

DEATH PENALTY REFORM ACT OF 2006

HEARING
BEFORE THE
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED NINTH CONGRESS

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DEATH PENALTY REFORM ACT OF 2006

THURSDAY, MARCH 30, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 11:47 a.m., in Room 2141, Rayburn House Office Building, the Hoonorable Howard Coble (Chairman of the Subcommittee) presiding.

Mr. COBLE. Good morning, ladies and gentlemen.

This is a departure from our normal regular order. There's a vote on the floor, and I am told there will be a subsequent vote imminently. And the Ranking Member, the distinguished gentleman from Virginia, I think Mr. Scott is on the floor now. If that bell does ring, I'm going to have to go.

But in the interest of time, since we have to clear this building at 1:30 for another hearing, I want to go ahead and give my opening statement now. And then, when Mr. Scott comes, we will hear from him, and then we will hear from our panel.

And I apologize to you all for that. But the best-laid plans of mice and men, you know, sometimes go awry. And today's no exception.

I welcome you all to this important hearing before the Subcommittee on Crime, Terrorism, and Homeland Security to examine H.R. 5040, the "Death Penalty Reform Act of 2006," introduced by the distinguished gentleman from Texas, Mr. Gohmert.

As I have said on previous occasions, the death penalty is the severest form of punishment in our country, and we must be vigilant in ensuring that it's meted out against only the truly guilty. It is imperative that we implement common sense procedures to ensure proper and fair application of the death penalty.

The Death Penalty Reform Act proposes a variety of procedural reforms to improve the Federal capital system. In response to the Supreme Court's decision in *Atkins v. Virginia*, which prohibited the execution of a mentally retarded offender as unconstitutional, the bill implements procedures for the determination of whether a defendant is, in fact, mentally retarded.

Although the Federal system prohibited such executions prior to *Atkins*, the Federal capital statutes did not have any specific statutes addressing how such a determination should be made or procedural rules for the handling of these issues. The bill prohibits capital punishment for mentally retarded defendants and contains specific notice of evidentiary procedures for handling such claims.

The bill furthermore enhances the efficiency and fairness of capital sentencing proceedings by providing additional notice and preparation time and improving jury selection and retention procedures.

I believe all these procedural reforms will improve the Federal death penalty system and provide adequate safeguards to ensure accurate and uniform application of our laws. I commend and thank Mr. Gohmert for his dedication and hard work on this critically important issue, and I look forward to hearing from today's witnesses.

And I think, for the moment, we will just suspend. You all rest easy, if you will. And I, again, apologize to you for this. It's really no one's fault. It's just the way the system sometimes works, and we can't control when these votes are called upon.

So you all rest easy for the moment, and we will proceed, hopefully, imminently. Thank you.

[Pause.]

Mr. COBLE. Ladies and gentlemen, in the interest of time, if you would, the Subcommittee swears in all of our witnesses appearing before it. So, to save even more time, if you all would please rise and raise your respective right hands?

[Witnesses sworn.]

Mr. COBLE. Let the record—you may be seated, and let the record show that the witnesses all answered in the affirmative. And I thank you for that. So that's a little bit more time saved.

And I will return imminently.

[Recess.]

Mr. SCOTT. Mr. Coble is on the way back and asked me to give my statement. He indicated that he's sworn in the witnesses.

So I'd like to thank Mr. Chairman, and I'd like to thank you for holding the hearing on H.R. 5040, the "Death Penalty Reform Act of 2006." I'm disappointed, however, that we're considering yet another bill, this Congress, that expands the opportunities to seek the Federal death penalty.

We recently expanded the death penalty applications in the USA PATRIOT Act renewal and the gangbusters bill and the court security bill, the sex offenders bill, and others. And here we go again, in a bill touted as a death penalty procedures bill, but it further expands the instances in which the death penalty can be sought.

There's still no credible evidence that the death penalty, particularly the Federal death penalty, deters murders or other crimes or otherwise promotes the general interests of the United States. Indeed, every time we expand the situations in which the death penalty can be applied, we restrict further our ability to extradite from other countries to this country terrorists and other killers of Americans.

Moreover, there's clear evidence that the Federal death penalty is disproportionately applied to African Americans and other minorities. And despite former Attorney General Reno's departing decision to have the Department of Justice examine the disturbing prevalence of minorities among those selected for the death penalty prosecutions and sentenced to death, no comprehensive and scientific examination has been made.

And although we passed last Congress the Innocence Protection Act, which enacted a set of standards to protect and support innocents in death penalty cases, we still have not provided the funding necessary to fully implement the law.

While the impact of the law on the Federal death penalty is limited, the death penalty—Federal death penalty practice does and should serve as a model for the States. Thus, we should not be expanding the application of any death penalty provisions before we provide the funding necessary to fully protect and support innocents.

This bill is problematic, and it's proposed procedural reforms as well. One cynical evaluation of the bill suggested that it represents DOJ's attempt to legislate victory on every point on which it has lost in court in recent years.

By adding more aggravating factors to a long list already in the statute and removing one of the few existing mitigating factors, DOJ further stacks the deck in favor of finding something which will hand down an argument for the death penalty.

Adding obstruction of justice aggravating factor in the way it is now worded would allow particularly broad application of an easily charged factor. We see from the current Moussaoui death penalty case over in Alexandria that the Department of Justice is willing to go to great lengths to argue for a death penalty where it wishes to do so.

One reason for expanding opportunities to pursue the death penalty is simply to ensure the impaneling of more death eligible juries. Death eligible juries necessarily are more focused on and inclined toward more severe penalties and more likely to convict than other juries.

So I'm concerned that the bill's proposed structure—excuse me. I'm concerned with the bill's proposal to structure procedures for the determination of whether a defendant is mentally retarded and, therefore, not subject to the death penalty, pursuant to the *Atkins* case.

First, the bill narrowly structures the definition of "mental retardation," requiring that all of several factors must be shown, or you can be put to death. And rather than have a pre-trial determination of whether a defendant is mentally retarded, the bill requires that a defendant be first tried by a death eligible jury and then found to be guilty and otherwise eligible for death. Then they would determine whether or not the defendant was mentally retarded. This virtually assures that a defendant's mental illness is not a factor until the jury has made up its mind that the defendant should die.

Further, I cannot believe—and I can't believe that on the basis of fairness to the prosecution, we would consider a provision that turns the traditional burden of proof on its head. That's what we would do if we would require a defendant to admit up front that he committed a crime under duress or extreme emotional distress in order to submit this as a mitigating factor during sentencing.

Yet another difficulty with the bill is its proposal to impanel less than 12 jurors to re-sentence an offender where the first jury deadlocks.

There can be no purpose for such drastic change in the time-honored criminal procedures other than to ensure that it would be easier to obtain the verdict of death. Opponents of this approach would certainly not be promoting it if they thought that death would be less likely.

While I understand Department of Justice's desire to win and its efforts to acquire more death penalties, I don't understand why Congress should want to further stack the deck in favor of prosecution in this manner.

Mr. Chairman, I can go on with other problems with the bill, but we'll leave some—we'll leave that to the witnesses to point out some of the pros and cons. And I appreciate you, again, holding this hearing.

Mr. COBLE. I thank you, Mr. Scott.

And again, the panelists and Members in the audience, I apologize for the delay. I want you all to hold Mr. Scott and me harmless for this.

When the trains run on time, we take credit for that. When the trains are belated, we discharge that elsewhere. But this was—we did not—we can't control when the time is called for votes.

I want to reiterate what I said to you earlier. We must clear this room at 1:30 because of a subsequent hearing that is scheduled herewith.

Let me introduce the witnesses. Our first witness is Ms. Margaret Griffey, chief of the Capital Case Unit, in the Criminal Division of DOJ. Prior to assuming this role, Ms. Griffey served for 5 years as chief of the Capital Litigation Division at the Texas attorney general and as assistant attorney general in that division. She's also argued two cases before the Supreme Court.

Ms. Griffey received her J.D. from the University of Texas and a master's degree from Stanford University.

Our second witness is Mr. Robert Steinbuch, professor of law at the University of Arkansas at Little Rock. Professor Steinbuch has held numerous positions in Government, including counsel to the Senate Judiciary Committee, trial attorney for the Justice Department, and deputy senior counsel to the commissioner of the Internal Revenue Service.

He earned his undergraduate and master's degrees from the University of Pennsylvania and his J.D. from Columbia University.

Professor, is the School of Law not at Fayetteville?

Mr. STEINBUCH. There are two schools of law. One in Little Rock and then one in northwestern—

Mr. COBLE. Okay. I wasn't sure about that. Thank you, sir.

Mr. STEINBUCH. Sure.

Mr. COBLE. Our third witness is Mr. Kent Scheidegger, legal director for the Criminal Justice Legal Foundation. Mr. Scheidegger has written over 100 briefs in cases in the United States Supreme Court. His articles on criminal and constitutional law have been published in law reviews, national legal publications, and congressional reports.

Previously, Mr. Scheidegger served for 6 years in the United States Air Force as a nuclear research officer. He was awarded his undergraduate degree from New Mexico State University and a law degree from the University of the Pacific.

Our final witness today is Mr. David Bruck, clinical professor of law at the Washington & Lee School of Law and director of the Virginia Capital Case Clearinghouse. Now, Professor, I know of at least two Members of our body up here who are W&L law grads, and perhaps more than those two.

Currently, Professor Bruck serves as one of four part-time Federal death penalty resource counsel to the Federal defender system Nation wide. Previously, he served as a county and State public defender in South Carolina and was awarded his undergraduate degree from Harvard and his J.D. from the University of South Carolina at Columbia.

Good to have you all with us, folks. We adhere to the 5-minute rule here. We are not totally inflexible about that, but when you see the amber light appear on the panel before you, that is your warning that you have 1 minute.

And when the red light illuminates, the ice on which you are skating becomes ever so thin. So if you will try to wrap up within that 5 minutes, we would be appreciative.

And Ms. Griffey, we'll start with you.

TESTIMONY OF MARGARET P. GRIFFEY, CHIEF OF THE CAPITAL CASE UNIT, CRIMINAL DIVISION, UNITED STATES DEPARTMENT OF JUSTICE

Ms. GRIFFEY. Mr. Chairman, Ranking Member Scott, and Members of the Subcommittee, thank you for the opportunity to appear before you today and for inviting the Department of Justice to testify about this issue of great importance.

The department applauds Congress for passing the recent improvements to death penalty procedures as part of the PATRIOT Act reauthorization, and particularly the provisions combining the title 21 procedures with those in title 18. But I think we can all agree that there is more to be done in this area.

It is our shared goal to ensure that the death penalty is administered in a fair and consistent manner across the country. In the department's view, the Death Penalty Reform Act of 2006 addresses several outstanding issues that have arisen due to recent court decisions and the continuing evolution of the death penalty practice across the country.

As we are all aware, certain court decisions have created the potential for either uncertainty about or the uneven application of death penalty procedures, and the department supports this effort to provide clarity and consistency in this critical area.

There are few greater responsibilities of Congress or of the Department of Justice than ensuring that there is a Federal death penalty procedure in place that comports with all constitutional requirements, and we should act now to fulfill that responsibility.

At the outset, however, I would like to respond to Mr. Bruck's criticism of the length of time between the indictment of a capital case and a decision by the attorney general whether to seek the death penalty. I must say that I'm surprised that Mr. Bruck would rush that decision or have it made on less than full information.

An indictment represents a grand jury's determination that there exists probable cause to believe that the defendant committed the charged offense, hardly an adequate basis upon which to decide

whether to seek the death penalty. The period between indictment and trial allows additional time for trial preparation, particularly for defense counsel who normally are the only—are only appointed following indictment.

Following indictment, if the U.S. attorney is considering whether to seek the death penalty, he or she affords the defendant's counsel the opportunity to present the case against seeking to the U.S. attorney. When the case is forwarded to the Department of Justice, if the Committee is considering recommending that the death penalty be sought or simply needs more factual development, the defendant will again be afforded the opportunity to present the case against seeking.

Defense counsel routinely ask for extended periods to prepare their case, ranging from several months to a year. Again, I want to emphasize that the department considers the death penalty decisions to be among the most important, if not the most important decisions it undertakes. Nothing less than the full and careful review should precede a decision to seek the death penalty, and I am surprised that Mr. Bruck would have it otherwise.

In *Atkins v. Virginia*, the Supreme Court held that the execution of the mentally retarded offenders violates the eighth amendment. Although the Federal capital sentencing scheme already prohibited the execution of mentally retarded offenders, it did not provide a procedure for determining whether a defendant's mental disability is sufficiently severe to foreclose execution.

The Death Penalty Reform Act of 2006 responds to the Supreme Court's decision in *Atkins* by providing a procedure for a capital sentencing jury to determine whether a defendant's mental retardation forecloses a death sentence.

The legislation is consistent with all prevailing definitions of mental retardation. A determination of mental retardation would require the jury to find that, since some point in time prior to the age of 18, the defendant has had both an IQ of 70 or less and deficits in adaptive reasoning. The statute incorporates the limitations in adaptive functioning identified by the Supreme Court in *Atkins*.

Mr. Bruck, however, would have us substitute the limitations in adaptive functioning, including in clinical definitions. Those definitions reflect a behavioral focus of diagnosticians, which is to identify an individual's need for services and support.

In contrast, the focus of a mental retardation inquiry in the capital sentencing context is on the defendant's culpability. The diminished capacities identified by the Supreme Court reflect characteristics that, in the court's view, render a defendant less culpable.

It must be recognized that a criminal defendant may have poor home living skills, engage little in community activities, and exhibit poor self-care skills for reasons independent of his mental capacity. There is no reason to exclude from a certain level of criminal responsibility someone who exhibits poor socialization skills if he or she is capable of running a complex criminal enterprise.

The Death Penalty Reform Act would also establish a punishment phase procedure for determining mental retardation. Mr. Bruck also takes issue with this provision, claiming that it's fair to the defendant and less wasteful of resources for the determination to be made pre-trial.

What he fails to recognize in his written testimony, but what I'm sure he would assert were he representing a defendant for whom there had been a pre-trial determination that the defendant was not mentally retarded, is that the Constitution likely requires that such a defendant be afforded an opportunity for the jury to determine his mental retardation.

In other words, Mr. Bruck seeks to have two bites of the apple or wants to have each defendant afforded two opportunities to establish his mental retardation. Either that, or what he proposes is most assuredly a constitutionally infirm procedure by resolving the issue pre-trial.

I look forward to questions later. Thank you.

[The prepared statement of Ms. Griffey follows.]

PREPARED STATEMENT OF MARGARET P. GRIFFEY



Department of Justice

STATEMENT

OF

MARGARET P. GRIFFEY
CHIEF, CAPITAL CASE UNIT
CRIMINAL DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

H.R. ____, THE "DEATH PENALTY REFORM ACT OF 2006"

PRESENTED ON

MARCH 30, 2006

Introduction

Good afternoon Mr. Chairman, Ranking Member Scott, and members of the Subcommittee. Thank you for the opportunity to appear before you today, and for inviting the Department of Justice to testify about this issue of great importance. The Department applauds Congress for passing the recent improvements to death penalty procedures as part of Patriot Act reauthorization, particularly the provisions combining the Title 21 procedures with those in Title 18, but I think we can all agree that there is more to do in this area. It is our shared goal to ensure that the death penalty is administered in a fair and consistent manner across the country. In the Department's view, the Death Penalty Reform Act of 2006 addresses several of the outstanding issues that have arisen due to recent court decisions and the continuing evolution of death penalty practice across the country. The Department of Justice supports each of those provisions, and I will address them in turn.

Amendments to Death Penalty Procedures

The Department of Justice strongly supports the Death Penalty Reform Act's amendments to existing death penalty procedures. As we are all aware, certain court decisions have created the potential for either uncertainty about, or uneven application of, death penalty procedures, and

the Department supports this effort to provide clarity and consistency in this critical area. There are few greater responsibilities of Congress or the Department of Justice than ensuring that there is a federal death penalty procedure in place that comports with all constitutional requirements, and we should act now to fulfill that responsibility.

Atkins

First and foremost, this legislation provides an appropriate set of procedures to be applied across the country to ensure that individuals who are mentally retarded are not executed. In *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), the Supreme Court held that the execution of mentally retarded offenders violates the Eighth Amendment. Although the federal capital-sentencing scheme already prohibited the execution of mentally retarded offenders, it did not provide a procedure for determining whether a defendant's mental disability is sufficiently severe to foreclose execution. The Death Penalty Reform Act of 2006 responds to the Supreme Court's decision in *Atkins* by providing a procedure for a capital-sentencing jury to determine whether a defendant's mental retardation forecloses a death sentence.

The procedures set forth in this bill provide that the burden would be on the defendant to establish to a jury (not a judge) his mental retardation by

a preponderance of the evidence. The bill would not require a showing of clear or convincing evidence or proof beyond a reasonable doubt on this issue. The Death Penalty Reform Act also would impose a common sense requirement that the defendant properly provide notice of his or her intention to raise a mental retardation defense. The legislation is consistent with all prevailing definitions of mental retardation, in that a determination of mental retardation would require the jury to find that, since some point in time prior to the age of 18, the defendant has had both an IQ of 70 or less and deficits in adaptive functioning. The statute therefore would incorporate the limitations in adaptive functioning feature identified by the Supreme Court in *Atkins*.

At the sentencing phase, the jury would determine first whether a defendant is eligible for the death penalty by finding the existence of alleged statutory aggravating factors beyond a reasonable doubt. At that point, the jury would determine whether the defendant is mentally retarded. The issue of mental retardation would be addressed, therefore, only upon a prior finding of a statutory aggravating factor. Finally, if the jury determines that the defendant is not mentally retarded, the jury would determine the existence of any mitigating factors established by a preponderance of the evidence and proceed to determine sentence.

The Department believes that these provisions address a great need in the death penalty area by providing clear procedures and standards to apply equally across jurisdictions. The Department further believes that the proposed solution satisfies all applicable constitutional requirements.

* * *

The Death Penalty Reform Act of 2006 also includes provisions that eliminate uncertainty about when the United States must file its intention to seek the death penalty and under what circumstances a defendant is statutorily entitled to a second appointed counsel who is learned in the law. The Department supports both sets of amendments.

