NATIONAL JUDICIAL COLLEGE

Reno, Nevada

Conducting the Penalty Phase of a Capital Case

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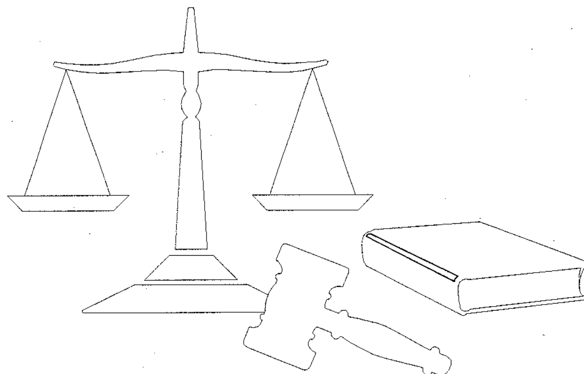

July 30, 2004

Preface

These materials were originally authored by Judge Susan Schaeffer of St. Petersburg, Florida, for use in the Handling Capital Cases Course at the Florida College of Advanced Judicial Studies. Judge Schaeffer taught the Penalty Phase portion of the same course at the National Judicial College for several years. Judge Schaeffer and I are still members of the faculty of the Florida College of Advanced Judicial Studies and have served on several committees together, most notably the Supreme Court of Florida's Committee on Postconviction Relief in Capital Cases.

I have updated the materials four times. The updates were for the purpose of bringing the materials current and including more material of national interest. This edition of the materials is in a new format. The sections are numbered. The National Judicial College is planning to publish a book on the trial of capital cases sometime in the near future and I have been asked to author Chapter 8 of the book, which will be trial of the penalty phase. These materials are still in the "construction phase" and have not been edited as of this date. Accordingly, I ask your forgiveness if my footnotes do not always match the technical requirements of the Harvard *Blue Book*. I am sure the editors will eventually make the necessary corrections and, meanwhile, student judges will have the benefit of materials that are much more complete than in previous years.

These materials are not the last word on this important subject. They are at best a bench book that can be used as a starting point by judges assigned to a capital case. The law in capital litigation is constantly changing. Both state and Federal courts review these cases regularly and it is not unusual for the law to change during the pendency of a capital case. Accordingly, judges assigned to these cases need to be ever mindful of the need to keep current on state and Federal decisions in their jurisdictions and elsewhere.

In the past several years I have been contacted by a number of judges who have questions that need to be answered about specific capital cases. I can be reached at the Seminole County Court House, 301 N. Park Avenue, Sanford, Florida 32771, telephone 407-665-4239. Call for my email address. I do not always know the answers, but I always have an opinion.

Comments, criticisms, and suggestions on how to improve these materials are most welcome.

O. H. Eaton, Jr.
Circuit Judge
Sanford, Florida

July 30, 2004

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[8.1] Introduction

Capital punishment is a possible penalty for the most serious homicides in thirty eight states. All thirty eight have some sort of post-verdict hearing to determine whether or not the death penalty should be imposed. These hearings are sometimes referred to as the "penalty phase" or "presentence hearing."

There must be a finding (verdict) of guilt by court or jury before the death penalty is considered in a capital case. While the procedure used to determine the penalty differs from state to state, arriving at that decision is the most difficult task presented to a judge or jury. And, due to the finality and severity of the death penalty, there is no decision that will receive more judicial scrutiny. Judicial review will take place in both state and federal courts, and it is not unusual for these courts to review a single case a number of times. More death penalty cases are reversed in the United States than any other type of case in criminal law. For instance, the Supreme Court of Florida reversed 47% of the death penalty cases it decided on plenary appeal in 2000. Since that time the reversal rate has significantly improved - 83% were affirmed in 2003. Florida now requires trial judges to complete a comprehensive course on the trial of death penalty cases and that may be a factor in reducing the reversal rate.

There are three basic schemes used to impose the death penalty. Each state has its own variations, but these schemes can be categorized as the Florida scheme, the Georgia scheme and the Texas scheme.

[8.1.1] The Florida scheme

In 1972, the United States Supreme Court held all of thedeath penalty statutes in the United States to be unconstitutional[1] Florida was the first state to reenact the death penalty after that decision.[2] Three states, Alabama, Delaware and Florida, follow the Florida scheme. Indiana was a Florida scheme state but the Indiana Legislature rewrote that state's statute to make Indiana a Georgia scheme state in 2002.[3] The Florida scheme requires the jury to unanimously find a defendant guilty of first degree murder. Then the same jury (unless the defendant waives a jury) hears evidence to establish statutory aggravating factors and statutory or non-statutory mitigating circumstances. The aggravating factors must be established beyond a reasonable doubt. The fact finder must be only "reasonably convinced" as to the existence of mitigating factors. If the jury finds one or more aggravating circumstances, and determines these circumstances sufficient to recommend the death penalty, it must determine whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances and, based upon these considerations, recommend whether the defendant should be sentenced to life imprisonment or death. A simple majority of the jury is necessary for the recommendation to be for the death penalty. (Florida and Delaware are the

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[1]*Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

[2]F. S. 921.141.

[3]IN ST 35-50-2-9 (2002).

only states that allow the jury to recommend the death penalty by simple majority.[4] Alabama requires at least 10 jurors to recommend the death penalty.[5] Most states require unanimity.) With rare exceptions, the judge must give the jury recommendation "great weight," but the final decision as to the penalty is made by the judge. After the jury renders its recommendation, the judge must give both sides an opportunity to present additional evidence or argument.[6] A comprehensive sentencing order, complete with findings and conclusions of law, is required if the death penalty is imposed. Under the Florida scheme, review by the State Supreme Court is automatic and includes a "proportionality review" comparing similar cases to avoid arbitrary sentences.

[8.1.2] The Georgia scheme

The Georgia scheme is similar to the Florida scheme.[7] The two schemes differ because, under the Georgia scheme, the prosecutor is not limited to presentation of evidence establishing statutory aggravating factors. After one statutory aggravating factor has been established, the prosecutor may present all relevant evidence of aggravation. The jury must state in its verdict the aggravating factors found beyond a reasonable doubt, and if the death penalty is unanimously recommended, the court must impose the death penalty. The fact that the jury determines the sentence instead of the judge is another difference between the Florida and Georgia schemes. Under the Georgia scheme, there is automatic review of the death sentence by the State Supreme Court. The reviewing court is required to determine (1) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and (3) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.

[8.1.3] The Texas scheme

The Texas scheme has a different approach than the Florida and Georgia schemes.[8] In Texas, the jury is required to answer three interrogatories. The interrogatories must be answered either "yes" or "no." The first two interrogatories must be answered "yes" unanimously or "no" by a vote of at least ten to two. The last interrogatory must be answered "no" unanimously or "yes" by a vote of at least ten to two. The interrogatories are set forth in the statute as follows:

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[4]DE ST TI 11 §4209.

[5]AL ST sec 13A-5-45.

[6]*Spencer v. State*, 615 So.2d 688 (Fla. 1993); *Phillips v. State*, 705 So.2d 1320 (Fla. 1997).

[7]Ga. Code Ann., §17-10-30 et seq.

[8]Vernon's Ann. Texas C.C.P. Art. 37.071

1. Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?[9]
2. Whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken?
3. Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

The Texas Court of Criminal Appeals automatically reviews the death sentence[10]. In reviewing the jury's finding on future dangerousness, the court must view all of the evidence before the jury in the light most favorable to its finding, then determine whether, based on that evidence and reasonable inferences therefrom, a rational jury could have found beyond a reasonable doubt that the answer to the punishment issue was "yes."[11]

[8.1.4] Constitutionality of the three schemes

These three schemes were originally approved on strictly Eighth and Fourteenth Amendment grounds by the U.S. Supreme Court in the 1976 trilogy of cases, Gregg v. Georgia, Proffitt v. Florida, and Jurek v. Texas.[12] The Eighth and Fourteenth Amendments to the United States Constitution require the judge or jury not be precluded from considering any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a mitigating circumstance as a basis for a sentence less than death.[13] The judge must instruct the jury that mitigating factors may not be limited by statute.[14]

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[9]At least one Georgia scheme state, Virginia, requires a finding that the defendant both presents a future danger to society and that the murder was "outrageously or wantonly vile, horrible or inhuman" as the only aggravating factor. Va. St. S 19.2-264.2.

[10]Vernon's Ann. Texas C.C.P. Art. 37.0711(j).

[11]*Salazar v. State*, 38 S.W.3d 141 (Tex. Crim. App. 2001); *Williams v. State*, 937 S.W.2d 479 (Tex. Crim. App. 1996).

[12]*Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Jurek v. Texas*, 428 U.S. 262 (1976).

[13]. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982).

[14]*Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

[8.1.5] Variations within the schemes

While all states follow the Florida, Georgia or Texas schemes, each state has its own variations that must be considered. These variations are sometimes significant and can make decisions from one state irrelevant to decisions from another state. Care must be taken when reading decisions from other jurisdictions, especially federal cases, before considering them persuasive of local law.

For instance, until recently, Arizona varied the Georgia scheme by eliminating the jury from the penalty phase and entrusting the responsibility to determine the existence of aggravating and mitigating circumstances to the trial judge. This procedure was disapproved by the United States Supreme Court in *Ring v. Arizona*.[15]. The *Ring* case is more fully discussed later in §8.2 of these materials.

Another interesting variation is found in the Delaware scheme. Delaware is a Florida scheme state with a Georgia scheme twist.[16] In Delaware, the jury must find at least one statutory aggravating circumstance beyond a reasonable doubt before considering the death penalty. The finding must be unanimous and included on the verdict form. However, the jury is not limited to considering the aggravating circumstances set forth in the statute. In order to recommend the death penalty the jury must find that the aggravating circumstances outweigh the mitigating circumstances by a preponderance of the evidence. The trial judge is the ultimate sentencing authority and, if the trial judge agrees with the jury, written findings supporting the death penalty must be entered. The Supreme Court of Delaware reviews the sentence and considers the proportionality of the sentence as well as whether the sentence was imposed arbitrarily or capriciously or through passion or prejudice and whether the evidence supports the finding of an aggravating circumstance.

Some states, Colorado, Nebraska, and Ohio, either provide, or used to provide, that the penalty phase shall be conducted before a three judge panel or permit that option instead of a jury.[17] All state procedures requiring a judge or judges, rather than the jury, to determine the existence of aggravating factors are at constitutional risk after *Ring v. Arizona*.[18]

Three states, California, Louisiana and Texas, include aggravating circumstances as elements of the crime of first degree murder.[19] California's definition includes "special circumstances." Louisiana defines first degree murder separately depending upon the aggravating circumstances. Texas draws a distinction between murder and capital murder depending upon the existence of aggravating circumstances. All three states require the prosecutor to include the aggravating or "special" circumstances to be charged in the indictment. The fact that the aggravating or "special"

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[15]*Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[16]DE ST TI 11 S 4209.

[17]CO ST S 16-11-103; Neb. Rev. Stat. §29-2519 et seq.; OH ST S 2929.03.

[18]*Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 379 (2002).

[19]CA PENAL S. 189 et seq.; LSA-R.S. 14:30; V.T.C.A. Penal Code §19.03

circumstances are also elements of the offense of capital murder does not mean that the death penalty must automatically be imposed upon conviction. The jury is not bound to find the existence of an aggravating circumstance which would justify the imposition of the death penalty merely because the jury found the defendant guilty of first degree murder. Accordingly, the use of aggravating circumstances as elements of the crime is not unconstitutional on the ground that the jury which has determined guilt has already determined the existence of an aggravating circumstance.[20] The fact that the aggravating or "special" circumstances must be alleged in the indictment may have significant meaning in light of recent cases decided by the United States Supreme Court.

New Jersey, a Georgia scheme state, restricts the state "to proving statutory aggravating factors and rebutting proof of mitigating factors." The prosecuting attorney does not have the authority to waive the penalty phase in New Jersey.[21]

[8.1.6] Understanding the variations

Some questions that must be addressed when comparing these variations are:

1. How much discretion does the prosecutor have to seek or waive the death penalty?

2. Does the prosecutor have to give notice to the defendant of intent to seek the death penalty? If so, how and when?

3. Does the prosecutor have to give notice of which aggravating factors will be relied upon? If so, how and when? Must the aggravating circumstances be contained in the indictment?

4. Do the rules of evidence, particularly the rules prohibiting hearsay, apply to the penalty phase?

5. Who makes the sentencing decision - the jury exclusively, the judge or judges if a jury is waived, or the judge after receiving a jury's recommendation? If the defendant wishes to waive a jury, must the prosecutor agree?

6. Does the jury's decision have to be unanimous or by some majority vote? If the decision is by majority vote, how much of a majority?

7. Is the judge or jury required to "balance" or "weigh" aggravating and mitigating factors to determine the proper sentence? If not, how is this decision made?

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[20] *State v. Clark*, 387 So.2d 1124, dissenting opinion 389 So.2d 1335 (La. 1980); *cert. den.*, 449 U.S. 1103, 101 S.Ct. 900, 66 L.Ed.2d 830, *rehearing den.*, 450 U.S. 989, 101 S.Ct. 1530, 67 L.Ed.2d 825.

[21] N.J.S.A. 2C:11-3; *State v. Rose*, 548 A.2d 1058 (N.J. 1988).

8. What are the potential problems with jury instructions? These instructions differ greatly from state to state. Some have been reviewed by the U.S. Supreme Court and approved or disapproved. More importantly, some may be ripe for review and may be struck down in the future. Following a state supreme court's jury instructions can still result in re-trying the penalty phase if the instructions are faulty.

9. What is the burden of proof in deciding aggravation and mitigation?

10. May the judge override the jury's recommendation? If so, what is the standard for the override?

11. What should be included and excluded from the sentencing order if one is required?

This list is only a partial list. There are other issues peculiar to the several states. However, most states have a great deal in common in sentence determination. These common factors and some of the individual differences will be discussed in these materials. Each state has its own procedural complexities and pitfalls, some of which are quite subtle. Research of local statutes, rules, and case law is definitely required to adequately conduct a penalty phase proceeding.

[8.2.] *Ring* and the "Flight to *Apprendi*-land"[22]

[8.2.1] Background

The original trilogy of cases that approved the new capital punishment schemes, were all decided on strictly Eighth and Fourteenth Amendment grounds.[23] All three cases held that capital punishment is not cruel and unusual for Eighth Amendment purposes and the procedures devised under the three schemes passed Constitutional muster under the due process provision of the Fourteenth Amendment. There was no Sixth Amendment claim (right to jury trial) presented in *Proffitt* and, because the jury determines the sentence under the Georgia and Texas schemes, there was no Sixth Amendment challenge in *Gregg* or *Jurek.*

The United States Supreme Court did consider Sixth Amendment challenges to the Florida scheme in *Spaziano v. Florida* and *Hildwin v. Florida*.[24]

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[22]This curious phrase was coined by Justice Antonin Scalia in his concurring opinion in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[23]*Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S.242 (1976) and *Jurek v. Texas*, 428 U.S.262 (1976).

[24]*Spaziano v. Florida*, 468 U. S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989).

In *Spaziano*, the issue presented was whether the trial judge had the power to override a jury recommendation of life imprisonment. The Court stated,

> Petitioner points out that we need not decide whether jury sentencing in all capital cases is required; this case presents only the question whether, given a jury verdict of life, the judge may override that verdict and impose death. As counsel acknowledged at oral argument, however, his fundamental premise is that the capital sentencing decision is one that, in all cases, should be made by a jury. Tr. of Oral Arg. 16-17. We therefore address that fundamental premise. Before doing so, however, it is useful to clarify what is not at issue here.
>
> Petitioner does not urge that capital sentencing is so much like a trial on guilt or innocence that it is controlled by the Court's decision in Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 91 (1968). In Duncan, the Court found that the right to jury trial guaranteed by the Sixth Amendment is so "'basic in our system of jurisprudence," *id*., at 149, 88 S.Ct. at 1447, quoting In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 449, 507, 92 L.Ed. 682 (1948), that it is also protected against state action by the Fourteenth Amendment.
>
> This Court, of course, has recognized that a capital proceeding in many respects resembles a trial on the issue of guilt or innocence. *See* Bullington v. Missouri, 451 U.S. 430, 444, 101 S.Ct. 1852, 1861, 68 L.Ed.2d 278 (1981). "Because the 'embarrassment, expense and ordeal' . . . faced by a defendant at the penalty phase of a . . . capital murder trial . . . are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial," the Court has concluded that the Double Jeopardy Clause bars the State from making repeated efforts to persuade a sentencer to impose the death penalty. *Id*., at 445, 101 S.Ct. at 1861, quoting Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 221,223, 2 L.Ed.2d 199 (1957); Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause, however, does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial.[25]

In *Hildwin*, the issue was more focused. The per curiam opinion opens with the statement, "This case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida."[26]. The Court stated:

> In Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed. 2d 340 (1984), we rejected the claim that the Sixth Amendment requires a jury trial on the sentencing issue of life or death. In that case, we upheld against Sixth Amendment

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[25]*Spaziano v. Florida*, 446 U.S. at 459-459.

[26]490 U.S. at 638

challenge the trial judge's imposition of a sentence of death notwithstanding that the jury had recommended a sentence of life imprisonment. We stated: "The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause . . . does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial." *Id.*, at 459, 104 S.Ct., at 3161. We did not specifically note that the death sentence may only be imposed if the judge makes a written finding of an aggravating circumstance. If the Sixth Amendment permits a judge to impose a sentence of death when the jury recommends life imprisonment, however, it follows that it does not forbid the judge to make the written findings that authorize imposition of a death sentence when the jury unanimously recommends a death sentence.[27] Nothing in our opinion in McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), suggests otherwise. We upheld a Pennsylvania statute that required the sentencing judge to impose a mandatory minimum sentence if the judge found by a preponderance of the evidence that the defendant visibly possessed a firearm. We noted that the finding under Pennsylvania law "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it." *Id.*, at 87-88, 106 S.Ct. at 2417-2418. Thus we concluded that the requirement that the findings be made by a judge rather than the jury did not violate the Sixth Amendment because "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Id.*, at 93, 106 S.Ct., at 2420. Like the visible possession of a firearm in *McMillan* the existence of an aggravating factor here is not an element of the offense but instead is "a sentencing factor that comes into play only after the defendant has been found guilty." *Id.*, at 86, 106 S.Ct. at 2417. *Accordingly, the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.*[28] (Italics supplied.)

A plain reading of *Spaziano* and *Hildwin* leads to the inescapable conclusion that the Florida scheme is constitutionally valid on Sixth, Eighth and Fourteenth Amendment grounds and that a jury need take no part in determining whether to impose a death sentence. The State of Arizona took comfort in these rulings and confidently defended its capital punishment statute before the Court in 1990, one year after the decision in *Hildwin*.

[8.2.2] ***Walton v. Arizona***[29]

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[27]In *Hildwin*, the jury returned a unanimous advisory sentence of death.

[28]490 U.S. at 640.

[29]*Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990).

The State of Arizona adopted the Georgia scheme with one important variation - the statute provided for the trial judge to preside over the penalty phase without a jury and to make the findings determining whether to impose the death penalty.[30] Walton made a direct Sixth Amendment challenge to this procedure before the Supreme Court. He lost.

Walton argued that every finding of fact underlying the sentencing decision had to be found by a jury and not by a judge. The Court stated, "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court."[31] The Court also noted that challenges to the Florida death penalty scheme had been repeatedly rejected, quoting from Hildwin, "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."[32]

The Court was not persuaded with Walton's attempt to draw distinctions between Arizona's scheme and the Florida scheme. The Court stated, "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. *A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.*"[33]
Walton also argued that in Florida aggravating factors are only "sentencing considerations" while in Arizona they are "elements of the offense." This argument was also rejected.

The Court concluded Arizona's capital punishment scheme did not violate the Sixth Amendment.

After *Walden*, all seemed well and stable in the capital punishment arena. But a surprise attack was looming on the far right flank.

[8.2.3] *Almendarez-Tores v. United States*[34]

In *Almendarez-Tores,* the Court addressed the problem of enhanced penalty due to prior conduct, a deportation resulting from prior convictions of aggravated felonies. Almendarez-Tores was an illegal alien who had been previously deported after aggravated felony convictions. He illegally returned to the United States and was charged with violating the statute that prohibits illegal aliens from returning to the United States after being deported.[35] The statute allows for an enhanced

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[30]AZ ST S 13-703 (2000).

[31]Citations omitted.

[32]490 U.S. at 648.

[33]697 U.S. at 650. (Italics supplied.)

[34]Almendarez-Tores v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

[35]8 U.S.C. 1326.

sentence if the illegal alien committed an aggravated felony prior to deportation. The indictment charged that Almendarez-Tores returned to the United States after being previously deported but did not allege that he had been convicted of prior aggravated felonies. He received an enhanced sentence and challenged the sufficiency of the indictment. The Court ruled that prior record or recidivism is a "sentencing factor" and not an element of the offense charged. The prior record was not required to be alleged in the indictment. This seemly innocuous statement came back the next year in a different context.

[8.2.4] *Jones v. United States*[36]

In *Jones*, the court was faced with the Federal carjacking statute.[37] The statute provided for enhanced penalties if, at the time of the crime, a person was in (1) possession of a firearm (penalty of not more than 15 years), (2) if serious injury resulted (penalty of not more than 25 years) and if death resulted (penalty any number of years up to life.) The Court held that the statute established three separate offenses and the facts (elements) that enhanced the penalties had to be alleged in the indictment and proven beyond a reasonable doubt.[38]

Then came *Apprendi*.

[8.2.5] *Apprendi v. New Jersey*[39]

In New Jersey, the legislature decided to increase the maximum penalty for certain offenses if they qualified as "hate crimes." Possession of a firearm for an "unlawful purpose" is a second degree offense punishable by imprisonment "between five and 10 years."[40] However, a separate statute provides for an "extended term" of imprisonment if the trial judge finds, by a preponderance of the evidence, that "the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion sexual orientation, or ethnicity." The "extended term" authorized is between 10 and 20 years.[41]

Charles C. Apprendi, Jr., was prosecuted under this statute after he admittedly fired several .22 caliber bullets into the home of an African American family that had recently moved into his neighborhood. The indictment did not mention the hate crimes statute. Apprendi entered into a plea bargain in which the State reserved the right to request the court to impose the higher "enhanced" sentence. Apprendi reserved the right to challenge the hate crimes sentence on the ground that it violated the United States Constitution. The trial judge imposed a twelve year sentence, two years more than the maximum allowed without the "enhancement."

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[36] *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999).

[37] 18 U.S.C. §2119.

[38] *Jones,* 526 U.S. at 243, n.6.

[39] 530 U.S.466 (2000)

[40] N.J. Stat. Ann. §2C:39-4(a) and 2C-43-6(a)(2).

[41] N.J. Stat. Ann. §2C-43-7(a)(3).

On appeal, Apprendi argued that the Due Process Clause of the United States Constitution requires that the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt. The Appellate Division of the Superior Court of New Jersey upheld the statute, relying upon the decision of *McMillan v. Pennsylvania*[42]. The court ruled that the hate crime enhancement was merely a "sentencing factor" rather than an element of the underlying offense.[43] The New Jersey Supreme Court affirmed. The court reasoned that "due process only requires the state to prove the 'elements' of an offense beyond a reasonable doubt."[44] The court stated that "the legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor."[45] There was a dissent. The dissent believed that the case turned on two critical characteristics: (1) "a defendant's mental state in committing the subject offense . . . necessarily involves a finding so integral to the charged offense that it must be characterized an element thereof" and (2) "the significantly increased sentencing range triggered by . . . the finding of a purpose to intimidate" means that the purpose "must be treated as a material element that must be found by a jury beyond a reasonable doubt." [46]

The United States Supreme Court reversed. The Court noted,

> "The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes from the jury the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone."[47]

Thus, the Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[48] Justice Thomas filed a concurring opinion suggesting that the continued validity of *Walton v. Arizona*, could be called into question.

Most state courts, post *Apprendi*, took the position that the decision did not pertain to capital cases because the maximum penalty in these cases already is death and, therefore, it is unnecessary

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[42]477 U.S.79 (1986).

[43]State v. Apprendi, 698 A.2d 1265 (1997).

[44]*State v. Apprendi*, 731 A.2d 485, 492 (1999).

[45]*Id.* at 494-495.

[46]*Id.* at 498.

[47]530 U. S. at 483.

[48]530 U.S. at 490.

for the jury to make findings of aggravation and mitigation beyond a reasonable doubt. The Maryland case of *Borchart v. State* [49] has an excellent review of these cases and this argument. The Florida Supreme Court has ruled that *Apprendi* does not apply to the Florida scheme on numerous occasions.[50] Not long after publication of the *Borchardt* case, the Supreme Court accepted certiorari in *Ring v. Arizona*.[51] The Court also stayed executions for two Florida death row inmates, Bottoson and King.

[8.2.6] *Ring v. Arizona*[52]

On November 28, 1994, Timothy Ring and two others robbed a Wells Fargo van in Glendale, Arizona, and killed the driver. The evidence at the guilt phase of the trial failed to prove that Ring was a major participant in the armed robbery or that he actually murdered the victim. However, between Ring's trial and sentencing hearing one of the co-defendants accepted a second degree plea and agreed to cooperate with the prosecution against Ring. The co-defendant testified that Ring actually killed the victim and was the leader in the escapade. The trial judge entered the "Special Verdict" required by Arizona law and sentenced Ring to death.

In an opinion by Justice Ginsberg, the Court noted that under Arizona law "a defendant cannot be sentenced to death unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment and not the death penalty." Accepting that proposition to be the law in Arizona, the Court concluded, "we are persuaded that *Walton*, in relevant part, cannot survive the reasoning of *Apprendi*."

Justice Scalia, joined by Justice Thomas, filed a concurring opinion. This opinion may be more important than the majority opinion.

Justice Scalia would overrule *Furman v. Georgia* but he does not have the votes. He agrees with Justice Rehnquist's dissenting opinion in *Garner v. Florida*,[53] where it was stated, "the prohibition of the Eighth Amendment relates to the character of the punishment, and not the process by which it is imposed."

He believes that jury verdicts finding aggravating circumstances must be unanimous. He stated, "I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment the defendant receives - whether

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[49] *Borchardt v. State,* 786 A.2d 631 (Md.2001).

[50] *See, Porter v. Moore*, 2002 WL 1338528, 27 Fla L. Weekly S606 (2002); *Hurst v. State*, 819 So.2d 689 (Fla.2002); *Mills v. Moore*, 786 So.2d 532, 536-37 (Fla. 2001).

[51] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[52] *Id.*

[53] *Garner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

the statute calls them elements of the offense, sentencing factors, or Mary Jane - must be found by the jury beyond a reasonable doubt." Proof beyond a reasonable doubt traditionally requires a unanimous verdict.[54]

Justice Scalia admitted that the Sixth Amendment claim in *Walton* "was not put with the clarity it obtained in *Almendarez-Tores* and *Apprendi*." However, if the issue had been "better put" at the time *Walton* was decided, he still "would have approved the Arizona scheme - I would have favored the State's freedom to develop their own capital sentencing procedures (already erroneously abridged by Furman) over the logic of the *Apprendi* principle."

Since *Walden*, Justice Scalia says, he has "acquired new wisdom". He now realizes two things: "First, that it is impossible to identify with certainty those aggravating factors whose adoption has been wrongfully coerced by *Furman*, as opposed to those that the State would have adopted in any event." Second, "our people's traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because a *judge* found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it."

Finally, Justice Scalia decided to take a barb at Justice Breyer in order to make the most important point of his opinion and, perhaps, the most important point in the entire case. Justice Breyer believes that the Sixth Amendment requires jury sentencing in capital cases.[55] Justice Scalia disagreed. He stated,

> today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so - by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase. There is really no way in which JUSTICE BREYER can travel with the happy band that reaches today's result unless he says yes to *Apprendi*. Concisely put, JUSTICE BREYER is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi*-land.

Apparently, Justice Scalia believes that a bifurcated trial with a penalty phase is not necessary to a capital punishment scheme. As long as the jury finds an aggravating factor, the states are free to devise procedures (possibly post verdict by judge alone) to determine whether the death penalty

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[54]The Court has upheld less than unanimous verdicts, but *Apprendi* probably calls those decisions into question. *See, Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972); (a 5-4 decision that involved several opinions authored by justices who are no longer on the Court.) *See, also, Johnson v. Louisiana*, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972), which approved a statute that allowed a less than unanimous (9-3) verdict in criminal cases. The validity of that case is also in doubt.

[55]None of the other justices have expressed this view.

is appropriate. All of the aggravating factors listed in most statutes, except the aggravators involving the existence of a prior felony, are developed during the guilt phase of the trial. However, as is plainly stated in *Almendarez-Tores*, the fact of prior record does not need to be submitted to the jury. The presence or absence of prior record can be considered by the court. Under Justice Scalia's view, matters of mitigation could be considered by the court without further jury involvement in determining the ultimate sentence.

[8.2.7] Initial reaction to *Ring*

The *Ring* decision was released on June 24, 2002. The 2002 term ended on June 30, 2002. The stay of execution for the two Florida death row inmates (Bottoson and King) was lifted on June 28, 2002, just before the term ended. Florida's governor signed new death warrants on July 1, 2002, and set the first execution on July 8, 2002, a week away. On July 8, 2002, the Supreme Court of Florida stayed the executions and set oral argument in the cases for August 21, 2002. The justices released their opinions in the cases on October 24, 2002[56]. The seven justices issued eight opinions.

All of the justices agreed that the Florida Supreme Court is bound by principles of stare decisis to deny relief to Bottoson and King. This course is a proper course to follow under our Federal system, particularly under the "supremacy clause" contained in Article VI of the Constitution of the United States. The Supreme Court has stated,

> The Supremacy Clause of the Constitution of the United States provides that document is the Supreme Law of the Land. Upon the State courts, equally with the courts of the Federal system, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, whenever those rights are involved in any suit or proceedings before them. Consequently, it is the duty of State Supreme Courts to follow the guidelines announced by the Supreme Court of the United States in construing Federal Constitutional rights.[57]

A majority of the justices agreed that the United States Supreme Court had the opportunity to address Florida's death penalty procedures in Bottoson and King and, since it declined to do so, the Florida scheme must still be valid. There were vigorous dissents. Ultimately, the Florida Supreme Court denied relief to Bottoson and King. Both of them were subsequently executed.

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[56]. *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002); *King v. Moore*, 831 So.2d 143 (Fla. 2002)

[57]*State v. Dixon*, 283 So.2d 1, 24 (Fla. 1973) [citing *Irvin v. Dowd*, 359 U.S. 394, 79 S.Ct. 825, 3 L.Ed.2d 900(1959); *Smith v. O'Grady*, 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed.859 (1941); *United States v. Bank of New York and Trust Company*, 296 U.S. 463, 56 S.Ct. 343, 80 L.Ed. 331 (1936); *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935)].

The "wait and see" approach the Supreme Court of Florida has taken is not the only approach available. Other state supreme courts have met the issue head on and declared their state statutes unconstitutional.[58]

The Nebraska legislature amended that state's statues to conform with the scheme envisioned by Justice Scalia.[59] The new scheme has the advantage of saving as much Nebraska case law as possible while providing an uncomplicated method to determine whether to impose the death penalty. Under the new statute the aggravating circumstances must be charged in the information. [60]The jury must find the defendant guilty beyond a reasonable doubt. Then, the aggravating circumstances are presented to the jury. The Rules of Evidence apply to this proceeding. The jury must unanimously find the existence of aggravating circumstances beyond a reasonable doubt and state the aggravating circumstances in the verdict. The jury is then discharged. The court convenes a three judge panel, including the trial judge, to hear "matters of mitigation and sentence excessiveness or disproportionality." The three judge panel must vote unanimously for the death penalty. A three judge panel is not required to satisfy Justice Scalia's suggested procedure. Nebraska was one of the states that had three judges decide the existence of aggravating circumstances prior to *Ring* and elected to keep that aspect of the prior procedure. This statute, absent the three judge panel, could be a model for many states, especially those with the Florida scheme.

[8.2.8] Retroactivity of *Ring*

Some lawyers and legal scholars believe that because the United States Supreme Court lifted the stay in those cases and allowed Bottoson and King to be executed, there was a signal that the Court approved of the Florida scheme. They are mistaken. Both Bottoson and King's cases were before the Court on certiorari from post conviction relief proceedings.

The United States Supreme Court has held that, with rare exceptions, decisions making constitutional changes in procedure will be applied retroactively only to cases on direct review and not on collateral review.[61] The reasons for this policy are not readily apparent and deserve further discussion.

In *Teague v. Lane*,[62] the defendant, a black man, was convicted in Illinois by an all white jury and his conviction was affirmed on appeal. He sought collateral review, complaining that the jury

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[58]*Woldt v. People*, 64 P.3d 256 (Colo2003); *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (Neb. 2003).

[59]Neb. Rev. Stat. § 29-2519 *et seq*.

[60]Nebraska allows first degree murder to be charged by information rather than indictment.

[61]*Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). The ruling in *Teague* has been codified in 28 U.S.C. sec. 2244(b)(2)(A).

