Anatomy of a Federal Death Penalty Prosecution: A Primer for Prosecutors

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ANATOMY OF A FEDERAL DEATH PENALTY PROSECUTION: A PRIMER FOR PROSECUTORS

DAVID J. NOVAK*

I. INTRODUCTION

The Department of Justice entered the world of death penalty prosecutions with the passage of the Anti-Drug Abuse Act of 1988, which became effective on November 18, 1988. The death penalty provision of this Act authorizes the Department to seek the death penalty for some drug-related murders and murders of law enforcement officers during specified drug offenses. The Department’s ability to seek the death penalty was expanded with the enactment of the Federal Death Penalty Act of 1994, which became effective on September 13, 1994. This statute expressly applies to “any other offense for which a sentence of death is provided.”

With the passage of these two statutes, Congress authorized the Department to seek the death penalty for violations of more than sixty federal offenses. The increased role of the federal government in capital litigation is reflected in the dramatic increase of federal death penalty prosecutions. Since 1990 the Attorney General has reviewed the cases of 382 capital-eligible defendants and authorized prosecutors to seek the death penalty against 125 of these defendants. Of those, twenty have been convicted of capital offenses, have been sentenced to death, and are currently on death row. Twenty-eight defendants were convicted of capital offenses; however, the jury chose not to impose the death penalty. In the cases of forty-three defendants, the notice to seek the death penalty was withdrawn pursuant to a plea agreement. One defendant was convicted of a lesser included offense. For another defendant,

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2. Id. § 7001.
4. Id. § 3591(a)(2).
5. Telephone Interview with Capital Case Unit of the Department of Justice (Dec. 4, 1998).
6. Id. To date, none of these 20 death row prisoners has been executed.
7. Id.
8. Id.
9. Id.
an appellate court ordered that a new penalty phase be held.\textsuperscript{10} Four defendants were acquitted of the capital charges against them.\textsuperscript{11} In the cases of four other defendants, the courts dismissed the notice of intent to seek the death penalty as untimely.\textsuperscript{12} For another defendant, the capital charges were dismissed on double jeopardy grounds.\textsuperscript{13} Two defendants died before the conclusion of their trials.\textsuperscript{14} Finally, as of the writing of this Article, trials are pending for twenty-one additional defendants.\textsuperscript{15}

There can be no question that a death penalty prosecution represents the most serious of all litigation due to the nature and severity of the punishment. As the courts have repeatedly noted, "death is . . . different,"\textsuperscript{16} and the participants in capital litigation must recognize this from the beginning of the prosecution.\textsuperscript{17} This Article seeks to identify the significant differences between a death penalty prosecution and a non-capital federal case and to provide some practical guidance to federal death penalty litigators.

II. CAPITAL-ELIGIBLE OFFENSES AND THE TWO STATUTORY SCHEMES (TITLES 18 AND 21)

An analysis of a death penalty prosecution must begin with the capital-eligible offense, which will dictate the statutory scheme to be used for the penalty phase. While the death penalty provisions of both Titles 18 and 21 envision a guilt phase followed by a penalty phase, and while many aspects of the statutes are the same, significant differences between the two statutes play an important role in the initial charging decision. In general, and as explained below, Title 18 is better written and should be the statute of choice if the prosecutor can charge under either title.

Section 848(e) of Title 21 applies to all drug-related homicides committed

\begin{itemize}
  \item 10. \textit{Id.}
  \item 11. \textit{Id.}
  \item 12. \textit{Id.}
  \item 13. \textit{Id.}
  \item 14. \textit{Id.}
  \item 15. \textit{Id.}
  \item 17. \textit{Id.} at 357-58 (citations omitted).
\end{itemize}

[D]eath is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.
after November 18, 1988. Its death penalty provisions apply to three different offenses:

(1) where the defendant “intentionally kills or counsels, commands, [or] induces . . . the intentional killing” of another while “engaging in or working in furtherance of a continuing criminal enterprise” as defined in § 848(c); 18
(2) where the defendant “intentionally kills or counsels, commands, [or] induces . . . the intentional killing” of another while engaging in a drug offense punishable under 21 U.S.C. § 841(b)(1)(A) or § 960(b)(1) (drug offenses punishable by a ten-year mandatory minimum sentence); 19
(3) where the defendant, “during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony [drug offense] . . . intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of [such] officer’s official duties.” 20

Section 848(h) of Title 21 mandates the Government file a notice within a reasonable time prior to trial or after a plea of guilty which states that, in the event of conviction of the capital-eligible offense, the Government intends to seek a sentence of death. 21 The notice must also set forth the aggravating factors upon which the Government will rely as a basis for imposition of the death penalty. 22 After a conviction for the capital-eligible offense, § 848(i) requires a sentencing hearing, or “penalty phase,” before the jury. 23 During the penalty phase, the Government presents its “information”—as opposed to evidence—in support of the aggravating factors identified in the notice, followed by the defense presentation of its “information” in mitigation. The presentation of this information is controlled by § 848(j) without regard to the Rules of Evidence. 24 Section 848(k) then requires the jury to return a sentencing verdict that includes special findings as to aggravating and mitigating factors. 25 If the jury unanimously concludes that the aggravating factors “sufficiently outweigh any mitigating factor[s],” the jury “shall

19. Id.
20. Id. § 848(e)(1)(B).
21. Id. § 848(h)(1)(A).
22. Id. § 848(h)(1)(B).
23. Id. § 848(i)(1). This section also provides that the penalty phase may occur before the trial court sitting without a jury “upon the motion of the defendant and with the approval of the Government.” Id.
24. Id. § 848(j).
25. Id. § 848(k).
recommend that a sentence of death shall be imposed.\textsuperscript{26} If this standard is not met, the jury must decline to impose a death sentence.

Sections 3591 to 3598 of Title 18 apply to all other capital-eligible offenses committed after September 13, 1994.\textsuperscript{27} Section 3593(a) of Title 18 requires the Government to file a notice informing the defendant of its intention to seek a sentence of death.\textsuperscript{28} The notice must also list the aggravating factors justifying a sentence of death.\textsuperscript{29} After a conviction for the capital-eligible offense, a sentencing hearing then transpires pursuant to § 3593(b).\textsuperscript{30} As with the Title 21 hearing, “information” is introduced by the parties as to aggravating and mitigating factors without regard to the Rules of Evidence.\textsuperscript{31}

Titles 18 and 21 are significantly different as to the jury’s options in rendering a penalty-phase verdict. Section 3593(e) of Title 18 provides that the jury may recommend a sentence of death, life imprisonment, “or some other lesser sentence”\textsuperscript{32} while § 848(k) of Title 21 provides only for a recommendation of death or a non-death sentence.\textsuperscript{33} Additionally, while under both statutes the jury must weigh aggravating and mitigating factors, 18 U.S.C. § 3591 requires the jury to recommend a death sentence if the aggravating

\textsuperscript{26} Id.

\textsuperscript{27} The list of capital-eligible offenses covered by 18 U.S.C. § 3591 includes: 8 U.S.C. § 1324(a) (1994) (alien smuggling resulting in death); 18 U.S.C. §§ 32, 34 (destruction of aircraft resulting in death); id. §§ 33, 34 (destruction of motor vehicles resulting in death); id. § 36(b) (drive-by shooting); id. § 37 (violence at international airport resulting in death); id. § 115 (murder of federal official’s family member); id. §§ 241, 242, 245, 247 (deprivation of civil rights resulting in death); id. § 351(b), (d) (murder of government officials); id. § 794(b) (espionage); id. § 844(d) (use of explosives resulting in death); id. § 924(i) (use of firearm during a violent or drug trafficking crime resulting in death); id. § 930(e) (murder in a federal facility); id. § 1091(b)(1) (genocide); id. § 1111(b) (first-degree murder); id. § 1114 (murder of federal employee); id. § 1116(a) (murder of foreign official or internationally protected person); id. § 1118(a) (murder by federal prisoner); id. § 1119(b) (foreign murder of U.S. national); id. § 1120(b) (murder by escaped federal prisoner); id. § 1121(a) (murder of persons aiding federal investigators or state correctional officers); id. § 1201(a) (kidnapping resulting in death); id. § 1203(a) (hostage taking resulting in death); id. § 1503(b)(1) (murder of court officer or juror); id. § 1512(2)(A) (murder of witness); id. § 1513(2)(A) (retaliation against witness resulting in death); id. § 1716 (mailing injurious article resulting in death); id. § 1751(a) (murder of President and staff); id. § 1958(a) (murder-for-hire); id. § 1959(a)(1) (murder in aid of racketeering); id. § 1992 (wrecking of trains resulting in death); id. § 2113(e) (bank robbery resulting in death); id. § 2119(3) (carjacking resulting in death); id. § 2245 (sexual abuse resulting in death); id. § 2251(d) (sexual exploitation of children resulting in death); id. §§ 2280(a), 2281(a) (maritime violence resulting in death); id. § 2332a(a) (use of weapons of mass destruction); id. § 2340A(a) (torture resulting in death); id. § 2381 (treason); id. § 3591(b) (large-scale continuing criminal enterprise); 49 U.S.C. § 46502 (1994) (aircraft piracy resulting in death).