Timely filing of a notice of intent to seek the death penalty

The legislation before the Committee would revise section 3593(a) to reflect more accurately the purpose of, and identify the consequences of a failure to satisfy, the requirement that a notice of intent to seek the death penalty be filed a reasonable time before trial. All agree that the defendant must be put on notice in a timely manner of the government's intention to seek the death penalty. Unfortunately, in *United States v. Ferebe*, 332 F.3d 722 (4th Cir. 2003), the Fourth Circuit concluded that the determination of whether a notice of intent has been filed in a timely manner must be made

with respect to the trial date in effect at the time the notice is filed and without regard to the additional preparation and issues resulting from a death penalty prosecution. In other words, in the Fourth Circuit, an actual trial date cannot be continued to allow the defense adequate time to prepare for the capital-punishment hearing. Particularly in those courts with what is known as a "rocket docket," the *Ferebe* rule could result in the dismissal of a death notice. In some instances, in order not to forfeit the ability to seek a death sentence, the Department has been forced to file a "protective death notice." A "protective death notice" is one that is filed in a case before the case has been fully reviewed and the Attorney General has made a final decision whether or not to seek the death penalty. In cases in which the Attorney General decides not to seek the death penalty, the protective notice is then withdrawn.

The Department of Justice is committed to the goal of the consistent, fair and even-handed application of the death penalty, regardless of geography and local sentiment. The decision whether it is appropriate to seek the death penalty involves awesome responsibilities and consequences. The *Ferebe* court's understanding of the existing section 3593(a) provisions favors expedience over considered decision-making, and when a considered decision cannot be reached in a limited amount of time, it forces the

government to choose between filing a protective death notice or abandoning the goal of consistency and evenhandedness in the application of the death penalty.

The Department therefore supports these provisions, which are aimed at ensuring that the government has adequate time to consider whether to seek the death penalty based on the facts and circumstances of each individual case.

*Appointment of second counsel upon the filing of
a notice of intent to seek the death penalty.*

The bill would also limit the *mandatory* appointment of counsel learned in the law applicable to capital cases to those cases in which the government has filed a notice of intent to seek the death penalty. The courts would retain, however, the discretion to appoint capital counsel or other experts before a notice of intent to seek the death penalty is filed. The proposed amendment to 18 U.S.C. § 3005 would thereby address two concerns. Because there is no procedural difference between the trial of a non-capital offense and the non-death penalty trial of a capital offense, it is clear that the appointment of learned capital counsel was intended to provide a defendant with the assistance of a second counsel in a death penalty prosecution. Despite the clear intent to provide additional assistance to defendants in death penalty prosecutions, the Fourth Circuit has construed

the existing provisions of section 3005 in such a way as to require a trial court to retain capital counsel through to the conclusion of the trial -- even in those cases in which the Attorney General decides not to seek the death penalty.¹ This amendment would eliminate the unnecessary expenditure of resources in this manner.

Second, the courts have not infrequently complained about the expenditure of resources in providing expert capital counsel in cases in which, in a court's view, a death penalty prosecution is unlikely. Currently, the right to second, learned capital counsel adheres upon indictment for a capital offense. Courts outside the Fourth Circuit have construed this to require the assistance of expert counsel only until there is a decision not to seek the death penalty.² As previously noted, trial judges would retain discretion to appoint learned counsel and other experts even prior to the filing of a notice of intent to seek the death penalty if it appears that such assistance is necessary or appropriate.

Given the principles animating Congress's decision to provide a statutory right to a learned second counsel, and the costs of misguided application of section 3005, the Department supports this clarifying amendment.

¹ *United States v. Boone*, 245 F.3d 352 (4th Cir. 2004).

² *United States v. Waggoner*, 339 F.3d 915, 919 (9th Cir. 2003); see also *United States v. Grimes*, 142 F.3d 1342, 1347 (11th Cir. 1998); *United States v. Weddell*, 567 F.2d 767, 770 (8th Cir. 1977).

Modification of statutory provisions for executions

Finally, the bill would modify the statutory provisions relating to the carrying out of executions to allow them to be implemented in the federal facilities at Terre Haute, Indiana. Prior to the establishment of the federal death row in Terre Haute, and the building of an execution facility there, it was necessary for federal death-sentenced inmates to be housed in state facilities and, it was anticipated, executed under state procedures. Existing statutes reflect this practice and expectation. As it turns out, the federal facility was in place prior to the first federal execution. There is therefore no reason to continue to provide courts with the option of designating a state facility or method of execution as applicable in a particular case, particularly as this state of affairs can create uncertainty. Consequently, under the modification, the federal government will carry out the execution of those prisoners sentenced to death in federal courts.

Additional Statutory Aggravators

The death penalty is and should be reserved for appropriate circumstances and the “worst of the worst” offenders. Examples of appropriate circumstances include those in which individuals put multiple lives at risk or threaten the integrity of our judicial system. Currently,

however, these circumstances are not always death-penalty eligible. The Death Penalty Reform Act of 2006 would help remedy this situation.

The current language of Section 3592 identifies as a statutory aggravating factor that the death occurred during the commission of another crime and lists the other crimes or offenses that trigger application of the factor. The Death Penalty Reform Act of 2006 would expand the listed offenses upon which to base the relevant statutory aggravating factor to include three civil rights offenses: conspiracy against rights resulting in death under 18 U.S.C. § 241, interference with federally protected activities resulting in death under 18 U.S.C. § 245, and interference with religious exercise resulting in death under 18 U.S.C. § 247. Moreover, this legislation would add two witness-related offenses, 18 U.S.C. § 1512 (tampering with a witness, victim, or an informant) and 18 U.S.C. § 1513 (retaliating against a witness, victim, or an informant) -- as well as 18 U.S.C. § 2339D (terrorist offenses resulting in death). Sections 1512 and 1513 of title 18 encompass the murder of a law enforcement informant, or a witness or cooperator in a federal or state prosecution when such person is killed because of his or her status as such. Violations of section 245 include deprivations of civil rights based on class, race, color, religion, or national origin and riotous action against businesses. Because of the flagrant nature of these offenses and the

heightened interest of the government in deterring such action, the Department of Justice supports proposals to associate a statutory aggravating factor with each.

The Department also supports the bill's clarification of the application of the aggravating factor in section 3592 (c)(2) ("previous conviction of a violent felony involving a firearm"). As currently worded, the factor is susceptible to two interpretations, which could undermine the clear and consistent application of the factor. Under one interpretation, a prior conviction for an offense involving a firearm could constitute an aggravating factor for all capital offenses *except* those involving firearms, an illogical interpretation considering that a defendant's prior firearm conviction may be most relevant when that same defendant's later use of a firearm has resulted in death. The other interpretation would only prohibit basing the aggravating factor on the immediately-prior section 924(j) conviction for which the defendant faces the death penalty. The amendment clarifies that the latter is the correct application of this factor.

In addition, the Department supports amending the pecuniary-gain aggravating factor (section 3592(c)(8)) to eliminate the current uneven and illogical application of that factor. As now interpreted by the courts, the pecuniary-gain aggravating factor applies when the murder, as viewed by the

defendant, is necessary to initially secure the pecuniary gain, but does not apply when committed to maintain possession of a stolen gain.³ Thus, for example, courts have held the factor to be applicable when a carjacking victim is killed at a dark intersection before the vehicle is taken but not applicable if the carjacking occurs in a public setting and the victim is taken a few miles away before he is killed.⁴ The amendment in this section proposes to fix the inconsistent application of the pecuniary-gain aggravator by making it applicable to killings committed “in order to retain illegal possession” -- not just to secure possession in the first instance -- of the item of pecuniary gain.

The Department further supports the addition of a new statutory aggravator related to obstruction of justice. Protecting the integrity of the justice system is a paramount goal for the Department. The proposed section 3592(c)(17) aggravator would apply if the defendant engaged in conduct, which resulted in harm or a threat of harm to another person, intending to obstruct the investigation or prosecution of any offense. This aggravator would apply to criminal conduct that is not encompassed by any other current or proposed statutory aggravator. For example, neither section 3592(c)(14)(D) nor the proposal related to section 3592(c)(1) would cover

³ *United States v. Chanthadara*, 230 F.3d 1237, 1263 (10th Cir. 2000).

⁴ Compare *United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002) with *United States v. Barnette*, 390 F.3d 775 (4th Cir. 2004).

the murder of a jury member, or a jury member's family. The obstruction of justice aggravator would apply more generally to the criminal justice system to encompass harm or threat of harm to other parties that the government also maintains a heightened interest in protecting.

Conclusion

Again, the Department commends this Committee for holding this hearing and taking the lead in finding legislative solutions to lingering concerns about death penalty procedures. The Department of Justice fully understands the gravity of the issues addressed by the Death Penalty Reform Act of 2006 and supports the approach taken in that legislation. In the Department's view, it goes a long way toward ensuring that the death penalty is available in appropriate circumstances and is applied consistently across the country.

Thank you again for the opportunity to testify. I have tried to focus on those issues of the most importance to the Department of Justice, so I have not addressed each and every provision of the Death Penalty Reform Act of 2006. I look forward to your questions.

Mr. COBLE. I thank you, Ms. Griffey.

And the Chair will note that Professor Bruck smiled very warmly. [Laughter.]

So, if facial responses are any indication, Ms. Griffey, I think the Professor will at least disagree agreeably.

Thank you, Ms. Griffey.

I don't mean to put words in your mouth, Professor. We'll hear from you subsequently.

Mr. Steinbuch, good to have you with us.

And thank you, Ms. Griffey.

**TESTIMONY OF ROBERT STEINBUCH, PROFESSOR OF LAW,
UNIVERSITY OF ARKANSAS**

Mr. STEINBUCH. Thank you, Mr. Chairman, Mr. Ranking Member. It's an honor and a pleasure to be here.

I just want to touch on three parts of this bill. First, dealing with the interference with the sound administration of justice. It's imperative that we have statutory aggravators that deal with this issue. We certainly need an aggravator for witness tampering. We certainly need an aggravator for jury tampering. And we need to adjust the aggravator regarding pecuniary gain so that killing a witness to hide the pecuniary gain satisfies that aggravator's standards.

The most important part of our justice system is to have legitimacy and continuity. These are interfered when criminals know that they can kill witnesses and get away with it. This is the highest order of statutory—should be the highest order of statutory aggravator, and its absence speaks loudly and its correction is needed.

Secondly, in the existing statutory scheme, the firearm aggravator needs to be adjusted. Currently, it is applied inconsistently. There is an anomaly in the legislation that allows it to be applied in certain death penalty cases, yet not in others. There doesn't seem to be any rational—rationale, excuse me, for this. And that needs to be made—that needs to be corrected.

Finally, I would like to talk about qualifying death penalty juries. Some case law has developed where it has been suggested that death qualifying juries can take place after the liability phase of the trial. Supreme Court precedent has long well defined the boundaries of jury qualification in death penalty cases. Jurors may not be hanging juries, and jurors must be willing to impose the legally mandated sentence if appropriate.

Failing to qualify a jury beforehand makes the system inefficient. Why would we not want to qualify a jury in the beginning of a trial regarding death penalty? Well, some have suggested that jurors who would never vote for the ultimate sentence are also less likely to convict defendants. We can draw two possible conclusions from this.

One, perhaps anti-death penalty advocates might be trying to circumvent the death penalty through increased acquittals. This, clearly, is inappropriate. So this does not serve as an adequate justification for not death qualifying juries at the beginning of a trial.

Some suggest that the greater statistical likelihood of conviction by a death qualified jury demonstrates an anti-defendant bias. I suggest otherwise. I believe that this is an improper conclusion.

This statistical difference, if it exists—and it may, indeed, exist—is not surprising. Jurors unwilling to apply the law to sentencing should equally be expected not to apply the law properly during the liability phase of a trial.

Accordingly, this bill corrects the three infirmities that I’ve discussed, and I support it.

Thank you.

[The prepared statement of Mr. Steinbuch follows:]

PREPARED STATEMENT OF ROBERT STEINBUCH

Mr. Chairman, thank you for inviting me to testify before the United States House of Representatives Committee on the Judiciary on these important issues of criminal law. I would like to discuss a few critical substantive issues that are of concern.

I. INTERFERING WITH THE SOUND ADMINISTRATION OF JUSTICE

In order for our justice system to work effectively and with legitimacy, deliberate wrongdoing to procure the unavailability of a witness or other participant in the judicial and law-enforcement system must not be tolerated. Such behavior, as the United States Court of Appeals for the Second Circuit has said, “strikes at the heart of the system of justice itself.” *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), *cert. denied*, 467 U.S. 1204 (1984). As such, tampering with, or retaliating against, a witness, victim, or an informant, resulting in death should be the archetypal statutory aggravating factor. The murder of a law enforcement informant, or a witness or cooperator in a federal or state prosecution because of his/her status as such is not only abhorrent in and of itself, but sends the message to criminals that sufficient wrongdoing could allow them to escape punishment. Similarly, the murder of a jury member or a jury member’s family creates an incredible chilling effect on the willingness of honest citizens to perform their civic duty in the most important cases before our courts.

The potential beneficial outcome in the eyes of criminals of avoiding criminal liability by killing witnesses and other relevant actors in the legal system creates a positive incentive for criminals to pursue this risky and socially devastating behavior. In order to create a balancing disincentive for such behavior, the costs to criminals must be significant. Because of the flagrant nature of these offenses, and the heightened interest of the government in deterring such action, adding such behavior to the category of the statutory aggravating factors is indeed appropriate and modest. The very same rationale led to the recent change in the Federal Rules of Evidence to permit the admission of hearsay statements because the witness was made unavailable as a result of this type of criminal wrongdoing. FRE 804(b)(6); *see also United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997). Criminals must be sent the message that interfering with the judicial system with violence will result in greater punishment, not less. The proposed statutory amendments addressing this concern are well needed and appropriate.

Moreover, for the very same reasons, the proposed statutory amendment regarding the pecuniary gain aggravator is well needed. Currently, section 3592(c)(8) provides that the pecuniary gain aggravator exists when “[t]he defendant committed the offense as consideration for the receipt, or in the expectation of receipt, of anything of pecuniary value.” 18 U.S.C. § 3592(c)(8). Courts have interpreted this in a manner that precludes the government from proving this factor in cases where the murder is committed after the pecuniary value has been received.

In *United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002), defendant gang members drove around in search of potential carjacking victims, planning to, among other things, acquire the victims Personal Identification Number (“PIN”) for Automatic Teller Machine (“ATM”) transactions. The gang members eventually ended up at a local convenience store where they encountered two youth ministers from Iowa. After successfully soliciting a ride, the gang members forced the couple at gunpoint to drive to an isolated location, where they robbed the couple of wallets and jewelry, acquired the couple’s ATM PIN, and then forced the couple into the trunk of the car. The gang members then attempted to withdraw money from the ATM, drove the couple to an isolated spot, shot them in the head and burned the car. The court

held that evidence in the case was insufficient to support the pecuniary gain aggravator because “the application of the pecuniary gain aggravating factor is limited to situations where pecuniary gain is expected to follow as a direct result of the [murder].” *Id.* at 483 (quoting *United States v. Chanthadara*, 230 F.3d 1237, 1263 (10th Cir. 2000)). The court reasoned that the motivation for the robbery was pecuniary gain while the motivation for the murder, in contrast, was to prevent the robbery from being reported. *Id.* While this seems accurate, the latter motivation is by far the more insidious. It demonstrates not only nefarious criminal behavior but because it is a manifestation of an attempt to manipulate our system of justice to conceal the former to avoid criminal liability. The latter behavior is manifestly more egregious, not less. As such, it must have greater, or at the minimum, equivalent, negative consequences relative to the former. The interpretation of the pecuniary gain aggravator demonstrated in *Bernard*, unfortunately, draws completely the opposite conclusion.

To illustrate the perverse outcome under existing caselaw, we need only compare *Bernard* with *United States v. Barnette*, 390 F.3d 775 (4th Cir. 2004). In *Barnette*, the defendant sought to commit a carjacking in order to secure transportation from Charlotte, N.C. to Roanoke, VA for the purposes of killing his estranged ex-girlfriend. The defendant hid in the bushes at a road intersection, waited for a car to stop, walked up to the window with a sawed-off shot gun, forced the driver from the vehicle, shot and killed the driver on the side of the road, and left with the vehicle. *Id.* at 781. The Fourth Circuit held that the pecuniary gain aggravator was applicable because the defendant committed the murder in order to gain the transportation. *Id.* at 785. In comparing the criminal conduct in *Barnette* with that in *Bernard*, the greater culpability, in fact, rests with the Defendant in *Bernard*. Yet, the aggravator was applied only in *Barnette*. In *Bernard*, the attack is equally upon society and the victim. In *Barnette*, Society is undoubtedly greatly impacted, but derivatively from the victim. The courts’ approach needs to be corrected.

II. FIREARM AGGRAVATOR

Current law provides another anomaly by barring the government from proving the firearm aggravating factor in cases where the death sentence is sought based on the commission of a crime of violence or drug trafficking crime while carrying or possessing a firearm that causes death. In seeking the death sentence for such a crime, the government is barred from proving as an aggravating factor that “the defendant has previously been convicted of a Federal or State offense punishable by a term or imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm against another person.” 18 U.S.C. § 3592(c)(2). However, if a defendant commits an offense punishable by death under 21 U.S.C. § 848(e), for example, murder while working in furtherance of a continuing criminal enterprise, the firearm aggravator is available.

Thus, under current law, if a defendant previously committed a violent crime using a firearm and served a two-year term in state prison and after release commits an offense punishable by death under section 924(c) or (j), he will not be subject to the firearm aggravator. But, if a defendant previously committed a violent crime using a firearm and served a two-year term in state prison and after release commits an offense punishable by death under 21 U.S.C. § 848(e), the firearm aggravator is applicable. If both defendants have satisfied the capital eligibility factors of age and intent, it is unclear why the previous state firearm conviction, under 3592(c)(2), can be used to prove a statutory aggravating factor in one case but not the other. Both have committed a capital eligible crime, and both have a similar previous criminal conviction. The purpose of this restriction is unclear and its application is uneven. It also seems to cut against the policy of deterring the use of firearms in conjunction with violent criminal behavior. This anomaly needs to be rationalized.

