute regardless of whether the government chooses to pursue the death penalty. See United States v. Boone, 245 F.3d 352, 361 n.8 (4th Cir. 2001). We respectfully disagree with the Fourth Circuit's holding in Boone, and are in accord with the majority view expressed above that a defendant's right to learned counsel ceases when the threat of a death penalty sentence ceases"); see also, *United States v. Douglas*, 525 F.3d 225, 237-38 (2d Cir. 2008)(" [W]e agree with the majority of the federal courts of appeals that once the government has formally informed the court and the defendant of its intention not to seek the death penalty, the matter is no longer a capital case within the meaning of §3005 and that section does not require the district court to continue the appointment of a second attorney.... Our conclusion that §3005 does not entitle a defendant to a second attorney under these circumstances would not preclude a district court, in its discretion, from maintaining the dual appointment in a future case out of a concern for fairness at the trial of a criminal offense"); see also, *United States v. Cordova*, 806 F.3d 1085, 1101-103 (D.C.Cir. 2015)(endorsing the majority view). The position of the Fourth Circuit remains unchanged, *United States v. Sheppрson*, 739 F.3d at 178 n.1 (" ... Our interpretation of §3005 is at odds with the view adopted by all our sister circuits to have considered the issue of whether the statute requires a second lawyer if the death penalty has been removed from consideration").

[73] See *United States v. Fields*, 483 F.3d 313, 348 (5th Cir. 2007)(finding no prejudice and consequently no reversal error in the trial court's failure to comply with the statutorily required consultation with the Federal Public Defender before selected the second capital defense counsel, but noting, "*See e.g., United States v. Williams*, 544 F.2d 1215, 1218 (4th Cir. 1976)(holding that failure to appoint second counsel under §3005 'gives rise to an irrebuttable presumption of prejudice')].... [T]he Third Circuit has explicitly rejected the Fourth Circuit's presumed-prejudice approach to a court's failure to appoint second counsel. *See United States v. Casseus*, 282 F.3d 253, 256 n.1 (3d Cir. 2003)").

[74] 18 U.S.C. 3006A, 3599. Section 3599 also authorizes the appointment of attorneys and other services in relation to the habeas corpus petitions of state death row inmates, matters that are beyond the scope of this report.

[75] *United States v. Mikos*, 539 F.3d 706, 712-13 (7th Cir. 2008).

[76] *United States v. Tillman*, 756 F.3d 1144, 1146 (9th Cir. 2014)("This case highlights the tension between judicial efforts to control costs of appointed counsel, the defendant's constitutional right to have counsel appointed, counsel's reliance on timely payment of Criminal Justice Act ("CJA") vouchers, and the delays often present in processing vouchers for payment.... The removal order is nonfinal and not immediately appealable; Tillman has the opportunity to raise this issue on direct appeal, if there is one").

[77] 18 U.S.C. 3593(a)("If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice—(1) 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 under this chapter and that the government will seek the sentence of death; and (2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death").

a death notice filed unreasonably close to the date set for trial is properly subject to a motion to strike the government's death notice, without which the government may not seek the death penalty; and (2) that an interlocutory appeal may be taken from the denial of such a motion.[78]

The Second Circuit, on the other hand, concluded that there is no right to avoid the death penalty simply because of the government's untimely death notice and that consequently a refusal to strike the death notice is not a matter from which an interlocutory appeal may be taken.[79]

Prosecutors will sometimes provide a "protective death notice" in order to preserve the option to seek the death penalty before a final decision is made. The notice is withdrawn should the Attorney General decide not to seek the death penalty. The arrangement is not one which the Justice Department prefers.[80] On the other hand, both the right to a speedy trial and the fact that the defendant in a capital case is not likely to be free on bail prior to trial may argue for such incentives for expeditious prosecutorial determinations.

The subsequent case law has muted the issue somewhat by holding that the indictment must contain allegations of the statutory aggravating factors without which the capital punishment may not be imposed.[81]

[78] *United States v. Ferebe*, 332 F.3d 722, 726-40 (4th Cir. 2003); *United States v. Wilk*, 452 F.3d 1208, 1220-221 (11th Cir. 2006); *see also United States v. Ayala-Lopez*, 457 F.3d 107, 108 (1st Cir. 2006)(assuming with some reservations that interlocutory appeal was available, but concluding that the defendant had been given timely notice).

[79] *United States v. Robinson*, 473 F.3d 487, 491-92 (2d Cir. 2007).

[80] *Death Penalty Reform Act of 2006: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 109th Cong., 2d Sess. (Margaret P. Giffin, Chief, Capital Case Unit, Criminal Division, Department of Justice) at 12-14 (2006), available at http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg26769/pdf/CHRG-109hhrg26769.pdf("All agree that the defendant must be put on notice in a timely manner of the government's intention to seek the death penalty. Unfortunately, in *United States v. Ferebe*, 332 F.3d 722 (4th Cir. 2003), the Fourth Circuit concluded that the determination of whether a notice of intent has been filed in a timely manner must be made with respect to the trial date in effect at the time the notice is filed and without regard to the additional preparation and issues resulting from a death penalty prosecution. In other words, in the Fourth Circuit, an actual trial date cannot be continued to allow the defense adequate time to prepare for the capital punishment hearing. Particularly in those courts with what is know[n] as a 'rocket docket,' the *Ferebe* rule could result in the dismissal of a death notice. In some instances, in order not to forfeit the ability to seek a death sentence, the Department has been forced to file a 'protective death notice.' A 'protective death notice' is one that is filed in a case before the case has been fully reviewed and the Attorney General has made a final decision whether or not to seek the death penalty. In cases in which the Attorney General decides not to seek the death penalty, the protective notice is then withdrawn. The Department of Justice is committed to the goal of the consistent, fair and even-handed application of the death penalty, regardless of geography and local sentiment. The decision whether it is appropriate to seek the death penalty involves awesome responsibilities and consequences. The *Ferebe* court's understanding of the existing section 3593(a) provisions favors expedience over considered decision-making, and when a considered decision cannot be reached in a limited amount of time, it forces the government to choose between filing a protective death notice or abandoning the goal of consistency and evenhandedness in the application of the death penalty").

[81] *Matthews v. United States*, 622 F.3d 99, 102 (2d Cir. 2010)("Although *Apprendi* [*Apprendi v. New Jersey*, 530 U.S. 466 (2000)] and *Ring* [*Ring v. Arizona*, 536 U.S. 584 (2002)] did not address the Fifth Amendment, we have held that the logic of those cases requires that statutory aggravating factors be alleged in the indictment in capital cases"); see also, *United States v. Lawrence*, 735 F.3d 385, 419 (6th Cir. 2013)("After *Ring*, several courts have held that an indictment charging a death-eligible offense under the FDPA must charge the statutory aggravating factors, *See United States v. Brown*, 441 F.3d 1330, 1367 (11th Cir. 2006); *United States v. Allen*, 406 F.3d 940, 943-44 (8th Cir. 2005); [*United States v.*] *Higgs*, 353 F.3d [281, 297-98 (4th Cir. 2003)"). The guidelines in the United States Attorneys' Manual instruct prosecutors to submit all capital- eligible cases for Justice Department review prior to indictment, absence extenuating circumstances, USAM §9-10.060.

Capital Juries

The Sixth Amendment affords the accused the right to trial before an impartial jury.[82] The Federal Death Penalty Act affords the defendant convicted of a capital offense the right to a jury for sentencing purposes.[83] The accused may waive his right to a jury trial, either by pleading guilty or by agreeing to a trial by the court without a jury.[84] A convicted defendant may also waive his right to a jury during the capital sentencing phase.[85]

The prosecution, on the other hand, enjoys comparable prerogatives. It may insist upon a jury if there is to be a trial.[86] It must also agree if the capital sentencing hearing is to be held before the court without a jury.[87] Moreover, it too is entitled to an impartial jury. Thus, the Sixth Amendment permits the exclusion of those potential jurors who assert that they will not vote to impose the death penalty under any circumstances.[88]

In most felony cases, the accused may peremptorily reject up to 10 potential jurors without regard to cause, and the prosecution may peremptorily reject up to 6.[89] In a capital case, each side has 20 peremptory challenges.[90] In the case of multiple defendants, the court may, but need not, allow the defendants additional challenges and may require they agree upon their challenges.[91]

Death-Ineligible Offenders

Whether by statute, by constitutional command, or both, some offenders may not be exposed to a federal trial in which the prosecution seeks the death penalty for a federal capital offense; some may not be executed. A woman may not be executed while she is pregnant.[92] Neither may a

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

[83] 18 U.S.C. 3593(b)(" ... The [sentencing] hearing shall be conducted—(1) before the jury that determined the defendant's guilt; (2) before a jury impaneled for the purpose of the hearing if—(A) the defendant was convicted upon a plea of guilty; (B) the defendant was convicted after a trial before the court sitting without a jury; (C) the jury that determined the defendant's guilt was discharged for good cause; or (D) after initial imposition of a sentence under this section, reconsideration of the sentence under this section is necessary; or (3) before the court alone, upon the motion of the defendant and with the approval of the attorney for the government. A jury impaneled pursuant to paragraph (2) shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number").

[84] F.R.Crim.P. 23(a)("If the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves); *Florida v. Nixon*, 543 U.S. 175, 187 (2004)(By entering a guilty plea, a defendant waives constitutional rights ... including the right to trial by jury ... ").

[85] 18 U.S.C. 3593(b)(3).

[86] F.R.Crim.P. 23(a); *Singer v. United States*, 380 U.S. 24, 35-6 (1965); *United States v. United States District Court*, 464 F.3d 1065, 1069-70 (9th Cir. 2006).

[87] 18 U.S.C. 3593(b)(3).

[88] *Uttecht v. Brown*, 551 U.S. 1, 9 (2007)(" ... [A] juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible"); *United States v. Snarr*, 704 F.3d 368, 379 (5th Cir. 2013); *United States v. Stinson*, 647 F.3d 1196, 1206 (9th Cir. 2011); *United States v. Fell*, 531 F.3d 197, 210 (2d Cir. 2008).

[89] F.R.Crim.P. 24(b)(2).

[90] F.R.Crim.P. 24(b)(1).

[91] F.R.Crim.P. 24(b); *United States v. Lopez*, 649 F.3d 1222, 1242-244 (11th Cir. 2011)(upholding the trial court's requirement that the defendants agree on challenges and to agree upon whether to accept the court's offer of four additional challenges contingent upon the prosecution being allowed three additional challenges).

[92] 18 U.S.C. 3596(b).

person who is mentally retarded be executed nor a person who lacks the mental capacity to understand that he is being executed and why.[93]

The Federal Death Penalty Act may not be employed to charge a juvenile for a capital offense committed when the accused was under 18 years of age.[94] An accused who is incompetent to stand trial may not be tried for a capital offense or any other crime.[95] Native Americans are not subject to the Federal Death Penalty Act under some circumstances. The limitation applies to murders committed by and against Native Americans in Indian Country when the appropriate tribe has refused to allow application of Federal Death Penalty Act in such cases.[96] It does not restrict workings of Federal Death Penalty Act when the crime is one of general rather than enclave application—regardless of the status of the victim, the offender, or tribal approval.[97]

Death-Eligible Offenses

Federal law permits imposition of the death penalty only where the defendant has been convicted of a death-eligible crime, where the aggravating and mitigating factors present in a particular case justify imposition of the penalty, and in a murder case where the defendant has been found to have the requisite intent for imposition of capital punishment.[98]

Federal law divides death-eligible offenses into three categories.[99] The one group consists of homicide offenses,[100] another of espionage and treason,[101] and a third of drug offenses that do not

[93] 18 U.S.C. 3596(c); see also *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)(holding that the Eighth Amendment prohibits execution of the mentally retarded).

[94] 18 U.S.C. 3591; see also *Roper v. Simmons*, 543 U.S. 351, 578 (2005)("The Eighth ... Amendment[] forbid[s] imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed").

[95] No accused may tried for any federal crime until he is competent to stand trial, that is, until he is capable of understanding the proceedings against him and assist in his defense, 18 U.S.C. 4241; *Dusky v. United States*, 362 U.S. 402, 402 (1960); *United States v. Dahl*, 807 F.3d 900, 904 (8th Cir. 2011); *United States v. Anzaldi*, 800 F.3d 872,877 (7th Cir. 2015); *United States v. Wingo*, 789 F.3d 1226, 1235 (11th Cir. 2015).

[96] 18 U.S.C. 3598 ("Notwithstanding sections 1152 and 1153, no person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the Federal jurisdiction for which is predicated solely on Indian country (as defined in section 1151 of this title) and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction").

[97] *United States v. Mitchell*, 502 F.3d 931, 948-49 (9th Cir. 2007)("[T]he FDPA unambiguously requires opt-in only where jurisdiction is based on Indian country.... [T]he opt-in provision appears to afford Indian tribes as much authority as states in determining whether capital punishment may be imposed in circumstances not involving federal crimes of general application. The federal government seeks and obtains FDPA death sentences in states that have long since abandoned the death penalty themselves"); *United States v. Gallaher*, 624 F.3d 934, 939 n.1 (9th Cir. 2010).

[98] 18 U.S.C. 3591, 3592, 3593.

[99] 18 U.S.C. 3591.

[100] 18 U.S.C. 3591(a)(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").