[62]*Id.*

was not composed of a fair cross section of the community. He was convicted before *Batson v. Kentucky* was decided and he sought that case to be applied retroactively to his case.[63]

The Supreme Court noted that it had often applied a new constitutional rule of criminal procedure to the defendant in the case announcing the new rule. The question of whether or not the new rule should be applied retroactively was left for the next case. The Court decided that "retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[64]

The Court admitted that it is difficult to determine when a case announces a new rule and no attempt was made to "define the spectrum of what may or may not constitute a new rule for retroactivity purposes." The Court then went on to explain, "In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." "To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."[65]

The Court adopted Justice Harland's view that new rules should always be applied retroactively to cases on direct review, but that generally they should not be applied retroactively to criminal cases on collateral review. This policy is justified on several grounds:

(1) Failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." There are two reasons for this:

a. The Court can promulgate new rules only in specific cases and cannot possibly decide all cases in which review is sought. Accordingly, "the integrity of judicial review" requires the application of the new rule to "all similar cases pending on direct review."

b. Selective application of new rules violates the principle of treating similarly situated defendants the same.

(2) Habeas corpus has always been a collateral remedy not designed to as a substitute for direct review. "The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed."[66]

(3) Given the "broad scope" of constitutional issues reviewable on Habeas Corpus, "it is sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of *habeas* cases on the basis of intervening

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[63] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). *Batson* stands for the proposition that potential jurors cannot be peremptorily challenged on account of race.

[64] 489 U.S. at 300.

[65] 489 U.S. at 301.

[66] *Mackey v. United States*, 401 U.S. 667, 91 S. Ct. 1160, 28 L. Ed. 2d 404 (1971).

changes in constitutional interpretation." [67] This is so because "the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function ... the *habeas* court need only to apply the constitutional standards that prevailed at the time the original proceedings took place.[68]

(4) The costs imposed upon the states by retroactive application of new rules of constitutional law on habeas corpus ... generally outweigh the benefits of this application.[69]

(5) State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during habeas proceeding, a new constitutional command.[70]

The Court adopted Justice Harland's view that there exists only two exceptions to the rule. First, a new rule should be applied retroactively on habeas if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Second, a new rule should be applied retroactively if it requires the observance of "those procedures that ... are implicit in the concept of ordered liberty." This second exception involves bedrock procedural elements, e.g., the right to counsel, necessary to obtain a valid conviction. This exception is also illustrated by recalling the classic grounds for *habeas* relief: "that the proceedings was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based upon a confession extorted from the defendant by brutal methods."[71]

Teague will probably foreclose relief to death row inmates like Bottoson and King whose cases are in post conviction relief or in Federal Habeas proceedings - unless, of course, the United States Supreme Court decides that having a jury determine the existence of the aggravating factors alleged in an indictment upon proof beyond a reasonable doubt is "implicit in the concept of ordered liberty."

In *Summerlin v. Stewart,*[72] the question of whether Ring has retroactive effect under the Teague analysis was presented. In an interesting and well written opinion, the Ninth Circuit concluded that *Ring* should be applied retroactively.

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[67]*Id.* at 689.

[68]*Desist v. United States*, 394 U.S. 244, 262-263 (1989).

[69]*Solem v. Stumes*, 465 U.S. 638 (1984), 654, Powell, J., concurring in the judgment.

[70]*See, Engle v. Isaac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982).

[71] *Rose v. Lundy*, 455 U.S.509, 544 (1982), Stevens, J., dissenting.

[72]*Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003)(*en blanc*).

The Supreme Court of the United States, through Justice Scalia, disagreed, in a 5-4 opinion.[73] The Court stated that the decision in Ring was procedural rather than substantive and announced no new watershed rule of criminal procedure. Justice Scalia explained,

> New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with the use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." That a new procedural rule is "fundamental" in some abstract sense is not enough; the rule must be one "without which the likelihood of an accurate conviction is seriously diminished." This class of rules is extremely narrow, and "it is unlikely that any ... ha[s] yet to emerge. "[74]

[8.2.9] The Federal Death Penalty Act (FDPA)

There have been other challenges to death penalty procedures that have thus far met with at least temporary success. Two Federal District Court cases have recently found fault with the Federal Death Penalty Act (FDPA).[75]

The FDPA is basically a Georgia scheme statute. It provides that the prosecution must notify the defendant "a reasonable time before trial or before acceptance by the court of a plea of guilty" that it intends to seek the death penalty. The notice must contain all of the aggravating factors the prosecution intends to prove to justify the death sentence. The jury, in a separate sentencing hearing, must make three separate determinations. First, the jury must find beyond a reasonable doubt that the defendant acted with one of four mental culpability factors, ranging from an intentional killing to intentionally engaging in violence, "knowing that the act created a grave risk of death" with the victim's death as a direct result. Second, the jury must consider whether the existence of at least one statutory aggravating factor has been proven beyond a reasonable doubt. Third, the jury must consider whether all the aggravating factors, both statutory and non-statutory, found to exist outweigh all mitigating factors beyond a reasonable doubt. The jury's finding must be unanimous. Mitigating factors may be proven by a preponderance of the information and may be found by just one or more members of the jury. Information relevant to the sentence, including any mitigating or aggravating factors "is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is

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[73]*Schiro v. Summerlin*, ___ U.S.___, 124 S.Ct. 2519, ___L.Ed.2d ___, 2004 WL 1402732 (June 24, 2004).

[74]Citations omitted.

[75]18 U.S.C.A. § 3591 *et seq.*

outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. Both the Government and the defendant have an opportunity to rebut any information and present argument as to the sentence.

[8.2.10] *United States v. Fell*[76]

Fell challenged the constitutionality of the FDPA on two grounds - failure of the FDPA to require aggravating circumstances to be submitted to the Grand Jury and included in the indictment upon probable cause and failure of the FDPA to comply with the requirements of Sixth Amendment due process by allowing otherwise inadmissible evidence (hearsay) to be considered in determining whether an aggravating circumstance has been proven beyond a reasonable doubt.

In his opinion, Judge Sessions acknowledged that *Ring* did not discuss the question of whether the facts to be relied upon in securing the death penalty had to be included in the indictment, stating, "the clear implication of the decision, resting squarely as it does on Jones, is that in a federal capital case the Fifth Amendment right to grand jury indictment will apply." Unfortunately for Fell, the Government saw this one coming and amended the indictment.[77]

Judge Sessions also found fault with the "relaxed evidentiary standard" included in the FDPA during the penalty phase of the proceedings. He held this standard can "withstand due process and Sixth Amendment scrutiny, given the Supreme Court's concern for heightened reliability and procedural safeguards in capital cases." In Fell's case, the prosecutor intended to introduce into evidence a statement made by a deceased co-defendant. This statement would not be admissible under the Federal Rules of Evidence. In discussing the background of the Due Process Clause, Judge Sessions stated:

> [A]s assurance against ancient evils, our country, in order to preserve "the blessings of liberty," wrote into its basic law the requirement, among others, that the forfeiture of the lives ... of people accused of crime can only follow if procedural safeguards of due process have been obeyed. Chambers v. Florida, 309 U.S. 227, 237, 60 S.Ct. 472, 84 L.Ed. 716 (1940). Although the rights of an accused to confront and cross-examine witnesses are set forth in the Sixth, not the Fifth Amendment, "[t]he rights to confront and cross-examine witnesses ... have long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Indeed, "the absence of proper confrontation at trial 'calls into question the ultimate integrity of the fact- finding process.' " Ohio v.

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[76] *United States v. Fell*, 217 F.Supp.2d 469 (D. Vermont 2002)

[77] It appears that Federal prosecutors have decided to include aggravating factors in grand jury indictments in order to avoid this obvious problem. *See, e.g.*, *United States v. Denis*, 246 F.Supp.2d 1250 (S.D.Fla. 2002). At least two courts have ruled that aggravating circumstances are elements of the offense and must be included in the indictment. *United States v. Haynes*, 269 F.Supp.2d 970 (W.D. Tenn. 2003); *United States v. Mikos*, 2003 WL 22110948 (N.D. Illinois, Sept 11, 2003). (Not reported in the Federal Supplement.)

Roberts, 448 U.S. 56, 64, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) (quoting Chambers, 410 U.S. at 295, 93 S.Ct. 1038) (internal quotation omitted).[78]

Thus, he reasoned, since the text of the Sixth Amendment's Confrontation Clause refers to "all criminal prosecutions," the rights enumerated there are not confined to trial. The Sixth Amendment does not operate to exclude all hearsay. But in order for hearsay to be admissible, the proponent must demonstrate necessity (such as the unavailability of the declarant) and trustworthiness. Because "an accomplice's confession that implicates a defendant does not fall within a firmly rooted hearsay exception, it is presumably unreliable."[79]

Judge Sessions concluded his opinion as follows:

> If the death penalty is to be part of our system of justice, due process of law and the fair-trial guarantees of the Sixth Amendment require that standards and safeguards governing the kinds of evidence juries may consider must be rigorous and constitutional rights and liberties scrupulously protected. To relax those standards invites abuse, and significantly undermines the reliability of decisions to impose the death penalty.[80]

Other Federal courts have disagreed with Judge Sessions and have approved the "relaxed evidentiary rules" provided in the FDPA.[81] And the Circuit Court of Appeals reversed the case, holding that the Federal Rules of Evidence need not apply to capital sentencing proceedings.[82] Some state courts have agreed.[83]

[8.2.11] *Crawford v. Washington*[84]

The question posed by Judge Sessions in *Fell* (whether any fact can be proven beyond a reasonable doubt using hearsay evidence) was addressed, although in a different context, in *Crawford v. Washington*.

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[78] 271 F.2d at 485-486.

[79] *Id.* at 486

[80] 217 F.Supp.2d at 489

[81] *United States v. Lentz*, 225 F.Supp.2d 672 (E.D.Va. 2002); *United States v. Denis*, 246 F.Supp.2d 1250 (S.D.Fla. 2002) and cases cited therein.

[82] *United States v. Fell*, 360 F.3d 135 (2d Cir. 2004).

[83] *State v. Berry*, 2003 WL 1855099 (Tenn Cr. Ct. App. April 10, 2003) (Unpublished opinion.)

[84] *Crawford v. Washington*, __ U. S. __, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Crawford was convicted of stabbing a man who was allegedly trying to rape his wife, Sylvia. At trial, Sylvia was unavailable to the prosecutor because of the state "marital privilege" which generally bars a spouse from testifying against the other spouse without the other spouse's consent. However, in Washington, the privilege does not extend to out-of-court statements admissible as an exception to the state hearsay rule. Sylvia made a recorded statement to the police and the state offered it in evidence to prove the stabbing was not self defense. The trial and appellate courts, for various different reasons, held that the statement bore "adequate 'indicia of reliability'" under *Ohio v. Roberts*,[85] and approved the statement as evidence.

The Supreme Court of the United States, through Justice Scalia, stated, "The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers." In tracing the history of the common-law tradition, Justice Scalia noted that a recurring question was "whether the admissibility of an unavailable witness's pretrial examination depended on whether the defendant had had an opportunity to cross examine him." The Court concluded,

> Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon the "law of Evidence for the time being. Leaving the regulation of out-of -court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.[86]

The Confrontation Clause does not, of course, bar all out-of-court statements from being admitted into evidence without prior opportunity for cross-examination. The Court explained that the Confrontation Clause applies to "witnesses" who "bear testimony." The Court defined "testimony" as "typically, 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact." The Court went on to distinguish "testimony" by an accuser who makes a formal statement to government officers from a person who makes a casual remark to an acquaintance. "Testimonial" statements include (1) ex parte in-court testimony or its functional equivalent such as affidavits, (2) custodial examinations, (3) pretrial statements that declarants would reasonably expect to be used prosecutorally, (4) "extrajudicial statements contained in formalized testimonial materials such as affidavits, depositions, prior testimony or confessions and (5) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Thus, the Court concluded, "the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine."

In considering exceptions to the hearsay rule at common-law, the Court observed,

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[85]*Ohio v. Roberts*, 448 U. S. 56, 100 S.Ct. 2531, 652 L.Ed. 2d 597 (1980).

[86]124 S.Ct. at 1364.

> But there is scant evidence that exceptions were invoked to admit testimonial statements against the accused in a criminal case. Most of the hearsay exceptions covered statements that by their nature were not testimonial--for example, business records or statements in furtherance of a conspiracy. We do not infer from these that the Framers thought exceptions would apply even to prior testimony. Cf. Lilly v. Virginia, 527 U.S. 116, 134, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (plurality opinion) ("[A]ccomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule").[87] (Footnote omitted.)

Most of the exceptions to the hearsay rule at common-law involved non-testimonial statements such as business records or statements in furtherance of a conspiracy. The one exception the Court found is the "dying declaration" but this type of statement has long been accepted as part of criminal hearsay law. The Court declined to rule whether "dying declarations" are allowed under the Sixth Amendment but noted "if this exception must be accepted on historical grounds, it is *sui generis*."[88]

The holding in Crawford may have significant effect on death penalty cases in both the guilt and penalty phase of death penalty trials. Many states allow hearsay to be admitted in the penalty phase of the trial so long as the defendant has a fair opportunity to rebut it. Crawford may prohibit the admission of that type of statement during the penalty phase. The Court has recognized, at least for double jeopardy purposes, that a that a capital proceeding in many respects resembles a trial on the issue of guilt or innocence and that the Double Jeopardy Clause prevents retrial of the death penalty issue.[89] "Because the 'embarrassment, expense and ordeal' . . . faced by a defendant at the penalty phase of a . . . capital murder trial . . . are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial," the Court has concluded that the Double Jeopardy Clause bars the State from making repeated efforts to persuade a sentencer to impose the death penalty.[90]

[8.2.12] *United States v. Quinones*[91]

The ruling in *Quinones* is not an attack on the death penalty from the right - it comes from the other direction. The issue presented to Judge Rakoff was, "whether the death penalty violate(s)

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[87] 124 S.Ct. at 1368.

[88] *Id.*

[89] *Spaziano v. Florida*, 468 U. S. 447 (1984); *See, Bullington v. Missouri*, 451 U.S. 430, 444; 101 S.Ct. 1852, 1861; 68 L.Ed.2d 278 (1981).

[90] *Id.*

[91] *Uninted States v. Quinones*, 196 F.Supp.2d 416 (S.D.N.Y 2002.); 205 F.Supp.2d 256 (S D N Y 2002).

due process, and is therefore unconstitutional, because, by its very nature, it cuts off a defendant's ability to establish his actual innocence." He determined that it was. This ruling is less persuasive in its foundation than the ruling in *Fell* but the opinion points out some very disturbing aspects of death penalty litigation.

Judge Rakoff began his analysis by noting:

> The Federal Death Penalty Act, 18 U.S.C. §§ 3591-3598, serves deterrent and retributive functions, or so Congress could reasonably have concluded when it passed the Act in 1994. But despite the important goals, and undoubted popularity, of this federal act and similar state statutes, legislatures and courts have always been queasy about the possibility that an innocent person, mistakenly convicted and sentenced to death under such a statute, might be executed before he could vindicate his innocence--an event difficult to square with basic constitutional guarantees, let alone simple justice. As Justice O'Connor, concurring along with Justice Kennedy in Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), stated: "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed -'contrary to contemporary standards of decency,' 'shocking to the conscience,' or offensive to a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'-the execution of a legally and factually innocent person would be a constitutionally intolerable event." (citations omitted).[92]

Judge Rakoff then relied upon cases and studies that show through such new technology as DNA testing, that a number of defendants on death rows across the country have been proven innocent, sometimes hours before their scheduled executions. He is unwilling to accept that considerations of deterrence and retribution can constitutionally justify the knowing execution of innocent persons.

He pointed out several pitfalls in federal practice that can result in unreliable death sentences. Unlike many states, federal practice allows a conviction upon the uncorroborated testimony of an accomplice. Additionally, in federal practice, circumstantial evidence does not have to exclude to a moral certainty other reasonable inferences except guilt. He also noted that it is "reasonably well established that the single most common cause of mistaken convictions is inaccurate eye-witness testimony."

He concludes that,

> the unacceptably high rate at which innocent persons are convicted of capital crimes, when coupled with the frequently prolonged delays before such errors are detected (and then often only fortuitously or by application of newly-developed techniques), compels the conclusion that execution under the Federal Death Penalty Act, by

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[92] 196 F.Supp.2d. at 416.

cutting off the opportunity for exoneration, denies due process and, indeed, is tantamount to foreseeable, state-sponsored murder of innocent human beings.[93]

The Circuit Court of Appeals subsequently reversed Judge Rakoff's ruling[94].

Refer to §8.8.26, Circumstances That Are Not Mitigating, for additional information on the subject of "lingering doubt."

[8.3] Is a penalty phase trial required - or - is there a clear prohibition against the death penalty in some cases?

Not every capital case involves the death penalty. Individual states have statutory exemptions and some United States Supreme Court decisions preclude imposition of the death penalty under certain circumstances. For instance, the sentencing court cannot be given unbridled discretion to impose the death penalty;[95] nor can the sentencing court be given no discretion[96]; the death penalty cannot be imposed for "ordinary" murder, [97] for the rape of an adult woman[98]; or for a felony murder unless the defendant possessed a sufficiently culpable state of mind.[99] Additionally, the Supreme Court has prohibited the execution of an insane person[100] or of a person who is mentally retarded.[101] Further, the Supreme Court has required the sentencing court to consider all mitigating circumstances.[102] Most recently, the Supreme Court has held that the decision in *Apprendi v. New Jersey*,[103] (other than fact of prior conviction, any fact that increases the penalty for a crime beyond

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[93]205 F.Supp.2d at 268

[94]*United States v. Quinones*, 313 F.3d 49 (2d Cir. 2002).

[95]*Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

[96]*Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).; *Sumner v. Shuman*, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (1987).

[97]*Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).

[98]*Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977).

[99]*Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

[100]*Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986).

[101]*Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

[102]*Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

[103]*Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt) applies to capital cases.[104]

There are at least six categories of cases where the death penalty may not be available. The trial judge should make a pretrial determination if the death penalty is not a possible penalty as a matter of law.

[8.3.1] The age of the defendant

Various states have laws that prohibit a death sentence for a defendant under a certain age. A number of states and the Federal Government have statutes that prohibit executing a defendant who was under a certain age, usually eighteen, when the murder was committed.[105] Ohio requires the state to prove the defendant's age and the jury must find the age on the verdict form. Two states (Nevada and Wyoming) have statutes prohibiting the execution of a defendant who was under the age of sixteen when the murder was committed.[106] The Supreme Court of Florida has held it to be cruel or unusual under the state constitution to impose the death penalty upon a defendant who is under sixteen years of age.[107] The United States Supreme Court has rejected the proposition that it is cruel and unusual punishment to execute both a sixteen-year-old and a seventeen-year-old.[108] But a plurality of the Court expressed the opinion that a defendant who is fifteen years old when the crime was committed is too young.[109] In 1992, the United States Supreme Court had the opportunity to revisit *Thompson* in the Alabama case involving Clayton Joel Flowers. Flowers was fifteen years old when he committed murder during the course of sodomy. The jury recommended a life sentence, but the trial judge, who had the ultimate sentencing responsibility in Alabama, sentenced Flowers to death. The Alabama Court of Criminal Appeals reversed the death sentence on the authority of *Thompson*. The Alabama Supreme Court denied *certiorari*, and the Alabama Attorney General petitioned the newly constituted United State Supreme Court to revisit *Thompson*. The Supreme

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[104]*Ring v. Arizona*, 534 U.S.584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

[105]Examples of states that prohibit the death penalty if the defendant committed murder while under age 18 are as follows: California (Cal. Pen. Code, §190.5); Colorado (C.R.S.A. §18-1.3-1201); Connecticut (C.G.S.A. §53a-46a); Illinois (720 IL CS 5/9-1); Ohio (R.C. §2929.02). New Hampshire prohibits execution of persons who commit murder while under age 17 (N. H. Rev. Stat. §630:1). New Jersey prohibits execution of juveniles charged as adults. (NJ ST S 2C:11-3g). The FDPA prohibits execution of persons who were under the age of 18 at the time of the crime. 18 U.S.C. §3591 (2004).

[106]NRS §176.025 (2004); Wyo. Stat. §6-2-101 (2003).

[107]*Allen v. State*, 636 So.2d 494 (Fla. 1994).

[108]*Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989).

[109]*Thompson v. Oklahoma*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1988).

Court denied *certiorari*, thus allowing *Thompson* to stand[110] The Court recently declined to review the issue further with three justices dissenting.[111]

Accordingly, defendants who were fifteen years of age or younger when the crime was committed may not be sentenced to death. And the death penalty is not available as a possible penalty if a state statute or court decision sets the age higher. There is no need for a penalty phase hearing. if the defendant does not qualify for the death penalty due to age. It is important to remember that "age" means "chronological age" and not "mental age." Mental age has been rejected as a circumstance in which the death penalty is prohibited.[112]

[8.3.2] Mental retardation

Persons with mental retardation are not eligible for the death penalty. The United States Supreme Court has ruled the execution of a mentally retarded person is “excessive” and a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.[113] A number of states, including Florida, New Mexico, and Tennessee, have statutes that prohibit a death sentence for a mentally retarded defendant. The test in *Adkins* placed the ceiling of mental retardation at an I.Q. of 70. That is the generally accepted ceiling throughout the country. However, there is more to the definition than numerical I.Q.

The American Association of Mental Retardation (AAMR) defines mental retardation as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18."[114]

The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly sub-average general intellectual functioning (Criterion A) that is accompanied by 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 (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect

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[110]*Alabama v. Flowers*, 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992).

[111]*In re Stanford*, 537 U.S. 968, 123 S. Ct. 472, 154 L. Ed. 2d 364 (2002).

[112]*Alston v. State*, 723 So.2d 162 (Fla. 1998).

[113]*Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

[114]*Mental Retardation: Definition, Classification, and Systems of Supports 5* (9th ed.1992).

the functioning of the central nervous system."[115] "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70.[116]

In Florida, the defendant must have "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18."[117]

Each of the definition have three elements, all of which must be present in order for a defendant to meet the definition of "mentally retarded." Expert testimony will no doubt be needed to establish this exemption from the death penalty.

When should the issue of mental retardation be decided, before or after the penalty phase? This question has become one of great importance. The great weight of authority supports the issue to be decided pretrial.

The Supreme Court of Florida recently rejected the procedure set forth in the Florida Statute that required mental retardation to be decided after the jury recommended the death penalty.[118] Justice Cantero, in a concurring opinion stated,

> "The idea of determining mental retardation before trial is by no means novel. In fact, it is the preferred procedure for determining a defendant's mental retardation in a murder case. Of the twenty-five jurisdictions that have adopted procedures for determining mental retardation in capital cases, eleven require or allow the determination to be made before trial.[119] Another five do not address the timing,

[115] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed.2000).

[116] *Id.,* at 42-43.

[117] F.S.921.137.

[118] *Amendments to Florida Rules of Criminal Procedure,* __ So.2d __ (Fla. 2004), 2004 WL 1119477 (May 20, 2004).

[119] These are: Arizona, see Ariz.Rev.Stat. § 13-703.02 (2002); Arkansas, see Ark.Code Ann. § 5-4-618 (Michie 2002); Colorado, see Colo.Rev.Stat. § 18-1.3-1102 (2002); Idaho, see Idaho Code § 19- 2515A (Michie 2002); Illinois, 725 Ill. Comp. Stat. 5/114-15 (2003); Indiana, see Ind.Code § 35-36-9-5 (2002); Kentucky, see Ky.Rev.Stat. Ann. § 532.135 (Michie 2002); Missouri, see Mo.Rev.Stat. § 565.030 (2002); North Carolina, see N.C. Gen.Stat. § 15A-2005 (2002); South Dakota, see S.D. Codified Laws § 23A-27A-26.3 (Michie 2002); and Utah, see Utah Code Ann. § 77-15a-101--77-15a-106 (2002).

therefore allowing it to be made pretrial.[120] Only three jurisdictions (including Florida) require the determination to be made after the penalty phase.[121]

Deciding the mental retardation issue before trial has obvious advantages:

(1) a plea agreement is more likely;

(2) the presiding judge need not meet the requirements for the trial of death penalty cases if the state has such a requirement;[122]

(3) defense attorneys need not meet the minimum standards for counsel in death penalty cases, if the state has such a requirement.[123]

(4) neither the State nor the defense needs to assign separate penalty phase counsel;

(5) neither the State nor the defense needs to hire investigators and expert witnesses to prepare for the penalty phase;

(6) neither the State nor the defense needs to interview and possibly transport penalty phase witnesses from distant locations;

(7) the jury does not have to be death-qualified; and

(8) no penalty phase jury trial must be conducted.

(9) A pretrial determination avoids a potentially innocent mentally retarded defendant's compulsion to enter a plea agreement to avoid the death penalty.

[8.3.3] The *Enmund/Tison* exclusion

In Enmund v. Florida,[124] the United States Supreme Court held that the Eighth Amendment does not permit the imposition of the death penalty on a defendant who aids and abets a felony (in *Enmund*, a robbery) in the course of which a murder is committed by others and the defendant does not kill, attempt to kill, intend that a killing take place or that lethal force be employed. In *Tison v. Arizona,*[125] the Supreme Court held that a defendant's major participation in a felony resulting in murder, combined with defendant's reckless indifference to human life is sufficient to satisfy the *Enmund* culpability requirement even if the defendant is not the killer. The United States Supreme

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[120] These are: Connecticut, see Conn. Gen.Stat. § 53a-46a (2002); Georgia, see Ga.Code Ann. § 17-7-131 (2002); Maryland, see Md.Code Ann., Crim. Law § 2-202 (2002); Tennessee, see Tenn.Code Ann. § 39-13-203 (2002); and the United States, see 18 U.S.C. § 3596 (2002).

[121] These are: Delaware, Del.Code Ann. tit. 11 § 4209 (2002); Florida, F.S. 921.137 (2001); and Virginia, Va.Code Ann. § 19.2-264.3:1.1-3:3. (Michie 2002).

[122] *See,* Fla. R. Jud. Admin. 2.050.

[123] *See*, Fla. R. Crim. Pro. 3.112.

[124] *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

[125] *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987).

Court has stated that a jury, the trial judge, an appellate court, or even a federal habeas court, can make the *Enmund/Tison* decision.[126] A penalty phase need not be held if it is quite obvious the holding in *Enmund/Tison* applies and there is no statutory or case law prohibition in a given state that precludes making this decision prior to the penalty phase.

[8.3.4] Disparate sentences among co-defendants

This category is related to the Enmund/Tison Exclusion but differs from it in important respects. In some states it is impermissible to impose the death penalty upon a co-defendant who is less culpable than a co-defendant who received a lesser sentence.[127] In other states, notably Texas, there is no constitutional requirement for one co-defendant to receive the same punishment as another co-defendant, even if the punishment is a death sentence, and there is no constitutional requirement for a proportionality review of defendant's death sentence to be made by an appellate court.[128] The Ohio Supreme Court's proportionality review is limited to cases in which the death penalty was actually imposed and does not include cases involving co-defendants[129]. Some states (and the Federal Government) consider this issue as a mitigating circumstance.[130] This issue is usually considered by a state appellate court as part of the proportionality review, but trial judges need to be aware of it in order to avoid needless reversals and waste of time, especially when the more culpable co-defendant has already been sentenced to less than death.

[8.3.5] No aggravating factors are present

All states require at least one statutory aggravating factor to exist before the defendant is eligible for the imposition of the death penalty. It is not necessary to hold a penalty phase hearing in a case where no aggravating factor exists. It is difficult to imagine such a case in most states considering the extensive list of aggravating circumstances in most statutes. However, if such a case does come up, the issue should be decided pretrial to avoid the time and expense of death qualifying the jury and the perceived prejudice that results.

[8.3.6] The prosecutor does not seek the death penalty

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[126] *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986).

[127] *People v. Caballaro, 2002WL31341296 (Ill. November 3, 2002); People v. Kliner*, 705 N.E.2d 850 (Ill. 1999); *Jennings v. State*, 718 So.2d 144 (Fla. 1998); *Williams v. State*, 430 N.E.2d 759 (Ind.1982); *State v. Stokes*, 352 S.E.2d 653 (N. C. 1987); *State v. Carter*, 714 S.W.2d 241 (Tenn.,1986); Williams v. State, 430 N.E.2d 759 (Ind. 1982).

[128] *DeGarmo v. State*, 691 S.W.2d 657 Tex.Crim.App.,1985.

[129] *State v. Green*, 609 N.E.2d 1253 (Ohio,1993).

[130] See §8.8.23 of these materials for further discussion of this issue.

The death penalty may not be imposed if the prosecutor does not seek it.[131] If the prosecutor waives the death penalty, the jury should be instructed as follows during voir dire:

> The penalty for first degree murder in this state is death or life in prison without the possibility of parole. However, not every first degree murder case involves the death penalty. This is one of those cases. The death penalty is not an issue in this case.

The fact that prosecutorial discretion is virtually unlimited in every state presents a proportionality review issue that will no doubt be the subject of future argument. In this day of "victim's rights," it is not unusual for the prosecution to waive the death penalty because the family of the victim wants "closure" or some other arbitrary reason. The waiver of the death penalty in such cases puts lesser sentences in similar cases into the mix. Additionally, such irrelevant factors as the county in which the homicide occurred, the race of the defendant and the victim, the quality of the evidence, the socio-economic status of the victim or the defendant, the relative abilities of trial counsel and the fact that there are no standards to guide prosecutorial discretion often determine whether the death penalty is sought. In Illinois recently it was discovered that out of 1000 murder cases, only 2% were sentenced to death. Illinois has 120 different elected prosecutors who make the decision of whether to seek the death penalty.[132]

[8.4.] Death is different

DEATH IS DIFFERENT! A capital trial is different in at least three different ways from every other kind of trial, and judges who do not recognize this invite reversal. Consider the words of Justice Stewart in his concurring opinion in *Furman v. Georgia*,[133]

> ...the penalty of death differs from all other forms of criminal punishment, not in degrees but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basis purpose of criminal justice, and it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

[8.4.1] Higher, sometimes called "super due process" standards

Off the record matters

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[131] *Lankfield v. Idaho*, 500 U.S. 110, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1990).

[132] *See* the summary of the Illinois *Governor's Capital Punishment Report*, www.state.il.us/defender/gcdp.html/.

[133] *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

Consider *Gardner v. Florida.*[134] It was customary for many years in Florida for a judge to order a pre-sentence investigation (PSI) prior to sentencing a defendant. The probation officer use to include a confidential section in the PSI for the judge's eyes only. In *Gardner*, the judge asked for a Presentence Investigation Report. The customary confidential section was included in it. Neither the state attorney nor the defense attorney requested to read the confidential section, nor was there any evidence anything in the confidential section was used to the detriment of the defendant. However, the United States Supreme Court held that, while this may be permissible in other cases, death is different. The Court held that the defendant was denied due process because the trial judge read the confidential material without giving the defendant and his attorney an opportunity to read it and respond to it.

Continuances

All judges are familiar with the vast body of case law holding that the granting or denying of a motion to continue rests within the sound discretion of the trial court and will not be disturbed on appeal unless a manifest abuse of discretion is found.[135] Judges are rarely reversed for denying a continuance in a trial that does not involve the death penalty. But in a death penalty trial - including the penalty phase itself - the standard is stricter, especially if it appears the death penalty is likely.[136] However, if the request is reasonable, and was not brought on by the defendant's dilatory conduct, it is the better practice to continue the matter to a later date. "Super" due process means granting a continuance that would otherwise be denied. Haste will not be tolerated in a death penalty case, including the penalty phase trial.

Conduct of counsel

Death penalty cases often involve the issue of whether defense counsel provided competent representation. Trial judges have a higher responsibility to monitor the actions of defense counsel in death cases than in other cases.[137] In the case of *Nixon v. Singletary,*[138] the defendant was charged with having murdered the victim by tying her to a tree, setting her on fire, and burning her to death. The defendant confessed to the gory details. At trial, during opening statement, defense counsel told the jury that the defendant committed the murder and the state could prove it. He focused on the

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[134]*Garner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

[135]*Commonwealth v. Busanet*, 817 A.2d 1060 (Pa. 2002).

[136]*Wilke v. State*, 596 So.2d 1020 (Fla. 1992). This does not mean an unreasonable request must be granted. *Com. v. Busanet*, 817 A.2d 1060 (Pa. 2002); *Barnhill v. State*, 834 So.2d 836 (Fla. 2002); *State v. Black*, 50 S.W.3d 778 (Mo.2001); *Davis v. State*, 44 S.W.3d 726 (Ark. 2001); *State v. Call*, 545 S.E.2d 190 (N.C.2001).

[137]*See, State v. Rose*, 548 A.2d 1058 (N.J. 1988) (Duty to supervise cross examination of defense character witness.)

