Benchbook

for United States District Courts

Seventh Edition

Federal Judicial Center
February 2026

FJC
Federal Judicial Center

The Federal Judicial Center produced this *Benchbook for United States District Courts* in furtherance of its mission to develop and conduct education programs for the judicial branch. This *Benchbook* is not a statement of official Federal Judicial Center policy. Rather, it was prepared by, and it represents the considered views of, the Center's *Benchbook* Committee, a group of experienced district judges appointed by the Chief Justice of the United States in his capacity as chair of the Center's Board. The committee was assisted by Federal Judicial Center staff.

Preface

The Seventh Edition of the *Benchbook*—previously the *Benchbook for U.S. District Court Judges* and now the *Benchbook for United States District Courts*—is a concise guide to handling matters that federal judges may experience on the bench. The name change reflects that the *Benchbook* may be valuable to magistrate judges, as well as potentially bankruptcy judges and other participants in district court proceedings, such as federal defenders and CJA attorneys, pretrial services officers, and probation officers.

The *Benchbook* covers procedures that are required by statute, rule, or case law, and offers detailed guidance from experienced trial judges on these requirements and other matters that arise in the courtroom. New judges should benefit from the *Benchbook*, but all judges may find useful reminders about how to handle both routine and more complex issues or how to handle situations they may encounter for the first time. While the *Benchbook* itself should not be cited as authority, the text is based on statutes, rules of procedure, case law, and other authorities, as shown by extensive citations to such authorities. The text also offers suggestions or recommendations that *Benchbook* Committees through the years thought useful for judges to consider. Because circuit law may vary, particularly with respect to procedures, judges should always familiarize themselves with the requirements of their circuit's law.

Each new edition focuses on updating relevant case law, statutes, and rules as needed, while also revising existing material and adding new information that the Committee has determined will be helpful.

In the Seventh Edition, the first three sections have been rewritten to provide a comprehensive step-by-step guide to the procedures and requirements of the Bail Reform Act of 1984, and to provide greater guidance on the right to the assistance of counsel with emphasis on the importance of timely appointment of counsel.

Section 3.01: Death Penalty Procedures was updated to reflect current practice and the information concerning appointment of counsel and interim recommendations adopted by the Judicial Conference of the United States from the Report of the Ad Hoc Committee to Review the Criminal Justice Act (2018). It also provides a list of resources that are available to assist judges who may handle a capital case.

A new Section 5.07: Juror Questions During Trial is not intended to either encourage or discourage the practice, but to provide information and guidance to courts that may consider whether to allow jurors to question witnesses during trial.

The Center will distribute printed copies of the *Benchbook* only to new judges and make it available to all judges electronically. Paper copies will be available to judges upon request. The electronic version provides links to many of the authorities cited in the text.

The *Benchbook* is prepared by the *Benchbook* Committee in collaboration with Center staff. Members are experienced judges appointed to the Committee by the Chief Justice. Thank you to the members of the Committee: Judge Julie A. Robinson (D. Kan.) and Judge Ricardo S. Martinez (W.D. Wash.) who separately served as committee Chair at different times in the process; Judges Irene M. Keeley (N.D. W. Va.), Danny C. Reeves (E.D. Ky.), Nancy D. Freudenthal (D. Wyo.), Kathleen Cardone (W.D. Tex.), Lisa P. Lenihan (W.D. Pa.), Sara L. Ellis (N.D. Ill.), and Jonathan E. Hawley (C.D. Ill.). The Seventh Edition reflects the dedicated efforts of all these judges.

This edition also benefited from the assistance of law professors, as well as staff at the Administrative Office. We thank them for their contributions.

We hope you find this edition of the *Benchbook* to be useful, and we invite comments and suggestions for making it better.

Robin L. Rosenberg
Director, Federal Judicial Center

Contents

1.01 Initial Appearance . . . 1
1.02 Appointment of Counsel or Pro Se Representation . . . 25
1.03 Release or Detention Pending Trial . . . 31
1.04 Offense Committed in Another District . . . 73
1.05 Commitment to Another District (Removal Proceedings) . . . 75
1.06 Waiver of Indictment . . . 79
1.07 Arraignment and Plea . . . 83
1.08 Joint Representation of Codefendants . . . 85
1.09 Waiver of Jury Trial (Suggested Procedures, Questions, and Statements) . . . 89
1.10 Speedy Trial Act . . . 93
1.11 Delinquency Proceedings . . . 97
1.12 Mental Competency in Criminal Matters . . . 107
1.13 Referrals to Magistrate Judges (Criminal Matters) . . . 113
2.01 Taking Pleas of Guilty or Nolo Contendere . . . 117
2.02 Taking Pleas of Guilty or Nolo Contendere (Organization) . . . 131
2.03 Pretrial Checklist and Trial Outline—Criminal . . . 135
2.04 Findings of Fact and Conclusions of Law in Criminal Cases . . . 141
2.05 Jury Selection—Criminal . . . 143
2.06 Standard Voir Dire Questions—Criminal . . . 147
2.07 Preliminary Jury Instructions—Criminal Case . . . 153
2.08 General Instructions to Jury at End of Criminal Case . . . 159
2.09 Verdict—Criminal . . . 163
2.10 Trial and Post-Trial Motions . . . 167
2.11 Release or Detention Pending Sentence or Appeal . . . 171
3.01 Death Penalty Procedures . . . 175
4.01 Sentencing Procedure . . . 199
4.02 Revocation or Modification of Probation and Supervised Release . . . 221
5.01 Handling a Disruptive or Dangerous Defendant . . . 233
5.02 Grants of Immunity . . . 239
5.03 Invoking the Fifth Amendment . . . 241
5.04 Handling the Recalcitrant Witness . . . 243
5.05 Criminal Defendant's Motion for Mistrial . . . 247
5.06 Duty to Disclose Information Favorable to Defendant (*Brady* and *Giglio* Material) . . . 249
5.07 Juror Questions During Trial . . . 273

6.01 Civil Case Management . . . 277
6.02 Trial Outline—Civil . . . 297
6.03 Findings of Fact and Conclusions of Law in Civil Cases and Motions . . . 299
6.04 Jury Selection—Civil . . . 303
6.05 Standard Voir Dire Questions—Civil . . . 305
6.06 Preliminary Jury Instructions—Civil Case . . . 309
6.07 General Instructions to Jury at End of Civil Case . . . 315
6.08 Verdict—Civil . . . 319
6.09 Referrals to Magistrate Judges (Civil Matters) . . . 321
7.01 Contempt—Criminal . . . 323
7.02 Contempt—Civil . . . 329
7.03 Injunctions . . . 333
7.04 Grand Jury Selection and Instructions . . . 339
7.05 Foreign Extradition Proceedings . . . 351
7.06 Naturalization Proceedings . . . 353
7.07 Excluding the Public from Court Proceedings . . . 355
7.08 Oaths . . . 359

3.01 Death Penalty Procedures

18 U.S.C. §§ 3005, 3591–3599

The Federal Death Penalty Act of 1994 (FDPA) established procedures for imposing any death penalty under federal law (except for prosecutions under the Uniform Code of Military Justice). See 18 U.S.C. §§ 3591–3599. This section provides an outline of procedures applicable to cases where the death penalty could be imposed. Capital cases are highly specialized, extraordinarily demanding, and known to raise numerous complex issues that require skilled attorneys and careful analysis. However, as the Cardone Report found, "[m]any federal judges are not familiar with the nature of criminal defense and are even less knowledgeable about what it takes to provide a strong defense in a death penalty case, because these cases are relatively rare."[1] As a result:

> Lacking capital experience, many judges may also be unaware of the need for extensive investigative, mitigation, and other expert assistance in both capital prosecutions and habeas petitions. The same lack of experience also hampers a judge's ability to evaluate requests to fund these services, sometimes resulting in significant delays. . . . Lack of knowledge among federal judges can have serious consequences when it leads to appointment of poorly-qualified counsel or failure to approve adequate expert assistance or to do so in a timely fashion.[2]

The following outline provides basic guidance for judges presiding over capital cases regarding the appointment and compensation of counsel, the Department of Justice (DOJ) Death Penalty Authorization Protocol, jury selection and instruction, statutory requirements, and case law, and also offers links to additional reference materials that cover these and other matters judges may face in a capital prosecution. Note: This section does not cover federal death penalty appeals or habeas corpus review of state[3] or federal capital convictions.

Guidance and Resources

Judges who have a potential death penalty case must familiarize themselves with the *Guide to Judiciary Policy* Vol. 7A: Defender Services, Ch. 6: Federal Death Penalty and Capital Habeas Corpus Representations. This chapter of Volume 7A contains federal judicial policy and recommendations of the Judicial Conference of the United States on the appointment and compensation of counsel in federal death penalty cases. Appendix 2A of Volume 7A sets forth the "Model Plan for Implementation and Administration of the Criminal Justice Act" [hereinafter

1. 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act 195 (2018) [hereinafter Cardone Report], https://cjastudy.fd.org.

2. *Id*. at 195–96. Chief Justice John G. Roberts tasked the Ad Hoc Committee, which was chaired by the Hon. Kathleen Cardone (W.D. Tex.), with "studying the current quality of public defense in federal courts nationwide provided under the auspices of the Criminal Justice Act." Following seven hearings around the United States with more than 200 witnesses and over 2,300 pages of written testimony, the Committee made a series of recommendations for the more effective delivery of representation under the Sixth Amendment and the Criminal Justice Act, including in capital cases. *See* the Committee's Executive Summary, https://cjastudy.fd.org/sites/default/files/public-resources/2017-final-report-ad-hoc-committee-review-cja/ad-hoc-report-exec-summary2018.pdf.