III. JURY QUALIFICATION

In *United States v. Green*, 407 F.3d 434, 444 (1st Cir. 2005), the First Circuit refused to issue an opinion regarding the district court’s practice of delaying death qualification of the jury until after the jury had found the defendant guilty of a capital crime. In its opinion, the district court reasoned that “[i]f death-qualified jurors can be found among the jurors from the guilt phase, the terms of the statute [under § 3593(b)(1)] will be followed. If none can be found, the jurors will be discharged for “good cause” shown, and the statute will still be followed [under § 3593(b)(2)(C)].” *United States v. Green*, 324 F.Supp.2d 311, 331 (D.Mass. 2004). This interpretation of § 3593 is contrary to the intent of the statute and misapplies the “good cause” provision.

Section 3593(b) provides that, in general, the sentencing hearing should be conducted before the jury that determined the defendant's guilt, unless one of four exceptions exist that justify impaneling a new jury. See 18 U.S.C. § 3593(b)(1)–(2). One of the four exceptions relates to situations where the guilt-phase jury has been discharged for “good cause.” 18 U.S.C. § 3593(b)(2)(C). The intent behind the “good cause” provision centers on addressing situations where an event or circumstance, which occurs after the defendant's guilt has been determined, renders the guilt-phase jury unable to serve during the penalty phase. See *Jones v. United States*, 527 U.S. 373, 418 (Ginsburg, J., dissenting) (opining that “[d]ischarge for ‘good cause’ under § 3593(b)(2)(C) . . . is most reasonably read to cover guilt-phase . . . juror disqualification due to, e.g., exposure to prejudicial extrinsic information or illness”); see also *Green*, 407 F.3d at 441. When combined with the structure of the statute, this supports a conclusion that Congress intended, in § 3593(b), a default rule—that the jury that determined the defendant's guilt also determines the sentence, barring some unavoidable circumstance making it impracticable or unfair. See *Green*, 407 F.3d at 441–442. Thus, the trial jury should be treated as the sentencing jury, and, as such, the trial jury must be qualified at the outset of the trial to be able to fulfill its obligations in the sentencing phase. In addition to constituting a strained reading of § 3593, a contrary approach, as suggested by the trial court in *Green*, is illogical and wastes time and resources.

Indeed, pre-qualifying juries is consistent with well-established Supreme Court precedent. In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Court set forth the important boundaries for juries in death-penalty cases. As such, the Court properly held that the 6th Amendment protects a defendant from a predetermined “hanging jury.” Equally, the Court in *Witherspoon* held that prospective jurors are excludable if they would vote against the death penalty irrespective of guilt and culpability, or their personal views on the death penalty prevented them from making an unbiased decision regarding guilt. Thus, prospective jurors in death-penalty cases, said the Court, should fit within the extremes and be appropriately open to fairly evaluating the facts and sentencing the defendant pursuant to the controlling law, if found guilty. *Witherspoon* remains good law and has been reaffirmed in *Adams v. Texas*, 448 U.S. 38 (1980). In *Wainwright v. Witt*, 469 U.S. 412 (1985) and *Lockhart v. McCree*, 476 U.S. 162 (1986), then Chief Justice Rehnquist further refined the previous caselaw on qualifying juries for death-penalty trials. And, in *Morgan v. Illinois*, 504 U.S. 719 (1992), the Supreme Court provided the same protection on the opposite end of the spectrum, by reaffirming the notion that jurors who would automatically vote for the death penalty irrespective of the facts are equally as objectionable. These cases clearly demonstrate the appropriateness and Constitutional validity of qualifying juries prior to trial. The qualification of the jury on the death penalty should occur at the outset of the capital trial and the aberrant caselaw needs correcting.

Mr. Chairman, thank you for considering my remarks and I remain available to respond to any questions.

Mr. COBLE. Professor, you may have established a world record. You beat the red light by about a minute. I don't think that's ever happened.

Mr. STEINBUCH. I figure we could average it out.

Mr. COBLE. We will award you the gold medal.

Mr. STEINBUCH. Thank you.

Mr. COBLE. Mr. Scheidegger, good to have you with us, sir.

**TESTIMONY OF KENT SCHEIDEGGER, LEGAL DIRECTOR AND
GENERAL COUNSEL, CRIMINAL JUSTICE LEGAL FOUNDATION**

Mr. SCHEIDEGGER. Thank you, Mr. Chairman. Thank you, Mr. Ranking Member.

I'm here today on behalf of the Criminal Justice Legal Foundation, which supports the rights of victims of crime and the law-abiding public to a fair and effective system of criminal justice.

The Death Penalty Reform Act presently before the Committee would make a number of worthwhile changes in the Federal death penalty law. And in particular, the bill would make the pre-trial notice requirements fair. The bill would require the defendant to

give notice in mitigating circumstances, just as the Government is required to give notice of aggravating circumstances.

However, the bill as presently drafted fails to correct and arguably codifies what I consider to be the most glaring defect in existing Federal death penalty law, which I call the “embassy bomber loophole.”

In July 2001, followers of Osama bin Laden were tried and convicted for their role in the conspiracy to bomb America’s embassies in Africa. On the question of penalty, most of the jurors believed that death was the appropriate punishment. Yet three jurors held out for a life sentence, and the result was that the decision of the three trumped the decision of the nine.

Now how can this be when the law clearly states the jury’s choice of sentence must be unanimous? Three to nine is not unanimous. In the guilt phase of the trial, everyone understands unanimous means unanimous one way or the other. If a jury deadlocks at 11 for guilt and 1 for acquittal, the judge does not enter a verdict of acquittal. That would be preposterous.

The jury must deliberate until it is unanimous, and if the jury is truly deadlocked, the judge declares a mistrial and impanels a new jury. That is how the penalty phase also works in California and, in my opinion, what the Federal statute provides if correctly interpreted.

Unfortunately, the Federal death penalty law was poorly drafted in this regard and does not expressly state what happens when the jury cannot agree. In the case of *Jones v. United States*, the Supreme Court decided that this silence, combined with ambiguous language about lesser sentences, meant that the failure of the jury to agree results in a lesser sentence.

This effective abrogation of the unanimity requirement makes the death penalty less fair and more arbitrary, and it prevents the jury from serving its function as representing the conscience of the community.

In 1972, the Supreme Court declared the system of unbridled discretion in choosing between life in prison and death to be unconstitutional because it was arbitrary and capricious. The system of guided discretion that replaced it was not for the purpose of reducing the number of death sentences rendered. The purpose was to make capital sentencing more consistent and less arbitrary.

It is important that the death penalty not be arbitrarily imposed, and it is just as important that it not be arbitrarily withheld. If one murderer gets the death penalty and another equally or greater culpable murderer gets a life sentence on the random chance that his jury includes a single juror who refuses to impose the punishment where it is warranted, that is arbitrary.

A discretionary system can never be completely uniform, but we should strive to make it as evenhanded as possible. Requiring the jury to come to unanimous agreement one way or the other reduces the chance of arbitrariness in either direction.

The jury is supposed to express the conscience of the community. To perform that function, the jury must be required to come to agreement. If a single juror knows that he can impose his will over the objection of the rest of the jury simply by holding out, then the jury fails to perform its representative function.

So I ask the Congress to restore the requirement of a truly unanimous jury to the Federal capital punishment law. Doing so will make the death penalty more fair and evenhanded, and it will reduce the change of miscarriages of justice such as we saw in the embassy bomber case.

Thank you.

[The prepared statement of Mr. Scheidegger follows:]

PREPARED STATEMENT OF KENT SCHEIDEGGER

Mr. Chairman, thank you for the opportunity to address the committee today on this important legislation. I am here today on behalf of the Criminal Justice Legal Foundation, which has for the last twenty-four years fought for the right of victims of crime and the law-abiding public to a fair and effective system of criminal justice. In no other area of the law is this right more routinely violated than in capital punishment.

The Death Penalty Reform Act of 2006 presently before the committee would make a number of worthwhile changes in the federal death penalty law. In particular, the bill will make the pretrial notice requirements fair. This bill will require the defendant to give notice of mitigating circumstances, just as the government is required to give notice of aggravating circumstances. However, the bill as presently drafted fails to correct and arguably codifies the most glaring defect in existing federal death penalty law, which I call the Embassy Bomber Loophole.

In July 2001, followers of Osama bin Laden were tried and convicted for their role in the conspiracy to bomb America's embassies in Africa. On the question of penalty, most of the jurors believed that death was the appropriate punishment. Yet three jurors held out for a life sentence, and the result was that the decision of the three trumped the decision of the nine, and the terrorists received a life sentence.

How can this be, when the law clearly states that the jury's choice of sentence must be unanimous? Three-to-nine is not unanimous. In the guilt phase of the trial, everyone understands that "unanimous" means unanimous one way or the other. If a jury deadlocks at eleven for guilt and one for acquittal, the judge does not enter a verdict of acquittal. That would be preposterous. The jury must deliberate until it is unanimous, and if the jury is truly deadlocked, the judge declares a mistrial and empanels a new jury. That is also how the penalty phase works in California, and, in my opinion, what the federal statute provides if correctly interpreted.

Unfortunately, the federal death penalty law was poorly drafted in this regard and does not expressly state what happens when the jury cannot agree. In the case of *Jones v. United States*, 527 U.S. 373 (1999), the Supreme Court decided that this silence, combined with ambiguous language about lesser sentences, meant that the failure of the jury to agree results in a lesser sentence. This effective abrogation of the unanimity requirement makes the death penalty less fair and more arbitrary, and it prevents the jury from serving its function as representing the conscience of the community.

In 1972, the Supreme Court declared the system of unbridled discretion in choosing between death and life in prison to be unconstitutional because it was arbitrary and capricious. The system of guided discretion that replaced it was not for the purpose of reducing the number of death sentences rendered. The purpose was to make capital sentencing more consistent and less arbitrary. It is important that the death penalty not be arbitrarily imposed, and it is just as important that it not be arbitrarily withheld. If one murderer gets the death penalty, and another, equally culpable murderer gets a life sentence on the random chance that his jury includes a single juror who refuses to impose the punishment where it was warranted, that is arbitrary. A discretionary system can never be completely uniform, but we should strive to make it as even-handed as possible. Requiring the jury to come to a unanimous agreement one way or the other reduces the chance of arbitrariness in either direction.

The jury is supposed to express the conscience of the community. To perform that function, the jury must be required to come to agreement. If a single juror knows that he can impose his will over the objection of the rest of the jury simply by holding out, then the jury fails to perform its representative function.

I ask the Congress to restore the requirement of a truly unanimous jury to the federal capital punishment law. Doing so will make the death penalty more fair and evenhanded, and it will reduce the chance of miscarriages of justice such as we saw in the Embassy Bomber case. Thank you.

SUGGESTED AMENDMENT TO FEDERAL DEATH PENALTY STATUTES

(a) Amend 18 U.S.C. § 3593(b)(2) to redesignate present paragraph (D) as paragraph (E) and insert a new paragraph (D):

“(D) the jury that determined defendant’s guilt was unable to reach unanimous agreement on the sentence;”

(b) Amend 18 U.S.C. § 3593(e) to add at the end:

“If the jury is unable to agree unanimously on a sentence, the court shall impanel a new jury for retrial of the penalty hearing; provided, that if the government withdraws its notice under subsection (a), the court shall sentence the defendant if the notice had not been given.”

Mr. COBLE. Professor, the pressure is on you. These two guys both beat the red light. Now, Professor, Mr. Scott is my neighbor to the north in Virginia. Were you reared in South Carolina?

Mr. BRUCK. No, I was there for 30 years, and I’ve now moved to Virginia.

Mr. COBLE. Well, you’re my neighbor to the south. I must say this. I think Mr. Scott’s heard me say this before. It has been said that North Carolina is a valley of humility between two peaks of pride. I think that would be the exception over you and Mr. Scott. I don’t think you all are that proud.

Good to have you with us, Mr. Bruck.

TESTIMONY OF DAVID BRUCK, DIRECTOR OF THE VIRGINIA CAPITAL CASE CLEARINGHOUSE AND CLINICAL PROFESSOR OF LAW, WASHINGTON & LEE SCHOOL OF LAW

Mr. BRUCK. Appreciate the invitation, Mr. Chairman. And I can certainly be agreeable to my friend Ms. Griffey, for whom I have great regard. However, I can’t promise that I will break any speed records since I seem to be the only witness who has noticed the many problems in this legislation today, and I’d like to try to touch a few of them in the time I have available.

George Will memorably remarked not long ago that conservatives should always recall that the death penalty is a Government program, so skepticism is in order. The Federal death penalty is a large, bureaucratic, expensive, and exceptionally inefficient Government program, and a lot of skepticism is in order.

I was a little surprised that Ms. Griffey was so concerned about my having observed that the average time under Attorney General Gonzalez between an indictment and a decision to seek the death penalty is now 23 months.

I’m not at all suggesting that these decisions should be made fast, but we clearly have a problem. It has its roots in a decision that Attorney General Reno made that every single death eligible case should be reviewed by the attorney general him or herself, even when the U.S. attorney that actually has to try the case doesn’t want to seek the death penalty.

This has produced tremendous backlog, tremendous delay. It has not produced any particular consistency. We have just as lopsided a racial picture on death row now as we did when this decision was made back in 1994.

But I mention it because one of the provisions in this bill is a very strange response to a decade of complaints by Federal judges that DOJ takes too long to make these decisions, and it is too expensive. The cases are being held up at great cost to the taxpayers.

And DOJ's response, or at least the response of this legislation, has been to say, well, we can save money by eliminating the entitlement to two lawyers, one of whom is qualified to handle death penalty cases, until the attorney general months and months and even years after indictment finally makes a decision.

Mr. Chairman, that entitlement was passed and signed into law by President George Washington on April 30, 1790. It was enacted by the first Congress that drafted the Bill of Rights. We are tinkering with things now that are fairly sacred to our system of Government and our sense of due process in this country.

I cite that not because it is the most serious problem with this bill, although it is a problem, but as a reminder that the devil is in the details in these matters, and we need to proceed with extreme caution.

Some more details. The mental retardation procedures. There are none in Federal law right now. There may be a need for them, but the procedures and the definition that is proposed in this bill is so far from being constitutional that it will move the Federal Government from having been a leader in the development of protections for people with mental retardation to a retrograde outlier whose statute would be struck down by the Supreme Court.

The definition of mental retardation is not a definition at all, but actually, a series of some of the reasons why the Supreme Court said that people with mental retardation can't get the death penalty. And this statute, if it were enacted, would require the jury, basically, to reconsider what the Supreme Court did on a case-by-case basis and to do it in the most unfair possible way after all the reasons to impose the death penalty have been set before the jury and before any of the reasons not to impose it have been heard by the jury.

I'd be more than happy to work with staff and to provide any help that the—that we can, based on all the years of observation in the trenches in these cases about how this system ought to work. I'm not at all just saying let's do away with this proposal and be done with it. But clearly, there are some very serious problems. There are devils in these details that really need—need to be looked at.

The—there is reform that could well be undertaken with regard to the Federal death penalty. I've mentioned one, which is to restore that things ought to be done again the way they were done in the first Bush administration, which is when a Federal prosecutor that's there with the evidence doesn't want to seek the death penalty, that's the end of it. They don't need permission from Washington.

When that change was made, Attorney General Ashcroft 43 times told local prosecutors who didn't want to seek the death penalty that they had to seek the death penalty. His success rate in those cases was 8 percent. In other words, the system spun its wheels at a cost of millions of dollars and produced almost no additional death sentences and did not improve the fairness of the system.

I could go on if I had more time, which I don't. But I hope I've made the point that this is something that needs a very, very careful look.

[The prepared statement of Mr. Bruck follows:]

PREPARED STATEMENT OF DAVID I. BRUCK

**TESTIMONY OF
DAVID I. BRUCK
Federal Death Penalty Resource Counsel
Clinical Professor of Law & Director, Virginia Capital Case Clearinghouse
Washington & Lee School of Law
Lexington, Virginia 24450**

Dear Chairman Coble and Representative Scott:

Thank you for inviting me to appear before your Subcommittee today to discuss the Death Penalty Reform Act of 2006.

I have been a practicing criminal defense attorney in Columbia, South Carolina, for 28 of the last 30 years, and since 2004 I have been running a law school clinic that enables students to assist court-appointed defense counsel in death penalty trials throughout Virginia.

I have also been a close observer of the federal death penalty for more than 14 years, beginning in 1992. In January of that year, the federal defender system contracted with me and Kevin McNally, a colleague in Frankfort, Kentucky, to provide expert assistance on an "as-needed" basis to federal defenders and court-appointed counsel in federal capital cases brought under the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(e). Ever since then, Mr. McNally and I (joined in 1997 by a third lawyer, Richard Burr of Hugo, Oklahoma), have worked part-time to assist counsel appointed to defend the increasing numbers of federal death penalty prosecutions brought under § 848(e) and later under the Federal Death Penalty Act of 1994 (18 U.S.C. § 3591 et seq.).

In addition to working with individual court-appointed lawyers, our responsibilities as Resource Counsel include:

- identification and recruitment of qualified, experienced defense counsel for possible appointment by the federal courts in death penalty cases,
- monitoring and data-collection concerning the implementation of the federal death penalty throughout the nation's 94 federal districts,

- development of training programs and publications, including a web site, www.capdefnet.org, to assist federal defenders and court-appointed private counsel in death penalty cases;
- responding to Congressional inquiries addressed to the federal defender system concerning proposed capital punishment legislation, and
- to the extent possible, maintaining a liaison between the federal public defender system and the Department of Justice regarding the administration of federal death penalty statutes.

This effort has led to our involvement, to a greater or lesser extent, in most of the federal death penalty cases brought by the federal government since the beginning of 1992. My comments on the Death Penalty Reform Act of 2006 today are based on our Project's experiences and observation of how the federal death penalty has actually operated in the federal courts of this nation. These comments are intended to provide information about actual practice in this complex area of the law, rather than an abstract discussion. My comments, of course, reflect my own views, and not those of any agency or judicial entity.

I appreciate the opportunity to comment on the Death Penalty Reform Act. Because this area of the law is so complex, and because it is already governed by a variety of laws that sometimes work inconsistently with each other, it is critical that any changes in the law be carefully considered in context, and with an eye toward how these changes would affect the actual cases that come before the federal courts.

