Death Resurrected: The Reimplementation of the Federal Death Penalty

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The question of capital punishment has been the subject of endless discussion and will probably never be settled so long as men believe in punishment. . . . questions of this sort, or perhaps of any sort, are not settled by reason; they are settled by prejudices and sentiments or by emotion. When they are settled they do not stay settled, for the emotions change as new stimuli are applied to the machine.

Clarence Darrow

INTRODUCTION

Terre Haute, Indiana is a quiet town nestled on the banks of the Wabash River. In the days of canal transportation, and later when two major national highways nearby intersected, Terre Haute became known as the “Crossroads of America.” The home to St. Mary-of-the-Woods Catholic College, the area maintains a Midwestern hometown feel where there might be respite from the hectic work-a-day world. This peace will soon be shaken, when the federal government, in the nearby federal penitentiary, takes the life of Juan Raul Garza. As the media descends upon western Indiana for this spectacle, Terre Haute will once again become the “Crossroads of America.”

Since 1963, the United States federal government has not carried out the ultimate punishment of a capital sentence.² That will change

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1. CLARENCE DARROW, CRIME: ITS CAUSE AND TREATMENT 166 (1922).
2. In 1963 Victor Feguer was hanged at the Iowa State Penitentiary for the kidnapping and murder of a doctor. Craig J. Albert, CHALLENGING DETERRENCE: NEW INSIGHTS ON CAPITAL PUNISHMENT

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with Garza’s execution. Recently, Terre Haute became home to the
new federal death chamber and the twenty-one men who sit on the
newly-constructed death row. Juan Raul Garza, a resident of the new
federal death row for drug-related homicides since the early 1990s, has
exhausted judicial review of his death sentence and likely will be ex-
ecuted within the next few months.

The procedure to be employed in the upcoming federal execution
is well-established. After spending the forty-eight to seventy-two
hours prior to the execution in a holding cell, the condemned is led to
the execution room by corrections officers and strapped to a gurney
with arms outstretched. An I.V. is inserted into the arm, and an
anesthetic and potassium chloride enter the blood stream, stopping the
heart. And so, the condemned experiences what death-row denizens
call “the ultimate high.”

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3. As of January 3, 2000, these men are: (1) David Ronald Chandler (sentenced in 1991 for
hiring someone to murder a police informant—his sentencing has recently been overturned by
the Eleventh Circuit, but will be reheard en banc); (2) Cory Johnson (sentenced in 1993 for
several murders); (3) James H. Roane (co-defendant of Johnson); (4) Richard Tipton (co-defendant
of Johnson); (5) Juan Raul Garza (sentenced in 1993); (6) John McCullah (sentenced in 1993
for a drug-related homicide); (7) Orlando Hall (sentenced in 1995 for the kidnapping, rape, and
murder of a girl); (8) Bruce Webster (same); (9) Louis Jones (sentenced in 1995 for the kidnap-
ping, rape, and murder of a female soldier); (10) Len Davis (sentenced in 1996 for killing a
woman who had filed a complaint against him); (11) Paul Hardy (Davis’ accomplice); (12)
Bountaem Chanthadora (sentenced in 1996 for a murder during a robbery); (13) Anthony Battle
(sentenced in 1997 for killing a corrections officer while serving a prison sentence); (14) Timothy
McVeigh (sentenced in 1997 for the murder of federal agents in the bombing of a federal build-
ing); (15) Darryl Alamount Johnson (sentenced in 1997 for a double murder); (16) Aquilla Bar-
nette (sentenced in 1998 for murdering his former girlfriend and another in a carjacking); (17)
Billie Jerome Allen (sentenced in 1998 for a murder during a bank robbery); (18) Norris Holder
(sentenced in 1998 for a murder during a bank robbery); (19) David Paul Hammer (sentenced in 1998
for killing a federal prison inmate); (20) Richard Thomas Stitt (sentenced in 1998 for ordering
the murder of three people); and (21) Danny Lee (convicted in 1999 for the murder of a gun
dealer and his family). See The Penalty Is Death: McVeigh Accepts His Punishment Stoically,
FLORIDA TODAY, June 14, 1997, at 11A; Federal Inmates, THE DAILY OKLAHOMAN, July 14,
1999, at 4. See also The Death Penalty Information Center <http://www.essential.org/dpic/
fedprisoners.html> (visited on 01/03/2000). The new federal death chamber has a capacity of

4. Garza has exhausted his direct appeals and the appeal from the denial of his 28 U.S.C. §
2255 motion. The United States Supreme Court recently denied certiorari. Garza v. United

5. The upcoming execution of Garza is based on the Drug Kingpin Act, which, pursuant to
deiith penalty scheme, the Federal Death Penalty Act of 1994, applies the manner of execution

6. The death chamber itself has been described as “an antiseptic place with ugly green tile,
dominated by a modern-looking death gurney.” See Ted Bridis, Uncle Sam’s New Death Cham-

This procedure, performed hundreds of times in the independent "laboratories of the states," will most likely be performed smoothly. However, while the procedure itself may be performed without a hitch, the emotions, concerns, and debates regarding execution will probably be tumultuous. While the nation is accustomed to the routine state executions and their accompanying vehement protests, the nation at large is unaccustomed to a sanctioned killing by the United States government. The imminent use of the death penalty by the federal government is sure to fuel the debate that has raged with increasing furor, escalating with every execution.

This Comment analyzes the federal death penalty. Part one discusses the history of the federal death penalty, from its roots in the superstitions and religious dogma of colonial America to the Drug Kingpin Act and the Federal Death Penalty Act of 1994. Part two examines the Drug Kingpin Act, the first federal move into the death penalty arena since the landmark Supreme Court case of Furman v. Georgia. Next, the Comment explores Congress' broad expansion of the federal death penalty in its most recent statute, the Federal Death Penalty Act of 1994. Part four examines the practical application of the Drug Kingpin Act in the case of Juan Raul Garza, the man who likely will be the first federal execution of the twenty-first century. Part four also contemplates the constitutionality of the federal death penalty, focusing on the recent Supreme Court case of Jones v. United States, the first treatment of the new death penalty law by this nation's highest court. Finally, part five considers the implications, pragmatic and political, of renewed federal executions.

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8. This expression of federalism was originally expressed by Justice Brandeis in his dissent in New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932):
   It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country . . . novelty itself is not a vice. These novel experiments, of course, must comply with the United States Constitution; but their mere novelty should not be a strike against them.
I. A HISTORY OF FEDERAL EXECUTIONS IN AMERICAN CAPITAL JURISPRUDENCE

A. The Federal Death Penalty Until 1972

Hail hieroglyphic State machine, Contrived to punish fancy in.13

To understand current death penalty provisions, it is helpful to examine the history of capital punishment under English common law and subsequent statutory developments in this country. English common law, from which American law originally derived, long employed capital punishment. Reflecting Biblical language, early English law provided:

Let the man who slayeth another wilfully perish by death. Let him who slayeth another of necessity or unwillingly, or unwil-
fully, as God may have sent him into his hands and for whom he has not lain in wait be worthy of his life and of lawful bot if he seek an asylum.14

In the 1500s England recognized eight crimes meriting capital punishment: “treason, petty treason (killing of husband by his wife), murder, larceny, robbery, burglary, rape, and arson.”15 This list grew over the centuries until “[b]y shortly after 1800, capital offenses num-
bered more than 200 and not only included crimes against person and property, but even some against the public peace.”16 This deluge of death may seem appalling in light of our current death penalty juris-
prudence, but, as Blackstone noted, England was fairly civilized when compared with the rest of Europe.17

Capital punishment has been an inherent component of the American legal experience since the origin of this nation. In 1622 the first colonial execution took place in Virginia for theft.18 In the early seventeenth century, the colonies prescribed execution for a laundry

13. DANIEL DEFOE, HYMN TO THE PILLARY.
14. 3 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 24 (1883). The lan-
guage from this statute echoes Exodus 21:12-13. Id.
16. Id.
17. See id. (citing 4 WILLIAM BLACKSTONE, COMMENTARIES). Common law executions hardly seem so barbaric when compared to capital punishment in modern China. China leads the world by far in executions, where most executions are performed with a single bullet to the back of the head. See Mark Curriden, Inmates’ Last Wish Is to Donate Kidney, 82 A.B.A. J. 26 (1996). Traditionally, the family of the executed is responsible for reimbursing the People’s Republic of China for the cost of the bullet used to kill their loved one. See Allison K. Owen, Death Row Inmates or Organ Donors: China’s Source of Body Organs for Medical Transplantation, 5 IND. INT’L & COMP. L. REV. 495, 502 (1995).
list of crimes including: murder, witchcraft, idolatry, assault in sudden anger, rape, buggery, adultery, sodomy, perjury in a criminal trial, rebellion, manstealing, and statutory rape. The colonial crimes that formed the basis for capital punishment collectively evolved from those based on theocratic principles to more secular principles.

As constructed by the framers of the Constitution, no explicit mention of the death penalty can be found within the four corners of the original document. But the guarantee of the Fifth Amendment against the improper deprivation of "life" without the due process of law in the Bill of Rights suggests an awareness by early American leaders that the death penalty would be implemented by the federal government. Moreover, the Fifth Amendment also implements the use of grand juries in capital prosecutions.

Some opposition to the death penalty did exist in the colonies prior to the creation of the nation. This, however, amounted to little more than an effort to reform the use of capital punishment, rather than a total abolition.

In 1790, the first Congress attempted to craft a federal criminal code and on April 30, 1790, passed an "Act of the Punishment of Certain Crimes Against the United States." The act sanctioned the use of capital punishment for several crimes, mandating that anyone committing treason, willful murder on federal property, forgery, piracy, counterfeiting, and any one of several crimes on the high seas "shall suffer death." For the next century, this law remained rather static. In 1829 the House of Representatives called for a presidential account-

19. See John P. Cunningham, Death in the Federal Courts: Expectations and Realities of the Federal Death Penalty Act of 1994, 32 U. RICH. L. REV. 939, 942 (1998) (citing Furman, 408 U.S. at 335 (Marshall, J., concurring)). Indeed, the imposition of capital punishment for these crimes was based on the proscriptions of the Old Testament, and "The Capital Lawes of New-England" referenced the section of the Bible that condemned the enumerated practice or crime. See Furman, 408 U.S. at 335.
20. See Furman, 408 U.S. at 335 (Marshall, J., concurring).
21. See U.S. CONST. amend. V.
22. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Id.
23. "Even in the 17th century, there was some opposition to capital punishment in some of the colonies. In his 'Great Act' of 1682, William Penn prescribed death only for premeditated murder and treason, although his reform was not long lived." Furman, 408 U.S. at 336 (Marshall, J., concurring). Also "in 1794, Pennsylvinia attempted to reduce the rigors of the law by abolishing capital punishment except for 'murder of the first degree,' defined to include all 'willful, deliberate and premeditated' killings, for which the death penalty remained mandatory." McGautha v. California, 402 U.S. 183, 198 (1971) (citing Pa. Laws 1794, c. 1777).
25. See id. See also 1 Stat. 112, sec. 1, 3, 8 (1790); 1 Stat. 115, sec. 14; 1 Stat. 117 sec. 23 (1790).
ing of federal executions.\textsuperscript{26} President Andrew Jackson reported that since 1790 there had been one hundred thirty-eight capital trials, with one hundred eighteen convictions.\textsuperscript{27} Of these convictions, there had been forty-two executions and sixty-four pardons.\textsuperscript{28} Surprisingly, six individuals who had been sentenced to death under the federal statute were unaccounted for.\textsuperscript{29}

The 1800s was a time of social change, and a loud call for the abolition of the death penalty arose in certain circles. While there was some movement earlier in the century to ban the use of capital punishment,\textsuperscript{30} the work of Edward Livingston, an attorney who became Secretary of State and Minister to France under President Jackson, became the chief proponent of the abolition movement during that time. Livingston provided credibility to the abolition movement, which previously may have been considered a radical cause. Throughout the Northeast, states began to use the death penalty less frequently and in more limited circumstances, until Michigan became the first state to abolish capital punishment in 1846. Soon other states curtailed the use of the death penalty.\textsuperscript{31} Even those states that continued to employ the death penalty narrowed the crimes that merited capital punishment.\textsuperscript{32}

The Civil War, however, seemed to derail the abolition attempts and thwarted any momentum to restrict or abolish the death penalty. One historian noted that “[a]fter the Civil War, men’s finer sensibilities, which had once been revolted by the execution of a fellow being, seemed hardened and blunted.”\textsuperscript{33} Following the Civil War, some abolitionist successes were achieved,\textsuperscript{34} but social pressure that had driven change during the first part of the century was generally diminished.

