Outline of Federal Death-Penalty Law

By the Federal Capital Appellate Resource Counsel Project[1]

(current through July 1, 2016)

This outline is intended only for the use of defense counsel assigned to federal capital trials or appeals. It generally covers only federal decisions, only issues of special applicability to death-penalty prosecutions, and only published decisions and unpublished ones available on Westlaw or Lexis. It is not intended to provide advice on strategic or tactical decisions; attorneys handling capital cases are advised to consult with resource counsel about such decisions. Resource counsel can also make available extremely useful information and materials on legal authorities not covered by this outline, including jury instructions and verdict forms used in particular cases, unpublished decisions not available electronically, and oral rulings.

I. Authorization 1
- A. Late Filing or Supplementation of Death Notice 2
- B. The Department of Justice Protocol 5
- C. Discrimination and Proportionality 7
- D. Double Jeopardy 9
- E. Ex Post Facto 10

II. Counsel 11
- A. Two Lawyers 11
- B. Timing of Appointment 12
- C. Learned Counsel 12
- D. Consultation With Federal Defender and Resource Counsel 13
- E. Funding for Experts and Investigators 13
- F. Access to Defendant 15
- G. Counsel on Appeal 17

III. Indictment 19
- A. Statute of Limitations 19
- B. Gateway and Aggravating Factors 19

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IV. Death Notices and Discovery 23
A. Aggravating Factors and Evidence 23
B. Mitigating Factors and Evidence 29
C. Timing 30
D. Names of Witnesses and Potential Jurors 31
E. Defense Disclosure to the Government 37
F. Striking Based on Outrageous Government Misconduct 38

V. Mental-Condition Notice: Federal Rule of Criminal Procedure 12.2 . . 40
A. Defense Notice 43
1. Timing 43
2. Content 44
B. Sealing; Timing of Disclosures to the Prosecution 46
1. Express Prohibitions Against Early Disclosure 46
2. "Fire-Walled" Government Attorneys 50
3. Alternatives to "Fire-Walled" Government Attorneys 53
4. Government Motion for Disclosure: Non-Testifying Experts . 56
C. Government Rebuttal Examination 57
1. Absent a Defense Examination 58
2. Notice to the Defense 60
3. Scope and Use 62
4. Timing 67
5. Presence of Defense Counsel; Recording 68
6. Place 71
D. Defense Examination: Government Attempts to Limit or Interfere . . 71
E. Sanctions for Non-Compliance 72

VI. Jurisdiction and Venue 73

VII. Continuances 77

VIII. Severance 80

IX. Intellectual Disability (Mental Retardation) 84
A. Procedures for Litigating Intellectual Disability 85
1. When to Litigate and Who Decides 85
2. Scope of Government Evaluation 87
B. Definition of Intellectual Disability 88

1. Significantly Subaverage Intellectual Functioning. 89
a. Standard Error of Measurement (SEM)/Confidence Intervals. 89
b. The Flynn Effect. 91
c. The Practice Effect. 92
d. Non-English Speakers 93
e. Multiple IQ Scores and Subtest Scores. 94
f. Poor Effort or Malingering. 96
g. Going Beyond IQ Scores in Assessing Intellectual Functioning. 96
h. DSM-5: Changes in Evaluating Intellectual Functioning 97
2. Deficits in Adaptive Functioning. 98
a. Sources of Information. 98
b. Irrelevance of Prison Behavior. 99
c. Improper Use of Stereotypes. 100
d. Irrelevance of Past Criminal Conduct. 102
e. Dual and Differential Diagnoses. 103
f. Role of Culture and Class. 104
g. DSM-5: Changes in Evaluating Adaptive Functioning. 106
3. Onset Before Age 18. 106

X. Jury Selection. 108
A. Jury Requirement 108
B. Voir Dire on Death-Penalty Opinions 108
C. Death Qualification 111
D. Life Qualification 115
E. Number of Peremptory Challenges 118
F. Separate Juries for Trial and Sentencing 118

XI. Gateway Factors 120
A. Age 120
B. Mental State 120

XII. Aggravating Factors. 125
A. Statutory Aggravating Factors Generally. 125
B. Particular Statutory Aggravating Factors. 127

1. Commission During a Specified Felony . . . 127
2. Previous Convictions . . . 128
a. Determining Whether a Conviction "Involves" Specified Conduct . . . 128
b. What Timing Renders a Conviction "Previous" . . . 130
c. The Constitutionality and Scope of the Prior-Drug-Conviction Aggravators . . . 131
d. Unconstitutional or Unreliable Prior Convictions . . . 134
3. Grave Risk of Death . . . 134
4. Especially Heinous, Cruel, or Depraved . . . 135
5. Pecuniary Gain . . . 139
6. Substantial Planning and Premeditation . . . 140
7. Vulnerable Victim . . . 144
C. Nonstatutory Aggravating Factors Generally . . . 146
D. Particular Nonstatutory Aggravating Factors . . . 147
1. Future Dangerousness . . . 147
a. General Constitutionality and Reliability . . . 147
b. Limited to Dangerousness in Prison . . . 152
c. Excluding Irrelevant or Improper Evidence . . . 154
d. Sufficiency of the Evidence . . . 161
e. Standard of Proof . . . 163
2. Victim Impact . . . 166
a. Generally . . . 166
b. Prohibition on Characterizations of the Defendant or the Crime and on Opinions About Punishment . . . 167
c. Prohibition on Non-"Family" Impact . . . 169
d. Prohibition on Consideration of Victim's Religious Beliefs or Practices . . . 175
e. Prohibition on Family Problems Attenuated From the Crime or Lacking a Presumptive or Demonstrated Nexus to the Crime . . . 176
f. Prohibition on Inflammatory or Other Unduly Prejudicial Evidence . . . 177
g. Prohibition on Victim Impact for Crimes Other Than the Capital Murder . . . 181
h. Defense Rebuttal . . . 181
i. Procedures for District Courts to Preview and Confine Victim Impact . . . 182

3. Other Crimes or Misconduct . . . 182
a. General Legality and Reliability . . . 182
b. Excluding Certain Other Crimes or Misconduct as Insufficiently Relevant . . . 186
c. Unanimity and Proof Beyond a Reasonable Doubt As to Each Individual Act . . . 189
4. Gang Membership or Leadership . . . 190
5. Lack of Remorse . . . 190
6. Miscellaneous Aggravating Factors . . . 192
E. Duplicative Aggravating Factors . . . 193
F. Vicarious Liability . . . 197
G. Aggravators With Multiple Components and Open-Ended Phrasing . . . 198
H. Holding the Government to the Precise Language of the Death Notice . . . 200
I. Limiting the Jury to Noticed Aggravating Factors . . . 201

XIII. Mitigating Factors . . . 202
A. Generally . . . 202
B. Execution Impact . . . 204
C. Residual Doubt . . . 208
D. Future Non-Dangerousness . . . 208
E. Miscellaneous Mitigating Factors . . . 210
i. Defendant's Ineligibility for Death Under State Law . . . 210
ii. Defendant's Offer to Plead Guilty . . . 210
iii. Defendants in Other Cases Not Sentenced to Death . . . 211
iv. Effects and Experiences of Race . . . 211
v. Equally Culpable Accomplices . . . 212
vi. Impropriety of Extradition for Capital Trial Under Foreign Law . . . 212
vii. Life Without Release Is Harsh Enough . . . 213
viii. Third-Party Based Mitigation . . . 213

XIV. Evidence . . . 216
A. Generally . . . 216
B. Confrontation and Hearsay . . . 217
C. Probative Value Versus Prejudice . . . 221
D. Rebuttal and Surrebuttal . . . 225

E. Mental-Health Evidence . . . 227
F. Other Expert Evidence . . . 229
G. Plea Offers, Discussions, or Agreements . . . 231
H. Polygraphs . . . 231
I. Defendant's Ethnicity or Religious Beliefs . . . 231
J. Trial Transcript . . . 232

XV. Sentencing Procedures . . . 233
A. Trifurcation . . . 233
B. Allocution . . . 234
C. Compulsory Process . . . 236
D. Presence . . . 237
E. Shackling . . . 238
F. Self-Representation and Waiving Mitigation . . . 238
G. Rule of Sequestration of Witnesses . . . 239
H. Mistrial . . . 240

XVI. Improper Summation Comments and Other Prosecutorial Misconduct at Sentencing . . . 241

XVII. Jury Instructions and Verdict Forms . . . 253
A. Mitigating Factors . . . 253
B. Death Never Required . . . 256
C. Standard for Weighing . . . 258
D. Death Sentence "Justified" . . . 259
E. Multiple Counts . . . 261
F. Life Imprisonment and Other Lesser Sentences . . . 263
G. Unanimity . . . 265
H. Defendant's Right Not to Testify . . . 271
I. Sentencing Verdict is not a "Recommendation" . . . 272
J. Anti-Discrimination Guarantee . . . 272
K. Miscellaneous Instructions . . . 274

XVIII. Jury Sentencing Deliberations . . . 276
A. Substituting Alternates . . . 276
B. Jury Misconduct . . . 281

XIX. Execution Issues . . . 284

XX. Appeal 286
A. Generally 286
B. Attacking the Death Verdict in the District Court Before Appeal 286
C. Record on Appeal 288
D. Preservation and Waiver 288
E. Mitigating-Factor Findings 291
F. Aggravating-Factor Findings 295
G. Proportionality 296
H. Constitutionality 298
I. Harmless Error 298
J. Passion, Prejudice, or Arbitrary Factors 306
K. Interlocutory Appeals 307
1. By the Defense 307
2. By the Government 308

I. Authorization

Federal capital cases are prosecuted under the Federal Death Penalty Act (FDPA), enacted in 1994.[2] The Act amended various substantive criminal statutes to allow numerous federal crimes to be punished by death.[3] It also set out

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[2] An earlier statute enacted in 1988, the Anti-Drug Abuse Act (ADAA), allowed the death penalty for a small category of drug-related killings. 21 U.S.C. § 848(e). The ADAA also set out procedures for such cases. 21 U.S.C. § 848(g)-(r) (repealed). Those procedures are similar but not identical to the ones contained in FDPA. In 2006, Congress repealed the Section 848 procedures.

[3] These include:

8 U.S.C. § 1342 — Murder related to the smuggling of aliens
18 U.S.C. §§ 32-34 — Destruction of aircraft, motor vehicles, or related facilities resulting in death
18 U.S.C. § 36 — Murder committed during a drug-related drive-by shooting.
18 U.S.C. § 37 — Murder committed at an airport serving international civil aviation.
18 U.S.C. § 115(b)(3) — Retaliatory murder of a member of the immediate family of law enforcement officials.
18 U.S.C. §§ 241, 242, 245, 247 — Civil rights offenses resulting in death.
18 U.S.C. § 351 — Murder of a member of Congress, an important executive official, or a Supreme Court Justice.
18 U.S.C. § 794 — Espionage.
18 U.S.C. § 844(d), (f), (i) — Death resulting from offenses involving transportation of explosives, destruction of government property, or destruction of property related to foreign or interstate commerce.
18 U.S.C. § 924(j) — Murder committed by the use of a firearm during a crime of violence or a drug-trafficking crime.
18 U.S.C. § 930 — Murder committed in a Federal Government facility.
18 U.S.C. § 1091 — Genocide.
18 U.S.C. § 1111 — First-degree murder.
18 U.S.C. § 1114 — Murder of a Federal judge or law enforcement official.
18 U.S.C. § 1116 — Murder of a foreign official.
18 U.S.C. § 1118 — Murder by a Federal prisoner.
18 U.S.C. § 1119 — Murder of a U.S. national in a foreign country.
18 U.S.C. § 1120 — Murder by an escaped Federal prisoner already sentenced to life imprisonment.
18 U.S.C. § 1121 — Murder of a State or local law enforcement official or other person aiding in a Federal investigation; murder of a State correctional officer.
18 U.S.C. § 1201 — Murder during a kidnapping.
18 U.S.C. § 1203 — Murder during a hostage taking.

procedures for how the government must notice its intention to seek death penalty, for capital sentencing hearings, and for appellate review of death sentences. See 18 U.S.C. §§ 3591-3598.

A. Late Filing or Supplementation of Death Notice

For the government to seek the death penalty, it must, "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 stating that intention and setting forth the aggravating factors it intends to prove. 18 U.S.C. § 3593(a).

How to decide whether a death notice is timely? The Fourth Circuit has held that this depends on whether it was filed an "objectively reasonable" time before the scheduled trial date, not whether the defendant has been prejudiced. Moreover, it said, postponing a scheduled trial upon the filing of a tardy notice is not an

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18 U.S.C. § 1503 — Murder of a court officer or juror.
18 U.S.C. § 1512 — Murder with the intent of preventing testimony by a witness, victim, or informant.
18 U.S.C. § 1513 — Retaliatory murder of a witness, victim, or informant.
18 U.S.C. § 1716 — Mailing of injurious articles with intent to kill or resulting in death.
18 U.S.C. § 1751 — Assassination or kidnapping resulting in the death of the President or Vice President.
18 U.S.C. § 1958 — Murder for hire.
18 U.S.C. § 1959 — Murder involved in a racketeering offense.
18 U.S.C. § 1992 — Willful wrecking of a train resulting in death.
18 U.S.C. § 2113 — Bank-robbery-related murder or kidnapping.
18 U.S.C. § 2119 — Murder related to a carjacking.
18 U.S.C. § 2245 — Murder related to rape or child molestation.
18 U.S.C. § 2251 — Murder related to sexual exploitation of children.
18 U.S.C. § 2280 — Murder committed during an offense against maritime navigation.
18 U.S.C. § 2281 — Murder committed during an offense against a maritime fixed platform.
18 U.S.C. § 2332 — Terrorist murder of a U.S. national in another country.
18 U.S.C. § 2332a — Murder by the use of a weapon of mass destruction.
18 U.S.C. § 2340 — Murder involving torture.
18 U.S.C. § 2381 — Treason.
21 U.S.C. § 848(e) — Murder related to a continuing criminal enterprise or related murder of a Federal, State, or local law enforcement officer, or Murder during large-scale drug distribution.
49 U.S.C. §§ 1472-1473 — Death resulting from aircraft hijacking.

adequate remedy. In assessing reasonableness, a district court should examine the nature of the charges and the aggravating factors listed in the death notice, the period of time remaining before trial, and the status of discovery. United States v. Ferebe, 332 F.3d 722, 737 (4th Cir. 2003). Cf. United States v. Breeden, 366 F.3d 369, 374-375 (4th Cir. 2004) (seven months notice was not objectively unreasonable, nor did district court err in using this as the relevant time period, though it had continued the trial at the government's request shortly before the government filed its death notice).

For favorable district-court decisions (in the Fourth Circuit and the District of Puerto Rico) on whether the notice was timely, see United States v. Le, 316 F. Supp. 2d 343, 354-355 adhered to, 326 F. Supp. 2d 739 (E.D. Va. 2004) (striking, as untimely, amended death notice, filed only 94 days prior to trial, which contained nine new allegations of serious unadjudicated crimes); United States v. Hatten, 276 F. Supp. 2d 574, 578-580 (S.D.W. Va. 2003) (granting defense motion to bar government from seeking death penalty because notice of intent was filed only 36 days before scheduled trial date); United States v. Rosado-Rosario, 1998 WL 28273 at * 3-4 (D.P.R. Jan. 15, 1998) (unpublished) (ordering case be treated as noncapital. Government failed to make authorization decision within time specified in local rules. Moreover, local AUSA thereafter filed notice of intent to seek the death penalty as if it were official Department of Justice determination, but it was not); United States v. Colon-Miranda, 985 F. Supp. 36, 39 (D.P.R. 1997) (barring death penalty trial where AG granted permission to seek death penalty ten days before trial. Court rejects alternatives of conducting death penalty trial on scheduled date, severing capital defendant's trial from that of codefendants, or continuing joint trial).

Other circuits besides the Fourth, however, have looked to whether the defendant has suffered any prejudice, and have generally found none — even where the notice was arguably tardy, as long as the trial was thereafter continued:[4]

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[4] For decisions ordering such a continuance, see United States v. Davis, 1995 WL 746661 at *1 (E.D. La. Dec. 12, 1995) (unpublished) (granting 45-day continuance after government filed amended death notice, three months before trial, which announced it would introduce evidence of five unadjudicated homicides as a nonstatutory aggravating factor); United States v. David, 1995 WL 405707 at *4 (E.D. La. July 7, 1995) (unpublished) (granting six-month continuance because government had not authorized seeking death penalty until five weeks before trial. Court relies on testimony from expert capital defense counsel about extensive

- United States v. Ayala-Lopez, 457 F.3d 107, 108 (1st Cir. 2006). Original notice was served almost three years before trial, and most recent amended notice contained no substantive changes from prior one.

- United States v. Wilk, 452 F.3d 1208, 1222 (11th Cir. 2006). Notice filed six months before trial was timely where counsel undertook significant preparation for death defense long before notice was filed, and notice listed same statutory aggravators as indictment and only added non-statutory aggravators that were straightforward.

- United States v. Frye, 372 F.3d 729, 738-741 (5th Cir. 2004). On government's appeal, rejecting district court findings that defendant was prejudiced by delayed notice because he had consented to continuance based on government's representation that it did not intend to seek the death penalty, because he had not conducted a mitigation investigation, and because government had used delay to prepare for DOJ authorization meeting.

- United States v. Williams, 318 F. App'x 571, 573 (9th Cir. 2009) (unpublished). Notice timely where, although it was initially filed less than three months before scheduled trial date, trial was continued so that it was not scheduled to begin until a year after notice was filed.

- United States v. Doe, 179 F. App'x. 919, 920-921 (6th Cir. 2006). Court of appeals lacked jurisdiction to review defendant's appeal of denial of motion to strike allegedly late-filed death notice. Motion was moot to extent it challenged insufficient notice of trial date that had already been reset, and unripe to extent it challenged insufficient notice of future trial date that had not yet been set.

- United States v. Cooya, 2012 WL 2321572 (M.D. Pa. June 19, 2012) (unpublished). District court allowed government to supplement death notice to add victim impact as an aggravating factor; no prejudice to defendant where court was also delaying the start of trial by 10 months.

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mitigation work that must be done under ABA Guidelines).

B. The Department of Justice Protocol

The Department of Justice authorization procedures are found in the United States Attorneys' Manual, § 9-10.000.[5] These include the criteria for local U.S. Attorneys and the DOJ to determine whether to seek the death penalty. U.S. Attorneys cannot seek death without prior written authorization from the Attorney General. A detailed evaluation memo must be prepared and sent to DOJ in every death-eligible cases, whether or not the local U.S. Attorney wishes to seek death. When a U.S. Attorney does wish to seek death, the government must give defense counsel notice and an opportunity to be heard, before requesting authorization from the Attorney General. Defense counsel must have the opportunity to present information, including mitigating factors, to the U.S. Attorney for consideration. A committee exists within DOJ to review each death-eligible case and recommend to the Attorney General whether to seek death. Defense counsel is provided an opportunity to present to the committee, orally or in writing reasons why the death penalty should not be sought. The Attorney General conducts a review and makes the final decision. A decision can be reconsidered if changed circumstances are brought to the attention of DOJ. The U.S. Attorney may not enter into a binding plea agreement that precludes seeking the death penalty, absent the Attorney General's authorization. Such authorization is also required before the U.S. Attorney agrees to a defense request for a sentencing hearing before a judge rather than a jury.

Several circuits have found that the capital-case-review provisions of the United States Attorneys' Manual confer no judicially-enforceable rights:

- United States v. Lopez-Matias, 522 F.3d 150, 155-156 & n.4 (1st Cir. 2008). No need to decide whether four days notice of chance to meet and present mitigation to Capital Case Review Committee was "reasonable opportunity" under the protocols. Court declines to address whether Capital Review Committee is "critical stage" under Sixth Amendment.

- United States v. Lee, 274 F.3d 485, 492 (8th Cir. 2001). Defendant was not entitled to relief based on claim that Deputy Attorney General rather than

[5] A copy is available on the Federal Death Penalty Resource Counsel website. It can also be accessed by searching the "USAM" database on Westlaw, or by going to the DOJ website: http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm.

Attorney General had decided not to withdraw the death notice at request of trial prosecutor.[6]

- Nichols v. Reno, 124 F.3d 1376, 1377 (10th Cir. 1997). Death-penalty protocol is unenforceable by individuals.

One circuit has also found privileged the documents generated by DOJ as part of its review process. United States v. Fernandez, 231 F.3d 1240, 1242-1244 (9th Cir. 2000) (reversing discovery order requiring government to provide U.S. Attorney's death-penalty evaluation form and prosecution memorandum, prepared under death-penalty protocol in U.S. Attorney's Manual, at least ten days before each defendant's meeting with DOJ death-penalty review committees. Items ordered to be produced are privileged and not subject to disclosure). But see United States v. Kee, 2000 WL 863119 at *4 (S.D.N.Y. June 27, 2000) (unpublished) (Court agrees to *in camera* review to address defendant's claim that U.S. Attorney's submission to Attorney General omitted evidence, provided by his counsel, that he did not personally commit the murder).

One district court found that it possessed, and chose to exercise, the authority to order DOJ to delay the authorization process to allow sufficient time for the defendant to present mitigating evidence. In United States v. McGill, 2010 WL 1571200 at *2 (S.D. Cal. Apr. 16, 2010), the Court said: "The question here, then, is whether this Court can issue a scheduling order which effectively requires the Department of Justice to delay its consideration of whether to seek the death penalty. Such an order can only be justified as an exercise of the Court's inherent authority if it furthers the goal of 'speedy and orderly administration of justice,' or is 'designed to ensure that the relevant issues to be tried are identified, that the parties have an opportunity to engage in appropriate discovery and that the parties are adequately and timely prepared so that the trial can proceed efficiently and intelligibly' . . . . The Court believes a scheduling order as requested by defendant, allowing additional time for presentation of mitigation evidence to the U.S. Attorney, furthers each of these goals." Id. at *3. The court proceeded to give the

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[6] See also In re: United States (United States v. Lee), 197 F.3d 310, 316 (8th Cir. 1999) (granting government's mandamus petition to quash subpoenas to Attorney General Reno and Deputy Attorney General Holder in connection with procedures used in deciding not to withdraw death notice when, after codefendant received life verdict, local U.S. Attorney had unsuccessfully sought permission for withdrawal from DOJ).

defendant additional time, though not all that he'd requested. Id. at *5. (The superseding, capital indictment came down in January 2010; DOJ had requested a mitigation presentation by June 2010; the defendant asked the court to extend this to January 2011; the court allowed him until September 2010).

Conversely, another district court agreed to set a deadline for the government to provide notification of its authorization decision. See United States v. Martinez, 2012 WL 4033341, at *3 (W.D. N.Y. Sept. 12, 2012) (unpublished) ("Based on the fact that defense counsel met with the Department of Justice Capital Review Committee on March 26, 2012, five and one-half months ago and were told to expect a decision within sixty (60) days from that meeting, the Court finds that the setting of a deadline for the notification of whether the government will seek the death penalty is more than reasonable").

C. Discrimination and Proportionality

A defendant contemplating a challenge to the death-noticing decision based on the government's capital charging practices in other cases must make a difficult threshold showing to obtain discovery regarding those practices:

- United States v. Lawrence, 735 F.3d 385, 439 (6th Cir. 2013). Rejecting the defendant's claim that "the process of charging and trying him in federal court rather than state court was racially biased and irrationally based on geography so as to dilute the presence of African Americans in the jury pool, thereby violating his Sixth Amendment right to a fair and impartial jury, his Fifth Amendment rights to equal protection and due process of law, and the Eighth Amendment prohibition against arbitrary use of the death penalty . . . . Lawrence has adduced no evidence that decisionmakers in his case acted with discriminatory purpose or that similarly situated individuals of a different race were not prosecuted in federal court."

- United States v. Bass, 536 U.S. 862, 863-864 (2002). Finding inadequate defendant's showing of nationwide statistics that black defendants were being charged with death-eligible offenses more than twice as often as white ones and that the government was entering into plea bargains more frequently with white defendants than with black ones. The Court explained that, even assuming the necessary showing could be made based on nationwide information (rather than information about decisonmakers in the

case at hand), nevertheless, raw statistics regarding overall charges say nothing about those brought against similarly situated defendants.

- United States v. Lighty, 616 F.3d 321, 369-70 (4th Cir. 2010). Under Armstrong, defendant was not entitled to discovery on his claim that the death penalty was not being pursued against non-Blacks who had committed similar crimes. Defendant proffered only gross racial breakdown of use of federal death penalty against Blacks and whites, and that all 16 of the federal defendants who faced in the death penalty in the District of Maryland were (like him) Black.

- In re United States (United States v. Williams), 397 F.3d 274, 286-287 & n. 18 (5th Cir. 2005). After government declined to fully comply with order finding that defendant had made prima facie showing of race discrimination in charging and ordering government to disclose capital charging practices, district court announced it would instruct jury on government's refusal to comply with discovery. Court of Appeals grants government's petition for writ of mandamus. Court further directs district court to commence trial immediately and use jury pool that had already been death qualified.

- United States v. Webster, 162 F.3d 308, 334 (5th Cir. 1998). Defendant was not entitled to discovery in support of his selective-prosecution claim where his showing consisted of an affidavit that 66 percent of federal death-penalty defendants were black. Defendant "has not even attempted to show that other similarly situated individuals committing similar acts were not prosecuted." Moreover, under McCleskey, statistical evidence does not rebut presumption of good faith.

One district court, however, has granted a challenge to a death notice based on intra-case disproportionality, because the government had previously failed to obtain death sentences for the more culpable codefendants, the founders and leaders of the gang in which the defendant was a low-level member. United States v. Littrell, 478 F. Supp. 2d 1179, 1180 (C.D. Cal. 2007) ("no rational decison-maker would continue to seek death against" defendant and thus doing so violated Fifth Amendment due process). But see United States v. Watts, ___ F. Supp. 3d, 2016 WL 305059 (S.D. Ill. Jan. 25, 2016) (denying discovery under Bass and Armstrong).

Finally, in a Second Circuit case, an unusual dissent from denial of *en banc* review raised the issue of whether, just as the death penalty for minors or the mentally retarded is cruel and unusual punishment under the Eighth Amendment, applying it to "predominantly local crimes in non-death penalty states may be sufficiently rare as to be constitutionally prohibited." United States v. Fell, 571 F.3d 264, 289 (2d Cir. 2009) (Calabresi & Straub, JJ., dissenting). See also id. at 295 (Pooler, J., dissenting from denial of *en banc* review); id. at 295 (Sack, J., dissenting from denial of *en banc* review). The dissent noted that only one in 19 federal capital prosecutions in New York has ended in a death sentence, and that Vermont and New York (two of the three state in the circuit) have rejected capital punishment. Meanwhile, seven judges, in an opinion by Judge Raggi, concurred in the denial. Supreme Court caselaw, she wrote, does not provide for "re-tailoring the Eighth Amendment in each state — or each vicinage — to test federal death sentences by reference to local practices." Id. at 274. In any event, she questioned whether the people of New York had really rejected the death penalty (even were this relevant to the validity of a Vermont death sentence): She noted that seven defendants had been sentenced to death in state court in New York before that state's law was invalidated for a procedural flaw, and, while only one had been sentenced to death in federal court, it appeared that the sentencing patterns in both reflected a willingness to impose capital punishment at least in the case of "innocent" victims. (Judge Calabresi's dissent, meanwhile, found "remarkable and troubling" this speculation that sentencing patterns seemed to turn on the "character of the victims"). See id. at 276-277 (Raggi, Cabranes, Parker, Wesley, Livingston & Walker, JJ, & Jacobs, CJ, concurring in denial of *en banc* review). See id. at 292.

Several district courts have also rejected challenges to the use of the federal death penalty in non-death states. See, e.g., United States v. Johnson, 2012 WL 5275491, at *10 (N.D. Iowa Oct. 25, 2012) (unpublished); United States v. Jacques, 2011 WL 3881033, at **2-3 (D. Vt. Sept. 2, 2011); United States v. Tuck Chong, 123 F. Supp. 2d 563, 567 (D. Haw. 1999).

D. Double Jeopardy

It is clear that a capital jury's refusal to unanimously find a federal defendant death eligible (*e.g.*, a refusal to find at least one gateway factor or at least one statutory aggravating factor) creates a double-jeopardy bar against the government seeking the death penalty at retrial following an appellate reversal. See Sattazahn

v. Pennsylvania, 537 U.S. 101, 106 (2003) (distinguishing this from case where non-unanimous jury verdict resulted in a life sentence; there, where defendant successfully appealed conviction and returned for retrial, state could seek death penalty). Cf. also United States v. Peoples, 360 F.3d 892, 895 (8th Cir. 2004) (no bar where government had withdrawn death notice after sentencing hearing had begun, since defendant was never "acquitted of death").

Before Sattazhan, the Supreme Court had held that the same double-jeopardy bar applied following a unanimous life verdict, even if an aggravating factor had been found. See Bullington v. Missouri, 451 U.S. 430, 445 (1981). The one circuit to address the issue since Sattazahn has adhered to this principle. United States v. Williams, 610 F.3d 271, 289-290 (5th Cir. 2010).

E. Ex Post Facto

The government may not seek the death penalty for crimes occurring before either of the two modern federal capital statutes setting out sentencing procedures were enacted (the ADAA in 1988 and FDPA in 1994). Though some previously enacted criminal statutes allowed for punishment by death, they were unconstitutional until Congress created procedures for capital sentencing that satisfied Supreme Court precedent. Any effort to judicially fashion similar procedures for a crime that occurred prior to passage of the ADAA or FDPA would usurp Congress's authority. See United States v. Woolard, 981 F.2d 756, 759 (5th Cir. 1993); United States v. Cheely, 36 F.3d 1439, 1446 (9th Cir. 1994); United States v. Church, 151 F. Supp. 2d 715, 718 (W.D. Va. 2001). See also United States v. Safarini, 257 F. Supp. 2d 191, 202-203 (D.D.C. 2003) (provisions of FDPA creating new substantive crimes cannot be applied retroactively). But see United States v. Hager, 530 F. Supp. 2d 778, 785 (E.D. Va. 2008) (procedural provisions of FDPA may be applied retroactively in case involving crime made capital by ADAA in 21 U.S.C. § 848(e) and committed when procedural provisions of Section 848(g)-(o) governed sentencing proceedings); United States v. Johnson, 900 F. Supp. 2d 949, 953-55 (N.D. Iowa 2012) (same).

Moreover, the government may not rely on a statutory aggravating factor added by Congress after the charged killing. United States v. Higgs, 353 F.3d 281, 301(4th Cir. 2003) (Ex Post Facto Clause forbade reliance on "multiple killing" aggravator, which was not added to FDPA as a statutory aggravating factor until April 1996, three months after murders were committed).

II. Counsel

A. Two Lawyers

When a defendant is "indicted" for a "capital crime," the district court "shall promptly, upon the defendant's request, assign 2 such counsel, of whom at least 1 shall be learned in the law applicable to capital cases." 18 U.S.C. § 3005. See also United States v. Massino, 302 F. Supp. 2d 1, 2 (E.D.N.Y. 2003) (appointing two attorneys, including "learned" counsel, even though defendants had also retained private counsel). But see United States v. McCullah, 76 F.3d 1087, 1097-1098 (10th Cir. 1996) (appointment of Federal Defender Office did not violate requirement of Section 3005 that court appoint two counsel, where defendant was represented by two lawyers from that office).

A district court has the authority under Section 3005 to appoint more than two counsel.[7]

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[7] See United States v. Moonda, 2006 WL 2990517 at *3 (N.D. Ohio Oct. 18, 2006) (unpublished) (ordering such appointment, over government's objection). See also Federal Death Penalty Resource Counsel Website, Litigation Issues, Section 3005 Litigation Guide (listing significant number of additional cases involving such appointments). The Federal Judiciary's Guide to Judiciary Policies and Procedures ("Judiciary Guide") recognizes that such appointment should be made "if necessary for adequate representation," where there are "exceptional circumstances and good cause." Section A: Guidelines for the Administration of the Criminal Justice Act, Chapter 6: Representation in Federal Death Penalty Cases and in Federal Capital Habeas Corpus Proceedings, Guideline 6.01: Appointment of Counsel in Capital Cases. (These guidelines are accessible at www.uscourts.gov/defenderservices/chapter_6.cfm.) So does the Judicial Conference. See Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation, at 15-16 (May 1998) ("Judicial Conference Recommendations"). (These recommendations are accessible at www.uscourts.gov/library/dpenalty/1COVER.htm.).

Separate and independent from the court's authority to appoint three attorneys, the report containing the Judicial Conference Recommendations "encourage[s]" courts "to permit appointed counsel to employ additional attorneys to perform more limited services where to do so would be cost-effective or otherwise enhance the effective use of resources." See also Judiciary Guide, *supra*, Guideline 6.01(A) ("appointed counsel may, with prior court authorization, use the services of attorneys who work in association with them, provided that the employment of such additional counsel (at a reduced hourly rate) diminishes the total cost of representation or is required to meet time limits").

One circuit has held that the failure to appoint a second attorney is reversible error, not subject to harmlessness analysis. United States v. Boone, 245 F.3d 352, 358-364 (4th Cir. 2001) (conviction reversed, even though government ultimately decided not to seek the death penalty). But other circuits have found no continued right to a second attorney once the defendant no longer faces the death penalty, and no grounds for reversal on appeal when the defendant did not receive the death penalty. See United States v. Cordova, 806 F.3d 1085, 1102 (D.C. Cir. 2015) (*per curiam*) (citing cases).

B. Timing of Appointment

The right to a second attorney applies after indictment, even if the government has not yet decided whether seek the death penalty. See In re Sterling-Suarez, 306 F.3d 1170, 1171-1175 (1st Cir. 2002) (granting writ of mandamus and ordering district court to appoint learned counsel forthwith, after court had ruled it would only do so after government determined it was going to seek death penalty). See also United States v. Cordova, 806 F.3d 1085, 1101 (D.C. Cir. 2015) (*per curiam*) ("'prompt' means promptly after indictment, and not later. This is because the goal of the defense in this early stage of the proceedings is to convince the Attorney General not to seek the death penalty in the first place.").

One district court has also found that the Sixth Amendment right to counsel attaches at commencement of the death-penalty authorization process, since it is a critical stage. Thus it found that counsel's failure to make any mitigation submission to DOJ during that process denied the defendant his right to counsel. It concluded that the appropriate remedy was to strike the death notice. United States v. Pena-Gonzalez, 62 F. Supp. 2d 358, 363-366 (D.P.R. 1999). See also United States v. Bran, 2012 WL 4507903, at *2 (E.D. Va. Sept. 28, 2012) (unpublished) ("Effective preparation in a potential death penalty case includes preparing and presenting to the Department of Justice an explanation on why, in the defendant's view, the death penalty should not be sought.").

In many instances district courts have appointed counsel for a potential capital defendant before indictment. See Federal Death Penalty Resource Counsel Website, Litigation Issues, Section 3005 Litigation Guide (listing cases).

C. "Learned Counsel"

To be "learned in the law applicable to capital cases," 18 U.S.C. § 3005, counsel should have "significantly more experience" than the three years of felony-trial experience and five years of practice in the court of prosecution required generally for capital assignments under 18 U.S.C. § 3599. Learned counsel should have "distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high quality representation." United States v. Miranda, 148 F. Supp. 2d 292, 294 (S.D.N.Y. 2001).[8] Cf. United States v. McCullah, 76 F.3d 1087, 1098 (10th Cir. 1996) (prior to 1994 amendment to 18 U.S.C. § 3005 requiring "counsel learned in the law applicable to capital cases," statute required only counsel "learned in the law," and thus court did not have to appoint counsel with prior death-penalty experience).

D. Consultation With Federal Defender and Resource Counsel

In assigning counsel, Section 3005 requires a court to "consider the recommendation of the Federal Public Defender organization, or, if no such organization exists in the district, of the Administrative Office of the United States Courts." But the only circuit to address this issue has found that the absence of consultation did not entitle the death-sentenced defendant to relief on appeal. United States v. Fields, 483 F.3d 313, 348 (5th Cir. 2007).

The Judicial Conference Recommendations call upon district courts to also consider the recommendation of the Federal Death Penalty Resource Counsel.[9]

E. Funding for Experts and Investigators

Counsel may obtain funding for "investigative, expert, or other services" if they are "reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence." The showing of

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[8] The court relied on the Judicial Guide and Judicial Conference Recommendations. See Section II.A (Right to Counsel — Two Lawyers), *ante*.

[9] Judicial Conference Recommendations, *supra*, at 18.

reasonable necessity may be made *ex parte*. Any such "proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review." 18 U.S.C. § 3599(f).

There are few reported appellate decisions regarding funding for experts and investigators in FDPA cases (and, because such requests are generally made *ex parte*, no published district court decisions):

- United States v. Mikos, 539 F.3d 706, 713 (7th Cir. 2008). No error in denying funds for jury selection expert.

- United States v. Brown, 441 F.3d 1330, 1364-1365 (11th Cir. 2006). No error in denying funds for a social worker and a future-dangerousness expert. Social worker would have been duplicative mitigation investigator and psychologist. And defense lay testimony on future dangerousness made expert testimony on same subject unnecessary.

The only extensive such decision was United States v. Snarr, 704 F.3d 368, 403-06 (5th Cir. 2013). There, the defense had submitted an itemized $196k budget for experts and investigators, which the district court cut slightly, approving $187k. But Circuit Chief Judge Edith Jones significantly cut the budget further, allowing a total of $65k — 30k for "investigators and mitigation experts" and 35k for "mental health expert, pathologist, and psychologist." After a hearing on defendant's challenge to the cut, the district court approved an additional $65k in funding, of which the Chief Judge approved only $20k (thus raising the total funding for experts and investigators to $85k). The Chief Judge also forbade any funding for a "cultural expert" for one defendant, who had grown up in Mexico. The court found that the reduction of funding did not deny Garcia the right to present cultural, prison, and neurological experts, since the Chief Circuit Judge gave him $85k and permitted him "to distribute those funds as he saw fit."[10] While he was forbidden from hiring a cultural expert, the district court "explicitly indicated that this did not preclude Garcia 'from presenting mitigating information regarding the effects and experiences of race, national origin, and/or culture on the

[10] The Fifth Circuit distinguished cases finding no right to appeal a Circuit Chief Judge's funding order from the defendant's claim here that "*as a result of* that order, they lacked the funds necessary to present an adequate defense, and therefore were denied due process."

defendant through other experts, friends, or family members.'" And "[t]o that end, Garcia did in fact present evidence of his cultural background through family members, as well as an expert psychologist . . . . Equally important, Defendants have failed to establish a reasonable probability that the requested experts would have been of assistance and that their absence resulted in a fundamentally unfair trial. While Defendants focus on the experts Garcia did not retain, they neglect that [their psychologist] provided extensive evidence about the impact on Garcia of his upbringing, his culture, and his life in prison. Thus, the fact that Garcia did not have additional experts did not render his trial fundamentally unfair, given that Dr. Brams was able to present much, if not all, of the evidence Garcia believed to be vital for mitigation purposes." The court added that "the government's case against Defendants was especially strong. Indeed, of the eighty-six mitigating factors submitted by Garcia, only eleven were found to exist by one or more jurors. Defendants have not advanced a credible argument that additional experts would have changed the jury's calculus."

F. Access to Defendant

18 U.S.C. § 3005 provides that capital counsel "shall have free access to the accused at all reasonable hours." There do not appear to be any published decisions applying or interpreting this language. One could argue, though, that, on its face, it constrains the authority of the government to house the defendant at a distant, remote location during the pretrial period. See also 18 U.S.C. § 3142(i)(3) (in detention order, district court may "direct that the person be afforded reasonable opportunity for private consultation with counsel").

For a case in which an appellate court, which was considering a condemned federal death-row prisoner's appeal, modified SAM's (Special Administrative Measures) that restricted access to him by paralegals, investigators, and translators employed by his appellate counsel, and thus (the court concluded) impaired his Sixth Amendment and due process rights, see United States v. Mikhel, 552 F.3d 961, 962-64 (9th Cir. 2009). See also United States v. Savage, 2010 WL 4236867, at *6 (E.D. Pa. Oct. 21, 2010) (unpublished) (PLRA does not apply to capital defendant's complaint about pretrial detention conditions "that directly and necessarily affect our ability to give him a fair and speedy trial." Accordingly, court agrees to "hear Defendant's complaints that he is not permitted sufficient contact visits with his attorneys, that he is not receiving sufficient access to a

computer and the law library, and that his legal mail is being opened outside of his presence").

This Savage court also overrode jail officials' refusal to allow visits between the defendant and his children, because "the ability to visit with his children could impact the preparation of Defendant's mitigation defense. A capital defendant should be provided the opportunity to develop any evidence he wishes to present at the sentencing phase of the trial." United States v. Savage, No. 2:07-cr-550 RBS, ECF #730, slip op. at 6-7 (E.D. Pa. Nov. 19, 2012). See also United States v. Catalan-Roman, 329 F. Supp. 2d 240, 254-55 (D.P.R. 2004) (unwarranted transfer to SHU violated defendants' Eighth Amendment right to present mitigating evidence by precluding participation in educational and work programs, gathering and presenting evidence on their rehabilitative efforts and ability to adjust to life in general population).

More recently, another district court in Puerto Rico intervened to increase attorneys' access to multiple pre-authorized codefendants, but declined to do so with regard to the clients' communications with their families for mitigation purposes — apparently because the court did not seem to understand the issue:

- United States v. Martinez-Hernandez, No. 3:15-cr-75-JAF (D.P.R. Oct. 15, 2015). On review of multiple co-defendants' broad-ranging challenges to various conditions of their confinement in the SHU's of mainland BOP faciities, including refusal to transfer defendants to facility in Puerto Rico and limits on defendants' visitation with attorneys, telephone contacts with relatives, access to law library and electronic equipment for discovery review, outdoor recreation, vocational training, and worship services, medical care, and access to Spanish-language books, court finds (A) it has jurisdiction only over those issues that "directly relates to a defendant's ability to prepare his defense," and it may remain "actively involved in the protection of the Defendants' right to counsel," (B) "Defendants must be allowed contact visits with their defense teams between the 10 hours of 8:00 a.m. and 8:00 p.m. or 9:00 a.m. and 9:00 p.m., any day of the week," (C) issue of defendants' access to discovery has been settled since "the court-appointed Coordinating Discovery Attorney requested funds allowing her to transfer the previously non-viewable evidence into a format that will be accessible both on counsel's computers and on facility computers for the Defendants' review," and court granted the request, (D) "Each of the moving

> Defendants state that the limitations placed on them by their placement in the SHU, along with their detention in facilities outside of Puerto Rico, inhibit their abilities to communicate with their families, thereby preventing them from developing mitigation evidence. Although the court is sympathetic to the difficulties that being placed in a facility off the island has on the Defendants' abilities to see their families, as long as they can communicate with their counsel, they are able to develop mitigation evidence. The fact that a defendant's family cannot afford to visit a defendant is not of constitutional import. Given the court's order requiring expanded hours for attorney visits, the court sees no impediment to developing mitigation evidence. The suggestion that this evidence may only be developed through personal visits by family members with the accused is unsupported by any legal theory or factual argument. Certainly the accused is in a position to provide details to counsel regarding this alleged mitigation evidence and no one has suggested that counsel lacks the ability to follow up on the island, in person, with these family members. As such, there is nothing about the housing of the defendants that is interfering with their ability to develop evidence of mitigation."

G. Counsel on Appeal

It would seem that Section 3005, which requires two lawyers including one learned in death-penalty law, applies on appeal, as well as at trial, though no court has addressed this issue. 18 U.S.C. § 3599(a)(1)(B), (c), provides that a federal defendant sentenced to death is entitled to the appointment of "one or more attorneys" and that, "[i]f the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases."

In practice, courts throughout the country have consistently appointed two lawyers, including at least one learned in death-penalty law, to federal capital appeals. The Judicial Conference has emphasized the importance of the "learned counsel requirement," in language particularly applicable to appellate assignments: "Counsel must . . . be thoroughly knowledgeable about a complex body of

constitutional law and unusual procedures that do not apply in other criminal cases."[11]

Thus, in appointing counsel on appeal in a capital case, a court should, according to the Judicial Conference, consider, foremost among all factors, "the attorney's experience in federal criminal appeals and capital appeals." As at the trial level, courts "should appoint counsel with 'distinguished prior experience' . . . in death penalty . . . appeals, even if meeting this standard requires appointing a lawyer from outside the district in which a matter arises" or appointing an "experienced state court capital litigator."[12]

It is also important that the team of lawyers who represented the defendant at trial not simply be maintained automatically for the appeal, as occurs generally in some circuits with non-capital cases. The Judicial Conference Recommendations state: "Ordinarily, the attorneys appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial."[13] There are several good reasons for this. One is to ensure a lawyer who is able to bring a fresh eye to the appeal, unencumbered by his or her own involvement in the trial, directly or through an association with trial counsel. Another is to make it possible for that attorney to remain as counsel in a post-conviction proceeding under 28 U.S.C. § 2255, should one be necessary and should such continued representation later be deemed appropriate.[14] Of course, trial counsel could not do so, because he or she would be conflicted.

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[11] Judicial Conference Recommendations, *supra*, at 11-12. See also id. (accompanying report notes: "Lawyers and judges recounted cases in which seasoned federal criminal lawyers who lacked death penalty experience missed important issues.").

[12] Judicial Conference Recommendations, *supra*, at 11-12, 18.

[13] Id. at 17.

[14] See id. at 18.

III. Indictment

A. Statute of Limitations

An offense punishable by death has no statute of limitations. 18 U.S.C. § 3281.

B. Gateway and Aggravating Factors

The Anti-Drug Abuse Act (ADAA), 21 U.S.C. §848(g)-(r) (repealed 2006) and the Federal Death Penalty Act (FDPA), 18 U.S.C. §§ 3591-95, provide for a capital jury to consider, at the sentencing hearing, (1) whether there exists one or more "gateway" factors, involving the defendant's mental state concerning the killing and (2) whether one or more statutory aggravating factors exist. Without a finding of both, the defendant is not eligible for the death penalty.

Since Ring v. Arizona, 536 U.S. 584, 597, 609 (2002), it has generally been accepted that the Constitution requires a grand jury to pass on — and the indictment to include — both these findings since they are, in effect, "elements" of any death-eligible offense. But see United States v. Higgs, 353 F.3d 281, 302-304 (4th Cir. 2003) (under Supreme Court's decision in Almendarez-Torres, statutory aggravating factors involving prior convictions did not need to be alleged in indictment). Thus, the government generally has the grand jury make special findings of the gateway factors and statutory aggravating factors as part of the indictment. The government may not add an additional statutory aggravating factor to the death notice that was not found by the grand jury. See United States v. Taylor, 2006 WL 3229966 at *5 (E.D. Tenn. Oct. 31, 2006) (unpublished) (striking substantial-planning aggravator from death notice since it was not found by grand jury).

For the most part, resulting issues involving Ring have fallen into two categories.

In one, generally involving cases that went to trial before Ring, several circuits have held that the government's failure to submit the gateway or statutory aggravating factors to the grand jury (and, relatedly, their omission from the indictment) is subject to harmless-error analysis. See United States v. Gabrion, 648 F.3d 307, 329 (6th Cir. 2011), modified on other grounds, 719 F.3d 511 (6th

Cir. 2013) (*en banc*); United States v. Davis, 380 F.3d 821, 829 (5th Cir. 2004); United States v. Robinson, 367 F.3d 278, 285-286 (5th Cir. 2004); United States v. Allen, 406 F.3d 940, 945 (8th Cir. 2005) (*en banc*); United States v. Barnette, 390 F.3d 775, 786 (4th Cir. 2004), vacated on other grounds, 546 U.S. 803 (2005). See also Battle v. United States, 419 F.3d 1292, 1301 (11th Cir. 2005) (even were Ring retroactively applicable on collateral review, "we doubt Battle could show prejudice," given that indictment language seemed to implicitly embrace the gateway and statutory aggravating factors); United States v. Lee, 374 F.3d 637, 651 (8th Cir. 2004) (no plain error in indictment's omission of gateway and statutory aggravating factors).

These courts have proceeded to find harmlessness. See United States v. Gabrion, 648 F.3d 307, 329 (6th Cir. 2011) ("no rational grand jury could fail to find that the prosecution lacked probable cause on any of the aggravating factors, because the evidence of probable cause on those factors was strong"), modified on other grounds, 719 F.3d 511 (6th Cir. 2013); United States v. Davis, 380 F.3d 821, 829-830 (5th Cir. 2004) (given overt acts found by grand jury in support of capital conspiracy count, it could not rationally have failed to find probable cause for gateway factors and statutory aggravating factor of substantial planning and premeditation had these been submitted); United States v. Robinson, 367 F.3d 278, 289 (5th Cir. 2004) (grand-jury evidence overwhelmingly shows there was probable cause to charge defendant with the "grave risk of death" statutory aggravating factor); United States v. Allen, 406 F.3d 940, 946 (8th Cir. 2005) (*en banc*) (same).[15] See also In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 93, 110-111 & n.15 (2d Cir. 2008) (indictment's capital counts adequately alleged gateway mental state and several statutory aggravators, including substantial planning, accompanying felony, and multiple killings; no need to consider whether, had there been error, it would be subject to harm analysis); United States v. Barnette, 390 F.3d 775, 785-786 (4th Cir. 2004) (indictment adequately alleged "pecuniary gain" aggravating factor, in count charging defendant with killing victim and taking his car. Although indictment did not allege statutory aggravator of "substantial planning and premeditation," court finds "that language must, as a fair construction, be read into the indictment," which charged that defendant traveled across state lines with intent to injure

[15] The Supreme Court has not yet addressed this issue. But see United States v. Cotton, 535 U.S. 625, 632 (2002) (omission from non-capital indictment of sentencing factor, which now must be treated as element under Apprendi, was error, but not plain error).

victim. "Moreover," any error was "harmless" since indictment "provided at least the factual structure from which the aggravating factors could be found"), vacated on other grounds, 546 U.S. 803 (2005); United States v. Higgs, 353 F.3d 281, 306-307 (4th Cir. 2003) (indictment adequately alleged statutory aggravating factor of murder-during-kidnapping; alternatively, any grand-jury error was harmless since petit jury's finding of all the statutory aggravators — two of which were uncontested — demonstrates defendant was not prejudiced); United States v. Jackson, 327 F.3d 273, 305 (4th Cir. 2003) (no plain error where indictment implicitly alleged one of the statutory aggravating factors, that murder occurred during kidnapping, and, given overwhelming nature of the evidence, surely grand jury would have found probable cause on the other aggravators too).

In the other category of cases, most involving post-Ring prosecutions in which the government had the grand jury make special findings of the gateway and statutory aggravating factors (in order to comply with Ring), a number of circuits have found that the ADAA and FDPA did not prohibit this, and that the statutes were not unconstitutional for failing themselves to require it. See United States v. Rodriguez, 581 F.3d 775, 805 (8th Cir. 2009); United States v. Honken, 541 F.3d 1146, 1174 (8th Cir. 2008); United States v. Mikos, 539 F.3d 706, 715 (7th Cir. 2008); United States v. Mitchell, 502 F.3d 931, 993-994 (9th Cir. 2007); United States v. Sampson, 486 F.3d 13, 20-24 (1st Cir. 2007); United States v. Brown, 441 F.3d 1330, 1367 (11th Cir. 2006); United States v. LeCroy, 441 F.3d 914, 921 (11th Cir. 2006); United States v. Purkey, 428 F.3d 738, 748-749 (8th Cir. 2005). See also United States v. Lee, 374 F.3d 637, 650-51 (8th Cir. 2004); United States v. Barnette, 390 F.3d 775, 789-790 (4th Cir. 2004), vacated on other grounds, 546 U.S. 803 (2005).

Several circuits have also rejected the argument that Ring requires the government to submit *non*-statutory aggravating factors to the grand jury.[16] See United States v. Lighty, 616 F.3d 321, 368 (4th Cir.2010); United States v. Rodriguez, 581 F.3d 775, 816 (8th Cir. 2009); United States v. Brown, 441 F.3d 1330, 1368 (11th Cir. 2006); United States v. LeCroy, 441 F.3d 914, 922 (11th Cir. 2006); United States v. Purkey, 428 F.3d 738, 748-749 (8th Cir. 2005); United States v. Bourgeois, 423 F.3d 501, 507-508 (5th Cir. 2005); United States v. Higgs,

[16] The Eighth Circuit has also held that the grand jury need not pass on whether aggravating factors outweigh mitigating ones. United States v. Purkey, 428 F.3d 738, 748 (8th Cir. 2005).

353 F.3d 281, 298-299 (4th Cir. 2003). See also United States v. Jackson, 327 F.3d 273, 288-289 (4th Cir. 2003) (no plain error). But see United States v. Green, 372 F. Supp. 2d 168, 184 (D. Mass. 2005) (granting defense motion to strike non-statutory aggravating factors based on prior unadjudicated criminal conduct because they were never presented to a grand jury. Court finds that other non-statutory aggravating factors do not need to be found by a grand jury).

IV. Death Notices and Discovery

A. Aggravating Factors and Evidence

The FDPA, 18 U.S.C. § 3593(a), (c), (d), requires the government to include, in the written notice of intent to seek the death penalty, the statutory and non-statutory aggravating factors on which it intends to rely. See United States v. Stitt, 250 F.3d 878, 897-898 (4th Cir. 2001) (since government had not noticed it, victim-impact evidence was not admissible as an aggravating factor).

The federal courts have seen significant litigation over the extent of the information about aggravating factors that the government is obligated to include in a death notice or otherwise provide to the defense.

The few circuit decisions on this subject are unfavorable:

- United States v. LeCroy, 441 F.3d 914, 929-930 (11th Cir. 2006). Government was not required to include in its death notice the evidence it would present in support of the aggravating factors.

- United States v. Higgs, 353 F.3d 281, 325 (4th Cir. 2003). Defendant received adequate notice of nonstatutory aggravating factor of obstruction-of-justice. He was not entitled to notice of the specific evidence of unadjudicated offense that government used to support it.

- United States v. Flores, 63 F.3d 1342, 1364 (5th Cir. 1995). Government did not give insufficient notice of facts and information underlying aggravating factors where defendant failed to point to any failure of the government to comply with discovery orders.

- United States v. Chandler, 996 F.2d 1073, 1090-1091 (11th Cir. 1993). Although not specifically noticed by government, evidence that defendant had threatened two other persons he thought were stealing his marijuana and that they later disappeared was relevant to prove noticed aggravating factor of substantial planning and premeditation in the charged killing.

But there have been a number of favorable district-court decisions:

- United States v. Con-Ui, No. 3:13-cr-00123-ARC, ECF #868 (M.D. Pa. Jan. 28, 2016). Ordering government to provide defense with an informational outlines on (1) HCD and substantial-planning aggravators, specifying witnesses that government intends to call and evidence it intends to present, (2) future-danger and acts-of-violence aggravators, specifying acts and characteristics alleged, witnesses, exhibits, and summary of testimony supporting each act, and (3) victim-impact aggravator, specifying list of personal characteristics of victim, whether any testimony will be introduced from persons not named in the NOI, particularized categories of harm and loss that government intends to present, and any other pertinent information defendant would need to adequately prepare to respond. Government is not precluded from submitting additional evidence at trial, but would have to make good faith showing why it was not disclosed earlier and that it was disclosed with sufficient time for defense to investigate it.

- United States v. Ciancia, No. 2:13-cr-902, ECF #228 (C.D. Ca. Sept. 4, 2015). Ordering government to provide defense with "an informational outline as to the factual basis on which the Government intends to show that Defendant's planning and premeditation were substantial."

- United States v. Stone, 2013 WL 5934349, at **1-2 (E.D. Cal. Nov. 5, 2013). Agreeing to strike paragraph from death notice that stated: "The United States further gives notice that, in support of the imposition of the death penalty, in addition to evidence of the above-listed aggravating factors, it intends to rely upon all the evidence admitted by the Court at the guilt phase of the trial and the offenses of conviction as alleged in the Indictment as they relate to the background and character of the defendant, SAMUEL STONE, his moral culpability, and the nature and circumstances of the offenses charged in Counts One and Two of the Indictment." Court explains that "to the extent the relevant paragraph sets out additional aggravating factors, it does not state them with sufficient clarity. The factors are unconstitutionally vague, as Stone's 'moral culpability,' his 'background and character,' and the 'egregious nature and circumstances of the offense' are described in insufficient detail."

- United States v. McCluskey, ECF #1017, Cr. No. 10-2734, slip op. at 14 (D. N.M. June 11, 2013) (unpublished). Ordering that, if government intends to cross-examine defense dangerousness expert about particular incidents of

escape or violence in BOP committed by other inmates, it disclose such incidents to the defense at least three days before the expert testifies.

- United States v. Pleau, 2013 WL 1673109, at **4, 6 (D.R.I. Apr. 17, 2013). "[T]he Court hereby orders the government to provide an outline of its victim impact evidence . . . . the Court [also] orders the government, by May 20, 2013, to provide a bill of particulars listing the incidents upon which it intends to rely in proving the second nonstatutory aggravating factor, participation in other serious acts of violence" and "to proffer its evidence in support of" other-acts-of-violence and future-dangerousness aggravating factors; proffer "shall include lists of the witnesses it expects to testify in support of each aggravator, brief descriptions of each witness's anticipated testimony, and copies of any out of court documents or exhibits that the government plans to introduce."

- United States v. Wilson, 2013 WL 1386137, at *9 (E.D. N.Y. Apr. 4, 2013). "Before the Government calls a cooperating witness whom it will question about Wilson's unadjudicated crimes, the Government must notify the defense of the crime or crimes about which the witness is expected to testify. The Government's notice must be provided at least one day prior to calling the witness and must state with reasonable specificity the date, location, and general nature of each crime about which the witness is expected to testify."

- United States v. Williams, 2013 WL 1335599, at **35, 40 (M.D. Pa. Mar. 29, 2013). "[T]he Court must assess the relevance and reliability of the evidence as well as its prejudicial and probative impact. Here, the Court cannot make these determinations without further information regarding each individual disciplinary infraction. The Court, therefore, will order the Government to submit a proffer of the evidence it seeks to use to prove Defendant's future dangerousness. If necessary, following the Court's review of the Government's submission, the Court will hold an evidentiary hearing to assess the reliability, relevance, probative value, and prejudicial impact of the evidence." And, regarding victim impact: "the Court will order the Government to provide an informational outline to Defendant, containing: the personal characteristics of Allery that it intends to prove; whether the Government intends to present the testimony of any individuals who are not identified by name in the amended notice; the particularized categories of injury, harm, and loss that it intends to present during the

penalty phase; whether the Government has informed the individuals identified by name in the amended notice of the accurate circumstances of Allery's death and corrected any of their misunderstandings; and any other pertinent information Defendant would need to adequately prepare responses during the penalty phase."

- United States v. Hammer, 2011 WL 6020157, at *3 (M.D. Pa. Dec. 1, 2011) (unpublished). "In order to ensure that Defendant's due process rights are protected and that the Court can properly screen the information the parties will introduce at the sentencing proceeding, the Court will order the Government to provide Defendant with Informational Outlines of the information it plans to present in support of the intent factors, the statutory aggravating factor of substantial planning and premeditation and the non-statutory factors of future dangerousness and victim impact. The Government should provide in the outline the general nature of the evidence it will seek to introduce in support of the threshold findings and specified aggravating factors."

- United States v. Basciano, 763 F. Supp. 2d 303, 357 (E.D.N.Y. 2011). "Should a penalty phase be necessary, the Government will be required to submit an affirmation to the court detailing the specific offenses it intends to present to the jury, including the expected testimony and evidence that will prove this uncharged conduct, so that the court may assess the reliability and sufficiency of this evidence."

- United States v. Lujan, 530 F. Supp. 2d 1224, 1271-1272 (D.N.M. 2008). Ordering government to submit (1) "outline of its anticipated victim impact evidence"; (2) a "written informative outline" of evidence on its "lack of remorse" aggravator; (3) an "outline" of the acts of institutional misconduct it will offer in support of "low rehabilitative potential" aggravator; and (4) notice of crimes government will rely on to support "pattern of violence" aggravator.

- United States v. Caro, 461 F. Supp. 2d 478, 482 (W.D. Va. 2006) ("absent proper disclosure, the government may not rely on specific instances of inmate violence (other than the defendant's own) in seeking to prove his future dangerousness").

- United States v. Delatorre, 438 F. Supp. 2d 892, 899 (N.D. Ill. 2006). Granting defense motion for bill of particulars as to times and places of defendant's conduct to support statutory aggravating factor. Rejecting government's contention that this was "work product."

- United States v. Karake, 370 F. Supp. 2d 275, 280-281 (D.D.C. 2005). Court will likely require government to provide more specific notice of aggravating factor that defendant participated in and supported activities of terrorist organization. Brady applies to any information that would rebut an aggravating factor. Regardless of whether Rule 16 applies to penalty phase, court has inherent authority to order discovery.

- United States v. Llera Plaza, 179 F. Supp. 2d 464, 470-475, 492 (E.D. Pa. 2001). Ordering government to provide outline of anticipated evidence in support of future-dangerousness and victim-impact aggravating factors, and more specific notice for aggravating factors of "grave risk of death to additional persons" and "defendant's participation in another killing."

- United States v. Johnson, 136 F. Supp. 2d 553, 560 n.5 (W.D. Va. 2001). Notice that merely listed four non-statutory aggravating factors was too vague. Court orders government to amend notice and use "short declarative sentences" to describe the factors.

- United States v. Bin Ladin, 126 F. Supp. 2d 290, 304 (S.D.N.Y. 2001). Granting bill of particulars as to victim-impact evidence.

- United States v. Cooper, 91 F. Supp. 2d 90, 110-111 (D.D.C. 2000). Ordering government to amend notice to include more specific information about extent and scope of injuries and loss suffered by each victim, family members, and other relevant individuals, and as to each victim's personal characteristics that government intends to prove through victim-impact factor.

- United States v. Glover, 43 F. Supp. 2d 1217, 1221-22 (D. Kan. 1997). Ordering government to provide factual amplification regarding (1) the "something of pecuniary value" referred to in death notice's allegation of pecuniary-gain aggravator; (2) the victim-impact factor, to-wit, which members of the family have suffered, nature of their suffering, and nature of

their alleged "permanent harm"; (3) the "substantial planning" and "lack of remorse" aggravators; (4) the "future danger" aggravator, including notice of any unadjudicated acts government intends to introduce, dates of the acts, and list of witnesses and exhibits; and (5) the gateway factors.

- United States v. Walker, 910 F. Supp. 837, 855-856 (N.D.N.Y. 1995). Ordering government to provide particulars regarding nonstatutory aggravating factors, including identities of drug dealers that one defendant allegedly robbed and dates and locations of robberies, and identities of juveniles to whom defendants allegedly distributed drugs and dates and locations of alleged distribution.

- United States v. Lecco, 2007 WL 486614, at **4-5 (S.D.W. Va. Feb. 9, 2007) (unpublished). Ordering government to submit outline of information it intends to use to establish aggravating factors listed in death notice.

- United States v. Diaz, 2007 WL 196752, at *3 (N.D. Cal. Jan. 23, 2007) (unpublished). Ordering government to provide defendant with "informative outline" of evidence supporting each aggravating factor, statutory and non-statutory. Later (2007 WL 4169973 at *14) striking "obstruction of justice" aggravating factor for government's failure to provide sufficient notice.

- United States v. Hargrove, 2005 WL 2122310, at *7 (D. Kan. 2005) (unpublished). Government must provide defense with advance notice of any unadjudicated acts it intends to rely on.

- United States v. Kaczynski, 1997 WL 34626785, at *21 (E.D. Cal. Nov. 7, 1997) (unpublished). Government notice that defendant has committed two other murders is insufficient; government must provide written description of all unadjudicated misconduct it intends to introduce during sentencing.

- United States v. Davis, 1996 WL 6997, at *1 (E.D. La. Jan. 5, 1996) (unpublished). Ordering government to provide particulars on unadjudicated offenses it intends to offer as non-statutory aggravation, including identity of others arrested for or charged with the same conduct, nature of defendant's participation in conduct, and weapons used. Court

also orders Rule 16 discovery as to these offenses, and disclosure of criminal convictions of penalty-phase witnesses.

- United States v. Davis, 1995 WL 608464, at *4 (E.D. La. Oct. 13, 1995) (unpublished) (ordering government to identify the "thing of pecuniary value" that one defendant allegedly promised to another for committing the offense.

B. Mitigating Factors and Evidence

Due process requires the government to disclose not only evidence that would be favorable to the defense at trial, but also evidence that would be favorable at sentencing, *i.e.*, that would help establish mitigating factors or to weaken or counter aggravating ones. Indeed, Brady itself was a case about discovery for capital sentencing. See Brady v. Maryland, 373 U.S. 83 (1963). See also Kyles v. Whitley, 514 U.S. 419 (1995). The government's discovery obligations under Rule 16(a)(i)(E)(i) also apply to "information material to defense preparation for the penalty phase." United States v. Tsarnaev, 2013 WL 6196279 (D. Mass. Nov. 27, 2013).

Several circuits (generally citing either a lack of preservation or a lack of prejudice) have rejected particular defense requests for appellate relief based on the late disclosure or lack of disclosure of mitigating or arguably mitigating evidence by the prosecution:

- United States v. Caro, 597 F.3d 608, 619-622 (4th Cir. 2010). No violation of Brady, or of Fed. R. Crim. P. 16 or 17, in denying access to BOP records, sought by defense future-dangerousness expert in prison-killing case, regarding (a) average length of stay at Florence ADMAX, and (b) transfers, housing, and institutional behavior for other inmates who had killed in prison. Defense made no showing that the records would have supported expert's testimony.

- United States v. Mitchell, 502 F.3d 931, 989 (9th Cir. 2007). Defendant not entitled to relief based on government's late disclosure (on day before sentencing hearing) of victim-impact statements and letter from Navajo Nation to United States Attorney indicating opposition to death penalty both generally and for defendant. Defense counsel did not request continuance

based on late disclosure. And record did not support claim that defense approach to mitigation would have been different had it known of the letter earlier.

- United States v. Brown, 441 F.3d 1330, 1351 (11th Cir. 2006). No Brady violation in government's failure to inform defense of a victim's family member who opposed the death penalty.

- United States v. Higgs, 95 F. App'x 37, 43-44 (4th Cir. 2004). Affirming district court's denial of mid-appeal Rule 33 motion for new sentencing hearing based on newly discovered evidence. While preparing direct appeal, defendant discovered, in district court record of codefendant's trial, that government knew of two inmates who claimed that codefendant had discussed the murder with them. Court finds no reasonable probability that any juror would have found codefendant's statement sufficient to overcome overwhelming evidence of defendant's predominant role in crimes such that jurors would have concluded that codefendant was equally culpable.

- United States v. Moussaoui, 365 F.3d 292, 315-316 (4th Cir. 2004). Government took interlocutory appeal from district court's order dismissing death notice as sanction for government's refusal to allow depositions to be taken from witnesses who were noncitizens being held abroad by the United States. Court agrees defendant had demonstrated that witnesses would provide favorable information and government must provide access to them. But Court finds that written statements from witnesses, in lieu of depositions, would be adequate.

C. Timing

Several district courts have ordered pre-authorization discovery to assist the defendant in preparing his presentation to DOJ:

- United States v. Delatorre, 438 F. Supp. 2d 892, 900-901 (N.D. Ill. 2006). Ordering government to produce all Brady information and Rule 16 discovery, pre-authorization.

- United States v. Feliciano, 998 F. Supp. 166, 176 (D. Conn. 1998). Granting, in part, motion for preauthorization discovery as to mitigating

evidence, aggravating factors government intends to prove, and expert tests government intends to offer at penalty phase.

- United States v. Diaz, 2005 WL 1575191, at *10 (N.D. Cal. June 30, 2005) (unpublished). Ordering government to provide pre-authorization discovery. Since defendants were indicted for death-eligible crimes, case was capital. Court agrees that exigencies of capital litigation compel prompt disclosure of information that will affect choice of penalty.

- United States v. Rivera Clemente, 2012 U.S. Dist. LEXIS 140728 (D.P.R. Sept. 19, 2012) (unpublished). Precluding government from seeking the death penalty because government's discovery violations prejudiced defendant in the authorization process.

One district court, in a published decision, ordered the government to provide all 18 U.S.C. § 3500 ("Jencks") material for *in camera* review two weeks before trial, to enable the court to determine whether it is sufficiently voluminous that early disclosure to the defense will be necessary. United States v. Lujan, 530 F. Supp. 2d 1224, 1254 (D.N.M. 2008).

D. Names of Witnesses and Potential Jurors

Many lawyers are not aware of a statute that imposes a special obligation on prosecutors in capital cases to disclose the names and addresses of jurors and witnesses three days before jury selection begins.

18 U.S.C. § 3432 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.[17]

Section 3432 "'is not directory only, but mandatory to the government,' and 'the trial cannot lawfully proceed until the requirement has been complied with.'" United States v. Young, 533 F.3d 453, 462 (6th Cir. 2008), quoting Logan v. United States, 144 U.S. 263, 304 (1892).

When is Section 3432 discovery due?

The Sixth Circuit has held that "trial commences," under Section 3432, with jury selection, rather than, as the government argued, only later, when the jury is selected and sworn. United States v. Young, 533 F.3d 453, 461 (6th Cir. 2008). The Tenth Circuit suggested it agreed that trial commences at the start of voir dire, rather than, as the defendant argued, earlier, with "jury qualification proceedings" that precede voir dire. United States v. Barrett, 496 F.3d 1079, 1116-1117 (10th Cir. 2007). See also United States v. Milburn, 2008 WL 2396839, at *2 (N.D. Cal. June 3, 2008) (unpublished) (ordering government to disclose witnesses not deemed at heightened risk 14 days before the start of trial, under Section 3432). But see United States v. Fort, 472 F.3d 1106, 1121 (9th Cir. 2007) (since Court had granted other aspects of the government's mandamus challenge to discovery order, which would affect the "overall management of discovery," Court would not address merits of challenge to requiring Section 3432 disclosure 21 days before trial, but rather would remand all discovery issues to the district court "for reconsideration").

In one FDPA case, the district court granted, in part, the defendant's motion for early disclosure of the government's witness list under Section 3432: It ordered the government to "produce a tentative witness list in this case 60 days prior to the commencement of trial," and to "designate[]" each witness on the list as "'will call,' 'probably will call,' and 'may call.'" But the court ordered that "the witness list may be amended as of right until three days before trial." United States v. Rodriguez, 380 F. Supp. 2d 1041, 1060 (D.S.D. 2005).

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[17] Congress has provided that, effective Dec. 1, 2009, section 3432 is amended by inserting after "commencement of trial" the words "excluding intermediate weekends and holidays." Pub.L. 111-16, §§ 3(10), 7, May 7, 2009, 123 Stat. 1608, 1609.

What must the government turn over?

The obligation to disclose the "abode" of potential jurors and witnesses seems to require more than simply the town or city, although the work address may suffice:

- United States v. Sampson, 177 F. Supp. 2d 166, 335 (D. Mass. 2004). Section 3432 requires government provide defense the home address of every witness it intends to call in its case in chief. Merely listing township might make it difficult to identify witnesses with a common last name.

- United States v. Taveras, 2006 WL 1875339, at *13 (E.D.N.Y. July 5, 2006) (unpublished). Granting defendant's motion for addresses of government's witnesses over objection that Section 3432 only required township of each witness. Court allowed government to substitute witnesses' work addresses for home addresses.

- United States v. Frank, 11 F. Supp. 2d 322, 326 & n.6 (S.D.N.Y. 1998). Noting that some courts have interpreted "place of abode" to mean township, but that government here agreed it would disclose addresses, absent protective order.

- United States v. Insurgents of Pennsylvania, 2 U.S. 335, 335 (C.C.D. Pa. 1795). Disclosure of state or county rather than township was not adequate.

There is also a good argument for requiring the government to do more than submit a list of every name ever connected with the case (in effect, a "hide-the-witnesses" list). Since the purpose of Section 3432 is to enable the defense to interview witnesses and prepare for trial, a narrowed, more realistic list should be required:

- United States v. Flores, 63 F.3d 1342, 1364 (5th Cir. 1995). When defendant objected to 400-name witness list submitted by government one week before trial, district court "appropriately directed the government to submit a more limited list. The government readily complied," with list of 200 witnesses, 60-70 of whom it eventually called.

What is the remedy when the government seeks to call a witness for whom such notice was not given?

The courts have looked to whether the defendant was prejudiced, whether the government's omission was in good faith, and what objection was made or relief requested by the defendant:

- United States v. Young, 533 F.3d 453 (6th Cir. 2008) (2-1, Cole dissenting). On government's interlocutory appeal challenging district court's exclusion of testimony from 19 late-noticed witnesses, appellate court finds that government acted in good faith and conducted a reasonably diligent investigation, and thus that exclusion would not be proper remedy absent showing of irreparable prejudice to defendant. Court remands for district court to address this issue, advising that, if defendant can establish prejudice resulting from lack of notice, district court should first consider whether adjournment would eliminate the prejudice. Id. at 464-466. Cole, dissenting, said that district court did not commit clear error of judgment in finding that government did not exercise reasonable diligence. Such a lack of diligence made exclusion appropriate without any need to consider prejudice to the defendant. Id. at 468-469.

- United States v. Barrett, 496 F.3d 1079, 117 (10th Cir. 2007). Defendant failed to establish plain error from delayed disclosure of names and addresses, which was not at least three days prior to trial, where defendant acquiesced to timing of disclosure and there was no showing of substantial prejudice.

- United States v. Fulks, 454 F.3d 410 (4th Cir. 2006). District court did not err in allowing testimony from two witnesses whose names were not on government's witness list as required by Section 3432. No *per se* bar against such testimony where names were discovered after list was submitted as long as omission was in good faith. (Here, omission was due to complexity of case and lack of diligent investigation, rather than bad faith). Even then, a defendant may still be entitled to exclusion if he can demonstrate actual prejudice that would not be eliminated by a brief adjournment. Defendant failed to do so here, as he declined trial court's offer of three-day continuance, was able to offer evidence to rebut these witnesses, and had been aware of the substance of the testimony through the

defense investigation. Id. at 423-427. Concurring judge (Williams) does not believe Section 3432 includes a good-faith exception, and thus would find error, but agrees with majority's finding of no prejudice, and thus would hold the error harmless. Id. at 439-441.

- United States v. Lee, 374 F.3d 637, 651-652 (8th Cir. 2004). No plain error under Section 3432 where government disclosed three witnesses only 48 hours before they testified at trial, but defense did not object to their testimony.

