

Federal Capital Offenses: An Abridged Overview of Substantive and Procedural Law

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Federal Capital Offenses: An Abridged Overview of Substantive and Procedural Law

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

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

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

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

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

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

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

Contents

Post- <i>Furman</i> Jurisprudence	1
Existing Federal Law	2

Contacts

Author Information.....	7
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Murder, committed under any of more than 50 jurisdictional circumstances, is a federal capital offense.¹ So are treason, espionage, and certain drug kingpin offenses. The Federal Death Penalty Act and related provisions establish the procedure that must be followed before a defendant convicted of a federal capital offense may be executed.

Post-Furman Jurisprudence

The Federal Death Penalty Act reflects the constitutional boundaries identified in *Furman v. Georgia* and subsequent related Supreme Court decisions. The opinion for the Court in *Furman* runs less than a page. It simply states: “The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.” *Furman* drew two responses. Some states sought to remedy arbitrary imposition of the death penalty by making capital punishment mandatory. Other states and Congress narrowed the category of cases in which the death penalty might be a sentencing option and crafted procedures designed to guide jury discretion in capital cases in order to equitably reduce the risk of random imposition. The Court in *Woodson v. North Carolina* rejected the first approach and in *Gregg* endorsed the second.

The Court has subsequently noted that *Furman* and *Gregg v. Georgia* “establish that a . . . capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant’s record, personal characteristics, and the circumstances of his crime.” With respect to eligibility for the death penalty, the Court declared “that capital punishment must ‘be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.’” “Applying this principle, [the Court] held in *Roper* and *Atkins* that the execution of juveniles and mentally retarded . . . persons are punishments violative of the Eighth Amendment because the offender had a diminished personal responsibility for the crime.”

Moreover, the Eighth Amendment cannot accept imposition of the death penalty where it is disproportionate to the crime itself as, at least in some instances, “where the crime did not result, or was not intended to result, in death of the victim. “In *Coker [v. Georgia]*, for instance, the Court held it would be unconstitutional to execute an offender who had raped an adult woman . . . And in *Enmund [v. Florida]*, the Court overturned the capital sentence of a defendant who aided and abetted a robbery during which a murder was committed but did not himself kill, attempt to kill, or intend that a killing would take place. On the other hand, in *Tison [v. Arizona]* and elsewhere, the Court later explained, it allowed the defendants’ death sentences to stand where they did not themselves kill the victims but their involvement in the events leading up to the murders was active, recklessly indifferent, and substantial.” (Kennedy v. Louisiana, 554 U.S. 407, 420-21 (2008)).

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

Once a defendant has been found to be a member of a capital punishment eligible class, the question becomes whether he is among that limited number within that class for whom the death

¹ The terms “death penalty” and “capital punishment” are used interchangeably throughout this report. This report is available in an unabridged form as CRS Report R42095, *Federal Capital Offenses: An Overview of Substantive and Procedural Law*, by Charles Doyle, with the footnotes, attributions of authority, and quotations pruned from this report.

penalty is an appropriate punishment. The Court, after *Gregg*, found acceptable sentencing schemes that reserved capital punishment for those cases in which the jury's consideration involved one or more aggravating factors and any mitigating factors. If an aggravating factor is not already required for eligibility, one must be found in the course of the individualized selection assessment. Aggravating factors must satisfy three requirements. "First the circumstance may not apply to every defendant convicted of the murder; it must apply only to a subclass of defendants convicted of murder. Second, the aggravating circumstance may not be constitutionally vague," although the defect in a facially vague aggravating circumstance may be cured by a clarifying jury instruction and binding appellate court construction. Third, the aggravating circumstance may not be statutorily or constitutionally impermissible or irrelevant.

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

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

Existing Federal Law

Existing federal law affords capital cases special treatment. There is no statute of limitations for capital offenses, but there is a preference for the trial of capital cases in the county in which they occur. The Attorney General must ultimately approve the decision to seek the death penalty in any given federal case. Defendants in capital cases are entitled to two attorneys, one of whom "shall be learned in the law applicable to capital cases." Defendants are entitled to notice when the prosecution intends to seek the death penalty, and at least three days before the trial, to a copy of the indictment as well as a list of the government's witnesses and names in the jury pool. Defendants and prosecutors each have 20 peremptory jury challenges in capital cases.

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

Statute of Limitations and Related Matters: "An indictment for any offense punishable by death may be found at any time without limitation." This provision applies when the offense is statutorily punishable by death, even if the prosecution elects not to seek the death penalty or the jury fails to recommend it. Prosecutorial options are somewhat more limited than this statement might imply. In rare cases, due process may preclude a stale prosecution even in the absence of a statute of limitations. The due process delay proscription only applies where the delay is the product of prosecutorial bad faith prejudicial to the defendant:

[A]pplicable statutes of limitations protect against the prosecution's bringing stale criminal charges against any defendant, and, beyond that protection, the Fifth Amendment requires

the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense.