The sponsors of this legislation may hope that some of these changes will expedite the process and make it more efficient. This is a result that capital defense lawyers support, since the current process is confusing, enormously costly, slow, and to prone to serious unfairness. However, many features of this legislation would compound rather than alleviate those problems.

I have not attempted to comment on every provision in this bill. Rather, I have limited my comments to sections that appear especially problematic, and to issues that may not be immediately apparent. Before making those comments, I would like to provide a brief description of the magnitude (or, more correctly, the

minuteness) of the role played by the federal death penalty in the nation's criminal justice system as a whole.

INTRODUCTION: THE CURRENT STATUS OF THE FEDERAL DEATH PENALTY

Federal prosecutions account for a little over one percent of the prisoners currently on death row throughout the nation,¹ and well under one percent of the executions to date. This reflects the fact that, despite many expansions of federal jurisdiction over violent crime in recent decades, the prosecution and punishment of persons who commit murder remains overwhelmingly a state responsibility.

The Department of Justice ceased providing aggregated data on death penalty prosecutions to the American public after mid-2001. Our Project has identified a total of 371 defendants against whom the Attorney General has authorized federal prosecutors to seek the death penalty between 1988 and January 30, 2006. As of that date, 185 of these defendants had actually stood trial for their lives, and of those, juries had reached the point of making life-or-death decisions for 142, deciding to impose death on 49 defendants, and choosing life imprisonment without possibility of release for the remaining 93 (or almost two-thirds of the total). All of this activity has produced, thus far, a total of three executions. The President commuted one sentence, at the request of the Attorney General, due to grave doubts concerning the prisoner's guilt, and three more death sentences have been reversed on appeal; 42 men and one woman currently remain under federal sentences of death.

I should also note that the 371 cases in which the Attorney General has authorized the death penalty were culled from a much larger pool of more than 2000 homicide defendants against whom the federal death penalty could have been sought. Ever since Attorney General Reno centralized prosecutorial decision-making over federal death cases within Main Justice—by requiring review and decision by the Attorney General for *every* death-eligible case, regardless of whether line federal prosecutors wished to seek the death penalty or not--the

¹At the end of 2005, the NAACP Legal Defense Fund's authoritative *Death Row USA* inventory, www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2006.pdf, listed 40 inmates then under federal death sentence. This represents less than 1.2 percent of the total of 3373 death row inmates nationwide. *Id.*

Attorney General and his or her Death Penalty Review Committee have reviewed roughly four times as many death-eligible cases as have been actually approved for capital prosecution. Put differently, Attorneys General Reno, Ashcroft and Gonzales have each authorized federal prosecutors to seek the death penalty in only between 25 and 30 percent of the cases in which death was legally available as a potential punishment.

In other words, it is clear that the Department of Justice has been somewhat selective in seeking the death penalty under federal law, and federal juries have been selective in imposing it when federal prosecutors have decided to seek it. That said, the racial make-up of capital defendants in the federal courts has been a source of continuing concern. Of the total of 372 defendants against whom the Attorney General has authorized federal prosecutors to seek the death penalty, 99 have been white, 64 Hispanic, 16 Asian/Indian/Pacific Islander/Native American, 3 Arab and 189 African-American. In all, 73% of the defendants approved for a capital prosecution to date are members of minority groups. Twenty-four of the forty-two defendants now on federal death row under active death sentences, or 57%, are non-white. When similar numbers first emerged from an internal DOJ study in September, Attorney General Reno called the data troubling and called for an in-depth review and analysis to determine whether race and ethnicity improperly influenced prosecutorial decision-making at any level.² Although Attorney General Ashcroft's Justice Department pledged to follow through with such a review in 2001,³ five more years have now elapsed, and no results have been made public.

Another characteristic of centralized decision-making by Main Justice and the Attorney General is delay. The *average* time that has elapsed between indictment and a decision by Attorney General Gonzales to seek the death penalty has been 23 months, and a decision to waive the death penalty has taken an average of 18 months from indictment. While these averages have been inflated somewhat by a few atypical multi-defendant cases, the government has required an average of 10 months after indictment to complete the multi-tiered DOJ death penalty review

²Marc Lacey and Raymond Bonner, "Reno Troubled by Death Penalty Statistics," N. Y. Times, September 12, 2000.

³Raymond Bonner, "Justice Dept. Set to Study Death Penalty in More Depth," N. Y. Times, June 14, 2001.

process even in “ordinary” cases that were ultimately selected for death by Attorney General Gonzales.

In sum, the federal death penalty system *as it is currently administered by the United States Department of Justice* appears to be cumbersome, selective, extremely slow, and highly concentrated on minority defendants. With this background in mind, I will now address the most important provisions of the Death Penalty Reform Act of 2006.

SIGNIFICANT FEATURES OF THE DEATH PENALTY REFORM ACT OF 2006.

Section 3, Subsection 2—Increasing the Roster of Offenses with “Automatic” Death-Eligibility.

This subsection adds five more statutes to the already long list of federal homicide offenses that carry “built-in” death eligibility simply by virtue of a conviction of the substantive offense, *see* 18 U.S.C. § 3592(c)(1), and proof of a constitutional minimum level of intent. 18 U.S.C. § 3591(a)(2)(A)-(D). While it can be argued that such “automatic” death-eligibility is not in and of itself unconstitutional, Lowenfield v. Phelps, 484 U.S. 231 (1988), *but see*, United States v. McVeigh, 944 F. Supp. 1478 (D.Colo. 1996); such changes should be made advisedly, because they have no effect other than to extend the death penalty to cases involving ever-lower levels of aggravation.

To see why this is so, we must keep in mind that when it adds new statutory eligibility factors, Congress is not merely allowing the jury to “consider” such factors in capital sentencing. The jury can already consider all relevant sentencing factors as *non*-statutory aggravation, including the fact that the defendant was convicted of each of the five new statutes at issue here. 18 U.S.C. § 3593(c). Rather, the point of creating a new statutory aggravating factor is to authorize the jury to impose the death penalty *on that basis alone*, when no other statutory aggravating factor is present. Since the FDPA’s existing list of statutory aggravating factors already includes some 35 separate bases for death eligibility, some of them extremely broad (such as that the murder was committed after “substantial planning and premeditation”), the only practical effect of adding still

more factors is to make the death penalty available in that small category of cases where the murder was not otherwise aggravated.

Stated differently, the addition of these five statutes to the list contained in § 3592(c)(1) will create death-eligibility where it would not otherwise have existed *only* where the defendant

- did **not** kill after substantial planning or premeditation, 18 U.S.C. § 3592(c)(9),
- did **not** commit the murder during the commission of some other serious crime, § 3592(c)(1),
- did **not** have a serious prior criminal record, § 3592(c)(2-4, -10, -12, -15),
- did **not** create a grave risk of death to additional persons, § 3592(c)(5),
- did **not** torture or seriously physically abuse the victim, § 3592(c)(6),
- did **not** pay for the killing or commit it for money, § 3592(c)(7-8),
- did **not** kill an especially vulnerable victim
- did **not** engage in a CCE that distributed drugs to minors, § 3592(c)(13)
- did **not** kill a public official, and § 3592(c)(14), and
- did **not** kill or attempt to kill more than one person. § 3592(c)(16).

Once the effect of such new death-eligibility factors is properly understood, one might expect some actual showing of a need to further expand the list of death-eligible federal murders before adding more death-eligibility factors to this already-long list.

Section 3, Subsection 3—Expansion of Prior Firearms Conviction Aggravator.

The purpose and effect of this amendment are both somewhat obscure. The Section by Section Analysis provided with the legislation does not explain whether the “prior adjudication” referred to in the section means (a) an adjudication prior to the *sentencing hearing* (which would include the just-completed trial on the merits of the capital murder that is the subject of the sentencing hearing), or (b) prior to the entire trial, or (c) prior to the firearms offense of conviction. However, since the second and third of these interpretations would mean that the amendment does not change existing law, it would appear that the first interpretation is the correct one. If that reading is correct (and I hope that the

Justice Department will provide the Committee with its own understanding of this amendment today), then the amendment appears to allow a single crime—a killing with a firearm by a person engaged in a federal drug or violent offense—to satisfy the government’s burden of establishing both a capital crime *and* a statutory aggravating factor sufficient to allow imposition of the death penalty.

The reason Congress originally enacted the 924(c) exclusion in the firearms aggravator, 18 U.S.C. 3592(c)(2), was to avoid making every firearm killing automatically death-eligible. This would otherwise have occurred because the firearms violation that serves as the predicate for the 924(j) conviction would do double-duty as a “prior conviction” of a “prior” qualifying firearms offense. By removing this exemption now, Congress would seemingly be making every federal firearms killing death-eligible, whether or not it would otherwise be warranted. In other words, there would be no requirement that the defendant have any genuinely *prior* record, and without requiring evidence of any *other* aggravating factor (such as substantial planning and premeditation, risk to additional persons, multiple victims, cruelty or torture, etc.)

As a practical matter, this change would only extend the death penalty to the very least aggravated firearms homicide cases—killings that occur with no planning, or that are unintentional. Truly aggravated cases are already death-eligible, and so will not be affected. This amendment is contrary to the now-widespread agreement among death penalty supporters and opponents alike that capital punishment should be reserved for the “worst of the worst.”

The Section-by-Section Analysis on this point does not fully convey the significance of the change. Under existing law, the fact of the firearms conviction can obviously be considered by the jury “where the death sentence is sought based on 19 U.S.C. § 924(c), (j).” Unless I have taken too dire a view of this ambiguously-drafted provision, and it actually would mean nothing at all, what the change appears to mean is that when there exists no *other* legal basis for seeking the death penalty—when, in plain English, the murder was not aggravated enough to justify the death penalty—the government can *still* seek death based simply on the illusion of a “prior” firearm record which is not actually “prior” at all, but simply part of the crime of conviction.

The enactment of 18 U.S.C. § 924(j) in 1994 represented a potentially

enormous expansion in federal jurisdiction over homicide offenses, which from the founding of the nation have been primarily a matter for state law enforcement. The § 924(c) exclusion at least represented an effort to keep this huge change under some sort of commonsense check by ensuring that every 924(j) offense would not automatically become punishable by death in the unfettered discretion of the jury. Removing this restraint is unwise, unnecessary (because any truly aggravated 924(j) killing is already death-eligible under existing law), and open to constitutional challenge as impermissibly all-inclusive under the two seminal Supreme Court cases governing capital punishment law, *Furman v. Georgia* and *Gregg v. Georgia*.

Section 3, Subsection 6—Broad New Eligibility Factor for “Any” Threat to Use Violence to Obstruct Justice

Again, this proposed new aggravating factor would extend the death penalty to a whole new range of cases that feature no other aggravating factor (in other words, that do **not** involve the killing of federal witnesses or officers, do **not** involve multiple victims, did **not** occur after substantial planning, was **not** committed in an especially heinous, cruel or depraved manner, and so on), based simply on proof that at some point in the past, the defendant had engaged in “any conduct,” including mere threats of violence, to obstruct the investigation or prosecution of “any” offense, including non-violent offenses and offenses having nothing to do the killing. For example: under this provision, an otherwise non-capital murder would become punishable by death if, ten or twenty years before the murder, the defendant had threatened to beat up his wife if she called the police following a domestic disturbance. Of course, such evidence is generally *admissible* now, as nonstatutory aggravation. The only effect of this change would be to allow such evidence to constitute ***the sole legal basis for imposing the death penalty***. Again, there is currently no gap in the reach of the federal death penalty that justifies such a broad and arbitrary expansion. In fact, this represents such an extraordinarily broad change that I suspect it is unintentional, and may reflect a drafting error.

Moreover, even if language were added to make clear that the proposed “obstruction of justice” factor requires some nexus to the capital homicide offense at issue, the new factor would still be susceptible of very broad application, because it could be construed to apply to any murder committed to avoid arrest. If

so construed, such a relatively uncontroversial-seeming expansion of the federal death penalty could eliminate almost every remaining murder under federal jurisdiction that is *not* currently subject to the death penalty. That is, this provision could remove the last bit of legislative “narrowing” from the FDPA, leaving the decision to inflict or withhold death to the unfettered discretion of the jury in every case.

Eventually the Supreme Court may take up the question of whether a given capital punishment statute has become so all-inclusive that it fails the basic requirement of *Furman* and *Gregg* that the sentencer’s discretion be legislatively narrowed and guided. Ill-considered expansions of death-eligibility under the FDPA may bring that day closer.

Section 4, Subsection (1)(C)—Authorization for Non-statutory Aggravating Factors Relating to Defendant’s State of Mind and Intent

This provision, which allows nonstatutory aggravating factors relating to the defendant’s intent or state of mind to be used as aggravating factors, does not seem to change existing law and therefore is superfluous. If it does change existing law, its enactment might call into question the validity of previous death sentences imposed in partial reliance on various versions and permutations of this factor. See *United States v. Higgs*, 353 F.3d 281, 301 (4th Cir. 2003) (recognizing that after-enacted statutory aggravating factor violates ex post facto clause.) On its face, the language is also vague, and may open the door to the risk of appellate reversal that such vague factors carry with them. Cf. *Jones v. United States*, 527 U. S. 373, 400-401 (1999) (narrowly rejecting Eighth Amendment vagueness challenges to nonstatutory aggravating factors).

Section 4, Subsection (3)(B)-(C) Unadjudicated Acts and Right to Cross-Examine Defendant

These provisions, which allow for notice (and presumably presentation) of unadjudicated conduct in support of aggravating factors, and for government cross-examination of a defendant concerning his statements or testimony to the sentencing jury, also appear to do nothing more than restate existing law. If any change from existing law is intended, the Section-By-Section Analysis does not indicate what the change might be. Perhaps the latter provision is intended to

foreclose claims, already soundly rejected by the courts, *see e.g. United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000), *United States v. Hall*, 152 F. 3d 381(5th Cir. 1998), that federal capital defendants have a right of allocution (i.e. to make an unsworn statement) to the sentencing jury. In view of the fact that no federal appeals court has upheld such a right to date, there appears little present need to legislate in this area.

Section 4, Subsection (4)(A) – “Intent” factors required by § 3591(a)(2) be found “during” a § 3593 hearing.

On its face, this provision seems simply to state current practice, which is that the sentencing jury determines all factual elements necessary to render the defendant eligible for the death penalty during the course of a sentencing hearing under the FDPA. However, it is conceivable that the real purpose of this amendment is to create an arguable statutory basis (albeit a thin one) for a claim that federal trial judges no longer have discretion to “bifurcate” capital hearings under the Federal Death Penalty Act in order to assure that the jury’s fact-finding procedures are fundamentally fair. Since *Apprendi v. New Jersey*, 530 U. S. 466 (2000), and *Ring v. Arizona*, 536 U. S. 584 (2002), which held that the facts on which a defendant’s death eligibility turns are the functional equivalent of elements of an aggravated substantive offense of death-eligible murder, federal courts have increasingly recognized the need to segregate the jury’s fact-finding concerning these elements from the inflammatory and extremely prejudicial nonstatutory character and victim-impact evidence that the prosecution typically introduces in aggravation of sentence. The current proceeding taking place in *United States v. Moussaoui* just a few miles from here, in which the trial judge has required the government to prove, and the jury to find, that the defendant actually caused death on September 11 before beginning the emotionally overwhelming “victim-impact” phase of the proceedings, provides a good example of a case in which such bifurcation is clearly essential to assure a fair trial. Congress should do nothing to prevent trial judges from fashioning such practical, commonsense remedies in the future. If Subsection (4)(A) would have such an effect (and I am unable to discern any other effect it might have), it should not be enacted.

Section 4, Subsection (4)(B), (4)(C); (7) Mental Retardation Procedures and Re-definition

Among other things, these sections create a procedure and standards governing the determination of whether a defendant is exempt from the death penalty by reason of mental retardation. The mental retardation exemption has been a feature of federal death penalty procedures since the first such procedures were enacted in 1988. *See* 21 U.S.C. § 848(1). It thus predates the Supreme Court's decision in Atkins v. Virginia, 536 US 304 (2002), that put this exemption on a constitutional footing. Unfortunately, the procedures proposed here fall well short of Atkins' constitutional minimum, and would thus contravene the Eighth Amendment.

The most serious defect is the definition of mental retardation set forth in the proposed 18 U.S.C. § 3593(b)(4):

For purposes of this section, a defendant is mentally retarded if, since some point in time prior to age 18, he or she has continuously had an intelligence quotient of 70 or lower and, as a result of that significantly subaverage mental functioning, has since that point in time continuously had a diminished capacity to understand and process information, abstract from mistakes and learn from experience, engage in logical reasoning, control impulses, and understand others' reactions.

To be sure, the Supreme Court in Atkins did not impose a single binding constitutional definition of mental retardation. However, the above language is not a definition at all, but rather a listing of many of the characteristics of people with mental retardation that the Atkins Court regarded as justifying a categorical bar against the infliction of death upon such defendants. In effect, this provision would require the jury to redetermine anew in each case whether the Supreme Court was correct in Atkins when it found that these characteristics of mental retardation justified a categorical exemption.

Note that the provision requires the jury to find *all* of the listed characteristics (and that all these characteristics have manifested themselves "continuously" since some point prior to age 18) in order to exempt a defendant on

grounds of mental retardation. Thus a defendant with an IQ of 70 or below who established, for example, that he had “diminished capacity to understand and process information, abstract from mistakes and learn from experience, engage in logical reasoning, [and] control impulses,” but who did *not* establish that he also had diminished capacity to “understand others’ reactions” would have failed to establish mental retardation, and could therefore be executed.

It can readily be seen that this approach fails to protect the entire class of persons with mental retardation, and enactment would therefore place the federal government in violation of the Eighth Amendment rule of Atkins. Indeed, the whole point of the Supreme Court’s decision in Atkins was that each of these facets of moral culpability was too difficult to determine reliably on a case-by-case basis, and that the severity of the disability suffered by all persons with mental retardation (whose intellectual functioning places them, by definition, in the bottom 2-3 percent of the population) justifies a categorical ban.

There is essentially only one accepted definition of mental retardation in use by psychologists and psychiatrists, with minor variances in wording. The majority opinion in Atkins cited the following definition, which was promulgated in 1992 by the American Association on Mental Retardation:

Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

122 S.Ct. at 2245 n.3. If a definition of mental retardation is felt to be needed in the Federal Death Penalty Act, that definition (or the essentially identical revision promulgated by the AAMR in 2002) should be used. The fact that the terminology employed in this draft of the Federal Death Penalty Reform Act of 2006 would extend to only a fraction of the people who are recognized as having mental retardation under virtually every other provision of state and federal law is proof that this language is unconstitutionally narrow and would fail to protect many (indeed almost all) members of the class of impaired defendants who are, in fact,

exempt from execution under Atkins.

