CHAPTER 8

PENALTY PHASE
Hon. O.H. Eaton

[8.1.] Introduction

Capital punishment is a possible penalty for the most serious homicides in 35 states. All 35 states have some sort of post-verdict hearing to determine whether the death penalty should be imposed. These hearings are sometimes referred to as the “penalty phase” or “presentence hearing.”

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

Florida now requires trial judges to complete a comprehensive course on death penalty cases. That requirement may be a factor in reducing the reversal rate.

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

[8.2.] Florida Scheme

In 1972, the U.S. Supreme Court held that all death penalty statutes in the United States are unconstitutional. Florida was the first state to reenact the death penalty after that decision. Three states, Alabama, Delaware, and Florida, follow the Florida scheme. Indiana was a Florida-scheme state but the Indiana Legislature rewrote that state’s statute in 2002 to make Indiana a Georgia-scheme state. The Florida scheme requires that the jury unanimously find a defendant guilty of first degree murder. The same jury (unless the defendant waives a jury) then hears evidence to establish statutory aggravating factors and statutory or non-statutory mitigating circumstances. The aggravating factors must be established beyond a reasonable doubt. The fact finder must be only “reasonably convinced” as to the existence of mitigating factors. If the jury finds one or more aggravating circumstances, and determines these

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circumstances sufficient to recommend the death penalty, it must determine whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances and, based upon these considerations, recommend whether the defendant should be sentenced to life imprisonment or death. Florida and Delaware are the only states that allow the jury to recommend the death penalty by simple majority.\textsuperscript{776} Alabama requires at least 10 jurors to recommend the death penalty.\textsuperscript{777} Most states require unanimity. With rare exceptions, the judge must give the jury recommendation “great weight,” but the final decision as to the penalty is made by the judge. After the jury renders its recommendation, the judge must give both sides an opportunity to present additional evidence or argument.\textsuperscript{778} A comprehensive sentencing order, complete with findings and conclusions of law, is required if the death penalty is imposed. Under the Florida scheme, in order to avoid arbitrary sentences, review by the Florida Supreme Court is automatic and includes a “proportionality review” comparing similar cases.

[8.3.] Georgia Scheme

The Georgia scheme is similar to the Florida scheme.\textsuperscript{779} The two schemes differ because, under the Georgia scheme, the prosecutor is not limited to presentation of evidence establishing statutory aggravating factors. After one statutory aggravating factor has been established, the prosecutor may present all relevant evidence of aggravation. The jury must state in its verdict the aggravating factors found beyond a reasonable doubt, and if the death penalty is unanimously recommended, the court must impose the death penalty. The fact that the jury determines the sentence instead of the judge is another difference between the Florida and Georgia schemes. Under the Georgia scheme, there is automatic review of the death sentence by the state supreme court. The reviewing court is required to determine (1) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) whether the evidence supports the jury’s finding of a statutory aggravating circumstance; and (3) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.

[8.4.] Texas Scheme

The Texas scheme has a different approach than the Florida and Georgia schemes.\textsuperscript{780} In Texas, the jury is required to answer three interrogatories which must be answered either “yes” or “no.” The first two interrogatories must be answered “yes” unanimously or “no” by a vote of at least ten-to-two. The last

\textsuperscript{776} \textsc{Del. Code Ann.} tit. 11, § 4209 (2005).
\textsuperscript{777} \textsc{Ala. Code} § 13A-5-45 (1981).
\textsuperscript{778} Spencer v. State, 615 So.2d 688 (Fla. 1993); Phillips v. State, 705 So.2d 1320 (Fla. 1997).
\textsuperscript{780} \textsc{Tex. Code Crim. Proc. art.} 37.071 (2005).
interrogatory must be answered “no” unanimously or “yes” by a vote of at least ten-to-two. The interrogatories are set forth in the statute as follows:

1. Whether there is a probability the defendant would commit criminal acts of violence which would constitute a continuing threat to society.\textsuperscript{781}

2. Whether the defendant actually caused the death of the deceased, or did not actually cause the death of the deceased but intended to kill the deceased or another, or anticipated a human life would be taken.

3. Whether, taking into consideration all the evidence including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment rather than a death sentence. The Texas Court of Criminal Appeals automatically reviews the death sentence.\textsuperscript{782}

In reviewing the jury’s finding on future dangerousness, the court must view all evidence before the jury in the light most favorable to its finding, then determine whether, based on that evidence and reasonable inferences, a rational jury could have found beyond a reasonable doubt that the answer to the punishment issue was “yes.”\textsuperscript{783}

\section*{[8.5.] Constitutionality of the Three Schemes}

These three schemes were originally approved strictly on the Eighth and Fourteenth Amendment grounds by the U.S. Supreme Court in the 1976 trilogy of cases, \textit{Gregg v. Georgia}, \textit{Proffitt v. Florida}, and \textit{Jurek v. Texas}.\textsuperscript{784} The Eighth and Fourteenth Amendments to the U. S. Constitution require that the judge or jury not be precluded from considering any aspect of the defendant’s character or record, and any of the circumstances of the offense that the defendant proffers as a mitigating circumstance as a basis for a sentence less than death.\textsuperscript{785} The judge must instruct the jury that mitigating factors may not be limited by statute.\textsuperscript{786}

\textsuperscript{781} VA. CODE ANN. § 19.2-264.2 (1977) (at least one Georgia scheme state, Virginia, requires a finding that the defendant both presents a future danger to society and that the murder was “outrageously or wantonly vile, horrible or inhuman” as the only aggravating factor).

\textsuperscript{782} TEX. CODE CRIM. PROC. art. 37.0711(j) (2001).


\textsuperscript{785} Eddings v. Oklahoma, 455 U.S. 104 (1982).

\textsuperscript{786} Penry v. Lynaugh, 492 U.S. 302 (1989).
[8.6.] Variations within the Schemes

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

For instance, until recently Arizona varied the Georgia scheme by eliminating the jury from the penalty phase and entrusting the responsibility to determine the existence of aggravating and mitigating circumstances to the trial judge. This procedure was disapproved by the U.S. Supreme Court in Ring v. Arizona. The Ring case is more fully discussed later in Section 8.8 of these materials.

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

Three states California, Louisiana, and Texas include aggravating circumstances as elements of the crime of first degree murder. California’s definition includes “special circumstances.” Louisiana defines first degree murder separately depending upon the aggravating circumstances. Texas draws a distinction between murder and capital murder depending upon the existence of aggravating circumstances. All three states require the prosecutor to include the aggravating or “special” circumstances to be charged in the indictment. The fact that the aggravating or special circumstances are also elements of the offense of capital murder does not mean the death penalty must automatically be imposed upon conviction. The jury is not bound to find the existence of an aggravating circumstance which would justify the imposition of the death penalty merely because the jury found the defendant guilty of first degree murder. Accordingly, the use of aggravating circumstances as elements of the crime is not unconstitutional on the grounds that the jury, which has determined guilt, has

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787 536 U.S. 584 (2002).
already determined the existence of these aggravating circumstances.\textsuperscript{790} The fact that the aggravating or special circumstances must be alleged in the indictment may have significant meaning in light of recent cases decided by the U.S. Supreme Court.

\textbf{[8.7.]} \textbf{Understanding the Variations}

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

- How much discretion does the prosecutor have to seek or waive the death penalty?
- Is the prosecutor required to give notice to the defendant of intent to seek the death penalty? If so, how and when?
- Is the prosecutor required to give notice of which aggravating factors upon which it will rely? If so, how and when? Must the aggravating circumstances be contained in the indictment?
- Do the rules of evidence, particularly the rules prohibiting hearsay, apply to the penalty phase?
- Who makes the sentencing decision: the jury exclusively, the judge or judges if a jury is waived, or the judge after receiving a jury’s recommendation? If the defendant wishes to waive a jury, must the prosecutor agree?
- Does the jury’s decision have to be unanimous or by some majority vote? If the decision is by majority vote, how much of a majority?
- Is the judge or jury required to “balance” or “weigh” aggravating and mitigating factors to determine the proper sentence? If not, how is this decision made?
- What are the potential problems with jury instructions? Jury instructions differ greatly from state to state; some have been reviewed by the U.S. Supreme Court and approved or disapproved. More importantly, some instructions may be ripe for review and may be struck down in the future. Following a state supreme court’s jury instructions can still result in re-trying the penalty phase if the instructions are faulty.
- What is the burden of proof in deciding aggravation and mitigation?
- Can the judge override the jury’s recommendation? If so, by what standard?

\textsuperscript{790} State v. Clark, 387 So.2d 1124 (La. 1980), dissenting opinion, 389 So.2d 1335 (La. 1980).
✓ What should be included and what should be excluded from the sentencing order if one is required?

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

[8.8.] Ring and the “Flight to Apprendi-land”

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

The U.S. Supreme Court did consider Sixth Amendment challenges to the Florida scheme in Spaziano v. Florida and Hildwin v. Florida. In Spaziano, the issue presented was whether the trial judge had the power to override a jury recommendation of life imprisonment. In its opinion, the U.S. Supreme Court did not decide if jury sentencing is required in capital cases and only addressed the question of whether, given a jury recommendation of life, the trial court could override that recommendation and impose a death sentence.

The U.S. Supreme Court recognized that a capital sentencing proceeding is very much like a trial on the issue of guilt or innocence because of the “embarrassment, expense, and ordeal . . . faced by a defendant which are at least equivalent to that faced by any defendant in the guilt phase of a criminal trial.” Accordingly, the U.S. Supreme Court has held that the Double Jeopardy Clause prohibits the prosecution from “repeated efforts to persuade a sentencer to impose the death penalty.” However, the U.S. Supreme Court held that while

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791 This curious phrase was coined by Justice Antonin Scalia in his concurring opinion in Ring v. Arizona, 536 U.S. 584 (2002).
794 In fact, the petitioner in Spaziano did not argue that the penalty phase of a capital case is “so much like a trial” that it is controlled by Duncan v. Louisiana, 391 U.S. 145 (1968), which recognized the right to a jury trial is applicable to the states through the Fourteenth Amendment.
795 Spaziano, 468 U.S. at 458.
the penalty phase of a capital trial may be similar to a trial for double jeopardy purposes, it is not similar to a trial for purposes of the Sixth Amendment right to jury trial.\textsuperscript{797} The jury override in \textit{Spaziano} was approved.

In \textit{Hildwin}, the issue was more focused. The \textit{per curiam} opinion opens with the statement, “This case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida.”\textsuperscript{798} The U.S. Supreme Court noted that in \textit{Spaziano} it had rejected the claim that a jury trial was required on the sentencing issue of life or death. In \textit{Hildwin}, the U.S. Supreme Court stated, “If the Sixth Amendment permits a judge to impose a sentence of death when the jury recommends life imprisonment, it follows that it does not forbid the judge to make the written findings that authorize imposition of a death sentence when the jury unanimously recommends a death sentence.”\textsuperscript{799} Citing \textit{McMillan v. Pennsylvania},\textsuperscript{800} the U.S. Supreme Court reiterated the fact that findings made by a judge rather than a jury do not violate the Sixth Amendment’s guarantee of right to trial by jury. A plain reading of \textit{Spaziano} and \textit{Hildwin} leads to the inescapable conclusion that the Florida scheme is constitutionally valid on the Sixth, Eighth, and Fourteenth Amendment grounds, and that a jury need take no part in determining whether to impose a death sentence. The state of Arizona took comfort in these rulings and confidently defended its capital punishment statute before the court in 1990, one year after the decision in \textit{Hildwin}.

\textbf{[8.9.]} \textit{Walton v. Arizona}\textsuperscript{801}

Until recently, the state of Arizona followed the Georgia scheme with one important variation: the trial judge presided over the penalty phase without a jury and made the findings in determining whether to impose the death penalty. Walton made a direct Sixth Amendment challenge to this procedure before the U.S. Supreme Court. He lost.

First, Walton argued every finding of fact underlying a sentencing decision must be made by a jury and not a judge. The U.S. Supreme Court rejected that argument and, citing \textit{Clemons v. Mississippi},\textsuperscript{802} held that the argument had been previously and soundly rejected. The U.S. Supreme Court then analogized the Arizona scheme with the Florida scheme. Having approved the Florida scheme in \textit{Hildwin}, the U.S. Supreme Court observed, “A Florida trial court no more has the assistance of a jury’s findings of fact with respect to sentencing issues than does a trial judge in Arizona.”\textsuperscript{803}

Second, Walton argued, unsuccessfully, that while in Florida aggravating circumstances are only “sentencing considerations,” in Arizona they are elements

\textsuperscript{797} \textit{Spaziano}, 468 U.S. at 459.
\textsuperscript{798} \textit{Hildwin}, 490 U.S. at 638.
\textsuperscript{799} \textit{Spaziano}, 468 U.S. at 460.
\textsuperscript{800} 477 U.S. 79 (1986).
\textsuperscript{802} 494 U.S. 738 (1990).
\textsuperscript{803} \textit{Walton}, 497 U.S. at 648.
of the offense. The U.S. Supreme Court rejected this argument stating aggravating circumstances are only “standards to guide the making of the choice between the alternative verdicts of death or life imprisonment.” It rejected the notion that “a state is required to denominate aggravating circumstances ‘elements’ of the offense or permit only a jury to determine the existence of such circumstances.”

[8.10.] **Almendarez-Torres v. U.S.**

In *Almendarez-Torres*, the U.S. Supreme Court addressed the problem of enhanced penalty due to prior conduct, a deportation resulting from prior convictions of aggravated felonies. Almendarez-Torres was an illegal alien who had been previously deported after aggravated felony convictions. He illegally returned to the United States and was charged with violating the statute that prohibits illegal aliens from returning to the United States after being deported. The statute allows for an enhanced sentence if the illegal alien committed an aggravated felony prior to deportation. The indictment charged that Almendarez-Torres returned to the United States after being previously deported but did not allege he had been convicted of prior aggravated felonies. He received an enhanced sentence and challenged the sufficiency of the indictment. The U.S. Supreme Court ruled the prior record or recidivism of a defendant is a “sentencing factor” and not an element of the offense charged. The prior record was not required to be alleged in the indictment. This seemingly innocuous statement came back the next year in a different context.

[8.11.] **Jones v. U.S.**

In *Jones*, the U.S. Supreme Court was faced with the federal carjacking statute. The statute provided for enhanced penalties if, at the time of the crime (1) a person was in possession of a firearm (penalty of not more than 15 years); (2) serious injury resulted (penalty of not more than 25 years); and (3) death resulted (penalty any number of years up to life). The U.S. Supreme Court held the statute established three separate offenses and the facts (elements) enhancing the penalties had to be alleged in the indictment and proven beyond a reasonable doubt.

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804 *Id.*
805 *Id.* at 649.
810 *Jones*, 526 U.S. at 243 n.6.
In New Jersey, the legislature decided to increase the maximum penalty for certain offenses if they qualified as “hate crimes.” Possession of a firearm for an “unlawful purpose” is a second degree offense punishable by imprisonment “between five and 10 years.” However, a separate statute provides for an “extended term” of imprisonment if the trial judge finds, by a preponderance of the evidence, that “the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity.” The “extended term” authorized is between 10 and 20 years.

Charles C. Apprendi, Jr. was prosecuted under this statute after he admittedly fired several .22 caliber bullets into the home of an African American family who had recently moved into his neighborhood. The indictment did not mention the hate crimes statute. Apprendi entered into a plea agreement in which the state reserved the right to request that the trial court impose the higher “enhanced” sentence. Apprendi reserved the right to challenge the hate crimes sentence on the grounds it violated the U.S. Constitution. The trial judge imposed a 12-year sentence, two years more than the maximum allowed without the “enhancement.”

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

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812 N.J. STAT. ANN. §§ 2C:39-4(a) and 2C:43-6(a)(2).
817 Id. at 494-495.
818 Id. at 498.
The U.S. Supreme Court reversed and noted:

The historic link between verdict and judgment and the consistent limitation on judges’ discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes from the jury the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.\(^{819}\)

Thus, the U.S. Supreme Court held, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.”\(^{820}\) Justice Thomas filed a concurring opinion suggesting the continued validity of Walton v. Arizona could be called into question.

Most state courts, post-Apprendi, took the position that the decision did not pertain to capital cases because the maximum penalty in these cases already is death and, therefore, unnecessary for the jury to make findings of aggravation and mitigation beyond a reasonable doubt. The Maryland case of Borchart v. State\(^{821}\) has an excellent review of these cases and this argument. The Florida Supreme Court has ruled Apprendi does not apply to the Florida scheme on numerous occasions.\(^{822}\) Not long after publication of the Borchart case, the U.S. Supreme Court accepted certiorari in Ring v. Arizona.\(^{823}\) It also stayed executions for two Florida death row inmates, Bottoson and King.

[8.13.] \(\textbf{Ring v. Arizona}\)^{824}

On November 28, 1994, Timothy Ring and two others robbed a Wells Fargo van in Glendale, Arizona and killed the driver.\(^{825}\) The evidence at the guilt phase of the trial failed to prove Ring was a major participant in the armed robbery or that he actually murdered the victim.\(^{826}\) However, between Ring’s trial and sentencing hearing, one of the co-defendants accepted a second degree plea and agreed to cooperate with the prosecution against Ring. The co-defendant testified Ring actually killed the victim and was the leader in the escapade.\(^{827}\) The

\(^{819}\) 530 U.S. at 483.
\(^{820}\) Id. at 490.
\(^{821}\) 786 A.2d 631 (Md. 2001).
\(^{822}\) See Porter v. Crosby, 840 So.2d 981 (Fla. 2003); Hurst v. State, 819 So.2d 689 (Fla. 2002); Mills v. Moore, 786 So.2d 532, 536-37 (Fla. 2001).
\(^{823}\) 536 U.S. 584 (2002).
\(^{824}\) Id.
\(^{825}\) Id. at 589.
\(^{826}\) Id. at 591.
\(^{827}\) Id. at 593.
trial judge entered the “Special Verdict” required by Arizona law and sentenced Ring to death. 828

In an opinion by Justice Ginsberg, the U.S. Supreme Court noted that under Arizona law “a defendant cannot be sentenced to death unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment and not the death penalty.” 829 Accepting that proposition to be the law in Arizona, the U.S. Supreme Court concluded, “we are persuaded that Walton, in relevant part, cannot survive the reasoning of Apprendi.” 830

Justice Scalia, joined by Justice Thomas, filed a concurring opinion. This opinion may be more important than the majority opinion. Justice Scalia would have overruled Furman v. Georgia but he did not have the votes. He agreed with Justice Rehnquist’s dissenting opinion in Garner v. Florida 831 wherein it was stated, “the prohibition of the Eighth Amendment relates to the character of the punishment, and not the process by which it is imposed.” 832

Justice Scalia believed jury verdicts finding aggravating circumstances must be unanimous. He stated, “I believe that the fundamental meaning of the jury trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt.” 833 Proof beyond a reasonable doubt traditionally requires a unanimous verdict. 834

Justice Scalia admitted the Sixth Amendment claim in Walton “was not put with the clarity it obtained in Almendarez-Torres and Apprendi.” 835 However, if the issue had been “better put” at the time Walton was decided, he still “would have approved the Arizona scheme -- I would have favored the state’s freedom to develop their own capital sentencing procedures (already erroneously abridged by Furman) over the logic of the Apprendi principle.” 836

Since Walton, Justice Scalia says he has “acquired new wisdom.” He realized two things: first, that “it is impossible to identify with certainty those aggravating factors whose adoption has been wrongfully coerced by Furman, as opposed to those that the state would have adopted in any event;” second, “our

828 Id. at 594.
829 Id.
830 Id.
832 Id. at 371.
833 Ring, 536 U.S. at 610.
834 The U.S. Supreme Court has upheld less than unanimous verdicts, but Apprendi probably calls those decisions into question. See Apodaca v. Oregon, 406 U.S. 404 (1972) (a 5-4 decision that involved several opinions authored by justices who are no longer on the U.S. Supreme Court); see also Johnson v. Louisiana, 406 U.S. 356 (1972) (approving a statute that allowed a less than unanimous (9-3) verdict in criminal cases). The validity of Johnson is also in doubt.
835 Id. at 611.
836 Id.
people’s traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man’s going to his death because a judge found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.\textsuperscript{837}

Finally, in order to make the most important point of his opinion, and perhaps the most important point in the entire case, Justice Scalia, disagreeing with Justice Breyer in his belief that the Sixth Amendment requires jury sentencing in capital cases,\textsuperscript{838} stated:

\begin{quote}
[T]oday’s judgment has nothing to do with jury sentencing. What today’s decision says is that the jury must find the existence of the \textit{fact} that an aggravating factor existed. Those states that leave the ultimate life-or-death decision to the judge may continue to do so - by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating factor determination (where it logically belongs anyway) in the guilt phase. There is really no way in which Justice Breyer can travel with the happy band that reaches today’s result unless he says yes to \textit{Apprendi}. Concisely put, Justice Breyer is on the wrong flight; he should either get off before the doors close, or buy a ticket to \textit{Apprendi}-land.\textsuperscript{839}
\end{quote}

Thus it seems Justice Scalia believes a bifurcated trial with a penalty phase is not necessary to a capital punishment scheme. As long as the jury finds an aggravating factor, the states are free to devise procedures (possibly post-verdict by judge alone) to determine whether the death penalty is appropriate. All aggravating factors listed in most statutes, except the aggravators involving the existence of a prior felony, are developed during the guilt phase of the trial. However, as is plainly stated in \textit{Almendarez-Torres}, the fact of prior record does not need to be submitted to the jury. The presence or absence of prior record can be considered by the court. Under Justice Scalia’s view, matters of mitigation could be considered by the court without further jury involvement in determining the ultimate sentence.