\textsuperscript{28} 18 U.S.C. § 3593(a).

\textsuperscript{29} Id. § 3593(a)(2).

\textsuperscript{30} Id. § 3593(b).

\textsuperscript{31} Id. § 3593(c).

\textsuperscript{32} Id. § 3593(e)(3) (emphasis added).

factors sufficiently outweigh the mitigating factors.\(^3^4\) In contrast, 21 U.S.C. § 848(k) requires the court to instruct the jury that, regardless of its findings with respect to aggravating and mitigating factors, it is never obligated to impose a death sentence.\(^3^5\) Given these differences, a prosecutor with the ability to charge under either title should elect to proceed under 18 U.S.C. §§ 3591 to 3593.

That charging option is available in almost any case where a defendant commits a drug-related murder after September 13, 1994. In such a case, the prosecutor could charge the defendant with violating 21 U.S.C. § 848(e) and then necessarily employ the penalty phase procedures of that statute. Alternatively, the prosecutor could charge the defendant under 18 U.S.C. § 924(j)\(^3^6\) or, possibly, 18 U.S.C. § 1959,\(^3^7\) and employ that Title’s penalty phase procedures of §§ 3591 to 3593. Given the choice, most prosecutors will choose the Title 18 offenses in order to use the better written capital sentencing framework.

### III. APPOINTMENT OF COUNSEL

An indigent capital defendant is entitled under 18 U.S.C. § 3005 to the appointment of two attorneys, at least one of whom “shall be learned in the law applicable to capital cases.”\(^3^8\) Section 848(q)(5) of Title 21 mandates that at least one of the attorneys be “admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.”\(^3^9\) Additionally, the district court may, for good cause, “appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the

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34. 18 U.S.C. § 3591(a)-(b) ("A defendant who has been found guilty . . . shall be sentenced to death if . . . it is determined that imposition of a sentence of death is justified . . .") (emphasis added).

35. 21 U.S.C. § 848(k).

36. This section provides in relevant parts: “A person who, in the course of a violation of subsection (e) [drug trafficking crime], causes the death of a person through the use of a firearm, shall—(1) if the killing is a murder (as defined by section 1111), be punished by death or by imprisonment for any term of years or for life . . . .” 18 U.S.C. § 924(j).

37. This section provides in relevant parts:

Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders . . . shall be punished—(1) for murder, by death or life imprisonment . . . .

Id. § 1959(a).

38. Id. § 3005.

seriousness of the possible penalty and to the unique and complex nature of the litigation.\textsuperscript{40} The defendant’s attorneys may also seek the appointment of investigators and other experts as needed to represent the defendant properly.\textsuperscript{41}

In selecting the defendant’s attorneys, the district court is required under 18 U.S.C. § 3005 to consult with the local Federal Public Defender.\textsuperscript{42} If there is no Federal Public Defender in the district, the court should consult with the Administrative Office of the United States Courts which, in turn, regularly consults with the Federal Death Penalty Resource Counsel Project.\textsuperscript{43} This Project consists of three attorneys who work on a part-time basis to provide support to attorneys appointed to defend capital cases.

IV. DEPARTMENT OF JUSTICE PROTOCOL

Even after a defendant has been charged with a capital-eligible offense and the court has appointed his two attorneys, the prosecution does not formally constitute a death penalty prosecution until the Government files its Notice of Intent to Seek a Sentence of Death as required by 18 U.S.C. § 3593(a)\textsuperscript{44} and 21 U.S.C. § 848(h).\textsuperscript{45} The Department of Justice prohibits the filing of such a notice without the prior written authorization of the Attorney General.\textsuperscript{46}

In order to ensure that the death penalty is sought in a fair and consistent manner, free from ethnic, racial, or other invidious discrimination, the Department of Justice established a “Death Penalty Protocol,” which became effective on January 27, 1995.\textsuperscript{47} The purpose of this Protocol is to review all potential capital cases prior to the decision of the Attorney General.\textsuperscript{48} Although more cynical defense attorneys may view the Protocol as a “rubber-stamp” for the decision of the United States Attorney, the Protocol actually imposes several layers of review and analysis within the Department of Justice that may provide important opportunities for defense counsel to avoid the filing of the notice.

The Protocol initially requires the submission of a “Death Penalty Evaluation Form” and prosecution memorandum by the United States Attorney to the Department of Justice.\textsuperscript{49} The submission requires a detailed discussion of the theory of liability, evidence relating to the criminal offense as well as any aggravating or mitigating factors, the defendant’s background and criminal

\textsuperscript{40} Id. § 848(q)(7).
\textsuperscript{41} Id. § 848(q)(9) (1994 & Supp. III 1997).
\textsuperscript{42} 18 U.S.C. § 3005.
\textsuperscript{43} Id.
\textsuperscript{44} Id. § 3593(a).
\textsuperscript{45} 21 U.S.C. § 848(h).
\textsuperscript{47} Id. § 9-10.010.
\textsuperscript{48} Id. §§ 9-10.040 to -10.050.
\textsuperscript{49} Id. § 9-10.040.
history, and the basis for a federal prosecution.\textsuperscript{50} The submission should occur prior to indictment or soon thereafter to ensure a sufficient opportunity for timely review.\textsuperscript{51}

In preparing his case and drafting the submission, the prosecutor must remember the central axiom of a death penalty prosecution: while the defendant’s culpability in the offense will be at issue in the guilty phase, his entire life will be at issue in the penalty phase. Consequently, the investigation must not focus solely upon the defendant’s role in the offense. At least one investigator should be dedicated to gathering all information about the defendant’s life, school records, medical records, mental health records, offense reports for previous arrests, jail records from previous confinements, probation and parole files, and employment records. The prosecutor should be able to describe the defendant’s entire life in minute detail in the submission.

The importance of gathering this information cannot be overstated. For example, while gathering the school records, an investigator might learn that the defendant was given multiple intelligence examinations that indicated mental retardation. Section 3596 of Title 18 and 21 U.S.C. § 848(l) both provide that: “A sentence of death shall not be carried out upon a person who is mentally retarded.”\textsuperscript{52} Therefore, the death penalty could not be imposed on the defendant. The reverse is also true. By the time of the penalty phase, the defendant’s attorneys will likely try to prove that the defendant either is mentally retarded or suffers from some type of mental impairment, which would be a mitigating factor.\textsuperscript{53} The defense attorneys’ evidence will include results of mental health examinations given after the defendant knows that he is subject to the death penalty. The defendant has a powerful motive to malinger during these examinations, which skews their accuracy. On the other hand, examinations given in earlier circumstances, where the defendant has no such motive, are more reliable and can be used to rebut claims of mental illness that have a tendency to appear only when the defendant faces the death penalty.

In addition to gathering documentary evidence, the penalty phase investigator should also interview as many people connected to the defendant as possible. This is particularly true if the defendant is in custody on other offenses, and there is little chance of jeopardizing the investigation. The investigator should interview the defendant’s family members, especially his mother, to trace his educational, medical, and mental health histories. All of these persons will be penalty phase witnesses, usually called by the defense, and the earlier in the proceedings that they are interviewed, the more candid they are likely to be. The investigator should also interview witnesses from previous cases, including victims of the defendant’s earlier criminal activities, because these persons will be witnesses necessary to proving aggravating

\textsuperscript{50} Id.
\textsuperscript{51} Id.
factors during the penalty phases. Experience has proven that witnesses are often developed during a penalty phase investigation who can also contribute to the guilt phase.

