A PRACTICE ORIENTED GUIDE TO COMPLEX DEATH PENALTY LITIGATION

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Managing Federal Death Penalty Cases

A Practice-Oriented Guide to Complex Death Penalty Litigation

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Biography

Judge David Carter has spent much of his professional career involved in homicides . . . but never as the perpetrator. He was a Deputy District Attorney in the Orange County Homicide Section in the 1970s. During the 1980s and 1990s, he presided over numerous death penalty cases as a California Superior Court Judge. He and Judge Alarcon taught criminal procedure at the California Judges' College during the 1980s.

As a member of the federal bench, Judge Carter has presided over the longest criminal trial in the history of the Central District of California, which was ultimately severed into three separate trials and lasted for one-and-a-half years. This trial involved the prosecution of members of the Mexican Mafia on charges of murder, attempted murder, conspiracy to murder, extortion, robbery, and various drug trafficking and firearms crimes, many of which arose out of a triple homicide that occurred in 1998. These were the first death penalty cases brought in the Central District of California in over fifty years.

Judge Carter also presided over an eight month death-qualified trial involving commission members of the Aryan Brotherhood and a five month trial of other members of that organization. These trials were part of the largest indictment of death-eligible defendants in our nation's history.

Be prepared to laugh and learn if you take this session. As he often states, he is teaching from all the mistakes he has made, "and they are numerous."

Preamble

A complex federal death penalty case is unlike any other criminal matter. For various reasons, there is increasing federalization of crimes traditionally prosecuted by states. First, in states that do not have the death penalty (e.g., Hawaii), traditional state-oriented murder prosecutions are brought in federal court because of the ability to pursue the death penalty. Second, Racketeer Influenced and Corrupt Organizations Act (RICO) cases are the primary driver behind these complex prosecutions, and often include Violent Crime in Aid of Racketeering (VICAR) allegations. Third, the federal government has the resources to prosecute multi-jurisdictional crimes that pass through state and international boundaries. As a result, the federal government is now pursuing large-scale prosecutions against entire criminal organizations, in contrast to the single-defendant criminal trials that typically occur at the state level.

The focus in a RICO prosecution is on breaking up the criminal organization, rather than pursuing the death penalty against any particular defendant. By concentrating on the organization rather than the individual, the government puts itself in a precarious position with respect to the death penalty. First, under the Federal Death Penalty Act ("FDPA"), there is only one opportunity for the government to obtain the death penalty.[1] If the jury reaches an impasse during the penalty phase, the defendant automatically receives a sentence of life imprisonment without the possibility of release. *Jones v. United States*, 527 U.S. 373, 380-81 (1999). In

[1] The USA PATRIOT Act reauthorization bill, 2005 HR 3199, initially sought to modify this rule, by amending 18 U.S.C. § 3594 to insert: "If the jury is unable to reach any unanimous recommendation under section 3593(e), the court, upon motion by the Government, may impanel a jury under section 3593(b)(2)(E) for a new sentencing hearing." However, this amendment did not ultimately become law.

contrast, at the state level, the government can pursue another penalty trial if the jury deadlocks. Second, in its zeal to dismantle the criminal enterprise, the government will rely on high-level cooperators who may be the most violent and/or the leaders of the criminal enterprise. For example, in their prosecution of the Mexican Mafia, the government relied on the cooperation of Max Torvisco, a leader of the gang who admitted responsibility for over a hundred murders. Meanwhile, the government pursued the death penalty against Mariano "Chuy" Martinez for involvement in three murders. In the Aryan Brotherhood case, Al Benton served as a cooperating witness. Benton personally murdered inmates after receiving a secret message from Barry Mills and T.D. Bingham to kill black inmates as part of a nationwide race war. While Benton only received nine years in prison as a result of his cooperation, the government sought the death penalty against Mills and Bingham. Death eligible defendants will argue to the jury, often successfully, that the disparity in punishment weighs heavily against imposing the death penalty.

In overseeing a complex death penalty case, it is important for you to understand the disadvantages the government may have as they simultaneously pursue RICO charges and the death penalty.

I. Death Penalty Authorization Protocol

A. There is a two-stage protocol to the death penalty authorization process. During the first stage, the local U.S. Attorney's Office ("USAO") reviews the case and makes a recommendation to the Department of Justice ("DOJ") about whether the death penalty should be sought. Defense counsel typically make both a written and an oral presentation to the local USAO in an effort to convince them to recommend against authorizing the death penalty. The second stage of the protocol was summarized by Judge Trott as follows:

> [T]he U.S. Attorney submits a death penalty evaluation form and a prosecution memorandum to the Attorney General's Death Penalty Committee (the "Committee"), which assists the Attorney General in deciding whether to seek the death penalty in a certain case. The [U.S. Attorney's Manual's] guidelines require the U.S. Attorney to submit these documents no later than thirty days before the government must file its "Notice of Intention to Seek the Death Penalty."
>
> Once the U.S. Attorney provides the Committee with these documents, a meeting is held at which the defendant is given an opportunity to persuade the government not to seek the death penalty. Specifically, the guidelines provide that "counsel for the defendant shall be provided an opportunity to present to the Committee, orally or in writing, the reasons why the death penalty should not be sought." After this meeting, the Committee then makes a recommendation to the Attorney General, who makes the final decision whether to seek the death penalty in a particular case.

United States v. Fernandez, 231 F.3d 1240, 1243 (9th Cir. 2000) (internal citations omitted). *See also* Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 Fordham. Urb. L. J. 347, 406-428 (1999) (providing an in-depth review of the DOJ death penalty

protocol).

B. The first stage of the protocol is often delayed for months after the indictment is filed to allow for the initial discovery process to occur. Considering that the death-authorization process by the DOJ usually takes upwards of one year, the court will not typically know whether the defendant will be death-authorized until about 14 to 18 months after the indictment is filed. It may take much longer. For example, in the government's prosecution of the Aryan Brotherhood, filed in October 2002, the government waited until May 12, 2006, to file notices of intent not to seek the death penalty against Defendants Slocum and Grizzle. Four other defendants received such notices in mid-to-late 2005. The defendants who were death authorized did not receive notices until between May 2005 and November 2006 (over four years after the indictment was filed).

C. Effective July 1, 2007, Section 9-10.080 of the U.S. Attorney's Manual now requires local U.S. Attorneys to submit a recommendation to the DOJ at least 90 days before the government is required, by an order of the court, to file a notice that it intends to seek the death penalty or 150 days in advance of a scheduled trial date if there is no court-ordered notice deadline. *See* Exhibit 7: U.S. Attorney's Manual, Capital Crimes section. This is twice the amount of time previously required and could lead to further delay absent the setting of strict deadlines, particularly if the government seeks additional overall time from the Court in order to meet the 90 day requirement.

D. As discussed in Section II ("Appointing Attorneys"), the longer the pre-

authorization period, the more expensive the case will become. A newly-added provision to the *Guide to Judiciary Policies and Procedures*, Vol. VII, Ch. 6.04, recommends setting deadlines for each stage of the death-authorization process as a means of controlling costs.

E. If the death authorization occurs too late in the litigation, there will not be adequate time to complete the mitigation investigation, so the trial judge must be aggressive in setting protocol decision deadlines and requiring strict government compliance. The judge should make clear that noncompliance with deadlines means waiver of the opportunity to seek the death penalty. *See* Exhibit 8: Judge George H. King's Order on Death Penalty Protocol Deadlines. Be aware, however, that local U.S. Attorneys often have no objection when defense counsel seek delay of the protocol process to enable a full social history investigation of a defendant. As discussed in Section III ("Managing Mitigation Costs"), while a preliminary mitigation investigation is critical during the pre-authorization stage, the defense presentation to the U.S. Attorney and DOJ is typically abbreviated. Further, there is no empirical evidence that a full-blown social history has a significant effect on the DOJ's decision to seek death. Thus, setting reasonable deadlines serves as an effective cost management tool.