\section*{[8.14.] Initial Reaction to \textit{Ring}}

The \textit{Ring} decision was released June 24, 2002. The 2002 term ended June 30, 2002. The stay of execution for the two Florida death row inmates (Bottoson and King) was lifted June 28, 2002, just before the term ended. Florida’s governor signed new death warrants on July 1, 2002, and set the first execution for July 8, 2002, a week away. On July 8, 2002, the Supreme Court of

\textsuperscript{837} Id.

\textsuperscript{838} None of the other justices have expressed this view.

\textsuperscript{839} 536 U.S. at 612.

The seven justices issued eight opinions.

All justices agreed the Florida Supreme Court is bound by principles of \textit{stare decisis} to deny relief to Bottoson and King. This course is a proper course to follow under our federal system, particularly under the Supremacy Clause contained in Article VI of the U.S. Constitution. Justice Boyd stated in his dissent:

\begin{quote}
The Supremacy Clause of the Constitution of the United States provides that document is the Supreme Law of the Land. Upon the State courts, equally with the courts of the Federal system, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, whenever those rights are involved in any suit or proceedings before them. Consequently, it is the duty of State Supreme Courts to follow the guidelines announced by the Supreme Court of the United States in construing Federal Constitutional rights.\footnote{State v. Dixon, 283 So.2d 1, 24 (Fla. 1973) (citing Irvin v. Dowd, 359 U.S. 394 (1959); Smith v. O'Grady, 312 U.S. 329 (1941); U.S. v. Bank of New York & Trust Co., 296 U.S. 463 (1936); and Mooney v. Holohan, 294 U.S. 103 (1935)).}
\end{quote}

A majority of the justices agreed the U.S. Supreme Court had the opportunity to address Florida’s death penalty procedures in \textit{Bottoson} and \textit{King} and since it declined to do so, the Florida scheme must still be valid. There were vigorous dissents. Ultimately, the Florida Supreme Court denied relief to Bottoson and King. Both were subsequently executed.

The wait and see approach the Supreme Court of Florida has taken is not the only approach available. Other state supreme courts have met the issue head on and declared their state statutes unconstitutional.\footnote{Woldt v. People, 64 P.3d 256 (Colo. 2003); State v. Gales, 658 N.W.2d 604 (Neb. 2003).}

The Nebraska legislature amended the state’s statutes to conform to the scheme envisioned by Justice Scalia.\footnote{\textsc{NEB. REV. STAT.} § 29-2519 \textit{et seq.} (2002).} The new scheme has the advantage of saving as much Nebraska case law as possible, while providing an uncomplicated method in determining whether to impose the death penalty. Under the new statute, the aggravating circumstances must be charged in the information.\footnote{Nebraska allows first degree murder to be charged by information, rather than indictment.} The jury must find the defendant guilty beyond a reasonable doubt. Then, the aggravating circumstances are presented to the jury. The rules of evidence apply to this proceeding. The jury must unanimously find the existence of aggravating circumstances beyond a reasonable doubt and state the aggravating

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circumstances in the verdict. The jury is then discharged. The court convenes a
three-judge panel, including the trial judge, to hear matters of mitigation and
sentence excessiveness or disproportionality. The three-judge panel must vote
unanimously for the death penalty. A three-judge panel is not required to satisfy
Justice Scalia’s suggested procedure. Nebraska was one of the states that had
three judges decide the existence of aggravating circumstances prior to Ring
and elected to keep that aspect of the prior procedure. This statute, absent the
three-judge panel, could be a model for many states, especially those with the
Florida scheme.

[8.15.] Retroactivity of Ring

Some lawyers and legal scholars believe, because the U.S. Supreme
Court lifted the stay in those cases and allowed Bottoson and King to be
executed, there was a signal that the U.S. Supreme Court approved of the Florida
scheme. They are mistaken. Both Bottoson’s and King’s cases were before the
U.S. Supreme Court on certiorari from post-conviction relief proceedings.
The U.S. Supreme Court has held, with rare exception, that decisions
making constitutional changes in procedure will be applied retroactively only to
cases on direct review and not on collateral review. The reasons for this policy
are not readily apparent and deserve further discussion.

In Teague v. Lane, the defendant, an African American man, was
convicted in Illinois by an all-white jury and his conviction was affirmed on
appeal. He sought collateral review, complaining the jury was not composed of a
fair cross-section of the community. He was convicted before Batson v. Kentucky
was decided and sought that case to be applied retroactively to his case.

The U.S. Supreme Court noted it had often applied a new constitutional
rule of criminal procedure to the defendant in the case announcing the new rule.
The question of whether the new rule should be applied retroactively was left for
the next case. The U.S. Supreme Court decided “retroactivity is properly treated
as a threshold question, for, once a new rule is applied to the defendant in the
case announcing the rule, evenhanded justice requires that it be applied
retroactively to all who are similarly situated.”

The U.S. Supreme Court admitted it is difficult to determine when a case
announces a new rule and no attempt was made to “define the spectrum of what
may or may not constitute a new rule for retroactivity purposes.” It then
explained, “In general, however, a case announces a new rule when it breaks new
ground or imposes a new obligation on the States or the Federal Government. To

845 Teague v. Lane, 489 U.S. 288 (1989). The ruling in Teague has been codified in 28
846 Id.
potential jurors cannot be peremptorily challenged on account of race.
848 Teague, 489 U.S. at 300.
849 Id. at 301.
put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final.\textsuperscript{850}

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

1. “Failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.”\textsuperscript{851} There are two reasons for this:
   a. The court can promulgate new rules only in specific cases and cannot possibly decide all cases in which review is sought. Accordingly, “the integrity of judicial review” requires the application of the new rule to “all similar cases pending on direct review.”\textsuperscript{852}
   b. Selective application of new rules violates the principle of treating similarly situated defendants the same.\textsuperscript{853}

2. \textit{Habeas corpus} has always been a collateral remedy not designed to be a substitute for direct review. “The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a \textit{habeas} petition is filed.”\textsuperscript{854}

3. Given the “broad scope” of constitutional issues reviewable on \textit{habeas corpus}, “it is sounder, in adjudicating \textit{habeas} petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of \textit{habeas} cases on the basis of intervening changes in constitutional interpretation.”\textsuperscript{855}

This is so because “the threat of \textit{habeas} serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional

\textsuperscript{850} \textit{Id.}
\textsuperscript{851} \textit{Id.} at 304.
\textsuperscript{852} \textit{Id.}
\textsuperscript{853} \textit{Id.}
\textsuperscript{855} \textit{Id.} at 689.
standards. In order to perform this deterrence function ... the habeas court need only to apply the constitutional standards that prevailed at the time the original proceedings took place.\footnote{856}{Griffith v. Kentucky, 479 U.S. 314, 321 (1987).}

4. The costs imposed upon the states by retroactive application of new rules of constitutional law on habeas corpus generally outweigh the benefits of this application.\footnote{857}{Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring in the judgment).}

5. State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during habeas proceedings, a new constitutional command.\footnote{858}{See Engle v. Isaac, 456 U.S. 107 (1982).}

The U.S. Supreme Court adopted Justice Harland’s view that there exists only two exceptions to the rule. First, a new rule should be applied retroactively on habeas if it places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.”\footnote{859}{Mackey, 401 U.S. at 692.} Second, a new rule should be applied retroactively if it requires the observance of “those procedures that . . . are implicit in the concept of ordered liberty.”\footnote{860}{Id. at 693.} This second exception involves bedrock procedural elements, e.g., the right to counsel, necessary to obtain a valid conviction. This exception is also illustrated by recalling the classic grounds for habeas relief: “that the proceedings was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based upon a confession extorted from the defendant by brutal methods.”\footnote{861}{Rose v. Lundy, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting).}

\textit{Teague} will, in all probability, foreclose relief to death row inmates whose cases are in post-conviction relief or in federal habeas proceedings.

In \textit{Summerlin v. Stewart},\footnote{862}{341 F.3d 1082 (9th Cir. 2003) \textit{(en banc)}.} the question of whether \textit{Ring} has retroactive effect under the \textit{Teague} analysis was presented. In an interesting and well written opinion, the Ninth Circuit concluded that \textit{Ring} should be applied retroactively.

The U.S. Supreme Court, through Justice Scalia, disagreed in a 5-4 opinion.\footnote{863}{Schriro v. Summerlin, 542 U.S. 348 (2004).} It stated the decision in \textit{Ring} was procedural rather than substantive and announced no new watershed rule of criminal procedure. Justice Scalia explained,

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

[8.16.] **Evidentiary Issues during the Penalty Phase**

During the penalty phase of a capital case, evidence is treated differently than during the trial phase. Many states lessen the burden of proof in establishing mitigating circumstances. Additionally, as required by the U.S. Supreme Court, hearsay evidence is treated different. These issues are explored more fully below.

[8.17.] **Burden of Proof**

Most state statutes require that aggravating circumstances be proven beyond a reasonable doubt. Some statutes are silent on the burden of proof required. But even if the statute is silent, the burden is on the prosecution to prove the aggravating factors beyond a reasonable doubt. Inferences or probabilities are not enough. Most states provide for a lesser burden of proof in establishing mitigating circumstances. Is there a constitutional problem in requiring the defendant to prove mitigating factors at all? This issue was specifically rejected by the U.S. Supreme Court in *Walton v. Arizona*. Arizona required the defendant to prove, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency. Walton contended this requirement violated the Eighth and Fourteenth amendments, and that the Constitution required the defendant be able to claim mitigating circumstances unless the state negated them by a preponderance of the evidence. The U.S. Supreme Court found nothing wrong with Arizona’s requirement that the burden of proving mitigating circumstances was on the defendant and that the burden of proof was by a preponderance of the evidence.

Some other states (Maryland, New Hampshire, Pennsylvania, and Wyoming) use preponderance of the evidence as their standard. Alabama’s statute gives the defendant the burden of “interjecting” the issue and once

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864 *id.* at 355.
interjected, the prosecutor has the burden of disproving by a preponderance of the evidence.\textsuperscript{870} In Florida, juries are instructed that if they are “reasonably convinced” of a mitigating circumstance, it may be considered as established.\textsuperscript{871} The majority of states do not give the burden of proof regarding mitigating evidence as part of their statute. In those states it is necessary to research relevant case law. If all else fails, rely upon the U.S. Supreme Court’s approval of the “preponderance” standard as an appropriate burden.

[8.18.] Prosecution’s Evidence for the Penalty Phase

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

The prosecutor will have to put on witnesses or introduce evidence of aggravation if a new jury has been selected for the penalty phase. Some states allow the prosecutor to introduce former testimony from transcripts of the guilt phase to the new jury if witnesses are not available.\textsuperscript{872} Unless these witnesses are no longer available, and have previously been subjected to cross-examination, the prosecutor will have to use live witnesses.\textsuperscript{873} However, some death penalty cases are very old and have been in the appellate courts for years. It may be difficult for the prosecutor to obtain live witnesses upon retrial and he or she will have to rely upon former testimony. Jurisdictions with no provision for the use of former testimony present a problem for the prosecutor. The use of transcripts, because a witness has died, has become incapacitated, or is unavailable, may be the only recourse. Whether to allow the use of former testimony under such circumstances must be determined by state law.

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

\begin{footnotes}
\item[870] ALA. CODE § 13A-5-45(g) (1981).
\item[871] FLA. STD. CRIM. JURY INSTR. 7.11.
\item[872] See Russell v. State, 670 So.2d 816 (Miss. 1995); see also State v. Carter, 888 P.2d 629 (Utah 1995) (oral testimony from transcripts allowed).
\end{footnotes}
stipulation is not accepted, the prosecution may introduce documents or live testimony to establish other aggravating factors.\textsuperscript{874}

\[8.19.\] \textbf{Hearsay Testimony during the Penalty Phase}

Some states, e.g., Louisiana, require the rules of evidence to apply during a penalty phase proceeding. Other states allow both the state and defense to introduce hearsay. Some states, e.g., Arizona, Arkansas, and Connecticut, permit the defense to use hearsay to prove mitigating circumstances but do not allow the prosecution to use it to prove aggravating circumstances.\textsuperscript{875} Some states do not allow the prosecution to use hearsay to prove aggravating circumstances, but do allow hearsay to be used to rebut mitigating circumstances. In \textit{Green v. Georgia}, the U.S. Supreme Court reversed a death penalty conviction because the defendant was not allowed to present hearsay testimony during the penalty phase.\textsuperscript{876} In Florida and North Carolina, hearsay is generally admissible so long as there is an opportunity to rebut it.\textsuperscript{877} In \textit{People v. Bilski},\textsuperscript{878} the Appellate Court of Illinois approved the prosecutor’s investigator reading statements from individuals he interviewed. The statements pertained to past misconduct of the defendant. The Appellate Court of Illinois concluded the statements contained an “indicia of reliability” because they showed a similar fact pattern of domestic abuse.

Other rules of evidence may still have to be complied with before the hearsay is admissible. For example, unless a state permits transcripts of previous testimony and depositions to be used, the unavailability of the witness may have to be established before a transcript of that witness’ previous testimony can be admitted. Some courts allow hearsay provided it can be rebutted.\textsuperscript{879} Courts have not hesitated to exclude hearsay statements that cannot be rebutted. For instance, admitting the statement of a non-testifying co-defendant that implicates the defendant on trial is not permitted.\textsuperscript{880} Additionally, hearsay statements are not admissible from witnesses who are unavailable because of death, incompetency through mental illness such as Alzheimer’s, or disappearance.\textsuperscript{881}

Allowing the prosecutor to introduce hearsay to prove an aggravating circumstance is probably error after \textit{Crawford v. Washington} on Sixth

\textsuperscript{874} See State v. Hessler, 734 N.E.2d 1237 (Ohio 2000); Singleton v. State, 783 So.2d 970 (Fla. 2001) (prosecutor allowed to call prior victim to testify that defendant severed both of her forearms during prior crime).
\textsuperscript{875} CONN. GEN. STAT. § 53a-46a (2001); ARK. CODE ANN. § 5-4-602 (1993); Ariz. REV. STAT. ANN. §13-703 (2005).
\textsuperscript{876} Green v. Georgia, 442 U.S. 95 (1979).
\textsuperscript{877} Rhodes v. State, 547 So.2d 1201 (Fla. 1989); State v. Strickland, 488 S.E.2d 194 (N.C. 1997).
\textsuperscript{878} 776 N.E.2d 882 (Ill. App. Ct. 2002).
\textsuperscript{879} Parker v. State, 873 So.2d 270 (Fla. 2004); \textit{Ex parte} Dunaway, 746 So.2d 1042 (Ala. 1999).
\textsuperscript{880} Ramirez v. State, 739 So.2d 568, 581 (Fla. 1999); Franqui v. State, 699 So.2d 1332, 1336 (Fla. 1997).
\textsuperscript{881} \textit{Parker}, 873 So.2d at 282.
Amendment grounds. Prosecutors are unwise to insist on presenting hearsay evidence and judges are unwise to allow it unless the U.S. Supreme Court specifically rules that the Confrontation Clause does not apply to penalty phase proceedings. A review of hearsay as it applies in the Federal Death Penalty Act as well as caselaw leading up to Crawford v. Washington follows below.

[8.20.] Federal Death Penalty Act (FDPA)

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

[8.21.] U.S. v. Fell

Fell challenged the constitutionality of the FDPA on two grounds: (1) failure of the FDPA to require aggravating circumstances to be submitted to the grand jury and included in the indictment upon probable cause; and (2) failure of

885 Id.
887 Id.
889 Id.
the FDPA to comply with the requirements of Sixth Amendment due process by allowing otherwise inadmissible evidence (hearsay) to be considered in determining whether an aggravating circumstance has been proven beyond a reasonable doubt.\footnote{891\textit{Id.}}

In his opinion, Judge Sessions acknowledged\textit{ Ring} did not discuss the question of whether the facts to be relied upon in securing the death penalty had to be included in the indictment, stating, “the clear implication of the decision, resting squarely as it does on\textit{ Jones}, is that in a federal capital case the Fifth Amendment right to grand jury indictment will apply.”\footnote{892\textit{Id.} at 483.} Unfortunately for Fell, the government saw this one coming and amended the indictment.\footnote{893It appears that federal prosecutors have decided to include aggravating factors in grand jury indictments in order to avoid this obvious problem. See, e.g., U.S. v. Denis, 246 F.Supp.2d 1250 (S.D. Fla. 2002). At least two courts have ruled that aggravating circumstances are elements of the offense and must be included in the indictment. U.S. v. Haynes, 269 F.Supp.2d 970 (W.D. Tenn. 2003); U.S. v. Mikos, No. 02 CR 137-1, 2003 WL 22110948 (N.D. Ill. Sept 11, 2003) (Not reported in the Federal Supplement).\textit{ Fell}, 217 F.Supp.2d at 473.\textit{ Id.} at 474.\textit{ Id.} at 483.\textit{ Id.} at 485.} Judge Sessions also found fault with the “relaxed evidentiary standard” included in the FDPA during the penalty phase of the proceedings.\footnote{894\textit{Fell}, 217 F.Supp.2d at 485-486 (citations omitted).} He held this standard cannot “withstand due process and Sixth Amendment scrutiny, given the U.S. Supreme Court’s concern for heightened reliability and procedural safeguards in capital cases.”\footnote{895\textit{Id.} at 474.} In Fell’s case, the prosecutor intended to introduce into evidence a statement made by a deceased co-defendant.\footnote{896Many states allowing hearsay evidence to prove aggravating or mitigating circumstances require the opponent to have a “fair opportunity to rebut” the hearsay. It is usually not possible to rebut the testimony of an unavailable witness, such as one who is dead, incompetent, or who has disappeared. Parker v. State, 873 So.2d 270, 282 (Fla. 2004).} This statement would not be admissible under the Federal Rules of Evidence. In discussing the background of the Due Process Clause, Judge Sessions stated:

\begin{quote}
[A]s assurance against ancient evils, our country, in order to preserve “the blessings of liberty,” wrote into its basic law the requirement, among others, that the forfeiture of the lives ... of people accused of crime can only follow if procedural safeguards of due process have been obeyed. Although the rights of an accused to confront and cross-examine witnesses are set forth in the Sixth, not the Fifth Amendment, “[t]he rights to confront and cross-examine witnesses ... have long been recognized as essential to due process.” Indeed, “the absence of proper confrontation at trial 'calls into question the ultimate integrity of the fact-finding process.'”\footnote{897\textit{Fell}, 217 F.Supp.2d at 485-486 (citations omitted).}
\end{quote}
Thus, Judge Sessions reasoned, since the text of the Sixth Amendment’s Confrontation Clause refers to “all criminal prosecutions,” the rights enumerated therein are not confined to trial. The Sixth Amendment does not operate to exclude all hearsay. But in order for hearsay to be admissible, the proponent must demonstrate necessity (such as the unavailability of the declarant) and trustworthiness. Because “an accomplice’s confession that implicates a defendant does not fall within a firmly rooted hearsay exception, it is presumably unreliable.”