[101] 18 U.S.C. 3591(a)(1)("A defendant who has been found guilty of—(1) an offense described in section 794 or (continued...)

involve a killing.[102] Most capital offenses involve a homicide.[103] More defendants are sentenced to death for murder than for all of the other federal capital offenses.[104]

Capital Homicide Offenses

Murder is a capital offense under more than 50 federal statutes.[105] Some outlaw murder as such under various jurisdictional circumstances.[106] Most, however, make some other offense, such as carjacking, a capital offense, if death results from its commission.[107]

A defendant convicted of a capital offense may be executed, however, only if it is shown beyond doubt at a subsequent sentencing hearing that one of the statutory aggravating circumstances exists, and that he either (A) killed the victim intentionally; (B) intentionally inflicted serious injuries that resulted in the victim's death; (C) intentionally participated in an act, aware that it would expose a victim to life-threatening force, and the victim died as a consequence; or (D) intentionally engaged in an act of violence with reckless disregard of its life-threatening nature and the victim died as a consequence.[108] The court will sometimes permit a separate preliminary

(...continued)

section 2381 ... 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").

[102] 18 U.S.C. 3591(b)("(b) A defendant who has been found guilty of—(1) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under the conditions described in subsection (b) of that section which involved not less than twice the quantity of controlled substance described in subsection (b)(2)(A) or twice the gross receipts described in subsection (b)(2)(B); or (2) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under that section, where the defendant is a principal administrator, organizer, or leader of such an enterprise, and the defendant, in order to obstruct the investigation or prosecution of the enterprise or an offense involved in the enterprise, attempts to kill or knowingly directs, advises, authorizes, or assists another to attempt to kill any public officer, juror, witness, or members of the family or household of such a person, 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").

[103] Of the more than 60 federal capital offenses, all are homicide offenses except for treason, espionage, and two drug kingpin offenses. A list of federal capital offenses is appended.

[104] Of the 58 federal inmates on death row, all were convicted of federal capital offenses involving a homicide, *Federal Death Row Prisoners*, available at http://www.deathpenaltyinfo.org/federal-death-row-prisoners.

[105] A list of federal capital offenses is appended.

[106] E.g., 18 U.S.C. 1111(b)("Within the special maritime and territorial jurisdiction of the United States, Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life ... ").

[107] 18 U.S.C. 2119("Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall ... (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death").

[108] 18 U.S.C. 3591(a)("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"); *Jones v. United States*, 527 U.S. 373, 376 (1999); (continued...)

jury proceeding to determine the existence of the requisite intent.[109] Some courts have upheld the submission of all four mental states to the jury.[110]

In *Moussaoui*, the "act" necessary to trigger the liability under 3591(a)(2)(C) consisted of his false statements at the time of his arrest that failed to disclose the then pending 9/11 attacks.[111]

The act-of-violence branch of the intent requirement "consists essentially of three elements. It requires first that the defendant has 'intentionally and specifically engaged in an act of violence.' Second, the defendant must have done so 'knowing that the act created a grave risk of death to a person ... such that participation in the act constituted a reckless disregard for human life.' Finally, 'the victim must have died as a direct result of the act.'"[112] The Federal Death Penalty Act does not define "act of violence." It has been said to encompass the use of physical force which "creates a grave risk of serious injury or death."[113]

Even in the presence of the necessary intent and at least one of the statutory aggravating factors, a defendant may only be sentenced to death, if the jury unanimously concludes that on balancing the aggravating and mitigating factors imposition of the death penalty is justified.[114]

Aggravating Factors

Subsection 3592(c) of the Federal Death Penalty Act lists 16 statutory aggravating factors:

1. Death during commission of another crime.[115]
2. Previous conviction of violent felony involving firearm.[116]

(...continued)

United States v. Umana, 750 F.3d 320, 357 (4th Cir. 2014); *United States v. Gabrion*, 719 F.3d 511, 531 (6th Cir. 2013); *United States v. Ebron*, 683 F.3d 105, 149 (5th Cir. 2012).

[109] *United States v. Johnson*, 764 F.3d 937, 938-39 (8th Cir. 2014)("[A] district court may bifurcate a capital sentencing hearing into an 'eligibility phase' and a 'penalty-selection phase'"); *United States v. Fell*, 531 F.3d 197, 240 n.28 (2d Cir. 2008); cf., *United States v. Moussaoui*, 591 F.3d 263, 301 (4th Cir. 2010).

[110] *United States v. Bolden*, 545 F.3d 609, 629-30 (8th Cir. 2008), citing in accord *United States v. Jackson*, 327 F.3d 273, 300-01 (4th Cir. 2003); *United States v. Webster*, 162 F.3d 308, 323-24 (5th Cir. 1998).

[111] *United States v. Moussaoui*, 591 F.3d. at 301 n.24.

[112] *United States v. Williams*, 610 F.3d 271, 285 (5th Cir. 2010).

[113] *Id*. at 285-89; see also, *In re Terrorist Bombings of U.S. Embassies*, 552 F.3d 93, 111 (2d Cir. 2008)(attacking the American Embassy with a bomb resulting in death satisfies the requirements of section 3591(2)(D)).

[114] 18 U.S.C. 3591(a)(2), 3593(e); *Jones v. United States*, 527 U.S. 373, 376-77 (1999); *United States v. Gabrion*, 719 F.3d 511, 532 (6th Cir. 2013); *United States v. Ebron*, 683 F.3d 105, 150 (5th Cir. 2012).

[115] "The death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense under section 32 (destruction of aircraft or aircraft facilities), section 33 (destruction of motor vehicles or motor vehicle facilities), section 37 (violence at international airports), section 351 (violence against Members of Congress, Cabinet officers, or Supreme Court Justices), an offense under section 751 (prisoners in custody of institution or officer), section 794 (gathering or delivering defense information to aid foreign government), section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of Government property by explosives), section 1118 (prisoners serving life term), section 1201 (kidnapping), section 844(i) (destruction of property affecting interstate commerce by explosives), section 1116 (killing or attempted killing of diplomats), section 1203 (hostage taking), section 1992 (wrecking trains), section 2245 (offenses resulting in death), section 2280 (maritime violence), section 2281 (maritime platform violence), section 2332 (terrorist acts abroad against United States nationals), section 2332a (use of weapons of mass destruction), or section 2381 (treason) of this title, or section 46502 of title 49, United States Code (aircraft piracy)," 18 U.S.C. 3592(c)(1).

[116] "For any offense, other than an offense for which a sentence of death is sought on the basis of section 924(c), the defendant has previously been convicted of a Federal or State offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm (as defined in section 921) against another person," 18 U.S.C. 3592(c)(2).

3. Previous conviction of offense for which a sentence of death or life imprisonment was authorized.[117]
4. Previous conviction of other serious offenses.[118]
5. Grave risk of death to additional persons.[119]
6. Heinous, cruel, or depraved manner of committing offense.[120]
7. Procurement of offense by payment.[121]
8. Pecuniary gain.[122]
9. Substantial planning and premeditation.[123]
10. Prior conviction for two felony drug offenses.[124]
11. Vulnerability of victim.[125]
12. Conviction for serious federal drug offenses.[126]
13. Continuing criminal enterprise involving drug sales to minors.[127]
14. High public officials.[128]
15. Prior conviction of sexual assault or child molestation.[129]

[117] "The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute," 18 U.S.C. 3592(c)(3).
[118] "The defendant has previously been convicted of 2 or more Federal or State offenses, punishable by a term of imprisonment of more than 1 year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person," 18 U.S.C. 3592(c)(4).
[119] "The defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to 1 or more persons in addition to the victim of the offense," 18 U.S.C. 3592(c)(5).

[120] "The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim," 18 U.S.C. 3592(c)(6).
[121] "The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value," 18 U.S.C. 3592(c)(7).

[122] "The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value," 18 U.S.C. 3592(c)(8).
[123] "The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism," 18 U.S.C. 3592(c)(9).
[124] "The defendant has previously been convicted of 2 or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance," 18 U.S.C. 3592(c)(10).
[125] "The victim was particularly vulnerable due to old age, youth, or infirmity," 18 U.S.C. 3592(c)(11).

[126] "The defendant had previously been convicted of violating title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 for which a sentence of 5 or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise," 18 U.S.C. 3592(c)(12
[127] "The defendant committed the offense in the course of engaging in a continuing criminal enterprise in violation of section 408(c) of the Controlled Substances Act (21 U.S.C. 848(c)), and that violation involved the distribution of drugs to persons under the age of 21 in violation of section 418 of that Act (21 U.S.C. 859)," 18 U.S.C. 3592(c)(13).
[128] "The defendant committed the offense against—(A) the President of the United States, the President-elect, the Vice President, the Vice President-elect, the Vice President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any person who is acting as President under the Constitution and laws of the United States; (B) a chief of state, head of government, or the political equivalent, of a foreign nation; (C) a foreign official listed in section 1116(b)(3)(A), if the official is in the United States on official business; or (D) a Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution - (i) while he or she is engaged in the performance of his or her official duties; (ii) because of the performance of his or her official duties; or (iii) because of his or her status as a public servant. For purposes of this subparagraph, a 'law enforcement officer' is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, or prosecution or adjudication of an offense, and includes those engaged in corrections, parole, or probation functions," 18 U.S.C. 3592(c)(14).

16. Multiple killings or attempted killings.[130]

The jury may also consider any non-statutory aggravating factors which it finds beyond a reasonable doubt to exist.[131] Justice Department approval forms once identified five possible non-statutory aggravating factors.[132] These gave way to more generic instructions, also no longer available.[133] At the present time, there does not appear be any publicly available information on the Justice Department's view of permissible non-statutory aggravating factors.[134]

Death during the commission of another federal offense: The first statutory aggravating factor encompasses those instances where "[t]he death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of" a violation of one of the following capital offenses:

- 18 U.S.C. 32 (destruction of aircraft or aircraft facilities),
- 18 U.S.C. 33 (destruction of motor vehicles or motor vehicle facilities),
- 18 U.S.C. 37 (violence at international airports),
- 18 U.S.C. 351 (violence against Members of Congress, Cabinet officers, or Supreme Court Justices),
- 18 U.S.C. 751 (prisoners in custody of institution or officer),
- 18 U.S.C. 794 (gathering or delivering defense information to aid foreign government),
- 18 U.S.C. 844(d) (transportation of explosives in interstate commerce for certain purposes),

(...continued)

[129] "In the case of an offense under chapter 109A (sexual abuse) or chapter 110 (sexual abuse of children), the defendant has previously been convicted of a crime of sexual assault or crime of child molestation," 18 U.S.C. 3592(c)(15).

[130] "The defendant intentionally killed or attempted to kill more than one person in a single criminal episode," 18 U.S.C. 3592(c)(16).

[131] 18 U.S.C. 3593(d)("The jury ... shall return special findings identifying any aggravating factor or factors set forth in section 3592 found to exist and any other aggravating factor for which notice has been provided under subsection (a) found to exist ... ").

[132] USAM, *Title 9, Criminal Resource Manual*, §76 ("(1) Participation in additional uncharged murders, attempted murders, or other serious acts of violence. (2) Obstruction of justice. The victim was killed in an effort by the defendant to obstruct justice, tamper with a witness or juror, or in retaliation for cooperating with authorities. (3) Contemporaneous convictions for multiple murders, attempted murders, or other serious acts of violence. (4) Future dangerousness to the lives and safety of other persons, as evidenced by one or more of the following: a. specific threats of violence, b. continuing pattern of violence, c. specific admissions of violence, d. low rehabilitative potential, e. lack of remorse, f. mental evaluation, and/or g. custody classification (escape risk). (5) Victim impact evidence concerning the effect of the offense on the victim and the victim's family as evidenced by oral testimony or a victim impact statement (removed)," previously available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00076.htm.

[133] USAM, *Title 9, Criminal Resource Manual*, §73 ("Title 18 capital sentencing provisions allow the government to rely on non-statutory aggravating factors. See 18 U.S.C. §3592(b)-(d). Identify applicable non-statutory factors by defendant and offense charged. Describe why it applies and the supporting evidence. The factor must be 'sufficiently specific to provide meaningful guidance to the jury' and have a 'core meaning that a criminal jury should be capable of understanding.' Avoid pejorative adjectives, such as heinous or atrocious which describe the crime as a whole. USAM 9-10.080 A(4) "), previously available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00073.htm.

[134] See generally, USAM §§9-10.010 to 9-10.200; USAM, Title I, Criminal Resource Manual, §§67 to 74.

- 18 U.S.C. 844(f) (destruction of Government property by explosives),
- 18 U.S.C. 1118 (prisoners serving life term),
- 18 U.S.C. 1201 (kidnapping),
- 18 U.S.C. 844(i) (destruction of property affecting interstate commerce by explosives),
- 18 U.S.C.1116 (killing or attempted killing of diplomats),
- 18 U.S.C. 1203 (hostage taking),
- 18 U.S.C. 1992 (wrecking trains),
- 18 U.S.C. 2245 ([sex] offenses resulting in death),
- 18 U.S.C. 2280 (maritime violence),
- 18 U.S.C. 2281 (maritime platform violence),
- 18 U.S.C. 2332 (terrorist acts abroad against United States nationals),
- 18 U.S.C. 2332a (use of weapons of mass destruction),
- 18 U.S.C. 2381 (treason), or
- 49 U.S.C. 46502 (aircraft piracy).[135]

Federal juries have concluded on a number of occasions that the fact that a murder was committed during the course of one of these predicate offenses was a sufficient aggravating factor to justify imposition of the death penalty.[136] The contention that this statutory aggravating factor is constitutionally suspect—because it does not narrow the class of offenders who face the death penalty—has been rejected.[137] Citation of the predicate offense in the indictment is sufficient notification; the indictment need not recite the elements of the predicate offense.[138]

Prior violent felony conviction involving a firearm: Prior state or federal conviction for an offense involving use of a firearm is a somewhat less frequently invoked statutory aggravating factor.[139] The factor is triggered by the use, attempted use, or threatened use of a firearm in connection with the crime for which the defendant was previously convicted; involvement of a firearm need not be an element of the earlier offense.[140]

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[135] 18 U.S.C. 3592(c)(1).