- United States v. Chandler, 996 F.2d 1073, 1098-1099 (11th Cir. 1993). Under Section 3432, government must provide defense with list of venirepersons and witnesses at least three days before trial. Though government called witness who was not on its list, defendant did not object and, moreover, error was technical since it did not affect outcome of case.

- United States v. Fernandez, 172 F. Supp. 2d 1265, 1280-1281 (C.D. Cal. 2001). Six weeks into trial, government sought to call two newly discovered witnesses. Defendants argued this would violate Section 3432. Court holds that witnesses may testify against noncapital defendant, but not against other two capital defendants unless government withdraws death notice. Court finds government acted in good faith but was negligent in not disclosing witnesses sooner. Court finds there would be only minor prejudice to other defendants. It also rules that witnesses may testify about dealings with noncapital defendant though this would inferentially bolster government's case against capital defendants. Finally, Section 3432 does not apply to rebuttal witnesses; therefore both witnesses can testify in rebuttal against capital defendants.

What about the exception for when disclosure would "jeopardize life or safety"?

If the government claims an exemption from disclosure because it would "jeopardize . . . lives or safety," it must prove such a threat by a "preponderance of evidence." 18 U.S.C. § 3432.

District courts that have invoked this exception as to jury disclosure have generally done so by citing as analogous, and thus analyzing, the same factors

applicable in a noncapital case. These include the defendant's involvement in organized crime, the defendant's participation in a group with the capacity to harm jurors, the defendant's past attempts to interfere with the judicial process, the defendant's exposure to an especially severe sentence if convicted, and extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment. See United States v. Byars, 603 F. Supp. 2d 826, 830-833 (D. Md. 2009); United States v. Honken, 378 F. Supp. 2d 880, 905-913 (N.D. Iowa 2004); United States v. Edelin, 128 F. Supp. 2d 23, 43-45 (D.D.C. 2001).

Nevertheless, there would appear to be a viable argument that, to satisfy this exception, the government needs to demonstrate more than is required of it in a noncapital case to justify withholding or delaying disclosure of witnesses' or jurors' identities. In Honken, the district court at least agreed that the various noncapital factors were relevant only to the extent they went to the question whether withholding jury names and addresses from the defense was necessary to "protect the life or safety of any person." Id. at 905.

Moreover, although a few other courts have disagreed, the district court in Honken said it was "not convinced that either an indictment or a notice of intent to seek the death penalty, alone or together, would satisfy this standard, because neither an indictment nor a notice of intent to seek the death penalty is evidence of anything; each merely contains allegations." Id. at 904-905. Thus, it proceeded to consider evidence previously admitted against Honken in this and other cases, but not an affidavit by an FBI agent. Id. at 910. United States v. Honken, 378 F. Supp. 2d 880, 905 (N.D. Iowa 2004).

There is on circuit decision that addresses this exception, in the context of witness disclosure. In United States v. Tipton, 90 F.3d 861, 888-889 (4th Cir. 1996), the court allowed the government not to disclose the addresses of 18 witnesses who were in the witness protection program pursuant to 18 U.S.C. § 3521. The court did arrange for defense counsel to be able to interview protected witnesses who consented, before they testified. (Most did not consent). The Fourth Circuit acknowledged that the withholding of the addresses was a "technical violation" of Section 3432. But it denied relief. The delayed disclosure was justified because "the threat of violence was palpable." Moreover, the defendant had made no showing of prejudice.

Is disclosure to the defendant himself required, or just to his lawyer?

One circuit has held that Section 3432 only entitles the defense, not the defendant personally, to witness and juror names, and thus does not forbid a district court from forbidding such information from being communicated by defense counsel to the defendant. United States v. Lee, 374 F.3d 637, 652 (8th Cir. 2004); United States v. Milburn, 2008 WL 2396839, at *2 (N.D. Cal. June 3, 2008) (Section 3432 disclosure would be only for the attorney's eyes and one investigator). See also United States v. Peoples, 250 F.3d 630, 635-636 (8th Cir. 2001) (holding, in life-sentence appeal, that Section 3432 did not forbid district court from directing that potential jurors and jurors be identified in open court only by number and not by name, where such information had been disclosed to the defense).

E. Defense Disclosure to the Government

A handful of district courts have taken the view that they may require a capital defendant to make reciprocal disclosure to the prosecution, at least as to evidence the defense intends to introduce at a capital sentencing hearing. These courts have relied on either Rule 16 or, assuming the Rule does not apply to capital sentencing, the court's inherent powers or to effectuate the government's right to sentencing rebuttal under 18 U.S.C. § 3593(c). See, e.g., United States v. Catalan Roman, 376 F. Supp. 2d 108, 115 (D.P.R. 2005) (applying Rule 16 requirements to defense non-mental-health experts); See United States v. Wilson, 493 F. Supp. 2d 348, 355-356 (E.D.N.Y. 2006) (same, as to mental-health experts; disclosure to fire-walled AUSA ordered); United States v. Northington, 2012 WL 2873360, at *8 (E.D. Pa. July 12, 2012) (unpublished) (where mental-retardation hearing was scheduled for two months hence, court orders disclosure reports by defense mental health experts, before government evaluations, to avoid unnecessary delay).

As discussed in the next section, however, when the reciprocal discovery relates to defense mental-health evidence, the requirements of Rule 12.2 may impose limitations on any effort, like the one in Wilson, to use Rule 16 or its equivalent to order defense disclosure.

Moreover, although the district court in Wilson held it possessed inherent authority to also order early disclosure of defense mitigating factors, see United States Wilson, 493 F. Supp. 2d 464, 464 (E.D. N.Y. 2006); United States v.

Tsarnaev, 2014 WL 4823882 (D. Mass. Sept. 24, 2014) (requiring disclosure under seal), this rests on even weaker footing. Such disclosure, unlike expert discovery, has no analogue in Rule 16. The Eighth Circuit has suggested that it is not required. See Eighth Circuit Criminal Pattern Jury Instructions, Death Penalty - Preliminary Instructions, Notes on Use ("the statute does not require the defendant to disclose mitigating factors. Therefore, the district court should not limit the defendant in presenting evidence of any mitigating factor. Further, although Rule 16 gives the district court broad discretion to regulate discovery, the Committee takes no position on whether the district court can order the defendant to disclose, prior to the penalty phase hearing, the mitigating factors he or she intends to prove."). So have other district courts. See, e.g., United States v. Henderson, 485 F. Supp. 2d 831, 847 n.8 (S.D. Ohio 2007); Catalan Roman, 376 F. Supp. 2d at 111. Moreover, in 2007, the two bills were proposed in Congress to require federal capital defendants to provide reciprocal notice of mitigating factors. Neither passed. See Congressional Research Service Report to Congress, The Death Penalty: Capital Punishment Legislation in the 110th Congress, at 12 (Sept. 7, 2007) (available on Resource Counsel Projects' website).

Equally tenuous was the rationale for another district court's order allowing the government to subpoena the authorized defendant's school records in preparing for trial. United States v. Pleau, 2012 WL 4369302, at **1-2 (D. R.I. Sept. 24, 2012) (unpublished). It said the records were "highly relevant to the merits of the case" because "they are necessary to identifying non-statutory mitigating factors." But there was no indication that the defendant intended to assert any non-mitigating factors to which the school records could conceivably be relevant or that the government made any showing that the records contained any information that would rebut such factors.

F. Striking Based on Outrageous Government Misconduct

In United States v. Sablan, 2014 WL 3385167 (E.D. Cal. July 10, 2014), a case involving the killing of a BOP officer, the court denied a motion to preclude the death penalty based on allegations that officials at USP Atwater had negligently "allowed for the widespread availability of alcohol and weapons" among inmates, thus creating an unsafe environment that led to the killing. While the proffered evidence did not meet "the extremely high standard of outrageous government misconduct . . . . This is not to say Defendant Sablan's contentions that USP Atwater was poorly managed by deliberately indifferent officials are unsubstantial.

Furthermore, the Government's response of ‘so what?’ to Defendant Sablan’s contentions does not acknowledge the gravity of the situation . . . . At trial, the jury may consider to what extent the prison’s conditions contributed to Defendant Sablan’s attack on Officer Rivera.”

V. Mental-Condition Notice: Federal Rule of Criminal Procedure 12.2

In 2002, Federal Rule of Criminal Procedure 12.2 was amended to cover cases in which a capital defendant intends to introduce expert mental-health evidence at a capital-sentencing hearing.[18] The new rule, and the Fifth and Sixth Amendments, protect the defense mental-health investigation from pretrial discovery except to a very limited extent. And, even when a government rebuttal mental-health examination is permitted, they narrowly circumscribe it so that it does not exceed that of the expert testimony the defense intends to introduce.

Stage 1: Defense files notice. When a defendant intends to offer such evidence, amended Rule 12.2(b) requires written pretrial notice from the defense:

> *12.2(b)(2) – Notice*: The defense must give notice of intent to introduce "expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on . . . the issue of punishment in a capital case." Such notice must be in writing and filed within the time provided for filing a pretrial motion or at any later time set by the court. For good cause, the court may permit late notice, grant a continuance, or may issue other appropriate orders.[19]

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[18] Prior to the 2002 amendments to Rule 12.2, a number of courts had, under their inherent authority, adopted or approved procedures for defense pretrial notice and government examinations. These procedures also generally included restrictions on disclosure to the government. See, e.g., United States v. Allen, 247 F.3d 741, 773-74 (8th Cir. 2001), vacated and remanded on other grounds, 536 U.S. 584 (2002); United States v. Webster, 162 F.3d 308, 339-40 (5th Cir. 1998); United States v. Hall, 152 F.3d 381, 399 (5th Cir. 1998), abrogated in part on other grounds, United States v. Martinez-Salazar, 528 U.S. 304 (2000); United States v. Minerd, 197 F. Supp. 2d 272, 275 (W.D. Pa. 2002); United States v. Edelin, 134 F. Supp. 2d 45, 47-49 (D.D.C. 2001); United States v. Beckford, 962 F. Supp. 748, 754-757 (E. D. Va. 1997); United States v. Haworth, 942 F. Supp. 1406, 1407-1409 (D. N.M. 1996); United States v. Vest, 905 F. Supp. 651, 653 (D. Mo. 1995). Of course, to the extent that the procedures implemented or endorsed in those cases conflict with Rule 12.2 as amended, they are no longer good law. See United States v. Sampson, 335 F. Supp. 2d 166, 241 (D. Mass. 2004).

[19] Other sections of Rule 12.2 require notice of certain mental-health defenses or evidence the defense intends to introduce at trial, and allow for court-ordered examinations in certain cases where such notice is given or when competency to stand trial is at issue.

Stage 2: If requested by government, rebuttal exam "may" be ordered "under procedures" decided by court. Upon defense notice, the court may, but is not required to, order a rebuttal examination of the defendant by a government-retained expert, upon motion by the government:

> *12.2(c)(1)(B) – Court-ordered Government Examination*: If the defense provides notice under 12.2(b), the court "may" upon motion by the government order the defendant to be examined "under procedures ordered by the court."

Stage 3: Results of rebuttal exam are sealed and filed with court. If the defendant files such a notice, the Rule imposes explicit limitations on disclosures to the government. The results and reports of the government's rebuttal examination must be filed under seal and may not be disclosed unless and until the defendant is convicted of a death-eligible offense and reconfirms an intent to introduce expert mental health evidence at sentencing:

> *12.2(c)(2) – Disclosure of Results of Government Examination*: The "results and reports" of any examination ordered by the court upon the defendant's 12.2(b)(2) notice "must be sealed and may not be disclosed" to any attorney for the government or the defendant unless the defendant is found guilty of a capital crime and confirms an intent to offer "expert evidence on mental condition" at sentencing.

Stage 4: After capital conviction, government evaluation is disclosed to defense; if defense then reaffirms intent to offer mental-health evidence, government and defense evaluations are thereafter disclosed to government. Only after disclosure of the results and reports of the government's rebuttal examination, is the defendant required — if the defense still intends to introduce expert mental health evidence — to disclose the defense experts' results and reports:

> *12.2(c)(3) – Disclosure of Results of Defense Examination*: After disclosure of the reports and results of the government's examination, the defense must disclose to the government "the results and reports" of "any examination conducted by the defendant's expert about which the defendant intends to introduce expert evidence."

In addition to the limits on disclosure, Rule 12.2 also explicitly restricts use of statements made by the defendant during the course of mental-health examinations conducted under the Rule: Neither statements nor fruits of the statements may be used unless and until the defendant first introduces expert mental health evidence and, then, only to the extent necessary to rebut the defense evidence.

> *12.2(c)(4) – Inadmissibility of Defendant's Statements*: No statement made by the defendant in the course of any examination conducted under the rule (with or without the defendant's consent), no testimony by any expert based on the statement, and no other fruits of the statement may be admitted into evidence in any criminal proceeding – unless, and only to the extent that, the defense introduces (a) evidence of incompetence to stand trial; (b) evidence in support of an insanity defense; (3) expert mental health evidence bearing on guilt or (4) expert mental health evidence bearing on punishment in a capital case.

Finally, Rule 12.2 authorizes sanctions for non-compliance:

> *12.2(d) – Sanctions*: The court may exclude defense expert evidence for failure to provide notice, failure to submit to a court-ordered examination, or failure to disclose results and reports of expert examination as required by the Rule.

This mechanism – pretrial notice, government rebuttal examination, and strict safeguards to prevent early disclosure to the government and limits on the use of the defendant's statements – was intended to balance competing interests: (1) the government's interest in preparing its case to rebut expert mitigating evidence introduced by the defense; (2) the defendant's Fifth Amendment right against self-incrimination and Sixth Amendment right to the effective assistance of counsel guaranteed; and (3) judicial efficiency concerns in avoiding unnecessary delays in capital sentencing proceedings. See, e.g., United States v. Fell, 372 F. Supp. 2d 753, 760 n.3 (D. Vt. 2005); United States v. Johnson, 383 F. Supp. 2d 1145, 1160 (D. Iowa 2005); Sampson, 335 F. Supp. 2d at 242-43; United States v. Taylor, 320 F. Supp. 2d 790, 792 (N.D. Ind.2004); Minerd, 197 F. Supp. 2d at 275, 276; Beckford, 962 F. Supp. at 757-60, 760-61, 761-63. See also Advisory Committee Notes to 2002 Amendments, citing, *inter alia*, Beckford.

Pretrial notice as well as government examinations, with limitations on government discovery and use of any results and reports, have been sustained, both before and after the 2002 amendments to Rule 12.2, against *facial* challenges raised under the Fifth and Sixth Amendments. [20]

Nevertheless, there are a range of critical questions concerning the amended Rule's *application*. There are also a number of lower court decisions that answer these questions favorably to the defense.

A. Defense Notice

1. Defense Notice: Timing

Rule 12.2(b) provides for the filing of the notice "within the time provided for filing a pretrial motion or at any later time the court sets." Typically, this means notice is filed quite late in the development of the case, as trial approaches.

The district courts that have expressly addressed the issue have required notice from three weeks to three months prior to the start of trial. See, e.g., United States v. O'Reilly, 2010 WL 653188, at *3, ¶¶ 1 & 3 (E.D. Mich. May 10, 2010) (defense to provide 12.2 notice approximately three months before jury selection commences, but court will consider any requests to amend notice up to and including 2 weeks prior to start of jury selection); United States v. Lujan, 530 F. Supp. 2d 1224, 1238 (D.N.M. 2008) (notice three months before trial sufficient); United States v. Wilson, 493 F. Supp. 2d 348, 353, 357 (E.D.N.Y. 2006) (notice

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[20] See, e.g., Allen, 247 F.3d at 773-74 (pre-amendment case) (holding no error in court's ordering defendant to undergo psychiatric exam and allowing one member of prosecution team to review results before sentencing phase under district court order not to divulge substance of evaluation to anyone; no error in prosecutor's divulging some information from the exam during hearing before sentencing where that information was also contained in pleading previously filed by defense; and rejecting appellant's argument that his right to testify was chilled a result of fear that the firewall had been breached: defendant could have testified and objected, on grounds of a violation of the court's protective order, to any improper questioning by the prosecution); Hall, 152 F.3d at 398 (district court's conditioning defendant's right to present psychiatric evidence in mitigation of punishment upon his submission to a pretrial government examination, did not violate defendant's Fifth Amendment rights); United States v. Lujan, 530 F. Supp. 2d 1224, 1237 (D.N.M. 2008); Fell, 372 F. Supp. 2d at 760; Johnson, 383 F. Supp. 2d at 1152; Taylor, 320 F. Supp. 2d at 792-93; Minerd, 197 F. Supp. 2d at 275-76; Edelin, 134 F. Supp. 2d at 49, 51.

required within three months of trial); United States v. Minerd, 197 F. Supp. 2d 272, 277 (W.D. Pa. 2002) (approximately three weeks prior to commencement of jury selection); United States v. Edelin, 134 F. Supp. 2d 45, 58 (D.D.C. 2001) (only one month between notice and beginning of jury selection).

At least one court directed that, before the defense would be required to file its notice of intent to introduce expert mental health evidence, the government would first have to disclose all mental health materials concerning the defendant in its possession. See Minerd, 197 F. Supp. 2d at 278 (directing government to produce, prior to the deadline for the defense to file its notice, all documents in its possession pertaining to any mental health examination performed on the defendant; further ordering that government's disclosure obligations are ongoing and that government must provide any such records that it obtains, at any time during the prosecution of the case, within five days of receipt).

Thus, there would appear to be no basis for the boilerplate motion, often filed by the prosecution, seeking early notice and discovery. (The government's request is also unnecessary, since there is no provision for a "demand" to trigger the defense obligations under Rule 12.2). An expectation of notice is arguably premature until, among other things, the prosecution has fully complied with its own discovery obligations and the defense mental-health investigation is complete. This would seem to require, for example, that the prosecution have provided complete discovery regarding the defendant's alleged criminal conduct, including uncharged misconduct, and complied with any mental-health or other mitigation-related Brady demands. It would also seem to require that the defense have been afforded funding, jail access, and time, for mental-health experts to be hired and conduct their work. Without all this, the defense cannot make an intelligent, informed decision whether to use mental-health evidence, or determine what mental-health evidence to introduce.

2. Defense Notice: Content

Rule 12.2(b), on its face, only requires that the defense serve and file written "notice" of intent to "introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on . . . the issue of punishment in a capital case."

While generally requiring that the notice do more than parrot this language, district courts have acknowledged that it need *not* identify the experts, the nature of the mental condition, the basis of the expert's opinion, the material the expert reviewed (*e.g.*, the defendant's medical records), or the mitigating factors. Instead, they have generally held that "meaningful notice" — *i.e.*, notice that apprises the government of the kinds of experts it will need to retain — includes the kinds of mental-health professionals the defense intends to call (*e.g.*, neuropsychologist, psychiatrist, neurologist) as well as the specific nature of any testing administered by these experts (*e.g.*, WAIS-III, MMPI). See United States v. O'Reilly, 2010 WL 653188, at *3, ¶ 2 (E.D. Mich. May 10, 2010); United States v. Umana, 2009 WL 2489309, at *3 (W.D.N.C. Aug. 12, 2009) (unpublished); United States v. Lujan, 530 F. Supp. 2d 1224, 1238-39 (D.N.M. 2008); United States v. Wilson, 493 F. Supp. 2d 348, 353 (E.D.N.Y. 2006); United States v. Johnson, 362 F. Supp. 2d 1043, 1079-80, 1081 (D. Iowa 2005); United States v. Sampson, 335 F. Supp. 2d 166, 242, 243 (D. Mass. 2004); but see United States v. Taveras, 2006 WL 1875339, at *9 (E.D.N.Y July 5, 2006) (defendant ordered to disclose to the government, at the beginning of jury selection, its witness lists for guilt and penalty proceedings; court further directs that "[u]pon disclosure by the government to defendant of a brief summary of the evidence it plans to use to support each of its aggravating factors, defendant shall within three days respond in kind"); United States v. Taylor, 320 F. Supp. 2d 790, 791 (N.D. Ind. 2004) (notice must include identities and qualifications of mental health experts who will testify or whose opinions will be relied upon).[21]

[21] A number of cases pre-dating the 2002 amendments to Rule 12.2 sometimes also required the defense to provide additional information in its notice. See, e.g., United States v. Minerd, 197 F. Supp. 2d 272, 277 (W.D. Pa. 2002) (notice must include name and qualifications of any mental health expert who may testify and a brief, general summary of the topics to be addressed, sufficient to permit the government to retain experts in the appropriate areas); United States v. Haworth, 942 F. Supp. 1406, 1409 (D.N.M. 1996) (requiring notice to include "brief summary of each expert's conclusions"): United States v. Vest, 905 F. Supp. 651, 654 (W.D. Mo. 1995) (name and professional qualifications of any expert who may testify or whose examination may be referred to in testimony and a brief description of the expert's diagnostic conclusions). Following the 2002 amendments, these cases, to the extent they require descriptions or summaries of the defendant's mental condition, are probably no longer good law. See Sampson, 335 F. Supp. 2d at 243 ("Under the new Rule . . . requiring the defendant to provide such information is no longer permissible because 'the nature of the proffered mental condition(s)' is essentially the same as 'results and reports' for which early disclosure is barred.").

At least three district courts have expressly held that the notice provisions of Rule 12.2(a) apply to mental health professionals who have not evaluated the defendant, but who will testify based only on their review of records. See, e.g., O'Reilly, 2010 WL 653188, at *3, ¶ 2; Umana, 2009 WL 2489309, at *3; Lujan, 530 F. Supp. 2d at 1239. Requiring notice in this circumstance may be justified both in terms of the plain text of the rule, as well as its underlying purpose in providing the government with sufficient time to obtain its own expert and prepare its case in rebuttal. Nevertheless, as set out below (see Section V.C.1, "Government Rebuttal Examination: Absent a Defense Examination," *post*), the notice and the rebuttal examination provisions of the Rule are not coextensive: A government rebuttal examination in the absence of a parallel, post-indictment examination by a defense expert raises significant 5th Amendment concerns that must be litigated and preserved.

B. Sealing; Timing of Disclosures to the Prosecution

1. Express Prohibitions Against Early Disclosure

As set out above, Rule 12.2(c)(2) explicitly requires that the results and reports of any government rebuttal examination be filed under seal and *not* disclosed.

The Rule also expressly establishes the timing and sequence for disclosures. The "results and reports" of any government rebuttal examination may not be disclosed to "any attorney for the government" or the defense *until after the defendant is found guilty of a capital offense AND reconfirms an intent to introduce expert mental health evidence at sentencing*. 12.2(c)(2). And the "results and reports" of the defense examination must be disclosed *only after the government's disclosure*. 12.2(c)(3). Thus, the Rule does *not* provide for simultaneous disclosure of defense and government reports. See, e.g., United States v. O'Reilly, 2010 WL 653188, at *4, ¶13 (E.D. Mich. Feb. 19, 2010) (following conviction on capital count, defense must file notice confirming or withdrawing intent to introduce expert mental health evidence at penalty phase; within 24 hours of reconfirmation notice, government rebuttal expert reports released to government and defense; defense then has 48 hours to review government reports; if, at the end of the 48-hour review period, defense has not

withdrawn notice of intent, defense must then disclose its experts reports to the government).

Given the sequence expressly set out in the Rule – government disclosure first, followed by defense disclosure – a reasonable argument can be made that the government's expert's report should first be turned over *only* to the defense and not provided to the government, until *after* the defense has had an opportunity to review and then further confirms the intent to introduce expert mental health evidence. Based upon its review, the defense could withdraw its intent, without the government having obtained information to which it would then not be entitled. The Rule's careful sequencing of the disclosures – plainly forbidding simultaneous disclosures – supports this additional protection.

Sealing and prohibiting early disclosure serve as a prophylactic against "inadvertent use" of the defendant's statements at guilt-innocence proceedings. They also avoid litigation over whether the government has improperly made derivative use of the defendant's statements before the defense introduced any mental-health evidence. See United States v. Allen, 247 F.3d 741, 774 (8th Cir. 2001), vacated and remanded on other grounds, 536 U.S. 584 (2002); United States v. Hall, 152 F.3d 381, 399 (5th Cir. 1998), abrogated in part on other grounds, United States v. Martinez-Salazar, 528 U.S. 304 (2000); United States v. Sampson, 335 F. Supp. 2d 166, 243 (D. Mass. 2004); United States v. Beckford, 962 F. Supp. 748, 762 & n.11, 764 n.17 (E.D. Va. 1997). As explained in the 2002 Advisory Committee Notes:

> Most courts that have addressed the issue have recognized that if the government obtains early access to the accused's statements, it will be required to show that it has not made any derivative use of that evidence. Doing so can consume time and resources. See, e.g., Hall, 152 F.3d at 398 (noting that sealing of record, although not constitutionally required, "likely advances interests of judicial economy by avoiding litigation over [derivative use issue]").

Accordingly, even prior to the 2002 amendments to Rule 12.2, district courts generally required the government's and defense experts' reports and results be

filed under seal and not disclosed.[22] Further, since the 2002 amendments, the district courts *have generally denied government requests for information or materials beyond the mere notice requirement described above*.[23]

- United States v. Umana, 2009 WL 2489309, at *3 (W.D.N.C. Aug. 12, 2009) (unpublished). Denying government's request that defense provide a general summary of the information that its experts will provide.

- United States v. Lujan, 530 F. Supp. 2d 1224, 1239 (D.N.M. 2008). Denying government's motion to require defense to provide names or qualifications of experts or a summary of the information they will provide.

- United States v. Wilson, 493 F. Supp. 2d 348, 352-53 (E.D.N.Y. 2006). Denying government's request for notice of names, areas of expertise, curriculum vitae of defense experts, as well as identities of lay witnesses and any research or studies on which the experts relied in reaching their conclusions. The district court in Wilson, however, subsequently directed the defense to provide to the prosecution, prior to sentencing, a list of all mitigating factors that it intended to prove at sentencing and, further, permitted the prosecution to provide that list to the fire-walled AUSA managing the government's rebuttal examination. 493 F. Supp. 2d 480, 482 (E.D.N.Y. 2006).

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[22] See, e.g., Allen, 247 F.3d at 774 (no error not to seal, but approving sealing in future cases); United States v. Edelin, 134 F. Supp. 2d 45, 55, 58-59 (D.D.C. 2001) (any report by government or defense experts be filed under seal and not discussed with government counsel until after the guilt phase); Beckford, 962 F. Supp. at 763, 764 (same); United States v. Haworth, 942 F. Supp. 1406, 1409 (D.N.M. 1996) (same); United States v. Vest, 905 F. Supp. 651, 654 (D. Mo. 1995) (same).

[23] Rule 12.2's sealing requirement and prohibitions on early disclosures, however, may not be constitutionally required. See Hall, 152 F.3d at 399 (in pre-amendment case, holding that district court was not required to seal results of government mental-health examination prior to conviction; defendant's rights were protected by ability to seek suppression of any tainted evidence the Government sought to present prior to defense presentation of mental-health testimony); Allen, 247 F.3d at 774; Sampson, 335 F. Supp. 2d at 243.

- United States v. Johnson, 362 F. Supp. 2d 1043, 1080-81 (D. Iowa 2005). Denying government's request for notice of the nature of defendant's proffered mental condition

- Sampson, 335 F. Supp. 2d at 243. Government's request for notice of the "nature of the proffered mental conditions" no longer permissible under amended Rule 12.2 because such information is essentially the same as "reports and results." Court further observes that "the defendant's Sixth Amendment right to the effective assistance of counsel could be compromised if defense counsel was required to reveal his strategy or to disclose materials he provided to his experts." Id.

- United States v. Minerd, 197 F. Supp. 2d 272, 278 (W.D. Pa. 2002). Rejecting, except for medical records, government's request that the defense provide all material supplied to defense experts

- Beckford, 962 F. Supp. at 764 n.15 & n.16. Rejecting government's request for notice of "the nature of the proffered mental condition" and date of onset and for a "summary of the basis of the opinions" of the defense experts, concluding that disclosure of such information would circumvent the court's order strictly limiting disclosure of the results of the government's examination unless and until the defendant was convicted of a capital offense and confirmed his intent to introduce mental health expert evidence. Also denying government's motion that defense provide the government with any and all material supplied to the defense expert that form the basis of his or her opinion, holding that such a sweeping order would in that defense planning and strategy would necessarily be revealed by the requested disclosure, in violation of the Sixth Amendment.

- Edelin, 134 F. Supp. 2d at 52 & n.11, 55. Rejecting on work-product and Sixth Amendment grounds, government request that defense provide copies of any and all materials supplied to the defense expert – except medical records. Defendant also need not provide, except in his sealed expert reports or as required by the court's order regarding the initial notice, information about nature of proffered mental condition, date of onset, summary of the diagnoses or summary of the bases of the expert's opinion.

2. "Fire-Walled" Government Attorneys

Although not provided for by Rule 12.2, a number of defense teams have asked the district courts to order the government to appoint "fire-walled" or "taint" attorneys to manage the government's rebuttal examination of the defendant. The benefits of employing a government taint lawyer are two-fold: The fire-walled AUSA serves as a point person to handle any legal and/or logistical issues arising from the government's rebuttal examination. See United States v. Johnson, 362 F. Supp. 2d 1043, 1083 (D. Iowa 2005) (approving request of parties to appoint taint team of fire-walled AUSAs to manage the government's examination of defendant); United States v. Sampson, 335 F. Supp. 2d 166, 243-244 (D. Mass. 2004) (upon agreement of the parties, court designated two fire-walled AUSAs to handle legal and logistical issues arising from governments testing). At the same time, the fire-walled AUSA provides an additional barrier, beyond the explicit protections set out in Rule 12.2, to ensure that information derived from the government's rebuttal examination, including statements made by the defendant during the course of that evaluation, are not revealed to the prosecuting attorneys prematurely -- that is, unless and until the defendant is convicted of a capital count and subsequently re-confirms his intent to introduce expert mental health evidence at the penalty phase. See Sampson, 335 F. Supp. 2d at 245; Johnson, 362 F. Supp. 2d at 1084.

Defense requests for the appointment of a fire-walled AUSA have routinely been approved. See, e.g., United States v. O'Reilly, 2009 WL 3615019, at *2-3 (E.D. Mich. Oct. 27, 2009) (unpublished) (granting defense motion to appoint fire-walled attorney; limiting government to one fire-walled attorney); United States v. Umana, 2009 WL 2489309, at *4 (W.D.N.C. Aug. 12, 2009) (fire-walled AUSA will be designated to receive notice of expert evidence of mental condition on the issue of punishment, arrange for any evaluation by an expert designated by the Government, handle any issues arising out of the evaluation process and arrange for filing of the expert's report under seal); United States v. Lujan, 530 F. Supp. 2d 1224, 1240 (D.N.M. 2008) (if defense files 12.2(b) notice, at least one fire-walled attorney must be assigned to handle any issues that may arise before, during, or after the government's expert's examination); United States v. Wilson, 493 F. Supp. 2d. 348, 357-358 (E.D.N.Y. 2006) (appointing, as agreed by the parties, fire-walled AUSAs); Johnson, 362 F. Supp. 2d at 1083; Sampson, 335 F. Supp. 2d at 243-244. And, most frequently, in order to ensure strict compliance with Rule 12.2's prohibition on early disclosure, the courts have required that the

fire-walled AUSAs be appointed from a district other than the one prosecuting the case. See, e.g., O'Reilly, 2009 WL 3615019, at **2-3 (granting defense motion, over government's objection, to appoint fire-walled attorney from outside district of prosecuting attorney's office, but permitting government to select fire-walled attorney from out of district); Wilson, 493 F. Supp. 2d. at 357-358 (granting defense request, over government objection, to appoint fire-walled AUSAs from outside the district of prosecuting attorney's office); Johnson, 362 F. Supp. 2d at 1084 (granting defense request, over government objection, to appoint taint team of AUSAs from outside the district); Sampson, 335 F. Supp. 2d at 243-244 (upon agreement of the parties, court designated two out-of-district AUSAs); but see Umana, 2009 WL 2489309, at *4 (fire-walled AUSA from within prosecuting U.S. Attorney's Office).

To further prevent even inadvertent leaks, the district court in Johnson took the additional prophylactic step of strictly limiting contact between the taint team and prosecuting attorneys – including ordering that any request for information from the fire-walled attorneys to the prosecuting attorneys be "one way" and either transcribed by a court reporter or and made in writing with a copy filed under seal. see also Sampson, 335 F. Supp. 2d at 244 & n.45, 245 (entering order of protection forbidding the fire-walled attorneys from disclosing defense records and information and any records or information obtained or developed by the government's experts to the prosecuting attorneys).

One concerning consequence of the use of fire-walled government attorneys — and something defense counsel should consider carefully before requesting or consenting to this procedure — is that the some district courts, in published opinions, have viewed the existence of the fire-walled AUSA as a justification to direct the defense to disclose to the taint lawyers, well in advance of penalty proceedings, materials that Rule 12.2 on its face would seem to protect:

- Wilson, 493 F. Supp. 2d at 356. Defense required, pre-trial, to disclose to the fire-walled AUSA a written summary of the expert testimony on defendant's mental condition that he intends to offer at penalty phase. Summary must describe the witness's opinions, the bases and reasoning for those opinions, and the witnesses's qualification. In addition, the defense must turn over to the fire-walled AUSA the results of tests and reports of

examination administered to defendant and all raw data obtained by defense experts.[24]

- United States v. Johnson, 383 F. Supp. 2d 1145, 1167 (D. Iowa 2005). Taint attorneys entitled to immediate access to defense raw testing data (and would have been entitled to defense experts' reports had they asked), notwithstanding 12.2(c)'s prohibition on disclosure of result and reports to government attorneys. Rule 12.2(c), however, precludes reciprocal discovery to the defense of the government's raw testing data.

- Sampson, 335 F. Supp. 2d at 245. Court, with the agreement of the parties, orders that the fire-walled AUSAs read the mental health reports prepared by the government expert(s) before filing the reports with the court.

Although Rule 12.2(c)(2) forbids disclosing the results and reports of the government and defense examination to "any attorney for the government," and would seem, on its face, to prohibit the disclosures described above, the courts implementing fire-wall procedures have read the rule to prohibit disclosure only to the prosecuting attorneys. See Wilson, 493 F. Supp. 2d at 356; Johnson, 383 F. Supp. 2d at 1166; Sampson, 335 F. Supp. 2d at 245.

A second troubling concern is the issue of whether the fire-walled AUSA will later be allowed to join the prosecution team. To-date, it appears that, since the 2002 amendments to Rule 12.2, most district courts implementing such taint procedures have expressly forbidden the fire-walled AUSAs from ever participating in the prosecution. See Johnson, 362 F. Supp. 2d at 1083 (forbidding taint attorneys from participating in prosecution at any stage of the proceedings); Sampson, 335 F. Supp. 2d at 245 (same).

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[24] Several courts had previously held that Federal Rule of Criminal Procedure 16 – which, in pertinent part requires a defendant who has given 12.2(b) notice to provide the government, upon request, with a written summary of any expert testimony that the defendant intends to use, including a description of the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications – does not apply to the sentencing phase of a capital trial. See, e.g., United States v. Minerd, 197 F. Supp. 2d 272, 275 (W.D. Pa. 2002); United States v. Beckford, 962 F. Supp. 748, 754 (E.D. Va. 1997). The court in Wilson disagreed and ordered the defendant to disclose the materials required under Rule 16 to the fire-walled AUSAs. Wilson, 493 F. Supp. 2d at 355. See also Section IV.E (Death Notices and Discovery — Defense Disclosure to the Government), *ante*.

In United States v. Allen, 247 F.3d 741 (8th Cir. 2001), vacated and remanded on other grounds, 536 U.S. 584 (2002), however, a pre-amendment case, the Eighth Circuit concluded that the district court did not err in ordering the defendant to undergo psychiatric exam and allowing one member of prosecution team to review results before sentencing phase. The prosecutor who reviewed the examination results was not permitted to divulge the results until after completion of the guilt phase, but was then allowed to join the prosecution team. Id. at 773. And the district court in Umana, 2009 WL 2489309, at *4, appears to have licensed the fire-walled AUSA to join the prosecution once the defense penalty-phase case has begun: "The fire-walled AUSA may not join the prosecution team until the defense case in the penalty phase has begun."

In sum, the potential downsides to the fire-walled government attorneys approach, then, may be significant: These cases, together, provide an AUSA, hand-picked by the prosecuting office (and who may later be permitted to join the prosecution team) with several months of access, not permitted to the defense, to both the government and defense experts' results and reports, in which to prepare the government's rebuttal case.

3. Alternatives to "Fire-Walled" Government Attorneys

In light of the potential downside to the fire-wall approach, defense teams have considered alternatives that do not rely on a government taint lawyer. Two such alternatives have found support in the district courts.

One such alternative would be to ask the district court to schedule the government's rebuttal examination to take place following the guilt phase. In United States v. Taveras, 233 F.R.D. 318 (E.D.N.Y. 2006), the district court denied government's request for a pretrial examination of defendant, postponing the government's rebuttal examination until after a verdict of guilt on a capital offense. The court, in reviewing the alternatives, noted that taint team procedures are "unwieldy" and expressed concern that "the chance of leakage of information -- or at least the contention to that effect -- remains substantial." Id. at 322, 323. Accordingly, the court held that postponing the government's rebuttal examination until after a guilt verdict on a capital count would better protect the defendant's constitutional rights. Id. at 322. In addition, the court observed that delaying the examinations and final reports of the experts would permit the experts to base their

opinions on portions of the live trial testimony and not solely on cold record materials. Id. at 323. Finally, the court was not persuaded that requiring the government to conduct its rebuttal examination after the guilt phase would unnecessarily or significantly delay penalty-phases proceedings. Id. at 323.

It should be noted, however, that to-date Taveras remains the only published decision that has required the government to conduct its rebuttal examination after the guilt phase. See, e.g., Wilson, 493 F. Supp. 2d at 359 (rejecting Taveras approach; acknowledging risks of leakage, even with fire-walled AUSAs, but concluding that risks associated with delay predominate); Lujan, 530 F. Supp. 2d at 1240 (same).

A second alternative to requesting a fire-walled AUSA is illustrated by the decision in United States v. O'Reilly, 2010 WL 653188 (E.D. Mich. Feb. 19, 2010) (unpublished).[25] The decision hews essentially to the plain language of Rule 12.2, with additional features to accomplish the same ends intended by the fire-wall approach, but without the consequent risks of premature disclosure of materials to any government attorney. The important provisions of this alternative include:

Advance notice of the government's proposed testing and two opportunities for defense to lodge objections with the court

- Prior to any rebuttal examination, at least 5 days advance notice of the names and professions of government rebuttal experts and tests. Id. at *5, ¶ 17. If, within 3 days of notice, defense files written formal objections, court will hold hearing, at which neither party will bear the burden of proof. Id. at *5, ¶ 18.

- Following disclosure of the government's rebuttal reports, the defense may file objections to their admissibility, and the court will address

[25] See also United States v. Minerd, 197 F. Supp. 2d 272, 276 (W.D. Pa. 2002) (prior to the 2002 amendments to Rule 12.2, concluding that sealing the government's report and prohibiting disclosure of the government and defense materials until after a capital conviction and the defendant's reconfirmation of an intent to introduce expert mental health evidence at sentencing better protects the defendant's constitutional rights than government's proposed fire-wall approach).

any defense objections before penalty-phase proceedings begin. Id. at *6, ¶ 22.

Restricted, carefully sequenced disclosures to the AUSAs

- Rebuttal experts must file their results, incorporated into reports, with the Court, under seal, within 15 days after completion of their rebuttal examinations. Id. at *4, ¶ 5. Following guilt verdict on capital count, defendant must, ten days prior to commencement of penalty phase, file notice reconfirming or withdrawing intent to introduce expert mental health evidence. Government rebuttal reports released to defense and AUSA within 24 hours of reconfirmation notice. Id. at *4, ¶ 13. Defense given 48 hours to review government rebuttal reports; if, by the end of the 48-hour review period, defendant has not withdrawn notice of intent, defense must disclose to the AUSAs its own experts' reports and any information provided to defense experts. Id. at 4 ¶ 13, 5 ¶ 19.[26]

Additional prohibition on discussions between the AUSAs and government rebuttal witnesses

- Rebuttal experts may not discuss the rebuttal examinations or any information derived therefrom, including statements made by the defendant during the course of the examination, with anyone associated with the government or the defense, unless and until the reports are released. Id. at *4, ¶ 10. Rebuttal experts must sign a written confirmation indicating their understanding that they may not discuss the examinations or any information derived therefrom with

[26] In a subsequent decision, 2010 WL 1856478 (E.D. Mich. May 10, 2010), the O'Reilly court expressly rejected the government's motion for pre-trial disclosure of defense of mental health expert reports under FRCP 16 (b)(1)(C)(ii). The court concluded that Rule 12.2(c) limited the timing of Rule 16 disclosures in a capital case. Id. at *1. In addition, the court held that cases, such as United States v. Wilson, 493 F. Supp. 2d 348, 357 (E.D.N.Y. 2006), described above, requiring disclosure of such materials to fire-walled AUSAs were not persuasive in O'Reilly's case, where no fire-wall mechanism had been implemented because such disclosures would be made directly to the prosecuting attorneys, rendering the protections afforded by Rule 12.2(c) "meaningless." Id. at **1-2.

anyone associated with the defense or the government, subject to contempt of court for failure to adhere to the requirement. Id. at *4, ¶ 11. All communications between the AUSAs and the government rebuttal experts must be audio-taped, and the tapes must be filed under seal with the court. Id. at *4, ¶ 7.

In camera review by the district court for Brady material

- After the government's rebuttal reports are filed under seal, the court will review them *in camera* for any material favorable to the defense to which the defense would be entitled. Id. at *4, ¶ 12.

These provisions, taken together, satisfy the principal goals of the taint-team approach — without the risk of premature disclosure to a government lawyer. First, the strict limitations on the content and timing of disclosures ensure that no protected information, either from the defense or from the government's own expert, is disclosed to the AUSA unless and until the defendant is convicted of a capital count and re-confirms his intent to introduce expert mental health evidence at the penalty phase. Second, the two scheduling hearings on defense objections, coupled with the court's own *in camera* review of the rebuttal reports, obviate the need to appoint a point person outside of the prosecution to manage the rebuttal examination: The O'Reilly order anticipates litigation both before the examination occurs (at a time when the government expert has no protected information to reveal) and after the release of the government's rebuttal report (at a time when the concern for protected information is lessened). Addressing defense objections at these two stages should reduce, if not eliminate, the need for the government to interact with its expert witnesses between the time when the rebuttal examination commences and when the reports are disclosed immediately before the penalty-phase begins.

4. Government Motion for Disclosure: Non-Testifying Experts

The government, in at least one recent case, moved for disclosure of the reports and results of testing or examination conducted by any *non-testifying* defense experts. See United States v. Williams, No. 06-00079 DAE-KSC, ECF #1268 (D. Haw. Aug. 12, 2010). The government argued, citing Pawlyk v. Wood, 248 F.3d 815 (9th Cir. 2001), that it "ha[d] a right to cross-examine Defendant's mental health experts with the contrary findings of Defendant's other mental health

experts." Significantly, it is clear from its motion that the government obtained the identities of two the non-testifying defense experts directly from the BOP/FDC. The district court in Williams denied the government's motion as premature, but strongly suggested that it would order disclosure of the requested results and reports at trial, in the event that the defense introduced evidence putting the defendant's mental state at issue. Pawlyk notwithstanding, compelled disclosure of the results/reports of consulting, non-testifying mental-health experts would seem to raise very significant privilege issues (work product and attorney-client) and would further seem to run afoul of FRCP Rule 16, as well as due process and the right to counsel under the 5th and 6th Amendments.[27]

Both the government's motion and the district court's ruling are very troubling: Success in even a single court may well prompt the government to file similar motions in future cases. The Williams team's opposition to the government's motion to compel is available on the FDPRC website. In addition counsel might, early in the case, consider asking the court to enter a protective order forbidding BOP and the relevant detention facility from sharing the defendant's visitation records with the prosecution team. A sample motion for such a protective order is also available on the FDPRC website.

C. Government Rebuttal Examination

An evaluation of a capital defendant by a government mental-health expert — which the United States Supreme Court has analogized to an in-custody interrogation of the defendant by law enforcement, see Estelle v. Smith, 451 U.S. 454, 467 (1981) — is a serious step with potentially grave implications. Well before defense counsel files 12.2 notice — indeed, even before they retain experts and set them to work — they should know what the law says are the prosecution's prerogatives, and what is says are the limitations on such evaluations and the procedural safeguards that attend them.

Following notice by the defense of an intent to introduce expert mental health evidence at sentencing, the court, under Rule 12.2(c)(1)(B), "*may*" order the

[27] Pawlyk, on appeal from the denial of a § 2254 petition for habeas corpus relief from a state conviction, necessarily addressed only the constitutional issues. The constitutional issues, however, seem significant enough to warrant preserving them even in the 9th Circuit, where Pawlyk is binding authority.

defendant to undergo a rebuttal examination by an expert retained by the government; the government's entitlement to its own examination is discretionary, not mandatory. Compare 12.2(c)(1)(B) (court "may" order government rebuttal examination following defense 12.2(b) notice), with id. (court "must" order government examination following defense notice of intent to interpose insanity defense). Notice and rebuttal examination are not co-extensive under the rule. This makes sense, for, even if the government is not permitted an exam, pretrial notice of the defense's intent to introduce expert mental-health evidence at allows the government sufficient time to retain its own experts and prepare its rebuttal case.

Further, in the event the court does permit the government to conduct a rebuttal examination, such examination must be conducted "under procedures ordered by the court." 12.2(c)(1)(B).

The decision whether or not to permit a government rebuttal examination, and the procedures adopted for such an examination, must be consistent with the purpose of the Rule – to facilitate the government's preparation of its case in rebuttal – and with the defendant's Fifth and Sixth Amendment rights.

1. Government Rebuttal Examination: Absent a Defense Examination

A government examination in the absence of a post-indictment examination by a defense-retained expert raises significant Fifth Amendment issues, that defense counsel should raise in district court, and preserve for appellate review.

In United States v. Edelin, 134 F. Supp. 2d 45, 55, 58-59 (D.D.C. 2001), the defense intended to introduce at sentencing (a) testimony from a neurologist who had examined defendant's health with respect to a gunshot wound and (b) a mental-health expert who would testify based on a review of records, without interviewing the defendant himself. 134 F. Supp. 2d at 51. To the extent that its evidence would not rely on an examination of defendant, the defense opposed a government examination. Acknowledging a lack of case law on the issue, the court determined that the government would be entitled to an examination of the defendant, even in the absence of a defense examination. The court, which had already concluded that the defense need not disclose any of the materials it had provided to its expert, reasoned that without such materials and without an examination, the government would be unable to rebut the defense mental health

evidence. Id. at 52-54. The court seemed to equate relevance with entitlement to an examination. It did not consider the Fifth Amendment implications of its order. See also United States v. Umana, 2009 WL 2489309, at **3-4 (W.D.N.C. Aug. 12, 2009) (unpublished) (notice shall include kinds of mental health experts defense intends to call, including "experts who are basing their opinions on a review of records and not a personal examination of Defendant," and if defense provides such notice, granting government's request to require defendant to submit to examination by government's experts); United States v. Lujan, 530 F. Supp. 2d 1224, 1239, 1273 (D.N.M. 2008) (ordering that defendant must provide notice, whether or not experts examined defendant, so long as expert will provide evidence of a mental condition bearing on punishment and that, once notice filed, government's expert will be permitted to examine defendant); United States v. Taylor, 2008 WL 471686, at *4 (E.D. Tenn. Feb. 15, 2008) (unpublished) ("even for psychiatric evidence not based on a psychiatric examination, the Government can rely on a psychiatric examination to rebut Defendant's expert").

The Supreme Court's cases in the area do not resolve the matter. Although the leading Supreme Court cases – Estelle v. Smith, 451 U.S. 454 (1981) and Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989) – admittedly include broad language that might appear to suggest that a defendant's introduction of mental health evidence waives the Fifth Amendment privilege against self-incrimination and permits the court to require, as a price of introducing such evidence, a government examination of the defendant,[28] the actual holdings of the cases do not address the government's entitlement to an examination in the absence of a corresponding defense examination.[29] See also Kansas v. Cheever, 134 S. Ct. 596, 601 (2013) ("The rule of Buchanan . . . is that where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal").

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[28] See, e.g., Smith, 451 U.S. at 465; id. at 465; Buchanan, 483 U.S. at 422-23; see also, e.g., Powell, 492 U.S. at 684.

[29] Smith held that a defendant's statements made during the course of a court-ordered competency hearing, without notice to defense counsel and without providing defendant Miranda warnings, could not be introduced against him a capital sentencing proceedings. 451 U.S. at 469. Buchanan held only that the government could cross-examine a defense expert with a psychiatric report previously prepared pursuant to a defense request for a competency evaluation. 483 U.S. at 423-24.

Circuit law, prior to the 2002 amendments to Rule 12.2, provides some support for allowing a defendant, who has not been examined by a defense expert, to decline to submit to an exam by a government expert. See, e.g., Battie v. Estelle, 655 F.2d 692, 702 (5th Cir. 1981) ("By introducing psychiatric testimony obtained by the defense team from a psychiatric examination of the defendant, the defense constructively puts the defendant on the stand and therefore the defendant is subject to psychiatric examination by the State in the same manner."); United States v. McSherry, 226 F.3d 153, 156 (2d Cir. 2000) ("[W]e conclude that the defendant's election to place in evidence expert opinion testimony, based upon defendant's own statements to the alienist whose qualification to testify rested upon those statements, which were made subsequent to the commission of one of the criminal acts charged, estopped the defendant from objecting to a like examination of the accused by the Government's expert and the admission into evidence of his opinion testimony."), quoting United States v. Baird, 414 F.2d 700, 707 (2d Cir.1969).

Additional support may be found in district court decisions describing the government's need for "similar access" to the defendant. See, e.g., United States v. Beckford, 962 F. Supp 748, 758 (E.D. Va. 1997) (government cannot meaningfully address the defense expert's conclusions unless the government's expert is given "similar access to the 'basic tool' of his or her area of expertise"), quoting United States v. Haworth, 962 F. Supp. 1406, 1407-08 (D.N.M. 1996).

At a minimum, to the extent that the proffered defense evidence does not derive from statements by the defendant made to a defense-retained expert, the defense should oppose any government evaluation on Fifth Amendment grounds. This is true not only where the defense does not intend to call (or introduce hearsay statements) from any expert who has ever examined the defendant, but also where it does but the expert was a neutral party who examined the defendant before the capital crime (*e.g.*, a school psychologist). In the latter case, the prosecutors have "similar access," without the need for a government exam, since they too may interview and call the prior expert.

2. Government Rebuttal Examination: Notice to the Defense

The Supreme Court has long recognized that the Sixth Amendment right to counsel entitles a capital defendant and his lawyers to notice of the scope and

purpose of a government mental health exam, so that he may consult with them before-hand about the exam. See Powell v. Texas, 492 U.S. 680, 686 (1989). Moreover, given judicial recognition that Rule 12.2 may limit the scope of the government's exam, including the tests that the government's expert administers (see Section V.C.3, *post*), such notice is critical to enabling defense counsel to raises objections in court in advance of the exam.

In a number of 12.2 cases, defendants have requested notice identifying, in some fashion, the government's expert and the tests that the expert will administer. These defendants have argued that such notice is (a) required by the Sixth Amendment and (b) necessary in order to permit the defense challenge, if necessary, any particular tests proposed by the government. While not entirely endorsing defense arguments, a number of district courts have ordered the government to provide some or all of the requested notice, typically reasoning that this will provide counsel a better opportunity to advise the defendant, will assist in avoiding duplicative testing (and the resulting risks of practice effects) by defense and government experts, and parallels the notice requirements imposed on the defense under Rule 12.2(b).

- United States v. O'Reilly, 2010 WL 653188, at *5, ¶¶ 17, 18 (E.D. Mich. May 10, 2010) (Prior to any rebuttal examination, government must give defense counsel at least 5 days advance notice of the names and professions of its rebuttal experts and any tests the experts intend to administer; if defense objects to a government rebuttal expert or test, parties must diligently work to resolve the dispute; if resolution cannot be achieved informally, court will hold a hearing, upon defense filing, within 3 days of receiving government notice, of written formal objections. Neither side bears the burden of proof at the hearing.)

- United States v. Hardy, 644 F. Supp. 2d 749, 751 (E.D. La. 2008). Government shall advise defense counsel of the date and time of proposed examination, so that counsel may inform defendant.

- United States v. Fell, 372 F. Supp. 2d 753, 761 (D. Vt. 2005). Government agreed to provide notice of testing.

- United States v. Johnson, 362 F. Supp. 2d 1043, 1085 (D. Iowa 2005). Ordering fire-walled attorneys to provide defense with five days's advance

notice of the professions of its proposed experts and the tests that the experts intended to perform; rejecting defendant's argument that notice was necessary to provide defense with an opportunity to challenge any testing of dubious validity because such challenges would more efficiently be addressed post-guilt verdict, but agreeing that such notice facilitated defense counsel's advice to client, permitted coordination to avoid overlapping tests and practice effects, and paralleled defense notice requirements.

- United States v. Sampson, 335 F. Supp. 2d 166, 246 (D. Mass. 2004). As agreed by the parties, ordering fire-walled attorneys to provide defense with five days's advance notice of the professions of its proposed experts and the tests they intended to perform; rejecting defendant's argument that notice was necessary to provide defense with an opportunity to challenge any testing of dubious validity because such challenges would more efficiently be addressed post-guilt verdict, but agreeing that such notice would facilitate defense counsel's advice to client, permit coordination to avoid overlapping tests and practice effects, and paralleled defense notice requirements.

- United States v. Taylor, 320 F. Supp. 2d 790, 791 (N.D. Ind. 2004). Permitting defendant to object to government's proposed testing and setting matter for hearing in the event of a dispute between the parties.

- United States v. Minerd, 197 F. Supp. 2d 272, 278 (W.D. Pa. 2002). Government must give the defense three-days notice of the intended examination date(s). Prior to any government testing, government must provide to the defense a list of the tests that its expert intends to use – and the government may not identify more than one instrument for the purpose of measuring the same mental functioning – so that defendant, within 3 days of receiving the government's list, may object, solely on the ground that its own expert intends to use the same test. Court will resolve any conflicts, and no testing may occur by either side until a final decision as to which tests the government's expert may use.

3. Government's Rebuttal Examination: Scope and Use

In Cheever, the Supreme Court acknowledged that it had held in Buchanan that "testimony based on a court-ordered psychiatric evaluation is admissible only for a 'limited rebuttal purpose.'" Though it held that an exam by the government's

expert, Dr. Welner, was admissible to rebut Cheever's defense that he lacked the mental capacity to premeditate, the Court noted that Cheever was also arguing that "Welner's testimony exceeded these limits by describing the shooting from Cheever's perspective; by insinuating that he had a personality disorder; and by discussing his alleged infatuation with criminals." But it declined to address this issue, instead remanding the case for the Kansas Supreme Court to consider it. 134 S. Ct. at 603.

The limitations on the government's right to present rebuttal evidence from a compelled exam of the defendant should require limitations on the scope of that exam. In other words, even if the government is entitled to a rebuttal examination of the defendant, the defense's 12.2 notice does not necessarily "open the door for any type of mental testing" by the government. United States v. Taylor, 320 F. Supp. 2d 790, 794 (N.D. Ind. 2004); see also United States v. Williams, 731 F. Supp. 2d 1012, 1020 (D. Haw. 2010) ("The Government may rebut Defendant's mental status defense, not prosecute based upon Defendant's mental health.") (emphasis in original); United States v. O'Reilly, No. 05-80025, 2010 WL 653188, at *5 ¶ 15, *6 ¶ 21 (E.D. Mich. 2010) ("sole purpose" of the government's rebuttal examination must be to confirm or rebut expert mental health testimony presented by defense; government experts may not administer more than one test to measure the same mental function and may only subject defendant to testing or examination that was performed by defense experts).

In Williams, the defense noticed its intent to introduce, at the guilt/innocence phase of a capital trial, expert evidence that the defendant suffered borderline intellectual functioning and brain damage – both relevant, as the court found, to whether the defendant could form specific intent required by the statutes under which the defendant had been charged.[30] 731 F. Supp. 2d at 1016. Accordingly, the defense argued, any rebuttal examination and resulting testimony by a government expert should be limited to the narrow question of whether defendant suffered borderline intellectual functioning and brain damage. Id. at 1017. The government, by contrast, argued that its experts should be free to opine broadly as

[30] The defendant in Williams also noticed his intent to introduce expert mental health evidence at the penalty proceedings, if any. Id. at 1015. The district court's written opinion, however, only addresses admissibility of the government's rebuttal evidence at guilt/innocence proceedings – apparently reserving discussion of admissibility at any penalty proceedings for later resolution. Id. at 1016 n.6.

to any possible motive, condition, or disease that might have caused the defendant to act. Id.

The district court concluded, first in broad strokes, that the defense notice had effected a waiver of the defendant's Fifth Amendment privilege, but only a limited waiver: "When a defendant raises a defense that relies on an expert examination of his mental condition, the Fifth Amendment does not protect him from being compelled to submit to a similar examination conducted on behalf of the prosecution or from the introduction of evidence from that examination for the purpose of rebutting the defense." Id. at 1017 (emphasis in original; citations omitted). The court therefore limited the government experts to rebutting the defendant's expert testimony that he suffered borderline intellectual functioning: to permit the experts to "affirmatively assert that Defendant suffers from psychosis or Anti-Social Personality Disorder and that either of those conditions actually caused him to commit the alleged acts, is tantamount to using Defendant's own statements, for which he has not waived his Fifth Amendment rights, against him in a criminal proceeding." Id. at 1020. The district court then turned to the specific evidence proffered by the government and, for the same reasons, precluded introduction of any evidence derived from the PCL-R, id. at 1023-24: "The Court finds that because the PCL-R necessarily addresses such factors as 'Lack of Remorse or Guilt' and the Defendant's post-arrest state of mind, which is not within the scope of an examination necessary to rebut Defendant's assertion of [Borderline Intellectual Functioning] . . . , the PCL-R exceeds the scope of admissible rebuttal by the prosecution." Id. at 1024.

In Taylor, the defense had noticed its intent to introduce expert mental-health evidence regarding the defendant's "developmental history and mental condition regarding substance abuse." Id. at 791. In response, the government notified the defense that it intended to administer a number of personality instruments, including the MMPI, the PAI, MCMI, and the PCL-R[31]. The defense objected, arguing that the PCL-R had been discredited and that the personality inventories proposed by the government exceeded the limited notice provided by the defense. Following a hearing on the matter, the court sustained the defendant's objections. It agreed that serious questions had been raised concerning

[31] Respectively, the Minnesota Multiphasic Personality Inventory (MMPI); Personality Assessment Inventory (PAI); Millon Clinical Multiaxial Inventory (MCMI); and the Interview Schedule for Psychopathy Checklist Revised (PCL-R).

the PCL-R's validity and reliability. It further agreed that the government would not be allowed to "use the limited notice" provided by the defense "as an open door for any type of mental testing" and held that government must be limited to "parallel testing of substance abuse." Id. at 794. The court, accordingly, prohibited the government's use of the PCL-R and restricted the government's testing to instruments containing test scales for substance abuse and barred the government from introducing any materials outside the scope of mental health testing "as it relates to substance abuse." Id.

In United States v. Johnson, 383 F. Supp. 2d 1145 (D. Iowa 2005), following the court's granting the government's motion for a mental-health examination, the defendant notified the government that she would assert the Fifth Amendment as to any questions concerning the charged crimes. Defense counsel had directed their experts not to question defendant about the charged crime or her mental state at that time, and argued that the mental-health presentation at sentencing would be limited to defendant's past and present mental state, without reference to her mental state at the time of the crimes. Id. at 1149, 1164. The district court upheld the defendant's assertion of her privilege against self-incrimination. It held that defendant's Fifth Amendment waiver is limited: "[T]he waiver is only to the extent necessary to allow the government the opportunity for adequate rebuttal." Id. at 1160, 1162. Accordingly, the court concluded that the government's expert would not be permitted to interview the defendant concerning the charged crimes to the extent that the defendant can demonstrate that such questions would not be necessary to rebut defendant's mental condition mitigation evidence. Id. at 1162, 1164. Given the defense representations on the limits of their experts' examinations and the limited mitigation circumstances the defense contended it would introduce, the district court agreed that questions about the offense were not necessary for rebuttal and would not be permitted.

In United States v. Troya (& Sanchez), 733 F.3d 1125, 1139-40 (11th Cir. 2013), Sanchez called two mental-health experts at sentencing. One, who had examined him, testified only about his low IQ and intellectual limitations. The other, Dr. Tom Reidy, testified about risk factors from Sanchez's childhood that had influenced his adult behavior. Reidy did not meet with Sanchez, but based his reports on several sources, including, the court said, "Sanchez's self-reports" about his childhood. In rebuttal, the government called an expert who had examined Sanchez after his counsel had filed notice under Federal Rule of Criminal Procedure 12.2. This expert testified that Sanchez had denied to him many of the

events and facts that had formed the basis for Reidy's opinions. The court concluded that the government expert's testimony complied with Rule 12.2 and Sanchez's Fifth Amendment rights. "Nothing" in the expert's testimony "exceeded the scope of the issues on which Sanchez introduced [expert] testimony . . . . More explicitly [the government expert's] testimony was admissible under Rule 12.2 to directly rebut Dr. Reidy's report and testimony on the issue of Sanchez's mental condition based on certain identified risk factors."

And in United States v. Wilson, 920 F. Supp. 2d 287, 293-94 (E.D. N.Y. 2012), the defendant gave Rule 12.2 notice in advance of trial, was examined by a government expert who wrote and filed a report with the court and a firewall prosecutor. The defendant was convicted of the capital offense but withdrew his notice at the capital sentencing hearing and did not present expert mental-health testimony, so the government expert never testified. The defendant was sentenced to death, but his sentence was overturned on appeal, and he went back to the district court for a new sentencing hearing. At that point, he asserted a claim of Intellectual Disability (ID), and the court arranged for an evidentiary hearing before the court prior to the capital sentencing hearing. The prosecution team sought access to the original government expert's report to help it investigate and rebut the ID claim . The district court held that, under Rule 12.2(c)(4), the report could not be used by the government except to respond to expert mental-health evidence at a "capital sentencing hearing." Thus, the court determined it should remain sealed unless until the defendant gave Rule 12.2 notice in connection with the capital resentencing hearing. See also United States v. Fell, 2015 WL 3887151, *5 (D. Vt. June 23, 2015) (prior to retrial and based on Rule 12.2, court orders that "any reports and related materials concerning testing and examination of Fell by the defense or by experts retained by the Government" from original trial "be sealed," in order to, as much as possible, "restore Fell to the exact position he was in prior to the start of the first trial").

Four caveats should be noted:

First, tension exists between attempts to restrict the scope of the defense notice (described above in Section V.A.2) and challenges to the scope of the government's rebuttal examination: Generic notice offered by the defense – notice that merely tracks the language of the rule – may license a broader examination by the government's expert. See, e.g., United States v. Fell, 372 F. Supp. 2d 753, 760-61 (D. Vt. 2005) (where defense had not identified the mitigating factors on

which it would rely, government's examination would include assessment of general mitigating circumstances, as well as an evaluation of defendant's mental state at the time of the alleged offense).

Second, a number of courts have expressed a reluctance to address, early on, challenges to the scope of the government's examination or evidence. See United States v. Hardy, 644 F. Supp. 2d 749, 751 (E.D. La. 2008) (rejecting defense request to limit government rebuttal examination, stating that "[t]he Court is simply not in a position to know what lines of inquiry are appropriate from the standpoint of the experts," but noting that, after the examination, defendant could lodge objections to admissibility of portions of the examination or conclusions reached by the expert that the defense believes are in violation of constitutional rights); United States v. Sampson, 335 F. Supp. 2d 166, 246 (D. Mass. 2004); United States v. Johnson, 362 F. Supp. 2d 1043, 1085 (D. Iowa 2005); but see O'Reilly, 2010 WL 653188, at **5, 6, ¶ 18, ¶ 22 (court schedules two opportunities for defense file objections to government testing and evidence: (1) prior to any rebuttal examination by government expert, court will hold hearing on any defense objections to any government expert or testing; and (2) following unsealing and release of government expert reports, but prior to penalty phase, court will resolve any defense objections to admissibility of government's proposed expert evidence).

Indeed, in United States v. Fell, 531 F.3d 197 (2d. Cir. 2008), the Second Circuit, reviewing for plain error, concluded that the district court had acted within its discretion in declining to hold a hearing on the admissibility of government's rebuttal mental health evidence until after defense had introduced its own evidence. At trial, the defense had moved to exclude the government's expert mental-health evidence on the ground that the government had violated the court's order on testing and had included testing not previously noticed by the government, as required by the district court's order. The defense requested a hearing on the admissibility of the government's rebuttal evidence prior to the testimony of its own mental-health expert. The district court denied the motion as premature, and the Court of Appeals affirmed. "The district court postponed its consideration of the scope of [the government's] rebuttal testimony to permit it to first assess the nature and scope of the defense expert's testimony. This approach was a sensible one that we are not inclined to second guess." Id. at 227. The court found no error in the district court's approach and, therefore, no plain error.

Third, attempts to limit the government's rebuttal examination may have consequences at sentencing. In Johnson, for example, discussed above, the court, based upon the defense representations, precluded introduction of mitigating circumstances concerning a mental condition at the time of the offense. 383 F. Supp. 2d at 1165, 1167. And the court noted that, should the defense mitigating evidence exceed its prior representations, the government could reassert its need to examine the defendant or request to cross-examine the defense experts on their failure to ask the defendant about her involvement in the charged crimes. Id. at 1165, 1167-68 The court further suggested that the parties should consider entering into a stipulation, to be read to the jury or incorporated into the court's instructions, concerning the limited nature of the defendant's mitigating evidence, in order to explain why questions about the offense were not asked of the defendant and why such evidence would not be introduced. Id.

Fourth, if defense counsel chooses to have a defense expert examine the defendant or to expose the expert to reports of the defendant's statements because the defense has tried unsuccessfully to limit the scope of the government's rebuttal examination or the rebuttal testimony by the government expert (*i.e.*, if the court has denied that request or has deferred ruling on it), then defense counsel should consider first making a record that their choices were compelled by the court's ruling or refusal to rule, so that this will be clear to any appellate court reviewing the matter.

4. Government Rebuttal Examination: Timing

Rule 12.2 does not specify a time for the government's examination. Most courts, however, have ordered the government's examination to occur pretrial. In rejecting defense requests to postpone government examination until after the guilt-phase verdict, the lower courts frequently cite the potential for lengthy delay in the sentencing proceedings while the government completes its examination and describe the inconvenience and risks (*e.g.*, jurors' fading memories, loss of seated jurors) associated with such a delay. See, e.g., United States v. Lujan, 530 F. Supp. 2d 1224, 1240 (D.N.M. 2008); United States v. Wilson, 493 F. Supp. 2d 348, 359 (E.D.N.Y. 2006); United States v. Minerd, 197 F. Supp. 2d 272, 276 (W.D. Pa. 2002); United States v. Edelin, 134 F. Supp. 2d 45, 56, 57-58 (D.D.C. 2001); United States v. Beckford, 962 F. Supp. 748, 762-63 (E.D. Va. 1997). One court, in addition, cited testimony of the government's expert that an examination of the

defendant after conviction might be skewed by the defendant's depression, anxiety, or tension. Beckford, 962 F. Supp. at 762 n.13.

At least one district court, however, recently rejected the reasoning of the other lower courts and declined to permit the government's examination to occur until after the defendant had been convicted. In United States v. Taveras, 233 F.R.D. 318 (E. D. N.Y. 2006), the district court, following defense filing of 12.2(b) notice, denied the government's request for pretrial examination of defendant, with leave to renew after guilty verdict. Id. at 323. The court reasoned that "unwieldy" "taint" procedures would not adequately reduce the risks of leakage of information (or at least contentions to that effect) and that any delays occasioned by postponing the government's examination until after a guilt verdict would not be excessive or pose significant hardships on the jurors. Id. at 322-23. See also United States v. Gabrion, 648 F.3d 307, 340-41 (6th Cir. 2011) (government's psychiatrist's exam and disclosure of his report were timely, though defense did not receive government psychiatrist's report until several days into the sentencing hearing; they occurred as soon as reasonably practicable given defendant's eve-of-trial notice of his intent to call five mental-health experts), modified on other grounds, 719 F.3d 511 (6th Cir. 2013) (*en banc*).

5. Government Rebuttal Examination: Presence of Defense Counsel; Recording

Generally, district courts have rejected defense requests, made under the Fifth and Sixth Amendments, to attend (or to have a defense expert attend) the government's expert's examination. Several, however, have required, as an alternative, that the government record its expert's examination and/or provide simultaneous audio-feed to defense counsel. United States v. O'Reilly, 2010 WL 653188, at *5, ¶ 20 (E.D. Mich. May 10, 2010) (unpublished) (defense counsel may arrange for government rebuttal examination to be audio- or videotaped; government expert must tapes to defense counsel by same-day or next-day delivery at the conclusion of each session; defense counsel may review tapes upon receipt); United States v. Fell, 372 F. Supp. 2d 753, 761 (D. Vt. 2005) (rejecting defense request under Fifth and Sixth Amendment to be present at government testing, upon government's agreement to provide adequate notice to defense of proposed testing and to tape record its interview with defendant and provide defense counsel the option of a simultaneous audio-feed); United States v. Hardy, 644 F. Supp. 2d 749, 751 (E.D. La. 2008) (government expert's entire interview and examination

must be videotaped); United States v. Johnson, 362 F. Supp. 2d 1043, 1085-91 (D. Iowa 2005) (rejecting defense counsel's request under Fifth and Sixth Amendments to be present at government testing, but ordering that government examination be tape-recorded and copies provided immediately to defense counsel); United States v. Sampson, 335 F. Supp. 2d 166, 247 (D. Mass. 2004) (rejecting defense counsel's request under Fifth and Sixth Amendments to be present at government testing, but, upon agreement of the parties, ordering that government examination be tape-recorded and copies provided immediately to defense counsel); but see United States v. Taveras, 2008 WL 4737728, at *1 (E.D.N.Y. Oct. 16, 2008) (unpublished) (rejecting defense request to attend government rebuttal examination or, in the alternative, to record the government's examination, noting, in part, lack of mutuality, where defense had not recorded its examination of defendant).

Moreover, one district court recently ordered videotaping of any government expert's exam of the defendant while rejecting the government's request that any defense expert's exam of the defendant also be videotaped so as to "level the playing field" by enabling the defense but not the government to use a videotape to cross-examine the other side's expert. The court found that the different taping requirements were justified by the need to protect the defendant's Fifth Amendment rights, and there was "no requirement of symmetry" in this area. United States v. Fell, No. 5:01-cr-00012-gwc, ECF #637 (D. Vt. Oct. 9, 2015).

Without taking a position on the strategic advisability of such recordings, it is worth noting that at least one court strictly forbade the government from recording its examination, without express, written consent from defense counsel.[32] See United States v. Minerd, 197 F. Supp. 2d 272, 278 (W.D. Pa. 2002) (government may not electronically record its examination of defendant, except with the express written consent of defense counsel).

[32] For a discussion of the risks associated with recordings of government rebuttal examinations, see Federal Death Penalty Resource Counsel's Litigation Guide to Government Mental Health Evaluations in Federal Capital Prosecutions, available on the Federal Death Penalty Resource Counsel Project's website.

6. Government Rebuttal Examination: Place

Although government exams in preparation for sentencing are ordinarily conducted at the jail where the defendant is housed pretrial, in United States v. Northington, 2012 WL 3279197, at *9 (E.D. Pa. Aug. 10, 2012) (unpublished), the district court permitted the defendant to be sent to MCFP Springfield for 15 days for an exam in preparation for a court hearing on whether he was mentally retarded and thus should be exempted from the death penalty. The decision is a murky precedent, however, since it appears the transport was also in part to allow for a competency evaluation and since defense initially consented to it, and only sought reconsideration after the fact.

D. Defense Examination: Government Attempts to Limit or Interfere

In some cases, the government has moved to require coordination between defense and government experts, in order to avoid duplicative testing and the resulting risks of practice effects. Courts are generally reluctant to interfere in defense testing. See, e.g., United States v. Umana, 2009 WL 2489309, at *4 (W.D.N.C. Aug. 12, 2009) (unpublished) (denying, as premature, government's motion that before the defense files 12.2 notice, the defense and the government be required to try to come to an agreement as to the testing measures to be used to avoid test overlap and to limit the "practice effects" and consider sharing data to avoid multiple administrations of the same test in a short period of time); United States v. Lujan, 530 F. Supp. 2d 1224, 1241 (D.N.M. 2008) (rejecting government's motion to require defense to coordinate testing with government experts).

One district court did order that if defendant intended to admit evidence based upon an examination, defendant and government must try to agree to designation of specific testing measures to be administered by their experts. See Edelin, 134 F. Supp. 2d at 58. (The court did reject the government's request that the defense be required to record or otherwise memorialize testing by the defense expert. Id. at 59.). And one district court required the parties to "consider sharing data between experts so that multiple administrations of the same test within a short period of time can be avoided." United States v. Minerd, 197 F. Supp. 2d 272, 278 (W.D. Pa. 2002).

E. Sanctions for Non-Compliance

Because Rule 12.2(d) expressly permits the court to exclude the defense expert mental-health evidence as a sanction for failure to comply with the Rule's notice, examination, or disclosure provisions, counsel should exercise caution with respect to Rule's requirements. The Advisory Committee notes to the 2002 amendments, however, make plain that preclusion should be the sanction of last resort:

> While subdivision (d) recognizes that the court may exclude the evidence of the defendant's own expert in such a situation, the court should also consider "the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful." Taylor v. Illinois, 484 U.S. 400, 414 n.19 (1988), citing Fendler v. Goldsmith, 728 F.2d 1181, 1188-90 (9th Cir. 1983).

VI. Jurisdiction and Venue

Whether and to what extent the United States has jurisdiction to prosecute a federal defendant for first-degree (death-eligible) murder under 18 U.S.C. § 1111 on the basis that the murder occurred in a National Forest has generated litigation in two circuits, including a lengthy dissent from one Sixth Circuit judge. See United States v. Gabrion, 517 F.3d 839, 858 (6th Cir. 2008) (2-1; Merritt, J., dissenting) Id. at 876-887 (United States had jurisdiction to prosecute defendant for murder in a National Forest, as such land falls within the government's special territorial jurisdiction); United States v. Fields, 516 F.3d 923, 928 (10th Cir. 2008) (same). See also United States v. Beyle, 782 F.3d 159, 168 (4th Cir. 2015) (capital prosecution of pirates in federal court was proper since murders 30-40 miles from Somali coast occurred on "high seas").