Judge Sessions concluded his opinion as follows:

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

Other federal courts have disagreed with Judge Sessions and have approved the “relaxed evidentiary rules” provided in the FDPA. The Second Circuit Court of Appeals reversed the case, holding that the Federal Rules of Evidence need not apply to capital sentencing proceedings. Some state courts have concurred.

[8.22.] **Crawford v. Washington**

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

Crawford was convicted of stabbing a man who was allegedly trying to rape Crawford’s wife, Sylvia. At trial Sylvia was unavailable to the prosecutor because of the state’s “marital privilege,” which generally bars a spouse from testifying against the other spouse without the other spouse’s consent. However, in Washington the privilege does not extend to out-of-court statements admissible as an exception to the state hearsay rule. Sylvia made a recorded statement to the police and the state offered it in evidence to prove the stabbing.
was not self-defense. The trial and appellate courts, for various reasons, held that the statement bore “adequate ‘indicia of reliability’” under \textit{Ohio v. Roberts}\textsuperscript{906} and approved the statement as evidence.\textsuperscript{907}

The U.S. Supreme Court, through Justice Scalia, stated, “The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.”\textsuperscript{908} In tracing the history of the common-law tradition, Justice Scalia noted a recurring question was “whether the admissibility of an unavailable witness’ pretrial examination depended on whether the defendant had had an opportunity to cross-examine him.”\textsuperscript{909} The U.S. Supreme Court concluded,

Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon the Law of Evidence for the time being. Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.\textsuperscript{910}

The Confrontation Clause does not, of course, bar all out-of-court statements from being admitted into evidence without prior opportunity for cross-examination. The U.S. Supreme Court explained the Confrontation Clause applies to “witnesses” who “bear testimony.”\textsuperscript{911} It defined “testimony” as “typically ‘a solemn declaration or affirmation made for the purpose of establishing or proving some fact.’”\textsuperscript{912} The U.S. Supreme Court went on to distinguish “testimony” by an accuser who makes a formal statement to government officers from a person who makes a casual remark to an acquaintance.\textsuperscript{913} “Testimonial” statements include (1) ex parte in-court testimony or its functional equivalent such as affidavits; (2) custodial examinations; (3) pretrial statements which declarants would reasonably expect to be used prosecutorially; (4) extra judicial statements contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions; and (5) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.\textsuperscript{914} Thus, it concluded, “the common law in 1791 conditioned

\textsuperscript{906} 448 U.S. 56 (1980).
\textsuperscript{907} \textit{Crawford}, 541 U.S. at 40.
\textsuperscript{908} \textit{id.} at 43.
\textsuperscript{909} \textit{id.} at 45.
\textsuperscript{910} \textit{id.} at 51.
\textsuperscript{911} \textit{id.}
\textsuperscript{912} \textit{id.}
\textsuperscript{913} \textit{id.}
\textsuperscript{914} \textit{id.}
admissibility of an absent witness’ examination on unavailability and a prior opportunity to cross-examine.”

In considering exceptions to the hearsay rule at common law, the U.S. Supreme Court observed,

But there is scant evidence that exceptions were invoked to admit testimonial statements against the accused in a criminal case. Most of the hearsay exceptions covered statements that by their nature were not testimonial - for example, business records or statements in furtherance of a conspiracy. We do not infer from these that the Framers thought exceptions would apply even to prior testimony.

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

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

[8.23.] Evidence that Violates the Fourth and Fifth Amendments

The prosecutor generally cannot introduce evidence that violates a defendant’s constitutional rights. Most statutes prohibit the introduction of any evidence seized in violation of the defendant’s Fourth or Fifth Amendment

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915 Id. at 54.
916 Id. at 55 (citation and footnote omitted).
917 Id.
919 *Spaziano*, 468 U.S. at 458.
rights. Further, the fact that a defendant belonged to a white racist group called the “Aryan Brotherhood” and had “Aryan Brotherhood” tattooed on his hand (and used the name “Abaddon”) is inadmissible because its introduction would violate the defendant’s First Amendment rights.\footnote{Dawson v. Delaware, 503 U.S. 159 (1992).} In \textit{Dawson v. Delaware},\footnote{Id.} the U.S. Supreme Court suggested this information might have been admissible if it had related to some issue to be decided. For example, this information might have been admissible if the defendant had killed an African American because of his or her race and such a killing was an aggravating factor.

\section*{[8.24.] Victim Impact Evidence}

In \textit{Booth v. Maryland},\footnote{482 U.S. 496 (1987).} the U.S. Supreme Court held that the Eighth Amendment prohibited victim impact statements from being admitted in a capital sentencing procedure. In \textit{South Carolina v. Gathers},\footnote{490 U.S. 805 (1989).} the U.S. Supreme Court extended \textit{Booth} to prohibit prosecutorial argument on the victim’s personal characteristics. \textit{Payne v. Tennessee}\footnote{501 U.S. 808 (1991).} overruled \textit{Booth} and \textit{Gathers}. This kind of testimony and argument is now allowed. \textit{Payne} does not affect \textit{Booth}’s holding that the Eighth Amendment bars admissions of opinions or characterizations by the victim’s family about the crime, the defendant, and the appropriate penalty for the defendant.

Victim impact statements can be disturbing to notions of due process and fairness. Victims often want vengeance instead of justice. There are times, however, when victims want a defendant who deserves the death penalty to be spared, usually for some arbitrary reason such as religious preferences. Prosecutors should encourage members of the victim’s family to limit their statements to establishing the victim’s uniqueness in the community. Some judges require victim impact statements to be presented in writing prior to being submitted to the jury. This is a good idea.

Examples of statements that should not be allowed include the following:

\begin{itemize}
  \item Statements designed to chastise or humiliate the accused;
  \item Statements that are for the purpose of advancing a political, social, or religious belief, or cause;
  \item Statements that are more appropriate for a press conference or support group;
  \item Statements that contain speculation about future events such as pardon or parole;
  \item Statements that recommend or suggest a particular sentence;
\end{itemize}
Photographs or other exhibits designed to elicit sympathy for the victim and prejudice the defendant; and

Emotional outbursts.

The sentencing process in a capital case does not include allowing a member of the victim’s family to demand that the defendant be put to death. The sentence to be imposed must be determined from the presentation of aggravating and mitigating circumstances and not from lay opinion. Additionally, the imposition of any sentence will have an impact upon public funds. Public officials (the prosecutor), and not members of the victim’s family, have the responsibility to advocate for a particular sentence. Some states, e.g., Florida, prohibit victims from expressing “characterizations and opinions about the crime, the defendant, and the appropriate sentence.”

[8.25.] Preliminary Matters

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

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

Jury instructions should be reviewed to be certain there is no minimization of the importance of the jury’s decision which would constitute a Caldwell violation. The Caldwell problem is more thoroughly discussed in Sections 8.75. and 8.85.

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

The right to jury trial can be waived. The procedure to waive a jury is a matter of state law. Some states--Illinois--allow the defendant to waive a jury

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925 CAL. PENAL CODE § 190.3(a); FLA. STAT. § 921.141(7) (2008).
927 536 U.S. 584 (2002).
928 See, e.g., People v. Dameron, 751 N.E.2d 1111 (Ill. 2001).
without consent of the prosecutor.\textsuperscript{929} Other states--Connecticut, Delaware--require both sides to agree.\textsuperscript{930} The waiver should be on the record and should establish that it is knowingly and voluntarily made.\textsuperscript{931}

Some states, such as Florida, do not require the trial judge to accept the waiver.\textsuperscript{932} However, there are several good reasons to consider allowing the waiver:

\begin{itemize}
\item The guilt phase jury will not have to be “death qualified” other than to inquire whether the jurors could return a guilty verdict knowing the death penalty is a possible penalty. This waiver will save time (sometimes days or weeks) on \textit{voir dire} and eliminate many of the errors which occur during \textit{voir dire} in death penalty cases.
\item A jury recommendation to impose the death penalty is often an emotional response to the offense and the defendant and not founded upon sound legal principles. The possibility of an emotional verdict that will have to be either accepted as the sentence or given “great weight” is eliminated.
\item The penalty phase can be scheduled at the convenience of the parties and court without concern about the jury being influenced by outside factors.
\item In states like Florida and Georgia, the penalty phase can be bifurcated with the prosecutor first presenting aggravating circumstances. If no aggravating circumstances are presented, or if they are insufficient to support the death penalty, no further proceedings need to be scheduled.
\item In states where the court has the ultimate sentencing decision, there is more opportunity for the judge to interact with the attorneys and witnesses when a jury is not involved.
\item There is less chance of reversible error in a non-jury trial.
\item Some mitigating circumstances sound like aggravation and may be better presented to the judge alone. \textit{See} Section 8.48. in these materials.
\end{itemize}

\textsuperscript{929} 725 ILL. COMP. STAT. ANN. 5/103-6 (1963); 725 ILL. COMP. STAT. ANN. 5/115-1 (1963).
\textsuperscript{930} CONN. GEN. STAT. ANN. § 54-82 (1981); DEL. SUP. CT. R. CRIM. P. 23.
\textsuperscript{931} \textit{See} People v. Dameron, 751 N.E.2d 1111 (Ill. 2001) (waiver of jury for sentencing phase not “knowing and intelligent” due to erroneous advice that defendant would not receive jury instruction to presume he would spend the rest of his life in prison if given a life sentence); People v. Gacho, 522 N.E.2d 1146 (Ill. 1988).
\textsuperscript{932} Sireci v. State, 587 So.2d 450 (Fla. 1991).
The defendant cannot make an *Apprendi* challenge if the
jury has been waived.\(^{933}\)

### [8.26.] Opening Statements

Opening statements should proceed as in any other trial unless the state statute or rule changes this procedure. For instance, in South Carolina, allowing opening statements is within the discretion of the trial judge.\(^{934}\)

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

The defense may make an opening statement prior to the introduction of any evidence, reserve making the statement until the prosecutor has rested, or waive the opening statement entirely. The trial judge should inquire before trial if defense counsel intends to waive an opening statement or concede any part of the evidence. If so, it is safer to make sure the defendant agrees to the waiver or concession.\(^{935}\)

### [8.27.] Aggravating Circumstances

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

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

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

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\(^{933}\) See *Lynch v. State*, 841 So.2d 362 (Fla. 2003).


\(^{935}\) *See Nixon v. State*, 572 So.2d 1336 (Fla. 1990).
Category I: Defendant: Past, Present, and Future

This first category of aggravating circumstances is a group of characteristics of the defendant which may have attached to him or her before the crime, while the crime occurred or in the future. A description of each of these characteristics is below.

Defendant’s “Freedom Status”

At the time of the murder, was the defendant in prison or jail, escaped from custody, or on parole or probation? Almost all states that list aggravating circumstances enumerate some version of this aggravator. Examples of some of the states’ variations are:

- The capital felony was committed by a person under sentence of imprisonment. (one state adds “or on community control, a house arrest program”).
- The capital felony was committed by a person under sentence of imprisonment, including a period of parole, or on probation for a felony (one state adds “defendant on probation after receiving a sentence for a felony”).
- The capital felony was committed by a person imprisoned as a result of a felony conviction (in some states, the felony must be a “forcible felony”).
- The offense was committed while the defendant was in the custody of the department of corrections, a law enforcement agency (one state adds “under custody of the county’s sheriff”), or the county or city jail (one state adds “confinement in any correctional institution”).
- The offense was committed by a defendant who was unlawfully at liberty after being sentenced to prison for a felony.
- The defendant was serving a life sentence or death sentence at the time of the murder.
- The defendant was under custody of the department of corrections, under custody of the county sheriff, on probation after receiving a sentence for a felony, or on parole.

If a state statute mentions custody, does this include a defendant who escaped from custody? Does it include a defendant who is on parole or probation? What about a defendant who has been sentenced to community control (house arrest)? What if a state has abolished parole, but still releases prisoners early due to overcrowding or on mandatory conditional release? If the defendant is on such a release program and commits a capital murder, does this factor apply?
In Florida, the statute is worded as in the first example. The Supreme Court of Florida answered the above questions in the following way: [t]his aggravating factor applies to (a) one incarcerated for a specific or indeterminate term of years; (b) persons incarcerated under an order of probation; (c) person under (a) and (b) who has escaped from incarceration; and (d) persons who are under sentence for a specific or indeterminate period of years and who have been placed on parole. It also includes a defendant who is on mandatory conditional release. It does not include offenders who are on probation unless they are in jail as a condition of probation. Nor does it include an offender who is on probation following a term of incarceration. It does not include a defendant on community control. State law will probably answer these same questions and a federal court will not likely disturb the answer.

[8.30.] Past Criminal Convictions of Violence

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

Almost all states include a statutory aggravating factor dealing with the defendant’s past criminal convictions of violence. Examples of some of the states’ variations are as follows:

- The defendant was previously convicted of a capital felony or felony involving the use (some states include “or threat”) of violence to the person.
- The defendant was previously convicted of an offense for which a sentence of life imprisonment or death was imposable (yes, “imposable” - not “possible.” This curious language is from Arizona).
- The defendant was previously convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping.
- The defendant was previously convicted of a capital felony (one state says “convicted previously for another murder”).
- The defendant was previously convicted of two felonies on different occasions which involved the infliction of serious bodily injury to another person.

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936 Peek v. State, 395 So.2d 492 (Fla. 1980).
937 Haliburton v. State, 561 So.2d 248 (Fla. 1990).
938 Ferguson v. State, 417 So.2d 631 (Fla. 1982).
939 Trotter v. State, 576 So.2d 691 (Fla. 1990) (the Florida Legislature did not like the ruling excluding an offender who is on community control and the statute was amended to specifically include an offender who is on community control).
✓ The defendant was convicted of two or more murders at the same or different times.
✓ The defendant has a prior conviction for a capital offense or has a substantial history of serious assaultive criminal convictions.

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

Generally, it is not improper to consider a conviction that is on appeal. But if that conviction is reversed, the imposition of the death penalty based on a reversed conviction may violate the Eighth Amendment and the penalty phase will have to be retried.\(^ {941}\)

The contemporaneous conviction problem is one of state law and will probably not be reversed by the federal courts, whichever way a state rules. Most states have determined a contemporaneous conviction cannot generally be used. For example, assume a defendant rapes, robs, and murders the victim and is convicted of all three crimes by a jury. The rape and robbery, although crimes of violence, cannot generally be used to support a previous violent conviction. If, however, two or more victims are involved, a contemporaneous conviction can generally be used.\(^ {942}\)

According to one court, this aggravator may be used even if the crime occurred after the capital crime. The term “previously convicted” refers to a conviction prior to the murder trial and not a crime committed prior to the homicide.\(^ {943}\) For this reason, prosecutors usually want to try non-capital crimes pending against a defendant prior to trying the defendant for murder. This situation calls for good case management to avoid undue delay in bringing the capital case to trial. A serious proof problem exists in states which require a conviction for “a crime of violence” if the testimony shows it to be a crime of violence but the judgment and sentence do not support the testimony. The case of Mann v. State provides an example of this problem.\(^ {944}\) Larry Mann had previously been charged with burglarizing a victim’s home and raping her. The victim of the prior crime testified at the penalty phase during Mann’s trial for a subsequent murder. The judgment and sentence for the prior crime recited the defendant had been convicted of “burglary.” The death penalty was reversed by the Supreme Court of Florida and remanded to determine if the defendant was previously convicted of a crime of violence or only of a burglary. The prosecutor introduced the charging document at the second penalty phase hearing. It charged the defendant with burglary during which a rape occurred and the verdict in the

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\(^ {942}\) Stein v. State, 632 So.2d 1361 (Fla. 1994).
\(^ {943}\) Elledge v. State, 346 So.2d 998 (Fla. 1977).
\(^ {944}\) See Mann v. State, 420 So.2d 578 (Fla. 1982).
case showed the defendant had been found guilty of burglary “as charged.” This verdict was held to be sufficient to satisfy the prior violent crime aggravator.

[8.31.] Past Criminal Activity

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

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

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

[8.32.] Defendant’s Future Dangerousness

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

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945 See Mann v. State, 453 So.2d 784 (Fla. 1984).
946 See IND. CODE § 35-50-2-9(b)(8) (2007) (defendant committed another murder, at any time, regardless of whether convicted); NEB. REV. STAT. § 29-2523 (2002) (offender was previously convicted of another murder or a crime involving the use or threat of violence to the person or has a substantial prior history of serious assaultive or terrorizing criminal activity); N.H. REV. STAT. ANN. § 630:5 (VII)(d) (1991) (defendant has previously been convicted of two or more state or federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance).
There is a probability the defendant would commit criminal acts of violence which would constitute a continuing threat to society.

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

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

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

Texas, Oklahoma, Oregon, and Virginia provide a wealth of cases involving this aggravating factor.\textsuperscript{950}

In Texas, the test is whether “any rational trier of fact could have believed beyond a reasonable doubt that appellant would probably commit criminal acts of violence that would constitute a continuing threat to society.”\textsuperscript{951}

Proof of this aggravator can arise from the facts of the murder itself, from the defendant’s lack of remorse, or from prior criminal history. The cases do not explain how the state can prove a probability beyond a reasonable doubt.