The procedures to be employed are also undesirable. Rather than a pretrial judicial determination (as occurs with competency to stand trial, for example, see 18 U.S.C. § 4241), this draft would wastefully require a defendant with mental retardation to go through the entire elaborate structure of a capital trial (with special jury selection procedures, bifurcated jury sentencing, special counsel provisions, and so forth), only to establish at the end of the process that he suffered all along from a life-long disability that rendered moot the entire death-penalty aspect of the proceedings—and that could have been determined at the start. Because mental retardation (unlike mental illness) is an essentially fixed condition that must have existed prior to age 18 and that does not resolve or dissipate over time, it is obviously more efficient and more logical to determine this issue before trial rather than at the end of the proceedings. Almost all state statutes implementing mental retardation bars in death penalty proceedings adopt this approach. *See, e.g.*, N.C. Gen. Stat. Ann. 15A-2005(c); Tenn. Code Ann. § 39-13-203(c).

Delaying the jury's mental retardation verdict until *after* the presentation of aggravation evidence is also unfair, because it ensures that the jury will not address the relatively straightforward issues of whether the defendant meets the clinical definition of mental retardation until it has been overwhelmed with inflammatory information about the defendant's prior record and bad character and with emotionally powerful victim impact evidence. Just as it has long been thought unfair to present *sentencing* evidence (including evidence of prior offenses and bad character) to a jury before the defendant's *guilt* or innocence has been determined, so too is it unfair to delay a determination of whether the defendant has the immutable disability of mental retardation until all of the evidence that might make the jury wish to impose the death penalty—retardation or no retardation—has been presented.

If a procedure for the determination of mental retardation is to be added to the FDPA, the statute should provide for a pretrial judicial determination analogous to a competency determination. In making that determination, the court should be guided by the actual clinical definition of mental retardation invariably employed by mental health professionals who assess the presence or absence of mental retardation in other settings. If the court determines that the defendant did not have mental retardation, the trial would proceed in the normal fashion, and if

the defendant is convicted he would retain the right (as required by *Lockett v. Ohio* and its progeny) to present evidence of his mental impairments to the sentencing jury as a mitigating factor.

Also in **Section 4, Subsection (7)**, the proposed 18 U.S.C. 3593(b)(1) and (2) set up a partial new **procedure for pretrial rebuttal mental health evaluations in capital cases** without taking into account the detailed set of procedures that only recently went into effect with the December, 2002 amendments to Rule 12.2, Fed.R.Crim.P. Rule 12.2 already requires written pretrial notice of expert mental health mitigation testimony, and authorizes government rebuttal evaluations following such notice. Adding on a statutory provision that is much less detailed than Rule 12.2 is likely to cause confusion, while adding little or nothing to the government's valid entitlement to a fair opportunity to rebut the defendant's mitigation.

In the proposed 18 U.S.C. § 3593(b)(1) and (2) , and at several other points in the legislation, the Act creates a new requirement that the defendant personally sign and serve **notice of all mitigating** factors upon which he will rely at sentencing. While this proposal has a superficially attractive symmetry to the government's obligation to provide pretrial notice of aggravating factors, it overlooks the real differences between aggravation and mitigation. Most importantly, an across-the-board notice requirement for defendants would effectively require many defendants to acknowledge factual guilt before trial, and would thus be unconstitutional. A defendant cannot personally "sign" and file notice of intent to prove a mitigating factor (such as having committed the offense under duress, or under the influence of extreme emotional disturbance) without admitting guilt of the underlying offense. That is why, to my knowledge, no state death penalty statute requires this kind of broad pretrial notice of mitigating factors, and why this provision would be unenforceable under the Fifth Amendment.

Section 4, Subsection 5—Directive that the sentencer must avoid "any influence of sympathy."

This subsection would insert into 18 U.S.C. § 3593(e) the following sentence:

In assessing the appropriateness of a sentence of death, the jury, or if

there is no jury, the court must base the decision on the facts of the offense and the aggravating and mitigating factors *and avoid any influence of sympathy*, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence.

The evident purpose of this provision would be to allow the government to seek a jury instruction using this verbiage. However, instructing a capital sentencing jury to avoid “any influence” of sympathy when choosing between life and death runs a grave risk of violating the constitutional requirement of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), that the sentencer consider all relevant mitigating evidence before imposing death as punishment. I realize that in California v. Brown, 479 U.S. 538 (1987), the Supreme Court narrowly upheld a rather different instruction not to be swayed by “mere sentiment, conjecture, sympathy, [or] sympathy. . . .” However, the language proposed here is much more sweeping. It is simply impossible to reconcile a prohibition of “any influence of sympathy” with the constitutional directive to consider the kinds of mitigating evidence—including horrific childhood abuse, or severe mental and physical disabilities—which tend to elicit sympathy by their very nature. There is no reason to push the constitutional envelope in order to help the government persuade jurors to stifle their own sympathetic responses to those “compassionate or mitigating factors stemming from the diverse frailties of humankind” which must be considered “as a constitutionally indispensable part of the process of inflicting the penalty of death.” Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ). This amendment is unnecessary, unwise, and unconstitutional.

Section 7: Amendments relating to Section 3005 of Title 18 (appointment of counsel).

Ever since 1790, federal law has required appointment, upon request, of two “counsel learned in the law” at the time that a defendant is *indicted* for a capital offense.⁴ This amendment would remove part of that entitlement for the first time, by delaying appointment of capital-qualified counsel until the Attorney General

⁴In 1994 this provision was strengthened in various ways, including addition of a provision making clear that at least one counsel so appointed must be learned in the law “applicable to capital cases,” and requiring the court to consider the recommendation of the Federal Defender in appointing counsel.

actually decided to seek the death penalty. This decision typically comes many months and even years after indictment, so the effect of this provision would be to cause an enormous delay before entry of capital-qualified counsel in most cases where the death penalty is eventually sought, and to delay such appointment until a critical decision-point—the government’s decision whether to seek death—has passed.⁵

This provision would overrule the First Circuit’s decision in In re Sterling-Suarez, 306 F.3d 1170 (1st Cir. 2002), which applied § 3005 to require a district court to appoint “learned counsel” upon indictment. Rejecting the government’s policy arguments in favor of delayed appointment of death-qualified counsel in that case, Judge Boudin observed,

In some cases the early appointment of learned counsel will not be wasted at all but may well make the difference as to whether the Attorney General seeks the death penalty (and perhaps as to whether defendant lives or dies). Further, the submission to the Attorney General is a comparatively informal one and in those cases where the opposition succeeds in persuading the Attorney General not to seek the death penalty, a substantial additional expenditure on the trial and sentencing phase of a capital case is likely to be avoided.

Id. at 1175. *Accord*, United States v. Miranda, 148 F. Supp. 2d 292 (S.D.N.Y. 2001). Both fairness and economy support prompt appointment of qualified counsel as soon as possible after indictment.⁶ Removing this entitlement would

⁵As pointed out above, the delays occasioned by the Attorney General’s death penalty review process have been extremely long, averaging 23 months from indictment to death notice for the first 25 defendants authorized for capital prosecution by Attorney General Gonzales.

⁶In 1998 the Judicial Conference of the United States adopted a series of recommendations contained in FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION, also known as the Spencer Report. Explaining these official judiciary policies, the Commentary to the Spencer Committee’s recommendations made the same point as *Suarez* court concerning the importance and cost-effectiveness of *early* appointment of death-qualified defense counsel:

Recommendation 1(b) calls for the appointment of specially qualified counsel “at the outset” of a case, because virtually all aspects of the defense of a federal death penalty case, beginning with decisions made at the earliest stages of the litigation,

work counter to President Bush's expressed support for increasing the quality of the defense afforded to defendants in capital cases, while weakening a protection that has been in place since the first years of our nation's existence.

That said, it is possible that the original purpose of this proposed revision to § 3005 was merely to obviate the need for appointment of two counsel in cases where they are clearly not needed. Alone among the federal circuits, the Fourth Circuit has held that "18 U.S.C. § 3005 creates an absolute right to two attorneys in cases where the death penalty may be imposed, even when the government does not, in fact, seek the death penalty." *United States v. Boone*, 245 F.3d 352, 358-59 (4th Cir. 2001). If Congress wishes to overrule this holding, it could do so simply by providing that the filing of a waiver of the death penalty by the government renders the provisions of 18 U.S.C. § 3005 inapplicable. In this way, the government could promote efficiency in the administration of the Criminal Justice Act by acting expeditiously itself to inform the court and the accused that the death penalty will not be an issue in the case.⁷ But so long as the government insists on retaining the option to seek the death penalty, the accused should have qualified counsel capable of defending a capital case. Given how sluggish the Justice Department's death penalty bureaucracy has become, there is something unseemly

are affected by the complexities of the penalty phase. Early appointment of "learned counsel" is also necessitated by the formal "authorization process" adopted by the Department of Justice to guide the Attorney General's decision-making regarding whether to seek imposition of a death sentence. (See *United States Attorney's Manual* § 9-10.000.) Integral to the authorization process is a presentation to Justice Department officials of the factors which would justify not seeking a death sentence against the defendant. A "mitigation investigation" therefore must be undertaken at the commencement of the representation. Since an early decision not to seek death is the least costly way to resolve a potential capital charge, a prompt preliminary mitigation investigation leading to effective advocacy with the Justice Department is critical both to a defendant's interests and to sound fiscal management of public funds.

Id. at 41-42.

⁷I note that such an amendment would comport with existing Judiciary policy, which encourages district judges (except in the Fourth Circuit, who must apply *Boone*) to reduce costs by relieving second counsel and lowering hourly rates whenever death is removed as a possible punishment in a case. VII GUIDE TO JUDICIARY POLICIES AND PROCEDURES: APPOINTMENT OF COUNSEL IN CRIMINAL CASES Chapter 602.B.2.

about any proposal to hobble the government's courtroom adversaries as a way of addressing the wastefulness of its own overly-centralized and almost interminable death penalty review process.

Section 8(a)–Narrowing of “equally culpable offender” mitigating factor

Section 8(a) would substantially narrow the jury's power to consider, as a reason not to impose the death penalty, the fact that other equally guilty offenders in the same case are escaping such punishment. Currently, § 3592(a)(4) directs the sentencer to consider, as a mitigating factor, whether “[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death.” Section 8(a) would narrow that mitigating factor to permit jury consideration only of the fact that “the Government could have, but has not, sought the death penalty against another defendant or defendants, equally culpable in the crime.”

The effect of this change is to allow the jury to take intra-case fairness into account only when disparities of treatment are created by the plea bargaining and charging process. If such disparities are produced by other factors—such as divergent jury sentencing verdicts, or the vagaries of apprehension, extradition and prosecution—the jury will not be able to take them into account. An example of this might include the fact that two 17-year-old defendants are exempt from the death penalty by virtue of their birth dates, leaving a single 18-year-old to face death alone. Likewise, defendants are not infrequently immunized from the death penalty by the terms of their extraditions from foreign countries: when one defendant is extradited from Egypt and his co-defendants from Germany, Britain, or Canada, the fact that only the first defendant would be facing the death penalty (as a result of the divergent policies of the rendering countries) could not be considered by his jury as a mitigating factor, even if the immunized defendants were equally or more culpable in the offense.

While prosecution decision-making is certainly *one* major reason for potentially unfair capital sentencing disparities, it is not the only one, and there is no good reason for narrowing the jury's power to consider what is fair under all the circumstances. To be sure, a strong argument can be made that the hypothetical defendants described here might still cite the disparate punishments in their cases as a non-statutory mitigating factor. In all likelihood, however, some federal courts would construe Congress's enactment of this amendment as intended to preclude reliance on such mitigating factors, while other courts would allow it. In

the absence of any demonstrated need for legislation on this point, the potential for inconsistency and confusion in capital sentencing that this subsection carries with it counsel against its enactment.

Section 8(c)—Authorization to empanel resentencing juries of less than 12 members over defendant’s objection where court finds “good cause”

Fed. R. Crim. P. 23(b) currently authorizes an 11-member jury to return a verdict where *one* juror is dismissed for good cause, even without the defendant’s consent or stipulation. This provision presumably already applies to capital as well as non-capital cases. Section 8(c) would apply this to re-sentencing juries in capital cases, but in so doing would remove the 11-juror minimum, thus allowing for even smaller juries --- of virtually any size --- so long as the judge finds good cause for dismissing two or more jurors. Even more significantly, this provision clearly authorizes judges to *empanel* resentencing juries of less than 12 members—with no apparent minimum number—so long as undefined “good cause” is found to exist. I am not aware of any justification for so radical a potential departure from the centuries-old practice of requiring 12-member juries in capital cases, and do not think that Congress should enact it without a very powerful justification being shown.

Thank you for considering these comments. I would be glad to work with the sponsors of this bill to address the significant shortcomings that I have identified today, and welcome any questions you might have.

Mr. COBLE. Well, in the spirit of equity, if you wanted—in view of the generosity of your two predecessors, if you want another minute, Mr. Bruck, you may have it.

Mr. BRUCK. I'd much rather answer questions that the Committee has. I think that might be more helpful, Mr. Chairman.

Mr. COBLE. Yes. I was hoping that the gentleman from Texas would be here, the primary sponsor, and I'm told he's on his way. So we'll get a chance to hear from him as well.

Now, ladies and gentlemen, we impose the 5-minute rule against ourselves as well. So I will begin the questioning, Ms. Griffey, with you.

Why, Ms. Griffey, are procedural guidelines for determining mental retardation needed in the light of *Atkins* and the existing prohibition on executing mentally retarded defendants?

Ms. GRIFFEY. They're needed because although the Federal statute precluded the execution of the mentally retarded, there were no procedures in place. And while the mental retardation issue had been addressed on an ad hoc basis, but through a variety of mechanisms—most typically a pre-trial determination by district courts when they hit the issue—it is our best understanding of the constitutional requirements that the determination, as I indicated in my earlier testimony, must be made or at least the defendant has the right to have the determination be made by the jury.

So that is why we—with the constitutionalization of the mental retardation issue, we really do need procedures that conform with the Constitution.

Mr. COBLE. Mr. Steinbuch, you touched on this, but I want to give you a chance to expand on it. Why is the 924(c) exception from the firearms aggravator unfair?

Mr. STEINBUCH. It just doesn't make any sense, Mr. Chairman. There is a firearms aggravator for other death penalty qualifying crimes. But for some reason, 924(c) has an exception where the firearm aggravator may not be applied.

Now if we don't want firearms to be an aggravator for the death penalty, then we should eliminate it. But if we want firearms, as I think, indeed, most on both sides of the aisle want, then we should have it for all death qualifying crimes.

Mr. COBLE. Mr. Scheidegger, in your testimony, you mentioned that provisions of the bill “will make pre-trial notice requirements fair.” Explain in a little more detail, if you will, how this will achieve fairness, and how might these provisions impact the treatment of crime victims?

Mr. SCHEIDEGGER. Well, I think that a fact-finding procedure operates better when both sides have notice of what the procedure is going to be about and have a chance to prepare a rebuttal to the other side's case.

And I think that a requirement that each side share with the other what factors it's going to put forward as aggravating or mitigating will produce a more reliable and a better truth-seeking function in the penalty phase of the trial.

Mr. COBLE. Professor Bruck, now here's the chance for you to agree/disagree, I believe, because I know you and Ms. Griffey are not in agreement on this. Tell me again—and again, you touched on this, Professor—how does the provision requiring pre-trial notice

by the defendant of mitigation circumstances or mental retardation violate the fifth amendment?

Mr. BRUCK. Mental retardation, it would not. And in fact, existing law, Congress and the Supreme Court just remanded rule 12.2 of the Rules of Criminal Procedure just in December of 2002 to require notice of expert testimony on any mental health issue, including mental retardation. So, in a way, there's really no need for a new notice provision on that.

And clearly, there's no reason—notice for MR. When mental retardation is advanced as a bar, there is nothing wrong with requiring notice. But the idea that every mitigating factor should be only admissible if there has been notice, there are 38 States with the—38 jurisdictions with the death penalty in this country, and not one has a rule like that. And the reason is that many mitigating factors, not mental retardation, but many of the others, would require—in effect require the defendant to admit that he committed the crime.

Mitigating factors, such as he acted—the defendant acted under duress in the commission of the murder, or he committed the murder while under the influence of mental or emotional disturbance. You can't file notice of that as your mitigating factor, and this actually requires it be signed by the defendant, unless you admit you did the killing.

And that's why none of the 38 States have that requirement because that violates the fifth amendment. You haven't been tried yet. It's much too early. This is simply not a requirement.

Mr. COBLE. Ms. Griffey, I'll give you a chance to respond subsequently. But for the moment, I'm going to take a page from Mr. Steinbuch and Mr. Scheidegger's book and recognize the gentleman from Virginia before my red light illuminates.

Mr. SCOTT. Thank you, Mr. Chairman.

There's a prohibition against using sentiment as a consideration in applying the death penalty. Mr. Bruck, can you indicate what—how you can do that if you're allowing victim impact statements?

Mr. BRUCK. Yes. There is a provision in this legislation to tell the jury to allow no influence of sympathy or sentiment or passion, prejudice, or any other arbitrary factor. There's nothing wrong with an instruction that says not to be carried away by emotion, but this instruction is very different.

It—and in particular, as I pointed out in my prepared remarks, it pushes the constitutional envelope. The whole point of mitigation is to try to show that even though a man committed murder, there are still reasons that he deserves some small amount of sympathy, enough to let him have life in prison rather than death.

To tell the jury not to be influenced by any influence of sympathy violates that constitutional provision. Now this isn't something that we can—we can follow or not if we choose. This is a constitutional requirement imposed in case after case by the United States Supreme Court, beginning with *Woodson v. North Carolina* in 1976 and going straight on until today.

So, again, the devil is in the details. There could be an argument, and perhaps the Department of Justice will win a 5–4 decision saying this pushes the envelope, but not too far. But why risk it?

These are the kinds of things that really shouldn't be—shouldn't be trifled with.