A special statutory provision, 18 U.S.C. § 3598, limits the government's ability to seek the death penalty for a capital offense committed in Indian country, even though such crimes are considered within the special territorial jurisdiction of the United States. See 18 U.S.C. § 1153. Under Section 3598, no one "subject to the criminal jurisdiction of an Indian tribal government" shall be subject to the death penalty for a crime where federal jurisdiction is predicated on its commission in 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." But such opt-in is not necessary where federal jurisdiction rest on the nature of the crime. United States v. Mitchell, 502 F.3d 931, 947-949 (9th Cir. 2007) (defendant could be subjected to death-penalty for carjacking notwithstanding tribe's opposition to capital punishment. Death sentence also did not violate First Amendment or American Indian Religious Freedom Act.).[33]

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[33] But see United States v. Mitchell, 790 F.3d 881, 897 (9th Cir. 2015) (Reinhardt, J., dissenting) ("although Mitchell committed a horrible crime, it was hardly one of national import or of particular federal interest other than the fact that it involved the Navajo Nation, and all of the persons with the greatest stake in the outcome of the case oppose his execution. The novel use of carjacking as a loophole to circumvent the tribal option also renders this an anomalous case. Mitchell will, unless spared by executive clemency, in all likelihood, suffer the ignominious fate of being the first person to be executed for an intra-Indian crime that occurred in Indian country. While this court's jurisprudence indeed gives the federal government the legal authority to exercise jurisdiction over this case for the purpose of obtaining capital punishment, succeeding in that objective over the express objections of the Navajo Nation and the victims' family reflects a lack of sensitivity to the tribe's values and autonomy and

Efforts to exempt Puerto Rico from the federal death penalty have also proven unsuccessful. See United States v. Martinez-Hernandez, ___ F. Supp. 3d ___, 2016 WL 1275039 (D. P.R. Apr. 1, 2016) (rejecting claim that "imposition of capital punishment on a Puerto Rico resident for a crime against another Puerto Rico resident violates the Eighth Amendment to the United States Constitution and also the Federal Relations Act, 48 U.S.C. § 734"); United States v. Acosta-Martinez, 252 F.3d 13, 17-20 (1st Cir. 2001) (reversing district court's order that had found Congress did not intend for death penalty to be applicable in Puerto Rico and had struck death notice).

As for venue, there is a special statute governing capital prosecutions: "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. There is some suggestion that this refers to the prosecution's inconvenience. See United States v. Parker, 103 F.2d 857, 861 (3d Cir. 1939). But most decisions have looked to the convenience to the courts. See, e.g., United States v. Taylor, 316 F. Supp. 2d 722, 728 (N. Dist. Ind. 2004) ("the Court uses the term in a broader sense that takes into consideration constraints such as the availability of a courtroom for a complex trial such as this, the affect this case has on the remaining docket and other workload considerations"). Under that interpretation, the "inconvenience" exception would seem to require, at a minimum, that there at least be a federal courthouse in the county of the offense, before the defendant may insist on being tried there. Cf. Hayes v. United States, 296 F.2d 657, 667 (8th Cir. 1961) ("it is our opinion that the District Court would not have been required to borrow the use of the County courthouse or to hire a hall in the County in which to try the case"); Greenhill v. United States, 6 F.2d 134, 134-136 (5th Cir. 1925) (same); United States v. Taveras, 2006 WL 473773, at *14 (E.D. N.Y. Feb. 28, 2006) (unpublished) ("If defendant decided to invoke Section 3235 then the court could hold the trial in Queens unless it would cause great inconvenience — as it would since no federal district courthouse is located there and the Brooklyn Courthouse is readily reached by public transportation from Queens, an adjoining county").

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demonstrates a lack of respect for its status as a sovereign entity").

Counsel should also be aware of a second venue statute, 18 U.S.C. § 3236, which provides: "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." But see United States v. Barnette, 211 F.3d 803, 813-814 (4th Cir. 2000) (venue for trial on capital charge under 18 U.S.C. § 924(j) was proper in North Carolina, where using or carrying firearm occurred, though killing itself took place in Virginia).

One district court has rejected a claim that Section 3235 requires that jurors be selected only from the county where the offense occurred. United States v. Savage, 2012 WL 4616099, at **1-3 (E.D. Pa. Oct. 2, 2012) (unpublished). The defendant had argued this was necessary to assure a fair-cross sectional jury, since African–Americans represent 43 percent of the population of Philadelphia County, but only 17 percent of the population of the entire Eastern District. The court found that the statute governs only the location of the trial, not the vicinage of the jurors.

One district court transferred venue based on prejudicial pretrial publicity. See United States v. Sablan, No. 1:08-cr-00259-PMP (E.D. Ca. Dec. 19, 2014) (unpublished order available on FDPRC website). The case involved the killing of a prison guard at USP Atwater, and the court relied on the fact that a sizable percentage of the population was employed in corrections, the significant media coverage of the case, a pretrial survey showing a high degree of bias in the pool, and the fact that a transfer to the Eastern District of California would not significantly inconvenience the victim's family or witnesses. But see In re Tsarnaev, 780 F.3d 514 (1st Cir. 2015) (denying mandamus petition challenging district court's denial of change of venue in Boston Marathon Bombing case); United States v. Tsarnaev, ___ F. Supp. 3d ___, 2016 WL 184389 (D. Mass Jan. 15, 2016) (denying renewed venue challenge in motion for new trial) .

In United States v. Taylor, 814 F.3d 340 (6th Cir. 2016), the authorities could have chosen to prosecute the defendant in any of four venues. Three of those (in state court in Georgia or Tennessee, and federal court in Georgia) had substantial Black populations. The fourth, federal court in Tennessee, where Taylor was in fact tried, did not. He ended up being tried by a jury of 11 whites and one African-American. The Sixth Circuit rejected his challenge to the venue selection, saying that he had produced no evidence that the government made the

decision based on the racial composition of the jury pools in the different venues. At most, the record showed the government knew that a federal jury in Tennessee was more likely to return a death sentence than one in the other venues.

VII. Continuances

The Speedy Trial Act recognizes that among the factors for a court to consider in determining whether to grant a continuance are "[w]hether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparations" within the time limits established by the Act; and whether failure to grant a continuance would "result in a miscarriage of justice" or "deny the counsel for the defendant . . . the reasonable time necessary for effective preparation, taking into account the exercise of due diligence." 18 U.S.C. § 3161(h)(7)(B).

The only two appellate decisions on this issue in federal capital cases were unfavorable, but each turned on the particular facts:

- United States v. Allen, 247 F.3d 741, 771 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002). Upholding denial of continuance sought by defense when its mitigation expert quit 10 days before trial. Second mitigation expert had sufficient time to complete the work. Moreover, defense did not demonstrate specific prejudice.

- United States v. Hall, 152 F.3d 381, 419-420 (5th Cir. 1998). Upholding denial of 30-day continuance: (1) Defendant had over six months to prepare for trial. (2) Though he complains discovery was voluminous, he does not deny it was open and forthcoming. (3) His only specific claim of prejudice on appeal is that only one of his two counsel was present for the majority of jury selection, yet record reveals no deficiencies in representation there.

Moreover, there have been several favorable district-court decisions, relying on the especially complex and demanding task of preparing for a capital trial, as well as on 18 U.S.C. § 3593(a)(1), which requires the government to give "reasonable notice" before trial of its intent to seek the death penalty:[34]

[34] See also Section I (Authorization), *ante*, for a discussion of the "reasonable notice" requirement.

- United States v. Storey, 927 F. Supp. 414, 415-416 (D. Kan. 1996). Granting defendant's motion to continue pretrial hearing based on nature of the charges, complexity of the case, and fact defendant faced the death penalty.

- United States v. Duncan, 2007 WL 896418, at **5-6 (D. Idaho Mar. 22, 2007) (unpublished). Indictment filed mid-January 2007, and death notice five days later. Trial initially scheduled for March 2007. District court grants defense motion to continue trial until January 2008. Court agrees that continuance is warranted under Section 3161 because case is "unusual or complex." Court explains: "Because this is a capital case, counsel for the Defendant have substantially greater obligations and responsibilities to conduct investigation and discovery in preparation not only for the guilt phase of this case but also any potential penalty phase," which "includes preparation for presenting mitigation evidence and rebutting the Government's presentation of aggravating circumstances." Court notes that "in terms of the work required by the Sixth Amendment to adequately prepare to defend the Defendant," defense counsel "faced . . . a daunting task."

- United States v. Davis, 1995 WL 746661, at *1 (E.D. La. Dec. 12, 1995) (unpublished). Granting 45-day continuance after government filed amended death notice, three months before trial, which announced it would introduce evidence of five unadjudicated homicides as a nonstatutory aggravating factor.

- United States v. Davis, 1995 WL 405707, at *1-3 (E.D. La. July 7, 1995) (unpublished). Granting six-month continuance because government had not authorized seeking death penalty until five weeks before trial. Court relies on testimony from expert capital defense counsel about extensive mitigation work that must be done under ABA Guidelines.[35]

[35] As of the October 2007, when the Federal Resource Counsel Project last analyzed the statistics, the average time between indictment and trial in federal capital cases was 20.5 months, and the average time between the notice of intent to seek the death penalty and trial was 12.6 months.

But in the Boston Marathon Bombing case, the district court continued the trial only for a portion of the time the defense had sought (two months instead of 10 months): " Although it appears that the defendant may have overstated his perceived predicament related to the volume and timing of discovery, particularly in light of (a) the government's representation that the defendant has been in possession of the relevant computers for over a year and (b) the level of detail of the government's September disclosures, there is likely utility in allowing the defendant some additional, though limited, time to prepare . . . . An additional delay of ten months as requested by the defendant does not appear necessary, however, given the size and experience of the defense team [ed: the defendant was represented by two nationally-renowned learned counsel, as well as a Federal Defender Office]; the availability of assistance from outside sources; the time period the defense already has spent in trial preparation; the relative impact on the other interests, including the Court, the government, and the public, if such a long postponement were granted; and the nature of the defendant's other concerns and the uncertainty that more time would actually be helpful in those respects." United States v. Tsarnaev, 2014 WL 4823882, *4 (D. Mass. Sept. 24, 2014).

Where defense counsel unsuccessfully seeks to strike the death notice (in addition to or in the alternative to a continuance) based on insufficient time between the notice's filing and an impending trial date, counsel should also be aware that several circuits have allowed interlocutory appeals from the denial of such motions. See Section XX.J.1, *post*.

VIII. Severance

Only two circuits have addressed the propriety of a joint capital-sentencing hearing for multiple defendants. Both have acknowledged that such a procedure may pose a threat to each defendant's constitutional right to individualized sentencing consideration. (But see Kansas v. Carr, 136 S. Ct. 633 (2016)). Yet both rejected the constitutional challenges under the facts of those cases:

- United States v. Snarr, 704 F.3d 368, 397 (5th Cir. 2013). No error where trial and sentencing were "carefully structured to prevent a spillover effect. During the eligibility phase, for example, the government did not introduce any individual evidence against Garcia until after it completed presentation of its evidence against Snarr. Likewise, during the selection phase, the government did not present any evidence against Garcia until after it introduced all evidence against Snarr. With the exception of one joint witness, Defendants also presented their mitigating evidence separately." Moreover, instructions at both trial and sentencing hearing emphasized to jurors the need for separate consideration of each defendant.

- United States v. Bernard, 299 F.3d 467, 475-476 (5th Cir. 2002). Rejecting defendant's unpreserved claim that joint sentencing hearing prejudiced him because he lacked mitigating evidence comparable to that codefendant offered about his Christian upbringing and religious conversion, and because such evidence violated defendant's right to exclude consideration of religion during sentencing hearing. Acknowledging that "[a] trial court must be especially sensitive to the existence of such tension in capital cases" between efficiency of joinder and "each defendant's constitutional entitlement to an individualized capital sentencing hearing." Here, codefendant did not "offer strong proof of his religious conversion," and none of this evidence "tarred" defendant "directly or indirectly, particularly since it was evident that" defendant "was not responsible for the fractured home life of his youth." Finally, district court repeatedly instructed jury on need for individualized consideration.

- United States v. Tipton, 90 F.3d 861, 892-893 (4th Cir. 1996). No error in denying severance motions and conducting joint trial and sentencing hearings for three codefendants. While acknowledging "threat posed to individualized consideration," Court finds "countervailing considerations,"

including statutory directive that trial be conducted before same jury that decided guilt. Nor could risk be "entirely removed" by conducting sequential, "largely repetitive" hearings before the same jury. "More critically," Court is reassured by district court's repeated instructions to the jury on the need for individualized consideration.

Although a number of district courts have conducted such joint sentencing hearings over defense objection, several have granted severance motions (or, alternatively, sequential rather than joint sentencing hearings) based in whole or part on the threat to individualized consideration of mitigation or on concern over other sentencing-related prejudice:

- United States v. Roland, No. 12-98, Bench Opinion (D. N.J. June 15, 2015) (transcript available from Resource Counsel). "Threshold for showing prejudice" justifying severance "is lower in a capital case than in a non-capital case." Applying this standard, court severs capital defendant from non-capital ones based on concerns about prejudice from different jury-selection strategies, spillover prejudice from evidence disparity, and antagonistic defenses.

- United States v. Aquart, 2010 WL 3211074, at *7 (D. Conn. Aug. 13, 2010) (unpublished). "Here, if a joint penalty trial were held, [capital defendant] could be at risk that the jury's conclusion of [his brother and capital codefendant's] lesser culpability . . . could support a jury's conclusion that [defendant] is comparatively more deserving of the death penalty. Further, since both Defendants plan to call family members to describe each brother's respective but different positive traits, they worry that as a result the jury may discredit all such testimony, or may conclude that the absence of similar testimony for the other means that those positive attributes are missing in him. All counsel agreed at oral argument that [defendant] is at greater risk of being deemed deserving of death from unfavorable comparisons between the two co-Defendants. This risk will be largely mitigated by holding separate penalty trials, with [defendant] to be held first. He then will receive a fully individualized penalty trial without comparison to [codefendant]."

- United States v. Catalan-Roman, 376 F. Supp. 2d 96, 105-108 (D. P.R. 2005). After guilty verdicts, court grants motion for sequential sentencing

hearings, based on (1) government's mid-trial change of theory as to how victim was shot, which made defendant seem more culpable and thus put him in the position of having to prove that co-defendant in fact was, including introducing co-defendant's statement to prove this. This might put jury in position of "balanc[ing] one defendant off the other"; and (2) defendant's case might be diluted by co-defendant's powerful mitigation about his pre- and post-arrest good behavior. Defendant's right to individualized sentencing might be prejudiced by comparative analysis of two defendants' mitigation cases.

- United States v. Green, 324 F. Supp. 2d 311, 325-326 (D. Mass. 2004). It would be prejudicial for the two capital defendants to be tried by same penalty-phase jury, since one defendant's mitigation would become, in effect, the other's aggravation. At joint sentencing, moreover, each defendant would likely try to show other was more deserving of death; given absence of rules for discovery among codefendants, this might lead to a "trial by ambush."

- United States v. Perez, 299 F. Supp. 2d 38, 44 (D. Conn. 2004). Court severs two authorized capital defendants, based on conflicting defenses and evidentiary issues. Notes "heightened need for reliability in a death penalty trial."

- United States v. Basciano, 2007 WL 3124622, at *8 (E.D. N.Y. Oct. 23, 2007) (unpublished). Though granting severance of capital from non-capital defendants on other grounds, court observes that, from its experience, "the different trial strategies" employed in jury selection by counsel for capital versus non-capital defendants "may in fact be sufficient on their own to justify severance." Here, this consideration provided "further support" for severance.

See also United States v. Lecco & Friend, No. 2:05-cr-107, ECF #1115, slip op. at 8-12 (S.D. W.Va. Sept. 3, 2009) (available on FDPRC website); United States v. Johnson & Smith, No.04-cr-17-HGB, ECF #274, slip op. at 4-7 (E.D. La. June 17, 2005) (same). But see United States v. Savage, 2012 WL 6609425, at *10 (E.D. Pa. Dec. 19, 2013) (unpublished) (denying request for severance based on need for individualized consideration and on risk of prejudice at capital sentencing hearing).

The Supreme Court has rejected the argument that a non-capital defendant has a constitutional right to severance from a capital defendant, in order to avoid a death-qualified jury. Buchanan v. Kentucky, 483 U.S. 402, 419-420 (1987). Moreover, one circuit, in a FDPA appeal, has rejected the converse argument by a capital defendant his joint trial with a noncapital codefendant sent an implicit message to the jury that the government had already decided that he was the more culpable of the two. United States v. Lighty, 616 F.3d 321, 350-51 (4th Cir. 2010). Nonetheless, "several district courts have found that the prejudice resulting from being tried before a death-qualified jury can add to the overall prejudice justifying severance of a non-capital co-defendant. See, e.g., United States v. Lujan, 529 F. Supp. 2d 1315, 1327 (D.N.M. 2007); United States v. Basciano, 2007 WL 3124622, at *8 (E.D.N.Y. Oct. 23, 2007) (unpublished); United States v. Rollack, 64 F. Supp. 2d 255, 257 (S.D.N.Y.1999)." United States v. Andrews, 2013 WL 6230450 (N.D. W.Va. Nov. 26, 2013). In ordering such severance, the Andrews court "agree[d] that any prejudice resulting from a death-qualified jury in this case, without more, cannot sustain severance; nonetheless, it adds to the aggregate prejudice resulting from joinder."

IX. Intellectual Disability (Mental Retardation)[36]

The Federal Death Penalty Act (FDPA), enacted in 1994, provides: "A sentence of death shall not be carried out upon a person who is mentally retarded." 18 U.S.C. § 3596(c).[37] In 2002, the Supreme Court overruled its prior precedent and held that the Eighth Amendment to the United States Constitution also forbids the execution of such a person. Atkins v. Virginia, 536 U.S. 304, 321 (2002). The scientific and legal communities now use the term, "intellectually disabled" ("ID") instead of "mentally retarded," though in the caselaw, they mean the same thing. See Hall v. Florida, 134 S. Ct. 1986 (2014). See also Pub. Law 111-256 ("Rosa's Law," enacted in 2010, replacing several instances of "mental retardation" in statutes with "intellectual disability").

There are seven decisions upholding a claim of ID in a FDPA case after a pretrial hearing: United States v. Wilson, ___ F. Supp. 3d ___, 2016 WL 1060245 (E.D.N.Y. March 15, 2016) ("Wilson II")[38]; United States v. Smith, 790 F. Supp. 2d 482 (E.D. La. 2011); United States v. Lewis, 2010 WL 5418901 (N.D. Ohio Dec. 23, 2010) (unpublished); United States v. Hardy, 762 F. Supp. 2d 849 (E.D. La. 2010); United States v. Davis, 611 F. Supp. 2d 472, 506 (D. Md. 2009); United States v. Shields, No. 2:04-cr-20254, ECF #557, (W.D. Tenn. May 11, 2009) (unpublished); United States v. Nelson, 419 F. Supp. 2d 891, 903 (E.D. La. 2006). In a number of other cases, the defendant raised a claim of ID and the government

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[36] This chapter catalogues the rulings of FDPA courts in the area of intellectual disability. It is not intended and should not be used as a clinical or scientific guide to ID or as a strategic guide on how to litigate a claim of ID.

[37] This section also provides that a death sentence shall not be carried out "upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person." This refers to the separate issue of whether the defendant is competent to be executed. Even where it is applicable, that issue is not ripe for litigation until much later in the case, and certainly not before a defendant has even been sentenced to die. See Panetti v. Quarterman, 551 U.S. 930, 943 (2007); Ford v. Wainwright, 477 U.S. 399, 425 (1986).

[38] The district court, before Hall, originally rejected Wilson's ID claim. United States v. Wilson, 922 F. Supp. 2d 334 (E.D. N.Y. 2013). After the Supreme Court decided Hall, the Second Circuit remanded Wilson's case to the district court for further consideration. The district court then granted the defense motion to reconsider, finding Wilson to be a person with an ID.

agreed to a plea or withdrew the authorization without the need for a hearing on the issue.

District courts have denied ID claims after pretrial hearings in seven cases: United States v. Williams, 1 F. Supp. 3d 1124 (D. Haw. 2014); United States v. Montgomery, 2014 WL 1516147 (W.D. Tenn. Jan. 28, 2014) (unpublished); United States v. Salad, 959 F. Supp. 2d 865 (E.D. Va. 2013); United States v. Jiménez-Bencevíi, 934 F. Supp. 2d 360 (D.P.R. 2013); United States v. Candelario-Santana, 916 F. Supp. 2d 191 (D.P.R. 2013); United States v. Northington, No. 07-550-05, ECF #1042 (E.D. Pa. Feb. 1, 2013) (filed under seal); United States v. Umana, 2010 WL 1052271 (W.D. N.C. Mar. 19, 2010) (unpublished). In several other cases, discussed below, courts have rejected such claims post-sentencing.

Virtually all of these cases were decided before the Supreme Court's recent decision in Hall, which, as discussed below, clarified the standards for evaluating an ID claim in several important respects.

A. Procedures for Litigating Intellectual Disability

1. When to Litigate and Who Decides

The Supreme Court has indicated that the Constitution does not dictate who the factfinder should be for a claim of ID. See Schriro v. Smith, 546 U.S. 6, 7-8 (2005) (reversing Ninth Circuit order directing Arizona courts to conduct jury trial on ID). Nor does the FDPA set out any procedures for how or when such a claim should be adjudicated.

Most district courts have found that, once such a claim is interposed, the question of ID should be resolved by the court itself at a pretrial evidentiary hearing, with the burden on the defendant by a preponderance of the evidence. See Montgomery, 2014 WL 1516147, at *4; Williams, 1 F. Supp. 3d at 1134; Wilson I, 922 F. Supp. 2d at 342-43; Lewis, 2010 WL 5418901, at *1; Davis, 611 F. Supp. 2d at 474; Hardy, 644 F. Supp. 2d at 751; Nelson, 419 F. Supp. 2d at 893-894; Candelario-Santana, 916 F. Supp. 2d at 192; Sablan, 461 F. Supp. 2d 1239, 1241 (D. Colo. 2006); Shields, slip op. at 2. See also Congressional Research Service Report to Congress, The Death Penalty: Capital Punishment Legislation in the 110th Congress, at 13 (Sept. 7, 2007) (available on FDPRC website) ("The limited available case law suggests — with some exception — that the determination of

the issue may be assigned to the court (rather than the jury) to be established by the defendant under a preponderance of the evidence standard prior to trial."). One circuit has rejected a claim that the Constitution requires the government to disprove mental retardation in a FDPA case. United States v. Umana, 750 F.3d 320, 359 (4th Cir. 2014).

In one case, the defense made no request for a pretrial hearing, instead raising the issue of ID for the first time after the guilt-innocence trial. The court agreed to put the issue to the jury at sentencing. See United States v. Cisneros, 385 F. Supp. 2d 567, 571 (E.D. Va. 2005) (issue of ID would be submitted to jury as mitigating factor at sentencing, with burden on defendant to prove it by a preponderance of the evidence. If jurors unanimously found it, defendant would not be death-eligible. If fewer than twelve jurors found it, those who found it would be instructed to consider it as a mitigating factor).

In several other cases where defense attorneys neglected to raise the issue pretrial, federal courts made a finding of fact on ID, either after the sentencing hearing, see United States v. Webster, 162 F.3d 308, 351-353 (5th Cir. 1998) (no plain error in district court's deciding issue, where defendant never objected to this, and never clearly submitted issue to jury as a mitigator. Defendant was not deprived of notice that court would resolve it, where he devoted substantial portion of his mitigation presentation to proving he was mentally retarded and, just before jury retired, asked court to find this factor true as a matter of law), or in § 2255 proceedings, see United States v. Ortiz, 664 F.3d 1151, 1167-68 (8th Cir. 2011) (district court denied ID claim in § 2255 proceedings, and court of appeals affirmed that finding as adequately supported by the record); Bourgeois v. United States, 2011 WL 1930684, *22 (S.D. Tex. May 19, 2011) (unpublished) (ID claim brought, and rejected by district court, during § 2255 proceedings). See also Webster v. Daniels, 784 F.3d 1123 (7th Cir. 2015) (*en banc*) (on review of habeas petition under 28 U.S.C. § 2241, case remanded to district court for hearing on ID in light of newly discovered evidence that only became available after Section 2255 proceeding).

District courts appear to disagree on whether and, if so, to what degree a defendant who has lost on a pretrial ID claim before the court can still present it as a mitigating factor to the jury at a capital-sentencing hearing. Compare United States v. Sablan, 461 F. Supp. 2d 1239, 1242 (D. Colo. 2006) ("The existence of mental retardation is not a mitigation factor for the jury to decide.") with United

States v. Hardy, 644 F. Supp. 2d 749, 750 (E.D. La. 2008) ("If the Court concludes that Hardy has failed to establish his mental retardation by a preponderance of the evidence at the pretrial hearing, Hardy may still present evidence and argue his alleged mental retardation to the jury") with United States v. Williams, 2014 WL 1669107 (D. Haw. Apr. 25, 2014) (defendant can present evidence of mental retardation to the jury as mitigation at sentencing hearing, but not as determinant of eligibility for death penalty).

2. Scope of Government Evaluation

If the defense raises a claim on intellectual disability, the government will likely be allowed to have its own expert evaluate the defendant. The government's evaluation should be limited to the question of whether or not the defendant is a person with intellectual disability and should not be an open-ended search for aggravating factors to introduce at trial.

At a minimum, it may be worth seeking an order that, in raising the Atkins claim, the defendant does not waive his rights under FRCP 12.2 and the Fifth Amendment and that neither the information derived from an evaluation of the defendant nor fruits from such information may be used unless and until the defense first opens the door by introducing expert mental health evidence at guilt or sentencing and the court finds that the government's evidence is proper rebuttal within the meaning of 12.2 and the Fifth Amendment. See, e.g., United States v. Nelson, ("The results of the tests and examination may only be used in connection with the pending Atkins motion, and may not be used at in or connection with the trial, nor may any statements of the defendant or the fruits thereof be use at or in connection with the trial, except pursuant to the terms of this court's [previous order concerning FRCP 12.2]").

In addition, consideration might be given to moving to limit the scope of the government's expert's evaluation. See Section V.C.3: FRCP 12.2: Government Rebuttal Examination: Scope and Use, *ante*. Some courts, however, have rejected such motions as premature, concluding that objections concerning relevance and weight of the government's experts evaluations should be addressed at the time of evidentiary hearing. See, e.g., United States v. Wilson, No. 04-CR-1016-NGG, ECF #782 (E.D.N.Y. Jan.15, 2007) ("[S]uch arguments are more properly made by the defense's experts in their reports, through cross-examination of the Government's experts at the Atkins hearing, or in motions after the hearing.").

Still, such a motion might help educate the court. And an argument might be made that the court should more carefully scrutinize the government's evaluation in the context of a pre-trial Atkins evaluation than would be necessary in the usual FRCP 12.2 situation: In the ordinary case, the government won't have access to any statements from the defendant unless and until there is a capital conviction and the defense reconfirms an intent to introduce evidence derived from his statements at sentencing. See FRCP 12.2(c)(2). The purpose of 12.2(c)'s limits on disclosure of such evidence is to prevent the government from using evidence it is not entitled to and reduce the need for Kastigar hearings. In the pre-trial Atkins context, by contrast, the government will necessarily have access to the results and reports of the experts' evaluations, which increases the worry that it will improperly use those statements or fruits of those statements to investigate and develop aggravation or anti-mitigation. To avoid as much possible the risk of Kastigar hearings, the court should, at the front end, strictly limit the governement's access to the defendant to only what is necessary to litigate intellectual disability.

On the other hand, successfully precluding the government expert from administering and relying on clinically unsound tests would remove a line of inquiry for cross-examination and grounds for the court to make adverse credibility findings.

B. Definition of Intellectual Disability

The FDPA itself does not indicate how mental retardation should be defined. Instead, FDPA courts and the Supreme Court in Hall have relied on the standards established in the medical and scientific community, particularly by the the American Association on Mental Retardation ("AAMR"), which has since changed its name to the American Association on Intellectual and Developmental Disabilities ("AAIDD"); and by the American Psychiatric Association ("APA"). For a defendant to be judged as ID under those standards, he or she must meet three criteria: (1) "significantly subaverage intellectual functioning," (2) "deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances)," and (3) onset during the developmental period, *i.e.*, before age 18. Hall, 134 S. Ct. at 1994.

1. Significantly Subaverage Intellectual Functioning

Intellectual functioning is judged primarily though not exclusively by performance on a standardized intelligence test, *i.e.*, an IQ test. Significantly subaverage intellectual functioning is generally performance that is two or more standard deviations below the mean; since the mean IQ test score is 100, that means an IQ score of "*approximately*" 70 or below. Hall, 134 S. Ct. at 1994 (emphasis added).

Hall made clear that "intellectual disability is a condition, not a number," and that there is no score cut-off for determining whether a defendant meets this prong of ID. The Supreme Court explained that this is because "[t]he IQ test is imprecise." It is also because IQ scores are not the only indicator of a defendant's intellectual functioning; the factfinder should consider "additional evidence" in assessing this prong, including the examiner's clinical judgment as well as "testimony regarding adaptive deficits," the second prong. Thus, a defendant with one or more scores up to 75 or higher may nonetheless be deemed to have significantly subaverage intellectual functioning. Id. at 2001. See also Brumfield v. Cain, ___ S. Ct. ___, 2015 WL 2473376, *7 (June 18, 2015).

The most widely respected IQ tests are the Wechsler Intelligence Scales, one for children and one for adults. Each Wechsler test is composed of several subtests. A person's ultimate ("full scale") IQ is calculated from the various subtests scores. See, e.g., Lewis, 2010 WL 5418901, at *10; Davis, 611 F. Supp. 2d at 483-84.

a. Standard Error of Measurement (SEM)/Confidence Intervals

In Hall, the Supreme Court recognized the understanding of the medical community that "IQ test scores should be read not as a single fixed number but as a range." Specifically, "[e]ach IQ test has a 'standard error of measurement,' often referred to by the abbreviation 'SEM.' A test's SEM is . . . a reflection of the inherent imprecision of the test itself . . . . The SEM allows clinicians to calculate a range within which one may say an individual's true IQ score lies." How this applies may depend on the test used and the degree of confidence that the measured score is within the specified range (the "confidence interval"). But, consideration of the SEM ultimately means an individual with a score or scores above 70 — at least as high as 75, and perhaps higher — may satisfy the first

prong. 134 S. Ct. at 1995. See also Brumfield, ___ S. Ct. at ___, 2015 WL 2473376, **6-7.

Prior to Hall, most FDPA courts, relying on the consensus of the medical and scientific communities, have accounted for measurement error and acknowledged that the SEM for well-standardized IQ tests is approximately between two and three points. Applying the generally accepted 95 percent confidence interval (two SEM's below to two SEM's above the observed score, which is plus or minus approximately five points), these courts have set the upper bound score for a finding of mental retardation at approximately 75, the level cited at points in Hall.[39] See, e.g., Montgomery, 2014 WL 1516147, at **4, 27; Williams, 1 F. Supp. 3d at 1142; Bourgeois, 2011 WL 1930684, at *25; Smith, 790 F. Supp. 2d at 490; Lewis, 2010 WL 5418901, at *8; Hardy, 762 F. Supp. 2d at 857; Davis, 611 F. Supp. 2d at 475. But see Jiménez-Benceví, 934 F. Supp. 2d at 365 (declining to find the defendant mentally retarded because his IQ scores did not fall below the "threshold score of 70" even though some of his scores fell within the standard error of measurement); Salad, 959 F. Supp. 2d at 872, 877 (also expressing doubt about use of 95 percent confidence interval, and finding defendant did not establish prong one based on scores of 75 and 76). In Wilson II, the court, which had previously adopted a 68 percent confidence interval, Wilson I, 922 F. Supp. 2d at 347-48, reversed course, concluding that Hall requires use of a 95-percent confidence interval, Wilson II, 2016 WL 1060245 at *14. But the district court rejected a blanket 5-point margin of error derived from the typical or average SEM and, instead, held that the confidence interval should be calculated from the specific SEM of the particular test at issue, Wilson II, 2016 WL 1060245 at *13-14.

The application of a confidence interval *higher* than 95 percent would permit diagnoses of mental retardation based on IQ scores above 75. In Wilson I, the defense experts advocated for the use of a 99 percent confidence interval,

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[39] While referring on several occasions to IQ scores as high as 75, Hall ultimately does not adopt any particular IQ score or SEM range as the upper limit for diagnosing ID. Rather, it requires that the defendant be afforded the opportunity to present additional evidence of intellectual disability when his or her IQ test score "falls within the . . . acknowledged and inherent margin of error" of the test. Id.; see also Wilson II, 2016 WL 1060245 at *12 ("the Court [in Hall] did not provide clear guidance on the appropriate confidence level lower courts should apply . . . .").

explaining that when "talking about [a] person's life, we probably should be using the 99th percentile and not having a five percent chance of being off." But the court rejected that argument. 922 F. Supp. 2d at 348 n.12.

b. The Flynn Effect

The Flynn Effect, named for its discoverer, James Flynn, is based on the well-recognized fact that a population's mean IQ score rises over time, by about a third of a point each year. When an IQ test is developed, it is standardized using a representative sample of test takers, with the mean set to 100. When the test is revised, it is again standardized using a new population sample, who (as a whole) will naturally have been born more recently than the first. Again, the average is set to 100. But, because of the rise over time in average IQ, if the new group were to take the old test, the mean score would be significantly above 100. Thus, if an individual's score is measured against the mean for a population sample from prior years, his or her score will appear artificially inflated. Accordingly, Flynn suggests that, to accurately assess an individual's IQ relative to today's population, his IQ scores should be adjusted downward by 0.3 points per year based on when the IQ test was administered relative to when the IQ test's norms were produced. See generally, e.g., Lewis, 2010 WL 5418901, at *6; Davis, 611 F. Supp. 2d at 485-88.

Most FDPA courts have recognized the Flynn Effect and have adjusted the defendant's scores to account for it. See, e.g., Wilson II, 2016 WL 1060245 at *4, 19, 20 n.26 (court previously "declared that it would adjust Wilson's scores based on the so-called 'Flynn effect" and "sees no reason to change its decision"; providing a Flynn-adjusted full-scale IQ score for each test administered to the defendant); Williams, 1 F. Supp. 3d at 1143 ("The court will also consider the 'Flynn Effect'"); Hardy, 762 F. Supp. 2d at 857-67 (endorsing the validity of the Flynn Effect and applying an inflation rate of 0.3 points per year to account for the effect); Smith, 790 F. Supp. 2d at 491 (same); Davis, 611 F. Supp. 2d at 488 ("[T]he Court finds the defendant's Flynn effect evidence both relevant and persuasive, and will, as it should, consider the Flynn-adjusted scores in its evaluation of the defendant's intellectual functioning."); Lewis, 2010 WL 5418901, at **11-12 (N.D. Ohio 2010) (recognizing the Flynn Effect as a best practice for an intellectual disability determination and adjusting scores accordingly). See also Shields, slip op. at *25 (recognizing existence and validity of Flynn Effect, but declining to adjust the score downwards because "the science for how to properly account for the Flynn Effect is . . . unsettled.")

A minority of FDPA courts have refused to apply a Flynn adjustment to defendants' IQ, because they were not fully persuaded by the expert testimony or scientific evidence regarding the existence or impact of the Flynn Effect. See Montgomery, 2014 WL 1516147, at **27-28; Bourgeois, 2011 WL 1930684, at *26 n.37; Jiménez -Benceví, 934 F. Supp. 2d at 370; Salad, 959 F. Supp. 2d at 872 n.10; Candelario-Santana, 916 F. Supp. 2d at 207-08.

c. The Practice Effect

The practice effect refers to the tendency of an individual's IQ score to increase due to more than one administration of the same or a similar test. "[B]ecause IQ assessments rely upon novel tasks and instructions to assess ability and performance, an instruction given on a test will be more familiar to the examinee and more quickly implemented on subsequent presentations." Wilson I, 922 F. Supp. 2d at 352 (citation and internal quotation omitted). Indeed, established clinical practice is to avoid administering the same intelligence test within the same year to the same individual because it will often lead to an overestimate of the examinee's true intelligence. See, e.g., Nelson, 419 F. Supp. 2d at 898 (criticizing an expert for administering an identical test a mere 51 weeks later).

In Nelson, the district court relied on the practice effect in assessing an increase in the defendant's IQ scores. Nelson, 419 F. Supp. 2d at 898 ("The conclusion that the increase was due to a practice effect . . . rather than an actual increase in IQ is borne out by the fact that Nelson's academic scores did not experience a concomitant rise during that period."). Other courts have also considered the practice effect. See e.g., Salad, 959 F. Supp. 2d at 872; Lewis, 2010 WL 5418901, at *8; Hardy, 762 F. Supp. 2d at 867-69; Williams, 1 F. Supp. 3d at 1143.

Courts typically do not apply a specific point adjustment to account for the practice effect. See, e.g., Wilson I, 922 F. Supp. 2d at 352, 354 (declining to apply a blanket point adjustment, but agreeing to "interpret" — but not reduce — the IQ scores in light of the practice effect). While most courts agree that the practice effect diminishes as the length of time between test administrations increases, there is some debate over how long it persists. See, e.g., id. at 353 ("To be sure, experts in this case have suggested that the practice effect *could* occur after even a very long interval between administrations . . . [but] Wilson has provided the court with

no persuasive guidance as to the proper adjustment (if any) for IQ tests taken a substantial amount of time after the original test, and the evidence suggests that any such adjustment should be minimal.").[1]

d. Non-English Speakers

Determining intellectual functioning for non-English speakers presents special issues. This is because IQ tests are normed to the population of a specific country, and therefore reflect the country's general level of intelligence and cultural norms. Thus, if the defendant was not born and raised in the United States, or does not speak or read English fluently, the court must determine how much weight to accord the defendant's IQ scores given that such scores are based upon American intelligence norms.

This issue arose in Salad, in which the defendant was a young Somali man who does not speak or read English. As a result, the vast majority of the evidence before the court, including IQ scores, was obtained through interpreters. Further complicating matters, the tests administered to Salad had been normed to American, rather than Somali, intelligence and cultural norms. Due to the language barriers, Salad's testing was confined to the TONI, which is best for non-verbal measures of IQ. The defendant routinely scored above 70 (75 and 76) on his TONI-4 tests, but scored only a 63 on the Wechsler Abbreviated Scale of Intelligence Test (WASI) and a 48 on the Nonverbal Scale of the Stanford-Binet Intelligence Scales, Fifth Edition (SB-V). The court ultimately accorded more weight to the scores obtained on the TONI tests than the scores obtained on the nonverbal portions of the WASI or SB-V tests, explaining that the TONI was designed as a "self-contained instrument to provide a reliable IQ score," whereas the defendant's WASI and SB-V scores required more extrapolation since he had only been administered the nonverbal portions of the test. The court expressed concern that looking only at the nonverbal scores of the WASI and SB tests would underestimate the subject's overall IQ. Salad, 959 F. Supp. 2d at 870, 875.

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[1] The court in both Wilson I and Wilson II failed to discuss the defendant's evidence and argument concerning the related concept of "progressive error," a subset of practice effects in which multiple administrations of the same IQ test or family of IQ tests can inflate scores over long periods if not permanently.

The defense in Salad endorsed the use of American-normed tests. It argued that insisting on foreign-normed tests in order to prove limited intellectual functioning would render many foreign defendants categorically incapable of meeting their burden of proof. Meanwhile, the prosecution expressed concern that a comparison between foreign defendants like Salad and the American population would too often lead to erroneous conclusions of ID. The court ultimately found that the defendant was not intellectually disabled, noting that even an American defendant who attained IQ scores of 75 and 76 on TONI tests would face a heavy burden in mounting a successful ID claim. Id. at 876.

Similar issues have arisen in cases involving Spanish-speaking defendants. Experts in some cases in Puerto Rico have used a Spanish-language adaptation of the WAIS-III called the EIWA-III. District courts there have said that it was developed at a school of medicine in Puerto Rico and reflects Puerto Rican lingual and cultural norms. See Jiménez-Benceví, 934 F. Supp. 2d at 366; Candelario-Santana, 916 F. Supp. 2d at 206, 207. But in some other cases it has been used with Spanish-speaking defendants who are not Puerto Rican. See, e.g., Umana, 2010 WL 1052271, at *2 n.11 (EIWA-III administered to Salvadoran defendant by both sides' experts).

e. Multiple IQ Scores and Subtest Scores

Litigation over ID often involves multiple IQ tests that were administered to the defendant at different points in his life, the scores of which may vary, sometimes widely. This too raises potential issues. As the Supreme Court observed in Hall, "when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a complicated endeavor . . . . In addition, because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning." 134 S. Ct. at 1986.

Some district courts have dismissed perceived outlier scores based on the potential influence of the practice effect or administration errors (including proctor error and the administration of an outdated or ill-suited tests). See Shields, slip op. at *21; Jimenez-Bencevi, 934 F. Supp. 2d at 367-69; Smith, 790 F. Supp. 2d at 495-96; Nelson, 419 F. Supp. 2d at 897-98. Another court interpreted the standard error of measurement and associated confidence interval narrowly in order to

dismiss a potentially qualifying IQ score. See Wilson I, 922 F. Supp. 2d at 349, 367-68 (dismissing a score of 70 because the defendant had taken nine separate IQ tests over the span of 23 years, and had only once received a raw score below 75 (without adjusting for the Flynn Effect)).

Some courts have also addressed variation among scores within a single IQ test. Generally the "full scale" IQ score is the best indicator of overall cognitive ability. See, e.g., Davis, 611 F. Supp. 2d at 483-85, 489; Montgomery, 2014 WL 1516147, at *27. But a few courts have found that wide variation between scores on different subtests during a single administration created doubt that the test accurately indicated the defendant's intellectual functioning. See Candelario-Santana, 916 F. Supp. 2d at 207; Montgomery, 2014 WL 1516147, at **30-33.

Some courts have also acknowledged the importance of experts' having access to raw data for past tests in order to verify the accuracy and reliability of scores. See, e.g., Williams, 2014 WL 869217, at *27. But see Wilson I, 922 F. Supp. 2d at 355 (rejected the view of one defense expert that the absence of raw data for certain IQ tests should significantly diminish the weight given to those results).

In Wilson I, the district court, confronting 9 IQ scores obtained over the course of the defendant's life, evaluated intellectual functioning by looking to the median and average of the scores. Wilson I, 922 F. Supp. 2d at 367-68. In Wilson II, citing Hall's warning that "analysis of multiple IQ scores jointly is a complicated manner," 2016 WL 1060245 at * 14-15, eschewed any reference to averages or medians, id *14 n.18 ("The analysis of multiple IQ test scores is more complicated than taking the highest score or looking at a pattern of scores to form a gestalt judgment about 'true' IQ. Doing so, or even using an average, may systematically overestimate a person's true intellectual functioning relative to his or her peers.") (quoting Reply Br. For Pet. Hall) (internal citations omitted). Instead, the court interpreted Hall to require that the intellectual functioning diagnostic criterion is satisfied, requiring analysis of adaptive functioning, "if any IQ test, evaluated in the context of a 95% interval, reflects a range falling to 70 or below." Id. at *15; see also *1 ("Here, the court interprets Hall as holding that, where application of the standard error measurement with a confidence interval of 95% results in a range of possible intelligence quotient ('IQ') test scores that reach 70 or below, the defendant has demonstrated that he or she suffers from significantly subaverage intellectual functioning.")

f. Poor Effort or Malingering

A number of courts have rejected government claims of poor effort or malingering by noting the defendant's consistent scores on a range of IQ tests administered over an extended period of time. See, e.g., Shields, slip op. at 24 ("In light of Defendant's consistency on administrations of the Wechsler, however, it is simply not plausible that Defendant's Wechsler scores are artificially low as a result of poor effort, malingering for 'secondary gain,' or any other influence not actually attributable to mental retardation."); Nelson, 419 F. Supp. 2d at 903 ("It is simply impossible for the Court to conclude that Nelson had been malingering since age 11 and has been able to manufacture the identical testing pattern for all those years."); Smith, 790 F. Supp. 2d at 498 (consistency of scores indicated good effort and reliability). Another court looked to the statements of the defendant's relatives, friends, and teachers to determine whether he was malingering or whether his symptoms had been consistent. It found that a documented pattern of deficits in IQ or adaptive behavior from childhood until the time of the crime was a strong indication that he was not malingering. See Davis, 611 F. Supp. 2d at 493. 1

There are special instruments that are designed to try to detect whether the subject put forth an adequate effort. See, e.g., Montgomery, 2014 WL 1516147, at **28-29, 36-37; Jimenez-Bencevi, 934 F. Supp. 2d at 368-69. But many experts believe that such tests are of limited use in the context of ID assessments because they have never been tested on a normative sample of individuals with ID. See Hardy, 762 F. Supp. 2d at 874-75; Nelson, 419 F. Supp. 2d at 902. Moreover, one court has said these tests should not even be considered unless they were administered concurrently with the IQ test. See Nelson, 419 F. Supp. 2d at 902.

g. Going Beyond IQ Scores in Assessing Intellectual Functioning

Prior to Hall, most courts agreed that assessing ID required a comprehensive analysis in which a court considered not only scores on tests and instruments, but also experts' clinical judgment and multiple additional sources of relevant information. See, e.g., Davis, 611 F. Supp. 2d at 492; Lewis, 2010 WL 5418901, at *5. But at least one court resisted this approach. See Wilson I, 922 F. Supp. 2d at 355-57 (refusing to consider adaptive-deficit evidence in determining intellectual functioning, though "both parties and their experts argue the court should do so").

The Supreme Court appears to have resolved this issue in Hall, where it invalidated Florida's "mandatory cutoff" rule. Under that rule, if the defendant's IQ score was above 70, "sentencing courts cannot consider even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances. This is so even though . . . all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score above 70." Later in its opinion, the Court said: "It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment . . . . a person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score." 134 S. Ct. at 1994, 2001 (citation and internal quotation omitted). But see Wilson II (holding that "conjunctive and interrelated assessment" language from Hall is dicta and, therefore, persisting in "independent, three-prong" analysis adopted in Wilson I).

h. DSM-5: Changes in Evaluating Intellectual Functioning

The DSM-IV-TR defined "significantly subaverage intellectual functioning," as "an [IQ] of approximately 70 or below on an individually administered IQ test," id. at 49. The "Diagnostic Criteria" section of the DSM-5, by contrast, omits any reference to "IQ tests" or scores, requiring more broadly a showing of "[d]eficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing," id. at 33. The "Diagnostic Features" section of the DSM-5 speaks of IQ scores of approximately two standard deviations below the mean, taking confidence intervals into account, but observes that "[i]ndividual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score." id. at 37.

In Wilson II, the defendant argued that this language from the DSM-5 broadened the kinds of neuropsychological tests to be considered when evaluating intellectual functioning, but the district court rejected the argument, finding that IQ tests "continue to play a uniquely important role in the analysis of intellectual functioning." Wilson II, 2016 10602045 at *5 n.7.

2. Deficits in Adaptive Functioning

In Atkins, which was decided in 2002, the Supreme Court cited the then generally accepted clinical definition of ID's second prong as "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." 536 U.S. at 308 n.3. That year, the manuals recognized as authoritative in the scientific community were revised so it now defines significant limitations in adaptive behavior more holistically, *i.e.*, as limitations expressed in conceptual, social, and/or practical skills. Since then, FDPA cases assessing the second prong have generally relied on the new definition, though they have found the two to be consistent and thus also considered the older one. See, e.g., Wilson II, 2016 WL 1060245 at *8-9; Williams, 1 F. Supp. 3d at 1138; Smith, 790 F. Supp. 2d at 484; Lewis, 2010 WL 5418901, at *5; Hardy, 762 F. Supp. 2d at 854 & n. 5; Davis, 611 F. Supp 2d at 474-75.

a. Sources of Information

To assess adaptive behavior, clinicians generally rely on interviews with lay witnesses who know or knew the defendant well and had the opportunity to directly observe him engaging in his typical behaviors. These include immediate family members; former and present close friends and those with whom the defendant has had an intimate relationship; teachers and other school personnel who have had contact with the defendant over the course of his educational career; and co-workers. See, e.g., Montgomery, 2014 WL 1516147, at **5, 45-47, 50, 53; Salad, 959 F. Supp. 2d at 878; Candelario-Santana, 916 F. Supp. 2d at 214-15; Shields, slip op. at 3, Bourgeois, 2011 WL 1930684, at *37-39.

But use of the defendant himself as an informant to his own adaptive abilities "is disfavored." Lewis, 2010 WL 5418901, at *23 (explaining that mildly ID individuals "may exaggerate their adaptive abilities to appear more competent"). "None of the generally accepted scales of adaptive behavior rely on direct observation of the person nor upon his own self-report of what he is capable of doing." Smith, 790 F. Supp. 2d at 503. See also id. at 487 (mildly ID defendants are "more likely to mask their deficits and attempt to look more able and typical than they actually are"); Salad, 959 F. Supp. 2d at 878 ("an evaluation should not rely primarily on an individual's self-report of his skill level"). But see

Northington, 2012 WL 4024944, at *5 (allowing instrument to be administered to defendant himself, even if results from such a test are not as reliable as ones obtained from third-party informants); Wilson I, 920 F. Supp. 2d at 298 (same).

In questioning third-party informants and analyzing the information obtained from them, clinicians sometimes use standardized instruments that have been developed to assess adaptive behavior. See, e.g., Lewis, 2010 WL 5418901, at *13, *23-24; Hardy, 762 F. Supp. 2d at 885; Smith, 790 F. Supp. 2d at 502-03; Davis, 611 F. Supp. 2d at 491-92. See also Montgomery, slip op. at 11, 117-18, 124; Williams, 1 F. Supp. 3d at 1138; Webster, 784 F.3d at 1189. But these instruments were not designed for retrospective evaluations, and thus their utility in this context is controversial. See, e.g., Wilson II, 2016 WL 1060245 at *17 (given instruments' limitations in context of retrospective evaluation, "court will consider the results of these tests . . . but it will place significantly greater weight on the clinical judgment of the experts the court finds most credible, along with record evidence from Wilson's youth); Smith, 790 F. Supp. 2d at 507. See also, e.g., Williams, 1 F. Supp. 3d at 1138; Montgomery, 2014 WL 1516147, at *51; Candelario-Santana, 916 F. Supp. 2d at 215-16.

b. Irrelevance of Prison Behavior

A number of courts have discounted evidence about the defendant's ability to carry out routine prison tasks. In Davis, the court did not give much weight to testimony of correctional officers who said the defendant was able to mop floors, keep an exercise routine, and seek medical care. 611 F. Supp. 2d at 495 (such activity "says nothing about the inmate's ability to take responsibility for his own health and safety while in the general community."). Similarly, the court in Wilson II held that the DSM-5 makes clear that "intellectually disabled individuals may be able to perform adequately if they are provided ongoing support, such as the structure, observation, instruction, and discipline that incarceration necessarily entails" and that "the ability to perform adequately with ongoing support does not negate a finding of intellectual disability. 2016 WL 1060245 at *17; see also id. (under AAIDD approach, limitations should be evaluated in context of community typical of the person's age peers "rather than in comparison to other inmates"); Smith, 790 F. Supp. 2d at 517, 518 (conclusions should not be drawn from the "routine[s] of prison life," which "are well suited to many people with mental retardation.").

Smith also found persuasive expert testimony that "correctional officers do not have the type of continuous contact with the offender that a caregiver would have, getting to know him well over a long period of time . . . . They are also not trained to make assessments of adaptive behavior." Id.; see also Wilson II, 2016 WL 1060245 at *18 ("while the court does not question the honesty of the many prison official who have evaluated and worked with Wilson over the years, the fact that they have only known Wilson in a correctional setting leads the court to treat their observations with measured skepticism"); Hardy, 762 F. Supp. 2d at 899 (rejecting government expert's conclusion on adaptative deficits because it was "tainted" by reliance on "Hardy's level of functioning while in prison," which is a "highly structured environment" with "hidden supports," and whose officials are poor informants on adaptive deficits); Salad, 959 F. Supp. 2d at 886 (assigning "little weight" to defendant's post-incarceration functioning); Montgomery, 2014 WL 1516147, at *49 ("courts have decided that correctional officers who interact with an examinee after his incarceration would certainly be inappropriate respondents for a standardized adaptive behavior scale," though court declines to "completely disregard Defendant's . . . post-incarceration behavior").

In Umana, the court took into consideration the defendant's behavior toward prison staff and other inmates, and his letters and phone calls in determining that he did not have limitations in communication. 2010 WL 1052271, at *3-4. But it did not rely wholly on the defendant's ability to carry out routine tasks; the court cited testimony that the defendant was seen teaching Spanish to other inmates and using a computer kiosk to check his commissary account balance and place orders. Id. at *6. See also Shields, slip op. at 27 (giving only limited consideration to defendant's behavior in prison setting, since "the structure and restrictions created by a jail or prison must be recognized").

c. Improper Use of Stereotypes

Most FDPA courts have relied on the AAIDD's caution that, among the ID (particularly where the level of ID falls in the "mild" category) limitations often coexist with some strengths, and that diagnoses should not be influenced by stereotypes about what a person who is ID can or cannot do or looks like. See e.g., Lewis, 2010 WL 5418901, at * 30 ("Defendant does possess some capabilities that relate to the practical domain. The evidence indicates that Defendant could count money, owned several cell phones, and drove cars for transportation. But a determination of intellectual disability must focus on Defendant's deficits, not his

abilities."). Lewis also rejected the testimony of a government expert witness who claimed that the defendant's ability to have a conversation indicated against his claims of intellectual disability. 2010 WL 5418901 at **20, 28. See also Shields, slip op. at 11 (rejecting assessment of government expert which was "tainted by woefully unjustified and inaccurate conceptions of how mentally retarded individuals are expected to act and appear").

Similarly, in Davis, 611 F. Supp. 2d at 475-476, the court said: that the fundamental assumption that within an individual with ID, "limitations often coexist with strengths is particularly salient in the context of this case." It rejected the government's argument that the defendant's having "fathered three children with three different women" indicated the high-functioning ability to "maintain more than one romantic relationship at a time without the women's knowledge and purchase items for his children." Id. at 503.

Likewise, the court in Hardy rejected the government's argument that the defendant's operation of a street-level cocaine distribution ring. 762 F. Supp. 2d at 902 ("the mildly mentally retarded have strengths as well as weaknesses"). In Salad too, the court cautioned against "evaluat[ing] a subject's performance based on inaccurate stereotypes of disabled individuals." 959 F. Supp. 2d at 878, 879. See also Smith, 790 F. Supp.2d at 487 (mildly ID defendants "frequently present a mixed competence profile").

The Seventh Circuit also addressed this in Webster:

> Counsel for the government, at oral argument, pointed to Webster's ability to come to the Dallas area, to lie about being an F.B.I. agent at Lisa's door, to travel back to Pine Bluff, to dig the grave in advance, and to kill and bury her, as evidence of his competence. But as we have just pointed out, that is a lay opinion. Dr. Finn put Webster's mental age at somewhere between six and seven. Common experience shows that children of that age can do quite a few things: they can lie; they can plan an immediate event; they can carry out instructions . . . . The government also relied on the fact that Webster complained on one occasion that he received the wrong change from the commissary. But studies indicate that adults with mild retardation can learn the essentials of paying bills.

784 F. 3d at 1184.

Some courts, though, have taken a different approach. See Bourgeois, 2011 WL 1930684, at * 32 (citing primarily Fifth Circuit Texas habeas cases, court refuses to accept AAIDD's view that "within an individual [with ID], limitations often coexist with strengths" and that therefore "significant limitations in conceptual, social, or practical adaptive skills is not outweighed by the potential strengths in some adaptive skills"); Candelario-Santana, 916 F. Supp. 2d at 213-14 ("It may be true as a general matter that one should not infer too much from specific examples of a person's apparent successes. But the defense experts repeated failure to prove the circumstances that produced [those] many apparent successes gave us pause"); Ortiz, 664 F.3d at 1169 (citing Bourgeois for the proposition that "the law makes a holistic view of an individual, recognizing that a few reported problems may not negate an inmate's ability to function in other ways.").

d. Irrelevance of Past Criminal Conduct

"Most experts believe that [current charges and prior criminal history] should not be considered in an assessment of adaptive functioning, and this view is reflected in the authoritative [AAIDD guide] . . . . The Court cannot discount the possibility that this information may have unnecessarily colored [the government expert's] analysis." Davis, 611 F. Supp. 2d at 500. See also Northington, 2012 WL 4024944, at *7 ("Defendant objects to any questioning by Government experts concerning the circumstances surrounding the alleged commission of the crimes charged against him. The Government states that its experts will not question Defendant about the charged crimes"); Hardy, 762 F. Supp. 2d at 902 ("Hardy was a reasonably successful street level crack cocaine distributor . . . . a person with mild mental retardation is capable of running such an operation" as such a person "can take a gun and shoot someone"). See also Hall, 134 S. Ct. at 1991 (criticizing trial court's conclusion — reached despite substantial evidence that Hall had been intellectually disabled his whole life, that "[n]othing of which the experts testified could explain how a psychotic, mentally-retarded, brain-damaged, learning-disabled, speech-impaired person could formulate a plan whereby a car was stolen and a convenience store was robbed").

In Wilson I, the defendant argued, pre-hearing and pre-government evaluation, that expert witnesses for the government should not be allowed to

question him about his past criminal history because this was irrelevant to ID. Although the court acknowledged the literature warning clinicians against relying on past criminal history, the court declined to adhere to that standard because it reasoned that anti-social behavior could be evidence that the defendant has not adapted, and therefore serve as evidence of impaired adaptive functioning. (Regarding the defendant's Fifth Amendment claim, the court ruled that he had waived his rights when he chose to make his past criminal record an issue at trial.). Wilson I, 922 F. Supp. 2d at 302-03. In Wilson II, however, after the evidentiary hearing (and a remand from the circuit for further consideration in light of Hall), the court acknowledged that the AAIDD's Users's Guide explains that "[t]he diagnosis of [intellectual disability] is not based on the person's street smarts, behavior in jail, or criminal adaptive functioning." 2016 WL1060245 at *17 (citing AAIDD User's Guide at 20) and faulted one of the government's experts for his improper "focus on criminal and prison evidence," a focus that "runs counter to the clinical standards": "Accordingly, the court will give not give significant weight to his testimony." Id. at *29; see also id. at 34 (rejecting government's experts' reliance on defendant's criminal conduct — including audio recordings that revealed the defendant confidently giving directions in the period of time leading up to the homicides and his prior crimes selling drugs and his position of leadership in a gang).

e. Dual and Differential Diagnoses

FDPA courts have recognized that an ID diagnosis does not require excluding other possible disorders. See e.g., Lewis, 2010 WL 5418901 at *32 ("Indeed, individuals with intellectual disability are three to four times more likely to have comorbid mental disorders than the general population."); Shields, slip op. at 27("[I]n explaining Defendant's deficits, the Government's experts appeared incredibly amenable to consideration of just about any explanation other than mental retardation. The position advanced by the Government's experts is absurd."); Davis, 611 F. Supp. 2d at 485 ("Dr. Antell's premise that 'in order to make a diagnosis of mental retardation, one must first exclude other factors which might impact on IQ test or adaptive performance' is simply incorrect . . . . the diagnostic criteria for Mental Retardation do not include an exclusion criterion; therefore, the diagnosis should be made whenever the diagnostic criteria are met, regardless of and in addition to the presence of another disorder.") (citation and internal quotation omitted). See also Brumfield, 135 S. Ct. 2269, 2280 (2015) (anti-social personality disorder is not inconsistent with intellectual disability).

Government experts sometimes attribute intellectual impairment and difficulties in adaptive functioning to other disorders, such as ADHD or a learning disability. See, e.g., Lewis, 2010 WL 5418901, at *32 (learning disability and ADHD); Davis, 611 F. Supp. 2d at 481-82 (learning disability). Some courts have said that a learning disability can be distinguished from intellectual disability in that it specifically affects academic performance, but not adaptive or intellectual functioning more generally. See Lewis, 2010 WL 5418901, at *32. But see Brumfield, 135 S. Ct. at 2281 (early diagnosis of learning disability was suggestive of ID). One court has noted that ADHD symptoms similarly will not be reflected in IQ measurement or in all domains of adaptive functioning. Lewis, 2010 WL 5418901, at *33.

In Wilson II, the government's experts all acknowledged that Wilson suffered deficits in adaptive functioning, but argued that because the defendant had failed to prove that his adaptive functioning deficits were specifically caused by an intellectual disability — had failed to prove that the deficits were not attributable to a learning disability, ADHD, or personality disorders — he had not satisfied his burden on prong 2. The court disagreed. It found that "Wilson's broad and persistent deficits across multiple areas of academic functioning suggest that he suffered from greater intellectual impairments than could be explained by a learning disability alone." Wilson II, 2016 WL 1060245 at *33. More importantly, it rejected the premise that the defendant is required to prove a specific causal connection, holding instead that the defendant need only show that the demonstrated deficits adaptive functioning relate to the demonstrated deficits in intellectual functioning. Id. at *18. And because intellectual disability can co-exist with other conditions, such as a learning disability, ADHD, or a behavior disorder, the court declined to require the defendant to rule out such conditions as contributing factors. Id. at 19; see also id. at *30 (faulting government's expert who espoused a causation approach that is "directly at odds" with the clinical standard and "was unable to cite any scientific literature, scholarly journals, or alternative clinical standard that supported his approach"); id. at 32 (same).

f. Role of Culture and Class

In Smith, the court agreed with the defense expert that ID "can go undetected or that the deficits in functioning can be misconstrued by professionals as a problem solely due to poverty, lack of access to education, limited intellectual stimulation, and/or problems in conduct." The defendant there "came from a low

socioeconomic area, and attended a school with problems and no special education program." 790 F. Supp. 2d at 535. See also Hardy, 762 F. Supp. 2d at 877 (rejecting earlier expert's conclusion, now repudiated by both sides' experts, that "socio-economic factors were at play and so Hardy's score," which was in the ID-range, "should be compared to others of his race, rather than the population in general").

But some courts have dismissed apparent deficits in academic and educational performance as a product of the defendant's socioeconomic background and cultural upbringing, rather than intellectual disability. For example, in Jiménez-Benceví, the court found that the defendant's "extremely difficult childhood—made worse by severe poverty, physical and emotional abuse, and poor educational support" were "far more persuasive" explanations for his poor academic performance than intellectual disability. 934 F. Supp. 2d at 374. See also Candelario-Santana, 916 F. Supp. 2d at 221; Umana, 2010 WL 1052271, at *6.

Salad is an extreme example for how culture and class can create challenges for ID assessments. Determining whether or not Salad, a Somali defendant, had deficits in adaptive functioning proved to be an exceptionally difficult endeavor for experts in the case. They had to create an individual baseline of the adaptive skills typical of a Somali man raised in a nomadic bush region with no formal schooling. The defense expert, Dr. Patton, then contracted an in-country investigator to conduct interviews with fourteen Somali individuals.Yet the court complained that the interviews had not been recorded or monitored by Dr. Patton, and the in-country investigator never confirmed the content or accuracy of the transcribed reports. In proving limited adaptive functioning, Dr. Patton relied on deficiencies such as "requir[ing] additional supervision for the basic tasks of herding and finding sustenance for the family's goats and camels" to show deficits in conceptual adaptive functioning, and "struggl[ing] to learn to swim and fish" and "display[ing] risky behavior by inadvertently firing his AK-47 while in the militia" to show shortcomings in practical adaptive functioning. Yet, again, the court demanded more, saying "it is unclear from Dr. Patton's declarations and his testimony on what foundation he could determine that Salad's functioning deviated so significantly from Somali community norms." It also expressed concern that the experts' baseline was not "rooted in evaluation of a specific quantity of Somalis over a given time" and was therefore of "limited utility to evaluate how the Defendant compares to his peers." As an example, the court explained that it

was "at a loss for context to understand how atypical it is for a nomadic Somali adolescent to fail to understand the monetary cost of goods in a city, having lived his entire life to that point in a nomadic culture based on bartering of goods." The court ultimately concluded that Salad had not met his burden with respect to adaptive skills deficits due to the significant inconsistencies and inherent reliability of the Somali interview reports. It did, however, commend the defense expert (Dr. Patton) for his "ambitious efforts to create a baseline understanding of a nomadic Somali's skill level." 959 F. Supp. 2d at 879-87.

g. DSM-5: Changes in Evaluating Adaptive Functioning

In Wilson II, the defense argued that, with respect to the adaptive-functioning criterion (Criterion B), the DSM-5 broadened the kinds of evidence the court should consider: Under the new definitions, the defense argued, the court should look not only at behaviors but should also consider evidence of deficits in adaptive reasoning, including impairments in abstract reasoning, executive functioning, and short-term memory — deficits in real-world functioning that would likely correlate with the scores obtained from the broad neuropsychological battery the DSM-5 now emphasizes for the intellectual-functioning criterion (Criterion A), see Section B.1.h, ante. The district court disagreed, concluding that the changes in the text merely bring the DSM-5 in line with the AAIDD's three-domain formulation adaptive behavior. Wilson II, 2016 WL 1060245 at *8.

3. Onset Before Age 18

A determination of ID requires that the defendant's significantly subaverage intellectual functioning and deficits in adaptive functioning became manifest before he reached adulthood. See, e.g., Smith, 790 F. Supp. 2d at 503-04; Wilson I, 922 F. Supp. at 342. As "IQ is a relatively stable characteristic of a person," Hardy, 762 F. Supp. 2d at 903-04, this can be satisfied by showing, for example, that the defendant's present IQ is consistent with childhood IQ test scores and/or school performance. The case for early onset can be enhanced by a showing of certain etiological factors contributing to the diagnosis, such as genetic predisposition, prenatal exposure to narcotics, or childhood illness or malnutrition. See, e.g., Lewis, WL 5418901, at *31-32.

But there is no requirement that the defendant have been identified or diagnosed as ID before he was 18. See, e.g., Wilson II, 2016 WL 1060245, at *35;

Smith, 790 F. Supp. 2d at 535; Lewis, 2010 WL 5418901, at *7 ("the characteristics for mild mental retardation are generally noticed later in an individual's life"); Davis, 611 F. Supp. 2d at 476 ("a retrospective diagnosis is often required because the defendant usually did not receive a diagnosis of mental retardation during the developmental period"). See also Williams, 1 F. Supp. 3d at 1136; Montgomery, 2014 WL 1516147, at *16. Nor is there any requirement that the cause of his ID be determined. See, e.g., Hardy, 762 F. Supp. 2d at 904 ("the etiology of Hardy's mental retardation is unknown," which clinical literature "notes is not unusual").

Demonstrating childhood onset of impaired adaptive functioning often relies on lay informants who were very familiar with the defendant during his childhood. Some courts have emphasized that the informants relied on must have had sufficient contact with the defendant during the relevant period of his life, and been of "sufficient age, maturity, and understanding during the time period they observed" the defendant, and that their memory must be accurate and reliable. Bourgeois, 2011 WL 1930684, at *34. See also Candelario-Santana, 916 F. Supp. 2d at 215-16.

X. Jury Selection

A. Jury Requirement

Whether a defendant pleads guilty or is convicted by a jury, FDPA prohibits him from waiving a jury on the issue of punishment without the government's consent. 18 U.S.C. § 3593(b)(3). Several district courts have rejected constitutional challenges to this provision. United States v. Henderson, 485 F. Supp. 2d 831, 857 (S.D. Ohio 2007); United States v. Minerd, 176 F. Supp. 2d 424, 442 (W.D. Pa. 2001); United States v. Foster, 2004 WL 225084, at *2 (D. Md. 2004) (unpublished); United States v. Cooper, 91 F. Supp. 2d 90, 102-103 (D.D.C. 2000).

B. Voir Dire on Death-Penalty Opinions

Two circuits have disapproved a court's excusing jurors based on the anti-death-penalty views they expressed in written questionnaires, without at least some voir dire. United States v. Chanthadara, 230 F.3d 1237, 1270-1273 (10th Cir. 2000) (district court erred by removing juror for cause, on government's challenge, based solely on her questionnaire answers. Only voir dire could have clarified her views on capital punishment); United States v. Quinones, 511 F.3d 289, 299-302 (2d Cir. 2007) (district court did not abuse discretion by excusing some jurors because of their death-penalty views based purely on their responses to written questionnaire, though Court "strongly" recommends that district courts use some voir dire before making such determinations).

Three district courts have issued useful opinions approving defense requests for case-specific questioning in life- and death-qualifying prospective jurors. United States v. Burgos Montes, 2012 WL 1190191 (D.P.R. Apr. 7, 2012) (unpublished); United States v. Fell, 372 F. Supp. 2d 766, 769-771 (D. Vt. 2005); United States v. Johnson, 366 F. Supp. 2d 822, 834-844, 848 (N.D. Iowa 2005).

But the remainder of circuit decisions on capital voir dire in FDPA cases have noted that district courts enjoy broad discretion in this area, and have found that the specific questioning conducted was adequate:

- United States v. Whitten, 610 F.3d 168, 186-187 (2d Cir. June 30, 2010). No abuse of discretion in refusing defendant's questions about jury's ability

to consider and weigh childhood mitigation. Questions court asked most jurors about ability to consider defendant's "character and background" sufficed. Nor did court's allowance of certain fact-specific government questions create a disparity between the prosecution and the defense. In any event, "Morgan demands adequacy, not parity."

- United States v. Caro, 597 F.3d 608 (4th Cir. 2010). No error though court's questioning referred only to charge of "murder" and "first degree murder," and refused to convey that it alleged intentional, premeditated murder. Id. at 614. Indeed, circuit precedent interpreting Supreme Court's decision in Morgan as requiring only "reverse-Witherspoon" questioning means it was sufficient for court to ask if prospective jurors would automatically vote for death on conviction for "a death penalty eligible offense." Id. at 614-615. No error in refusing to ask jurors if they thought factors in defendant's background like family, childhood, mental health issues, or drug or alcohol history were important to consider. "Reverse-Witherspoon" question adequately enabled court to weed out those who would not consider mitigating evidence about defendant's background. Id. at 616.

- United States v. Brown, 441 F.3d 1330, 1354-1355 (11th Cir. 2006). Rejecting claim that district court improperly told jurors during voir dire that the death sentence would be appropriate unless there were mitigating factors weighing in favor of a life sentence, and inappropriately indicated to jurors during voir dire that they may consider mitigating factors (as opposed to telling them they had to consider mitigating factors). While some voir-dire questions may have been "inartfully worded," jury ultimately was properly instructed at sentencing hearing.

- United States v. Nelson, 347 F.3d 701, 706-707 (8th Cir. 2003). Voir dire on sentencing issues was adequate where prospective jurors completed questionnaire asking their views on the death penalty; they were divided into groups of 50 and judge explained death-penalty procedure and ask if they could follow it; and finally they were then divided into smaller groups of 8-10 and court questioned them about whether they would automatically impose death sentence and lawyers were given at least 20 minutes a side to ask follow-up questions on this and other subjects.

- United States v. Ortiz, 315 F.3d 873, 888-889 (8th Cir. 2002). District court adequately explored prospective jurors' possible death-penalty biases through questionnaire question and individual voir dire.

- United States v. Paul, 217 F.3d 989, 1004-1004 (8th Cir. 2000). No plain error where voir dire took approximately two days, and several jurors were questioned individually while sequestered from the rest of the venire. The district court has wide latitude over the conduct of voir dire.

- United States v. McVeigh, 153 F.3d 1166, 1205-1208 (10th Cir. 1998). Exclusion of voir-dire question regarding whether juror would believe that death penalty automatically applied if defendant were convicted was not abuse of discretion when court interpreted question to be predicated on pretrial "allegations" made against defendant; question, as phrased, asked juror to speculate about her opinion based on allegations not even in evidence; and question was susceptible of interpretation that it asked juror how she would vote on evidence presented at trial. Each seated juror indicated ability to consider punishment less than death for criminal act in which someone was killed; in response to court's questioning, jurors indicated they could fairly consider all facts and circumstances before deciding appropriate sentence; and defense was allowed to ask appropriately phrased questions of many of jurors regarding propensity to impose death penalty automatically.

- United States v. Tipton, 90 F.3d 861, 878-879 (4th Cir. 1996). (1) District court adequately ensured that no jurors would unwaveringly impose death upon a finding of guilt and hence uniformly reject all mitigating factors, by asking each if he or she had strong feelings in favor of the death penalty and, if so, whether juror would always vote to impose it in every case where a defendant is found guilty of a capital offense; (2) No error in rejecting defendant's proposed questions about jurors' attitudes towards such mitigating factors as "deprived, poor background," "emotional, physical abuse," "young age," "limited intelligence," and "brain dysfunction."

- United States v. McCullah, 76 F.3d 1087, 1113-114 (10th Cir. 1996). District court not required to allow inquiry into each juror's views at to specific mitigating factors as long as voir dire was adequate to detect whether any would automatically vote for the death penalty.

- United States v. Flores, 63 F.3d 1342, 1353-1354 (5th Cir. 1995). District court did not unreasonably curtail voir dire where (1) it conducted extensive group questioning, including allowing counsel three hours of virtually unrestricted interrogation, and engaged in individual, sequestered questioning only when responses indicated bias, though (2) it refused to include any questions on questionnaire about death penalty or pretrial publicity.

C. Death Qualification

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

In FDPA appeals, one decision has found such error.

- United States v. Chanthadara, 230 F.3d 1237, 1271-1277 (10th Cir. 2000). Questionnaire answers that juror did not think she would be able to vote for death penalty, did not feel she would "ever be 100 percent sure that [death] was the proper verdict," and that she felt death penalty "is proper in some cases" but did not feel she could "ever think there was enough evidence to come to that conclusion," did not, without voir dire, sufficiently demonstrate substantial impairment. Juror was not informed law would dictate what degree of proof was necessary to impose a death sentence. And she was never asked if she would at least consider imposing a death sentence, if the facts and law warranted it, in light of her personal convictions. Nothing in her questionnaire responses indicated an intention to disregard or circumvent the law.