3. For information on federal habeas review of state capital cases, see Asifa Quraishi, Resource Guide for Managing Capital Cases, Volume II: Habeas Corpus Review of Capital Convictions (Federal Judicial Center 2010), https://fjc.dcn/sites/default/files/2012/Hab10-00.pdf, and Kristine M. Fox, Capital § 2254 Habeas Cases: A Pocket Guide for Judges (Federal Judicial Center 2012), https://fjc.dcn/sites/default/files/2012/Cap2254Hab.pdf.

referred to as Model Plan], which "is intended to provide guidance in the implementation and administration of the Criminal Justice Act, as required under 18 U.S.C. § 3006A(b). This reflects the policies of the Judicial Conference of the United States provided in *Guide to Judiciary Policy*, Vol. 7A."[4] Section XIV of the Model Plan covers "Appointment of Counsel and Case Management in CJA Capital Cases," and advises courts to make use of the federal judiciary's resource counsel, who provide specialized expert services in capital cases:

> Given the complex and demanding nature of capital cases, where appropriate, the court will utilize the expert services available through the Administrative Office of the U.S. Courts (AO), Defender Services Death Penalty Resource Counsel projects ("Resource Counsel projects"), which include: (1) Federal Death Penalty Resource Counsel and Capital Resource Counsel Projects (for federal capital trials), (2) Federal Capital Appellate Resource Counsel Project, (3) Federal Capital Habeas § 2255 Project, and (4) National and Regional Habeas Assistance and Training Counsel Projects (§ 2254). *These counsel are death penalty experts who may be relied upon by the court for assistance with selection and appointment of counsel, case budgeting, and legal, practical, and other matters arising in federal capital cases.*[5]

The Model Plan also states that "capital cases should be budgeted with the assistance of case-budgeting attorneys and/or resource counsel where appropriate," and that "[q]uestions about the appointment and compensation of counsel and the authorization and payment of investigative, expert, and other service providers in federal capital cases should be directed to the AO's Defender Services Office."[6]

Volume 7A of the *Guide to Judiciary Policy* also contains Appendix 6A: "Recommendations & Commentary Concerning the Cost and Quality of Defense Representation (Updated Spencer Report, September 2010)" [hereinafter Spencer Report Update]. This Appendix includes the eleven recommendations from the May 1998 Spencer Report that were adopted by the Judicial Conference, plus revised commentary from a 2010 update of the report.[7] The Spencer Report provides "[d]etailed recommendations on the appointment and compensation of counsel in federal death penalty cases," while the revised commentary "provides practical information that is useful to judges and appointed counsel in the management of a federal death penalty case."[8]

Judges should also consider reviewing Section 9: Capital Representation, of the Cardone Report,[9] and the chapter on capital cases in the Federal Judicial Center's study of the Cardone

4. *See* Admin. Office of the U.S. Courts, Guide to Judiciary Policy vol. 7A, https://www.uscourts.gov/sites/default/files/guide-vol07a.pdf. The Model Plan is available separately at https://www.uscourts.gov/file/2795/download.

5. Model Plan, *supra* note 4, at § XIV.B.4 (emphasis added). *See also* Blair Perilman & Cari Dangerfield Waters, Presiding Over District Court Cases with Appointed Criminal Justice Act (CJA) Counsel: A Handbook for New Judges 11 (June 2019) (see section IV, Additional Information Regarding Capital Representations, discussing resources for judges), https://fjc.dcn/sites/default/files/session/2023/New%20Judges%20CJA%20Handbook.pdf.

6. Model Plan, *supra* note 4, at § XIV.B.13–14. The Legal and Policy Division Duty Attorney of the Defenders Services Office may be reached at 202-502-3030 or by email at dso_lpd@ao.uscourts.gov.

7. Guide to Judiciary Policy vol. 7A, *supra* note 4, app. 6A (Updated Spencer Report) at 1–2 (introductory note), https://www.uscourts.gov/file/vol07a-ch06-appx6apdf. The original Spencer Report was produced in 1998 by a subcommittee of the U.S. Judicial Conference Committee on Defender Services: Judges James R. Spencer (E.D. Va.), Chair; Robin J. Cauthron (W.D. Okla.); and Nancy G. Edmunds (E.D. Mich.), and is available at https://www.uscourts.gov/sites/default/files/original_spencer_report.pdf. The report's recommendations were adopted by the Judicial Conference as official policy on September 15, 1998, and remain in effect. *See* Report of the Proceedings of the Judicial Conference of the United States, Sept. 1998, at 67–74. A comprehensive update of the Spencer Report in 2010, with revised commentary to the 1998 recommendations, was endorsed by the Defender Services Committee. The recommendations themselves, as adopted by the Judicial Conference in 1998, remain unchanged.

8. Guide to Judiciary Policy vol. 7A, app. 6A, *supra* note 7, at 1–2.

9. *See* Cardone Report, *supra* note 1, at 189.

Report's recommendations. See Margaret S. Williams et al., Federal Judicial Center, *Evaluation of the Interim Recommendations from the Cardone Report* ch. 6: Capital Representation (Recommendations 24–29) (2023).[10] Both volumes discuss issues and concerns related to appointment of counsel and providing adequate resources for the defense in federal capital cases. The six recommendations for capital cases in the Cardone Report were approved, or approved as modified, by the Judicial Conference.[11]

The Crime Victims' Rights Act, 18 U.S.C. § 3771(e), specifies that when the victim of a crime is deceased, "the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights." The court may want to consult with the prosecution about who will assume the victim's rights under the CVRA, especially if there are a large number of persons who want to do so.

I. Pretrial Matters

A. Appointment of Counsel

Under 18 U.S.C. § 3005, when a defendant is indicted for a federal capital offense, the court "shall promptly, upon the defendant's request, assign 2 [defense] counsel, of whom at least 1 shall be learned in the law applicable to capital cases." In addition, the statute provides that "the court shall consider the recommendation of the Federal Public Defender organization, or, if no such organization exists in the district, of the Administrative Office of the United States Courts." The prompt appointment of counsel, and the choice of qualified counsel, are crucial steps.

1. *"Promptly"*

Although the appointment of qualified trial counsel "must occur no later than when a defendant is charged with a federal criminal offense where the penalty of death is possible,"[12] courts have the discretion to appoint counsel before indictment, even before a defendant has been charged with a capital offense: "To protect the rights of an individual who, although uncharged, is the subject of an investigation in a federal death-eligible case, the court may appoint capitally qualified counsel upon request . . . ,"[13] before an indictment or formal charge:

> Courts should not wait to see whether the government will seek capital prosecution before appointing appropriately qualified counsel and granting them the resources necessary for a preliminary investigation. The goals of efficiency and quality of representation are achieved by early appointment of learned counsel in cases where capital indictment may be sought. Virtually all aspects of the defense of a federal death penalty case, beginning with decisions made at the earliest stages of the litigation, are affected by the complexities of the penalty phase.[14]

10. The FJC report is available at https://fjc.dcn/content/380873/evaluation-interim-recommendations-cardone-report.

11. *See* Report of the Proceedings of the Judicial Conference of the United States, March 2019, at 18–20, https://www.uscourts.gov/sites/default/files/2019-03_proceedings_0.pdf.

12. Model Plan, *supra* note 4, at § XIV.C.1.a.

13. *Id.* at XIV.C.1.b. "The goals of efficiency and quality of representation are achieved by early appointment of learned counsel in cases where capital indictment may be sought." Updated Spencer Report, *supra* note 7, at 93 (Commentary).

14. Guide to Judiciary Policy vol. 7A, app. 6A, *supra* note 7, at 93.

It is common, for example, for district courts to appoint counsel pre-charge for a defendant who is already in Bureau of Prisons (BOP) custody and is being investigated for a federal capital offense.[15]

One important reason for appointing counsel as soon as possible is that the Department of Justice cannot seek the death penalty unless defense counsel has been given the opportunity to present mitigating evidence and argument against pursuing the death penalty:

> In any case in which the United States Attorney or Assistant Attorney General is contemplating requesting authorization to seek the death penalty or otherwise believes it would be useful to the decision-making process to receive a submission from defense counsel, the United States Attorney or Assistant Attorney General shall give counsel for the defendant a reasonable opportunity to present information for the consideration of the United States Attorney or Assistant Attorney General which may bear on the decision whether to seek the death penalty. . . . No final decision to seek the death penalty shall be made if defense counsel has not been afforded an opportunity to present evidence and argument in mitigation.[16]

Having defense attorneys appointed promptly "is likely to be especially useful in making and supporting arguments about mitigating and aggravating factors, primarily made at the stage when the Attorney General is determining whether or not to seek the death penalty."[17]

2. *"Assign 2 counsel"*

As one court put it, "the purpose of the second lawyer is to provide additional support and expertise to defendants facing the possibility of the death penalty, precisely because defending those cases requires a separate and unique base of knowledge, training, and experience."[18] That additional support is crucial not just during the trial and penalty phases but also the early stages when the government is still deciding whether it will seek the death penalty. "[T]he appointment

15. Numerous courts have recognized the inherent authority to appoint counsel before federal indictment. *See, e.g.*, U. S. v. Bowe, 698 F.2d 560, 567 (2d Cir. 1983) (concluding that court could appoint counsel for witness invoking the Fifth Amendment either "under its inherent authority to insure the fair and effective administration of justice or under the Criminal Justice Act"); Doe v. Harris, 696 F.2d 109, 110 (D.C. Cir. 1982) (counsel appointed for target whose cooperation government sought); Jett v. Castaneda, 578 F.2d 842, 844 (9th Cir. 1978) (counsel appointed for suspect during investigation of prison stabbing). *See also* United States v. Hayes, 231 F.3d 663, 675 (9th Cir. 2000) (noting that, although Sixth Amendment *right* to counsel does not apply before indictment or formal charge, "there are many different reasons counsel might be appointed, some of which are not constitutionally compelled").