Mr. SCOTT. What about sympathy on behalf of the victim? If you have the witness—the victims parading before the jury, presumably eliciting emotional—an emotional response, how does that play?

Mr. BRUCK. Well, there is something a little inconsistent about now that we have victims able to testify so broadly, the survivors, which is not something—I mean, I understand why it's being done, why the Supreme Court allowed it. But then to turn around and say, "Oh, and don't be influenced by sympathy." It's a little illogical. The why did we hear all that testimony if we're not supposed to have any sympathy?

The real point of an instruction not to be influenced at all by sympathy is to try to convey to the jury what prosecutors try to do naturally in their closing argument, which is to say to the jury, "Don't use your heart. Don't be a human being. Don't look at all aspects of this. Just be sort of a calculator, a machine." And you know, total up the aggravators and mitigators and don't use really human common sense in deciding what is, after all, a moral judgment, the Supreme Court has told us, these sorts of add-ons to this.

You know, it's true that the Justice Department has had relatively little luck in getting anybody sentenced to death. There are 42 people on death row right now, and there have been 3 executions. But these little bells and whistles to try to grease the skids are not going to make any appreciable difference. All it's going to do is put these statutes at some constitutional risk.

Mr. SCOTT. Should lack of moral certainty of guilt be a mitigating factor?

Mr. BRUCK. Yes, I think it should. And it probably already is, informally. It's probably the oldest reason why juries have declined to seek the death penalty since there was—has been jury sentencing more than 100 years ago.

If we're going to—if we're going to make some fixes in this bill, making that explicit, whether it's constitutionally required or not—good grief, we've seen enough innocent people being found on our Nation's death row. President Clinton had to commute a sentence at the request of the attorney general's office, someone who had exhausted all of his appeals because of doubt about his innocence, about his guilt.

And of course, the jury ought to be able to consider whether it's certain enough to convict, but not certain enough to execute.

Mr. SCOTT. The obstruction of justice factor, do I understand the—I think what they're trying to get at is that you're killing the witness in that case. The way it's worded—

Mr. BRUCK. Yes.

Mr. SCOTT. What's the problem with the wording of the case—of that—

Mr. BRUCK. Well, I should say that I understand from majority staff that this is something that they already intend to correct. As it's written now, this would—if somebody had threatened to hurt a witness 20 years ago, that would be an aggravating factor. And I think that's not what they actually intended.

This should be—if we're going to add yet another aggravating factor, this should be very narrowly drawn. It should be made clear that it not only doesn't apply to a threat 20 years ago, that it has to relate to the murder that they're sentencing for. But it should also make clear that it doesn't apply to everyone who might become a witness. It should only apply to someone whose motivation is to obstruct an ongoing prosecution.

Otherwise, this will be the universal aggravator. Someone goes into a store with no premeditation, no advance planning, no prior record, and on and on and on, and shoots the clerk. And the Government could say, well, they probably shot the clerk because they were afraid the person would be a witness. Therefore, this aggravator applies. That is much too broad.

Mr. SCOTT. Can I ask one additional question?

Mr. COBLE. Without objection.

Mr. SCOTT. Just a kind of a general statement is do we have evidence that a death eligible jury is more likely to convict?

Mr. BRUCK. Yes. Absolutely. The Supreme Court has, by a vote of 6–3, said that it's close enough for Government work and has allowed it.

But there's no doubt that juries that are picked, where the willingness to impose the death penalty is a requirement for serving on the jury, and that's the way we do it now, is a jury that is more likely than a normal jury, a regular American jury, to find the defendant guilty in the first place. And that increases the risk of executing—of convicting and executing the innocent.

Mr. COBLE. I thank the gentleman from Virginia.

Now, as a general rule, ladies and gentlemen, we usually restrict opening statements to the Chairman and the Ranking Member. But the introducer of the bill is a Member of the Subcommittee. So, without objection, I'll recognize the distinguished gentleman from Texas for an opening statement, symbol for dash, examination of the witnesses.

The gentleman from Texas.

Mr. GOHMERT. Thank you so much, Mr. Chairman.

I really appreciate this opportunity, and I thank you for holding this hearing today on a bill that I think will clarify some of the areas of death penalty law that are currently in flux due to the things such as the Supreme Court decision in *Atkins v. Virginia*.

Now, it falls on Congress to promulgate statutory provisions that are both fair to the accused and fair to the victim's family, and this bill clarifies certain aggravating factors in death penalty cases, and it firms up notice requirements for both sides, the prosecution and the defense.

Having presided over three death penalty cases during my tenure on the bench and having been court appointed as counsel for a convicted capital murderer it turns out should not have been convicted, and the job I did was able to reverse that case. That's not a case of the system not working. It's a case of a good lawyer helping the system to work, all humility aside.

But it appears that in the areas of a sentencing, the various districts across the country have interpreted different provisions in different ways. And this bill seeks to bring consistency to the proc-

ess and especially when the life of an individual is in the hands of our justice system.

And I'd like to address a few things that Mr. Bruck had indicated with regard to a death eligible jury convicting in a higher percentage of cases. There are a number of factors at work there, I would point out.

First of all, if you've been involved in death penalty prosecutions or death penalty cases, you know that prosecutors do not do that lightly. And because of the tremendous amount of expense incurred simply as a result of pursuing the death penalty, DAs, prosecutors don't want to do it unless they have a very solid case. Otherwise, it wastes hundreds and hundreds of thousands of dollars.

So I would indicate and I would submit humbly that, you know, there aren't many of those capital murder cases that go to trial where they don't feel good about the evidence as far as producing a conviction. Otherwise, they don't go there.

With regard to the sympathy factor, you know, in the case of *Saffle v. Parks*, the Supreme Court of this glorious United States had dealt with that issue, and they dealt with an instruction there that said you must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence.

And Mr. Bruck, you had referred to the fact that we should use human common sense, and as a former judge and chief justice and prosecutor and defense attorney, all, my experience is if you let sympathy either for the victim, which is often a problem, or sympathy for a defendant rule, then common sense often has to take a back seat, and that's what we're trying to avoid.

And you've mentioned that we've found enough innocent people on death row, well, I had a client that was on death row. But the system worked, and he came off death row.

So I think we have a good system. But because capital murder is such a serious matter, it does require continually tweaking. Unfortunately, we have a Supreme Court that not only can't observe precedent, they can't even observe their own precedent and often subject their opinions to the fleeting whims that appear more like something a child's daydream would happen.

And that makes it tough for those of us trying to follow the law when we were judges, prosecutors, defense attorneys, when you haven't got any consistency on the Supreme Court. And you did rightfully mention about the threat provision. And you had said you understood that may be corrected in the future. I did want to let you know the original draft did not have that in there, and that I'd worked on and that the wonderful Judiciary staff had worked on.

And apparently, DOJ made that submission without my approval. And as soon as I caught it, that was yanked out of there. So that has already been changed and corrected. Whereas, I don't want something in the bill that I felt like going in is just not going to work. So you obviously noticed the same thing.

But anyway, fortunately, with the scrutiny of staff and Committee and colleagues, I think we have come to a fairly good bill that will assist in this death penalty tweaking to satisfy the ongoing, evolving will of our wonderful, illustrious Supreme Court.

So with that, I yield back—well, actually, my time is up. But Mr. Chairman, thank you for the hearing. Thank you for this opportunity.

Mr. COBLE. You're indeed welcome. And I say to you, Mr. Gohmert, we'll be glad for you to hang around. We're going to have a—we seem to have a pretty good handle on time. So I'm going to commence a second round. And Mr. Gohmert, I'll be glad for you to remain for that if your time permits.

Mr. Scott and I—I only have one more question, and I'm going to give Ms. Griffey a chance to respond and also the other two witnesses, if you feel so obliged, to Mr. Bruck's—Professor Bruck's comment regarding the fifth amendment.

Ms. GRIFFEY. Yes. Thank you for that opportunity.

The fifth amendment would not, under any circumstances, be violated by the requirement that they identified, the mitigating factors that the defendant will rely on. The fifth amendment is not violated unless a compelled incriminating statement is used against a defendant in a criminal case.

It's not violated. You—that's—if you would like, I saw a frown up there. The Supreme Court case is *Chavez v. Martinez*. It's a 2003 case. *Chavez v. Martinez*, 538 U.S. 760.

And of course, it's been well established the requirement that you give a variety—notice of a variety of defenses doesn't violate the fifth amendment. So just the fact that you have to provide notice does not violate the fifth amendment.

Mr. COBLE. Gentlemen, either of you wanted to weigh in on this?

Mr. STEINBUCH. Mr. Chairman, uncharacteristically, I have no comment on this issue. [Laughter.]

Mr. COBLE. Mr. Scheidegger?

Mr. SCHEIDEGGER. No, I think Ms. Griffey covered it. Thank you.

Mr. COBLE. And Ms. Griffey, the Professor continues to smile. So I'll—do you want to have a rebuttal on this, Professor?

Mr. BRUCK. Well, I would note that—I mean, I've expressed my view generally. I would note that the statute as drafted actually requires that the defendant sign—sign his name to the mitigating factors which, on their face, admit to having committed the crime.

I don't—there are many ways to violate the fifth amendment, including allowing the Government to make derivative use, and then there would be all sorts of hearings about whether the Government benefitted unfairly pre-trial by having a written, signed notice from the defendant detailing the circumstances of the offense.

There is a reason why none of the other 38 States have anything like this, and I would suggest that—

Mr. COBLE. Well, and I'll give the distinguished gentlemen from Virginia and Texas, respectfully, a chance to respond as we go along. Mr. Scott?

Mr. SCOTT. Thank you, Mr. Chairman.

Just to follow up on that, Ms. Griffey, would sometimes to get the mitigating circumstances, factors, you have to essentially admit to the crime. Can that admission be used against the defendant in the prima facie case?

Ms. GRIFFEY. No.

Mr. SCOTT. No?

Ms. GRIFFEY. No.

Mr. SCOTT. Can the information—investigatory information that you glean from the fact that he's admitted to it be used to help the investigation?

Ms. GRIFFEY. The situation is no different than if the defendant filed a notice of an insanity defense. It, you know, nobody is going to stand—no prosecutor is going to stand up in the courtroom and say that defendant admitted that he was insane at the time, so he must be admitting that he did it. That's just not something that's going to happen.

It would be a fifth amendment violation for sure to do that. But it is the fifth amendment that protects against such actions. It's not—just merely requiring notice is not a fifth amendment violation.

Mr. SCOTT. So the prosecution doesn't get undue advantage by extorting an admission of guilt from the defendant?

Ms. GRIFFEY. They're not extorting an admission of guilt. They are requiring notice that they intend—that the defendant intends to rely on a factor such as duress or other factor. This is no different from insanity or any other sort of defense that the defendant raises.

And what it does is it creates a level playing field. These cases are too important to be—to have the outcome be determined by surprise or hiding the ball. What we need to do is to have each side know what is going to be at issue and for each side to be able to test the evidence that is being put into—into the case.

Mr. SCOTT. Well, a level playing field is inconsistent with the presumption of innocence. Is it not?

Ms. GRIFFEY. Well, I don't see that as being inconsistent at all. I don't understand your question, I guess.

Mr. SCOTT. Well, you go in a civil trial with a level playing field. All you've got to prove is preponderance of evidence. There's no presumption one way or the other.

In a criminal trial, you're supposed to go in with an unlevel playing field. The prosecution has to prove the case. Not only prove it, but prove it beyond reasonable doubt. That's not a level playing field.

Ms. GRIFFEY. I think we're talking apples and oranges here. There's the—the burden of proof is one thing, and the due process and ability to establish the facts are another.

Mr. SCOTT. Let me ask you a couple of background questions, if I can, Ms. Griffey? What is the present law, and what would the bill do for co-defendant—the penalty given to a co-defendant?

What is the present law on the admissibility of that information, and what would this bill do to that present law?

Ms. GRIFFEY. It would change it so that the only way in which you could have—the only way in which you could claim entitlement to the statutory mitigating factor would be if there was a defendant against whom the Government could have sought the death penalty, but declined to do it.

You would not be entitled to a—the benefit of the statutory mitigating factor if, for example, a co-defendant was ineligible for the death penalty either because they had to be extradited from a foreign country or because he was underage and such.

And I did see Mr. Bruck claimed that that would create a disparate situation in terms of the outcome. But, of course, the focus of the sentencing phase is on a defendant's culpability.

Mr. SCOTT. Well, just simply the present law and how this would change the present law?

Ms. GRIFFEY. It would restrict the defendant's ability to claim the benefit of statutory mitigation. I don't think it would foreclose him claiming mitigation based on an ineligible co-defendant is non-statutory mitigation. And there's very little difference between the two.

Mr. SCOTT. Another kind of background question. What is the law now, and what would the law be, if this bill were to pass, on people—on the felony murder, where the person—where the defendant is not the triggerman? Can a person who is not the triggerman be given the death penalty under Federal law, and would that change that?

Ms. GRIFFEY. Yes, they can be given the death penalty under Federal law. The Federal law provides for at least four different threshold intent factors. And for example, in carrying out a robbery in which everybody goes in carrying a gun, only one person is the trigger person. Nonetheless, that person engaged in a dangerous act, knowing that it could create a risk of death to the victim.

So, yes, a non-triggerman can—or you know, somebody can commission a murder and order it and not be the triggerman.

Mr. SCOTT. What about the driver in the case? You drive the four or five people. One's a driver. Four go in with guns. Can the driver get the death penalty along with the rest of them?

Ms. GRIFFEY. That depends on what the driver knew.

Mr. SCOTT. Mr. Bruck, do you have any other comments on that, on either question?

Mr. BRUCK. On the last, second to last issue you put to Ms. Griffey about the equally culpable co-defendant. I was very struck that Ms. Griffey just now said it really doesn't change anything that much because the jury can still consider other kinds of unfairness between co-defendants other than prosecutorial decision-making.

And I was very surprised to hear her say that because it's obvious that if this passes, Federal prosecutors will be arguing to judges not only that juries cannot consider anything that is not here because Congress ruled that out as a mitigating—as a mitigating factor, but also that the Government is entitled to a jury instruction.

And that saying you may not consider the fact that there are three people equally guilty of this, but only this man is on trial for his life, and the others are going to get a lesser sentence. And moreover, I bet they're going to move, and judges will say that lawyers for the defense can't even argue that to the jury.

Because when Congress speaks, judges listen. This is a very mischievous provision, and—

Mr. SCOTT. I don't know if that's good or bad. But go ahead. [Laughter.]

Mr. BRUCK. I'm not going to respond to that, Mr. Scott. I just think that I was very surprised to hear the Justice Department say

that it really won't change the way these cases are tried, when I think we all know perfectly well that it will.

Mr. COBLE. Professor, I'm not thoroughly convinced that they always listen to us, but that's for another day.

We've been joined by the distinguished gentleman from Ohio, Mr. Chabot.

And the Chair recognizes the gentleman from Texas.

Mr. GOHMERT. Thank you, Mr. Chairman.

Just a couple of other things. Mr. Bruck raised a good issue about mitigation being signed by the defendant because if that were to go before the jury that, gee, he signed in advance basically tantamount to an admission, that would be a problem. And the fifth amendment protects that.

To me, it's a bit like in non-capital cases in Texas, a defendant has to make an election in writing before the case ever starts as to who will do the sentencing, either the judge or the jury. Well, that is not an admission of guilt. It's just—and it's never to be taken that way or anything of that nature. The fifth amendment protects that.

But it's just the procedure. You've got to sign that in advance, and if you don't make a choice, then your choice is made for you. But that has to be done in advance, and the fifth amendment protects that being taken or used as somehow an admission against interest.

So I see that in the same way, and I would certainly want to protect the fifth amendment rights. They work pretty well for us so far, and I want to see that continue. So I would expect that not to ever be an issue.

As far as good questions, my friend Mr. Scott regarding whether someone not the triggerman might ever get the death penalty, and it's a good issue, good question about whether a driver might ever get that.

Of course, Ms. Griffey pointed out appropriately, it depends on what he knew. And if the evidence isn't there to establish basically that he reasonably knew somebody was probably going to get killed, then the death penalty will not be appropriate there.

You can't just hail somebody off the street, and they don't know you're going to go in and probably kill somebody in robbing a place. There has to be much more evidence than that.

And again, sympathy for the victims in the case is just not enough to ever give somebody the death penalty. So either sympathy for victims or the defendant or the defendant's family is just not to be the issue, but whether there is evidence to support those things.

I really do wish that when Congress spoke that all the judges listened because that's—I think we need some people with hearing aides maybe on the court so that they do hear better.

But I do appreciate the testimony of the witnesses. I appreciate your input. I appreciate what each of you do in order to protect the integrity of our system. That's the only way we plod on forward.

And thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman from Texas.

And we need to vacate this room before too long, but I want to recognize the gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman.

I apologize for being somewhat late for this hearing, having had some conflicts. And I'll be brief in my questions since we do have to vacate the room.

It's my understanding, if I could start with you, Mr. Bruck, that in your testimony you said that—I believe I'm correct in this—that there is no place in a trial for victims' impact statements or victims' testifying relative to the—to the situation, and you shouldn't risk tainting the jury. Was that your testimony in general?

Mr. BRUCK. No. No, it was a question of what should happen in what order. There's no doubt that victims have—surviving members of victims' families have a statutory right to testify and have the jury hear the grief that they have suffered and the impact of the crime on their lives.

The question is whether the jury's decision about mental retardation as a bar should happen before or after the jury has been subjected to what is undeniably, whichever side of the aisle you sit on, very, very emotionally wrenching and powerful testimony that hasn't a thing in the world to do with whether the defendant is eligible for the death penalty by reason of mental retardation.

It's a question—there are many things that we do in a certain order in a criminal trial in order to protect the rights of the accused. And this is an example of something where the order, I think, is backwards in this legislation.

And it's the reason why most States implement *Atkins v. Virginia* by having the judge decide before trial and before millions of dollars or thousands and thousands of dollars are spent on a capital trial whether there's any point going through all this or whether this man is ineligible because of mental retardation. That's the proper order.

And if you're going to have the jury make the decision, which is not the better way to do it, at least have the jury do it when they can focus on that issue and not after they've heard all of the reasons why this guy ought to get the death penalty, mental retardation or no mental retardation, which is a very human reaction.