In other appeals, circuits applying Supreme Court precedent have found no error, based on the particular facts and deference to the district court's ability to

judge the juror's demeanor and resolve conflicting responses by the juror to inquiries about her death-penalty attitudes:

- United States v. Gabrion, 719 F.3d 511, 527, 531 (6th Cir. 2013) (*en banc*). Reviewing the district court's handling of death-penalty voir dire and rulings on cause challenges of pro- and anti-death penalty jurors "with considerable deference," the *en banc* majority (12 judges, over a 4-judge dissent) finds the conduct of voir dire was even-handed and that the court "retained pro-death penalty jurors . . . on grounds similar to the grounds on which it retained anti-death penalty jurors . . . — namely, that on balance each of them credibly stated that he could follow the court's instructions in choosing a sentence in the case."

- United States v. Snarr, 704 F.3d 368,. 379-81 (5th Cir. 2013). The court did not abuse its discretion in excusing for cause jurors who stated in their questionnaires or on voir dire that they did not think they could impose a death sentence, even though other answers they gave may have conflicted with these.

- United States v. Rodriguez, 581 F.3d 775, 792-793 (8th Cir. 2009). No error in granting government cause challenges to one juror who said his "impartiality might be skewed," that he had "trouble" with the death penalty, and that the penalty was "bothersome" because of post-execution exonerations, or to other juror who "affirmed his deeply-held moral opposition to the death penalty, providing exceptions only for politically-motivated and serial killer cases."

- United States v. Fell, 531 F.3d 197 (2d Cir. 2008). Though it was a close call, district court did not abuse discretion in excusing juror who said she opposed death penalty and would lean toward life sentence but could follow instructions and apply the law. Id. at 211-213. It was also proper to excuse juror who said she supported the death penalty at "a philosophical level," but was unsure if she could actually vote for it; she thought she probably could, but not in the case of a single killing.[2] Id. at 214-215.

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[2] Four judges (in three separate opinions) dissented from the denial of rehearing *en banc* on this issue. The lead dissenter wrote that *en banc* review was needed to address whether the district court, in its death-qualification rulings, should have considered not only "traditional

- United States v. Mitchell, 502 F.3d 931, 953-954 (9th Cir. 2007). Exclusion for cause of jurors based on views against the death penalty, even if those views reflected traditional Navajo opposition to capital punishment, did not violate Religious Freedom Restoration Act or American Indian Religious Freedom Act.

- United States v. Johnson, 495 F.3d 951, 966 (8th Cir. 2007). No error in excusing juror who gave markedly inconsistent and equivocal answers to the questions posed to her in the juror questionnaire and during voir dire, and twice expressed reservations about her ability to sign a verdict slip that would have the practical effect of sentencing someone to death.

- United States v. Sampson, 486 F.3d 13, 39-41 (1st Cir. 2007). No error in district court's dismissal of six potential jurors based on expressed reservations about imposing the death penalty.

- United States v. Brown, 441 F.3d 1330, 1353-1254 (11th Cir. 2006). (1) District court properly denied defendant's motion to bifurcate voir dire, in which he sought an opportunity first to question jurors prior to the guilt-innocence stage of the trial, and then a second opportunity for voir dire before the penalty stage of the trial. "[T]he natural consequence of this practice would be that the jury determining his guilt might not be the same one to determine his sentence," contrary to what FDPA provides. Death qualification does not violate defendant's rights at guilt stage, as Supreme Court held in Lockhart. (2) No error in disqualifying juror for cause "[b]ased on [her] equivocating answers and her ultimate conclusion that she would vote based on her own internal values and not on the instructed law."

- United States v. Purkey, 428 F.3d 738, 750-752 (8th Cir. 2005). No error in removing three death-scrupled jurors. First repeatedly expressed reservations about capital punishment and checked questionnaire answer that she would have difficulty voting for it. Second seemed to indicate in voir dire she would hold government to higher burden of proof than beyond

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rules" but also the constitutional interest in having the jury reflect the values of the people of Vermont, a state that had rejected the death penalty. United States v. Fell, 571 F.3d 264, 282-286 (2d Cir. 2009) (Calabresi and Straub, JJ., dissenting from denial of *en banc* review).

reasonable doubt. Third expressed same opinion and, though he later backtracked, district court was in best position to assess credibility.

- United States v. Barnette, 390 F.3d 775, 791-792 (4th Cir. 2004). No error in removing juror who "twice stated that she leaned against imposing the death penalty even before considering the evidence introduced at the sentencing proceeding. Her statements that she would apply the law equally without regard to the punishment options contradicted her earlier statements," vacated on other grounds, 546 U.S. 803 (2005).

- United States v. Nelson, 347 F.3d 701, 711-712 (8th Cir. 2003). No error in removing for cause three anti-death-penalty jurors. "At a minimum, the record reveals that each of the three venirepersons would have had a great reluctance if not an actual inability to vote in favor of imposing the death penalty. Their strong responses against the death penalty in the jury questionnaires in combination with their equivocal responses given during voir dire provide fair support for the district court's decision."

- United States v. Jackson, 327 F.3d 273, 295-296 (4th Cir. 2003). No error in excusing juror who gave ambiguous answers about his death-penalty views where district court made extended effort to clarify his views and was in the best position to see and hear juror.

- United States v. Bernard, 299 F.3d 467, 474-475 (5th Cir. 2002). No error in excusing juror who said on questionnaire unequivocally that she could not sentence someone to death. Though she said in voir dire she could under limited circumstances, she also stated "I cannot be sure about this."

- United States v. Paul, 217 F.3d 989, 1003-1004 (8th Cir. 2000). No error in disqualification of three jurors. One said unequivocally several times she could not impose death penalty, and defense did not object to her excusal. Second one said she could consider the death penalty, with difficulty, but at close of questioning said unequivocally she could not impose it; defense counsel had agreed to her excusal.

- United States v. Webster, 162 F.3d 308, 340-342 (5th Cir. 1998). District court did not err in excusing prospective juror where "the whole of her testimony could have left the court with the impression that she favored the

death penalty as a theoretical necessity, but would not be able to recommend it."

- United States v. Tipton, 90 F.3d 861, 879-881 (4th Cir. 1996). No error in removing three anti-death penalty jurors who initially expressed some reservation about imposing the death penalty in any case, and each responded to some extent ambiguously as to depth and likely consequence of such reservations.

- United States v. Flores, 63 F.3d 1342, 1354-1357 (5th Cir. 1995). No error in (1) excusing two jurors who indicated unequivocally they could not impose death penalty, without allowing defense chance to try to rehabilitate them; (2) excusing four jurors who indicated they could not impose the death penalty in this particular case.

- United States v. Barnette, 211 F.3d 803, 811-812 (4th Cir. 2000). No abuse of discretion in excluding juror who opposed the death penalty "unless it was very very well warranted."

D. Life Qualification

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

Some helpful published district court decisions implementing this principle and granting defense challenges for cause in federal capital cases include: United States v. Fell, 372 F. Supp. 2d 786, 789-792 (D. Vt. 2005) (court grants defense challenge for cause based on combination of juror's statement that he would not consider mitigating evidence related to drugs or alcohol use during crime or defendant's childhood and abuse, and juror's expression of belief that expert witnesses were biased. Court notes that defense's proposed question whether prospective juror could "give effect" to mitigating evidence was too close to a "stake out" question; thus, it would instead ask whether juror could consider mitigating evidence); United States v. Wilson, 2013 WL 1856534, at **5-6

(E.D.N.Y. May 2, 2013) (granting defense challenge for cause to juror who agreed that the fact the defendant was 20 at the time of the crime would "preclude consideration about childhood experiences in determining what the sentence should be"); United States v. Wilson, 2013 WL 1934071, at *4 (E.D.N.Y. May 9, 2013) (same, for juror who "when asked whether he could consider 'background information, information about family, growing up, upbringing, and other personal characteristics for someone who killed two police officers,' . . . replied, 'Well, I would listen to them with an open mind, but I think I would be hard-pressed to use that as a mitigating [factor] of this crime right now,'" and when "asked whether he could think of 'anything in terms of the defendant's background or experience' that he would be 'interested in knowing about,' . . . replied: 'Well, once again I will listen to what is presented. As a 20–year–old, he's a responsible adult. There has to be a point where you have to take personal responsibility for your actions, I assume. And you know, using all of these mitigating circumstances, whatever, is almost a scapegoat. I'm not too in favor of that. But once again, I will listen to it'"); United States v. Wilson, 2013 WL 2298952, at *10 (E.D.N.Y. May 24, 2013) (excusing juror for cause based on his "belief that any defendant convicted of intentional murder must prove that a life sentence is appropriate").

Though a number of circuits have gone ahead and rejected, on the merits, appellate challenges to the denial of such challenges for cause (again, based on the particular facts and giving great deference to the district court), it appears that, under federal law, the denial is only cognizable on appeal if the juror was seated, *i.e.*, if the defense did not exercise a peremptory challenge against the juror. See United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000); United States v. Lawrence, 735 F.3d 385, 444 (6th Cir. 2013):[3]

- United States v. Johnson, 495 F.3d 951, 964 (8th Cir. 2007). Denying for-cause challenge to juror in capital case who expressed empathy for victim's family and acknowledged possibility that his judgment could be affected by fact that crime involved children was not abuse of discretion. Juror's statements reflected the "reasonable self doubts" of a conscientious and reflective person.

[3] Two of the decisions listed below acknowledged this, while rejecting the merits of the claim as an alternative ground. See United States v. Nelson, 347 F.3d 701, 710 (8th Cir. 2003); United States v. Paul, 217 F.3d 989, 1004 (8th Cir. 2000).

- United States v. Fulks, 454 F.3d 410, 428-431 (4th Cir. 2006). Rejecting challenge to district court's qualification of certain jurors despite their strong support for death penalty or equivocation about being able to consider mitigation. One juror's statement that he would vote for death 90 percent of the time was not enough to disqualify him under Morgan. Other two jurors were confused by questioning and district court was in best position to determine qualifications.

- United States v. Barnette, 390 F.3d 775, 792-794 (4th Cir. 2004). No error in refusing to exclude juror. "Despite his initial statements on the jury questionnaire form stating that he favors the death penalty," where voir dire, under questioning by both sides, "tended to show his ability to consider both sentencing options and his lack of reservation about considering either penalty," vacated on other grounds, 546 U.S. 803 (2005).

- United States v. Nelson, 347 F.3d 701, 710 (8th Cir. 2003). Rejecting claim that district court erroneously denied defense cause challenges to four jurors who were biased in their death-penalty views. Defense used peremptories to eliminate all four and so none served on jury. Accordingly, any error in rulings on cause challenges did not deprive defendant of any federal right, per United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000).

- United States v. Ortiz, 315 F.3d 873, 892-895 (8th Cir. 2002). No error in rejecting defense challenges for cause against pro-death penalty jurors who ultimately stated they could follow procedure outlined by court and weigh all the aggravating and mitigating factors before imposing punishment).

- United States v. Paul, 217 F.3d 989, 1003-1004 (8th Cir. 2000). District court properly declined to disqualify three jurors. Though they said on questionnaire that they did not believe a sentence of life without parole was a sufficient penalty for an intentional killing, all three said "at some point" in voir dire that they could fairly consider a sentence other than death for an intentional killing. Moreover, none of these jurors served on the jury (since defendant used peremptories against them), so he was not deprived of any federal right, per United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000).

- United States v. Webster, 162 F.3d 308, 341 (5th Cir. 1998). District court was not obligated, under Morgan, to excuse jurors who stated in voir dire that, if they convicted defendant of an intentional kidnapping resulting in death, they would automatically find the corresponding statutory aggravating factor.

- United States v. Hall, 152 F.3d 381, 406-413 (5th Cir. 1998). District court acted within its discretion in refusing to strike for cause (1) venireperson who stated that she believed that person who took another life should be punished to fullest extent of the law, that people can overcome physically abusive families, and that she would lean toward death penalty if government proved aggravating factors and defendant proved no mitigating factors; venireperson also stated that she would give honest consideration to any mitigating factors, and that in some cases, people could not overcome abusive families. (2) venireperson who stated that life without parole was a waste and a burden to state, and that she did not consider the existence of equally culpable defendants who did not receive the death penalty to be a mitigating factor; venireperson made it abundantly clear that she considered herself fully capable of weighing aggravating and mitigating factors in determining appropriate sentence, and she ultimately stated that she could consider existence of equally culpable defendants who did not receive death penalty as a mitigating factor.

E. Number of Peremptory Challenges

"Each side has 20 peremptory challenges when the government seeks the death penalty." Fed. R. Crim. P. 24(b)(1).

One circuit has held that this rule does not violate equal protection by providing same number of peremptories to the defendant and the government in a capital trial while giving a defendant more strikes than the government in a noncapital one. United States v. Johnson, 495 F.3d 951, 963 (8th Cir. 2007).

F. Separate Juries for Trial and Sentencing

FDPA provides that the sentencing hearing ordinarily "shall be conducted before the jury that determined the defendant's guilt" unless "the jury that

determined the defendant's guilt was discharged for good cause." 18 U.S.C. § 3593(1), (2).

When district courts have granted pretrial defense requests to empanel separate juries for trial and sentencing, circuits have issued writs of mandamus prevent this. See United States v. Green, 407 F.3d 434, 443-444 (1st Cir. 2005) (declining, though, to issue "advisory mandamus" opinion about district court's alternative suggestion that it would defer death-qualification until after jury had found defendant guilty of death-eligible crime); United States v. Williams, 400 F.3d 277, 281-283 (5th Cir. 2005); United States v. Young, 424 F.3d 499, 506-508 (6th Cir. 2005).

XI. Gateway Factors

A. Age

Once a federal defendant is convicted of an offense punishable by death, the jury must then decide whether he was at least 18 years old at the time of the offense; otherwise, he is not eligible for a death sentence. 18 U.S.C. § 3591(2).

The gateway factor of age should not be submitted to the jury if the defendant stipulates that he was at least 18 at the time of the offense. See Eighth Circuit Criminal Pattern Jury Instructions, Death Penalty - Preliminary Instructions, Notes on Use, ¶ 3. Otherwise, the practical effect of requiring the jury to make a finding in favor of the government on an uncontested issue is to create a spurious sense of momentum toward the death penalty. In addition, requiring such a finding carries a false implication that the defendant's age is an aggravating factor unless he is under 18. (An exception to this might be in cases where the defendant is barely over 18, and counsel wishes the jury to be aware, in considering the weight to be accorded to the defendant's youth as a mitigating factor, that he is barely old enough to be considered for the death penalty at all.)

B. Mental State

The jury must also decide whether the defendant's mental state in connection with the killing satisfies at least one of four statutory factors.[4] 18 U.S.C. § 3591(2). If it does not, then the defendant is not eligible for capital punishment, and the court will impose a non-death sentence. That makes both age and the existence of at least one mental-state factor *de facto* elements of the offense of death-eligible murder, under Ring v. Arizona, 536 U.S. 584, 588, 609 (2002), and so the government generally has the grand jury make "special findings" of

[4] Congress has made certain non-homicide drug offenses punishable by death and has created separate factors for determining death eligibility for a defendant convicted of such a crime. See 18 U.S.C. §§ 3591(b), 3592(d). See also 18 U.S.C. § 3592(b) (listing aggravating factors for espionage and treason). No federal defendant has been authorized, let alone sentenced to death, under FDPA for such a non-homicide offense. And this provision is almost certain unconstitutional. See Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (holding that death penalty for child rape violates Eighth Amendment).

these factors when it returns an indictment. See Section III.B, *ante* (Indictment — Gateway and Aggravating Factors).

These four gateway mental-state factors are that the defendant,

(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.

18 U.S.C. § 3591(2)(A)-(D). Although the jury's finding of one of these factors may be superfluous where intent to kill is an element of the crime of conviction, there are numerous federal capital offenses that do not require such intent or, apparently, any mental state in connection with the killing. See, e.g., 18 U.S.C. § 1201 (allowing death penalty for kidnapping where "death results").

This requirement of at least one of these four findings reflects Congress's effort to comply with Supreme Court decisions requiring a minimum *mens rea*, under the Eighth Amendment, before the death penalty may be imposed. Tison v. Arizona, 481 U.S. 137, 156-158 (1987); Enmund v. Florida, 458 U.S. 782, 790-791, 797-801 (1982).

The circuits have generally found the four FDPA mental-state factors adequate to satisfy this Eighth Amendment requirement. See United States v. Bourgeois, 423 F.3d 501, 508-509 (5th Cir. 2005) (FDPA does not violate Eighth Amendment by allowing death sentence for murderer who acts only with reckless state of mind. Whether this is constitutional depends on degree of murderer's participation in acts that led to death. Here, defendant's role as sole participant was sufficient to satisfy Eighth Amendment); United States v. Paul, 217 F.3d 989, 997-998 (8th Cir. 2000) (2-1, Heaney dissenting) (though instruction on gateway

factors did not follow language of FDPA but rather required only that defendant intentionally aided and abetted in the killing, jury's finding that he did, together with implied guilt-phase finding that he intentionally committed act he knew would kill the victim — which, if anything, required even greater awareness than merely "contemplating" that a life will be taken — was sufficient to satisfy FDPA); United States v. Tipton, 90 F.3d 861, 899 (4th Cir. 1996) (rejecting defense argument that gateway factors unconstitutionally failed to channel discretion, since they reflected constitutionally minimal requirements for death-eligibility); United States v. McCullah, 76 F.3d 1087, 1108-1109 (10th Cir. 1996) (rejecting challenge to gateway factors as failing to adequately narrow class of death-eligible defendants).

One circuit, however, in a non-capital appeal, reversed as unsupported the jury's finding of the fourth gateway factor, that the defendant "intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death."[5] United States v. Williams, 610 F.3d 271, 288-291 (5th Cir. 2010). It held that an "act of violence" must involve the use of "physical force." Since the jury was not clearly instructed on this and there was insufficient evidence of physical force, it reversed the jury's life sentence and remanded for a new court sentencing. In United States v. Baskerville, 491 F. Supp. 2d 516, 521-522 (D.N.J. 2007), the district court reached a similar result. It explained that the defendant, who was in jail at time of murder but was alleged to have provided the identity of the victim so he would be killed, did not use physical force, and therefore did not engage in an act "of violence."

One district court struck the fourth gateway factor pretrial where the government acknowledged it would be proceeding on a theory the defendant intended for the victim to be killed. United States v. Basciano, 763 F. Supp. 2d 303, 344 (E.D.N.Y. 2011). In that case, which (like Baskerville) charged the defendant with ordering a murder from jail, the indictment and death notice also charged the third gateway factor, which required lethal intent. The court observed there was no problem generally with allowing the government to pursue different theories of liability. But, in light of the government's concession, the court

[5] Interestingly, the court later revised the opinion *sua sponte*, adding a footnote observing: "We are . . . not called upon to determine whether the statutory terms embrace the conduct of 'engag[ing] in' or 'participati[ng] in' an act of violence that the defendant did not personally commit, and we express no opinion on the matter."

concluded that instructions on the fourth, recklessness factor would risk confusing the jury.

Two issues have arisen about how a capital-sentencing jury should be instructed on the gateway mental-state findings. The first is whether they should be weighed as an aggravating factor in the ultimate sentencing decision. The since-repealed sentencing procedures in the Anti-Drug Abuse Act, 21 U.S.C. § 848(k) appeared to call for this, and the circuits have allowed it in those cases. See United States v. Honken, 541 F.3d 1146, 1170-1172 (8th Cir. 2008); United States v. Barrett, 496 F.3d 1079, 1110-111 (10th Cir. 2007).

But, under FDPA, the gateway findings are *not* to be weighed in aggravation. See, e.g., United States v. Jackson, 327 F.3d 273, 300-301 (4th Cir. 2003). See also 1 Leonard B. Sand, *et al.*, Modern Federal Jury Instructions — Criminal, Inst. 9A-7, 9A-19 (2008) ("any gateway factor found by you to exist is not an aggravating factor and may not be weighed by you in deciding whether or not to impose a sentence of death"). Nevertheless, one circuit has approved the use of the defendant's intent to kill as a nonstatutory aggravating factor, though it was also a gateway factor. United States v. Chanthadara, 230 F.3d 1237, 1261 (10th Cir. 2000).

The second, related legal issue that has been raised regarding the gateway factors is whether the jury should be instructed to make findings on all four or, instead, to stop if and when it finds one. Under Section 848, where the gateway factor factored into the ultimate sentencing decision, the Fourth Circuit found it was constitutional error to direct the jury to find and weigh multiple gateway factors in aggravation. United States v. Tipton, 90 F.3d 861, 899 (4th Cir. 1996) (finding the error was harmless, though; since jury found only one of the gateway factors, intent to kill, ultimate weighing of aggravating and mitigating factors would not have come out differently). But see United States v. Flores, 63 F.3d 1342, 1369-1372 (5th Cir. 1995) (jury permissibly found two gateway factors — intentional killing and intending that lethal force be employed — as they describe distinct mental states. Moreover, for one victim, there was sufficient evidence of intentionally-killing factor though defendant was not present at murder, since factor covered one who actively participated with others in a killing).

By contrast, under FDPA, where the gateway factors are not weighed in aggravation, two circuits have found it was not error to permit the jury to find and

consider all four. United States v. Jackson, 327 F.3d 273, 300-301 (4th Cir. 2003); United States v. Webster, 162 F.3d 308, 355 (5th Cir. 1998). But see Eighth Circuit Criminal Pattern Jury Instructions, Death Penalty - Final Instructions, Notes on Use (acknowledging that, even under FDPA, there is a legitimate concern about "stacking the deck" if jury is allowed to find multiple gateway factors).

Yet requiring the jury to make repeated findings of (greater and lesser versions of) the defendant's homicidal intent tends to exaggerate the gravity of his crime. There is also an argument that it is inconsistent for the jury to find both that the defendant acted both with an intentionally (the first gateway factor) and recklessly, as to the victim's death. See People v. Gallagher, 508 N.E.2d 909, 910-911 (N.Y. 1987) (failure to submit inconsistent charges of intentional and reckless/depraved murder to jury in the alternative held reversible error, requiring new trial on both convictions; error cannot be cured by vacating only one of the counts, as "it is not for the Appellate [court] in the first instance to determine whether defendant acted intentionally or recklessly at the time of the crime. That is the jury's function.").

Counsel should therefore ask for an instruction that the jury should consider whether the first alleged factor has been found; only if the jury does not unanimously find it to have been present should it proceed to the second, and so on. As soon as the jury unanimously agrees that one factor has been found, it should so indicate and move on to consider statutory aggravating factors. In other words, the jury should not return multiple intent findings on all of the "lesser-included" mental states listed. The argument in support of this approach is that although these threshold intent findings are not listed as aggravating factors, and the jury is not instructed to weigh them against mitigating factors, jurors will naturally tend to treat these factors as weighing on the side of the death penalty, and it is potentially prejudicial to exaggerate the defendant's homicidal intent by requiring the jury to make unanimous findings of that intent twice, three times and four times for a single homicidal act.

XII. Aggravating Factors

A. Statutory Aggravating Factors Generally

For a federal defendant to be eligible for a death sentence, the jury must not only convict him of a substantive crime that is punishable by death and then find at least one gateway mental-state factor (as well as that the defendant was at least 18 at the time of the crime), see Section XI, *ante* (Gateway Factors), it must also find at least one statutory aggravating factor, *i.e.*, an aggravating factor from among the list in 18 U.S.C. § 3592(c).

Once found, each statutory aggravator is later weighed by the jury in its ultimate sentencing decision. 18 U.S.C. § 3593(e). See United States v. McCullah, 76 F.3d 1087, 1108 (10th Cir. 1996) (rejecting claim that statutory aggravating factors are merely eligibility factors and Congress did not mean for them to be weighed in the selection process).

FDPA lists 16 possible statutory aggravating factors. Five of these apply to defendants who have certain prior convictions:

- A previous conviction of a crime, punishable by more than one year in prison, involving the "use or attempted or threatened use of a firearm." Section 3592(c)(2);[6]

- A previous conviction of a crime, resulting in the death of a person, for which a sentence of death or life imprisonment was authorized. Section 3592(c)(3);

- Two or more previous convictions for offenses, punishable by more than one year in prison, committed on different occasions and involving the infliction or attempted infliction of serious bodily injury or death on another person. Section 3592(c)(4);

[6] This aggravating factor does not apply to a capital offense "for which a sentence of death is sought on the basis of [18 U.S.C. §] 924(c)." 18 U.S.C. § 3592(c)(2).

- A previous conviction for 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. Section 3592(c)(12);

- Two or more previous convictions for offenses, punishable by more than one year in prison, committed on different occasions, involving the distribution of a controlled substance. Section 3592(c)(10).

- A previous conviction for engaging in a continuing criminal enterprise. Section 3592(c)(12);

- In the case of a capital offense involving sexual abuse or the sexual abuse of a child, a previous conviction for a crime of sexual assault or child molestation. Section 3592(c)(15).

Eight other statutory aggravating factors turn on the nature of the capital offense. These include:

- That the death or injury resulting in death occurred during the commission or attempted commission of, or immediate flight from, one of a series of specified felonies. Section 3592(c)(1);

- That the defendant, in committing the offense or escaping apprehension for it, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense. Section 3592(c)(5);

- That 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. Section 3592(c)(6);

- That the defendant procured the offense by payment or promise of payment of anything of pecuniary value. Section 3592(c)(7);

- That the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value. Section 3592(c)(8);

- That the defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism. Section 3592(c)(9);

- That the defendant intentionally killed or attempted to kill more than one person in a single criminal episode. Section 3592(c)(16); and

- That the defendant committed the offense in the course of engaging in a continuing criminal enterprise and the violation involved distributing drugs to a minor.[7] Section 3592(c)(13).

The remaining two statutory aggravating factors involve the identity or nature of the victim:

- The victim was particularly vulnerable due to old age, youth, or infirmity. Section 3592(c)(11); and

- The defendant committed the offense against a federal judge, federal law enforcement officer, federal employee of a penal or correctional institution, while the victim was engaged in his or her official duties, because of the performance of those duties, or because of the victim's status as a public servant, or the victim was a high public official of the United States or a foreign government. Section 3592(c)(14).

B. Particular Statutory Aggravating Factors

1. Commission During A Specified Felony

Relying on the Supreme Court's decision in Lowenfield v. Phelps, 484 U.S. 231, 241-245 (1988), the circuits have found this statutory aggravator to be constitutionally valid, despite the fact it often duplicates an element of the crime of conviction. United States v. Higgs, 353 F.3d 281, 315-316 (4th Cir. 2003); United States v. Webster, 162 F.3d 308, 354-355 (5th Cir. 1998); United States v. Hall,

[7] The Eighth Circuit pattern instructions say that, by using the word "distribute," rather than "dispense," Congress meant to not limit this aggravating factor to the distribution of drugs to minors for ingestion. Eighth Circuit Criminal Pattern Jury Instructions, Death Penalty - Final Instructions, Inst. 12.07M, Committee Comments.

152 F.3d 381, 416-417 (5th Cir. 1998); United States v. Jones, 132 F.3d 232, 248-249 (5th Cir. 1998); United States v. Garza, 63 F.3d 1342, 1369-1371 (5th Cir. 1995).

While the government may allege more than one felony from the list in Section 3592(c)(1), the court should provide jurors with a special interrogatory requiring them to "show unanimity in finding which of the underlying offenses they rely on." Tenth Circuit Criminal Pattern Jury Instructions, Inst. 3.08.1, Use Note (2005).

2. Previous Convictions

a. Determining Whether a Conviction "Involves" Specified Conduct.

A significant, unresolved issue for prior-conviction aggravators is who decides whether the conviction fits the statutory definition and how broad is the scope of that inquiry?

For a prior conviction to "involve" serious bodily injury under Section 3592(c)(4), or "involve" the use of a firearm, or distribution of a controlled substance, under Section 3592(c)(2), (12), does this need to be one of the elements of the offense — or, in the case of certain guilty-plea convictions, alleged in the charging document and either admitted by the defendant or established in the plea colloquy? That is what the Supreme Court has generally required for a prior conviction the government seeks to use to enhance a noncapital sentence under the Armed Career Criminal Act. See Taylor v. United States, 495 U.S. 575, 576-577 (1990); Shephard v. United States, 544 U.S. 13, 26 (2005). Cf. Nijhawan v. Holder, 557 U.S. 29, 32-33 (2009).

Yet, in some FDPA cases, the government has sought to establish the key component of a statutory prior-conviction aggravator (*e.g.*, serious bodily injury) by going beyond the elements of the prior offense — in some cases, even introducing extrinsic evidence about alleged conduct underlying the offense. Only two circuits have addressed this issue (and one involved resort to the plea colloquy, not extrinsic evidence):

- United States v. Rodriguez, 581 F.3d 775, 806-807 (8th Cir. 2009). The district court did not err in refusing to determine, based solely on the elements of the offenses of conviction, whether the defendant's two 30-year-old sex offenses satisfied this statutory aggravating factor. It properly permitted the prosecution to instead prove this to the jury, based on testimony from the prior victims. Taylor does not apply to FDPA statutory aggravating factors because, unlike under the ACCA, a death sentence does not automatically result if the predicates qualify; FDPA mandates an individualized, fact-intensive process; and no PSR is prepared in FDPA cases.

- United States v. Higgs, 353 F.3d 281, 316-317 (4th Cir. 2003). No error in government's use of defendant's plea to state charge of reckless endangerment to establish statutory aggravating factor of prior conviction involving use or attempted or threatened use of a firearm against another person, under Section 3592(c)(2). Rejecting defense argument that district court should have taken a "categorical" approach, as required by Supreme Court in Taylor v. United States for analogous determination under Armed Career Criminal statute, *i.e.*, looked only to statutory definition of crime of conviction to determine if it satisfied the aggravator. Here, government could rely on state plea colloquy, in which prosecutor stated that defendant had fired a .38 handgun and his codefendant a 9 mm handgun, in response to which defendant had stated he "didn't have a .38. It was the other way around."

There is a substantial argument that the government should not be permitted to resort to extrinsic evidence and, indeed, should be limited to the elements of the prior crime.[8] Such an argument is being pressed and considered in other cases. And it has been accepted by one district court:

- United States v. Smith, 630 F. Supp. 2d 713, 716-718 (E.D. La. 2007). Striking statutory aggravating factor that defendant was previously

[8] Of course, some defendants might *want* the court, or the jury (or both) to revisit whether the prior offense involved the required feature (e.g., serious bodily injury), where it was clearly an element of the offense or was charged and pled to, but the defendant now claims his actual conduct did not include it, *i.e.*, that he was convicted or pled to a more serious offense than the one he actually committed.

convicted of a crime "involving the use or attempted or threatened use of a firearm against another person," 18 U.S.C. § 3592(c). Conviction involved guilty plea to robbery in state court where use of firearm was not an element under state law and defendant did not admit to use of firearm in plea. Court rejects government's argument that it may look beyond this to collateral evidence that offense was, in fact, committed with a firearm.

A related question is who decides whether the prior conviction satisfies the statutory aggravator? Is the defendant entitled to have the court determine that the conviction does not qualify (say, because serious bodily injury was not charged or pled to), and thus remove it from the jury's consideration? Again, the Supreme Court's Taylor and Shepard decisions support the view that the district court, and not the jury, should decide this question, and that allowing this does not run afoul of Apprendi.

b. What Timing Renders a Conviction "Previous"

Another issue that may arise with the statutory prior-convictions aggravators is what, if any, timing limitation is imposed by the requirement that the defendant have "*previously* been convicted" of a certain crime or crimes. If the only requirement were that the conviction precede the capital-sentencing hearing, wouldn't that render the word "previously" superfluous? If something more is required, what? Must the capital crime postdate the other conviction? Must it postdate the offense underlying that conviction?

The only circuit to address this issue held that the statutory aggravator for prior drug convictions "encompasses all predicate convictions occurring prior to sentencing, even those occurring after the conduct giving rise to the capital charges." United States v. Higgs, 353 F.3d 281, 317-319 (4th Cir. 2003).[9] See also Eighth Circuit Criminal Pattern Jury Instructions, Death Penalty - Final Instructions, Inst. 12.07B (noting this remains an unresolved issue). But see id., Inst. 12.07L, Notes on Use (use of past perfect tense "had" in Section 3593(c)(12), governing statutory aggravating factor of prior serious drug conviction, "makes it clear that the conviction must predate the charged murder").

[9] Higgs also held that prior-conviction-type statutory aggravators are not subject to Ring and Apprendi, under United States v. Almendarez-Torres, 523 U.S. 224, 226-227 (1998), and thus need not be alleged in the indictment.

Nevertheless, neither the Supreme Court nor other circuits have addressed this issue. And a good argument can be made that Higgs was wrong, and that, under federal decisions involving the recidivist sentencing provision of the Armed Career Criminal Act, 18 U.S.C. § 924(e), the aggravating crime, and probably the aggravating conviction too, must predate the murder. See, e.g., United States v. Pressley, 359 F.3d 347, 349-351 (4th Cir. 2004); United States v. Talley, 16 F.3d 972, 975-977 (8th Cir. 2004); United States v. Richardson, 166 F.3d 1360, 1361-1362 (11th Cir. 1999). See also United States v. King, 509 F.3d 1338, 1342-1344 (11th Cir. 2007) (interpreting recidivist provision of child pornography statute, 18 U.S.C. § 2252A(b)(1)).

In 2006, a bill was proposed in Congress that would have changed the word "previously" to "in a prior adjudication," explicitly requiring only that the aggravating conviction have occurred before the capital one. It did not pass. See Death Penalty Reform Act of 2006, H.R. 5040, 109th Congress, 2d Session (Mar. 29, 2006) (available on Resource Counsel Projects' website).

Finally, one district court did refuse to extend the "prior to sentencing" theory of Higgs to its logical extreme, preventing the government from using crimes the defendant was just convicted of at his capital trial as "previous" convictions at sentencing to establish one of the statutory aggravators:

- United States v. Pitera, 795 F. Supp. 571, 577 (E.D.N.Y. 1992). Government could not amend death notice to redesignate seven unadjudicated homicides from nonstatutory to statutory aggravating factors on theory that such acts, which had been charged as predicates to racketeering, could, by virtue of conviction on racketeering, be treated as convictions. Phrase "had been convicted" in statutory aggravating factor must be construed to mean a judgment of conviction, not simply a guilty verdict.

c. The Constitutionality and Scope of the Prior-Drug-Conviction Aggravators

FDPA includes, as statutory aggravators, (1) a prior conviction for certain drug crimes punishable by five or more years in prison, and (2) two or more prior convictions involving distribution of a controlled substance. 18 U.S.C. §

3592(c)(10), (12). It appears that only two states use prior, non-violent drug offenses as eligibility factors in capital sentencing.

In several cases, federal defendants and death-sentenced appellants have challenged these factors. Two circuits have rejected such claims:

- United States v. Bolden, 545 F.3d 609, 617 (8th Cir. 2008). Court rejects claim that "prior remote [1993] nonviolent drug offenses do not rationally narrow the class of death-eligible defendants" because they lack "sufficient gravity." How broadly death penalty should be applied is "essentially a political choice" left to legislative and executive branch. Court also rejects claim that conviction for attempted possession with intent to deliver should not qualify, agreeing with government that statute "is not limited to actual distribution offenses; it should be read to include offenses where drug distribution was attempted but thwarted by police intervention."

- United States v. Caro, 597 F.3d 608, 622-624 (4th Cir. 2010). Though Eighth Amendment requires that an aggravator "reasonably justify" a more severe sentence, "one can hardly dispute the congressional wisdom that recidivism justifies harsher sentencing." Though defendant's convictions (for possession with intent to distribute cocaine and marijuana) "might be considered 'nonviolent' by themselves, illegal drugs have long and justifiably been associated with violence."

But the Supreme Court has not addressed this issue. And in Caro, Judge Gregory wrote a lengthy dissent, saying that, because the prior-drug-conviction aggravators cover relatively minor, non-violent priors, they violate the Eighth Amendment. Id. at 636-646. (Two other judges — and thus all three Obama appointees — joined a similar dissent by Gregory from the *en banc* court's refusal to rehear the case. United States v. Caro, 614 F.3d 101,102 (4th Cir. 2010)).[10]

That dissent and the challenges defendants have brought against these aggravators are based on the principle that, to satisfy the Eighth Amendment, an aggravator must "reasonably justify the imposition of a more severe sentence on

[10] Judge Duncan concurred in that refusal, in an terse opinion noting that the FDPA contains various safeguards for defendant's rights, and that the Eight Circuit in Bolden had also rejected this claim. Id.

the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 876-878 (1982). See also Lewis v. Jeffers, 497 U.S. 764, 776-778 (1990) (holding that aggravating circumstances must provide principled basis to distinguish those sentenced to death from those imprisoned for murder). As Judge Gregory noted, the other aggravators enumerated in FDPA arguably perform this narrowing function because they either: (1) involve circumstances of the offense that make the murder itself more culpable, or (2) involve prior violence, tending to suggest that the defendant is a danger to society. But prior non-violent drug offenses neither relate to a defendant's culpability in the capital offense nor suggest that he is a future danger to society. They therefore fail to "reasonably justify the imposition of more severe sentence on the defendant compared to others found guilty of murder," as required by Stephens. Caro at 636-646.

Empirical evidence also demonstrates that such prior drug convictions are commonplace among federal prisoners and bear little relevance to the risk of violence or recidivism. Federal drug laws have instead snared hundreds of minor offenders. Today, as Judge Gregory's dissent noted, approximately 55 percent of all federal prisoners are serving time for a drug offense. Id. at 642-643. A study published by the Department of Justice found that a substantial number of these federal drug offenders played minor roles, had engaged in no violence, had minimal or no prior contacts with the criminal justice system, and were less likely to commit future crimes than originally believed.[11] In fact, a subsequent study by the United States Sentencing Commission found that drug-trafficking offenders are among the least likely of federal offenders to commit future crimes.[12] Because federal drug offenders are typically neither violent nor high-level drug traffickers, aggravating factors based on prior drug convictions do not distinguish a defendant with such priors as more worthy of a death sentence than other offenders. Hence, such aggravating factors are arguably unconstitutional.

Another issue may arise when one of these aggravators is based on an attempt offense. The statutory aggravating factor of two prior convictions for drug-distribution offenses is phrased differently from the aggravators for offenses

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[11] See U.S. Department of Justice, An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories, Executive Summary (February 4, 1994) ("DOJ Drug Offender Analysis").

[12] See United States Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines at 13, 16 & Ex. 11 (May 2004).

involving serious bodily injury or use of a firearm: On its face, the latter, but not the former, embrace convictions involving "attempted" conduct. Compare 18 U.S.C. 3592(c)(10) with 18 U.S.C. 3592(c)(2), (4). Nevertheless, one circuit has interpreted the two-drug-convictions aggravator as including a conviction for attempted possession with intent to deliver. United States v. Bolden, 545 F.3d 609, 616-617 (8th Cir. 2008) (in separate concurrence, Judge Ebel characterizes issue as a novel, close one).

d. Unconstitutional or Unreliable Prior Convictions

- United States v. Rodriguez, 581 F.3d 775, 810-811 (8th Cir. 2009). No error in admitting prior state conviction from 1980, for attempted kidnapping and aggravated assault. Though victim was hypnotized before she testified at the prior trial and identified the defendant, the *Biggers* factors indicate that conviction was not based on a constitutionally impermissible identification.

3. Grave Risk of Death

Another statutory aggravating factor requires that 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).

The final phrase of this provision means that the person exposed to the "grave risk" must be someone other than a victim of the offense. Thus, if persons A and B are mentioned in the capital count as victims of the offense, the risk of death to which either was exposed may not form the basis for this aggravator. Rather, the government would need to show that the defendant also knowingly subjected person C to a grave risk of death. See Eighth Circuit Criminal Pattern Jury Instructions, Death Penalty - Final Instructions, Inst. 12.07E, Notes on Use (acknowledging that some states have construed similar aggravating factor "as not including surviving intended victims"); Sand, *et al.*, Modern Federal Jury Instructions — Criminal, Inst. 9A-10 (2008) ("'Persons in addition to the victims' include innocent bystanders in the zone of danger created by the Defendant's acts, but do not include other participants in the offense"). Cf., e.g., United States v. Savage, 2014 WL 4631976 (E.D. Pa. Sept. 27, 2014) (in case involving murder of residents of city row house via firebombing, aggravator established where resident of neighboring house was overcome by smoke and had to be rescued). The jury

must "unanimously agree on a particular person or class of persons who were placed in danger by Defendant's actions." Id.

Two circuits have rejected vagueness and sufficiency challenges to this aggravator. United States v. Allen, 247 F.3d 741, 786-787 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002); United States v. Barnette, 211 F.3d 803, 819-820 (4th Cir. 2000) (noting district court defined it as involving "a significant and considerable possibility" and placing other persons in "zone of danger." Evidence was sufficient to support factor where defendant aimed shotgun at victim's mother, who was only 50 feet away, threatening to shoot her, and when defendant actually shot victim, mother was only arm's length away). See also 1 Leonard Sand, *et al.*, Modern Federal Jury Instructions — Criminal, Inst. 9A-10 (2008) ("'grave risk of death' means a significant and considerable probability that another person might be killed").

There is support, though, for requiring that the alleged grave risk be narrowed down for the jury. See Tenth Circuit Criminal Pattern Jury Instructions, Inst. 3.08.5 (2005) (in pattern charge, district court is to "insert government specification of grave risk"). See also United States v. McVeigh, 944 F. Supp. 1478, 1490 (D. Colo. 1996) (indicating such a "clarifying" charge would be given).

4. Especially Heinous, Cruel or Depraved.

Almost 20 years ago, the Supreme Court found unconstitutionally vague the statutory aggravating factor, used in several states, that the capital offense was "especially heinous, atrocious or cruel." Maynard v. Cartwright, 486 U.S. 356, 364-365 (1988). See also Shell v. Mississippi, 498 U.S. 1, 1 (1990); Clemons v. Mississippi, 494 U.S. 738, 744-747, 754 (1990). It explained that, without any narrowing construction, an "ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" Maynard, 486 U.S. at 364.

FDPA employs a narrowing construction by providing that this statutory aggravator applies only where the offense was "especially heinous, cruel or depraved *in that it involved torture or serious physical abuse to the victim*." 18 U.S.C. § 3592(c)(4) (emphasis added). See also Eighth Circuit Criminal Pattern Jury Instructions, Death Penalty - Final Instructions, Inst. 12.07F, Notes on Use (jury must be unanimous on either torture or serious physical abuse). As such, the

circuits have found that it is not unconstitutionally vague under the Eighth Amendment as long as the jury is instructed on the requirement of torture or serious physical abuse. United States v. Mitchell, 502 F.3d 931, 975-978 (9th Cir. 2007); United States v. Sampson, 486 F.3d 13, 38-39 (1st Cir. 2007); United States v. Bourgeois, 423 F.3d 501, 511 (5th Cir. 2005); United States v. Paul, 217 F.3d 989, 1001 (8th Cir. 2000); United States v. Webster, 162 F.3d 308, 354 (5th Cir. 1998); United States v. Hall, 152 F.3d 381, 414-415 (5th Cir. 1998); United States v. Jones, 132 F.3d 232, 249-250 (5th Cir. 1998).

To establish this factor, the defendant must have intended to inflict torture or serious physical abuse on the victim, apart from the killing. 1 Leonard B. Sand, *et al.*, Modern Federal Jury Instructions, Inst. 9A-11 & n.1 (2008).

Several district courts have held or suggested that physical abuse of the victim after death may not be relied on to establish this aggravator. United States v. Taveras, 488 F. Supp. 2d 246, 251 (E.D.N.Y. 2007)[13]; United States v. Pitera, 795 F. Supp. 546, 557-558 (E.D.N.Y. 1992); United States v. Pretlow, 779 F. Supp. 758, 773-774 (D.N.J. 1991). The Ninth Circuit also observed that this view has some force (though it concluded that, if presentation of such evidence there was error, it was harmless). United States v. Mitchell, 502 F.3d 931, 975-978 (9th Cir. 2007). See also 1 Leonard B. Sand, *et al.*, Modern Federal Jury Instructions, Inst. 9A-11 & n.1 (2008) ("we do not believe that post-mortem abuse to a murder victim's body constitutes "serious physical abuse within the meaning of 18 U.S.C § 3592 (c)(6)." But victim need not be conscious of the abuse at the time it was inflicted).

This view finds support in the legislative history of this aggravating factor in the ADAA, 21 U.S.C. § 848(n)(12) (repealed 2006). See H.R. 3777- Criminal Justice Reform Act of 1987-Section-by-Section Analysis, 133 Cong. Rec. E4973-02, 100th Cong., 1st Sess., 1987 WL 953309 (Dec. 22, 1987) ("This aggravating factor encompasses situations involving torture, aggravated battery, the deliberate prolonging of suffering, or the serious physical abuse of the victim before inflicting death") (citation omitted); 134 Cong. Rec. S7472-02, (100th Cong., 2d Sess., 1988 WL 171042 (June 9, 1988) (principal sponsor, Senator

[13] See also United States v. Taveras, 584 F. Supp. 2d 535, 543-546 (E.D. N.Y. 2008) (court instructed jury at outset of penalty phase that guilt-phase evidence of post-death dismemberment could not be considered in deciding sentence).

D'Amato says aggravator's language was adopted with "limitations in mind," including that a sufficient narrowing construction would limit factor to "torture, aggravated battery, the deliberate prolonging of suffering, or serious physical abuse of the victim before inflicting death"). See also Godfrey v. Georgia, 446 U.S. 420, 433, n.16 (1980) (while it is technically a circumstance of crime, fact murder accomplished with shotgun rather than rifle, which resulted in "gruesome spectacle," was "constitutionally irrelevant" to penalty decision).

But two circuits have allowed consideration of abuse that occurred after the victim died. United States v. Chanthadara, 230 F.3d 1237, 1261-1263 (10th Cir. 2000); United States v. Hall, 152 F.3d 381, 414-415 (5th Cir. 1998); United States v. Jones, 132 F.3d 232, 249 (5th Cir. 1998). See also Eighth Circuit Criminal Pattern Jury Instructions, Death Penalty - Final Instructions, Inst. 12.07F (victim need not be conscious or even alive at time of the abuse).

And while "torture" necessarily implies the victim was conscious to experience pain, it is unclear how severe the pain needs to be or whether it can be exclusively psychological rather than physical, to qualify. See United States v. Sampson, 335 F. Supp. 2d 166, 206-207 (D. Mass. 2004) (discussing different definitions of torture); 1 Leonard B. Sand, *et al.*, Modern Federal Jury Instructions, Inst. 9A-11 (2008) (torture includes mental as well as physical abuse); Tenth Circuit Criminal Pattern Jury Instructions, Inst. 3.08.5 (2005) (torture may include "severe mental or physical pain"). The Tenth Circuit has rejected claims that mental harm be "prolonged," to constitute torture, and that physical abuse "significantly exceed" that necessary to cause death in order to be "serious." United States v. Chanthadara, 230 F.3d 1237, 1261-1263 (10th Cir. 2000). See also United States v. Sampson, 486 F.3d 13, 36-38 (1st Cir. 2007) (no error in denying instruction defense requested that, if defendant quickly inflicted stab wounds to kill victim, there would be no support for especially-heinous aggravator).

Chanthadara also held that an instruction on this factor permissibly allowed jurors to consider the senselessness of the killing and helplessness of the victim. But see 1 Leonard B. Sand, *et al.*, Modern Federal Jury Instructions, Inst. 9A-11 & n.1 (2008) ("our recommended instruction does not include 'senselessness of the killing' as a relevant factor for the jury's consideration.").

Several circuits have rejected challenges to the sufficiency of the evidence supporting the especially-heinous aggravator :

- United States v. Snarr, 704 F.3d 368, 393-94 (5th Cir. 2013). "Serious physical abuse" prong of the especially-heinous aggravator was also supported by evidence of "savage" and "frenzied" attack that left victim "a pulp" and his "whole body" a "stab wound," thus showing that defendants intended to cause suffering or mutilation beyond that necessary to cause death.

- United States v. Ebron, 683 F.3d 105, 151 (5th Cir. 2012). Government presented sufficient evidence where it showed, first, that victim was stabbed 106 times in the chest, causing mutilation of his body above and beyond that needed to cause death, and second, that defendant held victim from behind while codefendant stabbed him, thus demonstrating that defendant personally intended this serious physical abuse.

- United States v. Sampson, 486 F.3d 13, 48 (1st Cir. 2007). Evidence supported aggravator where defendant inflicted at least 24 stab wounds and admitted he slit victim's throat after victim said he was dying.

- United States v. Agofsky, 458 F.3d 369, 374-375 (5th Cir. 2006). Though attack lasted only a few seconds, aggravator does not require more. Moreover, though defendant stopped attack while victim was still alive (albeit brain-dead), reasonable juror could have found that he had already delivered injuries beyond what was needed to cause death.

- United States v. Bernard, 299 F.3d 467, 481-482 (5th Cir. 2002). Evidence was sufficient that defendant engaged in actions that satisfied the aggravator, though he was not present or responsible for every act during the crime.

For a discussion of whether the jury may rely on the conduct of a codefendant in finding this aggravating factor, see Section XII.F, *post* (Aggravating Factors — Vicarious Liability).

5. Pecuniary Gain

This statutory aggravating factor applies when "the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value."[14] 18 U.S.C. § 3592(c)(8).

Citing the "in the expectation of" language, several circuits have rejected claims that this aggravator is limited to the hiree in a murder-for-hire scenario. United States v. Bolden, 545 F.3d 609, 615-616 (8th Cir. 2008); United States v. Mitchell, 502 F.3d 931, 974-975 (9th Cir. 2007); United States v. Brown, 441 F.3d 1330, 1369-1372 (11th Cir. 2006).

But, in reviewing jury instructions and evidence on this factor, appellate courts have emphasized that it requires that the defendant have committed the actual killing — and not just some other prong of the capital offense (*e.g.*, a robbery) — for pecuniary gain.

Thus in United States v. Bernard, 299 F.3d 467, 483-484 (5th Cir. 2002), the Fifth Circuit found the evidence legally insufficient to prove the victims were murdered for pecuniary gain where the motive was to prevent them from reporting the defendant's robbery to the police. Similarly, in United States v. Chanthadara, 230 F.3d 1237,1263-1264 (10th Cir. 2000), the Tenth Circuit reversed a death sentence, in part, because the instruction wrongly allowed the jury to find this factor on the basis that the defendant expected pecuniary gain from the robbery of the victims. See Tenth Circuit Criminal Pattern Jury Instructions, Inst. 3.08.8, Use Note (2005). See also United States v. Lawrence, 735 F.3d 385, 412 (6th Cir. 2013) (jury could have found that, after defendant saw armed guard in bank, he shot and killed guard in hopes of still carrying out planned robbery, though he fled

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[14] Another, less commonly seen factor applies to the *hirer* in a murder-for-hire situation," *i.e.*, where "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). See United States v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996) (sufficient evidence supported jury's finding of pecuniary-value aggravating factor, even though defendant was paid for killing one person but actually killed a different one); United States v. Aquart, 2012 WL 603243, at **11-12 (D. Conn. Feb. 24, 2012) (unpublished) (rejecting argument that defendant had to have procured commission of actual murder, and that aggravator did not applying where party solicited did not know that was the goal).

immediately after being wounded by the guard); United States v. Bolden, 545 F.3d 609, 615-616 (8th Cir. 2008) (though defendant shot guard outside bank, after guard reached for his gun, and then fled with codefendants without attempting planned robbery, evidence supported pecuniary-gain aggravator, for it showed he killed "to remove an obstacle to completing the robbery and that his intention was to continue with the robbery once [guard] had been removed"); United States v. Mitchell, 502 F.3d 931, 974-975 (9th Cir. 2007) (factor does not apply to all carjacking cases, since, in some, the killing may be to evade capture rather than for pecuniary gain); United States v. Brown, 441 F.3d 1330, 1369-1372 (11th Cir. 2006) (jury could have concluded that defendant killed victim in order to successfully complete robbery. Though instructions could have been more explicit, district court adequately charged jury that expectation of pecuniary gain had to relate to the murder itself and not simply the robbery); United States v. Barnette, 390 F.3d 775, 784-785 (4th Cir. 2004) (instruction adequately conveyed that aggravator required proof defendant committed killings, not just robberies, for pecuniary gain), vacated on other grounds, 546 U.S. 803 (2005).

"The Justice Department has suggested that as now worded the factor is susceptible to uneven application since it does not include instances where the murder is committed to preserve a defendant's ill-gotten treasure." Thus, in 2007, several bills were proposed in Congress to address this issue by altering the aggravator to read: The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, *or in order to retain illegal possession* of anything of pecuniary value. None of them passed. Congressional Research Service Report to Congress, The Death Penalty: Capital Punishment Legislation in the 110th Congress, at 22 (Sept. 7, 2007) (available on Resource Counsel Projects' website).

6. Substantial Planning and Premeditation

Several circuits have rejected vagueness and overbreadth challenges to the statutory aggravating factor that "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). See United States v. Davis, 609 F.3d 663, 690 (5th Cir. 2010); United States v. Bourgeois, 423 F.3d 501, 511 (5th Cir. 2005); United States v. Jackson, 327 F.3d 273, 301 (4th Cir. 2003); United States v. Webster, 162 F.3d 308, 325-326 (5th Cir. 1998); United States v. Tipton, 90 F.3d 861, 895-896 (4th Cir. 1996); United States v. McCullah, 76 F.3d 1087,1110-

1111 (10th Cir. 1996); United States v. Flores, 63 F.3d 1342, 1373-1374 (5th Cir. 1995).

But the Supreme Court has not yet addressed this issue. And a few older state court decisions invalidated aggravating factors based on the vagueness of modifiers like "substantial." See Arnold v. State, 224 S.E.2d 386, 391 (Ga. 1976) (aggravating circumstance that the " 'murder was committed by a person ... who has a *substantial* history of serious assaultive convictions' held "too vague and nonspecific to be applied evenhandedly"); State v. David, 468 So.2d 1126, 1129-1130 (La. 1985) (invalidating aggravating circumstance of "*significant*" history of criminal conduct; "[a] person of ordinary sensibility could characterize almost any record of criminal activity as significant").[15]

The word "substantial" is also ambiguous, and can carry either of two distinct definitions: It can refer to the "existence" of something and thus "not mean seeming or imaginary," or it can refer to the "magnitude" of something, and thus mean "to a large degree." Victor v. Nebraska, 511 U.S. 1, 19 (1994). See also Pierce v. Underwood, 487 U.S. 552, 565 (1988). A jury instruction on the substantial-planning aggravator should, at minimum, convey that the word "substantial," in this context, carries the second meaning. See United States v. Flores, 63 F.3d 1342, 1373 (5th Cir. 1995) (construing "substantial," as used in the "substantial planning and premeditation" aggravator "to denote a thing of high magnitude"); United States v. Tipton, 90 F.3d 861, 896 (4th Cir. 1996) (though "substantial" may have different meanings, here jury would have understood it to mean "a high degree," "considerable," "more than merely adequate"); United States v. McCullah, 76 F.3d 1087, 1110-1111 (10th Cir. 1996) ("substantial," as used in this aggravating factor, means "considerable"); Eighth Circuit Criminal Pattern Jury Instructions, Death Penalty - Final Instructions, Inst. 12.07I ("substantial" means "a considerable or significant amount"). Otherwise, interpreting "substantial" to carry the former meaning might render this aggravator constitutionally overbroad. See United States v. Spivey, 958 F. Supp. 1523, 1531 (D.N.M. 1997) ("virtually all murders require some planning and premeditation").

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[15] The Supreme Court cited Arnold with some hint of approval in Gregg v. Georgia, 428 U.S. 153, 202 (1976). But for a more recent decision by the Court, taking a more limited view of what is required for an aggravating factor to survive a vagueness challenge, see Arave v. Creech, 507 U.S. 463, 468-473 (1993).

But see United States v. Davis, 609 F.3d 663, 688-690 (5th Cir. 2010) (instruction defining "substantial" as "considerable" sufficed).

Moreover, state case law on analogous aggravators provides support for further limiting this factor to cases which are truly distinguished by an unusually large amount of planning or premeditation.[16]

Any instruction on this aggravator should also, of course, make clear that the word "substantial" modifies both "premeditation" and "planning."

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[16] In Delaware, it applies when "[t]he murder was premeditated and the result of substantial planning. Such planning must be as to the commission of the murder itself and not simply as to the commission or attempted commission of any underlying felony." Del. Code Ann. tit. 11-4209(e)(1)(u). Although a recent Delaware case approved an instruction that defined "substantial" as "considerable" or "ample," Capano v. State, 781 A.2d 556, 673 (Del. 2001), prior Delaware cases had approved more demanding requirements for this factor. For example, in Stevenson v. State, 709 A.2d 619, 637-38 (Del. 1998), the Delaware Supreme Court noted with approval the following instruction: "This statutory aggravating circumstance applies to those murders which may be characterized as executions (or contract murders). This statutory aggravating circumstance requires a finding of heightened premeditation, *i.e.*, a cold-blooded intent to kill that is more contemplative, more methodical, more calculating and controlled than that necessary to sustain a conviction of first degree murder."

Other than Delaware, only Florida and Illinois have applied similar statutory aggravating factors: "The capital felony was a murder and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." Fla. Stat. 921.141(5)(i). "The murder was committed in a cold, calculated and premeditated manner pursuant to a preconceived plan, scheme or design to take a human life by unlawful means, and the conduct of the defendant created a reasonable expectation that the death of a human being would result therefrom." Ill. Ann. Stat. ch. 38 ¶ 9-1(b)(11). Like Delaware's, both of these statutes plainly require much more than simply considerable or ample planning and premeditation, and the Florida courts have further restricted that state's "cold calculated" factor to unusually elaborately preplanned killings. See e.g., Cannady v. State, 620 So. 2d 165, 169-170 (Fla. 1993) (neither of two murders — of defendant's wife and wife's rapist — met "cold, calculated" requirement; one lacked "careful plan or prearranged design," while other, though "calculated . . . was not the result of 'cold' premeditation."). Illinois has similarly construed its provision. The Illinois statute was modeled on Florida's, and requires, *inter alia*, "an extended period of deliberation." People v. Williams, 737 N.E.2d 230, 250 (Ill. 2000).

Courts have also acknowledged that, by its terms, this factor requires that the defendant have substantially planned and premeditated the actual killing, and not simply other conduct that was an element of the capital offense:

- United States v. Webster, 162 F.3d 308, 325 (5th Cir. 1998). "[B]y allowing the jury to consider premeditation with respect to the kidnaping and not just the murder, the court improperly charged the jury" on substantial-planning aggravator.

- United States v. Barnette, 390 F.3d 775, 802-804 (4th Cir. 2004), vacated on other grounds, 546 U.S. 803 (2005). District court properly responded to jurors' question about this aggravator (asking whether it meant defendant planned carjacking "to" cause death or "which" caused death) by calling their attention back to instruction that, tracking statutory language, told them to decide whether defendant "committed the offense of carjacking resulting in death . . . after substantial planning to cause the death of" the victim.

- United States v. Catalan Roman, 371 F. Supp. 2d 36, 46-47 (D.P.R. 2005). Striking substantial-planning aggravator because there was not "a considerable amount of planning directed at accomplishing the murder," though "there may have been evidence of planning as it related to the armed robbery."

One court, though, has held that the exact means of the killing need not have been the product of substantial planning and premeditation. United States v. Tipton, 90 F.3d 861, 897 (4th Cir. 1996). And another has held that this aggravator may apply even if the person killed was not the intended victim. United States v. McCullah, 76 F.3d 1087, 1110-1111 (10th Cir. 1996). But one district court forbade the government from pursuing this aggravator based on a theory the defendant's gang had a "shoot on sight" policy for rival gang members. "Substantial planning as an aggravating factor for the charged murder means substantial planning for that murder. It doesn't mean a generally violent lifestyle, a general willingness or even eagerness to kill, or a habit of carrying a weapon." United States v. Briseno, 2015 WL 163526, *10 (N.D. Ind. Jan. 12, 2015). See also 1Leonard B. Sand, *et al.*, Modern Federal Jury Instructions — Criminal, Inst. 9A-13 (2008) ("you must unanimously agree on the particular object of the substantial planning and premeditation").

The Fifth Circuit, in striking down a finding of this aggravating factor based on instructional error and evidentiary sufficiency, has also held that the government cannot rely on planning or premeditation undertaken by the codefendants. United States v. Ebron, 683 F.3d 105, 152 (5th Cir. 2012). Cf. United States v. Snarr, 704 F.3d 368 (5th Cir. 2013) (finding overwhelming evidence of this aggravator).

In another, Sixth Circuit case, a divided panel held the evidence of this aggravator to be legally sufficient. United States v. Taylor, 814 F.3d 340 (6th Cir. 2016) (2-1). The evidence indicated that the defendant and his codefendants had gone to the victim's home intending to rob him, but that when the plan went awry, they drove him two hours across the state line into Tennessee, where the defendant, reaching back from the driver's seat, shot him inside the vehicle they were driving. The majority thought the evidence supported an inference of substantial planning and premeditation. The dissent disagreed and believed no reasonable juror could have found this aggravator proven beyond a reasonable doubt. Both cooperators testified there was never a plan to murder, or even hurt, the victim. It was undisputed that the shooting only occurred after the victim attacked one of the cooperators in the car, and tried to grab his gun (which went off). And that cooperator told authorities the defendant was looking for a place to let the victim out when the struggle occurred.

7. Vulnerable Victim

Two circuits have rejected vagueness challenges to the statutory aggravator that "[t]he victim was particularly vulnerable due to old age, youth, or infirmity." 18 U.S.C. 3592(c)(11). See United States v. Bourgeois, 423 F.3d 501, 510-511 (5th Cir. 2005); United States v. Paul, 217 F.3d 989, 1001 (8th Cir. 2000). In Jones v. United States, 527 U.S. 373, 400-401 (1999), the Supreme Court considered a vagueness challenge to a similar, nonstatutory aggravating factor, the victim's "young age, her slight stature, her background, and her unfamiliarity with" the area in which she was taken, after being kidnapped, and killed. Writing for four justices, Justice Thomas thought the factor was not vague, and that jurors would have understood it called on them to consider whether the victim was especially vulnerable to the defendant's attack. He also thought the factor was not overbroad, saying that even though the concept of victim vulnerability might be relevant in every case, evidence of it was individualized. In any event, these four justices (joined by Justice Scalia, to make a majority) agreed with the Fifth Circuit

that any errors in this or another aggravating factor were harmless. Four other justices dissented.

Judge Sand's pattern instructions define these statutory terms: "'Old age' means having lived beyond the middle period of life. 'Youth' means the period when one is young and has not reached adulthood. A juvenile is a youth. 'Infirmity' means a physical or mental weakness or flaw. A person who has an infirmity may be physically or mentally handicapped or have a particular disease or condition. An example of a condition is pregnancy." 1Leonard B. Sand, *et al.*, Modern Federal Jury Instructions — Criminal, Inst. 9A-14 (2008).

The Eighth Circuit's pattern instructions define these terms as applying to persons who, because of "a condition related to old age," because of "youthful immaturity or inexperience," or because of "a mental or physical weakness, disability, deficiency, illness, or condition," is "significantly less able" (or, for infirmity, simply "less able") to "to avoid, resist, or withstand any attacks, persuasions, or temptations, or (2) to recognize, judge, or discern any dangers, risks, or threats." Eighth Circuit Criminal Pattern Jury Instructions, Death Penalty - Final Instructions, Inst. 12.07K.

Two other, unresolved issues involving this aggravator have arisen in the lower courts. The first is: What connection, if any, must there be between the victim's vulnerability and the killing? One district court struck this factor because there was no nexus between victim's vulnerability (pregnancy) and the crime, since she died instantaneously from a bomb blast. United States v. Johnson, 136 F. Supp. 2d 553, 560 (W.D. Va. 2001). And in United States v. Mikos, 539 F.3d 706 (7th Cir. 2008), the court split on this issue. The majority found that the evidence supported the vulnerable-victim aggravator because the victim was severely obese, and thus unable to run or fight back or seek help after being shot. Id. at 717. But Judge Posner dissented, saying that the victim's disability was irrelevant for, no matter how mobile she was, she would not have been able to escape the bullets that killed her. Id. at 721. See also 1Leonard B. Sand, *et al.*, Modern Federal Jury Instructions — Criminal, Inst. 9A-14 (2008) (jury must find "a connection between the victim's vulnerability and the offense committed upon the victim. A connection does not mean that the defendant targeted the victim because of the vulnerability. It means that, once targeted, the victim was more susceptible to death due to the vulnerability"); id., Inst. 9A-14, Comment ("this aggravating factor should not pertain to situations where a victim is killed due to a

circumstance entirely unconnected to the person's vulnerability"); United States v. Jacques, 2011 WL 1675417, at *21 (D. Vt. May 4, 2011) (unpublished) ("in order for an aggravating factor alleging that the victim was vulnerable to be put before a jury, there must be a connection between the victim's vulnerability and the offense committed upon the victim," citing Sand), vacated in part on other grounds, 684 F. 3d 324 (2d Cir. 2012); United States v. Savage, 2013 WL 1934531, at *9 (E.D. Pa. May 10, 2013) (unpublished) ("the vulnerable victim aggravating factor requires some nexus between the vulnerability and the criminal offense"). Cf. United States v. Sampson, 486 F.3d 13, 48-49 (1st Cir. 2007) (evidence was sufficient that victim was vulnerable, as a result of obesity and previous open-heart surgery, and that his vulnerability easily could have contributed to his death); United States v. Paul, 217 F.3d 989, 1001 (8th Cir. 2000) (evidence that victim was 82 and physically unable to resist attackers sufficiently supported this factor).

Another issue is whether the defendant must be aware of the victim's vulnerability. The only court to address this issue (in a challenge to the jury instructions) held that he did not and, indeed, that no scienter is required. United States v. Sampson, 486 F.3d 13, 34 (1st Cir. 2007).

C. Nonstatutory Aggravating Factors Generally

The Federal Death Penalty Act authorizes the government to notice, and the jury to consider (and, if found unanimously beyond a reasonable doubt, to weigh), "other aggravating factor[s]," in addition to those listed in the statute. 18 U.S.C. § 3593(d). See United States v. Robinson, 367 F.3d 278, 284 (5th Cir. 2004).

The circuits have rejected claims that this authority represents an unconstitutional delegation of legislative power. United States v. Barrett, 496 F.3d 1079, 1106 (10th Cir. 2007); United States v. Allen, 247 F.3d 741, 758 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002); United States v. Paul, 217 F.3d 989, 1003 (8th Cir. 2000); United States v. Webster, 162 F.3d 308, 354-355 (5th Cir. 1998); United States v. Jones, 132 F.3d 232, 239-240 (5th Cir. 1998); United States v. Tipton, 90 F.3d 861, 895-896 (4th Cir. 1996); United States v. McCullah, 76 F.3d 1087, 1106-1107 (10th Cir. 1996).

Two have also rejected claims that the use of non-statutory aggravating factors violates the Ex Post Facto Clause. See United States v. Higgs, 353 F.3d

281, 322 (4th Cir. 2003); United States v. Allen, 247 F.3d 741, 759 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002).

Nevertheless, "[c]ourts have 'substantial responsibility and considerable discretion in determining whether a proposed non-statutory aggravating factor is appropriate to submit to the jury . . . . [T]he government may only present non-statutory aggravating factors if they are relevant and reliable," not "overbroad or vague," and "an aggravating factor in the first place." 1Leonard B. Sand, *et al.*, Modern Federal Jury Instructions — Criminal, Inst. 9A-16, Comment (2008), quoting United States v. Davis, 912 F. Supp. 938, 941 (E.D. La. 1996). See also United States v. Hammer, 2014 WL 2465276, at *9 (E.D. Pa. May 29, 2014) ("Evidence supporting aggravating factors, however, must meet a "strikingly high level of relevance and reliability.")

Moreover, one district recently indicated that a statutory aggravator that the jury declines to unanimously find may not be considered under the guise of a non-statutory aggravator. United States v. Johnson, 915 F. Supp. 2d 958, 1019 (N.D. Iowa 2013) ("defining a single *uncharged* incident of distribution of a controlled substance as a 'non-statutory aggravating factor,' where two or more *convictions* are required to establish the 'statutory aggravating factor,' seems to me to be something of an 'end run' around the statute").

D. Particular Nonstatutory Aggravating Factors

1. Future Dangerousness

a. General Constitutionality and Reliability

A quarter century ago, the Supreme Court rejected a challenge to the aggravating factor in Texas's death penalty statute that, if not sentenced to death, "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Barefoot v. Estelle, 463 U.S. 880, 896 (1983). At that time there, a life sentence with a minimum term and the prospect of eventual parole was the alternative to death for a capital offender. Thus, the jury was not limited to assessing the probability that the defendant would pose a danger in prison. The Court rejected the broad claim that future-danger predictions, generally, were too speculative to be admitted. It relied in part on the fact that such predictions about dangerousness in society are routinely made in

other contexts, including civil commitments, parole decisions, and criminal sentencing generally. See Jurek v. Texas, 428 U.S. 262, 274-76 (1976).

Nevertheless, doubts about the reliability of future-dangerousness predictions in capital cases have persisted and grown. One Fifth Circuit judge, surveying the literature in 2000, noted that there was virtual consensus in the scientific community that even psychiatrists cannot reliably predict dangerousness. Flores v. Johnson, 210 F.3d 456, 463 (5th Cir. 2000) (Garza, J., concurring). See also United States v. Sampson, 335 F. Supp. 2d 166, 218-23 (D. Mass. 2004) (observing that it submitted future-danger factor because issue was controlled by Barefoot. But it suggested Supreme Court revisit issue in light of recent developments in law and science suggesting such testimony is unreliable).

Though future dangerousness is not listed in FDPA, the government frequently relies on it as a key nonstatutory aggravating factor in federal capital prosecutions. But, under many of the substantive federal statutes that allow death, the only possible alternative is life imprisonment.[17] Thus, only future dangerousness *in federal prison* could possibly be a relevant aggravating factor.

The Supreme Court has never squarely addressed the constitutionality of this kind of future-dangerousness factor.[18] But see Simmons v. South Carolina, 512

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[17] Moreover, in other cases, even if a term-of-years sentence is theoretically possible, there is generally no realistic possibility the defendant could ever be released from prison even if not sentenced to death. The Guidelines would ordinarily call for a life sentence. See, e.g., U.S.S.G. § 2A1.1, Application Note 2(A) ("In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. A downward departure would not be appropriate in such a case."). And many defendants are already serving previously-imposed prison sentences or face consecutive sentences for other noncapital convictions in the case at hand; as a result, they face a *de facto* life sentence if the death penalty is not imposed.

[18] Changes in sentencing laws since Barefoot mean that life imprisonment without release is now available as an alternative sentence in every capital-punishment jurisdiction in this country. See Mark D. Cunningham & John R. Sorenson, Improbable Predictions at Capital Sentencing: Contrasting Prison Violence Outcomes, 38 J. Am. Acade. Psychiatry Law 61, 62 (2010). "The universal availability of super-maximum conditions of confinement in correctional jurisdictions throughout the United States" represents another "important change" since Barefoot. Cunningham, Capital Jury Decision-Making, *supra*, at 248. Indeed, at the time the Texas statute was enacted in the mid-1970's, the prison system in that state "was quite a different place than it is today . . . . staffing was limited, 'building tenders' (inmates selected by the correctional officers and wardens for positions of authority in the inmate hierarchy) were used

U.S. 154, 165 n.5 (1994) (in dicta, Court observes: "Of course, the fact that a defendant is parole ineligible does not prevent the State from arguing that the defendant poses a future danger. The State is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff"). And there is recent empirical evidence that predictions of dangerousness in a correctional setting — including in federal capital cases — are unreliable.

A 2004 study, for example, examined the prison disciplinary records of 155 Texas capital defendants who experts had predicted would be a future danger. (This included defendants sentenced to life and to death). The error rate was a stunning 95%. See Texas Defender Service, Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness (2004), http://www.texasdefender.org/DEADLYSP.PDF.

Even more telling is a 2007 study — the first of federal prisoners convicted of capital crimes and sentenced to life imprisonment. See Mark D. Cunningham, Thomas J. Reidy, and Jon R. Sorensen, Assertions of "Future Dangerousness" at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence, 32 Law and Hum. Behav. 46 (2008).

The authors used information from the Bureau of Prisons about 145 capital murderers who had entered prison under a life sentence between 1991 and 2005. The study compared the rates of violence for (1) the capital life inmates against whom the government had formally alleged future dangerousness as an aggravating factor and (2) those without such an allegation. The result: There were no statistically significant differences between the two groups. *In other words, the government's predictions of future dangerousness were utterly unreliable*.

The rates of violence were quite low among those inmates against whom the government had alleged future dangerousness, just as they were for the larger

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extensively in the management of the prison milieu, and there were limited accommodations for super-maximum or administrative segregation confinement . . . Accordingly, there were limited mechanisms for preventing inmate violence, which led legislators to believe that such violence was always imminent." John F. Edens, *et al.*, Predictions of Future Dangerousness in Capital Murder Trials: Is it Time to "Disinvent the Wheel"?, 29 Law & Hum. Beh. No. 1, at 57 n.6 (Feb. 2005).

group of all capital life inmates. For example, only 9.6% of the "future danger" life inmates had been cited for a "serious assault." This classification included attempted assaults and incidents in which no injury or only minor injury was sustained. And the rates of assaults involving more significant injuries were vanishingly low. Id. at 55 & tables. Thus, in the 14-year period covered by the study:

- "[J]ust less than one in a hundred ['future danger' life inmates] had perpetrated an assault causing 'moderate' injuries (*i.e.*, serious injuries requiring evacuation to an outside hospital, but not life-threatening)."

- "None had perpetrated an assault resulting in 'major' (*i.e.*, life-threatening) injury."

- "[N]one . . . had perpetrated a serious assault against staff or killed another inmate."

Id. at 60-61.

In sum, the 2007 study concluded, "scientific data demonstrate that only a minority of capital offenders perpetrate serious violence in prison, and that it is *not* possible to reliably identify at trial which of these defendants are more likely than not to commit these acts. . . . Quite the contrary, in the face of base rate data, it is only assessments of varying *improbability* of prison violence among these offenders that are reliable." Id.

As one might expect, federal jurors fair no better than prosecutors at predicting future dangerousness. Another study of 72 federal inmates who had been capitally tried and either sentenced to life imprisonment or death over two decades, compared rates of serious prison violence against jury findings on this aggravating factor. It found that more than 90 percent of the defendants whom jurors had judged dangerous had, in fact, not engaged in any serious violence in prison in the ensuing years. This statistic cannot be dismissed just because most such defendants were sentenced to death and security is greater on death row.[19]

[19] Many death-sentenced inmates at USP Terre Haute, though, do have access to other inmates and staff. See Cunningham, Capital Jury Decision-Making at 243.