16. U.S. Dep't of Just., Justice Manual at 9-10.080 & 10.130, https://www.justice.gov/jm/jm-9-10000-capital-crimes. *See also* United States v. Cordova, 806 F.3d 1085, 1101 (D.C. Cir. 2015) (per curiam) ("'prompt' means promptly after indictment, and not later. This is because the goal of the defense in this early stage of the proceedings is to convince the Attorney General not to seek the death penalty in the first place."); *In re* Sterling-Suarez, 306 F.3d 1170, 1173 (1st Cir. 2002) ("learned counsel is to be appointed reasonably soon after the indictment and prior to the time that submissions are to be made to persuade the Attorney General not to seek the death penalty").

17. *Sterling-Suarez*, 306 F.3d at 1173 ("the early appointment of learned counsel . . . may well make the difference as to whether the Attorney General seeks the death penalty"). *See also* Guide to Judiciary Policy vol. 7A, app. 6A, *supra* note 7, at 106:

> A decision not to seek the death penalty against a defendant has large and immediate cost-saving consequences. The sooner that decision is made, the larger the savings. Since the death penalty ultimately is sought against only a small number of the defendants charged with death-eligible offenses, the process for identifying those defendants should be expeditious in order to preserve funding and minimize the unnecessary expenditure of resources.

18. *Cordova*, 806 F.3d at 1100.

of a second lawyer helps the defendant during this preliminary process when that investigation into relevant factors and presentment of information to the United States Attorney occurs. Surely, if the government decides not to seek the death penalty, then the penalty phase is won before trial, and a second lawyer has proven his worth."[19]

Section 3005 states that two counsel shall be assigned, but district courts have the statutory authority to appoint more than two attorneys in a federal capital case,[20] and judiciary policy provides that "[i]f necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in a capital case."[21]

If the government stipulates or otherwise announces that it will not seek the death penalty, the *Guide to Judiciary Policy* states that "the court should consider the questions of the number of counsel and the rate of compensation needed for the duration of the proceeding."[22] "Once the government has decided not to seek the death penalty, the trial court retains the discretion to keep or dismiss the second attorney, but it is not per se error for the court to choose dismissal."[23] Although not specified in the statute, most appellate courts to decide the issue have held that the district court may discontinue the appointment of the second attorney once the death penalty is no longer sought.[24]

3. "Learned in the law"

"High quality legal representation is essential to assure fair and final verdicts, as well as cost-effective case management:"[25]

> The court's selection of defense counsel will often prove to be the single most important decision that a federal judge makes in a capital case.
>
> . . . In addition to the obvious value of competent counsel to the fairness of the proceedings, truly expert and experienced counsel—
>
> 1. will conserve CJA resources by not having to re-invent the wheel on many legal and factual issues;
> 2. will value and utilize available resources and support;
> 3. will increase the likelihood of an early, negotiated non-capital disposition; and

19. United States v. Boone, 245 F.3d 352, 360 (4th Cir. 2001). Note that the Cardone Report found that the majority of capital cases eventually are *not* authorized by the Attorney General for the death penalty. Cardone Report, *supra* note 1, at 195 n.922.

20. *See* 18 U.S.C. § 3599(a)(1) (capital defendants "shall be entitled to the appointment of one or more attorneys").

21. Guide to Judiciary Policy vol. 7A, *supra* note 4, at § 620.10.10(b); Model Plan, *supra* note 4, at § XIV.C.1.c.

22. Guide to Judiciary Policy vol. 7A, *supra* note 4, at § 630.30.10.

23. *Cordova*, 806 F.3d at 1101–02.

24. *See, e.g.*, *id.* at 1099–1101; United States v. Douglas, 525 F.3d 225, 235–37 (2d Cir. 2008); United States v. Waggoner, 339 F.3d 915, 917–19 (9th Cir. 2003); *Sterling-Suarez*, 306 F.3d at 1174–75; United States v. Casseus, 282 F.3d 253, 256 (3d Cir. 2002); United States v. Grimes, 142 F.3d 1342, 1347 (11th Cir. 1998). *Contra Boone*, 245 F.3d at 359 ("the text is clear that the statute becomes applicable upon *indictment* for a capital crime and not upon the later decision by the government to seek or not to seek the death penalty").

25. *See* Guide to Judiciary Policy vol. 7A, app. 6A, *supra* note 7, at 90, Recommendation 1A.

4. will minimize the risk of an unwarranted capital sentence, and the attendant costs in public resources and confidence that such sentences entail.[26]

The *Guide to Judiciary Policy* states that "'learned counsel' . . . should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high-quality representation."[27] "'[D]istinguished prior experience' contemplates excellence, not simply prior experience."[28] In appointing counsel, section 3005 requires the court to "consider the recommendations of the Federal Public Defender organization" or the Administrative Office of the U.S. Courts if the district has no such organization. Judiciary policy not only requires "judges [to] consider and give due weight to the recommendations by federal defenders and resource counsel," but also to "articulate reasons for not doing so."[29]

The court and the federal defender should consult "regarding the facts and circumstances of the case to determine the qualifications which may be required to provide effective representation."[30] Additionally, "recommendations concerning appointment of counsel are best obtained on an individualized, case-by-case basis."[31] Courts should not rely on a list of generally qualified counsel "because selection of trial counsel should account for the particular needs of the case and the defendant, and be based on individualized recommendations from the [federal defender] in conjunction with the Federal Death Penalty Resource Counsel and Capital Resource Counsel projects."[32] The attorneys "must have sufficient time and resources to devote to the representation, taking into account their current caseloads and the extraordinary demands of federal capital cases."[33]

Because it may be difficult to find counsel within the court's district who both meet the standard required for "learned counsel" *and* are willing and able to take a particular case, courts must be prepared to look outside their district: "Out-of-district counsel, including federal defender organization staff, who possess the requisite expertise may be considered for appointment in capital trials to achieve high quality representation together with cost and other efficiencies. . . . Counsel with distinguished prior experience should be appointed even if meeting this standard

26. Managing the Defense Function in Federal Capital Cases, David Bruck, Federal Death Penalty Resource Counsel, August 11–12, 2009, Death Penalty Workshop for U.S. District Judges, https://fjc.dcn/sites/default/files/2012/DP090021.pdf. *See also Sterling-Suarez*, 306 F.3d at 1174 (in cases where the defense "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").

27. Guide to Judiciary Policy vol. 7A, *supra* note 4, at § 620.30(b)(2).

28. Model Plan, *supra* note 4, at § XIV.C.2.d.; Guide to Judiciary Policy vol. 7A, app. 6A, *supra* note 7, at 94.

29. Guide to Judiciary Policy vol. 7A, *supra* note 4, at § 620.40(a). *See also* Model Plan, *supra* note 4, at § XIV.B.4 ("To effectuate the intent of 18 U.S.C. § 3005 that the [federal defender's] recommendation be provided to the court, the judge should ensure the [federal defender] has been notified of the need to appoint capitally qualified counsel.").

30. Guide to Judiciary Policy vol. 7A, *supra* note 4, at § 620.30(a)(2).

31. *Id*. at app. 6A, *supra* note 7, at 99 ("individualized recommendations help to ensure that counsel are well-suited to the demands of a particular case and compatible with one another and the defendant. Whether at trial, on appeal, or in post-conviction, the federal defender and Resource Counsel are likely to have access to information that the court lacks.").

32. Model Plan, *supra* note 4, at § XIV.C.1.g. *See also* Guide to Judiciary Policy vol. 7A, app. 6A, *supra* note 7, at 99 & n.97 ("The distinction between being qualified to serve and willing to do so is significant. Many defense counsel would not be willing to accept appointment to more than one federal death penalty case at a time," or may not be able to commit to the time required for a particular case.).

33. Model Plan, *supra* note 4, at § XIV.B.9.

requires appointing counsel from outside the district where the matter arises."[34] Whether from within or outside the district, courts must "ensure that all attorneys appointed in federal death penalty cases are well qualified, by virtue of their prior defense experience, training and commitment, to serve as counsel in this highly specialized and demanding type of litigation."[35]

B. Compensation of Appointed Counsel and Case Budgeting[36]

Although the specifics of compensation and budgeting are beyond the scope of the *Benchbook*, judges should be aware of some general principles and how capital cases differ from non-capital cases. One thing to keep in mind is that funds for capital cases do not come from a district court's budget or the circuit court's budget but come out of the national Defender Services appropriation. This is true with respect to both federal defender organization costs and the costs of private CJA panel attorneys.

Capital cases have different rules governing compensation of appointed CJA panel attorneys and the approval and compensation of experts, investigators, and other service providers.[37] One important distinction is that there is no statutory cap on attorney's fees in capital cases.[38] "There is neither a statutory case compensation maximum for appointed counsel nor provision for review and approval by the chief judge of the circuit of the case compensation amount in capital cases," and there should also not be any "formal or informal non-statutory budgetary caps on capital cases, whether in a capital trial, direct appeal, or habeas matter."[39] Note, however, that fees and expenses over $7,500 for investigative, expert, and other services must be approved by the presiding judge and the chief judge of the circuit.[40]

In addition, the use of case budgeting is standard in capital cases: "All capital cases should be budgeted with the assistance of case-budgeting attorneys and/or resource counsel where appropriate. . . . Courts are encouraged to require appointed counsel to submit a proposed initial litigation budget for court approval that will be subject to modification in light of facts and developments that emerge as the case proceeds."[41] Note that case budgets are confidential and

34. *Id.* at § XIV.C.1.h, 2.d. *See also id.* at 2.a ("Appointment of counsel from outside the jurisdiction is common in federal capital cases."); Margaret S. Williams et al., Federal Judicial Center, Evaluation of the Interim Recommendations from the Cardone Report 125 (2023) ("Appointing local counsel quickly does not ensure quality representation because they may not be qualified to receive such appointments.").