[136] E.g., *Jones v. United States*, 527 U.S. 373, 377(1999); *United States v. Rodriguez*, 581 F.3d 775, 784 (8th Cir. 2009); *United States v. Basham*, 561 F.3d 302, 316 (2009); *United States v. Fell*, 531 F.3d 197, 207-208 (2d Cir. 2008); E.g., *Higgs v. United States*, 711 F.Supp.2d 479, 492 (D.Md. 2010)(kidnapping).

[137] *United States v. Jones*, 132 F.3d 232, 248-49 (5th Cir. 1998), aff'd on other grounds, 527 U.S. 373 (1999)("An aggravating factor which merely repeats an element of the crime passes constitutional muster as long as it narrows the jury's discretion. See [*Lowenfield v. Phelps*, 484 U.S. 231] at 246.... The FDPA channels the jury's discretion during the penalty phase to ensure that the death penalty is not arbitrarily imposed"); see also, *United States v. Hall*, 152 F.3d 381, 417 (5th Cir. 1998)("There is no question but that the [FDPA] narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more").

[138] *United States v. Jackson*, 327 F.3d 273, 289-90 (4th Cir. 2003).

[139] E.g., *United States v. Purkey*, 428 F.3d 738, 762 (8th Cir. 2005); 18 U.S.C. 3592(c)(2) ("For any offense, other than an offense for which a sentence of death is sought on the basis of section 924(c), the defendant has previously been convicted of a Federal or State offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm (as defined in section 921) against another person"). Subsection 924(c) outlaws use of a firearm during and in relation to a crime of violence or drug trafficking offense.

[140] *United States v. Higgs*, 353 F.3d 281, 316-17 (4th Cir. 2003).

Prior conviction for a capital offense: This statutory aggravating factor has apparently only been invoked infrequently.[141] It seems most likely to occur in a prison context and in the presence of other statutory aggravating factors, for example, death during the commission of another crime (murder in a federal prison), murder committed against an employee of a federal penal or correctional institution.[142]

Other prior convictions: Subsection 3592(c) features four other statutory aggravated factors predicated on prior convictions, three of which may be called upon more often than the prior capital offense factor. They cover prior convictions for serious drug offenses, multiple prior convictions for drug felonies or felonies involving serious bodily injury, and prior convictions for sexual assault or child molestation.[143]

The twin prior drug conviction statutory factors—(1) two or more prior felony drug convictions,[144] and (2) a prior federal drug conviction for which the defendant was sentenced to imprisonment for five years or more[145]—are not constitutionally suspect simply because they may be unrelated to the murder.[146] As a consequence, the convictions may have occurred after the murder with respect to which they are aggravating factors.[147] They meet the constitutional minimum standard for aggravating factors, that is, they "genuinely narrow the class of persons eligible for the death penalty" and they "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[148]

The factor covering two or more prior felony convictions involving infliction of serious bodily injuries[149] applies to convictions not merely for offenses with a serious injury element, but also to convictions for offenses that in fact involved the infliction of serious injuries including psychological injuries.[150]

The final recidivist statutory aggravating factor occurs only under very limited circumstances. It encompasses only murders committed during the course of a federal sexual assault or child molestation and only with respect to defendants who have a prior conviction for sexual assault or child molestation.[151]

[141] E.g., *United States v. Battle*, 979 F.Supp. 1442 (N.D.Ga. 1997).

[142] 18 U.S.C. 3592(c)(1), (14)(D).

[143] 18 U.S.C. 3592(c)(12), (10), (4), (15), respectively.

[144] 18 U.S.C. 3592(c)(10); the factor which covers convictions for offenses "involving" distribution includes attempt offenses as well, *United States v. Bolden*, 545 F.3d 609, 617 (8th Cir. 2008).

[145] 18 U.S.C. 3592(c)(12).

[146] *United States v. Caro*, 597 F.3d 608, 622-24 (4th Cir. 2010); *United States v. Bolden*, 545 F.3d at 616-17.

[147] *United States v. Higgs*, 353 F.3d 281, 318 (4th Cir. 2003)("Unlike others contained within §3592(c), the aggravator does not concern matters directly related to the death penalty offense. Rather, it is concerned with the characteristics of the offender as of the time that he is sentenced").

[148] *United States v. Caro*, 597 F.3d at 623, quoting *Zant v. Stevens*, 462 U.S. 862, 877 (1983); *United States v. Bolden*, 545 F.3d at 617.

[149] 18 U.S.C. 3592(c)(4).

[150] *United States v. Rodriguez*, 581 F.3d 775, 804-10 (8th Cir. 2009).

[151] 18 U.S.C. 3592(c)(15)("In the case of an offense under chapter 109A (sexual abuse) or chapter 110 (sexual abuse of children), the defendant has previously been convicted of a crime of sexual assault or crime of child molestation").

Grave risk of other deaths: The statutory aggravating factor covering the creation of a grave risk of death to someone other than the murder victim reaches cases involving "a significant and considerable possibility" of the death of another and of placing others in a "zone of danger."[152]

Heinous, cruel, or depraved manner: The "heinous, cruel, or depraved" aggravating factor has historically been troublesome because "[m]ost federal offenses that carry the death-penalty punishment could be fairly characterized as heinous, cruel, or depraved."[153] Without more, it would be poorly suited to perform the necessary narrowing function required of an aggravating factor.[154] The statute and the courts have added more. First, subsection 3592(c)(6) limits the factor to instances that "involve torture or serious physical abuse of the victim."[155] Second, the courts have explained that this limits the factor to cases in which the defendant "inflicted 'suffering or mutilation above and beyond that necessary to cause death.'"[156]

Ordering a murder for hire: The statutory aggravating factor that applies when the defendant has procured another to commit a murder appears to have been cited sparingly.[157]

Murder for pecuniary gain: On the other hand, the closely related pecuniary gain factor—"the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value"—is cited with some regularity.[158] It applies both to murders committed for gain received beforehand and to murders committed in anticipation of gain.[159]

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[152] *United States v. Barnette*, 211 F.3d 803, 819 (4th Cir. 2000); see also, *United States v. Robinson*, 367 F.3d 278, 289 (5th Cir. 2004)("All three death sentences involved the aggravating factor that in the killings of Shelton and Reyes, Robinson 'knowingly created a grave risk of death to one or more persons in addition to ... the victim.' Cf. 18 U.S.C. §3592(c)(5). Robinson killed Shelton by firing an AK-47 assault rifle from the window of a moving vehicle on a public highway, directly endangering Shelton's passenger and anyone else in range. The record also shows that in the course of killing Reyes, Robinson and his co-assailant managed to shoot Rodriguez three times and to fire enough times at Marques's car fleeing the scene to leave it riddled with bullets. All this took place in a residential neighborhood in close proximity to at least two adolescent eyewitnesses playing on a nearby porch, and across the street from a barbecue attended by at least ten people. No rational grand jury would fail to find that this evidence constituted anything less than probable cause to believe that, in the course of committing each murder, Robinson created a grave risk of death to someone other than the victim"); *United States v. Umana*, 750 F.3d 320, 329 (4th Cir. 2014); *United States v. Lawrence*, 735 F.3d 385, 417-18 (6th Cir. 2013).

[153] *United States v. Montgomery*, 635 F.3d 1074, 1095 (8th Cir. 2011).

[154] *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)("[I]f a State wishes to authorize capital punishment, it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.... [A] death penalty system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur. In the case before us, the Georgia Supreme Court has affirmed a sentence of death based, upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence").

[155] *United States v. Mitchell*, 502 F.3d 931, 975 (9th Cir. 2007)("Mitchell submits that this factor is constitutional, but this can't be so given that Congress defined what it meant by 'especially heinous, cruel, or depraved' when it specified that for this manner of killing to be aggravating, it must involve 'torture or serious physical abuse to the victim'").

[156] *United States v. Montgomery*, 635 F.3d at 1095-96 ("The jury instruction stated as much, defining serious physical abuse as [a] significant or considerable amount of injury or damage to the victim's body and requiring that the defendant intended the abuse in addition to the killing"), quoting *United States v. Agofsky*, 458 F.3d 369, 374 (5th Cir. 2006); see also, *Brown v. United States*, 720 F.3d 1316, 1324 (11th Cir. 2013); *United States v. Snarr*, 704 F.3d 368, 394-95 (5th Cir. 2013); *United States v. Ebron*, 683 F.3d 105, 123 (5th Cir. 2012).

[157] E.g., *United States v. Solomon*, 513 F.Supp.2d 520, 525 (W.D.Pa. 2007); *United States v. McGriff*, 427 F.Supp.2d 253, 261 (E.D.N.Y. 2006).

[158] 18 U.S.C. 3592(c)(8); e.g., *United States v. Whitten*, 610 F.3d 168, 176 (2d Cir. 2010*); United States v. Basham*, 561 F.3d 302, 314 (4th Cir. 2009); *United States v. Davis*, 380 F.3d 821, 826-27 (5th Cir. 2004).

[159] *United States v. Bolden*, 545 F.3d 609, 615 (8th Cir 2008), citing in accord *United States v. Brown*, 441 F.3d 1330, (continued...)

When committed in conjunction with another crime, the gain must be anticipated as a consequence of the murder, not be merely a consequence of accompanying crime, such as bank robbery, for example.[160]

Substantial planning and premeditation: The substantial planning aggravating factor reaches both murders where the planning and premeditation were directed at the murder and the planning and premeditation were directed at a terrorist offense.[161] The factor requires the government to show a considerable amount of planning,[162] but there is no need to show that the "defendant deliberated for any particular period of time."[163] The steps taken in preparation for a murder will often bespeak substantial planning.[164]

Victim vulnerability: The victim vulnerability factor looks to the victim's age, youth, or infirmity. It applies to disabilities, for instance, which impair the victim's ability to resist or flee the murderer.[165] The prosecution does not have to establish that the defendant knew of the victim's vulnerability.[166]

Drug dealing to children: The statutory aggravating factor for murder committed in the context of a large-scale drug trafficking enterprise that involves the trafficking to children is also narrowly drawn. It requires a murder committed in the course of a continuing criminal (drug kingpin) enterprise offense involving the sale of controlled substances to children.[167]

High public official: The high public official aggravating factor is both more inclusive and more exclusive than its caption might suggest. It does not encompass high state officials. It does, however, include foreign officials as well as federal law enforcement and correctional officers

(...continued)

1370 (11th Cir. 2006); *United States v. Mitchell*, 502 F.3d 931, 974-74 (9th Cir. 2007); and *United States v. Chanthadara*, 230 F.3d 1237, 1263-264 (10th Cir. 2000).

[160] *United States v. Bolden*, 545 F.3d at 615 ("We agree with Bolden that the pecuniary gain factor applies to a killing during the course of a bank robbery only where pecuniary gain is expected to follow as a direct result of the murder"); again citing in accord, *United States v. Mitchell*, 502 F.3d at 975, and *United States v. Brown*, 441 F.3d at 1370-371; see also, *United States v. Runyon*, 707 F.3d 475, 486-87 (4th Cir. 2013); *United States v. Lawrence*, 735 F.3d 385, 412 (6th Cir. 2013).

[161] 18 U.S.C. 3592(c)(9)("The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism"); e.g., *In re Terrorist Bombings of U.S. Embassies*, 552 F.3d 93, 111 (2d Cir. 2008); *United States v. Mitchell*, 502 F.3d at 978.

[162] E.g., *United States v. Runyon*, 707 F.3d 475, 486-87 (4th Cir. 2013); *United States v. Snarr*, 704 F.3d 368, 392 (5th Cir. 2013)('substantial planning' means a considerable amount of planning); *United States v. Ebron*, 683 F.3d 105, 152 (5th Cir. 2012)(the planning must be that of the defendant not a co-defendant or co-conspirator).

[163] *United States v. Davis*, 609 F.3d 663, 689-90 (5th Cir. 2010).

[164] E.g., *United States v. Fields*, 516 F.3d 923, 941 (10th Cir. 2008)("The government aptly summarizes facts from which a reasonable jury could (indeed, very likely would) find the SPP aggravator: [Fields] camouflaged his rifle, carefully constructed a ghillie suit, and practiced stalking people. He potentially began planning the Chicks' murder two days before the offense, when he first saw them. On the night of the murders, he drove to a secluded area and surveilled his victims while they sat on a vista. Instead of burgling their van and fleeing in the Chicks' absence, he methodically donned his ghillie suit, retrieved his rifle and waited for the victims to come within easy range. Even then, [he] watched the Chicks for 15 to 20 minutes before firing, then shot each victim repeatedly to ensure death'").

[165] 18 U.S.C. 3592(c)(11); *United States v. Mikos*, 539 F.3d 706, 717 (7th Cir. 2008), citing in accord *United States v. Sampson*, 486 F.3d 13, 48-9 (1st Cir. 2007) and *United States v. Paul*, 217 F.3d 989, 1001-02 (8dth Cir. 2000).