For even among those defendants found to be a future danger but sentenced to life, the jurors' positive predictions still proved wrong more than two-thirds of the time. See Mark D. Cunningham, Jon R. Sorensen, Thomas J. Reidy, Capital Jury Decision-Making: The Limitations of Predictions of Future Violence, 15 Psychology, Public Policy & Law 223, 239-40 & Table 4 (2009).

Three circuits have rejected a generalized claims that the future-danger aggravator is constitutionally unreliable:

- United States v. Taylor, 814 F.3d 340 (6th Cir. 2016) Citing Simmons v. South Carolina, 512 U.S. 154 (1994), the panel said the Supreme Court had held that future dangerousness in prison is a valid aggravating factor. Thus, the district court properly refused to strike it.

- United States v. Hager, 721 F.3d 167, 200 (4th Cir. 2013). Defendant "makes much of his evidence that allegedly demonstrates that future dangerousness cannot be reasonably predicted. But this is an argument for the jury. In fact, Hager presented this argument to the jury, but the jury rejected it . . . . Perhaps we might someday be presented with a case in which we are persuaded that the evidence presented as to a defendant's future dangerousness was merely speculative or that it was constitutionally infirm. But, this is not such a case." See also United States v. Umana, 750 F.3d 320 (4th Cir. 2014) (adhering to Hager).

- United States v. Fields, 483 F.3d 313 (5th Cir. 2007). No error in admitting testimony by government psychiatrist that defendant would be future danger. Daubert does not apply to capital sentencing hearing, given inapplicability of Rules of Evidence. Supreme Court in Barefoot already determined that future-dangerousness evidence is sufficiently reliable to be admitted.[20]

But no circuit in a FDPA case seems to have squarely addressed Barefoot's applicability (1) to an aggravator involving future danger exclusively in a federal-

[20] Several circuits have held that this factor is not vague or overbroad. See United States v. Fields, 516 F.3d 923, 941-943 (10th Cir. 2008); United States v. Bourgeois, 423 F.3d 501, 511-512 (5th Cir. 2005). But see United States v. Grande, 353 F. Supp. 2d 623, 640-642 (E.D. Va. 2005) (court also strikes, as vague, portion of future-danger factor that alleged defendant had continued to "influence" and "conduct" "gang business" from jail).

penitentiary setting, rather than in society, or (2) in light of recent empirical evidence that neither expert psychiatrists nor experienced prosecutors can reliably predict future danger in such a setting. And the Supreme Court has not examined this issue since it decided Barefoot a quarter century ago. The only decisions rejecting such challenges have come from several district courts. See United States v. Merriweather, 2014 WL 2890632, at *6 (N.D. Ala. June 25, 2014); United States v. Pleau, 2013 WL 1673109, at *4 (D.R.I. Apr. 17, 2013) (unpublished); United States v. Williams, 2013 WL 1335599, at *32 (M.D. Pa. Mar. 29, 2013) (unpublished); United States v. Wilson, 923 F. Supp. 2d 481, 487 (E.D. N.Y. 2013); United States v. Casey, 2012 WL 6645702, at **1-2 (D.P.R. Dec. 20, 2012) (unpublished).

Finally, two other district-court decisions have granted defense requests for Daubert hearings on the admissibility of government expert testimony on future dangerousness. United States v. Rodriguez, 2006 WL 435581, at **1-2 (D.N.D. Feb. 21, 2006); United States v. Taveras, 2006 WL 1875339, at *23 (E.D. N.Y. July 5, 2006). See also United States v. Diaz, 2007 WL 656831, at **23-24 (N.D. Cal. 2007) (while acknowledging admissibility of future dangerousness as aggravating factor, court orders government to explain how its incarceration facilities would be insufficient to safely house both defendants. Court notes that Daubert hearing on future dangerousness may be required); United States v. Hargrove, 2005 WL 2122310, at *6-8 (D. Kan. 2005) (prior to introducing any evidence of future dangerousness, government would have to proffer the evidence and demonstrate why it would support a finding of future dangerousness in prison). But see United States v. Barnette, 211 F.3d 803, 815-816 (4th Cir. 2000) (without deciding whether Daubert applies to capital sentencing hearing, no error in admission of Psychopathy Checklist Revised (PCL-R). Absent evidence indicating more than a disagreement among certain mental-health professionals about the test's merits, district court did not need to go further to evaluate reliability. Court also finds no error in government expert's consideration of race, age, and poverty in evaluating psychopathy and future dangerousness, given that he considered numerous other bases).

b. Limited to Dangerousness in Prison

When the only alternative to death (legally, practically, or as a result of a defense waiver) is life imprisonment, then the evidence, argument, and instructions on the future-dangerousness factor should limit the jury to considering whether the

defendant will pose a danger in a correctional setting. See Shafer v. South Carolina, 532 U.S. 36, 37-38 (2001); Simmons v. South Carolina, 512 U.S. 154, 164-166, 169 (1994). FDPA decisions acknowledge this:

- United States v. Fields, 516 F.3d 923, 942-944 (10th Cir. 2008). Jury was informed defendant would not be eligible for parole, and thus understood it was limited to a prison setting.

- United States v. O'Reilly, 545 F. Supp. 2d 630, 638-639 (E.D. Mich. 2008). Court notes it was limiting future-dangerousness evidence as it applied to life in prison.

- United States v. Llera Plaza, 179 F. Supp. 2d 464, 487-488 (E.D. Pa. 2001). "[T]he jury will be instructed that it is to evaluate the defendants' 'future dangerousness' in the context of life imprisonment, and the government will be requested to limit its sentencing phase evidence to that which is relevant to a context of life imprisonment."

- United States v. Duncan, 2008 WL 711603, at *11 (D. Idaho Mar. 6, 2008) (unpublished). Government would be limited to evidence defendant would be future danger while incarcerated. Argument he might escape is "illusory" and "too speculative" to justify expanding scope of the evidence.

- United States v. Rodriguez, 2006 WL 487117, at *5 (D.N.D. Feb. 28, 2006) (unpublished). Government limited to evidence relevant to defendant's future dangerousness to prison employees and other inmates. Rejecting, as remote, possibility that defendant may escape or be pardoned in the future.

Two district courts limited the future-danger factor to dangerousness in prison even though a lesser sentence was theoretically available:

- United States v. Johnson, 915 F. Supp. 2d 958, 1023 (N.D. Iowa 2013). "The future dangerousness factor will be limited to future dangerousness in prison, and in support of that factor, the prosecution may rely only on incidents of assaults by Johnson on other inmates." Though sentence of less-than-life was theoretically possible, it was "improbable in this case."

- United States v. Hardy, 2008 WL 1776447, at *1 (E.D. La. Apr. 15, 2008) (unpublished). When defendant objected that government's future-danger aggravator went beyond dangerousness in federal prison, government noted that a sentence of less than life imprisonment was possible. But court held that if defendant waived instruction on less-than-life sentence, it would sustain defendant's objection to government's evidence. Court also noted that, if jury could not reach unanimous verdict, it would impose life sentence.

See also 1 Leonard B. Sand, *et al.*, Modern Federal Jury Instructions — Criminal, Inst. 9A-17 (2008) ("You may only consider the non-statutory aggravating factor of future dangerousness in the context of the mandatory life sentence without the possibility of release that must be imposed by the Court if Defendant is not sentenced to death, and the conditions of confinement that may likely be imposed by the United States Bureau of Prisons"). But see United States v. LeCroy, 441 F.3d 914, 929 (11th Cir. 2006) (no plain error in future-dangerousness instruction telling jurors to consider defendant's risk to general public only if they found beyond a reasonable doubt that he was an escape risk); United States v. LeCroy, 739 F.3d 1297 (11th Cir. 2013) ("Rather than inviting the jury to entertain a 'fanciful' possibility of escape, as LeCroy suggests, the court [properly] instructed the jury that they could only consider LeCroy's future dangerousness 'if each of you finds beyond a reasonable doubt that Mr. LeCroy does pose a risk of escape.'").

c. Excluding Irrelevant or Improper Evidence[21]

Courts have excluded evidence of the defendant's prior misconduct that, because of its nature or non-seriousness, is not relevant to gauging the likelihood the defendant would engage in violence in a federal penitentiary:

- United States v. Pleau, 2013 WL 1673109, at *4 (D.R.I. Apr. 17, 2013) (unpublished). "[N]ot all disciplinary infractions are sufficiently serious to be relevant to the capital sentencing decision. Indeed, mere 'threatening

[21] See also Section XII.D.3.b. (Aggravating Factors . . . Excluding Certain Other Crimes or Misconduct as Insufficiently Relevant), *post*; XIV.C (Evidence — Prejudice vs. Probative Value), *post*.

words' directed at correctional officers are not probative of future dangerousness" (citation omitted).

- United States v. Pepin, 514 F.3d 193, 206 (2d Cir. 2008). On government's interlocutory appeal, holding that district court did not abuse discretion in excluding aggravating evidence that defendant had physically and sexually abused a child, offered to prove future dangerousness. District court found evidence had little if any relevance at sentencing since alternative to death penalty was life imprisonment where he would not be housed with children.

- United States v. Taveras, 585 F. Supp. 2d 327, 330 (E.D. N.Y. 2008). Forbidding government from asking jury to find that defendant was member of allegedly violent prison gang that was composed primarily of Dominicans in support of future-dangerousness aggravator. "Proof of membership is ambiguous and of slight probative force. It is far outweighed by the dangers of ethnic prejudice and overvaluation." As to evidence jury had heard about the gang, court would instruct jury that it could not find defendant was or is member, and that Dominicans are not more or less dangerous in prison or more or less likely to be members of a gang. Jury could use evidence that this and other gangs exist in prison and that they may make prison more dangerous to gang members and other inmates.

- United States v. O'Reilly, 545 F. Supp. 2d 630, 638-639 (E.D. Mich. 2008). Because it was limiting future-dangerousness evidence as it applied to life in prison, court excludes evidence of defendant's statements about crimes he would commit if released from prison and about how he should have killed his codefendant after the crime.

- United States v. Grande, 353 F. Supp. 2d 623, 639-640 (E.D. Va. 2005). Excluding evidence that, while incarcerated, defendant threw his food tray through door slot, and evidence that he participated in disturbance with other prisoners in jail involving banging on bars and writing graffiti on walls. Such evidence "does not speak to" defendant's "tendency to commit criminal acts of violence."

- United States v. Gilbert, 120 F. Supp. 2d 147, 154-155 (D. Mass. 2000). Court excludes, as irrelevant to future dangerousness (1) evidence that defendant was a "poisoner," who had abused her position as a nurse and

tried to obtain medicine and syringes under false pretenses. Defendant would not have access to medication or poison; (2) evidence that defendant had broken and entered home of her extramarital lover. Defendant would be under lock and key in prison; and (3) defendant's earlier threat to stab husband and tearing a telephone out of the wall. This amounted to "a confused and angry outburst during a heated domestic dispute."

- United States v. Peoples, 74 F. Supp. 2d 930, 931 (W.D. Mo. 1999). Excluding evidence of defendant's uncharged burglaries because they are of doubtful relevance to future dangerousness and because jury had already been informed that defendant was, in essence, a career criminal. Court also suggests that simple possession of a weapon during an auto theft seemed unlikely to be relevant.

- United States v. Sampson, 335 F. Supp. 2d 166, 224-25 (D. Mass. 2004). Excluding "evidence of the defendant's past membership in a prison gang because the government proffered no evidence to prove: (1) that the defendant was still a member of the gang; (2) that the gang of which the defendant was allegedly once a member operated in federal penitentiaries; or (3) that, if it did, the chapters in the federal prisons engaged in the same sort of misconduct as the chapter of which the defendant was once allegedly a member."

- United States v. Merritt, 2013 WL 395458, at *6 (E.D. Pa. Feb. 1, 2013) (unpublished). "At this point, it is unclear how threats to and the alleged attempted abduction of potential witnesses in an uncharged murder impact the future dangerousness of Defendant in the prison context. Courts have recognized that, if proven, a defendant's history of threatening and intimidating potential witnesses would have little bearing on defendant's dangerousness in prison, where [he] would be under lock and key. If the Government intends to present evidence regarding Defendant's threats to witnesses and attempted abduction of one witness in relation to the Simon murder, the Government may provide additional briefing on how witness threats, intimidation, and the attempted abduction of a witness related to Simon's murder would be probative in establishing Defendant's future dangerousness in the prison setting or would satisfy one of the other aggravating factors."

- United States v. Jacques, 2011 WL 1675417, at *27 (D. Vt. May 4, 2011) (unpublished), vacated in part on other grounds, 684 F.3d 324 (2d Cir. 2012). "Jacques's rehabilitative potential is not particularly relevant to the choice between death or life imprisonment without the possibility of parole. The Government's allegations with regard to the instant offense and Jacques' past criminal conduct suggest that his victims have been under-aged females. Given that there is nothing in the record indicating that Jacques presents an escape risk and that the nature of his alleged criminal behavior suggests he is unlikely to victimize prison officials or fellow prisoners, the Court grants the motion to strike this factor on the grounds that it is not particularly relevant to the sentencing decision."

- United States v. O'Reilly, 2009 WL 5217365, at *2 (E.D. Mich. Dec. 30, 2009). Regarding aggravating evidence of defendant's participation in unadjudicated murder-for-hire plot, court states that, "[i]f there is a penalty phase, the Court will hold an evidentiary hearing before it begins. Based on the evidence presented at that hearing, the Court will decide whether the evidence is reliable. The Court will also decide whether the evidence meets the 'future dangerousness' test."

- United States v. Sablan, 2008 WL 700172, at **3-6 (D. Colo. Mar. 13, 2008). Excluding, in support of future dangerousness (1) government evidence of an aggravated assault conviction from 20 years before when defendant was a juvenile; and (2) government evidence that defendant had stabbed an inmate in federal prison, where no charges were filed, victim refused to provide any information to the authorities, and sentencing evidence would consist of testimony of inmate who came forward several years after the assault and became a cooperating informant and now claims to have witnessed the assault.

On the other hand, courts routinely admit evidence of the defendant's prior acts of violence to prove future dangerousness. See, e.g., United States v. LeCroy, 441 F.3d 914, 929-930 (11th Cir. 2006) (evidence of defendant's prior crimes, burglary and statutory rape, and of "hit list" he composed of persons that he wanted to kill, including mother of his statutory rape victim and law enforcement personnel, was relevant to show future dangerousness). And one circuit validated the admission of evidence about the defendant's nonviolent misconduct in prison, and about a courtroom disturbance:

- United States v. Basham, 561 F.3d 302, 330-333 (4th Cir. 2009). (1) No error in admitting (1) evidence that, while a prisoner, defendant "engaged in sexually aggressive and threatening behavior toward female employees"; (2) evidence of courtroom scuffle in which defendant, who had become upset and unsuccessfully requested to absent himself because district judge broke his promise to let him chew tobacco in the courtroom, refused to comply with judge's instruction to take his seat, and physically resisted marshals. Incident was relevant to future dangerousness. District court substantially diminished risk of prejudice by excising defendant's remarks, during scuffle, assailing judge and claiming he was victim of racism.

In many cases, the prosecution, the defense, or both, seek to introduce expert evidence not only about the defendant's proclivities but about Bureau of Prisons policies, practices, and facilities that would apply to the defendant, if sentenced to life, or about how these do or do not keep other life-term inmates from engaging in violence inside federal penitentiaries. In one case, the Seventh Circuit disapproved expert testimony about statutes or regulations in this area, finding that this encroached on the judge's authority to instruct on the law:

- United States v. Johnson, 223 F.3d 665, 671-673 (7th Cir. 2000). Government had former assistant warden at Florence testify about policies that are prescribed or codified in statutes or regulations, as distinct from being informal policies. "This testimony was improper, though the defendant makes no issue of its admissibility and so any objection is waived. If the Bureau of Prisons is forbidden by law to confine a prisoner in a control unit for his entire life on the basis of evidence presented at his trial, that is something for the judge to tell the jury, not for a witness to testify to.

While the Seventh Circuit added: "But the warden's testimony, though it did not track the regulations exactly, was not false. The impression that he conveyed of practice and legal policy was correct," id., nevertheless, on 2255, the district court granted relief, finding that the testimony was misleading and defense counsel were ineffective for leaving it uncorrected: "the testimony may have left the jury with the mistaken impression that neither the BOP nor the Court had the authority to impose certain restrictions on an inmate immediately upon sentencing." United States v. Johnson, No. 02-cv-06998, ECF #112, slip op. at 5 (N.D. Ill. Dec. 13, 2010).

In the direct appeal in Johnson, the circuit had also found no error in a former warden's hearsay testimony about how an inmate at USP Florence had managed to convey an order to members of his gang at another prison to kill two inmates. It noted that such hearsay is admissible at capital sentencing, and the warden was in good position to determine the reliability of the information, so the risk of confusing or misleading jury did not outweigh probative value. Id. at 674. But see United States v. Whitten, 610 F.3d 168, n.16 (2d Cir. 2010) (testimony by former Bloods member and (on cross) by defense prison expert about how gang operates in federal prison was sufficiently reliable to be admitted on future dangerousness).

In one case, in which the government was relying on the defendant's supposed membership in the Bloods, a prison gang, to establish dangerousness, the court precluded "[g]eneric descriptions of other Bloods members' violent acts." It explained: "While Investigator Sheridan may be entitled to give some context to explain how Wilson's conduct relates to his future dangerousness, the Government may not elicit evidence that merely speaks generally to the future dangerousness of other incarcerated Bloods members. In other words, the Government may introduce evidence that describes Wilson's conduct and its potential implications for future dangerousness, but may not elicit proof that his activities are indicative of future dangerousness solely because they demonstrate his membership in the Bloods, which is generally believed to be a violent gang. For instance, Investigator Sheridan's expected testimony concerning 'the function and role of gangs in a prison setting, and the ability of incarcerated Bloods members to order and carry out acts of violence both inside and outside prison,' if not tailored to Wilson's specific activities, is likely inadmissible [citation omitted]. Conversely, specific evidence interpreting the meaning of certain letters or phone calls is quite probative of whether Wilson poses a future danger in prison and is not unduly prejudicial. The court will carefully administer this standard to balance the Government's right to present its case against the risk of admitting overly prejudicial or otherwise inadmissible evidence." United States v. Wilson, 2013 WL 1386137, at *4 (E.D.N.Y. Apr. 4, 2013) (unpublished).

As to expert defense evidence on this subject, there are several favorable district court decisions:

- United States v. Umana, 2010 WL 1688441, at *3 (W.D.N.C. Apr. 26, 2010). "To the extent that Dr. Cunningham will testify as to the rates of prisoner violence at various security levels within the Bureau of Prisons, it appears that he intends to use these statistics to make an individualized prediction of whether the defendant will commit future acts of violence. He will attempt, therefore, to draw conclusions about how various conditions of confinement would affect this 'particular defendant.' Recognizing this, several district courts have allowed Dr. Cunningham to offer similar testimony in capital cases where the government has alleged the defendant's future dangerousness. Upon the allegations present in this case, Dr. Cunningham's testimony is relevant to the jury's assessment of the defendant's future dangerousness in prison."

- United States v. Wilson, 493 F. Supp. 2d 491, 508-509 (E.D.N.Y. 2007). Denying government motions to preclude sentencing testimony by (1) Mark Cunningham, to show rates of violence in federal prisons and security measures available to deal with inmates. Court rejects government's argument that testimony was not sufficiently specific to defendant, since it would rebut government's future-dangerousness aggravator. But Cunningham could not testify about a particular institution where defendant was unlikely to be housed (*i.e.*, ADX Florence), since that was too speculative. (And defense had to turn over Cunningham's notes on interview with defendant even if he was not going to base any of his testimony on the interview); and (3) Donald Romine, former BOP warden and administrator, who would testify about its ability to manage inmates convicted of violent crimes. Court rejects government's argument that testimony was not sufficiently specific to defendant, since it was rebutting government's future-dangerousness aggravator.

- United States v. Sampson, 335 F. Supp. 2d 166, 226-228 (D. Mass. 2004). Denying government's motion to preclude testimony from Dr. Mark Cunningham. Cunningham had specialized knowledge that would assist jury in evaluating government's allegations regarding future dangerousness in a prison setting if incarcerated for life. Court notes it permitted only general testimony from Cunningham about the ability of the BOP to control inmates, including gross statistics regarding assaults and other misconduct, but did not permit testimony regarding specific other prisoners.

But see United States v. Johnson, 223 F.3d 665, 674-675 (7th Cir. 2000) ("[w]hile the defendant was of course entitled to counter the government's evidence that he would be a continued menace to society while in prison, that being evidence offered to establish an aggravating factor . . . he should not have been permitted to present to the jury, as he was, evidence of the existence of maximum-security federal prisons decked out with control units, in order to establish a mitigating factor"); United States v. Taylor, 583 F. Supp. 2d 923, 936-939 (E.D. Tenn. 2008) (excluding expert defense testimony about security in federal prison facilities).

Finally, in United States v. Caro, 597 F.3d 608, 616-622 (4th Cir. 2010), the Fourth Circuit found no violation of Brady, or of Fed. R. Crim. P. 16 or 17, in denying access to BOP records, sought by the defense future-dangerousness expert in a prison-killing case, regarding (a) average length of stay at Florence ADMAX, and (b) transfers, housing, and institutional behavior for other inmates who had killed in prison. The appeals court said the defense had made no showing that the records would have supported the expert's testimony.

d. Sufficiency of the Evidence

Appellate claims of legally insufficient evidence to support a future-dangerousness factor have not met with success:

- United States v. Taylor, 814 F.3d 340 (6th Cir. 2016). Evidence that the defendant had participated in an attempted jailbreak involving shanks in which two guards were assaulted, his possible connection to vandalism against a cooperator's relatives, his lack of remorse were sufficient to support an inference that he would pose a danger in prison.

- United States v. Snarr, 704 F.3d 368, 395 (5th Cir. 2013). Evidence established dangerousness of defendants who had serious records of violence before and during their incarcerations, and who broke out of handcuffs in SHU, stabbed two guards to get their keys, and used them to enter cell and "savagely" stab to death another prisoner. "In arguing that this evidence was insufficient to allow the jury rationally to conclude that they posed a threat of future dangerousness, Defendants primarily rely on the testimony of a prison consultant and former warden named Mark Bezy. Bezy testified that Defendants would likely be moved to the ADX prison — "the most secure facility the Bureau [of Prisons] has" — which essentially would preclude

them, he contended, from engaging in further dangerous activity. Whatever impact Bezy's testimony had, however, was undercut by a government rebuttal witness named Greg Hershberger, who previously served as the warden at the ADX. Hershberger explained that the goal of the ADX is to prepare inmates to function in the general population of another prison facility. Hershberger further testified that based on their histories, Defendants likely could successfully complete the ADX's transition program and be moved to the general population of another facility."

- United States v. Davis, 609 F.3d 663, 674-675 (5th Cir. 2010). Legally sufficient evidence at resentencing supported future-dangerousness aggravating factor. In 1994, defendant, a corrupt police officer, hired his codefendant, a drug dealer, to kill a woman who had sworn out an internal-affairs complaint against him. Defendant also gave directions, offered advice, and assisted in codefendant's other violent criminal activities around that time. "His leadership role and ability to influence others . . . could easily translate to a penitentiary." Such evidence of past dangerousness "is not negated" by defendant's "violence-free prison record during the 11 years" between his arrest and resentencing," since he was "'on display'" during that period.

- United States v. Fields, 516 F.3d 923, 943 (10th Cir. 2008). Circumstances of the murders themselves were sufficient to support this factor.

- United States v. Ortiz, 315 F.3d 873, 901-902 (8th Cir. 2002). Government presented adequate evidence to support future dangerousness, by proving both of its alleged components, that defendant lacked remorse for his crime and that he had used physical force and threats of violence to collect drug debts and enforce discipline for drug gang prior to the charged murder.

- United States v. Bernard, 299 F.3d 467, 482 (5th Cir. 2002). Government presented sufficient evidence to support future-danger aggravator, including expert psychiatric testimony about defendant's propensity for violence in prison, the "horrific facts" of defendant's participation in the charged crimes, evidence of his gang membership and prior criminal record including participation in at least two dozen burglaries.

e. Standard of Proof

The government usually casts the future-dangerousness aggravator in probabilistic terms, *e.g.*, the defendant "represents a continuing danger to the lives and safety of other persons," is "likely to commit acts of criminal violence in the future," *etc.* See United States v. Whitten, 610 F.3d 168, 203 (2d Cir. 2010) (court did not err in using "likely" rather than "probably" as standard for future dangerousness in jury charge, as two terms are synonymous. And any possible prejudice from prosecutor's supposed dilution of standard in summation was cured by the charge.). But there is a substantial argument, not yet considered by any circuit, that such a construction violates FDPA's reasonable-doubt standard, and that the only valid construction would be one couched in definite terms, *e.g.*, that, if sentenced to life, the defendant "will commit criminal acts of violence in the future in federal prison."

The statutory aggravators listed in FDPA are phrased in such definite terms rather than probabilistic ones. Some of these address whether certain events occurred in connection with the capital crime[22] or whether the defendant has previously been convicted of certain offenses in the past.[23] One of these addresses the defendant's motive for the capital crime.[24] And two others characterize the defendant's conduct in committing the capital crime.[25] Notably, none of the statutory aggravating factors listed in FDPA involve the occurrence (or characterizing) of *future* events.

FDPA provides: "The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt." 18 U.S.C.A. § 3592(c).

Thus, were the government to notice an aggravating factor involving a past event, such as, for example, that the defendant "assaulted Bill Smith in the Atlanta, Georgia on January 5, 2005," it would not be permitted to have the court instruct the jury to find and weigh this factor if jurors found that it was "likely" or

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[22] See 18 U.S.C. § 3592(c)(1), (7), (9), (14), (16).
[23] See 18 U.S.C. § 3592(c)(2)-(4), (10)-(12), (15).
[24] See 18 U.S.C. § 3592(c)(8).
[25] See 18 U.S.C. § 3592(c)(5), (9).

"probably" true, *i.e.*, that the defendant "likely" or "probably" assaulted Bill Smith in the Atlanta, Georgia on January 5, 2005.

It follows that the government also would not be permitted to arrive at this same result by the back-door method of diluting its reasonable-doubt burden of proof by incorporating a "likely" or "probably" standard into the definition of the aggravator itself — *i.e*., that the defendant *"likely/probably* assaulted Bill Smith in the Atlanta, Georgia on January 5, 2005" — and then having the factor weighed in favor of death as long as jurors found, beyond a reasonable doubt, that the defendant "likely" or "probably" committed the assault.

There is no reason why any different rule should apply simply because the government chooses to fashion an aggravating factor involving not *past* crimes, but *future* ones. If the government wishes to obtain a death sentence based on violent acts that a defendant will supposedly commit years from now, it still must satisfy the reasonable-doubt standard required by Section 3593(c). Just as it may not obtain an instruction allowing jurors to find and weigh such an aggravating factor if they determine its existence is "likely" or "probably," true, so the government may not achieve the same result by incorporating a diminished standard of proof into the definition of the aggravator itself. Thus, FDPA does not allow an aggravating factor phrased in terms such as: "The defendant likely/probably will commit criminal acts of violence in prison if not sentenced to death."

The same is true of future-danger aggravators that, while not explicitly using modifiers such as "likely" or "probably," are still couched in probabilistic terms that impermissibly incorporate a diminished standard of proof. Thus, asking jurors to decide whether a defendant "represents a continuing danger to the lives and safety of other persons" would call upon them to decide, not whether the defendant *will* commit acts of violence in prison (with the level of confidence required by the reasonable-doubt standard) but whether he *might*. A person "represents a danger" if there is a *risk* he will be violent. See Merriam-Webster Online Dictionary, 2008 ("danger" defined as "exposure . . . to injury" and as a "case or cause of danger," as in "the dangers of mining").

It does not suffice to instruct jurors that they need to find "beyond a reasonable doubt" a likelihood or probability that a defendant will commit future acts of violence (whether phrased as "he represents a danger" or otherwise). Not only does this fail to alter the inherently diluted standard of proof of an aggravator

so defined. In addition, the very notion of a probability proved beyond a reasonable doubt remains, at its core, "incoherent," as the United States Supreme Court has recognized in a different context: "But to say . . . that one must demonstrate that something is more probably clearly erroneous than not or more probably than not unreasonable is meaningless. *One might as intelligibly say, in a trial court, that a criminal prosecutor is bound to prove each element probably true beyond a reasonable doubt*. The statute is thus incoherent with respect to the degree of probability of error required of the employer to overcome a factual conclusion made by the plan sponsor." Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 625 (1993). Indeed, one could challenge the government to rationally explain: What would it mean to prove a "probability" "beyond a reasonable doubt"? And how would it be different from proving a "probability" to a "probability"?

Case law on the purpose of the reasonable-doubt standard at trial confirms the unacceptability of diluting it at sentencing through a "probably"-type definition of this aggravating factor. "The reasonable-doubt standard . . . . is a prime instrument for reducing the risk of convictions resting on factual error." In re Winship, 397 U.S. 358, 363 (1970). Thus, in charging jurors on the burden of proof beyond a reasonable doubt, a court should "impress[] upon" them "the need to reach a subjective state of near certitude of the guilt of the accused." Victor v. Nebraska, 511 U.S. 1, 15 (1994), quoting Jackson v. Virginia, 443 U.S. 307, 315 (1979). See also Winship, 397 U.S. at 364 (reasonable-doubt standard requires government to "convinc[e] a proper factfinder" of defendant's "guilt with utmost certainty").

It stands to reason that Congress adopted the reasonable-doubt standard for aggravating factors in FDPA because it wanted to ensure that, before any jury weighed a factual allegation in favor of a death sentence, the government had to prove the allegation with "near" or "utmost certainty." Surely Congress chose this stringent standard to try to prevent, as much as reasonably possibly, death verdicts "resting on factual error." Yet allowing a federal defendant to be dispatched to execution because jurors believe it "likely" he will engage in future criminal conduct raises the serious, if not probable specter of just such an error.

Because this argument rests on FDPA, it is not undermined by the fact that some states, like Texas, have death-penalty statutes that explicitly include future-dangerousness aggravating factors phrased in contingent terms (*e.g.*, "likely" or

"probably") similar to the one typically proposed by the government in federal cases.[26] FDPA contains no such statutorily-specified factor and, instead, requires that every aggravator, whether listed in the statute or created by the government, be proven beyond a reasonable doubt.

2. Victim Impact

a. Generally

In Payne v. Tennessee, 501 U.S. 808, 822-827 (1991), the Supreme Court reviewed a capital defendant's challenge to a brief snippet of testimony from a family member that the victim's young son cried for his mother and missed his younger sister, both of whom had been murdered. A divided Court held that this appropriately provided a "'quick glimpse of the life'" of each victim, to ensure she did not become a "faceless stranger" amidst all the mitigating evidence about the defendant. The Court concluded that "a State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." In doing so, the Court substantially overruled Booth v. Maryland, 482 U.S. 496 (1987), which had prohibited all such victim-impact evidence, on Eighth Amendment grounds.

The death-penalty provisions of the Anti-Drug Abuse Act, 21 U.S.C. 848, enacted in 1988, had made no mention of victim-impact evidence. But FDPA, enacted three years after Payne, did. In permitting the government to notice additional aggravating factors, beyond those specified in the statute, FDPA says that these,

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[26] A defendant in a state like Texas cannot claim that such contingent terms undermine a *statutory* reasonable-doubt standard, since the legislature in such a state obviously intended the contingent phrasing (and that it coexist, somehow, with the reasonable-doubt standard). See Sosa v. State, 769 S.W.2d 909, 916-17 (Tex. Crim. App. 1989). And where Texas defendants have raised *constitutional* challenges to such statutes (*i.e.*, by claiming that the contingent phrasing undermines a reasonable-doubt standard required by the Federal Constitution), the courts evidently have found that the Federal Constitution does not require proof beyond a reasonable doubt of a non-eligibility factor. See, e.g., Turner v. Quarterman, 481 F.3d 292, 299 (5th Cir. 2007); Rayford v. State, 125 S.W.3d 521, 533 (Tex. Crim. App. 2003).

> 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.

18 U.S.C. § 3593(a).

The Supreme Court reviewed a victim-impact aggravator in a FDPA case in Jones v. United States, 527 U.S. 373, 400-401 (1999). There, in an opinion joined only by four justices,[27] it found that the factor of the victim's "personal characteristics and the effect of the instant offense on [her] family" was not unconstitutionally vague or overbroad. The jury, Justice Thomas wrote, would have understood that it was being asked to consider "the victim's personal traits and the effect of the crime on her family." See also United States v. Bourgeois, 423 F.3d 501, 510 (5th Cir. 2005); United States v. Barnette, 211 F.3d 803, 817 (4th Cir. 2000).

b. Prohibition on Characterizations of the Defendant or the Crime and on Opinions About Punishment

Payne expressly declined to overrule existing law that "a victim's family members' characterizations and opinions about the crime" and about "the defendant . . . violates the Eighth Amendment." It also left intact the prohibition on characterizations and opinions about "the appropriate sentence."

Courts of appeal in FDPA cases have acknowledged this continuing prohibition, although they have been unwilling to find the admission of such evidence to be harmful or plain error:

- United States v. Bernard, 299 F.3d 467, 479-480 (5th Cir. 2002). (1) Court is "troubled" that one victim's mother "addressed" defendants during her victim-impact statement, "warned them that heaven and hell are real, and

[27] On this issue, Justice Thomas wrote not for the Court but for himself and three other justices. Four other justices joined a dissenting opinion on this issue. Justice Scalia, who joined Justice Thomas's opinion on several other issues, did not join the section of the opinion that addressed this issue.

called on them to put their faith in Jesus Christ for the forgiveness of their sins." While such evidence "might have been excluded upon timely objection," it did not violate defendant's substantial rights and thus did not rise to plain error. Neither the witness nor the prosecutor urged jurors to use a religious standard in reaching their verdict. (2) Comments by another victim-impact witness that characterized defendants and offered opinions about the nature of their crime were inadmissible, but did not give rise to plain error, since comments were brief and district court instructed jurors not to be swayed by passion, prejudice or sympathy.

- United States v. Mitchell, 502 F.3d 931, 989 (9th Cir. 2007). No error in victim-impact testimony that maternal side of victim's family was responsible for teaching children about Navajo heritage and passing down practices. But testimony that characterized defendant as being disrespectful of Navajo Culture was error, though not prejudicial since it was brief and isolated.

- United States v. Barrett, 496 F.3d 1079, 1100 (10th Cir. 2007). No error where sentence from a note written by victim's daughter ("I wish Kenneth Barrett could just have gone to jail with my dad rather than shooting my dad because now he's in jail and I don't have my dad") was briefly projected on a screen for jury to read, but district court made factual finding that it was unlikely jurors had read the sentence.

- United States v. Barnette, 390 F.3d 775, 800 & n.7 (4th Cir. 2004). No due process violation from outburst by victim's mother during her testimony in which, addressing defendant by name, she said he knew victim was "joy of my life. The only little girl I had . . . . You know how much she meant to me . . . . How can you kill my baby?" Given "strong evidence of the brutal nature" of the murder, these "few sentences" did not violate fundamental fairness. Court notes that no objection was made at time of outburst and defense did not file mistrial motion until several days later, vacated on other grounds, 546 U.S. 803 (2005).

See also United States v. Lighty, 616 F.3d 321, 361 (4th Cir. 2010) (during penalty-phase closing arguments, the AUSA twice informed the jurors that the victim's family was asking for a sentence of death; "there is little doubt that the statements were improper," both because the statements were without record

support and because such evidence would have been inadmissible under Booth and Payne).

Judge Sand's pattern instructions also call for jurors to be charged that "because the law does not permit any witness to state whether he or she personally favors or opposes the death penalty in this case, you should draw no inference either way from the fact that no witnesses have testified as to their views on this subject." 1 Leonard B. Sand, *et al.*, Modern Federal Jury Instructions — Criminal, Inst. 9A-4 (2008). Judge Sand's comment explains that this instruction "directs the jury that the witnesses' views on the death penalty are not relevant to the jury's deliberations. This instruction is particularly important to help guide a jury when the government has presented victim impact testimony, given the often emotional or inflammatory nature of this testimony." Id. But see United States v. Whitten, 610 F.3d 168, 192 (2d Cir. 2010) (no error in denying instruction that jurors should not infer or consider sentencing preference of victims' relatives).

c. Prohibition on Non-"Family" Impact

Neither the Supreme Court nor most of the circuits have decided whether FDPA or the Eighth Amendment permit victim-impact evidence beyond family impact, *i.e.*, the effects of the victim's death on his relatives and, relatedly, the victim's personal characteristics. This is an issue in cases where the government seeks to present evidence or argument about the impact of the victim's death on co-workers or on the larger society, or, relatedly, about the victim's positive contributions through his work or in the community.[28]

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[28] It may also relate to whether the defendant possesses a corellative right to present evidence about a victim's negative effect on society — *i.e.*, bad acts by the victim, even if the defendant was unaware of them and even if they significantly predated the crime. Several district courts have rejected such evidence. See, e.g., United States v. Caro, 461 F. Supp. 2d 459, 463-64 (W.D. Va. 2006) (granting government's motion to preclude defendant from arguing "that he is undeserving of the death penalty solely because the victim was a fellow inmate"); United States v. Beckford, 962 F. Supp. 804, 822 (E.D. Va. 1997) ("Payne cannot be read to sanction a defense argument that a defendant is undeserving of the death penalty simply because his victim was a drug dealer"). Moreover, the government has fought hard in other cases to keep it out, arguing that the sentencing jury should not be asked to pass on the "worth" of the victim's life. See, e.g., Government Motion in Limine (to exclude evidence of victims' pedophilia), United States v. Brian Richardson, No. 1:08-cr-139, ECF #309, slip op. at 13-14 (N.D. Ga. July 8, 2010). But the government cannot have its cake and eat it too. If such defense evidence is

Payne v. Tennessee, 501 U.S. 808 (1991), rejected the criticism that victim-impact evidence "permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy." It elaborated:

> [V]ictim impact evidence is not offered to encourage comparative judgments of this kind — for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim's "uniqueness as an individual human being," whatever the jury may think the loss to the community resulting from his death might be.

Id. at 823 (citation omitted).

Notably, in the paragraph of the majority opinion that begins, "We thus hold," the court identified the impact evidence deemed constitutionally admissible as that of the murder "on the victim's family." Id. at 827. Nevertheless, certain language used by the majority and concurring opinions could be read as suggesting approval of a broader range of evidence. See id. at 822 ("loss to the victim's family *and to society*") (emphasis added); id. at 830, 832-33 (O'Connor, White & Kennedy, JJ., concurring) (twice using phrase, "impact on the victim's family *and community*") (emphasis added).

Against this backdrop, Congress enacted FDPA in 1994, three years after Payne. Perhaps because Payne had expressed concern about "comparative judgments" and phrased its actual holding in terms of only family impact, FDPA followed suit, limiting the scope of this factor to the crime's effect on the victim's family: In permitting the government to notice additional aggravating factors, beyond those specified in the statute, FDPA states that these,

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inadmissible, then so is aggravating evidence about the victim's positive "worth" outside his family (*i.e.*, to society).

> may include factors concerning the effect of the offense on *the victim*[29] *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.

18 U.S.C. § 3593(a) (emphasis added). See also House Report No. 103-467 [H.R. 4035], 103rd Cong., 2d Sess. (Mar. 25, 1994), 1994 WL 107578 ("Subsection 3593(a) adds another aggravating factor: the effect of the offense on the victim and the victim's family").[30]

As for the remainder of the statutory language quoted, this does not appear intended to expand the range of permissible *subjects* of victim-impact evidence. Rather, it appears to address only the *forms* such evidence may take, *i.e.*, "oral testimony," a "victim impact statement," or "other . . . information" that is "relevant" to family impact. This last form may include, for example, photographs, or letters or journals from family members.[31] See, e.g., United States v. Chanthadara, 230 F.3d 1237, 1274 (10th Cir. 2000). But see United States v. Sampson, 335 F. Supp. 2d 166, 191-193 (D. Mass. 2004) (excluding evidence of memorial video for one of the victims).

Thus, in defining the kind of impact that may be treated as an aggravating factor, Congress did not include the effect of the offense on friends, colleagues,

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[29] The reference to the effect on "the victim" would appear to apply to cases involving harm done prior to death (*e.g.*, rape or torture) or perhaps after death (*e.g.*, dismemberment). See, e.g., United States v. Mitchell, 502 F.3d 931, 977 (9th Cir. 2007).

[30] H.R. 4035 together with H.R. 4032 "ultimately became (with a few amendments) the Federal Death Penalty Act." Rory K. Little, The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role, 26 Fordham Urb. L.J. 347, 386 (1999).

[31] Indeed, as to a "victim impact statement," the statute repeats the limitation expressed in the first part of the subsection, noting that such a statement may "identif[y] . . . the injury and loss suffered by the victim and the victim's family." Section 3593(a). It would make no sense to construe the statute to allow "oral testimony" or other forms of "information" to cover a far-ranging array of effects (*e.g.*, on colleagues and the community), while limiting only "statements" to family impact. Moreover, such a reading would effectively erase most of the provision's language, essentially rewriting it to say: "may include any relevant information about the effect of the offense."

groups or institutions in the community, or society as a whole.[32] Presumably, Congress would have added this had it intended to allow (and thought Payne permitted) a broader scope of aggravating evidence on this issue. Cf. Ga. Code Ann. § 17-10-1.2 (authorizing evidence of "impact of the crime on . . . the victim's family or the community").

Nor does Section 3593 independently allow evidence about the victim's larger accomplishments or worth. Rather, the victim's personal characteristics are logically admissible only to the extent they influenced, and thus reveal something about, the relationships he had with his "family"; in that regard, they help show the "effect" that losing the victim had on those relatives. See Jones v. United States, 527 U.S. 373, 399 (1999) ("'personal characteristics'" of the victim, as used in victim-impact aggravating factor, "refer[red] to those aspects of the victim's character and personality that her family would miss the most").

Thus, for example, evidence that the victim was a loving father would be admissible under the statute to show the harm that his murder caused to his teenage son. But the same would not be true of evidence that, in his professional life, the victim was an exceptional doctor, engineer, soldier, or judge, or held some other position that contributed greatly to people or institutions outside his family or to the community in general.

Again, had Congress wished to permit (and thought Payne allowed) a broader range of evidence about a victim's character or achievements, untethered to "family" impact, it would have spelled this out in the statute. Cf., N.J.S.A. 2C:11-3c(6) ("[T]he State may present evidence of the murder victim's character and background and of the impact of the murder on the victim's survivors.").

Even were it "plausible" to construe Section 3593 as allowing evidence beyond family impact, such an extension would raise serious constitutional questions under Payne's prohibition on "comparative judgments."

The Supreme Court has not addressed these issues, and there is some division in the lower courts on them. The Tenth Circuit recently noted it was "not

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[32] This is not to say the statute precludes evidence *from* non-family members about the crime's impact on the victim's relatives.

aware of any precedent approving . . . an inquiry" into "the impact of the victim's death on the community at large" or the "impact on the victim's co-workers." United States v. Fields, 516 F.3d 923, 946-47 (10th Cir. 2008). And it refused to approve either.

It found that professional impact on colleagues was "very far afield from the personal loss" suffered by a family member:

> [A]s to co-workers *per se*, a victim-impact inquiry would have a qualitatively different character. The loss of a co-worker in this sense, for example, the loss of her contribution to an office, unit or team . . . is very far afield from the personal loss discussed in cases following the Supreme Court's initial approval of victim-impact evidence from family members in Payne . . . . Without additional guidance from the Court encouraging further expansion of the victim-impact inquiry, we are not willing to extend it to the impersonal utilitarian considerations included within the idea of a loss to co-workers.

Id.

The Tenth Circuit was even more dubious about evidence of "impact on the community," saying this would involve a "radical change" from family impact:

> Including the community in the victim-impact inquiry is fraught with complication. It would involve not just the incremental extension from family to friends (and even to co-workers), but radical change in perspective: replacing a close-in focus on persons closely or immediately connected to the victim with a wide view encompassing generalized notions of social value and loss. Even if justified in principle, such an approach would be difficult to delimit and police to ensure it stayed within proper bounds. And there is no guidance to be gleaned from the case law, which is still on the first step of extending the victim-impact inquiry from family to friends. Lacking clear direction from the Supreme Court, we do not approve further expansion of the inquiry to the community.

Id.

Accordingly, the Tenth Circuit in Fields "determined that the District Court erred in including co-workers and the community in the victim impact inquiry."[33]

Fields substantially retreated from an earlier decision by the Tenth Circuit, United States v. Barrett, 496 F.3d 1079 (10th Cir. 2007). There, said Fields, it had "rejected . . . an objection" under Section 3593 to some testimony "regarding impact on a victim's friends," suggesting that the statute's reference to "other relevant information" meant the government was not strictly limited to family impact. Fields, 516 F.3d at 946-47, citing Barrett, 496 F.3d at 1098-99. "But we did not consider an extension of the inquiry to co-workers and community." Fields, 516 F.3d at 946-47. Though, in Barrett, one of the two friends of the state-trooper victim who had testified was a colleague, "the defendant's challenge was framed solely in terms of 'testimony from friends' of the victim" and "we did not invoke the friend's status as a co-worker in our analysis approving admission of the testimony." Fields, 516 F.3d at 946-47.

By contrast, the Second, Fourth, and Sixth Circuits have rejected such a claim. See United States v. Whitten, 610 F.3d 168, 187-190 (2d Cir. 2010). (evidence about impact of crime, the murder of two police detectives, on their coworkers, and about how victims were heroic individuals who loved their work and inspired other officers, violated neither Payne v. Tennessee nor victim-impact provision of Federal Death Penalty Act. Nor was brief reference to societal harm impermissible); United States v. Runyon, 707 F.3d 475, 500-01 (4th Cir. 2013) (prosecution permissibly used the effect of naval officer's death on his friends and shipmates and his professional accomplishments as part of the aggravating factor of victim impact); United States v. Lawrence, 735 F.3d 385, 406 (6th Cir. 2013) (no error in admitting victim-impact evidence from friends, including one who was co-worker of the murdered police officer, though "some of government counsel's closing argument remarks were questionable, suggesting that others, who did not testify, were affected by Hurst's death"). And the Eleventh Circuit has approved the presentation of evidence about the harm suffered by others involved in the victim's profession or by the community he and his colleagues served. See United States v. Battle, 173 F.3d 1343, 1348-49, 1350-51 (11th Cir. 1999) (approving testimony by three prison guards that defendant's murder of guard at federal

[33] The court found the error harmless because the objectionable testimony came from a single co-worker, concerned the "loss of [his] friend," and the government did not argue professional- or community-impact in summation. Id. at 947-48, 950.

penitentiary had undermined prison discipline, and that failure to impose death sentence would undermine it further). But that court never even mentioned Section 3593, let alone addressed its limiting language on victim impact.

Moreover, Battle did not involve evidence of the victim's professional accomplishments or special value to society. The only case that even approaches licensing anything akin to that is United States v. Bernard, 299 F.3d 467, 478-80 (5th Cir. 2002). There, four relatives and a friend testified at the sentencing hearing, without objection, about the victims' religious beliefs and activities as youth ministers. Reviewing for plain error, the Fifth Circuit found that this was "contextual evidence," since the trial had showed the victims were attending a church revival meeting on the day they were murdered and had discussed the meeting and their religion with the defendants just before they were killed. The court added — in dicta and, like Battle, without confronting the limiting language of Section 3593 (or Payne's prohibition on "comparative judgments") — that the testimony was also "relevant to the community's loss at their demise." Id. at 477-80.

d. Prohibition on Consideration of Victim's Religious Beliefs or Practices

In some cases, government victim-impact testimony has touched on the victim's religious devotion or practices. See, e.g., United States v. Bernard, 299 F.3d 467, 478-80 (5th Cir. 2002). Though no court has addressed the issue, this arguably violates FDPA's anti-discrimination provision. 18 U.S.C. § 3593(f). It requires the district court to instruct the jury "that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant *or of any victim* and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be."

One court has applied this provision to exclude certain evidence because it risked prejudicing the jury against the *defendant* on the basis of his ethnicity. United States v. Taveras, 585 F. Supp. 2d 327, 339 (E.D. N.Y. 2008) (prohibiting government from asking jury to find that defendant was member of allegedly violent prison gang that was composed primarily of Dominicans in support of future-dangerousness aggravator). By the same logic, courts should forbid

evidence or argument inviting jurors to consider the victim's religious beliefs, national origins, or some other attribute covered by the anti-discrimination provision, as part of a victim-impact aggravating factor and thus in favor of a death sentence. Moreover, such evidence or argument arguably would violate due process. See South Carolina v. Gathers, 490 U.S. 805, 821 (1989) (O'Connor and Kennedy, JJ, and Rehnquist, CJ, dissenting) ("It would indeed be improper for a prosecutor to urge that the death penalty be imposed because of the race, religion, or political affiliation of the victim").

e. Prohibition on Family Problems Attenuated From the Crime or Lacking a Presumptive or Demonstrated Nexus to the Crime

Victim impact evidence is relevant to assess "the defendant's moral culpability and blameworthiness," but only if the proffered evidence shows "the specific harm caused by the defendant." Payne, 501 U.S. at 825. See also id. at 838 (Souter and Kennedy, JJ., concurring) (victim impact involves "the kinds of consequences" to victim's family "that were obviously foreseeable," and thus have "direct moral relevance" to offender's culpability). The impact described in Payne had an obvious, immediate, and direct link to the capital offense: The jury heard that a young boy, who himself had been stabbed during the crime, cried and asked for his murdered mother and sister. Id. at 826. Thus, the Supreme Court had no occasion to identify an outer limit on what problems or suffering sustained by a victim can deemed harm caused by a murder, or when such problems or suffering are too attenuated from the crime to be relevant to the defendant's moral culpability.

But, under the logic of Payne a defendant is "not responsible for a never-ending chain of causes and effects." United States v. Witt, 21 M.J. 637, 640 n. 3 (ACMR 1985). See also Kelly v. California, 129 S.Ct. 567, 568 (2008) (Breyer, J., dissenting from denial of certiorari) ("minimal probity coupled with" victim impact evidence's "emotional impact . . . may call due process protections into play."). Not every problem or form of suffering a victim's relative experiences in the years following a murder can automatically be deemed an effect of the crime, and thus to be considered by the jury in favor of a death sentence. That is particularly true where the government offers no expert or other evidence supporting such an attribution.

Some lower-court authorities on the issue have drawn a line excluding attenuated effects. See People v. Carrington, 211 P.2d 617, 658 (Cal. 2009) (prosecutor properly agreed not to argue that victim's death caused her mother to die prematurely and her father to suffer a stroke, and that such an inference would not be appropriate; when witness later noted mother's death and added, "I think the loss of her daughter took its toll," court properly "admonished the witness . . . stating that 'this is an area we can't speculate about'"); State v. Young, 196 S.W.3d 85, 101 (Tenn. 2006) (court erred in admitting evidence that one of the victim's friends had been in therapy since the murder and was at apparent risk of suicide); State v. Koskovich, 776 A.2d 144, 216 (N.J. 2001) (Zazzali, J., concurring) ("The link between the potential of the victim's father suffering a car accident on U.S. Interstate 80 and the victim's murder is extremely attenuated. Suggesting that the defendant will bear the responsibility for future harms that may befall the victim's family is, in my view, the sort of speculation that lies well beyond the appropriate boundaries of victim impact statements."). See also United States v. Rust, 41 M.J. 472, 478 (1995) (in non-capital case, finding that murder-suicide of mother and boyfriend, following negligent act by defendant that led to the death of their baby, was too indirect to be used in aggravation).

Indeed, in the civil context, some additional proof of a nexus to the crime is required to prove that certain kinds of damages resulted from an injury. See Price v. City of Charlotte, 93 F.3d 1241, 1251-52, 1256-57 (4th Cir. 1996) (plaintiff "must demonstrate a causal connection between the constitutional violation and their demonstrable emotional distress to recover compensatory damages"; award reversed because plaintiffs failed to prove that their emotional distress stemmed from the invidious discrimination); Knussman v. Maryland, 272 F.3d 625, 641 (4th Cir. 2001) (cutting damages award, in part because "[t]he nexus . . . between Mullineaux's unconstitutional conduct and Knussman's emotional injuries is attenuated . . . . the evidence linked a large portion of Knussman's emotional difficulties to the litigation of this action . . . rather than Mullineaux's unconstitutional conduct").

f. Prohibition on Inflammatory or Other Unduly Prejudicial Evidence

By its nature, victim-impact testimony risks overwhelming a jury. The Supreme Court has recognized that such evidence, and accompanying argument, "can of course be so inflammatory as to risk a verdict impermissibly based on

passion, not deliberation." Payne v. Tennessee, 501 U.S. 808, 836 (1991) (Souter and Kennedy, JJ., concurring). Thus, lower courts should be careful not to "cross[]" the "line" into "inflammatory" evidence that would render a capital sentencing hearing "fundamentally unfair." 501 U.S. at 831 (majority opinion). Accord id. at 836 (noting "trial judge's authority and responsibility" to "guard against the inflammatory risk") (Souter and Kennedy, JJ., concurring). See also United States v. Fell, 531 F.3d 197, 239 (2d Cir. 2008) (noting that "victim-impact evidence . . . can sometimes be unduly prejudicial" and "inflammatory").

An experienced district judge has described how, at a federal capital trial, victim-impact evidence, when "observed first hand, rather than through review of a cold record," has an "unsurpassed emotional power . . . on a jury," even when prosecutors use "restraint in terms of the scope, amount, and length":

> I can say, without hesitation, that the "victim impact" testimony . . . was the most forceful, emotionally powerful, and emotionally draining evidence that I have heard in any kind of proceeding in any case, civil or criminal, in my entire career as a practicing trial attorney and federal judge spanning nearly 30 years . . . . To pretend that such evidence is not potentially unfairly prejudicial . . . is simply not realistic. . . .

United States v. Johnson, 362 F. Supp. 2d 1043, 1107 (N.D. Iowa 2005).

Indeed, even in the Oklahoma City bombing case, where the extraordinary nature of the crime and number of victims occasioned an unprecedented victim-impact presentation, the district court still disallowed "non-objective emotional testimony" — testimony about "the emotional aspect" of each family's loss, particularly "the grieving process, the mourning process." And it prohibited the introduction of wedding photographs and home videos. United States v. McVeigh, 153 F.3d 1166, 1221-22 (10th Cir. 1998). See also United States v. Sampson, 335 F. Supp. 2d 166, 190 (D. Mass. 2004) (court warned jury not to "permit the victims' families' testimony to overwhelm your ability to follow the law").

Nevertheless, the circuits have thus far repeatedly rejected appellate claims that the victim-impact presentation in a particular case crossed this line:

- United States v. Whitten, 610 F.3d 168, 190-191 (2d Cir. 2010). Victim's widow's emotional testimony, including description of how children visited cemetery on Father's Day and hugged tombstone, was not too inflammatory. No error in refusing to repeat (in final charge) instruction telling jurors not to let emotional victim-impact evidence overwhelm them.

- United States v. Rodriguez 581 F.3d 775, 779 (8th Cir. 2009). No error in testimony by six witnesses, including about victim's good nature, popularity, and relationship with her brother; her sorority sisters' reactions when her body was found; a non-family member's impressions about the effect of the crime on the family; her father's testimony about last time he saw his daughter, his not working for five months during search for her body; and her stepfather's testimony about impact of crime on him and his wife, including work-related disruptions. Though some of the testimony was emotional, it was, "on the whole, factual." Moreover, district court did not allow "statements of love or emotion."

- United States v. Bolden, 545 F.3d 609, 626-627 (8th Cir. 2008). No showing jury was inflamed by testimony from 16 witnesses, which constituted 80 percent of government's penalty-phase presentation, and which included tape of victim's girlfriend's 911 call requesting police escort to hospital on afternoon he was killed, resolutions in victim's honor by state house of representatives and city board of alderman, and testimony from co-worker who ran to assist dying victim and testified about impact of that experience on his own life.

- United States v. Barrett, 496 F.3d 1079, 1099-1100 (10th Cir. 2007). No plain error in admitting victim-impact testimony from victim's widow, mother, and sister about his personal characteristics, their relationships with him, and personal impact of his death on them, or in admitting four family photographs.

- United States v. Johnson, 495 F.3d 951, 976-977 (8th Cir. 2007). No error in allowing victim's brother to read poem written by child friend of victim. Government presented only six victim-impact witnesses whose testimony lasted only two hours.

- United States v. Fulks, 454 F.3d 410, 435-436 (4th Cir. 2006). Defendant's due process rights were not violated by allowing victim's sister to read aloud a letter she had received from victim, 12 years before her murder, concerning past abuse of them by their father and victim's desire to leave her abusive husband.

- United States v. Barnette, 390 F.3d 775, 818 (4th Cir. 2004). No due process violation from victim-impact evidence, including 16 photographs of different phases of victim's life.

- United States v. Nelson, 347 F.3d 701, 713-714 (8th Cir. 2003). Victim-impact testimony, comprising approximately 101 of the more than 1100 pages of trial transcript and consisting of statements by victim's sisters, mother, classmate, friend, and teacher, was not so unduly prejudicial as to render capital defendant's murder trial fundamentally unfair, particularly in light of defendant's presentation of mitigating evidence on his own behalf, including testimony from a psychologist, his mother, brothers, aunts, and numerous other witnesses.

- United States v. Allen, 247 F.3d 741, 778-779 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002). No plain error in allowing 11 victim-impact witnesses to testify where testimony took less than a day and there was no allegation of prejudice from any specific testimony.

- United States v. Chanthadara, 230 F.3d 1237, 1274 (10th Cir. 2000). Victim-impact evidence was not unduly prejudicial, though jury heard testimony from victim's husband and two children, ages seven and ten; husband's testimony was amplified with numerous colored photographs of wife while she was alive; both children ended their testimony in tears; and jury was also allowed to take into the jury room physical evidence of the impact of victim's death on her children including letters the children had written to their dead mother and a daily journal which described one child's loss.

- United States v. Paul, 217 F.3d 989, 1002 (8th Cir. 2000). Volume and emotional impact of victim-impact evidence did not render sentencing hearing fundamentally unfair and so did not violate Constitution.

- United States v. Barnette, 211 F.3d 803, 818-819 (4th Cir. 2000). Victim-impact evidence did not violate due process; even if it exceeded "quick glimpse of the life" of the victim, it included only 7 of 23 prosecution witnesses and 22 percent of total case in aggravation at sentencing phase, and defendant called 23 mitigation witnesses including 10 who testified about his difficult childhood.

- United States v. McVeigh, 153 F.3d 1166, 1219-1222 (10th Cir. 1998). No error in admission of victim-impact testimony, including evidence of survivors' last contacts with victims, efforts to discover fate of victims, victim histories, and love and innocence of children affected by the bombings.

- United States v. Hall, 152 F.3d 381, 404-405 (5th Cir. 1998). "The victim impact statements admitted here were not so unduly prejudicial that they rendered the trial fundamentally unfair. By and large, the statements did nothing more than generally describe [victim's] character and her aspirations of becoming a doctor as well as the pain that her family members felt as a result of her senseless death."

g. Prohibition on Victim Impact For Crimes Other than the Capital Murder

Two district courts have held that the government is limited to victim impact regarding the victim of the capital murder, and may not introduce victim impact for the defendant's other crimes, even if evidence about his commission of those crimes is otherwise admissible. See United States v. Sampson, 335 F. Supp. 2d 166, 193 (D. Mass. 2004); United States v. Gooch, 2006 WL 3780781, at *21-22 (D.D.C. Dec. 20, 2006).

h. Defense Rebuttal

In United States v. Hardy, 2008 WL 1776447, at *2 (E.D. La. Apr. 15, 2008) (unpublished), the district court granted a defense request to be able to rebut victim-impact with evidence that the government's decision to pursue the death penalty had caused emotional distress to the victim's family, and that the victim's family members did not want the government to pursue death penalty.

i. Procedures for District Courts to Preview and Confine Victim Impact

Several district courts have adopted procedures to enable them to vet the government's victim-impact presentation in advance, and ensure that it is kept within legal limits:

- United States v. Henderson, 485 F. Supp. 2d 831, 849-850 (S.D. Ohio 2007). Court reviewed proposed victim-impact statements, redacted them, and had witnesses read them to jury without deviation. Government agreed to instruct witnesses to refrain from excessive emotion.

- United States v. Glover, 43 F. Supp. 2d 1217, 1221-22 (D. Kan. 1997). Court agrees to strictly limit victim impact by requiring that: all testimony be reduced to writing, which court will review in advance; victim's family be informed by court that they may not testify if unable to contain emotions; and court will remind witnesses that they may not present characterizations or opinions about the defendant, the crime, or the appropriate sentence. Court declines defendant's request that witnesses be permitted only to read their previously approved testimony.

- United States v. Solomon, 513 F. Supp. 2d 520, 535 (W.D. Pa. 2007). Directing government to provide preview of victim-impact evidence it intended to offer at trial so court could carefully review it and exclude evidence that is more prejudicial than probative.

3. Other Crimes or Misconduct

a. General Legality and Reliability

Several circuits have approved, in principle, the government's use of another crime or crimes — either as a free standing nonstatutory aggravating factor or in

support of a broader future-dangerousness aggravator[34] — in the face of challenges to the statutory legality or reliability of such evidence:

- United States v. Runyon, 707 F.3d 475 (4th Cir. 2013). Though defendant raised legitimate questions about the reliability of the government's witnesses to alleged unadjudicated acts of domestic violence, those were questions for the jury.

- United States v. Gabrion, 648 F.3d 307, 348 (6th Cir. 2011), modified on other grounds, 719 F.3d 511 (6th Cir. 2013) (*en banc*). The Constitution is not violated by the admission of unadjudicated crimes in aggravation.

- United States v. Lujan, 603 F.3d 850 (10th Cir. 2010) (2-1, Henry dissenting). On government's interlocutory appeal, reversing district court's exclusion of two unadjudicated murders as nonstatutory aggravating evidence at the sentencing hearing. The evidence would not impinge on the defendant's presumption of innocence, for he enjoyed no such presumption as to other-crimes evidence at sentencing. The gruesome nature of the unadjudicated crimes was not a reason for keeping them out; "a defendant should not benefit from the grisly nature of his acts." And while the district court correctly identified a risk of juror confusion, since the government sought to use the other murders to prove future dangerousness, but not as independent aggravation, the court "overstated" this concern. Limiting instructions would suffice. Id. at 855-860. In dissent, Judge Henry, while noting that the admission of unadjudicated-crimes evidence in a capital sentencing "has troubled jurists for some time," acknowledged that it was generally admissible. But, he said, the district court expressed a valid concern that jurors might confuse the issue and not limit their consideration of the unadjudicated murders to future dangerousness. Moreover, the local district judge has a better feel of the case and of the local community that

[34] In two cases, the Fifth Circuit has rejected claims that the jury may not consider a prior crime in support of future dangerousness unless it first determines, to some standard of proof, that the prior crime was committed. Instead, said that court, it is enough that the jury be told to determine the overall future-dangerousness factor beyond a reasonable doubt. United States v. Webster, 162 F.3d 308, 320-321 (5th Cir. 1998); United States v. Hall, 152 F.3d 381, 403-404 (5th Cir. 1998).

informed his discretion and judgment about what impact this evidence would have on jurors. Id. at 862-864.

- United States v. Bolden, 545 F.3d 609, 624-625 (8th Cir. 2008). Government properly relied on noncapital offenses (bank-robbery conspiracy, felon-in-possession, and prior conviction for resisting arrest) to establish "other criminal activity" aggravator.

- United States v. Barnette, 390 F.3d 775, 809-810 (4th Cir. 2004), vacated on other grounds, 546 U.S. 803 (2005). Rejecting argument that evidence of unadjudicated crimes caused jury to render death verdict based on passion, prejudice, or arbitrary factors. (Evidence was legitimately offered to prove future-danger aggravator, though jury did not find that factor proven beyond a reasonable doubt).

- United States v. Higgs, 353 F.3d 281, 322-323 (4th Cir. 2003). Neither FDPA nor Constitution forbade government from relying on unadjudicated crimes in aggravation, to prove nonstatutory aggravating factor of obstruction of justice.

- United States v. Allen, 247 F.3d 741, 789-790 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002). Use of "other criminal acts" factor was not precluded just because six of the statutory aggravating factors listed in FDPA are based on prior criminal conduct.

- United States v. Webster, 162 F.3d 308, 320-321 (5th Cir. 1998). Evidence of unadjudicated offenses was sufficiently reliable where it was based on first-hand observation, defense had opportunity to confront witnesses, defense had advance notice of the evidence, and several of the incidents were corroborated.

- United States v. Hall, 152 F.3d 381, 403-404 (5th Cir. 1998). The Constitution does not prohibit use of unadjudicated offenses in aggravation.

See also United States v. Davis, 609 F.3d 663, 678-687 (5th Cir. 2010). No plain error in admission of testimony that codefendant had prior murder cases and reputation as a killer; this was relevant to show defendant's knowledge of his activities, and to rebut residual doubt. No plain error in prosecutor's improper

"Would it surprise you?"-type cross-examination questions, suggesting that arrests of defendant and codefendant explained drop from 23 to 4 in annual murder rate in local housing project where they operated. District court's admonitions to prosecutor to refrain from such questioning alerted jury to improper nature of the remarks, obviating need for defense objection or curative instruction. Moreover, general line of questioning was appropriate, since witness, a defense expert on effects of trauma and stress on police officers, testified on direct that defendant was a product of the violent atmosphere in which he worked. Finally, ample evidence supported prosecutor's summation comments that defendant had acted as "godfather to a hit squad."

In rejecting a challenge to evidence of an unadjudicated murder, however, the Seventh Circuit emphasized that the district court had held a two-day long hearing to determine the reliability of the evidence. United States v. Corley, 519 F.3d 716, 723 (7th Cir. 2008). The district court's published decision describes more fully the strictures it imposed on this evidence. United States v. Corley, 348 F. Supp. 2d 970, 973-980 (N.D. Ind. 2004) (ordering that (1) standard for admissibility would be whether a reasonable jury could find beyond a reasonable doubt that defendant committed the murder; (2) if evidence was admitted, jury would be instructed to consider it only if it was proven beyond a reasonable doubt; and (3) government could not meet burden at hearing with hearsay testimony (*i.e.*, summary testimony from law enforcement officers), but would have to present live witnesses at hearing). For another, similar decision, see United States v. Beckford, 964 F.Supp. 993, 999-1000 (E.D. Va. 1997) (unadjudicated criminal conduct may only be presented to sentencing jury if district court first determines it meets threshold level of reliability. Accordingly, government would be required to submit detailed proffer of the evidence before sentencing hearing begins, and defendant permitted to brief and argue opposition to its admission. Court would determine whether jury could reasonably find, by a preponderance, that act occurred, that defendant committed it, and that it was probative).

One district court did exclude evidence of four unadjudicated murders attributed to the defendant because its prejudicial impact outweighed its probative value. The underlying facts of the crimes were inflammatory, the crimes were based on fact patterns similar to the capital charge, and the evidence for them came primarily from accomplices and cooperators. United States v. Gonzalez, 2004 WL 1920492, at *7-8 (D. Conn. Aug. 17, 2004) (unpublished). See also United States v. Rodriguez, 2006 WL 487117, at *3-5 (D. N.D. Feb. 28, 2006) (unpublished)

(prohibiting government from presenting aggravating evidence about prior sexual assault and kidnapping for which defendant was tried and acquitted in state court).

b. Excluding Certain Other Crimes or Misconduct as Insufficiently Relevant[35]

In a number of cases, courts have excluded or disapproved the admission of certain prior crimes, either as independent nonstatutory aggravators or as support for future dangerousness, on the ground that the crimes were not sufficiently probative because they were too trivial, too remote, or incapable of repetition in a prison setting:

- United States v. Pleau, 2013 WL 1673109, at *5 (D.R.I. Apr. 17, 2013) (unpublished). "The government does not allege that the burglary involved any violence or threat of violence against the person. Absent such an allegation, this incident is not sufficiently relevant to the determination of whether Pleau should live or die to be considered by the sentencing jury."

- United States v. Johnson, 915 F. Supp. 2d 958, 1014, 1019 (N.D. Iowa 2013) (unpublished). Incidents of defendant's perjury before grand jury and "single instance of drug dealing" were not sufficiently relevant to death sentence decision to be admissible.

- United States v. Jacques, 2011 WL 1675417, at *23 (D. Vt. May 4, 2011) (unpublished) ("[T]he non-statutory aggravating factors pertaining to Jacques' alleged 'manipulation and deception of the Vermont criminal justice system,' to 'witness elimination,' and to unadjudicated allegations of sexual misconduct from the 1970s and 1980s [are] struck from the notice of intent." (1) Most offenders try to convince authorities they are rehabilitated and should be released; even if dishonest, such efforts are not particularly relevant to death-worthiness. Moreover, this aggravator might "incorrectly suggest to the jury that, if not given the death penalty, the defendant might have the opportunity to be released from prison again." (2) Witness-elimination aggravator was duplicative, as government's theory was that

[35] See also Section XII.D.1.c. (Aggravating Factors . . . Future Dangerousness — Excluding Irrelevant or Otherwise Improper Evidence), *ante*; Section XIV.C (Evidence — Prejudice vs. Probative Value), *post*.

defendant sought to eliminate victim as witness to her own kidnapping and rape, and those crimes were alleged in another aggravator. (3) Unadjudicated conduct that occurred 23-33 years before did not satisfy heightened reliability), affirmed in part, vacated in part, 684 F.3d 324 (2d Cir. 2012) (finding no abuse of discretion in excluding two of the unadjudicated acts, but vacating and ordering reconsideration of the third, since district court relied in part on mistaken assumption that it was unadjudicated).

- United States v. Basciano, 763 F. Supp. 2d 303, 358 (E.D.N.Y. 2011). "[T]o be relevant, the government must have proof that this uncharged conduct rose to the level of a sufficiently serious crime to be considered by a death penalty jury. It is clear that to be a relevant aggravating factor in favor of the death penalty, prior misconduct must at least be a crime, and a grave one at that. Furthermore, while the court announces no decision at this time, some of the alleged uncharged conduct, such as some of the arson-related or assault-related charges, may not even rise to the level of sufficient seriousness to be introduced to a death penalty jury" (citation omitted).

- United States v. Bolden, 545 F.3d 609, 633, 625 (8th Cir. 2008). Court notes with approval that "[t]he district court did not allow the government to introduce less relevant aspects of Bolden's criminal history, such as misrepresentations to his landlord and employer, improperly received unemployment benefits, and multiple driving violations."

- United States v. Pepin, 514 F.3d 193, 206 (2d Cir. 2008). On government's interlocutory appeal, holding (1) district court did not abuse discretion in excluding evidence that defendant had physically and sexually abused a child, offered as an independent aggravating factor. District court found evidence did not relate to the capital murder charges, would inflame the jury, and would require a mini-trial.

- United States v. Grande, 353 F. Supp. 2d 623, 634-639 (E.D. Va. 2005). Two related incidents, three days apart, did not support aggravating factor alleging "pattern" of juvenile criminal activity. Though one of the incidents, a stabbing, could be considered individually as an aggravating factor, the other, a school fights, could not. Court also excludes as irrelevant and vague factor involving defendant's multiple suspensions and expulsion from school. Finally, court excludes evidence of two adult crimes: prior

conviction for obstruction of justice and allegations that defendant repeatedly carried a knife. Obstruction conviction resulted in sentence of 30 days in jail and $177 fine, and thus court assumed underlying conduct was not "highly egregious." And knife-carrying allegations were more prejudicial than probative.

- United States v. Johnson, 136 F. Supp. 2d 553, 562 (W.D. Va. 2001). Court strikes, as irrelevant, aggravating factor of defendant's "criminal livelihood."

- United States v. Gilbert, 120 F. Supp. 2d 147, 153-154 (D. Mass. 2000). Allegations that defendant scalded young, mentally retarded boy with hot bath water while she was his nurse (where no evidence it resulted in severe injury and incident was years old) and that she assaulted her husband with kitchen knife during divorce without injuring him were not serious enough to be considered as aggravating factors.

- United States v. Friend, 92 F. Supp. 2d 534, 542-545 (E.D. Va. 2000). Striking aggravating factor that defendant discussed killing a potential witness after the murder. Court finds no prior case involving unadjudicated misconduct not itself a crime used as an aggravating factor. Factor here not sufficiently relevant and reliable to weigh in favor of a death sentence.

- United States v. Peoples, 74 F. Supp. 2d 930, 933-934 (W.D. Mo. 1999). Prior burglary conviction did not involve a crime sufficiently serious to serve as a nonstatutory aggravating factor.

- United States v. Cuff, 38 F. Supp. 2d 282, 288-289 (S.D.N.Y. 1999). Striking nonstatutory aggravating factor that defendant used gun in committing the homicides. "[U]se of a firearm does not, in any rational sense, make a homicide worse, whether one looks at it from the standpoint of the crime, the victim or the perpetrator."

- United States v. Davis, 912 F. Supp. 938, 945-946 (E.D. La. 1996). In assessing non-statutory aggravating factor that defendant, a police officer, assisted others in commission of crimes, court admits certain evidence but excludes evidence of passive behavior, *i.e.*, that he failed to investigate or arrest others for criminal conduct of which he was aware. Such malfeasance does not rise to necessary level of severity or relevancy. Court also excludes

evidence of "threatening rhetoric" by defendant as too attenuated to be relevant. As to evidence of prior crimes court had not *per se* excluded, it would conduct pretrial examination to assure its reliability, and would not allow evidence of any crime of which defendant had been acquitted.

- United States v. O'Reilly, 2009 WL 5217365, at *2 (E.D. Mich. Dec. 30, 2009) (unpublished). Regarding aggravating evidence of defendant's participation in unadjudicated murder-for-hire plot, court states that, "[i]f there is a penalty phase, the Court will hold an evidentiary hearing before it begins. Based on the evidence presented at that hearing, the Court will decide whether the evidence is reliable.

- United States v. Brown, 2008 WL 4965152, at *6 (S.D. Ind. Nov. 18, 2008) (unpublished). Striking nonstatutory aggravating factor involving juvenile conviction for criminal recklessness for shooting girl with a BB gun, where conviction was more than 10 years old.

- United States v. Diaz, 2007 WL 656831, at *19 (N.D. Cal. 2007) (unpublished). For prior unadjudicated conduct to be relevant in aggravation, it must be criminal and serious in nature.