35. Model Plan, *supra* note 4, at § XIV.B.8.

36. The compensation and case budgeting rules discussed in this section apply only to CJA panel attorneys; federal defender organizations (FDOs) are funded separately and are subject to different oversight rules and procedures. Capital cases can frequently have both an FDO and CJA panel attorney appointed in the case and these compensation and budgeting rules apply only to the CJA panel attorney portion of the representation.

37. *See* 18 U.S.C. § 3599(f)–(g); Guide to Judiciary Policy vol. 7A, *supra* note 4, at §§ 630, 640, 660. The compensation maximum amounts for investigative, expert, and other services in Chapter 3 of the Guide are inapplicable to all capital cases. *See id.* at § 660.20.10.

38. *Compare* 18 U.S.C. § 3006A(d)(2)–(3) *with* 18 U.S.C. § 3599(g).

39. Guide to Judiciary Policy vol. 7A, *supra* note 4, at §§ 630.10.20, 635.

40. *Id.* at § 660.20.20; 18 U.S.C. § 3599(g)(2).

41. Guide to Judiciary Policy vol. 7A, *supra* note 4, at § 640.10(a), (b). *See also id.* at app. 6A, *supra* note 7, at 115, Recommendation 9(f) ("An approved budget should guide counsel's use of time and resources by indicating the services for which compensation is authorized. Case budgets should be re-evaluated when justified by changed or unexpected circumstances, and should be modified by the court where good cause is shown.").

should be submitted *ex parte* and filed and maintained under seal.[42] Courts are also encouraged to permit interim payments to counsel and other service providers.[43]

For more information on payments in CJA panel attorney representations for experts, investigators, and other service providers, see the *Guide to Judiciary Policy*, Vol. 7A at § 660: Authorization and Payment for Investigative, Expert, and Other Services in Capital Cases. See also Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View From the Federal Bench*, 36 Hofstra L. Rev. 819, 821 (Summer 2008) ("The primary purpose of this Article is to hopefully dispel judicial misgivings about the crucial importance of mitigation development in the trial of a capital case."); Russell Stetler, Maria McLaughlin, and Dana Cook, *Mitigation Works: Empirical Evidence of Highly Aggravated Cases Where the Death Penalty was Rejected at Sentencing*, 51 Hofstra L. Rev. 89, 90 (2022) (documenting cases that indicate "effective investigation and presentation of mitigating evidence can forestall a death sentence no matter how death-worthy the crime facts may appear at first glance").

C. Government's Decision to Seek or Not Seek the Death Penalty

The Department of Justice does not permit a federal prosecutor to seek the death penalty unless specifically authorized to do so by the Attorney General. Before the government can pursue a capital sentence in any federal death-eligible case, the Attorney General must affirmatively decide to seek the death penalty against the defendant;[44] after the Attorney General provides this approval, the case is considered "authorized."

Defense counsel must be given the opportunity to present mitigating evidence and argument in an effort to persuade the government not to seek the death penalty at the local U.S. Attorney and/or Main Justice levels before the government may pursue the death penalty.[45]

1. Whether or not the government ultimately chooses to seek the death penalty, capital counsel and appropriate funding for experts, investigators, and other service providers remain necessary unless and until the Department of Justice formally notifies the court and defense counsel that it has decided not to seek the death penalty. In determining whether to request authorization to seek the death penalty, the DOJ *Justice Manual* directs prosecutors to consider, along with a number of other factors, all applicable statutory and non-statutory mitigating factors.[46] The Constitution requires that a capital sentencer may 'not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"[47] (emphasis in original).

Because defense counsel plays such a critical role in the government's process for deciding whether to seek the death penalty, counsel must undertake a mitigation investigation at the

42. Guide to Judiciary Policy vol. 7A, *supra* note 4, at § 640.20(b); *id.* at app. 6A, *supra* note 7, at 115, Recommendation 9(e).

43. Guide to Judiciary Policy vol. 7A, *supra* note 4, at §§ 630.40, 660.40.10.

44. Justice Manual, *supra* note 16, at §§ 9-10.050, 9-10.130.

45. *Id.* at §§ 9-10.080 & 9-10-130.

46. *Id.* at § 9-10.140 (prosecutors must carefully consider, among other things, "whether the applicable aggravating factors sufficiently outweigh the mitigating factors to justify a sentence of death").

47. Lockett v. Ohio, 438 U.S. 586, 604–05 (1978).

very beginning of the representation and continue until the government formally notifies the court and counsel that it will not seek the death penalty.[48] See discussion at I.A.1, *supra*.

2. The Department of Justice has internal time frames for its review and provides for expedited consideration in some cases, but it is recommended that courts should discuss with counsel "establish[ing] a schedule for resolution of whether the government will seek the death penalty."[49] The schedule should set time frames and deadlines for:

- a submission by the defendant to the U.S. Attorney of reasons the government should not seek the death penalty;
- the recommendation by the U.S. Attorney to DOJ, with supporting documentation, regarding whether the death penalty should be sought; and
- either filing the required notice under 18 U.S.C. § 3593(a) that the government will seek the death penalty or notifying the court and the defendant that it will not.[50]

"The schedule should be flexible and subject to extension for good cause at the request of either party," and should allow, in light of the particular circumstances of the case, "reasonable time for counsel for the parties to discharge their respective duties with respect to the question of whether the death penalty should be sought."[51]

Note that, even if the local U.S. Attorney recommends against seeking the death penalty, that decision can be overruled, which has occurred from time to time. Therefore, as noted above, the defense must be allowed to continue its work unless and until DOJ officially notifies the court that it will not seek the death penalty.

3. If the Attorney General decides to seek the death penalty, the government must provide written notice to the court and the defendant—"a reasonable time before the trial or before acceptance by the court of a plea of guilty"—and must identify which statutory and non-statutory aggravating factors it intends to prove.[52] The court may permit the government to amend the notice upon a showing of good cause.[53]

---

48. *See* Cardone Report, *supra* note 1, at XL (recommendation 29, which was approved by the Judicial Conference, stressed the importance of "the funding of mitigation, investigation, and expert services in death-eligible cases at the earliest possible moment, allowing for the presentation of mitigating information to the Attorney General"). Judicial Conference Defender Services Committee policy stresses the importance of defense counsel undertaking a mitigation investigation at the very beginning of a federal capital case, including cases in which the local U.S. Attorney's recommendation to Main Justice is not to pursue the death penalty:

> 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 local U.S. Attorney and with the Justice Department is critical both to a defendant's interests and to sound fiscal management of public funds.

Guide to Judiciary Policy vol. 7A, app. 6A, *supra* note 7, at 93.

49. *See* Guide to Judiciary Policy vol. 7A, *supra* note 4, at § 670(a).

50. *Id.* at § 670(b).

51. *Id.* at § 670(c), (d).

52. 18 U.S.C. § 3593(a). In addition, to satisfy *Ring v. Arizona*, 536 U.S. 584, 600 (2002), a federal indictment in a potential capital case must include special allegations of the statutory factors required for a defendant to be eligible for the death penalty under 18 U.S.C. §§ 3591 and 3592. *See, e.g.*, United States v. Rodriguez, 581 F.3d 775, 816 (8th Cir. 2009); United States v. Mikos, 539 F.3d 706, 715 (7th Cir. 2008); United States v. Sampson, 486 F.3d 13, 21 (1st Cir. 2007).

53. 18 U.S.C. § 3593(a).

For Further Reference

- Helen G. Berrigan, "Death Penalty Cases" (outline provided for the National Workshop for District Judges I, March 2008), https://fjc.dcn/sites/default/files/2012/Dist8002.pdf
- Mark W. Bennett, *Sudden Death: A Federal Trial Judge's Reflections on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 42 Hofstra. L. Rev. 391 (2013)
- Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 Hofstra L. Rev. 1161 (2018)

II. Jury Selection and Trial

At least three business days before commencement of trial, the defendant must receive a copy of the indictment and a list of the names and addresses of venire members and witnesses, unless the court finds by a preponderance of the evidence that providing the list may endanger any person. 18 U.S.C. § 3432.[54] Note that by saying "at least" three days, the statute leaves a court the discretion to require the government to provide this information sooner.

A. Jury Venire and Voir Dire

1. In capital cases, courts often arrange for lengthier[55] and more extensive voir dire[56] (frequently including at least some conducted by the attorneys[57]) and a significantly larger jury pool,

54. For purposes of § 3432, the trial commences with jury selection. United States v. Young, 533 F.3d 453, 461 (6th Cir. 2008); United States v. Barrett, 496 F.3d 1079, 1116–17 (10th Cir. 2007). For a capital case that affirmed the use of an anonymous jury for safety reasons, see United States v. Hager, 721 F.3d 167, 186–90 (4th Cir. 2013); United States v. Peoples, 250 F.3d 630, 635–36 (8th Cir. 2001). *See also* United States v. Lee, 374 F.3d 637, 652 (8th Cir. 2004) (affirming order to limit defendant's access to discovery materials and witness lists based on finding that defendant posed a danger to potential witnesses—section 3432 "only requires disclosure of witness and juror names to the defense but not to the defendant personally"). *See also* section 2.05: Jury Selection—Criminal, *supra*, at B. Anonymous Juries.