\textsuperscript{26} See Little, supra note 24, at 366.
\textsuperscript{27} Id. at 363; H.R. EXEC. NO. 20-146 (1829).
\textsuperscript{28} H.R. EXEC. NO. 20-146 (1829).
\textsuperscript{29} Id. at n.87.
\textsuperscript{30} For example, several governors of New York strongly urged their state legislature to revoke the use of capital punishment. See Furman v. Georgia, 408 U.S. 238, 337 (1972) (noting that “in the early 1800’s, Governors George and DeWitt Clinton and Daniel Tompkins unsuccessfully urged the New York Legislature to modify or end capital punishment.”).
\textsuperscript{31} Specifically, Rhode Island partially abolished capital punishment in 1852 and Wisconsin totally abolished the death penalty in 1853. See Furman, 408 U.S. at 338 (Marshall, J., concurring).
\textsuperscript{32} HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA 10 (1967).
\textsuperscript{34} “Maine abolished the death penalty in 1876, restored it in 1883, and abolished it again in 1887; Iowa abolished capital punishment from 1872-1878; Colorado began an erratic period of de facto abolition and revival in 1872; and Kansas also abolished it in 1872, and by law in 1907.” Furman, 408 U.S. at 339 (Marshall, J., concurring). During this time period there also was a retreat from the use of a mandatory death penalty scheme and an increase in the use of jury nulli-
Opposition to the death penalty revived toward the end of the century, and in 1892 the move for abolition finally reached the federal legislature, when a bill was introduced that called for the revocation of capital punishment. While ultimately unsuccessful, this bill provided a basis for serious discussion on the federal level concerning abolition and led to the first reduction of the federal death penalty in 1897. The “Act to Reduce the Cases in Which the Death Penalty May Be Inflicted” reduced the number of potential capital offenses to five.

One of the more important modifications in 1897 was the change from a mandatory to a permissive death penalty, allowing the jury to decide the propriety of the death penalty. However, these efforts had little impact on the death penalty as a whole. Indeed, this amounted to little more than “a slight and fluctuating trend to abolish it.”

After a revival of abolitionist support, the period following the First World War again saw public support dissipated. This period marked the progression of four separate trends: (1) a tendency to abolish, then reinstate the death penalty; (2) a tendency toward a permissive death penalty scheme in place of a mandatory one; (3) a reduction in the number of precursor capital crimes; and (4) a reduction in the total number of executions. The federal death penalty during this time also was slightly broadened in scope beyond the five offenses enumerated in 1897.

In the 1960s a renewed abolition movement began, spearheaded by the NAACP Legal Defense and Educational Fund. The Legal Defense Fund, largely through the efforts of Professor Anthony Amsterdam, attempted to block executions through a “moratorium to prohibit the use of the death penalty in inappropriate circumstances. Id. See also McGautha v. California, 402 U.S. 183, 199 (1971) (stating that “jurors on occasion took the law into their own hands in cases which were ‘willful, deliberate, and premeditated’ in any view of that phrase, but which nevertheless were clearly inappropriate for the death penalty. In such cases they simply refused to convict of the capital offense.”).

36. Little, supra note 24, at 367.
37. Id.
39. By 1917 twelve states had abandoned the death penalty, but four of these reinstated capital punishment during World War One and others later. See Furman, 408 U.S. at 339 (Marshall, J., concurring).
40. This trend began in the 1800s, and by the early 1900s almost every jurisdiction had cast aside the mandatory capital sentencing scheme. See Furman, 408 U.S. at 339 (Marshall, J., concurring).
41. See Sutherland, supra note 38, at 561.
42. See Little, supra note 24, at 374.
43. See William B. Lockhart et al., Constitutional Rights and Liberties 301 (7th ed. 1991).
strategy" to create a "death row logjam." A slowdown in the execution machine also helped the abolition movement. While the number of executions nationwide had peaked in the 1930s, by the 1960s the gradual decline resulted in a virtual standstill. Several states during this period discontinued the use of the death penalty. The abolition effort proved so successful that between 1967 and 1972 there was not one execution in the United States, either on the state or federal level. Although the number of executions in the United States had been steadily decreasing since the first part of the twentieth century, the unparalleled quiet in the execution chamber spoke loudly of the discontent in society.

From 1927 to 1963 there were thirty-four federal executions. While many of these executions were for murder, several individuals were executed for sabotage, espionage, and kidnapping. The method used to execute these individuals varied between hanging, electrocution, and the gas chamber. The final execution by the federal government in the twentieth century occurred in Iowa on March 15, 1963, as Victor Feguer was hanged for kidnapping and murder.

B. The Modern Federal Death Penalty—1972 to Present

Capital Punishment, a penalty regarding the justice and expediency of which many worthy persons—including all the assassins—enter- tain grave misgivings.

Modern death penalty jurisprudence began in 1972 with the breakthrough Supreme Court case of Furman v. Georgia. While the

44. Id.
45. In 1930 there were 155 executions. In 1935 this number had increased to 199. 1940 saw a small decline to 160. In 1945 the number continued to decline to 120, but remained nearly steady in 1950 with 119 executions. By 1955 the number dropped to 81, and dropped to nearly half that in 1960 to 49. 1965 represented a substantial drop to 15 executions, and by 1970 there were no executions. See United States Department of Justice, Bureau of Justice Statistics Bulletin, Capital Punishment 1998 (accessible at http://www.ojp.usdoj.gov/bjs/abstract/cp98) (visited 12/15/99).
46. See id.
48. See Death Penalty Information Center, supra note 3.
49. Id.
50. Id.
51. On Feb 15, 1963, Feguer was hanged for the kidnapping and murder of a doctor. His execution, however, received little media attention, especially in comparison to the media onslaught that Garza's execution will bring. For a more comprehensive treatment of Feguer's execution, see Little, supra note 24, at 355-58.
52. AMBROSE BIERCE, THE DEVIL'S DICTIONARY 14 (1911).
Supreme Court had previously considered challenges to the death penalty under the Eighth Amendment's prohibition of cruel and unusual punishments, before this case it had never considered a facial challenge to the death penalty as unconstitutional per se.\textsuperscript{54} Earlier cases, such as Witherspoon \textit{v.} Illinois,\textsuperscript{55} in which the court ruled that a "death-qualified jury" was unconstitutional, indicated that the death penalty would soon face drastic review by the Supreme Court. The \textit{Furman} Court, however, forever changed the face of death penalty jurisprudence.\textsuperscript{56}

\textit{Furman} challenged the use of the death penalty as being arbitrary, capricious, and discriminatory in its application. \textit{Furman} challenged state statutes that allowed the decision of life or death to be made by a jury with almost no guidance. In \textit{Furman}, a decision marked by a separate opinion for every member of the Supreme Court, the Court failed to find that every application of the death penalty would be unconstitutional, but cast enough doubt over the process to create a four-year hiatus in death penalty jurisprudence. \textit{Furman} called into question the process by which the death penalty was implemented, and states subsequently revised their statutes to conform with Eighth Amendment expectations,\textsuperscript{57} bringing the national execution machine to a halt.\textsuperscript{58} However, this respite from the death penalty was short-lived, and the death penalty reemerged in the seminal case of \textit{Gregg v. Georgia}.\textsuperscript{59}

In \textit{Gregg}, the Court unequivocally held that not all capital punishment violates the constitution.\textsuperscript{60} Most importantly, \textit{Gregg} estab-

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\item \textsuperscript{53} 408 U.S. 238 (1972).
\item \textsuperscript{54} Some members of the court had previously suggested that they may consider the use of this death penalty as violation of the prohibition against cruel and unusual punishment. See Rudolph \textit{v.} Alabama, 375 U.S. 889, 889 (1963) (Goldberg, J., dissenting).
\item \textsuperscript{55} 391 U.S. 510 (1968). Another case from that period, however, bolstered capital punishment in holding that leaving the decision of life and death to a jury offended nothing in the constitution. See McGautha \textit{v.} California, 402 U.S. 183 (1971). Indeed, any attempt to divine the course of Supreme Court jurisprudence according to the cases decided during that time period was unreliable speculation.
\item \textsuperscript{56} Furman \textit{v.} Georgia, 408 U.S. 238 (1972).
\item \textsuperscript{57} Of the nine Justices, only Brennan and Marshall opined that the death penalty would be unconstitutional in all applications.
\item \textsuperscript{58} While the great majority of jurisdictions had a death penalty at the time of \textit{Furman}, the number of executions per year had been slowly decreasing. In the time period between 1900 and 1966, nationwide in the federal and state systems there were 7,126 executions. See RICHARD QUINNEY, \textit{THE SOCIAL REALITY OF CRIME} 185 (1970). "But since 1930, when statistics began to be systematically compiled, executions have declined from an annual average of 167 during the 1930's to an annual average of 27 during the first seven years of the 1960's." \textit{Id.} at 185-86. Since \textit{Gregg}, however, the number of executions has greatly surpassed the slowing period of the Sixties. \textit{Id.}
\item \textsuperscript{59} 428 U.S. 153 (1976).
\item \textsuperscript{60} \textit{Id.} at 169.
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lished the standards that govern the application of the death penalty. Gregg mandated that "[n]o longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines." The Court held that the Eighth Amendment required "an assessment of contemporary values concerning the infliction" of the death penalty. This objective test would involve the discernment of "the evolving standards of decency that mark the progress of a maturing society." The Court identified the actions of state legislatures and the decisions of juries as two important subcomponents of this evaluation when imposing the death penalty. Having assessed the moral barometer of the public, a court in such cases must then decide if the punishment "comports with the basic concept of human dignity at the core of the [Eighth] Amendment."