But see United States v. Runyon, 707 F.3d 475 (4th Cir. 2013) (no error in use of defendant's previous unadjudicated domestic incidents as an aggravating factor. Although defendant argued the incidents were too minor to legitimately weigh in favor of death, they all involved attempted, used, or threatened force or violence).

c. Unanimity and Proof Beyond a Reasonable Doubt As to Each Individual Act

One district court has held that "each specific criminal act to be considered by the jury in connection with" an aggravating factor that included multiple prior crimes "must be proven beyond a reasonable doubt. The jury's decision must be unanimous with respect to each act considered." United States v. Kee, 2000 WL 863119, at *7 (S.D.N.Y. June 27, 2000) (unpublished).

4. Gang Membership or Leadership

Several district courts have invalidated nonstatutory aggravating factors involving gang membership or leadership as too ambiguous, insufficiently individualized, or on other grounds:

- United States v. Taveras, 585 F. Supp. 2d 327, 330 (E.D.N.Y. 2008). Forbidding government from asking jury to find that defendant was member of allegedly violent prison gang that was composed primarily of Dominicans in support of future-dangerousness aggravator. "Proof of membership is ambiguous and of slight probative force. It is far outweighed by the dangers of ethnic prejudice and overvaluation." As to evidence jury had heard about the gang, court would instruct jury that it could not find defendant was or is member, and that Dominicans are not more or less dangerous in prison or more or less likely to be members of a gang. Jury could use evidence that this and other gangs exist in prison and that they may make prison more dangerous to gang members and other inmates.

- United States v. Grande, 353 F. Supp. 2d 623, 638 (E.D. Va. 2005). Excluding evidence that defendant was part of gang that engaged in acts of violence. Fact was not sufficiently individualized, and general statements about uncharged misconduct by gang would be impossible to cross-examine.

- United States v. Diaz, 2007 WL 656831, at *22 (N.D. Cal. 2007) (unpublished). While declining to strike aggravator of "leadership role in a criminal enterprise," court expresses concern about using "associational evidence" to support aggravator, and about overlap of this aggravator with future dangerousness.

5. Lack of Remorse

In FDPA cases, the government often relies on the defendant's supposed "lack of remorse," either as an independent aggravating factor or as a component of a future-dangerousness aggravator.[36] Such reliance may trench on the

[36] In some recent cases, the government has started relying on the defendant's "callous disregard for the severity of the offense," either in lieu of or in addition to "lack of remorse."

defendant's right against self-incrimination, especially when it directs the jury to the defendant's silence (*e.g.*, his failure to apologize for his conduct, show regret, etc.), rather than his supposedly remorseless words or actions in the wake of the crime.

It is well-established that, in criminal cases, a prosecutor may not adversely comment on the defendant's exercise of his Fifth Amendment privilege not to testify. Griffin v. California, 380 U.S. 609, 614-15 (1965). And, at the defendant's request, the jury must be instructed not to draw any inference against him as a result of that decision. Carter v. Kentucky, 450 U.S. 288, 305 (1981).[37]

The constitutional rules of Griffin and Carter apply in full to a capital sentencing hearing, at which a convicted defendant retains a Fifth Amendment privilege. See Estelle v. Smith, 451 U.S. 454, 462-63 (1981) ("We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned."); Lesko v. Lehman, 925 F.2d 1527, 1542 (3d Cir. 1991) ("Griffin's protections apply equally to the guilt and penalty phases of a death penalty trial."). Indeed, a defendant retains a limited privilege even at a non-capital sentencing hearing. Mitchell v. United States, 526 U.S. 314, 316-17 (1999) (court violated defendant's Fifth Amendment privilege by drawing adverse inference from her failure to testify at sentencing hearing).

In United States v. Caro, 597 F.3d 608, 627-631 (4th Cir. 2010), the Fourth Circuit acknowledged that, under Estelle and Mitchell, the Fifth Amendment prohibits considering a federal capital defendant's silence in support of an aggravating factor of lack of remorse. Similarly, in United States v. Davis, 912 F. Supp. 938, 946 (E.D. La. 1996), the district court said the government could use the defendant's "exultation" at hearing the victim was dead, to support the future-danger aggravator. But it found that the factor of lack of remorse was not proper. Such a factor, said the court, is generally problematic, since it is difficult to prove and risks treading on defendant's constitutional rights to silence and to rest on the presumption of innocence. Cf. United States v. Johnson, 915 F. Supp. 2d 958, 999

[37] In federal prosecutions, these rules also derive from a statutory command. See 18 U.S.C. § 3481 (defendant's failure to testify "shall not create any presumption against him"); Bruno v. United States, 308 U.S. 287, 292-93 (1939) (court's refusal to give no-adverse-inference charge required reversal under Section 3481).

(N.D. Iowa 2013) (government entitled to present "evidence of affirmative conduct displaying lack of remorse . . . not merely evidence of Johnson's silence").

But in a split decision in United States v. Mikos, 539 F.3d 706, 721-723 (7th Cir. 2008) (2-1; Posner, J., dissenting), the Seventh Circuit rejected the defendant's arguments that the evidence did not support this aggravating factor and that, in addressing it in summation, the prosecutor had improperly commented on his silence and failure to plead guilty. Since it is appropriate to take confessions, guilty pleas, *etc.*, into consideration as mitigation at sentencing, said Judge Easterbrook, it is equally proper for a prosecutor to point out when none of these events have occurred. Moreover, the primary theme of the prosecutor's lack of remorse argument was the defendant's affirmative conduct after arrest (*e.g.*, contacting potential witnesses to persuade them not to testify), rather than his silence.

6. Miscellaneous Aggravating Factors

- United States v. Runyon, 707 F.3d 475, 503 (4th Cir. 2013). Nothing improper in government's aggravating factor that the defendant exploited his law-enforcement and military training in committing the crime. It did not prevent the jury from giving mitigating weight to the defendant's earlier years of service in the military and in law enforcement.

- United States v. Bolden, 545 F.3d 609, 624 (8th Cir. 2008). Government properly relied on evidence that defendant fired second, lethal shot at guard to prevent him from identifying defendant, to establish "obstruction of justice" aggravating factor.

- United States v. Allen, 247 F.3d 741, 787-788 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002). No vagueness problem with factor that "conduct in committing the offense was substantially greater in degree than that described in the definition of the crime."

- United States v. McCullah, 76 F.3d 1087, 1108 (10th Cir. 1996). Rejecting challenges to nonstatutory aggravating factors of "use of a deadly weapon," "commission of the charged offenses," and that "repeated attempts to rehabilitate the defendant or deter him from future criminal behavior have been unsuccessful."

- United States v. Ciancia, No. 2:13-cr-902, ECF #231 (C.D. Ca. Sept. 8, 2015). Striking (1) as "impermissibly inflammatory," aggravating factor language that defendant, who killed TSA officer at L.A. International Airport, acted with the intent "to strike fear into the hearts of [TSA] employees"; and (2) aggravating factor that defendant "terrorized numerous airline passengers" because no indication defendant chose murder's location for that purpose.

- United States v. Bin Laden, 126 F. Supp. 2d 290, 302-303 (S.D. N.Y. 2001). In case involving Al-Qaeda bombing of U.S. embassies in Africa, court strikes aggravating factor of "disruption to important governmental functions" as insufficiently serious, as it did not focus on extent of human trauma involved in the crime. Court also tentatively finds that "knowledge of simultaneous acts of terrorism" is not appropriate factor.

- United States v. Davis, 912 F. Supp. 938, 946 (E.D. La. 1996). Aggravating factor of "low rehabilitative potential" was "too vague" and could not serve as independent aggravating factor, though evidence of it might be introduced under future-danger factor.

E. Duplicative Aggravating Factors

In United States v. McCullah, 76 F.3d 1087, 1111-1112 (10th Cir. 1996), the Tenth Circuit reversed a death sentence because several of the aggravating factors were "duplicative" and "cumulative." Specifically, the statutory aggravating factor that the defendant "intentionally engaged in conduct intending that the victim be killed" substantially overlapped with the non-statutory aggravating factor alleging he "committed the offenses . . . charged in the indictment." And the statutory factor that he "intentionally engages in conduct which he knows creates a grave risk of death and that such death results" substantially overlapped with the statutory aggravating factor of "intentional conduct intending that the victim be killed."

Three years later, the Supreme Court addressed, but did not resolve, when, if ever, aggravating factors impermissibly double-count the same facts. In Jones v. United States, 527 U.S. 373, 398-401 (1999), the Court split 4-4 on this issue.

Justice Thomas's opinion, for himself and three other justices,[38] noted that the Court had never held that aggravators may be so duplicative as to render them unconstitutional, or passed on the Tenth Circuit's "double counting" theory in McCullah. Even accepting that theory, he said, the Fifth Circuit had erred in finding that the phrase "personal characteristics" [of victim], as used in a victim-impact aggravator, and the vulnerable-victim aggravator were duplicative of each other. The former referred to those aspects of the victim's character and personality her family would miss the most, while the latter went to the victim's vulnerability. Furthermore, any risk that the weighing process would be skewed was eliminated by an instruction that jurors should not focus on the number of aggravating or mitigating factors.

Several courts of appeal have rejected duplicative-aggravator claims where there was some overlap between the factors, while leaving the door open for the possibility that "true" double counting (*e.g.*, one factor wholly subsumed within another) would not be permitted:

- United States v. Fields, 516 F.3d 923, 944-945 (10th Cir. 2008). Nonstatutory aggravating factor of victim's mental anguish before death was not overbroad. Government could rely on it even though it is similar to the statutory aggravator, "heinous, cruel or depraved."

- United States v. Purkey, 428 F.3d 738, 761-763 (8th Cir. 2005). No constitutional error in government's use of nonstatutory aggravating factors (involving defendant's criminal history) that duplicated statutory ones. Jury was instructed to weigh aggravating and mitigating factors rather than merely tallying numbers on each side.

- United States v. Robinson, 367 F.3d 278, 292-293 (5th Cir. 2004). Rejecting claim of duplication for aggravating factor of grave risk of death to one or more persons and factor of killing or attempted killing of more than one person in a criminal episode. Jones rejected idea that similarity between two factors makes their combined use invalid.

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[38] Four other justices joined a dissenting opinion on this issue. Justice Scalia, who joined Justice Thomas's opinion on several other issues, did not join the section of the opinion that addressed this one.

- United States v. Paul, 217 F.3d 989, 1001-1002 (8th Cir. 2000). Especially-heinous and victim-vulnerability aggravating factors were not impermissibly duplicative, as each was directed to a different aspect of the offense.

- United States v. Webster, 162 F.3d 308, 324 (5th Cir. 1998). No plain error from overlap of especially-heinous aggravator and victim-impact factor, both of which included mental or emotional suffering by the victim before she died. "[A]lthough they may rely on similar underlying facts, they focus on different aspects of the crime and its results." Especially-heinous aggravator focused on defendant's "actions and intent," while victim-impact aggravator looked "not to his actions but to their result."

- United States v. Hall, 152 F.3d 381, 416-417 (5th Cir. 1998). Especially-heinous factor did not unconstitutionally duplicate aggravating factor that death occurred during a kidnapping.

Several district courts, however, have found that certain aggravating factors were impermissibly duplicative:

- United States v. Johnson, 136 F. Supp. 2d 553, 561-562 (W.D. Va. 2001). Non-statutory aggravating factor of "death of a fetus" could not be used because it would be duplicative of factor that defendant "terminated the victim's pregnancy."

- United States v. Bin Laden, 126 F. Supp. 2d 290, 300-301 (S.D.N.Y. 2001). Proposed non-statutory aggravating factor of "serious injury to surviving victims" was wholly subsumed within second aggravator, "victim impact evidence," and thus impermissibly duplicative, though government attempted to distinguish factors by reserving second category for deceased victims only.

- United States v. Glover, 43 F. Supp. 2d 1217, 1221-22 (D. Kan. 1997). (1) "grave risk of death" factor does not apply to surviving intended victims because such a construction would duplicate the (c)(16) multiple-attempted-murder factor. Government must elect one of these two statutory aggravators. (2) Striking nonstatutory aggravator that defendant intended victim be killed or that lethal force be employed against victim, which resulted in victim's death, as duplicative of the two statutory aggravators.

- United States v. Hammer, 25 F. Supp. 2d 518, 539-540 (M.D. Pa. 1998). Defendant's prior conviction could not be used to help establish statutory aggravating factor and to also support nonstatutory aggravating factor of "additional . . . serious acts of violence."

- United States v. Chanthadara, 928 F. Supp. 1055, 1058 (D. Kan. 1996). Striking nonstatutory aggravating factor of "low potential for rehabilitation" as duplicative of future-dangerousness factor.

- United States v. Nguyen, 928 F. Supp. 1525, 1543-1544 (D. Kan. 1996). Striking nonstatutory aggravating factor of "low potential for rehabilitation" as duplicative of future-dangerousness factor.

- United States v. Umana, 707 F. Supp. 2d 621, 638 (W.D.N.C. 2010). Striking nonstatutory aggravating factor of "callous disregard for the severity of the offense" as potentially duplicative of lack-of-remorse component of future-dangerousness aggravating factor.

- United States v. Johnson, 2009 WL 1856240, at **10-12 (E.D. Mich. June 29, 2009) (unpublished). "The fact that the Government has not alleged 'future dangerousness' as a separate factor does not preclude alleging lack of remorse. Indeed, it appears to the court that alleging both would be duplicative, and threaten an unconstitutional skewing of the jury's weighing process."

- United States v. Watson, 2007 WL 4591860, at **1-2 (E.D. Mich. 2007) (unpublished). Two non-statutory aggravating factors based on the same conduct, future dangerousness and additional violent behavior, were unconstitutionally duplicative.

- United States v. Diaz, 2007 WL 4169973, at **7-8 (N.D. Cal. Nov. 20, 2007) (unpublished). While declining to strike either aggravator at this juncture, court observes that jury findings that defendant was member of criminal enterprise and that he had leadership role in criminal enterprise would be impermissibly duplicative.

- United States v. Kaczynski, 1997 WL 34626785, at **20-22 (E.D. Cal. Nov. 7, 1997) (unpublished). Statutory aggravating factor that death occurred during commission or attempted commission of offense under 18 U.S.C. § 844(d) improperly duplicates charged offense and should be stricken.

F. Vicarious Liability

Some courts instruct the sentencing jury to apply the principles of accomplice liability in determining aggravating factors, or otherwise charge the jury it may find an aggravator based on the conduct or even the mental state of an accomplice. The Supreme Court has never addressed this issue. But see Lankford v. Idaho, 500 U.S. 110, 123 (1991) ("Even if petitioner had been the actual killer, it is at least arguable that the evidence was insufficient to support this finding [of especially-heinous aggravator]. If petitioner was not the actual killer, this finding was even more questionable."). The Fifth and the Eighth Circuits have rejected challenges to such instructions:

- United States v. Johnson, 495 F.3d 951, 975 (8th Cir. 2007). Evidence was sufficient to establish aggravating factor that murders were committed in an especially heinous, cruel, or depraved manner. No requirement that defendant have personally committed murders so long as her conduct "involved" the torture or serious physical abuse.

- United States v. Ortiz, 315 F.3d 873, 901 (8th Cir. 2002). An aggravating factor can be based on liability as an accessory. Thus, jury could find multiple-killing aggravator, even if defendant himself did not kill multiple victims, based on his intent that they be killed

- United States v. Webster, 162 F.3d 308, 322-323 (5th Cir. 1998). Court did not err in refusing to instruct that, in assessing aggravating factors, jury could consider only defendant's intent and conduct and not words or acts of any other codefendant or participant in the crime. "Once the constitutionally required minimum level of culpability" under Enmund and Tison "is found . . . there is no reason why the jury cannot take a broader look at the crime in assessing the aggravating factors; it need not limit itself exclusively to the defendant's conduct or intent." In any event, court instructed that "'[i]n considering the question of intent, as it related to aggravating factors, you may consider only the intent of the defendant.' The aggravating factors,

other than the victim vulnerability factor, all pointed to Webster's conduct. The instructions explaining the factors repeatedly referred to Webster's conduct and intent."

But one district court has found that vicarious liability does not apply to an aggravating factor:

- United States v. Hargrove, 2005 WL 2122310, at *8 (D. Kan. Aug. 25, 2005) (unpublished). Government may not use prior conviction for use of a firearm to establish statutory aggravating factor, 18 U.S.C. § 3592(c), absent evidence that defendant himself, rather than one of his accomplices in that prior case, used the firearm. If case proceeds to penalty phase [*ed. note: it did*], court will conduct evidentiary hearing on this issue.

Moreover, Judge's Sand's pattern instructions tell jurors that the finding of a statutory aggravating factor "must be based on Defendant's personal actions and intent." 1Leonard B. Sand, *et al.*, Modern Federal Jury Instructions — Criminal, Inst. 9A-8 (2008). See also id., Inst. 9A-11 (in assessing especially-heinous factor, jurors "may only consider the actions of the Defendant; you may not consider the manner in which any codefendants committed the offense").

G. Aggravators With Multiple Components and Open-Ended Phrasing

The government often crafts a broad nonstatutory aggravating factor, followed by language like ". . . as demonstrated by one or more of the following," and then a list of several possible sources of proof. One common example is future dangerousness: The government often notices, and asks the court to instruct the jury, that the components of this are things such as the defendant's other crimes, his "low rehabilitative potential," and his "lack of remorse." Another example are aggravators that refers to a defendant's prior "pattern of violent criminal activity," and allows jurors to choose from a "Chinese Menu" of particular offenses.

This tactic arguably undermines the statutory requirement that the jurors unanimously find each aggravating factor beyond a reasonable doubt, if jurors are

not instructed they need to be unanimous on each prong. It is also arguably an improper marshaling of the evidence by the court.[39]

In United States v. Taylor, 814 F.3d 340 (6th Cir. 2016), the Sixth Circuit agreed that "a district court treads on thin ice when [as in that case] it summarizes [the government's aggravating] evidence in instructing a jury, especially when the court does not treat the evidence similarly on both sides of a case," and that the practice is "inadvisible." Yet it denied relief because the defendant had not shown prejudice. And in United States v. Fields, 516 F.3d 923, 943-944 (10th Cir. 2008), the Tenth Circuit found no plain error in the court's failure to instruct jurors they had to agree on a particular ground — continuing pattern of violence or lack of remorse — as supporting the future-dangerousness aggravator, before finding it. The Court observed it was" far from clear that the phrasing of the future-dangerousness aggravator was erroneous; indeed, Fields cites and we have located no authority directly on point." But see United States v. Cisneros, 363 F. Supp. 2d 827, 839 (E.D. Va. 2005) ("to make sure that the requisite indicia of reliability are met, the Court will instruct the jurors that they must conclude beyond a reasonable doubt that each of these offenses occurred in determining whether Mr. Cisneros was engaged in a pattern of criminal activity"); United States v. Kee, 2000 WL 863119, at *7 (S.D.N.Y. June 27, 2000) (unpublished) ("each specific criminal act to be considered by the jury in connection with" an aggravating factor that included multiple prior crimes "must be proven beyond a reasonable doubt. The jury's decision must be unanimous with respect to each act considered.").

In some cases, the notice and jury instructions further identify these components as a *non-exclusive* list of elements of the aggravator, by using phrases such as "among others" or "for example." This is also problematic, for it appears to invite jurors to find the factor by concocting and finding other elements, even if it does not believe the listed ones were proven. One court of appeals has disapproved such open-ended phrasing:

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[39] Such marshaling is especially improper for the future-danger aggravator since the government has apparently never proffered an empirical basis for infering future dangerousness from "lack of remorse." And, as for "low rehabilitative potential," the United States Supreme Court recently recognized that a "sentence of life imprisonment without parole . . . cannot be justified by the goal of rehabiliatation" since that "penalty forswears altogether the rehabilitative ideal." Graham v. Florida, 560 U.S. 48, 74 (2010).

- United States v. Ortiz, 315 F.3d 873, 902-903 (8th Cir. 2002). Phrases "among others" and "for example" in future-dangerousness aggravator "are open ended and could distract the jury from focusing on whether the government has provided sufficient evidence" on the lack-of-remorse and enforcer components to support the factor. But defendant did not object to this language, and its use did not rise to level of a "miscarriage of justice," and thus did not constitute plain error, especially since district court omitted the "among others" phrase from its final instructions and neither party mentioned the objectionable language in its summations.

See also United States v. Johnson, 915 F. Supp. 2d 958, 1023 (N.D. Iowa 2013) (striking "including but not limited to" language from aggravator, and permitting government to rely on only five identified incidents of prior misconduct in support of dangerousness).

In one case, United States v. Umana, 750 F.3d 320 (4th Cir. 2014), "the verdict form . . . allowed the jury only to indicate that it had found the particular subfactors and did not give the jury an opportunity to indicate whether or not they had found the 'overarching aggravator' of future dangerousness." The defendant argued on appeal that "this created a 'presumption' of future dangerousness upon finding any one of the subfactors." The Fourth Circuit rejected that reading: "To be sure, we think that the form would have been clearer had the introductory language ended after the first two lines and had each lettered paragraph thereafter begun with future dangerousness language. But the form as used did not create any presumption, as Umaña argues. Rather, it presented the jury with four specific factual circumstances of future dangerousness on which the government presented evidence. The form was not designed to permit the jury to find future dangerousness except by finding one or more of the specific facts evidencing future dangerousness."

H. Holding the Government to the Precise Language of the Death Notice

In some cases, the instruction on an aggravating factor does not track the language of the death notice. One district court has held that the defense is entitled to hold the government to the precise phrasing of an aggravator in the notice:

- United States v. Sampson, 335 F. Supp. 2d 166, 223-224 (D. Mass. 2004). In instructing jury on future danger, court bound government to factor as alleged in notice; thus, government had to prove dangerousness in prison, that acts (plural) of violence were likely, and that acts would be criminal.

I. Limiting the Jury to Noticed Aggravating Factors

- 1 Leonard B. Sand, *et al.*, Modern Federal Jury Instructions, Inst. 9A-16 (2008). "The law permits you to consider and discuss only the [insert number] non-statutory aggravating factors specifically claimed by the Government in advance and listed below. You are *not* free to consider any other facts in aggravation that you conceive of on your own."

- Eighth Circuit Criminal Pattern Instructions, Death Penalty - Preliminary Instructions, Inst. 12.08. "You must not consider any other facts in aggravation which you think of on your own."

- Tenth Circuit Criminal Pattern Jury Instructions, Inst. 3.07 (2005). "The government is required to specify the factors it relies on, and your deliberations are constrained by its choice. Even if you believe that the evidence reveals other aggravating factors, you may not consider them."

XIII. Mitigating Factors

A. Generally

The United States Supreme Court has developed a substantial body of case law, dating back 30 years, establishing the extremely broad right of a capital defendant, under the Eighth Amendment, to present and have the jury consider all relevant mitigating evidence at a capital sentencing hearing. See Lockett v. Ohio, 438 U.S. 586, 604-605 (1978) (capital 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 that the defendant proffers as a basis for a sentence less than death"); Green v. Georgia, 442 U.S. 95, 97 (1979) (state hearsay rule could not be invoked to bar relevant mitigating evidence); Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982) ("The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration"); Tennard v. Dretke, 542 U.S. 274, 284-285 (2004) (rejecting view that evidence needs to have some nexus to the crime to be mitigating; "[r]elevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value"); Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986); Hitchcock v. Dugger, 481 U.S. 393, 398-399 (1987); Penry v. Lynaugh, 492 U.S. 302, 303-304 (1989); Penry v. Johnson, 532 U.S. 782, 797-800, 803-804 (2001).[40]

The Federal Death Penalty Act reflects this broad right. It provides that the sentencing jury "shall consider any mitigating factor, including, the following." 18 U.S.C. 3592(a). It then sets forth seven specific mitigating factors:

(1) that the defendant's capacity to appreciate the wrongfulness of his conduct or conform it to the requirements of the law was significantly impaired,

(2) that the defendant was under unusual and substantial duress,

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[40] See also Payne v. Tennessee, 501 U.S. 808, 822 (1991) ("virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances"); Ayers v. Belmonte, 127 S.Ct. 464, 478 (2006) (describing a jury's penalty-phase task as weighing "the finite aggravators against the potentially infinite mitigators").

(3) that the defendant's participation in the offense was relatively minor,

(4) that an equally culpable codefendant will not be punished by death,

(5) that the defendant did not have a significant prior history of other criminal conduct,

(6) that the defendant committed the offense under severe mental or emotional disturbance, and

(7) that the victim consented to the criminal conduct that resulted in the victim's death.

18 U.S.C. § 3592(a)(1)-(7).

Importantly, this section also includes an eighth, catch-all provision, requiring the jury to consider "[o]ther factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence." 18 U.S.C. § 3592(a)(8). A defendant may rely on a non-statutory mitigating factor even if it is similar to or a subset of a statutory one. See United States v. McVeigh, 153 F.3d 1166, 1211-1212 (10th Cir. 1996) ("the government apparently believes that because McVeigh cannot meet the elements of the "minor participation" mitigating factor, he is barred from presenting mitigating evidence to support his claim of a "lesser role" in the offense. We disagree.").

Other language in the FDPA suggests that there will also be mitigation that extends beyond the catch-all provision. See 18 U.S.C. § 3592(a) (list of illustrative factors, including the catch-all, is prefaced by requirement that "finder of fact shall consider any mitigating factor, *including the following* . . .") (emphasis added); 18 U.S.C. § 3593(c) ("information may be presented as to any matter relevant to the sentence, including any mitigating . . . factor permitted or required to be considered under section 3592") (emphasis added).

Thus, a number of district courts have held that the FDPA authorizes mitigation beyond the constitutional minimum, *i.e.*, not just evidence or factors related to the crime, or the defendant's character or background. See, e.g., United

States v. Sampson, No. 1:01-cr-10384-LTS, ECF #2259, at 7 (D. Mass. May 13, 2016); United States v. Caro, 433 F. Supp. 2d 726, 727-28, aff'd in part and rev'd in part on other grounds, 461 F. Supp.2d 459 (W.D. Va. 2006); United States v. Bodkins, 2005 WL 1118158 *8 (W.D. Va. May 11, 2005); United States v. Sampson, 335 F. Supp. 2d 166, 194-95 (D. Mass. 2004); United States v. Bin Ladin, 156 F. Supp. 2d 359, 370 (S.D.N.Y. 2001); United States v. Davis, 132 F. Supp. 2d 455, 464-65 (E.D. La. 2001).

The FDPA further provides that, at the capital-sentencing hearing, "[t]he defendant may present any information relevant to a mitigating factor." The Rules of Evidence do not apply, but information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. The burden of establishing the existence of a mitigating factor is on the defendant, who must do so by a preponderance of the information. 18 U.S.C. § 3593(c). Any juror who finds a mitigating factor may consider it established regardless of how many other jurors concur. 18 U.S.C. § 3593(d).

The practice in federal capital cases is for the defense to submit a list of statutory and nonstatutory mitigating factors to the court, which instructs the jurors to consider and make findings on each. The sentencing verdict form typically lists each mitigator and the foreperson is directed to indicate, next to each, the number of jurors who found the factor established. See also Section XVII.A (Jury Instructions and Verdict Forms — Mitigating Factors), *post*.

In addition to the published decisions discussed below, the completed sentencing verdict forms from federal capital cases (almost all of which are accessible from the appeals page of the FDPRC website) provide precedent for allowing defendants to present, argue, and have the jury consider certain kinds of mitigating factors.

B. Execution Impact

Supreme Court caselaw on mitigation and the broad language of the FDPA would seem to support the admissibility of evidence from the defendant's family about the value of maintaining their relationships with him and the loss and grief they would suffer if he were executed — so-called "execution impact" — and even though the A.B.A. Guidelines, several circuit habeas decisions, analogous

noncapital federal sentencing cases, many state courts, and almost all commentators support this view.[41]

Thus, it is not surprising that the prevailing practice in federal cases generally is to permit evidence about the harm the defendant's execution would cause to his family and close friends. According to data maintained by the Federal Death Penalty Resource Counsel Project, federal capital juries have found execution impact as a mitigating factor in more than 58 cases. See Declaration of Kevin McNally Regarding Execution Impact Testimony (Jan. 25, 2010), available at www.capdefnet.org/FDPRC/WorkArea/DownloadAsset.aspx?id=3728. See also United States v. Sampson, No. 1:01-cr-10384-LTS, ECF #2259, at 13 (D. Mass. May 13, 2016) ("Permitting execution impact evidence and including related mitigating factors is common, if not universal, practice")..

Nonetheless, FDPA decisions are not divided. Two circuits have issued adverse rulings. Most others, and, more importantly, the Supreme Court, have yet to weigh in explicitly on this issue.

Favorable FDPA decisions include the following:

- United States v. Mitchell, 502 F.3d 931, 991 (9th Cir. 2007). The district court drew an "appropriate line" when "[it] allowed witnesses to testify regarding their affection for Mitchell *and their wish for his life to be spared*, but did not allow them to offer an opinion about what they thought the jury's verdict should be." The former, said the Ninth Circuit, was "relevant mitigating evidence" because it "tend[ed] to logically . . . prove" something about Mitchell's "record and character." Id.

[41] Indeed, so well-established is the use of such mitigation that even Justices Scalia and Thomas have characterized a defense built on testimony "that sentencing [defendant] to death would devastate his family and friends" as a "reasonable mitigation theory." Sears v. Upton, 130 S. Ct. 3259, 3268 (2010) (Scalia & Thomas, JJ., dissenting). See also Cullen v. Pinholster, 131 S. Ct. 1388, 1409 & n.19 (Apr. 4, 2011) (defense focused on "family-sympathy mitigation," which focused on "creating sympathy for the defendant's family," was reasonable strategy at capital sentencing hearing . . . . "the whole premise of the family sympathy defense is *the family's interest*").

- United States v. Sampson, No. 1:01-cr-10384-LTS, ECF #2259, at 12 (D. Mass. May 13, 2016). Denying government's motion to strike: "Sampson may present execution impact evidence and include related mitigating factors if he wishes to do so."

- United States v. Williams, 18 F. Supp. 3d 1065, 1070 (D. Haw. 2014). "[T]he court will allow Defendant, if desired, to present limited testimony from others about 'their affection for [him] and their wish for his life to be spared' . . . . Defense witnesses may also, if desired, testify that Defendant's life has value to them, and in that sense, his death could impact them. As Defense counsel stated at oral argument, they may testify to the effect 'that he has been a good enough person to build a relationship with someone to the point that that person will say I care that he's going to be executed and I don't want to see him executed.'"

- United States v. Fell, 2005 WL 1634067, at *2 (D. Vt. July 5, 2005) (unpublished). Refusing to strike the mitigating factor, "Donald Fell's execution would detrimentally affect persons who care about him." The court explained that this factor "may shed light on Fell's background and character," including his "positive qualities, his capacity to be of emotional value to others, and the nature of his interpersonal relationships." The court rejected the government's argument that such mitigation would "invite the jury to consider sympathy for Fell's loved ones," which it agreed was not an appropriate factor.

- United States v. Wilson, 493 F. Supp. 2d 491, 506 (E.D.N.Y. 2007). "The sort of evidence the Government seeks to preclude, *i.e.*, how Wilson's family would feel if he were executed, may fairly be considered part of Wilson's "background."

- United States v. Rodriguez, 2007 WL 466752, at *43 (D N.D. Feb. 12, 2007) (unpublished). "The Court recognizes that execution impact evidence is relevant mitigating evidence under the Federal Death Penalty Act."

Moreover, the Eleventh Circuit has validated the *government's* use of third-party impact that patently had nothing to do with the character or background of the individual defendant. In United States v. Battle, 173 F.3d 1343 (11th Cir. 1999), which involved an inmate's killing of a prison guard, the Court rejected a

defense challenge to sentencing testimony from other guards about how a life sentence would undermine discipline and security at the prison. See *id.* at 1348-49 (approvingly characterizing disputed testimony as "descriptions of . . . the effect the sentence in this case would have on the prison population and guards at this particular prison" and " about how . . . the resulting sentence for [victim's] killer would affect them").

But there are unfavorable decisions from three circuits:

- United States v. Taylor, 814 F.3d 340 (6th Cir. 2016)**.** No abuse of discretion in excluding such evidence, as "there are good reasons to believe" it "would not properly constitute mitigating evidence," because it does not reflect on defendant's background or character.

- United States v. Hager, 721 F.3d 167, 195-96 (4th Cir. 2013). The district court properly excluded testimony and videotape evidence of defendant's two teenage daughters discussing (a) how much they love him, and how happy it makes them and how important it is to them to talk to him, see him, and have him in their lives, and (b) how they would feel and be affected if he were executed. None of this evidence "sheds . . . light" on the defendant's character or background, since "we are unable to say" such sentiments were "conditioned on" whether defendant was a good father.

- United States v. Snarr, 704 F.3d 368, 401-02 (5th Cir. 2013). In concluding that the district court did not err in precluding "evidence as to the impact" one defendant's execution "would have on certain of his family members," the court cited two prior habeas cases and another FDPA decision from the circuit that had approved the exclusion only of "general pleas for mercy." It quoted language from one of the habeas cases that because "friend/family impact testimony" "does not reflect on the defendant's background or character or the circumstances of his crime, the Supreme Court has never included" it "among the categories of mitigating evidence that must be admitted during a capital trial.'" (Victim-impact, by contrast, it said, "is relevant" to the defendant's "culpability"). The defendants "present no persuasive argument suggesting we should so hold now."

C. Residual Doubt

Without squarely deciding the issue, the United States Supreme Court, through various justices' opinions in two state cases, has expressed skepticism about whether the Eighth Amendment guarantees a capital defendant the right to have a sentencing jury consider, in mitigation, so-called "residual" or "lingering" doubt about guilt, *i.e.*, doubt that does not rise to the level of "reasonable" doubt. See Oregon v. Guzek, 546 U.S. 517, 525 (2006); Franklin v. Lynaugh, 487 U.S. 164, 173-174, n.6, and 180-187 (1988).

In FDPA cases, three courts of appeal have ruled unfavorably to defendants on this issue:

- United States v. Rodriguez, 581 F.3d 775, 813-815 (8th Cir. 2009). No error in refusing to instruct jury to consider, as mitigator, residual doubt about trial theory of defense (*i.e.*, that victim was killed in parking lot where she was abducted, and thus was never kidnapped). FDPA and Franklin v. Lynaugh do not require a district court to give a residual doubt instruction.

- United States v. Jackson, 549 F.3d 963, 981-982, n.24 (5th Cir. 2008). Capital defendant is not entitled to have sentencing jury instructed on residual doubt. Even assuming some right to consideration of residual doubt — issue that Supreme Court declined to resolve in Oregon v. Guzek — here, defendant was able to argue his self-defense theory at sentencing, and district court instructed jury it could consider, as mitigating, any factors from the evidence and anything about commission of the crime.

- United States v. Corley, 519 F.3d 716, 729 (7th Cir. 2008). No plain error in district court's failure to instruct jury to consider residual doubt as to unadjudicated murder offered in aggravation.

Several district courts, though have ruled that instructions, and in some cases evidence, on residual doubt were appropriate:

- United States v. Davis, 132 F. Supp. 2d 455, 467-468 (E.D. La. 2001). Defendant entitled to present and argue evidence in support of residual doubt and to have jury instructed on it at capital resentencing.

- United States v. Honken, 378 F. Supp. 2d 1040, 1041 (N.D. Iowa 2004). Court would allow defense to present evidence, and would instruct jury, on lingering doubt as mitigating factor.

- United States v. Bodkins, 2005 WL 1118158, at *9 (W.D. Va. May 11, 2005) (unpublished). Residual doubt is proper mitigating factor and court would charge jury on it if evidence reasonable supported it.

- United States v. Foster, 2004 WL 868649, at *1 (D. Md. April 09, 2004) (unpublished). Jury will be instructed on residual doubt as a mitigating factor.

Finally, again, as with other mitigating factors, the verdict forms used in federal capital prosecutions throughout the country reflect that a significant number of district courts have included residual doubt, formulated in various ways, in their jury charges. One formulation, which does not appear to call on jurors to revisit or question their guilty verdict and which has proved acceptable to many district courts, is: "The evidence in this case does not establish Mr. Defendant's guilty of the capital crimes with sufficient certainty to justify imposition of a sentence of death."

D. Future Non-Dangerousness

- United States v. Taylor, 814 F.3d 340 (6th Cir. 2016). District court had discretion to exclude expert testimony about defendant's future non-dangerousness, offered as mitigation, because it was "about general prison conditions and the anticipated effectiveness of security protocols" — "facts that could be said to apply to every death-eligible offender" — and thus "had nothing to do with" defendant and was not "individualized" to him.

- United States v. Troya, 733 F.3d 1125, 1134-35 (11th Cir. 2013). At his sentencing hearing, Troya unsuccessfully sought to introduce evidence to show that, if sentenced to life, he would make a positive adjustment to federal prison, could be safely managed, and would not be dangerous there. But the district court refused to allow any testimony from the defense expert, Dr. Mark Cunningham. Cunningham was a Ph.D. psychologist and nationally renowned expert on the predictors and rates of prison violence, particularly among capital offenders. The appellate court found that this was

constitutional error. In addition to being admissible as rebuttal, "Dr. Cunningham's testimony was also admissible as non-statutory mitigating evidence," and thus its exclusion violated Troya's rights not only to due process but also under the Eighth Amendment.

E. Miscellaneous Mitigating Factors

i. Defendant's Ineligibility for Death Under State Law

- United States v. Gabrion, 719 F.3d 511, 521-23, 525 (6th Cir. 2013) (*en banc*). Michigan's prohibition on capital punishment was not a mitigating factor under the Eighth Amendment or the FDPA. No need to decide whether, as the defense also argued, the district court's ruling abridged his right to rely on residual doubt about whether the victim was actually killed on federal land, since any such error was harmless.

- United States v. Higgs, 353 F.3d 281, 328 (4th Cir. 2003). No error in refusing to instruct jury, as a mitigator, that defendant would not have been eligible for death penalty under state law, since he was not triggerman.

- United States v. Sampson, No. 1:01-cr-10384-LTS, ECF #2259, at 7 (D. Mass. May 13, 2016). "To permit such mitigating factors here, where location is immaterial to the offenses, might confuse or mislead the jury. Objections to the federal government's pursuit of a death sentence in a state that has voted not to include capital punishment in its own system of criminal justice are properly made to the legislature, not placed before a federal criminal jury."

ii. Defendant's Offer to Plead Guilty

- United States v. Caro, 597 F.3d 608, 635 (4th Cir. 2010). Court did not abuse discretion in excluding evidence that defendant wrote a letter to the government offering to plead guilty in return for dropping the death penalty. Because plea offer was so conditioned, "we cannot agree" it "shows acceptance of responsibility."

- United States v. Williams, 2014 WL 2436215, at *2 (D. Haw. May 30, 2014). "That Defendant offered a conditional guilty plea may show some

degree of acceptance of responsibility, and it is ultimately up to the jury — not this court — to determine how such fact should be weighed in determining Defendant's sentence. The court therefore denies the government's motion" to preclude mitigating factors based on plea offer.

- United States v. Fell, 372 F. Supp. 2d 773, 784-785 (D. Vt. 2005). Court agrees to defense request to offer, as evidence to support mitigating factor of acceptance of responsibility, defendant's pretrial offer to plead guilty in exchange for a life sentence.

iii. Defendants in Other Cases Not Sentenced to Death

- United States v. Sampson, 486 F.3d 13, 44-45 (1st Cir. 2007). No error in excluding defense evidence of verdict sheets and descriptive material relating to other federal capital prosecutions in which defendants were not sentenced to death.

- United States v. Regan, 221 F. Supp. 2d 659, 660-661 & n.1 (E.D. Va. 2002). Proportionality evidence of harm done in other espionage cases that did not result in death sentence could not be mitigating because it lacked probative value and would confuse and mislead the jury.

- United States v. Sampson, No. 1:01-cr-10384-LTS, ECF #2259, at 7 (D. Mass. May 13, 2016). Mitigation "comparing Sampson to other federal inmates . . . would have required dozens of "mini-trials" in order to permit meaningful comparison of Sampson's circumstances with those of the other allegedly similar defendants or inmates."

iv. Effects and Experiences of Race

- United States v. Webster, 162 F.3d 308, 355-356 (5th Cir. 1998). "Webster asserts that by precluding consideration of 'race, color, religious beliefs, national origin, or sex of the defendant or of any victim' as a mitigating factor, the FDPA is unconstitutional . . . . although race per se is an irrelevant and inadmissible factor, the effects and experiences of race may be admissible."

v. Equally Culpable Accomplices

- United States v. Whitten, 610 F.3d 168, 204 (2d Cir. 2010). No error in refusing to allow jury to learn that codefendants had been sentenced to terms of years, not life in prison. District court permissibly ruled that defendant was only entitled to inform jury that codefendants had not been sentenced to death, and that confusing or misleading effect of further information outweighed any minimal probative value it might have had. Moreover, it was doubtful other defendants were equally culpable in the crime, since defendant pulled the trigger.

For discovery-related cases, see:

- United States v. Beckford, 962 F.Supp. 804, 816 (E.D. Va. 1997). Defendant entitled to discovery of any murder or death-eligible offense in furtherance of the CCE or drug conspiracy, charged or uncharged, committed by any coconspirator or codefendant who will not be punished by death, since such information could be used to support mitigating factor that equally culpable participants were not facing death penalty.

- United States v. Johnson, 2008 WL 474078, at **5-6, adhered to, 2008 WL 2095344 (E.D. Mich. May 16, 2008) (unpublished). Government required to disclose information suggesting that equally culpable participants (even if not codefendants) would not face the death penalty.

A number of courts have permitted defendants to incorporate, as part of this mitigating factor, the specific, less-than-life sentences received by or promised to such accomplices.[42]

vi. Impropriety of Extradition for Capital Trial Under Foreign Law

- United States v. Bin Laden, 156 F. Supp. 2d 359, 368 (S.D.N.Y. 2001). Court allows mitigating factor that South Africa violated its own law by

[42] Copies of verdict sheets and summaries of mitigating factors found are available from the Federal Death Penalty Resource Counsel Project.

delivering defendant to United States custody without assurance that he would not be subjected to death penalty.

- United States v. Karake, 281 F. Supp. 2d 302, 369-371 (D.D.C. 2003). Government required to disclose any evidence that United States represented to foreign government that defendant would not be subject to death penalty if extradited; Questionable extradition procedures of capital defendants may also give rise to mitigating circumstances to be considered during sentencing. The government is required to disclose any evidence that the United States government represented to any foreign government that defendants would not be subject to the death penalty upon extradition.

vii. Life Without Release Is Harsh Enough

- United States v. Bolden, 545 F.3d 609, 627-628 (8th Cir. 2008). No error in refusing to submit factor that "[t]he sentence of life in prison without the possibility of release is an adequate harsh alternative punishment that will protect society from further risk of criminal conduct by Robert Bolden," since government did not submit dangerousness as an aggravating factor.

- United States v. O'Reilly, 2010 WL 3324914, at **1 (E.D. Mich. Aug. 23, 2010) (unpublished) (agreeing to submit mitigating factor that LWOR is harsh punishment; "If the jury finds by a preponderance of the evidence, that life in prison without the possibility of parole is harsh, that certainly could suggest to the jury that such a sentence is more appropriate than death").

- United States v. Sampson, No. 1:01-cr-10384-LTS, ECF #2259, at 9-10 (D. Mass. May 13, 2016). "[A]rguments that life in prison is sufficiently punishing, or that the death penalty does not prevent or deter serious crimes, are properly directed at legislators or judges considering the propriety of the death penalty as a general matter."

viii. Third-Party Based Mitigation

District courts have shown varying willingness to expand or expansively interpret the statutory mitigating factor that "The victim consented to the criminal conduct that resulted in the victim's death." 18 U.S.C. § 3592(a)(7). Compare United States v. Aquart, 2012 WL 603243, at *8 (D. Conn. Feb. 24, 2012)

(unpublished) (court instructed on, and defense argued in summation, the non-statutory mitigating factor that "One or more victims chose to engage in illegal drug trafficking activities, a circumstance that contributed to their deaths") and United v. Johnson, 403 F. Supp. 2d 721, 871 (N.D. Iowa 2005) (statutory mitigating submitted to jury, and parties permitted to argue whether it should be given weight because adult victims "participated in drug trafficking activity" with defendants, or not, because they did not participate the conduct that actually caused their deaths); with United States v. Beckford, 962 F. Supp. 2d 804, 818 (E.D. Va. 1997) (adopting more narrow interpretation of this mitigator); United States v. Johnson, 2008 WL 2095342, at *1 (E.D. Mich. May 16, 2008) (unpublished) (same).

One circuit has rejected the admissibility of "reverse victim impact" mitigation, in a case in which the government was not relying on victim-impact aggravation:

> United States v. Snarr, 704 F.3d 368, 400 (5th Cir. 2013). "Defendants' argument as to 'reverse victim impact' misapprehends . . . the purpose of victim impact evidence. Contrary to Defendants' assertions — which seem to suggest that a defendant is less culpable if he murders a vile person —the purpose of permitting victim impact evidence is to counteract a defendant's mitigating evidence and fully explain to the sentencing authority the harm caused by the defendant's crime . . . . Defendants cite no authority that supports their apparent proposition that a defendant must be permitted to offer general evidence of the victim's bad character during the sentencing phase of a federal capital murder case. Moreover, to the degree Defendants maintain that the excluded evidence was necessary to provide a clear picture of the circumstances allegedly precipitating the murder, we note that the evidence the court did admit about [the victim] gave the jury the context it needed to resolve this issue."

As reflected in federal verdict forms, numerous courts, particularly in BOP cases, have allowed mitigating evidence and factors related to third-party negligence that may have facilitated or contributed to the murder. In a non-BOP case, one district court issued an equivocal decision regarding what it termed "contributory negligence" by third parties. United States v. Sampson, No. 1:01-cr-10384-LTS, ECF #2259, at 11 (D. Mass. May 13, 2016). There, the defendant had called the FBI prior to the offense seeking to surrender because he

felt "out of control" and was wanted in another state, and even showed up to surrender at the proposed time and place. The court said that Sampson was entitled to present evidence "[t]hat the call was dropped, the employee who took the call did not tell anyone about it, and the FBI did not show up to arrest Sampson, as "relevant facts" that were "part of the background related to the call." The court went on to say: "Whether such facts are mitigating depends in part on the evidence presented and, thus, cannot be determined at this time. However, allegations of 'contributory negligence' by third parties (here, the FBI) present a more difficult question. Although possibly relevant to explore at trial (for example, in cross-examining a victim impact witness . . .), the Court is not persuaded such facts are reasonably viewed as mitigating or diminishing Sampson's culpability for his crimes. United States v. Williams, Crim. No. 06-79, 2014 WL 2436199, at *4 (D. Haw. May 30, 2014) (finding alleged third party negligence did 'not in any way lessen and/or explain Defendant's conduct in carrying out the offense')." Id.

XIV. Evidence

A. Generally

"The Federal Death Penalty Act (FDPA) erects very low barriers to the admission of evidence at capital sentencing hearings." United States v. Lee, 274 F.3d 485, 494 (8th Cir. 2001). The defendant may present "any information relevant to a mitigating factor," and the government any information relevant to a noticed aggravating factor. 18 U.S.C. § 3593(c). "Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials." Id.

The only statutory exception is a version of the court's traditional balancing discretion: "[I]nformation may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." Note that this provision does not authorize the court to exclude evidence on the basis that it will cause "undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Crim. P. 403. Moreover, unlike Rule 403, it allows evidence to be excluded if its probative value is merely "outweighed," even if it is not "substantially outweighed."

The circuits have consistently rejected constitutional challenges to FDPA's relaxed evidentiary standard. See United States v. Snarr, 704 F.3d 368 (5th Cir. 2013); United States v. Gabrion, 648 F.3d 307, 345 (6th Cir. 2011), modified on other grounds, 719 F.3d 511 (6th Cir. 2013) (*en banc*); United States v. Mitchell, 502 F.3d 931, 979-980 (9th Cir. 2007); United States v. Fulks, 454 F.3d 410, 438 (4th Cir. 2006); United States v. Lee, 374 F.3d 637, 648 (8th Cir. 2004); United States v. Fell, 360 F.3d 135, 143-144 (2d Cir. 2004); United States v. Allen, 247 F.3d 741, 759-760 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002); United States v. Jones, 132 F.3d 232, 241 (5th Cir. 1998). See also United States v. Barrett, 496 F.3d 1079, 1106 (10th Cir. 2007) (upholding similarly phrased standard in 21 U.S.C. § 848).

One circuit judge has suggested that the defendant in a FDPA case may be entitled to present evidence, at the guilt-innocence trial, that is relevant to rebut an aggravating factor the government intends to rely on at the sentencing hearing, at least where the government itself will be relying on its own trial evidence to establish the aggravator. United States v. Catalán-Roman, 585 F.3d 453, 467-68,

470-71 (1st Cir. 2009) (Lipez, J., for the Court), found that a district court had abused it discretion at trial by excluding defense evidence of prior inconsistent statements by a prosecution witness. One key reason why the district court was wrong in deeming the earlier statements not inconsistent was, the circuit said, that the earlier statements had omitted details (which the witness included in his trial testimony) that were "essential to the government's death penalty case" — specifically, the aggravating factor that the murder was heinous, cruel, or depraved. Moreover, at sentencing, the jury was explicitly told it could rely on trial evidence in determining the aggravators.[43] But a concurring opinion by two other members of the panel pulled back from this reasoning. Id. at 476 (Boudin and Stahl, JJ., concurring). They would have found no abuse of discretion because the impeachment evidence was arguably collateral at trial, though they acknowledged that it was "not collateral to the jury's further choice in the second phase of the trial as to whether to recommend death or life imprisonment. Thus, if the" prior statements "were deemed inconsistent, extrinsic evidence of them would have to be allowed at that second stage. It is hard to imagine that at any penalty stage a judge would have excluded" such evidence. Id.

B. Confrontation and Hearsay

It remains an open question whether and, if so, to what extent, the Sixth Amendment's Confrontation Clause applies to a federal capital sentencing hearing, and thus, for example, prohibits the government from introducing testimonial hearsay, under Crawford v. Washington, 541 U.S. 36 (2004).

Some district courts have indicated that the defendant maintains this right throughout the sentencing hearing:

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[43] "Defense counsel expressed this concern at trial, arguing that if [the witness's] testimony went unimpeached, the defendants' lawyers would not later be able to "unring the bell" about the reprehensible details when it came time for the jury to deliberate about whether to impose the death penalty. That argument was apt, but, in the final analysis, the jury apparently did unring the bell," since it sentenced the defendant to life. Judge Lipez observed that harmless-error analysis (which led it to find the error harmless as to the conviction) might have been "different" as to a death sentence. Id. In a footnote, Judge Lipez did note that the defendant "[s]trangely . . . apparently did not seek to have any of the agents testify about" the excluded impeachment "during the penalty phase of the trial, even though the court clearly took a different view of the relevance of the evidence in that phase of the trial." Id. at 471 n.23.

- United States v. Pleau, 2013 WL 1673109, at **4, 6 (D.R.I. Apr. 17, 2013) (unpublished). Noting that government has indicated it intends to rely on police reports and witness statements to help establish other-acts-of-violence and future-dangerousness aggravators, court observes that [t]he Supreme Court has, however, emphasized the need for heightened reliability in such proceedings" and that some district courts "have required the government to prove aggravating factors without relying on hearsay evidence." Court therefore, without addressing admissibility issues, orders government "to proffer its evidence in support of" these factors. Proffer "shall include lists of the witnesses it expects to testify in support of each aggravator, brief descriptions of each witness's anticipated testimony, and copies of any out of court documents or exhibits that the government plans to introduce."

- United States v. Taveras, 585 F. Supp. 2d 327, 340 (E.D.N.Y. 2008). "The court will not permit the government's expert — Dr. Welner — to present communicated out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of an expert opinion."

- United States v. Mills, 446 F. Supp. 2d 1115, 1135-1139 (C.D. Cal. 2006). Confrontation Clause and Crawford apply to both the eligibility phase and the selection phase of a capital sentencing hearing. Therefore, introduction of testimonial hearsay is prohibited. While this may not include presentencing reports (which are prepared for sentencing, not trial), it does include many of the statements and documents on which PSR's are based.

- United States v. Sablan, 2008 WL 700172, at **1-2 (D. Colo. Mar. 13, 2008) (unpublished). Confrontation Clause and Crawford apply to both the eligibility phase and the selection phase of a capital sentencing hearing.

Other district courts have taken the more limited view that the Confrontation Clause applies only to the "eligibility phase" of sentencing — *i.e.*, to the government's effort to prove gateway and statutory aggravating factors — because, under Ring v. Arizona, 536 U.S. 584, 609 (2002), these are *de facto* elements of the offense. See also Section III.B, *ante* (Indictment — Gateway and Aggravating Factors).

- United States v. Jordan, 357 F. Supp. 2d 889, 902-904 (E.D. Va. 2005). Statement given to police by witness who later committed suicide was testimonial and not admissible at eligibility phase of capital sentencing hearing, where right to confrontation applied, but would be admissible at selection phase.

- United States v. Bodkins, 2005 WL 1118158, at *5 (W.D. Va. May 11, 2005) (unpublished). Confrontation Clause and Crawford apply to eligibility phase of capital sentencing hearing.

Only three circuits have addressed this issue, in each instance ruling against the defendant, but with some exception or dissent:

- The Eleventh Circuit has recognized a limited right to cross-examine the authors of psychiatric reports, Proffitt v. Wainwright, 685 F.2d 1227, 1254-55 (11th Cir.1982), but has declined to apply the Confrontation Clause generally to capital sentencing proceedings, Muhammad v. Sec'y, Fla. Dep't of Corrections, 733 F.3d 1065, 1073–77 (11th Cir. 2013)

- The Fifth Circuit left open the question whether the defendant maintains a constitutional confrontation right at the eligibility phase, while holding that the Confrontation Clause does not apply to the government's effort to establish non-statutory aggravating factors. United States v. Fields, 483 F.3d 313, 324-326 (5th Cir. 2007). In a lengthy, scholarly opinion, Judge Benavides dissented from that holding. A divided panel of the Fourth Circuit recently followed suit. United States v. Umana, 750 F.3d 320 (4th Cir. 2013). Judge Gregory filed a lengthy dissent, urging that Crawford should apply at a capital sentencing hearing. The *en banc* court denied rehearing by a vote of 8-5, with Judges Wilkinson concurring and Judge Gregory again dissenting, in an opinion joined by Judge Wynn. Those two, along with Judges Motz, Keenan, and Thacker would have granted rehearing *en banc*. 762 F.3d 413 (4th Cir. 2014).

In Fields, the Fifth Circuit did caution that "due process requires that some minimal indicia of reliability accompany a hearsay statement, and a significant possibility of misinformation justifies the sentencing court in requiring the Government to verify the hearsay information." (citations omitted). 483 F.3d at 337-338.

Nevertheless, defendants have not succeeded in challenging, as constitutionally unreliable, the government's use of particular hearsay:

- United States v. Umana, 750 F.3d 320 (4th Cir. 2013). Defendant argued that accomplice hearsay, introduced by prosecution to implicate him as shooter in two prior murders, "did not bear sufficient indicia of reliability. He argues that their statements were not corroborated by independent evidence; that any similarities in their statements were on 'undisputed peripheral details'; that [two of the accomplices] spent a weekend in jail together before telling the same stories; that the statements were the product of police pressure; that they were contradicted in some respects by neutral observers; and that they were self-serving inasmuch as they exculpated the accusers . . . . While these are all legitimate arguments, we conclude that the court had other evidence that rendered the hearsay testimony sufficiently reliable to overcome any presumption and support its discretion in admitting the evidence."

- United States v. Fulks, 454 F.3d 410, 436 (4th Cir. 2006). Defendant's due process rights were not violated by allowing victim's sister to read aloud a letter she had received from victim, 12 years before her murder, concerning past abuse of them by their father and victim's desire to leave her abusive husband. Although hearsay, letter was reliable.

- United States v. Brown, 441 F.3d 1330, 1361 (11th Cir. 2006). No Crawford violation at capital sentencing hearing from victim-impact testimony about statements made "by one grieving family member to another."

- United States v. Barrett, 496 F.3d 1079, 1099-1100 (10th Cir. 2007). No plain error in allowing victim's widow to read short essay written by her daughter and describe drawing by her son, where FDPA expressly states Rules of Evidence do not apply, testimony was not unduly prejudicial, and it is far from plain whether the Confrontation Clause even applies at such a proceeding.

- United States v. Webster, 162 F.3d 308, 321 (5th Cir. 1998). No Eighth Amendment error in admission of nontestimonial victim-impact statements.

- United States v. Hall, 152 F.3d 381, 405 (5th Cir. 1998). No Eighth Amendment error in admission of nontestimonial victim-impact statements.

C. Probative Value Versus Prejudice[44]

For *favorable* or partially favorable decisions on the admission of government evidence or on the exclusion of defense evidence, including hearsay, see:

- United States v. Jacques, 684 F.3d 324, 328 (2d Cir. 2012). On government's interlocutory appeal, holding (1) district court did not abuse discretion in excluding evidence of two unadjudicated acts of sexual abuse that occurred more than 20 years before. Remoteness reduced their reliability and fact defendant was a youth himself at the time reduced their probative value; (2) exclusion of third act was vacated and remanded for reconsideration, as district court based its order in part on mistaken assumption that act was unadjudicated.

- United States v. Pepin, 514 F.3d 193 (2d Cir. 2008). On government's interlocutory appeal, holding (1) district court did not abuse discretion in excluding aggravating evidence that defendant had physically and sexually abused a child, whether offered to prove future dangerousness or an independent aggravating factor. District court had found that evidence did not relate to the capital murder charges, would inflame the jury, require a mini-trial, and had little if any relevance at sentencing since alternative to death penalty was life imprisonment where he would not be housed with children. Id. at 205-206. But, (2) district court did abuse discretion in excluding relevant trial evidence that defendant had dismembered victims after the murders, simply on the basis that it had ruled such evidence would be excluded from sentencing phase. District court had option of giving curative instruction at sentencing phase. Id. at 207-209.

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[44] See also Section XII.D.3.b. (Aggravating Factors . . . Excluding Certain Other Crimes or Misconduct as Insufficiently Relevant), *ante*; Section XII.D.1.c (Aggravating Factors . . . Future Dangerousness — Excluding Irrelevant or Otherwise Improper Evidence), *ante*.

- United States v. Purkey, 428 F.3d 738 (8th Cir. 2005). (1) District court erred in precluding cross of prosecution psychiatric expert Park Dietz about his error in testimony in Andrea Yates case. Cross would have been relevant to demonstrate expert's fallibility. "Further, we cannot agree with the district court that this testimony would have resulted in confusion. Dr. Dietz freely admitted that he erred; that was not in dispute. The nature of Dr. Dietz's error, moreover, was not unusually complex or confusing. Therefore we can find no reason to conclude that the probative value of this testimony was 'outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury,' 18 U.S.C. § 3593(c). Id. at 758-759 (2) But no error in excluding evidence that defendant was under influence of rat poison, administered by his wife, when he committed murder. Wife's testimony about the poisoning was "equivocal," defendant had no evidence that such poison has any effect on the mind, and "scandalous and perplexing" nature of the claim might have confused and misled jury. No plain error in exclusion of evidence on theory it showed defendant's difficult home life. Wife testified she administered poison to persuade defendant to give up illegal drugs, and thus evidence might have demonstrated he had someone who cared for him. Moreover, there was ample other evidence of the dysfunctional environments in which he lived, so exclusion did not violate substantial rights. Id. at 757.

- United States v. Hammer, 2011 WL 6020555, at *8 (M.D. Pa. Dec. 1, 2011) (unpublished). FBI 302's from deceased inmate witnesses would be relevant to aggravating factor of substantial premeditation and not unduly prejudicial, and thus admissible at resentencing hearing.

- United States v. Umana, 2010 WL 1688423, at *6 (W.D.N.C. Apr. 26, 2010) (unpublished). Excluding police officer testimony about photo I.D. of defendant by witness to prior shooting government would be using in aggravation. Moreover, "due to the passage of five years . . . the Court will no[t] permit the government to elicit an in-court identification by [the witness], finding that the danger of unfair prejudice outweighs its probative value."

- United States v. Sampson, 335 F. Supp. 2d 166, 183-186 (D. Mass. 2004). Excluding government photographs that portrayed decomposition of victims' bodies, one victim's crucifix, and victims' bloody clothing.

- United States v. Gilbert, 120 F. Supp. 2d 147, 153 (D. Mass. 2000). Finding a prior unadjudicated act unreliable, based in part on the fact that it occurred so long before the homicide: "Any testimony about the incident thirteen years after the fact is not reliable enough to be used at a capital sentencing hearing."

- United States v. Sablan, 2008 WL 700172 (D. Colo. Mar. 13, 2008) (unpublished). Court excluded (1) government evidence of an aggravated assault conviction from 20 years before when defendant was a juvenile Id. at *4; and (2) government evidence that defendant had stabbed an inmate in federal prison, where no charges were filed, victim refused to provide any information to the authorities, and sentencing evidence would consist of testimony of inmate who came forward several years after the assault and became a cooperating informant and now claims to have witnessed the assault. Id. at **5-6.

- United States v. Gonzalez, 2004 WL 1920492, at **2-3 (D. Conn. Aug. 17, 2004) (unpublished). Excluding evidence of four unadjudicated murders attributed to the defendant because its prejudicial impact outweighed its probative value. The underlying facts of the crimes were inflammatory, the crimes were based on fact patterns similar to the capital charge, and the evidence for them came primarily from accomplices and cooperators.

- United States v. Davis, 2003 WL 1873088, at **5-6 (E.D. La. Apr. 10, 2003) (unpublished). Excluding evidence of two of defendant's juvenile convictions for possession of a weapon at ages 11 and 13, finding that danger of unfair prejudice outweighed probative value.

For *unfavorable* decisions on the admission of government evidence or the exclusion of defense evidence, see:

- United States v. Taylor, 814 F.3d 340 (6th Cir. 2016) (2-1). Hearsay testimony that defendant had robbed drug dealers after arrest was sufficiently reliable and admissible because "it was based on an official 302 Form . . . completed immediately after" an interview with a cooperating codefendant. Same, for hearsay testimony that unnamed relative of cooperator had reported vandalism to her home after defendant's conviction,

since defendant had written a letter suggesting people were angry at the cooperator for testifying, which "could fairly be read to hint at his familiarity with — and possible role in — reprisals against [the cooperator] for testifying."

- United States v. Umana, 750 F.3d 320 (4th Cir. 2013). Rejecting defendant's contention "that the district court abused its discretion in refusing to permit him . . . to introduce evidence of the murders committed by his RICO coconspirators, who were also MS-13 members . . . . to show that his own violent proclivities were not unique but rather were a 'product of social conformity' . . . . It is difficult to imagine that giving the jury evidence of unrelated murders by MS-13 members would contribute to the individualized decision of whether to impose the death penalty on Umaña. Indeed, it might even work against him, linking him with a number of other unrelated murders.

- United States v. Lujan, 603 F.3d 850, 858-859 (10th Cir. 2010) (2-1, Henry dissenting). On government's interlocutory appeal, reversing the district court's exclusion of two unadjudicated murders as nonstatutory aggravating evidence at the sentencing hearing. (For more on this decision, see Section XII.D.3.a, *ante*).

- United States v. Caro, 597 F.3d 608, 634 (4th Cir. 2010). No error in excluding sentencing evidence that victim had been placed in SHU cell with defendant (where he was killed) after being found carrying a shank. Defendant never laid a foundation for his theory that victim was following a plan to gain access to defendant, and nothing in record supports this theory.

- United States v. Corley, 519 F.3d 716, 726 (7th Cir. 2008). No error in admitting two photos of charred body of victim of unadjudicated prior murder. Photos were probative of manner of death, extent of injuries, and viciousness of attack. Also, victim lived for some time after being set on fire, and photos provided context to statements she had made about attackers.

- United States v. Sampson, 486 F.3d 13, 42-44 (1st Cir. 2007). No error in admitting certain crime-scene and autopsy photographs at sentencing hearing. District court correctly understood it was free to consider

cumulativeness as ground for exclusion thought it is not mentioned in 18 U.S.C. § 3593(c).

- United States v. Purkey, 428 F.3d 738, 760 (8th Cir. 2005). No error in permitting government to cross defense expert about his views on death penalty, since questioning went to possible bias.

- United States v. McVeigh, 153 F.3d 1166, 1213-1216 (10th Cir. 1998). No error in excluding (1) defense testimony about another anti-government group that allegedly expressed interest in bombing Murrah Federal Building. Evidence was not relevant to show defendant played a "lesser role" in offense, as it failed to link defendant to another conspiracy; (2) defense evidence critical of government's actions against Branch Davidian group at Waco to show defendant's opinion on subject was objectively reasonable.

- United States v. Hall, 152 F.3d 381, 402-403 (5th Cir. 1998). District court did not err in admitting videotape depicting a walk through the park in which victim was killed, the area where her burned clothes were recovered, and the exhumation of her body.

D. Rebuttal and Surrebuttal

FDPA provides: "The government and the defendant shall be permitted to rebut any information received at the hearing." 18 U.S.C. § 3593(c).

For *favorable* or partially favorable decisions on the scope of government rebuttal or defense rebuttal or surrebuttal, see:

- United States v. Troya, 733 F.3d 1125, 1134-35 (11th Cir. 2013). At his sentencing hearing, Troya unsuccessfully sought to introduce evidence to show that, if sentenced to life, he would make a positive adjustment to federal prison, could be safely managed, and would not be dangerous there. But the district court refused to allow any testimony from the defense expert, Dr. Mark Cunningham. Cunningham was a Ph.D. psychologist and nationally renowned expert on the predictors and rates of prison violence, particularly among capital offenders. The appellate court found that this was constitutional error. "[T]he government indubitably put Troya's future dangerousness at issue." Indeed, the "impact" of its evidence about the

capital offense, other violence by Troya, and his attempted prison escape was "manifest: if the jury did not sentence Troya to death, he would be just as lawless in the future" in federal prison. Moreover, in his summation arguments, "the prosecutor accentuated the clear implication of future dangerousness raised by the evidence . . . . Consequently, Troya had a right to rebut this evidence with Dr. Cunningham's testimony."

- United States v. Jackson, 327 F.3d 273, 306-307 (4th Cir. 2003). District court "abused it discretion in permitting the government to show to the jury the entire videotape, the major portion of which goes beyond the scope of proper rebuttal." Videotape included defendant's rants about politicians, prosecutors, and police, describing them as "scum" and "the devil," and his claims of a government conspiracy against him. (Also rejects government's argument on appeal that videotape was admissible to rebut evidence presented by defendant at trial, which he was seeking to rely upon at sentencing. Court notes that *Section 3593 only allows rebuttal of information received at sentencing*.) But error was harmless, as it did not affect jury's findings of aggravators and, even if it affected mitigation findings, jury still would have voted death even in absence of the videotape.

- United States v. Stitt, 250 F.3d 878, 897-898 (4th Cir. 2001). District court abused discretion in admitting government victim-impact testimony in rebuttal after no notice to defense, as such evidence was not proper rebuttal.

- United States v. Barnette, 211 F.3d 803, 825 (4th Cir. 2000). Reversible error for court to prevent defense from calling its expert in surrebuttal of prosecution's rebuttal expert who had opined that defendant was a psychopath. Defense expert had previously testified but not mentioned psychopath diagnosis or instrument that government expert used to reach diagnosis.

For *unfavorable* decisions on the scope of government rebuttal or defense surrebuttal, see:

- United States v. Taylor, 814 F.3d 340 (6th Cir. 2016) (2-1). No abuse of discretion to exclude defense expert testimony to rebut dangerousness "none of it rebutted any of the Government's future dangerousness arguments" in summation, which "went exclusively to the notion that Taylor could be

vicariously dangerous if given a life sentence," *i.e.*, that he might "conspir[e]" with or "recruit" others.

- United States v. Basham, 561 F.3d 302, 333 (4th Cir. 2009). No error in admitting video evidence of courtroom scuffle in which defendant, who had become upset and unsuccessfully requested to absent himself because district judge broke his promise to let him chew tobacco in the courtroom, refused to comply with judge's instruction to take his seat and physically resisted marshals. Incident was relevant to future dangerousness. Among other things, it was relevant to rebut mitigation argument that defendant suffered mental defects that limited his culpability, since, coupled with fact he later remained calm when he was permitted to chew tobacco during breaks, it showed he was manipulative.

- United States v. Purkey, 428 F.3d 738, 759-760 (8th Cir. 2005). No error in precluding defense surrebuttal of government mental-health expert on issues of whether defendant could have suffered serious brain injuries in two auto accidents and whether his work as jailhouse lawyer was inconsistent with the kind of brain damage claimed by defense experts. Relaxed evidentiary standard of FDPA did not divest district court of traditional authority to control mode and order of interrogation of witnesses.

- United States v. Higgs, 353 F.3d 281, 329-330 (4th Cir. 2003). No error in allowing government evidence of defendant's prison infractions as rebuttal to mitigating evidence that aimed to show he was trying to stay out of trouble while incarcerated and that he intended to continue to be a good influence on his son and nephew from prison.

E. Mental-Health Evidence[45]

For *favorable* or partially favorable decisions on the admission of government evidence or the exclusion of defense evidence, see:

[45] See also Section V (Psychiatric Notice: Federal Rule of Criminal Procedure 12.2), *ante*.

- United States v. Purkey, 428 F.3d 738, 757-758 (8th Cir. 2005). District court erred by refusing to allow psychologist Mark Cunningham to testify to his opinion that defendant suffered from fetal alcohol exposure. Though defendant could not adduce specific evidence that his mother drank during the time that she was pregnant with him, his offer of proof indicated psychologist could have brought forth significant circumstantial evidence that defendant suffered from this affliction.

For *unfavorable* decisions on the admission of government evidence or the exclusion of defense evidence, see:

- United States v. Gabrion, 648 F.3d 307, 341 (6th Cir. 2011), modified on other grounds, 719 F.3d 511 (6th Cir. 2013) (en banc). The panel held that, even if some isolated remarks from the psychiatrist's testimony went beyond the scope of the mitigation, it was, on the whole, fair rebuttal. The *en banc* court added that "'Dr. Saathoff's testimony [including about Gabrion's 'contempt for women'] as a whole was a fair rebuttal of Gabrion's mitigation evidence and did not unfairly prejudice Gabrion.' For example, Dr. Jackson — one of Gabrion's experts — testified at length about 'Gabrion's psychological makeup[,]' an open-ended subject of which Gabrion's misogyny was certainly a part. Gabrion's mitigation evidence also downplayed the extent of his future dangerousness to women. Thus, whatever the contours of the Fifth and Sixth Amendment rights that Gabrion asserts here, Dr. Saathoff's testimony did not violate them — for reasons already stated in the original panel opinion."

- United States v. Fell, 531 F.3d 197, 227 (2d Cir. 2008). District court did not err by delaying ruling, on defense motion to exclude testimony from government psychiatric expert, until after defense had to decide whether to present psychiatric testimony.

- United States v. Fields, 483 F.3d 313, 341-355 (5th Cir. 2007). No error in admission of testimony by government psychiatric expert that defendant would be future danger. Daubert does not apply to capital sentencing hearing, given inapplicability of Rules of Evidence. Supreme Court in Barefoot already determined that future-dangerousness evidence is sufficiently reliable to be admitted.

- United States v. Lee, 274 F.3d 485 (8th Cir. 2001). Reversing district court's grant of new capital sentencing hearing. Defense psychologist had testified at sentencing hearing about defendant's upbringing. Over objection, government had cross-examined expert about defendant's capacity for violence and about his unadjudicated bad acts. (1) Cross about bad acts was probative of future dangerousness and relevant to expert's credibility, for it tested whether he had presented a distorted account of defendant's history. *Id.* at 493-494. (2) Cross about defendant's psychopathy may have exceeded scope of direct, but did not prejudice defendant. By introducing mental-health expert, defense opened door to testimony about defendant's psychological diagnosis. Evidence satisfied balancing test of Section 3593. Id. at 495. (3) Cross did not violate defendant's right to notice of aggravating evidence. Defendant only had right to notice of aggravating factors. Moreover, defendant was not denied opportunity to respond to cross and could have moved for continuance if necessary. Id. at 495-496.

- United States v. Barnette, 211 F.3d 803, 815-816 (4th Cir. 2000). Without deciding whether Daubert applies to capital-sentencing hearing, finding no error in admission of Psychopathy Checklist Revised (PCL-R). Absent evidence indicating more than a disagreement among certain mental-health professionals about the test's merits, district court did not need to go further to evaluate its reliability. Court also finds no error in government expert's consideration of race, age, and poverty in evaluating psychopathy and future dangerousness, given that he considered numerous other bases.

- United States v. Jackson, 327 F.3d 273, 289 (4th Cir. 2003). No error in excluding testimony by defendant's adoptive parents that his biological sister demonstrated many abnormal behaviors. Defendant failed to offer expert testimony, as promised by counsel, that would permit jury to connect sister's mental condition with defendant's.

F. Other Expert Evidence

In some cases, the government seeks to elicit expert-type testimony from non-expert witnesses, of a kind that would not be admissible at trial (*e.g.*, testimony from a prison guard about the characteristics that make an inmate more dangerous, testimony from a local jailhouse informant about the general internal operations of the Bloods gang in federal prisons). Defense counsel should be

watchful for some testimony and consider challenging it. There is caselaw, from the trial context, excluding expert testimony from an unqualified expert or one who lacks a factual basis for his or her opinion. Although the Federal Rules of Evidence do not apply at a capital sentencing, such caselaw is still relevant to the issue of reliability, since the Supreme Court has noted that "the exclusion of unreliable evidence is a principal objective" of Rule 702. See United States v. Scheffer, 523 U.S. 303, 309 (1998).

Two district courts have rebuffed prosecution efforts to exclude defense expert testimony at sentencing:

- United States v. Lecco, 495 F. Supp. 2d 581, 585-586 (S.D.W. Va. 2007). Rejecting government effort to preclude defense expert from testifying because he was employed by the Department of Veterans Affairs and federal regulation prohibits government employee from serving as expert witness in case in which U.S. is party. Asserted privilege could not override court's discovery powers, particularly when it would deprive defense of key mitigation witness on eve of trial.