[138]*Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000)

penalty to be imposed. The defendant was sentenced to death and the case was affirmed on appeal[139]. Years later, the Supreme Court of Florida considered an appeal from the denial of a post conviction relief motion. The court held:

> We recognize that in certain unique situations, counsel for the defense may make a tactical decision to admit guilt during the guilt phase in order to persuade the jury to spare the defendant's life during the penalty phase. Of course, in such cases, the dividing line between a sound defense strategy and ineffective assistance of counsel is whether or not the client has given his or her consent to such a strategy. See, Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983); Wiley v. Sowders, 647 F.2d 642 (6th Circ. 1981); Jones v. State, 110 Nev. 730, 877 P.2d 1052 (1994); State v. Anaya, 134 N.H. 346, 592 A.2d 1142 (1991); State v. Harbison, 315 N.C. 175, 337 S.E. 2d 504 (1995).
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> Although an attorney has the right to make tactical decisions regarding trial strategy, see, Faretta v. California, 422 U.S. 806, 820, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the determination to plead guilty or not guilty is a matter left completely to the defendant. See, Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) ("It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal...."); Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966)(stating that although an attorney can make tactical decisions as to how to run a trial, the Due Process Clause does not permit an attorney to admit facts that amount to a guilty plea without the client's consent). At his arraignment, Nixon entered a "not guilty" plea. By pleading "not guilty," Nixon exercised his right to make a statement in open court that he intended to hold the State to strict proof beyond a reasonable doubt as to the offenses charged. See, Byrd v. United States, 342 F.2d 939,941 (D.C. Cir. 1965); Licata v. State, 81 Fla. 649, 651, 88 So. 621, 622 (1921). "Unquestionably, the constitutional right of a criminal defendant to plead 'not guilty,' or perhaps more accurately not be plead guilty, entails the obligation of his attorney to structure the trial of the case around his client's plea." Wiley, 647 F.2d at 650.
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> Thus, the dispositive issue in this case is whether Nixon gave his consent to his trial counsel to concede guilt during the guilt phase of the trial. Because Nixon previously invoked the attorney-client privilege, the 1990 Court was unable to get the answer to this question. Essentially, the 1990 Court issued an invitation to Nixon to raise this issue again in his 3.850 motion. Implicit within that invitation was that the postconviction circuit court conduct another evidentiary hearing, without the risk of the attorney-client privilege, to determine whether Nixon consented to the strategy. Despite this, the circuit court in the present postconviction motion refused to grant an

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[139] *Nixon v. State*, 572 So.2d 1336 (Fla. 1991).

evidentiary hearing, and this Court still does not have the answer that it has been seeking for the last eleven years. Therefore, we remand this case for an evidentiary hearing on this issue. Due process demands this result.

The *Nixon* case serves as a warning to trial judges to take extra precautions during a capital trial. It may be necessary to interrupt the trial or hold pretrial conferences with the defendant present to make sure the defendant is aware of his lawyer's proposed conduct of the trial and consents to it.

[8.4.2] Different evidentiary standards

Although many states allow hearsay testimony in the penalty phase, Georgia does not. Also, while Georgia recognizes a hearsay exception for a declaration against pecuniary interest, it does not recognize an exception for a declaration against penal interest. [140]

In *Green v. Georgia*,[141] the defendant and a co-defendant (Moore) raped and killed the victim, a convenience store clerk. Moore was convicted and sentenced to death. During Moore's trial, the prosecutor used a statement made by Moore to a cell mate admitting that he killed the victim after sending Green on an errand. In the penalty phase of Green's trial, Green attempted to introduce the exculpatory statement. The prosecutor objected on hearsay grounds and the statement was excluded. During final argument, the prosecutor claimed that because the victim was shot twice, the jury could infer that Green directly participated in the murder.[142] The Georgia Supreme Court affirmed the exclusion of Moore's statement, observing: "This has been the law of Georgia for over one hundred years."[143] Green petitioned for *certiorari* assigning as error the trial court's refusal to allow the hearsay testimony. In a short, two-page opinion, including Justice Rehnquist's dissent, the United States Supreme Court allowed a little equity to creep into criminal justice and reversed Green's death sentence. The *per curiam* opinion held exclusion of the statement to be a violation of due process because it was "highly relevant to a critical issue in the punishment phase of the trial." The Court described the hearsay testimony as trustworthy because it was made spontaneously, was against interest and because Moore had no ulterior motive to make it. Perhaps most importantly, the prosecutor thought it to be reliable enough to use it against Moore in his trial. "In these unique circumstances, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 97. There is no analysis in the opinion concerning any exception to the hearsay rule or of Georgia's rules of evidence. The Court simply found death to be different and, therefore, fairness required the proffered testimony to be admitted. Justice Rehnquist, in his dissent, suggested the Court made its decision only because of the death sentence imposed on Green. He stated, "I think it impossible to

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[140] *Little v. Stynchcombe*, 180 S.E.2d 541 (Ga. 1971).

[141] *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979).

[142] This was not the only instance of prosecutorial misconduct during the trial.

[143] *Green v. State*, 249 S.E.2d 1 (Ga. 1978) at p. 9.

find any justification in the Constitution for today's ruling, and take comfort only from the fact that since this is a capital case, it is an example of the maxim that "hard cases make bad law."[144]

The *Green* decision would clearly have been different if Green had not been sentenced to die. The lesson here is that strict evidentiary standards that apply to other cases cannot be blindly followed in cases involving the death penalty.

[8.4.3] Intense and multiple scrutiny of the court's rulings and of defense counsel's performance

No case will be reviewed as meticulously, as often, and by as many courts as a death case. Defense counsel's performance will be scrutinized for ineffectiveness like in no other case. The trial judge will be required to monitor that performance. Defense counsel's performance in the closing arguments of the penalty phase will be covered later in these materials. Ineffective assistance of counsel will be covered in the materials on postconviction proceedings.

[8.5] Preliminary matters

Assuming the same jury tries both the guilt phase and the penalty phase, there may be little need for preliminary instruction because penalty phase procedure was covered in the initial *voir dire*. However, it is advisable to begin the penalty phase with preliminary instructions similar to those used before any trial in order to inform the jury about what to expect in the penalty phase. Also, preliminary instructions should advise the jury as to how they will use the matters presented during their deliberations and, if this has not already been done, advise them of the expected length of the proceeding and the hours court is expected to be in session. Other matters, such as sequestration and transportation, should also be discussed.

Usually, the same jury that tried the guilt phase will try the penalty phase. However, a new jury will have to be empaneled if the case was remanded for a re-sentencing after defendant's successful appeal, a successful postconviction motion, a successful *habeas corpus* petition, or if other reasons prevent the use of the guilt phase jury. The new jury will be empaneled subject to the same unique problems inherent in selecting juries for death cases. The new jury must be told that guilt has already been decided and that the role of the jury is to determine or assist in determining the penalty.

Jury instructions should be reviewed to be certain there is no minimization of the importance of the jury's decision that would constitute a *Caldwell* violation.[145] The *Caldwell* problem more thoroughly discussed in §8.9.3.

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[144] *Id.* at 98.

[145] See, *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1988).

After *Ring v. Arizona*,[146] it is clear that there is a constitutional right to a jury for the sentencing phase. Cases that state otherwise are no longer valid.[147]

The right to jury trial can be waived. The procedure to waive a jury is a matter of state law. Some states allow the defendant to waive a jury without consent of the prosecutor. (Florida, Illinois) Other states require both sides to agree. (Connecticut, Delaware) The waiver should be on the record and should establish that it is knowingly and voluntarily made.[148]

Some states, such as Florida, do not require the trial judge to accept the waiver.[149] However, there are several good reasons to consider allowing the waiver:

1. The guilt phase jury will not have to be "death qualified" other than to inquire whether the jurors could return a guilty verdict knowing that the death penalty is a possible penalty. This will save time (sometimes days or weeks) on voir dire and eliminate many of the errors that occur during voir dire of juries in death penalty cases.
2. A jury recommendation to impose the death penalty is often an emotional response to the offense and the defendant and not founded upon sound legal principles. The possibility of an emotional verdict that will have to be either accepted as the sentence or given "great weight" is eliminated.
3. The penalty phase can be scheduled at the convenience of the parties and the court without concern about a jury wandering around in the community being influenced by outside factors.
4. In states like Florida and Georgia, the penalty phase can be bifurcated with the prosecutor presenting aggravating circumstances first. If no aggravating circumstances are presented, or if they are insufficient to support the death penalty, no further proceedings need to be scheduled.
5. In states where the court has the ultimate sentencing decision, there is better opportunity for the judge to interact with the attorneys and the witnesses when a jury is not involved.
6. There is less chance of reversible error in a non jury trial.
7. Some mitigating circumstances sound like aggravation and may be better presented to the judge alone. See the section on Mitigating Circumstances in these materials.

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[146]Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[147]*See, e.g., People v. Dameron*, 751 N.E.2d 1111 (Ill. 2001).

[148]*People v. Dameron*, 751 N.E.2d 1111 (Ill. 2001). (Waiver of jury for sentencing phase not "knowing and intelligent" due to erroneous advice that defendant would not receive jury instruction to presume he would spend the rest of his life in prison if given a life sentence.); *People v. Gacho*, 522 N.E.2d 1017 (Ill. 2001).

[149]*Sireci v. State*, 587 So.2d 450 (Fla. 1991).

8. The defendant cannot make an Apprendi challenge if the jury has been waived.[150]

[8.6] Opening statements

Opening statements should proceed as in any other trial unless the state statute or rule changes this procedure. For instance, in South Carolina, allowing opening statements is within the discretion of the trial judge.[151]

Generally, the prosecutor makes an opening statement prior to the introduction of any evidence or the prosecutor may waive making an opening statement. This is not unusual when the only aggravating circumstances involve the facts of the case the jury has already heard.

The defense may make an opening statement prior to the introduction of any evidence, reserve making the statement until the prosecutor has rested, or waive the opening statement entirely. The trial judge should inquire if defense counsel intends to waive making an opening statement or to concede any part of the evidence to make sure the defendant agrees to the waiver or concession.[152] Many judges make this inquiry outside of the presence of the jury before the penalty phase begins. Trial judges are expected to monitor the performance of defense counsel during a death case.

[8.7] Prosecution's evidence in support of the death penalty

It is not necessary for the prosecutor to reintroduce evidence of aggravating circumstances introduced during the guilt phase of the trial if the same jury is trying the penalty phase. The jury should be instructed that all testimony and other evidence that bears upon an aggravating or mitigating factor that was presented during the trial may be considered as part of the penalty phase.

The prosecutor will have to put on witnesses or introduce evidence of aggravation if a new jury has been selected for the penalty phase. Some states allow the prosecutor to introduce former testimony from transcripts to the new jury from the guilt phase if witnesses are not available.[153] Unless these witnesses are no longer available, and have previously been subjected to cross-examination, the prosecutor will have to use live witnesses.[154] However, some of these cases are very old and have been in the appellate courts for years. It may be difficult for the prosecutor to obtain live witnesses upon retrial and will have to rely upon former testimony. Jurisdictions with no provision for the use of former testimony present a problem for the prosecutor. The use of transcripts because

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[150] *See Lynch v. State,* 841 So.2d 362 (Fla. 2003).

[151] *State v. Southerland,* (S.C. 1994) 447 S.E.2d 862.

[152] *See Nixon v. State*, 572 So.2d 1336 (Fla. 1991).

[153] *Russell v. State*, 670 So.2d 816 (Miss. 1995); *State v. Carter*, 888 P.2d 629 (Utah 1995) (oral testimony from transcripts allowed.).

[154] *Crawford v. Washington*, __ U. S. __, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

a witness has died, has become incapacitated, or is unavailable, may be the only recourse. Whether or not to allow the use of former testimony under such circumstances must be determined by state law.

[8.7.1] Statutory aggravating factors or circumstances

There are many similarities in the state statutes listing aggravating factors or circumstances. These factors are suppose to narrow or limit the cases that are deserving of the death penalty. A state by state analysis of each aggravating factor has not been attempted for these materials. This type of analysis is unnecessary in states with the Georgia scheme if the prosecutor may introduce any relevant aggravation allowed by the court once a statutory aggravator has been established. Additionally, most of the states have the same aggravators that are most frequently used to support death penalty cases - "cold, calculated and premeditated" and "heinous, atrocious and cruel." The words are different from state to state but the concept is the same. Judges from states that follow the Florida or Texas schemes can easily identify aggravating factors from the statutory list of aggravators (Florida) or the interrogatories to be answered (Texas).

Circumstances that typically constitute factors in aggravation are under the following three broad categories:

1. The defendant's past, present or future;
2. The circumstances of the crime itself; and
3. The status of the victim in the community.

[8.7.2] Category I: The defendant - past, present, and future

[8.7.3]. The defendant's "freedom status" at the time of the murder

At the time of the murder, was the defendant in prison or jail, escaped from custody, or on parole or probation?

Almost all states that list aggravating circumstances enumerate some version of this aggravator. Examples of some of the states' variations are:

(1) The capital felony was committed by a person under sentence of imprisonment (one state adds or on community control, the house arrest program).

(2) The capital felony was committed by a person under sentence of imprisonment, including a period of parole, or on probation for a felony (one state adds defendant on probation after receiving a sentence for a felony).

(3) The capital felony was committed by a person imprisoned as a result of a felony conviction (In some states, the felony must be a "forcible felony".).

(4) The offense was committed while the defendant was in the custody of the State Department of Corrections, a law enforcement agency (one state adds under custody of the county's sheriff), or county or city jail (one state includes confinement in any correctional institution).

(5) The offense was committed by a defendant who was unlawfully at liberty after being sentenced to prison for a felony.

(6) The defendant was serving a life sentence or death sentence at the time of the murder.

(7) The defendant was under custody of the Department of Corrections, under custody of the county sheriff, on probation after receiving a sentence for a felony, or on parole.

[8.7.4] Application of the "freedom status" aggravating circumstance

If a state statute mentions custody, is a defendant who has escaped from custody included? Is a defendant who is on parole or probation included? What about a defendant who has been sentenced to community control (house arrest)? What if a state has abolished parole, but still releases prisoners early due to overcrowding, on mandatory conditional release? If the defendant is on such a release program and commits a capital murder, does this factor apply?

In Florida, the statute is worded as in example (1) above. The Supreme Court of Florida answered the above questions in the following way: This aggravating factor applies to (a) one incarcerated for a specific or indeterminate term of years, (b) persons incarcerated under an order of probation, (c) person under (a) and (b) who have escaped from incarceration, and (d) persons who are under sentence for a specific or indeterminate period of years and who have been placed on parole[155]. It also includes a defendant who is on mandatory conditional release.[156] It does not include offenders who are on probation unless they are in jail as a condition of probation. Nor does it include an offender who is on probation following a term of incarceration. [157] It does not include a defendant on community control.[158] State law will probably answer these same questions and a federal court will not likely disturb the answer.

[8.7.5] The defendant's past criminal convictions of violence

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[155] *Peek v. State*, 395 So.2d 492 (Fla. 1981).

[156] *Haliburton v. State*, 561 So.2d 248 (Fla. 1990).

[157] *Ferguson v. State*, 417 So.2d 631 (Fla. 1982).

[158] *Trotter v. State*, 576 So.2d 691 (Fla. 1991). The Florida Legislature did not like the ruling excluding an offender who is on community control and the statute was amended to specifically include an offender who is on community control.

At the time of the murder or the sentencing was the defendant a person who had previously led a relatively law-abiding life, or at least one without violence? Or is there a past history of criminal convictions involving violence?

Almost all states include a statutory aggravating factor dealing with the defendant's past criminal convictions of violence. Here are examples of some of the states' variations:

(1) Defendant was previously convicted of another capital felony or a felony involving the use (some states include "or threat") of violence to the person.

(2) Defendant was convicted of another offense for which a sentence of life imprisonment or death was imposable (yes, "imposable" - not "possible." This curious language is from Arizona..[159])

(3) Defendant was previously convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping.

(4) Defendant was previously convicted of a capital felony (one state says convicted previously for another murder).

(5) Defendant was previously convicted of two felonies on different occasions that involved the infliction of serious bodily injury to another person.

(6) Defendant was convicted of two or more murders at the same or different times.

(7) Defendant has a prior conviction for a capital offense or has a substantial history of serious assaultive criminal convictions.

[8.7.6] Applications of prior convictions as an aggravating circumstance

What if a conviction is on appeal? What if a conviction is subsequently reversed or a defendant receives some relief because of a postconviction motion (ineffective assistance of counsel, for example)? What about a contemporaneous conviction for a violent felony?

Generally, it is not improper to consider a conviction that is on appeal. But, if that conviction is reversed, the imposition of the death penalty based on a reversed conviction may violate the Eighth Amendment and the penalty phase will have to be retried.[160]

The contemporaneous conviction problem is one of state law and will probably not be reversed by the federal courts whichever way a state rules. Most states have determined that a contemporaneous conviction cannot generally be used. For example, assume a defendant rapes and robs a murder victim and is convicted of all three crimes by a jury. The rape and robbery, although

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[159] A.R.S. §13-703 F.1.

[160] *Johnson v. Mississippi*, 486 U.S. 578 (1988).

crimes of violence, cannot generally be used to support a previous violent conviction. However, if two or more victims are involved, a contemporaneous conviction can generally be used.[161]

According to one court, this aggravator may be used even if the crime occurred after the capital crime. The term "previously convicted" refers to a conviction prior to the murder trial and not a crime committed prior to the homicide.[162] For this reason, prosecutors usually want to try non-capital crimes pending against a defendant prior to trying the defendant for murder. This situation will call for good case management in order to avoid undue delay in bringing the capital case to trial.

A serious proof problem exists in states that require a conviction for "a crime of violence" if the testimony shows it to be a crime of violence but the judgment and sentence do not support the testimony. The case of *Mann v. State* provides an example of this problem.[163] Larry Mann had previously been charged with burglarizing a victim's home and raping her. The victim of the prior crime testified at the penalty phase trial during Mann's trial for a subsequent murder. The judgment and sentence for the prior crime recited the defendant had been convicted of "burglary." The death penalty was reversed by the Supreme Court of Florida and remanded to determine if the defendant was previously convicted of a crime of violence or only of a burglary. The prosecutor introduced the charging document at the second penalty phase hearing. It charged the defendant with burglary during which a rape occurred and the verdict in the case showed the defendant had been found guilty of burglary "as charged." This was held sufficient to satisfy the prior violent crime aggravator.[164]

[8.7.7] The defendant's past criminal non-violent convictions or other violent criminal activity without convictions

At least three states, Indiana, Nebraska, and New Hampshire, allow aggravating circumstances to be based on violent crimes for which the defendant has not been convicted or on crimes where a conviction has been obtained but the crimes might not be violent crimes.[165]

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[161] *Stein v. State*, 632 So.2d 1361 (Fla. 1994).

[162] *Elledge v. State*, 346 So.2d 998 (Fla. 1977).

[163] See *Mann v. State*, 420 So.2d 578 (Fla. 1982)

[164] See *Mann v. State*, 453 So.2d 784 (Fla. 1984).

[165] IN ST 35-50-9(b)(8). (Defendant committed another murder, at any time, regardless of whether convicted.) NE ST S 29-2523. (The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person or has a substantial prior history of serious assaultive or terrorizing criminal activity). NH ST S603:5(VII)(b).(Defendant has previously been convicted of two or more state or federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.)

There may be constitutional problems if the prosecutor tries to use another murder "committed" for which no conviction has been obtained as an aggravating circumstance. When an appellate court reverses a death sentence and requires a new penalty phase hearing, the prior conviction in the case cannot be used as an aggravator. It appears that Indiana has limited this aggravating factor to murders involving multiple victims and has determined that it would not be proper for the judge or jury to consider another murder not related to the principal charge for which the defendant has not been convicted.[166]

States are allowed to create aggravating factors as long as they relate to the severity of the offense. New Hampshire, for instance, makes previous conviction for a drug trafficking offense an aggravator. This is more than likely permissible. No New Hampshire cases have been reported on this factor as of July 30, 2004, which is not surprising since there are no death row prisoners in that state and the last execution was in 1939.[167]

[8.7.8] The defendant's future dangerousness

Several states list the future dangerousness of the defendant as a statutory aggravating factor or as a question to be answered (Oregon, Texas, Virginia) in determining sentence. Some variations are:

(1) There is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

(2) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder that will probably constitute a continuing threat to society.

(3) There is a probability based upon the evidence of the prior history of the defendant, or of the circumstances surrounding the commission of the offense of which he/she is accused that he/she would commit criminal acts of violence that would constitute a continuing serious threat to society.

(4) The defendant poses a substantial and continuing threat of future dangerousness or is likely to commit continued acts of criminal violence.

Texas, Oklahoma, Oregon and Virginia provide a wealth of cases involving this aggravating factor.[168]

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[166]See *State v. McCormick*, 397 N.E.2d 276 (Ind. 1979); *Judy v. State*, 416 N.E.2d 95 (Ind. 1981); *Moore v. State*, 479 N.E.2d 1264 (Ind. 1985).

[167]*Annual Report*, New Hampshire Department of Corrections.

[168]*Hankins v. State*, 132 S.W.3d 380 (Tex. Crim. App. 2004); *Salazar v. State*, 38 S.W.3d 141 (Tex. Crim. App. 2001); Littlejohn v. State, 85 P.3d 287 (Okla. Crim. App. 2004); *Ryder v. State*,

In Texas, the test is whether "any rational trier of fact could have believed beyond a reasonable doubt that appellant would probably commit criminal acts of violence that would constitute a continuing threat to society.[169] Proof of this aggravator can arise from the facts of the murder itself, from the defendant's lack of remorse or from prior criminal history. The cases do not explain how the State can prove a probability beyond a reasonable doubt.

In Oklahoma, in addition to the factors considered in the Texas test, the jury can consider the "callousness of the crime."[170] In determining the callousness of the crime, the defendant's attitude is critical to the determination of whether the defendant poses a continuing threat to society.[171]

In a case where the defendant was convicted of murder, burglary and attempted rape, the Supreme Court in Oregon has approved allowing the mother of the intended rape victim to testify about how the victim would be impacted by "fear of what defendant might do" if he were released from prison.[172]

In Virginia, evidence peculiar to a defendant's character, history, and background is relevant to the future dangerousness inquiry and should not be excluded from a jury's consideration. This includes evidence relating to a defendant's current adjustment to the conditions of confinement.[173]

Also, several states that allow the jury to consider any relevant evidence in aggravation after at least one statutory aggravating factor is found, have quite a body of case law that allows the jury to consider the future dangerousness of the defendant in determining sentence even though it is not specifically listed as a statutory aggravator. For instance, in *Gillard v. Scroggy*, the United States Court of Appeal, Fifth Circuit, held that the prosecutor could argue future dangerousness to the jury even though it is not specified in Mississippi's statute[174].

[8.7.9] Application of future dangerousness as an aggravating circumstance

Should experts be allowed to testify concerning the future dangerousness factor? If experts are going to examine the defendant at the request of the state or the court, does the defendant need

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83 P.3d 856 (Okla. Crim. App. 2004); *Cunningham v. Thompson*, 62 P.3d 823 (Or.App. 2003); *State v. Reyes-Camarena*, 7 P.3d 522 (Or. App. 2000); *Green v. Commonwealth*, 580 S.E.2d 834 (Va. 2003); *Wolfe v. Commonwealth*, 576 S.E.2d 471 (Va. 2003).

[169] *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Guevara v. State*, 97 S.W.3d 579 (Tex. Crim App. 2003); *Allridge v. State*, 850 S.W.2d 471 (Tex. Crim. App. 1991), cert. den., 510 U.S. 831 (1993).

[170] *McKmurry v. State*, 60 P.3d 4 (Okl. Cr. 2002).

[171] *Snow v. State*, 876 P.2d 291, 298 (Okl.Cr.1994); *cert. denied* 513 U.S.1179 (1995).

[172] *State v. George*, 54 P.3d 619 (Ore. 2002).

[173] *Bell v. Commonwealth*, 563 S.E.2d 695 (Va. 2002).

[174] *Gillard v. Scroggy*, 847 F.2d 1141 (5th Cir. 1988). Mississippi is a Georgia scheme state.

to be advised of Fifth Amendment rights? What about Sixth Amendment right to counsel? Must the defendant's attorney be notified of the examination? What is a "propensity"?

Fortunately, most of these questions have been answered. In *Barefoot v. Estelle*,[175] the United States Supreme Court held that psychiatrists can give their opinions on this issue. Three justices dissented. Justice Blackman's dissent and the American Psychiatric Association's research conclude that psychiatric predictions of long-term future violence are wrong more often than they are right (in fact, the best research indicates psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior). This research has occasioned the Nevada Supreme Court to hold psychiatric evidence purporting to predict the future dangerousness of a defendant inadmissible because such evidence is "highly unreliable and therefore inadmissible at death penalty sentencing hearings."[176] California, while not adopting Nevada's absolute bar to experts, has limited the use of expert testimony to circumstances that would rarely exist. Except in those very rare instances, experts cannot be used to predict future dangerousness in California.[177]

The defendant has both a Fifth and Sixth Amendment right that must be addressed before an expert can be ordered to examine the defendant on the issue of future dangerousness. Statements made by the defendant must, of necessity, be used by the prosecutor's expert. The defendant needs to be advised of the right against self incrimination and of the right to an attorney in deciding whether or not to be examined or answer any questions. Defense counsel is entitled to be noticed for any attempted examination in order to be able to assist the defendant in deciding these issues. Failure to pay heed to these requirements may result in a new sentencing hearing even if no unconstitutionally obtained testimony is admitted.[178]

Idaho is the only state that speaks of "propensities." The Idaho Supreme Court has defined this term in as follows:

> We would construe 'propensity' to exclude, for example, a person who has no inclination to kill but in an episode of rage, such as during an emotional family or lover's quarrel, commits the offense of murder. We would doubt that most of those convicted of murder would again commit murder, and rather we construe the 'propensity' language to specify that person who is a willing, predisposed killer, a killer who tends toward destroying the life of another, one who kills with less than the

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[175] *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983).

[176] *Redman v. Nevada*, 828 P.2d 395, 400 (Nev. 1992).

[177] *People v. Murtishaw*, 631 P.2d 446 (Cal. 1981).

[178] *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981); *Satterwhite v. Texas*, 486 U.S. 249, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1988); *Powell v. Texas*, 492 U.S. 680, 109 S. Ct. 3146, 106 L. Ed. 2d 551 (1989).

normal amount of provocation. We would hold that propensity assumes a proclivity, a susceptibility, and even an affinity toward committing the act of murder.[179]

The *Creech* case was decided when the Idaho statute allowed the judge to decide the sentence without a jury. Vague terms are not as likely to receive as close scrutiny when a judge determines the sentence instead of the jury. However, that procedure is no longer permissible, and the Idaho legislature has amended the statute accordingly.[180]

[8.7.10] Category II: The capital crime and the events surrounding it -- what, why, how, and how many?

[8.7.11] At the time of the capital crime, was the victim the only person who could have been killed, or were there others either killed or at risk?

Many states have an aggravating factor that speaks to a crime where more than one person was (or could have been) killed or injured. Examples of some variations are:

(1) The defendant knowingly created a great risk of death to many persons (one state requires at least several persons).

(2) The defendant knowingly created a risk of death or great bodily harm to more than one person.

(3) The defendant created a grave risk of death to another person or persons in addition to the victim.

(4) The defendant killed two or more persons.

(5) Defendant's acts of killing were intentional and resulted in multiple deaths.

(6) The defendant created a great risk of death to more than one person in a public place by means of a weapon or device that would normally be hazardous to the lives of more than one person.

(7) The defendant committed a "mass murder" which is defined as the murder of three or more persons within the State of Tennessee within a period of 48 months and perpetuated in a similar fashion in a common scheme or plan.

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[179] *State v. Creech*, 670 P.2d 463 (Idaho 1983)

[180] ID CODE §19-2515; *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[8.7.12] Application of the multiple victims or multiple persons at risk aggravating circumstance

How many is "many"? What is a "great" or "grave" risk? How many persons are "several"? Are two deaths "multiple"?

Arizona, Louisiana, Oklahoma, and Pennsylvania require only one person other than the victim to be put at risk.[181] In Tennessee and Nebraska, it takes at least two more persons other than the victim.[182] In Georgia the risk must be to "more than one person in a public place."[183] In Florida, "many persons" means four or more persons other than the victim.[184]

[8.7.13] What was the defendant doing when the victim was killed - was the defendant engaged in some other felony?

This is the felony murder aggravating circumstance. All states that authorize the death penalty have some version of this circumstance. Differences from state to state include the laundry list of underlying felonies that are included, and whether such inchoate offenses as attempts, solicitations, or conspiracies to commit these felonies are included. Flight after commission of enumerated felonies may also come into play. For instance, in Florida, the force, violence, assault, or putting in fear element of robbery does not have to be at the time of the taking. It is sufficient if it is "in the course of the taking."[185] A charge of robbery can be sustained on facts that occur some time after the taking. This is an example of the "widening the net" trend embraced by state legislatures over the past couple of decades, which brings defendants with relatively low levels of culpability into death penalty cases.

The aggravating circumstance usually reads as follows: The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit any . . . and here the laundry list begins. The felonies usually included are:

(1) Robbery (armed or otherwise);

(2) Sexual battery (rape, sodomy, oral copulation, unlawful sexual intercourse, rape by instrument, a sex crime);

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[181] *See State v. Johnson*, 710 P.2d 1050 (Ariz. 1985); *State v. Williams*, 480 So.2d 721 (La. 1985); *Malone v. State*, 876 P.2d 707 (Okla. Crim. App. 1994); *Com. v. Paolello,* 665 A.2d 439 (Pa. 1995)

[182] *State v. Cone*, 665 S.W.2d 86 (Tenn. 1984); *State v. Simants*, 250 N.W.2d 881 (Neb. 1977).

[183] *Phillips v. State*, 297 S.E.2d 217 (Ga. 1982).

[184] *Johnson v. State*, 696 So.2d 317 (Fla. 1997).

[185] F.S. 812.13(1).

(3) Arson;

(4) Burglary;

(5) Kidnapping;

(6) Aircraft piracy;

(7) Unlawful throwing, placing, or discharging, detonating of a destructive (explosive) device or bomb;

(8) Lewd and lascivious crimes on a child under the age of 14;

(9) Train wrecking;

(10) Mayhem;

(11) Forcible detention (criminal confinement);

(12) Calculated criminal drug conspiracy;

(13) Child molesting;

(14) Criminal deviant conduct;

(15) Dealing in cocaine or a narcotic drug;

(16) Felony abuse of a child.

(17) Unnatural intercourse with a child.

(18) Battery of a child; and

(19) Unlawful distributing, manufacturing, disposing, selling or possessing with intent to sell a controlled substance.

Several states do not list specific felonies. Examples:

(1) Any Class I, II, or III felony;

(2) Any felony, but a previous conviction of the felony is required;

(3) Another capital felony; and

(4) A felony.

[8.7.14] Application of the felony murder aggravating circumstance

Which felonies are included in a particular state? Does the prosecutor have to charge the felony for this factor to apply? Is a conviction of this felony a requirement?

It is necessary to refer to state law to answer these questions. The federal courts are not likely to interfere with a state's felony murder rule.

The felony murder rule is not favored by the courts. Courts are reluctant, and some refuse, to approve the death penalty when felony murder is the only aggravating factor.[186] For a more complete discussion see §8.8.25, defendant's lack of intent to kill.

[8.7.15] What was the motive for the murder? For money? As part of a contract killing? To avoid arrest or escape from custody? To prevent a person from testifying? Because of the race or nationality of the victim?

Most states have one or more aggravating factors dealing with the defendant's motive for the murder or the "why" question. The most common aggravating factor involves a killing for money or any other pecuniary gain. There are other common "why" aggravators, including the following:

(1) The capital offense was committed for pecuniary gain.

(2) The capital offense was committed for hire or the defendant hired another to commit the offense.

(3) The defendant was a party to an agreement to kill another person in furtherance of which a person had been intentionally killed.

(4) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value.

(5) The defendant caused or directed another to commit murder or committed murder as an agent or employee of another.

(6) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(7) Defendant committed the murder in furtherance of an escape or attempt to escape from or evade lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

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[186] *Caruthers v. State*, 465 So.2d 496 (Fla. 1985).

(8) The murder was committed in an apparent effort to conceal the identity of the perpetrator or to conceal the commission of a crime.

(9) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function, or the enforcement of laws.

(10) The victim was intentionally killed because of race, color, religion, nationality, or country of origin.

And there is one aggravator for which the "why" cannot be determined:

(11) The murder was committed upon one or more persons at random and without apparent motive.

[8.7.16] Application of aggravating circumstances involving motive - Doubling

Killing for money or other pecuniary reward is included in this factor, whether the killing is a paid contract killing or committed during the course of a robbery, burglary, or other felony. However, if the defendant killed the victim during a robbery, for example, is it permissible for the jury or judge to find both the felony murder aggravator and that the pecuniary gain aggravator? How is it proven that the killing was for the purpose of avoiding or preventing a lawful arrest? Does this aggravator always apply if the victim and the defendant know each other? Can both aggravating factors, such as (6) and (9), apply if the victim is a police officer? Can the fact that the victim was a police officer apply as another aggravator? How many aggravating circumstances can be counted based on a single aspect of the crime?

In most states the existence of an aggravating factor, such as numbers (6), (7), or (8), is not presumed. And the mere fact that a victim can identify a defendant is insufficient. There must be proof, usually beyond a reasonable doubt, that this was the reason for the murder, not an assumption or innuendo. Often, the defendant's own statement or that of a co-defendant is the best source of information as to why a victim was killed. In two Florida cases, the defendant knew the victim and the victim could have identified the defendant had he not been killed.[187] In *Harmon*, the aggravating factor applied; in *Caruthers*, it did not. The distinction appears to be the statements of the defendants. Caruthers said that during the armed robbery, he panicked and started shooting, whereas Harmon told a cellmate he killed the blind victim during the armed robbery because the victim had heard his name spoken and therefore could identify him. The defendant's own statements have been held to be sufficient to prove this factor in other states as well.[188]

Aggravating factor (9) above applies mostly to witnesses who are killed to prevent their testimony before the grand jury or the petit jury.