Gregg was well-received both in the political and public arena. At the time of Furman, fifty-seven percent of Americans favored the death penalty. By the time Gregg was decided, this number had risen to sixty-five percent.

The judicial reasoning in Gregg soon was followed nationwide. In 1979 Gary Gilmore was executed in Utah for the murder of a gas station attendant and motel clerk. Since then, all but thirteen jurisdictions have adopted the death penalty.

The executions that have ensued represent a steady use of the death penalty in our nation’s history. Indeed, in 1999 there were

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61. Id. at 206-07.
62. Id. at 173.
63. Id. (quoting Trop v. Dulles, 356 U.S. 86, 101 (1956)).
64. Id. at 182.
65. See LOCKHART, supra note 43, at 313.
66. See id.
67. Utah is one of the few states that employs the firing squad for executions. Only Utah, Idaho, and Oklahoma continue to allow this form of execution. See IDAHO CODE § 19-2716 (1999); OKLA. STAT. tit. 22 § 1014 (1999); UTAH CODE ANN. § 77-18-5.5 (1999). Oklahoma will only use the firing squad if the other forms of execution are ruled unconstitutional. OKLA. STAT. tit. 22 § 1044 (1999). Utah specifically has used the firing squad for a century and a half, since its territorial legislature in 1851 mandated that "[b]e it further ordained, that when a person shall be found guilty of murder, under any of the preceding sections of this ordinance, and sented [sic] to die, he, she, or they shall suffer death by being shot, hung, or beheaded." CRIMINAL LAWS OF THE STATE OF DESERET, Sec. 10. The Supreme Court expressly held this manner of execution constitutional in 1879 in Wilherson v. Utah, 99 U.S. 130 (1879) (ruling in the first challenge to the death penalty under the Eighth Amendment that the firing squad did not amount to a punishment involving torture, and consequently, was not cruel and unusual).
68. Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, and the District of Colombia do not employ the death penalty.
69. Since Gilmore’s execution there have been 598 executions by the states. These executions escalated gradually, with only eleven individuals being executed by 1983. In 1984 there were 21 executions, with the number of executions hovering at this level for several years. In
ninety-eight executions in the states. This use, however, is less extensive than death penalty implementation in earlier times. The Supreme Court in Trop v. Dulles discussed the changing nature of Eighth Amendment jurisprudence, commenting on the “evolving standards of decency that mark the progress of a maturing society” that affect the manner in which we employ the death penalty. In keeping with this, the states have subsequently tempered and refined death penalty jurisprudence through constitutional review.

This renewed fervor over the death penalty was not replicated on the national level contemporaneously with the states. After Gregg, from 1976 to 1988, the federal government enacted no new death penalty legislation. During that period, some bills were introduced to reactivate the federal death penalty, but they did not pass.

One of the unanticipated effects of a federal death penalty statute is an actual hindrance in the administration of justice. A study by the President’s Crime Commission during the Furman-mandated reprieve in executions noted that

Whatever views one may have about the efficacy of the death penalty as a deterrent, it clearly has an undesirable effect on the administration of justice. The trial of a capital case is a stirring drama, but that is perhaps its most dangerous attribute. Selecting a jury often requires several days; each objection or point of law requires excessive deliberation because of the irreversible consequences of error. The jury’s concern with the death pen-

1992 there were 31 executions. In 1995 there was a dramatic leap to 56 executions, and the number has steadily increased since.

70. This number is up significantly from the 68 executions in 1998 and 74 in 1997. Id.
73. One commentator has noted that, to some extent,
[int]his slow response was attributable . . . to the Democratic Party’s control of both houses of Congress as well as the Presidency from 1976-80. The Democratic Party traditionally expressed greater opposition to the death penalty than the Republican Party. However, pro-death penalty political strength began to grow from 1980 to 1992 under the strong Republican leadership of Ronald Reagan and George Bush.
74. While 18 U.S.C. § 1512 was amended in 1986 to include the penalty of death for killing a witness, the section did not comport with the requirements of Furman and was regarded as being of no significance. See Little, supra note 24, at 380. In 1977-1978, 1979-1980, and 1981 death penalty bills were introduced in Congress, but were ultimately unsuccessful. See Peggy M. Tobolowsky, Drugs and Death: Congress Authorizes the Death Penalty for Certain Drug-Related Murders, 18 J. CONTEMP. L. 47, 49 (1992). In 1984 the Senate passed federal death penalty legislation that was ignored by the House. Id. The House later reciprocated with a death penalty provision in the Omnibus Anti-Drug Act of 1986, but the Senate version did not include that provision. Id. at 59.
ality may result in unwarranted acquittals and there is increased danger that public sympathy will be aroused for the defendant, regardless of his guilt of the crime charged.75

This procedural morass has reduced the likelihood that executions today will ever surpass the level of executions held during the 1930s.

Some commentators have felt that the federal hiatus was at least partially due to frequent allegations of racial and socioeconomic disparities in the use of the death penalty.76 These concerns, however, were alleviated in 1987 when a majority of the Supreme Court upheld a trial court's denial of the use of statistical evidence to establish a claim of cruel and unusual punishment in McCleskey v. Kemp.77 Finally, with the stabilizing effect of over a decade of Supreme Court jurisprudence that defined the contours of the Eighth Amendment, and with public support for the death penalty at an all-time high,78 the federal legislature in 1988 enacted the "Drug Kingpin Act."

II. THE DRUG KINGPIN ACT

[1]s there something else you should do, perhaps something you should do before anything else? Of course there is. You need to get sharks out of the water. Drive them out, surround them, net them, spear them—you do whatever it takes, but you get rid of them.79

By 1988, the phrase "the War on Drugs" had become an often repeated phrase in American vernacular.80 Seeking to alleviate the social ills accompanying the torrent of illegal narcotics entering this country, Congress made great efforts to curtail drug importations. One of the most visible results of this effort is the "Drug Kingpin Act," codified as 21 U.S.C. § 848, creating a federal death penalty for

75. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS, COURTS (1973).
76. See Little, supra note 24, at 378-79.
78. In 1986 public support for the death penalty ranged from 70 to 75 percent. See WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL RIGHTS AND LIBERTIES 313 (7th Ed. 1991).
80. The term "war on drugs" came into the national spotlight in a 1982 radio address by President Ronald Reagan where he stated:
The mood toward drugs is changing in this country, and the momentum is with us. We're making no excuses for drugs—hard, soft, or otherwise. Drugs are bad, and we're going after them. As I've said before, we've taken down the surrender flag and run up the battle flag. And we're going to win the war on drugs.
certain crimes associated with the drug trade. While the legislative history for the Drug Kingpin Act is minimal, it the use of the Drug Kingpin Act to curtail drug dealers was a natural progression of the war on drugs and a predictable response to the nation's overwhelming support for the death penalty. The Drug Kingpin Act was created in a whirlwind of political fury. One commentator noted that

Congress's haste was evidenced most obviously in the fact that it neglected to include . . . anything at all about the actual time, place, method, and manner for carrying out federal death sentences. That election-year Congress's interest in the death penalty was purely and transparently symbolic, almost aesthetically so, and not remotely practical.

After hasty creation, on November 18, 1988, the Drug Kingpin Act became effective. 21 U.S.C. § 848 implements the death penalty as a sentencing alternative for several crimes. First, 21 U.S.C. § 848 bases its imposition of the death penalty on those homicides committed during the commission of a "continuing criminal enterprise." Specifically, the phrase "continuing criminal enterprise" focuses on any person who violates the drug control or enforcement laws involving importation and exportation of drugs. This violation must be committed by an

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81. See Little, supra note 24, at 383.
83. George Kannar, Federalizing Death, 44 BUFF. L. REV. 325, 326. Another commentator has termed the speedy resolution of the bill as the result of "the frenzy of the final hours before an election-year adjournment . . ." Peggy M. Tobolowsky, Drugs and Death: Congress Authorizes the Death Penalty for Certain Drug-Related Murders, 18 J. CONTEMP. L. 47, 56 (1992).
84. See David J. Novak, Anatomy of a Federal Death Penalty Prosecution: A Primer for Prosecutors, 50 S.C. L. REV. 645 (1999). This is not to say there was no opposition to the death penalty provisions. One senator noted that
[O]nce again we are going for an election year slam dunk on drugs. Unfortunately, our goal seems to be more to score points with the voters than to address the phenomenally difficult drug problem in this country and to do it in a responsible way. We are taking precipitous steps to indulge our own political vanity while treading with impunity on civil liberties cherished by all Americans . . . [W]e will score our election year slam dunk I fear to the cheers of the crowd, but it will not even slow down the drug problem of this Nation.
86. As an essential part of the prosecution under this portion of the Drug Kingpin Act, the government must not only show that the killing was intentional, they must also demonstrate that the killing had been related in some meaningful way to the continuing criminal enterprise. See
individual "in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management." 87 To constitute a continuing criminal enterprise, the offender must also obtain substantial income or resources from the criminal activities. 88 To qualify for the death penalty, the individual engaging in the continuing criminal enterprise must be one who "intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual." 89

Secondly, the Drug Kingpin Act institutes the death penalty for anyone who intentionally "kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results" 90 while importing a controlled substance, possessing a controlled substance on a vessel, aircraft, or vehicle, or manufacturing or possessing with the intent to distribute. 91 This section specifically focuses on murders accomplished by those who "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" a controlled substance. 92

Finally, the Drug Kingpin Act provides for the death penalty for those who kill "during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution, or service of a prison sentence for" a felony involving drug control or enforcement and the import and export of drugs. 93 For this part of the act to apply, the individual must either kill or order the killing of a federal, state, or local law enforcement officer engaged in his or her duties. 94 The definition of law enforcement officer broadly encompasses "those engaged in corrections, probation, or parole functions." 95

Under the Drug Kingpin Act, if the government intends to seek the death penalty, before trial or the acceptance of a guilty plea by the

United States v. Walker, 912 F. Supp. 646, 652 (N.D.N.Y. 1996), aff'd, 142 F.3d 103 (2d Cir. 1998). This, however, does not mean that only the "kingpin" himself may be prosecuted under this section. Courts have interpreted the "working in furtherance of a continuing criminal enterprise" language as referring to "working to promote or advance the interests" of the enterprise. See United States v. Cooper, 19 F.3d 1154, 1165 (7th Cir. 1994). Thus, the murder of an individual involved in the laundering of the proceeds of a drug organization for being an informant by a member of that organization was properly brought under this section. Id.