55. Jury selection can take as long as several weeks in capital cases. In some courts, judges handling a high-profile trial will have hundreds or, in rare instances, even thousands of potential jurors fill out an extensive questionnaire. A manageable number of eligible jurors are then called in each day to be questioned individually.

56. United States v. Chanthadara, 230 F.3d 1237, 1269 (10th Cir. 2000) ("because the jurors are vested with greater discretion in capital cases, the examination of prospective jurors must be more careful than in non-capital cases").

57. In the vast majority of federal capital trials, attorneys are permitted to ask the jurors questions during voir dire. There were 11 federal capital jury trials (involving 12 defendants) from 2015 to 2024. Attorney questioning of potential jurors was allowed in at least nine of those cases, or 82 percent of the time. *See, e.g.*, United States v. Council, 77 F.4th 240, 253–54 (4th Cir. 2023) ("the district court allowed defense counsel to question prospective jurors, thus giving Council a chance to explore matters he believed were not adequately captured by the supplemental questionnaire or the court's questions"); see also id. at 251 ("the court conducted multiple days of individualized voir dire, during which both the court and the parties asked questions"). However, it is up to the court's discretion whether to allow such attorney questioning. *See* United States v. Tsarnaev, 595 U.S. 302, 316 (2022) ("This Court has held many times that a district court enjoys broad discretion to manage jury selection, including what questions to ask prospective jurors."); Fed. R. Crim. P. 24(a) (court "may" permit parties to examine prospective jurors).

compared to the typical non-capital felony trial.[58] This will help accommodate the additional peremptory challenges allowed in capital cases (20 per side under Fed. R. Crim. P. 24(b)(1)), a potentially greater number of excusals for cause, a greater number of hardship excusals necessary given the lengthier trial involving a potential penalty phase, and a greater number of alternate jurors.

2. It is common practice for courts to utilize a written jury questionnaire customized to the case, with additional questions beyond those found in standard questionnaires,[59] and to build in adequate time for attorneys to review the completed questionnaires and raise with the court stipulated hardship and cause excusals before voir dire commences.[60]

3. After the prospective jurors have filled out the questionnaires and the parties have had an opportunity to present the court with stipulated hardship and cause excusals, courts often try to minimize the number of days the prospective jurors must appear for jury selection by dividing the remaining prospective jurors into groups that appear in court each day. It is common practice for the prospective jurors to be questioned individually, outside the presence of other jurors—studies have shown that jurors tend to be more forthcoming when questioned individually.[61] It is also common practice to give an instruction to each panel of prospective jurors to provide an introduction to and overview of the case and the capital trial process.[62]

---

58. *See, e.g.*, *Tsarnaev*, 595 U.S. at 309, 314 (over 1,300 potential jurors were called for the first round of jury selection and the court held three weeks of voir dire); United States v. Savage, 970 F.3d 217, 236 (3d Cir. 2020) (hundreds of potential jurors were brought in and the court held thirty days of voir dire); United States v. Whitten, 610 F.3d 168, 176 (2d Cir. 2010) (600 potential jurors were brought to court and 260 jurors were individually questioned in voir dire).

59. *See, e.g.*, *Tsarnaev*, 595 U.S. at 308–09 ("the parties jointly proposed a 100-question" questionnaire); *Whitten*, 610 F.3d at 176, 185 (600 jurors each completed fifty-four-page questionnaire).

Samples of comprehensive juror questionnaires used in recent federal capital trials may be obtained from the Administrative Office of the U.S. Courts, Defender Services Office. Please contact Judy Gallant, Senior Attorney Advisor (Judy_Gallant@ao.uscourts.gov, (202) 502-3030), to obtain these samples.

60. *See, e.g.*, United States v. Tsarnaev, 968 F.3d 24, 47 (1st Cir. 2020) (noting the parties agreed to excuse many of the 1,373 potential jurors who filled out the Special Juror Questionnaire prior to the commencement of voir dire), *rev'd on other grounds*, 595 U.S. 302 (2022). *See also* Valerie P. Hans & Alayna Jehl, *Avoid Bald Men and wPeople with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi-Kent L. Rev. 1179, 1198 (2003) (recommending increased use of juror questionnaires, which "are efficient in that they can quickly pinpoint for the court and the attorneys the specific areas that require individual follow-up questioning" while providing jurors with "a relatively comfortable way to reveal sensitive information" and "encourag[ing] completeness").

61. Voir dire of prospective jurors in a group setting inhibits rather than facilitates honest self-disclosure. Individuals who are exposed to the views of others and are required to state their own views before a group tend to conform their views to those of the majority. *See* David Suggs & Bruce D. Sales, *Juror Self Disclosure in the Voir Dire: A Social Science Analysis*, 56 Ind. L.J. (1980) 245, 259–61 (Winter 1980). They are also able to hear others' responses, and thus learn which answers are accepted at face value and which result in follow-up questions. Jurors can thereby reach conclusions about the "right" and "wrong" answers and conform their statements accordingly. *Id.* at 261. *See also* Hans & Jehl, *supra* note 60 at 1195–96 (outlining the shortcomings of group voir dire: "The desire to appear favorably is a main concern of prospective jurors, and that shapes the attitudes and opinions that they disclose during [group] voir dire." In addition, they may be "hesitant to share embarrassing experiences and beliefs because of the broad audience that can learn of their responses.").

In addition, questioning jurors individually will prevent the spread of prejudicial information. *See* Skilling v. United States, 561 U.S. 358, 389 (2010) (noting with approval that, "aware of the greater-than-normal need, due to pretrial publicity, to ensure against jury bias, . . . the court examined each prospective juror individually, thus preventing the spread of any prejudicial information to other venire members").

62. Samples of instructions read to the daily panels of prospective jurors in recent federal capital trials may be obtained from the Administrative Office of the U.S. Courts, Defender Services Office. Please contact Judy Gallant, Senior Attorney Advisor (Judy_Gallant@ao.uscourts.gov, (202) 502-3030), to obtain these samples.

[Suggested explanation of the trial process:]

Statement to the Daily Panels of Prospective Jurors Prior to Individual Voir Dire[63]

After greeting the prospective jurors and, if necessary, introducing or reintroducing yourself, provide the following—or similar—explanation of the jury selection process:

> I want to thank you for coming in this morning. Your presence reflects your serious commitment to your civic responsibilities. Jury service is one of the highest and most important duties of a citizen of the United States.
>
> Each of you is a potential juror in the case of *United States versus* ________________________. As you know, you already completed the first portion of the jury selection process when you came in and filled out the juror questionnaire.
>
> In a few minutes, you will be asked to make your way to an adjacent room to wait until your name is called to return to this courtroom for individual questioning. Before you head to the waiting room, you will be given a copy of your juror questionnaire so that you have an opportunity to review it. When you return for individual questioning, please bring the juror questionnaire with you. If we have some questions about certain answers in the questionnaire, you can review it.
>
> While you are waiting—before or after you are individually questioned—please do not talk with each other about any aspects of this case, the juror questionnaire, or about questions that were asked of you or your answers. I wish to make this very clear; you may not have any discussions at all about the case, the juror questionnaire, or the questioning process with anyone, including other prospective jurors.
>
> Before we begin, I would like to explain that there are no 'right' or 'wrong' answers to any of the questions that will be posed to you today.
>
> Citizens in our community have and are entitled to hold a wide variety of different views and have had different life experiences that inform their feelings and views on different topics. Of course, this is also true of prospective jurors. We are genuinely interested in learning your views on issues related to this case, and because you may be called upon to determine punishment, we are interested in learning about your views and feelings about life imprisonment without the possibility of release and the death penalty. The integrity of the process depends on your truthfulness. You will all be treated with dignity and respect, and we simply ask you to provide honest and complete answers. Please don't answer based on what you think you should say, on what you think is a socially desirable

63. This suggested explanation was derived from those given in 15 capital cases between 2009 and 2023, including United States v. Saipov, No. 17-cr-722 (S.D.N.Y.), in 2023. Examples of these instructions are available upon request from the Administrative Office of the U.S. Courts, Defender Services Office. Please contact Judy Gallant, Senior Attorney Advisor (Judy_Gallant@ao.uscourts.gov, (202) 502-3030).

and acceptable response, or what you believe I expect or wish you to say. Simply relax and answer our questions as honestly as you can.

The defendant in this case, ____________________, is charged in an indictment with the criminal offenses outlined in the Case Summary on page ___ of the juror questionnaire. Please review this summary before you return to this courtroom. I want you to have enough information about this case so that you are in a position to be able to make honest, accurate and informed assessments as you are responding to the questions today.

The charges contained in the Indictment stem from allegations that __________________. As you know from my prior remarks and the jury questionnaire, this trial may proceed in two phases. The first is the trial phase in which the jury determines whether the defendant is guilty of the crimes charged. The second is the penalty phase, which only occurs if the defendant is found guilty of certain capital charges. In the trial phase, your job will be to determine, according to my instructions, whether or not the Government has proven the defendant guilty of the charges in the Indictment beyond a reasonable doubt. If you find that the defendant is guilty of one or more of the capital charges as I will define them for you at the conclusion of trial, there will be a penalty phase of the trial in which the same jurors will have the responsibility to decide whether the defendant is sentenced to life in prison without the possibility of release or, instead, sentenced to death. In the federal system there is no parole; therefore, if the defendant is sentenced to life imprisonment, they will spend the rest of their life in prison and never be released. A death sentence means that the defendant will be executed.