Mr. CHABOT. Because I—it's my belief that the role of the victim or the victim's family is really critical and one of the things that too often does get short shrift. And it's one of the reasons that I proposed a victims' rights constitutional amendment. Our Chairman, former Chairman Henry Hyde had originally proposed it, and we took up the mantle when Henry left the Committee.

And it's always been my view that when you consider that the defendant's rights are protected in our Constitution, and the victim's rights, on the other hand, are sometimes statutorily protected, sometimes not. But if the two come into conflict, the Constitution's going to trump the statute every time. And there are a number of instances where this has happened.

We haven't had the votes, quite frankly, to pass that constitutional amendment. We've only amended the Constitution 27 times in our Nation's history, and the first 10 times, of course, were the Bill of Rights. So that leaves 17.

And of those 17, 2 of those were—canceled each other out, Prohibition and then doing away with that. So it's only 15 times. So we really don't do that very often.

That being the case, in order to protect victims, we did pass some, I think, helpful legislation which did emphasize more victims' rights about a year or two ago. It didn't go quite as far as a lot of us would have liked it to, but I think it's a step in the right direction.

So anything that we can do to elevate the rights of victims, whether it's a death penalty case or not, I would certainly like to take the opportunity to do that.

Would any of the other members of the panel like to comment relative to victims' rights and the issue that Mr. Bruck just discussed? Have any input they'd like to give us on that?

Mr. Scheidegger?

Mr. SCHEIDEGGER. Yes, I'd like to address that, as far as the sympathy instruction goes. Because of the decision of *Lockett v. Ohio*, where the Supreme Court read into the Constitution a requirement to introduce practically anything the defendant wants, death penalty proceedings have become more emotional than necessary, and the victim impact statements are brought in, in part, to rebalance the scale.

I would like to see less emotional testimony on both sides, but we're kind of stuck with what we have. But I do think it is appropriate to instruct the jurors to make their decisions based on objective circumstances and not on sympathy, even though they are inclined to be sympathetic.

The victim impact testimony is about the impact of the crime on not only the direct victim of the homicide, but on other people, and that is a circumstance for them to consider rationally. And I think an instruction to consider that not based on sympathy is an appropriate one for both sides of the aisle.

Mr. CHABOT. Thank you very much, Mr. Chairman. I see that my time has expired here.

Mr. COBLE. I thank the gentleman from Ohio.

And folks, as I did not exhaust my full time, I want to put two brief questions. We're going to have a vote here before long.

Ms. Griffey, you mentioned in your testimony that the bill places the burden of proof—strike that. That the bill places the burden of proof for mental retardation determination upon the defendant. Is this type of burden shifting present in other areas of prosecution?

Your mike's not on.

Ms. GRIFFEY. Yes, it is. In terms of a variety of defenses. We took a very, very careful look at all of the remotely applicable Supreme Court precedent, and we concluded that it was best to put the burden on the defendant by a preponderance of the evidence.

Mr. COBLE. What would be some other instances where that occurs, the shifting?

Ms. GRIFFEY. Well, the burden is on the defendant to prove insanity. The burden is on the defendant to prove a variety of defenses such as that. The burden—what is a constitutionally permissible burden depends on a variety of factors in terms of the analysis.

Mr. COBLE. Right. I got you.

Mr. Steinbuch, very briefly. In your testimony, you stressed the importance of pre-qualifying jurors for both the trial and sentencing phase. Why is this important, A? And B, do these types of

questions on prospective jurors have the potential to create a bias toward guilt?

Mr. STEINBUCH. Thank you, Mr. Chairman.

This is important for our system to work efficiently, simply. We need to have juries that are willing to impose the law. If the law is the possibility of a death sentence, it makes no sense to have a jury that says ahead of time, we won't follow the law.

And as for the bias issue, as my co-panelist has said, there has been demonstrated some statistical difference between juries that are death qualified and juries that are not death qualified, although I would not characterize the latter as "normal juries."

And as I said previously, I suspect that the bias or, indeed, the statistical aberration is not a bias, but a reflection of the fact that the jurors are willing to follow the law, both in the sentencing phase and in the guilt phase.

Mr. COBLE. Well, Professor, is pre-qualification used in other States? And if so, how many? Or do you know?

Mr. STEINBUCH. You know, I'm probably not the best—the practitioners are probably the best to answer that question. I'm confident it is done, but I don't know—

Mr. COBLE. You can get that to us. We're going to leave the record open for 7 days anyway.

Mr. Scott, any more questions?

Mr. SCOTT. Yes. Mr. Steinbuch, as you death qualify the jury, just demographically, isn't that also a nice way to reduce the number of African Americans on the jury?

Mr. STEINBUCH. I have seen no statistics that demonstrate that one way or the other. So I can't comment on that.

Mr. SCOTT. Statistics show that death penalty is about 50 percent in the African-American community and about 80 percent everywhere else. Doesn't that give you a better shot at back-door striking African Americans from the jury?

Mr. STEINBUCH. Well, I mean, I think it gives you a better shot at back-door subverting the sentencing procedures enacted by Congress. So if those two factors coincide statistically, that may be the case, yes.

Mr. SCOTT. Just another point, Mr. Chairman.

When you do insanity and some of these other things that you have to kind of give notice on, you get in your case-in-chief with the burden beyond a reasonable doubt on the prosecution before you have to kind of help them out. This is a mitigating factor, which you ought to be able to wait until the end of the case after the conviction—after the conviction. Then you come up with the sentencing as a mitigating factor for the death penalty. There's really no reason to require the defendant to put this in prior to the guilty verdict.

And so, I think it is slightly different from some of the others because you actually get to argue about whether they're insane or not. You don't—and it's part of the case-in-chief, which I think is different than what we're talking about here.

Mr. COBLE. Well, folks, we thank you all for your testimony today, and the Subcommittee appreciates your contribution.

In order to ensure a full record and adequate consideration of this important issue—and it is, indeed, an important issue—the

record will remain open for 7 days for additional submissions. Also, any written questions that a Member of the Subcommittee wants to submit should be submitted to you all within that 7-day time-frame.

This concludes the legislative hearing on H.R. 5040, the "Death Penalty Reform Act of 2006." Thank you all for your cooperation, and the Subcommittee stands adjourned.

[Whereupon, at 1:12 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE ROBERT C. SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND RANKING MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Thank you, Mr. Chairman. And I want to thank you for holding this hearing on H.R. 5040, "The Death Penalty Reform Act of 2006." I am disappointed, however, that we are considering yet another bill this Congress that expands opportunities to seek the federal death penalty. We recently expanded federal death penalty applications in the USA PATRIOT Act renewal, in the "Gangbusters" bill, the Court Security bill, the sex offender bill, and others. And here we go again, in a bill touted as a death penalty procedures bill, expanding further instances in which the death penalty can be sought.

There is still no credible evidence that the death penalty, particularly the federal death penalty, deters murder or other crimes, or otherwise promotes the general interest of the U.S. Indeed, every time we expand the situations in which the federal death penalty can be applied, we restrict further our ability to extradite from other countries to this country terrorists and other killers of Americans.

Moreover, there is clear evidence that the federal death penalty is disproportionately applied to African Americans and other minorities. And despite former Attorney General Reno's departing decision to have the Department of Justice (DOJ) examine the "disturbing" prevalence of minorities among those selected for death penalty prosecutions and sentenced to death, no comprehensive and scientific examination has been made.

And although we passed last Congress the Innocence Protection Act, which enacted a set of standards to protect and support innocence in death penalty cases, we still have not provided the funding necessary to fully implement the law. While the impact of the law on the federal death penalty is limited, federal death penalty practice does and should serve as a model for the states. Thus, we should not be expanding application of any death penalty provisions before we provide the funding necessary to fully protect and support innocence.

This bill is problematic in its proposed procedural reforms as well. One cynical evaluation of the bill suggested that it represents DOJ's attempt to legislate victory on every point on which it has lost in court in recent years. By adding more aggravating factors to the long list already in the statute, and removing one of the few existing mitigating factors, DOJ further stacks the deck in favor of finding something on which to hinge an argument for the death penalty. Adding the obstruction of justice aggravating factor in the way it is now worded would allow particularly broad application of an easily charged factor. We see from the current *Moussaoui* death penalty case over in Alexandria that DOJ is willing to go to great lengths to argue for a death penalty where it wishes to. One reason for expanding opportunities to pursue the death penalty is simply to ensure the impaneling of more death-eligible juries. A death-eligible jury is necessarily more focused on, and inclined toward, more severe penalties than would a regular jury.

I am also concerned with the bill's proposal to structure procedures for determination of whether a defendant is mentally retarded and, therefore, not subject to the death penalty pursuant to the *Atkins* case. First, the bill narrowly structures the definition of mental retardation, requiring that all of several factors must be shown, or you can be put to death. And rather than have a pre-trial determination of whether the defendant is mentally retarded, the bill requires that the defendant be first tried by a death-eligible jury and when found guilty and otherwise eligible for death, then they could determine whether he is mentally retarded. This virtually assures that a defendant's mental illness is not a factor until the jury has made up its mind that the defendant should die!

Further, I cannot believe that ,on the basis of fairness to the prosecution, we would consider a provision that turns the traditional burden of proof on its head. That's what we would do if we require a defendant to admit upfront that he committed the crime under duress or extreme emotional distress in order to submit this as mitigation during sentencing.

Yet another difficulty with the bill is its proposal to impanel less than 12 jurors to re-sentence an offender where the first jury deadlocks. There can be no purpose for such a drastic change in time-honored criminal procedures other than to ensure that it is easier to obtain a verdict of death. Proponents of this approach would certainly not be promoting it if they thought it would make death a less likely verdict. While I can understand DOJ's desire to win in its efforts to acquire more death penalties, I don't understand why the Congress should want to further stack the deck in favor of the prosecution in this manner..

There are other significant problems with this bill, Mr. Chairman, but I will leave discussions of those problems to our witnesses and our questioning. Thank you.

LETTER FROM KENT SCHEIDEGGER, LEGAL DIRECTOR AND GENERAL COUNSEL,
CRIMINAL JUSTICE LEGAL FOUNDATION TO THE SUBCOMMITTEE

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April 5, 2006

Honorable Howard Coble, Chairman
Subcommittee on Crime, Terrorism,
and Homeland Security
Committee on the Judiciary
House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Chairman Coble:

Thank you for the opportunity to address the committee at the hearing on March 30. There are a few matters that were discussed at the hearing that warrant further comment.

1. Co-defendant Sentence.

One of the changes to be made by H.R. 5040 is to narrow the present statutory mitigating circumstance regarding another defendant not being punished by death. Section 8(a) of the bill narrows this circumstance to situations where it is the government that chooses not to seek the death penalty against an equally culpable co-defendant.

As Justice Stevens wrote for the Supreme Court in *Atkins v. Virginia*, 536 U. S. 304, 319 (2002), "the severity of the appropriate punishment necessarily depends on the culpability of the offender." For this reason, it is important to permit consideration of all factors that bear on culpability, and it is just as important to exclude factors that have no bearing on culpability. We should not grant arbitrary exemptions from the death penalty based on irrelevant factors.

Testifying in opposition to the bill, Mr. David Bruck identified two situations where present law tells the jury to consider the sentences of co-defendants as mitigating, while the new law would not. One is the case of a co-defendant extradited from a country that requires preclusion of the death penalty as a condition for extradition, and the other is the case of the juvenile co-defendant. These are exactly the kinds of situations where the law should not classify the co-defendant's sentence as mitigating.

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Regrettably, foreign countries exercise too much control over American criminal law. A murderer who makes it to the border guarantees himself exemption from full punishment, no matter how heinous his crime. This is a situation that the State Department should be negotiating with other countries, to put an end to this practice. Unless and until such an agreement is reached, however, we are going to have murderers escape the death penalty in this manner. Even so, the fact that one co-defendant made it across the border has no bearing whatsoever on the culpability of his partners in crime. It is not a circumstance of the offense, and it is not an aspect of the other defendants' character or record. The fact that justice has been obstructed by a foreign country for one perpetrator is no reason to let the others off with less than they deserve.

Even worse is the case of the juvenile co-defendant. Suppose, hypothetically, that the notorious D.C. Snipers, John Allen Muhammad and Lee Boyd Malvo, had been prosecuted in federal court. Malvo is exempt from the death penalty because he was under 18 at the time of the crimes. Some jurors might consider him equally culpable, though, because he was the triggerman. Under present federal law, the fact that Muhammad had recruited a juvenile rather than an adult to be his triggerman would be considered a *mitigating* circumstance! That is beyond wrong; that is scandalous. The jury would be instructed to consider as mitigating a fact that in reality is seriously aggravating.

For the most part, each defendant's case should be considered on its own merits. The outcomes of the cases of other defendants have no more relevance than the sentences of comparably culpable defendants in other, unrelated cases. The one exception, which the bill preserves, is when the government cuts a deal with equally culpable defendants and seeks the maximum penalty against the one who won't deal. The bill permits the jury to consider this in sentencing.

2. Notice of Mitigating Factors.

The present death penalty law provides for the government to give notice of the factors it will claim as aggravating in the penalty phase. See 18 U. S. C. § 3593(a)(2). Section 4(7) of the bill would create a reciprocal obligation on the part of the defendant to give notice of the factors he will claim as mitigating. It has long been understood and accepted in American law that pretrial discovery improves the accuracy and reliability of the fact-finding process by reducing the likelihood of "trial by ambush," and this principle is no less applicable to capital sentencing proceedings than to any other kind of trial.

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During the hearing, there was some discussion of whether the proposed notice rule violates the Fifth Amendment privilege not to be compelled to be a witness against oneself. Some of the objections seemed to be based on a misinterpretation of the statute. The requirement that the defendant sign and file the notice should not be understood to mean that a defendant represented by counsel must personally sign the notice. Notices are normally signed by counsel. However, if this is perceived to be a problem, the bill can be amended to expressly state that counsel may sign the notice. Similarly, language can be added along the lines of existing notice rules to the effect that the notice is not an admission and is not admissible as evidence. See, e.g., Fed. R. Crim. P. 12.1(f).

On the more general issue of discovery in the penalty phase, California's experience may be instructive. In 1990, the people of California added to the state Constitution a requirement that discovery in criminal cases be reciprocal. See Cal. Const., Art. I, § 30(c). This requirement was implemented in Penal Code § 1054.3. The California discovery statute is considerably more extensive than H.R. 5040. It requires disclosure of the names and addresses of the defense witnesses, any statements or reports of the witnesses (other than the defendant himself), and any examinations, tests, or real evidence.

The California Supreme Court quickly rebuffed claims that this statute was unconstitutional. See *Izazaga v. Superior Court*, 815 P. 2d 304 (Cal. 1991). In *People v. Superior Court (Mitchell)*, 859 P. 2d 102 (Cal. 1993), the court further held that the statute applies to the penalty phase of capital cases and generally requires that the discovery be provided before the beginning of the guilt phase of the trial. However, the court acknowledged that there could be situations where disclosure of a witness and his statement might provide evidence of guilt, even though mitigating on penalty, and held that the trial court could defer the disclosure of individual items in such circumstances. *Mitchell* has been established law in California for 13 years now, and it has not been questioned, not even by the Ninth Circuit.

Self-incrimination problems are far less likely under H.R. 5040. Because the defendant is only required to give notice of the factors he will claim and not the evidence supporting those factors, the potential for being a witness against oneself is greatly reduced. For example, a pretrial notice that a defendant intends to claim duress in the penalty phase does not provide the prosecution with evidence that the defendant participated in the crime, while a statement of a witness who saw the defendant being pressed into participation would.

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Even so, if Congress is concerned that the possibility that a pre-guilt-phase notice might, in some rare case, conflict with the Fifth Amendment, then Congress can provide for the same solution that California Supreme Court devised in *Mitchell*. The disclosure could be made *in camera* to the court, and the court could defer disclosure to the prosecution on an item-by-item basis. However, the statute should provide that this procedure is inapplicable to claims of mitigation based on the background of the defendant unrelated to the circumstances of the crime. These are the bulk of claims in mitigation in capital cases today, and they are *per se* not incriminating.

3. Claims of Racial Discrimination.

Finally, we heard at the hearing the familiar charge that the death penalty is administered in a racially discriminatory manner. I believe that there is a widespread misperception on this point. Attached to this letter is an article I wrote in 2003 discussing the leading studies and how they are frequently misinterpreted.

Thank you for allowing me to include these additional remarks. I hope that Congress will move forward to enact this important legislation.

Sincerely,

Kent S. Scheidegger

"SMOKE AND MIRRORS ON RACE AND THE DEATH PENALTY," SUBMITTED BY KENT SCHEIDEGGER, LEGAL DIRECTOR AND GENERAL COUNSEL, CRIMINAL JUSTICE LEGAL FOUNDATION

SMOKE AND MIRRORS ON RACE AND THE DEATH PENALTY

By KENT SCHEIDEGGER*

Introduction

Claims that the death penalty is enforced in a manner that discriminates on the basis of race have long been prominent in the capital punishment debate. In its 1972 decision in *Furman v. Georgia*,¹ the Supreme Court relied on the Eighth Amendment's Cruel and Unusual Punishment Clause to throw out the capital punishment laws then in existence, but the Equal Protection Clause lay just beneath the surface of the opinions.² Congress and 38 state legislatures rewrote their laws to put more structure into the sentencing decision so as to reduce the possibility of racial bias.³

In January 2003, a study of capital punishment in Maryland was widely reported as confirming the claim that race remains a large factor. "Large Racial Disparity Found By Study of Md. Death Penalty," said the headline in the Washington Post.⁴ A hard look at the numbers tells a different story. First, however, a review of the background is in order.