90. Id.
court, the government must serve a notice on the defendant that it
intends to seek the death penalty if a conviction results.\footnote{21 U.S.C. § 848(g),(h) (1994). Before the notice of intent is filed, government protocol requires the Department of Justice to get written authorization from the Attorney General to proceed with the capital prosecution. For a more comprehensive look at this process see David J. Novak, Anatomy of a Death Penalty Prosecution: A Primer for Prosecutors, 50 S.C. L. REV. 649-53 (1999).} In this
notice, the government must set forth the aggravated factors that the
government plans to emphasize in seeking the death penalty.\footnote{21 U.S.C. § 848(h)(1)(B) (1994).} The
notice must be given within a reasonable time before trial.\footnote{United States v. Pretlo, 770 F. Supp. 239, 241 (D. N.J. 1991).} This
notice, however, may be amended upon a showing of good cause.\footnote{21 U.S.C. § 848(h)(2) (1994).}

Furthermore, the Drug Kingpin Act mandates a bifurcated trial.
After the government has provided notice of the intent to seek the
death penalty, and the defendant is found culpable in the guilt phase
of the trial, a separate hearing is held to determine which punishment
should be imposed.\footnote{21 U.S.C. § 848(I)(1)(A) (1994).} If the defendant has been found guilty after a
jury trial, the same jury will sit in the penalty phase.\footnote{21 U.S.C. § 848(I)(1)(B) (1994).} Under certain
circumstances, such as in the case of a guilty plea, the discharge of the
jury, or court-ordered redetermination of sentencing, a new jury will
be impaneled.\footnote{21 U.S.C. § 848(I)(2) (1994).} Generally, the sentencing jury will consist of twelve
members.\footnote{21 U.S.C. § 848(I)(3) (1994).} However, if the defendant so requests, and the govern-
ment agrees, the sentencing proceeding may be held before a judge
rather than a jury.\footnote{Id.}

Before the sentencing hearing, no presentencing report is cre-
ated.\footnote{21 U.S.C. § 848(I)(1)(C) (1994).} In the sentencing hearing, aggravating factors are presented to
the jury for their consideration in determining the applicability of the
death penalty. As a preliminary matter, the sentencing jury must find
the aggravating factor of "mens rea" before proceeding to find other
aggravating factors that would support the imposition of the death
penalty.\footnote{21 U.S.C. § 848(j) (1994).} The jury must first consider whether the defendant intention-
ally killed the victim, inflicted bodily harm that resulted in death,
engaged in conduct intending that the victim be killed, or engaged in
conduct intending to cause grave risk to a person, and the victim was
killed. 107 Once these "gateway" factors have been found, the jury then considers if any other aggravating factors are present. 108

The Drug Kingpin Act provides a long list of factors the jury may consider as aggravating. 109 This list, however, is by no means exhaustive; so long as the government provides notice, aggravating factors other than those enumerated in the statute may be considered by the jury. 110


108. These "gateway" factors are taken from the Supreme Court cases of Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987). In those cases, the Supreme Court held that the government may not execute a defendant who did not "himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." Enmund, 458 U.S. at 797. See also United States v. Flores, 63 F.3d 1342, 1370 (5th Cir. 1995). The use of these factors as aggravators in the Drug Kingpin statute is interesting in that it seems to be the only death penalty scheme that uses the Enmund and Tison factors as aggravating circumstances. See id.

109. The statute provides the following aggravating factors:

If the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the following aggravating factors are the only aggravating factors that shall be considered, unless notice of additional aggravating factors is provided under subsection (h)(1)(B) of this section: (1) The defendant—(A) intentionally killed the victim; (B) intentionally inflicted serious bodily injury which resulted in the death of the victim; (C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim; (D) intentionally engaged in conduct which—(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and (ii) resulted in the death of the victim. (2) The defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute. (3) The 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 infliction of, or attempted infliction of, serious bodily injury upon another person. (4) The 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. (5) In the commission of the offense or in escaping apprehension for a violation of subsection (e) of this section, the defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense. (6) The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value. (7) The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value. (8) The defendant committed the offense after substantial planning and premeditation. (9) The victim was particularly vulnerable due to old age, youth, or infirmity. (10) The defendant had previously been convicted of violating this subchapter or subchapter II of this chapter for which a sentence of five or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise. (11) The violation of this subchapter in relation to which the conduct described in subsection (e) of this section occurred was a violation of section 859 of this title. (12) The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.


In considering the aggravating factors, however, the jury cannot base its imposition of a capital sentence on the finding of a single aggravating factor that duplicates an element of the underlying offense. The statute intends to narrow the class of death-eligible defendants at both the guilt and penalty phases.

The statute provides that the government will first present evidence in the sentencing hearing. The government bears the burden of proving the aggravating factors beyond a reasonable doubt. The defense will have the opportunity to rebut any information presented at the hearing. After the government presents its case, the defense presents mitigating factors that militate against the imposition of a capital sentence. The statute broadly provides for these factors, allowing for nearly all factors "in the defendant's background or character [that] mitigate imposition of the death sentence." The defense may also present factors relating to the crime for which the defendant has been found guilty.


111. Pretlow, 779 F. Supp. at 772.
112. See id.
114. Id.
115. Id.
116. Id. These factors include:
(1) The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge. (2) The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge. (3) The defendant is punishable as a principal (as defined in section 2 of Title 18) in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge. (4) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of murder, or other offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person. (5) The defendant was youthful, although not under the age of 18. (6) The defendant did not have a significant prior criminal record. (7) The defendant committed the offense under severe mental or emotional disturbance. (8) Another defendant or defendants, equally culpable in the crime, will not be punished by death. (9) The victim consented to the criminal conduct that resulted in the victim's death. (10) That other factors in the defendant's background or character mitigate against imposition of the death sentence.

The mitigating factors that are presented, as with the aggravating factors, may be excluded if the probative value is outweighed by the prejudicial value.\textsuperscript{118} The burden of proving the mitigating factors rests upon the defense, and the factors must be established by a preponderance of the evidence.\textsuperscript{119} After the presentation of the mitigating evidence, the government has the opportunity for rebuttal.\textsuperscript{120}

Having considered the factors presented, the fact finder returns special findings concerning the aggravating factors.\textsuperscript{121} These findings must be unanimous.\textsuperscript{122} A mitigating factor need not been approved unanimously, and a single juror may find a mitigating factor.\textsuperscript{123} Having found the aggravating factors to exist, the fact finder must evaluate whether the aggravating factors sufficiently outweigh any mitigating factors, or, if no mitigating factors are shown, whether the aggravating factors themselves are sufficient to support the imposition of the death penalty.\textsuperscript{124} If the hearing is conducted before a jury, the jury then votes on whether to impose the death penalty. To impose a death sentence, the vote must be unanimous.\textsuperscript{125}

Unlike some state laws, a unanimous jury vote under the Drug Kingpin Act does not leave the court with discretion to impose any other sentence.\textsuperscript{126} The court must follow the jury's recommenda-

\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} 21 U.S.C. § 848(k) (1994).
\textsuperscript{122} Id. The court, however, does not need to instruct the jury regarding the consequences of an inability to reach an unanimous verdict. See United States v. Chandler, 996 F.2d 1073, 1089 (11th Cir. 1993), cert. denied, 512 U.S. 1227 (1994).
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Jones v. United States, 119 S. Ct. 2090, 2117 n.22 (1999) (Ginsburg, J., dissenting). Some states differ significantly from the federal scheme in this regard. In Idaho, Montana, Nebraska, and Arizona, the judge ultimately makes the life or death decision. Nevada provides that a three-judge panel will make the decision if a jury cannot. Four other states (Alabama, Delaware, Indiana, and Florida) employ a hybrid scheme where the jury and judge share involvement in the ultimate sentence. See Peyton Robinson, Judge Over Jury: Judicial Discretion in the Federal Death Penalty Under the Drug Kingpin Act, 45 U. KAN. L. REV. 1491, 1518 n.200 (1997). At least one commentator has found fault in this scheme: [T]he provision for an absolute jury determination of the life or death of a defendant under the Drug Kingpin Act assures inconsistent and unfair results. The similar jury provision under the Federal Death Penalty Act of 1994 suffers from the same fundamental problem. The balancing of accuracy and uniformity in the hands of various and varied juries is doomed to end in the arbitrary and capricious results the Supreme Court determined to be unconstitutional in Furman.

Boettcher, supra note 73, at 1080 n.335.
tion. The jury is instructed that it is never required to impose a death sentence, but merely to recommend its imposition.

The Drug Kingpin Act also precludes the death sentence from being imposed on anyone under the age of eighteen, anyone who is "mentally retarded," or anyone who suffers from a mental deficiency that would detract from the ability to understand the proceedings or appreciate the facts, which would make the death penalty unjust. Also, the Drug Kingpin Act provides for representation for "financially unable defendants."129

The Drug Kingpin Act contains a provision regarding appeals from capital convictions.130 The act requires an appellate court to affirm if the court determines that the death penalty was imposed without the influence of passion or prejudice and that the information supports the finding of the aggravating factors that predicated the sentence. Moreover, the section allows a reviewing court to reverse if passion, prejudice, or "any other factor," including legal error, is found.132

Courts have routinely found that this provision does not unconstitutionally curtail the appellate process. If a court finds a sentence to be in contravention of these provisions, it must do so in a written opinion and then remand the case for reconsideration. After exhausting all appeals, under the Drug Kingpin Act, the condemned will be executed by lethal injection.

A rather unique provision in the Drug Kingpin Act addresses the many concerns that have been raised about the racially disproportionate imposition of the death penalty. The "antidiscrimination provision" provides that the jury will be instructed "that in its consideration of whether the sentence of death is justified it shall not consider

130. Interestingly, while the Drug Kingpin Act provides the standards for appellate review, it does not fashion an obligatory review of the death sentence. Of the 38 jurisdictions that sanction the death penalty, 36 provide a review of all death sentences, regardless of the defendant’s wishes.
135. See 28 C.F.R. § 26.3 (1997). An increasing number of jurisdictions employ lethal injection as the preferred method of execution. In 1987, 18 states authorized the use of lethal injection and by 1998, this number jumped to 34 states. See Capital Punishment 1998, supra note 48. Also, in 1987 28% of all executions were by lethal injection, but by 1997, this number had risen to 92%. Id. Of the 34 federal executions in the last century, 15 people died by electrocution, 12 by hanging, and 7 by the gas chamber. See David A. Kaplan, Life and Death Decisions, NEWSWEEK, June 16, 1997, at 28.
the race, color, religious beliefs, national origin, or sex of the defendant or the victim."\textsuperscript{136} The statute requires the jury to return a sentence of death only if it would return such a sentence regardless of the race, color, religious beliefs, national origin, or sex of the defendant or victim.\textsuperscript{137} Moreover, the statute requires that each juror sign a certificate stating that the individual juror did not take those factors into consideration in reaching a decision.\textsuperscript{138} This provision, however, does not prevent the defense from presenting potentially mitigating evidence on subjects referred to in that section.\textsuperscript{139} Overall, the "antidiscrimination provision" seems to be a reaction to the Supreme Court decision in \textit{McClesky v. Kemp}.\textsuperscript{140} The "antidiscrimination provision," while not removing all potential bigotry in death penalty jurisprudence, seems to dispel pre-\textit{McClesky} discrimination arguments against the death penalty, at least in the federal context.\textsuperscript{141}

While a powerful tool for prosecutors, the Drug Kingpin Act has not been a substantial source of death row candidates.\textsuperscript{142} To date, only five of the individuals sitting on federal death row have been convicted under the Drug Kingpin Act.\textsuperscript{143} In comparison the Federal Death Penalty Act of 1994 has been not only a broader legislative attempt to federalize the death penalty, but also has been the source of a substantially greater number of capital convictions and death row candidates.