[166] *United States v. Sampson*, 486 F.3d at 34.

[167] 18 U.S.C. 3592(c)(13)("The defendant committed the offense in the course of engaging in a continuing criminal enterprise in violation of section 408(c) of the Controlled Substances Act (21 U.S.C. 848(c)), to persons under the age of 21 in violation of section 418 of that Act (21 U.S.C. 859)").

and employees.[168] The defendant need not be aware of the status of his victims, unless they are federal law enforcement officers or employees murdered for that reason.[169]

Multiple killings or attempted killings: The multiple killing aggravating factor covers only cases in which the multiple killings or attempting killings occurred as part of the same criminal episode,[170] and only cases occurring after the factor was added to the subsection in 1996.[171]

Victim impact: The impact of the defendant's crime upon the victim's family is ordinarily described as a non-statutory aggravating factor, on the theory that it is not listed among the statutory aggravating factors. Subsection 3593(a), on the other hand, mentions it as one of the factors that may be considered aggravating.[172] This mixed treatment may be a product of the Supreme Court's struggles with the issue. The Court initially suggested that a prosecution's presentation of victim impact evidence at a capital sentencing hearing was inherently prejudicial.[173] Shortly thereafter, however, it rejected the notion that the Eight Amendment contained a per se prohibition on victim impact evidence. It concluded that in "the majority of cases ... victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause ... provides a mechanism for relief."[174] The Court later rejected a contention that overlap between the statutory victim vulnerability factor and the non-statutory victim impact factor resulted in a constitutionally impermissible double counting.[175]

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[168] 18 U.S.C. 3592(c)(14)("The defendant committed the offense against - (A) the President of the United States, the President-elect, the Vice President, the Vice President-elect, the Vice President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any person who is acting as President under the Constitution and laws of the United States; (B) a chief of state, head of government, or the political equivalent, of a foreign nation; (C) a foreign official listed in section 1116(b)(3)(A), if the official is in the United States on official business; or (D) a Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution - (i) while he or she is engaged in the performance of his or her official duties; (ii) because of the performance of his or her official duties; or (iii) because of his or her status as a public servant").

[169] *United States v. Wilson*, 493 F.Supp.2d 491, 497-98 (E.D.N.Y. 2007); cf., *United States v. bin Laden*, 126 F.Supp.2d 290, 302 n.18 (S.D.N.Y. 2001); *United States v. McVeigh*, 944 F.Supp. 1478, 1490-491 (D.Colo. 1996).

[170] 18 U.S.C. 3592(c)(16). E.g., *United States v. Umana*, 750 F.3d 320, 329 (4th Cir. 2014).

[171] *United States v. Higgs*, 353 F.3d 281, 300-301 (4th Cir. 2003).

[172] 18 U.S.C. 3593(a)(" ... The [aggravating] factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and 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 ... ").

[173] *Booth v. Maryland*, 482 U.S. 496, 502-503 (1987)("[Personal characteristics of the victims and the emotional impact of the crimes on the family [,as well as,] the family members' opinions and characterizations of the crimes and defendant ... are irrelevant to a capital sentencing decision, and that [their] admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner"); see also, *South Carolina v. Gathers*, 490 U.S. 805 (1989).

[174] *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); see also, *Jones v. United States*, 527 U.S. 373, 391 (1999).

[175] *Jones v. United States*, 527 U.S. 373, 398-99 (1999)("Even accepting, for the sake of argument, petitioner's 'double counting' theory, there are nevertheless several problems with the Fifth Circuit's application of the theory in this case. The phrase 'personal characteristics' as used in factor 3(C)[statutory factor 3592)(c)(11)] does not obviously include the specific personal characteristics listed in 3(B) [non-statutory victim impact].... In the context of considering the effect of the crime on the victim's family, it would be more natural to understand 'personal characteristics' to refer to those aspects of the victim's character and personality that her family would miss the most. More important, to the extent that there was any ambiguity arising from how the factors were drafted, the Government's argument to the jury made clear that 3(B) and 3(C) went to entirely different areas of aggravation—the former clearly went to victim vulnerability while the latter captured the victim's individual uniqueness and the effect of the crime on her family.... As such, even if the phrase 'personal characteristics' as used in factor 3(C) *was* understood to include the specific personal (continued...)

The statute refers to the impact of the offense on the victim's family, but the courts have also permitted expressions of grief and loss from non-family members.[176] Evidence of "a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence" may still be out of bounds,[177] but the courts are otherwise reluctant to bar the admission of victim impact evidence.[178]

Future dangerousness: The non-statutory aggravating factor covering future dangerousness appears with some regularity in cases in which the Justice Department elects to seek the death penalty.[179] It is understood to encompass "evidence that a defendant is likely to commit criminal acts of violence in the future that would be a threat to the lives and safety of others."[180] The factor may be problematic when proof of its existence takes the form of evidence of the defendant's lack of remorse—particularly when that unconstitutionally draws the jury's attention to the defendant's exercise of either his right to a trial or his right not to testify.[181] Establishing future

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characteristics listed in 3(B), the factors as a whole were not duplicative—at best, certain evidence was relevant to two different aggravating factors. Moreover, any risk that the weighing process would be skewed was eliminated by the District Court's instruction that the jury 'should not simply count the number of aggravating and mitigating factors and reach a decision based on which number is greater [but rather] should consider the weight and value of each factor'").

[176] *United States v. Lawrence*, 735 F.3d 385, 405-406 (6th Cir. 2013)("Courts have interpreted Payne and the FDPA to permit similarly situated witnesses, i.e., family members, friends, and co-workers, to give victim-impact testimony"); *United States v. Runyon*, 707 F.3d 475, 499-501 (4th Cir. 2013); *United States v. Whitten*, 610 F.3d 168, 188 (2d Cir. 2010), citing in accord *United States v. Bolden*, 545 F.3d 609, 626 (8th Cir. 2008); *United States v. Fields*, 516 F.3d 923, 946 (10th Cir. 2008*); United States v. Barrett*, 496 F.3d 1079, 1098-99 (10th Cir. 2007); *United States v. Nelson*, 347 F.3d 701-712-14 (8th Cir. 2003); and *United States v. Bernard*, 299 F.3d 467, 478 (5th Cir. 2002).

[177] *Payne v. Tennessee*, 501 U.S. at 830 n.2; *United States v. Lighty*, 616 F.3d 321, 361 (4th Cir. 2010); but see *United States v. Davis*, 609 F.3d 663, 684-85 (5th Cir. 2010)(after concluding that the victim impact testimony did not violate Davis' due process rights, the court quoted a passage that makes it clear that the prosecutor had emphasized the victim's opinions about the defendant and the appropriate sentence: "In summation at the close of the selection phase, the prosecutor returned to Jasmine's testimony to argue the family wishes: 'In simple and powerful words, she [Jasmine] told you that life was too good for the defendant and she told you why. He didn't have the decency to apologize'").

[178] See e.g., *United States v. Whitten*, 610 F.3d at 191 (2d Cir. 2010)("Courts are reluctant to conclude that the jury was unduly prejudiced by emotional testimony if the defendant presented mitigating factors that the jury found proven and if the trial court warned the jury against returning a verdict based on emotion").

[179] E.g., *United States v. Umana*, 750 F.3d 320, 354-55 (4th Cir. 2014); *United States v. Whitten*, 610 F.3d 168, 176 (2d Cir. 2010); *United States v. Davis*, 609 F.3d 663, 674 (5th Cir. 2010).

[180] *Id.*; *United States v. Basham*, 561 F.3d 302, 331 (4th Cir. 2009); *United States v. Fields*, 516 F.3d 923, 941-42 (10th Cir. 2008).

[181] *United States v. Whitten*, 610 F.3d at 200-201(emphasis in the original)("Wilson has adequately preserved both his Sixth and Fifth Amendment claims.... The prosecution cited two constitutional elections made by Wilson—to go to trial and not to testify—as reasons to reject two of Wilson's offered mitigators: acceptance of responsibility and remorse. And the government then cited the lack of remorse as evidence of an aggravating factor: Wilson's future dangerousness.... Moreover, the focus on Wilson's decision to elect a trial had an uncontrollable resonance for the jury. After acknowledging Wilson's 'absolute right to go to trial,' the government suggested that if Wilson had accepted responsibility, he would not have 'put the government to its burden of proof, to prove he committed these crimes.' Not incidentally, however, the burden thus placed on the prosecution to mount its case placed a counterpart burden on the jurors to sit through it. These arguments were potent—*no juror* found that Wilson accepted responsibility or showed remorse, and *every juror* found that Wilson presented a risk of future dangerousness. On these facts, it is hard to see how the government can prove that these errors were harmless. Indeed, the government's emphasis on these arguments during summation suggests they were not harmless beyond a reasonable doubt"); but see *United States v. Davis*, 609 F.3d at 685-86("Here, the prosecutor's comments ... were the only prosecutorial remarks which referred to Davis's supposed lack of remorse.... In the context of the prosecutor's summation and the evidence overall, therefore, Davis's rights were not affected by the isolated remark"); *United States v. Caro*, 597 F.3d 608, 627 (4th Cir. 2010)("Caro argues that the government and district court violated his Fifth Amendment privilege against self-incrimination by having the (continued...)

dangerousness by reference to unadjudicated crimes or other forms of misconduct seems more readily accepted.[182]

Mitigating Factors

The Constitution and the Federal Death Penalty Act favor the introduction of mitigating evidence during the capital sentencing proceeding. The Supreme Court declared some time ago that "the Eighth Amendment ... require[s] that the sentencer ... not 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."[183] The Federal Death Penalty Act directs the finder of fact to consider any mitigating factor and permits the defendant to present any information relevant to a mitigating factor.[184] This gives the defendant considerable latitude. Yet his options are not boundless. The evidence he offers must be relevant and not invite confusion or unfair prejudice.[185] Moreover, the prosecutor may question the weight that a mitigating factor warrants.[186]

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jury consider Caro's failure to speak words of remorse.... Given the court's cautionary instruction and overwhelming information showing Caro's lack of remorse, we conclude that any error would have been harmless ... "); *United States v. Mikos*, 539 F.3d 706, 718 (7th Cir. 2008)("The prosecutor's main theme was not the absence of a guilty plea, or Mikos's silence ... in open court, but the fact that Mikos had not done anything to reduce or redress the hurt his crimes had caused").

[182] *United States v. Corley*, 519 F.3d 716, 724 (7th Cir. 2008)("[E]very circuit to consider the issue has held that unadjudicated conduct may be considered in the process of assessing aggravating factors, and many courts have specifically recognized the relevance to the factor of future dangerousness"); see also, *United States v. Runyon*, 707 F.3d 475, 505 (4th Cir. 2013).

[183] *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), quoting, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

[184] 18 U.S.C. 3592(a), 3593(c).

[185] *United States v. Lighty*, 616 F.3d 321, 362-63 (4th Cir. 2010)("Under the FDPA, in the sentencing phase of the trial, mitigating evidence is 'admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials.' 18 U.S.C. §3593(c). This lenient standard affords a defendant the opportunity to present mitigating evidence consistent with the Supreme Court's directive that in capital cases the jury must ''not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' ... *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)(plurality opinion) (emphasis in original).... This wide berth for the admission of mitigating evidence, however, does not mean that the defense has *carte blanche* to introduce any and all evidence that it wishes. The district court has the authority 'to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.' *Lockett*, 438 U.S. at 604 n.12. Moreover, under the FDPA, the district court has the authority to exclude probative information during the penalty phase if 'its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.' 18 U.S.C. §3593(c)"); see also, *United States v. Snarr*, 704 F.3d 368, 400 (5th Cir. 2013).

[186] *United States v. Whitten*, 610 F.3d 168, 184 n.6 (2d Cir. 2010)("The Eighth Amendment forbids a capital sentencing regime in which the jury is '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.' *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 247-48 (2007). According to Wilson, the prosecution's summations advised the jury that only defenses to the crime and the aggravating factors could be considered mitigating evidence, that a death sentence should be imposed irrespective of the mitigation because a sentence of life without parole was appropriate for certain less serious crimes, and that Wilson's merciless conduct rendered him categorically ineligible for mercy. On review, we ask whether there is a 'reasonable likelihood that the jurors believed themselves to be precluded from considering [the] mitigating evidence.' *United States v. Fell*, 531 F.3d 197, 233 (2d Cir. 2008).... We see no such likelihood. First, the government's summations deprecated the weight of the mitigating evidence, explained why a life sentence is insufficient, and argued that the victim impact evidence militated against mercy; but the government's summations did not urge the jury to ignore mitigation and repeatedly instructed the jury to consider every mitigating factor. Second, the final jury charge in the penalty phase instructed the jurors to consider the mitigating evidence broadly. Third, the jury heard several days of testimony concerning mitigation, and the prosecution (continued...)

Subsection 3592(b) of the Federal Death Penalty Act describes seven statutory factors and adds a catch-all that encompasses "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."[187] The other seven cover:

1. Impaired capacity.[188]
2. Duress.[189]
3. Minor participation.[190]
4. Equally culpable, disparate punished defendants.[191]
5. No prior criminal record.[192]
6. Disturbance.[193]
7. Victim's consent.[194]

The defendant is not entitled to mitigating consideration of "residual doubt" of his guilt.[195] Nevertheless, mitigation is not confined to factors related to the murder, "but need only allow the

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extensively argued the weight of that evidence: It is improbable the jurors believed that the parties were engaging in an exercise in futility all that time").