F. Setting the Trial Date

1. Set times for compliance to ensure that local and national death penalty protocol decisions are made by the government in a timely fashion.

a. Local U.S. Attorney recommendation to DOJ

b. National decision made by the Attorney General

2. Suggested Timeline:

a. 4 months for local U.S. Attorney recommendation

b. 4 months for Attorney General's decision

II. Appointing Attorneys

A. Capital Defendants are Entitled to Two Attorneys

1. "Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel; and the court before which the defendant is to be tried, or a judge thereof, shall promptly, upon the defendant's request, assign 2 such counsel, of whom at least 1 shall be learned in the law applicable to capital cases . . ." 18 U.S.C. § 3005. Although some might argue that the second attorney should not be appointed until the defendant is death authorized (in order to save funds if the defendant is never death authorized), the law requires, and the practice is, to appoint two counsel from the inception of the case. The Ninth Circuit has stated "[o]n its face, the statute is clear that two attorneys must be appointed to represent a defendant promptly upon the defendant's request after the defendant is indicted for a capital crime." *United States v. Waggoner*, 339 F.3d 915, 917 (9th Cir. 2003) (*citing In re Sterling-Suarez*, 306 F.3d 1170, 1173 (1st Cir. 2002) (holding that the statutory requirement applies promptly after indictment, not only after the Attorney General has made a determination to seek the death penalty)). *See also*

United States v. Boone, 245 F.3d 352, 359 (4th Cir. 2001) ("[T]he statute becomes applicable upon indictment for a capital crime and not upon the later decision by the government to seek or not to seek the death penalty."). Further, it is the policy of the Administrative Office of the U.S. Courts to appoint two counsel "at the outset of every capital case." Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Volume 7, *Guide to Judiciary Policies and Procedures*, chapter VI at 1.

2. Appointing two counsel at the inception is necessary to avoid the possibility of a lengthy continuance later on. If the defendant is later death-authorized, and the second attorney is not appointed until that time, the new attorney will argue that he or she needs time to become familiar with the case.

B. The vast majority of the defendants who are initially death eligible are not death-authorized by the DOJ. Under Attorney General Janet Reno, 973 defendants were considered by the DOJ for the death penalty, but only 162 were authorized (811 not authorized). Under Attorney General John Ashcroft, from January 20, 2001 until February 2, 2005, of 585 defendants considered, 137 were authorized; 448 were not. Under Attorney General Gonzalez, from February 3, 2005 until February 26, 2007, of 281 defendants considered, 66 were authorized and 215 were not authorized.

	Total Considered	Authorized	Not Authorized	Percent not Authorized
A.G. Reno[2]	973	162	811	83%
A.G. Ashcroft[3]	585	137	448	77%
A.G. Gonzalez[4]	281	66	215	77%
Reno + Ashcroft + Gonzalez	1839	365	1474	80%

The fact that so many death eligible defendants are not death-authorized by the DOJ means that a tremendous amount of money is wasted on funding a second attorney from the inception of the case. The death-authorization process by the DOJ usually takes upwards of one year. Assuming the second attorney bills for 1800 hours[5] that year at a rate of $166 per hour, it costs $298,800 to fund the unnecessary attorney. Assuming the federal courts have appointed two counsel from the inception for each of the 1,474 death eligible defendants that were not death authorized, the courts may have spent in the range of $332 million to $440 million on unnecessary attorneys since the beginning of Janet Reno's term as

[2] The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review, United States Department of Justice (June 6, 2001).

[3] Resource Counsel Project - 1/20/06 through 2/2/05.

[4] Resource Counsel Project - 2/3/05 through 2/26/07.

[5] The number of hours worked by counsel during the time of the death penalty protocol varies widely. Complex multi-defendant cases will require counsel to devote all their time to the matter, whereas single defendant cases may require less time. This document provides statistics based on 1800 and 1500 hours per year, but the reader is encouraged to calculate expenditures based upon their own figures.

Attorney General.

Wasted costs if second attorney in a capital case works 1800 hours per year	
Hourly rate	**Wasted costs**
$125 (4/24/96 - 2/1/05)	$331,650,000
$140 (blended rate)	$371,448,000
$166 (current rate, effective 5/20/2007)	$440,431,200
Wasted costs if second attorney in a capital case works 1500 hours per year	
Hourly rate	**Wasted costs**
$125 (4/24/96 - 2/1/05)	$276,375,000
$140 (blended rate)	$309,540,000
$166 (current rate)	$367,026,000

C. Again, approximately 80% of all death eligible defendants are not death-authorized by the DOJ. For a significant number of death-eligible defendants, the government certainly knows upon filing the indictment, or soon thereafter, that it will not seek death against the defendant. Unfortunately, as of July 2007, the U.S. Attorney's Manual now prohibits the local U.S. Attorney from revealing to a court whether it intends to request authorization to seek death. USAM § 9-10.040 (requiring confidentiality of decision-making process). Although the government cannot state at the inception whether it intends to seek the death penalty, the court should request the government to fast-track the decision if it believes the defendant will be within the 80% that are not death-authorized. In discussing this matter with the AUSA, the court should cite the 80% statistic and note the enormous costs that will be incurred so long as the defendant remains death-

eligible.

D. Considering the 20% of defendants that are death-authorized, the problem of wasted costs is worsened by the fact that the DOJ withdraws its notice of intent to seek the death penalty or negotiates pleas against a significant number of the death-authorized defendants.

Outcomes of 382 Death-Authorizations, 1988 to June 2006	
Awaiting Trial or Now on Trial	63
Notice Dismissed by Judge	15
Notice Withdrawn by DOJ	38
Negotiated Plea[6]	100
Died before sentencing	3
Acquitted of capital charges	18
Sentenced to Less than Death	95
Death Sentence vacated	2
Sentenced to Death, now on appeal	44
Sentenced to Death, received clemency	1
Executed	3

E. If the death penalty is dropped, one counsel may be removed. *See* *United States v. Waggoner*, 339 F.3d 915 (9th Cir. 2003) (district court properly concluded that defendant was not entitled to be represented by two attorneys after the

[6] Typically, the negotiation of pleas could have occurred prior to the death-authorization decision. To the extent that death authorization is being used as a negotiating tool to influence a plea, this practice is disallowed by the United States Attorney's Manual. *See* USAM § 9-10.110 ("The death penalty may not be sought, and no attorney for the Government may threaten to seek it, solely for the purpose of obtaining a more desirable negotiating position.").

government filed formal notice that it did not intend to seek the death penalty); *Guide to Judiciary Policies and Procedures*, Vol. VII, Ch. 6.02(B)(2). However, counsel will argue that both attorneys are still necessary because the work had been divided. If the court agrees and declines to remove one attorney, the court will incur unnecessary expenses. The best way to avoid this problem is to inform counsel, on the record and in an order, at the start of the case that they should not divide up the work such that removal of one counsel at a late stage would prejudice the defendant. The judge should state that if the government elects not to seek the death penalty, one counsel will be removed and the court will not entertain future arguments that two counsel are still necessary because of the way the work had been divided.[7]

F. Other Matters Regarding Counsel

1. If the case is a complex multi-defendant matter, it may require the appointment of CJA attorneys from other districts because of the large number of defendants and number of conflicts that arise from testifying witnesses who have been previously represented by CJA counsel. The Federal Public Defender's Office can only represent one of the defendants. This means the majority of attorneys will be CJA counsel and occasionally

[7] Counsel have a tactical choice. One option is for both to actively involve themselves in the trial. Alternatively, one attorney could participate in the trial, while the other assumes responsibility during the penalty phase if one occurs. If there is a conviction during the guilt phase, the counsel who has lost credibility during the guilt phase is not as involved in the penalty phase. If both attorneys choose to participate in the guilt phase, they both still must be familiar enough with the all aspects of the case such that one can be removed if the death penalty is dropped.

private counsel. The Federal Public Defender's Office should be appointed to represent the defendant most likely to undergo a lengthy trial. This way, the court can save thousands of dollars that would otherwise have to be spent on CJA counsel. There is no reason to use the resources of the Public Defender's Office on a defendant who will require representation for only a short period of time.

2. However, note that the court must consult with the Federal Public Defender's Office in deciding whom to appoint as counsel for any death-eligible defendant. 18 U.S.C. § 3005. There could be a potential conflict of interest if the Federal Public Defender's Office was offering advice to the court about representation of one defendant while simultaneously representing another defendant. The court should be aware of this possibility and possibly seek advice from the Administrative Office of the United States Courts instead. *Id*. (stating that court shall seek advice from the A.O. office if no Federal Public Defender Organization exists in the district).