\begin{itemize}
\item \textsuperscript{136} 21 U.S.C. § 848(o)(1) (1994).
\item \textsuperscript{137} Id.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} See United States v. Cooper, 754 F. Supp. 617, 624 (N.D. Ill. 1990).
\item \textsuperscript{140} 481 U.S. 279 (1987). In \textit{McClesky}, a sharply divided court held that statistical evidence of racial disparity was insufficient to declare the death penalty cruel and unusual. \textit{Id.} at 306.
\item \textsuperscript{141} For an example of the racial breakdown that occurs in the implementation of the death penalty, in 1997, 74 men were executed. Of those, 41 were nonhispanic whites, 26 were blacks, 1 was black-Hispanic, 1 was American-Indian, and 1 was Asian. \textit{See Capital Punishment 1998, supra} note 48.
\item \textsuperscript{142} As of early 1998, only 46 prosecutions had even been authorized under the Drug Kingpin Act, and only six had been capital convictions, one of which was later overturned. John P. Cunningham, \textit{Death in the Federal Courts: Expectations and Realities of the Federal Death Penalty Act of 1994}, 32 U. RICH. L. REV. 939, 952 (1998).
\item \textsuperscript{143} These prisoners are Chandler, Tipton, Johnson, Roane, and Garza. \textit{See supra} note 3.
\end{itemize}
III. THE FEDERAL DEATH PENALTY ACT OF 1994

Let us get tough with an effective, believable, and timely death penalty for violent offenders.144

In 1994 Congress introduced the largest expansion of the death penalty in our nation’s history when, in connection with the Violent Crime and Law Enforcement Act of 1994,145 it introduced the new federal death penalty, a broad expansion of federal capital crimes. In a move void of substantial expressed intention, Congress greatly augmented the list of death-eligible offenses. Congress enacted this sweepingly broad measure for two purposes: to expand the number of crimes that potentially could be punished by death, and to provide a new federal system for the imposition of the death penalty.146 Discussion concerning this expansion of the death penalty did not go far beyond these two objectives, with “little substantive discussion on the overall effectiveness, merits, and morality of the death penalty.”147 Congress seemed to focus more on the procedure of the act than on its substantive necessity.148

In creating the Federal Death Penalty Act of 1994 (the 1994 Act), Congress recognized that it repeated much of the procedure in the Drug Kingpin Act.149 However, when compared to the Drug Kingpin Act, the Federal Death Penalty Act of 1994 has much broader focus and application. The 1994 Act federalized the death penalty for approximately sixty crimes.150 While the multitude of offenses

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147. Cunningham, supra note 19, at 953. "Senator Joseph Biden summed up the common sentiments favoring the expansion of the federal death penalty when he said, 'I agree that tougher penalties for violent offenders are important. That is why . . . we have included the largest ever expansion of the death penalty. . . ."' Charles Kenneth Eldred, The New Federal Death Penalties, 22 AM. J. CRIM. L. 293, 294 (1994).

148. Cunningham, supra note 19, at 953.


150. The scope of the death eligible offenses is wide.

that are currently punishable by death may seem excessive, the target of the coverage may be appropriate, at least when compared with the nation's history.\footnote{151}

Most of the crimes designated as death penalty precursors involve murder. However, the 1994 Act includes crimes that do not involve homicide. One commentator has grouped the precursor crimes into three separate classifications: (1) crimes involving risky activity resulting in a homicide, such as kidnapping or hostage-taking resulting in death; (2) crimes involving direct homicide, such as the murder of governmental officials; and (3) nonhomicide crimes like espionage and treason.\footnote{152}

\begin{itemize}


151. An interesting comparison is the criminal code for the New Haven Colony, which called for the death sentence for any person who by "direct, express, imious or presumptuous ways, deny the true God and His attributes." The colony also condemned any "child or children, above sixteen years of age, and of sufficient understanding, [who] shall smite natural father or mother, unless thereunto provoked and forced for their own self-protection from death or maiming, at the complaint of said father and mother." JAMES A. INCIARDI, CRIMINAL JUSTICE 488-89 (3d ed. 1990) (quoting HARRY ELMER BARNES, THE REPRESSION OF CRIME 220 (1926)).

As with the Drug Kingpin Act, under the 1994 Act, the government must file notice of its intent to seek the death penalty within a reasonable time before trial or before the entering of a guilty plea. This notice must specify that "the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified" and that the government will seek a death sentence. The notice also must set forth the aggravating factors that the government will demonstrate in order to justify a sentence of death if the defendant is convicted.

The second phase of the trial begins after the defendant has been found guilty. The sentencing hearing takes place before either the same jury that heard the guilt portion, a new jury if the defendant pleaded guilty or was found guilty by the court, or by the court upon defendant's request and the government's approval. As with the Drug Kingpin Act, no presentence report is prepared. The process of presenting aggravating and mitigating factors is also similar in both acts. Furthermore, the prosecution must prove aggravating factors beyond a reasonable doubt, while the defense must prove mitigating factors only by a preponderance of the evidence.

In the sentencing hearing, the government must first demonstrate the aggravating factors that would justify a capital sentence. The specific factors for consideration in the 1994 Act, however, differ from those in the Drug Kingpin Act. This is largely due to the broad spectrum of crimes that fall under the purview of the 1994 Act, as compared with the narrow focus on drug-related homicides in the Drug Kingpin Act. The aggravating factors in the 1994 Act are grouped into three separate classifications: (1) aggravating factors for nonhomicide crimes; (2) aggravating factors for homicide; and (3) aggravating factors for drug offenses. The statute also provides for the introduction of nonstatutory aggravating factors when notice has been provided. Unlike the Drug Kingpin Act, under the 1994 Act, the jury does not need to consider a "gateway" factor before proceeding with the analysis of the other proffered aggravating factors.

156. A new jury will also be seated in the case of reconsideration of the sentence. 18 U.S.C. § 3593(b) (1994).
157. Id.
159. Id.
160. Id.
161. Id.
The statute provides three aggravating factors for the two nonhomicide crimes (espionage and treason) that are covered under the 1994 Act. The court allows the jury to consider whether the defendant had been convicted of another crime involving espionage or treason for which death or life imprisonment could have been the punishment, whether the defendant created a "grave risk of substantial danger to the national security" through the criminal acts, and whether the defendant's act created a grave risk of death to another person.163

Next, the statute lists the sixteen aggravating factors that are applicable to a capital prosecution for homicide.164 Some of these factors are found in the Drug Kingpin Act, while others are not. Aggravating factors, such as whether the offense was committed against a high public official, previous conviction for an offense involving a firearm, and previous conviction of two or more serious offenses for which the punishment is more than one year, are enumerated aggravating factors. The aggravating factors also are tailored to the specific predicate offense. For example, in offenses involving the sexual abuse of children, the government may present evidence of prior convictions for sexual assault or child molestation.165

The 1994 Act provides additional aggravating factors to be considered for the "drug offense death penalty."166 These factors include the previous conviction for an offense for which death or life imprisonment is the penalty, previous conviction of two or more serious offenses, previous serious drug felony convictions, and the use of a firearm in the criminal episode or enterprise. The statute also provides specific factors for crimes involving the importation, distribution, and manufacture of drugs, allowing the following factors to elevate the offense to a capital crime: (1) distribution of drugs near schools, (2) the use of minors in trafficking, and (3) presence of a lethal adulterant in the controlled substance.167

Finally, as in the case of the Drug Kingpin Act, nonstatutory factors may be presented by the government as aggravating factors so long as the defendant is given reasonable notice.168 The use of such nonstatutory factors is encouraged to tailor the prosecution to the facts of the case.169 Courts have upheld the use of nonstatutory aggravating

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factors against defense challenges based on cruel and unusual punishment, ex post facto violations, allegations of vagueness, and inference that was unduly weighty.

The mitigating factors in the 1994 Act are also all in the Drug Kingpin Act. The Drug Kingpin Act, however, does include several mitigating factors that are not present in the 1994 Act. These include the unforseeability of the crime, the age of the defendant, and the lack of a significant criminal record. These factors could still be presented to the sentencing jury, or as a nonstatutory aggravating factor under the Drug King Pin Act pursuant to the catch-all provision allowing for "[o]ther factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence." After the presentation of the aggravating and mitigating factors, the fact finder returns the verdict as to punishment by special findings. The mitigating factors may be found by only one member of the jury, but the aggravating factors must be agreed upon unanimously. Unlike under the Drug Kingpin Act, the jury may recommend death, life imprisonment, or some lesser sentence. If no aggravating factor is found, the court must impose a sentence other than death. A jury must unanimously agree to a death sentence. Moreover, like the Drug Kingpin Act, the 1994 Act contains an antidiscrimination provision, requiring the jury to return a certificate stating that they would have returned a verdict of death regardless of the defendant or victim's race, color, religious beliefs, national origin, or sex.

The 1994 Act sets out appellate procedure to be followed after conviction. The statute specifies that the reviewing court will examine the entire record, addressing all substantive and procedural issues raised on appeal. The reviewing court considers whether the sentence of death was imposed under the influence of passion or prejudice, and

172. See McVeigh, 944 F. Supp. at 1490.
173. See id. at 1489.
must determine if the evidence supports the finding of the special aggravating factor. The penalty of death will not be vacated for harmless error, so long as the government shows harmlessness beyond a reasonable doubt. The appellate process has been held by lower courts to conform to equal protection requirements.

After conviction, the defendant is committed to the custody of the Attorney General until the appeal and postconviction avenues are exhausted. The Attorney General then releases the defendant into the custody of a United States Marshal who oversees the execution.

Interestingly, the 1994 Act calls for the execution to be performed using the method of execution used by the state in which the sentence is carried out. If the state where the sentencing took place does not have a death penalty, the court must designate another state to look to for the manner in which the death sentence should be carried out. The statute also specifies that the death penalty should not be carried out on a woman during pregnancy, a person "who is mentally retarded," or a person who lacks the capacity to understand the death penalty and the reason for its imposition.

Another interesting area in which the 1994 Act has departed from the traditional capital punishment jurisprudence of the state courts is the inclusion of several nonhomicidal crimes. While the Supreme Court has never specifically held the death penalty for all nonhomicide crimes to violate the Eighth Amendment, it has held that a death penalty for a specific crime violates the Eighth Amendment. Additionally, most state courts hold that such use of the death penalty violates the Eighth Amendment. Two years after Gregg, in Coker v.