In Oklahoma, in addition to the factors considered in the Texas test, the jury may consider the “callousness of the crime.”\textsuperscript{952} In determining the callousness of the crime, the defendant’s attitude is critical to the determination of whether the defendant poses a continuing threat to society.\textsuperscript{953}

In a case where the defendant was convicted of murder, burglary, and attempted rape, the Supreme Court of Oregon approved allowing the mother of the intended rape victim to testify how the victim would be impacted by “fear of what defendant might do” if he were released from prison.\textsuperscript{954}


\textsuperscript{954} State v. George, 54 P.3d 619 (Or. Ct. App. 2002).
In Virginia, evidence peculiar to a defendant's character, history, and background is relevant to the future dangerousness inquiry and should not be excluded from a jury's consideration. This includes evidence relating to a defendant's current adjustment to the conditions of confinement.\(^{955}\)

Also, several states, which allow the jury to consider any relevant evidence in aggravation after at least one statutory aggravating factor is found, have quite a body of case law which allows the jury to consider the future dangerousness of the defendant in determining sentence even though it is not specifically listed as a statutory aggravator. For instance, in *Gillard v. Scroggy*, the Fifth Circuit Court of Appeals held that the prosecutor could argue future dangerousness to the jury even though it is not specified in Mississippi’s statute.\(^{956}\)

Should experts be allowed to testify concerning the future dangerousness factor? If experts are going to examine the defendant at the request of the state or the court, must the defendant be advised of Fifth Amendment rights? What about Sixth Amendment right to counsel? Must the defendant’s attorney be notified of the examination? What is a “propensity”?\(^{957}\)

Fortunately, most of these questions have been answered. In *Barefoot v. Estelle*, the U.S. Supreme Court held that psychiatrists can give their opinions on this issue. Three justices dissented. Justice Blackman’s dissent and the American Psychiatric Association’s research concluded psychiatric predictions of long-term future violence are wrong more often than they are right. (In fact, the best research indicates psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior.) This research has occasioned the Nevada Supreme Court to hold psychiatric evidence purporting to predict the future dangerousness of a defendant inadmissible because such evidence is “highly unreliable and therefore inadmissible at death penalty sentencing hearings.”\(^{958}\) California, while not adopting Nevada’s absolute bar to experts, has limited the use of expert testimony to circumstances that would rarely exist. Except in those very rare instances, experts cannot be used to predict future dangerousness in California.\(^{959}\)

The defendant has both a Fifth and Sixth Amendment right which must be addressed before an expert can be ordered to examine the defendant on the issue of future dangerousness. Statements made by the defendant must, of necessity, be used by the prosecutor’s expert. The defendant must be advised of the right against self incrimination and of the right to an attorney in deciding whether or not to be examined or answer any questions. Defense counsel is entitled to be noticed of any attempted examination in order to assist the defendant in deciding these issues. Failure to heed these requirements may result

\(^{955}\) Bell v. Commonwealth, 563 S.E.2d 695 (Va. 2002).
\(^{956}\) 847 F.2d 1141 (5th Cir. 1988). Mississippi is a Georgia scheme state.
in a new sentencing hearing even if no unconstitutionally obtained testimony is admitted.  

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

We would construe “propensity” to exclude, for example, a person who has no inclination to kill but in an episode of rage, such as during an emotional family or lover’s quarrel, commits the offense of murder. We would doubt that most of those convicted of murder would again commit murder, and rather we construe the “propensity” language to specify that person who is a willing, predisposed killer, a killer who tends toward destroying the life of another, one who kills with less than the normal amount of provocation. We would hold that propensity assumes a proclivity, a susceptibility, and even an affinity toward committing the act of murder.

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


The aggravating circumstances that are enumerated below cover those factors or characteristics about how the crime occurred. With each description below is a survey of statutes in various states of each of the factors.

[8.34.] Multiple or Potential for Multiple Murders or Injury

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

- The defendant knowingly created a great risk of death to many persons (one state requires “at least several persons”).
- The defendant knowingly created a risk of death or great bodily harm to more than one person.

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The defendant created a grave risk of death to another person or persons in addition to the victim.
The defendant killed two or more persons.
The defendant’s acts of killing were intentional and resulted in multiple deaths.
The defendant created a great risk of death to more than one person in a public place by means of a weapon or device that would normally be hazardous to the lives of more than one person.
The defendant committed a “mass murder,” which is defined as the murder of three or more persons within the state of Tennessee within a period of 48 months and perpetuated in a similar fashion in a common scheme or plan.

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

Arizona, Louisiana, Oklahoma, and Pennsylvania require only one person other than the victim to be put at risk. 963 In Tennessee and Nebraska, it takes at least two more persons other than the victim. 964 In Georgia, the risk must be to “more than one person in a public place.” 965 In Florida, “many persons” means four or more persons other than the victim. 966

[8.35.] Felony Murder Aggravating Circumstance

What was the defendant doing when the victim was killed - was the defendant engaged in some other felony? This is the felony murder aggravating circumstance. All states that authorize the death penalty have some version of this circumstance. Differences from state to state include the laundry list of underlying felonies, and whether such inchoate offenses as attempts, solicitations, or conspiracies to commit these felonies are included. Flight after commission of enumerated felonies may also come into play. For instance, in Florida the force, violence, assault, or putting-in-fear element of robbery does not have to be at the time of the taking it is sufficient if it is “in the course of the taking.” 967 A charge of robbery can be sustained on facts that occur some time after the taking.

964 State v. Cone, 665 S.W.2d 87 (Tenn. 1984); State v. Simants, 250 N.W.2d 881 (Neb. 1977).
966 Johnson v. State, 696 So.2d 317 ( Fla. 1997).
The aggravating circumstance usually reads as follows: The capital felony was committed while the defendant was engaged, or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any . . . (and here the list begins). The felonies usually included are as follows:

- Robbery (armed or otherwise);
- Sexual battery (rape, sodomy, oral copulation, unlawful sexual intercourse, rape by instrument, a sex crime);
- Arson;
- Burglary;
- Kidnapping;
- Aircraft piracy;
- Unlawful throwing, placing, or discharging, detonating of a destructive (explosive) device or bomb;
- Lewd and lascivious crimes on a child under the age of 14;
- Train wrecking;
- Mayhem;
- Forcible detention (criminal confinement);
- Calculated criminal drug conspiracy;
- Child molesting;
- Criminal deviant conduct;
- Dealing in cocaine or a narcotic drug;
- Felony abuse of a child;
- Unnatural intercourse with a child;
- Battery of a child; and
- Unlawful distributing, manufacturing, disposing, selling, or possessing with intent to sell a controlled substance.

Several states do not list specific felonies. Examples are as follows:

- Any Class I, II, or III felony;
- Any felony, but a previous conviction of the felony is required;
- Another capital felony; and
- A felony.

Which felonies are included in a particular state? Does the prosecutor have to charge the felony for this factor to apply? Is a conviction of this felony a requirement? It is necessary to refer to state law to answer these questions. The federal courts are not likely to interfere with a state’s felony murder rule.
The felony murder rule is not favored by the courts. Courts are reluctant, and some refuse to approve the death penalty when felony murder is the only aggravating factor. For a more complete discussion see Section 8.67.

[8.36.] Motive

What was the motive for the murder? Money? As part of a contract killing? To avoid arrest or escape from custody? To prevent a person from testifying? The race or nationality of the victim? Most states have one or more aggravating factors dealing with the defendant’s motive for the murder or the “why” question. The most common aggravating factor involves a killing for money or any other pecuniary gain. There are other common “why” aggravators, including the following examples:

- The capital offense was committed for pecuniary gain.
- The capital offense was committed for hire or the defendant hired another to commit the offense.
- The defendant was a party to an agreement to kill another person in furtherance of which a person had been intentionally killed.
- The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value.
- The defendant caused or directed another to commit murder or committed murder as an agent or employee of another.
- The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- Defendant committed the murder in furtherance of an escape or attempt to escape from or evade lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.
- The murder was committed in an apparent effort to conceal the identity of the perpetrator or to conceal the commission of a crime.
- The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- The victim was intentionally killed because of race, color, religion, nationality, or country of origin.

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\[968\] Caruthers v. State, 465 So.2d 496 (Fla. 1985).
And there is one aggravator for which the “why” cannot be determined:

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

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

In most states the existence of an aggravating factor is not presumed, and the mere fact that a victim can identify a defendant is insufficient. There must be proof, usually beyond a reasonable doubt, that this was the reason for the murder, not an assumption or innuendo. Often, the defendant’s own statement or that of a co-defendant is the best source of information as to why a victim was killed. In two Florida cases, the defendant knew the victim and the victim could have identified the defendant had he not been killed.\(^\text{969}\) In \textit{Harmon}, the aggravating factor applied; in \textit{Caruthers}, it did not. The distinction appears to be the statements of the defendants. Caruthers said during the armed robbery he panicked and started shooting, whereas Harmon told a cellmate he killed the blind victim during the armed robbery because the victim heard his name spoken and therefore could identify him. The defendant’s own statements have been held to be sufficient to prove this factor in other states as well.\(^\text{970}\)

Aggravating factor -- the capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws -- applies mostly to witnesses who are killed to prevent their testimony before the grand jury or the petit jury.

Aggravating factor -- the victim was intentionally killed because of race, color, religion, nationality, or country of origin -- must not be presumed solely because a victim is of a different race or nationality than the defendant. There must be proof that the reason the victim was killed was because of the difference. In \textit{People v. Sassounian},\(^\text{971}\) the defendant was Armenian and had come with his family from Lebanon. He had expressed hatred of the Turkish people. The victim was an official representative of the Republic of Turkey. The defendant’s statement to an inmate indicated he murdered the victim for no reason other than the fact he was a Turk and an official representative of the government of Turkey. The trial court sentenced the defendant to life without the possibility of parole due to the finding of the special circumstance. The California appeals

\(^{969}\) See, e.g., Caruthers v. State, 465 So.2d 496 (Fla. 1985); Harmon v. State, 527 So.2d 183 (Fla. 1988).


court found the application of this circumstance was both constitutional (not vague) and appropriate based on the facts of the case.

A common problem in this area is sometimes referred to as “doubling” or “double counting” of aggravating factors. In some states, conviction of capital murder requires the jury to find one or more special circumstances which sound very much like or are identical to elements of the offense. For example, Louisiana\textsuperscript{972} defines first degree murder as the killing of a human being:

- When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;
- When the offender has a specific intent to kill or inflict great bodily harm upon a fireman or peace officer engaged in the performance of his or her lawful duties;
- When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person;
- When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing; or
- When the offender has the specific intent to kill or inflict great bodily harm upon a victim under the age of 12 years.

Louisiana requires the jury that finds the defendant guilty of first degree murder to sentence the defendant to death or life imprisonment without benefit of parole, probation, or suspension of sentence. A sentence of death cannot be imposed unless the jury finds at least one enumerated statutory aggravating circumstance, considers all mitigating circumstances, and unanimously recommends the defendant be sentenced to death.\textsuperscript{973}

All five circumstances making a defendant eligible for the death penalty are found in Louisiana’s list of 11 aggravating factors. In the case of\textit{Lowenfield v. Phelps}, the defendant killed five people.\textsuperscript{974} The jury convicted him of two counts of manslaughter and three counts of first degree murder.\textsuperscript{975} An essential element of the three first degree murder convictions was a finding that he intended to kill or inflict great bodily harm upon more than one person.\textsuperscript{976} The same jury recommended the death sentence, finding as an aggravating circumstance that the defendant “knowingly created a risk of death or great

\begin{itemize}
  \item \textsuperscript{974} \textit{484 U.S. 231} (1988).
  \item \textsuperscript{975} \textit{Id.} at 243.
  \item \textsuperscript{976} \textit{Id.} at 233.
\end{itemize}
bodily harm to more than one person.” The defendant appealed to the U.S. Supreme Court and claimed his death sentence could not be based on a single aggravating circumstance which was a necessary element of the underlying offense. The U.S. Supreme Court rejected this argument. It stated:

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

The U.S. Supreme Court also stated, “and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm.”

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

Most states will not permit doubling up of aggravating factors. In Provence v. State, the Supreme Court of Florida held it to be improper to find that a murder committed during a robbery and a murder committed for pecuniary gain were separate aggravating factors. In Bello v. State, the Supreme Court of Florida held it to be improper doubling to find that the murder was committed for the purpose of avoiding or preventing a lawful arrest and that the murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. In Bello, the defendant killed a police officer “who was entering his house to arrest the defendant.” The same result was reached in the North Carolina case of State v. Goodman. Several states have solved this problem through jury instructions which allow both aggravating factors to be submitted for the jury’s consideration, but require the jury to consider them as one in determining the appropriateness of the death penalty. Other instructions simply direct the jury not to count the number of aggravators and mitigators in determining the sentence.

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977 Id. at 243.
978 Id. at 233.
979 Id.
980 Id. at 244.
981 Id. at 246.
983 337 So.2d 783 (Fla. 1976); contra State v. Jones, 749 S.W.2d 356 (Mo. 1988).
984 547 So.2d 914 (Fla. 1989).
in states that use the Georgia scheme as weighing the various aggravating and mitigating circumstances is not part of the process.987

[8.37.] Manner of Death

How was the victim killed? Was death quick and painless, or torturous and prolonged? Did the victim know his or her death was about to occur? What was the defendant’s state of mind: depraved; cold and calculated? Did the defendant act out of panic?

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

✓ The capital offense was especially heinous, atrocious, or cruel.
✓ The capital offense was especially heinous, atrocious, or cruel, manifesting exceptional depravity (one state adds “by ordinary standards of morality and intelligence”).
✓ The defendant committed the offense in an especially heinous, cruel, or depraved manner.
✓ The offense was outrageously vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
✓ The murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison, or the defendant used such means on the victim prior to murdering him or her.
✓ The offense was a deliberate homicide and was committed by means of torture.
✓ The murder involved torture, depravity of mind, or the mutilation of the victim.
✓ The capital murder was committed by means of a destructive device, bomb, explosive, or similar device that the person planted, or caused to be planted, hid or concealed in any place, area, dwelling, building, or structure, or mailed or delivered (some states add “and the person knew that his or her act or acts would create a great risk of death to human life”).
✓ The defendant intentionally killed the victim while lying in wait (some states, “or ambush”). (The term “lying in wait” seems to be popular only in the western states.)
✓ The defendant intentionally killed the victim by the administration of poison.

✓ The defendant committed the offense by use of an assault weapon (some states, “machine gun”).
✓ The capital murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
✓ By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.
✓ The murder was committed in a cold, calculated, and premeditated manner, pursuant to a preconceived plan, scheme, or design to take a human life by unlawful means, and the conduct of the defendant created a reasonable expectation that the death of a human being would result therefrom.
✓ The defendant dismembered the victim.

[8.38.] “Heinous, Atrocious, and Cruel” Aggravating Circumstance

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

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

**Arizona**

**Florida**

**Georgia**

**Idaho**

**Mississippi**
The U.S. Supreme Court has ruled on the validity of this aggravator as enacted by several states. The problem the U.S. Supreme Court has had to solve is that the terms used to describe this aggravator are both subjective and vague. For example, in Oklahoma the aggravating circumstance was described as “especially heinous, atrocious, or cruel” and the U.S. Supreme Court concluded that adding the adjective “especially” to the aggravator did not sufficiently guide the jury’s discretion in deciding whether to impose the death penalty as an ordinary person could honestly believe every unjustified, intentional taking of life would be “especially heinous.” However, the U.S. Supreme Court approved the definition because the Oklahoma courts limit this aggravating circumstance to murders involving “some kind of torture or physical abuse.”

In Georgia, the statute defined this aggravating circumstance as “the offense of murder was outrageously or wantonly vile, horrible, and inhuman.” In Godfrey v. Georgia, the U.S. Supreme Court found the aggravating circumstance to be vague and the Supreme Court of Georgia’s explanation too broad. It stated,

In the case before us the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was “outrageously or wantonly vile, horrible and inhuman.” There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as “outrageously or wantonly vile, horrible and inhuman.” Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge’s sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)’s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation.

In Mississippi and Florida, trial courts tried to give the jury a limiting instruction defining heinous, atrocious, or cruel, but the U.S. Supreme Court held the instruction to be insufficient. However, the Arizona aggravator, “the

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988 Id.
991 446 U.S. 420 (1980).
992 Id. at 428-429 (footnote omitted).
defendant committed the offense in an especially heinous, cruel, or depraved manner,” which was declared unconstitutional as being vague, has not been disturbed after the application of it has been given “narrow construction” by the Arizona Supreme Court. The Idaho aggravator of committing a murder with utter disregard for human life has been upheld because the Idaho Supreme Court had adopted a limiting construction that met constitutional standards. The confusion about the constitutionality of this type of aggravator can be resolved by considering the following factors:

- Who is the sentencer—the judge or the jury? Vague terms may be more acceptable if applied by a judge.
- Did the jury receive a sufficient limiting definition of the terms in the jury instructions?
- Does the state appellate court apply a sufficient and appropriate limiting definition of the aggravating circumstance?

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

Arizona defines “especially cruel” as “when the perpetrator inflicts mental anguish or physical abuse before the victim’s death.” “Mental anguish” is defined as follows: “Mental anguish includes a victim’s uncertainty as to his ultimate fate.” The Arizona Supreme Court further limits the cruel circumstance to situations where the suffering of the victim was intended by or foreseeable by the killer. The U.S. Supreme Court approved this definition of “especially cruel” as “constitutionally sufficient because it gives meaningful guidance to the sentencer.”

In Proffitt v. Florida, the U.S. Supreme Court held the Florida aggravator of “especially heinous, atrocious, or cruel” not to be vague or over broad if it is defined as “the conscienceless or pitiless crime which is unnecessarily torturous to the victim.”

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994 Walton v. Arizona, 497 U.S. 639 (1990); Richmond v. Lewis, 506 U.S. 40 (1992); Lewis v. Jeffers, 497 U.S. 764, rehearing denied, 497 U.S. 1050 (1990); Gretzler v. Stewart, 112 F.3d 992 (9th Cir. 1997). There may be current problems here. These cases were decided before Arizona judges were prohibited from presiding over the penalty phase without a jury.
996 Walton, 769 P.2d at 1032.
997 Id.
998 Id.
1000 Id. at 256.
The U.S. Supreme Court approved Arizona’s version of this aggravator because Arizona’s courts defined “depraved” as “when the perpetrator relishes the murder, evidencing debasement or perversion” or “shows an indifference to the suffering of the victim and evidences a sense of pleasure” in the killing as an appropriate construction of its statute.\(^\text{1001}\)

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

**[8.39.] Victim Suffering while Unconscious or Dead**

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

In Florida, by way of example, nothing done to the victim after death can be used to support the aggravating factor of heinous, atrocious, or cruel\(^\text{1002}\).

In Louisiana, the jury is required to consider what happened before death rather than after death in determining whether there was torture or the unnecessary infliction of pain upon the victim.\(^\text{1003}\) Arizona case law defines “especially cruel” as that which happens to the victim before death.\(^\text{1004}\)

In Tennessee, mutilating the body of a victim after death is a statutory aggravating factor.\(^\text{1005}\) Another issue is whether the heinous, atrocious, or cruel aggravator applies to the defendant’s actions once the victim is unconscious. It is generally recognized that an unconscious person no longer feels any pain. Accordingly, some states hold that nothing the defendant does to the victim after this point may be considered.\(^\text{1006}\)

**[8.40.] Category III: The Victim’s Status or Identity**

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

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\(^{1001}\) *Walton*, 497 U.S. 656.


\(^{1006}\) *Herzog*, 439 So.2d at 1380; *Jackson v. State*, 451 So.2d 458 (Fla. 1984).
[8.41.] **Age of the Victim**

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

- ✓ The victim was under 15 years of age and the defendant was an adult or tried as an adult.
- ✓ The victim was under the age of 18 and this was known or reasonably should have been known by the defendant.
- ✓ The victim was under the age of 12 and death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty.
- ✓ The victim was under the age of 12.
- ✓ The victim was 62 years of age or older.
- ✓ The victim was less than 16 or older than 65 and the defendant knew or should have known the victim’s age.