During a penalty phase, jurors consider certain evidence referred to in the law as "aggravating factors," and "mitigating factors." These factors have to do with the circumstances of the crime, or the personal traits, character, or background of the defendant, or anything else relevant to the sentencing decision. Aggravating factors are certain specified factors that could support a death sentence. In order for an aggravating factor to be considered, *all twelve jurors* must agree that the factor has been proved by the government beyond a reasonable doubt. Jurors may not consider anything else as an aggravating factor.

"Mitigating factors" are any circumstances or factors that would suggest, for *any individual juror*, that life imprisonment without possibility of release is an appropriate punishment. A mitigating factor is not offered to justify or excuse the defendant's conduct, and the law does not require that there be a connection between a mitigating factor and the crime committed. There are three important distinctions that I want to highlight for you with respect to mitigating factors as compared to aggravating factors. First, the defendant is not required to prove the existence of a mitigating factor beyond a reasonable doubt, but only to establish its existence by a preponderance of the evidence. That is to say, you

need only be convinced that a mitigating factor is more likely true than not true in order to find that the mitigating factor exists.

Second, each juror independently considers the mitigating factors; *a unanimous finding is not required*. Any juror may, individually and independently, find the existence of a mitigating factor, regardless of the number of other jurors who may agree, and any juror who so finds must give that mitigating factor whatever weight they think it deserves. Thus, if even a single member of the jury finds that a mitigating factor has been proved, that member of the jury is required to weigh that factor in making up their own mind on whether to vote for a death sentence or a sentence of life imprisonment without the possibility of release.

Third and finally, unlike with aggravating factors, jurors are not limited in their consideration to the specific mitigating factors submitted to the jury. If, in addition to those specific mitigating factors, there is anything about the circumstances of the offense, the defendant's personal traits, character, or background, or anything else relevant that you individually believe mitigates against the imposition of the death penalty or supports a sentence of life imprisonment without the possibility of release, you are free to consider that factor in the balance as well.

In a penalty phase, the jurors' task is not simply to decide what aggravating and mitigating factors exist, if any. Rather, in addition to evaluating those factors, the jurors are called upon to make a unique, individualized moral decision between the death penalty and life in prison without the possibility of release. It is important that you understand the law never requires the imposition of a sentence of death and never assumes that any defendant found guilty of committing capital murder must be sentenced to death. The government must persuade each and every juror beyond a reasonable doubt that the aggravating factor or factors exist. You will then determine whether all of the aggravating factors found to exist sufficiently outweigh the mitigating factors to justify a sentence of death. Each juror must ultimately make a unique individual moral judgment about whether to sentence a defendant convicted of a capital crime to life imprisonment without the possibility of release or to death.

At the conclusion of a penalty phase, if all 12 jurors unanimously find that life imprisonment without the possibility of release is appropriate, then a sentence of life imprisonment without the possibility of release will be imposed. If, and only if, all twelve jurors unanimously find that death is the only appropriate sentence, will a death sentence be imposed. If one or more jurors finds that a sentence of life imprisonment without the possibility of release is the appropriate sentence, and the jury is not unanimous in its decision regarding punishment, then the Court will impose a sentence of life imprisonment without the possibility of release. The sentence imposed by the jury, whether a unanimous vote for life imprisonment, a unanimous vote for death, or a non-unanimous vote for life is final. I must follow the jury's sentencing determination.

This is only an overview of the law to provide you some context to answer our questions today. At trial, I will instruct jurors in greater detail about their duties.

I want to thank you again for your taking part in this important process, and for returning to the Courthouse today.

This completes my preliminary remarks. I will now ask my Deputy Clerk, _________________, to re-administer the oath that will govern your participation in the jury-selection process.

[OATH ADMINISTERED]

Introductory General Questions

(Ask the jurors to raise their hand if they have information relevant to the question asked. Their answers will be elicited when they return to the courtroom for individual questioning.)

Please remember that you are under oath to provide honest answers and that there are no right or wrong answers.

A. Since you were here last, have you read, seen, or heard anything about this case or ___________________ [defendant's name] from any source?

B. Have you done any kind of research, internet or otherwise, about this case, the defendant, or the people involved in this trial, or posted anything online about this case or your jury service?

C. Have you spoken to anyone or has anyone spoken to you about this case or the defendant, including discussions with fellow prospective jurors?

D. Have you overheard any discussion about this case or the defendant, including discussions among fellow jurors?

E. As prospective jurors, you are to avoid all media associated with this case, you cannot research the case in any way, and you cannot talk or post about your jury service in this case until you have been formally excused from jury duty. Do you think you may have difficulty, for any reason, following those instructions?

F. Has anything changed about your ability to serve as a juror in this case, that is, something you have not already indicated in your questionnaire?

G. Do you know any person introduced here today or anyone else you think might be connected to this case in any way, including but not limited to any witnesses, investigators, rescue workers, law enforcement officers or agents?

H. We have provided you with a copy of your juror questionnaire. Would you like to change or amend any of your answers?

4. Because the jury in a capital case is responsible for determining both guilt and—upon conviction for a capital offense—punishment at a second, separate penalty phase of the trial, prospective jurors must be questioned at the outset about their attitudes and opinions regarding the death penalty and life imprisonment without release. It is recommended that this be done

by careful individual voir dire of each prospective juror, outside the presence of others.[64] The standard for excusal for cause is whether a juror's views about the death penalty or life imprisonment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath."[65]

5. Representatives of the deceased victim may not be excluded from the trial just because they may testify at the capital sentencing hearing.[66]

6. When the jury retires to consider its verdict in the guilt phase, consider retaining the alternate jurors.[67] Instruct the alternates to avoid discussing the case with anyone. If an alternate juror replaces a juror after deliberations have begun, instruct the jury to begin its deliberations anew. Fed. R. Crim. P. 24(c)(3).

B. Penalty Phase Proceedings After a Guilty Verdict or Plea

1. No presentence report should be prepared. 18 U.S.C. § 3593(c).

2. Unless the defendant moves for a hearing without a jury and the government consents, the hearing must be before a jury.

   (a) If the defendant was convicted after a jury trial, the hearing should be before the jury that determined guilt, unless such jury has been discharged for good cause.[68]

   (b) If the defendant was convicted upon a plea or after a bench trial, a jury and alternates should be impaneled.[69]

64. *See, e.g.*, *Council*, 77 F.4th at 251 ("the court conducted multiple days of individualized voir dire, during which both the court and the parties asked questions"). *See also* note 61, *supra*, and accompanying text.

65. Wainwright v. Witt, 469 U.S. 412, 424 (1985) (pro-life penalty biased jurors). *See also* Morgan v. Illinois, 504 U.S. 719, 729, 736–38 (1992) (pro-death penalty biased jurors). For examples of circuit decisions on "death-qualifying" and "life-qualifying" a federal jury, see, e.g., *Tsarnaev*, 968 F.3d at 46 (pro-death penalty biased jurors); *Whitten*, 610 F.3d at 185 (pro-death penalty biased jurors); and *United States v. Barnette*, 390 F.3d 775, 790 (4th Cir. 2004), *vacated on other grounds*, 546 U.S. 803 (2005) (pro-life penalty and pro-death penalty biased jurors).

66. *See* 18 U.S.C. § 3771(a)(3) & (e)(2)(B); 18 U.S.C. § 3510(b).

67. Fed. R. Crim. P. 24(c)(3) gives district courts the discretion to retain alternate jurors when the jury retires and to replace a juror "after deliberations have begun." Note that section 3593(b) does not allow a jury of fewer than twelve members during the sentencing phase unless the parties stipulate to a lesser number before the conclusion of the sentencing hearing. Also, it has been held that an alternate juror who did not participate in guilt deliberations can be substituted in during the sentencing phase. *See, e.g.*, United States v. Honken, 541 F.3d 1146, 1165–66 (8th Cir. 2008) (interpreting same language in 21 U.S.C. § 848(i)); Battle v. United States, 419 F.3d 1292, 1301–02 (11th Cir. 2005); United States v. Johnson, 223 F.3d 665, 669–71 (7th Cir. 2000).

68. 18 U.S.C. § 3593(b)(2).

69. *Id.*

3. Courts should provide the jury with preliminary instructions about the purpose of the sentencing hearing.[70]

(a) Courts should inform the jurors that they will be required to make findings about whether the government has met its burden of proving that the defendant is eligible for a death sentence,[71] and if so, additional findings about alleged aggravating factors and mitigating factors. The jury will then decide whether the defendant should be sentenced to death or life imprisonment without release.[72]

(b) Courts should instruct the jurors that, in considering whether a sentence of death is justified, they shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim, and shall not return a verdict of a sentence of death unless and until they have concluded they would return such a verdict for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. Also instruct the jurors that each of them will be required to certify this in writing upon return of a sentencing verdict. 18 U.S.C. § 3593(f).