187. Id.
188. This, however, would be an unusual situation as only 1.3% of those on death row nationwide are women. See Capital Punishment 1998, supra note 45. In 1997, however, both Texas and Florida executed a woman. Id. Also, in the past century, the federal government has executed two women. Id.
190. United States Senator Orrin Hatch has argued that there has always been a Federal death penalty, and there has always been a Federal death penalty for nonhomicide offenses. To begin with, death has always been the traditional and accepted punishment for treason, as well as for some forms of espionage. This is true worldwide, and it is reflected in our Federal Criminal Code. The Supreme Court has never said nor implied that the current prescribed penalty for treason—death—is in any way unconstitutional.
191. Louisiana is a notable exception to this trend. Recently, Louisiana upheld the consti-
Georgia,192 the United States Supreme Court, noting that few states had a statutory death penalty for rape, and that only a negligible number of juries had condemned an individual to die for rape, held that rape should not be punishable by death.193 After evaluating the indicia of common societal opposition to such an application of the death penalty, the Court noted that "in the end our own judgment will be brought to bear on the acceptability of the death penalty."194

Yet Coker did not hold that capital punishment may be imposed only for homicide. Several states have routinely invalidated state laws that imposed the death penalty absent a homicide on the basis of disproportionality.195 Even so, in several states nonhomicide crimes may still serve as a basis for the death penalty.196 The 1994 Act’s inclusion of nonhomicide crimes, however, has not yet been addressed because every individual currently sitting on federal death row was convicted of a crime involving a murder. Resolution of this issue must therefore be reserved for the future.197

One of the most interesting elements of the 1994 Act involves an omission. At the time Congress debated the 1994 Act, it also considered an amendment entitled the "Racial Justice Act."198 This amendment, which was ultimately rejected, augmented the "antidiscrimination provision’s" protection regarding racial bigotry in capital sentencing, providing that "no person shall be put to death under color of State or Federal law in the execution of a sentence that was imposed based on race."199 This amendment would have required a statistical inquiry into the implementation of the death penalty, focus-
ing on any disparity in the number of members of a particular race who are executed compared to the race of all defendants. The amendment would have allowed an inference of discrimination to be established by showing disparity, which would then have shifted the burden to the government to show nonracial factors to explain the disparities. Because of criticism of the amendment,\(^{200}\) the act did not pass.

IV. APPLICATION OF THE FEDERAL DEATH PENALTY

*Other sins only speak, Murder cries out.*\(^{201}\)

The federal prosecutor is now armed with two alternative capital penalty statutes: the Drug Kingpin Statute and the Federal Death Penalty Act. So far, twenty-one men sit on federal death row as a result of these statutes. The judicial proceedings that have occurred in the wake of the Oklahoma City bombings, particularly with Timothy McVeigh's placement on death row, have accentuated the general public interest in the death penalty as it is enforced on a federal scale. In recent months, however, two death row inmates have drawn national attention, one for his legal proceedings and one for his imminent doom. Soon, unless a pardon is issued, Juan Raul Garza will become the first man to be executed in Terre Haute's death chamber under federal law since 1963. Additionally, the Supreme Court recently upheld the conviction of Louis Jones, and in the process, has for the first time sustained a conviction under the Federal Death Penalty Act of 1994.\(^{202}\) Examining the cases against these two individuals\(^{203}\) can give us a better understanding of the application of the federal death penalty.

A. Application of the Drug Kingpin Statute: Juan Raul Garza

Juan Raul Garza was a businessman\(^ {204}\) who, having come from a family of farm workers and having never graduated from high school, surpassed most people's expectations. Operating out of Brownsville,

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\(^{201}\) **ANN HOCKING, DEATH LOVES A SHINING MARK** (as quoted in *THE QUOTABLE LAWYER* § 91.8, at p. 225 (David Shrager & Elizabeth Frost eds., 1986)).


\(^{203}\) Both of these federal cases in the media arise out of Texas. Texas is by far the most prolific executioner, accounting for nearly a third of all executions.

\(^{204}\) United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996) (Flores was a co-defendant of Garza). See also United States v. Garza, 165 F.3d 312 (5th Cir. 1999), cert. denied, 120 U.S. 502.
Texas, Garza earned hundreds of thousands of dollars in the eighties and early nineties. Through his thrift and industry, Garza distributed his goods nationally, finding especially flourishing markets in Texas, Louisiana, and Michigan. Garza originally purchased his product from a supplier in Mexico, but later cut out the middleman, sending his own workers across the border. Yet, like many businessmen, Garza encountered difficulties getting his product to his target markets. This was not surprising, as Garza sold enormous amounts of marijuana. 205

As Garza built his intricate web of drug trafficking, he encountered great setbacks when police confiscated his deliveries. These setbacks made him distrustful of his employees, and Garza suspected that several of them may have been in collusion with the police. 206 Garza employed unorthodox employee dispute resolution practices—when Garza was suspicious of employees’ behavior, he simply had them killed. Suspecting that Erasmo De La Fuente, a fellow drug smuggler, had been informing the police about his shipments, Garza ordered his subordinate to kill him. 207 Garza also ordered the murder of De La Fuente’s associate Giliberto Matos. Garza’s men shot Matos in the head, and five months later, shot De La Fuente in the head twice as he left his Brownsville nightclub. 208

Garza committed the third murder himself. After Thomas Rumbo surrendered 360 pounds of marijuana and agreed to help the police, Garza suspected Rumbo of stealing the drugs for himself. Arriving at Rumbo’s house, Garza persuaded Rumbo to get into his pickup with four other people. 209 While they drove, Garza interrogated Rumbo and was dissatisfied with the results. Stopping on a deserted rural road, Garza told Rumbo to get out of the vehicle and walk home. Rumbo did, but complained that he did not want to walk because he had just purchased new shoes. After he got out, Garza shot him in the back of the head. Garza then pulled his body into the underbrush and shot him four more times. 210

Law enforcement finally caught up with Garza. Using phone taps, surveillance, and informants, law enforcement officers gathered information culminating in a U.S. Customs Service raid of the homes of Garza and his associates. Garza, however, escaped to Mexico. 211

205. See Flores, 63 F.3d at 1351-52.
206. Id.
207. Id.
208. Id.
209. Id.
210. Id.
211. Id.
While Garza was in Mexico, U.S. Customs made plea agreements with the members of Garza's organization they had captured, so that when they located him, they had sufficient probable cause to charge Garza with operating a continuing criminal enterprise, the three homicides in furtherance of that enterprise,\(^{212}\) and various violations of drug and money laundering laws.\(^{213}\)

At trial, a jury found Garza guilty of murder.\(^{214}\) In the penalty phase, after hearing evidence and argument, the jury unanimously found that Garza had intentionally killed De La Fuente and Rumbo\(^{215}\) and had engaged in conduct intended to kill them or employed lethal force against them.\(^{216}\) The jury only found the latter factor in the murder of Matos. Having found at least one of the precursor factors, the jury then considered the other aggravating factors, both statutory and nonstatutory. The jury unanimously found the statutory factors of premeditation and planning,\(^{217}\) and that the murders of Matos and De La Fuente involved the payment of something of pecuniary value.\(^{218}\)

Turning to the nonstatutory factors, the jury found that Garza constituted a continuing danger to society because of his continuous violent and brutal acts. The jury also found as aggravating factors that Garza had been responsible for five additional murders, that four of those murders were premeditated, two of those had been in furtherance of the continuing criminal enterprise, and two had been for the payment of something of pecuniary value.\(^{219}\)

Then, examining the mitigating factors, the jury found that three statutory mitigating factors applied. The jury found that Garza was youthful,\(^{220}\) that the victims had consented to the criminal conduct that had caused their deaths,\(^{221}\) that other defendants who were equally

\(^{213}\) These charges included conspiracy to import more than 1,000 kilograms of marijuana into the United States from Mexico, 21 U.S.C. § 963, 952(a)(2), and 960(b)(1)(G); conspiracy to possess with intent to distribute more than 1,000 kilograms of marijuana, 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A)(vii); possession with intent to distribute approximately 163.6 kilograms and 586.3 kilograms of marijuana, 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(vii); and possession with intent to distribute 95.4 kilograms of marijuana, 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). Garza, 165 F.3d at 312.  
\(^{214}\) Id. At closing arguments, Garza's counsel called him "less than an angel, but no drug baron." Violent Drug Boss Would Be 1st to Die Under Drug Kingpin Law, CHICAGO TRIBUNE, October 18, 1999, at 10.  
\(^{218}\) Garza, 165 F.3d at 1367; see 21 U.S.C. § 848(n)(6) (1994).  
\(^{219}\) Id.  
\(^{220}\) Id.; see 21 U.S.C. § 848(m)(5) (1994).  
\(^{221}\) Id.; see 21 U.S.C. § 848(m)(9) (1994).
as culpable would not be punished by death,\textsuperscript{222} and that Garza acted under unusual and substantial duress.\textsuperscript{223} The jury also found a non-statutory mitigating factor, but did not specify which one they found. Finding that the aggravating factors outweighed the mitigating factors, the jury recommended that Garza receive the death sentence. Following this recommendation, on August 2, 1993, United States District Court Judge Filemon B. Vela sentenced Garza to death.\textsuperscript{224}

In 1994, Garza, as the only federal inmate on death row, gave an interview, in which he stated, “I didn’t kill any of those people. I’m not responsible.”\textsuperscript{225}

On direct appeal, Garza raised numerous issues, only some of which related to the Drug Kingpin Act.\textsuperscript{226} Garza predicated his challenges that related directly to the Drug Kingpin Act on the Supreme Court case of Simmons v. South Carolina.\textsuperscript{227} Garza relied on the Sim-

\begin{itemize}
\item\textsuperscript{222} Id.; see 21 U.S.C. § 848(m)(8) (1994).
\item\textsuperscript{223} Id.; see 21 U.S.C. § 848(m)(2) (1994).
\item\textsuperscript{224} After the sentence of death, Garza filed a motion for a new punishment trial due to the improper balancing of aggravating circumstances which “placed a thumb . . . on Death’s side of the Scale.” This motion was denied. United States v. Garza, 77 F.3d 481 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996).
\item\textsuperscript{225} Smuggler Faces Death by Injection, Terre Haute Inmate Could Become the First Federal Prisoner to be Executed Since 1963, AUGUSTA CHRONICLE, October 18, 1999, at A6. This, however, does not mean that each individual on death row is unrepentant, or even cruel and inhumane. Indeed, the following words penned by David Allen Osborne while on death row in Idaho both express the remorseful words of a penitent soul and provide fodder for any supporter of the deterrence theory of sentencing:
\begin{quote}
How I came to be here
God please let others see
Let them have a chance to change
Before someday they are me

. . .

But how I came to be here
Should be quite simple to tell
One does not get to Heaven
When he walks the Road to Hell!"
\end{quote}
\item\textsuperscript{226} Specifically, Garza raised issues concerning voir dire, the admission of certain tape recordings, the introduction of testimony, the illegality of the stop of a co-conspirator, and issues concerning confessions. United States v. Flores, 63 F.3d 1342, 1352-68 (5th Cir. 1995).
\item\textsuperscript{227} 512 U.S. 154 (1994). In Simmons, the petitioner received the death penalty for the beating death of an elderly woman. At that time, South Carolina allowed for a sentence of life in prison without the possibility of parole for a conviction of a capital offense. The defense sought a jury instruction that would indicate that life imprisonment would carry no possibility of parole, but the trial court refused to instruct the jury on parole ineligibility. On appeal to the Supreme Court, the Court ruled that when “the alternative sentence to death is life without parole, . . . due process plainly requires that [the defendant] be allowed to bring [parole ineligibility] to the jury’s attention by way of argument by defense counsel or an instruction from the court.” Simmons, 512 U.S. at 169 (citing Gardner v. Florida, 430 U.S. 349, 362 (1977)).
\end{itemize}

The Simmons Court reasoned that when a state imposes the death penalty on the premise that the convicted individual poses a dangerous threat to society, the fact that the defendant may
mons holding that "when a defendant is legally ineligible for parole and the government uses the defendant’s future dangerousness as an aggravator, due process requires that the jury be informed that if he is not executed, the defendant will spend the rest of his life in prison." Garza argued that under the Drug Kingpin Act he was ineligible for parole or anything less than a life sentence, so the jury should have been informed that the only alternative to the death sentence was life without parole. The Fifth Circuit found this construction of Garza’s situation incorrect. The Fifth Circuit reasoned that under the Act as it read at the time, the base offense level for the homicides under 21 U.S.C. § 848(e) would be life imprisonment. Yet, had the jury not returned a death sentence, Garza could have received a downward departure based on the mitigating factors the jury found.