[187] 18 U.S.C. 3592(a)(8); *United States v. Umana*, 750 F.3d 320, 350 (4th Cir. 2014)(the district court did not abuse its discretion by holding that §3592(a)(8) did not require admission of evidence of other murders committed by the defendant's associates, offered in mitigation to show that the defendant's conduct was a "product of social conformity").

[188] "The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge," 18 U.S.C. 3592(a)(1).

[189] "The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge," 18 U.S.C. 3592(a)(2).

[190] "The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge," 18 U.S.C. 3592(a)(3).

[191] "Another defendant or defendants, equally culpable in the crime, will not be punished by death," 18 U.S.C. 3592(a)(4); *United States v. Gabrion*, 719 F.3d 511, 524 (6th Cir. 2013)("This factor does not measure the defendant's culpability itself, but instead considers – as a moral data point – whether the same level of culpability, for another participant in the same criminal event, was thought to warrant a sentence of death"); see also, *United States v. Runyon*, 707 F.3d 475, 487 (4th Cir. 2013).

[192] "The defendant did not have a significant prior history of other criminal conduct," 18 U.S.C. 3592(a)(5); *United States v. Runyon*, 707 F.3d 475, 487 (4th Cir. 2013).

[193] "The defendant committed the offense under severe mental or emotional disturbance," 18 U.S.C. 3592(a)(6).

[194] "The victim consented to the criminal conduct that resulted in the victim's death," 18 U.S.C. 3592(a)(2).

[195] *United States v. Rodriguez*, 581 F.3d 775, 814-15 (8th Cir. 2009)("The Supreme Court has declined to require 'residual doubt' instructions at sentencing. In *Franklin v. Lynaugh*, Justice White, writing for four Justices, explained: 'Our edict that, in a capital case, the sentencer ... [may] not 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, ... in no way mandates reconsideration by capital juries, in the sentencing phase, of their residual doubts over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's character, record, or a circumstance of the offense. This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.' *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988). Justice O'Connor's concurring opinion in *Franklin*, joined by Justice Blackmun, also doubts the constitutional basis of a "residual doubt" instruction.... *Id.* at 188 (O'Connor, J. concurring). *Franklin* addressed the constitutional claim in favor of a 'residual doubt' instruction, rather than an argument based on §3592(a). The Justices' reasons for declining to recognize a constitutional rule apply with equal force the FDPA. Residual doubt is not a mitigating circumstance of the defendant or of the offense. Rather, residual doubt, if it exists, highlights the difficulty of ever proving anything with complete certainty. Section 3592(a) does not require a district court to grant such an instruction at sentencing, and the district court here did not abuse its (continued...)

sentencer to reasonably find that it warrants a sentence less than death."[196] Defendants have accordingly been allowed to present a wide range of non-statutory mitigation factors.[197] Childhood hardships, remorse, and impact of the execution on the defendant's family are among the more common.[198] Yet, a jury's capital sentencing decision will not always be undone by the trial court's erroneous failure to admit mitigating evidence. The sentence will stand if the error is harmless, that is, if the result would have been the same had the evidence been admitted.[199]

Treason

Treason is also a federal capital offense. The Constitution defines treason and authorizes Congress to set its punishment:

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open court. The Congress shall have Power to declare the Punishment of Treason, but no

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discretion by rejecting Rodriguez's request"); see also, *United States v. Jackson*, 549 F.3d 963, 981(5th Cir. 2008)("We find no error in the denial of Jackson's request for a jury instruction on residual doubt.... [E]ven if we assume some right to consideration of residual doubt, the trial court placed no limitation whatsoever on Jackson's opportunity to press the residual doubts question with the sentencing jury"); *United States v. Corley*, 519 F.3d 716, 729-30 (7th Cir. 2008)("The jury in this case already heard any evidence introduced at trial casting doubt on his guilt, and therefore it is difficult to envision how denying a residual doubt argument could be reversible error. We need not decide that, however, because Corley raises no challenge on appeal related to residual doubt as to the offense of conviction"); cf., *United States v. Gabrion*, 719 F.3d 511, 525 (6th Cir. 2013) ("The exclusion of Gabrion's residual-doubt argument was harmless beyond a reasonable doubt").

[196] *United States v. Fell*, 531 F.3d 197, 222 (2d Cir. 2008).

[197] *Jones v. United States*, 527 U.S. 373, 378-79 n.4 (1999)(identifying the 10 mitigating factors considered by the jury in *Jones*); *United States v. Runyon*, 707 F.3d 475, 487 (4th Cir. 2013)("The jury also unanimously found that Runyon had established seven of the fourteen mitigators proposed by the defense"); *United States v. Basham*, 561 F.3d 302, 315 (4th Cir. 2009)("In mitigation, Basham offered six statutory and thirty non-statutory factors"); *United States v. Bolden*, 545 F.3d 609, 627 (8th Cir. 2008)("The district court placed few limits on Bolden's mitigating evidence; he argued thirty-two mitigating factors to the jury"); *United States v. Caro*, 102 F.Supp.3d 813, 825 (W.D.Va. 2015)("[T]he jury unanimously found that 12 mitigating factors proposed by the defense had been proved").

[198] *Jones v. United States*, 527 U.S. at 378-79; *United States v. Whitten*, 610 F.3d 168, 177 (2d Cir. 2010)("Wilson's affirmative case in the sentencing phase focused on mitigating factors relating to his Dickensian upbringing.... The defense also called members of Wilson's family to testify about his loving relationship with them, and how they would suffer if he is executed.... The defense received permission for Wilson to read aloud an allocution of remorse"); *United States v. Williams*, 610 F.3d 271, 279 n.9 (5th Cir. 2010); but see, *United States v. Snarr*, 704 F.3d 368, (5th Cir. 2013) (footnote 20 of the court's opinion on brackets)("Because such evidence 'does not reflect on the defendant's background or character or the circumstances of his crime, the Supreme Court has never included friend/family impact testimony among the categories of mitigating evidence that must be admitted during a criminal trial. Accordingly, this court consistently has affirmed exclusion of execution impact testimony similar to that proffered by Garcia. [Although some courts evidently permit execution impact testimony, see *Wright v Bell*, 691 F.3d 586, 597-98 (6th Cir. 2010); *Sinisterra v. United States*, 600 F.3d 900, 909-10 (8th Cir 2010), none appear to require it]"); *United States v. Umana*, 750 F.3d 320, 355 (4th Cir. 2014)("Umana argues that he should have been allowed to submit evidence regarding the impact that his execution would have on his wife and child.... Allowing a capital defendant to argue execution impact as a mitigator is improper").

[199] 18 U.S.C. 3595(c)(2)d(" ... The court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous specific finding of an aggravating factor, where the government establishes beyond a reasonable doubt that the error was harmless"); *United States v. Troya*, 733 F.3d 1125, 1138 (11th Cir. 2013), citing, *Harrington v. California*, 395 U.S. 250, 254 (1969)("[T]he evidence against Troya in the present case was 'so overwhelming' that the exclusion of Dr. Cunningham's lack of future dangerousness testimony was harmless beyond a reasonable doubt ").

> Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.[200]

Treason is punishable by death or imprisonment for not less than five years and a fine of not less than $10,000.[201]

Aggravating and Mitigating Factors

The death penalty for treason may only be imposed upon conviction, a finding of one or more of the statutory aggravating factors, and a determination that the aggravating factors outweigh any mitigating factors.[202]

The mitigating factors in a treason case are the same as those in a murder case, seven statutory factors and one catch-all: impaired capacity; duress; minor participation; equally culpable but less severely punished defendants; absence of prior criminal record; mental disturbance; victim consent; and any other mitigating factor relating to the offender or the offense.[203]

Different aggravating factors, however, apply in treason and espionage cases. The aggravating factors are four: prior treason or espionage conviction;[204] grave risk to national security;[205] grave risk of death;[206] and "any other aggravating factor."[207]

At one time, the Justice Department identified five non-statutory aggravating factors that might apply in capital treason or espionage cases and noted that the aggravating factors appropriate in a murder or drug cases might also serve in some instances. The five non-statutory factors were:

> 1. Participation in additional uncharged murders [attempted murders, or other serious acts of violence].
>
> 2. Obstruction of justice. [The victim was killed in an effort by the defendant to obstruct justice, tamper with a witness or juror, or in retaliation for cooperating with authorities].
>
> 3. Contemporaneous convictions for multiple murders, attempted murders, or other serious acts of violence.
>
> 4. Future dangerousness to the lives and safety of other persons, as evidenced by one or more of the following:
>
> a. specific threats of violence,
> b. continuing pattern of violence,
> c. specific admissions of violence,
> d. low rehabilitative potential,
> e. lack of remorse,
> f. mental evaluation, and/or

[200] U.S. Const. Art. III, §3.

[201] 18 U.S.C. 2381.

[202] 18 U.S.C. 3593(e).

[203] 18 U.S.C. 3592(a).

[204] 18 U.S.C. 3592(b)(1)("The defendant has previously been convicted of another offense involving espionage or treason for which a sentence of either life imprisonment or death was authorized by law").

[205] 18 U.S.C. 3592(b)(2)("In the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security").

[206] 18 U.S.C. 3592(b)(3)("In the commission of the offense the defendant knowingly created a grave risk of death to another person").

[207] 18 U.S.C. 3592(b)("The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists").

g. custody classification (escape risk).

5. Victim impact evidence concerning the effect of the offense on the victim and the victim's family as evidenced by oral testimony or a victim impact statement.[208]

The Justice Department no longer publicly identifies potential non-statutory aggravating or mitigating factors in capital punishment cases involving treason.[209]

Constitutional Threshold

Commentators have questioned whether the Constitution allows imposition of the death penalty in cases involving treason, espionage, or murder-less drug offenses, since in such cases the statute on its face authorizes the death penalty without requiring the death of a victim.[210] The Court in *Kennedy* specifically distinguished this class of crimes from those involving violence against individuals.[211] Each of the crimes presents considerations of its own and might under some circumstances survive scrutiny even under the individual violence standards. Nevertheless, it seems likely that any court confronting the issue would at a minimum consider the *Kennedy* standards (indicia of "the evolving standards of decency that mark the progress of a maturing society" read in conjunction with the Court's precedents).[212]

Treason is the crime of which the Founding Fathers were most leery—so uneasy, in fact, that they inserted a narrow definition and procedural safeguards in the Constitution itself: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[213]

Congress made treason a capital offense in the very first Congress, and so it has remained throughout.[214] Congress ensured its status as a capital offense when it revived the death penalty in 1994.[215] Treason is a state crime in at least 23 states,[216] and a capital offense in 10 of those.[217]

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[208] Former USAM, *Title 9, Criminal Resource Manual*, §76, previously available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00076.htm.

[209] See generally, USAM §§9-10.010 to 9-10.200; USAM, Title I, Criminal Resource Manual, §§67 to 74.

[210] *An Unanswered Question in* Kennedy v. Louisiana*: How Should the Supreme Court Determine the Constitutionality of the Death Penalty for Espionage?* 70 LOUISIANA LAW REVIEW 995(2010); *None Dare Call It Treason: The Constitutionality of the Death Penalty for Peace Time Espionage*, 87 CORNELL LAW REVIEW 820 (2002); Pickard, *The Death Penalty for Drug Kingpins: Constitutional and International Implications*, 24 VERMONT LAW REVIEW 1 (1999); Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 UNIVERSITY OF PITTSBURGH LAW REVIEW 99 (1983).

[211] *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008)("Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State. As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken").

[212] *Id.* at 539-40 (2008).

[213] U.S. Const. Art. III, §3, cl.1. See generally, Hurst, THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS (1945); Chapin, THE AMERICAN LAW OF TREASON: REVOLUTIONARY AND EARLY NATIONAL ORIGINS (1964).

[214] 1 Stat. 112 (1790); Rev. Stat. §5332 (1878); Act of March 4, 1909, §2, 35 Stat. 1088 (1909); Act of June 25, 1948, §2381, 62 Stat. 807 (1948); 18 U.S.C. 2381.

[215] P.L. 103-322, §60002(a), 108 Stat. 1959 (1994), 18 U.S.C. 3591.

[216] ALA. CODE §§13A-11-2, 13A-5-40; ARK. CODE ANN. §5-51-201; CAL. PENAL CODE §37; COLO. REV. STAT. ANN. §§18-11-101, 18-1.3.401; FLA. STAT. ANN. §§876.32, 775.082; GA. CODE §16-11-1; ILL. COMP. STAT. ANN. ch. 720 §5/30-1; KAN. STAT. ANN. §21-5901; MASS. GEN. LAWS ANN. ch. 264 §§1, 2; MICH. COMP. LAWS ANN. §750.544; MINN. STAT. ANN. §609.385; MISS. CODE ANN. §97-7-67; MO. ANN. STAT. §§576.070, 557.021; NEV. REV. STAT. ANN. §196.010; N.D. CENT. CODE §12.1-07-01; ORE. REV. STAT. §166.005; R.I. GEN. LAWS §11-43-1; VT. STAT. ANN. tit.13 (continued...)