All of this information must be inserted into the submission to the Department of Justice to ensure that the United States Attorney and the Attorney General have all available facts regarding the defendant prior to making the death penalty decision. While the prosecutor's memorandum is protected work product, the investigators should prepare a defense copy of penalty phase records pertaining to the defendant's background (e.g., school records, criminal history, probation files) for immediate discovery after the defendant's arrest. Early production of all documents prepared about the defendant's background—excluding information about protected witnesses—will provide defense attorneys with a meaningful chance to exploit their opportunity under the Protocol to make a submission, either in writing, orally, or both, to the Department of Justice as part of the authorization process. 54

The prosecutor must also demonstrate to the Department of Justice that there is a substantial federal interest in the capital case. 55 The Department begins with the premise that homicides are local in nature and traditionally subject to prosecution in the state system. The United States Attorneys' Manual instructs that a federal indictment for a capital-eligible offense "will be obtained only when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities." 56 The Manual points to three factors that should be considered when making this assessment:

(A) "The relative strength of the state's interest in prosecution;"

(B) "[t]he extent to which the criminal activity reached beyond the local jurisdiction;" and

(C) "[t]he relative ability and willingness of the State to prosecute effectively." 57

Additionally, the Manual provides: "In states where the imposition of the death penalty is not authorized by law, the fact that the maximum Federal penalty is death is insufficient, standing alone, to show a more substantial interest in Federal prosecution." 58

Timing must also be considered while this process goes forward.

54. See U.S. DEP'T OF JUSTICE, supra note 46, § 9-10.050. While this Article recommends that this information be furnished to the defendant's attorneys to aid in their submission to the Department, it is also clear that the defendant has no additional discovery rights with respect to this administrative process. See United States v. Frank, 8 F. Supp. 2d 253, 284 (S.D.N.Y. 1998); United States v. McVeigh, 944 F. Supp. 1478, 1483 (D. Colo. 1996); United States v. Boyd, 931 F. Supp. 968, 973 (D.R.I. 1996); United States v. Roman, 931 F. Supp. 960, 962-64 (D.R.I. 1996).


56. Id.

57. Id.

58. Id.
Obviously, while these submissions are being made to the Department of Justice, the Speedy Trial Act\(^5\) clock continues to tick and judicial pressure normally exists to set a trial date. At the time of arraignment, the prosecutor should request the district court to certify the case as “complex” in order to schedule a trial date beyond the normal seventy days provided in the Speedy Trial Act.\(^6\) The district court should then inquire as to whether the defendant wishes to make a submission to the Department of Justice as provided in the Protocol. The answer in virtually every case will be “yes” because every defense attorney should explore all possible avenues to prevent his client from facing the death penalty. If so the court should then order the defendant’s attorneys to make their submission to the Department within thirty days. The court should schedule the case for a status hearing sixty days from the date of arraignment and order the Government to notify the court and the defendant prior to the status hearing whether the Government will seek a sentence of death. If the Government files a notice of its intention to seek the death penalty, the court should set the case for trial approximately four to six months from the date of the status conference.\(^6\) If the Government does not file such a notice, the court should schedule the case as it does any other non-capital case. This procedure allows the case to move forward while also allowing the Attorney General to review the submissions of the prosecutor and the defense attorneys prior to making her decision on the death penalty.\(^6\)

V. THE NOTICE OF INTENT TO SEEK A SENTENCE OF DEATH

If the Attorney General authorizes the Government to seek a sentence of death, the case formally becomes a capital case with the filing of the Notice of Intent to Seek the Death Penalty (“Notice”). The Notice is without question the most important filing of the death penalty process and must be treated as such. Both 18 U.S.C. § 3593(a) and 21 U.S.C. § 848(h) require the Government to set forth in the Notice the aggravating factors on which it will rely during the sentencing phase as a basis for imposition of a death sentence.\(^6\) Consequently, the Notice sets forth the parameters for the Government’s proof during the penalty phase.


\(^6\) While defense attorneys often request one year to prepare to defend a death prosecution, the recommended four to six months time period affords the defense more than ample time to prepare for trial.

\(^6\) It should be noted that at least one court has stricken the Government’s Notice as being untimely and ordered the case to go forward as a non-capital prosecution. See United States v. Rosado-Rosario, No. 97-049(JAF), 1998 WL 28273, at *4 (D.P.R. Jan. 15, 1998).

\(^6\) 18 U.S.C. § 3593(a); 21 U.S.C. § 848(h)(1)(B) (1994). These sections both provide that, upon a showing of good cause, the court may allow the attorney for the Government to amend this notice. 18 U.S.C. § 3593(a); 21 U.S.C. § 848(h)(2).
Although the principal purpose of the Notice is to apprise the defendant of the aggravating factors, the Notice also ensures compliance with the Eighth Amendment. The Supreme Court has consistently stated that capital punishment offends the Eighth Amendment when it is imposed in an arbitrary and capricious manner. To satisfy the Eighth Amendment, the capital-sentencing scheme must narrow the eligible class of murderers by controlling the discretion of the sentencer with clear and objective standards. The sentencing scheme must also ensure individualized sentencing, with a sentencing decision "based on the facts and circumstances of the defendant, his background, and his crime." As a result, there are two distinct aspects of the capital sentencing process, the eligibility phase and the selection phase. "In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant."

By identifying the aggravating factors—both statutory and non-statutory—the Notice "'channel[s] the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" The aggravating factors "enable the sentencer to distinguish those who deserve capital punishment from those who do not." The district court in United States v. Johnson described the different roles for statutory and non-statutory factors in the capital sentencing process as follows: "In reality, statutory factors narrow the class of defendants eligible for the death penalty, whereas non-statutory factors serve the separate 'individualizing' function that ensures the 'jury [has] before it all possible relevant information about the individual defendant whose fate it must determine.'" Consequently, by setting forth the aggravating factors—both statutory and non-statutory—in the Notice, there can be no question that the federal capital sentencing process survives Eighth Amendment scrutiny.

69. Arave, 507 U.S. at 474.
VI. STATUTORY AGGRAVATING FACTORS

Section 848(n)(1) of Title 21 requires the jury to first find one of the "gateway" mens rea aggravating factors before proceeding with its deliberations. This section requires the jury to find that the defendant:

(A) intentionally killed the victim;
(B) intentionally inflicted serious bodily injury which resulted in the death of the victim;
(C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim;
(D) intentionally engaged in conduct which—
   (i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and,
   (ii) resulted in the death of the victim.\textsuperscript{72}

These factors begin the narrowing of the eligible class of murderers by requiring a threshold mens rea that passes the constitutional requirements of \textit{Tison v. Arizona} \textsuperscript{73} and \textit{Enmund v. Florida}.\textsuperscript{74} If the jury cannot find that one of these factors exists, the deliberations must end, and the jury may not impose a sentence of death. If the jury finds that one factor does exist, it must then go to the other alleged statutory aggravating factors.

In reviewing these gateway factors, the jury may find that only one of the four mens rea factors exists.\textsuperscript{75} The Notice should plead all possible mens rea factors, but the jury must be instructed that they can only find one such factor, and, if they do, they should continue in their deliberations without further

\textsuperscript{72} 21 U.S.C. § 848(n)(1) (1994). Section 3591(a)(2) of Title 18 also requires the jury to make threshold mens rea findings; however, unlike 21 U.S.C. § 848(n)(1), they are merely "gateway eligibility findings" not subject to weighing as an aggravating factor. See 18 U.S.C. § 3591(a)(2) (1994); United States v. Beckford, 968 F. Supp. 1080, 1086 (E.D. Va. 1997); see also United States v. Webster, 162 F.3d 308, 323 (5th Cir. 1998) (discussing the instruction to the jury regarding aggravating factors); Johnson, 1997 WL 534163, at *2 (discussing the defendant's challenge of two statutory aggravating factors); United States v. Nguyen, 928 F. Supp. 1525, 1538-41 (D. Kan. 1996) (explaining the various non-statutory aggravating factors), aff'd, 155 F.3d 121 (10th Cir. 1998), petition for cert. filed, ___ U.S.L.W.. ___ (U.S. Jan. 11, 1999 (No. 98-7669). Unlike Title 21, the jury may determine that more than one of the threshold mens rea findings exist.