4. Proceed with the hearing in the manner set forth in 18 U.S.C. § 3593(c). Note that:

(a) the government may seek to prove only those aggravating factors of which it gave notice;

(b) the rules of evidence do not apply, but information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury;[73]

(c) the trial transcript and exhibits may be used, particularly if a new jury has been impaneled for the sentencing stage;

(d) the government argues first in summation, the defendant argues in reply, and the government may then argue in rebuttal; and

(e) victim impact evidence may be presented during the penalty phase when the government has noticed it as a non-statutory aggravating factor. Victim impact testimony is

70. Samples of preliminary and final jury instructions that have been used in the penalty phase of federal capital cases may be obtained from the Administrative Office of the U.S. Courts, Defender Services Office. Please contact Judy Gallant, Senior Attorney Advisor (Judy_Gallant@ao.uscourts.gov, (202) 502-3030), to obtain these samples. Courts may also wish to consult the sections on capital sentencing in the leading treatise on federal jury instructions, 1 Leonard B. Sand, et al., Modern Federal Jury Instructions, 9A-0.1 to 9A-0.5 (2022), and pattern instructions for capital sentencing from the two circuits that have promulgated them, the Eighth Circuit's Model Jury Instructions 743 (see 12.00: Homicide—Death Penalty—Sentencing (18 U.S.C. §§ 3591 et seq.)) (2023), https://juryinstructions.ca8.uscourts.gov/instructions/criminal/Criminal-Jury-Instructions.pdf, and the Tenth Circuit's Criminal Pattern Jury Instructions 345 (revised Feb. 2025) (Death Penalty Instructions, 3.01 et seq.), https://www.ca10.uscourts.gov/form/criminal-pattern-jury-instructions.

71. See paragraph 5(a), *infra*, for the three required findings in the eligibility determination.

72. 18 U.S.C. § 3593(d)–(e). In many capital cases, the statute of conviction makes life imprisonment the minimum sentence and the only alternative to a death sentence. *See, e.g.*, 18 U.S.C. § 201(a) (kidnapping resulting in death). And although the FDPA allows for a lesser sentence than life imprisonment when permitted by the statute of conviction, *see* 18 U.S.C. § 3594, federal capital defendants usually waive that option so that the jury is instructed on only two sentencing options, death or life imprisonment without release. Courts have approved such waivers. *See, e.g.*, United States v. Moussaoui, 591 F.3d 263, 304–05 (4th Cir. 2010); United States v. Quinones, 511 F.3d 289, 321–22 (2d Cir. 2007) ("a defendant might reasonably conclude that he can best avoid a death sentence by agreeing to life imprisonment as the single alternative punishment").

73. For a discussion of the standards for admitting evidence at a federal capital sentencing, see *Tsarnaev*, 595 U.S. at 317–24. *See also* United States v. Jacques, 684 F.3d 324, 328 (2d Cir. 2012); United States v. Lujan, 603 F.3d 850, 858–59 (10th Cir. 2010); United States v. Pepin, 514 F.3d 193, 205–09 (2d Cir. 2008); United States v. Sampson, 486 F.3d 13, 42–44 (1st Cir. 2007); United States v. Fields, 483 F.3d 313, 324–26 (5th Cir. 2007).

limited, however, to evidence "concerning the effect of the offense on the victim and the victim's family, . . . the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information."[74]

5. Give the jury final instructions and be sure to cover the following points:

(a) The jury must first determine if the defendant is eligible for the death penalty. To do so, the jury must assess whether or not the government has proven beyond a reasonable doubt three requirements:

- first, the defendant was 18 or older at the time of the offense;
- second, the existence of at least one of the statutory factors involving the defendant's mental state and role in the killing; and
- third, the existence of at least one statutory aggravating factor.

If the jury determines the government has failed to prove any one of these three requirements unanimously and beyond a reasonable doubt, its deliberations are over, it must report its verdict, and the court is required to impose a sentence less than death.[75]

(b) If, on the other hand, the jury finds all three of these requirements unanimously and beyond a reasonable doubt, the jury must next consider whether the government has unanimously proven beyond a reasonable doubt any *non*-statutory aggravating factors of which the government gave notice. 18 U.S.C. § 3593(c) and (d).

(c) Next, the jurors must consider whether the defendant has proven the existence of any mitigating factors. A mitigating factor includes those listed in the statute, as well as any "[o]ther factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence." 18 U.S.C. § 3592(a)(1)–(8).

"The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."[76] "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a factfinder could reasonably deem to have mitigating value."[77] Evidence need not have a nexus to the crime to be mitigating.[78]

(d) List the mitigating factors submitted by the defendant, which the jury must consider. Each juror should also consider whether there may be other circumstances, not listed in the instructions or the verdict form or even identified by defense counsel, that constitute a mitigating factor or factors.[79]

74. 18 U.S.C. § 3593(a). Victim impact evidence may not include "characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence." Bosse v. Oklahoma, 580 U.S. 1, 3 (2016). Note also that, because the victim is deceased, family members or certain other representatives of the victim "may assume the crime victim's rights." 18 U.S.C. § 3771(e)(2)(B). These rights include "[t]he right not to be excluded from any . . . public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding." 18 U.S.C. § 3771(a)(3).

75. 18 U.S.C. §§ 3591(a)(2), (c); 3592(c); 3593(d); 3594.

76. Eddings v. Oklahoma, 455 U.S. 104, 114–15 (1982).

77. Tennard v. Dretke, 542 U.S. 274, 284–85 (2004).

78. United States v. Fell, 531 F.3d 197, 224 (2d Cir. 2008).

79. *See, e.g.*, *id.* ("ten individual jurors found additional mitigating factors not expressly provided by the defense . . .").

(e) A mitigating factor should be taken as true if it has been established by a preponderance of the evidence. Distinguish between the reasonable doubt and preponderance standards. 18 U.S.C. § 3593(c).

(f) The jurors are not required to reach a unanimous decision in finding specific mitigating factors. A finding of a mitigating factor may be made by only one or more jurors, and any member of the jury who finds the existence of a mitigating factor by a preponderance of the evidence may consider such a factor established, regardless of whether any other juror agrees. 18 U.S.C. § 3593(d).

(g) Next, the jury members proceed to weigh the aggravating and mitigating factors. Each juror should consider only those aggravating factors that have been found to exist beyond a reasonable doubt by unanimous vote, and each juror must consider any mitigating factors that have been proved by a preponderance of the evidence to the juror's own satisfaction.[80]

(h) The jury should then:

1. consider whether the aggravating factor(s) sufficiently outweigh the mitigating factor(s) to justify a sentence of death rather than one of life imprisonment without possibility of release or, in the absence of a mitigating factor, whether the aggravating factor(s) alone are sufficient to justify a sentence of death rather than one of life imprisonment without possibility of release, and

2. determine whether the defendant should be sentenced to death or to life imprisonment without possibility of release.

18 U.S.C. § 3593(e).

Note that the jury must find that the aggravating factors "sufficiently" outweigh the mitigating factors to justify a death sentence, not that they outweigh the mitigating factors beyond a reasonable doubt.[81]

(i) Regardless of their findings about aggravating and mitigating factors, a juror is never required to vote to impose a sentence of death.[82]

(j) The jury shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or any victim in considering whether a sentence of death is justified and must not impose a death sentence unless it would do so no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim. The jurors must sign a certificate to this effect when a death sentence is returned. 18 U.S.C. § 3593(f).

---

80. 18 U.S.C. § 3593(c) & (d); United States v. Jackson, 327 F.3d 273, 301 (4th Cir. 2003) (approving instruction that "[a]ny juror who is persuaded of the existence of a mitigating factor must consider it").

81. *See* United States v. Gabrion, 719 F.3d 511, 531–33 (6th Cir. 2013) (en banc) (also citing the six other circuits that have held the same).

82. Jones v. United States, 527 U.S. 373, 385 (1999) (jury instructed that "regardless of your findings with respect to aggravating and mitigating factors, you are never required to recommend a death sentence").

6. If the jury unanimously finds in favor of a death sentence, the court must impose such a sentence. If the jury unanimously finds in favor of life imprisonment without the possibility of release, the court must impose that sentence.[83] 18 U.S.C. § 3594.

7. If the jurors do not unanimously agree on either a death sentence or a sentence of life imprisonment without the possibility of release, the court will impose a sentence of life imprisonment without the possibility of release.[84]

Some statutes allow for a sentence of death, life imprisonment, or a term of years, see, e.g., 18 U.S.C. § 924(j) (murder through use of a firearm during crime of violence or drug trafficking crime), while others allow only life imprisonment or death, see, e.g., 18 U.S.C. § 1201(a) (kidnapping resulting in death). However, even where the third option of a "lesser sentence" is statutorily available, district courts have consistently agreed, at the defendant's request, not to instruct the jury on it, but rather to limit jurors to death or life imprisonment without release.[85] As one court put it, "a defendant might reasonably conclude that he can best avoid a death sentence by agreeing to life imprisonment as the single alternative punishment."[86]

In the rare case where a sentence of less than life without the possibility of release is an option, the adjustments to the instructions and verdict form "necessary to accommodate other sentencing choices, though unwieldy and impractical for pattern instructions, should be a straightforward matter in any particular case."[87]

8. The Supreme Court held that when a defendant's future dangerousness is an issue and the only alternative sentence to death is life with no possibility of parole, due process entitles the

83. Note: Although the term "recommend" is used in the FDPA, *see* 18 U.S.C. § 3593(e) (jury "shall recommend whether the defendant should be sentenced to death"), it should not be used with jurors as it is potentially misleading—the court does not have the authority to reject the jury's sentencing verdict. Section 3594 states that "the court *shall* sentence the defendant" according to the jury's recommendation (emphasis added). *See also* Caldwell v. Mississippi, 472 U.S. 320, 329–33 (1985) (improper to indicate to the jury that the "ultimate determination of death" will be decided by the courts).

84. *See* 18 U.S.C. § 3594; *Jones v. United States*, 527 U.S. at 380–81. *See also* United States v. Candelario-Santana, 977 F.3d 146, 159 (1st Cir. 2020):

> Though the verdict form included a so-called "third option" if the jury was not unanimous, the district court's comments (and the verdict form itself) also made clear to the jury that, if it could not reach a unanimous decision on the appropriate punishment, Candelario would be sentenced to life imprisonment. These instructions are not erroneous; the district court is permitted, though not required, to instruct the jury as to the consequences of its decision. *See Jones*, 527 U.S. at 383 . . . ; *Tsarnaev*, 968 F.3d at 92–93.