- United States v. Wilson, 493 F. Supp. 2d 491, 507-509 (E.D.N.Y. 2007). Denying government motions to preclude sentencing testimony by (1) defense expert on hip-hop culture, offered to explain lyrics of violent rap lyrics written by defendant and found in his possession when he was arrested. Expert had sufficient knowledge of subject area to provide opinion. Defense was entitled to call expert to address this subject since government intended to use lyrics to show defendant was a remorseless killer; (2) Mark Cunningham, to show rates of violence in federal prisons and security measures available to deal with inmates. Court rejects government's argument that testimony was not sufficiently specific to defendant, since it would rebut government's future-dangerousness aggravator. But Cunningham could not testify about a particular institution where defendant was unlikely to be housed (*i.e.*, ADX Florence), since that was too speculative. And defense had to turn over Cunningham's notes on interview with defendant even if he was not going to base any of his testimony on the interview; and (3) Donald Romine, former BOP warden and administrator, who would testify about its ability to manage inmates convicted of violent crimes. Court rejects government's argument that

testimony was not sufficiently specific to defendant, since it was rebutting government's future-dangerousness aggravator.

G. Plea Offers, Discussions, or Agreements

- United States v. Fell, 531 F.3d 197, 218-221 (2d Cir. 2008). No error in excluding defense evidence of draft plea agreement between defendant and local United States Attorney's office, which was ultimately rejected by Attorney General, notwithstanding that government argued in summation that defendant was only willing to plead guilty because he knew the evidence was overwhelming and that he was going to be convicted, and that he could have pled guilty (*i.e.*, without an agreement) had he had really wanted to.[46]

H. Polygraphs

- United States v. Fulks, 454 F.3d 410, 434-435 (4th Cir. 2006). District court did not abuse its discretion in excluding three polygraph examinations offered by defense at capital sentencing proceedings. Constitution does not mandate admission of such evidence.

I. Defendant's Ethnicity or Religious Beliefs

- United States v. Runyon, 707 F.3d 475, 493-94 (4th Cir. 2013). At sentencing, the government played a lengthy videotape of an interrogation of the defendant in which police confronted him with the evidence and facts of the crime and urged him to confess and show remorse, and he, for the most part, kept silent. The court holds that the admission of the tape was error to the extent it included references by the officers to the defendant's religion

[46] Four judges (in three separate opinions) dissented from the denial of rehearing *en banc* on this issue. The lead dissenter wrote that *en banc* review was needed to address whether the defendant was entitled to inform the sentencing jury that the local U.S. Attorney in Vermont, a state whose people had rejected the death penalty, had been willing to accept a sentence of life imprisonment in exchange for a guilty plea (but that the Attorney General had rejected this). United States v. Fell, 571 F.3d 264, 287-290 (2d Cir. 2009) (Calabresi and Straub, JJ., dissenting from denial of *en banc* review).

and ethnicity (he was half-Asian), such as comments that he would confess if he believed in God and was "an honorable Asian man."

- United States v. Fell, 531 F.3d 197, 229-231 (2d Cir. 2008). Government improperly introduced evidence at sentencing about defendant's religious beliefs, including a satanic tattoo and desire to engage in Native American and Muslim worship. But no plain error because defendant did not demonstrate prejudice.[47]

J. Trial Transcript

FDPA provides that the "information presented" at the sentencing hearing "may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion." 18 U.S.C. § 3593(c). In federal prosecutions, the government will usually ask the court to admit or deem admitted, at sentencing, all the testimony and exhibits from the trial.

- United States v. Basham, 561 F.3d 302, 334-335 (4th Cir. 2009). No plain error in admission of entire trial transcript during penalty phase. 18 U.S.C. § 3593(c) invests district court with discretion to admit transcript and, since same jury is presumed to hear both phases, it will almost always be considered at penalty phase. Trial evidence that defendant now claims should not have been considered at penalty phase was actually relevant to government's aggravating factors. Moreover, since jury had already head the evidence, its admission at penalty in the form of the transcript was not prejudicial.

[47] For a Supreme Court decision limiting, to some degree, the prosecution's ability to rely on aggravating evidence involving a defendant's activities that are protected by the First Amendment, see Dawson v. Delaware, 503 U.S. 159, 166-167 (1992).

XV. Sentencing Procedures

A. Trifurcation

FDPA provides for bifurcated proceedings in which the defendant is first tried on the capital charge. If found guilty, he then faces a sentencing hearing at which the jury determines whether he is eligible for a death sentence and, if so, whether he should be sentenced to death. See 18 U.S.C. § 3593(b), (c).

Some district courts, though, have granted defense requests for *tri*furcation, in which the sentencing hearing itself is divided into two phases: first, an "eligibility" phase in which each side presents evidence and argument and the jury renders a verdict on the gateway and statutory aggravating factors; and, if the defendant is found eligible for capital punishment, then a "selection" phase at which each side presents evidence and argument and the jury renders a verdict on nonstatutory aggravating factors, mitigating factors, and whether the defendant should be sentenced to death. See, e.g., United States v. Henderson, 485 F. Supp. 2d 831, 850-851 (S.D. Ohio 2007); United States v. Natson, 444 F. Supp. 2d 1296, 1309 (M.D. Ga. 2006); United States v. Johnson, 362 F. Supp. 2d 1043, 1110 (N.D. Iowa 2005); United States v. Bodkins, 2005 WL 1118158, at *7 (W.D. Va. May 11, 2005) (unpublished).

One reason for this approach is to enable the court to apply the Confrontation Clause and the Rules of Evidence at eligibility, but not at selection. See Section XIV.B, *ante* (Evidence — Confrontation and Hearsay). See, e.g., United States v. Bodkins, 2005 WL 1118158, at *7 (W.D. Va. May 11, 2005). See also United States v. Johnson, 764 F.3d 937, 946 (8th Cir. 2014) (Bye, J., dissenting) ("Bifurcating the sentencing phase is done to allay concerns over the relaxed evidentiary rules governing the jury's determination of eligibility"). Another is to prevent the jury's determination of eligibility from being prejudiced by highly emotional evidence relevant only to selection, such as victim impact. See, e.g., United States v. Johnson, 362 F. Supp. 2d 1043, 1110 (N.D. Iowa 2005).

The Eighth Circuit has said that trifurcation is permissible, but found no abuse of discretion in the district court's refusal to trifurcate in that case. United States v. Bolden, 545 F.3d 609, 618-619 (8th Cir. 2008). The Court agreed that trial courts should "consider carefully the ramifications of presenting . . . evidence that would otherwise be inadmissible in the guilt phase . . . to a jury that has not yet

made findings concerning death eligibility." Here, though, it concluded, the evidence cited by the defense did not merit trifurcation. The defendant's prior crimes were relevant to both statutory and non-statutory aggravating factors. And the district court carefully instructed jury not to let victim-impact evidence overwhelm their ability to follow the law. But see also United States v. Johnson, 764 F.3d 937 (8th Cir. 2014) (ADAA, antecedent to FDPA, requires single jury, not two different juries, to decide both eligibility and selection; thus district court abused discretion in limiting capital resentencing to selection and forbidding government from relitigating eligibility and adding new statutory aggravating factor not found by previous sentencing jury).

B. Allocution

An often-contested, unsettled issue in federal capital law is whether a defendant should be allowed an "allocution" before the sentencing jury — in other words, to make a brief, unsworn, uncross-examined statement, usually focusing on or limited to expressing remorse and asking for mercy.

Defendants have argued that they have a right to do so under the Constitution and Fed. R. Crim. P. 32(i)(4)(ii), which generally requires a district court to allow a defendant to speak in mitigation before sentence is prounounced. Several district-court decisions have accepted this argument, reasoning that, in a capital case, such an opportunity would be meaningless unless afforded before the actual sentencer, the jury. See United States v. Sampson, ___ F. Supp. 3d ___, 2016 WL 3102003, at *6 (D. Mass. June 2, 2016); United States v. Williams, 18 F. Supp. 3d 1065, 1068 (D. Haw. 2014); United States v. Henderson, 485 F. Supp. 2d 831, 845-46 (S.D. Ohio 2007); United States v. Gabrion, 2002 U.S. Dist. LEXIS 1379, at **2-8 (W.D. Mich. Jan. 25, 2002) (unpublished); United States v. Chong, 104 F. Supp. 2d 1232, 1233-34 (D. Haw. 1999). A number of other district courts have also allowed allocution, without a written opinion.

But the Fourth, Fifth, Sixth and Eighth Circuits have held, in FDPA appeals, that a capital defendant has no absolute right to make an unsworn, uncross-examined statement to the sentencing jury, under either the Constitution or Rule 32. See United States v. Lawrence, 735 F.3d 385, 407-08 (6th Cir. 2013); United States v. Honken, 541 F.3d 1146, 1172 (8th Cir. 2008); United States v. Purkey, 428 F.3d 738, 760-761 (8th Cir. 2005); United States v. Barnette, 211 F.3d 803,

820 (4th Cir. 2000); United States v. Hall, 152 F.3d 381, 391-392 (5th Cir. 1998). The Supreme Court has not yet addressed this issue.

Another, perhaps more promising argument for allowing allocution is that, even if it is not always mandated, it is permissible under 18 U.S.C. § 3593(c), which provides: "Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials . . . ."

This approach was successful with one district court. United States v. Wilson, 493 F. Supp. 2d 515, 517-520 (E.D.N.Y. 2007) (though finding no constitutional right to allocute, court allows defendant to do so, relying on Fed. R. Crim. P. 32 and 18 U.S.C. § 3593. But court excludes a portion of expanded outline submitted by defendant, which referred to some victim-impact testimony, said his life had been difficult, and spoke of positive things he would do in prison if sentenced to life.). Moreover, in an appeal challenging a denial of allocution, this argument could be framed as a claim that the district court erred by imposing a categorical bar on allocution and thus refusing to exercise discretion and conduct the balancing of probative value and prejudice required under Section 3593.

The Sixth Circuit in Lawrence implied that allocution probably should have been granted in that case. It noted that some district courts have allowed allocution "as information relevant to mitigation," and it acknowledged that allowing allocution "'to mitigate the sentence' only before the court, which has no discretion and is obliged to impose sentence in accordance with the jury's recommendation, would seem to be an 'empty formality' . . . . Further, 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." 735 F.3d at 408.

The Fifth Circuit in Hall also acknowledged that a district court may well have discretion under this provision to admit an unsworn, uncross-examined statement of remorse by a capital defendant, particularly since the requirement that witnesses be sworn stems from Fed. R. Evid. 603, which, under Section 3593(c), does not apply at a capital sentencing hearing. See also Fed. R. Evid. 611 (governing "mode and order of interrogation and presentation" of "witnesses," including "cross-examination").

This argument derives force from the fact that district courts often (rightly or wrongly) authorize the government to introduce, under Section 3593(c), hearsay that is arguably quite similar to a defendant's allocution. See, e.g., United States v. Barrett, 496 F.3d 1079, 1099-1100 (10th Cir. 2007) (victim's widow read aloud a "short essay written by her daughter"); United States v. Fields, 483 F.3d 313, 324-25 (5th Cir. 2007) (detective testified about statements from witnesses regarding defendant's past crimes); United States v. Fulks, 454 F.3d 410, 435-36 (4th Cir. 2006) (victim's sister read aloud letter victim had written, 12 years before she was killed, discussing abuse by her husband); United States v. Brown, 441 F.3d 1330, 1360 (11th Cir. 2006) (witness testified about conversations in which victim's family recounted emotional difficulties dealing with victim's death).

One final observation: To be sure, one might argue that the defendant's speaking directly to the jury, as in an allocution, is materially distinguishable from these other forms of hearsay, in which a written statement is presented to the jury or a sworn, cross-examined witness reads such a statement aloud. But, if so, it seems mistaken for courts to also broadly exclude (as some have) even these other forms of hearsay if (and only if) they derive from the defendant, on the theory that they are, therefore, a *de facto* or back-door allocution. Compare United States v. Bolden, 545 F.3d 609, 628 (8th Cir. 2008) (no error in excluding testimony from witness about how he helped defendant prepare an unsworn, unsigned, undated "statement of accountability" to explain his remorse to victim's family and friends, since statement (which lacked "indicia of reliability") and witness's testimony about it "both constituted unsworn allocution." Nor does defendant have "carte blanche" under 18 U.S.C. § 3593 to introduce any evidence he wishes) with United States v. Hall, 152 F.3d 381, 396-397 (5th Cir. 1998) ("[T]he district court allowed Hall to introduce hearsay evidence of his own remorse in the form of his sister's testimony of his statements of remorse to her when she visited him in prison. The government was not allowed to cross-examine Hall as to the contents of these statements."). See also United States v. Lighty, 616 F.3d 321, 365 (4th Cir. 2010) (assuming that it was error, though harmless, for district court to characterize mitigating evidence — of letter defendant had written grandmother during the trial — as a backdoor allocution and to thus exclude it).

C. Compulsory Process

- United States v. Ortiz, 315 F.3d 873, 904 (8th Cir. 2002). Defendant could not show prejudice from inability to introduce live testimony from family

members, as a result of government's refusal to issue them visas or grant them humanitarian parole to enter the country. Defense presented their videotaped testimony. While not as powerful, it was sufficient, and also had certain advantages over live testimony.

D. Presence

- United States v. Gabrion, 648 F.3d 307, 335-36 (6th Cir. 2011), modified on other grounds, 719 F.3d 511 (6th Cir. 2013). The panel found that exclusion of defendant from five chambers conferences, at which counsel and court discussed his bizarre behavior, his intent to testify against counsel's advice, and related matters, did not violate constitutional or Rule 43 right to presence. "Gabrion would not have gained anything by attending these conferences." The *en banc* court also rejected the defendant's claim that his constitutional rights were violated when he was excluded from the courtroom during the testimony of 24 witnesses at the sentencing hearing, after he punched his lawyer. "Specifically, Gabrion suggests that the court should have put him in shackles and returned him to the courtroom almost immediately after the punch" [which it ultimately did, after the 24 witnesses had testified]." But, said the majority, "the court had every reason to think that Gabrion would continue to be *verbally* disruptive if he were promptly to return . . . . Gabrion was verbally disruptive throughout almost the entire trial . . . The court had no reason to think Gabrion would behave any better just after punching his counsel and carrying on upstairs all afternoon [in a detention cell]."

- United States v. Mitchell, 502 F.3d 931, 987-988 (9th Cir. 2007) (2-1, Reinhardt dissenting). District court did not err in permitting defendant to waive his presence at penalty phase. District court had no reason to doubt his competence and thus no obligation to conduct a competency hearing. Fed. R. Crim. P. 43 forbids waiver of presence only at formal imposition of sentence by the court, and does not forbid waiver of presence at penalty phase before jury.

- United States v. Battle, 173 F.3d 1343, 1346-1347 (11th Cir. 1999). Suggesting that capital defendant, especially one who is arguing "some sort of diminished-capacity defense," may be incapable of waiving right to be present.

E. Shackling

For the key Supreme Court decision on shackling of a defendant at a capital sentencing hearing, see Deck v. Missouri, 544 U.S. 622, 632 (2005) ("courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding," absent "case specific . . . particular concerns, say, special security needs or escape risks, related to the defendant on trial"). For FDPA cases on this subject, see:

- United States v. Honken, 541 F.3d 1146, 1164 (8th Cir. 2008). No error in use of shackles or stun belt on defendant, given his "extreme dangerousness." Defendant had prior escape attempts and threats against witnesses, law enforcement officers, and prosecutors. District court took appropriate measures to minimize prejudice by ensuring jurors would not see restraints and that they would not make noise.

- United States v. Battle, 173 F.3d 1343, 1346 (11th Cir. 1999). No error in requiring defendant to appear wearing leg shackles and arm restraints, where defendant had committed three separate attacks on correctional officers, including two using concealed, sharpened instrument. District court took reasonable steps to hide restraints from jury.

F. Self-Representation and Waiving Mitigation

For the Supreme Court's recent, key decision on self-representation at trial, see Indiana v. Edwards, 128 S. Ct. 2379, 2383-2388 (2008) (trial court may refuse defendant's request to proceed *pro se*, even if defendant is competent to stand trial, if, because of mental illness, defendant is not "competent to conduct trial proceedings" by himself). For FDPA decisions on this subject, see:

- United States v. Davis, 285 F.3d 378, 381 (5th Cir. 2002). Granting defendant's petition for writ of mandamus, supported by government. District court lacked authority to appoint independent counsel to present mitigating evidence at capital sentencing hearing against wishes of competent *pro se* defendant.

- United States v. Duncan, 2008 WL 2954976, at *3 (D. Idaho July 29, 2008) (allowing capital defendant to proceed *pro se*), remanded, 643 F.3d 1242 (9th Cir. 2011) (ordering hearing on defendant's competency).

- United States v. Davis, 2001 WL 34712238, at **2-3 (5th Cir. July 17, 2001) (unpublished). Granting defendant's petition for writ of mandamus, supported by government. District court erred violated competent capital defendant's clear legal right to self-representation.

G. Rule of Sequestration of Witnesses

When the district court in the Oklahoma City Bombing case ordered that family members of the victims who were going to be victim-impact witnesses for the government at the sentencing hearing could not watch the guilt-innocence trial, Congress swiftly enacted a series of provisions exempting such witnesses from the rule of sequestration, Fed. R. Evid. 615. This included one stating: "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)." 18 U.S.C. § 3510(b). See also 18 U.S.C. § 3593(c) ("the fact that a victim, as defined in section 3510, attended or observed the trial shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury").

As for whether such witnesses can be excluded from the *sentencing hearing* before they testify, see 18 U.S.C. § 3771(a)(3) (giving crime victims, among other rights, "[t]he right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding"). Section 3771(e) provides that, when the victim is deceased, the "legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter."

To whatever extent the government's victim-impact witnesses are exempted from the rule of sequestration, the defense should request the same treatment for the defense's family mitigation witnesses, lest the jury be presented with an

inaccurate, skewed picture of a spectator gallery filled with relatives of the victim but bereft of any loved ones on behalf of the defendant.

Without addressing the inequity, the Sixth Circuit recently rejected a challenge to such disparate treatment in United States v. Lawrence, 735 F.3d 385, 440-41 (6th Cir. 2013). Multiple members of the victim's family, who testified as victim-impact witnesses at sentencing, were allowed to attend the trial and the sentencing hearing. "In contrast, Lawrence's family members were excluded from the courtroom during the sentencing phase until after they had testified. This disparity, Lawrence contends, could have been viewed by jurors as suggesting that Hurst's life was more valuable because he had more family support. In response, the government points out that Lawrence's family attended the trial, that the jury was not told who in the audience was related to Hurst or Lawrence, that Hurst's fellow officers were not in uniform, and that the jury was aware of Lawrence's family's support because more than twenty relatives and friends testified on his behalf at the sentencing hearing. Lawrence has cited no authority for the proposition that the mere presence of a murder victim's family members in the courtroom can result in inherent prejudice to the defendant's right to a fair trial."

H. Mistrial

- United States v. Gabrion, 648 F.3d 307, 332-33 (6th Cir. 2011), modified on other grounds, 719 F.3d 511 (6th Cir. 2013) (*en banc*). District court permissibly refused to allow counsel to withdraw and refused to grant a mistrial after the defendant punched his counsel in the head during the sentencing hearing. "Although it is undeniable that a conflict existed between Gabrion and his trial counsel after the physical assault, that conflict did not cause a total lack of communication." Mistrial and appointment of new counsel would have required new sentencing proceeding, "thereby significantly detracting from the prompt and efficient administration of justice," allowing a manipulative defendant to "profit from his own wrong," and setting bad precedent that could be abused by future defendants.

XVI. Improper Summation Comments and Other Prosecutorial Misconduct at Sentencing

Note: A comprehensive model motion *in limine*, available on the appeals page of the FDPRC website, discusses more than 25 characteristic forms of summation misconduct, and includes extensive briefing on each, drawing also from state and federal habeas law.

On a (wholly, partially, or even slightly) favorable note:

- United States v. Taylor, 814 F.3d 340 (6th Cir. 2016). It was "close to the edge," but not plain error, for prosecutor to use animal and monster references to refer to defendant, a young Black man, as, *e.g.*, a wolf, a chameoleon, Dr. Jekyll-Mr. Hyde, *etc.*

- United States v. Umana, 750 F.3d 320 (4th Cir. 2014). (1) On the first day of jury selection, defendant tried to "bring a concealed shank (tied to his penis) into the courtroom," but it was found by the marshals. In sentencing summation, the prosecutor argued that Umaña tried to bring in the shank 'to fight off rivals. . . . You know who the rivals were? They're the Marshals. Those are his rivals. The judge is his rival. I'm his rival. Anybody in this courtroom is a rival. You're his rival' . . . . The prosecutor's statement portraying the jurors as Umaña's rivals was improper . . . .Nonetheless, we conclude that it was not so prejudicial as to deprive Umaña of a fair sentencing trial. The comment was isolated and did not constitute a pervasive theme throughout the closing argument. Moreover, its effect could only be minimal in light of the fact that Umaña did indeed try to bring a shank to the jury selection proceeding, which likely influenced the jurors more than did the prosecutor's statement. In addition, we think that, in light of Umaña's attempt to bring the shank to the jury selection, the prosecutor's comments were, to some degree, invited." (2) . "Umaña objects to the prosecutor's comment made during closing argument that '[y]ou want to bring El Salvador here. . . . [Y]ou'd better be ready for some American justice' . . . . We cannot agree that the comment . . . responds to Umaña's mitigation case that his impoverished El Salvadoran upbringing was responsible for his criminality. But the statement was isolated in only a small part of the prosecutor's closing argument. Moreover, any prejudice that the statement may have caused was likely dwarfed by the racial

prejudice Umaña himself incited in letters he had written from prison evincing strong anti-American rhetoric . . . . Finally, the district court instructed the jury that national origin could not play a part in its verdict, and each juror certified in writing that it had not."

- United States v. Lawrence, 735 F.3d 385, 433-34 (6th Cir. 2013). (1) "[S]ome of the prosecutor's comments may have skirted the line of impropriety . . . . by invoking the need to protect community values and deter criminal conduct by others and by asking the jury to communicate messages to Hurst's family, the police community and the community in general, the prosecutor invited the jurors to consider arguably irrelevant factors." But most were unobjected to and they were not so flagrant as to be reversible. (2) "The suggestion that Lawrence's exercise of his right to trial, in order to avoid death, refutes evidence that he accepted responsibility for his actions carries little weight. In this respect, the remark may be viewed as having a slight tendency to mislead the jurors. But even if the prosecutor's comments were deemed improper, they were not flagrant."

- United States v. Runyon, 707 F.3d 475, 514-15 (4th Cir. 2013). The prosecutor's sentencing comments to the jury to "do your job" and to "send a message" were improper. But, given their brevity and the "evidence of numerous aggravating factors," they did not render the proceeding fundamentally unfair.

- United States v. Montgomery, 635 F.3d 1074, 1097-98 (8th Cir. 2011). Prosecutor's cross-examination questioning of defendant's daughter about whether defendant had ever apologized to her for what defendant put her and siblings through, and prosecutor's general remarks about whether defendant was a good mother, were proper to rebut mitigating factor of defendant's positive parenting. But "[t]he prosecutor's remarks criticizing the decision to have Montgomery's children testify is another matter . . . . The prosecution cannot use the defendant's exercise of specific fundamental constitutional guarantees against [her] at trial. Montgomery had the right to have her children testify at her trial. It was thus improper for the prosecutor to argue that Montgomery forced her children to testify and 'victimized them again in front of the whole world.'" But remarks were not so prejudicial as to deprive defendant of a fair trial.

- United States v. Lighty, 616 F.3d 321, 361 (4th Cir. 2010). During penalty-phase closing arguments, the AUSA twice informed the jurors that the victim's family was asking for a sentence of death: (1) "And let there be no doubt what the United States is asking you to do in this case, on behalf of [the victim's] family . . . to impose a sentence of death." (2) "[Y]ou will do what the victim's family asks you to do . . . and that is to impose [the death sentence]." Court holds that "there is little doubt that the statements were improper," both because the statements were without record support and because such evidence would have been inadmissible under Booth and Payne. But comments did not prejudice defendant's substantial rights.

- United States v. Whitten, 610 F.3d 168 (2d Cir. 2010) (2-1). (1) Prosecutor improperly argued in summation that while defendant (who had allocuted before the sentencing jury, expressing remorse) had right to trial, he "can't have it both ways. He can't do that, then say I accept responsibility. And say 'I'm sorry, only after you prove I did it.'" Argument penalized defendant for exercising Sixth Amendment right to trial. Under United States v. Jackson and Zant v. Stephens, capital sentencing scheme cannot allow jury to draw adverse inference from constitutionally protected conduct. Increasing the severity of a sentence, as prosecutor urged here, is distinct from refusing to grant leniency; latter may be premised on defendant's exercise of right to trial. Id. at 194-196. (2) Prosecutor also improperly argued, as to defendant's allocution: "He chose to do it from there. The path for that witness stand has never been blocked for Mr. Wilson, had that opportunity too. He chose, like many other things in this case, to do it that way." Although allocution resulted in limited waiver of Fifth Amendment right allowing for adverse inference from failure to testify about what defendant said in allocution, prosecutor's argument, together with court's denial of a modified no-adverse-inference instruction per Carter v. Kentucky, created risk that jurors considered Wilson's failure to testify at sentencing or guilt for other, more expansive purposes.[48] Id. at 196, 200. (3)

[48] The majority opinion was by Chief Judge Jacobs with Senior Judge Miner joining. In dissent, Judge Livingston said the comments on Wilson's failure to plead guilty responded to his mitigating factors of remorse and acceptance of responsibility. Thus, the government did not use his request for trial as an aggravating circumstance. The Fifth Amendment claim was "marginally more substantial," but it was still doubtful any error occurred. It is questionable whether there is any right to a no-adverse-inference instruction at a capital sentencing, and

Rejecting claims that prosecutor castigated defense counsel for presenting mitigating evidence and for supposedly shifting the blame for the murders to the victims and others. Misconduct, if any, could not be deemed severe. And defendant cannot show substantial prejudice, since jury instructions directed broad consideration of mitigation. Id. at 202-203.

- United States v. Sinisterra, 600 F.3d 900, 910, 910-11 (8th Cir. Apr. 2010). In 2255 appeal, the Court condemned "the prosecutor's remarks that the jury could act as the conscience of the community and 'send a message to all other drug dealers that this community will not tolerate [crimes like Sinisterra's]' . . . . The prosecutor's arguments linking Sinisterra to the broader drug problems of the United States, telling the jury to act as the conscience of the community, and asking the jury to send a message with its verdict were improper. Such arguments impinge upon the jury's duty to make an individualized determination that death is the appropriate punishment for the defendant."

- United States v. Caro, 597 F.3d 608, 625-28 (4th Cir. 2010). Court finds "troubling" the prosecutor's summation argument that the BOP, judge, and prosecutor were powerless to control defendant, and only the jury could by imposing a death sentence. Capital sentencing should involve an individualized determination, but "[t]he suggestion that the BOP would not secure Caro adequately to prevent future violence implicates policy and resource considerations that are quite different . . . . Moreover, calling upon the jury to 'control' Caro gives them a role more akin to law enforcement than to impartial arbitration between the defendant and the government." It also "might have been improper" for government to argue in summation that a life sentence would send bad message to defendant's prison gang, to prison staff and inmates victimized by the gang, and to parents of the victim. (But neither argument required reversal, since they were isolated; the defense opened the door to the "control" one; it was counterbalanced by an

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whether the defense preserved this part of its claim since the instructions it sought went too far. In any event, the error was harmless, given the brevity of the comments (an "errant three words"), the absence of any direct argument that defendant's silence be used in an unlawful manner, and the "overwhelming" and "devastating" evidence of aggravating factors. Whitten at 212-213.

instruction directing "individualized" consideration; and evidence of future dangerousness was strong.)

- United States v. Rodriguez, 581 F.3d 775, 803 (8th Cir. 2009) (2-1, Melloy dissenting). It was improper for prosecutor to refer to "fear" victim felt (since there was no evidence about this), "what defense experts are trying to sell you in this case," and that defense strategy was "put it up, hope it sticks," but no plain error.

- United States v. Bolden, 545 F.3d 609, 630 (8th Cir. 2008). "[A]s long as the jurors are not told to ignore or disregard mitigators, a prosecutor may argue, based on the circumstances of the case, that they are entitled to little or no weight." And, while prosecutor "did improperly ask for the jury to impose the death penalty on behalf of the Ley family," court imposed remedy sought by defense, an instruction not to speculate about the family's wishes.

- United States v. Mitchell, 502 F.3d 931, 994 (9th Cir. 2007) (2-1, Reinhardt dissenting). Argument that defendant "has sentenced himself to death" was "improvident," but not plainly improper. Other arguments — that Attorney General had information jurors did not have when he decided to seek death, calling mitigating factors "excuses," and asking jury what defendant had done to earn a life sentence — were not fair comments on the evidence, but did not affect the proceedings so as to require reversal.

- United States v. Johnson, 495 F.3d 951, 979 (8th Cir. 2007). Court condemns as "over the line," government noting that ten, twenty, thirty years from now the child victims will still be dead and arguing "No matter how small [the defendant's] cell may be, it's going to be larger than the coffin that [the victims] are laying in now." "Although the government was entitled to respond to Johnson's portrait of a miserable thirty years behind bars, it should not have used the victims' plights to do so." As to prosecutor's argument that "The intentional murder of children is an unspeakable evil. It's an evil that cannot be mitigated by any evidence. None of the defendant's mitigators can take away what she did and her involvement in killing those children," Court declines to find error, but "do[es] note, however, that the prosecutor's choice of words was infelicitous. While he had probably meant to argue only that Johnson's mitigators did not

outweigh the heinousness of the children's murders, his remarks, if they were taken out of context, could be taken to suggest that the mitigation evidence was intended to diminish the horror of the killings or Johnson's involvement therein. At least some of the mitigating factors, however, such as Johnson's relationship with her daughters or her potential for leading a productive life in prison, were intended to provide reasons for mercy despite the gravity of the offense, rather than to 'take away' Johnson's involvement in the crime or portray the murders as any less evil. The question is not whether evidence in mitigation makes the defendant any less guilty, or the crime any less horrible, but whether it provides a reason why, despite those things, the defendant should not die."

- United States v. Higgs, 353 F.3d 281, 331 (4th Cir. 2003). Argument that 'mercy is not in the instructions' and 'not something you do in this case' "arguably crossed into" improper argument. But court need not definitively determine this, since if comments were error, they did not deny defendant a fair trial since they were isolated and not made to mislead jury, and district court properly instructed jury it need not impose death regardless of aggravation and mitigation findings.

- United States v. Allen, 247 F.3d 741, 776 (8th Cir. 2001), , vacated on other grounds, 536 U.S. 953 (2002). Prosecutor's reference to defendant as "murderous dog" in summation was improper, but did not deprive defendant of fair sentencing hearing.

Otherwise, federal capital defendants have been unsuccessful thus far in appellate challenges to government closing arguments and cross-examination questions:

- United States v. Umana, 750 F.3d 320 (4th Cir. 2014). (1) Rejecting defendant's contention "that the district court abused its discretion in refusing to permit him . . . to introduce evidence of the murders committed by his RICO coconspirators, who were also MS-13 members . . . . to show that his own violent proclivities were not unique but rather were a 'product of social conformity' . . . . It is difficult to imagine that giving the jury evidence of unrelated murders by MS-13 members would contribute to the individualized decision of whether to impose the death penalty on Umaña. Indeed, it might even work against him, linking him with a number of other

unrelated murders. Moreover, whatever benefit Umaña might have obtained from introducing such evidence was already available to him from evidence in the record." Also rejecting defendant's contention that "the prosecutor misleadingly compared him to other MS-13 members" by referring to him as 'the only killer' . . . . When taken in context, the government clearly could not have meant that Umaña was the only member of MS-13 who had committed murder. Indeed, shortly before making that statement, the prosecutor stated that Umaña was a 'killer among killers.' Finally, there was ample evidence before the jury that other MS-13 members committed murders, as we have already summarized." (2) Rejecting defendant's challenge to government summation argument: "'But you know what we heard today from one of their witnesses? There are only 240 MS-13 members in prison. And I can promise you that if one of them was there for life and was behaving, we would have heard all about it.' Umaña notes that the district court had earlier denied his motion to obtain data from the Bureau of Prisons regarding the behavior of incarcerated MS-13 members. Nonetheless, he obtained the evidence he wanted when he called as a witness a retired warden for the Bureau of Prisons who testified that MS-13 is not considered an especially serious security risk in the prison environment. Understood in that context, the prosecutor's statement was just a critique of this testimony, and we find nothing improper about it." (3) "Umaña challenges the following prosecutorial statement made during closing argument: '[I]f you give him life, [he] is going to have his inmate bill of rights. . . . He took lives. Are you going to give him his bill of rights? Manuel and Ruben didn't have a bill of rights . . . .they're a corpse and you're going to send him to the dining hall. Is that justice?' . . . . We do not believe that it was error, much less plain error, for the prosecutor to have compared Umaña's potential prison sentence with the plight of the victims." (4) "To be sure, we have condemned religiously charged arguments as confusing, unnecessary, and inflammatory . . . . In this case, however, prejudice could hardly have occurred, as Umaña's conduct amply invited reference to the devil. When he was in the courtroom, he 'threw' MS-13's gang sign -- the horns of the devil. Moreover, he had tattoos of devilish figures on his body. And, of course, his prison letters -- including the one that the prosecutor read immediately after she made the beast comment -- contained vivid imagery evoking the devil. While it might have been better not to make so explicit or direct an allusion to the devil and its place in

Umaña's heart, we cannot conclude that, in context, the comment so prejudiced Umaña as to affect his substantial rights."

- United States v. Lawrence, 735 F.3d 385, 435 (6th Cir. 2013). No impropriety in prosecutor's urging jury to compare the victim-impact evidence with the "wasted life" of the defendant. This argument was entirely "consistent with [the] recognition" by the Supreme Court in Payne v. Tennessee that "victim-impact evidence is properly considered to 'counteract' the mitigating evidence in helping the jury evaluate moral culpability."

- United States v. Hager, 721 F.3d 167, 199, 202-03 (4th Cir. June 20, 2013). (1) Although jury was told that cooperating codefendants had received life sentences and had only a "hope" of an unspecified reduction at some later point, each codefendant had his sentence reduced to 25 years shortly after testifying against defendant. Nonetheless, the Court holds that defendant's jury was not misled by prosecutor's argument comparing various defendants' culpability and appropriate sentences or by district court's refusal to instruct that there was "expectation" of a substantial reduction. "There was no way for anyone to predict the extent of the sentence reductions or even if either [codefendants] would receive one." (2) No plain error when prosecutor questioned defense expert, Dr. Mark Cunningham, about whether defendant was a member of a dangerous nationwide prison gang, the "D.C. Blacks," or when prosecutor put on rebuttal testimony from a BOP official about the gang, since it was Cunningham who first "introduced the term" during cross-examination. Similarly, no plain error in prosecutor's questioning of Cunningham about federal judge whose assassination was solicited by an inmate that was a member of a prison gang, even though killing of judge had not been solicited by any inmate. Although Court finds this concededly inaccurate line of questioning "disturbing," it finds that the prosecutor was not insinuating defendant might try to harm the judge or other participants in his trial. And any risk of prejudice was remedied by the district court's instruction to jury: "I'm not concerned in the slightest, and you should disregard that insofar as it has anything to do with me. Forget that."

- United States v. Runyon, 707 F.3d 475, 507-15 (4th Cir. 2013). The court rejects an assortment of other (largely unpreserved) challenges to the

government's summation comments at the sentencing hearing, including: a reference to the fact that DOJ did not seek death against the boyfriend of the victim's wife (not clear error, defense counsel raised the subject, and not prejudicial); a comparison of the defendant's and the victim's lives (no direct comparison made by the prosecutor, nor was any "comparative judgment" encouraged); a comparison of the criminal-justice system's treatment of the defendant with the defendant's treatment of the victim (defense counsel raised the subject, and it was part of the "thrust and parry" of closing argument), and inviting jurors to consider the mental torture the victim must have suffered between the carjacking and the shooting (evidence supported the argument, which was at most a "slight rhetorical flourish").

- United States v. Ebron, 683 F.3d 105, 147 (5th Cir. 2012). (1) Prosecutor's sentencing arguments that implicitly referred to the defendant as a shark, the "grim reaper," and a "leopard" who cannot "change its spots" were not plain error; (2) argument that life sentence would send wrong "message" to the other federal prisoners, including those affiliated with the defendant's "DC Crew," were a permissible appeal to the jurors to act as the "conscience of the community," and thus not plain error; (3) Rejecting claim that prosecutor's argument — that defendant would be back in general population in a USP within six years if sentenced to life — invited a death sentence based on decisions that were within the BOP's hands, not the defendants. Absent legal authorities showing the argument was improper, it was not plain error.

- United States v. Davis, 609 F.3d 663, 685-688 (5th Cir. 2010). (1) Though prosecutor's remarks, restating victim's daughter's testimony chiding defendant for never saying he was sorry in the years since the crime, "could have led the jury to believe that Government was highlighting Davis's failure to apologize," this comprised just a few lines of transcript in a lengthy summation. Moreover, evidence from right after the crime suggested defendant lacked remorse. Thus, defendant's Fifth Amendment rights were not prejudiced. (2) No plain error in argument that life sentence would be a "freebie," since defendant was already serving life on corruption conviction; "[c]ourts have divided on the question of whether such an argument is permissible . . . . Given the contradictory authority, and our lack of circuit precedent on the issue, the district court's error, if any, was not clear or obvious." (3) Prosecutor did not communicate to jurors that they

were duty-bound to return a death verdict or should ignore mitigation. (4) Prosecutor permissibly appealed to jury to act as conscience of community, distinguishing recent Eighth Circuit case in which prosecution had urged jury to send message to other criminals.

- United States v. Rodriguez, 581 F.3d 775, 798-803, 823-824 (8th Cir. 2009) (2-1, Melloy dissenting). No error in summation arguments that jurors should discount mitigation because it lacked nexus to the crime; that jurors should discount execution-impact mitigation, and that jurors should imagine what victim went through. No prejudice where court sustained objection to prosecutor's comments on rejection of defendant's plea offer, and to comments that a life sentence would punish only the kidnapping and render the murder a "freebie." (It was improper for prosecutor to refer to "fear" victim felt, since there was no evidence about this, "what defense experts are trying to sell you in this case," and that defense strategy was "put it up, hope it sticks," but no plain error.) Melloy would have found that these, the mitigation nexus argument, the "Golden Rule" argument, and the "freebie" argument were all improper and cumulatively prejudicial.

- United States v. Bolden, 545 F.3d 609, 630 (8th Cir. 2008). "[A]s long as the jurors are not told to ignore or disregard mitigators, a prosecutor may argue, based on the circumstances of the case, that they are entitled to little or no weight." And, while prosecutor "did improperly ask for the jury to impose the death penalty on behalf of the Ley family," court imposed remedy sought by defense, an instruction not to speculate about the family's wishes.

- United States v. Honken, 541 F.3d 1146, 1172-1173 (8th Cir. 2008). No plain error in government's sentencing argument emphasizing unanimity requirement and telling jurors that "there's strength" in a group.

- United States v. Fell, 531 F.3d 197, 222-224 (2d Cir. 2008). No constitutional error arose from prosecutor's argument that mitigating evidence lacked relevance because it was not related to the crime. There was little likelihood the jury felt constrained in considering the non-crime-related mitigation, given the court's instructions on it and the amount of time devoted to it.

- United States v. Corley, 519 F.3d 716, 728-729 (7th Cir. 2008). No reversible error in prosecutor's isolated comment at sentencing, apparently offered to counter impact of defendant's mother's testimony, that just "because there was no histrionics, because there was no raw emotion, don't assume for a minute that the sentence of life will be perceived as justice by the victims of this case." Comment was vague and isolated, defense objection was unclear, and instructions as a whole properly guided jury.

- United States v. Fields, 483 F.3d 313, 340-341 (5th Cir. 2007). Proper for prosecutor in summation to ask jury to consider actions of defendant before, during, and after murder, as compared to actions of the victim. This did not amount to an impermissible comparative-worth argument.

- United States v. Johnson, 495 F.3d 951 (8th Cir. 2007). (1) No error in prosecutor's argument that jury should not give any mitigating weight to defendant's lack of criminal record. Id. at 966. (2) No error in prosecutor's argument that intentional murder of children is "an evil that cannot be mitigated by any evidence. None of the defendant's mitigators can take away what she did and her involvement in killing those children." Prosecutor was arguing that mitigators were insufficient to outweigh gravity of offense, though choice of words was imprecise and may have mistakenly conveyed that defendant's mitigation was intended to diminish horror of crimes rather than simply offering reason why she should not be sentenced to death. Id. at 978. (3) Prosecutor did not improperly diminish jurors' sense of responsibility by arguing they would choose death "as a group" and that there was "courage in numbers." Id. at 979. (4) No plain error in prosecutor's argument: "No matter how small Angela Johnson's cell may be, it's going to be larger than the coffin that [the child victims] are laying in now."Id. at 979-980.

- United States v. Purkey, 428 F.3d 738, 763 (8th Cir. 2005). No due process violation from prosecutor's asking defense mental-health expert whether he was aware that defendant had "threatened to run my head through yesterday in court." (Question referred to comment defendant had made, outside presence of jury, which prosecutor had taken as a threat). District court sustained defense objection to the question, and defense did not request any cautionary instruction. Moreover, any misconduct was "brief and isolated."

- United States v. Higgs, 353 F.3d 281, 326-327, 330-332 (4th Cir. 2003). (1) Government did not violate due process by making inconsistent arguments at defendant's and codefendant's sentencings. "[T]he argument that Haynes was a 'partner in crime' with Higgs because he could have chosen not to murder the women is not inconsistent with the argument that Higgs was more culpable because he brought the murder weapon to the scene and told Haynes to do it." (2) Nothing improper about government reminding jury of oath to impose death if justified by law and arguing that death was only just resolution of case. (3) Government permissibly argued that jury should reject equal-culpability mitigator based on facts. (4) Prosecutor did not express personal opinion, despite using phrase "I think." (5) Nothing improper about prosecutor's argument that life imprisonment would be soft because defendant could go to school, have a job, establish friendship, watch television, *etc.*, since it responded to defense arguments that life in prison meant continuous monitoring in a high security environment.

- United States v. Ortiz, 315 F.3d 873, 903 (8th Cir. 2002). No plain error in single reference by prosecutor to Adolf Hitler, Charles Manson, and Jeffrey Dahmer, where prosecutor did not directly liken defendant's crimes or character to those of these three infamous figures, but rather cited them to argue that defendant's family's love for him should not outweigh aggravating factors.

- United States v. Chandler, 996 F.2d 1073, 1095 (11th Cir. 1993). Prosecutor's sentencing summation was not improper. Prosecutor was permitted to argue for death penalty as form of self-defense for society and as a deterrent. And, while it is improper to argue that mercy is *per se* inappropriate, it is proper to argue that, under facts of case, jury should not extend mercy to particular defendant.

- United States v. Aquart, 2012 WL 603243, at *9 (D. Conn. Feb. 24, 2012) (unpublished). "[W]hile the Government's summation arguments deprecated the weight of Mr. Aquart's mitigating evidence, sometimes veering into improper linkage to the crimes or imprudently using phrases like 'no weight,' the Government's summations did not urge the jury to ignore mitigation."

XVII. Jury Instructions and Verdict Forms

A. Mitigating Factors

FDPA places on the defendant the burden to establish the existence of any mitigating factor by a "preponderance of the information." 18 U.S.C. § 3593(c).

One issue that has arisen is whether jurors are to decide only whether a mitigating is *factually* proven and, if so, what weight to give it, or whether they may or should also determine if it has mitigating value in the first place. A favorable decision on this subject is United States v. Sampson, 335 F. Supp. 2d 166, 228-232 (D. Mass. 2004). The court instructed jurors that, while they were required to find certain factually undisputed mitigators to be proven, it was up to them to decide how much weight to give such mitigators. But the court rejected the government's argument that it was also up to each juror to decide if a factor was mitigating or aggravating. Rather, it wrote, that is a question of law for the court. "A juror can properly determine that a particular factor is so insignificant compared to the other factors found that its presence or absence has no impact on the juror's decision. It would be improper, however, for a juror to refuse to even consider a particular factor because he or she disagrees with the court's determination that the factor is aggravating or mitigating."

FDPA also provides that a finding of a mitigating factor "may be made by 1 or more" jurors, and "any" juror "who finds the existence of a mitigating factor may consider such factor established . . . regardless of the number of jurors who concur." 18 U.S.C. § 3593(d). This reflects a constitutional requirement that each juror must be free to consider and weigh mitigation, unconstrained by any unanimity requirement. See McKoy v. North Carolina, 494 U.S. 433, 439-444 (1990); Mills v. Maryland, 486 U.S. 367, 375-384 (1988).

The Tenth Circuit goes even farther, calling for the jury to be instructed that "any juror may consider a mitigating factor found by another juror, even if he or she did not concur in that finding." Tenth Circuit Criminal Pattern Jury Instructions, Inst. 3.10 (2005). But see United States v. Jackson, 327 F.3d 273, 301-302 (4th Cir. 2003) (Section 3593 does not *require* entire jury to weigh mitigating factor whenever at least one juror finds it); United States v. Paul, 217 F.3d 989, 999 (8th Cir. 2000) (no plain error in instruction that did not inform each juror of her prerogative to take into account mitigating factors found by other

jurors but not her); United States v. Webster, 162 F.3d 308, 327 (5th Cir. 1998) (district court was not required to instruct that all jurors should consider a mitigator if one or more jurors found it to exist. Under Section 3593, "although any one juror may find and weigh a mitigating factor, the others may make their own determinations with respect to each mitigator").

The juror-finding language of Section 3593(d) has also spawned the question of whether the jury should be instructed to record the number of jurors, if any, who found each proposed mitigating factor to be established.[49] That has been the practice in virtually every case tried under FDPA. The Tenth Circuit has explained that directing jurors to record such findings facilitates appellate review, and also avoids any "implicit suggestion" that decisions about mitigators are "less important" or "subject to less searching scrutiny" than those about aggravators. Tenth Circuit Criminal Pattern Jury Instructions, Inst. 3.10, Comment (2005).

True, the Eighth Circuit upheld a death sentence though the jury failed to record mitigating-factor findings (after having been instructed to do so). United States v. Purkey, 428 F.3d 738, 763-764 (8th Cir. 2005). That court acknowledged such findings facilitate appellate review, but found that FDPA does not require them, and thus concluded there was no error in the district court's accepting the death verdict. Moreover, the Fifth Circuit has said, in dicta, that FDPA "does not require the jury to return special findings regarding which mitigating factors the jury found to exist or the number of jurors who found that a particular mitigating factor existed." United States v. Hall, 152 F.3d 381, 413 (5th Cir. 1998). See also United States v. Johnson, 223 F.3d 665, 675 (7th Cir. 2000) (suggesting, also in dicta, that mitigation findings may not be required).

But the remaining circuit to address this issue, the Eleventh, said the same provision in the Anti-Drug Abuse Act, 18 U.S.C. § 848(k) (repealed 2006), meant that district courts should instruct jurors that it was up to them whether or not to return written findings on proposed mitigating factors. United States v. Chandler, 996 F.2d 1073, 1086-1087 (11th Cir. 1993). (Thus, it found error in the instructions' failure to give jurors that option as to two such factors, but concluded

[49] Just before this language, Section 3593(d) requires that the jury as a whole "return special findings identifying any" aggravator factor "found to exist."

the error was not plain since the government had stipulated to them, and so the error did not affect the sentencing hearing.)

In some cases, district courts decline to submit certain non-statutory mitigating factors on a theory they are redundant. See United States v. Webster, 162 F.3d 308, 327 (5th Cir. 1998) (no error in refusing to submit certain nonstatutory mitigating factors to the jury, where "[m]any of the mitigating factors presented to the jury touched on the ones Webster complains were omitted," and court also submitted the catch-all mitigator). See also United States v. Wilson, 2013 WL 3226705, at *2 (E.D.N.Y. June 25, 2013) (court agrees to give most of defendant's requested mitigators, a total of 21, though it notes concern that list not be too numerous so as to "skew" weighing process, and the mitigators not be "duplicative"). Relatedly, district courts sometimes require the defense to combine discrete mitigating facts into a single factor in the jury instructions and on the verdict sheet. This may constitute error, for it arguably requires each juror to find every component fact true and of mitigating worth in order to include any of the facts in his or her sentencing calculus. See United States v. Johnson, 860 F. Supp. 2d 663, 875 (N.D. Iowa 2012) ("Johnson argues—and I agree—that, instead of allowing jurors to give meaningful consideration and effect to the mitigating effect of separate facts, this single mitigating factor included many facts (at least eight) that jurors were asked to consider as a group"); United States v. Sampson, No. 1:01-cr-10384-LTS, ECF #2259, at 13-15 & n.16 (D. Mass. May 13, 2016) (same, though court signals it will not submit all of the 282 mitigating factors defense previewed before trial). But see United States v. Davis, 609 F.3d 663, 690-692 (5th Cir. 2010) (district court did not violate Eighth Amendment by condensing proposed mitigating factors, since catch-all factor covered any factors that had been truncated or altered. Moreover, having heard the mitigating evidence, it was not reasonably likely that jurors would have thought instructions precluded consideration of any of it).

One circuit has held it was not error to omit the statutory catch-all mitigator from the verdict form, where the district court included and carefully explained it in the instructions but told jurors it would not appear on the form because it would be "impossible to list an infinite number of mitigating factors." United States v. Basham, 561 F.3d 302, 336-337 (4th Cir. 2009).

Another circuit said that "the difference in the . . . presentation of aggravating and mitigating factors was questionable," but not cause for relief

because it was not prejudicial to the defendant for the district court to summarize rather than list the mitigating factors in the instructions, instead providing the complete list on the verdict form. United States v. Taylor, 814 F.3d 340 (6th Cir. 2016).

B. Death Sentence Never Required

FDPA does not include the language from the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(k), that "[t]he jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed." And it is true that the House voted down a proposal, before FDPA passed, to restore to the bill the obligation to instruct the jury that it is never required to recommend a death sentence. But substitute House language, which would have made death penalty mandatory once the jury found that aggravating factors outweighed mitigation, was removed in the House-Senate conference committee, and replaced with the relatively unstructured formulation ultimately enacted as Section 3593(e). More important, this provision nowhere defines "sufficiently," in calling on each juror to determine whether aggravators "sufficiently outweigh" mitigators. Thus, the FDPA sentencing scheme is actually just as discretionary as § 848(k)'s "never-have-to-give-death" formulation: the only differences are (a) that the statute doesn't dictate any particular jury instruction, and (b) that the jury is not free to nullify the statutory scheme — that is, once each juror determines that the death penalty is justified and should be imposed, the law requires that he or she actually vote to impose it.

Accordingly, the large majority of district courts in FDPA cases, emphasizing the highly discretionary nature of the jury's ultimate sentencing decision, have continued to instruct that a death sentence is never required. See, e.g., United States v. Jones, 527 U.S. 373, 384 (1999) (jury instructed that "regardless of your findings with respect to aggravating and mitigating factors, you are never required to recommend a death sentence"). Two published decisions by district courts have also approved such an instruction. See United States v. Sampson, 335 F. Supp. 2d 166, 239-240 (D. Mass. 2004); United States v. Haynes, 265 F. Supp. 2d 914, 921-922 (W.D. Tenn. 2003).[50] And so do Judge Sand's

[50] See also United States v. Hammer, 25 F. Supp. 2d 518, 521 (M.D. Pa. 1998) (verdict formed required jurors to certify that "[w]e . . . understand that a jury is never required to impose a death sentence . . . "); United States v. Battle, 979 F.Supp. 1442, 1482 (N.D.Ga. 1998) (same);

pattern instructions. 1 Leonard B. Sand, *et al.*, Modern Federal Jury Instructions — Criminal, Inst. 9A-19 & Comment (2008) (while FDPA does not contain same explicit "mercy" provision as ADAA, "it is strongly suggested that the court impress upon the jury that it is never obligatory to impose the death penalty. Thus, the instruction states that, 'no juror is ever required by the law to impose a death sentence.'").

But the Eighth Circuit has repeatedly held that not only is such a charge not required, but that it is not error to instruct jurors that they "shall" impose death if aggravators sufficiently outweigh mitigators. See United States v. Montgomery, 635 F.3d 1074, 1098-99 (8th Cir. 2011); United States v. Rodriguez, 581 F.3d 775, 812-814 (8th Cir. 2009); United States v. Purkey, 428 F.3d 738, 762-763 (8th Cir. 2005); United States v. Nelson, 347 F.3d 701, 712 (8th Cir. 2003); United States v. Ortiz, 315 F.3d 873, 900-01 (8th Cir. 2002); United States v. Allen, 247 F.3d 741, 780-781 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002).

The Tenth Circuit has sought to straddle this divide. See Tenth Circuit Criminal Pattern Jury Instructions, Inst. 3.02 (2005) ("If you determine that the factors do justify a death sentence, that sentence must be imposed." But, regardless of findings on aggravating and mitigating factors, "the result of the weighing process is never foreordained. For that reason, a jury is never required to impose a sentence of death."). See also United States v. Caro, 597 F.3d 608, 631-633 (4th Cir. 2010) (no error in refusing to give instruction that incorrectly suggested to jurors they could decline to impose a death sentence out of mercy even if they found death penalty justified with aggravators sufficiently outweighing mitigating ones); United States v. Lighty, 616 F.3d 321, 366-67 (4th Cir. 2010) (same). But see United States v. Caro, 614 F.3d 101, 101-102 (4th Cir. Sept. 7, 2010) (Duncan, J., concurring in denial of rehearing *en banc*) ("at no point is the jury required to impose a sentence of death").

The Eighth Circuit pattern charge is arguably misleading in suggesting that "the law" ever "provides that the defendant must be sentenced to death." Eighth Circuit Pattern Instructions, Death Penalty - Preliminary Instructions, Inst. 12.01. This statement is true only in the tautological sense that the defendant "must" be

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United States v. McVeigh (D. Col. No. 96-CR-68-M) (Matsch, J.) (jury instructed that "[w]hatever findings you make with respect to aggravating and mitigating factors, a jury is never required to impose a death sentence"), aff'd,153 F.3d 1166 (10th Cir. 1998).

sentenced to death after each juror has concluded that he should be so sentenced. But the instructions must communicate to jurors that the ultimate decision is up to each one of them.

C. Standard for Weighing

Judge Sand's pattern charge calls for jurors to be told to apply a "reasonable doubt" standard to the determination whether aggravators sufficiently outweigh mitigators. See 1 Leonard B. Sand, *et al.*, Modern Federal Jury Instructions — Criminal, Inst. 9A-19 (2008) ("This weighing process asks whether you are unanimously persuaded, beyond a reasonable doubt, that the aggravating factors sufficiently outweigh any mitigating factors or, in the absence of any mitigating factors that the aggravating factors are themselves sufficient to call for a sentence of death on the particular capital count you are considering . . . . Remember that all 12 jurors must agree beyond a reasonable doubt that death is in fact the appropriate sentence"). And a number of district courts have given such a charge. See, e.g., United States v. Sampson, 335 F. Supp. 2d 166, 239-240 (D. Mass. 2004) (court charged: "However you personally define sufficiency, the prosecution must convince you beyond a reasonable doubt that the aggravating factor or factors sufficiently outweigh the mitigating factors to make death the appropriate penalty in this case.").

A number of circuits, however, have held that a federal defendant is not entitled to this instruction based on the Sixth Amendment right to jury trial and the Eighth Amendment right to reliability in capital decisionmaking. United States v. Gabrion, 719 F.3d 511, 531-33 (6th Cir. 2013) (*en banc*); United States v. Runyon, 707 F.3d 475, 506 (4th Cir. 2013); United States v. Fields, 516 F.3d 923, 950 (10th Cir. 2008); United States v. Mitchell, 502 F.3d 931, 993 (9th Cir. 2007) (2-1, Reinhardt, J., dissenting); United States v. Barrett, 496 F.3d 1079, 1107-08 (10th Cir. 2007); United States v. Sampson, 486 F.3d 13, 31-32 (1st Cir. 2007); United States v. Fields, 483 F.3d 313, 345-46 (5th Cir. 2007); United States v. Chandler, 996 F.2d 1073, 1091-92 (11th Cir. 1993).

Most of those decisions find Apprendi inapplicable because the weighing decision in a federal capital sentencing is "subjective" and "moral," and thus, in their view, not a finding of fact covered by the Fifth and Sixth Amendments. Gabrion, 719 F.3d at 532-33; Barrett, 496 F.3d at 1107 (10th Cir. 2007), quoting

Fields, 483 F.3d at 346. See also Mitchell, 502 F.3d at 993; Sampson, 486 F.3d at 32; United States v. Purkey, 428 F.3d 738, 750 (8th Cir. 2005).

But such an analysis is arguably flawed. The criminal law is replete with elements that turn on moral judgments (*e.g.*, negligence, depravity, provocation, obscenity, even causation) and on subjective modifiers (*e.g.*, "unreasonable," "unjustifiable," "substantial," or "adequate"). Yet the Constitution does not permit such elements to be withdrawn from the jury or found on less than proof beyond a reasonable doubt. Indeed, the Supreme Court has made clear that the requirement of a jury determination under the reasonable-doubt standard applies fully, not just to "historical," "evidentiary," and "basic" facts, but more broadly to anything other than pure questions of law, including "how to apply" a subjective legal standard to a given set of facts "and draw the ultimate conclusion." United States v. Gaudin, 515 U.S. 506, 512-15 (1995).

Thus, until the Supreme Court decides this issue, defense counsel should continue to raise it.

D. Death Sentence "Justified"

Sentencing instructions sometimes misleadingly suggest that jurors should render a death verdict if that punishment is found to be "justified," considered (at least initially) in isolation. See, e.g., Eighth Circuit Criminal Pattern Jury Instructions, Death Penalty - Preliminary Instructions, Inst. 12.01 ("If, after weighing the aggravating and mitigating factors, any one of you finds that a sentence of death is not justified, the jury must then determine whether the defendant should be sentenced to life imprisonment without possibility of release . . .").

But jurors' consideration of the death penalty does not occur in a vacuum. Rather, as spelled out by 18 U.S.C. § 3593(e), the jury's sentencing decision is a choice among alternatives. The jury could well conclude that the death penalty is "justified" but that life imprisonment without possibility of release is also "justified," and that life is in fact the preferable sentence.

This point was made by Senator Levin during the 1988 debate on the predecessor of 18 U.S.C. § 3593, 21 U.S.C. § 848(k):

> Mr. LEVIN. Mr. President, I would like to thank members on both sides of the aisle, particularly Senators NUNN, MOYNIHAN, KENNEDY, D'AMATO and RUDMAN, for their cooperation in shaping and in obtaining agreement on the amendments that I offered as part of the leadership package with respect to the death penalty provision of the drug bill. . . . The 19 amendments which I offered and which are part of the leadership package . . . fall into five categories: First, the bill as it was introduced only required that a jury justify that a sentence of death shall be imposed. It was then required to be imposed by the court. The use of the word "justify" in the original bill language could have led a jury to sentence a defendant to death even though it might have thought that both a sentence of death or some lesser sentence were both justified. From our own common experiences, we can see that there is a difference between justify and recommend. Take, for example, someone takes their pet to a veterinarian and is told that the animal is very sick. The vet might say that it would be justified to put the animal to sleep. But the vet might also say that it would be justified to utilize some medical intervention to keep the animal alive for another 6 months. Many pet owners would then ask, "But doctor, what do you recommend?" Justify is a much broader concept than recommend and legislation which imposes a penalty as severe as the death penalty should recognize that important distinction. That is why two amendments in the package change this to require the jury to recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without a possibility of release or some other lesser sentence.

134 Cong. Rec. S16001 (daily ed. October 14, 1988). Both Section 848(k) from the ADAA and Section 3593(e) from FDPA reflect this change, by requiring the jury to choose between sentencing alternatives. See 18 U.S.C. § 3593(e) (jurors shall determine "whether the defendant should be sentenced to death, to life imprisonment without possibility of release," or, where applicable, some other lesser sentence). Any use of the word "justify" in jury instructions under FDPA must make clear that the death penalty is only "justified" if the jury finds that it

more justified than, and thus should be imposed instead of, life imprisonment without possibility of release.[51]

E. Multiple Counts

In cases where the defendant has been convicted of multiple capital counts for the murder of a single victim, one charge is sometimes a lesser-included offense of another. If so, counsel may request that the jury be instructed it may not convict on both counts. Rutledge v. United States., 517 U.S. 292, 307 n.16 (1996) ("A jury is generally instructed not to return a verdict on a lesser included offense once it has found the defendant guilty of the greater offense. See, e.g., Seventh Circuit Pattern Criminal Jury Instruction 2.03, in 1 L. Sand, J. Siffert, W. Loughlin, & S. Reiss, Modern Federal Jury Instructions, p. 7-7 (1991)."). Alternatively, before sentencing, counsel may request that the district court vacate the lesser conviction.

Nevertheless, in many cases, the jury must impose sentence on multiple capital counts, involving either the same offense and multiple victims or one victim but different offenses. Where the same aggravating factors (*e.g.*, future dangerousness, victim impact, *etc.*) and same mitigating factors (e.g., the defendant's abusive childhood, his youth at the time of the offense, *etc.*) apply fully to all the counts, counsel should consider requesting instructions and verdict forms that present and have the jury vote on these factors once, for all the counts — rather than reiterating the same factors for each count and requiring multiple findings on them. See, e, g.,United States v. Bin Laden, 126 F. Supp. 2d 290, 299 (S.D.N.Y. 2001) (expressing approval of "grouping" approach taken in Oklahoma City bombing case, where district court allowed government to allege each aggravating factor once, in jury instructions and on verdict form, even where defendant faces multiple capital counts for the same conduct). See also Eighth Circuit Criminal Pattern Jury Instructions, Death Penalty - Final Instructions, Committee Comments (noting this). But see 1 Leonard B. Sand, *et al.*, Modern Federal Jury Instructions — Criminal, Inst. 9A-1, 9A-19 (2008) (instructions that

[51] The Supreme Court has declined to address the constitutionality of an instruction that "require[d] the jury to unanimously reject a death sentence before considering other sentencing alternatives." Smith v. Spisak, 558 U.S. 139, 148-49 (2010) (whatever Court might hold "were we to consider [instruction] on direct appeal," it was not contrary to "clearly established federal law").

jurors should determine sentence separately for each capital count, and may conclude that aggravating and mitigating factors should receive different weights for each count); United States v. Fields, 516 F.3d 923, 938-39 (10th Cir. 2008) (refusing to address merits of challenge to use of single, consolidated verdict for two capital counts involving different victims and slightly different aggravating factors, as any error was invited by defense).

Separate verdict sheets for each count allow inconsistent verdicts of death on one or more counts and life on another count or counts. One problem with permitting this is that jurors may not understand that such a "mixed" verdict still means the defendant will be executed. Indeed, they may think it means something different than death verdicts on all counts (for why else would they have been called on to render different verdicts on different counts?), and may find it an attractive compromise. See also United States v. Johnson, 223 F.3d 665, 676 (7th Cir. 2000) (suggesting that in future cases involving multiple murders, any findings on mitigating factors common to both counts be made together rather than separately on each verdict form, to avoid problem of inconsistent findings).[52]

Another issue arises with dual capital convictions when one is a lesser-included offense of another. In that circumstance, double jeopardy allows only one of the convictions to stand. See United States v. Johnson, 495 F.3d 951, 980 (8th Cir. 2007) (remanding capital case to district court to vacate one of two capital convictions). When, as in Johnson, this remedy is imposed on appeal, existing law indicates the death sentences may stand, if the jury sentenced the defendant separately on each count. See United States v. Agofsky, 458 F.3d 369, 372 (5th Cir. 2006) (defendant not entitled to sentencing relief though Court was ordering that only one of defendant's two capital convictions could stand based on double jeopardy. Court relies on fact that jury sentenced defendant separately on each conviction). Cf. United States v. Causey, 185 F.3d 407, 423 (5th Cir. 1999) (after court reversed codefendants' convictions on one of three capital counts (because of lack of evidence on an essential element), it also reversed their death sentences "[b]ecause it is impossible to say" sentences "were not influenced by the fact" defendants "had received three death eligible convictions, rather than two").

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[52] Defense counsel should be aware that, if they acquiesce in the use of separate verdict forms (including separate mitigation findings) for multiple counts, they risk later being held to have thereby waived any challenge if the jury returns verdicts that are arguably legally inconsistent. See Section XX.E, *post* (Appeal — Mitigating Factor Findings).

Accordingly, defense counsel should move the district court, after the guilty verdicts but before the sentencing hearing, to dismiss one of the two multiplicitous counts.

F. Life Imprisonment and Other Lesser Sentences

FDPA provides that the sentencing jury, "by unanimous vote, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence." 18 U.S.C. § 3593(e). It also provides that, if the jury recommends death or life imprisonment without parole, the court must impose that sentence. "Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release." 18 U.S.C. § 3594.

When the court instructs on the third option of a "lesser offense," one circuit has held that the statute does not give the jury the authority to choose the particular, lesser sentence; that would be up to the court. United States v. Chandler, 996 F.2d 1073, 1084-85 (11th Cir. 1993) (analyzing 21 U.S.C. § 848(k), analogous precursor to FDPA). Nor is the district court required to inform the jury of the range of possible "lesser" sentences. Id. Accord United States v. Flores, 63 F.3d 1342, 1368 (5th Cir. 1995).

Whether any lesser sentence at all, *i.e.*, any alternative to death besides life imprisonment, is available in the first place in a particular case depends on the statute that defines the capital offense of conviction. Some statutes allow for a sentence of death, life imprisonment, or a term of years. See, e.g., 18 U.S.C. § 924(j) (murder through use of a firearm during crime of violence or drug trafficking crime). Others allow only life imprisonment or death. See, e.g., 18 U.S.C. 1201(a) (kidnapping resulting in death).

Judge Sand's pattern instructions caution: "Courts prosecuting defendants under FDPA must be careful to determine the sentencing options available to the jury prior to the penalty phase. If there are only two options available to the jury, the court should not provide the jury with a third, and misleading, option." 1 Leonard B. Sand, *et al.*, Modern Federal Jury Instructions — Criminal, Introduction, § 9A.01 (2008). See also id., Inst. 9A-7, Comment ("If the statute

does not provide for a lesser authorized sentence, it is critical that the court inform the jury that it is required to sentence the defendant to life imprisonment without possibility of release. A juror presented with the possibility of a lesser authorized sentence could be persuaded to switch from life to death to ward off . . . any chance of a lesser sentence by the judge"). But see United States v. Jones, 132 F.3d 232, 246-248 (5th Cir. 1998) (although district court erred in incorrectly instructing that sentence less than life was available, this was not plain error, as FDPA had not been previously reviewed on appeal); United States v. Whitten, 610 F.3d 168, 203-204 (2d Cir. 2010) (rejecting claim that jury may have been left to think that non-unanimous verdict would allow court to impose sentence less than life. Though court mentioned "lesser sentence" as option for some of the capital counts, for others it told jurors that life and death were the only alternatives. Moreover, jury found, as mitigating factor, that defendant would remain in prison for life if he did not receive the death penalty).

Even where the third option of a "lesser sentence" was statutorily available, in a number of cases, district courts have agreed, at the defendant's request, not to instruct the jury on it, but rather to limit jurors to death or life imprisonment. In some of these, the defendant had argued to the court that such an instruction would be misleading since, even if the jury voted for that third option, there was no realistic possibility the court would ever impose a sentence of less than life. See, e.g., United States v. Johnson, 915 F. Supp. 2d 958, 981-83 (N.D. Iowa 2013); United States v. Pleau, 2013 WL 1673109, at *6 (D.R.I. Apr. 17, 2013) (unpublished). In some cases, the defendant was serving a previous sentence or faced consecutive sentences on other noncapital convictions such that even a term-of-year sentence on the capital offense would amount to de facto life imprisonment. And in some cases the defendant has sought to waive any claim or possibility of a sentence less than life, in order to avoid instruction on such a possibility. See, e.g., United States v. Hardy, 2008 WL 1776447, at *1 (E.D. La. Apr. 15, 2008) (unpublished) (though sentence of less than life imprisonment was technically available, district court held that if defendant waived instruction on less-than-life sentence, it would sustain defendant's objection to government's evidence of future-dangerousness outside of prison. Court also noted in advance that, if jury could not reach unanimous verdict, it would impose life sentence). See also United States v. Quinones, 511 F.3d 289, 321-22 (2d Cir. 2007) ("it was a tactical decision for defendants, at the penalty phase of this case, to agree that a life sentence was the only alternative to death" in summation arguments and in instructions they successfully sought from District Court, even though, in fact,

statute of conviction permitted death, life, or term of years); United States v. Moussaoui, 591 F.3d 263, 304-05 (4th Cir. 2009) (same). Moreover, the Fifth Circuit has cautioned district courts not to "allow the government to hammer away on the theme that the defendant could some day get out of prison if that eventuality is legally possible but actually improbable." United States v. Flores, 63 F.3d 1342, 1368-1369 (5th Cir. 1995).

Nonetheless, Flores rejected a defense challenge to an instruction on the lesser-sentence option that was statutorily available, since, at the time the jury was instructed it could not be determined if there would be grounds for a downward departure. Moreover, said the Court, the government only focused on future dangerousness in a prison setting, and did not emphasize the possibility that the defendant would be released from prison. See also United States v. Stitt, 250 F.3d 878, 888-889 (4th Cir. 2001) (Eighth Amendment did not require instruction that it was unlikely defendant would be released on parole. Simmons does not apply because, though Guidelines would have called for life sentence, court could have departed downward and imposed less-than-life sentence had jury not sentenced defendant to death.).

G. Unanimity

In Jones v. United States, 527 U.S. 373 (1999), the Supreme Court addressed the questions of what ensues if a federal capital sentencing jury is not unanimous on death or life imprisonment, and what instruction, in the main charge, can or should be given to the jury about the consequence of non-unanimity.

As to what ensues, the Court rejected the government's argument that a capital resentencing hearing would be permissible following a deadlock. Instead, said the Court, Section 3595 provides that the district court shall impose a sentence other than death, which could include life imprisonment or, if statutorily available, a lesser sentence. See also Section XVII.F, *ante* (Jury Instructions and Verdict Forms — Life Imprisonment and Other Lesser Offenses).

But the Court proceeded to also reject the defendant's claim that FDPA and the Eighth Amendment *requires* that the jury be instructed, in the main sentencing charge, that a deadlock between death and life imprisonment would result in the district court imposing a sentence of life. (Under the statute of conviction in Jones, life was the minimum sentence the defendant could receive; a term of years was

not available.). The Court, though, *did not forbid* such an instruction. Rather, it stated: "In light of the legitimate reasons for not instructing the jury as to the consequences of deadlock, and in light of congressional silence, we will not exercise our supervisory powers to require" it "be given in every case."

Finally, the Court also rejected the defendant's claim that the instructions and verdict form in his case created plain error by leading jurors to think that a deadlock would result in a lesser sentence, thus potentially coercing life jurors into a vote for death. The Court found no reasonable likelihood that Jones' jurors would have thought non-unanimity would allow the district court to impose a lesser sentence. Moreover, said the Court, even assuming the jurors were confused over the consequences of a deadlock, the defendant could not show such confusion necessarily worked to his detriment, and thus could not satisfy the heightened prejudice requirement for plain error.

Despite Jones (or perhaps because of its permissive language), numerous district courts since have instructed federal sentencing juries, in the main charge, that non-unanimity would result in a life sentence. In many of these cases, the court has also given jurors the explicit option of a not-unanimous verdict on the verdict form. See, e.g., United States v. Sampson, 335 F. Supp. 2d 166, 240 (D. Mass. 2004) (court informed jury of consequences of nonunanimity because this emphasized individual responsibility of each juror and ensured each was fully informed of consequences of its actions).

The Tenth Circuit supports such an instruction. See Tenth Circuit Criminal Pattern Jury Instructions, Inst. 3.01 (2005) (notwithstanding Jones, advising district courts that "the most straightforward approach" is to give pattern charge: "If you cannot unanimously agree on the appropriate punishment, I will sentence the defendant to life imprisonment without the possibility of release").[53]

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[53] It appears the Eighth Circuit has also rejected the Jones approach of saying nothing about the consequences of deadlock and instead giving jurors the options only of a unanimous death or a unanimous life verdict. The language of the circuit's pattern charge, however, is confusing and objectionable, for it suggests that, even in a case where the minimum statutory sentence is life, the defendant might receive a sentence allowing release:

> Where defendant faces minimum of life without release, court should instruct jurors that, if they cannot agree unanimously on death or life imprisonment

So, in a modified form, do Judge Sand's pattern instructions:

> If, after engaging in the balancing process . . . all twelve members of the jury do not unanimously find, beyond a reasonable doubt, that the Defendant should be sentenced to death . . . then you may not impose the death penalty. In that event, Congress has provided that life imprisonment without any possibility of release is the only alternative sentence available. If the jury reaches this result, you should do so by unanimous vote, and indicate your decision [on the verdict form]. Before you reach any conclusion based on a lack of unanimity . . . you should continue your discussions until you are fully satisfied that no further discussion will lead to a unanimous decision.

1 Leonard B. Sand, *et al.*, Modern Federal Jury Instructions — Criminal, Inst. 9A-20 (2008).

Of course, where a deadlock would allow a lesser sentence than life, the defense may not wish for the jury to be told this, for, as discussed above in connection with Jones, it may tend to coerce life jurors to go along with a death verdict. But see United States v. Fields, 483 F.3d 313, 338 (5th Cir. 2007) (noting that court responded without objection to first jury note inquiring about court's punishment options if jury could not agree, by instructing that, in that event, court would choose sentence and it could not be death). See also United States v. Barnette, 211 F.3d 803, 817 (4th Cir. 2000) (any error in instructing juror that court would sentence defendant "as provided by law up to life," if jury could not reach verdict, was harmless. At time of trial, district court did not have benefit of Jones, which makes clear it was not required to give any instruction on subject).

As to what to do if a district court has not given jurors a non-unanimity instruction in the final charge but jurors send a note asking about the subject during

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> without release, court will sentence defendant to "a minimum of life in prison and may sentence the defendant to life imprisonment without the possibility of release." [There is no parole in the federal system].

Eighth Circuit Criminal Pattern Jury Instructions, Death Penalty - Final Instructions, Inst. 12.12.

deliberations, Judge Sand's pattern instructions advise that Jones "does not mean that if the jury asks the court to explain the effect of a lack of unanimity the court should not respond. If the jury inquires as to the consequences of a deadlock, it is strongly advised that the trial court speak candidly regarding the court's sentencing possibilities." 1 Leonard B. Sand, *et al.*, Modern Federal Jury Instructions — Criminal, Inst. 9A-20, Comment (2008). But the giving of such a mid-deliberations charge on the consequences of deadlock, said the Fifth Circuit, does not mean that the district court must end deliberations at the first sign of non-unanimity. See United States v. Fields, 483 F.3d 313, 338 (5th Cir. 2007) (no error when court responded to second note indicating jury could not reach unanimous agreement, by asking jury to continue deliberations).