\textsuperscript{73} 481 U.S. 137 (1987).

\textsuperscript{74} 458 U.S. 782 (1982); see also United States v. Flores, 63 F.3d 1342, 1370 (5th Cir. 1995) (noting that narrowing factors were pulled from \textit{Tison} and \textit{Enmund}).

\textsuperscript{75} United States v. Tipton, 90 F.3d 861, 899 (4th Cir. 1996); United States v. McCullah, 76 F.3d 1087, 1111-12 (10th Cir. 1996); Beckford, 968 F. Supp. at 1084. \textit{But cf. Flores}, 63 F.3d at 1372 (death sentence was not made invalid by fact that it was based on two aggravating factors for homicide that did not describe identical conduct).
consideration of any other mens rea factor. Further, the Special Verdict Form must also make this instruction clear by directing the jury to consider the first alleged mens rea and, if they find it to exist, then move forward in their deliberations without addressing the other possible mens rea factors.°

If the jury finds that one of the mens rea factors exists, it must further find at least one other statutory aggravating factor exists. For the Title 18 scheme, these statutory aggravating factors are found in 18 U.S.C. § 3592(b), (c) or (d), depending on the capital-eligible offense.° For Title 21, these statutory factors are found in 21 U.S.C. § 848(n)(2)-(12). These factors serve to narrow further the eligible class of defendants by identifying general aggravating factors that have historically served as a basis for imposition of a death sentence.° If the jury finds that at least one of these statutory aggravating factors exists, the defendant is eligible for the death penalty. However, before reaching its verdict, the jury may find that more than one of these aggravating factors exists and must weigh any of the found aggravating factors, along with any found non-statutory aggravating factors, against any mitigating factors.

VII. NON-STATUTORY AGgravATING FACTORS

In addition to the statutory aggravating factors, Congress has provided that the Government may identify other non-statutory aggravating factors, particularly tailored for the defendant, as a basis for a death sentence.° In doing so Congress recognized that it could not envision every conceivable aggravating factor that could possibly serve as a reason to include a defendant in that narrow class of persons on whom the death penalty should be imposed. The non-statutory aggravating factors serve to individualize the sentencing determination. The use of non-statutory aggravating factors by the Government in the selection process should be encouraged because it serves the need for individualized sentencing by providing the sentencer with all available information about the individual defendant.°

The most common non-statutory aggravating factor alleged is future dangerousness—the defendant continues to represent a threat to society whether confined in a correctional institution or eventually released back into society. The courts have consistently upheld the use of future dangerousness

76. See Johnson, 1997 WL 534163, at *4; Beckford, 968 F. Supp. at 1089.
77. 18 U.S.C. § 3592(b), (c), (d).
as a non-statutory aggravating factor. Future dangerousness may be established with evidence of specific threats of violence, a continuing pattern of violence, the use of firearms, low rehabilitative potential, lack of remorse, misconduct while in custody, and the defendant’s mental condition.

In proving future dangerousness or any other aggravating factor, the Government may present unadjudicated criminal conduct committed by the defendant. However, because there has been no adjudication as to this conduct, the courts have imposed a heightened reliability requirement on this evidence. If admitted, this type of evidence can be decisive in establishing the dangerousness of the defendant. For example, in United States v. Bradley the Government, “upon a showing of reliability,” was permitted to introduce evidence of two additional uncharged murders that the defendant committed. Clearly, a jury is more likely to impose the death penalty on a multiple murderer.

VIII. ATTACKS UPON THE NOTICE

The defense commonly argues that certain aggravating factors are impermissibly duplicative and that others are vague. There is no question that duplicative factors are unconstitutional because “[s]uch double counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and, thus, unconstitutionally.” The court in United States v. Pitera noted that the defendant’s “real complaint” was that “a duplicative factor unfairly tips the sentencing balance by permitting the [G]overnment to argue something in aggravation that really adds nothing new to the crime of conviction.” The Kaczynski court stated that “[i]n order to be impermissibly duplicative, the two factors must entirely replicate each other and not just overlap in some respect. Even if one factor is relevant to another and involves

86. 880 F. Supp. 271.
87. Id. at 287.
88. United States v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996).
90. Id. at 557.
either a common method of proof or some of the same evidentiary support, the factors are not impermissibly duplicative." The issue, of course, frequently becomes whether the individual aggravating factors are duplicative under this standard.

Defendants commonly allege that an aggravating factor duplicates an element of the capital-eligible offense and, therefore, is unconstitutional. The Supreme Court rejected this precise argument in *Lowenfield v. Phelps* and held that the narrowing function of an aggravating factor may occur during the guilt phase and then be adopted at the penalty phase without offending the Eighth Amendment. Another frequent attack alleges that future dangerousness duplicates other aggravating factors alleging lack of remorse or low rehabilitative ability. The courts have split when addressing this issue.

Defendants also commonly allege that aggravating factors cited in the Notice are vague. The Supreme Court discussed the dangers of a vague aggravating factor in *Stringer v. Black*.

A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in *Zant* that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

93. *Id.* at 246.
96. *Id.* at 235-36.
To avoid a vagueness challenge, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." 97 Additionally, the Fifth Circuit stated that "an aggravating factor will be upheld [against a vagueness challenge] as long as it has some "common-sense core meaning . . . that criminal juries should be capable of understanding." 98 The aggravating factor must channel the jury’s discretion by "clear and objective standards" that provide "specific and detailed guidance." 99 In reviewing vagueness challenges to the Notice, "it must be recognized that the notices will be given to a jury with additional instructions to assist in further narrowing and defining the terms used and the concepts communicated." 100 Vagueness challenges have been denied against aggravating factors alleging future dangerousness; lack of remorse; substantial planning and premeditation; heinous, cruel, and depraved manner; pecuniary gain; and grave risk of death to others. 101

IX. DISCOVERY

A death penalty prosecution presents unique issues for discovery. First, Brady v. Maryland 102 imposes discovery requirements regarding aggravating and mitigating factors. Second, the Government must pursue discovery as to mental health evidence that the defendant may seek to introduce in mitigation. Third, the defendant has a statutory right to a witness list, unlike non-capital cases. Each of these issues presents challenges that do not present themselves in non-capital cases. There is no question that the mandates of Brady apply to the penalty phase of a capital prosecution. 103 The question becomes: what is Brady material in this context?

"Evidence relevant to a statutory mitigating factor would certainly be, for the defendant, ‘favorable’ evidence pertaining to punishment in that it may justify a sentence of life imprisonment as opposed to death." In order to be entitled to discovery of this information, "defendants need only establish a ‘substantial basis for claiming’ that a mitigating factor will apply at the penalty phase, in order to invoke the Government’s obligation under Brady and its progeny to produce any evidence which is material to that mitigating factor."  

For example, the Government must produce any evidence that indicates that the defendant expressed remorse for having killed the victim, acted under duress, or suffered from mental health illness or defects. However, the Government need not turn over the "opinions of interested persons concerning whether the defendant should . . . or would receive the death penalty."  

Greater Brady issues exist in drug conspiracy cases involving multiple murders by an organization where the victims are also drug dealers. For example, in United States v. Beckford the defendants were members of a violent drug organization known as the "Poison Clan." Members of the organization, other than the capital-eligible defendants, committed murders while members of the drug conspiracy. The capital-eligible defendants sought production of all evidence that would support the mitigating factor cited in 21 U.S.C. § 848(m)(8) which states: "Another defendant or defendants, equally culpable in the crime, will not be punished by death." Although finding that this mitigating factor applied only to the capital-eligible offenses at issue in the trial, the court in Beckford required the Government to produce under 21 U.S.C. § 848(j) all evidence pertaining to any member of the Poison Clan who committed a homicide in furtherance of the conspiracy and was not facing the death penalty.