Garza further argued that even if Simmons had not been directly violated, the spirit of the Supreme Court holding had been disregarded because, when focusing on future dangerousness, the government was well aware that Garza would most likely never be freed from prison. This argument, however, was unsuccessful, as the government briefly had commented on the possibility of a punishment of a term of years.

Ultimately Garza’s Simmon’s contention failed because it relied on a faulty interpretation of the Drug Kingpin Act sentencing procedure. 21 U.S.C. § 848 provides that “[u]pon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death.” The section then provides that the court impose the sentence as authorized by law. The Fifth Circuit thus agreed with prior cases holding that if the jury did not recommend the death penalty, then the jury is unable to return a binding recommendation to any other sentence. The court did admit that the 1994 Act seemed to give the jury the ability to recommend a life sentence without parole

receive life without possibility of parole “will necessarily undercut the State’s argument regarding the threat the defendant poses to society.” Simmons, 512 U.S. at 169. This reasoning prevents a “false dilemma by advancing generalized arguments regarding the defendant’s future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole.” Id. at 171.

Flores, 63 F.3d at 1367.

Id. at 1368. Specifically, because the jury found that Garza had acted under duress, Garza might qualify for a downward departure under U.S.S.G. 5K2.12. Id.

Id.


rather than the death penalty, but did not resolve any conflict in the law because Garza's conviction occurred prior to the 1994 Act.

Garza next argued that the aggravating factors under 21 U.S.C. § 848(n)(1) were unconstitutional as they did not sufficiently narrow the class of defendant that would be eligible for the death penalty. Focusing on the "gateway" factors that act as both a precursor and an aggravating factor in the penalty phase, Garza argued that their curious introduction in the death penalty scheme violated the constitution. He argued that under Enmund and Tison, those factors would have to be found in every case where an individual could be executed. Thus "'a sentencer fairly could conclude that [it] applies to every defendant eligible for the death penalty [and it] is constitutionally infirm.'" To decide whether the precursor factors sufficiently narrowed the class of those eligible for the death penalty, the court necessarily looked at the cases from which the death penalty class would have to be narrowed. Comparing the definition of murder in the first degree with the underlying offense under the Drug Kingpin statute, the court concluded that by selecting from those who under the Kingpin

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233. Flores, 63 F.3d at 1370.
236. Flores, 63 F.3d at 1370 (quoting Arave v. Creech, 507 U.S. 463, 474 (1993)).
237. Murder in the first degree is statutorily defined as follows:
Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
238. The Drug Kingpin Act explains murder as follows:
(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death; and (B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.
Act were "at least reckless of killing, the (n)(1) factors genuinely narrow the class of defendants who have committed murder." The court especially noted that the presence of a "Continuing Criminal Enterprise" factor and the requirement that the jury find an aggravating factor in addition to the precursor were significant in narrowing the class of defendants eligible for the death penalty.

Garza also argued that the "substantial planning" aggravating factor under 21 U.S.C. § 848(n)(8) was unconstitutionally vague and that the district court failed to cure the defect. The jury found this aggravating factor to be present in all three of the murders for which Garza had been convicted. Focusing on the fact that "[a]n aggravating factor must 'channel the sentencer's discretion by [a] clear and objective standard [] that provide[s] specific detailed guidance,'" the Fifth Circuit dismissed Garza's vagueness argument. Concurring with other federal courts that had addressed the issue, the court found that the "substantial planning" factor has a "'common-sense core meaning . . . that criminal juries should be capable of understanding.'"

Finally, Garza argued that the district court committed reversible error by informing the jury that, under the Drug Kingpin Act, the jury had to find that the aggravating factors substantially outweigh the mitigating factors in order to impose the death penalty. Garza argued that the jury should have been instructed that they must find the aggravating factors to be more weighty beyond a reasonable doubt. The Fifth Circuit noted that "the Supreme Court has 'never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.'" Thus, the Drug Kingpin Act provided a constitutionally valid method for considering the mitigating and aggravating factors in the penalty hearing.

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239. *Flores*, 63 F.3d at 1371.
240. *Id.* at 1373.
241. The government argued that because Garza never requested the District Court to further define the term "substantial planning," the plain error standard would prevent any reversal on this point. The court found the plain error standard inapplicable, however, because Garza did object during the penalty phase. *Id.*
242. *Id.* at 1373 (quoting *Creech*, 507 U.S. at 471).
243. Specifically, the court relied on *United States v. Cooper*, 754 F. Supp. 617, 623 (N.D. Ill. 1990). In *Cooper*, the court upheld the factor because the term "substantial" "is frequently encountered and readily understood in a number of contexts in criminal law." 754 F. Supp. at 623.
244. *Flores*, 63 F.3d at 1373 (quoting *United States v. Tuilaepa*, 512 U.S. 967, 973 (1994)).
245. *Flores*, 63 F.3d at 1376.
246. *Id.* (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988) (plurality opinion)).
After the decision in the Fifth Circuit, Garza petitioned the Supreme Court for certiorari, which was denied.247 On December 1, 1997, Garza filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255 in the Southern District of Texas.248 On April 9, 1998, the motion was denied.249 The court soon after ruled that a certificate of appealability should be denied, and Garza sought relief from that denial in the Fifth Circuit.250 In the appeal of the denial of his certificate of appealability, Garza argued that the Fifth Circuit had previously denied him his Eighth Amendment right to meaningful appellate review by failing to explicitly address issues involving the introduction in his penalty phase of four unadjudicated murders that had occurred in Mexico.251 The Fifth Circuit held that, even though the opinion did not reflect it, the broad assertion that Garza had not presented any error was expansive enough to cover the challenges he made on direct review.252 The court found that the issue had received full consideration and a ruling, and did not merit individual attention.253

Garza argued that the introduction of the four unadjudicated murders denied him due process. Essentially, Garza argued that he did not have a fair opportunity to explain the evidence against him because he had no right to compulsory process or subpoena in Mexico, impairing his ability to defend himself against that aggravating factor.254 Moreover, Garza argued that due to these international limitations, the government had an obligation to use its power to obtain exculpatory evidence that Garza was unable to obtain, and then disclose this evidence to Garza.255 The court held that while under Brady v. Maryland256 the government has an obligation to turn over exculpatory evidence, the government had fulfilled this obligation by providing Garza with all the exculpatory information it had.257 The court then held that the government had no obligation to conduct Garza's defense investigation for him, and that Garza had not argued with specificity what favorable witness or exculpatory evidence such a

248. United States v. Garza, 165 F.3d 312, 313 (5th Cir. 1999).
249. Id.
250. Id.
251. Id. at 314.
252. Id.
253. Id.
254. Id.
255. Id.
fully-conducted investigation would have brought to light.\textsuperscript{258} The Fifth Circuit ultimately denied the appeal from the denial of the certificate of appealability.

On November 15, 1999, the Supreme Court again denied certiorari.\textsuperscript{259} Garza had by then exhausted his appeals, and absent an executive pardon,\textsuperscript{260} would be executed.

\textbf{B. Constitutionality of the Federal Death Penalty: United States v. Jones}

On February 18, 1995, United States Air Force Private Tracie Joy McBride was abducted from the Goodfellow Air Force Base in San Angelo, Texas.\textsuperscript{261} During the subsequent investigation of her disappearance by the Office of the Air Force Special Investigations (OSI), it came to light that Sergeant Sandra Lane had filed a complaint against her ex-husband, Louis Jones, for an assault that had occurred two days before McBride's abduction.\textsuperscript{262} The OSI informed the local police department, who issued an arrest warrant for Jones. After having been arrested by the local police, OSI investigators interrogated Jones, considering him a possible suspect in McBride's disappearance.\textsuperscript{263}

Waiving his Miranda rights, in a written statement Jones confessed to the abduction and murder of McBride.\textsuperscript{264} Jones then led investigators to a bridge twenty miles outside town under which the body of McBride had been buried.\textsuperscript{265} A later autopsy showed that McBride had been sexually assaulted and had died of blunt force trauma to her head. McBride had been beaten so violently that portions of her skull had been driven into her brain cavity or were entirely missing.\textsuperscript{266} Jones stated that \textquote{\textquote{On [the day he murdered McBride], the demons he had suppressed throughout his life overwhelmed him, leading to tragic consequences.}}}\textsuperscript{267}

\textsuperscript{258} Id. at 315.
\textsuperscript{259} Garza v. United States, 120 S. Ct. 502 (1999).
\textsuperscript{260} Under the Constitution, the President has the \textquote{Power to grant Reprieves and Pardons for Offenses against the United States except in Cases of Impeachment.} U.S. CONST. art. II, § 2. cl. 1.
\textsuperscript{261} The facts of this case are derived from Jones' Fifth Circuit appeal, United States v. Jones, 132 F.3d 232 (5th Cir. 1998), and Jones v. United States, 119 S. Ct. 2090 (1999).
\textsuperscript{262} Jones, 132 F.3d at 237.
\textsuperscript{263} Id.
\textsuperscript{264} Id.
\textsuperscript{265} Id.
\textsuperscript{266} Id.
\textsuperscript{267} Boettcher, supra note 73, at 1098 (quoting Appellant's Initial Brief at 6, United States v. Jones, 132 F.3d 232 (5th Cir. 1998) (Nos. 96-10113, 96-10448)).
Because of the special jurisdiction of the murder, Jones was indicted under 18 U.S.C. § 1201(a)(2) and charged with kidnapping with a resultant death. Following the procedure outlined in death penalty cases, the United States Attorney’s Office filed a Notice of Intent to Seek the Death Penalty. On October 23, 1995, a jury found Jones guilty. A separate hearing was then held to determine the sentence, a hearing from which the bulk of his appellate arguments would flow.

During the sentencing hearing, the jury first found that Jones had the requisite intent to commit the crime pursuant to 18 U.S.C. § 3591(a)(2). The jury then considered whether or not the state had proven one of the statutorily listed factors and had considered the mitigating factors. The jury found two of the aggravating factors beyond a reasonable doubt: that Jones had caused the death of McBride during the commission of another crime and that the murder had been committed in an especially heinous, cruel, and depraved manner.