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[187] *See*, for example, two Florida cases: *Caruthers v. State*, 465 So.2d 496 (Fla. 1985) and *Harmon v. State*, 527 So.2d 183 (Fla. 1988).

[188]. *See*, for example, *Berget v. State*, 824 P.2d 364 (Okla. Crim. App. 1991).

Aggravating factor (10) must not be presumed solely because a victim is of a different race or nationality than the defendant. There must be proof that the reason why the victim was killed was because of the difference. In *People v. Sassounian*,[189] the defendant was Armenian and had come with his family from Lebanon. He had expressed hatred of the Turkish people. The victim was an official representative of the Republic of Turkey. The defendant's statement to an inmate indicated he murdered the victim for no reason other than the fact that he was a Turk and an official representative of the government of Turkey. The defendant's statement proved the murder was a revenge killing against the Turkish people for what they had done years before to the Armenians. The California appeals court (defendant sentenced to life without possibility of parole because of the finding of the special circumstance) found the application of this circumstance was both constitutional (not vague) and appropriate based on the facts of the case.

A common problem in this area is sometimes referred to as "doubling" or "double counting" of aggravating factors. In some states, conviction of capital murder requires the jury to find one or more special circumstances that sound very much like or are identical to elements of the offense. For example, Louisiana[190] defines first degree murder as the killing of a human being:

> (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;
> (2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his/her lawful duties;
> (3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person;
> (4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing; or
> (5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve years.

Louisiana requires the jury that finds the defendant guilty of first degree murder to sentence the defendant to death or life imprisonment without benefit of parole, probation, or suspension of sentence. A sentence of death cannot be imposed unless the jury has found at least one enumerated statutory aggravating circumstance, considers all mitigating circumstances, and unanimously recommends the defendant be sentenced to death.[191]

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[189] *See People v. Sassounian*, 182 Cal. App.3d 361, 226 Cal. Rptr. 880 (Cal. App. 2d Dist. 1086).

[190] La.Rev.Stat.Ann. §14.30(A)(West 1986).

[191] LA C.Cr.P Art. 905.3.

All five of the circumstances that make a defendant eligible for the death penalty are found in Louisiana's list of eleven aggravating factors. In the case of *Lowenfield v. Phelps*, the defendant killed five people. The jury convicted him of two counts of manslaughter and three counts of first degree murder. An essential element of the three first degree murder convictions was a finding that he intended to kill or inflict great bodily harm upon more than one person. The same jury recommended a death sentence, finding as an aggravating circumstance that the defendant "knowingly created a risk of death or great bodily harm to more than one person." The defendant appealed to the United States Supreme Court and claimed that his death sentence could not be based on a single aggravating circumstance that was a necessary element of the underlying offense. The United States Supreme Court rejected this argument.[192] The Court stated:

> The use of aggravating circumstances is not an end in itself, but a means of genuinely narrowing the class of death - eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase.[193]

The Court also stated, "and so that fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm."[194]

However, the United States Supreme Court has not specifically addressed the question of "doubling" or "double counting" aggravating factors. For example, if a state has aggravating factors that include "the homicide was committed during the course of a robbery or burglary" and "the homicide was committed for pecuniary gain," can the jury or the judge find both aggravating factors?

Most states will not permit doubling up of aggravating factors.[195] In *Provence v. State*,[196] the court held it to be improper to find that a murder committed during a robbery and a murder committed for pecuniary gain were separate aggravating factors. In *Bello v. State,*[197] the court held it to be improper doubling to find the murder was committed for the purpose of avoiding or preventing a lawful arrest and the murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. In *Bello*, the defendant killed a police officer "who was entering his house to arrest the defendant." The same result was reached in the North

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[192]*Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).

[193]*Id.* at 484 U.S. 244.

[194]*Id.* at 484 U.S. 246.

[195]*Cook v. State*, 369 So.2d 1251 (Ala. 1979); *State v. Rust*, 250 N.W.2d 867 (Neb. 1977).

[196]*Provence v. State*, 337 So.2d 783 (Fla. 1976); *Contra*, *State v. Jones*, 749 S.W.2d 356 (Mo. 1988).

[197]*Bello v. State*, 547 So.2d 914 (Fla. 1989)

Carolina case of *State v. Goodman*.[198] Several states have solved this problem through jury instructions that allow both aggravating factors to be submitted to the jury for consideration, but require the jury to consider them as one in determining the appropriateness of the death penalty. Other instructions simply direct the jury not to count the number of aggravators and mitigators in determining the sentence.[199] The problem of doubling is not of as much concern in states that use the Georgia scheme if weighing the various aggravating and mitigating circumstances is not part of the process[200]

[8.7.17] How was the victim killed?

Was death quick and painless or torturous and prolonged? Did the victim know that death was about to occur? What was the defendant's state of mind? Depraved? Cold and calculated? Did the defendant act out of panic?

All states that list aggravating circumstances have at least one that deals with the method used by the defendant to cause death and how this affected the victim. Some variations are:

(1) The capital offense was especially heinous, atrocious, or cruel.

(2) The capital offense was especially heinous, atrocious, or cruel, manifesting exceptional depravity. (One state adds "by ordinary standards of morality and intelligence.")

(3) The defendant committed the offense in an especially heinous, cruel, or depraved manner.

(4) The offense was outrageously vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(5) The murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison, or the defendant used such means on the victim prior to murdering him.

(6) The offense was a deliberate homicide and was committed by means of torture.

(7) The murder involved torture, depravity of mind, or the mutilation of the victim.

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[198] *State v. Goodman*, 257 S.E.2d 569 (N.C. 1979).

[199] *See People v. Harris*, 679 P.2d 433 (Cal. 1984); *State v. Bey*, 548 A.2d 887 (N.J. 1988); *State v. Rose*, 548 A.2d 1058 (N.J. 1988); *Castro v. State*, 597 So.2d 259 (Fla. 1992).

[200]. *State v. Bellamy*, (S.C. 1987) 359 S.E.2d 63; *People v. Kuntu*, 752 N.E.2d 380 (Ill. 2001); *People v. Edwards*, 745 N.E.2d 1212 (Ill. 2001)

(8) The capital murder was committed by means of a destructive device, bomb, explosive, or similar device that the person himself planted, or caused to be planted, hid or concealed in any place, area, dwelling, building, or structure, or mailed or delivered. (Some states add "and the person knew that his/her act or acts would create a great risk of death to human life.")

(9) The defendant intentionally killed the victim while lying in wait (some states -- "or ambush"). (The term "lying in wait" seems to be popular only in the Western States.)

(10) The defendant intentionally killed the victim by the administration of poison.

(11) The defendant committed the offense by use of an assault weapon (some states -- "machine gun").

(12) The capital murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(13) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

(14) 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.

(15) The defendant dismembered the victim.

[8.7.18] Application of the"heinous, atrocious and cruel" aggravating circumstance

This type of aggravator sounds subjective at best. How does it apply to a given case? What if a state's aggravating factor is not exactly the same as a factor that has been held unconstitutionally vague, but also contains vague terms? Does this aggravating factor allow consideration of what happened to the victim both before and after death?

The following U.S. Supreme Court cases illustrate the problems with this kind of aggravator:

ARIZONA
Lewis v. Jeffers, 497 U.S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990).
Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990).

FLORIDA
Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992).
Sochor v. Florida, 504 U.S. 527, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992).
Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976).

GEORGIA

Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).

IDAHO
Arave v. Creech, 507 U.S. 463, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993).

MISSISSIPPI
Stringer v. Black, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992).
Shell v. Mississippi, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990).
Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990).

OKLAHOMA
Maynard v. Cartwright, 401 U.S. 667, 91 S. Ct. 1160, 28 L. Ed. 2d 404 (1988).

[8.7.19] Validity of the heinous, atrocious and cruel aggravator

The United States Supreme Court has ruled on the validity of this aggravator as enacted by several states. The problem the Court has had to solve is the fact that the terms used to describe this aggravator are both subjective and vague.

For example, in Oklahoma, the aggravating circumstance was described as "especially heinous, atrocious, or cruel" and the Court concluded adding the adjective "especially" to the aggravator did not sufficiently guide the jury's discretion in deciding whether to impose the death penalty because an ordinary person could honestly believe that every unjustified, intentional taking of life would be "especially heinous."[201] However, the Supreme Court approved of the definition because the Oklahoma courts limit this aggravating circumstance to murders involving "some kind of torture or physical abuse."

In Georgia, the statute defined this aggravating circumstance as "the offense of murder was outrageously or wantonly vile, horrible and inhuman." In *Godfrey v. Georgia*,[202] the Court found the aggravating circumstance to be vague and the Supreme Court of Georgia's explanation of it to be too broad. The Court stated,

> In the case before us the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously or wantonly vile, horrible and inhuman." There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost *429 every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions.

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[201] *Maynard v. Cartwright*, 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1988).

[202] *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).

These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation. (Footnote omitted.)[203]

In Mississippi and Florida, trial courts tried to give the jury a limiting instruction defining heinous, atrocious, or cruel, but the United States Supreme Court held the instruction to be insufficient.[204] However, the Arizona aggravator of especially heinous, cruel, which was declared unconstitutional as being vague, has not been disturbed after the application of it has been given "narrow construction" by the state supreme court.[205] The Idaho aggravator of committing a murder with utter disregard for human life has been upheld because the Idaho Supreme Court had adopted a limiting construction that met constitutional standards.[206]

The confusion about the constitutionality of this type of aggravator can be resolved by considering the following factors:

(1) Who is the sentencer, the judge or the jury? Vague terms may be more acceptable if applied by a judge.

(2) Did the jury receive a sufficient limiting definition of the terms in the jury instructions?

(3) Does the state appellate court apply a sufficient and appropriate limiting definition of the aggravating circumstance?

The trial judge must give the jury an instruction that properly defines vague terms and explains the types of cases can be included with this aggravator.

Arizona defines "especially cruel" as "when the perpetrator inflicts mental anguish or physical abuse before the victim's death." "Mental anguish" is defined as follows: "Mental anguish includes

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[203] *Id.* at 420 U.S. 428-429.

[204] *See, Shell v. Mississippi,* 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990); *Espinosa v. Florida,* 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992); and *Sochor v. Florida,* 504 U.S. 527, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992).

[205] Walton v. Arizona, *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990); *Richmond v. Lewis*, 506 U.S. 40, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992); *Lewis v, Jeffers*, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1992), dissenting opinion, *rehearing denied*, 497 U.S. 1050, 111 S.Ct. 14, 111 L.Ed.2d 829; *Gretzler v. Stewart*, 112 F.3d 992 (9th Cir. 1997), *certiorari denied*, 520 U.S. 1081, 117 S.Ct. 1443, 137 L.Ed.2d 549, *rehearing denied*, 520 U.S. 1173, 117 S.Ct. 2427, 138 L.Ed.2d 189. There may be current problems here. These cases were decided before Arizona judges were prohibited from presiding over the penalty phase without a jury.

[206] *Arave v. Creech,* 507 U.S. 463, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993).

a victim's uncertainty as to his ultimate fate."[207] The Arizona Supreme Court further limits the cruel circumstance to situations where the suffering of the victim was intended by or foreseeable by the killer. The U.S. Supreme Court approved this definition of "especially cruel" as "constitutionally sufficient because it gives meaningful guidance to the sentencer."[208]

In *Proffitt v. Florida*,[209] the United States Supreme Court held the Florida aggravator of "especially heinous, atrocious, or cruel" not to be vague or over broad if it is defined to be "the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

The United States Supreme Court approved Arizona's version of this aggravator because Arizona's courts defined "depraved" as "when the perpetrator relishes the murder, evidencing debasement or perversion" or "shows an indifference to the suffering of the victim and evidences a sense of pleasure" in the killing is an appropriate construction of its statute.[210]

Trial judges should use instructions that have been approved by the U.S. Supreme Court as a basis for instructing the jury on this aggravator whenever possible. Another possible solution is to accept the definition suggested by the defense if it appears to follow the state statute and case law.

[8.7.20] Did the victim suffer or was the victim unconscious or dead?

Different states interpret the "how" aggravating factor differently as it applies to events occurring before and after death.

In Florida, by way of example, nothing done to the victim after death can be used to support the aggravating factor of heinous, atrocious, or cruel.[211]

In Louisiana, the jury is required to consider what happened before death rather than after death to determine whether there was torture or the unnecessary infliction of pain upon the victim.[212]

Arizona case law defines especially cruel as that which happens to the victim before death.[213]

In Tennessee, mutilating the body of a victim after death is a statutory aggravating factor.[214]

Another issue is whether the heinous, atrocious, or cruel aggravator applies to the defendant's actions once the victim is unconscious. It is generally recognized that an unconscious person no

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[207] *Walton v. Arizona*, 769 P.2d 1017, 1032 (Ariz.1989).

[208] *Walton v. Arizona*, 769 P.2d 1017, 1032 (Ariz.1989).

[209] *Proffitt v. Florida*, 428 U.S. 242 (1976)

[210] Walton *v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990).

[211] *Herzog v. State*, 439 So.2d 1372 (Fla. 1983); *Jackson v. State*, 451 So.2d 458 (Fla. 1984).

[212] *State v. Sonnier*, 402 So.2d 650 (La. 1981).

[213] *Walton v. Arizona*, 769 P.2d 1017 (Ariz. 1989).

[214] T.C.A. §39-13-204.

longer feels any pain. Accordingly, some states hold that nothing the defendant does to the victim after this time may be considered.[215]

[8.7.21] Category III: The victim - what was the victim's status or identity?

The last category of aggravating factors addresses the victim of the homicide. Almost all states have factors in aggravation that deal with the identity or status of the victim. How old was the victim? What was the victim's profession? Did the victim have a special circumstance that made him or her more vulnerable or more worthy of protection than another victim?

[8.7.22] The age of the victim

Was the victim young or old? Examples of some of the states' variations:

(1) The victim was under fifteen years of age and the defendant was an adult or tried as an adult.

(2) The victim was under eighteen and this was known or reasonably should have been known by the defendant.

(3) The victim was under the age of twelve and death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty.

(4) The victim was under the age of twelve.

(5) The victim was sixty-two years of age or older.

(6) The victim was less than sixteen or older than sixty-five and the defendant knew or should have known the victim's age.

[8.7.23] The victim's profession or title

Examples of professions or titles included by the various states:

(1) A law enforcement officer killed in the performance of his/her official duties (almost all states). Some states include " . . . and the defendant know or should have known that the victim was a law enforcement officer" while other states do not mention any knowledge requirement.

(2) A law enforcement officer killed in retaliation for performance of his/her duties.

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[215] *Hertzog v. State,* 439 So.2d 1372 (Fla. 1983); *Jackson v. State*, 451 So.2d 458 (Fla. 1984).

(3) Victim was a fireman engaged in the performance of his/her duties. Some states include " . . . and the defendant knew or should have known the victim was a fireman" while other states do not include any knowledge requirement.

(4) Victim was a prosecutor (district attorney, state attorney, etc.), an assistant prosecutor, etc., a former prosecutor (some include just state prosecutor, some include a federal prosecutor) and the murder occurred in retaliation for or to prevent the performance of the victim's duties (one state requires the murder to have been committed "during or because of his/her duties").

(5) Victim was an elected or appointed public official (or former public official)(engaged in the performance of his/her official duties, if the motive for the murder was related, in whole or in part, to the victim's official capacity). (Murder carried out in retaliation for or to prevent performance of victim's official duties.) (Murder occurred during or because of official duties.)

(6) Victim was a judge, former judge, magistrate, hearing officer [with all the variations noted in number (5)].

(7) Victim is a corrections officer or employee.

(8) Victim is a probation or parole officer.

(9) President of the U.S., person in line for the presidency; president-elect, vice-president elect; or a candidate for the offices of president or vice president.

(10) Governor of the state or lieutenant governor, governor-elect, lt. governor-elect, or a candidate for governor or lt. governor.

(11) Auditor general of the state, treasurer of the state.

[8.7.24] Special circumstance of the victim

(1) The victim was a witness (or a potential witness) to a crime (in any criminal or civil proceeding) and was intentionally killed for purpose of preventing his/her testimony in a criminal (or civil) proceeding (and the killing was not committed during the commission or attempted commission of the crime to which he was a witness), or the victim was a witness (to a crime) and was intentionally killed in retaliation for his/her testimony in a criminal (or civil) proceeding.

(2) The victim was an inmate or another person on the grounds of the facility with permission.

(3) The victim was a juror or former juror while engaged in his/her duties or because of the exercise of his/her duties.

(4) The victim was pregnant.

(5) The victim was severely handicapped or severely disabled.

(6) The victim was defenseless.[216]

(7) The victim was particularly vulnerable due to old age or infirmity.

(8) The victim was especially vulnerable due to significant mental or physical disability.

[8.7.25] Application of aggravating circumstances involving the identity or status of the victim

If there is a knowledge requirement included with the aggravating circumstance, must the defendant actually "know" or is it sufficient that the defendant "should have known" the identity or status of the victim? If the aggravating factor does not mention knowledge, does this mean knowledge is irrelevant?

If a state has a knowledge requirement, it should probably be strictly construed as written. The following states have a statutory knowledge requirement in their aggravating factor of the victim being a police officer: Arizona, California, Colorado, Illinois, Nevada, Ohio, Tennessee, and Utah. The statutes in the rest of the states do not speak specifically to a knowledge requirement. Appellate decisions may provide guidance if a statute is silent on the knowledge requirement. If a knowledge requirement is added, is it "know" or "should have known"? The states differ on this issue. For example, neither the Indiana nor the New Mexico statute mention a knowledge requirement if the victim is a police officer. Indiana's case law requires the defendant must know - not should have known - the victim is a police officer for this aggravating factor to apply.[217] New Mexico, on the other hand, does not require the defendant to know the victim was a police officer for the aggravating circumstance to apply.[218] If a statute does not have a knowledge requirement and there are no appellate decisions on point, the safest approach is to require the prosecutor to prove actual

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[216] This was a Delaware circumstance, but it was declared unconstitutional. *State v. White*, 395 A.2d 1082 (Del. 1978).]

[217] *Castor v. State*, 587 N.E.2d 1281 (Ind. 1992).

[218] *State v. Compton*, 726 P.2d 837 (N.M. 1986).

knowledge or at least that the defendant reasonably should have known the victim's age, profession, title, or special circumstance.

Vulnerability due to old age or infirmity is an aggravating factor that has recently been added to some statutes. In *Francis v. State*,[219] the Supreme Court of Florida rejected the finding of this aggravating circumstance for the first time. The two victims in *Francis* were twin sisters, 66 years of age. They appeared to be in reasonable health for their age. No particular disability was shown. The Supreme Court of Florida noted that an aggravating circumstance must "not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder," citing *Tuilaepa v. California*.[220] The United States Supreme Court agreed that not every murder victim would fall into this category and found it not to be unconstitutionally vague. A similar statute ("particularly vulnerable due to youth") has been approved by a Federal Court.[221] The issue the Court resolved is the application of the terms "particularly vulnerable" and "advanced age."

In *Woodel v. State*,[222] the Supreme Court of Florida held the finding of this aggravator is not dependent on the defendant targeting his or her victim on account of the victim's age or disability. In *Woodel*, the victims were husband and wife, aged 74 and 79. The husband "led a sedentary lifestyle resulting from a triple bypass surgery. He previously had both knees replaced and walked with an uneven gait." The wife suffered from arthritis and had lost partial use of her arm. Defensive wounds were found on her other arm. The Supreme Court approved the finding of this aggravator under the circumstances.

[8.7.26] Proof problems: aggravating circumstances

[8.7.27] Burden of proof

Most state statutes require the aggravating circumstances to be proven beyond a reasonable doubt. Some statutes are silent on the burden of proof required. But even if the statute is silent, the burden is on the prosecution to prove the aggravating factors beyond a reasonable doubt. Inferences or probabilities are not enough.

[8.7.28] Aggravating factors proven in the guilt phase

Many aggravating factors will not require additional proof at the penalty phase hearing because the proof or lack of it will have been established in the guilt phase of the trial. Thus, further proof of these factors is not required unless a new jury is hearing the penalty phase. If there is a new

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[219] *Francis v. State*, 808 So.2d 110 (Fla. 2002)

[220] *Tuilaepa v. California*, 512 U.S. 967, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994).

[221] *United States v. Pretlow*, 779 F. Supp. 758, 774 (D.N.J. 1991).

[222] *Woodel v. State*, 804 So.2d 316 (Fla. 2001)

jury, the prosecutor will be required, unless statute dictates otherwise, to retry parts of the guilt phase with live witnesses and other evidence.

[8.7.29] Proof of new aggravating factors

Aggravating factors that were not proven in the guilt phase (e.g. defendant's prior convictions for violent crimes) must be proven in the penalty phase by calling witnesses and introducing exhibits into evidence. Certified copies of prior convictions are admissible. Business records can be introduced to prove the defendant's custody status. Often, a defendant will offer to stipulate to certain aggravating factors to avoid live testimony, particularly from victims of prior crimes of violence. Generally, the prosecutor can accept the stipulation or reject it. If a stipulation is accepted by the prosecutor, the jury should be informed of the stipulation and instructed to accept it as being true. If the stipulation is not accepted, the prosecution may introduce documents or live testimony to establish other aggravating factors.[223]

[8.7.30] Hearsay testimony

Some states, *e.g.,* Louisiana, require the rules of evidence to apply during a penalty phase proceeding. Other states allow both the state and defense to introduce hearsay. Some states, *e.g.* Arizona and Connecticut, permit the defense to use hearsay to prove mitigating circumstances but do not allow the prosecution to use it to prove aggravating circumstances. Some states do not allow the prosecution to use hearsay to prove aggravating circumstance, but do allow hearsay to be used to rebut mitigating circumstances. As has been noted previously, in *Green v. Georgia*, the United States Supreme Court reversed a death penalty conviction because the defendant was not allowed to present hearsay testimony during the penalty phase.[224] In Florida, Illinois and North Carolina, hearsay is generally admissible so long as there is an opportunity to rebut it[225]. In *People v. Bilski*,[226] the court approved the prosecutor's investigator reading statements from individuals he interviewed. The statements pertained to past misconduct of the defendant. The court concluded the statements contained an "indicia of reliability" because they showed a similar fact pattern of domestic abuse.

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[223] *State v. Josephs*, 803 A.2d 1074 (N.J. 2002) (Trial judge has authority to limit evidence of prior murders to control prejudicial effect.); *State v. Hessler*, 734 N.E.2d 1237 (Ohio 2000); *Singleton v. State*, 783 So.2d 970 (Fla. 2001) (Prosecutor allowed to call prior victim to testify that defendant severed both of her forearms during prior crime.)

[224] *Green v. Georgia*, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979).

[225] *Rhodes v. State*, 547 So.2d 1241 (Fla. 1989); *State v. Strickland*, 488 S.E.2d 194 (N.C. 1997).

[226] *People v. Bilski*, 776 N.E.2d 882 (Ill. 2d Dist. 2001).

The recent case of *Crawford v. Washington*[227] will probably result in hearsay being inadmissible during the penalty phase of a capital trial on Sixth Amendment grounds. Prosecutors are unwise to insist on presenting hearsay evidence and judges are unwise to allow it unless the United States Supreme Court specifically rules that the Confrontation Clause does not apply to penalty phase proceedings. This issue is more fully discussed in §8.2.11.

[8.7.31] Notice to the defense of aggravating factor to be proved

Some states require notice of aggravating factors to be given in the charging document itself. Some states require notice of the specific aggravating factors that will be relied upon at some point prior to trial. Some states allow the prosecutor to amend this notice for good cause shown. Some states require no notice at all. If a statute requires notice to be given and the prosecutor fails to list a particular aggravating factor, no evidence should be allowed to prove that factor unless an amendment is allowed. The death penalty may not be imposed if the prosecutor does not seek it. Such a sentence violates the Fourteenth Amendment's due process clause.[228]

It is likely that the Federal courts will eventually require the aggravating circumstances to be included in the indictment or other charging instrument under the rationale of *Apprendi v. New Jersey.*[229] Wise prosecutors will seek grand jury findings of aggravating circumstances before the Federal courts order it.[230]

[8.7.32] Evidence that violates the Fourth and Fifth Amendments

The prosecutor generally cannot introduce evidence that violates a defendant's constitutional rights. Most statutes prohibit the introduction of any evidence seized in violation of the defendant's Fourth or Fifth Amendment rights. Further, the fact that a defendant belonged to a white racist group called the "Aryan Brotherhood" and had "Aryan Brotherhood" tattooed on his hand (and used the name "Abaddon") is inadmissible because its introduction would violate the defendant's First Amendment rights. In *Dawson v. Delaware,*[231] the United State Supreme Court held that this information might have been admissible if it had related to some issue to be decided. For example, this information might have been admissible if the defendant had killed a black person because of his race and such a killing was an aggravating factor.

[8.7.33] Other non-statutory aggravation

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[227]*Crawford v. Washington*, __ U.S. __, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

[228]. *Lankford v. Idaho*, 500 U.S. 110, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1990).

[229]*See* §8.2.5.

[230]*See, Blakely v. Washington*, 2004 WL 1402697 (June 24, 2004), __ U. S. __ (2004).

[231]*Dawson v. Delaware*, 503 U.S. 159 (1992).

In a state with the Georgia sentencing scheme, the prosecutor is not limited to statutory aggravating factors once a statutory aggravator is proven. All relevant evidence that might be considered aggravating, though not enumerated in the statute, may be admissible. The Illinois Supreme Court has held that the statute that allows the jury to consider "any other reason" why a defendant should be sentenced to death sufficiently minimizes the risk of an arbitrary and capriciously imposed death sentence.[232] Some Georgia scheme states, including Arizona, Connecticut, North Carolina, and New Jersey, limit aggravating circumstances to the statutory list. But, in a state with the Florida sentencing scheme, only statutory aggravating factors may be proven. Admitting evidence of non statutory aggravators will likely result in reversal, especially if the error was not harmless beyond a reasonable doubt. In *Wainwright v. Goode*,[233] the trial judge improperly considered future dangerousness which is not a factor listed in the Florida statute. However, since there were other properly found aggravating factors, and the error was harmless, the death sentence did not violate the Eighth Amendment.

In Texas, evidence is limited to the issues to be presented to the jury. No other evidence is relevant or admissible.

Aggravating circumstances not contained in the record may not be considered by the jury or the judge. For example, it is a violation of due process for the judge to give weight to a social science book and a death case over which his father presided.[234]

[8.7.34] Victim impact evidence

In *Booth v. Maryland*,[235] the United States Supreme Court held the Eighth Amendment prohibited victim impact statements from being admitted in a capital sentencing procedure. In *South Carolina v. Gathers*,[236] the Court extended *Booth* to prohibit prosecutorial argument on the victim's personal characteristics. *Payne v. Tennessee*,[237] overruled *Booth* and *Gathers*. This kind of testimony and argument is now allowed. *Payne* does not affect *Booth's* holding that the Eighth Amendment bars admissions of opinions or characterizations by the victim's family about the crime, the defendant, and the appropriate penalty for the defendant.

Victim impact statements can be disturbing to notions of due process and fairness. Victims often want vengeance instead of justice. There are times, however, when victims want a defendant who deserves the death penalty to be spared, usually for some arbitrary reason, such as religious preferences. Prosecutors should encourage members of the victim's family to limit their statements

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[232] *People v. Chapman*, 743 N.E.2d 48 (Ill. 2000).

[233] *Wainwright v. Goode*, 464 U.S. 78, 104 S. Ct. 378, 78 L. Ed. 2d 187 (1986).

[234] *People v. Dameron*, 751 N.E.2d 1111 (Ill. 2001)

[235] *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987).

[236] *South Carolina v. Gathers,* 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989).

[237] *Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).

to establishing the victim's uniqueness in the community. Some judges require victim impact statements to be presented in writing prior to being submitted to the jury. This is a good idea. Examples of statements that should not be allowed include the following:

(1) Statements designed to chastise or humiliate the accused.
(2) Statements that are for the purpose of advancing a political, social, or religious belief or cause.
(3) Statements that are more appropriate for a press conference or support group.
(4) Statements that contain speculation about future events such as pardon or parole.
(5) Statements that recommend or suggest a particular sentence.
(6) Photographs or other exhibits designed to elicit sympathy for the victim and prejudice the defendant.
(7) Emotional outbursts.

Only in places like The People's Republic of China are the victim's family members allowed to shame and chastise an accused before a judge or a jury. The sentencing process in a capital case does not include allowing a member of the victim's family to demand that the defendant be put to death. The sentence to be imposed must be determined from the presentation of aggravating and mitigating circumstances and not from lay opinion. Additionally, the imposition of any sentence will have an impact upon public funds. Public officials (the prosecutor), and not members of the victim's family, have the responsibility to advocate for a particular sentence. Some states, *e.g.*, California and Florida, prohibit victims from expressing "characterizations and opinions about the crime, the defendant, and the appropriate sentence."[238]

[8.7.35] Newly discovered aggravating circumstances

There is no double jeopardy prohibition to the introduction of newly discovered aggravating circumstances during the retrial of a penalty phase. The prosecutor may also introduce evidence about an aggravating circumstance known at the time of the original trial but not proven. In *Poland v. Arizona*,[239] The Court held the double jeopardy clause is not violated when, at resentencing, an aggravating factor is found that was presented but not considered at the first trial. But if the defendant was sentenced to life imprisonment after the first trial and a new aggravating factor is found, it is too late. The double jeopardy clause is violated if a death sentence is imposed after a sentence of life imprisonment.[240]

[8.8] Defendant's evidence in support of a life sentence

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[238] Cal. Penal Code § 190.3(a); F.S. 921.141(7).

[239] *Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986).

[240] *See Arizona v. Ramsey*, 467 U.S. 203, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984); *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 278 (1981).

All evidence that is properly considered to be mitigating against a death sentence is admissible during the penalty phase. Statutory mitigating factors are only a starting point. Other mitigating factors are limited only by the imagination of defense counsel. Any aspect of a defendant's character, record, background, or any of the circumstances of the offense that the defendant offers as a basis for a sentence less than death is error.[241] For instance, in one Florida case,[242] a supreme court justice listed the following factors that could be considered mitigating:

(1) Defendant completed the fifth grade.
(2) Defendant never knew his father and was raised primarily by an aunt.
(3) Defendant developed behavioral problems after age 11 while living with his mother.
(4) Defendant constantly ran away from home.
(5) Defendant became involved with "less than desirable" people.
(6) Defendant's mother beat his twin brother to death in his presence.
(7) Defendant entered a juvenile delinquency facility at age 13.
(8) Defendant has many brothers and sisters.
(9) Defendant claims no physical or emotional problems.
(10) Defendant changed his residence many times after age 11.
(11) Defendant first used marijuana at age 11 and powdered cocaine at age 20 and is addicted.
(12) Defendant never tried crack cocaine or drug treatment.
(13) Defendant will prove a challenge to his attorney.

A quick review of the list discloses the problem with mitigation, especially in states that follow the Florida or Georgia schemes. For example, if the defendant claims that alcoholism is mitigating, inquiry must be made as to how that is relevant to the case. Was the defendant under the influence of alcohol at the time of the offense? Has long-term alcohol abuse caused brain damage that is linked to the crime? Some states have abolished "voluntary intoxication" as a defense. However, voluntary intoxication can be used in mitigation. Second, and this is the most difficult aspect of mitigation, many of the factors listed above do not sound like they are mitigating at all. Presenting these mitigators to a jury in a state with the Florida scheme may be unwise. The jury may simply believe this evidence provides an opportunity to cleanse the shallow end of the gene pool of unwanted rubbish. It may be more prudent for the defense to waive a jury in the penalty phase or, in states that allow it, to present this type of mitigation to the trial judge prior to the sentencing as additional mitigation. The defendant may have a more difficult choice in presenting this type of mitigation in states that follow the Georgia or Texas schemes because the jury determines the sentence in those states.

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[241]*See Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

[242]*Miller v. State*, 733 So.2d 955 (Fla. 1999) (Anstead, J., concurring).

One court has given guidance on how to determine and weigh mitigation.[243] First, determine whether the factor in question is mitigating in nature. It is automatically mitigating in nature if it falls within a statutory category. Second, if the factor is not part of the statutory list, determine if it is mitigating under the facts of the case at hand before submitting it to the jury. Third, assign weight to be given to the factor found to be mitigating if the state is a "weighing state."

Death penalty cases are reversed by appellate courts more often than any other type of criminal case. Careful consideration of mitigating circumstances is crucial, especially in states where trial judges have the ultimate responsibility for determining the penalty to be imposed.[244] However, the high reversal rate indicates that trial judges in these states either do not understand the requirement to give mitigating circumstances significant consideration or simply follow the emotional recommendation of the juries, even when the case is a close one.

[8.8.1] Statutory mitigating circumstances

Most states list certain statutory mitigating factors. These factors usually relate to the defendant, the crime, and the victim and can be categorized that way just like aggravating factors. All of the circumstances that follow come from one or more of the state statutes. Statutory mitigating circumstances must be considered by the jury, the judge, or both if there is any evidence to support them. Some states do not list statutory mitigating factors, but all of the factors listed below should be considered even if no statutory circumstances are listed in the statute.