106. Id. at *4.
108. Id. at 808.
109. Id. at 808-10.
111. 21 U.S.C. § 848(j) allows the defendant to present any other information that may be relevant to mitigation.
112. Beckford, 962 F. Supp. at 825-26; see also United States v. Feliciano, 998 F. Supp. 166, 172 (D. Conn. 1998) (stating that § 3593 of Title 18 provides for "any matter relevant to the sentence" to be considered at the sentencing hearing).
The defendants in \textit{Beckford} also sought all evidence that the victims (who were drug dealers) were engaged in drug trafficking based upon a \textit{Brady} request as to the mitigating factor provided in 21 U.S.C. § 848(m)(9) which states that: "The victim consented to the criminal conduct that resulted in the victim’s death."\textsuperscript{113} The defendants argued that, by willingly engaging in drug trafficking, the victims consented to the activity that led to their deaths and, therefore, the jury could possibly find this mitigating factor. The court rejected this argument determining that drug trafficking did not amount to consent and required the Government to produce only evidence that the victims consented to the actual violence that caused their deaths.\textsuperscript{114}

\textit{Brady} also requires production of any evidence that tends to negate any aggravating factor, whether statutory or non-statutory. For example, if the Government identifies the impact of the victim’s loss to society as a non-statutory aggravating factor, the Government may have to produce negative evidence about the victim such as his criminal record. This must be considered when drafting the Notice.

While fulfilling its discovery obligations, the Government must also be vigilant in seeking discovery from the defense as to the penalty phase. This is particularly true for mental health evidence that the defense may present in mitigation. Commonly, defense attorneys have experts examine the defendant and testify to their conclusions as to mental defects or illnesses. The defense offers this evidence in mitigation and to rebut the aggravating factor of future dangerousness. In order to combat this testimony, the Government must also have an opportunity to examine the defendant. Although no statutory right to Governmental testing exists, several courts have balanced the Government’s need for testing against the defendant’s Fifth Amendment privilege against self-incrimination and ruled that the Government has the right to administer mental health tests to the defendant prior to trial.\textsuperscript{115} The three district courts addressing this situation all ordered that the results of the examinations conducted by the Government’s expert be filed with the court under seal and not shared with the Government’s attorneys until after a conviction on the capital offense. At that point the results of the examination were to be unsealed only if the defendant filed a notice indicating his intention to rely upon mental health evidence during the penalty phase. These protections further safeguard the defendant’s

\textsuperscript{113} 21 U.S.C. § 848(m)(9); \textit{Beckford}, 962 F. Supp. at 816-24.

\textsuperscript{114} \textit{Beckford}, 962 F. Supp. at 822-24; \textit{see also Feliciano}, 998 F. Supp. at 171-72 (discussing the “victim consent” mitigating factor).

\textsuperscript{115} United States v. Webster, 162 F.3d 308, 338-40 (5th Cir. 1998) (ruuling that a district court has the inherent powers to compel a defendant to submit to a mental health examination so that the Government can rebut the defendant’s claims); United States v. Hall, 152 F.3d 381, 399-400 (5th Cir. 1998); \textit{Beckford}, 962 F. Supp. at 764; United States v. Havworth, 942 F. Supp. 1406, 1408-09 (D.N.M. 1996); United States v. Vest, 905 F. Supp. 651, 653 (W.D. Mo. 1995).
Fifth Amendment rights while also allowing governmental testing to occur.\footnote{116}  
Finally, unlike non-capital cases, the Government has a statutory responsibility to provide the defendant with a list of witnesses and veniremen at least three days prior to trial. Section 3432 of Title 18 provides:

A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness, except that such list of the veniremen and witnesses need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person.\footnote{117}

Although the district courts have differed on whether the Government must produce the witness list earlier than the minimum three days identified in the statute,\footnote{118} all courts agree that three days is the mandatory minimum in every case.

X. SEVERANCE

While severance motions are commonly filed in multiple-defendant cases, such motions are more common in capital cases and raise additional issues. A severance motion must initially be viewed against the well-established principle that defendants who are charged together should be tried together for the sake of judicial economy and to avoid "the scandal and inequity of inconsistent verdicts."\footnote{119} Initially, non-capital defendants will seek severance from their capital co-defendants in order to avoid a "death qualified" jury. The Supreme Court in \textit{Buchanan v. Kentucky}\footnote{120} rejected this argument as a basis for severance and held that a non-capital defendant's request for severance or separate juries in a joint murder trial with his capital co-defendant was
foreclosed by its previous analysis in *Lockhart v. McCree*. The Court in *Buchanan* explained that the state’s legitimate interest in having a single jury decide all issues in a joint capital trial promoted the reliability and consistency of the judicial process and was more compelling than the defendant’s concern about the “possible effect” upon him. The Court reasoned:

In joint trials, the jury obtains a more complete view of all the acts underlying the charges than would be possible in separate trials. From such a perspective, it may be able to arrive more reliably at its conclusions regarding the guilt or innocence of a particular defendant and to assign fairly the respective responsibilities of each defendant in the sentencing.

Next, if there are multiple capital-eligible defendants, each may seek separate penalty phases by alleging that they cannot receive individualized sentencing unless they have separate sentencing hearings. The Fourth Circuit rejected this argument in *United States v. Tipton* and stated:

Because the relevant statutory provision, § 848(i)(1)(A), requires that, except in situations not present here, the penalty hearing shall be conducted before the same jury that determined guilt, severance here would have required three separate, largely repetitive penalty hearings before this jury. The same considerations of efficiency and fairness to the Government (and possibly the accused as well) that militate in favor of joint trials of jointly-charged defendants in the guilt phase must remain generally in play at the penalty phase. The district court was therefore entitled to weigh those considerations in the balance.

More important of course than any consideration of inconvenience or possible unfairness to the Government from sequential separate trials are the possibilities of unfairness to the accused persons from a joint penalty-phase

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124. 90 F.3d 861 (4th Cir. 1996).
trial—specifically the threat posed to individualized consideration of their situations, and in particular the quite different mitigating factors relevant to each. While such a potential risk was certainly present here, as it will be in any case involving multiple defendants, it could not of course have been entirely removed by conducting three sequential, largely repetitive hearings before the same jury. More critically, we are satisfied that the court’s frequent instructions on the need to give each defendant’s case individualized consideration sufficed to reduce the risk to acceptable levels.125

Consequently, the fact that some of the defendants are facing the death penalty does not provide a sufficient reason for severance.

XI. **VOIR DIRE**

The object of jury selection in a capital case is the same as for any other case—ensuring “a fair trial by a panel of impartial, ‘indifferent’ jurors.”126 “[T]he quest is for jurors who will conscientiously apply the law and find the facts.”127 To attain this objective in a capital case, however, it is necessary to go beyond the standard series of questions and inquire into the thoughts and beliefs of the veniremen regarding the death penalty because capital punishment touches the deeply held beliefs of many citizens. A juror’s personal, moral, or religious beliefs for or against the death penalty may be so strong that the juror would not be able to follow impartially the law at either the guilt or penalty phase of a trial.

Thus, the Supreme Court has held that voir dire must explore these beliefs in capital cases. In *Witherspoon v. Illinois*128 the Supreme Court held that potential jurors may not be excused for cause “simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.”129 Such individuals “may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.”130 However, at some point a juror’s beliefs about the death penalty may so cloud that person’s ability to render an impartial verdict that the person must be disqualified from service.