[8.42.] **Victim’s Profession or Title**

Examples of professions or titles considered as aggravating factors by various states:

- ✓ The victim was a law enforcement officer killed in the performance of his or her official duties (almost all states). Some states include “and the defendant knew or should have known that the victim was a law enforcement officer” while other states do not mention any knowledge requirement.
- ✓ The victim was a law enforcement officer killed in retaliation for performance of his or her duties.
- ✓ The victim was a fire fighter engaged in the performance of his or her duties. Some states include “and the defendant knew or should have known the victim was a fire fighter” while other states do not include any knowledge requirement.
- ✓ The victim was a prosecutor (district attorney, state attorney, etc.), an assistant prosecutor, etc., a former prosecutor (some include just state prosecutor, some include a federal prosecutor), and the murder occurred in retaliation for or to prevent the performance of the victim’s duties. (One state requires the murder to have been committed “during or because of his or her duties.”)
- ✓ The victim was an elected or appointed public official (or former public official) engaged in the performance of his or her official duties, if the motive for the murder was related, in whole or in part, to the victim’s official
capacity. The murder was carried out in retaliation for or to prevent performance of victim’s official duties. The murder occurred during or because of official duties.

- The victim was a judge, former judge, magistrate, hearing officer [with all the variations noted above].
- The victim was a corrections officer or employee.
- The victim was a probation or parole officer.
- The victim was the President of the U.S., person in line for the presidency; president-elect, vice-president elect, or a candidate for the offices of president or vice president.
- The victim was governor of the state or lieutenant governor, governor-elect, lieutenant governor-elect, or a candidate for governor or lieutenant governor.
- The victim was auditor general of the state or treasurer of the state.

[8.43.] Special Circumstance(s) of the Victim

The below list is an enumeration of different aggravating circumstances that relate to qualities that the victim had at the time of the crime.

- The victim was a witness (or potential witness) to a crime (in any criminal or civil proceeding) and was intentionally killed for purpose of preventing his or her testimony in a criminal (or civil) proceeding (and the killing was not committed during the commission or attempted commission of the crime to which he was a witness), or the victim was a witness (to a crime) and was intentionally killed in retaliation for his or her testimony in a criminal (or civil) proceeding.
- The victim was an inmate or another person on the grounds of the facility with permission.
- The victim was a juror or former juror while engaged in his or her duties or because of the exercise of his or her duties.
- The victim was pregnant.
- The victim was severely handicapped or severely disabled.
- The victim was defenseless.1007
- The victim was particularly vulnerable due to old age or infirmity.
- The victim was especially vulnerable due to significant mental or physical disability.

1007 This was a Delaware circumstance, but it was declared unconstitutional. State v. White, 395 A.2d 1082 (Del. 1978).
[8.44.] **Identity or Status of the Victim**

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

If a state has a knowledge requirement, it should probably be strictly construed as written. The following states have a statutory knowledge requirement in their aggravating factor of the victim being a police officer: Arizona, California, Colorado, Illinois, Nevada, Ohio, Tennessee, and Utah. The statutes in the other states do not speak specifically to a knowledge requirement. Appellate decisions may provide guidance if a statute is silent on the knowledge requirement. If a knowledge requirement is added, is it “know” or “should have known”? The states differ on this issue. For example, the Indiana statute does not mention a knowledge requirement if the victim is a police officer. Indiana’s case law requires that the defendant must know, not “should have known,” the victim was a police officer for this aggravating factor to apply.\(^{1008}\) If a statute does not have a knowledge requirement and there are no appellate decisions on point, the safest approach is to require the prosecutor to prove actual knowledge or at least that the defendant reasonably should have known the victim’s age, profession, title, or special circumstance.

Vulnerability due to old age or infirmity is an aggravating factor which has recently been added to some statutes. In *Francis v. State*,\(^ {1009}\) the Supreme Court of Florida rejected the finding of this aggravating circumstance for the first time. The two victims in *Francis* were twin sisters, 66 years of age. They appeared to be in reasonable health; no particular disability was shown. The Supreme Court of Florida noted that an aggravating circumstance must “not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder,” citing *Tuilaepa v. California*.\(^ {1010}\) A similar statute (“particularly vulnerable due to youth”) has been approved by the U.S. District Court, District of New Jersey.\(^ {1011}\) The issue the court resolved is the application of the terms “particularly vulnerable” and “advanced age.”

In *Woodel v. State*,\(^ {1012}\) the Supreme Court of Florida held the finding of this aggravator is not dependent on the defendant targeting his or her victim on account of the victim's age or disability. In *Woodel*, the victims were husband and wife, aged 74 and 79. The husband “led a sedentary lifestyle resulting from a triple bypass surgery. He previously had both knees replaced and walked with an uneven gait.”\(^ {1013}\) The wife suffered from arthritis and had lost partial use of her

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\(^{1009}\) 808 So.2d 110 (Fla. 2001).

\(^{1010}\) 512 U.S. 967 (1994).


\(^{1012}\) 804 So.2d 316 (Fla. 2001).

\(^{1013}\) *Id.* at 325.
Defensive wounds were found on her other arm. The Supreme Court of Florida approved the finding of this aggravator under the circumstances.

[8.45.] Notice to Defense of Aggravating Factor to Be Proved

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

It is likely the federal courts will eventually require the aggravating circumstances to be included in the indictment or other charging instrument under the rationale of Apprendi v. New Jersey. For more information about Apprendi see Section 8.8. Wise prosecutors will seek grand jury findings of aggravating circumstances before the federal courts order it.

[8.46.] Other Non-statutory Aggravation

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

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1014 Id.
1015 Id.
1016 Id.
In Texas, evidence is limited to the issues to be presented to the jury. No other evidence is relevant or admissible.
Aggravating circumstances not contained in the record may not be considered by the jury or the judge. For example, it is a violation of due process for the judge to give weight to a social science book and a death case over which his father presided.  

[8.47.] Newly Discovered Aggravating Circumstances

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

[8.48.] Mitigating Circumstances

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

✓ Defendant completed the fifth grade;
✓ Defendant never knew his father and was raised primarily by an aunt;
✓ Defendant developed behavioral problems after age 11 while living with his mother;
✓ Defendant constantly ran away from home;

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1021 People v. Dameron, 751 N.E.2d 1111 (Ill. 2001).
1022 476 U.S. 147 (1986).
Defendant became involved with “less than desirable” people;
- Defendant’s mother beat his twin brother to death in his presence;
- Defendant entered a juvenile delinquency facility at age 13;
- Defendant has many brothers and sisters;
- Defendant claims no physical or emotional problem;
- Defendant changed his residence many times after age 11;
- Defendant first used marijuana at age 11 and powdered cocaine at age 20 and is addicted;
- Defendant never tried crack cocaine or drug treatment; and
- Defendant will prove a challenge to his attorney.

A quick review of the list discloses that the difficulty with mitigation is the application of mitigating circumstances to the case at hand. For example, if the defendant claims alcoholism is mitigating, inquiry must be made as to how that is relevant to the case. Was the defendant under the influence of alcohol at the time of the offense? Has long-term alcohol abuse caused brain damage that is linked to the crime? Some states have abolished “voluntary intoxication” as a defense. However, voluntary intoxication can be used in mitigation. Second, and this problem is the most difficult aspect of mitigation, many of the factors listed above do not sound like they are mitigating at all. Presenting these mitigators to a jury may be unwise. It may be more prudent for the defense to waive a jury in the penalty phase or, in Florida-scheme states, to present this type of mitigation to the trial judge prior to the sentencing as additional mitigation.

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

Death penalty cases are reversed by appellate courts more often than any other type of criminal case. Careful consideration of mitigating circumstances is crucial, especially in states where trial judges have the ultimate responsibility for determining the penalty to be imposed. However, the high reversal rate indicates trial judges in these states either do not understand the requirement to

1026 Ford v. State, 802 So.2d 1121 (Fla. 2001).
give mitigating circumstances significant consideration or simply follow the emotional recommendation of the juries, even when the case is a close one.

[8.49.] **Statutory Mitigating Circumstances**

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

[8.50.] **Category I: Defendant: Past, Present, and Future**

As with the aggravating circumstance, the following breaks down the mitigation circumstances by category. This first category contains a list of characteristics of the defendant prior, during or after the commission of the crime.

[8.51.] **Defendant’s Past Criminal Record or Activities**

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

- ✓ The defendant has no significant history of prior criminal activity (some states include “delinquency adjudications”).
- ✓ The defendant’s record lacks any significant prior conviction.
- ✓ The defendant has no significant history of prior criminal convictions.
- ✓ The defendant has not previously been found guilty of a crime of violence, entered a plea of guilty or *nolo contendere* to a charge of a crime of violence, or had a judgment of probation or stay of entry of judgment enhanced on a charge of a crime of violence.
- ✓ The defendant has not previously been convicted of another capital offense or of a felony involving violence.

If the statutory circumstance does not include the word “conviction,” what constitutes “history” or “activity”? Can the prosecutor introduce a defendant’s record of non-violent crimes before the defendant attempts to put this circumstance in issue? Can juvenile crimes be considered?
A defendant who has been adjudged to be delinquent as a juvenile has not been convicted of a crime; therefore, juvenile offenses are not convictions. Evidence of juvenile adjudications is not admissible as an aggravating circumstance or as rebuttal to a defendant’s claim of no prior convictions. The result may be different if the mitigator is defined as “no significant history” or “no prior criminal activity.” For instance, delinquency adjudications may be admissible in rebuttal if a defendant relies upon “lack of significant history” or “prior criminal activity.”

Unlike the parallel aggravating circumstance of prior criminal activity, the mitigating circumstance of no significant prior criminal activity is generally not limited to convictions or violent felonies. Thus, if a defendant announces an intention to rely on this mitigator, the prosecutor can introduce convictions of nonviolent felonies or misdemeanors and may even introduce evidence short of a conviction in rebuttal, such as evidence of a crime which has not yet been tried.1028 Some states (e.g., Alabama) allow only adult convictions to rebut this mitigating circumstance.1029

Generally, if the defendant announces this mitigating circumstance will not be sought, evidence of other crimes that do not qualify as an aggravating circumstance are inadmissible. The defendant is not entitled to a jury instruction on this mitigating factor unless evidence is presented on the subject.1030

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

[8.52.] Defendant’s Mental Status at the Time of the Crime

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

- The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- The capacity of the defendant to appreciate the criminality (wrongfulness) of his or her conduct or to conform his or her conduct to the requirement of laws was “substantially” or “significantly” impaired (some states add “due to a mental defect, disease, illness, mental incapacity, mental disorder, emotional disturbance, drugs, alcohol, retardation, or one or more of the above”).

1028 Dennis v. State, 817 So.2d 741 (Fla. 2002); State v. Greene, 528 S.E.2d 575 (N.C. 2000).
1029 Ex parte Burgess, 811 So.2d 617 ( Ala. 2000).
✓ The emotional state of the defendant at the time the crime was committed.
✓ The defendant was under the influence of drugs or alcohol.

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

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

Expert psychologists and psychiatrists are typically called as witnesses to testify to the state of mind of the defendant when the crime was committed. If the defendant desires to explore these mental mitigators and has a basis to do so, the failure of the state to provide such an expert at public expense will probably cause a death sentence to be reversed for a new sentencing hearing. Lay testimony is also admissible.1032

It is important to understand these circumstances do not require the establishment of insanity. These factors can be argued to the sentencer, with or without expert testimony, if the facts indicate the impairment of the defendant’s mental condition or drugs or alcohol contributed to the defendant’s behavior. Whether the condition falls within the wording of a particular statute is a question for the sentencer. If the testimony is in conflict, the sentencer will have to resolve those conflicts. If the testimony is not in conflict, it may be error for the sentencer not to find and consider this type of mitigating circumstance.1033

However, uncontroverted expert testimony can be rejected if it is difficult to reconcile with other evidence in the case.1034 If a statute requires “extreme” mental or emotional disturbance or that the defendant’s capacity was “substantially” or “significantly” impaired, and the expert testifies the defendant was mentally disturbed, but not extremely so, or the defendant’s capacity was impaired, but not substantially so, the jury must be allowed to consider the statutory circumstance.

1033 Mann v. State, 420 So.2d 578 (Fla. 1982); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Knowles v. State, 632 So.2d 62 (Fla. 1993).
In *Stewart v. State*, the only expert testified the defendant’s capacity was impaired but not substantially so. The defendant requested the jury be instructed on the statutory mitigating circumstance of the defendant’s substantially impaired capacity. The judge refused to do so because the only expert testimony was that his impairment was not “substantial,” a requirement under the statute. The Supreme Court of Florida reversed for a new sentencing hearing. It stated:

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

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

Some states require the defendant to notify the prosecutor that mental mitigation will be presented during the penalty phase and that the defendant will submit to a mental examination by a state expert for purposes of rebuttal. A defendant who refuses to cooperate can be precluded from presenting mental mitigation.

**[8.53.] Age of the Defendant When the Crime Was Committed**

Chapter 1 discusses Eighth Amendment limitations on the execution of persons under the age of 18 when a murder is committed. This section concerns a defendant who is death eligible, but whose age may be a mitigating factor. Almost all states list the defendant’s age as a statutory mitigating factor. Some variations are as follows:

- The age of the defendant at the time of the crime;
- The youth of the defendant at the time of the crime; and

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1035 558 So.2d 416 (Fla. 1990).
1036 *Id.* at 420.
The youth or advanced age of the defendant at the time of the crime.

If a statute lists only “age” as a mitigating factor, does this include the old as well as the young? When is a defendant “old” or “young”? What about the defendant’s emotional age? What is “youth”? The U.S. Supreme Court has held the Eighth Amendment prohibits imposition of the death penalty for any defendant who was under the age of 18 at the time of the crime.1038 Earlier cases allowing the execution of 16- or 17-year-old defendants are no longer valid.1039

Even if a statute lists the exact age under which it is a definite statutory mitigating circumstance, the jury should be allowed to consider the defendant’s age, either chronological or emotional, anytime the defense requests it.1040 Failure to give this circumstance to a jury for consideration or failure to consider this factor in the sentencing order may result in reversal. The lawyers in the case can put the defendant’s age in perspective during closing argument. If a sentencing order is required, the defendant’s age should be discussed therein and given the weight it deserves.

Some states, notably Florida-scheme states, have held “the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes.”1041 In Ramirez v. State,1042 the Florida Supreme Court held it was an abuse of discretion for the trial judge to give “little weight” to the defendant’s age at the time of the crime (one month over 17) when there was uncontroverted testimony that the defendant was emotionally, intellectually, and behaviorally immature. There is no requirement to give youthful age any particular weight in some Georgia-scheme states.1043 The age of a defendant who has reached majority should only be given significant weight if it is linked with some other characteristic of the defendant or the crime, such as significant emotional immaturity or mental problems.1044

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1040 Archer v. State, 673 So.2d 17 (Fla. 1996); Campbell v. State, 679 So.2d 720 (Fla. 1996). See Blackwood v. State, 777 So.2d 399 (Fla. 2000) (which suggests that it may have been error not to consider the defendant’s age of 37 as a mitigating factor except it was not requested).
1041 Urbin v. State, 714 So.2d 411, 418 (Fla. 1998).
1042 739 So.2d 568 (Fla. 1999).
1043 State v. Craig, 699 So.2d 865 (La. 1997).
Defendant’s Cooperation with Police and Prosecutor

Two states--Colorado and North Carolina--list the defendant’s cooperation with police as a specific statutory mitigating circumstance:

- The extent of the defendant’s cooperation with law enforcement officers or agencies and with the office of the district attorney (Colorado).\textsuperscript{1045}
- The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution for a felony (North Carolina).\textsuperscript{1046}

The defendant’s cooperation with police or the prosecutor has been recognized as a non-statutory mitigating circumstance in states that do not include it in the list of statutory mitigating circumstances.\textsuperscript{1047}

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

The defendant’s cooperation with the authorities, such as confessing to the crime or pleading guilty, is recognized either as a statutory or non-statutory mitigating factor under certain circumstances. For instance, the fact that the defendant entered a guilty plea and provided an unsworn statement expressing remorse and apologizing to the families of the victims has been held to be a mitigating factor entitled to be weighed at sentencing.\textsuperscript{1048} The defendant’s remorse and assistance to the police can be sufficient in becoming mitigating factors.\textsuperscript{1049}

Not all cooperation is sufficient to qualify as mitigating. When a defendant voluntarily confesses, appears before the grand jury, and pleads guilty, such cooperation can be rejected as mitigating when the defendant’s willingness to cooperate was not motivated by remorse but to obtain a life sentence in order to return to prison and murder an inmate who had robbed him.\textsuperscript{1050} A defendant is not entitled to have cooperation considered as mitigating when he believes his guilt to be discoverable and after he hides or destroys evidence, evades detection, and denies knowledge of the crime before he decides to “cooperate.”\textsuperscript{1051} Cooperation out of self-interest can disqualify this mitigating circumstance. If the defendant calls the police from the crime scene, awaits their arrival, and then lies about knowing anything about the crime, the court can conclude he acted out of self-interest and the “cooperation” does not constitute a mitigating

\textsuperscript{1045} COLO. REV. STAT. § 18-1.3-1201(4)(h) (2003).
\textsuperscript{1048} State v. Fitzpatrick, 810 N.E.2d 927 (Ohio 2004).
\textsuperscript{1049} State v. Rojas, 592 N.E.2d 1376 (Ohio 1992).
\textsuperscript{1050} Agan v. State, 445 So.2d 326 (Fla. 1983).
\textsuperscript{1051} State v. Pandeli, 26 P.3d 1136 (Ariz. 2001).
While cooperation and expression of remorse can be a mitigating circumstance, it comes too late after the defendant learns the police have evidence against him.

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

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

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

Numerous cases involving cooperation as a mitigating circumstance are reported in Alabama, Arizona, and Ohio. The common theme is that cooperation must be early, complete, and without prior evasiveness or denial. Further, before cooperation amounts to a circumstance worth serious weight or

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1055 Lugo v. State, 845 So.2d 74 (Fla. 2003).
1057 State v. Bane, 57 S.W.3d 411 (Tenn. 2001).
consideration, it must lead to material evidence which actually assists the investigation. Cooperation must be evidence of remorse and not some ulterior motive.

[8.55.] **Defendant’s Lack of Future Dangerousness**

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

- The defendant is not a continuing threat to society (Colorado).\(^{1060}\)
- It is unlikely the defendant will engage in further criminal activity which would constitute a continuing threat to society (Maryland).\(^{1061}\)

The discussion in Section 8.32 explains the kind of evidence usually presented in order to establish future dangerousness as an aggravating circumstance. This same approach can be used to establish lack of future dangerousness as a mitigating circumstance.

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

California has held that the state cannot introduce expert testimony predicting the defendant will commit future acts of violence. In *People v. Murtishaw*,\(^{1062}\) the prosecution introduced testimony of a psycho-pharmacologist who testified that the defendant, in a prison setting, “will continue to be a violent, assaultive, and combative individual” and “he could show the same types of homicidal tendencies that he has shown in the past, with no ability to morally or physically constrain himself to the demands of the environment in which he finds himself.”\(^{1063}\) The California Supreme Court remanded the case for a new penalty phase stating:

> We believe that the trial court should not have permitted this testimony. We shall explain that (1) expert predictions that persons will commit future acts of violence are unreliable and frequently erroneous; (2) forecasts of future violence have little relevance to any of the factors which the jury must consider in determining whether to impose the death penalty; and (3) such

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\(^{1060}\) COLO. REV. STAT. § 18-1.3-1201(4)(k) (2003).

\(^{1061}\) MD. CODE ANN., CRIM. LAW § 2-303 (2003).