State prosecutions are virtually unheard of, however.[218] Federal treason prosecutions, never numerous, have become particularly uncommon. There were 35 federal treason cases prior to World War II; 11 arose out of that conflict, and apparently there has been only 1 since then.[219]

Thus, the Supreme Court has had no occasion to pass upon the constitutionality of capital punishment in a treason case since *Furman*. The Court, however, had previously handed down decisions in four treason cases. In the first, *Ex parte Bollman*, the Court granted habeas corpus relief on the ground that there was insufficient evidence to hold the petitioners on a charge of treason.[220] In the second, *Cramer v. United States*, the Court overturned the petitioner's treason conviction on the ground that the overt acts upon which it was based were insufficient, either because the overt acts did not show treasonous intent or because they lacked the support of two witnesses upon which the Constitution insists.[221] The Court affirmed the treason convictions in *Haupt v. United States*[222] and *Kawakita v. United States*.[223] None of the treasonous acts by Kawakita or Haupt involved the death of a victim.[224]

The existing federal statute likewise permits capital punishment even in a deathless treason case.[225] Yet, it reserves the death penalty for those defendants who have previously been convicted of treason, or who, in the commission of the offense, have created either a grave risk of death or a grave risk of substantial danger to national security, or whose case presents some

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§3401; VA. CODE §§18.2-481, 18.2-10; WASH. REV. CODE ANN. §9.82.010; W.VA. CODE ANN. §§61-1-1, 61-1-2; WIS. STAT. ANN. §§946.01, 939.50.

[217] ARK. CODE ANN. §5-51-201; CAL. PENAL CODE §37; COLO. REV. STAT. ANN. §§18-11-101, 18-1.3.401; GA. CODE §16-11-1; ILL. COMP. STAT. ANN. ch. 720 §5/30-1; MISS. CODE ANN. §97-7-67; VT. STAT. ANN. tit.13 §3401; WASH. REV. CODE ANN. §9.82.010.

[218] 70 AM. JUR. 2D *Sedition, Subversive Activities, and Treason* §84 (2005). Nevertheless, the last person executed for treason in the United States may have been hanged following a state conviction. See, Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 UNIVERSITY OF PITTSBURGH LAW REVIEW 99, 156 (1983)("Nobody has been executed for treason since John Brown in 1859"). The abolitionist John Brown was hanged after his raid on Harpers Ferry and conviction in Virginia state court for murder, slave insurrection, and treason against the Commonwealth of Virginia, 4 ENCYCLOPÆDIA BRITANNICA 285 (1972 ed.).

[219] Crane, *Did the Court Kill the Treason Charge?: Reassessing* Cramer v. United States *and Its Significance*, 36 FLORIDA STATE UNIVERSITY LAW REVIEW 635, 636-39 & n.13 (2009), citing, *inter alia*, Hurst, THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS (1971). See also, *Cramer v. United States*, 325 U.S. 1, 25 n.38 (1944), citing from the government's brief earlier cases construing the treason clause in the Constitution. The only post-WWII case involves the treason indictment of Adam Gadahn, a fugitive, yet to be apprehended and brought to trial, Department of Justice Press Release, *U.S. Citizen Indicted on Treason, Material Support Charges for Providing Aid and Comfort to al Qaeda* (October 11, 2006), available at http://www.justice.gov/opa/pr/2006/October/06_nsd_695.html.

[220] 8 U.S. (4 Cranch) 75, 135 (1807).

[221] 325 U.S. 1, 37-8, 48 (1945).

[222] 330 U.S. 631, 644 (1947).

[223] 343 U.S. 717, 747 (1952).

[224] Haupt, sentenced to life imprisonment, was "the father of Herbert Haupt, one of the eight saboteurs convicted by a military tribunal, *See Ex parte Quirin*, 317 U.S. 1. Sheltering his son, assisting him in getting a job, and in acquiring an automobile, all alleged to be with knowledge of the son's mission, involved defendant in the treason charge," *Haupt v. United States*, 303 U.S. at 632-33. Kawakita, an American with dual citizenship living in Japan when the war broke out, was convicted and sentenced to death on the basis of his assaults and other abuse of prisoners of war used as slave labor by the private defense contractor by whom Kawakita was employed as a translator, *Kawakita v. United States*, 343 U.S. at 737-40. President Eisenhower commuted Kawakita's sentence to life imprisonment; President Kennedy later pardoned him on the condition that he leave the United States, *"Meatball" Kawakita Ordered Freed in One of Kennedy's Last Actions*, L.A. TIMES, November 29, 1963, at 1.

[225] 18 U.S.C. 3591, 3592.

similar aggravating circumstance.[226] It remains to be seen whether this is enough or even whether treason cases are subject to the same manner of Eighth Amendment analysis as the state violence cases.

It might be a close question under the elements of the tests mentioned in *Kennedy*. Executive officials have virtually abandoned recourse to treason prosecutions, but inclusion in the 1994 revival belies the suggestion that capital punishment in all treason cases is commonly considered excessive. The dearth of modern treason prosecutions might be attributed to the ability to prosecute treasonous conduct as other crimes, crimes whose prosecutions come without the evidentiary hurdles of a treason case.[227] On other hand, most of those crimes are not capital offenses.[228] The only exception, the espionage statute, dates from a time before treason prosecutions had become passé, although Congress made it a death-eligible offense when it revived capital punishment as a sentencing option in 1994.[229]

Under the Federal Death Penalty Act, the death penalty does not follow inevitably from a treason conviction. Capital punishment is confined to those cases marked by one of the three aggravating factors and by the absence of countervailing mitigating factors.[230] The national security factor might be considered a bit too open ended,[231] but that defect, if it is one, might be cured by jury instruction or appellate construction.[232] Of the three—treason, espionage, and murder-less drug kingpin offenses—commentators seem to consider treason the most likely to survive constitutional scrutiny.[233]

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[226] 18 U.S.C. 3592(b), 3593(d).

[227] E.g., 18 U.S.C. 2383 (rebellion or insurrection), 2384 (seditious conspiracy), 2339A (providing material support for terrorist offenses), 2339B (providing material support to designated foreign terrorist organizations), 794 (espionage).

[228] E.g., 18 U.S.C. 2383 (rebellion or insurrection)(maximum penalty: imprisonment for not more than 10 years), 2384 (seditious conspiracy)(maximum penalty: imprisonment for not more than 20 years), 2339A (providing material support for terrorist offenses)(maximum penalty: imprisonment for not more than 15 years; imprisonment for any term of years or for life, if death results), 2339B(providing material support to designated foreign terrorist organizations) (maximum penalty: imprisonment for not more than 15 years; imprisonment for any term of years or for life, if death results), 794 (espionage)(maximum penalty: death or imprisonment for any term of years or for life).

[229] P.L. 103-322, §60002(a), 108 Stat. 1959 (1994), 18 U.S.C. 3591.

[230] 18 U.S.C. 3592(b).

[231] 18 U.S.C. 3592(b)("Aggravating Factors for Espionage and Treason.—In determining whether a sentence of death is justified for an offense described in section 3591(a)(1), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist: ... (2) Grave risk to national security. - In the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security").

[232] *Lambrix v. Singletary*, 520 U.S. 518, 530-31 (1997); see also *Jones v. United St*ates, 527 U.S. 373, 401 & n.15 (1999)(internal citations omitted)("Ensuring that a sentence of death is not so infected with bias or caprice is our controlling objective when we examine eligibility and selection factors for vagueness. Our vagueness review, however, is quite deferential. As long as an aggravating factor has a core meaning that criminal juries should be capable of understanding, it will pass constitutional muster.... We reiterate the point we made in *Tuilaepa*—we have held only a few, quite similar factors vague, see, *e.g.*, whether murder was 'especially heinous, atrocious, or cruel,' while upholding numerous other factors against vagueness challenges").

[233] E.g., *None Dare Call It Treason: The Constitutionality of the Death Penalty for Peacetime Espionage*, 87 CORNELL LAW REVIEW 820, 851 (2002)("Subjectively, espionage fails to measure up the standards of inherent moral depravity and injury involved with the capital crimes of murder and treason.... [E]spionage, even when jeopardizing the national security, does not involve a betrayal as dangerous or as harmful as that required of treason"); Wilson, *Chaining the Leviathan: the Unconstitutionality of Executing Those Convicted of Treason*, 45 UNIVERSITY OF PITTSBURGH LAW REVIEW 99, 179 (1983)("Most of us dread the midnight knock on the door; we do not want to confront our own police, much less an invading army or armed revels. Nobody can know which fear is more likely to be realized: the use of executions to destroy political opposition or the defeat of the country because it could not kill its enemies").

Espionage

Espionage is a death-eligible offense under any of three conditions. First, it is a capital offense to disclose national defense information with the intent to injure the United States or aid a foreign government, if the disclosure results in the death of an American agent.[234] Second, it is a capital offense to disclose information relating to major weapons systems or elements of U.S. defense strategy with the intent to injure the United States or aid a foreign government.[235] Third, it is a capital offense to communicate national defense information to the enemy in time of war.[236] The statutory aggravating and mitigating factors are the same as those used in treason cases.[237]

Constitutional Threshold

The existing federal espionage statute, 18 U.S.C. 794, permits capital punishment in espionage cases in the absence of a death as well. Treason and espionage are alike in some respects. Both are offenses against the nation, against the citizens of United States collectively rather than individually. Perhaps neither is appropriately measured by the *Kennedy* standards for that reason. Nevertheless, their marks under a *Kennedy* analysis are not the same. Espionage is of comparatively recent vintage. Section 794 has continued relatively unchanged since its enactment in the Espionage Act of 1917, with two significant modifications.[238]

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[234] 18 U.S.C. 3591(a)(1); 794(a)("Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life, except that the sentence of death shall not be imposed unless the jury or, if there is no jury, the court, further finds that the offense resulted in the identification by a foreign power (as defined in section 101(a) of the Foreign Intelligence Surveillance Act of 1978) of an individual acting as an agent of the United States and consequently in the death of that individual ...").

[235] 18 U.S.C. 3591(a)(1); 18 U.S.C. 794(a)("Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life, except that the sentence of death shall not be imposed unless the jury or, if there is no jury, the court, further finds that the offense ... directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy").

[236] 18 U.S.C. 3591(a)(1); 18 U.S.C. 794(b)("Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life").

[237] 18 U.S.C. 3592(a), (b).

[238] Act of June 15, 1917, §2, 40 Stat. 218 (1917). See generally, Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUMBIA LAW REVIEW 929 (1973).

Until 1954 when Congress made peace time espionage a capital offense, espionage was only punishable by death when committed in time of war.[239] In 1994, Congress restricted capital punishment as a sentencing option in peace time to instances involving a death or more limited range of protected government information.[240]

Unlike treason, there are few state espionage statutes.[241] Section 794 prosecutions occur with some regularity,[242] but the last espionage execution apparently took place in 1953.[243] Moreover, "[t]he death penalty jurisprudence for espionage is virtually nonexistent."[244]

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[239] Espionage and Sabotage Act of 1954, §201, 58 Stat. 1219 (1954). In its original form, peace-time espionage was punishable by imprisonment for not more than 20 years, 40 Stat. 218 (1917), 18 U.S.C. 794 (1952 ed.).

[240] P.L. 103-322, §60003(a)(2), 108 Stat. 1968 (1994), 18 U.S.C. 794 (1994 ed.)(" ... except that the sentence of death shall not be imposed unless ... the offense resulted in the identification by a foreign power ... of an individual acting as an agent of the United States and consequently in the death of that individual, or directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy").

[241] One state, South Carolina, has an espionage-like statute that it does not characterize as espionage, S.C. Code § 25-7-20 ("(A) It is unlawful for a person, for the purpose of obtaining information respecting the national or state defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States or this State or to the advantage of a foreign nation to: (1) go upon, enter, fly over, or otherwise obtain information concerning any: (a) vessel, aircraft, work of defense, navy yard, naval base, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telephone, telegraph, wireless or signal station, building, office, or other place connected with the national or state defense owned or constructed or in progress of construction by the United States or any of its officers or agents within this State or by this State or any of its subdivisions or agencies; or (b) place in this State in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored under any contract or agreement with the United States or with a firm on behalf of the United States;

"(2) copy, take, make, or obtain or attempt, induce, or aid another to copy, take, make, or obtain any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national or state defense;

"(3) receive or obtain from a person or from any source whatsoever any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note of anything connected with the national or state defense knowing or having reason to believe, at the time he receives, obtains, agrees, attempts, induces, or aids another to receive or obtain it that it has been or will be obtained, taken, made, or disposed of by a person contrary to the provisions of this chapter.

"(B) It is unlawful for a person to: (1) have possession of, access to, control over, or be entrusted with, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national or state defense and wilfully communicate, transmit, or attempt to communicate or transmit the same to a person not entitled to receive it or wilfully retains the same and fails to deliver it on demand to the officer or employee of the United States or this State, entitled to receive it;

(2) be entrusted with or have lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, or information relating to the national defense or state defense through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust or to be lost, stolen, obstructed, or destroyed.

"(C) A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than ten thousand dollars or imprisoned not more than three years, or both").

A second state, New Mexico, authorizes state courts martial to impose the death penalty for espionage when committed by members of its National Guard, N.MEX. STAT. ANN. §20-12-42.