On several occasions the Supreme Court has visited the appropriate

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125. *Id.* at 892 (citations omitted).
129. *Id.* at 522 (footnote omitted).
standard for disqualification of jurors for their beliefs in the death penalty. In *Witherspoon* the Court, in *dicta*, suggested that a venireman could be removed for cause only if that venireman had "made unmistakably clear . . . that [he] would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case."\(^{131}\) The Court revisited the issue in *Wainwright*,\(^{132}\) substantially modifying its prior position by ruling that a juror may be disqualified if his "views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"\(^{133}\) "A prospective juror is substantially impaired in his ability to perform his duties in accordance with his instructions and oath if he 'will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.'"\(^{134}\)

Accordingly, the court must question each venireman to determine her views on the death penalty and must excuse for cause anyone whose views would prevent or substantially impair her ability to render a fair verdict at either the guilt or the penalty phase of the trial. In determining whether a venireman is "death qualified," the court need not find that the potential juror's bias is certain. The Supreme Court has explained that the "standard . . . does not require that a juror's bias be proved with 'unmistakable clarity.' This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism."\(^{135}\) It is sufficient if "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law."\(^{136}\)

Thus, courts have held that jurors may properly be excused for cause where they provide equivocal responses to questions about whether they could apply the death penalty.\(^{137}\) Jurors are also properly excluded where they indicate that they could impose the death penalty only in an extremely limited set of circumstances.\(^{138}\) For example, in *United States v. Webster*,\(^{139}\) the Fifth Circuit

\(^{131}\) *Witherspoon*, 391 U.S. at 522 n.21.
\(^{132}\) *Wainwright*, 469 U.S. at 412.
\(^{133}\) Id. at 424 (footnote omitted) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).
\(^{135}\) *Wainwright*, 469 U.S. at 424.
\(^{136}\) Id. at 426.
\(^{137}\) Id. at 416 (potential juror who responded, "I am afraid it would," to the question "Would [personal belief against death penalty] interfere with you sitting as a juror in this case?," was properly disqualified); Pickens v. Lockhart, 4 F.3d 1446, 1452 (8th Cir. 1993) (striking a person for cause because her "continuous response of "if I had to" indicated a person that might not be able to consider the death penalty even if the evidence justified it")) (quoting Pickens v. State, 783 S.W.2d 341, 345 (Ark. 1990)); O'Bryan v. Estelle, 714 F.2d 365, 379 (5th Cir. 1983) (juror properly excluded where he was uncertain whether he could impose a death penalty).
\(^{138}\) United States v. Flores, 63 F.3d 1342, 1355 (5th Cir. 1995) (excluding veniremen who would impose death penalty only if the defendant had abused and murdered a very small child).
\(^{139}\) 162 F.3d 308 (5th Cir. 1998).
upheld the district court’s decision to strike a prospective juror where the “presence of the alternative of a life sentence without parole raised serious questions about her ability to follow the law.” 140

In Morgan v. Illinois 141 the Supreme Court considered the “reverse-Witherspoon” situation—when a juror would automatically vote for death, regardless of the facts of the case. 142 The Court held that “[a]ny juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider the mitigating evidence and to decide if it is sufficient to preclude imposition of the death penalty.” 143 The court, therefore, must also question each venireman to determine whether a strong belief in favor of the death penalty would prevent or substantially impair that person’s ability to render a fair verdict at either the guilt or the penalty phase. A venireman who could not satisfy this standard would also be disqualified in a capital case. The Supreme Court has recognized, however, that there are not likely to be as many successful challenges on reverse-Witherspoon grounds as there are under Witherspoon. “Despite the hypothetical existence of the juror who believes literally in the Biblical admonition ‘an eye for an eye,’ it is undeniable, . . . that such jurors will be few indeed as compared with those excluded because of scruples against capital punishment.” 144 A prospective juror must also be prepared to consider evidence in mitigation that a defendant may present prior to imposing a sentence. However, “[t]he Constitution does not require that a juror be willing to give a mitigating factor any particular amount of weight; it only requires that the juror manifest an ability to consider such factors in determining whether death is an appropriate punishment.” 145

[A] trial court is obligated to ensure that prospective jurors are asked sufficient questions to allow the court and parties to determine whether, should the defendant be convicted, the jurors have already decided to apply the death penalty, or whether they would truly weigh any mitigating and aggravating factors found at the penalty phase of the trial. 146

The inquiry to determine the beliefs of the veniremen about the death penalty and the effect of such beliefs should go well beyond simply asking the

140. Id. at 341.
142. Id. at 729.
143. Id. at 738.
ultimate question: “Would your beliefs about the death penalty prevent or substantially impair your ability to render a fair verdict?” It is likely that many, if not most, in the venire will not come to court with well-defined ideas about the death penalty. As one court has explained, “[f]ew have been called upon to formulate and express their thoughts with any degree of clarity or precision. In reality, then, voir dire becomes an exercise in the shaping of opinions, more so than their expression.”147 The Supreme Court also has recognized the problems that arise in attempting to determine the views veniremen have of the death penalty:

What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made “unmistakably clear”; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.148

Consequently, a series of questions should be asked to determine a venireman’s beliefs, both for and against, regarding the death penalty.

While the voir dire questioning should be searching, it should not be a sneak preview of the juror’s thoughts regarding the appropriateness of the death penalty in the particular case on trial. The Court in Witherspoon required that disqualification be based on the juror’s general death penalty views and not on his views regarding the particular facts and circumstances of a specific case:

[A] prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties . . . , and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.149

Therefore, disqualification turns not on how the juror will weigh particular evidence, but on whether that juror can impartially weigh the evidence in a capital case. “Morgan does not require a court to allow questions regarding how a juror would vote during the penalty phase if presented with specific mitigating factors.”150

150. McVeigh, 153 F.3d at 1208.
Likewise, reverse-\textit{Witherspoon} challenges do not turn on the specific facts of a given case; rather these challenges turn on whether a juror that favors the death penalty would automatically vote to execute a convicted capital defendant "\textit{regardless of the facts and circumstances of conviction}."\textsuperscript{151} The Supreme Court defined the legal issue presented in \textit{Morgan} as "whether [a] defendant is entitled to challenge for cause and have removed on the ground of bias a prospective juror who will automatically vote for the death penalty \textit{irrespective of the facts} or the trial court's instructions of law."\textsuperscript{152} The Court phrased its holding as disqualifying "a juror who will automatically vote for the death penalty \textit{in every case} [and thus] fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do."\textsuperscript{153} Given the Supreme Court's framing of the issue and its actual holding, references in the opinion to whether a juror "would automatically" impose death if the jury found the defendant guilty cannot fairly be read to require inquiry into the particular facts of the crime committed by the defendant. In \textit{United States v. Tipton}\textsuperscript{154} the Fourth Circuit specifically held that the court need not inquire into specific mitigating factors, and the district court's refusal to permit such questioning was not an abuse of discretion.\textsuperscript{155}

In summary, the court should make a probing inquiry into the beliefs of the veniremen regarding capital punishment. This inquiry should go beyond merely asking whether the potential jurors harbor any beliefs about the death penalty that would prevent or substantially impair their ability to render impartial service. This inquiry, however, should not explore the manner in which prospective jurors would weigh various mitigating and aggravating factors in the particular case.

The manner in which the above standards are met is left to the discretion of the trial court. However, there are certain recommended procedures. First, the court should employ a detailed jury questionnaire that explores the potential jurors' backgrounds and general views as to the death penalty.\textsuperscript{156} Second, while standard \textit{voir dire} questions should be administered to prospective jurors as a group, death penalty questions should be asked on an individual basis in order to achieve the most candid responses. Third, the trial court should conduct the majority of the \textit{voir dire} with brief follow-up from the parties. This will ensure that the case moves forward in a timely fashion and precludes the parties from

\begin{itemize}
  \item[152.] \textit{Id.} at 726 (emphasis added).
  \item[153.] \textit{Id.} at 729 (emphasis added).
  \item[154.] 90 F.3d 861 (4th Cir. 1996).
  \item[155.] \textit{Id.} at 879; \textit{see also} \textit{United States v. McCullah}, 76 F.3d 1087, 1114 (10th Cir. 1996) (citing \textit{Morgan}, 504 U.S. at 732-34) ("The district court was not required, as Mr. McCullah suggests, to allow inquiry into each juror's views as to specific mitigating factors as long as the \textit{voir dire} was adequate to detect those in the venire who would \textit{automatically} vote for the death penalty.").
\end{itemize}
attempting to try the case during the voir dire process. In no other type of case is it more important for the trial court to establish control, and this should certainly begin at the voir dire stage.

XII. THE PENALTY PHASE

A conviction for the capital-eligible offense in the guilt phase results in the second part of a capital prosecution: the penalty phase. Unlike the guilt phase, the parties introduce “information” in the penalty phase, not evidence. The parties present this information without regard to the Federal Rules of Evidence. However, “information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.” Essentially, the court must engage in a balancing test similar to that required by Rule 403 of the Federal Rules of Evidence before allowing a party to submit its information in aggravation or mitigation. This “gatekeeping function” of the court serves to prevent an evidentiary free-for-all in which the parties could present any information they desired.