\(^{1063}\) *Id.* at 466.
forecasts, despite their unreliability and doubtful relevance, may be extremely prejudicial to the defendant. The admission of this testimony, in our opinion, constitutes error requiring reversal of the verdict at the penalty trial.\(^{1064}\)

However, the defendant is entitled to introduce evidence of lack of future dangerousness if defense counsel chooses to do so. In *People v. Lucero*,\(^ {1065}\) the defense expert was asked how Mr. Lucero would adjust in a structured setting such as a prison years down the road. The prosecutor objected on the grounds stated in *Murtishaw* and the trial court sustained the objection.\(^ {1066}\) The case was remanded for a new penalty phase hearing because, California evidentiary rules aside, *Eddings v. Oklahoma* requires the consideration of “any aspect of a defendant’s character . . . that the defendant proffers as a basis for a sentence less than death.”\(^ {1067}\)

*Lucero* also holds that if the defense introduces such expert testimony, the state may introduce experts in rebuttal. The U.S. Supreme Court has held that the use of this type of testimony does not violate the Constitution.\(^ {1068}\) Some states disallow the use of experts for this prediction.\(^ {1069}\)

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

**[8.56.] Category II: Circumstances Surrounding the Crime**

This second category enumerates mitigating circumstances that define how the crime occurred. The lists below provide a survey of some of the variations from the states.

\(^{1064}\) *Id.* at 768.
\(^{1065}\) 750 P.2d 1342 (Cal. 1988).
\(^{1066}\) *Id.* at 1353.
\(^{1067}\) *Id.* at 1027.
[8.57.] Minor Participation by Defendant

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

- The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor (with little or no variation; 24 states list this circumstance).
- The defendant was not personally present during the commission of the act or acts causing death.

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

It cannot be said that one who hires another to commit a murder has “minor” participation in the crime. In Illinois, the only state with variation as in the second example, there is only one case that discusses this mitigating circumstance. 1070 It is doubtful Illinois would allow a defendant who hired another to do the killing (and was not personally present) to take advantage of this mitigating factor. It is probably more appropriately applied to the driver of the getaway car in a robbery where the defendant is a principle and cannot meet the Enmund criteria to avoid the death penalty altogether.

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

[8.58.] Defendant Acted under Duress or Influence as a Mitigating Circumstance

The defendant committed the crime under duress or under the influence of another. This mitigating circumstance exists in almost all states which list

1070 People v. Ruiz, 447 N.E.2d 148 (Ill. 1982).
mitigating circumstances. It applies generally to murders that are not legally defensible, but which have extenuating circumstances that exist to mitigate against the death penalty being imposed as the sentence. Some variations are as follows:

✓ The defendant acted under (extreme) duress.
✓ The defendant acted under the (substantial) domination of another person.
✓ The defendant acted under unusual and substantial duress.
✓ The defendant acted under unusual pressures or influences or under the domination of another person.
✓ The defendant acted under extreme duress or under the substantial domination of another person.
✓ The defendant acted under the provocation of another person.
✓ The offense was committed under circumstances that the defendant reasonably believed to be a moral justification or extenuation (or excuse) for his or her conduct.
✓ The defendant had a good-faith belief, although mistaken, that circumstances existed which constituted a moral justification for defendant’s conduct.
✓ The defendant acted under other circumstances that extenuate the gravity of the crime even though not a legal excuse for the crime.
✓ The defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm.

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

Three states—Arizona, Colorado, and Connecticut—list lack of foreseeability as follows: "The defendant could not reasonably have foreseen that his or her conduct would cause or create a grave risk of causing death to another person."  

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

Most often this mitigator arises as a mitigating circumstance in the context of felony murder or conspiracy and is related to the “lack of intent to kill” mitigating circumstance. For more information about the lack of intent to kill mitigating circumstance see Section 8.66.

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

A conspirator may be held liable for criminal offenses committed by a co-conspirator if the offenses are within the scope of the conspiracy, are in furtherance of it, and are reasonably foreseeable as a necessary or natural consequence of the conspiracy. The rationale behind the principle of vicarious liability of a conspirator is, when the conspirator has played a necessary part in setting in motion a discrete course of criminal conduct, he or she should be held responsible, within appropriate limits, for the crimes committed as a natural and

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1075 See Hallman v. State, 371 So.2d 482 (Fla 1979), overruled on other grounds, Jones v. State, 591 So.2d 911 (Fla. 1991).
probable result of that course of conduct. A conspirator who is criminally liable as a matter of law may be able to argue his or her participation in the crime was less culpable than the co-conspirator’s participation as a matter of fact on the grounds that the homicide was not foreseeable.

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

[8.60.] Category III: Victim’s Conduct

Many states listing mitigating circumstances include one that addresses the victim’s own conduct which might have contributed to his or her death. Some variations are as follows:

✓ The victim was a willing participant, initiator, aggressor, or provoker of the incident.
✓ The defendant was provoked by the victim.

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

[8.61.] Category IV: Miscellaneous Mitigating Factors

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

1. The act of the defendant is not the sole proximate cause of the victim’s death.

Presumably, this Maryland factor applies if the defendant seriously wounds the victim, justifying a conviction of murder, but part of the reason for the victim’s

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1076 State v. Coltherst, 820 A.2d 1024 (Conn. 2003).
1077 People v. Nieves, 739 N.E.2d 1277 (Ill. 2000); State v. Larry, 481 S.E.2d 881 (N.C. 1997); State v. Parkus, 753 S.W.2d 881 (Mo. 1988).
death is medical malpractice or the refusal of the victim to accept medical care. The law does not excuse the defendant from being convicted of murder under either of those circumstances, but the medical malpractice could be used to mitigate the sentence.¹⁰⁷⁹

2. Another defendant in the same case, equally culpable, will not be punished by death.¹⁰⁸⁰

Under some sentencing schemes, the existence of this factor will preclude imposition of the death penalty altogether. This New Hampshire factor speaks for itself. If one co-defendant, who is equally culpable, enters into a plea agreement with the prosecution, or, after trial receives a sentence of life imprisonment, the jury or judge must consider this factor in deciding the sentence of the other co-defendant.

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

[8.62.] Category V: “Catch-all” Statutory Mitigator

Sixteen states have added a “catch-all” mitigating circumstance to the list of statutory mitigating circumstances. All states now recognize the jury must be told that mitigating circumstances are not limited to those specified by the statutes. The “catch-all” factor is listed as any other aspect of the defendant’s character (or background) or record, and any other aspect of the crime may be considered in mitigation of the sentence of death. Whether the “catch-all” is listed in a statute, failure to instruct the jury accordingly will result in a new sentencing hearing unless this error is found to be harmless.¹⁰⁸¹ Sentencing orders, if required, must state that the sentencing court is aware that mitigating circumstances are not limited to the statutory list.¹⁰⁸²

[8.63.] Non-statutory Mitigating Circumstances

All states now recognize the sentencer must be allowed to consider mitigating factors, whether specifically enumerated by the state’s statute, if they

¹⁰⁸² See Graham v. Collins, 506 U.S. 461 (1993) and Johnson v. Texas, 509 U.S. 350 (1993). These two cases involve the Texas statute before it was amended to allow the jury to consider all mitigation presented by the defendant.
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relate in any way to the defendant’s character, record, or background, and those that relate to any other aspect of the crime which the defendant offers as a basis for a sentence less than death.\footnote{1083} The U.S. Supreme Court has left no doubt about this. A death sentence will be reversed for a new penalty phase hearing if the trial judge fails to instruct the jury about non-statutory mitigation.\footnote{1084} Some of these broad categories deserve further discussion.

[8.64.] **Defendant’s Character or Background**

This mitigating circumstance includes family background;\footnote{1085} employment background;\footnote{1086} alcoholism/drug dependency;\footnote{1087} military service (including Vietnam-era post traumatic stress disorder);\footnote{1088} and mental or emotional problems or retardation that does not reach the level that would prohibit capital punishment under *Atkins v. Virginia*.\footnote{1089} Other matters of mitigation in this category include abuse (physical, sexual, or mental) of defendant by parents or others;\footnote{1086} the defendant’s contributions to society, including charitable contributions and humanitarian deeds;\footnote{1091} the quality of being a caring parent;\footnote{1092} the defendant’s age (both chronological and

\footnote{1086} State v. Leavitt, 822 P.2d 523 (Idaho 1991); Smalley v. State, 546 So.2d 720 (Fla. 1989).
\footnote{1087} Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991); Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989); Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987).
\footnote{1088} Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991); Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991); Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989). Two cases discussing the defendant’s claim of Vietnam-era post traumatic stress syndrome are Johnson v. Dugger, 932 F.2d 1360 (11th Cir. 1991) and People v. Lucero, 750 P.2d 1342 (Cal. 1988).
\footnote{1091} Franklin v. Lynaugh, 487 U.S. 164 (1988) (not addressed in majority opinion) (O’Connor, J., concurring; Stevens, J., dissenting).
\footnote{1092} Tafero v. Wainwright, 796 F.2d 1314 (11th Cir. 1986).
emotional),¹⁰⁹³ and the defendant’s regular church attendance or religious devotion.¹⁰⁹⁴

If a state lists mental or emotional factors that are modified by such words as “substantial” or “extreme” as a statutory mitigators and the evidence does not rise to this level, this factor must still be considered by the jury or judge as a non-statutory mitigating factor. In other words, a defendant who wants to present this evidence to a jury must be allowed to do so. If the sentencing judge has written a sentencing order, this factor must not be ignored simply because the evidence does not meet the level required by the statute.¹⁰⁹⁵

[8.65.] Defendant’s Criminal Record

This mitigating circumstance includes the defendant’s criminal record (including previous and predicted prison behavior),¹⁰⁹⁶ the defendant’s potential for rehabilitation (lack of future dangerousness),¹⁰⁹⁷ and the defendant’s good jail conduct, including death row behavior.¹⁰⁹⁸

[8.66.] Other Aspects of the Offense

This mitigating circumstance includes the defendant’s remorse,¹⁰⁹⁹ cooperation with the authorities, including confession to the crime; assistance in locating evidence and testimony against co-defendants;¹¹⁰⁰ the fact that the defendant was a minor participant in the crime; the fact that the victim was a participant in the crime; and the fact that a co-defendant received a lesser sentence. The fact that a co-defendant received a lesser sentence is a circumstance that has been accepted by one state (New Hampshire) as a statutory mitigator and it has been accepted by one state (Florida) as a non-statutory mitigating circumstance. It has generally been rejected by non-weighing states.


¹⁰⁹⁵ See Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991).

¹⁰⁹⁶ Lockett v. Ohio, 438 U.S. 586 (1978); Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991) (this is a statutory mitigating circumstance in most states. If it is not listed in a particular statute, it can be considered as a non-statutory mitigating circumstance).


¹⁰⁹⁸ Skipper v. South Carolina, 476 U.S. 1 (1986); Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989).

¹⁰⁹⁹ Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991); Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987).

¹¹⁰⁰ Wilkerson v. Collins, 950 F.2d 1054 (5th Cir. 1992).
The state and lower federal courts have split on this issue. One line of cases considers the lesser sentence of a co-defendant to be relevant and another line of cases reaches the opposite conclusion. Courts that allow this mitigating circumstance consider the relative culpability of the co-defendants, while states that do not take the position that each jury trial has to stand on its own evidence and merit.

The U.S. Supreme Court has held that appellate courts need not compare one co-defendant’s sentence to another co-defendant’s sentence, but that was in the context of whether state courts of last resort are required to conduct a proportionality review. The U.S. Supreme Court has not ruled directly on the issue.

[8.67.] Defendant’s Lack of Intent to Kill

This mitigating circumstance can be argued in a felony murder case where the intent to kill is not present. The felony murder rule has questionable origin and has outlasted its usefulness. Many courts have condemned it as an outmoded throwback to medieval times. Some legal historians claim the rule was invented by Lord Chief Justice Edward Coke through a misapplication of the law attaching criminal liability to principles in a crime. The English Parliament abolished it in that country in 1957. The case of People v. Aaron contains a critical analysis of origins, history, and application of the felony murder rule. Other sources have been equally critical of the rule. For instance, the Supreme Court of Michigan stated:

Felony murder has never been a static, well-defined rule at common law, but throughout its history has been characterized by judicial reinterpretation to limit the harshness of the application of the rule. Historians and commentators have concluded that the rule is of questionable origin and that the reasons for the rule no longer exist, making it an anachronistic remnant, “a historic survivor for which there is no logical or

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1103 Johnson v. State, 477 So.2d 196 (Miss. 1985).


1106 Section 1 of England’s Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 1.

1107 299 N.W.2d 304 (Mich. 1980).
practical basis for existence in modern law.”

In People v. Phillips,\(^\text{1109}\) the Supreme Court of California stated, “[w]e have thus recognized that the felony murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application. Indeed, the rule itself has been abandoned by the courts of England, where it had its inception. It has been subjected to severe and sweeping criticism.”

The felony murder rule artificially raises culpability for any homicide to the level of first degree murder without consideration of scienter. A homicide that would be second degree murder, manslaughter, or justifiable homicide becomes first degree murder if committed during any statutorily enumerated felony.\(^\text{1110}\) Since the rule already raises a lesser homicide to first degree murder, the fact that the homicide was not premeditated presents strong mitigation against the felony murder aggravator. In fact, they should cancel each other out.

[8.68.] Determining if a Non-statutory Circumstance is Mitigating

Defendants regularly rely upon mitigating circumstances which are not included in a particular statute. The lists of statutory and non-statutory mitigation in these materials are generally accepted by other states and provide a starting point. A good rule of thumb is to include evidence in mitigation unless the local courts, or the U.S. Supreme Court, have specifically rejected the evidence as mitigating. In Florida-scheme states, each mitigating circumstance must be considered and weighed in the sentencing order. The jury must not be refused the opportunity to consider any evidence that is reasonably mitigating. The jury may give mitigation the weight it deserves in weighing states and must consider it in non-weighing states.

The Supreme Court of Florida has given guidance to trial judges on how to approach weighing mitigating circumstances. This guidance assists judges in deciding whether a proffered mitigating circumstance is valid. First, the judge must determine whether the factor in question is mitigating in nature. It is automatically mitigating if it falls within a statutory category. Next, if the factor is not part of the statutory list, the judge must determine if it is mitigating under the facts of the case at hand. Finally, at least in Florida-scheme states, the judge must assign the weight to be given to the factor if it has been found to be mitigating.\(^\text{1111}\)


\(^{1109}\) 414 P.2d 353, 360 (Cal. 1966).

\(^{1110}\) Some states provide for a limited defense to felony murder.

\(^{1111}\) Ford v. State, 802 So.2d 1121 (Fla. 2001).
Non-Mitigating Circumstances

There are several factors that have been determined not to constitute non-statutory mitigating circumstances. They are as follows:

1. Residual or lingering doubt;
2. Extraneous emotional factors;
3. Descriptions of executions;
4. Evidence of the church’s opposition to the death penalty;
5. Evidence that the death penalty is not a deterrent;
6. Testimony of the victim’s relatives requesting that the death penalty not be imposed;
7. Testimony that it would cost less to imprison the defendant for life than it would to execute him;
8. The state’s offer of life imprisonment in return for a guilty plea; and
9. The sentence of a co-defendant to life, or a lesser term or imprisonment.

The first item, residual or lingering doubt, requires some special attention which follows.

In Oregon v. Guzek, the U.S. Supreme Court held there is no Eighth Amendment or Fourteenth Amendment right to present evidence of “residual doubt.” In an opinion by Justice Breyer, the U.S. Supreme Court stated,

That evidence is inconsistent with Guzek's prior conviction. It sheds no light on the manner in which he committed the crime for which he has been convicted. Nor is it evidence that Guzek contends was unavailable to him at the time of the original trial. And, to the extent it is evidence he introduced at that time, he is free to introduce it now, albeit in transcript form. Or. Rev. Stat. § 138.012(2)(b) (2003). We can find nothing in the Eighth or Fourteenth Amendments that provides a capital defendant a right

1112 Franklin v. Lynaugh, 487 U.S. 164 (1988); Way v. State, 760 So.2d 903 (Fla. 2000); Darling v. State, 808 So.2d 145 (Fla. 2002).
1114 Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986).
1115 Glass v. Butler, 820 F.2d 112 (5th Cir. 1987).
1116 Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985).
1117 Robison v. Maryland, 829 F.2d 1501 (10th Cir. 1987) overruled on other grounds, Romano v. Gibson, 239 F.3d 1156, 1169 (10th Cir.2001).
1119 Id.
1120 This applies to some jurisdictions, notably Texas and non-weighing states.
to introduce new evidence of this kind at sentencing.1122

Justice Breyer’s opinion sets forth three reasons why “residual doubt” evidence is not allowed in the penalty phase. The first reason is that sentencing traditionally focuses on “how” and not “whether” the defendant committed the crime.1123 Second, “the parties previously litigated the issue to which the evidence is relevant—whether the defendant committed the basic crime. The evidence thereby attacks a previously determined matter in a proceeding at which, in principle, that matter is not at issue. The law typically discourages collateral attacks of this kind.”1124

The third reason given is peculiar to Oregon law. In Oregon, the defendant may introduce any portion of the transcript of the guilt phase trial into evidence in the penalty phase.1125 Therefore, if evidence of alibi, self-defense, or any other defense was presented to the jury, this evidence can be reconsidered by the jury.

This aspect of the opinion drew criticism from Justice Scalia. He rejected all Eighth Amendment residual doubt claims. He also rejected the third reason in the U.S. Supreme Court’s opinion. He referred to it as “an analytical misfit in the company of the other two.”1126 He stated if a third reason was needed, “a better candidate would be that the claim we consider here finds no support in our Nation's legal history and traditions.”1127 Justice Scalia then quoted Justice Marshall’s 1986 dissent in which he stated, “few times in which any legitimacy has been given to the power of a convicted capital defendant facing the possibility of a death sentence to argue as a mitigating factor the chance that he might be innocent.”1128

This position is by no means unanimous. Some states, notably Tennessee, include lingering doubt among the non-statutory mitigating circumstances.1129 In Way v. State,1130 one justice stated:

I write separately to address Way’s point on appeal that this Court should recede from its prior decisions that preclude the consideration of “lingering” or “residual” doubt as a non-statutory mitigator - especially because this was a resentencing proceeding in which the jury did not decide the issue of guilt.1131

1122 Id. at 523.
1123 Id. at 526.
1124 Id.
1126 Id. at 528.
1127 Id.
1128 Id. at 529 (citing Lockhart v. McCree, 476 U.S. 162, 205 (1986) (dissenting opinion)).
1129 State v. Hartman, 42 S.W.3d 44 (Tenn. 2001); State v. Henness, 679 N.E.2d 686 (Ohio 1997) (reasonable doubt allowed to be “raised”).
1130 760 So.2d 903 (Fla. 2001) (Pariente, J., concurring).
1131 Id. at 922.
Many of the concerns over the death penalty have focused on the possibility of executing an innocent person - a specter that runs contrary to the interests of justice. While a jury verdict of guilt based on competent substantial evidence is sufficient for upholding convictions and prison sentences, it isn’t always enough for upholding a death sentence. There are cases, albeit not many, when a review of the evidence in the record leaves one with the fear that an execution would perhaps be terminating the life of an innocent person.