Many states do have trade secret protection statutes that use the term "espionage," but they more closely resemble the federal trade secrets section, 18 U.S.C. 1832, than the federal economic espionage provisions, 18 U.S.C. 1831, and are otherwise in no way comparable to 18 U.S.C. 794, see e.g., ALA. CODE §§8-27-1 to 8-27-6; ARK. CODE ANN. §§4-75-601 to 4-75-607; CAL. CIVIL §§3426.1 to 3426.9; COLO. REV. STAT. ANN. §§7-74-101 to 7-74-110; FLA. STAT. ANN. §§688.001 to 688.009; GA. CODE §§10-1-760 to 10-1-767; ILL. COMP. STAT. ANN. ch. 765 §1065/1 to 1065/9; LA. REV. STAT. ANN. §§51:1431 to 51:1439; MICH. COMP. LAWS ANN. §§445.1901 to 445.1910; MINN. STAT. ANN. §§325C.01 to 325C.08; MISS. CODE ANN. §§75-26-1 to 75-26-19; MONT. CODE ANN. §§30-14-401 to 30-14-409; NEV. REV. STAT. ANN. §§600A.010 to 600A.100; N.D. CENT. CODE §§47-25.1-01 to 47-25.1-08; ORE. REV. STAT. §§646.461 to 646.475; (continued...)

Nevertheless, treason and espionage differ by nature from murder or rape. Society punishes murder or rape as an offense against an individual whom it is obligated to protect. Society punishes treason or espionage as an offense against all those whom it is obligated to protect. The distinction may be critical.[245]

Drug Kingpin (Continuing Criminal Enterprise)

Murder committed in furtherance of a drug kingpin (continuing criminal enterprise) offense is a capital crime.[246] It is one of the many federal homicide offenses discussed earlier. Certain drug kingpin offenses, however, are capital offenses even though they do not involve a murder. A continuing criminal enterprise is one in which five or more individuals generate substantial income from drug trafficking.[247] The leader of such an enterprise is subject to a mandatory term of life imprisonment, if the enterprise either realizes more than $10 million in gross receipts a year or traffics in more than 300 times of the quantity of controlled substances necessary to trigger the penalties for trafficking in heroin, methamphetamines, or other similarly categorized controlled substances under 21 U.S.C. 841(b)(1)(B).[248]

A drug kingpin violation is a capital offense, if it involves twice the gross receipts or twice the controlled substances distributed necessary to trigger the life sentence,[249] or if it involves the use of attempted murder to obstruct an investigation or prosecution of the offense.[250]

(...continued)

R.I. GEN. LAWS §§6-41-1 to 6-41-11; S.D. CODIFIED LAWS §§37-29-1 to 37-29-11; VT. STAT. ANN. tit. 9 §§4601 to 4609; VA. CODE §§59.1-336 to 59.1-343; WASH. REV. CODE ANN. §§19.108.010 to 19.108.940; W.VA. CODE ANN. §§47-22-1 to 47-22-10.

[242] See e.g., *United States v. Gowadia*, 760 F.3d 989 (9th Cir. 2014); *United States v. Campa*, 529 F.3d 980 (11th Cir. 2008); *United States v. Pollard*, 416 F.3d 48 (D.C.Cir. 2005); *United States v. Pitts*, 176 F.3d 239 (4th Cir. 1999); *United States v. Hoffman*, 995 F.Supp.2d 555 (E.D.Va. 2014); *United States v. Regan*, 228 F.Supp.2d 742 (E.D.Va. 2002); *Ames v. United States*, 155 F.Supp.2d 525 (E.D.Va. 2000); *United States v. Nicholson*, 955 F.Supp.2d 588 (E.D.Va. 1997).

[243] *An Unanswered Question in* Kennedy v. Louisiana: *How Should the Supreme Court Determine the Constitutionality of the Death Penalty for Espionage?* 70 LOUISIANA LAW REVIEW 995, 996 (2010)("If he had been given the death penalty, Regan would have been the first person executed for espionage in the United States since Julius and Ethel Rosenberg were put to death for conspiring to transmit secrets to the former Soviet Union in 1953").

[244] *Id.* at 1013 (citing two pre-*Furman* cases, *United States v. Rosenberg*, 195 F.2d 583, 608 n.34 (2d Cir. 1952) and *United States v. Harper*, 729 F.2d 1216, 1226 (9th Cir. 1984)).

[245] *Id*. at 1020 ("The Eighth Amendment analysis in *Kennedy* is easily applied to capital punishment statutes for espionage. The considerations remain the same, but the analytic factors change with the criminal context. In *Kennedy*, the crime of child rape was compared to murder, and espionage can be compared to treason and terrorism to determine the proportional Eighth Amendment punishment").

[246] 21 U.S.C. 848(e), 18 U.S.C. 3591(a)(2).

[247] 21 U.S.C. 848(c).

[248] 21 U.S.C. 848(b)("Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section, if—(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and (2)(A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or (B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title").

[249] 18 U.S.C. 3591(b)(1). A life sentence may be imposed in cases involving 300 times the following controlled substance quantities: (i) 100 grams or more of a mixture or substance containing a detectable amount of heroin; (ii) 500 grams or more of a mixture or substance containing a detectable amount of—(I) coca leaves, except coca leaves and (continued...)

Aggravating and Mitigating Factors

The drug kingpin capital offense comes with its own aggravating factors, that is, the defendant has previously been convicted of a capital offense, a serious drug trafficking felony, or multiple drug and violent offenses; the offense involved the use of a firearm or a juvenile; the offense involved distribution to a child or near a school; or the offense involved potentially lethal adulterants; or some other aggravating factor.[251] Its mitigating factors are those that come with treason, espionage, or murder.[252]

Constitutional Threshold

The continuing criminal enterprise (drug kingpin) capital punishment provisions differ from "ordinary" crime by degree rather than by nature. Drug trafficking, like treason and espionage, is a federal capital offense that the Supreme Court elected to distinguish in *Kennedy*.[253] Punishment is cruel and unusual when legislatures have rejected it; prosecutors have ignored it; juries have refused to impose it; and the courts have found it incompatible with their precedents.[254] The evidence in support of a capital drug trafficking offense is mixed.

(...continued)

extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; (II) cocaine, its salts, optical and geometric isomers, and salts of isomers; (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III); (iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base; (iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP); (v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD); (vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4- piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N- phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide; (vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or (viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers." The threshold for a capital offense would be 600 times these quantities or gross receipts of $20 million per year.

[250] 18 U.S. 3591(b)(2)("A defendant who has been found guilty of ... (2) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under that section, where the defendant is a principal administrator, organizer, or leader of such an enterprise, and the defendant, in order to obstruct the investigation or prosecution of the enterprise or an offense involved in the enterprise, attempts to kill or knowingly directs, advises, authorizes, or assists another to attempt to kill any public officer, juror, witness, or members of the family or household of such a person, 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").

[251] 18 U.S.C. 3592(d), 3593(d).

[252] 18 U.S.C. 3592(a).

[253] *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008)("Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State").

[254] *Id.* at 421(internal citations omitted)("In these cases the Court has been guided by 'objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions.' The inquiry does not end there, however. Consensus is not dispositive. Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose").

Drug trafficking is a crime in every state,[255] but a capital offense in only one.[256] Yet, Congress established it as the only modern federal capital offense when it revived the death penalty as a sentencing option generally in 1994.[257] There have apparently not been any cases in which the death penalty has been imposed under either the state or federal trafficking statute, but there is little evidence that under compelling circumstances prosecutors would not pursue it, nor juries impose it.[258] The crime sows human misery more deeply and more broadly than perhaps any other crime. Is that enough? The courts have said that death is a disproportionate punishment for the rape of a child, a "simple" murder, or even the most depraved murder by a juvenile. Will they nevertheless say death is not a disproportionate punishment for a drug kingpin offense?

Presenting and Weighing the Factors

The Federal Death Penalty Act establishes the same capital sentencing hearing procedures for all capital offenses—murder, treason, espionage, or murder-less drug kingpin offenses. The hearing is conducted only after the defendant has been found guilty of a death-eligible offense.[259] It is held before a jury, unless the parties agree otherwise.[260] The prosecution and the defense are entitled to offer and rebut relevant evidence in aggravation and mitigation without regard to the normal rules of evidence in criminal proceedings.[261] "The Supreme Court has not expressly

[255] ALA. CODE 13A-12-231 to 13A-12-233; ALASKA STAT. §§11.71.010 to 11.71.050; ARIZ. REV. STAT. ANN. §§13-3405 to 13-3410; ARK. CODE ANN. §5-64-401; CAL. HEALTH & SAFETY CODE §11352; COLO. REV. STAT. ANN. §18-18-405; CONN. GEN. STAT. ANN. §§21a-278, 21a-278A; DEL. CODE ANN. tit.16 §§4751 to 4753A; FLA. STAT. ANN. §§893.13 to 893.135; GA. CODE §16-13-30; HAWAII REV. STAT. §329-42; IDAHO CODE §§37-2732, 37-2732B; ILL. COMP. STAT. ANN. ch. 720 §§570/401, 570/401.1; IND. CODE ANN. §§35-48-4-1 TO 35-48-4-4; IOWA CODE ANN. §§124.401 to 124.401E; KAN. STAT. ANN. §21-5705; KY. REV. STAT. ANN. §§218A.1401 to 218A.1413; LA. REV. STAT. ANN. §§40:966 to 40:969; ME. REV. STAT. ANN. tit.17-A §§1103 to 1106; MD. CRIM. CODE ANN. §§5-602, 5-608; MASS. GEN. LAWS ANN. ch. 94C §§32 to 32E; MICH. COMP. LAWS ANN. §333.7401; MINN. STAT. ANN. §§152.021 to 152.027; MISS. CODE ANN. §§41-29-139 to 41-29-143; MO. ANN. STAT. §§195.222, 195.223; Mont. Code Ann. §45-9-101; NEB. REV. STAT. §28-1347; NEV. REV. STAT. §453.321; N.H. REV. STAT. ANN. §§318-B:2, 318-B:26; N.J. STAT. ANN. §2C:35-5; N.M. STAT. ANN. §30-31-20; N.Y. PENAL LAW §§220.31 to 220.44, 220.77; N.C. GEN. STAT. §§90-95, 90-95.1; N.D. CENT. CODE §19-03.1-23 to 19-03.1-25; OHIO REV. CODE ANN. §2925.03; OKLA. STAT. ANN. tit.63 §§2-401, 2-415; ORE. REV. STAT. §§475.840, 475.890, 475.900; PA. STAT. ANN. tit.35 §780-113; R.I. GEN. LAWS §§21-28-4.01 to 21-28-4.03; S.C. CODE ANN. §44-53-370; S.D. CODIFIED LAWS §§22-42-2 to 22-42-4.1; TENN. CODE ANN. §39-17-417; TEX. HEALTH & SAFETY CODE ANN. §§481.112 to 481.114; UTAH CODE ANN. §58-37-8; VT. STAT. ANN. tit.18 §§4230 to 4234a; VA. CODE §§18.2-248 to 18.2-248.1; WASH. REV. CODE ANN. §69.50.401; W.VA. CODE ANN. §§60A-4-401 to 60A-4-403; WIS. STAT. ANN. §961.41; WYO. STAT. §§35-7-.... to 35 -7-.....

[256] FLA. STAT. ANN. §§921.142, 893.135.

[257] P.L. 103-322, §60002(a)(1994), 18 U.S.C. 3591(b).

[258] The *Criminal Resource Manual* which accompanies the Justice Department's *U.S. Attorneys Manual* lists "18 U.S.C. 3591(b)(1) Non-Homicide Mega-Narcotics Offense" and "18 U.S.C. 3591(b)(2) CCE-Obstruction Attempted Killing" within the class of federal "Capital Eligible" offenses, U.S. Department of Justice, *U.S. Attorneys Manual, Title 9, Criminal Resource Manual*, §71, available at http://www.justice.gov/usam/criminal-resource-manual-71-capital-eligible-statutes-assigned-section.

[259] 18 U.S.C. 3593.

[260] 18 U.S.C. 3593(b).

[261] 18 U.S.C. 3593(c)(" ... Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing of the issues, or misleading the jury ... "); *United States v. Snarr*, 704 F.3d 368, 399 (5th Cir. 2013); *United States v. Jacques*, 684 F.3d 324, 327 (2d Cir. 2012); *United States v. Basham*, 561 F.3d 302, 330-31 (4th Cir. 2009). The courts have rejected the suggestion that this approach is constitutionally untenable, e.g., *United States v. Umana*, 750 F.3d 320, 347 (4th Cir. 2014)(rejecting the contention that the Confrontation Clause precludes admission of hearsay evidence during a capital sentencing hearing); *United States v. Snarr*, 704 F.3d at 399 ("FDPA's relaxed evidentiary standard during a defendant's sentencing proceeding is not unconstitutional"); *United States v. Lee*, 374 F.3d 637, 648-49 (8th Cir. 2004); *United States v. Fell*, 360 F.3d 135, 140-(continued...)

recognized a constitutional right to allocution [allocution is a defendant's unsworn statement to the judge or jury prior to the announcement of sentence]. The circuits that have addressed the question have held that there is no constitutional right to allocution before a jury in a federal capital sentencing hearing."[262]

As noted earlier, there is some question whether the prosecutors' arguments or rebuttal concerning the defendant's lack of remorse constitute a violation of the defendant's right not to testify.[263] Some also question whether prosecutors are free to argue that the death penalty is made more appropriate by a defendant's insistence of his right to a trial.[264]

The prosecution bears the burden of establishing the existence of aggravating factors and the defendant of establishing mitigating factors.[265] The burdens, however, are not even. The prosecution must show proof beyond a reasonable doubt; the defendant a less demanding proof by a preponderance of the evidence.[266] The finding on aggravating circumstances must be unanimous; the finding on mitigating circumstances need only be espoused by a single juror.[267]

(...continued)

46 (2d Cir. 2004).