Importantly, different standards exist for establishing aggravating and mitigating factors. In order to find an aggravating factor, the jurors must unanimously find that the aggravating factor exists beyond a reasonable doubt. Conversely, a defendant need only prove a mitigating factor by a preponderance of the information, and a single juror can find the mitigating factor to exist without regard to the findings of the other jurors. Although one juror alone may find a mitigating factor to exist by a preponderance of the evidence, other jurors need not weigh the mitigating factor unless they also find the same mitigating factor exists. After the jury determines the aggravating and mitigating factors, they must engage in the weighing process. If the aggravating factors sufficiently outweigh the mitigating factors, a sentence of death should be returned.

XIII. THE ROLE OF THE VICTIM AND VICTIM IMPACT EVIDENCE

The prosecutor in a capital case must remain cognizant of the role and of

159. 18 U.S.C. § 3593(c); see also 21 U.S.C. § 848(j) (imposing burden of “substantially outweighed” instead of merely “outweighed”).
162. 18 U.S.C. § 3593(c); 21 U.S.C. § 848(j)-k.
163. United States v. Webster, 162 F.3d 308, 327-28 (5th Cir. 1998).
the needs of the decedent’s family members, for they are the “victims” in a death penalty prosecution. Section 10607 of Title 42 of the United States Code lists numerous rights that victims have during a prosecution, including being advised of all court proceedings. Also, arrangements must be made to provide the victims with a waiting room away from the defendant and his supporters. Furthermore, the Department’s Death Penalty Protocol requires the United States Attorney to “notify the family of the victim of all final decisions regarding the death penalty.”

Additionally, the victim’s family members may testify in the penalty phase to the impact of the loss of the victim to the family and to society in general. In Payne v. Tennessee the Supreme Court ruled that the victim’s personal characteristics and the impact of the murder on the victim’s family may be considered in capital sentencing. Although Payne addressed a state prosecution, the federal courts have consistently admitted “victim impact” evidence as an aggravating factor during the penalty phase of a federal capital prosecution. Indeed, 18 U.S.C. § 3593(a) provides that an aggravating factor 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.

The introduction of victim impact evidence is permitted “in order to allow the jury to understand the consequences of the crime committed.” However, in order to present victim impact evidence during the penalty phase, the Government must identify this factor as a non-statutory aggravating factor in the Notice.

Even if the victim’s family members will provide victim impact evidence in the penalty phase, they may not be sequestered. On March 19, 1997,

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165. Id. § 10607(c)(4).
166. U.S. Dep’t of Justice, supra note 46, § 9-10.060.
168. Id. at 825.

(b) CAPITAL CASES—Notwithstanding any statute, rule, or other provision of law, a United States district court shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may, during the sentencing hearing, testify as to the effect of the offense on the victim and the victim's family or as to any other factor for which notice is required under section 3593(a).172

Consequently, family members who testify only to victim impact have a right to attend the entire trial.173

XIV. DEFENDING AGAINST THE MITIGATION CASE

Defendants have the right to offer evidence in mitigation.174 This mitigation evidence may focus on any aspect of either the defendant's character or her role in the offense.175 Both 18 U.S.C. § 3592(a) and 21 U.S.C. § 848(m) list a series of statutory mitigating factors, but the defendant may identify any factor in mitigation that is relevant to the sentencing proceeding.176 Generally, the defense will build the case with a mitigation specialist followed by a mental health expert.

The mitigation specialist traces the defendant's life, as well as her family's, and will typically summarize the defendant's life by focusing on the negative aspects in order to excuse the defendant's criminal conduct. Often this will include tales of the defendant's abuse and impoverishment as a child. Because the basis for this information usually consists of interviews of the defendant's family who are motivated to help the defendant escape the death penalty, it is imperative for the prosecutor to have the investigators interview family members about the defendant's life as early in the investigation as possible. Moreover, the investigators should also contact other sources not aligned with the defendant, such as school teachers, neighbors, and probation officers, to gain a more balanced picture of the defendant's life. The investigators should also examine the lives of the defendant's siblings who, presumably, grew up in the same circumstances and did not turn out to be killers. This helps negate

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173. Effective December 1, 1998, Rule 615 of the Federal Rules of Evidence was modified to conform to 18 U.S.C. § 3510(b) by precluding exclusion of "a person authorized by statute to be present." Fed. R. Evid. 615.
the deterministic effect of the defendant’s environment in her actions.

The defendant likely will also use a mental health expert to detail any mental illnesses or defects the defendant may claim. The mental health expert will perform a series of mental health examinations upon the defendant to provide a scientific basis for her opinion. The opinion will typically come in two parts. First, the opinion will identify mental illnesses that the defendant may use as an explanation for his conduct and to support possible mitigating factors based on his mental health. Second, the mental health expert will opine that the defendant does not represent a future danger to the community, especially if the defendant is sentenced to life imprisonment. To provide the jury with a balanced picture of the defendant’s mental health, it is critical for the prosecutor to pursue the Government’s discovery rights as to mental health evidence as discussed above. The Government must have the opportunity to examine the defendant in the same fashion as the defense. The prosecutor must seek this discovery before any mental health testing occurs because many tests have a “practice effect,” which effectively prohibits subsequent testing by another mental health expert. The discovery order must therefore delineate the tests that each expert will administer to the defendant.

In response to the Government’s claim of future dangerousness, the defense likely will introduce evidence pertaining to the Bureau of Prisons. The defense will attempt to persuade the jury that, if spared, the defendant will inevitably serve a life sentence at the ADX Prison in Florence, Colorado—the most secure facility within the United States Bureau of Prisons. As part of its presentation, the defense will argue that the defendant will be housed in a “Hannibal the Cannibal” type cell and have virtually no human contact, thereby eliminating the defendant’s ability to harm others. In the defense’s view, this is particularly true in light of the restrictions that the district court may impose upon the defendant while she serves her sentence.

The Government must be prepared to put forth evidence of the actual manner in which the Bureau of Prisons will house the defendant and of the danger that she still represents within the prison system. First, defendants who commit murder are rarely housed by the Bureau of Prisons at the ADX Prison in Florence. Instead, defendants are usually housed in one of the nine federal penitentiaries and placed in open population. Additionally, despite the security in the Bureau of Prisons’ facilities, the defendant can still participate in significant violence. This is particularly true if the defendant has the ability to order murders by merely using the telephone or by writing letters. Such

177. See supra Part IX.
179. See United States v. Felipe, 148 F.3d 101, 109-12 (2d Cir. 1998) (upholding restrictions on the defendant’s ability to communicate with others while serving a life sentence).
181. Id.
evidence, in conjunction with the testimony of the Government's mental health expert, should effectively rebut the defendant's mitigation evidence.

XV. ALLOCATION BY DEFENDANT WITHOUT CROSS-EXAMINATION

During non-capital sentencing, the Federal Rules of Criminal Procedure require the court to "address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence." Many defendants, relying on Rule 32(c)(3)(C) and the common law, request the opportunity to address the jury directly without taking the witness stand and undergoing cross-examination. The federal statutes do not, however, envision allocation by the defendant without cross-examination. Both 18 U.S.C. § 3593(c) and 21 U.S.C. § 848(j) begin with "[n]otwithstanding rule 32(c) of the Federal Rules of Criminal Procedure" before setting forth the manner in which the penalty phase is to be conducted. Moreover, such an unsworn and unchallenged statement by the defendant would contradict the mandate of both statutes that only reliable information may be put before the jury.