[8.8.2] Category I: The defendant - past, present, and future

[8.8.3] The defendant's past criminal record or activities

Almost all states that list statutory mitigators require the consideration of the defendant's lack of a past criminal record as a mitigating circumstance. Some variations are:

(1) The defendant has no significant history of prior criminal activity (some states include "delinquency adjudications").

(2) The defendant's record lacks any significant prior conviction.

(3) The defendant has no significant history of prior criminal convictions.

(4) The defendant has not previously been found guilty of a crime of violence, entered a plea of guilty or nolo contendere to a charge of a crime of violence, or had a judgment of probation or stay of entry of judgment enhanced on a charge of a crime of violence.

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[243] *Ford v. State*, 802 So.2d 1121 (Fla. 2001).

[244] See, Liebman, *A Broken System: Error Rates in Capital Cases 1973-1995.*

(5) The defendant has not previously been convicted of another capital offense or of a felony involving violence.

[8.8.4] Application of lack of prior record or criminal activities as mitigation

If the statutory circumstance does not include the word "conviction," what constitutes "history" or "activity"? Can the prosecutor introduce a defendant's record of non violent crimes before the defendant attempts to put this circumstance in issue? Can juvenile crimes be considered?

A defendant who has been adjudged to be delinquent as a juvenile has not been "convicted" of a crime. So juvenile offenses are not "convictions." Evidence of juvenile adjudications is not admissible as an aggravating circumstance or as rebuttal to a defendant's claim of no prior "convictions." The result may be different if the mitigator is defined as "no significant history" or "no prior criminal activity." For instance, delinquency adjudications may be admissible in rebuttal if a defendant relies upon "lack of significant history" or "prior criminal activity."

Unlike the parallel aggravating circumstance of prior criminal activity, the mitigating circumstance of no significant prior criminal activity is generally not limited to convictions or to violent felonies. So, if a defendant announces an intention to rely on this mitigator, the prosecutor can introduce convictions of nonviolent felonies or misdemeanors and may even introduce evidence short of a conviction in rebuttal, such as evidence of a crime that has not yet been tried[245]. Some states, *e.g.* Alabama, allow only adult convictions to rebut this mitigating circumstance.[246]

Generally, if the defendant announces that this mitigating circumstance will not be relied upon, evidence of other crimes that do not qualify as an aggravating circumstance are inadmissible. The defendant is not entitled to a jury instruction on this mitigating factor unless evidence is presented on the subject.[247]

If absence of significant prior criminal activity is not a statutory mitigating circumstance, it must be recognized as a non statutory mitigating circumstance.

[8.8.5] The defendant's mental status at the time of the crime

Almost all states list at least one mitigating factor - some more than one - that deal with the defendant's mental or emotional state at the time of the crime. Some variations are:

(1) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

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[245] *Dennis v. State*, 817 So.2d 741 (Fla. 2002); *State v. Greene*, 528 S.E.2d 575 (N.C. 2000).

[246] *Ex Parte Burgess*, 811 So.2d 617 (Ala. 2000).

[247] *Delo v. Lashley*, 507 U.S. 272, 113 S. Ct. 1222, 122 L. Ed. 2d 620 (1993).

(2) The capacity of the defendant to appreciate the criminality (wrongfulness) of his/her conduct or to conform his/her conduct to the requirement of laws was "substantially" or "significantly" impaired. (Some states add "due to a mental defect, disease, illness, mental incapacity, mental disorder emotional disturbance, drugs alcohol, retardation or one or more of the above.")

(3) The emotional state of the defendant at the time the crime was committed.

(4) The defendant was under the influence of drugs or alcohol.

No matter the wording of a particular state's definition of this category of mitigating circumstance, all of these variations have been recognized as mitigating factors - statutory or non-statutory. Therefore, any or all of the above factors need to be considered as mitigating the sentence of death.

[8.8.6] Application of mental status as mitigation

Do some of these issues require expert testimony? What if the defendant is indigent? Does the state or county have to pay for the expert or experts? What if a statute says the emotional disturbance must be "extreme" or the defendant's capacity must be "significantly" or "substantially" impaired and the expert testifies that the defendant was impaired, but not "substantially" so, or that the defendant was under the influence of mental or emotional disturbance, but not "extremely" so?

[8.8.7] Expert testimony

Expert psychologists and psychiatrists are typically called as witnesses to testify to the state of mind of the defendant when the crime was committed. If the defendant desires to explore these mental mitigators and has a basis to do so, the failure of the state to provide such an expert at public expense will probably cause a death sentence to be reversed for a new sentencing hearing.[248] Lay testimony is also admissible.[249]

It is important to understand that these circumstances do not require the establishment of insanity. These factors can be argued to the sentencer - with or without expert testimony - if the facts indicate the impairment of the defendant's mental condition, or that drugs or alcohol contributed to the defendant's behavior. Whether or not the condition falls within the wording of a particular statute is a question for the sentencer. If the testimony is in conflict, the sentencer will have to resolve these

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[248] *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

[249] *Nance v. State*, 526 S.E.2d 560 (Ga. 2000); *Rivers v. State*, 458 So.2d 762 (Fla. 1984); *Strausser v. State*, 682 So.2d 539 (Fla. 1996); *Soloman v. State*, 49 S.W.3d 356 (Tex. Crim. App. 2001).

conflicts. If the testimony is not in conflict, it may be error for the sentencer not to find and consider this type mitigating circumstance.[250] However, uncontroverted expert testimony can be rejected if it is difficult to reconcile it with other evidence in the case.[251] If a statute requires "extreme" mental or emotional disturbance or that the defendant's capacity was "substantially" or "significantly" impaired, and the expert testifies that the defendant was mentally disturbed, but not extremely so, or the defendant's capacity was impaired, but not substantially so, the jury must be allowed to consider the statutory circumstance.

In *Stewart v. State*,[252] the only expert testified that the defendant's capacity was impaired, but not substantially so. The defendant requested the jury be instructed on the statutory mitigating circumstance of the defendant's substantially impaired capacity. The judge refused to do so, because the only expert testimony was that his impairment was not "substantial" - a requirement under the statute. The Supreme Court of Florida reversed for a new sentencing hearing. The Court stated:

> Once a reasonable quantum of evidence is presented showing impaired capacity, it is for the jury to decide whether it shows 'substantial' impairment . . . .To allow an expert to decide what constitutes 'substantial' is to invade the province of the jury. Nor may a trial judge inject into the jury's deliberation his views relative to the degree of impairment by wrongfully denying a requested instruction.[253]

This case is cited to suggest that it is better to give an instruction on a requested mitigating circumstance and allow the jury to sort it out (with help from closing arguments) than to refuse an instruction on a statutory mitigating circumstance. Trial judges cannot be reversed for giving a defendant's requested instruction, but can be reversed for refusing to give it. Additionally, although the proffered testimony may not reach the level of a statutory mitigating circumstance, all such testimony must be allowed, if it is otherwise admissible, because mitigation such as alcohol, drugs, and mental factors are clearly non statutory mitigating factors that must be considered by the sentencer even if they do not rise to the level of the statutory mitigating factor(s).

Some states require the defendant to notify the prosecutor that mental mitigation will be presented during the penalty phase and submit to a mental examination by a state expert for purposes

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[250] *Mann v. State*, 420 So.2d 578 (Fla. 1982); *Nibert v. State*, 574 So.2d 1059 (Fla. 1990); *Knowles v. State*, 632 So.2d 62 (Fla. 1993).

[251] *Nelson v. State*, 850 So.2d 514 (Fla. 2003); *Jenkins v. State*, 2004 WL 362360 (Ala. Crim. App. 2004).

[252] *Stewart v. State*, 558 So.2d 416 (Fla. 1990)

[253] *Id.* at 402.

of rebuttal. A defendant who refuses to cooperate can be precluded from presenting mental mitigation.[254]

[8.8.8] The age of the defendant when the crime was committed

Section 8.3 of these materials discusses statutes that provide an age under which the death penalty is not allowed. This section concerns a defendant who is death eligible, but whose age may be a mitigating factor. Almost all states list the defendant's age as a statutory mitigating factor. Some variations are:

(1) The age of the defendant at the time of the crime.

(2) The youth of the defendant at the time of the crime.

(3) The youth or advanced age of the defendant at the time of the crime.

(4) The defendant was less than eighteen years of age when the murder was committed.

[8.8.9] Age as a mitigating circumstance

If a statute lists only "age" as a mitigating factor, does this include the old as well as the young? What about the defendant's emotional age? When is a defendant "old" or "young"? What is "youth"?

The United States Supreme Court has held that the Eighth Amendment prohibits imposition of the death penalty for any defendant who is less than 16 at the time of the crime.[255] The Court has also held that it is not an Eighth Amendment violation to execute a defendant who was 16 or 17 at the time of the crime.[256] And while the Court has held it is not cruel and unusual punishment to execute a 22 year old mentally retarded defendant with a mental (emotional) age of 6 ½ years, that holding has been superceded by *Atkins v. Virginia*.[257] A more complete discussion of this subject is included in §8.3. Although there may be no Eighth Amendment prohibition against imposition of the death penalty due to the age of the defendant, age can still be a mitigating factor if the defendant is young or old or has a young mental or emotional age.

Unless a statute lists the exact age under which it is a definite statutory mitigating circumstance, such as variation (4) above, the jury should be allowed to consider the defendant's age,

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[254]*Philmore v. State*, 820 So.2d 919 (Fla. 2002), *cert. den.*, 537 U.S.895, 123 S.Ct. 179, 154 L.Ed.2d 162; *State v. Johnson*, 576 S.E.2d 831 (Ga. 2003).

[255]*Thompson v. Oklahoma*, 487 U.S. 815 (1988).

[256]*Stanford v. Kentucky*, 492 U.S. 361 (1989).

[257]*Atkins v. Virginia*, 536 U. S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

either chronological or emotional, anytime the defense requests it.[258] Failure to give this circumstance to a jury for consideration or failure to consider this factor in the sentencing order may result in reversal. The lawyers in the case can put the defendant's age in perspective during closing argument. If a sentencing order is required, the defendant's age should be discussed in it and given the weight it deserves.

Some states, notably Florida scheme states, have held "the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes."[259] In *Ramirez v. State*,[260] the court held the trial judge abused his discretion in giving "little weight" to the defendant's age at the time of the crime (one month over 17) when there was uncontroverted testimony that the defendant was emotionally, intellectually, and behaviorally immature. There is no requirement to give youthful age any particular weight in some Georgia scheme states.[261] The age of a defendant who has reached majority should only be given significant weight if it is linked with some other characteristic of the defendant or the crime, such as significant emotional immaturity or mental problems.[262]

[8.8.10] The defendant's cooperation with the police and the prosecutor

Four states list the defendant's cooperation with police or a specific statutory mitigating circumstance:

(1) The extent of the defendant's cooperation with law enforcement officers or agencies and with the office of the district attorney (Colorado).[263]

(2) The defendant rendered substantial assistance to the state in the prosecution of another person for the crime of murder (New Jersey).[264]

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[258] *Archer v. State*, 673 So.2d 17 (Fla. 1996); *Campbell v. State*, 679 So.2d 720 (Fla. 1996). *See*, *Blackwood v. State*, 777 So.2d 399 (Fla. 2000) which suggests that it may have been error not to consider the defendant's age of 37 as a mitigating factor except it was not requested.

[259] *Urbin v. State*, 714 So. 2d 411, 418 (Fla. 1998).

[260] *Ramirez v. State*, 739 So.2d 568 (Fla. 1999).

[261] *State v. Craig*, 699 So.2d 865 (La. 1997).

[262] *Hurst v. State*, 819 So.2d 689 (Fla. 2002); Johnson v. State, 820 So.2d 842 (Ala. Crim. App. 2001); *State v. Peterson*, 516 S.E.2d 131 (N.C. 1999); *Johnson v. State*, 203 A.2d 1267 (Md. 1998); *State v. Jackson*, 918 P.2d 1038 (Ariz. 1996) (defendant age 16); *State v. Ballew*, 667 N.E.2d 369 (Ohio 1996); *Holmes v. State*, 671 N.E.2d 841 (Ind. 1996).

[263] Colo. Stat. §16-11-103(4)(h).

[264] NJ ST 2C: 11-3(5)(g).

(3) The defendant cooperated with the authorities (New Mexico).[265]

(4) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution for a felony (North Carolina).[266]

The defendant's cooperation with the police or the prosecutor has been recognized as a non statutory mitigating circumstance in states that do not include it in the list of statutory mitigating circumstances.[267]

[8.8.11] Cooperation as a mitigating circumstance

Does this factor include a defendant's confession to the police? Does a guilty plea equal cooperation? What about lack of cooperation? Does this factor apply if the cooperation occurs after the death sentence is imposed?

The defendant's cooperation with the authorities, such as confessing to the crime or pleading guilty, is recognized as either a statutory or non statutory mitigating factor under certain circumstances. For instance, the fact that the defendant entered a guilty plea and provided an unsworn statement expressing remorse and apologizing to the families of the victims has been held to be a mitigating factor entitled to weight at sentencing.[268] The defendant's remorse and assistance to the police can be sufficient to become mitigating factors.[269]

Not all cooperation is sufficient to qualify as mitigating. When a defendant voluntarily confesses, appears before the grand jury, and pleads guilty, such cooperation can be rejected as mitigating when the defendant's willingness to cooperate was not motivated by remorse but his plan to obtain a life sentence so he could return to prison and murder another inmate who had robbed him.[270] A defendant is not entitled to have cooperation considered as mitigating when the defendant believes his guilt to be discoverable and after he hides or destroys evidence, evades detection and denies knowledge of the crime before he decides to "cooperate."[271] Cooperation out of self interest can disqualify this mitigating circumstance. If the defendant calls the police from the crime scene, awaits their arrival and then lies about knowing anything about the crime, the court can conclude that

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[265] NM Stat. §31-20A-6(H).

[266] NC ST S 15A-2000(f)(8).

[267] *Hocker v. State*, 840 So.2d 197 (Ala. Crim. App. 2002).

[268] *State v. Fitzpatrick*, 810 N.E.2d 927 (Ohio 2004).

[269] *State v. Rojas*, 592 N.E.2d 1376 (Ohio 1992).

[270] *Agan v. State*, 445 So.2d 326 (Fla. 1983).

[271] *State v. Pandeli*, 26 P.3d 1136 (Ariz. 2001).

he acted out of self interest and conclude the "cooperation" does not constitute a mitigating circumstance.[272]

Assuming the cooperation or assistance given to the police to be sufficient to be mitigating, the weight to be given to it may be minimal. Mitigation has been given very little weight where the defendant assisted the police in finding the torsos of his victims but that assistance was of little value since the identifying parts of the bodies (heads, hands, and feet) were disposed of at a separate location.[273] Likewise, a defendant's cooperation should be given very little weight when it does not occur until after the co-defendant implicates him in the crime.[274]

What about lack of cooperation? In one case, the Supreme Court of Tennessee considered "lack of cooperation" while determining the death penalty was proportionate. The court held the death penalty was neither arbitrary nor disproportionate, given the circumstances of murder, where the defendant played a major role in offense and did not cooperate with authorities or express remorse. Additionally, the defendant and the co-defendant actively planned the robbery of an acquaintance of the co-defendant's, the defendant stated that victim would have to be killed to keep him from reporting the robbery, and the defendant repeatedly beat the 60-year-old victim as he tried to resist, gagged the victim with a cloth, placed a plastic bag over his head, tied the bag around his neck with electrical cord, and strangled him. Thereafter, the victim was placed in a bathtub while still alive and a plunger was used to hold his head under water.[275]

It is too late to claim cooperation as a mitigating circumstance in a Georgia scheme state after the jury has rendered its death sentence verdict, even if the prosecutor agrees to it. Post verdict cooperation is more properly brought to the attention of the governor of the state in a clemency proceeding.[276]

Numerous cases involving cooperation as a mitigating circumstance are reported in Alabama, Arizona and Ohio. The common theme is that cooperation must be early, complete and without prior evasiveness or denial. Further, before cooperation amounts to a circumstance worth serious weight or consideration, it must lead to material evidence that actually assists the investigation. Cooperation must be evidence of remorse and not some ulterior motive.

[8.8.12] The defendant's lack of future dangerousness

Just as some states allow the defendant's future dangerousness to be considered in aggravation, three states have a statutory mitigating factor that speaks to the likelihood of the defendant not being a continuing threat to society. The variations are:

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[272] *State v. Doerr*, 969 P.2d 1168 (Ariz. 1998).

[273] *Lugo v. State*, 845 So.2d 74 (Fla. 2003).

[274] Raliegh v. State, 705 So.2d 1324 (Fla. 1997).

[275] *State v. Bane*, 57 S.W.3d 411 (Tenn. 2001).

[276] *Commonwealth v. Moran*, 636 A.2d 612 (Pa. 1993).

(1) The defendant is not a continuing threat to society (Colorado).[277]

(2) It is unlikely the defendant will engage in further criminal activity that would constitute a continuing threat to society (Maryland).[278]

(3) The defendant is likely to be rehabilitated (New Mexico).[279]

[8.8.13] Lack of future dangerousness as a mitigating circumstance

The discussion in 8.7.8 explains the kind of evidence usually presented in order to establish future dangerousness as an aggravating circumstance. This same approach can be used to establish lack of future dangerousness as a mitigating circumstance.

If the defense does not rely upon lack of future dangerousness as a mitigating circumstance, can the prosecutor present testimony concerning defendant's future dangerousness in anticipation in its case in chief? Is expert testimony admissible to establish lack of future dangerousness?. Is expert testimony reliable?

One state (California) has held that the state cannot introduce expert testimony predicting that the defendant will commit future acts of violence. In *People v. Murtishaw*, the state introduced testimony of a psychopharmacologist who testified, that the defendant, in a prison setting, "will continue to be a violent, assaultive and combative individual" and "he could show the same types of homicidal tendencies that he has shown in the past, with no ability to morally or physically constrain himself to the demands of the environment in which he finds himself.". The California Supreme Court remanded the case for a new penalty phase stating,

> We believe that the trial court should not have permitted this testimony. We shall explain that (1) expert predictions that persons will commit future acts of violence are unreliable, and frequently erroneous; (2) forecasts of future violence have little relevance to any of the factors which the jury must consider in determining whether to impose the death penalty; (3) such forecasts, despite their unreliability and doubtful relevance, may be extremely prejudicial to the defendant. The admission of this testimony, in our opinion, constitutes error requiring reversal of the verdict at the penalty trial.[280]

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[277]Colo. Stat. §16-11-103(4)(k).

[278]Md. Code 1957 Art. 27 §413(g)(7).

[279]NM Stat. §31-20A-6(G).

[280]*People v. Murtishaw*, 631 P.2d 446 (Cal. 1981).. at 768.

However, the defendant is entitled to introduce evidence of lack of future dangerousness if defense counsel chooses to do so. In *People v. Lucerno*,[281] the defense expert was asked, "as to how Mr. Lucero would adjust in a structured setting like a prison for years down the road?" The prosecutor objected on the grounds stated in *Murtishaw* and the trial court sustained the objection. The case was remanded for a new penalty phase hearing because, California evidentiary rules aside, *Eddings v. Oklahoma* requires the consideration of "any aspect of a defendant's character ... that the defendant proffers as a basis for a sentence less than death."[282]

Lucerno also holds if the defense introduces such expert testimony, the state may introduce experts in rebuttal. The United States Supreme Court has held that the use of this type of testimony does not violate the Constitution.[283] Some states have begun to disallow the use of experts for this prediction.[284]

A critical question here is whether state law allows the prosecutor attorney to present rebuttal evidence prior to and in anticipation of the defendant's presentation of mitigating evidence. If so, this could allow the prosecutor to introduce aggravating testimony, otherwise inadmissible as a statutory aggravating factor, even before the defense puts forth such evidence as mitigating. Most states that do not list future dangerousness as an aggravating factor would not allow the prosecutor to put forth such rebuttal evidence until the defendant has offered this type of evidence in mitigation. However, in a state using the Georgia scheme (if one statutory aggravating factor is proven, all relevant evidence must be received because the prosecution is not limited to statutory aggravating factors), the prosecutor may be able to present this type of testimony in its case in chief. However, in a state with the Florida scheme, when future dangerousness is not listed as an aggravating factor, the defense will have to present evidence on this in issue before the prosecutor can introduce rebuttal evidence.

[8.8.14] Category II: The crime and the circumstances surrounding it

[8.8.15] Minor participation in the crime by the defendant

Most states list a mitigating factor that deals with the crime committed by two or more persons where the defendant is a participant, but his participation is minor compared to the others. Some variations are:

(1) The defendant was an accomplice in the capital felony committed by another person and his/her participation was relatively minor. (With little or no variation, twenty four states lists this circumstance.)

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[281] *People v. Lucerno*, 750 P.2d 1342 (Cal. 1988).

[282] *Id.* at 1027.

[283] *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983).

[284] *Redmen v. Nevada*, 828 P.2d 395 (Nev. 1992).

(2) The defendant was not personally present during the commission of the act or acts causing death.

[8.8.16] Minor participation as a mitigating circumstance

Does this factor apply to one who hires a "hitman" to commit the crime? Is this the same as the *Enmund/Tison* death penalty prohibition? How does this apply to cases where each co-defendant points the finger for the actual murder at the other defendant?

It cannot be said that one who hires another to commit a murder has "minor" participation in it. In Illinois, the only state with variation (2) above, there is only one case that discusses this mitigating circumstance.[285] It is doubtful that Illinois would allow a defendant who hired another to do the killing (and was not personally present) to take advantage of this mitigating factor. It is probably more appropriately applied to the driver of the getaway car in a robbery where the defendant is a principle and cannot meet the *Enmund* criteria to avoid the death penalty altogether.

Clearly, this mitigating circumstance is not for an *Enmund* defendant. *Enmund* defendants are not death eligible. If a defendant is death eligible because of the *Tison* extension of *Enmund*, there will probably be an issue of fact as to whether the defendant's participation in the actual murder itself was relatively minor.[286] If two or more people commit a murder, it is quite possible that one of them was a minor participant in the murder. That defendant should have this mitigation presented to the sentencer for consideration. Each defendant has the right to have the jury consider this circumstance, and resolve the conflict, a finger pointing case. In such cases there often is no conflict because it may be impossible for the state to present the testimony of the co-defendant to contradict the defendant's statements, especially if the state is seeking the death penalty for both defendants. Any evidence supporting this mitigating factor must be given to the jury for its determination.

[8.8.17] The defendant committed the crime under duress, under the influence of another, or because of other extenuating circumstances

This mitigating circumstance exists in almost all states that list mitigating circumstances. It applies generally to murders that are not legally defensible, but there are extenuating circumstances that exist to mitigate against the death penalty being imposed as the sentence. Some variations are:

(1) The defendant acted under (extreme) duress.

(2) The defendant acts under the (substantial) domination of another person.

(3) The defendant acts under unusual and substantial duress.

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[285] *People v. Ruiz*, 447 N.E.2d 148 (Ill. 1982).

[286] *See,* §8.3 for a discussion of the *Enmund/Tyson* exclusion.

(4) The defendant acted under unusual pressures or influences or under the domination of another person.

(5) The defendant acted under extreme duress or under the substantial domination of another person.

(6) The defendant acted under the provocation of another person.

(7) The offense was committed under circumstances that the defendant reasonably believed to be a moral justification or extenuation (or excuse) for his/her conduct.

(8) The defendant had a good faith belief - although mistaken - that circumstances existed which constituted a moral justification for defendant's conduct.

(9) The defendant acted under other circumstances that extenuate the gravity of the crime even though not a legal excuse for the crime.

(10) The defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm.

[8.8.18] Extenuating circumstances as mitigation

What types of factual situations are included here? The circumstance are varied. One is a so-called "mercy killing," where the defendant believes putting the victim "out of her misery" is the right thing to do. Other examples are: (1) a suicide pact, where the defendant kills the other person but does not commit suicide; (2) a son or daughter acting under orders from a parent; (3) a younger person acting under orders from an older person; (4) a subordinate acting under orders from a superior. Another example is where the defendant believes, although incorrectly, that the victim had to be killed to avoid death or serious bodily harm to the defendant or to another person. Because the jury rejects self-defense in the guilt phase does not mean the defendant cannot receive the benefit of this mitigating circumstance. If any evidence is submitted to support this circumstance, the sentencer must be allowed to consider the existence of this circumstance.

[8.8.19] Lack of foreseeable harm

Three states (Arizona, Colorado, and Connecticut) list lack of foreseeability as follows:

> The defendant could not reasonably have foreseen that his/her conduct would cause or create a grave risk of causing death to another person.[287]

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[287] A.R.S. 13-703(G) (2004); Colo. Stat. §18-1.3-1201(4)(e) (2004); Conn. Gen. Stat. §53a-46a(h)(4).

[8.8.20] Lack of foreseeable harm as a mitigating circumstance.

Lack of foreseeable harm arises in a number of ways. For example, the aggravating circumstance of cruelty is not proven in a murder for hire case where the defendant hired others to kill the victim but did not intend for the victim to be brutalized. Under that circumstance, the brutalization is not foreseeable and the cruelty aggravating circumstance is avoided altogether.[288] The same rationale applies to certain aggravating circumstances, such as murder for pecuniary gain, which require proof that the motive for the killing was pecuniary gain and not an afterthought or a result of the killing.[289]

Most often this mitigator arises as a mitigating circumstance in the context of felony murder or conspiracy and is related to the "lack of intent to kill" mitigating circumstance.[290]

Some states allow defenses to felony murder. Typical defenses are: (1) the defendant did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (2) was not armed with a deadly weapon, or any dangerous instrument; and (3) had no reasonable ground to believe that any other participant was armed with such a weapon or instrument; and (4) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.[291] A jury may reject these defenses in the guilt phase of the trial but, like most mitigating circumstances that arise out of the facts of the case, may consider them mitigating if the defendant claims the homicide was unforeseeable. An example of this kind of situation is a case where the victim dies, not from wounds inflicted by the defendant, but by medical malpractice.[292]

A conspirator may be held liable for criminal offenses committed by a coconspirator that are within the scope of the conspiracy, are in furtherance of it, and are reasonably foreseeable as a necessary or natural consequence of the conspiracy. The rationale behind the principle of vicarious liability of conspirator is that, when the conspirator has played a necessary part in setting in motion a discrete course of criminal conduct, he should be held responsible, within appropriate limits, for the crimes committed as a natural and probable result of that course of conduct.[293] A conspirator who is criminally liable as a matter of law, may be able to argue that his participation in the crime was less culpable than his coconspirators as a matter of fact on the grounds that the homicide was not foreseeable.

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[288]*State v. Carlson*, 48 P.3d 1180 (Ariz. 2002).

[289]*State v. Lee*, 917 P.2d 692 (Ariz. 1996).

[290]*See*, §8.8.29.

[291]Conn. Gen. Stat. §53a-54c.

[292]See, *Hallman v. State*, 371 So.2d 482 (Fla 1979), overruled on other grounds, *Jones v. State*, 591 So.2d 911 (Fla. 1991). *See*, §8.8.23.

[293]*State v. Coltherst*, 820 A.2d 150 (Conn. 2000).

Lack of foreseeable harm may become a matter of mitigation when the homicide occurs under strange or bazaar circumstances. Perhaps the facts could include a victim of a robbery who chases the defendant and has a heart attack due to the exertion of the chase. Or perhaps this circumstance would apply during a purse snatching if the victim trips, falls, receives a head injury, and later dies as a result of an aneurysm during a purse snatching.

[8.8.21] Category III: The victim's conduct

Many states listing mitigating circumstances include one that addresses the victim's own conduct that might have contributed to his/her death. Some variations are:

(1) The victim was a willing participant, initiator, aggressor, or provoker of the incident.

(2) The defendant was provoked by the victim.

[8.8.22] Victim's conduct as a mitigating circumstance

There are many factual situations that fit this mitigating circumstance. Most often, this circumstance will need to be considered when the defense at the guilt phase was justifiable use of deadly force (self-defense). The jury may reject self-defense as a legal defense to the crime and still consider it as a mitigating circumstance. This mitigator also applies in felony murder cases if the applicable statute allows the death of a co-perpetrator to a crime, killed by someone other than the defendant, to be a capital offense. It applies when a defendant kills a person as part of a suicide pact but fails to commit suicide himself. And it applies to mercy killings

[8.8.23] Category IV: Miscellaneous mitigating factors

There are two statutory mitigating factors that do not seem to fit the broad categories of the defendant, the crime, or the victim. They are:

(1) The act of the defendant is not the sole proximate cause of the victim's death.[294]

Presumably, this Maryland factor applies if the defendant seriously wounds the victim justifying a conviction of murder, but part of the reason for the victim's death is medical malpractice, or the refusal of the victim to accept medical care. The criminal law does not excuse the defendant from being convicted of murder under either of those circumstances, but the medical malpractice could be used to mitigate the sentence.[295]

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[294] MD CODE 1957, Art. 27, § 413(g)(6).

[295] *State v. Ulin,* 548 P.2d 19 (Ariz. 1976) (medical malpractice does not excuse criminal conduct in a homicide unless it becomes the sole cause of death); *State v. Smith*, 496 So.2d 195 (Fla.

(2) Another defendant in the same case, equally culpable, will not be punished by death.[296]

Under some sentencing schemes, the existence of this factor will preclude imposition of the death penalty altogether. Section 8.3 contains a general discussion about disparate sentences.

This New Hampshire factor speaks for itself. If one co-defendant, who is equally culpable, enters into a plea agreement with the prosecution, or, after trial, receives a sentence of life imprisonment, the jury or judge must consider this factor in deciding the sentence of the other co-defendant.

Most statutory mitigating circumstances discussed in this Section must be considered as non statutory mitigating circumstances if a particular state statute fails to list them. However, this particular mitigating circumstance has been accepted by some courts and rejected by others.[297]

[8.8.24] Category V: "Catch-all" statutory mitigator

Sixteen states have added a "catch-all" mitigating circumstance to the list of statutory mitigating circumstances. All states now recognize that the jury must be told that mitigating circumstances are not limited to those specified by the statutes. The "catch-all," factor is listed as "any other aspect of the defendant's character (or background) or record, and any other aspect of the crime may be considered in mitigation of the sentence of death." Whether the "catch-all" is listed in a statute or not, failure to instruct the jury accordingly will result in a new sentencing hearing unless this error is found to be harmless.[298] Sentencing orders, if required, must state that the sentencing court is aware that mitigating circumstances are not limited to the statutory list.[299]

[8.8.25] Non-statutory mitigating circumstances

All states now recognize that the sentencer must be allowed to consider mitigating factors, whether or not specifically enumerated by the state's statute, if they relate in any way to the

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3d DCA 1086); *State v. Arner*, 538 So.2d 528 (Fla. 4th DCA 1989), Glickstein, J., dissenting; *Rose v. State*, 591 So.2d 195 (Fla. 4th DCA 1991); *Evans v. State*, 499 A.2d 1261 (Md. 1985); *People v. Griffin*, 594 N.Y.S.2d 694 (N.Y. 1993). *See*, §8.8.20.

[296]NH ST S 630:5, VIg.

[297]See §8.8.25(3)(f).

[298]*Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987).

[299]*See, Graham v. Collins*, 507 U.S. 698, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993) and *Johnson v. Texas*, 509 U.S. 350, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993). These two cases involve the Texas statute before it was amended to allow the jury to consider all mitigation presented by the defendant.

defendant's character, record, or background, and those that relate to any other aspect of the crime that the defendant offers as a basis for a sentence less than death.[300] The United States Supreme Court has left no doubt about this. A death sentence will be reversed for a new penalty phase hearing if the trial judge fails to instruct the jury about non-statutory mitigation.[301] Some of these broad categories deserve further discussion.

[8.8.26] The defendant's character or background

This mitigating circumstance includes family background,[302] employment background,[303] alcoholism/drug dependency,[304] military service (including Vietnam-era post traumatic stress syndrome),[305] and mental, emotional problems, or retardation that do not reach the level of statutory mitigating factors.[306] Other matters of mitigation in this category include, abuse (physical, sexual, or mental) of defendant by parents or others,[307] the defendant's contributions to society, including

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[300]*See, Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); and *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

[301]*See Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987)); *Penry v. Lynaugh,* 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

[302]*Graham v. Collins*, 506 U.S. 461, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993); *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987); *Eddings v. Oklahoma,* 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); *Moore v. Clark*, 904 F.2d 1226 (5th Cir. 1990)

[303]*State v. Leavitt*, 822 P.2d 523 (Idaho 1991); *Smalley v. State*, 546 So.2d 720 (Fla. 1989).

[304]*Booker v. Dugger*, 922 F.2d 633 (11th Cir. 1991); *Demps v. Dugger*, 874 F.2d 1385 (11th Cir. 1989); *Hargrave v. Dugger*, 832 F.2d 1528 (11th Cir. 1987).

[305]*Jackson v. Dugger*, 931 F.2d 712 (11th Cir. 1991); *Booker v. Dugger, supra*; *Demps v. Dugger, supra*. Two cases discussing the defendant's claim of Vietnam-era post traumatic stress syndrome are, *Johnson v. Dugger*, 932 F.2d 1360 (11th Cir. 1986) and *People v. Lucerno*, 750 P.2d 1342 (Cal. 1988).