3. Early on, the judge should get some indication from the government of its intended witnesses so that he or she can check for conflicts with appointed counsel. If counsel has previously represented a witness, there may be a conflict requiring the substitution of counsel, which increases the time and money required for the defense.

4. It is recommended that the court not wait until a guilty verdict comes back

to prepare for the penalty phase. Instead, the court should prepare during the guilt phase deliberations in anticipation of the penalty phase. Because the attorneys will be billing for the time anyway, the court should use that time to finalize jury instructions and address other issues regarding the penalty phase.

III. The Scheduling Conference

A. Why Is the Initial Scheduling Conference Important?

1. The initial scheduling conference is an opportunity to handle numerous problems up front that could hinder or delay trial if they are allowed to arise later on.

B. Setting Up the Scheduling Conference

1. Who Should Be Present?

- The U.S. Attorney
- Every defendant
- Defense counsel
- A representative from the facility where the defendants are being housed (e.g., BOP, MDC or the local jail)
- Court administrator
- A sufficient number of Marshals and/or CSOs

2. Defendants: Because all of the important dates for the case will be set at the Scheduling Conference, it is imperative that every defendant appear.

a. A problem arises when some defendants are in custody in other

jurisdictions. For example, in the Florencia 13 case, most of the defendants were taken into custody in Los Angeles pursuant to the RICO indictment. However, fleeing defendants were apprehended in other states (e.g. Texas) and one was in prison for an unrelated matter in another state.

b. To solve this problem, the U.S. Attorney's office must writ these defendants into the jurisdiction. However, the process requires cooperation from the U.S. Attorney's Office and must take place in advance of the scheduling conference in order to allow time for transportation. Because the U.S. Attorney's Office oftentimes lacks incentive to writ in dispersed defendants, the judge must make sure that they do so. The Court may direct the U.S. Attorney's office to properly and timely seek the writs.

3. Attorneys: It is often difficult to get all of the attorneys together at one time. Consider scheduling the conference very early in the morning, late in the evening or on weekends. After each attorney has appeared, if absolutely necessary, they may be allowed to designate another attorney to substitute for them for the remainder of the conference.

C. Agenda for the Scheduling Conference

1. Set the Trial Date:

a. Attorneys must give notice to other courts that they will be unavailable, and a federal court cannot legally "run over" a state

court by forcing attorneys to fail to appear in state court.

b. One solution is to tell the attorneys that the judge is willing to work with counsel for a few weeks by making phone calls to state court judges, but that he or she will not make such phone calls in the future.

c. Sometimes one or a handful of defendants will initially wish to assert their right to a speedy trial, especially if friends or family are in the audience. They should be informed that all of the defendants will be tried together so that if one defendant goes to trial early, all of the others will be forced to do so as well. Generally after a group discussion, the outliers will agree to have a trial at a later date.

2. Plea Bargains: The judge should set a final date for plea bargains after which time any plea will be a straight plea to the court.

a. This date must be set after the date for motions so that defendants are not forced out of running their motions in order to enter a plea bargain. It is questionable whether setting a plea bargain deadline prior to the motion deadline comports with due process.

b. While it may seem odd to place a firm deadline on plea agreements, this will save the court from soliciting jurors unnecessarily. Anecdotally, if no deadline is set, the court may be required to bring in as many as 6,000 to 8,000 jurors when far less

are actually needed due to numerous settlements on the eve of trial.

3. Medical Needs: As discussed more fully elsewhere, untreated medical conditions can delay trial and create the need for continuances. It is better to confront these issues immediately by polling the defendants than to wait for them to roll in piecemeal.

4. Discovery Issues:

   a. The main discovery questions to ask are:

      - What has been sent out?
      - How has it been sent out?
      - How is it bates stamped or paginated?
      - How will electronic discovery be formatted?

   b. Poll defense counsel re discovery: Have defense counsel bring in all of the discovery they presently have and make sure that each has a copy of whatever is needed. The government should also commit to providing discovery in electronic format to each defense attorney.

   c. A court administrator should be present to discuss methods of lowering the cost of discovery, including negotiations with vendors to duplicate large numbers of documents at a discounted price. (Randall Schnack, CJA Supervising Attorney for the Central District of California, has been invaluable in arranging for

discounted duplication at Copy Pro.)

d. A representative from the BOP, MDC, local jail, etc. can verify what discovery will be allowed for general and segregated defendants.

e. You may also want to set a future date for a conference to assure that discovery is running smoothly.

5. Seek Stipulations on Procedural Matters: As discussed elsewhere, the government will resist producing its list of confidential informants. The scheduling conference is often a good time to work out a stipulation on this point. It is also a good time to agree on the number of peremptory challenges each side will receive.

6. Confidential Discussions:

a. The Defendants should be given at least one opportunity (and preferably several) to meet confidentially as a group outside of the presence of the judge, the U.S. Attorney, or others. One purpose for these meetings is to allow the defendants to speak to their individual counsel, many of whom they are meeting for the first time. Another is that it provides an opportunity for the defendants to coordinate their defenses.

b. Additionally, the parties should meet outside of the judge's presence to work out stipulations on dates, discovery, etc. The parties should agree upon a proposed schedule. They will then

present this proposed schedule when they are back on the record. The judge should poll each defendant on whether he or she agrees to the schedule and waives his or her right to a speedy trial.

IV. Managing Mitigation Costs

A. Necessity of Mitigation Investigation

1. 18 U.S.C. § 3593 provides that mitigating and aggravating factors must be considered in determining whether a sentence of death is justified. In addition, Supreme Court jurisprudence has established that in a capital case the sentencer must be allowed to consider in mitigation "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982).

2. The 2003 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases provide that in addition to two counsel, the defense team should consist of an investigator and a mitigation investigator, with at least one member of the team qualified to screen for mental or psychological disorders. Guideline 4.1 (*available at* http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf). The Supreme Court has cited the ABA Guidelines as have numerous lower federal courts. *See, e.g., Wiggins v. Smith*, 539 U.S. 510 (2003) (finding ineffective assistance of counsel where attorney conducted

inadequate mitigation investigation that failed to meet ABA standards).[8]

3. For any investigative and/or expert assistance the defense requests, the court must find that such assistance is "reasonably necessary for the representation of the defendant." 18 U.S.C. § 3599(f). Although the universe of mitigating evidence is virtually boundless, *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (mitigating factors include "the diverse frailties of humankind"), the duty on defense counsel to search for mitigating evidence is not unlimited. Case law requires reasonable investigation as shown in *Wiggins v. Smith*, 539 U.S. 510 (2003). However, *Wiggins* also states that, "[u]ltimately, this Court's conclusion that counsel's investigation was inadequate does not mean that *Strickland* requires counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing."

B. Authorizing Funds Before Death-Authorization

1. The trial court is in a quandary when the United States Attorney's Office initially brings an indictment with death-eligible defendants. Many defense counsel will bring an initial request for up to 1,000 hours of mitigation expert time prior to the final decision by the DOJ as to whether

[8] However, the Supreme Court has clarified that the ABA Guidelines "are only guides." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). *See also Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000) (reiterating that "prevailing norms of practice as reflected in American Bar Association standards and the like . . . are only guides, and imposing specific guidelines on counsel is not appropriate").

to death-authorize the defendant. As discussed, counsel will make written and oral presentations to the local U.S. Attorney's Office and the DOJ in an attempt to convince the government not to seek the death penalty. These presentations will contain arguments based upon the non-existence of aggravating factors and the existence of significant mitigating factors, so some investigation into mitigation will have to occur initially.[9] The question that arises for the trial court is how much mitigation funding

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[9] There is ample support for the idea of funding mitigation early on. The Judicial Conference Report stated:

> One of defense counsel's most important functions is to present information first to the local United States Attorney and then to the Justice Department that would justify a lesser sentence. Effective advocacy requires counsel to explore all of the issues that are likely to enter into the Attorney General's decision whether to authorize a federal death penalty prosecution, including the nature and strength of the federal interest, the evidence of guilt, and the aggravating and mitigating factors. Although the written and oral presentations made to the Death Penalty Review Committee are not as detailed or comprehensive as a penalty phase presentation to a jury, counsel must conduct a wide-ranging *preliminary* investigation of facts relevant to sentencing before the Justice Department makes the decision whether to file a notice seeking the death penalty, if it is to have an effect on the authorization process.