The Fifth Circuit's opinion in United States v. Hall is the only reported decision addressing whether the defendant has the right to make an unsworn statement directly to the jury during the penalty phase of a federal death penalty prosecution. The court found that the defendant had no right to make an unsworn statement to the jury because Rule 32(c)(3)(C) did not apply to the penalty phase before the jury. Furthermore, the court ruled that the common law did not support the defendant's request to address the jury directly without

182. FED. R. CRIM. P. 32(c)(3)(C).
183. Numerous state courts allow the defendant to make a plea for mercy directly to the jury without taking the witness stand and undergoing cross-examination. See Jeffries v. Blodgett, 5 F.3d 1180, 1191 (9th Cir. 1993) (noting Washington state's rule); Henry v. State, 596 A.2d 1024, 1045 (Md. 1991); State v. Zola, 548 A.2d 1022, 1046 (N.J. 1988) (relying solely on judicial supervisory powers over criminal trials in New Jersey to allow defendant limited allocation). Although approving the right of allocation, the Nevada Supreme Court ruled in Honick v. State, 825 P.2d 600 ( Nev. 1992), that the defendant's right of allocation is limited to his "expressions of remorse, pleas for leniency, and plans or hopes for the future." Id. at 604; see also Echavarria v. State, 839 P.2d 589, 596 ( Nev. 1992) ("The right of allocation is not intended to provide a convicted defendant with an opportunity to introduce unsworn, self-serving statements of his innocence as an alternative to taking the witness stand."); Zola, 548 A.2d at 1046 (requiring the trial court to instruct the defendant specifically before allocating as to the limitations of the right to make an unsworn mitigating statement). Furthermore, in State v. Lord, 822 P.2d 177 (Wash. 1991) (en banc), the Washington Supreme Court ruled that a defendant was subject to cross-examination after his allocation because he gave factual testimony instead of merely pleading for mercy. Id. at 217.
186. Id. at 392-93.
undergoing cross-examination. 187 The court stated that “even if such a common-law right existed, its continued recognition in federal capital cases would be inconsistent with the procedural framework for capital sentencing hearings established by the FDPA.” 188

Addressing this issue in the context of a petition under 28 U.S.C. § 2254 189 from a state capital defendant in North Carolina, the Fourth Circuit in Green v. French 190 also found that allocation by a defendant without undergoing cross-examination made little sense in light of the complex procedures employed during the penalty phase of a death penalty case. 191 In doing so the court noted:

At English common law, in capital cases, the practice of allocation required the judge to inquire of the defendant if he had any reason why sentence should not be imposed upon him. At that time, however, capital defendants had no right to counsel nor could they testify in their own behalf. Allocation therefore afforded a convicted defendant with his only opportunity to address the court. The North Carolina Supreme Court could have reasonably concluded, as have many other lower courts, that modern procedural protections, including the right to counsel and to testify on one’s own behalf, accomplish the same or similar objectives of the practice of allocation by allowing a defendant to lodge legal objections to the proceedings and to present his own version of the facts. The North Carolina courts therefore could have reasonably concluded that any constitutional rationale for a right to allocation based upon the common law tradition is absent in a case such as this where other protections would dramatically reduce, if not eliminate altogether, the significance of allocation. 192

Therefore, any requests by a defendant to make an unsworn statement directly to the jury during the penalty phase without taking the witness stand and being placed under oath should be denied.

XVI. JURY INSTRUCTIONS

Differences between Titles 18 and 21 require additional jury instructions

187. Id. at 393-95.
188. Id. at 395.
190. 143 F.3d 865 (4th Cir. 1998).
191. Id. at 877-84.
192. Id. at 881 (citations and footnote omitted).
if the penalty phase occurs pursuant to 21 U.S.C. § 848. Section 848(k) requires the court to instruct the jury that “regardless of its findings with respect to aggravating and mitigating factors, [the jury] is never required to impose a death sentence.”193 Conversely, 18 U.S.C. § 3591 requires the jury to impose a death sentence if it finds that aggravating factors sufficiently outweigh the mitigating factors.194

The choice of verdicts also influences the jury instructions. Section 3593(e) of Title 18 provides that the jury may recommend “whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.”195 Consequently, the jury will know with certainty whether the defendant will be released if it does not impose a death sentence.

Section 848 of Title 21 provides only for a death or non-death sentence.196 If the jury declines to impose the death penalty, the court then sentences the defendant above the mandatory minimum sentence of twenty years imprisonment provided for in 21 U.S.C. § 848(e).197 Hence, if the jury does not recommend death, the statute does not mandate life imprisonment. However, the court must sentence in accord with the United States Sentencing Guidelines.198 Section 2A1.1 of the Sentencing Guidelines provides for a base offense level of forty-three for any first degree murder,199 which necessarily results in a life sentence under the guidelines in the absence of a sentencing departure.200 Application Note 1 for section 2A1.1 provides that “in the absence of capital punishment life imprisonment is the appropriate punishment for premeditated killing.”201 Therefore, a sentence of life imprisonment is a likely, but not certain, result if the jury declines to impose a death sentence.

The issue then becomes whether the jury must be instructed that the defendant faces life imprisonment without possibility of parole if the jury declines to impose a death sentence. The Supreme Court in Simmons v. South Carolina202 ruled that when a defendant is legally ineligible for parole and the Government identifies future dangerousness as an aggravating factor, due process requires a jury instruction that, if the jury declines to impose a death sentence, the defendant will spend the rest of her life in prison.203 The Fifth Circuit in United States v. Flores204 addressed the application of Simmons to 21

195. Id. § 3593(e).
196. 21 U.S.C. § 848(k), (l).
197. Id. § 848(e)(1)(A).
198. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (1998).
199. Id. § 2A1.1, at 40.
200. Id. at 310.
201. Id. at § 2A1.1, at 40.
203. Id. at 162-64.
204. 63 F.3d 1342 (5th Cir. 1995).
U.S.C. § 848 and ruled that a life without parole instruction need not be given because there is no statutory requirement that life imprisonment be imposed and because the district court could depart downward from the Sentencing Guidelines. 205 Despite the Flores decision, district courts commonly issue a “watered-down” life without parole instruction in which the jury is told that, although the district court could theoretically depart from the Sentencing Guidelines and impose a sentence other than life imprisonment, the very likely sentence will be life imprisonment without parole if the jury declines to impose the death penalty.

XVII. USE OF SPECIAL VERDICT FORM

When the jury returns a sentencing verdict, both 18 U.S.C. § 3593(d) and 21 U.S.C. § 848(k) mandate that the jury make special findings as to each aggravating and mitigating factor submitted for its consideration. 206 The jury must identify on the Special Verdict Form each aggravating and mitigating factor found to exist. Of course the jury must be unanimous as to an aggravating factor while one juror alone is sufficient to find a mitigating factor. 207 An example of a Special Verdict Form can be found in Exhibit B of the Appendix to United States v. Battle. 208

XVIII. REPLACEMENT OF JURORS AFTER GUILT PHASE

An interesting issue exists in the situation where a juror must be excused after the guilt phase verdict but before the penalty phase is completed. May the district court seat an alternate juror to deliberate as to the sentence even though the alternate juror did not participate in the guilt phase deliberations? In United States v. Webster 209 the Fifth Circuit answered “no” and found that the Federal Rules of Criminal Procedure preclude the seating of a juror after deliberations have begun in the guilt phase. 210 Instead, the court held that the district court should have proceeded with eleven jurors in accordance with procedural rule 23(b). 211

While Webster may be the only case addressing this issue, the situation is

205. Id. at 1367-68.
208. 979 F. Supp. 1442, 1480-83 (N.D. Ga. 1997). Additionally, 18 U.S.C. § 3591 requires the jury to find that the defendant was at least 18 years old at the time of the offense. 18 U.S.C. § 3591(a).
209. 162 F.3d 308 (5th Cir. 1998).
210. Id. at 346-47; Fed. R. Crim. P. 24(c) (“An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.”).
211. Webster, 162 F.3d at 346 & nn.44 & 45 (citing Fed. R. Crim. P. 23(b)). Although the court in Webster determined that the district court erred by seating the alternate juror for the penalty phase, the court found the error to be harmless. Id. at 347.
not uncommon in death penalty prosecutions. Capital prosecutions are usually lengthy and always stressful for all participants, including the jurors. This combination often results in illnesses among jurors by the end of the case.

XIX. CONCLUSION

A death penalty prosecution requires an enormous amount of preparation by the prosecutor and a recognition that, while the defendant’s culpability will be decided in the guilt phase, the defendant’s entire life will be at issue in the penalty phase. Early in the case, investigators must be dedicated to learning all aspects of the defendant’s life. Soon after arrest, the Government must pursue its discovery rights as to the defendant’s mental health and prepare to meet the defendant’s mitigation evidence. Only in this way can the Government ensure that the jury receives all pertinent information to allow it to render the most difficult verdict a juror can reach.