Moreover, the statute of limitations only marks time from the commission of the crime to accusation, in the form of either arrest or indictment. Deadlines between accusation and trial are the province of the constitutional and statutory speedy trial provisions. Here too, the limits are not particularly confining in most instances. As the Supreme Court has observed:

The Sixth Amendment . . . Speedy Trial Clause is written with such breadth that, taken literally, it would forbid the government to delay the trial of an 'accused' for any reason at all. [The] cases, however, have qualified the literal sweep of the provision by specifically recognizing the relevance of four separate enquiries: whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result.

The Speedy Trial Act provides a more detailed timetable, but one that comes with a number of extensions and exclusions. All in all, pre-trial delay is rarely an issue in federal capital cases.

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

Appointment of Counsel: Capital defendants are entitled upon request to the assignment of two attorneys for their defense. There is some uncertainty over whether they are to be appointed immediately following indictment for a capital offense or whether they need only be appointed "promptly" sometime prior to trial. The statute does not permit the court to hold appointment in abeyance during pendency of the DOJ review process. Federal appellate courts are divided over whether a lower court's erroneous refusal to appoint a second attorney in a capital case is presumptively prejudicial and grounds for reversal or if the defendant must still show that the error was prejudicial. The trial court may authorize the payment of attorneys, investigators, experts, and other professional services reasonably necessary for the defense of indigent defendants charged with a capital offense. This does not entitle the accused to the attorney or expert of his choice or to a jury-selection expert. Moreover, removal of the defendant's attorney in a compensation dispute is not appealable until after the trial.

Pre-trial Notice of Intent to Seek the Death Penalty: Section 3593 obligates the prosecutor to advise the defendant and the court, "a reasonable time before trial" or before the acceptance of a plea, of the government's intention to seek the death penalty.

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

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

Death-Ineligible Offenders: Whether by statute, by constitutional command, or both, some offenders may not be exposed to a federal trial in which the prosecution seeks the death penalty for a federal capital offense; some may not be executed. A woman may not be executed while she is pregnant. Neither may a person who is intellectually disabled (“mentally retarded” under governing statute and caselaw) be executed nor a person who lacks the mental capacity to understand that he is being executed and why. The Federal Death Penalty Act may not be employed to charge a juvenile for a capital offense committed when the accused was under 18 years of age. An accused who is incompetent to stand trial may not be tried for a capital offense or any other crime.

Death-Eligible Offenses: Federal law permits imposition of the death penalty only where the defendant has been convicted of a death-eligible crime, where the aggravating and mitigating factors present in a particular case justify imposition of the penalty, and in a murder case where the defendant has been found to have the requisite intent for imposition of capital punishment. Federal law divides death-eligible offenses into three categories. The one group consists of homicide offenses, another of espionage and treason, and a third of drug offenses that do not involve a killing.

Capital Homicide Offenses: Murder is a capital offense under more than 50 federal statutes. Some outlaw murder as such under various jurisdictional circumstances. Most make some other offense, such as carjacking, a capital offense, if death results from its commission. A defendant convicted of a capital offense may be executed, however, only if it is shown beyond doubt at a subsequent sentencing hearing that one of the statutory aggravating circumstances exists, and that he either (A) killed the victim intentionally; (B) intentionally inflicted serious injuries that resulted in the victim’s death; (C) intentionally participated in an act, aware that it would expose a victim to life-threatening force, and the victim died as a consequence; or (D) intentionally engaged in an act of violence with reckless disregard of its life-threatening nature and the victim died as a consequence. The court will sometimes permit a separate preliminary jury proceeding to determine the existence of the requisite intent. Some courts have upheld the submission of more than one mental state to the jury. Under some circumstances, aiding and abetting liability may supply the mental state necessary for (C) or (D). Even in the presence of the necessary intent and at least one of the statutory aggravating factors, a defendant may only be sentenced to death, if the jury unanimously concludes that on balancing the aggravating and mitigating factors imposition of the death penalty is justified.

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

- Death during commission of another crime.
- Previous conviction of violent felony involving firearm.
- Previous conviction of offense for which a sentence of death or life imprisonment was authorized.
- Previous conviction of other serious offenses.
- Grave risk of death to additional persons.
- Heinous, cruel, or depraved manner of committing offense.
- Procurement of offense by payment.

- Pecuniary gain.
- Substantial planning and premeditation.
- Prior conviction for two felony drug offenses.
- Vulnerability of victim.
- Conviction for serious federal drug offenses.
- Continuing criminal enterprise involving drug sales to minors.
- High public officials.
- Prior conviction of sexual assault or child molestation.
- Multiple killings or attempted killings.

The jury may also consider any non-statutory aggravating factors which it finds beyond a reasonable doubt to exist. The Justice Department's *Justice Manual* contains a list of suggested possible non-statutory aggravating factors.