Earlier, Justice Thurgood Marshall made similar observations:

There is certainly nothing irrational - indeed, there is nothing novel - about the idea of mitigating a death sentence because of lingering doubts as to guilt. It has often been noted that one of the most fearful aspects of the death penalty is its finality. There is simply no possibility of correcting a mistake. The horror of sending an innocent defendant to death is thus qualitatively different from the horror of falsely imprisoning that defendant. The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice. As such it has been raised as a valid basis for mitigation by a variety of authorities. 1132

Actually, the courts have tacitly recognized the “lingering doubt” concept by calling it “newly discovered evidence.” “Newly discovered evidence” issues are brought by motions for new trial as well as post-conviction relief proceedings. Lingering doubt also arises in post-conviction claims involving Brady issues. 1133 For more information on newly-discovered evidence see Section 9.30. and the sections that follow it.

[8.70.] Waiver of a Particular Mitigating Factor by the Defendant

Generally, if a defendant waives presentation of a particular mitigating circumstance, neither the prosecutor nor the defense may present evidence about it. However, such evidence may become admissible to impeach a witness’ testimony. For example, the defendant will probably want to waive the mitigating factor of no significant history of prior criminal activity if there has been a prior conviction of a crime but not a crime of violence. If the defendant tried to rely upon it, the prior record would be admissible in rebuttal and the defendant would probably not want the jury to be aware of it. If the defendant’s relatives or other witnesses testify that the defendant is not a person who is likely to violate the

law, the prosecutor may be able to inquire about the defendant’s prior record to impeach the witness.

The trial judge should question the defendant on the record in order to establish that the waiver of a particular mitigating factor has been made freely and voluntarily with knowledge of its consequences.

[8.71.] Assigning Weight to Mitigating Circumstances

Assigning weight to mitigating circumstances is subjective at best. The sentencing court may determine what amount of weight to give to relevant mitigating evidence, but may not exclude such evidence from consideration. The correct approach to mitigation that has little or no weight is to find that the mitigator has been established and give it “little” or “some” weight. The Florida Supreme Court has held that a mitigator can be given “no” weight. However, giving a mitigator “no” weight could result in a remand if the reviewing court disagrees. It is a safer practice to at least give the mitigator “some” weight so the reviewing court knows the mitigator has been considered.

[8.72.] Defendant Chooses the Death Penalty

Generally the defendant will want to escape the death penalty. However, what if the defendant wants to be executed and insists on presenting no mitigating evidence and no closing argument? Most states have dealt with this issue. However, a good discussion of the problem is contained in a book authored by David A. Davis. Florida has had several of these cases. In Hamblen v. State, the Florida Supreme Court ruled the defendant had the right to represent himself and control his own destiny. In Anderson v. State, the defendant had counsel but directed him to present no testimony at the penalty phase. His death penalty was upheld. In Klokoc v. State, the defendant refused to allow his attorney to participate in the penalty phase, indicating he wanted to die. The trial court appointed special counsel to represent the “public interest” in bringing forth mitigating factors to be considered by the court. Even though the trial court sentenced the defendant to die, the Florida Supreme Court, after rejecting defendant’s request to dismiss the appeal, reversed the death sentence to life imprisonment based upon the mitigation presented by the special counsel.

1135 Trease v. State, 768 So.2d 1050 (Fla. 2000).
1136 David A. Davis, Capital Cases - When the Defendant Wants to Die, CHAMPION, June 1992, pp. 45-47. Mr. Davis points to other articles as well: Linda E. Carter, Maintaining Systematic Integrity in Capital Cases: The Use of Court Appointed Counsel to Present Mitigating Evidence when the Defendant Advocates Death, 55 TENN. L. REV. 95 (1987); Richard C. Dieter, Ethical Choices for Attorneys Whose Clients Elect Execution, 3 GEO. J. LEGAL ETHICS 799 (1989).
1137 527 So.2d 800 (Fla. 1988).
1138 574 So.2d 87 (Fla. 1991).
1139 589 So.2d 219 (Fla. 1991).
In Florida, the jury recommends the penalty, but the trial judge has the responsibility to make a separate determination and render a comprehensive sentencing order. In the case of Muhammad v. State, the defendant became disgruntled over his murder conviction and refused to present evidence of mitigation. The jury returned a death penalty recommendation, and the trial judge sentenced Muhammad to death. The Florida Supreme Court set forth the procedure to be used in such cases in the future by looking to both New Jersey and Georgia for guidance. The Florida Supreme Court stated:

In the past, we have encouraged trial courts to order the preparation of a PSI [Presentence Investigation] to determine the existence of mitigating circumstances “in at least those cases in which the defendant essentially is not challenging the imposition of the death penalty.” Having continued to struggle with how to ensure reliability, fairness, and uniformity in the imposition of the death penalty in these rare cases where the defendant waives mitigation, we have now concluded that the better policy will be to require the preparation of a PSI in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence. To be meaningful, the PSI should be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background. In addition, the trial court could require the state to place in the record all evidence in its possession of a mitigating nature such as school records, military records, and medical records. Further, if the PSI and the accompanying records alert the trial court to the probability of significant mitigation, the trial court has the discretion to call persons with mitigating evidence as its own witnesses.

In states such as Florida, the recommendation of the jury is entitled to be given “great weight.” This requirement is relaxed when the defendant presents no mitigation to the jury.

[8.73.] Closing Arguments

All states permit both sides to give closing arguments. Some states allow the prosecution to go last and some states allow the defense to go last. Some states give the prosecutor an opening argument and a rebuttal argument. Some states allow the defendant or defense counsel to make the final argument. Many

1140 782 So.2d 343 (Fla. 2001).
1141 Muhammad, 782 So.2d at 363 (citations and footnotes omitted) (citing State v. Koedatich, 548 A.2d 939 (N.J. 1988) and Morrison v. State, 373 S.E.2d 506 (Ga. 1988)).
1142 Id.
states do not mention final argument in a statute. Presumably, in these states final arguments follow the same procedure as at trial.

[8.74.] State’s Argument

A proper argument is one that reflects how the evidence tends to prove the existence of aggravating circumstances or how the evidence does not support the existence of statutory or non-statutory mitigating circumstances. Argument is proper when it deals with balancing or weighing the circumstances or any other aspect of the law which will be given to the jury to use in making the penalty decision.

Reference to matters outside the evidence, such as the increasing crime rate or the deterrent effect of the death penalty, may be proper if the subject is “within the common knowledge of all reasonable people.” These arguments are seldom necessary to win a case and merely give the defendant an issue to argue on appeal if a conviction is obtained. Counsel should be encouraged not to make this type of reference. Some judges provide counsel with a list of matters considered prohibited in final argument, and the list often includes matters outside the record.

Many cases that criticize inappropriate closing argument by prosecutors, in general, apply to the closing argument of a penalty phase. Examples include arguments that contain personal opinions, inflammatory arguments, and “golden rule” arguments. Any argument that is improper in any other criminal trial is improper in a penalty phase argument. However, some arguments that have been condemned specifically relate to death penalty arguments.

[8.75.] Denigration of the Role of the Jury

Judges should closely monitor the prosecutor’s closing to be certain the role of the jury in the sentencing process is in no way minimized. Monitoring is particularly crucial in a jury-sentencing state. In *Caldwell v. Mississippi*, the prosecutor told the jury members if they returned a death sentence, an appellate court would review it and possibly overturn the finding if it was incorrect. This inappropriate reference to the judicial process resulted in a reversal of the death sentence.

Even in a state where the jury recommends a sentence, it is still improper to minimize the jury’s responsibility either in final argument or in jury instructions. In these states the jury should be instructed that the recommendation must be given “great weight” by the court and can be disregarded only in the rarest of circumstances.

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1143 See Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985); Tenorio v. U.S., 390 F.2d 96 (9th Cir. 1968).
In Mann v. Dugger, the prosecutor, during voir dire, told the jury its recommendation was simply a recommendation and the court was not bound by it. He further stated the jury did not impose the death penalty and that burden was not on its shoulders. He emphasized the jury acted in an advisory capacity only, with the ultimate sentencing responsibility resting with the court. During final argument he again stated the sentencing responsibility ultimately rests with the court. The U.S. Circuit Court of Appeals for the Eleventh Circuit held that the jury’s role in the Florida scheme is significantly important to trigger Eighth Amendment rights, and misleading the jury members into believing their role is unimportant is error.

[8.76.] Arguing Aggravation Not Listed in the Statute

In states following the Florida scheme, except Delaware, and in Georgia-scheme states that limit aggravating factors to those set forth in the statute, the prosecutor may not argue matters in aggravation which are not listed in the statute. A common example of a non-statutory aggravating factor is the defendant’s lack of remorse. No state lists lack of remorse as a statutory aggravating factor. Unless non-statutory aggravating factors are allowed, a prosecutor must refrain from arguing the fact that the defendant has shown no remorse for the killing. The same problem exists if a prosecutor attempts to argue future dangerousness if it is not listed as an aggravating factor. While prior violent conduct can be argued in most states because such conduct is a statutory aggravating circumstance, future dangerousness cannot be argued unless it is also a statutory aggravator. Of course, if remorse or lack of future dangerousness is offered in mitigation, it can be rebutted by other evidence and argued to the jury. Another example is an argument regarding the deterrent effect, in general, of the death penalty. Arguments that attempt to shift mitigation into aggravation, such as arguing that a bad childhood, mental problems, and alcoholism are aggravating, are also improper.

[8.77.] Personal Opinions, Expertise, and Selection of Death Penalty Cases

In Brooks v. Kemp, many pages are devoted to proper versus improper prosecutorial argument. The U.S. Circuit Court of Appeals for the Eleventh Circuit clearly states that the prosecutor’s personal belief in the death penalty is improper. An argument in which it is claimed the prosecutor or prosecutor’s office seeks the death penalty in only a few cases, including the case presently

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1145 844 F.2d 1446 (11th Cir. 1988). See also Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988).
1146 People v. Pollock, 89 P.3d 353 (Cal. 2004).
1147 762 F.2d 1383 (11th Cir. 1985), opinion reinstated after remand, 809 F.2d 700 (11th Cir. 1987).
1148 Id. at 1409.
before the jury, is an improper argument. In *Johnson v. Wainwright*, the U.S. Circuit Court of Appeals for the Eleventh Circuit held the prosecutor’s personal opinion that the death penalty was appropriate to the case at hand and the argument that his office seeks the death penalty in only a limited number of cases were both improper arguments.

[8.78.] Cost of Life Imprisonment versus Death

It is not uncommon for prosecutors to argue that the cost of life imprisonment exceeds the cost of imposing the death penalty. This argument is improper as the cost of any penalty imposed by a court is irrelevant to any issue to be decided by a jury. Additionally, this argument is outside the evidence and is probably inaccurate as well.

In *Brooks v. Kemp*, the U.S. Circuit Court of Appeals, Eleventh Circuit stated,

> It was clearly improper for Whisnant (the prosecutor) to argue that death should be imposed because it is cheaper than life imprisonment. The factual assertion was completely unsupported. More importantly, cost is not accepted as a legitimate justification for the death penalty . . . . The jury cannot be exhorted to impose death for that reason.

[8.79.] Improper Focus on the Victim

It is clearly improper for a prosecutor to urge the imposition of death because of the race, religion, sex, or social status of the victim. Any reference to such potentially prejudicial characteristics must be undertaken only with the greatest of care and only when the reference is relevant to some legitimate issue in the case. Excessive focus on the characteristics of the victim, even if no explicit link is drawn between those factors and the punishment sought, may also be improper when the effect is to inject irrelevant considerations into the sentencing decision.

State law governs which arguments are proper or improper. For example, future dangerousness is a proper topic for argument if a statute lists it as an aggravating circumstance, or if the state follows the Georgia scheme and allows unlisted aggravating circumstances. State appellate courts, even in Georgia-

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1149 778 F.2d 623 (11th Cir. 1985).
1151 One estimate puts the cost of the average execution in Florida at $3.2 million. David Von Drehle, *Bottom Line: Life in Prison One-Sixth as Expensive*, MIAMI HERALD, July 10, 1988, at 12A.
1152 *Brooks*, 762 F.2d at 1412.
1153 *Id.*
scheme states, will differ on the appropriateness of a deterrent argument, mostly because of the unsettled disagreement regarding the deterrent effect of the death penalty. State law also differs on the propriety of a “send a message to the community” argument. Some hold it to be proper; others do not.\textsuperscript{1154}

In the U.S. Supreme Court case of \textit{Darden v. Wainwright},\textsuperscript{1155} the prosecutor made a number of improper closing remarks in his guilt phase closing. Some of the remarks included blaming the Department of Corrections for allowing the defendant out on furlough, arguing the only way to ensure the prison system would not let the defendant out again was to impose the death penalty; calling the defendant an “animal;” wishing the victim had been in possession of a shotgun and had blown the defendant’s face off; and wishing the defendant had committed suicide with the last bullet in the murder weapon. The U.S. Supreme Court reviewed not only whether the arguments rendered the trial itself fundamentally unfair, but also whether the improper remarks deprived the sentencing determination of the reliability required by the Eighth Amendment. Most of the remarks were “invited” by the defendant’s argument. Quoting \textit{State v. Young},\textsuperscript{1156} the U.S. Supreme Court stated the “idea of invited response is not used to excuse improper comments, but to determine their effect upon the trial as a whole.” This case points out the importance of proper closing arguments by the prosecutor, not only in the sentencing phase of the trial but in the guilt phase as well. Clearly, the trial judge should have controlled the improper arguments in the case.

\textbf{[8.80.]} \textbf{Defendant’s Argument}

Any argument that shows the lack of aggravating circumstance(s) or the existence of statutory or non-statutory mitigating circumstances is proper. Any argument that deals with the law the jury will be presented with to make the penalty decision is proper.

The same rules of inappropriate defense argument generally apply in penalty phase arguments as they do at any other trial. Defense counsel may not inject personal opinions about the death penalty into argument any more than the prosecutor may. Inflammatory arguments and golden rule arguments are also improper. The matters below relate specifically to death penalty arguments.

\textbf{[8.81.]} \textbf{Ineffective Assistance of Counsel}

Judges must be ever mindful in listening to defense counsels’ closing arguments. Improper arguments will be raised as an ineffective assistance of counsel claim in a later collateral proceeding. The claim will be raised in both

\footnotesize{\textsuperscript{1154} State v. Rogers, 562 S.E.2d 859 (N.C. 2002); State v. Baden, 572 S.E.2d 108 (N.C. 2002); Middleton v. State, 80 S.W.3d 799 (Mo. 2002) (proper argument); Urbin v. State, 714 So.2d 411 (Fla. 1998); Bertolotti v. State, 476 So.2d 130 (Fla. 1985) (improper argument).

\textsuperscript{1155} 477 U.S. 168 (1986).

\textsuperscript{1156} 470 U.S. 1 (1985).}
state and federal courts. This is a fertile field for a new penalty phase hearing to be ordered.

In *King v. Strickland*, the U.S. Circuit Court of Appeals, Eleventh Circuit, remanded the case for a new penalty phase based on ineffective assistance of counsel, both in failing to present available mitigating evidence and for making a closing argument which may have done “more harm than good.” The defense counsel called the crime “evil and gross” and “cruel and evil.” He implied that, as a public defender, he was duty-bound to represent the defendant. The Eleventh Circuit stated:

In effect, counsel separated himself from his client, conveying to the jury that he had reluctantly represented a defendant who had committed a reprehensible crime. Reminding a jury that the undertaking is not by choice, but in service to the public effectively stacks the odds against the accused. Rather than attempting to humanize King, counsel in his closing argument stressed the inhumanity of the crime.

In *Osborn v. Shillinger*, the U.S. Circuit Court of Appeals, Tenth Circuit, reversed the defendant’s guilty plea and death sentence due to counsel’s failure to fulfill his duty of loyalty to his client. The district court judge described counsel’s behavior as it was quoted by the U.S. Circuit Court of Appeals, Tenth Circuit, as follows:

“Counsel’s arguments at the sentencing hearing stressed the brutality of the crimes and the difficulty his client had presented to him . . . . In closing, counsel referred to the problems Osborn’s behavior had created for counsel throughout the representation. Counsel described the crimes as horrendous. He analogized his client and the co-defendants to ‘sharks feeding in the ocean in a frenzy; something that’s just animal in all aspects.’

Both *King* and *Osborn* stand for the proposition that a case will be tried again if the defendant’s counsel abandons vigorous representation and loyalty to the defendant during final arguments in the penalty phase. What should the trial judge do when this situation happens? There are no easy answers. There are times when the judge must interrupt the proceedings, excuse the jury, and discuss the argument on the record. In some circumstances, the defendant should be

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1157 714 F.2d 1481 (11th Cir. 1983), cert. granted and judgment vacated, 467 U.S. 1211 (1984), and on remand, 748 F.2d 1462 (11th Cir. 1984).
1158 Id. at 1491.
1159 Id.
1160 Id.
1161 Id. (citations omitted).
1162 861 F.2d 612 (10th Cir. 1988).
1163 Id. at 628.
allowed to express approval or disapproval of the argument. Counsel should be admonished if the argument is determined to be improper and the jury should be instructed to disregard it. Waiting until it is too late removes the ability to correct the harm. Being aware of the problem will help, but only an alert and observant trial judge can determine when or if counsel should be interrupted and corrective action taken.

[8.82.] Residual or Lingering Doubt

States vary on whether residual or lingering doubt (something between beyond a reasonable doubt and absolute certainty of defendant’s guilt) is a non-statutory mitigating circumstance. Tennessee recognizes it.\textsuperscript{1164} In \textit{Franklin v. Lynaugh},\textsuperscript{1165} the U.S. Supreme Court held, in a plurality opinion, that there is no constitutional requirement to have lingering or residual doubt considered in mitigation. However, a close reading of the case suggests the failure to give a jury instruction did not impair the defendant’s right, if he had one. The U.S. Supreme Court stated the trial court placed “no limitation whatsoever on petitioner’s opportunity to press the ‘residual doubt’ question with the sentencing jury.”\textsuperscript{1166}

If a state specifically precludes residual or lingering doubt to be a mitigating circumstance, then defense counsel’s closing argument should not include this type of argument. However, in a circumstantial evidence case, especially a close one, it will be very difficult for a trial judge not to allow this type of argument.

[8.83.] Aggravating Circumstance Laundry List

If a state lists 10 aggravating circumstances (or eight, or six, or 14) and only one or two apply to the case being tried, can the defendant argue the case is not very aggravated because the legislature has listed 10 circumstances and only one (or two) apply? Can the defendant’s attorney then proceed to inform the jury of all the aggravating circumstances that do not apply? One state has specifically answered this question against the defendant. In \textit{Floyd v. State},\textsuperscript{1167} the Florida Supreme Court held the trial court may restrict closing argument to the aggravating factors for which evidence has been presented and therefore might apply and need not allow argument of other aggravating factors which do not apply.

\textsuperscript{1164} State v. Hartman, 42 S.W.3d 44 (Tenn. 2001).
\textsuperscript{1165} 487 U.S. 164 (1988).
\textsuperscript{1166} \textit{Id.} at 174.
\textsuperscript{1167} 569 So.2d 1225 (Fla. 1990).
In the penalty phase, there are some special issues with regard to jury instructions. In particular, it is important to have jury instructions that correctly state the role of the jury. There is relevant U.S. Supreme Court case law as well as state law that must be reviewed in order to ensure that a death penalty case is not overturned. Below is a review of the most important issues.

**Caldwell Problems: Denigrating the Role of the Jury**

In states where the jury recommends the sentence to the judge, it is important that the jury’s role not be minimized in closing arguments or in the jury instructions. The U.S. Supreme Court has not dealt specifically with a *Caldwell* problem in a state with the Florida sentencing scheme. There was an opportunity to do so in *Dugger v. Adams*, but the U.S. Supreme Court relied upon a procedural default to deny relief instead of deciding the case on the merits. However, in *Mann v. Dugger*, the U.S. Circuit Court of Appeals, Eleventh Circuit held *Caldwell v. Mississippi* applies not only to a jury-sentencing state, but also to a judge-sentencing state where the judge receives a recommendation from the jury. It reasoned that jury recommendations must be given great weight in Florida, and a recommendation of life can be overridden only in rare circumstances. However, jury instructions should not minimize the importance of the jury’s decision under any state’s sentencing scheme. Instructions that do not follow this rule should be modified.