[262] *United States v. Lawrence*, 735 F.3d 385, 407 (6th Cir. 2013), citing, *United States v. Jackson*, 549 F.3d 963, 980-81 (5th Cir. 2008) and *United States v. Barn*ette, 211 F.3d 803, 820 (4th Cir. 2000). Lawrence argued that the right to offer evidence in mitigation under 18 U.S.C. 3592(c) included the right of the defendant to present the evidence to the jury himself. The court conceded that "although the FDPA does not mention allocution, the probative value of the sound of the defendant's own voice, explaining his conduct and subsequent remorse in his own words, as information relevant to mitigation, can hardly be gainsaid," *United States v. Lawrence*, 735 F.3d at 408. However, it concluded that the trial court had not abused its discretion by denying allocution but affording Lawrence the opportunity to address the jury under oath and subject to cross examination, *id*. "[C]onsidering the extent of Lawrence's mitigation case and contents of his short unsworn statement, the [trial] court could well have concluded that the probative value of the statement was limited and cumulative," *id*.

[263] *United States v. Whitten*, 610 F.3d 168, 198-99 (2d Cir. 2010), citing, *Estelle v. Smith*, 451 U.S. 454, 462-63 (1981)("It is settled that prosecutors may not comment adversely on a defendant's invocation of his Fifth Amendment privilege not to testify.... This protection extends to capital sentencing proceedings"); *United States v. Davis*, 609 F.3d at 685-86 (finding harmless a prosecutor's remark that could have been taken as comment on the defendant's failure to testify); *United States v. Caro*, 597 F.3d 608, 629 (4th Cir. 2010)(finding that in the case before it any error would be harmless, but noted that "our sister circuits are divided over whether the Fifth Amendment prohibits using silence to show lack of remorse inviting a harsher sentence. *Compare United States v. Mikos*, 539 F.3d 706, 718 (7thCir. 2008)(holding that during a capital sentencing a defendant's silence may be considered regarding lack of remorse, *with Lesko v. Lehman*, 925 F.2d 1527, 1544-45 (3d Cir. 1991)(holding that during a capital sentencing a defendant's failure to apologize may not be considered regarding a lack of remorse)").

[264] *United States v. Whitten*, 610 F.3d at 194-95, quoting, *Zant v. Stephens*, 462 U.S. 862, 885 (1983)("if the government invites the jury to find the existence of an aggravating factor based on 'inferences from conduct that is constitutionally protected ... for example ... the request for trial by jury ... due process of law would require that the jury's decision to impose death be set aside").

[265] 18 U.S.C. 3593(c); *United States v. Lawrence*, 735 F.3d 385, 410 (6th Cir. 2013); *United States v. Lighty*, 616 F.3d 321, 343 (4th Cir. 2010); *United States v. Rodriguez*, 581 F.3d 775, 799 (8th Cir. 2009).

[266] *United States v. Lawrence*, 735 F.3d at 410 ("The FDPA requires a higher standard of proof for aggravating factors than mitigating ones. The prosecution must establish the existence of an aggravating factor beyond a reasonable doubt, and the jury must agree unanimously. 18 U.S.C. §3593(c). The defendant need only establish the existence of a mitigating factor by a preponderance of the evidence").

[267] 18 U.S.C. 3593(d)("The jury, or if there is no jury, the court ... shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factor or factors set forth in section 3592 found to exist and any other aggravating factor for which notice has been provided under subsection (a) found to exist. A finding with respect to a mitigating factor may be made by 1 or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such factor established for purposes of this section regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor (continued...)

Capital punishment may only be recommended and imposed, if the jurors all agree that the aggravating factors sufficiently outweigh the mitigating factors to an extent that justifies imposition of the death penalty.[268] If they find the death penalty justified, they must recommend it.[269] If they recommend the death penalty, the court must impose it.[270] If they cannot agree, the defendant must be sentenced to a term of imprisonment, most often to life imprisonment.[271]

Appellate Review

A defendant sentenced to death is entitled to review by the court of appeals.[272] The defendant is entitled to relief if the court determines that (1) the sentence was the product of passion, prejudice, or other arbitrary factor; (2) the finding of at least one statutory aggravating factor cannot be supported by the record; or (3) there exists some other legal error that requires the sentence to be overturned.[273] Convictions and sentences imposed in a capital case are subject to normal appellate and collateral review as well.[274]

Execution of Sentence

Once all opportunities for appeal and collateral review have been exhausted, a defendant sentenced to death is executed pursuant to the laws of the state where the sentence was imposed, or if necessary, pursuant to the laws of a state designated by the court.[275] The United States Marshal has the authority to use state or local facilities and personnel to carry out the

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must be unanimous. If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law").

[268] 18 U.S.C. 3593(e), 3594; see also, *United States v. Gabrion*, 719 F.3d 511, 532 (6th Cir. 2013); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007); *United States v. Mitchell*, 502 F.3d 931, 993-94 (10th Cir. 2008); *United States v. Fields*, 483 F.3d 313, 346 (5th Cir. 2007).

[269] 18 U.S.C. 3593(e); *United States v. Gabrion*, 719 F.3d at 532; *United States v. Montgomery*, 635 F.3d 1074, 1099 (8th Cir. 2011)("We have interpreted the statutory language [of 18 U.S.C. 3593(e)] to mean that once a jury makes a final, unanimous determination that a sentence of death is justified, then the FDPA requires its imposition"); *United States v. Caro*, 597 F.3d 608, 631-33 (4th Cir. 2010).

[270] 18 U.S.C. 3594.

[271] 18 U.S.C. 3593(d). Some federal capital offenses are punishable by death or life imprisonment, e.g., 18 U.S.C. 1201(a)(kidnapping where death results); others by death, life imprisonment or any term of years, e.g., 18 U.S.C. 924(c)(5)(B)(use of armor piercing ammunition during and in relation to a crime of violence or drug trafficking where death results).

[272] 18 U.S.C. 3595(a).

[273] 18 U.S.C. 3595(c)("(1) The court of appeals shall address all substantive and procedural issues raised on the appeal of a sentence of death, and shall consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor and whether the evidence supports the special finding of the existence of an aggravating factor required to be considered under section 3592. (2) Whenever the court of appeals finds that - (A) the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (B) the admissible evidence and information adduced does not support the special finding of the existence of the required aggravating factor; or (C) the proceedings involved any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure, the court shall remand the case for reconsideration under section 3593 or imposition of a sentence other than death. The court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous special finding of an aggravating factor, where the Government establishes beyond a reasonable doubt that the error was harmless").

[274] 28 U.S.C. 1291, 2255.

[275] 18 U.S.C. 3596(a). The implementing regulations call for execution of lethal injection unless the court provides otherwise, 28 C.F.R. §26.3(a)(4).

execution.[276] The regulations permit 6 defense witnesses and 18 public witnesses to attend the execution.[277] Video and audio recording are forbidden.[278]

Federal Crimes Punishable by Death (Citations)

7 U.S.C. 2146 (murder of a federal animal transportation inspector)
8 U.S.C. 1324 (death resulting from smuggling aliens into the U.S.)
15 U.S.C. 1825(a)(2)(C) (killing those enforcing the Horse Protection Act)
18 U.S.C. 32 (death resulting from destruction of aircraft or their facilities)
18 U.S.C. 33 (death resulting from destruction of commercial motor vehicles or their facilities)

18 U.S.C. 36 (murder by drive-by shooting)
18 U.S.C. 37 (death resulting from violence at international airports)
18 U.S.C. 115(a)(1)(A), (b) (murder of a family member of a United States officer, employee or judge with intent to impede or retaliate for performance of federal duties)
18 U.S.C. 115(a)(2), (b) (murder of a former United States officer, employee or judge or any member of their families in retaliation for performance of federal duties)
18 U.S.C. 229, 229A (death resulting from chemical weapons offenses)

18 U.S.C. 241 (death resulting from conspiracy against civil rights)
18 U.S.C. 242 (death resulting from deprivation of civil rights under color of law)
18 U.S.C. 245 (death resulting from deprivation of federally protected activities)
18 U.S.C. 247 (death resulting from obstruction of religious beliefs)
18 U.S.C. 351 (killing a Member of Congress, cabinet officer, or Supreme Court justice)

18 U.S.C. 794 (espionage)
18 U.S.C.844(d) (death resulting from the unlawful transportation of explosives in United States foreign commerce)
18 U.S.C. 844(f) (death resulting from bombing federal property)
18 U.S.C. 844(i) (death resulting from bombing property used in or used in an activity which affects United States foreign commerce)
18 U.S.C. 924(c) (death resulting from carrying or using a firearm during and in relation to a crime of violence or a drug trafficking offense)

18 U.S.C.930(c) (use of a firearm or dangerous weapon a firearm or other dangerous weapon in a federal facility)
18 U.S.C.1091 (genocide when the offender is a United States national)
18 U.S.C. 1111 (1st degree murder within the special maritime and territorial jurisdiction of the U.S.)[applies to offenses committed overseas on U.S. facilities or residences by or against an American, 18 U.S.C. 7(e); to offenses committed overseas by individuals serving in, employed by, or accompanying U.S. Armed Forces, 18 U.S.C. 3261; and to offenses committed within the special aircraft jurisdiction of the U.S., 49 U.S.C. 46506]
18 U.S.C.1114 (murder of a federal officer or employee during the performance of (or on account of) the performance of official duties)

[276] 18 U.S.C. 3597(a).

[277] 28 C.F.R. §26.4(c)("In addition to the Marshal and Warden, the following persons shall be present at the execution (1) Necessary personnel ... ; (2) ... attorneys of the Department of Justice ... ; (3) Not more than the following number of persons selected by the prisoner: (1) One spiritual adviser; (ii) Two defense attorneys; and (iii) three adult friends or relatives; and (4) Not more than the following number of persons selected by the Warden: (i) Eight citizens; and (ii) Ten representatives of the press").

[278] 28 C.F.R. §26.4(f).

18 U.S.C.1116 (murder of an internationally protected person)
18 U.S.C. 1118 (murder by a federal prisoner)
18 U.S.C.1119 (murder of a U.S. national by another outside the U.S.)
18 U.S.C.1120 (murder by a person who has previously escaped from a federal prison)
18 U.S.C.1121(a) (murder of another who is assisting or because of the other's assistance in a federal criminal investigation or killing (because of official status) a state law enforcement officer assisting in a federal criminal investigation)

18 U.S.C.1201 (kidnaping where death results)
18 U.S.C.1203 (hostage taking where death results)
18 U.S.C.1503 (murder to obstruct federal judicial proceedings)
18 U.S.C.1512 (tampering with a federal witness or informant where death results)
18 U.S.C. 1513 (retaliatory murder of a federal witness or informant)

18 U.S.C. 1716 (death resulting from mailing injurious items)
18 U.S.C. 1751 (murder of the President, Vice President, or a senior White House official)
18 U.S.C. 1958 (murder for hire in violation of U.S. law)
18 U.S.C. 1959 (murder in aid of racketeering)
18 U.S.C. 1992 (attacks on mass transit systems engaged in interstate or foreign commerce resulting in death)

18 U.S.C. 2113 (murder committed during the course of a bank robbery)
18 U.S.C. 2119 (death resulting from carjacking)
18 U.S.C.2241, 2245 (aggravated sexual abuse within the special maritime and territorial jurisdiction of the United States where death results)
18 U.S.C.2242, 2245 (sexual abuse within the special maritime and territorial jurisdiction of the United States where death results)
18 U.S.C.2243, 2245 (sexual abuse of a minor or ward within the special maritime and territorial jurisdiction of the United States where death results)

18 U.S.C.2244, 2245 (abusive sexual contact within the special maritime and territorial jurisdiction of the United States where death results)
18 U.S.C. 2251 (murder during the course of sexual exploitation of a child)
18 U.S.C. 2280 (a killing resulting from violence against maritime navigation)
18 U.S.C. 2281 (death resulting from violence against fixed maritime platforms)
18 U.S.C. 2282A (murder using devices or dangerous substances in U.S. waters)

18 U.S.C. 2283 (transportation of explosives, biological, chemical, radioactive or nuclear materials for terrorist purposes on the high seas or aboard a U.S. vessel or in U.S. waters)
18 U.S.C. 2291 (murder in the destruction of vessels or maritime facilities)
18 U.S.C. 2332 (killing an American overseas)
18 U.S.C. 2332a (death resulting from use of weapons of mass destruction)
18 U.S.C. 2322b (multinational terrorism involving murder)

18 U.S.C. 2332f (bombing public places where death results)
18 U.S.C. 2340A (death resulting from torture committed outside the U.S.)
18 U.S.C. 2381 (treason)
18 U.S.C. 2441 (war crimes)
21 U.S.C.461(c) (murder of federal poultry inspectors during or because of official duties)

21 U.S.C.675 (murder of federal meat inspectors during or because of official duties)
21 U.S.C. 848(c), 18 U.S.C. 3592(b) (major drug kingpins and attempted murder by drug kingpins to obstruct justice)
21 U.S.C.848(e)(1) (drug kingpin murders)
21 U.S.C.1041(b) (murder of an egg inspector during or because of official duties)

42 U.S.C.2283 (killing federal nuclear inspectors during or because of official duties)
49 U.S.C. 46502 (air piracy where death results)

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