Judicial Conference Report, at § I.B.6 (emphasis added). *See also* ABA Guideline 4.1(B) (counsel should "receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation *at every stage of the proceedings*.") (emphasis added); ABA Guideline 10.7 (at every stage, counsel have an obligation to investigate the case thoroughly); ABA Guideline 10.11(A) (at every stage, counsel have an obligation "to seek information that supports mitigation or rebuts the prosecution's case in aggravation"); ABA Guideline 10.11(L) ("Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.").

Funding mitigation early is also necessary so that any mental health professional the defense plans to use can examine the defendant well in advance of trial. This will prevent the appearance that the professional examined the defendant solely for the purpose of providing testimony at trial instead of to diagnose a legitimate mental illness.

should be allowed prior to the DOJ death-authorization decision?

2. Judicial oversight is the key to avoiding unnecessary expenditures. Prior to authorizing funding on mitigation, the court should require detailed descriptions of the planned expenditures and inquire, in an *ex parte* hearing without the government present, into the types of mitigating evidence sought. If the mitigating evidence is unlikely to influence the government's decision, funding should be more closely examined pending the DOJ's decision. The court should also consider the likelihood that the government will seek death regardless of the types of mitigation presented by defense counsel.

3. If deadlines have been set for the U.S. Attorney's recommendation and the DOJ's decision, the court should take that into account when determining the amount of investigative time that is actually available to the defense. The use of deadlines will necessarily force counsel to focus on the most significant issues first.

4. Some judges make the mistake of authorizing large sums from the start of the case based on the mere assumption that such funds will be useful. This reduces the incentive of defense counsel to be cost-sensitive and to only pursue worthwhile avenues of mitigation. Defense counsel should <u>not</u> be given an open checkbook on mitigation! Instead, mitigation funding should be authorized in increments, only after an adequate showing has been made at each stage. For example, if the court decides to

fund a mental health professional, it should initially only provide funds for a preliminary evaluation. Then, defense counsel can use the results of the evaluation to request further money for additional work, provided that the initial evaluation raised relevant issues.

5. The *Guide to Judiciary Policies and Procedures*, Vol. VII, Ch. 6.02(F), recommends that courts require appointed counsel to submit, *ex parte* and under seal, a proposed litigation budget estimating all costs needed through the time the DOJ determines whether to authorize the death penalty. A separate budget estimating all costs through guilt and penalty phases should be required if the DOJ decides to seek the death penalty.

C. Requests for Service Providers

1. Any request for investigative or expert services must be specific and include (i) the type of service being requested; (ii) the general purpose or necessity of the service; (iii) the amount of time being requested; (iv) a list of what services will be performed during the time being requested (i.e. interview, report writing, data assessment, etc.); (v) an explanation of the fee arrangement such as hourly rate for services, hourly rate for travel, per diem rate, etc.; and (vi) the total dollar amount being requested.

2. Travel considerations

a. The trial judge should make every effort to appoint agents from within the geographic area (or if none is available, from a nearby jurisdiction) to minimize transportation costs. The judge should

consider cutting the rate paid for travel if an expert outside the jurisdiction is approved when similar experts reside closer.

b. If a proposed service provider is not located in the jurisdiction of the case, the request for appointment must describe efforts made to locate local or a nearby provider and explain why the provider is more qualified than an in-jurisdiction provider.

c. If professionals want to be paid for travel time while sitting on an airplane or train as a passenger, they need to be working on the case, and if they want to be paid while driving, they need to accept payment lower than the usual hourly rate.

V. The Complex Courtroom and Why You Need It

A. Construction must accommodate each defendant, two attorneys for each death-qualified defendant, and one attorney for each non-death-qualified defendant. The last row can be space for Marshals.

B. Exhibits

1. *See* Exhibit 1a, 1b: Photos of permanent complex courtroom

2. *See* Exhibit 2: Diagrams of temporary/collapsible complex courtroom

3. *See* Exhibit 3: Photos of ordinary federal district courtroom modified for complex trials (note use of curtains to hide shackles)

VI. Security

A. Security for the judge

1. The Marshals should develop an overall security plan that encompasses

your safety from the assignment of the case until its conclusion.

2. The judge will typically be offered Marshal protection. The best security for the judge and his family is usually the local police department.

   a. For over two-and-a-half years, to avoid Marshals living with the family, we came up with an operational security plan through the coordination of the Marshals and the local police department. Every time a patrol car was passing near our home, they drove by to check our security. This averaged two drive-by checks of our home every hour (although the frequency was not uniform throughout the day).

   b. Marshal protection extended to transportation to work and home.

3. Pole cameras may be installed to allow for 24 hour surveillance of your home.

B. Courtroom security

1. Marshals should be required to immediately implement specific directions for staff and court personnel in case of a disruption. This includes egress routes and places of reassembly to account for all staff. Staff and court personnel should know how to implement this plan in an emergency.

   a. Jurors should not be informed of an emergency plan because of the prejudicial effect, but such a plan should be in place.

2. Typically, 15-18 Marshals will be brought into your jurisdiction on a three-week rotating assignment.

3. Defendants and in-custody witnesses may need to be restrained. If you will be using restraints, lay your record for each individual defendant.

a. A decision to shackle defendants is reviewed for abuse of discretion. *See* *United States v. Fernandez*, 388 F.3d 1199, 1245 (9th Cir. 2004); *Morgan v. Bunnell*, 24 F.3d 49, 50 (9th Cir. 1994).

(1) "[T]he court must be persuaded that some measure was needed to maintain the security of the courtroom; and the court must pursue less restrictive alternatives before imposing physical restraints." *Fernandez*, 388 F.3d at 1245.

b. Make sure restraints are not visible to the jury and do not create noise.

c. Defendants should NEVER be brought in or out of the courtroom while the jury is present.

d. Ask everyone in the courtroom to remain seated while you enter and leave the courtroom since the defendants will be unable to stand while they are restrained. Having everyone else stand while the defendants remain seated will suggest to the jury that the defendants are shackled or will make the defendants appear disrespectful. Instruct attorneys to remain seated even during pretrial hearings, to condition the behavior.

e. *See* Exhibit 4: Oral ruling re: shackling

f. *See* Exhibit 5: Photo of shackle/chair configuration

4. Position magnotometers (metal detectors) so that everyone who enters the floor must pass through security. *See* Exhibit 6: Photo of magnotometers. Placing the magnotometers directly in front of your courtroom could result in security breaches by innocent wandering people and could also prejudice the defendants by showing the jury that extra precaution is necessary for your trial but not for other proceedings on the same floor.

C. Juror security

1. If you use an anonymous jury to ensure the safety of the jury, you must find that:

a. "there is a strong reason for concluding that it is necessary to enable the jury to perform its factfinding function, or to ensure juror protection; and"

b. "reasonable safeguards are adopted by the trial court to minimize any risk of infringement upon the fundamental rights of the accused." *United States v. Shryock*, 342 F.3d 948, 971 (9th Cir. 2003).

2. Because of the high notoriety of these cases, you might consider that the jurors and alternates take lunch together at court expense inside the confines of the courthouse. Disbursement of jurors over the lunch hour can only lead to problems.

3. Hopefully you will be able to avoid sequestration. If you do not sequester

the jury, then be aware that there will be profuse press coverage of your trial at the time of the verdict in the guilt phase and the verdict in the penalty phase. Consider leasing vans with tinted windows to transport the jury to a centralized location so they can disburse for the evening without walking and facing massive television coverage that will expose the identities of your anonymous jurors. It is virtually impossible to control a television cameraman who turns a camera on a juror exiting the courthouse. This can be particularly prejudicial and cause great concern amongst the jurors especially after the guilt phase but prior to the start of the penalty phase. The trial judge will find himself or herself helpless in terms of contempt and enforcement once the jury leaves the courthouse.

VII. Dealing with the Press

A. Consider appointing a media coordinator (a member of the press selected by the press) to serve as a liaison between the press and the court.

B. Contact the clerk of court (whose office will undoubtedly receive calls about the case) concerning media coverage to ensure consistent interaction with the media.

1. The Ninth Circuit also has a media person, David Madden, a former journalist, who works on a daily basis for the Circuit with all forms of media (t.v., radio, internet blogs, and newspapers).