[306]*McKoy v. North Carolina*, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990); *Penry v. Lynaugh, supra; Eddings v. Oklahoma, supra; Booker v. Dugger, supra.*

[307]*Penry v. Lynaugh*, supra; *Eddings v. Oklahoma*, supra.

charitable contributions and humanitarian deeds,[308] the quality of being a caring parent,[309] the defendant's age (both chronological and emotional),[310] and the defendant's regular church attendance or religious devotion.[311]

If a state lists mental or emotional factors that are modified by such words as "substantial" or "extreme" as a statutory mitigators and the evidence does not rise to this level, this factor must still be considered by the jury or judge as a non statutory mitigating factor. In other words, a defendant who wants to present this evidence to a jury must be allowed to do so. If the sentencing judge has written a sentencing order, this factor must not be ignored simply because the evidence does not meet the level required by the statute.[312]

[8.8.27] The defendant's criminal record

This mitigating circumstance includes the defendant's criminal record (including previous and predicted prison behavior),.[313] the defendant's potential for rehabilitation (lack of future dangerousness),[314] the defendant's good jail conduct, including death row behavior,[315]

[8.8.28] Any other aspect of the offense

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[308]*Franklin v. Lynaugh*, 487 U.S. 164, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988). (Not addressed in majority opinion), (O'Connor, J., concurring; Stevens, J., dissenting)

[309]*Tafero v. Wainwright*, 796 F.2d 1314 (11th Cir. 1986).

[310]*Johnson v. Texas*, supra; *Graham v. Collins*, supra; *Penry v. Lynaugh*, supra; *Eddings v. Oklahoma*,supra; *Lockett v. Ohio*, supra; *Thompson v. Oklahoma*, 487 U.S. 815, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1988). Statutes refer to chronological age when listing this mitigating circumstance. Non-statutory mitigation may include emotional age.

[311]*Franklin v. Lynaugh*, 487 U.S. 164, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988). (Not addressed in majority opinion), (O'Connor, J., concurring; Stevens, J., dissenting); *Graham v. Collins*, supra; *Jackson v. Dugger*, supra.

[312]*See, Booker v. Dugger*, 922 F.2d 633 (11th Cir. 1991).

[313]*Lockett v. Ohio*, supra; *Jackson v. Dugger*, supra. This is a statutory mitigating circumstance in most states. If it is not listed in a particular statute, it can be considered as a non-statutory mitigating circumstance.

[314]*Hitchcock v. Dugger*, supra; *Lockett v. Ohio*, supra; *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989).

[315]*Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986); *Demps v. Dugger*, 874 F.2d 1385 (11th Cir. 1989).

This mitigating circumstance includes the defendant's remorse,[316]cooperation with the authorities, including confession to the crime, assistance in locating evidence and testimony against co defendants,[317] the fact that the defendant was a minor participant in the crime, the fact that the victim was a participant in the crime and the fact that a co defendant received a lesser sentence.[318]

The fact that a co-defendant received a lesser sentence is a circumstance has been accepted by one state (New Hampshire) as a statutory mitigator.[319] It has been accepted by one state (Florida) as a non statutory mitigating circumstance. It has generally been rejected by "non-weighing states." The state and lower federal courts have split on the issue. One line of cases considers the lesser sentence of a co-defendant to be relevant[320] and another line of cases reaches the opposite conclusion.[321] Courts that allow this mitigating circumstance consider the relative culpability of the co defendants while states that do not take the position that each jury trial has to stand on its own evidence and merit.[322]

The United States Supreme Court has held that appellate courts need not one co defendant's sentence to another co-defendant's sentence but that was in the context of whether state courts of last resort are required to conduct a proportionality review.[323] The Court has not ruled directly on the issue.

[8.8.29] Defendant's lack of intent to kill

This mitigating circumstance can be argued in a felony murder case where the intent to kill is

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[316]*Booker v. Dugger*, 922 F.2d 633 (11th Cir. 1991); *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989); *Magill v. Dugger*, 824 F.2d 879 (11th Cir. 1987).

[317]*Wilkerson v. Collins*, 950 F.2d 1054 (5th Cir. 1992)

[318]See Section 8.3 for a discussion of disparate sentences.

[319]See §8.8.23.

[320]*Demps v. Dugger*, 874 F.2d 1385 (11th Cir. 1989); People v. Gleckler, 411 N.E.2d 849 (Ill. 1980); *Brookings v. State*, 495 So.2d 135 (Fla. 1986); State v. McIlvoy, 629 S.W.2d 333 (Mo. 1982); *Coulter v. State*, 438 S.2d 336 (Ala. Crim. App. 1982); *State v. Williams*, 292 S.E.2d 243 (N.C. 1982); *Johnson v. State,* 477 So.2d 196 (Miss. 1985), rev'd on other grounds, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); *Brogie v. State*, 695 P.2d 538 (Okl. Crim. App. 1985). *Peoples v. Beltnontes*, 755 P.2d 310 (Cal. 1988).

[321]*Brogdon v. Blackburn*, 790 F.2d 1164, 1169 (5th Cir.1986); *People v. Dyer*, 45 Cal.3d 26, 69-71, 246 Cal.Rptr. 209, 234-36, 753 P.2d 1, 26-27 (1988); *Brogie v. State*, 695 P.2d 538, 546-47 (Okla.1985); *State v. Williams*, 305 N.C. 656, 686-87, 292 S.E.2d 243, 261- 62 (1982).

[322]*Johnson v. State*, 477 So.2d 196 (Miss. 1985).

[323]*Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 871 (1984).

not present.[324] The felony murder rule has questionable origin and has outlasted its usefulness. Many courts have condemned it as an outmoded throw back to medieval times. Some legal hisorians claim the rule was invented by Lord Chief Justice Edward Coke through a misapplication of the law attaching ciminal liability to principles in a crime. The English Parliament abolished it in that country in 1957.[325] The case of *Aaron v. State*,[326] contains a critical analysis of origins, history and application of the felony murder rule. Other sources have been equally critical of the rule. For instance one court stated,

> Felony murder has never been a static, well-defined rule at common law, but throughout its history has been characterized by judicial reinterpretation to limit the harshness of the application of the rule. Historians and commentators have concluded that the rule is of questionable origin and that the reasons for the rule no longer exist, making it an anachronistic remnant, "a historic survivor for which there is no logical or practical basis for existence in modern law." [327]

In *People v. Phillips*,[328] the court stated, "[w]e have thus recognized that the felony-murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application. Indeed, the rule itself has been abandoned by the courts of England, where it had its inception. It has been subjected to severe and sweeping criticism."

The felony murder rule artificially raises culpability for any homicide to the level of first degree murder without consideration of scienter. A homicide that would be second degree murder, manslaughter, or justifiable homicide, becomes first degree murder if committed during any statutorily enumerated felony. Since the rule already raises a lesser homicide to first degree murder, the fact that the homicide was not premeditated presents strong mitigation against the felony murder aggravator. In fact, they should cancel each other out.

[8.8.30] Determining if a non-statutory circumstance is mitigating

Defendants regularly rely upon mitigating circumstances that are not included in a particular statute. The lists of statutory and non-statutory mitigation in these materials are generally accepted by other states and provide a starting point. A good rule of thumb is include evidence in mitigation unless

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[324] *Lockett v. Ohio*, supra.

[325] Section 1 of England's Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, s 1.

[326] *Aaron v. State*, 299 N.W.2d 304 (Mich. 1980).

[327] Moreland, *Kentucky Homicide Law With Recommendations*, 51 Ky.L.J. 59, 82 (1962). *See also*, Fletcher, *Reflections on Felony murder*, 12 S.W.U.L.R. 413 (1980-1981); Gegan, *Criminal Homicide in the Revised New York Penal Law*, 12 *N.Y.L. Forum* 565, 586 (1966).

[328] *People v. Phillips*, 64 Cal.2d 574, 582-583, 51 Cal.Rptr. 225, 415 P.2d 353, 360 (1966)

the local courts, or the United States Supreme Court has specifically rejected the evidence as being mitigating. In Florida scheme states, each mitigating circumstance must be considered and weighed in the sentencing order. The jury must not be refused the opportunity to consider any evidence that is reasonably mitigating. The jury may give mitigation the weight it deserves in weighing states and must consider it in non-weighing states.

The Supreme Court of Florida has given guidance to trial judges on how to approach weighing mitigating circumstances. This guidance assists judges to decide whether a proffered mitigating circumstance is valid. First, the judge must determine whether the factor in question is mitigating in nature. It is automatically mitigating in nature if it falls within a statutory category. Next, if the factor is not part of the statutory list, the judge must determine if it is mitigating under the facts of the case at hand. Finally, at least in Florida scheme states, assign the weight to be given to the factor if it has been found to be mitigating.[329]

[8.8.31] Circumstances that are not mitigating

The following have been determined not to constitute non-statutory mitigating circumstances:

(1.) Residual or lingering doubt.[330]

This position is by no means unanimous. Some states, notably Tennessee, include lingering doubt among the non-statutory mitigating circumstances.[331]

In *Way v. State*,[332] one justice stated,

> I write separately to address Way's point on appeal that this Court should recede from its prior decisions that preclude the consideration of "lingering" or "residual" doubt as a non-statutory mitigator--especially because this was a resentencing proceeding in which the jury did not decide the issue of guilt.
>
> Many of the concerns over the death penalty have focused on the possibility of executing an innocent person--a specter that runs contrary to the interests of justice.... While a jury verdict of guilt based on competent substantial evidence is sufficient for upholding convictions and prison sentences, I do not believe it is always enough for upholding a death sentence. There are cases, albeit not many, when a review of the

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[329] *Ford v. State*, 802 So.2d 1121 (Fla. 2001).

[330] *Franklin v. Lynaugh*, 487 U.S. 164, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988); *King v. State*, 514 So.2d 354 (Fla. 1987); *Way v. State*, 760 So.2d 903 (Fla. 2000); *Darling v. State*, 808 So.2d 145 (Fla. 2002).

[331] *Hartman v. State*, 42 S.W.3d 44 (Tenn. 2001); *State v. Henness*, 679 N.E.2d 686 (Ohio 1997) (reasonable doubt allowed to be "raised.").

[332] *Way v. State*, 760 So.2d 903, 922-923 (Fla. 2001), Pariente, J., concurring.

evidence in the record leaves one with the fear that an execution would perhaps be terminating the life of an innocent person.

Earlier, Justice Thurgood Marshall made similar observations:

> There is certainly nothing irrational--indeed, there is nothing novel--about the idea of mitigating a death sentence because of lingering doubts as to guilt. It has often been noted that one of the most fearful aspects of the death penalty is its finality. There is simply no possibility of correcting a mistake. The horror of sending an innocent defendant to death is thus qualitatively different from the horror of falsely imprisoning that defendant. The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice. As such it has been raised as a valid basis for mitigation by a variety of authorities.[333]

Actually, the courts have tacitly recognized the "lingering doubt" concept by calling it "newly discovered evidence." "Newly discovered evidence" issues are brought by motions for new trial as well as postconviction relief proceedings. Lingering doubt also arises in post conviction claims involving *Brady* issues.[334]

Prosecutors wish that every homicide would occur in the presence of two innocent, uninterested eyewitnesses who are the pillars of the community. Unfortunately, it never happens that way. Often the quality of the evidence rather than the quantity of it hinders making a case. For instance, forensic evidence may become less than trustworthy due to mistake, fraud or unavailability. Sometimes witnesses die or disappear. When this happens, prosecutors have to make concessions or use evidence that has questionable reliability. Accomplices are given plea bargains in return for their testimony, confessions taken under less than ideal circumstances are introduced, and jailhouse snitches save their skins by testifying.[335] These cases often do not withstand the test of time and death sentences are frequently reduced to life or lesser terms.[336]

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[333] *Heiney v. Florida*, 469 U.S. 920, 921-22, 105 S.Ct. 303, 83 L.Ed.2d 237(1984) (dissenting from denial of certiorari) (emphasis supplied).

[334] *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[335] *See, e.g., Morris v. State*, 811 So.2d 661 (Fla. 2002).

[336] See, *State v. Mills*, 788 So.2d 249 (Fla. 2001). The author was the successor judge who was assigned to Mills' post conviction motion. Mills was sentenced to death on the testimony of his co-defendant, who was given complete immunity for his testimony. The co-defendant bragged about his perjured testimony many years later. Mills ultimately received a life sentence. Mills' case was reviewed by the Supreme Court of Florida four times, the United States Court of Appeals, Eleventh Circuit, twice and by the United States Supreme Court twice. It was the quality of the evidence that doomed the State's case. But it took over twenty years for the courts to admit the identity of the

Newly discovered evidence usually comes in two forms: recanted testimony and testimony or other evidence that was unknown at the time and could not reasonably have been discovered. But it is not enough for the evidence to be newly discovered. The newly discovered evidence must be probative enough to probably produce a different result.[337]

In *Armstrong v. State*,[338] the court stated the rule as follows:

> Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial. "Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury." Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted. (Citations omitted..)

Brady violations are governed by different rules than newly discovered evidence. In *Strickler v. Greene*,[339] the United States Supreme Court summarized the important constitutional principles arising from the State's failure to disclose material evidence to the defendant:

> In *Brady*, this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, and that the duty encompasses impeachment evidence as well as exculpatory evidence. . . . In order to comply with Brady, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police."
>
> These cases, together with earlier cases condemning the knowing use of perjured testimony, illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States attorney is "the representative not of an ordinary party to a

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actual killer would never be known to any degree of certainty.

[337]. *State v. Watts*, 835 So.2d 441 (La. 2003); *Williams v. State*, 722 So.2d 447 (Miss. 1998); *Armstrong v. State*, 642 So.2d 730 (Fla. 1994); *State v. Fisher*, 859 P.2d 179 (Ariz. 1993).

[338]*Id.*

[339]*Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

controversy but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[340]

The Court explained the principle necessitating reversal when the prosecutor fails to disclose material favorable evidence to the defense in the *Brady* opinion:

> The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. . . . A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . .[341]

As was stated in *Rogers v. State*,[342] "errors involving the suppression of evidence in violation of *Brady* raise issues of constitutional magnitude. In order to establish a *Brady* violation, a defendant must prove: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued."

Not every instance where the State withholds favorable evidence will rise to the level of a *Brady* violation necessitating the granting of a new trial, but only those where there is a determination that the favorable evidence that was withheld resulted in prejudice.

In *Kyles v. Whitley*,[343] the court stated,

> The materiality of the inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict".

The determination of whether a *Brady* violation has occurred is subject to independent

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[340] *Id.* at 280-81 (citations and footnote omitted).

[341] *Brady v. Maryland*, supra.

[342] *Rogers v. State*, 782 So. 2d 373, 376-77 (Fla. 2001).

[343] *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)

appellate review.[344] Further, the cumulative effect of the suppressed evidence must be considered when determining materiality.[345] The fact that a witness is discredited or impeached on one matter does not necessarily render additional impeachment cumulative.[346]

Thus, a *Brady* violation only requires proof of prejudice instead of proof of a probable different result, and that distinction can become crucial in capital litigation.

(2) Extraneous emotional factors[347]

(3) Descriptions of executions[348]

(4) Evidence of the church's opposition to the death penalty[349]

(5) Evidence that the death penalty is not a deterrent[350]

(6) Testimony of the victim's relatives requesting that the death penalty not be imposed.[351]

(7) Testimony that it would cost less to imprison the defendant for life than it would to execute him.[352]

(8) The state's offer of life imprisonment in return for a guilty plea.[353]

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[344] *See, Rogers v. State*, 782 So. 2d at 377 (Fla. 2001); *Way* v. *State*, 760 So. 2d at 913 (Fla. 2000).

[345] *Way, Id.*

[346] *Brown v. Wainwright*, 785 F.2d 1457, 1466 (11 Cir. 1986); *United States v. Rivera Pedin*, 861 F.2d 1522, 1530 (11th Cir. 1988).

[347] *California v. Brown*, 497 U.S. 538 (1987). (*mere* sympathy)

[348] *Johnson v. Thigpen*, 806 F.2d 1243 (5th Cir. 1986).

[349] *Glass v. Butler*, 820 F.2d 112 (5th Cir. 1987).

[350] *Martin v. Wainwright*, 770 F.2d 918 (11th Cir. 1985).

[351] *Robinson v. Maryland*, 829 F.2d 1501 (10th Cir. 1987); *See Section* 8.7.30. (Victim Impact Evidence.)

[352] *Hitchcock v. State*, 578 So.2d 685 (Fla. 1991), *rev'd on other grounds*, 505 U.S. 1215, 112 S.Ct. 3020 (Mem), 120 L.Ed.2d 892 (1992).

[353] *Id.*

(9) The sentence of a co-defendant to life, or a lesser term or imprisonment.[354]

[8.9] Proof problems - mitigating circumstances

[8.9.1] Burden of proof

Most states require the state to establish aggravating circumstances beyond a reasonable doubt and provide for a lesser burden of proof to establish mitigating circumstances. Is there a constitutional problem in requiring the defendant to prove mitigating factors at all? This issue was specifically rejected by the United States Supreme Court in *Walton v. Arizona*.[355] Arizona required the defendant to prove, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency. Walton contended that this requirement violated the Eighth and Fourteenth amendments, and that the Constitution required the defendant be able to claim mitigating circumstances unless the state negated them by a preponderance of the evidence. The Court found nothing wrong with Arizona's requirement that the burden of proving mitigating circumstances was on the defendant and that the burden of proof was by a preponderance of the evidence.

Some other states (Maryland,[356] New Hampshire,[357] Pennsylvania, and Wyoming,[358] for example) use preponderance of the evidence as their standard. Alabama's statute gives the defendant the burden of "interjecting" the issue and once interjected, the prosecutor has the burden of disproving by a preponderance of the evidence.[359] In Florida, juries are instructed that if they are "reasonably convinced" of a mitigating circumstance, it may be considered as established.[360] The majority of states do not give the burden of proof regarding mitigating evidence as part of their statute. In those states it is necessary to research relevant case law. If all else fails, rely upon the United States Supreme Court's approval of the "preponderance" standard as an appropriate burden.

[8.9.2] Expert Testimony

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[354] This applies to some jurisdictions, notably Texas and non-weighing states. *See, Section* 8.8.25.

[355] *Walton v. Arizona*, supra.

[356] MD CODE 1957, Art. 27 §413(g).

[357] NH ST S 630:5.

[358] WY ST §6-2-102.

[359] AL ST §13A-5-45(g).

[360] F.S.A. Std. Crim. Jury Instr. 7.11.

Many recognized mitigators - both statutory and non-statutory - require proof through psychiatric or other expert testimony. Indigent defendants are entitled to have these experts appointed at public expense.[361]

[8.9.3] Waiver of particular mitigating factor by the defendant

Generally, if a defendant waives presentation of a particular mitigating circumstance, neither the prosecutor nor the defense may present evidence about it. However, such evidence may become admissible to impeach a witness' testimony. For example, the defendant will probably want to waive the mitigating factor of no significant history of prior criminal activity if there has been a prior conviction of a crime but not a crime of violence. (If defendant tried to rely upon it, the prior record would be admissible in rebuttal and the defendant would probably not want the jury to be aware of it.) If the defendant's relatives or other witnesses testify that the defendant is not a person who is likely to violate the law, the prosecutor may be able to inquire about the defendant's prior record to impeach the witness.

The trial judge should question the defendant on the record in order to establish that the waiver of a particular mitigating factor has been made freely and voluntarily with knowledge of its consequences.

[8.9.4] Weighing states

Assigning weight to be given to mitigating circumstances is subjective at best. The sentencing court may determine what amount of weight to give to relevant mitigating evidence, but may not exclude such evidence from consideration.[362] The correct approach to mitigation that has little or no weight is to find that the mitigator has been established and give it "little" or "some" weight. One court has held that a mitigator can be given "no" weight.[363] However, giving a mitigator "no" weight could result in a remand if the reviewing court disagrees. It is safer practice to at least give the mitigator "some" weight so the reviewing court knows the mitigator has been considered.

[8.9.5} Hearsay

Many states allow hearsay testimony, within limits, during the penalty phase. Hearsay is generally allowed to prove statutory or non-statutory mitigating circumstances.[364] Other rules of evidence may still have to be complied with before the hearsay is admissible. For example, unless a state permits transcripts of previous testimony and depositions to be used, the unavailability of the

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[361] *See, Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

[362] *Eddings v. Oklahoma*, 452 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982).

[363] Trease v. State, 768 So.2d 1050 (Fla. 2000).

[364] *Green v. Georgia*, 442 U.S. 95 (1979).

witness may have to be established before a transcript of that witness's previous testimony can be admitted. Some courts allow hearsay provided it can be rebutted.[365]

Allowing the prosecutor to introduce hearsay to prove an aggravating circumstance is probably error after *Crawford v. Washington*.[366]

[8.10] The defendant who wants the death penalty

Generally, the defendant will want to escape the death penalty. But what if the defendant wants to be executed and insists on presenting no mitigating evidence and no closing argument? Most states have dealt with this issue. However, a good discussion of the problem is contained in a book authored by David A. Davis[367] Florida has had several of these cases. In *Hamblin v. State*,[368] the court ruled the defendant had the right to represent himself and control his own destiny. In *Anderson v. State*,[369] the defendant had counsel but directed him to present no testimony at the penalty phase. His death penalty was upheld. In *Klokoc v. State*,[370] the defendant refused to allow his attorney to participate in the penalty phase, indicating he wanted to die. The trial court appointed special counsel to represent the "public interest" in bringing forth mitigating factors to be considered by the court. Even though the trial court sentenced the defendant to die, the Supreme Court of Florida, after rejecting defendant's request to dismiss the appeal, reversed the death sentence to life imprisonment based upon the mitigation presented by the special counsel.

In Florida, the jury recommends the penalty but the trial judge has the responsibility to make a separate determination and render a comprehensive sentencing order. In the case of *Muhammad v. State*,[371] the defendant became disgruntled over his murder conviction and refused to present evidence of mitigation. The jury returned a death penalty recommendation and the trial judge sentenced Muhammad to death. The Supreme Court of Florida set forth the procedure to be used in such cases in the future by looking to both New Jersey and Georgia for guidance. The court stated:

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[365]*Parker v. State*, 873 So.2d 270 (Fla. 2004); *Ex Parte Dunaway*, 746 So.2d 1042 (Ala. 1999).

[366]*See*, *§* 8.7.28.

[367]David A. Davis "Capital Cases - When the Defendant Wants to Die," *The Champion*, June 1992, pp. 45-47. Mr. Davis points to other articles as well: Linda E. Carter, "Maintaining Systematic Integrity in Capital Cases: The Use of Court Appointed Counsel to Present Mitigating Evidence when the Defendant Advocates Death," 55 Tennessee Law Review 95; Richard C. Dieter, "Ethical Choices for Attorneys Whose Clients Elect Execution," 3 Georgetown Journal of Legal Ethics 799.

[368]*Hamblin v. State*, 527 So.2d 800 (Fla. 1988),

[369]*Anderson v. State*, 574 So.2d 87 (Fla. 1991)

[370]*Klokoc v. State*, 589 So.2d 219 (Fla. 1991)

[371]*Muhammad v. State*, 782 So.2d 343 (Fla. 2001)

> In the past, we have encouraged trial courts to order the preparation of a PSI [Presentence Investigation] to determine the existence of mitigating circumstances "in at least those cases in which the defendant essentially is not challenging the imposition of the death penalty." Farr v. State, 656 So.2d 448, 450 (Fla.1995) ("Farr II "); see Allen v. State, 662 So.2d 323, 330 (Fla.1995). Having continued to struggle with how to ensure reliability, fairness, and uniformity in the imposition of the death penalty in these rare cases where the defendant waives mitigation, we have now concluded that the better policy will be to require the preparation of a PSI in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence. To be meaningful, the PSI should be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background. In addition, the trial court could require the State to place in the record all evidence in its possession of a mitigating nature such as school records, military records, and medical records. Further, if the PSI and the accompanying records alert the trial court to the probability of significant mitigation, the trial court has the discretion to call persons with mitigating evidence as its own witnesses. This precise procedure has been suggested by the New Jersey Supreme Court in State v. Koedatich, 112 N.J. 225, 548 A.2d 939, 992 (1988), and recognized as appropriate by the Georgia Supreme Court in Morrison v. State, 258 Ga. 683, 373 S.E.2d 506, 509 (1988). If the trial court prefers that counsel present mitigation rather than calling its own witnesses, the trial court possesses the discretion to appoint counsel to present the mitigation as was done in Klokoc v. State, 589 So.2d 219 (Fla.1991), or to utilize standby counsel for this limited purpose. 782 So.2d at 363. (Footnotes omitted.)

In states like Florida, the recommendation of the jury is entitled to be given "great weight'. This requirement is relaxed when the defendant presents no mitigation to the jury.[372]

[8.11] Closing arguments

[8.11.1] In general

All states permit both sides to give closing argument. Some states allow the prosecution to go last and some allow the defense to go last. Some give the prosecutor an opening argument and a rebuttal argument. Some states allow the defendant or defense counsel to make the final argument. Many states do not mention final argument in a statute. Presumably, in these states final arguments follow the same procedure as at trial.

[8.11.2] State's argument

Appropriate argument.

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[372] *Id.*

A proper argument is one that reflects how the evidence tends to prove the existence of aggravating circumstances or how the evidence does not support the existence of statutory or non-statutory mitigating circumstances. Argument is proper when it deals with the balancing or weighing of the circumstances or any other aspect of the law that will be given to the jury to use in making the penalty decision.

Reference to matters outside the evidence, such as the increasing crime rate or the deterrent effect of the death penalty, may be proper if the subject is "within the common knowledge of all reasonable people."[373] These arguments are seldom necessary to win a case and merely give the defendant an issue to argue on appeal if a conviction is obtained. Counsel should be encouraged not to make this type of reference. Some judges provide counsel with a list of matters considered prohibited in final argument and the list often includes matters outside the record.

Inappropriate argument.

Many of the cases that criticize inappropriate closing argument by prosecutors in general apply to the closing argument of a penalty phase. Examples include arguments that contain personal opinions, inflammatory arguments, and golden rule arguments. Any argument that is improper in any other criminal trial is improper in a penalty phase argument. However, some arguments that have been condemned specifically relate to death penalty arguments.

[8.11.3] Denigration of the role of the jury

Judges should closely monitor the prosecutor's closing to be certain the role of the jury in the sentencing process is in no way minimized. This is particularly crucial in a jury sentencing state. In *Caldwell v. Mississippi*,[374] the prosecutor told the jury that if a death sentence was returned, an appellate court would review it and could overturn it if it was wrong. This inappropriate reference to the judicial process resulted in a reversal of the death sentence.

However, even in a state where the jury recommends a sentence, it is still improper to minimize the jury's responsibility either in final argument or in jury instructions. In these states the jury should be instructed that the recommendation must be given "great weight" by the court and that it can be disregarded only in the rarest of circumstances.

In *Mann v. Dugger*,[375] the prosecutor, during voir dire, told the jury that their recommendation was simply a recommendation and that the court was not bound by it. He further stated that the jury did not impose the death penalty and that burden was not on their shoulders. He emphasized that the jury acted in an advisory capacity only with the ultimate sentencing responsibility resting with the court. During final argument he again stated the sentencing responsibility ultimately, rests with the

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[373] *See*, *Brook v. Kemp*, 762 F.2d 1383 (11th Cir. 1985); *Tenorio v. United States*, 390 F.2d 96 (9th Cir. 1968).

[374] *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1988).

[375] *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988). See, also, *Harich v. Dugger*, 844 F.2d 1464 (11th Cir. 1988).

court. The U. S. Circuit Court of Appeals for the Eleventh Circuit held that the jury's role in the Florida scheme is significantly important enough to trigger Eighth Amendment rights and misleading the jury into believing their role is unimportant is error.

[8.11.4] Arguing aggravation not listed in the statute

In states following the Florida scheme, except Delaware, and in Georgia scheme states that limit aggravating factors to those set forth in the statute, the prosecutor may not argue matters in aggravation that are not listed in the statute. A common example of this is the defendant's lack of remorse. No state lists lack of remorse as a statutory aggravating factor. Unless nonstatutory aggravating factors are allowed, a prosecutor must refrain from arguing the fact that the defendant has shown no remorse for the killing. The same problem exists if a prosecutor attempts to argue future dangerousness if it is not a listed aggravating factor. While prior violent conduct can be argued in most states because such conduct is a statutory aggravating circumstance, future dangerousness cannot be argued unless it is also a statutory aggravator. Of course, if remorse or lack of future dangerousness is offered in mitigation it can be rebutted by other evidence and argued to the jury.[376]. Another example is an argument regarding the deterrent effect, in general, of the death penalty. Arguments that attempt to shift mitigation into aggravation, such as arguing that a bad childhood, mental problems, and alcoholism are actually aggravating, are also improper.

[8.11.5] Personal opinions, expertise, and selection of death penalty cases

In *Brooks v. Kemp*,[377] many pages are devoted to proper versus improper prosecutorial argument. The court clearly says the prosecutor's personal belief in the death penalty is improper. An argument in which it is claimed the prosecutor or the prosecutor's office seeks the death penalty in only a few cases and that the case presently before the jury, above most of the others, deserves the death penalty, is an improper argument. In *Johnson v. Wainwright*,[378] the court held the prosecutor's personal opinion that the death penalty was appropriate to the case at hand, and the argument that his office seeks the death penalty in only a limited amount of cases, were both improper arguments.[379]

[8.11.6] Costs of life imprisonment versus death

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[376] *People v. Pollack*, 89 P.3d 353 (Cal. 2004).

[377] *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985), opinion reinstated after remand, 809 F.2d 700 (11th Cir. 1987).

[378] *Johnson v. Wainwright*, 778 F.2d 623 (11th Cir. 1985).

[379] *See also, People v. Frye*, 959 P.2d 183 (Cal. 1998); *People v. Scott*, 939 P.2d 354 (Cal. 1997); *Torres v. State*, 962 P.2d 3 (Okla. Crim. App. 1998); *State v. Grant*, 620 N.E.2d 50 (Ohio 1993).

It is not uncommon for prosecutors to argue that the cost of life imprisonment exceeds the cost of imposing the death penalty. This argument is improper because the cost of any penalty imposed by a court is irrelevant to any issue to be decided by a jury. Additionally, this argument is outside the evidence and is probably inaccurate as well.[380]

In *Brooks v. Kemp,*[381] the court stated,

> It was clearly improper for Whisnant (the prosecutor) to argue that death should be imposed because it is cheaper than life imprisonment. The factual assertion was completely unsupported. More importantly, cost is not accepted as a legitimate justification for the death penalty . . . . The jury cannot be exhorted to impose death for that reason.

[8.11.7] Improper focus on the victim

It is clearly improper for a prosecutor to urge the imposition of death because of the race, religion, sex, or social status of the victim. Any reference to such potentially prejudicial characteristics must be undertaken only with the greatest of care and only when the reference is relevant to some legitimate issue in the case. Excessive focus on the characteristics of the victim, even if no explicit link is drawn between those factors and the punishment sought, may also be improper when the effect is to inject irrelevant considerations into the sentencing decision.[382]

State law governs which arguments are proper or improper. For example, future dangerousness is a proper topic for argument if a statute lists it as an aggravating circumstance or, if the state follows the Georgia scheme and allows unlisted aggravating circumstances. State appellate courts, even in Georgia scheme states, will differ on the appropriateness of a deterrent argument - mostly because of the unsettled disagreement regarding the deterrent effect of the death penalty. State law also differs on the propriety of a "send a message to the community" argument. Some hold it to be proper; others do not.[383]

In the United States Supreme Court case of *Darden v. Wainwright,*[384] the prosecutor made a number of improper closing remarks in his guilt phase closing. Some of the remarks included

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[380] One estimate puts the cost of the average execution in Florida at $3.2 million. David Von Drehle, *Bottom Line: Life in Prison One-Sixth as Expensive*, Miami Herald, 12A (July 10, 1988).

[381] *Brooks v. Kemp, supra*, at 1412:

[382] *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985).

[383] *State v. Rogers*, 562 S.E.2d 859 (N.C. 2002); *State v. Baden*, 572 S.E.2d 108 (N.C. 2002); *Middleton v. State*, 80 S.W.3d 799 (Mo. 2002) (Proper argument); *Urbin v. State*, 714 So.2d 411 (Fla. 1998); *Bertolotti v. State*, 476 So.2d 130 (Fla. 1985) (Improper argument).

[384] *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986).

blaming the department of corrections for allowing the defendant out on furlough, arguing the only way to insure that the prison system would not let the defendant out again was to impose the death penalty, calling the defendant an "animal," wishing the victim had been in possession of a shotgun and had blown the defendant's face off, and wishing the defendant had committed suicide with the last bullet in the murder weapon. The Court reviewed not only whether the arguments rendered the trial itself fundamentally unfair, but also whether the improper remarks deprived the sentencing determination of the reliability required by the Eighth Amendment. Most of the remarks were "invited" by the defendant's argument. Quoting *State v. Young*,[385] the Court stated the "idea of invited response is not used to excuse improper comments, but to determine their effect upon the trial as a whole." This case points out the importance of proper closing arguments by the prosecutor, not only in the sentencing phase of the trial but in the guilt phase as well. Clearly, the trial judge should have controlled the improper arguments in the case.