85. *See e.g.*, United States v. Quinones, 511 F.3d 289, 320–22 (2d Cir. 2007) ("it was a tactical decision for defendants, at the penalty phase of this case, to agree that a life sentence was the only alternative to death" in summation arguments and in instructions they successfully sought from the district court, even though the statute of conviction permitted death, life, or a term of years: "The singular alternative of life imprisonment was thus plainly critical to defendants' arguments to the jury that justice did not require imposition of the death penalty."); United States v. Moussaoui, 591 F.3d 263, 304–05 (4th Cir. 2009) (same, agreeing with *Quinones*: "counsel for Moussaoui repeatedly argued to the jury that Moussaoui would spend the rest of his life in prison if the jury did not sentence him to death, and counsel specifically requested that the jury *not* be asked to recommend, as provided for in § 3593, life imprisonment or a lesser sentence"). *Cf.* United States v. Flores, 63 F.3d 1342, 1368–1369 (5th Cir. 1995) (district courts should not "allow the government to hammer away on the theme that the defendant could some day get out of prison if that eventuality is legally possible but actually improbable").

86. *Quinones*, 511 F.3d at 322.

87. *See* Tenth Circuit, Pattern Criminal Jury Instructions, *supra* note 70, at 346. See also the jury instructions noting the possibility in some circumstances of "a lesser sentence" in the Eighth Circuit's Model Jury Instructions, *supra* note 70, at Instructions 12.11 ("to be determined by the court" or "as provided by law") and 12.12 ("a term of imprisonment without parole and may be up to life imprisonment without the possibility of release").

defendant to tell the jury that the defendant will never be released from prison. *Simmons v. South Carolina*, 512 U.S. 154, 168–78 (1994). The Court later held that such an instruction should have been given where the prosecution introduced evidence of the defendant's future dangerousness, even though the prosecutor did not specifically argue future dangerousness as a reason to impose the death penalty. *Kelly v. South Carolina*, 534 U.S. 246, 252–57 (2002).

C. Sentencing Verdict Form

While the sentencing verdict form will be tailored to the specific capital counts of conviction, including the list of the gateway intent factors,[88] the statutory and non-statutory aggravating factors[89] contained in the government's *Notice of Intent to Seek the Death Penalty*, and the defendant's list of mitigating factors,[90] the information below outlines the issues that are normally addressed in a sentencing verdict form.

A capital defendant normally stipulates to the fact that the defendant was eighteen years of age or older at the time of the offense.

The first issue the jury must determine is whether the government has proven unanimously and beyond a reasonable doubt one or more gateway or threshold "intent" factors.[91] These may be framed in the following manner:

> SECTION I. GATEWAY ("INTENT") FACTORS
>
> In this section, please indicate which, if any, of the following gateway factors you unanimously find that the Government has proven beyond a reasonable doubt.
>
> [List Gateway ("Intent") factors here.]
>
> (Please check one box.)
>
> [ ] We, the jury, unanimously find that the government has proven this factor beyond a reasonable doubt.
>
> [ ] We, the jury, do not unanimously find that the government has proven this factor beyond a reasonable doubt.

If there is no capital count for which the jury unanimously found a gateway intent factor, then the jury is directed to skip ahead in the verdict form to the non-discrimination certification (Section VI below), to conclude their deliberations, and told that the Court will impose a sentence of life imprisonment without the possibility of release.[92]

88. 18 U.S.C. § 3591(a)(2)(A)–(D).
89. *Id.* § 3593(a).
90. *Id.* § 3592(a).
91. These factors are:

> (A) intentionally killed the victim; (B) intentionally inflicted serious bodily injury that resulted in the death of the victim; (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act[.]

18 U.S.C. § 3591(a)(2)(A)–(D).

92. 18 U.S.C. § 3591(a).

If the jury finds at least one gateway intent factor with regard to one or more capital counts, the jury then proceeds to consider whether the government has proven unanimously and beyond a reasonable doubt one or more statutory aggravating factors.[93] These may be framed in the following manner:

SECTION II. STATUTORY AGGRAVATING FACTORS

In this section, please indicate which, if any, of the following statutory aggravating factors you unanimously find that the Government has proven beyond a reasonable doubt.

[List Statutory Aggravating factors here.]

(Please check one box.)

[ ] We, the jury, unanimously find that the government has proven this factor beyond a reasonable doubt.

[ ] We, the jury, do not unanimously find that the government has proven this factor beyond a reasonable doubt.

If the jury does not unanimously find that the Government has proven beyond a reasonable doubt at least one of the statutory aggravating factors with respect to a particular capital count,[94] then direct the jury to cease deliberations on that capital count. If the jury does not unanimously find that the Government has proven beyond a reasonable doubt at least one of the statutory aggravating factors with respect to any of the capital counts, then the jury is directed to skip ahead in the verdict form to the non-discrimination certification (Section VI below), to conclude their deliberations, and told that the Court will impose a sentence of life imprisonment without the possibility of release.[95]

If the jury finds one or more statutory aggravating factors with regard to one or more capital counts, then the jury will ultimately decide between the death penalty and life imprisonment without the possibility of release for those capital counts.[96] In this event, the jury proceeds to consider whether the government has proven unanimously and beyond a reasonable doubt one or more non-statutory aggravating factors[97] for those capital counts. These may be framed in the following manner:

93. *Id.* § 3592(b)–(d).

94. *Id.* § 3593(d).

95. *Id.* ("If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.").

96. *Id.* § 3593(e).

97. *Id.* § 3593(a), (c).

SECTION III. NON-STATUTORY AGGRAVATING FACTORS

In this section, please indicate which, if any, of the following non-statutory aggravating factors you unanimously find that the Government has proven beyond a reasonable doubt.

[Non-Statutory Aggravating factors listed here.]

(Please check one box.)

[ ] We, the jury, unanimously find that the government has proven this factor beyond a reasonable doubt.

[ ] We, the jury, do not unanimously find that the government has proven this factor beyond a reasonable doubt.

The verdict form then directs the jury to consider the mitigating factors[98] for the capital counts for which the jury found at least one gateway intent factor in Section I and at least one statutory aggravating factor in Section II. These may be framed in the following manner:

SECTION IV. MITIGATING FACTORS

As to the mitigating factors which are listed below, please indicate which factors have been proven by a preponderance of the evidence, which is a lesser burden than beyond a reasonable doubt.

Recall that your vote as a jury need not be unanimous with regard to the mitigating factors in this section. A finding with respect to a mitigating factor may be made by one or more of the members of the jury. Any member of the jury who finds the existence of a mitigating factor may consider such a factor in making their individual determination of whether to vote for a sentence of life imprisonment without the possibility of release or a sentence of death, regardless of the number of other jurors who agree that the factor has been established, and even if no other jurors agree that the factor has been established. In the space provided, please indicate the number of jurors who have found the existence of that mitigating factor to be proven by a preponderance of the evidence with regard to each of the capital counts.

[List Mitigating factors here]

[For each factor:]

Number of Jurors Who So Find: ______

When it comes to mitigating factors, you are not limited to those mitigating circumstances specified on the verdict sheet, or even those identified by defense counsel. You may also consider any other factor or factors in the defendant's background, record, character, or any circumstance of the offense that any individual juror believes supports voting for life imprisonment without the possibility of release rather than death. In the space provided below, please write in any additional mitigating factors that have been found to be proven by a preponderance of the evidence with regard to each of the capital counts and indicate the number of jurors who agree.

[Provide space for juror(s) to write mitigating factor(s)]

98. *Id.* § 3593(c), (d).

The verdict form then directs the jury to determine the sentence for the capital counts for which the jury found at least one gateway intent factor in Section I and at least one statutory aggravating factor in Section II.[99]

The jury is instructed that in determining the appropriate sentence for the capital count they are considering, the jurors must each independently weigh the aggravating factor or factors that were unanimously found to exist beyond a reasonable doubt with regard to that count, whether statutory or non-statutory, and independently weigh the mitigating factors that the jurors individually or with others found to exist by a preponderance of the evidence.[100] The jurors are not to weigh any of the four preliminary gateway intent factors from Section I as part of this process.[101] This determination may be framed in the following manner:

> SECTION V. DETERMINATION OF SENTENCE
>
> Based upon consideration of whether the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist to justify a sentence of death rather than life imprisonment without the possibility of release, or, in the absence of any mitigating factors, whether the aggravating factor or factors are alone sufficient to justify a sentence of death rather than life imprisonment without the possibility of release:[102]
>
> [ ] We determine, by unanimous vote, that a sentence of life imprisonment without the possibility of release shall be imposed.
>
> [ ] We determine, by unanimous vote, that a sentence of death shall be imposed.
>
> [ ] We are not unanimous on the issue of punishment. We understand that the Court will impose a sentence of life imprisonment without the possibility of release.

Finally, after the jury has completed the sentence determination in the above section, direct the jury to review and sign a non-discrimination certification:[103]

> SECTION VI. CERTIFICATION
>
> If you sign below, you will be individually certifying that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victims was not involved in reaching your individual decision. The certificate also states that you, as an individual, would have made the same recommendation regarding a sentence for the crime in question regardless of the race, color, religious beliefs, national origin, or sex of the defendant, or the victims.
>
> [Each juror must sign this certification.]

99. *Id.* § 3593(d), (e).
100. *Id.* § 3593(d).
101. *Id.* § 3593(e).
102. *Id.*
103. *Id.* § 3593(f).