C. Cameras are not allowed in the courtroom, nor is radio broadcasting from the courtroom permitted. *See* Fed. R. Crim. P. 53.

1. Beware of cell phone cameras. Consider a blanket ban on cell phones or a

close examination of cell phones to make sure they are not capable of taking photographs or recording sound.

D. Persuade any courtroom artists not to draw jurors or witnesses that are in protective custody.

E. *See* Cal. Rules of Court, Rule 980 (containing practical tips regarding interaction with the media).

VIII. Handling the Day-to-Day Needs of Defendants Before and During Trial

A. Medical

1. Defendants will be housed in local institutions close to the courthouse and will remain there for a long time because of the length of the litigation. These prisoners may be transferred into your jurisdiction from BOP institutions such as ADX, Marion, Lompoc, Leavenworth, Lewisburg, and Atlanta or the federal hospital at Springfield, IL. Other prisoners may be transferred from state prisons such as Pelican Bay or Folsom. Oftentimes medical treatment is interrupted when these inmates are transferred. Defendants who require medical care will begin to make requests to the court for such care. These requests will range from eye glasses or dental treatment to treatment for Hepatitis C. The local institutions housing these transferred defendants (i.e. your MDCs) will only house them for the duration of the trial and sometimes do not provide the same care as state prisons or BOP facilities. Some of the more serious requests will be for treatment of Hepatitis C. You will need to adjudicate these issues to the

extent they interfere with the defendants' Sixth Amendment trial rights. *See* *United States v. Weston*, 206 F.3d 9 (D.C. Cir. 2000) (holding that because the issue implicated the defendant's "ability to obtain a fair trial as guaranteed under the Sixth Amendment" the issue was properly before the District Court).

B. Visitation with lawyers, family, and friends

1. U.S. Marshals will want to know in advance which visitors are authorized.

C. Discovery issues

1. Because of the large amount of discovery, the defendants will request access to laptops to review discovery in their prison cells.

2. You will have to work with the institution housing the defendants to determine what hardware and software configurations are both effective and safe. For example, in the Florencia 13 case, defendants in general population were given paper copies and segregated defendants were given computers. Discovery rooms have been used, but present significant logistical and security problems. Sometimes inmates will have limited access and will need to swap documents out through their attorneys.

D. Meals

1. During trial, defendants should be provided a morning meal as well as lunch and an evening meal if you are keeping late hours. The morning meal is particularly important.

a. Many of our defendants are housed at Terminal Island and get a

wake-up call at about 4:00 a.m. Transportation begins at approximately 5:45. The length of time between the 4:30 breakfast and the 12:00 lunch is too long without the Court providing food to the defendants prior to the start of the morning session.

2. Because of the need to remove the defendants from their shackles, feed, and return them, you should plan on at least 30 minutes for morning breaks and 1 hour and 15 minutes for lunch. Usually the defendants must be moved out one at a time.

IX. Choosing the Sequence of Trials

A. Death-qualified and non-death-qualified defendants are joined together through RICO and RICO conspiracy charges. Often the non-death-qualified defendants are ready to proceed to trial before the death-qualified defendants because the death eligible defendants go through lengthy local and national protocol procedures, which take time.

1. There are usually multiple pleas by non-death-qualified defendants because:

a. The government offers reasonable plea bargains because they do not want to unnecessarily expose their confidential informants to cross examination in early non-death penalty trials.

b. There is more latitude for plea bargaining. Both sides can negotiate because they are not presented with only one of two

choices (life without possibility of release or death) as they are not in a death-qualified trial.

c. The government usually makes the mistake of using a high-ranking member of the criminal enterprise (i.e., "the shooter") as a cooperator. The shooter has the incentive to plea because of the severity of charges against him.

d. Be careful about group or package plea bargains. *See* *United States v. Caro*, 997 F.2d 657 (9th Cir. 1993).

B. After the local and national protocols, you may have a mix of death-qualified defendants and defendants who were initially death eligible but eventually were not death-qualified.

1. You can mix non-death eligible defendants with death-qualified defendants if those defendants were involved in a murder as principals and aiders and abetters. *See* *Buchanan v. Kentucky*, 483 U.S. 402 (1987); *United States v. Mercado*, 110 Fed. Appx. 19 (9th Cir. 2004); *People v. Kelly*, 183 Cal. App. 3d 1235 (1986).

2. Be careful where the connection between joined defendants is due to RICO conspiracy and *Pinkerton* theory but the overt acts and/or murders are separated by time and activity. *See* *Pinkerton v. United States*, 328 U.S. 640 (1946). For instance, some older Aryan Brotherhood defendants were charged with numerous murders committed in the 1980s, but were joined with younger defendants who did not join the gang until the 1990s,

when separate and distinct murders were committed.

3. In considering how to join defendants, it may be advisable to order production of the defendants' statements to the court under Rule 14(b). This will allow you to anticipate and avoid issues that may arise under *Bruton v. United States*, 391 U.S. 123 (1968), which can be difficult and complicated in its interaction with RICO and *Pinkerton* liability.

C. Practical tip: Use top-down trial sequence

1. Whenever possible, preside first over those defendants who are most culpable and most likely to be considered for the death penalty (RICO enterprise leaders or hands-on murderers who kill at their order).

2. This way, if the government is not successful in obtaining the death penalty with the "top" defendants, the chances of plea bargaining dramatically increase because of the decreased likelihood of obtaining the death penalty for the remaining defendants.

3. Proceeding bottom-up will cause the government to continue to pursue the death penalty, whether initially successful or not, since the chances of obtaining a death punishment increase with culpability.

4. Proceeding top-down can save millions of dollars and avoid unnecessary trials.

D. Summary

1. The sequence of trials should be:

a. Non-death eligible (fast track for pleas)

b. Top of the pyramid

c. From the top down, grouped by related charges

X. Discovery

A. Criminal discovery is governed by Fed. R. Crim. P. 16, 17, the Jencks Act, and case law. *See* Exhibit 9: Easy chart of criminal discovery (*Giglio*, *Brady*, Jencks, FRCrP 16 and 17).

1. "Rule 16 was adopted 'in view that broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence.'" *United States v. Fort*, 472 F.3d 1106, 1123 (9th Cir. 2007) (W. Fletcher, dissenting) (citing Fed. R. Crim. P. 16 advisory committee's note (1974 Amendment)), *rehearing en banc denied*, 478 F.3d 1099, *cert. denied* 128 S. Ct. 375.

B. The court may have to set time constraints to force the government to comply with discovery obligations in a timely manner to avoid delaying trial.

C. Determine which federal and state government agencies will be involved in discovery (e.g., FBI, ATF, BOP, CDCR, etc.) and designate someone from each agency to be responsible for discovery compliance. Make certain the court approves someone with sufficient authority (i.e., Warden, Western Representative for the BOP). Records custodians do not have the authority to ensure compliance.

See *United States v. McVeigh*, 923 F.Supp. 1310 (D. Co. 1996) (discussing problems associated with criminal discovery in a case resulting from a broad investigation involving multiple agencies).

1. Investigations leading up to RICO indictments often involve the participation of federal, state, and local law enforcement agencies. The defendants will want to obtain discovery from state and local law enforcement, but their discovery rights may not always extend so far. *United States v. Fort*, 472 F.3d 1106 (9th Cir. 2007) (holding that documents prepared by local law enforcement prior to investigation by federal authorities are not discoverable even though held by federal prosecutors because they are protected by the work-product exception of Fed. R. Crim. P. 16(a)(2)).

D. Government must provide a list of witnesses to the defendant at least three days before the commencement of trial. 18 U.S.C. § 3432.

1. You may want to ask the government to disclose their witness list earlier than required by statute because three days is often an insufficient amount of time for the defense to fully prepare in a complex death penalty case. If the government is unwilling, inform the government that after the direct examination of the witness, the court will allow the defense to bring that witness back at a later time during the government's case or may grant a lengthy continuance to allow the defense time to prepare for cross-examination, which will break up the government's case. Further, and

most importantly, advise the government that the court will admonish the jury that the delay is not the fault of the defense, but is being done because the defense was not provided with the witness list in time to prepare. Under these circumstances, the government will typically opt to disclose the witness list early.