The Constitution and the Federal Death Penalty Act favor the introduction of mitigating evidence during the capital sentencing proceeding. The Supreme Court declared some time ago that “the Eighth Amendment ... require[s] that the sentencer ... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” The Federal Death Penalty Act directs the finder of fact to consider any mitigating factor and permits the defendant to present any information relevant to a mitigating factor. This gives the defendant considerable latitude. Yet his options are not boundless. The evidence he offers must be relevant and not invite confusion or unfair prejudice. Moreover, the prosecutor may question the weight that a mitigating factor warrants. The jury is bound to consider any offered mitigating factor, but it is not required to give it either weight or effect.

Subsection 3592(a) of the Federal Death Penalty Act describes seven statutory mitigating factors and adds a catch-all that encompasses “other factors in the defendant’s background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence.” The other seven cover: 1. Impaired capacity; 2. Duress; 3. Minor participation; 4. Equally culpable, disparate punished defendants; 5. No prior criminal record; 6. Disturbance; and 7. Victim’s consent. The Department of Justice’s *Justice Manual* provides examples of non-statutory mitigating factors.

Treason: Treason is also a federal capital offense. The Constitution defines treason and authorizes Congress to set its punishment. Treason is punishable by death or imprisonment for not less than five years and a fine of not less than \$10,000, nor more than the higher of \$250,000 or twice the amount of the pecuniary gain or loss associated with the offense. The death penalty for treason may only be imposed upon conviction and a finding of one or more of the statutory aggravating factors, and a determination that the aggravating factors outweigh any mitigating factors. The statutory mitigating factors in a treason case are the same as those in a murder case, seven statutory factors and one catch-all: impaired capacity; duress; minor participation; equally culpable but less severely punished defendants; absence of prior criminal record; mental disturbance; victim consent; and any other mitigating factor relating to the offender or the offense. Different statutory aggravating factors, however, apply in treason and espionage cases. The aggravating factors are four: prior treason or espionage conviction; grave risk to national security; grave risk of death; and “any other aggravating factor.”

Commentators have questioned whether the Constitution allows imposition of the death penalty in cases involving treason, espionage, or murder-less drug offenses, since in such cases the statute

on its face authorizes the death penalty without requiring the death of a victim. The Court in *Kennedy* specifically distinguished this class of crimes from those involving violence against individuals. Each of the crimes presents considerations of its own and might under some circumstances survive scrutiny even under the individual violence standards. Nevertheless, it seems likely that any court confronting the issue would at a minimum consider the *Kennedy* standards (indicia of “the evolving standards of decency that mark the progress of a maturing society” read in conjunction with the Court’s precedents).

The existing federal statute likewise permits capital punishment even in a deathless treason case. Yet, it reserves the death penalty for those defendants who have previously been convicted of treason, or who, in the commission of the offense, have created either a grave risk of death or a grave risk of substantial danger to national security, or whose case presents some similar aggravating circumstance. It remains to be seen whether this is enough or even whether treason cases are subject to the same manner of Eighth Amendment analysis as the state violence cases.

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

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

Drug Kingpin (Continuing Criminal Enterprises): Murder committed in furtherance of a drug kingpin (continuing criminal enterprise) offense is a capital crime. It is one of the many federal homicide offenses discussed earlier. Certain drug kingpin offenses, however, are capital offenses even though they do not involve a murder. A continuing criminal enterprise is one in which five or more individuals generate substantial income from drug trafficking. The leader of such an enterprise is subject to a mandatory term of life imprisonment, if the enterprise either realizes more than \$10 million in gross receipts a year or traffics in more than 300 times of the quantity of controlled substances necessary to trigger the penalties for trafficking in heroin, methamphetamines, or other similarly categorized controlled substances under 21 U.S.C. § 841(b)(1)(B). A drug kingpin violation is a capital offense, if it involves twice the gross receipts or twice the controlled substances distributed necessary to trigger the life sentence, or if it involves the use of attempted murder to obstruct an investigation or prosecution of the offense.

Presenting and Weighing the Factors: The Federal Death Penalty Act establishes the same capital sentencing hearing procedures for all capital offenses—murder, treason, espionage, or murder-less drug kingpin offenses. The hearing is conducted only after the defendant has been found guilty of a death-eligible offense. It is held before a jury, unless the parties agree otherwise. The prosecution and the defense are entitled to offer and rebut relevant evidence in aggravation and mitigation without regard to the normal rules of evidence in criminal proceedings. The prosecution bears the burden of establishing the existence of aggravating factors and the defendant of establishing mitigating factors. The burdens, however, are not even. The prosecution must show proof beyond a reasonable doubt; the defendant a less demanding proof by a

preponderance of the evidence. The finding on aggravating circumstances must be unanimous; the finding on mitigating circumstances need only be espoused by a single juror.

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

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

Execution of Sentence: Once all opportunities for appeal and collateral review have been exhausted, a defendant sentenced to death is executed pursuant to the laws of the state where the sentence was imposed, or if necessary, pursuant to the laws of a state designated by the court. This rule does not appear to require the federal government “to follow all the subsidiary details set forth in state execution protocols.” The United States Marshal has the authority to use state or local facilities and personnel to carry out the execution. The regulations permit 6 defense witnesses and 18 public witnesses to attend the execution. Video and audio recording are forbidden.

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