[8.11.8] Defendant's Argument

Appropriate argument.

Any argument that shows the lack of aggravating circumstance(s) or the existence of statutory or non-statutory mitigating circumstances is proper. Any argument that deals with the law the jury will be given to make the penalty decision is proper.

Inappropriate argument.

The same rules of inappropriate defense argument generally apply in penalty phase arguments as they do at any trial. Defense counsel cannot inject personal opinions about the death penalty into argument any more than the prosecutor can. Inflammatory arguments and golden rule arguments are also improper. The matters below relate specifically to death penalty arguments.

[8.11.9] Ineffective assistance of counsel arguments

Judges must be ever mindful in listening to defense counsels' closing arguments. Improper arguments will be raised as an ineffective assistance of counsel claim in a later collateral proceeding. The claim will be raised in both state and federal courts. This is a fertile field for a new penalty phase hearing to be ordered.

In *King v. Strickland*, [386]the U. S. Circuit Court of Appeals, Eleventh Circuit, remanded for a new penalty phase based on ineffective assistance of counsel both in failing to present available mitigating evidence and for making a closing argument that may have done "more harm than good" The defense counsel called the crime "evil and gross" and "cruel and evil." He implied that, as a public defender, he had to represent the defendant. The Eleventh Circuit stated:

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[385]*State v. Young*, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).

[386]*King v. Strickland*, 714 F.2d 1481 (11th Cir. 1983), *cert. granted and judgment vacated*, 467 U.S. 1211 (1984), *on remand*, 748 F.2d 1492 (11th Cir. 1984).

> In effect, counsel separated himself from his client, conveying to the jury that he had reluctantly represented the defendant who had committed a reprehensible crime. Reminding the jury that the undertaking is not by choice, but in service to the public effectively stacks the odds against the accused. (Citation omitted). Rather than attempting to humanize King, counsel in his closing argument stressed the inhumanity of the crime.

In *Osborn v. Shillinger*,[387] the U. S. Circuit Court of Appeals, Tenth Circuit, reversed the defendant's guilty plea and death sentence due to counsel's failure to fulfill his duty of loyalty to his client. The court stated:

> Counsel's argument at the sentencing hearing stressed the brutality of the crimes and the difficulty his client has presented to him . . . . In closing, counsel referred to the problems Osborn's behavior had created for counsel throughout the representation. Counsel described the crimes as horrendous. He analogized his client and the co-defendants to "sharks feeding in the ocean in a frenzy; something that's just animal in all aspects."

Both *King* and *Osborn* stand for the proposition that a case will be tried again if the defendant's counsel abandons vigorous representation and loyalty to the defendant during final arguments in the penalty phase. What should the trial judge do when this happens? There are no easy answers. There are times when the judge must interrupt the proceedings, excuse the jury and discuss the argument on the record. In some circumstances, the defendant should be allowed to express approval or disapproval of the argument. Counsel should be admonished if the argument is determined to be improper and the jury should be instructed to disregard it. Waiting until it is too late removes the ability to correct the harm. Being aware of the problem will help. But only an alert and observant trial judge can determine when or if counsel should be interrupted and corrective action taken.

[8.11.10] Residual or lingering doubt

States vary on whether residual or lingering doubt (something between beyond a reasonable doubt and absolute certainty of defendant's guilt) is a non-statutory mitigating circumstance. Tennessee recognizes it.[388] In *Franklin v. Lynaugh*,[389] the United States Supreme Court held, in a plurality opinion, there is no Constitutional requirement to have lingering or residual doubt considered in mitigation. However, a close reading of the case suggests that the failure to give a requested jury instruction did not impair the defendant's right - if he had one. The Court stated that the trial court

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[387] *Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988).

[388] *Hartman v. State*, 42 S.W.3d 44 (Tenn. 2001).

[389] *Franklin v. Lynaugh*, 487 U.S. 164 , 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988).

placed "no limitation whatsoever on petitioner's opportunity to press the 'residual doubts' question with the sentencing jury."

If a state specifically precludes residual or lingering doubt to be a mitigating circumstance, then defense counsel's closing argument should not include this type of argument. However, in a circumstantial evidence case, especially a close one, it will be very difficult for a trial judge not to allow this type of argument.

[8.11.11] The aggravating circumstance laundry list argument

If a state lists ten aggravating circumstances (or eight, or six, or fourteen) and only one or two apply to the case being tried, may the defendant argue the case is not very aggravated because the legislature has listed ten circumstances and only one (or two) apply? May the defendant's attorney then proceed to inform the jury of all the aggravating circumstances that do not apply? One state has specifically answered this question against the defendant. In *Floyd v. State*,[390] the court held that the trial court can restrict closing argument to the aggravating factors for which evidence has been presented and therefore might apply and need not allow argument of other aggravating factors that do not apply.

[8.12] Jury instructions

[8.12.1] *Caldwell* problems: denigrating the role of the jury

In states in which the jury recommends the sentence to the judge, it is important that the jury's role not be minimized in closing arguments or in the jury instructions. The United States Supreme Court has not dealt specifically with a *Caldwell* problem in a state with the Florida sentencing scheme. There was an opportunity to do so in *Drugger v. Adams*,[391] but the Court relied upon a procedural default to deny relief instead of deciding the case on the merits. However, in *Mann v. Dugger*,[392] the court held that *Caldwell v. Mississippi*,[393] applies not only to a jury-sentencing state, but also to a judge-sentencing state where the judge receives a recommendation from the jury. The Court reasoned that the jury recommendations must be given great weight in Florida and a recommendation of life can be overridden only in rare circumstances.

A jury instruction under the Florida scheme state should be as follows:

"Your advisory sentence is entitled by law and will be given great weight by this court in determining which sentence will be imposed upon the defendant. It is only under rare circumstances

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[390] *Floyd v. State*, 569 So.2d 1225 (Fla. 1990).

[391] *Drugger v. Adams*, 489 U.S. 401, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989).

[392] *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988)

[393] *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1988).

that this court could impose a sentence other than the sentence you recommend."

However, jury instructions should not minimize the importance of the jury's decision under any state's sentencing scheme. Instructions that do not follow this rule should be modified.

[8.12.2] Is death mandatory?

There have been a number of United States Supreme Court cases involving death penalty schemes that appear to make death mandatory in certain instances.

In *Sumner v. Shuman*,[394] the Court reviewed Nevada's sentencing scheme. Nevada required the death sentence to be imposed upon any defendant who murdered while serving a life sentence. The United States Supreme Court disallowed this requirement. The Eighth Amendment requires individualized sentencing - mandatory death sentences will not be approved.

In *Penry v. Lynaugh*,[395] the Court considered the Texas scheme. In 1989, Texas required the jury to answer three interrogatories. If all three were answered "yes," the defendant had to be sentenced to death. Johnny Penry was a mentally retarded defendant who had been badly abused as a child. Penry's lawyer objected to the proposed jury instructions, suggesting that the jury was not given latitude by the three questions presented to consider the mitigating circumstances presented by Penry. The defense suggested that the jury must be instructed in a way that would allow them to give effect to such mitigation as his retardation and his abused childhood. The Supreme Court agreed and reversed his death sentence.

The Texas statute and jury instructions have been changed to allow the jury to consider all mitigation and decide whether it is sufficient to warrant a sentence of life imprisonment instead of death. The third interrogatory now allows the jury to consider the mitigating circumstances. Only if the last interrogatory is unanimously answered "no" (and the others are unanimously answered against the defendant), will the death penalty be imposed.[396]

In *Blystone v. Pennsylvania*,[397] Blystone argued that the jury instructions in Pennsylvania required the jury to return a verdict of death if it found at least one aggravating circumstance and no mitigating circumstances, or if it found one or more aggravating circumstances that outweighed any mitigating circumstances. In a 5 to 4 opinion, the United States Supreme Court upheld the Pennsylvania scheme and its instructions.

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[394]*Sumner v. Shuman*, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (1987).

[395]*Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

[396]For two other cases dealing with the Texas scheme and the problems it presented prior to the statute being amended, *see Graham v. Collins*, 506 U.S. 461, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993), and *Johnson v. Texas*, 509 U.S. 350, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993).

[397]*Blystone v. Pennsylvania*, 494 U.S. 299, 110 S. Ct. 1078, 108 L. Ed. 2d 255 (1990).

In *Boyd v. California*,[398] the jury was told that they "shall" impose a sentence of death if the aggravating circumstances outweigh the mitigating circumstances. Although the California instructions have since been changed to eliminate the mandatory language, the Court, by a 5 to 4, decision held that the "shall" instruction did not unconstitutionally prohibit individualized sentencing.

Some states, e.g., Wyoming, have statutes that require the jury to unanimously find mitigating circumstances to exist.[399] The United States Supreme Court has held this type of statute to be unconstitutional in two cases.[400] Juries must be instructed that the finding of a mitigating circumstance is the responsibility of each juror individually. In *Mills v. Maryland*, the jury instructions could have been interpreted to require the jury to impose a death sentence if they found one aggravating factor to exist and could not unanimously agree on any of a number of mitigating factors. If there was no mitigation to consider, the death penalty was mandated. In *McKoy v. North Carolina*, the situation was a little different. Unlike the scheme in Maryland, North Carolina allows the jury to recommend a life sentence even if no mitigation exists. However, the United States Supreme Court held that the instructions were improper because they likely precluded jurors from properly considering mitigating evidence.

These cases illustrate the problems jury instructions can generate. If instructions suggest, for example, that the mitigating circumstances must outweigh aggravating circumstances in order for a life sentence to be imposed, there is a burden-shifting problem. The United States Supreme Court has not yet specifically addressed burden shifting. Instructions should be modified to eliminate these types of problems.

[8.12.3] Define vague terms

Vague terms, such as "heinous, atrocious, and cruel" must be defined for the jury in a manner that has been approved by the United States Supreme Court. Failure to properly define these terms can result in a flood of cases returned for re-sentencing. In *Espinosa v. Florida*,[401] the Court struck down Florida's definition of heinous, atrocious, or cruel in its Standard Jury Instruction as unconstitutionally vague. On the same day it remanded *Espinosa*, the Supreme Court summarily remanded five other cases, citing *Espinosa* as authority. *Espinosa* has caused numerous cases to be reviewed in Florida. One suggestion is to use the definition provided by defense counsel if it is reasonable. Use of the defendant's definition will help to resolve the issue on appeal and in postconviction proceedings.

[8.12.4] Jury instructions on aggravating and mitigating circumstances

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[398] Boyd v. California, 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990).

[399] WY ST §6-2-102.

[400] *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988); McKoy v. *North Carolina*, 434 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990).

[401] *Espinosa v. Florida*, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992).

The trial court should allow the jury to consider only those aggravating circumstances for which evidence has been presented and which state law will support. If a jury is allowed to consider an aggravating circumstance that is later determined by an appellate court or by a federal court to be invalid, the penalty phase may have to be retried. Trial judges should not rely upon escape valves like "harmless error" in a death case.[402]

Only one of the available aggravators should be used in states that do not allow "doubling." In *Castro v. State*,[403] defense counsel requested the following instruction:

> The state may not rely upon a single aspect of the offense to establish more than a single aggravating circumstances. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance. For example, the commission of a capital felony during the course of a robbery and done for pecuniary gain relates to the same aspect of the offense and may be considered as being only a single aggravating circumstance.

The trial court refused the instruction and the case was remanded for a new penalty phase trial. The "doubling" or "double counting" problem can be solved in states that do not allow it by providing the jury with specific instructions. [404] Alternatively, the trial judge can rule that two aggravating circumstances are supported by the same aspect of the case and require the prosecutor to elect which one will be argued to the jury.

The jury must be instructed on statutory mitigating circumstances if any evidence in the record supports them. Failure to allow the jury to consider one of these circumstances - no matter how weak - may result in reversal. Of course, the jury need not be instructed on mitigating circumstances that have no support in the record.[405]

The *Lockett* instruction must be given in every case. The jury must be instructed that they murt consider in mitigation "any other aspect of the defendant's character or record, and any other aspect of the offense."[406] The word "background" should be added to this instruction.[407] Failure to include

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[402]*See, Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990).

[403]*Castro v. State*, 597 So.2d 259 (Fla. 1992)

[404]*People v. Proctor,* 15 Cal. Rptr.2d 340, 842 P.2d 1100 (Cal. 1992); *State v. Rose*, 548 A.2d 1058 (N.J. 1988); *State v. Bey*, 548 A.2d 887 (N.J. 1988).

[405]*Delo v. Lashley*, 507 U.S. 272, 113 S. Ct. 1222, 122 L. Ed. 2d 620 (1993).

[406]*Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

[407]*Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

"background" may result in the opportunity to hold a second penalty phase trial.[408]

[8.12.5] Anti-sympathy instructions

In *California v. Brown,*[409] the jury was instructed to not be "swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling. The United States Supreme Court held this instruction did not violate the Eighth Amendment. In *Saffle v. Parks,*[410] the jury was instructed, "you must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence." The case was decided on procedural grounds, leaving unanswered whether this instruction was constitutionally flawed. Neither of these cases were decided by a clear majority of the Court. These instructions cause too many problems because some mitigating factors and some aggravating factors are designed to invoke sympathy for the victim or the defendant. This type of instruction may be appropriate for the guilt phase of a capital trial but it is too problematical for a penalty phase.

[8.12.6] Jury pardons

Juries sometimes ask the question of whether they have the right to ignore the facts and the law and render the verdict they feel is just under the circumstances. This presents the classic jury pardon problem. Some cases hold that the jury need not be instructed on a jury pardon if such a question is asked..[411] The Supreme Court of Florida has held it is improper to instruct the jury that the facts and the law can be ignored because sentencing recommendations will be opened to arbitrariness and capriciousness in violation of *Gregg v. Georgia.*[412] The Supreme Court of Florida approved the trial judge's response to the jury's question. The jury was told to rely upon the law and evidence they had heard. However, in *Henyard v. State,*[413] that same court held that "a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors" and an instruction to that effect is included in the model penalty phase instructions recommended by the Florida College of Advanced Judicial Studies.[414] It appears, at least in Florida, that the jury has the

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[408] *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987).

[409] *California v. Brown*, 479 U.S. 538, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987).

[410] *Saffle v. Parks*, 494 U.S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990).

[411] *See Dougan v. State*, 595 So.2d 1 (Fla. 1992).

[412] Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

[413] *Henyard v. State*, 689 So.2d 239 (Fla. 1996).

[414] http://www.jud18.flcourts.org/18th_stuff/seminole/eaton/Model_Penal_Phase_Instr.pdf

power to pardon the death penalty but cannot be told about it.[415]

Other states have decided, by case law or by statute, that the jury can exercise a jury pardon. For example, in Arkansas, the court held that the jury, regardless of its findings (regarding aggravation outweighing mitigation), can still return a life without parole verdict simply by rejecting the death penalty.[416] In New Hampshire, the statute follows many others in suggesting the jury shall decide if an aggravating factor or factors exist and, if so, shall then determine if they outweigh any mitigating factors found to exist. If there is an absence of any mitigating factors the jury must determine if the aggravating factors themselves are sufficient to justify a death sentence. If so, the jury, by unanimous vote, may recommend a sentence of death rather than a sentence of life imprisonment without parole. However, "The jury, 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.*"[417] (Emphasis supplied)

[8.12.7] Hung juries

What if the jury can't agree on a sentence or recommendation? Most of the states require a unanimous vote for death before the jury can return a death sentence. Two states require a vote of ten or more for death. One state requires a simple majority (seven or more) for a death recommendation. In some states, if the jury cannot agree unanimously a recommendation for life must be returned. Some states require a unanimous decision for a life sentence. In one state (Alabama) it takes a majority for life, but ten or more for death. In the state requiring a majority for death (Florida), a six-six vote is a life recommendation as is a majority for life. What about the states that require unanimity? What if the jury cannot agree?

Some states require the jury to impose a life sentence if the jury cannot agree unanimously on death. Some states require the judge, if the jury is unable to agree, to impose a life sentence. In three states (Alabama, California, Kentucky) a new jury must be impaneled if the jury cannot agree. In California, if the second jury cannot agree, the judge can then impose a life sentence or impanel another jury. Alabama allows the judge to decide after one or more mistrials if the prosecutor, defense counsel and the judge agree that the judge may impose the sentence. In Kentucky the judge has no authority to sentence and a new jury must be impaneled. There is no direction in the Kentucky statute as to how many times a new jury must be impaneled - presumably until the state gives up and agrees to a life sentence. In Florida, where a majority vote recommends death and six or more votes recommends life, there is never a hung jury.

The biggest problem is whether or not the jury can be told what will happen if they cannot agree on the sentence. There is no agreement among the states on this issue. Some states require the jury to be told; others do not.

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[415]*See also*, *Franqui v. State*, 804 So.2d 1185, (Fla. 2001). (Jury must be instructed that it "is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors.")

[416]*Pickens v. State*, 730 S.W.2d 230 (Ark. 1987).

[417]N.H. Rev. Stat. Ann §630:5 IV (1991).

[8.12.8] Judicial responsibility after sentencing verdict

Jury-Sentencing States (Georgia scheme and Texas)

The judge has little post-verdict responsibility in the states in which the jury's sentence is the sentence the judge must impose. The judge simply imposes the sentence and the appellate process begins. The same is true in the states where the judge must impose a life sentence if the jury cannot agree. A new sentencing proceeding must be scheduled in states where the judge has no sentencing authority absent jury agreement.

In states like California and Ohio, the defendant must be sentenced to life if the jury's verdict is life, but the judge is allowed to override a verdict of death under certain specific circumstances. These states require various findings by the trial judge. Presumably the findings are required to be in writing. Ohio requires written findings. California requires the court to set forth reasons for its ruling and direct that they be entered in the clerk's minutes.

In Ohio, there is a writing requirement regardless of whether the court imposes life or death. The court must lay out the aggravating and mitigating circumstances and the reasons why the aggravating circumstances outweigh the mitigating circumstances or why the court "could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors."[418]

In California, the court must look to the aggravating and mitigating circumstances and can impose life only if the finding of the jury that the aggravating circumstances found outweigh the mitigating circumstances are "contrary to the law or the evidence presented."[419]

Penalty phase proceedings in cases when a jury has been waived, are less likely to be reversed because appellate courts presume that trial judges are aware of the rules of evidence and do not consider inadmissible evidence in making a ruling.[420]

Florida scheme states

Three states, Alabama, Delaware, and Florida have the best (or worst) of both worlds.[421] The trial judge must preside over the penalty phase jury trial (with all the chances of error) and then after considering the jury's penalty recommendation, decide the sentence with a written sentencing order (subject to more error). In these three states, the jury recommendation is not binding. In the Delaware scheme, the jury's new function is to make findings regarding the existence of aggravating circumstances and whether the aggravating factors outweigh the mitigating factors. The judge then decides the sentence. In these states, the judge can sentence the defendant to life if the jury has

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[418]OH ST S 2929.03

[419]CA PENAL S 190.4

[420]*State v. Brewer*, 826 P.2d 783 (Ariz. 1992); *Lynch v. State*, 841 So.2d 362 (Fla. 2003).

[421]Indiana was a Florida scheme state. The Indiana Legislature amended the death penalty statute in 2002 after *Ring v. Arizona* was decided and now has adopted the Georgia scheme. IN ST 35-50-2-9.

recommended death. More drastically, if the jury recommends life, the judge can override the recommendation and sentence the defendant to death. This scheme, as applied in Florida has been upheld several times by the United States Supreme Court.[422] In *Spaziano v. Florida*, the Court was faced specifically with an override from life to death and the constitutionality of that occurrence. The Supreme Court found the override constitutional.[423] The United States Supreme Court has not reviewed the override provisions in Alabama or Delaware.

The fact that the jury renders a recommendation rather than a binding verdict does not mean that the recommendation can be ignored. In Florida, case law requires the verdict of the jury to be given "great weight" under most circumstances. To override a recommendation of life in Florida, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable people could differ."[424] Alabama has not formulated a standard to allow a judge to override a jury's recommendation of life. The trial court is required only to consider the recommendation of the jury. The law allows the trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty is appropriate. The appellate court in *Lindsey v. State*,[425] held that the trial judge was free, after considering the jury's recommendation, to disregard it. The Alabama Supreme Court may reverse a death sentence imposed after the jury recommends life where "the principles and standards of 'fundamental fairness' require that the trial court's action be reversed."[426] Delaware followed the Florida standard until 2002 when the Delaware statute was amended to require the court to "give such consideration as deemed appropriate by the Court in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender as found to exist by the Court. The jury's recommendation shall not be binding upon the Court." [427]

All three states require the judge to issue a sentencing order dealing with the aggravating and mitigating circumstances. Alabama requires that each aggravating factor and each mitigating factor to be addressed, whether found to exist or not. Florida requires that each aggravating factor found to

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[422]*Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); *Spasiano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984); *Hildwin v. Florida*, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989).

[423]*Spaziano v. Florida,* 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984).

[424]*Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975). Indiana had a standard similar to Florida's *Tedder* standard. In order to override a jury's recommendation of life in Indiana and sentence a defendant to death, "the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate in light of the offender and his crime." *Martinez-Chavez v. State*, 534 N.E.2d 731, 735 (Ind. 1989). Indiana is now a Georgia scheme state.

[425]*Lindsey v. State*, 456 So.2d 383 (Ala. Crim. App. 1983).

[426]*Hadley v. State*, 575 So.2d 145, 158-159 (Ala. Crim. App. 1990).

[427]HB No. 287 (2002).

exist be addressed and that all mitigation proffered by the defense be addressed in the sentencing order. Indiana required that the judge's findings include identification of each mitigating and aggravating circumstance found to exist. Delaware requires the order to set forth the "findings upon which the sentence of death is based." There are, of course, additional requirements such as weighing the aggravating circumstances found against the mitigating circumstances found to determine the proper sentence.

Examples of sentencing orders following the Florida writing requirements are provided in Appendix A.

[8.13] Preparation of sentencing orders

The trial judge should require the attorneys to submit a sentencing memorandum prior to the sentencing date. It is of particular importance to require the defense to list all statutory and non-statutory mitigating factors believed to have been established by the evidence. This will provide the basis for discussion of mitigation in the sentencing order. The attorneys, especially the prosecutor, should not be asked to prepare a draft sentencing order. The writing requirement is for the judge - not the prosecutor or defense counsel. Ex parte communications between the judge and the prosecutor concerning the content of the sentencing order are forbidden and can lead to reversal.

In *Rose v. State*,[428] the trial judge requested the prosecutor to prepare the sentencing order. The Supreme Court of Florida criticized this practice and stated:

> The judicial practice of requesting one party to prepare a proposed order for consideration is a practice born of the limitation of time. Normally, any such request is made in the presence of both parties or by a written communication to both parties. We are not unmindful that in the past, on some occasions, judges, on an ex parte basis, called only one party to prepare an order for the judge's signature. The judiciary, however, has come to realize that such a practice is fraught with danger and gives the appearance of impropriety. (Citations omitted.)
>
> Canon 3A(4) of Florida's Code of Judicial Conduct states clearly that '[a] Judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, *neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding*." Fla. Bar Code of Jud. Conduct, Canon 3A94). (Emphasis added.) Nothing is more dangerous and destructive of the impartiality of the judiciary that a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments.

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[428] *Rose v. State*, 601 So.2d 1181 (Fla. 1992)

The court went on to state:

> We are not concerned with whether an ex parte communication actually prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect on the appearance of impartiality of the tribunal. The impartiality of the trial judge must be beyond question. In the words of Chief Justice Terrell: '[t[his court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge . . . . The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.
>
> The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on the litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.[429]

Justice Harding, in a concurring opinion in *Rose*, stated: "Judges should be ever vigilant that every litigant gets that to which he or she is entitled: 'the cold neutrality of an impartial judge.'"[430]

Findings in aggravation and mitigation should not be mere conclusions. The findings should state facts supporting the finding or lack of finding of the various aggravating and mitigating circumstances. The facts stated should be supported by the record. A trial judge who fails to state the reasons for the death penalty with unmistakable clarity will likely have the opportunity to preside over a resentencing hearing.

If there is a writing requirement, the findings should (in some states, must) be written prior to the pronouncement of the sentence. The Supreme Court of Florida became so frustrated with delayed written findings that it reversed a death sentence and reduced the sentence to life in one case.[431] The trial judge should allow any additional evidence or argument to be presented before pronouncement of the sentence. It disturbs defense counsel to have a judge listen to evidence or argument and immediately begin reading from a previously prepared sentencing order.

Most importantly, reasons for imposing a death sentence must be based upon the aggravating circumstances that have been presented and supported by the evidence. All statutory and non-statutory mitigation presented by the defense must be considered and discussed in the sentencing order. The weight to be given aggravating and mitigating circumstances is generally up to the trial judge.[432]

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[429] *State ex rel Davis v. Parks*, 141 Fla. 516, 519-20, 194 So. 613, 615 (1939).

[430] *Rose v. State, supra,* at 1184. *See also, Spencer v. State*, 615 So.2d 688 (Fla. 1993); *Huff v. State*, 622 So.2d 982 (Fla. 1993); *Card v. State*, 652 So.2d 344 (Fla. 1995).

[431] *Christopher v. State*, 583 So.2d 642 (Fla. 1991).

[432] *Campbell v. State,* 571 So.2d 415 (Fla. 1990); receded from in part in *Trease v. State,* 768 So.2d 1050 (Fla. 2000).

[8.14] Conclusion

These materials attempt to point out the various problems and many of the pitfalls that will be encountered by trial judges the penalty phase of a capital trial. These materials are only a starting point and not a complete treatise on the subject. Death penalty law is continually evolving and may vary significantly from state to state and even from trial to trial. The death penalty is reserved for the most aggravated and least mitigated of cases. In states that allow judges to have the final say, it takes a dose of courage and judicial independence to override a jury verdict and impose a life sentence when the jury's recommendation is simply an emotional reaction to a case. But that is what trial judges are supposed to do. Judges who are unwilling to rule responsibly in death penalty cases should consider a less stressful assignment. Death is truly different and death penalty cases present an opportunity for trial judges to prove that our system of justice can be administered fairly and impartially.

APPENDIX A

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT OF FLORIDA, SEMINOLE COUNTY

STATE OF FLORIDA,
PLAINTIFF,

CASE NO. 99-881-CFA

v.

RICHARD LYNCH,
DEFENDANT
_______________________/

SENTENCING ORDER
(CORRECTED)

The defendant entered a plea of guilty before this court on October 19, 2000, to the first degree murders of Roseanna Morgan and Leah Caday as well as to one count each of armed burglary of a dwelling and kidnapping. On that same date the defendant waived his right to a penalty phase jury and the court allowed the penalty phase to commence at a non-jury hearing on January 8, 2001. The parties presented matters in aggravation and mitigation during the penalty phase hearing. A Spencer hearing was scheduled for February 6, 2001, and additional evidence was taken. Victim impact statements were presented but the court has not considered them in arriving at the sentence to be imposed. The defendant was given an opportunity to be heard regarding the sentences to be imposed and he made a statement. The parties stipulated to submit written final arguments and sentencing memoranda and the court has read them and considered them. The court now finds as follows:

FACTS

The defendant and Roseanna Morgan had an affair that lasted several months. The defendant, who was unemployed and who was being supported by his wife, obtained three credit cards that he used to establish Roseanna Morgan in an apartment. He also bought her an automobile. He ran up over $6,000.00 in credit card debt as a result of this affair. Roseanna Morgan was also married. Her husband was employed in Saudi Arabia. He returned home and, on

February 9, 1999, she decided to resume relations with him. This upset the defendant and on March 3, 1999, he wrote a letter to his wife in which he disclosed the affair in detail and announced his future plans. In the letter the defendant stated,

"I am sorry. I am very despondent and depressed beyond description. There has been recent events which drove me to this.

"I want you to send copies of letter & card and pictures to her family, mom and dad in Hawaii...I want them to have a sense of why it happened, some decent closure, a reason and understanding, they are good parents like yours. I want them to know what she did, the pain she caused, that it was not just a random act of violence.

"I had three credit cards I got by myself - Chase Visa, People's Mastercard, MBNA Visa. She had no good credit, and I helped her buy car, '85 Buick, get apt in Rosecliff and buy things for apt, pay bills, she was paying on cards and would have paid them little by little. She was responsible. Suddenly she decided to get back with husband on Feb 9. She is afraid of him, or custody of kids or something. Suddenly just a week after she gave me that card, it was over......She promised to pay credit cards, her bills and she made payment February 18 on one, but I cannot live with that worry. The Chase Visa is $6,000 - I feel she will not pay all. So between the worry about bills, you finding out and your anger and possibly getting thrown out on street, our sad life lately and the pain of losing her, and losing my dream which seemed so close, I feel there is no way out for me. I am sorry for all the pain, suffering, expense, embarrassment and hardship I will cause and give to you.....

"That is why she must pay the price. She built me up, made me love her, loved me, gave me that card on Feb 6 then on 9th she ended it. You cannot tell someone words like that, then expect them to turn off like a switch. Then there's the $ worry."

The evidence presented establishes that subsequent to February 6, 1999, the defendant made numerous attempts to regain Roseanna Morgan's favor and even had conversations with her husband on the subject. One of Roseanna Morgan's coworkers saw the defendant at their place of employment. By then, he was stalking her.

On the afternoon of March 5, 1999, the defendant carefully packed three firearms and ammunition into a black bag. Then he carried the black bag and firearms to Roseanna Morgan's apartment. He waited outside the apartment for her to come home. Leah Caday, Roseanna Morgan's teen age daughter, came home first. In describing the incident the defendant stated, "I was waiting for her. Her daughter come home and we went in the apartment." The defendant held Leah in the apartment with one of the firearms in view for thirty to forty minutes. The defendant admits that Leah was thoroughly terrified during this ordeal. He stated, "I put the gun down on the table and the daughter was just terrified. She says 'why are you doing this to me?'" When Roseanna Morgan returned to the apartment

the defendant met her at the front door and shot her several times in the legs while she was standing in the hallway. Another shot entered her eye and exited her neck. Then the defendant dragged her into the apartment while she was screaming for help and administered a coup de grace by firing a bullet into her brain. Meanwhile, a neighbor called 911 and notified the police.

After shooting Roseanna Morgan, the defendant telephoned his wife and told her what he had done. The defendant's wife testified that during this conversation she heard Leah screaming in the background. Then he dispatched Leah with one shot in the back that killed her almost instantly. He notified his wife of the second murder and told her where to find the letter he had written to her. She obtained the letter and called 911. The defendant called the Sanford Police Department. During that call he made a statement about the incident to the dispatcher.

After the police were notified, two officers attempted to investigate but when they tried to enter the apartment a shot was fired and they retreated. The SWAT team arrived and, after negotiations, the defendant was arrested without further incident.

Based upon the testimony presented and the other evidence in the case, the court concludes as follows:

AGGRAVATING FACTORS
(ROSEANNA MORGAN)

The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The facts that tend to establish this aggravating factor are: (1) the defendant's letter to his wife in which he asked her to notify Roseanna Morgan's parents about "the pain she caused," that the homicide was not "a random act of violence" and that she had to "pay the price;" (2) the defendant carefully packed three firearms in a black bag along with ammunition and took them with him to Roseanna Morgan's apartment; (3) the passage of time between the date of the letter and the killing; (4) the passage of time while the defendant held and terrorized Leah while awaiting Roseanna Morgan's return and (5) the coup de grace.

The defense presented a psychologist, Dr. Jacqueline Olander, who opined that the defendant's motive in going to the apartment was to commit suicide in front of Roseanna Morgan. Dr. William Riebsame, a psychologist presented by the state, disagreed. It was his opinion that the defendant's motive was a murder-suicide and that the defendant simply did not carry out the second part of the plan. Dr. Riebsame's opinion is more supportive of the evidence in the case and it is accepted by the court. The contents of the defendant's letter set forth a murder suicide plan without saying as

much in so many words. It would have been unnecessary for Roseanna Morgan's parents to be notified "about the pain she caused" or that the killing "was not just a random act of violence" or "(t)hat is why she must pay the price" unless the defendant fully intended to kill her. But for the actions of Joyce Fagan, the dispatcher for the Sanford Police Department, and Stephanie Ryan, the hostage negotiator, the defendant may have carried out the second part of his plan. These two individuals had extensive conversations with the defendant after the murders and dissuaded him from harming himself or anyone else.

The court finds this aggravating circumstance to have been established beyond a reasonable doubt. The mental mitigation presented by the defendant has been carefully considered by the court in light of the holding in Alameida v. State, 748 So.2d 922 (Fla. 1999). The court is convinced that the defendant was sufficiently in control of his faculties to plan and carry out the murder of Roseanna Morgan. Accordingly, this aggravating circumstance is given great weight.

The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The contemporaneous conviction for a violent crime cannot generally be used to support this circumstance. However, if more than one victim is involved, this circumstance can be considered. King v. State, 390 So.2d 315 (Fla. 1980); Pardo v. State, 563 So.2d 77 (Fla. 1990); Stein v. State, 632 So.2d 1361 (Fla. 1994). Since there were two victims in this case, this aggravating factor has been established beyond a reasonable doubt. However, since Roseanna Morgan was the first victim to be killed, this aggravator is given only moderate weight.

The capital felony was committed while the defendant was engaged in aggravated child abuse, burglary or kidnapping.