E. Defendants may seek discovery related to the government's decision to pursue the death penalty against them. *But see* *United States v. Fernandez*, 231 F.3d 1240 (9th Cir. 2000) (Court held that predecisional death penalty evaluation form and prosecution memorandum were not discoverable and that the U.S. Attorney's Manual could not serve as a legal basis for discovery order because it did not create any substantive or procedural rights).

F. Exhibits:

1. *See* Exhibit 10: August 3, 2005 Order Re: Discovery

2. *See* Exhibit 11: January 18, 2006 Order Re: Discovery

XI. Substantive Motions

A. Motion for Severance

1. Severance issues take on a unique relevance in a capital case because of their potential to influence the penalty phase verdict. The defense will argue that joinder will prejudice the defendants in the penalty phase of the trial. *See* Exhibit 12: Johnson, Molly Treadway and Laurel L. Hooper, Resource Guide for Managing Capital Cases, Volume 1: Federal Death Penalty Trials, FJC (2004) 45-46.

2. Generally, defendants charged in the same indictment should be tried in a joint trial. *See* Fed. R. Crim. P. 8, 14. Joint trials "promote efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Zafiro v. United States*, 506 U.S. 534, 537 (1993) (internal citation omitted). However, the courts do not have the capacity to try dozens of defendants together. Also, for numerous reasons, different defendants will be ready for trial at different times. Numerosity of the defendants, issues of prejudice, and the arrival of the defendants into the district at different times will preclude joining the defendants for trial.

3. **"Spillover prejudice"**: Defendants may argue severance is necessary because joinder of non-capital defendants creates "spillover prejudice" against a capital defendant.

    a. Compare the following hypotheticals regarding when mixing capital and non-capital defendants is permissible

        (1) Hypo 1: All defendants are charged with acts growing out of the same incident.

            (a) No reason for severance

        (2) Hypo 2: Non-capital defendants will cause the introduction of evidence of other crimes not involving capital defendants.

            (a) Possibility of prejudice is greater here

4. **"Antagonistic" defenses**: Defendants may argue severance is necessary because the defendants will present "antagonistic" defenses.

   a. *See Zafiro v. United States*, 506 U.S. 534, 539 (1998); *United States v. Ramirez*, 45 F.3d 1096, 1100 (7th Cir. 1995) ("mutually antagonistic defenses do not automatically require severance because less drastic measures, such as limiting instructions, will often suffice"). *But see United States v. Tootick*, 952 F.2d 1078 (9th Cir. 1991) (trial court improperly denied severance where defenses were mutually exclusive; both defendants were at the scene of the crime and each contended the other was responsible).

5. **Prejudice to non-death eligible defendant**: Defendants may argue severance is necessary because a non-death eligible defendant will be prejudiced by joinder with a death eligible defendant.

   a. The joinder of death eligible and non-death eligible defendants does not deny the non-death eligible defendant his right to an impartial jury by death qualification of jury. *See Buchanan v. Kentucky*, 483 U.S. 402 (1987).

6. **Size and complexity**: Defendants may argue prejudice from the size and complexity of the joined case.

   a. Amount and complexity of evidence as to one defendant may cause prejudice to other capital defendants. *But see United States v. Villarreal*, 963 F.2d 725 (5th Cir. 1998) (holding complexity did

not require severance).

7. **Prejudice during penalty phase**: Defendants may argue severance is necessary because the jury may be influenced during the penalty phase by evidence presented against the co-defendant during the guilt phase, since the jury during the penalty phase can consider evidence presented during the guilt phase.

8. **Antagonistic mitigation**: Defendants may argue severance is necessary because mitigating factors presented during the penalty phase will be antagonistic.

9. **Similar mitigation**: Defendants may argue severance is necessary because similar mitigating factors may not be persuasive to the jury.

10. **Comparing defendants in sentencing**: Defendants may argue for severance because jurors may compare and contrast the defendants in such a way that would prevent individualized sentencing. For example, if there are two defendants with different levels of culpability, the jury will be inclined to sentence the "worse" defendant to death and the "better" defendant to life imprisonment even though the "worse" defendant might receive life imprisonment if tried alone and the "better" defendant might receive death if tried alone. The jury will be evaluating each defendant *relative to the other* and not individually as is proper.

11. *See* *United States v. Mercado*, 110 Fed. Appx. 19 (9th Cir. 2004) (review of severance and outrageous government conduct rulings).

B. Motion for Change of Venue

1. Many capital cases will generate substantial pretrial publicity bringing about a motion to change venue under the Fifth and Sixth Amendments. *See* *Patton v. Yount*, 467 U.S. 1025 (1984) (describing two tests for determining whether pre-trial publicity has altered the presumption that a fair trial is possible in a given jurisdiction).

C. Motion to Declare the Federal Death Penalty Act Unconstitutional

1. *See* Exhibit 13: Order Denying Defendant Bingham's Motion to Declare the Federal Death Penalty Act Unconstitutional

D. Motion to Dismiss on the Grounds of Outrageous Government Conduct

1. RICO investigations leading to the charges last for years and may involve government conduct later challenged by defendants as outrageous. For example, in the Mexican Mafia case, the investigation lasted over two years and involved at least eleven wiretaps. There will typically be numerous conversations overheard that involve threats to kill rival gang members for failing to pay "taxes" or their perceived disrespect towards the criminal organization and its leaders. Most of these conversations do not result in a murder. The trial court may have evidence that one or more of the many conversations actually did result in a murder. The defendant may challenge the government's non-interference as outrageous government conduct.

a. *See* *United States v. Mercado*, 110 Fed. Appx. 19 (9th Cir. 2004)

(review of outrageous government conduct and severance rulings; "The standard for outrageous government conduct is extremely high. It is met, for example, when 'the government engineers and directs a criminal enterprise from start to finish.'") (internal citation omitted).

2. *See* Exhibit 14: Order Denying Without Prejudice Defendant Hevle's Motion to Dismiss Counts 6, 7, and 8 and Overt Act 251 of Count 2 on the Grounds of Outrageous Government Conduct

a. This motion dealt with grand jury misconduct stemming from the case agent's providing an unintentionally inaccurate account of witness hearsay to the grand jury. This is common in large cases with many informants whom the government is trying to protect from *Jencks* discovery.

E. Motion for a Bill of Particulars

1. Usually, the defendant brings this motion in a capital case requesting specific information relating to non-statutory aggravating factors. For example, if the government alleges the non-statutory aggravating factor of "future dangerousness," the defendant may seek specific information regarding the government's theory underlying that factor.

2. *See* Exhibit 15: Order Denying Defendant Mills's Motion for a Bill of Particulars

F. Motion to Strike Statutory Aggravating Factor as Non-Narrowing

1. *See* Exhibit 16: Order Denying Defendant Bingham's Motion to Strike Statutory Aggravating Factor No. 3 as Non-Narrowing

G. Motion to Strike Statutory Aggravating Factor as Materially Inaccurate

1. *See* Exhibit 17: Order Granting in Part and Denying in Part Motion of T.D. Bingham to Strike Statutory Aggravating Factor No. 1 as Materially Inaccurate

H. Motion to Strike Statutory Aggravating Factor for Vagueness

1. *See* Exhibit 18: Order Denying Defendant Bingham's Motion to Strike Statutory Aggravating Factor No. 4 for Vagueness

I. Motion to Strike Non-Statutory Aggravating Factors as Violating the Ex Post Facto Clause

1. *See* Exhibit 19: Order Denying Defendant Bingham's Motion to Strike Non-Statutory Aggravating Factors as Violating the Ex Post Facto Clause

J. Motion to Strike Non-Statutory Aggravating Factor as Contrary to FDPA

1. *See* Exhibit 20: Order Denying Defendant Bingham's Motion to Strike Non-Statutory Aggravating Factor No. 3 as Contrary to FDPA

K. Motion to Preclude Evidence Pursuant to *Crawford*, Fed. R. Evid. 403, 801(d)(2)(E), and 805

1. *See* Exhibit 21: Order Denying in Part and Reserving Decision in Part Defendant Mills's Motion to Preclude Evidence Pursuant to *Crawford*, Fed. R. Evid. 403, 801(d)(2)(E), and 805

XII. Jury Summons

A. Jury summons letter

1. Draft a time qualification letter. This is critical! Otherwise, you will end up with thousands of jurors arguing inability to serve due to hardship.

a. Practical tip: Have counsel help draft the letter and get a stipulation to time qualify the jurors. We sent out 11,600 jury summons on the Aryan Brotherhood trial (four defendants, two of which were death qualified) and over 18,000 for the three trials of 24 Mexican Mafia defendants. Considering that jurors are paid $40 per day for their service, it would have cost an astonishing $472,000 to bring in all 11,800 members of the Aryan Brotherhood jury pool for a single day.

b. *See* Exhibit 22: Jury letter

2. A defendant might refuse to stipulate to allowing the Jury Commissioner to pre-screen the jury pool for hardship. The defendant will argue that such procedure results in a greater number of older, retired jurors, depriving him of a jury drawn from a fair cross-section of the community and depriving him of due process. However, such a procedure is lawful and appropriate, especially considering the enormous costs and inconvenience that would result if every potential juror had to be brought to the courthouse before being excused for cause.

a. *See* Exhibit 23: Judge James Selna's Order re: Jury Selection. *See also* *Johnson v. McCaughtry*, 92 F.3d 585, 592 n.10 (7th Cir.