**Is Death Mandatory?**

There have been a number of U.S. Supreme Court cases involving death penalty schemes which appear to make death mandatory in certain instances. In *Sumner v. Shuman*, the U.S. Supreme Court reviewed Nevada’s sentencing scheme. Nevada required the death sentence to be imposed upon any defendant who committed a murder while serving a life sentence. The U.S. Supreme Court disallowed this requirement. The Eighth Amendment requires individualized sentencing; mandatory death sentences will not be approved.

In *Penry v. Lynaugh*, the U.S. Supreme Court considered the Texas scheme. In 1989, Texas required the jury to answer three interrogatories. If all three were answered “yes,” the defendant had to be sentenced to death. Johnny Penry was a mentally retarded defendant who had been badly abused as a child. Penry’s lawyer objected to the proposed jury instructions, suggesting the jury was not given latitude by the three questions presented to consider the mitigating

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1169 844 F.2d 1446 (11th Cir. 1988).
circumstances presented by Penry. The defense suggested the jury must be instructed in a way that would allow them to consider such mitigation as his retardation and abusive childhood. The U.S. Supreme Court agreed and reversed his death sentence.

The Texas statute and jury instructions have been changed to allow the jury to consider all mitigation and decide whether it is sufficient to warrant a sentence of life imprisonment instead of death. The third interrogatory now allows the jury to consider mitigating circumstances. Only if the last interrogatory is unanimously answered “no” (and the others are unanimously answered against the defendant) will the death penalty be imposed.\(^{1173}\)

In *Blystone v. Pennsylvania*,\(^{1174}\) Blystone argued that jury instructions in Pennsylvania required the jury to return a verdict of death if it found at least one aggravating circumstance and no mitigating circumstances, or if it found one or more aggravating circumstance that outweighed any mitigating circumstances. In a 5-to-4 opinion, the U.S. Supreme Court upheld the Pennsylvania scheme and its instructions.

In *Boyde v. California*,\(^{1175}\) the jury members were told they “shall” impose a sentence of death if the aggravating circumstances outweigh the mitigating circumstances. Although the California instructions have since been changed to eliminate the mandatory language, the U.S. Supreme Court, by a 5-to-4 decision, held that the “shall” instruction did not unconstitutionally prohibit individualized sentencing.

Some states, e.g., Wyoming, have statutes that require the jury to unanimously find mitigating circumstances to exist.\(^{1176}\) The U.S. Supreme Court has held this type of statute to be unconstitutional in two cases.\(^{1177}\) Juries must be instructed that the finding of a mitigating circumstance is the responsibility of each juror individually. In *Mills v. Maryland*, the jury instructions could have been interpreted to require the jury to impose a death sentence if they found one aggravating factor to exist and could not unanimously agree on any of a number of mitigating factors.\(^{1178}\) If there was no mitigation to consider, the death penalty was mandated. In *McKoy v. North Carolina*, the situation was a little different.\(^{1179}\) Unlike the scheme in Maryland, North Carolina allows the jury to recommend a life sentence even if no mitigation exists.\(^{1180}\) However, the U.S. Supreme Court held the instructions were improper because they likely precluded jurors from properly considering mitigating evidence.\(^{1181}\)


\(^{1180}\) *Id.*

\(^{1181}\) *Id.*
These cases illustrate the problems jury instructions can generate. If instructions suggest, for example, that the mitigating circumstances must outweigh aggravating circumstances in order for a life sentence to be imposed, there is a burden-shifting problem. The U.S. Supreme Court has not yet specifically addressed burden shifting. However, instructions should be modified to eliminate these types of problems.

[8.87.] Vague Terms

Vague terms, such as “heinous, atrocious, and cruel,” must be defined for the jury in a manner approved by the U.S. Supreme Court. Failure to properly define these terms can result in a flood of cases returned for re-sentencing. In Espinosa v. Florida, the U.S. Supreme Court struck down Florida’s definition of heinous, atrocious, or cruel in its Standard Jury Instruction as unconstitutionally vague. On the same day it remanded Espinosa, the U.S. Supreme Court summarily remanded five other cases, citing Espinosa as authority. Espinosa has caused numerous cases to be reviewed in Florida. One suggestion is to use the definition provided by defense counsel if it is reasonable. Use of the defendant’s definition will help resolve the issue on appeal and in post-conviction proceedings.

[8.88.] Jury Instructions on Aggravating and Mitigating Circumstances

The trial court should allow the jury to consider only those aggravating circumstances for which evidence has been presented and state law will support. If a jury is allowed to consider an aggravating circumstance which is later determined by an appellate court or by a federal court to be invalid, the penalty phase may have to be retried. Trial judges should not rely upon escape valves like “harmless error” in a death case.

Only one of the available aggravators should be used in states that do not allow “doubling.” In Castro v. State, defense counsel requested the following instruction:

The state may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance. For example, the commission of a capital felony during the course of robbery and done for pecuniary gain relates to the same aspect of the offense and may be considered

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597 So.2d 259 (Fla. 1992).
as being only a single aggravating circumstance.\textsuperscript{1185}

The trial court refused the instruction and the case was remanded for a new penalty phase trial. The “doubling” or “double counting” problem can be resolved in states which do not allow it by providing the jury with specific instructions.\textsuperscript{1186} Alternatively, the trial judge can rule that two aggravating circumstances are supported by the same aspect of the case and require the prosecutor to elect which one will be argued to the jury.

The jury must be instructed on statutory mitigating circumstances if any evidence in the record supports them. Failure to allow the jury to consider one of these circumstances, no matter how weak, may result in reversal. Of course, the jury need not be instructed on mitigating circumstances that have no support in the record.\textsuperscript{1187}

The \textit{Lockett} instruction must be given in every case. The jury must be instructed that they must consider in mitigation “any other aspect of the defendant’s character or record, and any other aspect of the offense.”\textsuperscript{1188} The word “background” should be added to this instruction.\textsuperscript{1189} Failure to include “background” may result in the opportunity to hold a second penalty phase trial.\textsuperscript{1190}

\section*{[8.89.] Anti-sympathy Instructions}

In \textit{California v. Brown},\textsuperscript{1191} the jury was instructed not to be “swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling.”\textsuperscript{1192} The U.S. Supreme Court held this instruction did not violate the Eighth Amendment. In \textit{Saffle v. Parks},\textsuperscript{1193} the jury was instructed, “you must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence.”\textsuperscript{1194} The case was decided on procedural grounds, leaving unanswered whether this instruction was constitutionally flawed. Neither case was decided by a clear majority of the court. These instructions cause too many problems as some mitigating factors and some aggravating factors are designed to invoke sympathy for the victim or the defendant. This type of instruction may be appropriate for the guilt phase of a capital trial, but it is too problematical for a penalty phase.

\begin{itemize}
  \item Id. at 261.
  \item People v. Proctor, 842 P.2d 1100 (Cal. 1992).
  \item Penry v. Lynaugh, 492 U.S. 302 (1989).
  \item Hitchcock v. Dugger, 481 U.S. 393 (1987).
  \item 479 U.S. 538 (1987).
  \item Id. at 538.
  \item 494 U.S. 484 (1990).
  \item Id. at 487.
\end{itemize}
[8.90.]  Jury Pardons

Juries sometimes ask the question of whether they have the right to ignore the facts and the law and render the verdict they feel is just under the circumstances. This question presents the classic jury pardon problem. Some cases hold the jury need not be instructed on a jury pardon if such a question is asked.\footnote{See Dougan v. State, 595 So.2d 1 (Fla. 1992).} 1195 The Supreme Court of Florida has held it improper to instruct the jury that the facts and the law can be ignored because sentencing recommendations will be opened to arbitrariness and capriciousness in violation of Gregg v. Georgia.\footnote{428 U.S. 153 (1976).} 1196 The Supreme Court of Florida approved the trial judge’s response to the jury’s question. The jury was told to rely upon the law and evidence they had heard. However, in Henyard v. State,\footnote{689 So.2d 239 (Fla. 1996).} 1197 that same court held that “a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors”\footnote{Id. at 249.} 1198 and an instruction to that effect is included in the model penalty phase instructions recommended by the Florida College of Advanced Judicial Studies. It appears, at least in Florida, that the jury has the power to pardon the death penalty but cannot be told about it.\footnote{See also, Franqui v. State, 804 So.2d 1185 (Fla. 2001) (jury must be instructed that it “is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors”).} 1199

Other states have decided, by case law or by statute, that the jury can exercise a jury pardon. For example, in Arkansas the court held that the jury, regardless of its findings (regarding aggravation outweighing mitigation), can still return a life-without-parole verdict simply by rejecting the death penalty.\footnote{Pickens v. State, 730 S.W.2d 230 (Ark. 1987).} 1200 In New Hampshire, the statute follows many others in suggesting the jury shall decide if an aggravating factor or factors exist and, if so, shall then determine if they outweigh any mitigating factors found to exist. If there is an absence of any mitigating factors, the jury must determine if the aggravating factors themselves are sufficient to justify a death sentence. If so, the jury, by unanimous vote, may recommend a sentence of death rather than a sentence of life imprisonment without parole. However, “The jury, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.”\footnote{N.H. REV. STAT. ANN. § 630:5 IV (1991) (emphasis added).} 1201

[8.91.]  Hung Juries

What if the jury cannot agree on a sentence or recommendation? Most states require a unanimous vote for death before the jury can return a death sentence. Two states require a vote of 10 or more for death. One state (Florida) requires a simple majority (seven or more) for a death recommendation. In some
states, if the jury cannot agree unanimously, a recommendation for life must be returned. Some states require a unanimous decision for a life sentence. In one state (Alabama), it takes a majority for a life sentence, but 10 or more for a death sentence. In the state requiring a majority for death, a six-six vote is a life recommendation as is a majority for life. What about the states that require unanimity? What if the jury cannot agree?

Some states require the jury to impose a life sentence if the jury cannot agree unanimously on death. Some states require the judge, if the jury is unable to agree, to impose a life sentence. In three states—Alabama, California, and Kentucky—a new jury must be impaneled if the jury cannot agree. In California, if the second jury cannot agree, the judge can then impose a life sentence or impanel another jury. In Alabama after one or more mistrials if the prosecutor, defense counsel, and judge agree, the judge may impose the sentence. In Kentucky, the judge has no authority to sentence and a new jury must be impaneled. There is no direction in the Kentucky statute as to how many times a new jury must be impaneled presumably until the state gives up and agrees to a life sentence.

In Florida, where a majority vote recommends death and six or more votes recommend life, there is never a hung jury.

The biggest problem is whether the jury can be told what will happen if they cannot agree on the sentence. There is no agreement among the states on this issue. Some states require the jury to be told; others do not.

[8.92.] Post-verdict Responsibility in Jury-sentencing States (Georgia Scheme and Texas Scheme)

The judge has little post-verdict responsibility in states where the jury’s sentence is the sentence the judge must impose. The judge simply imposes the sentence and the appellate process begins. The same is true in states where the judge must impose a life sentence if the jury cannot agree. A new sentencing proceeding must be scheduled in states where the judge has no sentencing authority absent jury agreement.

In states like California and Ohio, the defendant must be sentenced to life if the jury’s verdict is life, but the judge is allowed to override a verdict of death under certain specific circumstances. These states require various findings by the trial judge. Presumably, the findings are required to be in writing. Ohio requires written findings. California requires the court to set forth reasons for its ruling and directs they be entered in the clerk’s minutes.

In Ohio, there is a writing requirement regardless of whether the court imposes life or death. The court must lay out the aggravating and mitigating circumstances and the reasons why the aggravating circumstances outweigh the mitigating circumstances or why the court “could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors.”

In California, the court must look to the aggravating and mitigating circumstances and can impose life only if the finding of the jury that the aggravating circumstances found outweigh the mitigating circumstances is “contrary to the law or the evidence presented.”

Penalty phase proceedings in cases where a jury has been waived are less likely to be reversed because appellate courts presume trial judges are aware of the rules of evidence and do not consider inadmissible evidence in making a ruling.

[8.93.] Post-verdict Responsibility in Florida-scheme States

Three states, Alabama, Delaware, and Florida, have the best (or worst) of both worlds. The trial judge must preside over the penalty phase jury trial (with all the chances of error) and then after considering the jury’s penalty recommendation, decide the sentence with a written sentencing order (subject to more error). In these three states, the jury recommendation is not binding. In Delaware, the jury’s function is to make findings regarding the existence of aggravating circumstances and whether the aggravating factors outweigh the mitigating factors. The judge then decides the sentence. In these states the judge can sentence the defendant to life if the jury has recommended death. More drastically, if the jury recommends life, the judge can override the recommendation and sentence the defendant to death. This scheme, as applied in Florida, has been upheld several times by the U.S. Supreme Court. In Spaziano v. Florida, the U.S. Supreme Court was faced specifically with an override from life to death and the constitutionality of that occurrence. The U.S. Supreme Court found the override constitutional. It has not reviewed the override provisions in Alabama or Delaware.

The fact that the jury renders a recommendation rather than a binding verdict does not mean the recommendation can be ignored. In Florida, case law requires the verdict of the jury to be given great weight under most circumstances. To override a recommendation of life in Florida, “the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable people could differ.” Alabama has not formulated a standard to

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1205 Indiana was a Florida scheme state. The Indiana Legislature amended the death penalty statute in 2002 after Ring v. Arizona was decided and now has adopted the Georgia scheme. IND. CODE § 35-50-2-9 (2007).
1208 Id.
1209 Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Indiana had a standard similar to Florida’s Tedder standard. In order to override a jury’s recommendation of life in Indiana and sentence a defendant to death, “the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was
allow a judge to override a jury’s recommendation of life. The trial court is required only to consider the recommendation of the jury. The law allows the trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty is appropriate. The Alabama Criminal Court of Appeals in *Lindsey v. State*1210 held that the trial judge was free to disregard it after considering the jury’s recommendation. The Alabama Supreme Court may reverse a death sentence imposed after the jury recommends life when “the principles and standards of ‘fundamental fairness’ require that the trial court’s action be reversed.”1211 Delaware followed the Florida standard until 2002 when the Delaware statute was amended to require the court to “give such consideration as deemed appropriate by the court in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender as found to exist by the court. The jury's recommendation shall not be binding upon the court.”1212

All three states require the judge to issue a sentencing order dealing with aggravating and mitigating circumstances. Alabama requires each aggravating factor and each mitigating factor be addressed, whether found to exist or not. Florida requires that each aggravating factor found to exist be addressed and that all mitigation proffered by the defense be addressed in the sentencing order. Indiana requires the judge’s findings include identification of each mitigating and aggravating circumstance found to exist. Delaware requires the order to set forth the “findings upon which the sentence of death is based.” There are, of course, additional requirements such as weighing the aggravating circumstances against the mitigating circumstances to determine the proper sentence. Examples of sentencing orders following the Florida writing requirements are provided in Appendix 8-1.

[8.94.] Preparation of Sentencing Orders

The trial judge should require the attorneys to submit a sentencing memorandum prior to the sentencing date. It is of particular importance that the defense list all statutory and non-statutory mitigating factors believed to have been established by the evidence. This list will provide the basis for discussion of mitigation in the sentencing order. The attorneys, especially the prosecutor, should not be asked to prepare a draft sentencing order. The writing requirement is for the judge, not the prosecutor or defense counsel. *Ex parte* communications between the judge and prosecutor concerning the content of the sentencing order are forbidden and can lead to reversal.

appropriate in light of the offender and his crime.” Martinez Chavez v. State, 534 N.E.2d 731, 735 (Ind. 1989). Indiana is now a Georgia scheme state.

In *Rose v. State*, the trial judge requested that the prosecutor prepare the sentencing order. The Supreme Court of Florida criticized this practice and stated:

The judicial practice of requesting one party to prepare a proposed order for consideration is a practice born of the limitation of time. Normally, any such request is made in the presence of both parties or by a written communication to both parties. We are not unmindful that in the past, on some occasions, judges, on an *ex parte* basis, called only one party to prepare an order for the judge’s signature. The judiciary, however, has come to realize that such a practice is fraught with danger and gives the appearance of impropriety.

Canon 3A(4) of Florida’s Code of Judicial Conduct states clearly that “[a] Judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding.” Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side’s case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments.

The court went on to state:

We are not concerned with whether an *ex parte* communication actually prejudices one party at the expense of the other. The most insidious result of *ex parte* communications is their effect on the appearance of impartiality of the tribunal. The impartiality of the trial judge must be beyond question. In the words of Chief Justice Terrell: [t]his court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge . . . . The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.

The attitude of the judge and the atmosphere of the courtroom

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1213 601 So.2d 1181 (Fla. 1992).
1214 *Id.* at 1183 (citations omitted and emphasis added).
should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.\textsuperscript{1215}

Justice Harding, in a concurring opinion in \textit{Rose}, stated, “[j]udges should be ever vigilant that every litigant gets that to which he or she is entitled: ‘the cold neutrality of an impartial judge.’”\textsuperscript{1216}

Findings in aggravation and mitigation should not be mere conclusions. The findings should state facts supporting the finding or lack of finding of the various aggravating and mitigating circumstances. The facts stated should be supported by the record. A trial judge who fails to state the reasons for the death penalty with unmistakable clarity will likely have the opportunity to preside over a resentencing hearing.

If there is a writing requirement, the findings should (in some states, must) be written prior to the pronouncement of the sentence. The Supreme Court of Florida became so frustrated with delayed written findings that in one case it reversed a death sentence and reduced the sentence to life.\textsuperscript{1217} The trial judge should allow any additional evidence or argument to be presented before pronouncement of the sentence. It disturbs defense counsel to have a judge listen to evidence or argument and immediately begin reading from a previously prepared sentencing order.

Most importantly, reasons for imposing a death sentence must be based upon the aggravating circumstances which have been presented and supported by the evidence. All statutory and non-statutory mitigation presented by the defense must be considered and discussed in the sentencing order. The weight to be given aggravating and mitigating circumstances is generally up to the trial judge.\textsuperscript{1218}

\section*{Conclusion}

These materials point out the various problems and many of the pitfalls that will be encountered by trial judges during the penalty phase of a capital trial. These materials are only a starting point and not a complete treatise on the subject. Death penalty law is continually evolving and may vary significantly from state to state and even from trial to trial. The death penalty is reserved for the most aggravated and least mitigated cases. Death penalty cases present an opportunity for trial judges to prove that our system of justice can be administered fairly and impartially.

\textsuperscript{1215} Id. (citing State \textit{ex rel.} Davis v. Parks, 194 So. 613, 615 (Fla. 1939)).
\textsuperscript{1216} Id. at 1184. \textit{See also} Spencer v. State, 615 So.2d 688 (Fla. 1993); Huff v. State, 622 So.2d 982 (Fla. 1993); Card v. State, 652 So.2d 344 (Fla. 1995).
\textsuperscript{1217} Christopher v. State, 583 So.2d 642 (Fla. 1991).
\textsuperscript{1218} Campbell v. State, 571 So.2d 415 (Fla. 1990), \textit{receded from in part in}, Trease v. State, 768 So.2d 1050 (Fla. 2000).