The jury also found two nonstatutory aggravating factors: “Tracy Joy McBride’s young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas” and “Tracie Joy McBride’s personal characteristics and the effect of the instant offense on [her] family constituted an aggravating factor of the offense.” The jury, although not unanimously, found several mitigating factors. These factors included that Jones did not have a previous criminal record, had an impaired capacity to appreciate the wrongfulness of the act, acted under severe mental or emotional disturbance, had been subjected to abuse as a child, had served his country well in the armed forces, had a daughter who would be harmed by the trauma of her father’s actions, was remorseful, was under duress at the time of the killing, and operated under mental disorders. The jury also considered an unclear factor concerning Jones’ ex-wife. Despite the miti-

268. See id.
270. Id.
271. Id.
275. Id.
277. Id. at 239.
gating factors, the jury unanimously found the aggravating factors to be more weighty and recommended that the death penalty be imposed on Jones.278

On appeal to the Fifth Circuit, Jones attacked his conviction on several grounds, focusing his appeal on constitutional challenges to the 1994 Act, error in the essence and presentation of the aggravating factors at trial, and error in jury instructions.279 The Fifth Circuit upheld the constitutionality of the sentencing provisions found in the 1994 Act, ruled that the lower court did not err in refusing to instruct the jury of the consequences of jury deadlock, and, while finding the aggravating factors presented to the jury to be vague, duplicative, and overbroad, found any error to be harmless because the death sentence would have been imposed absent any invalid aggravating factor.280

On his subsequent appeal before the Supreme Court, Jones presented three main issues:

1. Whether there is a reasonable likelihood that the jury instructions led the jury to believe that deadlock on the penalty recommendation would result in a court-imposed sentence less severe than life imprisonment. 2. Whether petitioner was entitled to a jury instruction that the jury’s failure to agree on a sentencing recommendation would result in a court-imposed sentence of life imprisonment without possibility of release. 3. Whether the court of appeals correctly held that the submission of invalid nonstatutory aggravating factors was harmless beyond a reasonable doubt.281

Affirming the Fifth Circuit ruling, Justice Thomas wrote the opinion for the majority of the court, with Justice Ginsburg writing in dissent.282 Justice Thomas began the majority opinion by addressing the consequences of jury deadlock.283 He first noted that the Fifth Circuit had ruled that the lower court did not err in refusing Jones’ instruction to advise the jury that the judge could sentence the defendant to life without the possibility of release upon a jury recommendation.

The Court then evaluated the Fifth Circuit’s determination that 18 U.S.C. § 3593(b)(2)(C) requires the impanelment of a new jury and a second sentencing hearing if the jury is unable to reach a unanimous

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278. Id.
280. Jones, 132 F.3d at 252.
283. Id. at 2097-98.
decision. Jones argued that any result other than a unanimous verdict would transfer the sentencing determination to the purview of the court. The Court, however, found this issue to be immaterial pertaining to jury instructions, stating, "The truth of the matter is that the proposed instruction has no bearing on the jury's role in the sentencing process." Rather than addressing the responsibilities of the jury, the instruction, in essence, dealt with what would occur if the jury were unable to carry out its responsibilities. Consequently, the jury was not led astray by the omission of such an instruction.

Jones, nonetheless, still objected to the omission. While noting that the argument was less than clear, the Court interpreted Jones' argument as being that "a death sentence is arbitrary within the meaning of the Eighth Amendment if the jury is not given any bit of information that might possibly influence an individual juror's voting behavior." The Court found this argument to be without merit and contrary to the long-held views of the Court. The Court had never before required a jury to be informed of the consequences of a breakdown in deliberation, and the proposed jury instruction would have, in fact, undermined the strong governmental interest in "secur[ing] unanimity by a comparison of views." Moreover, due to the congressional silence on the issue, the Court refused to hold that in every capital case the jury be given an instruction concerning the consequences of deadlock.

Overall, the jury did not likely experience confusion as to its role and the effect of a jury deadlock. Even assuming that some error had occurred in the instructions, the Court found that the district court's instruction to the jury not to concern itself with the results of their recommendation allowed the jury to set aside any concerns about deadlock, and thus did not affect Jones' substantial rights. The

284. Id. at 2098. The proffered jury instruction read:
In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release.

In the event you are unable to agree on [a sentence of] Life Without Possibility of Release or Death, but you are unanimous that the sentence should not be less than Life Without Possibility of Release, you should report that vote to the Court and the Court will sentence the defendant to Life Without the Possibility of Release.

Id. at 2097-98.
285. Id. at 2099.
286. Id.
287. Id.
288. Id. (quoting Allen v. United States, 164 U.S. 492, 501 (1896)).
289. Id.
290. Id. at 2105.
court also found that Jones would have been unable to show that the error would prejudice him. In fact, however, the effects of jury confusion could also have helped Jones in that the jury could as easily be less inclined to impose a death sentence as be predisposed to do so.

The Court then turned to Jones’ contentions about the nonstatutory aggravating factors. Jones argued that the nonstatutory aggravating factors violated the Eighth Amendment because they were vague, overbroad, and duplicative, and that any harm resulting from their use was not harmless beyond a reasonable doubt. Finding that the “double counting” of aggravating factors skews the process in determining the appropriate penalty, the Fifth Circuit ruled that the factors were in error, but that they were harmless beyond a reasonable doubt.

Taking issue with this finding, the Supreme Court stated that it had “never before held that aggravating factors could be duplicative so as to rendering them constitutionally invalid. . . .” Clarifying precedent, the Supreme Court noted that all it had ever held is that invalid factors may skew the weighing process, but not duplicative ones. Any other construction of the weighing process would necessarily infer that duplicative factors would be invalid. The Supreme Court also noted that any potential error by the introduction of similar aggravating factors was diminished by the district court’s jury instruction that prevented the jury from simply counting the number of aggravating and mitigating factors and basing their decision on numerical superiority, rather than on pure weight.

The Supreme Court also found that the Fifth Circuit erred in ruling that the nonstatutory aggravating factors suffered from vagueness. Noting that the review of such factors is “quite deferential,” the Court found that the jury would have had no difficulty evaluating the factors to determine the vulnerability of the victim and the effect of the crime on her family. The Court further ruled that the factors were not overbroad in violation of the Eighth Amendment; for “evidence of victim vulnerability and victim impact in a particular case is

291. Id.
292. Id.
293. Id. at 2107.
294. Id. (citing Stringer v. Black, 503 U.S. 222, 232 (1992)).
295. This holding not only called into doubt the ruling of the Fifth Circuit with respect to the “double counting theory,” but expressly called into doubt the Tenth Circuit case of United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996), upon which the Fifth Circuit, in part, had relied.
297. See id. at 2107-08.
298. Id. at 2108 (quoting Tuilaepa v. California, 512 U.S. 967, 973 (1994)).
inherently individualized."\textsuperscript{299} Even considering the loose drafting of the nonstatutory factors considered by the jury, the Court found that any resultant error would be harmless.\textsuperscript{300}

Justice Ginsburg, joined by Justice Stevens and Souter, and partially by Justice Breyer, presented a vigorous dissent. The dissent argued that the possibility of a flaw in the jury instructions concerning the effect of a deliberative breakdown was too great for their conscience. The dissent noted that ""Capital sentencing should not be ... a game of 'chicken,' in which life or death turns on the ... happenstance of whether the particular 'life' jurors or 'death' jurors in each case will be the first to give in, in order to avoid a perceived third sentencing outcome unacceptable to either set of jurors."\textsuperscript{301} Moreover, the dissent did not consider the use of the similar aggravating factors to be inconsequential, and criticized the "tolerance of error in this case, and [the Supreme Court's] refusal to face up to it. . . .\textsuperscript{302}"

V. CONCLUSION

\textit{No man is an island, entire of itself; every man is a piece of a continent, a part of the main; ... any man's death diminishes me because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee.}\textsuperscript{303}

Regardless of the arguments for and against, the federal death penalty is now active and will soon be reimplemented. Nevertheless, the future of capital punishment is uncertain, and the United States federal government's execution of Juan Raul Garza in the new millennium will affect the future of the death penalty.

In some ways, the federal death penalty has not fulfilled its expectations. For example, the dream of an efficient and speedy death penalty in federal legislation was not practically accomplished by the Drug Kingpin Act or the 1994 Act. In the early days of the nation, executions proceeded quickly after sentencing. Since 1972, however, due to the imposition of procedural safeguards and seemingly limitless appeals in the state courts, those on death row wait very long periods of time to be executed.\textsuperscript{304}

\textsuperscript{299} Id.
\textsuperscript{300} Id. at 2109-10.
\textsuperscript{301} Id. at 2116 (quoting Reply brief of Jones at 7-8, n.11).
\textsuperscript{302} Id. at 2118.
\textsuperscript{303} Devotions No. 17, in JOHN DONNE, SELECTED PROSE (N. Rhodes ed. 1987).
\textsuperscript{304} Of those prisoners executed in the states in 1997, they had been on death row for an average of 11 years and one month. See Capital Punishment 1998, supra note 45. This number had risen by eight months from 1996. Id. By 1999, however, the number was reduced by 90 days. See Richard Carelli, Time on Death Row Remains an Eternity, SALT LAKE TRIBUNE,
The extremely long wait for the inmate to be executed could itself seem to be cruel and unusual punishment. Seven years ago, a jury imposed the death penalty on Juan Raul Garza. Compared with the speed in which executions were performed in our history, Garza has long awaited the death penalty. In an individual proportionality evaluation, Garza's anxiety may seem inconsequential compared to the gravity of his offenses, yet these years must have affected Garza as he has awaited his execution. As one death row resident put it:

I go to sleep and I dream of me sitting down in that chair. I mean it's such a fearful thought. Me walking down the tier, sitting down in it, them hooking it up and turning it on... I can wake up, my heart's beating fast, I'm sweating like hell, just like I'd rinsed my head in water.... I feel like I'm going to have a heart attack.\(^{305}\)

To many, this anticipation of ultimate punishment may be the true and deserved punishment behind capital sentencing, with the cessation of body functioning little more than a formality. This argument, however, is countered by those who argue that blood shedding blood is not justice.

The foregoing examples accentuate the emotional basis for one's personal perspective on the ultimate punishment.\(^{306}\) Like it or not, the death penalty is something that will not soon go away. Public expectations underlie and support the 1994 Act. In the end, neither Supreme Court jurisprudence nor Congress will change the death penalty or its implementation. As it has for hundreds of years, discussion and argument will continue, and emotions will rage.

Garza's upcoming execution will serve to accentuate the tension that still exists in the country. The collective effect of Garza's death and others in the future will sway the pendulum of popular opinion in one direction or another, for the modern death penalty is not static.

The effect of Garza's execution may not be readily apparent immediately after his execution. The future of the death sentence in America will be determined, in part, by public opinion after it experiences executions and responds. Each execution will influence all of us. One day we as a society may find the answer to the death penalty conundrum. Until then, we will be left observing, but in so doing, we are also participating in the end effects of a federal death penalty.

\(^{305}\) JAMES A. INCIARDI CRIMINAL JUSTICE 509 (3d ed. 1990).

\(^{306}\) For a concise summary of the arguments advanced by both camps in the death penalty debate, see Sandra R. Acosta, Recent Development, Imposing the Death Penalty Upon Drug Kingpins, 27 HARV. J. ON LEGIS. 596, 603-06 (1990).