1996) ("Johnson argues that while the state may put age restrictions on juror qualification, it is unconstitutional for a single jury commissioner to do so on his own. While this argument is plausible, we have already rejected it."); *People v. Powell*, 40 Cal. App. 3d 107, 133-34 (1974) (rejecting challenge to "the fact that the jury commissioner, by and with his examiners, has the authority to make a determination as to whether or not a person should be excused when he asserts that service would constitute a hardship . . . .")

B. Determining how many veniremen you will need

1. Consider:

a. How many defendants are death qualified?

b. Are you mixing death-qualified and non-death-qualified defendants?

2. Practical exercise

a. While the peremptory ratio for a non-death-qualified felony trial is 10:6 (defendants:government), the ratio for a capital trial is 1:1. *See* Fed. R. Crim. P. 24(b)(1).

b. The law assigns 20 peremptory challenges per side in a capital trial, but the court may allow additional peremptories. *See* Fed. R. Crim. P. 24(b). Assume each side is allowed 45 peremptories for jurors and 6 peremptories for alternates.

c. There will be 20 jurors (12 on the panel and 8 alternates)

d. 12 jurors + 8 alternates + 45 government peremptories + 45 defense peremptories + 6 government alternate peremptories + 6 defense alternate peremptories = 122 veniremen.

e. Death qualification will remove approximately 40% of the initial responding panel. Some jurors will not return after your first day during which the indictment is read and the questionnaire filled out.

f. To be safe, you must have between 160 and 200 veniremen.

XIII. Selecting the Jury

A. Jury questionnaire

1. The veniremen are brought in on day one, at which point the indictment is read to them and they are given a questionnaire to fill out.

a. Fill your courtroom with potential jurors while the indictment is read, and use video cameras to broadcast proceeding to potential jurors in other rooms.

(1) *See* Exhibit 24: Photos showing use of cameras

(2) An even better procedure is to place all overflow jurors together in the jury commissioner's room where they will view the proceeding on video screens.

b. Another option is to mail the questionnaire out to be used as an initial screening before bringing in any potential jurors. This may

save costs slightly by eliminating some jurors early, but it is not recommended because the jurors are more likely to complete the questionnaire sincerely when at the courthouse than when at home. Also, the solemnity of the courthouse causes otherwise reluctant panel members to become willing jurors. Further, the in-court admonishment of a judge not to discuss the case is much more effective than a written admonishment attached to the questionnaire.

2. The parties should be allowed to weigh in on the contents of the jury questionnaire.

3. *See* Exhibit 25: Jury questionnaire

B. Death qualification

1. In capital cases, the law provides for a two-stage trial. The first phase involves a determination of guilt or innocence. If the jury finds the defendant guilty, it then considers the punishment. There are only two options: life without the possibility of release and death.

2. In any case in which the charge carries a possible penalty of death, the law requires that potential jurors answer questions regarding their thoughts, feelings, and opinions about the possible penalties. This is true even though the defendant might be found not guilty in which case the trial would not reach the penalty stage.

3. Jurors who have views on the death penalty that make them unable to

follow and apply the law must be removed from the panel. The process by which these veniremen are removed is called "death qualification." Jurors are removed for the following reasons:

a. Jurors may be excused for cause whenever their views would cause them to automatically vote against the death penalty, without considering the evidence before them. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

b. Jurors may be excused for cause whenever their views would cause them to automatically vote for the death penalty without considering the evidence before them. *Morgan v. Illinois*, 504 U.S. 719 (1992).

c. Jurors may be excused for cause whenever their views would "prevent or substantially impair the performance of their duties in accordance with their instructions and their oath." *Wainwright v. Witt*, 469 U.S. 412, 424 n.5 (1985).

4. Methods

a. See the Death Qualification Colloquy for an example of questions to ask.

b. Individual Questioning

(1) Each prospective juror is questioned individually

(2) 30 jurors per day = 6 days

c. Category Questioning

(1) Jurors are brought in as a large group, and asked to place themselves into one of four categories

(a) Category 1: Those whose opposition to the death penalty would render them unable to follow the law to impose a punishment of death (or would have substantial difficulty in doing so).

(b) Category 2: Those who believe that anyone convicted of the charged crimes should be sentenced to death without consideration of any other factors as required by law, and such belief would cause the person to not follow the law (or would cause substantial difficulty in doing so).

(c) Category 3: Those who believe in the death penalty but could not themselves sentence another person to death (or would have substantial difficulty in doing so).

(d) Category 4: Those who, regardless of their feelings on the charged crimes and the death penalty, could follow the law and impose whichever punishment is appropriate.

i) Only veniremen in this category are eligible to become jurors.

(2) 60 jurors per day = 3 days

d. Small group questioning

(1) Prospective jurors are questioned in small groups of 10-20.

(2) If someone makes a prejudicial remark, the whole group can be excused.

(3) 60 jurors per day = 3 days

e. Mass questioning

(1) A large group of jurors is brought in and the judge asks questions to the entire group.

(2) Problems arise when a potential juror blurts out: "My sister was raped and murdered by a no good son of a bitch and I would kill anyone charged with murder!"[10]

(3) 180 jurors in one day

5. Practical tips

a. Highly religious people may have strong feelings both for or against death. The Bible is used by the "automatic kill" juror quoting "an eye for an eye" as often as the "automatic life" juror quoting "thou shalt not kill."

b. Remove non-death eligible defendants from death-qualification

[10] A note to my dear colleagues: maybe the Circuit will pretend there was no prejudice when all of the other prospective jurors heard that remark, but, in fact, it was prejudicial. Hopefully, you will have some automatic comments at hand when it happens to you. I suggest any of the other techniques as much safer and fairer than mass questioning.

process if they waive presence so that they are not associated with the death-qualified defendant's questions regarding the death penalty. Non-capital defendants do not have the right to participate in the death qualification of the jury. *United States v. Sanchez*, 75 F.3d 603 (10th Cir. 1996) (holding that trial court did not abuse its discretion by ruling a non-capital defendant is without right to participate in the death-qualification stage of jury selection).

c. Be careful excusing those jurors who would have difficulty voting for death. Imposing a death sentence should never be easy for anyone, so the mere fact that the decision will be difficult is not enough to excuse the juror. There must be "substantial difficulty."

(1) If you make a mistake and all peremptories are used by the defendant, then on appeal he can argue that your improper exclusion of those jurors decreased their opportunity for a fair jury.

d. You should also excuse veniremen at this point that would obviously be excused later for cause unrelated to the death penalty.

C. General Voir Dire

1. Reassemble the death-qualified venire to general venire.

2. Limit the general voir dire because you had jurors fill out a questionnaire.

3. Allow the attorneys some limited supplemental voir dire. Do not allow

any further death-qualification questions; that is now complete.

4. Practical tip: Suggest a stipulation by all parties that if they so request the Court will give them the names of the first 18 to 24 potential jurors that will be called one day prior to selection. This way, the parties can study the questionnaires of those jurors the day before, instead of shuffling through 150-200 questionnaires as the jurors are called and asking for time to review.

XIV. Jury Instructions

A. Guilt Phase Instructions

1. *See* Exhibit 26: *Mills* guilt phase instructions and verdict form.