The McCleskey Case

The most widely known study of race and capital punishment is the one involved in a Supreme Court case, *McCleskey v. Kemp*.⁵ The NAACP Legal Defense and Education Fund, Inc. (LDF) asked a group of researchers headed by Dr. David Baldus to undertake a study for the specific purpose of using the results to challenge Georgia's capital punishment system.⁶ The LDF also arranged funding for the study. One result of this study was undisputed. "What is most striking about these results is the total absence of any race-of-defendant effect."⁷ The reforms after *Furman v. Georgia* had successfully eliminated discrimination against black defendants as a substantial factor in capital sentencing. This was consistent with a variety of studies done in other states.⁸

With their primary argument disproved by their own study, McCleskey's defenders proceeded to a federal *habeas corpus* hearing on a different theory. The Baldus group claimed to have found a "race-of-victim" effect. That is, after controlling for other factors, murders of black victims are somewhat less likely to result in a death sentence than murders of white victims.⁹ Based on a mechanical "culpability index," Dr. Baldus identified a class of clearly aggravated cases where the death penalty was consistently imposed, a class of clearly mitigated cases where it was almost never imposed, and a mid-range where it was sometimes imposed,¹⁰ exactly the way a discretionary system should work. It was only within the mid-range that the race of the victim was claimed to be a factor. After an extensive hearing with experts on both sides, the federal District Court found numerous problems with Dr. Baldus's data and methods. Most important, though, was a finding that the model claiming to show a

race-of-victim effect had failed to account for the legitimate factor of the strength of the prosecution's case for guilt. When a different model that accounted for that factor was used, the race-of-victim effect disappeared.¹¹

Despite this finding, and contrary to normal appellate practice, the Court of Appeals and the Supreme Court assumed on appeal that Dr. Baldus had actually proven his case.¹² Ever since, the Supreme Court's opinion in *McCleskey* has been cited for "facts" which it merely assumed, and which the trial court had found were false.¹³ The Court held that even if the statistics were valid, "McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty."¹⁴

This holding points out what is so very odd about this race-of-victim bias claim. The benchmark of our society for what kind of case "deserves" the death penalty is established in those cases where race is not a factor, i.e., in those cases where the murderer, the victim, and the decision-makers are all the same race. Traditionally, at least in the Southeast, that would be the case where they are all white. A race-of-defendant bias would mean that there are black defendants on death row who would have been sentenced to life if their cases had been measured by the benchmark. That is a valid ground for attacking the death penalty, as was done successfully in *Furman*. However, a race-of-victim effect means that every murderer on death row would still be there if the bias were eliminated and every case judged by the race-neutral benchmark, but a few more murderers would be there as well. The unjust verdicts which result from a system biased against black victims are the cases that should result in a death sentence according to the race-neutral criteria, but which result in life sentences instead. McCleskey's sentence was correct when measured against the race-neutral benchmark, and he was justly executed for gunning down a police officer in the performance of his duty. The unjust sentences, if Dr. Baldus is correct, are in the similar cases where equally culpable murderers get off with life.

Post-McCleskey Studies

The *McCleskey* decision shut down Baldus-type studies as tools of federal litigation. Similar studies since then have been done in a few states where state courts chose not to follow *McCleskey* on independent state grounds, where legislative or executive branches commissioned them, or where there were done independently of government.

The California Attorney General commissioned the RAND Corporation to study that state's system in preparation for *McCleskey*-type litigation which was subsequently

dismissed. Using a different methodology, Klein and Rolph found no evidence of racial discrimination based on either the race of the victim or the race of the defendant.¹⁵

In New Jersey, the Supreme Court appointed a succession of special masters, the first one being Dr. Baldus, to study the death penalty in that state. The 2001 report of Judge David Baime reports that the statistical evidence supports neither the thesis of race-of-defendant bias nor that of race-of-victim bias in determining the likelihood that a defendant will be sentenced to death.¹⁶ Statewide data do show that proportionately more white-victim cases advance to the penalty phase. However, this is not actually caused by race of the victim, but rather by different prosecutorial practices in counties with different populations. Prosecutors in the more urban counties, with proportionately more black residents and hence more black-victim cases, take fewer potentially capital cases to a penalty trial. Conversely, prosecutors in the less urban counties, which generally have higher percentage white populations, seek relatively more death sentences. "New Jersey is a small and densely populated state. It is, nevertheless, a heterogeneous one. It is thus not remarkable that the counties do not march in lock-step in the manner in which death-eligible cases are prosecuted."¹⁷

The Nebraska Legislature commissioned a study, which was headed by Dr. Baldus and George Woodworth, the lead researchers of the *McCleskey* study. This study found no significant evidence of sentencing disparity based on race of the defendant, race of the victim, or socioeconomic status.¹⁸ The study did find differences among counties, particularly between urban and rural. The Baldus group uses the term "geographic disparity"¹⁹ to describe the same phenomenon that Judge Baime calls not marching in lock-step. However, the Baldus group found that the trial judges, who did the sentencing in Nebraska at this time, effectively corrected for the difference.²⁰

In January 2000, the United States Justice Department released raw data on the ethnic breakdown of persons for whom the death penalty was sought at various stages of federal prosecutions and on those finally sentenced to death.²¹ Federal prosecution of violent crime has been targeted specifically at drug-trafficking organized crime for many years. From 1988 to 1994, the only federal death penalty in force was the Drug Kingpin Act.²² No one should be surprised that the organizations smuggling drugs from Latin America are largely Hispanic or that the drug-fueled, violent gangs of the inner city are largely black. So there should have been no surprise that the federal death row has a very large percentage of black and Hispanic murderers, as this report showed it does. The shock and dismay that accompanied the release of this report²³ was entirely unwarranted. The data gathering process continued and, sure enough, the proportion of minorities for whom the death penalty is sought or obtained reflects the pool of potentially capital cases which are appropriate for federal prosecution.²⁴

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A study by a legislative commission in Virginia produced results similar to the New Jersey and Nebraska studies. "The findings clearly indicate that race plays no role in the decisions made by local prosecutors to seek the death penalty in capital-eligible cases."²⁵ However, urban prosecutors do seek it less often than rural ones.²⁶ In interviews with the urban prosecutors, the reason most often given for seeking the death penalty less often was the reluctance of urban juries to impose it.²⁷

The Maryland Study

With the background of these other studies in mind, analysis of the Paternoster study in Maryland²⁸ is straightforward. Prior to the year 2000, there had been four studies of the death penalty in Maryland, but none of them had information on the aggravating and mitigating circumstances of the individual cases. Thus, they lacked the essential information to make a judgment about the administration of the death penalty in Maryland.²⁹ In 2000, Governor Glendonning funded a study to gather that information.

The study began with a database of approximately 6,000 cases where the defendant was convicted of first- or second-degree murder between 1978 and 1999.³⁰ That is about 40% less than the approximately 10,000 cases of murder and voluntary manslaughter in that period,³¹ so presumably the remainder were voluntary manslaughter, unsolved cases, or cases where a perpetrator was identified but evidence was insufficient to convict.

One of the essential requirements of a valid post-*Furman* death penalty statute is that it first narrow the category of defendants for whom the death penalty can even be considered.³² Maryland law does this by requiring that the murder meet all of the following criteria: (1) the murder was first degree; (2) the defendant was a principal in the first degree (i.e., the actual killer, rather than just an accomplice); (3) the defendant was at least 18; (4) the defendant was not retarded; and (5) at least one of a list of ten aggravating circumstances is true.³³ The most common aggravating circumstance is murder in the course of a rape, robbery, or certain other felonies. The Paternoster group determined that 1,311 out of 5,978 murder convictions were "death eligible."³⁴ Before any decision-maker exercises any discretion, Maryland law whittles the class of murderers eligible for the death penalty to a mere 22% of the total. Maryland's criteria therefore easily meet the constitutional requirement of a meaningful narrowing of the eligible class.

Prosecutor discretion in seeking the death penalty and continuing the case to a penalty hearing further reduced the number of hearings to 14% of the original 1,311. Juries actually imposed death sentences in about 42% of the cases where they were asked, or about 6% of the originally eligible cases. The key question is what part, if any, racial discrimination plays in these two discretionary steps: the decision of

the prosecutor to ask the jury for the death penalty, and the decision of the jury, when asked, to actually impose it. A further subdivision is whether the race of the defendant or the race of the victim makes a difference.

The study also asks about so-called "geographic disparity," at one point even equating such "disparity" with "arbitrariness."³⁵ The study appears to simply assume throughout that variation by county is a problem on the same order as racial discrimination. In other words, contrary to Judge Baime's report in New Jersey,³⁶ the Paternoster report appears to assume that Maryland's counties *should* "march in lock-step." This assumption colors the entire report.

The report then tabulates numbers of cases by race and by county without adjusting for case characteristics.³⁷ However, the meat of the study lies in the adjusted race data, and the combined effects of race and county. First, there is the result, that by all rights, *should* have been the headline story. After adjusting for relevant case characteristics, so as to compare apples to apples, there is no difference between the death sentence rates of black and white offenders, beyond the inevitable level of statistical "noise" inherent in such studies. "In sum, we have found no evidence that the race of the defendant matters in the processing of capital cases in the state."³⁸

Although this result is consistent with the other studies discussed above, it is completely contrary to the popular conception of the death penalty in America. For any American institution to eliminate the primary racial effect of concern to the point that it is lost in the statistical grass is an accomplishment to be celebrated with fireworks and champagne. Instead, this finding was barely noticed.

On the race-of-victim effect, the picture is murky. There are various ways to analyze the data. Some ways show a significant race of victim effect while others do not.³⁹ Different regression models can be constructed by choosing which variables to include. Paternoster reports that "considered *alone* the race of the victim matters, those who kill white victims are at a substantially increased risk of being sentenced to death . . ."⁴⁰ But considering race alone is wrong. A different model considering race and jurisdiction together yields a very different result:

"When the prosecuting jurisdiction is added to the model, the effect for the victim's race diminishes substantially, and is no longer statistically significant. This would suggest that jurisdiction and race of victim are confounded. There are state's attorneys in Maryland who more frequently pursue the death penalty than others. It also happens that there are more white victim homicides committed in those jurisdictions where there is a more frequent pursuit of the death penalty."⁴¹

What this means, in English, is that some counties

in Maryland elect tougher-on-crime prosecutors and have tougher juries than other counties. In the tougher counties, a murder in the middle range is more likely to result in a death sentence than a similar murder in a softer county. Support for tough-on-crime measures generally and capital punishment in particular is substantially correlated with race. One poll earlier this year found whites in favor of capital punishment (68-27) and blacks opposed (40-56).⁴² For this reason, the tougher counties are likely to have a higher proportion of white residents and hence white crime victims.

What the Paternoster group calls "geographic disparity" is, in reality, local government in action. This is exactly the way our system is *supposed* to work. We elect our trial-level prosecutors by county so that local people have local control over how the discretion of that office is exercised. If the voters of suburban Baltimore County choose to elect a prosecutor who seeks the death penalty frequently, while the voters of downtown Baltimore City elect one who seeks it rarely, that is their choice.

Prosecutors also make judgments about the kinds of cases in which the juries of their area will impose the death penalty. This form of local control, the jury of the vicinage, is one of our cherished rights going back to the common law. Parliament's violation of this right was one of the reasons for the American Revolution.⁴³ The right is guaranteed, albeit in modified form appropriate for the federal courts, in the Sixth Amendment.

Why, one might ask, is there so much hyperventilating about "geographic disparity"? Apparently, it is because all the other discrimination arguments against capital punishment have failed. The post-*Furman* reforms have been a resounding success in smashing the form of discrimination of greatest concern: the race of the defendant. In study after study, race-of-victim bias is either nonexistent or disappears when legitimate variables are accounted for. What is left is to create a brand new requirement of statewide uniformity, flatly contrary to the American tradition of local control, and then declare our judicial system a failure for violating this *ex post facto* requirement. It is an elaborate sleight of hand.

The Real Problem

Debunking the racial discrimination claim does not mean that everything is just fine in Maryland, or any other state. The Paternoster study does indicate a very real problem. The people of Baltimore City and Prince George's County are receiving an inferior quality of justice. A murderer who kills a resident of one of those counties is more likely to get off with a life sentence under circumstances where the death penalty is warranted.

Failure to use the death penalty where it is warranted can have fatal consequences for innocent people.

Although the deterrence debate has not yet been conclusively resolved, a mounting body of scholarship confirms what common sense has always told us: a death penalty that is actually enforced saves innocent lives.⁴¹

We can make a rough calculation with the Paternoster study's unadjusted geographic data⁴² to get an idea of the magnitude of the problem. Baltimore City had a fraction of 0.435 of the state's 1311 death-eligible homicides, or 570. At the statewide average rate of death sentences, that would yield 33, instead of the 10 that Baltimore City actually produced. The Emory study estimates that each execution saves 18 innocent lives through deterrence.⁴³ If the additional 23 death sentences had been imposed and carried out,⁴⁴ over 400 murders could have been deterred.

That is a staggering toll of death caused by insufficient use and execution of the death penalty. Even if this rough calculation is off by a factor of four, that would still be over 100 people murdered who could have been saved.

To properly protect the people in Baltimore City and other jurisdictions like it, we must restore public confidence in and support of capital punishment, so that prosecutors can seek it in appropriate cases, and juries will impose it. The first step toward that end is to debunk the myth that capital punishment is imposed discriminatorily. The numbers are there in the opponents' own studies, once we cut through the spin and look at the facts.

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Footnotes

- ¹ 408 U. S. 238.
² See *Graham v. Collins*, 506 U. S. 461, 479-484 (1993) (Thomas, J., concurring).
³ See *Gregg v. Georgia*, 428 U. S. 153, 179-180 (1976); U. S. Dept. of Justice, U. S. Bureau of Justice Statistics, *Capital Punishment 2001*, Tables 1 & 2 (2002).
⁴ Susan Levine & Lori Montgomery, *Large Racial Disparity Found By Study of Md. Death Penalty*, *Washington Post*, Jan. 8, 2003, p. A1.
⁵ 481 U. S. 279 (1987).
⁶ See D. Baldus, G. Woodworth & C. Pulaski, *Equal Justice and the Death Penalty* 44 (1990).
⁷ *Id.*, at 159.
⁸ See *id.*, at 254.
⁹ The alarmist claim that the Baldus study shows that killers of white victims are "four times as likely" to receive a death sentence as killers of black victims is literally a textbook example of how to lie with statistics. See Barnett, *How Numbers Can Trick You*, 97 *Technology R.* 38, 42-43 (1994).
¹⁰ See Baldus, *supra* note 6, at 91, Figure 5.
¹¹ *McCleskey v. Kemp*, 380 F. Supp. 338, 368 (ND Ga. 1984).
¹² *McCleskey v. Kemp*, 481 U. S. 279, 291, n. 7 (1987).
¹³ See, e.g., *Callins v. Collins*, 510 U. S. 1141, 1153-1154 (1994) (Blackmun, J., dissenting).
¹⁴ 481 U. S., at 307.
¹⁵ Klein & Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California*, 32 *Jurimetrics J.* 33, 44 (1991).

¹⁶ D. Baine, *Report to the Supreme Court Systemic Proportionality Review Project: 2000-2001 Term* 61 (2001), <http://www.judiciary.state.nj.us/baine-bainereport.pdf>.

¹⁷ *Id.*, at 62.

¹⁸ D. Baldus, G. Woodworth, G. Young, & A. Christ, *The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis*, Executive Summary 14-22 (2001).

¹⁹ *Id.*, at 18.

²⁰ *Id.*, at 21.

²¹ U. S. Dept. of Justice, *The Federal Death Penalty System: A Statistical Survey (1988-2000)* (2000).

²² *Id.*, at 1.

²³ See, e.g., Bonner & Tacey, *Pervasive Disparities Found in the Federal Death Penalty*, *N. Y. Times*, Sept. 12, 2000, at A6.

²⁴ U. S. Dept. of Justice, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review* 4 (2001).

²⁵ Joint Legislative Audit and Review Commission, *Review of Virginia's System of Capital Punishment*, iii (2002), <http://jlarc.state.va.us/reports/rpt4274.pdf>.

²⁶ *Ibid.*

²⁷ *Id.*, at 31.

²⁸ R. Paternoster, et al., *An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction* (2003) (cited below as "Paternoster"). The study is on the University of Maryland Web site as <http://www.urhome.umd.edu/newsdesk/pdf/evsc.pdf> (Executive Summary) and <http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf> (Final Report). Page cites below are to the Executive Summary unless otherwise noted.

²⁹ *Id.*, at 4.

³⁰ *Id.*, at 7.

³¹ U. S. Bureau of Justice Statistics, *Data Online*, query run July 28, 2003; <http://bjsdata.ojp.usdoj.gov/dataonline/Search/Homicide/State/StatebyState.cfm>. The FBI collects data on a category it calls "murder and nonnegligent manslaughter."

³² See *Inhanga v. California*, 512 U. S. 967, 972 (1994).

³³ Paternoster, *supra* note 28, at 5-7.

³⁴ *Id.*, at 9.

³⁵ *Id.*, at 1.

³⁶ See *supra* note 17 and accompanying text.

³⁷ Paternoster, *supra* note 28, at 13-23.

³⁸ *Id.*, at 26 (emphasis in original).

³⁹ See *id.*, at 27-28 (logistical regression shows significant race-of-victim effect, according to generally accepted statistical criterion, while stepwise regression does not).

⁴⁰ *Id.*, at 32 (emphasis added).

⁴¹ *Ibid.*

⁴² Sussman, *No Blanket Commutation, Poll: Most Oppose Clearing Death Row* (Jan. 24, 2003), http://abcnews.go.com/sections/us/DailyNews/commutation_poll030124.html.

⁴³ Declaration of Independence (1776) ("For transporting us beyond Seas to be tried for pretended Offences").

⁴⁴ See Dezhbakhsh, Rubin, and Shepard, *Does Capital Punishment Have a Deterrent Effect?*, 33 *American Law and Economics Review* 344 (2003); Mocan, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, *Journal of Law and Economics* (forthcoming Oct. 2003), <http://econ.cudenver.edu/mocan/papers/GettingOffDeathRow.pdf>; Cloninger & Marchesini, "Execution and Deterrence: A Quasi-Controlled Group Experiment," 33 *Applied Economics* 569, 576 (2001); California District Attorneys' Association, *Prosecutors' Perspective on California's Death Penalty* 44-46 (2003), <http://www.cdaa.org/WhitePapers/DPPaper.pdf>.

⁴⁵ See Paternoster, *supra* note 28, Report Figure 5. The adjustments for case characteristics, see *id.*, Report Figure 10b, are significant but not needed for the order-of-magnitude calculations being made here.

⁴⁶ See Dezhbakhsh, et al., *supra* note 44.

⁴⁷ Actually carrying them out is another problem and the subject of another paper. The primary reason death sentences are not carried out in Maryland has been changes in the rules after the trial.