This aggravating circumstance invokes the ancient and much criticized "felony-murder rule." See, Aaron v. State, 299 N.W.2d 304, 13 A.L.R.4th 1180 (Mich. 1980); Fletcher, Reflections on Felony Murder, 12 S.W.U.L.R. 413 (1980-1981); Gegan, Criminal Homicide in the Revised New York Penal Law, 12 N. Y. L. Forum 565, 586 (1966); Moreland, Kentucky Homicide Law with Recommemdations, 51 Ky. L. J. 59, 82 (1962). For instance, in People v. Phillips, 64 Cal.2d 574, 582-583, 51 Cal.Rptr. 225, 415 P.2d 353, 360 (1966), the court stated,

> "We have thus recognized that the felony-murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application.

> Indeed, the rule itself has been abandoned by the courts of England, where it had its inception. It has been subjected to severe and sweeping criticism."

The evidence established that the defendant gained entry into the apartment with the intent to commit murder so the homicide was committed during an armed burglary. This aggravating circumstance has been proven beyond a reasonable doubt. The defendant formed the intent to kill Roseanna Morgan before he entered the apartment. Just how he gained entry, whether it was by force after he met Leah Caday or after he convinced her to allow him in, is immaterial. Entry gained by trick or fraud will support conviction for burglary, because consent to enter obtained by trick or fraud is actually no consent at all and, therefore, the entry is unauthorized. Gordon v. State, 745 So.2d 1016 (4th DCA 1999), rehearing denied, cause dismissed, 751 So.2d 50.

The evidence does not establish that Roseanna Morgan was killed during a kidnapping[433] or as a result of child abuse.[434]

Since the felony-murder rule merely provides an alternative theory to first degree murder by premeditation and since armed burglary was part of the defendant's premeditated plan, this aggravator is given little weight.

The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

This aggravating factor is refuted by all of the evidence as to the murder of Roseanna Morgan and the court determines that it has not been established beyond a reasonable doubt.

The capital felony was especially heinous, atrocious or cruel.

In order for a crime to be especially heinous, atrocious or cruel it must be both conscienceless or pitiless and unnecessarily torturous to the victim. Richardson v. State, 604 So.2d 1107 (Fla.

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[433] Berry v. State, 668 So.2d 967 (1996). (If, during commission of robbery, the defendant confines the victims by simply holding them at gunpoint, or if the defendant moves the victims to different room in apartment, closes the door, and orders them not to come out, a kidnapping conviction cannot stand.); Brown v. State, 719 So.2d 955 (Fla. 4th DCA 1998). (For a kidnapping conviction to stand, the resulting movement or confinement: (1) must not be slight, inconsequential, and merely incidental to the other offense; (2) must not be of the kind inherent in the nature of the other offense; and (3) must have some significance independent of the other offense in that it makes the other offense substantially easier to commit or substantially lessens the risk of detection.)

[434] Roseanna Morgan was over the age of eighteen.

1992); Hartley v. State, 686 So.2d 1316 (Fla. 1996); Zakrzewski v. State, 717 So.2d 488 (Fla. 1988); Nelson v. State, 748 So.2d 237 (Fla. 1999). Generally, this circumstance does not apply to shooting deaths that are instantaneous or nearly so. Lewis v. State, 398 So. 2d 432 (Fla. 1981); Clark v. State, 613 So.2d 412 (Fla. 1992) Robertson v. State, 611 So.2d 1228 (Fla. 1993); Kearse v. State, 662 So.2d 677 (Fla. 1995). There are exceptions to the general rule but they do not apply here. Roseanna Morgan was shot a number of times over a relatively short period of time. There is no evidence that the defendant engaged in extreme and outrageous depravity as exemplified by a desire to inflict a high degree of pain or the utter indifference to or the enjoyment of the suffering of another. Buckner v. State, 714 So.2d 384 (Fla. 1998).

In considering all of the circumstances of this case, the court finds this aggravating factor has not been proven beyond a reasonable doubt.

AGGRAVATING FACTORS

(LEAH CADAY)

The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

As stated above, the contemporaneous conviction for a violent crime cannot generally be used to support this circumstance. However, if more than one victim is involved, this circumstance can be used. King v. State, 390 So.2d 315 (Fla. 1980); Pardo v. State, 563 So.2d 77 (Fla. 1990); Stein v. State, 632 So.2d 1361 (Fla. 1994). Since there were two victims in this case, this aggravating factor has been established beyond a reasonable doubt. And, since Leah Caday was the second victim to be killed, this aggravator is given great weight.

The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The evidence does not establish beyond a reasonable doubt that the defendant premeditated the murder of Leah Caday.

The capital felony was committed while the defendant was engaged in aggravated child abuse, burglary or kidnapping

This aggravating circumstance also invokes the felony-murder rule. Leah Caday was under the age of eighteen years. In fact she was thirteen. The legislature, through the operation of the felony-murder rule, has made the killing of any child her age first degree

murder. The killing was also committed during the course of an armed burglary. An objective view of the facts surrounding the killing of Leah Caday results in the conclusion that her killing was an afterthought - an act imminently dangerous to another and evincing a depraved mind regardless of human life. But for the felony-murder rule, such a killing would be second degree murder. Since the killing has already been elevated from second degree murder to first degree murder, the amount of weight given to this aggravating factor should be substantially less than great weight. However, considering all of the circumstances of this aggravator, the court assigns moderate weight to it.

The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

This aggravating circumstance is not permitted to be found absent "strong evidence." In cases where the victim is not a law enforcement officer it must be "the sole or dominant motive for the murder." Preston v. State, 607 So.2d 404 (Fla. 1992). However, this aggravator has been allowed in cases where the only motive for the killing appears to be the elimination of a witness. In Willacy v. State, 696 So.2d 693 (Fla. 1997), for instance, the victim surprised the defendant during a burglary and he killed her. The court reasoned there was little reason to do so other than to eliminate her as a witness. In contrast, in Zack v. State, 753 So.2d 9 (Fla. 2000), the murder was premeditated and elimination of the witness was only incidental to the premeditated plan.

The murder of Leah Caday was not premeditated. In order to find the existence of this aggravator there must have been no other logical reason for the defendant to kill Leah except to eliminate her as a witness. This, of course, requires a finding that sometime after Roseanna Morgan's murder the defendant changed his mind about committing suicide and decided to escape detection by killing Leah. The taped conversation with the dispatcher is evidence that he had no such intent. It was the defendant who called the police, confessed to the killings and made arrangements for his subsequent arrest without incident. It would be illogical for the defendant to kill Leah in order to eliminate her as a witness and then confess to the crime moments later. Accordingly, the court finds that the murder of Leah Caday was for a reason or reasons other than to avoid or prevent a lawful arrest.

The capital felony was especially heinous, atrocious or cruel.

Leah Caday was confined in the apartment with the defendant for between thirty and forty minutes before her mother came home. During that time she was terrified of the defendant and his gun. After her mother came home she watched in horror while her mother was brutally murdered. Virginia Lynch heard her screaming in the background during the first phone call the defendant made to her. She had time to contemplate her impending death. See, Hannon v. State, 638 So.2d 39 (Fla. 1994). Fear and emotional strain may be considered as contributing to the heinous nature of the murder, even when the victim's death is almost instantaneous. Preston v. State, 607 So.2d 404 (Fla. 1992). The heinous, atrocious, or cruel aggravating circumstance may be proven in part by evidence of the infliction of "mental anguish" which the victim suffered prior to the fatal shot. Henyard v. State, 689 So.2d 239 (Fla. 1997). The actions of the defendant prior to shooting Leah qualify her murder as especially heinous, atrocious and cruel. This aggravating circumstance has been established beyond a reasonable doubt and is given great weight.

MITIGATING CIRCUMSTANCES

The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

The experts called by the defense and the state presented evidence on this mitigating circumstance. They did not agree with each other. Dr. Olander believed the defendant was under the influence of extreme mental or emotional disturbance. Dr. Riebsame believed the disturbance to be less than extreme. Dr. Riebsame's testimony is the most credible. The defendant was emotionally disturbed. His girlfriend had decided to return to her husband and this meant loss of a sex partner for whom he had strong feelings. However, he was able to plan his course of action and carry out all but the suicide portion of the plan. The court gives the emotional disturbance suffered by the defendant moderate weight.

The defendant's capacity to conform his conduct to the requirements of law was substantially impaired.

The experts, Dr. Olander and Dr. Riebsame, agreed that the defendant's capacity to conform his conduct to the requirements of law was impaired. They disagree on the degree of impairment. Dr. Olander believes the defendant has a schizoaffective disorder. Dr. Riebsame did not believe the defendant has a schizoaffective

disorder. He noted that the defendant did not suffer delusions or have difficulty recalling events about the murders. He testified that it is usual for a person with such a disorder to report a very bizarre description of events that makes sense to him or her but not to anyone else. Dr. Riebsame's testimony on this issue is the most credible and is accepted by the court. The fact that the defendant's capacity to conform his conduct to the requirements of law was impaired, but not substantially impaired, is given moderate weight.

The defendant has no significant history of prior criminal activity.

This mitigating factor has been established and is not controverted. However, the circumstances of this double murder, including the murder of the second victim, "militate against" this factor and it is given little weight. Ramirez v. State, 739 So.2d 568 (Fla. 1999).

Any other aspect of the defendant's character or background.
The defendant suffered from mental illnesses at the time of the offense.

The expert witnesses agreed that the defendant has a depressive disorder and that he had this condition at the time of the offense. The evidence also established that he has a personality disorder not otherwise specified with paranoid features, obsessive-compulsive features and passive aggressive features. As previously stated, while Dr. Olander believes the defendant to have a schizoaffective disorder, Dr. Riebsame disagrees and the court has accepted Dr. Riebsame's opinion. The defendant's personality disorders are given little weight.

The defendant was emotionally and physically abused as a child.

The evidence established that the defendant's father was a strict disciplinarian who insisted upon the defendant reporting to him every half hour if he was playing or "sign in" if the father was not present. The experts disagreed about whether this amounted to emotional and physical abuse but the court considers this mitigating factor to have been established. However, since there is no real connection between this mitigator and the murders, it is given little weight.

The defendant has a history of alcohol abuse.

The defendant reported a history of alcohol abuse to Dr. Olander and there is no evidence to the contrary. However, the defendant was neither under the influence of alcohol at any time during the events that led up to the murders nor at the time of the murders themselves so this mitgator is given little weight. Mahn v. State, 714 So.2d 391 (Fla. 1998).

The defendant has adjusted well to incarceration.

There is no direct evidence of this mitigating factor. However, the court has observed the defendant during these proceedings and views this mitigator as having been established but assigns little weight to it.

When possible, the defendant has sought gainful employment.

The defendant has been employed during much of his lifetime. He has been a truck driver, a transit authority policeman, a security guard and a bus driver. He was not employed at the time of the murders. He took care of the two young children while his wife worked as income provider. This mitigating circumstance has been established but it is given little weight.

The defendant cooperated with the police.

The evidence is clear that the defendant remained at the scene of the murders and made several statements implicating himself in the murders. While the evidence contradicts the defendant's version of the events as being accidental, the court agrees that the degree of cooperation given resulted in the guilty pleas entered in this case. The fact that this case did not have to be tried convinces the court to give this mitigator moderate weight.

Other mitigating factors:

During the Spencer hearing the defendant made a statement in which he expressed remorse for his actions and stated that he has been a good father to his children and intends to continue being as good a father as he can while in prison. The court accepts these factors as mitigating but assigns little weight to them.

Summary

To summarize, the court finds the following aggravating and mitigating factors and assigns the weight given to each:

Aggravating Factors
(Roseanna Morgan)

The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. - Great weight.

The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. - Moderate weight

The capital felony was committed while the defendant was engaged in aggravated child abuse, burglary or kidnapping. - Little weight

Aggravating Factors
(Leah Caday)

The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. - Great weight

The capital felony was committed while the defendant was engaged in aggravated child abuse, burglary or kidnapping - Moderate weight

The capital felony was especially heinous, atrocious or cruel.- Great weight

MITIGATING CIRCUMSTANCES

The crime for which the defendant is to be sentenced was committed while he was under the influence of a mental or emotional disturbance. - Moderate weight

The defendant's capacity to conform his conduct to the requirements of law was impaired. - Moderate weight

The defendant has no significant history of prior criminal activity. - Moderate weight

The defendant suffered from mental illnesses at the time of the offense. - Little weight

The defendant was emotionally and physically abused as a child. - Little weight

The defendant has a history of alcohol abuse. Little weight

The defendant has adjusted well to incarceration. - Little weight

The defendant cooperated with the police. - Moderate weight

Other mitigating factors including the defendant's expression of remorse, he has been a good father to his children and his intention to maintain his relationship with his children while in prison. - Little weight

Having reviewed all of the aggravating and mitigating circumstances the court finds that the aggravating circumstances outweigh the mitigating circumstances for the murders of Roseanna Morgan and Leah Caday. Accordingly,

IT IS THE JUDGMENT OF THIS COURT:

1. For the murder of Roseanna Morgan the defendant is sentenced to be put to death in the manner prescribed by law.
2. For the murder of Leah Caday the defendant is sentenced to be put to death in the manner prescribed by law.
3. For the crime of armed burglary of a dwelling defendant is sentenced to serve a term of imprisonment in the Department of the Corrections of the State of Florida for his natural life.
4. For the crime of kidnapping the defendant is sentenced to serve a term of imprisonment in the Department of Corrections of the State of Florida for his natural life.
5. The sentences are to run concurrent with each other and the costs are waived.
6. The defendant is given 757 days credit for time served.

ORDERED at Sanford, Seminole County, Florida, this 3rd day of April, 2001.

Copies to:
All counsel
Defendant

O. H. Eaton, Jr.
Circuit Judge

APPENDIX B

CAPITAL CASE: SENTENCING ORDER

FACTS

On April 1, 2000, a neighbor who played Bingo with Mrs. Dorothy Jones was alarmed when Mrs. Jones did not show up for the weekly Bingo game. She went to Mrs. Johns' home and knocked on the door. She received no answer. She summoned the police. The police found a living room window had been pried open. Upon entering the house, they found the naked body of Mrs. Jones. She had been severely beaten and sexually assaulted. They found an electrical cord around her neck. The medical examiner was summoned. An autopsy revealed bruises to the victim's face and body. She had sperm in her torn vagina and rectum. Knitting needles, which had been found on the floor of the victim's home had blood on them and the autopsy showed 30 puncture wounds to the victim's breasts, which could have been caused by these needles. The autopsy further revealed the victim had died from strangulation. The ligature marks around her neck were consistent with the electrical cord found.

Crime scene technicians found smudges and prints on the window and frame, but none with sufficient points for effective comparison. No one in the neighborhood had heard or seen anything unusual. The police had no leads.

Upon contacting the victim's family, the police learned the victim kept large sums of cash at her home on a regular basis. No cash was found during a search of the victim's residence.

Two days later, the defendant, JOHN DOE, arrived at the Sheriff's Office. He asked to speak to the detective in charge of the Dorothy Jones' murder. The defendant then told the detective he was the person they were looking for. He was advised of his Miranda rights and he told the detective he had worked for Mrs. Jones and knew she kept large sums of money on hand. He owed a lot of money to various drug dealers. He decided to break into Mrs. Jones' home and steal her money. After prying open the living room windows, he searched the house for money but couldn't find any. He woke Mrs. Jones. She told him the money was under the mattress. After he had the money, which he said was over $10,000.00, he said something "snapped" inside of him and he threw the victim to the ground and sexually assaulted her. When she screamed, he found some tape and taped her mouth shut. He found some knitting needles and punctured her breasts. He couldn't believe he was doing this - he said it was like another person was doing it - not him. He remembered telling her he would kill her if she didn't perform to his liking. He said after he had anal sex with her, this "other person" got an electrical cord and put it around the victim's throat. She finally stopped struggling. He left through the same window.

The defendant told the detective he paid off his debts and bought more cocaine. He went to a bar and finally passed out somewhere. When he woke up the next day and realized what he had done, he thought about running away or killing himself. He finally decided to turn himself in.

The detective learned the defendant was an alcoholic and drug addict and had been so for some time. On the day of the homicide, he had begun drinking around noon. He had used cocaine three times that day and had consumed twelve beers and a pint of scotch. The defendant could offer no explanation for his violent sexual assault on the victim or for the murder except the effect of the drugs

and alcohol.

Throughout the interview, the defendant expressed extreme remorse for his actions. the detective believed the defendant was truly sorry for his deeds.

The defendant's background shows convictions for armed robbery, possession of cocaine, aggravated assault, and felon in possession of a firearm. He is presently on parole for the armed robbery.

The defendant was charged with and convicted by a jury of First Degree Murder, Involuntary Sexual Battery, and Burglary to a Residence.

In the penalty phase, the state produced evidence regarding the defendant's convictions for prior crimes of violence and evidence that he was currently on parole for Armed Robbery.

Two doctors testified for the defendant, and one testified for the state. They all agreed he was an alcoholic and drug addict and had been for some time. Two of the three felt the defendant's addictions had affected his brain to the extent that he was under some mental or emotional disturbance at the time of the crime. The third doctor disputed this. None felt he was under the influence of "extreme" mental or emotional disturbance at the time of the homicide. Two of the doctors expressed the opinion that at the time of the murder, the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired due to his addiction and due to his alcohol and drug usage on the day of the offense. The third doctor disputed this and indicated that even though the defendant may have been "high" at the time of the crime and this may have "clouded" his ability to conform his conduct to the requirements of the law, he felt the defendant did appreciate the criminality of his conduct and that was why he murdered the victim - to keep from being caught and prosecuted for this vicious sexual assault.

The defendant's mother, brother, and sister testified. They thought his criminal problems were the result of his abusive alcoholic father. All of them had been physically abused occasionally. However, neither the brother nor sister had ever been arrested. The parents divorced when the defendant was ten years old and the father abandoned the family.

The defendant was thirty-four years old when he committed this crime.

The defendant has recently been a model inmate. However, when he was in prison for the Armed Robbery, he once tried to escape, and had six disciplinary reports. He also had two disciplinary reports in the county jail, had participated in a hunger strike, and once was moved to isolation due to his abusive behavior toward the guards.

The defendant proffered valid testimony that it would cost the taxpayers less money to keep him alive and in prison for the rest of his life than it would to execute him. Although the judge would not allow this testimony before the jury, the defendant has asked the court to consider this in mitigation.

The jury returned a recommendation, by a vote of ten to two, that the defendant be sentenced to death. After giving the parties an additional opportunity to present further evidence and argument, the court prepared the following sentencing order:

IN THE CIRCUIT COURT IN AND FOR ____________________ COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. CRC00-12345CFANO

STATE OF FLORIDA

vs.

JOHN DOE

________________________/

SENTENCING ORDER

The defendant was tried before this court on February 3, 2001 - February 7, 2001. The jury found the defendant guilty of all three counts of the Information (Count I - Murder in the First Degree; Count II - Involuntary Sexual Battery; Count III - Burglary to a Residence). The same jury re-convened on February 10, 2001, and evidence in support of aggravating factors and mitigating factors was heard. On February 11, 2001, the jury returned a ten to two recommendation that the defendant be sentenced to death in the electric chair. On February 11, 2001, the court requested memoranda from both counsel for the state and counsel for the defendant. The memoranda were received from both sides on March 13, 2001. On March 20, 2001, the court held a further sentencing hearing where both sides made further legal argument. The court set final sentencing for this date, March 27, 2001.

This court, having heard the evidence presented in both the guilt phase and penalty phase, having had the benefit of legal memoranda and further argument both in favor and in opposition of the death penalty finds as follows:

A. AGGRAVATING FACTORS

1. The capital felony was committed by a person under sentence of imprisonment. The defendant, JOHN DOE, was sentenced to twenty years in prison for the crime of armed robbery in 1978. He was released on parole in 1985. His parole was due to expire on March 3, 1998. This homicide occurred on April 10, 1991. Since the defendant was on parole when this murder was committed, the defendant was under a sentence of imprisonment when he committed this capital felony. This aggravating circumstance was proved beyond a reasonable doubt.

2. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The defendant was convicted in 1978 of the crime of armed robbery. Additionally, in 1989 the defendant was convicted of the crime of aggravated assault. Both of these felonies involve the use or threat of violence to another person. This aggravating circumstance was proved beyond a reasonable doubt.

3. The capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, or escape after committing a sexual battery.

The defendant was charged and convicted of committing a sexual battery on the victim of the homicide. The evidence shows the victim, an 81 year old woman living alone, had tears to vagina and rectum. The medical examiner testified these injuries were inconsistent with consensual intercourse. The defendant's own statement admits he raped the victim. The capital felony was committed, therefore, while the defendant was engaged in the commission of asexual battery. This aggravating circumstance was proved beyond a reasonable doubt.

4. The capital felony was committed for pecuniary gain.

The defendant was charged and convicted of the crime of burglary. The facts of the case show the defendant broke into the victim's house with the intent to steal. His statement to the detectives indicates this was his intent when he broke into the house. He left the house with over $10,000.00 in cash that was hidden under the victim's mattress. Therefore, the capital felony was committed for pecuniary gain. This aggravating circumstance was proved beyond a reasonable doubt.

5. The capital felony was especially heinous, atrocious, or cruel.

The victim in this case had gone to bed for the evening. The defendant, who had worked for the victim in the past, knew the victim kept large sums of money on hand. He decided to break into her house and steal her money, which he needed to support his extensive drug habit. After crawling in through the living room window, the defendant proceeded to look through the victim's house for this cash. When he was unable to find it, he woke the victim and demanded her money. She told him it was under her mattress. After retrieving the money, the victim demanded that the defendant leave her house. According to the defendant's own statement to the detectives in this case, he then decided he wanted more than money. He threw the victim to the ground and demanded sex from her. She refused. He ripped her nightgown off and had vaginal intercourse with her. When she begged him to stop, and cried out in pain, he beat her and taped her mouth shut so her cries could not be heard. He then proceeded to take her knitting needles and puncture her breasts. According to the medical examiner, the victim had over thirty such puncture wounds on her breasts. Then and performed anal sex on the victim. Throughout the ordeal, he kept telling the victim if he was not pleased with her performance, he was going to kill her. Finally, the defendant strangled the victim with an electrical cord. This entire ordeal lasted over 1 ½ hours, and the victim, according to the medical examiner, put up quite a struggle and experienced excruciating pain. She was conscious throughout and surely knew of her impending doom when the defendant wrapped the cord around her throat and began to choke the life out of her. This murder was indeed a conscienceless , pitiless crime, which was unnecessarily torturous to the victim. since the defendant admitted these facts, and the evidence fully supports his admission, the aggravating factor that the capital felony was especially heinous, atrocious, or cruel has been proved beyond a reasonable doubt.

6. The state has asked the court to find two additional aggravating factors - that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest for the crimes of Burglary and Involuntary Sexual Battery and that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Part of the defendant's statement was that he never intended to harm the victim, but only to steal her money. He stated that something inside him just "snapped" and he could not explain why he committed the acts of rape and murder. He believed it had to be because he was "strung out" on cocaine and had consumed both alcohol and cocaine prior to these crimes. While the state certainly has an argument that these two aggravating factors apply, it cannot be said that either of them has been proved beyond a reasonable

doubt. Therefore, the court neither finds, nor has it considered, either of these aggravating factors.

None of the other aggravating factors enumerated by statute are applicable to this case and this court has not considered them.

Nothing except as previously indicated in paragraphs 1-5 above was considered in aggravation.

B. MITIGATING FACTORS

Statutory Mitigating Factors

In its sentencing memorandum, the defendant requested the court to consider the following statutory mitigating circumstances:

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Three doctors testified during the penalty phase of the trial. Two were called by the defendant, and one was called by the state. These doctors differed on the extent, and even the existence of any mental disturbance of the defendant at the time of the murder. However, on one thing they all agreed - the defendant was not under the influence of any extreme mental or emotional disturbance at the time of this crime. This court allowed the defendant to argue this circumstance to the jury, but now finds that neither the totality of the facts, nor any expert or non-expert testimony suggests the defendant was under the influence of extreme mental or emotional disturbance when he committed this murder. This mitigating circumstance does not exist.

2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Two doctors testified that the defendant had been a cocaine addict and alcoholic for many years. They believed the defendant had ingested these substances prior to this entire episode and that because of his addiction and the use of both cocaine and alcohol during the day and night of this crime, that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The doctor for the state found the defendant did appreciate the criminality of his conduct, which is why he believed the defendant murdered the victim - to avoid being caught and prosecuted for his vicious sexual assault on the victim. He did admit the defendant suffered from alcohol and cocaine abuse, and acknowledged the defendant may have been "high" at the time of the crime. He believed this may have "clouded" the defendant's ability to conform his conduct to the requirements of law, but did not feel the defendant was so intoxicated or so under the influence of drugs that his capacity was substantially impaired.

The facts of this case, the defendant's statements, and the testimony of two of the three experts, coupled with the lack of any known or suspected sexual abnormality or sexual violence in the defendant's past, cause this court to be "reasonably convinced" - the test for a mitigating factor - that the defendant's capacity to conform his conduct to the requirements of law was substantially impaired. Accordingly, this mitigating circumstance exists.

The court has given this circumstance significant weight since it appears the defendant was acting out of character in committing this homicide.

3. The age of the defendant at the time of the crime.

At the time this murder was committed, the defendant was thirty-four years old. All three doctors said the defendant's I.Q. was normal, and he was in no way retarded. Accordingly, the defendant's emotional age is consistent with his actual age. The defendant's age at the time of the

crime is not a mitigating factor.

Non-Statutory Mitigating Factors

The defendant has asked the court to consider the following non-statutory mitigating factors.

1) Family background
2) Abuse of the defendant as a child
3) Defendant's remorse
4) Voluntary confession
5) Good conduct in jail
6) Defendant's alcohol and, drug abuse
7) The fact that it would cost less to imprison defendant for life than to execute him

1)&2) The testimony of defendant, as well as of his sister, brother, mother, and the three expert witnesses showed that an alcoholic father abused the defendant and his other family members physically. This abuse stopped when the parents divorced when the defendant was ten years old. The abuse was not extreme, nor was the defendant singled out any more than the other siblings. Neither the defendant's brother nor sister has ever been arrested for any crime. Thus, while the court finds the abuse suffered by the defendant at the hand of his father and the fact that the defendant came from a broken home to be mitigating circumstances, the court gave them little weight in the weighing process.

3)&4) The defendant appears to be truly remorseful for what he has done. This is evident by the fact that he turned himself into the police and gave a voluntary confession. His tape-recorded confession displays much grief. He has written a letter of sincere apology to the victim's family, against his attorney's advice. The police admitted in the penalty phase that the defendant was not a suspect when he turned himself in and agreed to cooperate. Both the defendant's remorse, and his voluntary confession are recognized mitigating circumstances. They have both been proved by the evidence. This court gave them both substantial weight.

5) There is no doubt that the defendant's good conduct in jail may be a mitigating factor. In this case, however, the defendant has not shown this to exist. During his tenure in prison for his Armed Robbery conviction, he once attempted escape, and had six disciplinary reports prior to his parole. Since being incarcerated for the instant offense, he has participated in a hunger strike, has accumulated two disciplinary reports, and was finally moved to isolation because of abusive behavior toward the guards. Although his recent behavior has improved dramatically, and he has been moved back to general population with no additional difficulties, the court does not find that it has been reasonably established by the evidence that the defendant's jail conduct is good.

6) It has been established by the evidence that the defendant suffers from both alcoholism and drug addiction. This disease is recognized as a mitigating circumstance. The court has given this factor some weight in her consideration of defendant's sentence.

7) The defendant asked to present evidence to the jury that it would cost the taxpayers of Florida significantly less to imprison the defendant for the alternative sentence of life imprisonment without possibility of parole for twenty-five years than to execute him. The court did not allow the jury to hear this testimony. The defendant proffered the testimony for the record to

preserve his appellate rights. He now asks the court to consider the proffered testimony and declare this a non-statutory mitigating factor. The proffered testimony suggests the defendant's assertion is correct. However, the Florida Supreme Court does not recognize this as a non-statutory mitigating factor, and this court has accordingly not considered it as such.

8) The defendant asked the court to find the statutory mitigating factor that he was under the influence of extreme mental or emotional disturbance when he committed this murder. For the reasons previously expressed, the court declined to do so. However, there was testimony, while in conflict, that the defendant was suffering from some mental or emotional disturbance when this murder was committed. The crux of the testimony was that the defendant's use of alcohol and drugs over a period of time has taken a toll on the defendant's mind and body. The court does consider this as a non-statutory mitigating factor. Since the court has given weight to the defendant's alcohol and drug use and addiction both as a statutory mitigating factor (defendant's capacity was substantially impaired) and as a non-statutory mitigating factor (see paragraph 6 above), the court gives it only little weight as an additional non-statutory mitigating factor.

The court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present.

Accordingly, it is:

ORDERED AND ADJUDGED that the defendant, JOHN DOE, is hereby sentenced to death for the murder of the victim, DOROTHY JONES. The defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

DONE AND ORDERED in ____________ County, Florida, this 27th day of March 2001.

____
CIRCUIT JUDGE

Copies furnished to:

State Attorney
Counsel for Defendant
Defendant

APPENDIX C

Rule 3.112. Minimum Standards for Attorneys in Capital Cases (Florida)

(a) Statement of Purpose. The purpose of these rules is to set minimum standards for conflict attorneys to help ensure that competent representation will be provided to indigent capital defendants in all cases. Minimum standards that have been promulgated concerning representation for defendants in criminal cases generally and the level of adherence to such standards required for noncapital cases should not be adopted as sufficient for death penalty cases. Counsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation. These minimum standards for capital cases are not intended to preclude any circuit from adopting or maintaining standards having greater requirements.

(b) Definitions. A capital trial case is defined as any first-degree murder case in which the State has not formally waived the death penalty on the record. A capital appeal case is any appeal in which the death penalty has been imposed. A capital postconviction case is any case where the defendant is still under a sentence of death.

(c) List of Qualified Counsel.

(1) Every circuit shall maintain a list of counsel qualified for appointment in capital cases in each of three categories:

(A) lead trial counsel;

(B) trial cocounsel; and

(C) appellate counsel.

No attorney may be appointed to handle a capital trial or appeal unless duly qualified on the appropriate list.

(2) The conflict committee for each circuit is responsible for approving and removing attorneys from the list pursuant to section 925.037, Florida Statutes. Each circuit committee is encouraged to obtain additional input from experienced capital defense counsel.

(3) No attorney may be qualified on any of the capital lists unless he or she has attended within the last year a continuing legal education program of at least ten hours' duration devoted specifically to the defense of capital cases. Continuing legal education programs meeting the requirements of this rule shall be offered by the Florida Bar or another recognized provider and should be approved for continuing legal education credit by the Florida Bar. The failure to comply with this requirement shall be cause for removal from the list until the requirement is fulfilled.

(d) Appointment of Counsel. A court must appoint lead counsel and, upon written application and a showing of need by lead counsel, should appoint cocounsel to handle every capital trial in which the defendant is not represented by retained counsel or the Public Defender. Lead counsel shall have the right to select cocounsel from attorneys on the lead counsel or cocounsel list. Both attorneys shall be reasonably compensated for the trial and sentencing phase. Except under extraordinary circumstances, only one attorney may be compensated for other proceedings.

(e) Lead Counsel. Lead trial counsel assignments should be given to attorneys who:

(1) Are members of the bar admitted to practice in the jurisdiction or admitted to practice pro

hac vice; and

(2) are experienced and active trial practitioners with at least five years of litigation experience in the field of criminal law; and

(3) have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead defense counsel or cocounsel in at least two cases tried to completion in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder; or alternatively, of the nine jury trials, at least one was a murder trial and an additional five were felony jury trials; and

(4) are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

(5) are familiar with and experienced in the utilization of expert witnesses and evidence, including but not
limited to psychiatric and forensic evidence; and

(6) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

(f) Cocounsel. Trial cocounsel assignments should be given to attorneys who:

(1) Are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and

(2) Who qualify as lead counsel under paragraph (e) of these standards or meet the following requirements:

(A) are experienced and active trial practitioners with at least three years of litigation experience in the field of criminal law; and

(B) have prior experience as lead counsel or cocounsel in no fewer than three jury trials of serious and
complex cases which were tried to completion, at least two of which were trials in which the charge was murder; or alternatively, of the three jury trials, at least one was a murder trial and one was a felony jury trial; and

(C) are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

(D) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

(g) Appellate Counsel. Appellate counsel assignments should be given to attorneys who:

(1) Are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and

(2) are experienced and active trial or appellate practitioners with at least five years of experience in the field of criminal law; and

(3) have prior experience in the appeal of at least one case where a sentence of death was imposed, as well as prior experience as lead counsel in the appeal of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of a murder conviction; or alternatively, have prior experience as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder conviction; and

(4) are familiar with the practice and procedure of the appellate courts of the jurisdiction; and

(5) have demonstrated the necessary proficiency and commitment which exemplify the quality

of representation appropriate to capital cases.

(h) Exceptional Circumstances. In the event that the trial court determines that counsel meeting the technical requirements of this rule is not available and that exceptional circumstances require appointment of other counsel, the trial court shall enter an order specifying, in writing, the exceptional circumstances requiring deviation from the rule and the court's explicit determination that counsel chosen will provide competent representation in accord with the policy concerns of the rule.