B. Penalty Phase Instructions

1. Single penalty phase proceeding: *See* Exhibit 27: *Mills* penalty phase instructions and verdict form.

2. Bifurcated penalty phase proceeding: *See* Exhibit 28: *Houston* penalty phase instructions and verdict form for stage one; Exhibit 29: *Houston* penalty phase instructions and verdict form for stage two.

C. When the jury begins deliberations, give each juror a written copy of the final jury instructions.

D. Selected problems

1. *See* Exhibit 30: Order Rejecting Defendant Bingham's Proposed Jury Instruction Re: "Lingering Doubt"

2. *See* Exhibit 31: Order Re: Proposed Reasonable Doubt Jury Instruction

XV. The Federal Death Penalty Act

A. The Federal Death Penalty Act (FDPA) went into effect on September 13, 1994. (*See* FDPA, 18 U.S.C. § 3591, et seq.)

1. The FDPA empowers the jury to impose the death penalty. The statutory procedure differs from non-capital sentencing, which is conducted by the judge. The procedure during the penalty phase involves weighing positive and negative aspects about the accused and the severity of the crimes. The jury must go through this process before choosing a punishment.

2. There are two phases:

a. Eligibility phase

(1) Statutory intent factor proven beyond a reasonable doubt. 18 U.S.C. § 3591(a)(2).

(2) At least one statutory aggravating factor has been established beyond a reasonable doubt. 18 U.S.C. § 3593(c), (d).

b. Selection phase

(1) Whether any additional statutory aggravating factors have been found beyond a reasonable doubt. 18 U.S.C. § 3593(c).

(2) Whether any non-statutory aggravating factor has been found beyond a reasonable doubt. 18 U.S.C. § 3593(c), (d).

(3) Whether any single juror has found a mitigating factor by a preponderance. 18 U.S.C. § 3593(c), (d).

(4) "[W]hether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death." 18 U.S.C. § 3593(e).[11]

B. Penalty Phase Issues

1. Recess between guilt verdict and start of sentencing hearing: Ordinarily, the sentencing hearing for a defendant who has been found guilty of a death eligible offense "shall be conducted" before the jury that determined the defendant's guilt. 18 U.S.C. § 3593(b)(1). For that reason, the recess between the guilt verdict and the start of the sentencing hearing should ordinarily be brief, *i.e.*, only a few days. However, be aware that in some cases a defendant may become defiant to an attorney's mitigation efforts following a guilt-phase conviction and additional time may be needed for counsel to enlist the defendant's cooperation for the penalty phase. In these instances, a two- or three-week recess may be appropriate.

2. Admissibility of evidence: Information may be presented as to any matter

[11] *See* 18 U.S.C. § 3592(c) for a list of mitigating and aggravating factors. Note non-statutory aggravating factor of "future dangerousness."

relevant to the sentence, including any mitigating or aggravating factor permitted or required under § 3592, regardless of its admissibility under the Federal Rules of Evidence, "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." *See* 18 U.S.C. § 3593(c).

3. Testimony by victim's family: The Eighth Amendment does not bar admission of evidence relating to a victim's personal characteristics and the emotional impact on the victim's family. However, the Eighth Amendment does prohibit admission of specific sentencing recommendations by the victim's family. *See Booth v. Maryland*, 482 U.S. 496 (1987), *overruled in part by Payne v. Tennessee*, 501 U.S. 808 (1991). *See also* 18 U.S.C. § 3771 (setting out rights of crime victims).

C. Case study of penalty phase issue: Does the Confrontation clause of the Sixth Amendment apply during the penalty phase of a capital trial?

1. Under *Crawford v. Washington* 541 U.S. 36 (2004), an out-of-court "testimonial" statement by a non-testifying declarant is inadmissible unless:

   a. the declarant is unavailable, and

   b. the defendant has had a prior opportunity to cross-examine the declarant. *Id*. at 54.

2. A statement is testimonial when made "under circumstances which would

lead an objective witness reasonably to believe that [it] would be available for use at a later trial." *Parle v. Runnels*, 387 F.3d 1030, 1037 (9th Cir. 2004) (quoting *Crawford*, 541 U.S. at 52 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas J., concurring))).

3. If *Crawford* does not apply to a particular statement, a non-testimonial statement may nevertheless be inadmissible if "its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jurors." 18 U.S.C. § 3593(c).

4. Examples of testimonial statements:

   a. Prior testimony at preliminary hearing

   b. Prior testimony before a grand jury

   c. Prior testimony at a trial

   d. Police interrogation

5. In the Aryan Brotherhood trial, the government sought to introduce hearsay statements contained in Pre-sentence reports, Institution Discipline Committee reports, Bureau of Prison progress reports, Bureau of Prison classification studies, and Psychiatric evaluations.

6. What is the concern?

   a. Government will present to the jury hundreds of pages of documents regarding a defendant. Within these documents are numerous allegations of misconduct and crimes, including acts ranging in severity from delaying a bed count to never prosecuted

acts of murder. The government will attempt to prove the non-statutory factor of future dangerousness primarily through the hearsay contained in the documents. It will likely place an appealing prison official on the witness stand who will, with his or her professional demeanor and authority, transfer his or her credibility to the "snitch" and thereby serve as a buffer to insulate the jury from the less-than-appealing aspects of the informant. Many of these reports do not even disclose the identity of the informants, listing them only as "confidential prison inmate #1" or the like. Oftentimes the government does not even known the identity of the informant. Accordingly, defendants are unable to attack the accuser's credibility on cross-examination and this unnamed and often unknown jail informant never has his lengthy criminal record and bias disclosed.

7. There are numerous decisions which have reached different conclusions on this issue. The following cases demonstrate the range of results reached by different courts when addressing the issue:

a. *United States v. Mills, et al.*, 446 F. Supp. 2d. 1115 (2006)

(1) *Crawford* applies to both the eligibility phase and the selection phase.

(2) "The Court finds that all of the alleged aggravating factors - statutory or non-statutory - are of constitutional

significance. Thus the jury's factfinding with respect to steps three and four should be accompanied by the same constitutional protection as those which accompany the trial of elements. . . . [T]he Court holds that *Crawford v. Washington*'s protections apply to any proof of any aggravating factor during the penalty phase of a proceeding under the FDPA."

b. *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007)

(1) *Crawford* does not apply to the selection phase due to the logic in *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079 (1949) which distinguishes between guilt and sentencing proceedings and emphasizes the sentencing authority's access to a wide body of information in the interest of individualized punishment.

(2) Dissent would apply *Crawford* and the Confrontation Clause to capital sentencing proceedings. Dissent argues this based on the fact that *Williams v. New York* is not a Sixth Amendment case and because the *Williams* Court did not distinguish between capital and ordinary sentencing. Later decisions have suggested that death is different.

c. *United States v. Jordan*, 357 F. Supp. 2d. 889 (E.D. Va. 2005)

(1) *Crawford* applies to the eligibility phase, but not the

selection phase.

(2) The selection phase, unlike the eligibility phase, is intended to be less structured.

d. *Summers v. State*, 148 P.3d 778 (Nev. 2006)

(1) When a capital penalty hearing is not bifurcated, the Confrontation Clause and Crawford must apply to the entire hearing.

(2) The right to confrontation applies at the eligibility phase, but not the selection phase, if the capital penalty hearing is bifurcated.

(3) The selection phase of a capital penalty hearing is analogous to a noncapital sentencing hearing.

e. *Proffitt v. Wainwright*, 685 F.2d 1227, 1254-1255 (11th Cir. 1982)

(1) Holding that the "right to cross-examine adverse witnesses applies to capital sentencing proceedings, at least where necessary to ensure the reliability of the witnesses' testimony."

8. See the following law review articles for a thorough analysis of the applicability of the Confrontation Clause to the penalty phase of a capital trial:

a. Penny J. White, *"He Said," "She Said," and Issues of Life and Death: The Right to Confrontation at Capital Sentencing*

Proceedings, 19 Regent U. L. Rev. 387 (2007)

(1) Author argues that the text of the Constitution, history, and constitutional developments mandate the right to confrontation in capital sentencing proceedings.

(2) The Supreme Court precedent in *Williams v. New York*, which is most often relied on by courts holding that the right of confrontation does not apply at capital sentencing, has been eviscerated by recent constitutional developments.

b. John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967 (2005)

(1) Author argues that the whole of the Sixth Amendment applies to the whole of a capital case.