Where a district court, relying on Jones, declines to explicitly instruct that non-unanimity is a verdict option or that it will result in a life sentence, defense counsel should consider several possible subsidiary requests:

Instruction that jurors are not required to harmonize their mitigation findings to achieve unanimity on sentence.

One issue not raised or addressed in Jones is that simply requiring unanimity on the ultimate sentencing verdict arguably conflicts with and threatens to undermine the requirement of individual, non-unanimous decisionmaking on mitigating factors. FDPA cases are not simply governed by the constitutional prohibition against unanimity requirements that constrain juror consideration of mitigation. See McKoy v. North Carolina, 494 U.S. 433, 439-443 (1990). In addition, Congress affirmatively required that "[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." 18 U.S.C. § 3593(c). If each juror, then, must be clearly and explicitly authorized to find his or her own mitigating factors, regardless of what other jurors find, then different jurors may well be weighing different combinations of aggravators and mitigators in the final sentencing calculus. Imagine, for example, Jurors A and B agree on substantial planning and future dangerousness as the two aggravating factors, but that A finds 6 substantial mitigators and B none, and that (based on their varying mitigation findings) A initially favors life while B favors death. Hearing that they are

required to strive for unanimity, they may reasonably infer that they are expected to harmonize their mitigation findings.

Accordingly, counsel should consider requesting an instruction that, when it comes to the ultimate selection decision, not only should no juror surrender his or her conscientious belief about what the sentence should be or merely go along with the conclusion of fellow jurors about the appropriate sentence; in addition, no juror should seek to achieve unanimity or consensus about the mitigating factors — for example, by altering his or her his individual findings as to the existence or weight any mitigating factor or factors, so as to conform to the findings of other jurors — in order to arrive at a unanimous sentencing verdict. Because each juror must make and apply his or her own individual findings about mitigating factors, it may be that different jurors will end up weighing different combinations of factors when they each decide the appropriate sentence. If different jurors reach different conclusions about the appropriate sentence because they have made different mitigation findings, then such lack of unanimity is not at odds with the law or with the court's instructions.

Instruction that non-unanimity will not result in a retrial (or resentencing).

In one FDPA case, the district court declined to tell jurors that a deadlock was an acceptable verdict option or that it would result in a life sentence — but did (eventually) tell them that it would not undo the convictions. Anecdotal evidence suggest that capital jurors may fear that a failure to unanimously agree on a sentence will require a complete guilt-innocence retrial, with all the attendant trauma, time, and expense — and that this fear can undermine holdouts. See Hooks v. Workman, 606 F.3d 715, 733-734, 742-744 & n.33 (10th Cir. 2010) (prosecutor's misleading argument that sentencing deadlock would require retrial contributed to unconstitutional coercion of the jury); Sundby, Scott E., War and Peace in the Jury Room: How Capital Juries Reach Unanimity, at 49 (May 11, 2010), Hastings Law Journal, Vol. 62, 2010; Washington & Lee Legal Studies Paper, No. 2010-6, available at SSRN: http://ssrn.com/abstract=1604572 (describing actual juror who changed his sentencing vote for this reason).

A corrective instruction may be necessary to prevent jurors from acting on misconceptions or being misled. In Jones, the Supreme Court relied on its decision in Shannon v. United States, 512 U.S. 573, 587-88 (1994), which held that juries need not always be instructed on the consequences of a not-guilty-by-reason-of-

insanity (NGI) verdict. But Shannon also noted such an instruction may sometimes be necessary, and gave as one example, a case where the jury heard a mistaken suggestion that the defendant would go free if found NGI. See also United States v. Polouizzi, 564 F.3d 142, 162 (2d Cir. 2009) ("The Shannon Court's reasoning suggests that an instruction might be appropriate in such circumstances because the jury's attention already has been drawn in an unfair and misleading way toward the very thing-the possible consequences of its verdict-it should ignore.") (citation omitted).

These same principles and concerns suggest that counsel may wish to include, in such a requested, corrective instruction, that non-unanimity also would not result in a new sentencing trial.

In United States v. Taylor, 814 F.3d 340 (6th Cir. 2016), the jury sent back two notes asking about what would happen if they could not reach a verdict, including specifically whether it would affect the guilty verdict. The court told them it would not affect the guilty verdict, but it refused to inform them it would result in a life sentence. Instead the court directed them to continue deliberating. The panel found that, under United States v. Jones, 527 U.S. 373 (1999), the instructions were proper. It also found that the supplemental instructions were not coercive, though the district court did not remind jurors either that they should not change their vote just to achieve a majority or that they should adhere to any conscientious beliefs Among other things, the jurors' right to continue disagreeing was implicit in the court's answers, said the panel.

Argue on summation that verdict form permits not-unanimous verdict.

While objecting to an instruction that would expressly license a not-unanimous verdict, the government often requests and obtains verdict-form language that — rather than offering jurors two boxes to check, death or life without release — treats death as the first-order presumptive sentence. Jurors are asked to answer "yes" or "no" to the question whether they have unanimously found that the aggravators sufficiently outweigh the mitigators making death appropriate. They are then told that if they checked "no," they should then proceed to answer "yes" or "no" to whether they unanimously agree to impose life without release. Such language implicitly allows the jury to check "no" to both boxes and be finished with its deliberations — *i.e.,* to render, in effect, a not-unanimous verdict. The government should not be allowed to have its cake and eat it too. If

such verdict-form language is employed, defense counsel should be permitted to point out to jurors that it permits a not-unanimous verdict. Moreover, counsel can distinguish Jones (where the verdict forms provided jurors no such option, but rather left only the options of different unanimous outcomes) in urging the court to instruct that such a verdict would result in a life sentence.

H. Defendant's Right Not To Testify

In a criminal case, the Fifth Amendment requires that the district court, at the defendant's request, instruct the jury not to draw any inference against him as a result of his decision not to testify. Carter v. Kentucky, 450 U.S. 288, 305 (1981). In federal prosecutions, these rules also derive from a statutory command. See 18 U.S.C. § 3481 (defendant's failure to testify "shall not create any presumption against him"); Bruno v. United States, 308 U.S. 287, 292-93 (1939) (court's refusal to give no-adverse-inference charge required reversal under Section 3481).

Carter applies to a capital sentencing hearing, at which a convicted defendant retains a Fifth Amendment privilege. See Estelle v. Smith, 451 U.S. 454, 462-63 (1981) ("We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned."). Indeed, a defendant retains a limited privilege even at a non-capital sentencing hearing. Mitchell v. United States, 526 U.S. 314, 316-17 (1999) (court violated defendant's Fifth Amendment privilege by drawing adverse inference from her failure to testify at sentencing hearing). But see White v. Woodall, ___ U.S. ___, 2014 WL 1612424 (Apr. 23, 2014) (finding it is not clearly established whether Carter fully applies to a capital sentencing, so as to preclude jury from inferring lack of remorse from silence, or instead whether it applies only so as to preclude adverse inferences about the offense of conviction).

Thus, the Eighth Circuit calls for a no-adverse-inference instruction at the sentencing hearing, on request. See Eighth Circuit Criminal Pattern Jury Instructions, Death Penalty - Final Instructions, Inst. 12.14 (noting there is no burden on defendant to prove he should not be sentenced to death, and fact that defendant did not testify must not be considered). So do Judge Sand's pattern instructions. See 1 Leonard B. Sand, *et al.*, Modern Federal Jury Instructions — Criminal, Inst. 9A-25, Comment (2008). And the Second Circuit reversed a death sentence based, in part, on the denial of a modified version of such an instruction, even though the defendant had allocuted to the sentencing jury. See United States

v. Whitten, 610 F.3d 168, 200-202 (2d Cir. 2010). But see United States v. Flores, 63 F.3d 1342, 1375-76 (5th Cir. 1995) (no plain error in failing to instruct penalty jury not to draw adverse inference from defendant's failure to testify. Jury found several mitigators and declined to find some aggravators, prosecutor did not refer to defendant's failure to testify, and aggravating evidence was overwhelming).

One unresolved issue is the extent to which a capital defendant's allocution to the sentencing jury expressing remorse waives the Fifth Amendment privilege. There is support for the view that such an allocution permits jurors to consider the allocution's unsworn, uncross-examined nature in deciding what weight to give it, but not to adversely consider the defendant's failure to testify. See DePew v. Anderson, 311 F.3d 742, 745-746 (6th Cir. 2002); McNelton v. State, 900 P.2d 934, 936-937 (Nev. 1995). See also Appellant's Brief, United States v. Wilson, No. 07-1320-cr at 159-172 (2d Cir.) (challenging district court's refusal to give no-adverse-inference instruction at sentencing and prosecutor's summation taking defendant to task for choice to allocute rather than testify).

I. Sentencing Verdict is Not "Recommendation"

Though FDPA describes the jury's decision as "recommending" a sentence, this word is misleading and should not be used in the instructions, for it risks obscuring the fact that 18 U.S.C. § 3594 obligates the district court to impose the sentence chosen by the jury:

- Eighth Circuit Criminal Pattern Jury Instructions, Death Penalty - Preliminary Instructions, Notes on Use, ¶ 3. "Although the statute uses the word 'recommend,' the jury's determination is binding; the court MUST impose the sentence the jury 'recommends' unless a new trial is ordered. The Committee recommends use of the word 'determine,' because of concern that use of the word 'recommend' might tend to diminish the jury's sense of its ultimate responsibility for determining the sentence. See Caldwell v. Mississippi, 472 U.S. 320, 349 (1985)."

J. Anti-Discrimination Guarantee

FDPA includes a "[s]pecial precaution to ensure against discrimination." 18 U.S.C. 3593(f). It requires the district court to instruct the jury "that, in considering whether a sentence of death is justified, it shall not consider the race,

color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be."[54] This provision further requires that "[t]he jury, upon return of" a sentencing verdict, "shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be."

One court has relied in part on this provision to forbid the government from injecting evidence that might prejudice the jury against the defendant because of his ethnicity. United States v. Taveras, 585 F. Supp. 2d 327, 336-337 (E.D.N.Y. 2008) (prohibiting government from asking jury to find that defendant was member of allegedly violent prison gang that was composed primarily of Dominicans in support of future-dangerousness aggravator).

The uniform practice by courts is to append the anti-discrimination certification to the last page of the verdict form, and to have jurors sign it after rendering a verdict, whether for or against death. But counsel should consider requesting two significant variations from this practice, both of which would seem to be advantageous to the defendant and supported by the text of Section 3593(f).

First, the certification should only be required for a death verdict, not for a verdict against or less than death. If honest, some jurors in some cases will have to acknowledge that they have not been able to put race or other invidious factors out of their minds or to arrive at a verdict they would render even for a defendant of a different race. (Indeed, that must be why Congress included this requirement). If that is the case, the result cannot logically be, and certainly Congress did not intend it to be, no verdict; rather, it should be a non-death verdict.

[54] For a discussion of the this provision's implications for victim-impact evidence, see Section XII.D.2.d., *ante*.

Second, the verdict form should call for the jury to address this issue *before* the ultimate sentencing decision. For example, the verdict form could ask for a finding that the jury either has or has not unanimously concluded that that it can abide by the non-discrimination requirements on which they have been instructed (*i.e.*, don't consider race or other invidious factor, and don't vote for a death sentence unless they would vote for it for a defendant of a different race). That way, if any juror cannot abide those requirements, the verdict form could direct the jury that it must impose a non-death sentence. By contrast, the standard practice of having jurors make no findings or certification as to anti-discrimination until *after* they have imposed a death sentence seems illogical: By that point, they have already checked "death" on the verdict form. As nothing on the form suggests a mechanism for "undoing" the memorialized death verdict if one or more jurors cannot in good conscience sign the certification, this cart-before-the-horse approach would seem to render the anti-certification requirement a meaningless formality.

In, United States v. Lawrence, 735 F.3d 385, 402-03 (6th Cir. 2013), the Sixth Circuit found that a partial certification error was not reversible. The sentencing jury was properly instructed they could not consider race and that they could not render a death verdict unless they had concluded they would do so regardless of the race of the defendant and victim. But the verdict form omitted the second of these two requirements, and so the jury's certification only included the first. The omission was raised for the first time on appeal. The court found that the error was not structural, and that because the defendant could not prove it had prejudiced him, it was not plain.

K. Miscellaneous Instructions

- United States v. Agofsky, 458 F.3d 369, 373-374 (5th Cir. 2006). No error in court's affirmative answer to jurors' note inquiring whether they would be polled if they delivered a life sentence. Defendant consented at trial to the answer. And note did not show jury was influenced by arbitrary factor of concern about negative public reaction to such a verdict, since there were other possible interpretations of the question.

- United States v. Ortiz, 315 F.3d 873, 904 (8th Cir. 2002). No error in instructing sentencing jury that it could consider government's inability to cross-examine defendant's family members portrayed on videotape

presented by defense at sentencing hearing, in deciding what weight, if any, to give this evidence. Instruction did not place blame on defendants or their counsel for the limits of the videotape evidence.

XVIII. Jury Sentencing Deliberations

A. Substituting Alternates

If a juror has to be excused during a guilt-innocence trial, a district court may substitute an alternate at any time, including during deliberations, under Federal Rule of Criminal Procedure 24, even without the defendant's consent. Thus, the court may keep the alternates available until the conclusion of the trial. Moreover, if the court has good cause to excuse a juror during deliberations, Rule 23 authorizes it to permit a jury of 11 to return a verdict, again, without the defendant's consent.

But it remains to be decided by the Supreme Court what effect, if any, these rules have at a capital-sentencing hearing. Though several circuits have rejected it, there is a strong argument that the law forbids a district court from adopting these measures if it excuses a juror at sentencing. To preserve this claim, a defendant should (1) after the guilty verdict, object to retaining the alternates; (2) if a juror is excused thereafter, ask for a mistrial of the sentencing proceeding and object to either proceeding with a jury of 11 or substituting an alternate; and (3) state clearly that the objection is based on both the jury-provisions of the Federal Death Penalty Act, 18 U.S.C. § 3593, and the Sixth Amendment right to jury trial.

When Congress enacted FDPA in 1994, it declined to incorporate Rule 23 and allow a non-stipulated jury of 11 if a juror is excused during a capital-sentencing hearing. Instead, it provided that such a hearing "shall be conducted . . . before the jury that determined the defendant's guilt." 18 U.S.C. § 3593(b)(1). And it further provided that a sentencing jury "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."[55] 18 U.S.C. § 3593(b).

In 1994, there was no provision for substituting a juror in a criminal case after the jury had retired to deliberate on guilt. Indeed, at that time, Rule 24(c) required that "an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." Thus, when Section 3593 was enacted, Congress must have contemplated that the discharge of a juror during a capital-sentencing hearing would require a new capital-sentencing hearing before a newly impaneled jury.

This view is also supported by the policy consideration that gave rise to the current version of Rule 23, namely, the problem of having to abort "lengthy" trials, thus "necessitat[ing] a second expenditure of substantial prosecution, defense and court resources." Advisory Committee Notes to Rule 23 (1983). The Notes cite, as examples, two cases in which the discharge of a juror during deliberations had required a mistrial after trials lasting four and six months, respectively. But capital-sentencing hearings in federal court do not last months. Rather, they generally last a few days. Even taking account of the additional time that would be required to select a new jury, mistrying such a sentencing hearing would not generally necessitate the "expenditure" of anywhere near the same additional "resources" as aborting an entire trial. Congress may well have had this distinction in mind when it evidently chose not to incorporate Rule 23's "jury of 11" provision into FDPA.

If so, then the Eighth Circuit was wrong in recently holding that there is "no provision" in the statutory language [in Section 848(k), the analogous precursor to Section 3593] for what should be done when a juror is discharged during a

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[55] True, the latter provision is said to govern "A jury impaneled under paragraph 1(B)," *i.e.*, a newly impaneled jury. Id. But it would appear illogical, indeed arbitrary, to read the provision as permitting an unstipulated sentencing jury of less than 12 if the sentencing is conducted before the trial jury, but not if it takes place before a newly impaneled jury. It is difficult to imagine any reason for drawing such a distinction. Rather, one plausible reading of the statute would appear to be that Congress understood the requirement that the sentencing be conducted "before the jury that determined the defendant's guilt" as itself barring a jury of less than 12. That would be why the latter portion of the statute, which forbids an unstipulated sentencing jury of less than 12, is directed to the subsection involving newly impaneled juries.

sentencing hearing. United States v. Honken, 541 F.3d 1146, 1165 (8th 2008) (neither Constitution, federal-death penalty statute, nor Fed. R. Crim. P. 24 forbade district court from replacing juror with alternate after conviction but before sentencing hearing began). See also:

- United States v. Runyon, 707 F.3d 475, 516-19 (4th Cir. 2013). No abuse of discretion in substituting alternate, just before start of sentencing hearing, for juror whose mother had just died. While the court erred in making the decision and dismissing the juror without notice to and outside the presence of defense counsel and the defendant, still, the defendant had a chance to object thereafter and declined to do so. Moreover, after the court dismissed a second juror and substituted another alternate 1 1/2 hours into the sentencing hearing, the court permissibly instructed the jury to "review with her what was discussed and key her in, and then proceed with your deliberations." There was no significant difference between this and telling the newly constituted jury to recommence deliberations from scratch, as defendant argued on appeal should have happened. Moreover, the defendant never objected below to the instruction.

- Battle v. United States, 419 F.3d 1292, 1301-1302 (11th Cir. 2005). Defendant waived challenge to district court's failure to discharge alternates once jury retired to deliberate at trial; in any event, failure was not prejudicial. No error, moreover, in district court's substitution of two alternate jurors at penalty phase. FDPA does not guarantee that guilty and penalty decisions will be made by same 12 jurors. Moreover, alleged error was not prejudicial.

- United States v. Johnson, 223 F.3d 665, 669-670 (7th Cir. 2000). Replacing juror, who did not appear for sentencing hearing, with alternate did not violate 18 U.S.C. § 3593, which requires that trial jury impose sentence. Substitution was permissible under Fed. R. Crim. P. 24, though alternate had not participated in guilt deliberations, and, in any event, error was waived by defendant's failure to object below.

- United States v. Webster, 162 F.3d 308, 345-347 (5th Cir. 1998). No error in substituting alternate for juror who had automobile accident during the sentencing hearing. "Because an alternate was available and the jury had not retired to deliberate on its sentence recommendation, the court had the

> authority, under rule [Fed. R. Crim. P. 24(c), to elevate the alternate]." Moreover, it was not plain error for court to fail to dismiss alternates when jury began trial deliberations, as defendant suffered no prejudice from the substitution: "[T]he jury had not started deliberating at the penalty phase. Those issues were distinct from those decided at the guilt-innocence phase; any overlap is irrelevant, because the jury specifically was instructed to consider everything as if for the first time."

It is also doubtful that Congress contemplated that the 1999 amendment to Rule 24, permitting unconsented juror substitution during trial deliberations, would operate to amend these jury-sentencing provisions of Section 3593. (Yet the Seventh and Eighth Circuits relied on this amendment in validating alternate substitution during sentencing).

First, the purpose of that amendment was to give district courts a second tool for dealing with the discharge of a juror during trial deliberations, comparable to the first tool — proceeding with a jury of 11 — that had been afforded them by the 1983 amendment to Rule 23. See Advisory Committee Notes to Rule 23 (1999) (in a "long, costly, and complicated case," when juror is discharged during trial deliberations, court "should have discretion . . . to proceed with eleven jurors or to substitute a juror . . ."). But when Congress enacted FDPA in 1994, it purposely withheld from district courts the authority to require a jury of 11 in a sentencing hearing. It would have been illogical to continue to withhold this authority, while extending to district courts the power to substitute an alternate. Indeed, at least in the trial context, the latter authority was considered by the rulemakers to be more controversial and potentially problematic. See Advisory Committee Notes to Rule 23 (1983).

Second, substituting an alternate at sentencing differs enormously from substituting one during trial deliberations. With the latter, as long as the reconstituted jury is instructed to begin deliberations anew, as required by Rule 24(c), *all* the jurors will have participated in *all* the deliberations and decision-making resulting in the verdict. But when a juror is replaced during a capital-sentencing hearing, the 11 original jurors will have discussed and reached decisions about a myriad of factual issues during trial deliberations. Because the alternate was not part of that process, and because the other 11 jurors are not instructed to undo and forget their trial deliberations, findings, and verdicts, it

cannot be said that all 12 jurors participated in all the deliberations and decisionmaking resulting in the sentencing verdict.

The Eighth Circuit (again, following the Seventh) dismissed this problem by declaring that "[t]he issues of guilt and punishment are sufficiently distinct," so that the alternate did not need to have been part of the guilt deliberations and decisionmaking in order to "participate meaningfully" in the sentencing ones. Honken, 541 F.3d at 1145, quoting Johnson, 223 F.3d at 670.

But this ignores the myriad ways in which the issues at trial and sentencing in a capital case are enmeshed. The trial jury discusses and arrives at answers to numerous subsidiary questions in their deliberations: Which witnesses and testimony are credible and which are not? What particular events occurred before, during, and after the crime? What were the mental states of the defendant and the other actors during these events? Furthermore, the jury's guilty verdicts memorialize and reflect these answers. And many identical or similar questions lie at the heart of the issues that later confront the jury during sentencing deliberations, when it must find and weigh aggravating and mitigating factors. See 18 U.S.C. §§ 3592, 3593. Surely the decisions made by jurors during trial deliberations will end up guiding, if not controlling, their resolution of such key sentencing questions.

Not only does this suggest why Congress may not have intended the 1999 amendment to Rule 24 extend to capital sentencings. It also raises the substantial question whether such fragmented deliberation would violate the Sixth Amendment right to jury trial. The Supreme Court has recognized that "group deliberation" is an "essential feature" of the Sixth Amendment right to jury trial. Williams v. Florida, 399 U.S. 78, 100 (1970). Moreover, in approving the use of non-unanimous verdicts in state criminal cases, the Court emphasized that, even when a minority of jurors are outvoted, "[t]hey will be present during all deliberations, and their views will be heard. " Apodaca v. Oregon, 406 U.S. 404, 413 (1972) (plurality).

Some lower courts have construed this to mean that the Sixth Amendment requires that *all* the jurors rendering a verdict have participated in *all* the deliberations, and thus have said that the substitution of an alternate during trial deliberations is constitutional only if the reconstituted jury is instructed to begin deliberations anew. See Claudio v. Snyder, 68 F.3d 1573, 1575-77 (3rd Cir. 1995);

Miller v. Stagner, 757 F.2d 988, 995 (9th Cir. 1985); Ramjit v. Warden, 2006 U.S. Dist. LEXIS 15007 *62-63 (N.D. Ohio Mar. 31, 2006) (unpublished), aff'd, 243 F. App'x 103(6th Cir. 2007). See also Tate v. Bock, 271 F. App'x 520, 523 (6th Cir. 2008) (Clay, dissenting in part).

In 2007, several bills were submitted in Congress that would have explicitly licensed the substitution of alternates during a capital sentencing hearing as well as the use of a capital sentencing jury of 11 members, without the consent of the defendant. See Congressional Research Service Report to Congress, The Death Penalty: Capital Punishment Legislation in the 110th Congress, at 24-25 (Sept. 7, 2007) (available on Resource Counsel Projects' website). None of them passed.

B. Jury Misconduct

Several claims of jury misconduct at sentencing have been presented to the circuits. One resulted in relief being granted:

- United States v. Chanthadara, 230 F.3d 1237, 1264-1268 (10th Cir. 2000). Reversing death sentence. At mid-trial hearing away from jury, district court characterized defense theory that another person was responsible for crimes as a "smoke screen" and "bogus." Newspaper reported judge's comments the next day, and six jurors admitted they had seen headline that conveyed the comments, but claimed they had not read further. Sentencing (but not guilt) relief granted though court gave curative instructions and questioned jurors about whether they could be fair.

The other claims were unsuccessful:

- United States v. Basham, 561 F.3d 302, 320-321 (4th Cir. 2009). Though foreperson's calls to five media outlets during trial triggered a presumption of prejudice, there was no reasonable possibility the verdict was influenced by the contacts. Moreover, district court did not abuse its discretion in declining to re-interrogate jurors when telephone records revealed 71 calls between foreperson and two other jurors during trial and sentencing hearing, including calls on day of guilty verdict, day of opening statement at sentencing, and day of closing arguments at sentencing (when foreperson spoke four times with another juror for a total of almost two hours).

- United States v. Jackson, 549 F.3d 963, 984 (5th Cir. 2008). Court rejects claim that jury erroneously believed defendant might ultimately be released from prison even if he were sentenced to life without release. Federal Rule of Evidence 606(b) precluded consideration of affidavit by defense investigator who said that a number of jurors he contacted after trial believed that defendant could be released early, as had happened with a cooperating witness who testified at trial. District court, which had properly instructed jurors on this issue, did not err in denying an evidentiary hearing.

- United States v. Johnson, 495 F.3d 951, 981-982 (8th Cir. 2007). No reasonable possibility that jury deliberations could have been affected by information juror received from son that prisoners serving life sentences were in general population and that death-row prisoners were in solitary confinement. Fed. R. Evid. 606(b) precluded considering evidence that this juror also told fellow jurors that defendant would have three automatic appeals.

- United States v. Fulks, 454 F.3d 410, 431-433 (4th Cir. 2006). Denying new trial based on discovery that a juror had not disclosed that her husband had been murdered more than two decades earlier. Even had juror done so, court would not have excused her for cause, since defense did not show she was actually biased and circumstances surrounding her husband's murder did not show implied bias. Moreover, juror honestly, though mistakenly, thought she had disclosed the information.

- United States v. Barnette, 390 F.3d 775, 808-809 (4th Cir. 2004), vacated on other grounds, 546 U.S. 803 (2005). Where alternate juror notified court during sentencing that he had overheard a juror (whom he identified as one of two jurors that looked alike) make remarks indicating prejudgment of the outcome but which had not risen to the level of premature deliberations, district court properly responded by calling jury into courtroom and asking if anyone had violated court's instructions or if anything had happened to impair any juror's ability to be fair and impartial.

- United States v. Allen, 247 F.3d 741, 790-791 (8th Cir. 2001), vacated on other grounds, 536 U.S. 953 (2002). When separately tried codefendant received the death penalty and verdict was read in courtroom, there was an outburst that was heard by the panel in defendant's case, prior to jury

selection. District judge individually questioned prospective jurors and instructed them to ignore the outburst. Court finds no abuse of discretion in denial of defendant's motion to strike the entire panel, in part because outburst was ambiguous.

XIX. Execution Issues

The FDPA provides that once a death-sentenced prisoner's appeals are exhausted, "[w]hen the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law." 18 U.S.C. § 3596. See also 18 U.S.C. § 3597(a) ("A United States marshal charged with supervising the implementation of a sentence of death may use appropriate State or local facilities for the purpose, may use the services of an appropriate State or local official or of a person such an official employs for the purpose, and shall pay the costs thereof in an amount approved by the Attorney General").

The legality of the Bureau of Prison's lethal-injection procedures is currently being challenged in a civil action brought in District Court for the District of Columbia by six federal death row inmates. In April 2009, the District Court largely denied the government's motion to dismiss and for judgment on the pleadings. See Roane v. Holder, 607 F. Supp. 2d 216, 222-223 (D.D.C. 2009).

For previous circuit and district court decisions on execution issues, see:

- United States v. Fell, ___ F. Supp. 3d ___, 2016 WL 1572894 (D. Vt. Apr. 18, 2016). Rejecting claim that 18 U.S.C. § 3596 is unconstitutionally arbitrary because it does not guide a federal court in a non-death-penalty state in choosing death-penalty state in which death-sentenced defendant should be executed.

- United States v. Bourgeois, 423 F.3d 501, 509-510 (5th Cir. 2005). Provision in 18 U.S.C. § 3596 that federal death sentence would be executed in manner prescribed by law of state in which sentence is imposed was a constitutional delegation of federal power.

- Garza v. Lapin, 253 F.3d 918, 923-926 (7th Cir. 2001). Defendant was not entitled to stay of execution because he cannot demonstrate substantial

ground for relief based on ruling of American Commission on Human Rights that introduction of evidence of uncharged murders in Mexico violated his rights under the American Declaration of the Rights and Duties of Man. Though petition was cognizable under 28 U.S.C. § 2241, the Declaration did not create any enforceable obligations on the part of nations who are members of the Organization of American States. Moreover, American Convention on Human Rights had not been ratified by United States and thus was not a treaty that created binding obligations.

- United States v. Battle, 173 F.3d 1343, 1350 (11th Cir. 1999). Provision in 18 U.S.C. § 3596 that federal death sentence will be executed in manner prescribed by law of state in which sentence is imposed was a constitutional delegation of federal power.

- United States v. Tipton, 90 F.3d 861, 901-903 (4th Cir. 1996). Vacating district court's order staying executions pending congressional authorization of means of execution under 21 U.S.C. § 848(e). Attorney General had authority to promulgate regulations providing means and procedures for execution.

- United States v. Sampson, 300 F. Supp. 2d 278, 283 (D. Mass. 2004). Rejecting government's request that defendant's execution be carried out at USP Terre Haute; instead, it should be carried out in New Hampshire, since Massachusetts does not employ the death penalty and New Hampshire is adjoining state within the same circuit.

- United States v. Hammer, 121 F. Supp. 2d 794, 801-02 (M.D. Pa. 2000). 18 U.S.C. § 3596 required that time, place, and manner of execution be according to law of Pennsylvania, where death sentence was imposed. Pennsylvania statutory provisions for executions "take precedence over any inconsistent regulations promulgated by the Attorney General." Trial court retained jurisdiction over any manner relating to implementation of death sentence, including date, time, method of execution, and whether autopsy is conducted. Court grants prisoner's motion to preclude an autopsy based on his sincerely held religious belief.

XX. Appeal

A. Generally

An appeal from a judgment that includes a sentence of death should be noticed like any other criminal appeal. 18 U.S.C. § 3595(a).

The court of appeals must review "the entire record in the case," including the trial evidence, the sentencing information and procedures, and the special sentencing findings returned by the jury. In addition to addressing "all substantive and procedural issues" raised, the court of appeals must consider (1) "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor," and (2) "whether the evidence supports the special finding of the existence of an aggravating factor required to be considered under section 3592," *i.e.*, a statutory aggravating factor. 18 U.S.C. § 3595(b).

If the court of appeals finds that the death sentence was imposed under the influence of passion, prejudice, or an arbitrary factor; that the admissible evidence and information do not support the special finding of a statutory aggravator; or that "the proceedings involved any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure," it must remand the case for a new capital sentencing hearing or imposition of a non-death sentence. 18 U.S.C. § 3595(c).

"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." 18 U.S.C. § 3595(c).

B. Attacking the Death Verdict in the District Court Before Appeal

The Rules of Criminal Procedure do not explicitly address what procedural vehicle, if any, is available to a capital defendant who wishes to challenge a jury's death verdict in the district court before appeal.

But two circuits have assumed that Federal Rule of Criminal Procedure 33(a), which authorizes a district court to "vacate any judgment and grant a new trial if the interest of justice so requires," permits a defendant to attack a death

verdict as well as a guilty verdict. See United States v. Lawrence, 555 F.3d 254, 261-263 (6th Cir. 2009); United States v. Lee, 274 F.3d 485, 493-494 (8th Cir. 2001), reversing on other grounds, 89 F. Supp. 2d 1017, 1020-21 (E.D. Ark. 2000).

Moreover, two district courts have they had the authority to entertain a Rule 29-type motion challenging the sufficiency of the evidence at a capital sentencing hearing. See United States v. Runyon, 652 F. Supp. 2d 716, 718 (E.D. Va. 2009) (although Fed. R. Crim. P. 29(a) — which permits the court on the defendant's motion to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction" — is not applicable to capital sentencing hearing, district court may, pursuant to Fed. R. Crim. P. 57(b) and its inherent powers, entertain post-verdict motions, challenging sufficiency of evidence or "other impropriety" in the jury's sentencing verdict); United States v. Sampson, 335 F. Supp. 2d 166, 198-201 (D. Mass. 2004) (Fed. R. Crim. P. 29(a) — which permits the court on the defendant's motion to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction" — was not applicable to capital sentencing hearing, but court conducts same analysis under its inherent powers and the heightened-reliability doctrine).

A Rule 29 motion for "judgment of acquittal" must be filed within seven days "after a guilty verdict or after the court discharges the jury." Fed. R. Crim. P. 29(c)(1) Thus, in a capital case, the deadline for a Rule 29 motion challenging the death verdict would appear to be due seven days after the date of *that* verdict, which is when the jury is discharged. Under Rule 33, a motion for new trial (other than one based on newly discovered evidence) must be filed within seven days after the verdict. Fed. R. Crim. P. 33(b)(2).

For both Rule 29 and Rule 33 motions, a district court has complete discretion to extend this deadline before it expires; after the time expires, the court may extend the deadline if the defendant "failed to act because of excusable neglect." Fed. R. Crim. P. 45(b)(1). Moreover, if an appeal is pending, the district court may not grant a motion for new trial unless the appeals court remands the case. Fed. R. Crim. P. 33(b)(1).

C. Record on Appeal

- United States v. Brown, 441 F.3d 1330,1372-1374 (11th Cir. 2006). Defendant successfully sought remand to reconstruct record because it believed there were *ex parte* hearings on funding that had not been transcribed. Court of Appeals held that, on remand, district court did not abuse discretion by not holding an evidentiary hearing on this issue, since defense made no proffer regarding any untranscribed hearings, and thus did not comply with FRAP.

D. Preservation and Waiver

The ordinary rules regarding preservation and waiver of error apply generally to death-sentencing issues on appeal. See 18 U.S.C. § 3593(2)(c) (court of appeals may grant relief when "the proceedings involved any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure"). An unpreserved issue is reviewed only for "plain error." See Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention"). This generally requires that, for court of appeals to grant relief, the unpreserved error (1) was clear and obvious; (2) was seriously prejudicial, so it affected the defendant's substantial rights; and (3) seriously affected the fairness, integrity, or public reputation of the proceedings. See United States v. Olano, 507 U.S. 725, 776-779 (1993).

FDPA also requires a grant of relief if the court of appeals finds "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." In Jones v. United States, 527 U.S. 373, 389 (1999), the Supreme Court held that the language of Section 3593(2)(c) "makes clear that Congress sought to impose a timely objection requirement at sentencing and did not intend to equate the phrase 'arbitrary factor' with legal error."[56] Accordingly,

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[56] The Fourth Circuit has said it will vacate a death sentence if an arbitrary factor "most likely" influenced the jury's decision. United States v. Basham, 561 F.3d 302, 338-339 (4th Cir. 2009). This did not occur there, it added, since the jury was instructed not to rely on any arbitrary factor, significant evidence supported the aggravating factors, the jury's rejection of one aggravator and its finding of many of defendant's mitigators suggests it followed the instructions and weighed the evidence dispassionately, and the trial was conducted fairly, albeit

the Court reviewed an unpreserved challenge to the sentencing instructions only for plain error. See also:

- United States v. LeCroy, 441 F.3d 914, 927-928 (11th Cir. 2006). Where district court reserved ruling on defendant's challenge to scope of government rebuttal evidence and defendant then chose not to call two doctors who had treated him for psychological issues during an earlier incarceration, defendant did not preserve for appeal any challenge to scope of rebuttal.

- United States v. Battle, 173 F.3d 1343, 1349-1350 (11th Cir. 1999). Defendant failed to preserve for appeal challenge to government's misleading notice about nature of victim-impact testimony. Although defense counsel objected when nature of testimony became clear, they failed to move for a continuance, something they needed to do if they seriously thought more time would help.

A "waiver" of an appellate claim is different from a failure to preserve it, in two important respects. First, not every preservation failure is a waiver. Rather, a claim is waived only when there has been an "intentional relinquishment or abandonment of a known right" by the defense. United States v. Olano, 507 U.S. 725, 733 (1993). Second, when a claim is waived (rather than merely unpreserved), it generally may not be reviewed at all by the court of appeals, even for plain error. Id.

Several circuit decisions have found that capital sentencing claims had been waived:

- United States v. Basham, 561 F.3d 302, 330 (4th Cir. 2009). Defendant claimed on appeal that he should have been permitted to introduce statements made by prosecutor at codefendant's trial suggesting that defendant was merely codefendant's "puppet" during their crimes spree. Court finds issue was waived because defendant moved to admit the

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imperfectly. See also United States v. Caro, 614 F.3d 101, 101-102 (4th Cir. 2010) (Duncan, J., concurring in denial of rehearing *en banc*) ("the statute calls for reconsideration of the death penalty when its imposition appears to have resulted from the influence of arbitrary factors").

statements but, after district court deferred ruling, defendant never asked for one.

- United States v. Quinones, 511 F.3d 289, 316-322 (2d Cir. 2007). By successfully requesting jury instruction that defendant would receive life imprisonment if not sentenced to death, defense waived any claim that, following jury's failure to agree on sentence, district court wrongly imposed life imprisonment based on erroneous belief it lacked discretion to impose lower sentence.

Finally, the only circuit to squarely address the question has held that FDPA does not prevent a federal defendant from choosing to waive entirely his direct appeal of a judgment that includes a death sentence. United States v. Hammer, 226 F.3d 229, 236 (3rd Cir. 2000).[57] Another circuit has held that a condemned federal prisoner who supposedly waived an appeal filed on his behalf by standby counsel could not later revoke the waiver and pursue his appeal:

- United States v. Duncan, 643 F.3d 1242 (9th Cir. 2011), on return from remand, 599 Fed. Appx. 679 (9th Cir. 2015). Mentally-ill defendant waived counsel at trial and represented himself, with previous attorneys appointed as standby counsel by the district court. Defendant opted not to present evidence or argument in his defense. After jury convicted and imposed death sentence and district court entered judgment, standby counsel filed notice of appeal. Government obtained hearing to determine if defendant had authorized filing of notice of appeal. Under questioning by district court, defendant expressed beliefs that prosecution experts would later characterized as "highly extreme," bordering on delusional. Defense experts would later say that defendant's ideas about the "System," "Truth," and how his case might affect a universal societal "Epiphany" were psychotic. At hearing, defendant expressed no desire to be executed or any belief that death was appropriate or desired punishment. Nonetheless, district court construed his statements as a waiver of appeal and ordered the notice of appeal struck. While that 2008 order was on appeal to the Ninth Circuit, defendant, in 2010, attempted to revoke any waiver and endorse the notice

[57] But the defendant must be mentally competent, and the waiver knowing and voluntary. See generally Whitemore v. Arkansas, 494 U.S. 149, 152-153 (1990); Gilmore v. Utah, 429 U.S. 1012, 1017 (1979).

of appeal. Ninth Circuit, in 2011, reversed district court's order accepting the waiver and remanded for competency determination, and put off addressing defendant's current wish to appeal. Following evidentiary hearing, district court found that, at time of supposed waiver, defendant had requisite mental competence. On return from remand, Ninth Circuit, in 2015, affirmed, concluding that district court's factual findings were not clearly erroneous and district court had applied correct legal standard for competency. As for defendant's attempt to revoke any waiver and endorse the notice of appeal, one he had presented five years earlier and had repeated and consistently maintained since, Ninth Circuit said only: "Because Defendant was competent in . . . 2008, the notice of appeal that standby counsel filed . . . was a nullity. At that time, Defendant had validly and affirmatively waived his right to file an appeal. His decision to withdraw that waiver, which he made more than two years later, came too late. See 18 U.S.C. § 3595(a) (requiring the notice of appeal to be filed within the time specified for the filing of a notice of appeal'); Fed. R.App. P. 4(b)(1)(A) (requiring a notice of appeal in a criminal case to be filed 'within 14 days after ... the entry of ... the order being appealed')."

E. Mitigating-Factor Findings

Two issues have arisen in connection with courts of appeals' review of jurors' refusal to find certain mitigating factors, as revealed by the sentencing verdict forms.

First, in addressing defendants' claims that such findings were contrary to the evidence, the circuits have expressed disagreement and uncertainty over whether such claims are even cognizable. See United States v. Jackson, 549 F.3d 963, 982 & n.26 (5th Cir. 2008) (court doubts it has authority to review jury's findings on mitigating factors as reflected in special verdict sheet); United States v. Bernard, 299 F.3d 467, 485 (5th Cir. 2002) (same); United States v. Fields, 516 F.3d 923, 948-949 (10th Cir. 2008) (FDPA does not provide for appellate review of allegation that jury erred in failing to find that defendant committed murders under severe mental or emotional disturbance). But see United States v. Higgs, 353 F.3d 281, 327 (4th Cir. 2003) (considering claim on the merits).

FDPA does not mention appellate review of mitigation findings, though the Anti-Drug Abuse Act procedures (repealed in 2006) did. See 21 U.S.C. §

848(q)(3); United States v. McCullah, 76 F.3d 1087, 1112 (10th Cir. 1996) (failure of some jurors to find mitigating factor in case under Anti-Drug Abuse Act is subject to appellate review, under this provision). But see House Report No. 103-467 [H.R. 4035], 103rd Cong., 2d Sess. (Mar. 25, 1994), 1994 WL 107578 ("Subsection 3593(d) requires special findings by the jury, or if there is no jury, by the court, identifying each aggravating *and mitigating factor* found to exist.") (emphasis added).[58]

In almost all FDPA appeals, though, circuits have proceeded to consider such claims on the merits — and to reject them, either on the ground that the evidence about the factual existence of the mitigator was in conflict or impeached, or that the jury was entitled to conclude that the fact, even if true, lacked mitigating significance:

- United States v. Jackson, 549 F.3d 963, 982-983 (5th Cir. 2008). Court must accept jury's mitigation findings unless no reasonable juror could have arrived at them. Moreover, verdict inconsistencies are generally tolerated. Accordingly, Court rejects defendant's "strongest claim," challenging refusal by 11 of 12 jurors to find statutory mitigating factor that equally culpable codefendant did not receive death penalty. Given defendant's testimony that codefendant "didn't help me kill the man" and in fact yelled "let's get out of here" after attack started, jury could have rationally concluded that codefendant was not equally culpable. Similarly, jurors could have rationally doubted that other asserted mitigating factors it rejected were factually proven or had mitigating value.

- United States v. Higgs, 353 F.3d 281, 327 (4th Cir. 2003). No error in jury's refusal to find equally-culpable-accomplice mitigator. Jury was only required to consider evidence; "there is no constitutional requirement that the jury find a mitigating factor even when it is supported by uncontradicted evidence." Moreover, rational juror could have found that defendant had the dominant role in the murders, and thus that codefendant was not equally culpable.

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[58] H.R. 4035 together with H.R. 4032 "ultimately became (with a few amendments) the Federal Death Penalty Act." Rory K. Little, The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role, 26 Fordham Urb. L.J. 347, 386 (1999).

- United States v. Bernard, 299 F.3d 467, 485-486 (5th Cir. 2002). Rejecting defendants' challenges to jurors' unanimous refusal to find their ages (18 and 19, respectively) as mitigating factors. Constitution does not require jury to give mitigating effect or weight to any particular evidence. Here, jury had ample basis to believe that defendant's pattern of gang activities made them older, criminally, than their chronological ages.

- United States v. Paul, 217 F.3d 989, 1000 (8th Cir. 2000). No constitutional violation in six jurors' refusal to find defendant's age of 18 at the time of the offense, or codefendant's life sentence, as mitigating factors.

- United States v. Hall, 152 F.3d 381, 413 (5th Cir. 1998). No error in jury's failure to find mitigating factor of abusive childhood since jury was free to believe or disbelieve defendant's evidence.

- United States v. McCullah, 76 F.3d 1087, 1112-1113 (10th Cir. 1996). Record reveals facts that may have led reasonable jurors to conclude that defendant had failed to prove three mitigating factors that are subject of his appellate challenge (that he had an IQ of 80, and suffered from brain dysfunction and ADHD).

- United States v. Sampson, 486 F.3d 13, 50 (1st Cir. 2007). No error in jury's failure to find mental-illness mitigators on which evidence was "freighted with contradictions."

The second issue that has arisen is whether a death sentence is tainted if the verdict forms reflect unexplained discrepancies between the jurors' mitigating findings or their ultimate verdict on multiple counts.

In United States v. Lawrence, 555 F.3d 254, 267-268 (6th Cir. 2009) (Lawrence I), the jury voted life on one capital count and death on the other (for a single-victim killing), with different mitigation findings on each. The district court set aside the death sentence. On the government's appeal, the Sixth Circuit noted that the United States Supreme Court has held that inconsistent trial verdicts (*i.e.*, guilty on one, not guilty on another) do not entitle a defendant to relief, even if the inconsistency is irrational. See Dunn v. United States, 284 U.S. 390, 393 (1932); United States v. Powell, 469 U.S. 57, 64-69 (1984).

In any event, the Sixth Circuit found no inconsistency there to suggest an arbitrary factor influenced the sentencing decision. The ultimate sentencing verdicts weren't inconsistent, it said, because the capital count on which the defendant received death was more morally culpable than one on which he received life, and the total mitigation findings were more numerous on the life count than the death one. (The death verdict was for a conviction under 18 U.S.C. § 924(j), for malice murder with a gun during a bank robbery, while the life verdict was for a conviction under 18 U.S.C. § 2113, for a killing during a bank robbery). The court added that differences in blameworthiness between the counts may also explain different mitigation findings on each count. See also United States v. Johnson, 223 F.3d 665, 675-676 (7th Cir. 2000) (death verdicts on two counts for two murders were not invalidated by unexplained discrepancies between mitigation findings made by jury on each verdict form); United States v. Allen, 247 F.3d 741, 770 (8th Cir. 2001) (speculating that jury likely voted life on Section 2113 count and death on 924(j) count because defendant was more culpable than codefendant for the murder but not for the bank robbery), vacated on other grounds, 536 U.S. 953 (2002). Cf. United States v. Agofsky, 458 F.3d 369, 375 (5th Cir. 2007) ("we find no merit in Agofsky's argument that his conviction or sentence for Federal Murder is invalid because the jury may have rendered inconsistent verdicts as between the guilt and punishment phases on that count," citing Dunn and Powell as holding that inconsistent verdicts are permissible).

Nevertheless, there is a good case to be made that the Sixth Circuit was wrong, and that Dunn and Powell should not be reflexively applied to inconsistent verdicts or findings in a federal capital sentencing hearing. Thus, defendants should challenge any such inconsistencies, and do so at the earliest possible opportunity, preferably before the court accepts and announces the verdict or, alternatively, in a Rule 33 motion for a new sentencing proceeding.

There are key differences between inconsistent verdicts in these two contexts. Most important, at trial, when a jury acquits on one charge and convicts on another, and the two results can't be rationally reconciled, the jury may well (as Powell and Dunn both emphasized) have simply exercised "lenity." That makes perfect sense. A jury that believes the defendant guilty on both counts might decide to cut him a break by acquitting on one and convicting on the other. The jury will reasonably assume that such a choice has some consequence, namely that it will materially affect the defendant's punishment (*i.e.*, that conviction on one

count will lead to a lesser overall sentence than he would have received had he been found guilty on both).

But in the capital sentencing context, the jury presumably understands that there will be absolutely no difference, as far as the defendant's ultimate fate, between (1) death verdicts on both counts, and (2) one death verdict and one life verdict. In either scenario, he will be condemned to death and executed.[59] Thus, unlike in the trial context, it is simply not reasonable to assume that inconsistent verdicts may have derived from a jury that thought the defendant deserved death on both counts but wanted to extend him "lenity." Nor, for the same reason, is it possible that the result reflected a "compromise" (the other scenario posited by Powell). In other words, it is clear, in the capital sentencing context, that it is the defendant whose "ox is gored" (the phrase used in Powell) when there are inconsistent verdicts.

The Sixth Circuit rejected another type of inconsistency claim in another, later decision in the same case, United States v. Lawrence, 735 F.3d 385, 409-11 (6th Cir. 2013) (Lawrence II). One of the mitigating factors submitted to the jury was that life imprisonment without release was "an appropriate and sufficient punishment." Six jurors found this. Yet the court disagreed that this finding conflicted with or rendered arbitrary the jury's death sentence. It reasoned that the jurors could still have concluded that death was "more" appropriate and the "most" appropriate punishment.

F. Aggravating-Factor Findings

The Fifth Circuit has applied the statutory requirement under FDPA that it determine whether "the admissible evidence and information adduced . . . support[s] the special finding of the existence of the required aggravating factor," 18 U.S.C. § 3595(c)(2)(B), as applying to non-statutory as well as statutory aggravators. United States v. Webster, 162 F.3d 308, 353-354 (5th Cir. 1998).[60]

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[59] If a jury does *not* understand this, *i.e.*, if they somehow think the one life verdict might enable him to escape execution, then that misconception would itself constitutionally taint his death sentence. See Section XVII.G (Jury Instructions and Verdict Forms — Unanimity), *ante*.

[60] This, although the language of FDPA is not as broad as that from the Anti-Drug Abuse Act, which required a court of appeals to consider "the special findings returned under this section," and to determine if "the information supports the special finding of the existence of

It also held that the standard for appellate review of the sufficiency of the evidence of an aggravating factor is whether "a rational trier of fact could have found that the evidence established the essential elements of [its existence] beyond a reasonable doubt." *Id.* Accord United States v. Agofsky, 458 F.3d 369, 374 (5th Cir. 2006). This is the standard the Supreme Court established for similar attacks on aggravators in habeas challenges to state death sentences. Lewis v. Jeffers, 497 U.S. 764, 781 (1990).

Note that sufficiency review under Section 3595(c)(2)(B) is limited to the "admissible" evidence and information. Cf. Lockhart v. Nelson, 488 U.S. 33, 40-42 (1988) (if evidence was improperly admitted, it must nevertheless be considered as part of review of sufficiency of evidence supporting conviction).

G. Proportionality

FDPA does not provide for appellate review of proportionality. And circuits have rejected claims that this failure is constitutional, or that the death sentence in a particular case was disproportionate or arbitrary, often citing Pulley v. Harris, 465 U.S. 37, 42-51 (1984) (Eighth Amendment does not require comparative proportionality review). But see Walker v. Georgia, 129 S. Ct. 453, 457 (2008) (Stevens, J., respecting denial of certiorari) ("likely result" of state supreme court's pattern of "perfunctory" proportionality review, since Pulley, "in conjunction with the remainder of the Georgia scheme, which does not cabin the jury's discretion in weighing aggravating and mitigating factors — is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment").

- United States v. Umana, 750 F.3d 320 (4th Cir. 2013). "[E]ighth Amendment principles do not suggest, as Umaña urges, a categorical ban on capital punishment for 'second degree murders' . . . . there is no indication by the [Supreme] Court that the States or the federal government must include premeditation or deliberation as a required aggravating factor. Indeed, the Court has repeatedly upheld death penalty schemes that did not require a finding of premeditation and deliberation . . . . In the same vein, a survey of state statutes reveals a lack of any national consensus that premeditation and deliberation are necessary to qualify a defendant for the

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every aggravating factor upon which the sentence was based." 21 U.S.C. § 848(q)(3).

death penalty. Most state statutes that divide murder into degrees include in 'first degree murder' more than just premeditated murders . . . . The federal statutes applicable in this case follow the national consensus . . . . The jury found that Umaña killed two people in furtherance of a racketeering enterprise, and that he had killed before and posed a danger in the future. We conclude that the death penalty was proportional to the crimes for which Umaña was convicted."

- United States v. Ebron, 683 F.3d 105, 155-56 (5th Cir. 2012). Though three codefendants, who were arguably equally or more culpable, were not sentenced to death (one suicided, other was adjudicated mentally retarded, and third cooperated with government and testified against defendant), this did not violate the FDPA or the Eighth Amendment.

- United States v. Mitchell, 502 F.3d 931, 981 (9th Cir. 2007). FDPA is not unconstitutional on basis that it fails to provide for comparative proportionality review. Rejects defendant's claim that two more culpable codefendants were not sentenced to death. Jury implicitly rejected that claim. Moreover, to the extent defendant relies on one codefendant's culpability for a separate murder, Court notes that there is no right to inter-case proportionality review. Death sentence also did not violate Eighth Amendment based on defendant's age, 20, and maturity level. Jury was allowed to consider this information.

- United States v. Johnson, 495 F.3d 951, 961 (8th Cir. 2007). No Eighth Amendment violation arose from disparity between defendant's death sentence and life sentence received by her codefendant in separate trial. Defendant's substantial involvement in murders and their planning also satisfied Enmund and Tison.

- United States v. Sampson, 486 F.3d 13, 19 (1st Cir. 2007). Rejecting claim that FDPA is arbitrary in its operation because death penalty is infrequently sought and carried out.

- United States v. Lee, 374 F.3d 637, 653 (8th Cir. 2004). Defendant's death sentence did not violate Eighth Amendment or non-arbitrariness requirement of 18 U.S.C. § 3595 on theory that his more culpable codefendant received a life sentence from the jury.

- United States v. Jones, 132 F.3d 232, 240-241 (5th Cir. 1998). FDPA is not unconstitutional on basis that it fails to provide for proportionality review.

H. Constitutionality

The First Circuit has rejected claims that FDPA is unconstitutional because death penalty is sought based on race of the defendant and of the victim. United States v. Sampson, 486 F.3d 13, 25-28 (1st Cir. 2007). See also United States v. Rodriguez, 581 F.3d 775, 815 (8th Cir. 2009) (rejecting, based on McCleskey, defendant's claim that death penalty, as applied federally, is unconstitutional because the government seeks death in higher percentage of cases involving white (female) victims than minority victims).

Sampson, and the Second Circuit, in United States v. Quinones, 313 F.3d 49, 63-69 (2d Cir. 2002), also rejected claims that FDPA is unconstitutional because of the risk of executing an innocent person.

A district court in Puerto Rico rejected the argument that the imposition of capital punishment on a Puerto Rico resident for a crime against another Puerto Rico resident violates the Eighth Amendment and the Federal Relations Act, 48 U.S.C. § 734. United States v. Martinez-Hernandez, 2016 WL 1275039 (D. P.R. Apr. 1, 2016).

I. Harmless Error

In assessing whether a trial error is reversible, a federal court of appeals applies a stricter standard to constitutional errors than to nonconstitutional ones. Compare Chapman v. California, 386 U.S. 18, 23-24 (1967) (prosecution must prove "beyond a reasonable doubt" that constitutional error did not contribute to conviction) with Kotteakos v. United States, 328 U.S. 750, 764-765 (1946) (defendant must prove that non-constitutional error had substantial and injurious influence on verdict). See also Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded"). The United States Supreme Court has held that, in state cases, the Chapman "beyond a reasonable doubt" standard for harmless error applies to constitutional errors at a capital sentencing hearing. See Satterwhite v. Texas, 486 U.S. 249, 256-258 (1988).

But it is important to note that, in federal capital cases, FDPA provides that the Chapman standard applies to *all* sentencing claims, whether constitutional or not. See 18 U.S.C. § 3595(c)(2) (applying "beyond a reasonable doubt" standard generally to court of appeals' decision whether to set aside a death sentence under FDPA). Two circuits have applied the statute's reasonable-doubt test to non-constitutional errors at capital sentencing hearings. See United States v. Basham, 561 F.3d 302, 330 (4th Cir. 2009) (court acknowledges that, under FDPA, Chapman standard applies to even nonconstitutional errors: "By statute . . . at the penalty phase, if evidence was erroneously admitted, reversal is mandated unless the Government can show beyond a reasonable doubt that the error was harmless"); United States v. Jackson, 327 F.3d 273, 307 (4th Cir. 2003) (applying Chapman test to claim court abused its discretion in allowing government evidence that was not proper rebuttal); United States v. Purkey, 428 F.3d 738, 758-59 (8th Cir. 2005) (applying test to court's preclusion of defense impeachment of government expert, based on mistaken finding that risk of confusion outweighed probative value).

When it comes to an error affecting an aggravating factor, the Supreme Court has recognized that there are two kinds of harmless-error review: One looks to whether, absent an invalid factor, the jury would have reached the same verdict. The other looks to whether the result would have been the same had the invalid aggravating factor been properly defined. United States v. Jones, 527 U.S. 373, 402-405 (1999) (any "loose drafting" of nonstatutory aggravating factors of victim vulnerability and victim impact were harmless. Without passing on whether the Fifth Circuit was correct in finding harmlessness under the first approach (on theory that jury would have voted death based on kidnapping and especially-heinous aggravators), court finds that, under the second approach, error was harmless. Had the two factors been "precisely defined," jury surely would have reached the same result).

Also potentially affecting appellate review of errors involving aggravating factors is Brown v. Sanders, 546 U.S. 212, 221 (2006), in which the Supreme Court held that an invalid aggravating factor will constitutionally infect a death verdict only if the "jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor." See United States v. Bolden, 545 F.3d 609, 616-617 (8th Cir. 2008) (any error in submitting statutory aggravator involving prior drug conviction was not reversible,

under Brown, since the evidence relevant to the attempted-possession conviction was admissible and jury could have weighed it as part of the non-statutory aggravating factor of "other criminal conduct"); United States v. Mitchell, 502 F.3d 931, 977 (9th Cir. 2007) (" Even if post-mortem mutilation may not inform the statutory aggravating factor" of especial heinousness, "it could inform a non-statutory aggravating factor encompassing mutilation after death"). See also United States v. Mikos, 539 F.3d 706, 719 (7th Cir. 2008) (2-1; Posner, J., dissenting) (as an alternative basis for denying relief based on the prosecutor's lack-of-remorse arguments, the majority opinion concluded that any error was not reversible because "[t]he Supreme Court held in Brown" that when a non-statutory aggravating factor "is set aside, the sentence still may be affirmed if all of the evidence that supported this consideration would have been admitted anyway"). But see Brown, 546 U.S. at 220 ("Th[e] test is not . . . an inquiry based solely on the admissibility of the underlying evidence").

In several FDPA cases, the circuits have found that errors related to aggravation were not harmless:

- United States v. Whitten, 610 F.3d 168, 173 (2d Cir. 2010). Prosecutor's improper summation comments on defendant's decisions not to testify or plead guilty bore on the "critical issues" of remorse, acceptance of responsibility and future dangerousness, and thus, cumulatively, were not harmless beyond a reasonable doubt.

- United States v. Chanthadara, 230 F.3d 1237, 1264-1268 (10th Cir. 2000). Two errors — faulty instruction on pecuniary gain and six jurors' exposure to newspaper headline conveying that district judge had referred to defense theory as a "smokescreen" — were prejudicial enough to require new sentencing hearing. Court also notes that remaining statutory aggravating factor, heinous-cruel-depraved, was not supported by overwhelming evidence, and there was some doubt about whether defendant was the actual shooter.

- United States v. McCullah, 76 F.3d 1087, 1102 (10th Cir. 1996). Erroneous admission at trial of defendant's coerced statements to government informant was not harmless as to sentence, since such statements were emphasized by the government and were the only evidence of defendant's nonrepentance and his willingness to murder again.

In several others, courts of appeal have found an error related to an aggravator to be harmless:

- United States v. Hager, 731 F.3d 167, 206 (4th Cir. 2013). District court's and prosecutor's use of present tense to describe defendant's supposed lack of remorse, in jury instructions and summation, was harmless error as to risk that this may have encouraged jury to rely on his silence. The district court instructed jurors not to draw any adverse inference from defendant's failure to testify and his "affirmative conduct displaying lack of remorse was significant and telling." Moreover, "in its closing argument, Hager's counsel stated, 'Barbara White was killed 14 years ago. Members of the jury, you do not know how Tommy Hager feels about that today.' Hence, to the extent that the prosecutor's comments highlighted Hager's failure to testify, this statement by Hager's counsel is a self-inflicted wound that potentially does the same."

- United States v. Runyon, 707 F.3d 475, 492-99 (4th Cir. 2013). Finding harmless error in introduction at sentencing of videotape of an interrogation of the defendant in which police confronted him with the evidence and facts of the crime and urged him to confess and show remorse by making references to his religion and ethnicity, and defendant, for the most part, kept silent. Court instructed jurors not to consider the officers's statements on the videotape, and not to consider race or religion generally in their verdict; issues to which tape was relevant, lack-of-remorse aggravator and equally-culpable-codefendant mitigator, were established by other evidence; videotape consumed a relatively insignificant portion of sentencing hearing; and aggravating factors were numerous and compelling.

- United States v. Ebron, 683 F.3d 105, 153 (5th Cir. 2012). Erroneous finding of substantial-planning aggravating factor held harmless because the court is persuaded, beyond a reasonable doubt, that jury still would have voted death based on the other aggravating factors, which were the focus of the prosecutor's summation, notwithstanding that one or more jurors found 10 mitigating factors

- United States v. Caro, 597 F.3d 608, 630-631 (4th Cir. 2010). Any error in aggravating factor that defendant "has not expressed remorse for his violent

acts" was harmless. Court gave cautionary instruction that defendant had right to silence and silence alone could not be considered as proof of lack of remorse. Moreover, defendant's affirmative conduct displaying lack of remorse, which jury properly considered, was significant and telling.

- United States v. Mikos, 539 F.3d 706, 719 (7th Cir. 2008) (2-1; Posner, J., dissenting). Even if lack of remorse was not a valid aggravator, its use at trial was harmless, since it did not give rise to inadmissible evidence and occupied a small portion of the prosecutor's summation.

- United States v. Agofsky, 458 F.3d 369, 372-373 (5th Cir. 2006). Defendant not entitled to sentencing relief though court was ordering that only one of defendant's two capital convictions could stand based on double jeopardy. Court relies on fact that jury sentenced defendant separately on each conviction.

- United States v. Higgs, 353 F.3d 281, 319 (4th Cir. 2003). (1) Even if aggravating factor of prior serious drug offense was improperly submitted, error was harmless, where five other aggravators were submitted and found, and jury found only three mitigators, and only one of those unanimously; (2) though submission of "multiple killings" as a *statutory* aggravating factor was error, it was harmless; since jury found other statutory aggravating factors, this did not "increase the available punishment," and instead was appropriately considered by the jury in the selection decision.

- United States v. Bernard, 299 F.3d 467, 484-487 (5th Cir. 2002). (1) Jury's invalid finding of pecuniary-gain aggravating factor (based on insufficient evidence) was harmless error. Jury unanimously found two other statutory aggravating factors as to one defendant, and three as to the other, as well as three non-statutory aggravators as to both. In government's summation, pecuniary-gain aggravator received less attention than any of the others. Jury found "hardly any mitigating factors." "We are confident the jury would have imposed the same sentences" even had pecuniary-gain factor not been submitted. (2) Any error in sustaining objection to question of defendant's mother whether his fights with other kids growing up were because of his mixed racial background was harmless where she was allowed to testify at length about the racial tension in his life, and defense expert also testified about effect of racial harassment on defendant.

- United States v. Stitt, 250 F.3d 878, 898-899 (4th Cir. 2001). Erroneous admission of victim-impact evidence in rebuttal was harmless beyond a reasonable doubt since the "relatively unemotional" testimony comprised only a fraction of entire penalty phase (19 out of 1082 transcript pages); court instructed jury not to consider it as an aggravating factor; jury found all the statutory aggravators and 40 non-statutory aggravators including several very serious ones; and mitigating factors found by jury were "unremarkable."

- United States v. Paul, 217 F.3d 989, 1001 (8th Cir. 2000). Any error in using pecuniary gain as an aggravating factor in addition to being an element of the offense was harmless where jury found two other statutory aggravating factors.

- United States v. Webster, 162 F.3d 308, 326 (5th Cir. 1998). Erroneous instruction on "substantial planning" aggravator was harmless error, as government has shown jury would have imposed death even without it. Jury found two other statutory aggravators, including weighty "especially heinous" factor, and two nonstatutory ones. Import of "substantial planning" factor "pales in comparison" to these. Moreover, nine mitigating factors found by some combination of jurors were "paltry."

- United States v. Hall, 152 F.3d 381, 418 (5th Cir. 1998). Any error in submitting victim-impact aggravator was harmless, given "atrociousness of this crime," jury's finding of three other aggravators (future dangerousness, special heinousness, and kidnapping), and "the relative paucity" of the mitigating factors.

In several cases, circuits have addressed the prejudicial effect of errors involving the exclusion of defense evidence at a federal capital sentencing. With one exception, these errors were found to be harmless.[61]

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[61] The Supreme Court has not squarely addressed the question of whether harm analysis applies to errors that resulted in the jury not hearing or not considering mitigating evidence. And two circuits have suggested that such errors are structural. See Nelson v. Quarterman, 472 F.3d 287, 314-15 (5th Cir. 2006) ("the Supreme Court has *never* . . . given any indication that harmless error might apply in its long line of post-*Furman* cases addressing the jury's ability to give full effect to a capital defendant's mitigating evidence" and citing cases); Davis v. Coyle,

- United States v. Troya, 733 F.3d 1125, 1136-38 (11th Cir. 2013). While "the government omitted this argument in its brief," court finds that the error in excluding Dr. Mark Cunningham's testimony on future non-dangerousness, which should have been admitted as both mitigation and rebuttal, was "harmless" in case involving murder of a cocaine supplier, his wife, and their two young children. Despite the fact that the sentencing jury imposed life sentences on the majority of the counts, the panel believed the death sentences for the two counts involving the children showed that "the jury drew a line in the sand when it came to the[ir] cold-blooded murder . . . . We cannot say that a reasonable jury would change its vote of death for the murder of the . . . children to life imprisonment based on" Cunningham's testimony "that Troya could be safely managed in prison."

- United States v. Gabrion, 719 F.3d 511, 525 (6th Cir. 2013) (*en banc*). Exclusion of defendant's residual-doubt argument about jurisdiction was "palpably harmless . . . . The government's case for aggravation was overwhelming: Gabrion killed Timmerman in an undisputedly horrific manner, killed her infant daughter, likely killed three other people who either witnessed his crimes or whose death was otherwise useful to him, and terrorized countless people who crossed his path."

- United States v. Montgomery, 635 F.3d 1074, 1091-92 (8th Cir. 2011). (1) Neurologist's interpretation of defendant's PET scan — as showing abnormalities allegedly consistent with theory that defendant suffered from mental illness — was "arguably admissible." But exclusion was harmless beyond a reasonable doubt. Although "a jury may be more likely to believe someone suffers from a problem if its cause is explained," evidence was scientifically unreliable and of minimal probative value, and aggravating factors were "serious" and supported by overwhelming evidence; (2) Summation remarks criticizing the decision to have defendant's children testify in mitigation were improper, but did not deprive her of a fair trial "particularly in light of the substantial evidence supporting the aggravating factors. Moreover, the offending remarks were brief and were made in the context of an otherwise proper argument."

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475 F.3d 761, 774-75 (6th Cir. 2007) (error in excluding mitigating evidence required reversal of death sentence; for such an error, reviewing court could not engage in harm analysis or reweighing).

- United States v. Lighty, 616 F.3d 321, 363 (4th Cir. 2010). Finding or assuming district court erred in excluding mitigating evidence of (1) a baby book, written by defendant's mother, in which she had described drug use during her pregnancy; (2) letter defendant had written to his grandmother during the guilt phase of trial, which "demonstrates a certain level of love for family, loyalty to family, and gratitude to family, all of which are relevant to Lighty's character"; and (3) certain testimony by defense psychologist regarding which risk and protective factors, of those he had identified from DOJ study as probative of future criminality or non-criminality, defendant had or lacked. Court nevertheless concludes that these errors were harmless because the excluded evidence was cumulative.

- United States v. Barnette, 211 F.3d 803, 825 (4th Cir. 2000). Erroneous exclusion of surrebuttal testimony by defense mental-health expert was not harmless, given importance of psychiatric evidence and "damning" nature of testimony by government expert that it had been intended to rebut. Defense cross-examination of government expert was not adequate substitute for its own live expert witness.

- United States v. Purkey, 428 F.3d 738, 757-759 (8th Cir. 2005). (1) Error in preventing defense psychologist from opining that defendant suffered from fetal alcohol syndrome was harmless beyond a reasonable doubt. Defendant was allowed to present "significant expert testimony regarding [his] brain abnormalities and their impact on his mental and emotional health." Though jury might have been more likely to believe he suffered from such problems if their cause was explained, nevertheless, court has no doubt jury would still have imposed a death sentence even had evidence been admitted, given its "minimal probative value" and the "overwhelming evidence and jury findings of serious aggravating factors." (2) Error in precluding cross of prosecution psychiatric expert about mistake in his testimony in another, high-profile case was harmless beyond a reasonable doubt, since defense was able to bring out errors expert had made in other prior cases. (3) Even assuming other government expert's testimony on certain issues, relating to defendant's claim of brain damage, went to "new matter," any error in precluding defense surrebuttal was harmless beyond a reasonable doubt, since defendant presented significant amount of testimony in support of that claim and aggravating factors were "overwhelming."

In one case, the Fifth Circuit found that a trial error may have influenced the jury's punishment decision, and so granted sentencing relief. United States v. Causey, 185 F.3d 407, 423 (5th Cir. 1999). After the court reversed two codefendants' convictions on one of three capital counts (because of lack of evidence on an essential element), it also reversed their death sentences "[b]ecause it is impossible to say" sentences "were not influenced by the fact" defendants "had received three death eligible convictions, rather than two." See also United States v. Catalán-Roman, 585 F.3d 453, 471 (1st Cir. 2009) (in holding harmless district court's erroneous exclusion of defense impeachment evidence at trial, court notes that "if Catalán had been sentenced to death, it might be necessary to decide whether the exclusion . . . was an error of constitutional dimension, because the harmless error analysis might well be different. As noted, in the penalty phase of the trial, the same jury that had decided appellants' guilt was asked to determine whether to impose the death penalty, and was expressly instructed that it could consider the evidence it heard in the guilt phase").

Finally, there is no language in Section 3595 that would allow a court of appeals to "reweigh" the aggravating and mitigating factors, and thereby affirm a death sentence despite a prejudicial error at the sentencing hearing. See Clemons v. Mississippi, 494 U.S. 738, 748-751 (1990) (explaining difference between harmless-error review and appellate reweighing). Indeed, the bill that was hammered out by the House-Senate Conference Committee, and ultimately passed, jettisoned language from the House version that would have required an affirmance of the death sentence, whatever the sentencing error, if the court of appeals found at least one valid statutory aggravating factor "and that the remaining aggravating factor or factors found to exist sufficiently outweigh any mitigating factors found to exist." See Violent Crime Control and Law Enforcement Act of 1994, 140 Cong. Rec. S6018-02, 103rd Cong., 2d Sess., 1994 WL 196834 (May 19, 1994).

J. Passion, Prejudice, or Arbitrary Factors

The FDPA provision requiring the court of appeals to set aside a death sentence imposed under the influence of passion, prejudice, or any arbitrary factor does not create a wholesale exception to the plain error rule allowing reversable based on unpreserved error. See Jones v. United States, 527 U.S. 373, 388-89 (1999). But neither the Supreme Court nor the circuits have made clear what ths provision *does* cover. One circuit recently said: "We review the record to determine not only whether the jury's decision is supported by the evidence, but

also whether there is evidence of improper influence . . . . A sentence of death can be vacated only upon a finding that passion, prejudice, or an arbitrary factor most likely influenced the sentence . . . . Speculation is insufficient to show arbitrary influence; there must be some basis for concluding that emotion rather than reason swayed the jury." After canvassing the aggravating and mitigating evidence, the court "cannot say that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." United States v. Lawrence, 735 F.3d 385 (6th Cir. 2013).

K. Interlocutory Appeals

1. By the Defense

Two circuits have found that, under the collateral-order doctrine, a defendant may take an interlocutory appeal from a district court's denial of a motion to strike a death notice as not filed within a "reasonable time" before trial. United States v. Wilk, 452 F.3d 1208, 1220 (11th Cir. 2006); United States v. Ferebe, 332 F.3d 722, 726-730 (4th Cir. 2003). Two others have assumed this. United States v. Ayala-Lopez, 457 F.3d 107, 109 (1st Cir. 2006); United States v. Williams, 318 F. App'x 571, 573 (9th Cir. 2009). But one found it lacked jurisdiction over the appeal. United States v. Robinson (McGriff), 473 F.3d 487, 491-492 (2d Cir. 2007).

Although this issue has arisen after death notices were tardily filed in cases with existing trial dates, see also Section VII, *ante*, one could certainly argue that an interlocutory appeal, based on the absence of a "reasonable time" before trial, should also be available to challenge a district court's refusal to grant an adjournment or its setting of an unreasonably early trial date in a previously death-noticed case.

The majority line of cases suggests that an interlocutory appeal may be available from a district court's denial of a motion to strike a death notice not just based on the timeliness of the notice but also on any other ground. See also United States v. Harper, 729 F.2d 1216, 1222-1224 (9th Cir. 1984) (Court finds mandamus review appropriate for district court's pretrial order holding death-penalty provision of Espionage Act constitutional).

2. By the Government

One circuit has held that a district court's order vacating a death sentence and ordering a resentencing hearing on the defendant's motion is subject to an interlocutory appeal by the government under 18 U.S.C. § 3731, which permits such an appeal "from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof." United States v. Lawrence, 555 F.3d 254, 260-261 (6th Cir. 2009).[62]

Moreover, several circuits have similarly allowed an interlocutory government appeal under Section 3731 from a pretrial order striking the death notice. See United States v. Frye, 372 F.3d 729, 733-734 (5th Cir. 2004); United States v. Quinones, 313 F.3d 49, 57 (2d Cir. 2002); United States v. Bass, 266 F.3d 532, 535 (6th Cir. 2001), rev'd on other grounds, 536 U.S. 862 (2002); United States v. Acosta-Martinez, 252 F.3d 13, 16-17 (1st Cir. 2001); United States v. Fernandez, 231 F.3d 1240, 1244-1245 (9th Cir. 2000); United States v. Cheely, 36 F.3d 1439, 1441 (9th Cir. 1994); United States v. Woolard, 981 F.2d 756, 757 (5th Cir. 1993).

One circuit has applied Section 3731 to a capital resentencing that was occurring as a result of a grant of relief under 28 U.S.C. § 2255, over a dissent that would have held that the phrase "criminal case" in Section 3731 excluded an interlocutory appeal in that setting. United States v. Johnson, 764 F.3d 937 (8th Cir. 2014).

[62] The Sixth Circuit distinguished district court grants of relief under 28 U.S.C. § 2255, where a government appeal must await resentencing. Id. Cf. United States v. Stitt, 459 F.3d 483, 485-486 (4th Cir. 2006) (court of appeals lacked jurisdiction over government's appeal from district court order, in Section 2255 proceeding, setting aside defendant's death sentence and ordering resentencing. Judgment would not be final and appealable until new sentence was imposed).