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DEATH FOR DRUG RELATED KILLINGS: REVIVAL OF THE FEDERAL DEATH PENALTY*

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I. INTRODUCTION

Capital punishment is the most severe punishment that society can impose upon its citizens. Because of the finality of the punishment, it is a highly divisive emotional topic that engenders strong and widely divergent opinions from individuals at all levels of society. Views range from those who believe death is appropriate for all felonies to those who abhor capital punishment for any crime. The diverse views result from the wide range of moral, religious and philosophical views that make up our pluralistic society. The dialogue implicates difficult moral choices that test our values as individuals and as a society.

Proponents of the death penalty have emphasized that it is a deterrent to future crime and it protects society from the one put to death because that individual will never commit another crime.[1] Punishment is further reinforced with respect to serial killers and others who have committed depraved crimes without the apparent capacity to conform to society's standards of legal conduct. Proponents argue that the punishment in such cases must fit the crime.[2] Their aim is retribution—society and individual victims must be satisfied that the murder has been avenged.

Abolitionists argue that procedural safeguards do not ensure that the innocent are not killed.[3] Further, the present system is often skewed

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1. Capital punishment is the "only effective way to protect society from certain violence-prone and irreformable criminals" who can kill again. Burton Leiser, *Retribution and the Limits of Capital Punishment*, *in* SOCIAL ETHICS: MORALITY AND SOCIAL POLICY 100 (Thomas A. Mappes & James S. Zembaty eds., 3d ed. 1987).

2. Retentionists, those in favor of the death penalty, defend a punishment that has existed since Biblical times as an effective deterrent. *See, e.g.*, *Matthew* 5:38.

3. *See* Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987). The authors conducted an empirical study of 350 cases where defendants convicted of capital crimes were later found to be innocent.

A recent example of this phenomenon was documented in the movie THE THIN BLUE LINE

because of the different levels of competency of counsel, non-uniform plea bargaining procedures, broad prosecutorial discretion and discrimination of all kinds.[4] Moreover, some studies have shown that capital punishment does not deter intentional homicides.[5]

Homicides resulting from drug usage are at an all time high. There is almost universal agreement that the drug problem has infected our society in an unprecedented fashion.[6] With the escalating illegal drug industry making the headlines daily, public concern for the rights of innocent victims and law enforcement personnel has intensified. Surveys reveal that the overwhelming majority of citizens, as much as 70% of the American public, are in favor of the death penalty.[7] Reacting to this public sentiment, Congress passed legislation providing for a death penalty for drug kingpins[8] who intentionally kill. The 1988 legislation au-

(Miramax 1988). The movie described the case of Randall Adams who was convicted for the murder of a police officer in Texas in 1977. Although Adams was sentenced to death for this offense, prior to his death the government discovered new evidence that showed that Adams was not the killer. Had this discovery been delayed or not forthcoming, Adams could have easily been put to death.

4. *See generally* WELSH S. WHITE, DEATH PENALTY IN THE NINETIES (1991).

5. Studies have demonstrated that homicide rates do not vary greatly between states that have a death penalty and those that do not. In addition, the homicide rates do not vary before and after the imposition of capital legislation in any given jurisdiction. For a review of the literature on deterrence, *see* FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 167-186 (1986).

6. Recent federal cases recognize the fact that the harm to society caused by the distribution of illicit drugs far exceeds that involved in the case of the killing of an individual human being:

> Except in rare cases, the murder's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image—others who create others still, across our land and down our generations, sparing not even the unborn.

Terrebonne v. Butler, 820 F.2d 156, 157-158 (5th Cir. 1988).

7. *See, e.g., American Survey: Capital Punishment*, THE ECONOMIST, Mar. 19, 1988, at 23; Fred Strasser, *One Nation Under Siege*, NAT'L L.J., Aug. 7, 1989, at S2 (survey taken in 1989 revealed that 62% of Americans favor a death penalty for drug criminals); James S. Granelli, *Justice Delayed*, 70 A.B.A. J. 51 (1984) (almost 73% of adults surveyed expressed support for capital punishment).

8. WASH. POST, Sept. 6, 1989, at A18. A "kingpin" is defined in Title 21 U.S.C. § 848(c):

> a person is engaged in a continuing criminal enterprise if -
> (1) he violates any provision of [Title 21 U.S.C. §§ 801-904] the punishment for which is a felony, and (2) such violation is a part of a continuing series of violations of [Title 21 U.S.C. §§ 801-904] or [Title 21 U.S.C. §§ 951-971] (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(c).

By contrast, the so-called "super kingpin" is an individual who is a principal administrator, organizer, or leader of a continuing criminal enterprise and who is involved with 300 times the quantity of drugs outlined in the statute, or whose enterprise receives $10 million in gross receipts during any 12 month period. *Id.* § 848(b).

The word "series" in § 848(c)(2) has been construed to mean "three or more federal narcotics law violations." United States v. Ordonez, 737 F.2d 793 (9th Cir. 1984).

The death penalty provision is contained in Title 21 U.S.C. § 848(e). *See* Part III *infra*.

thorizes the death penalty for persons engaging in or working in furtherance of a continuing criminal enterprise ("CCE") who kill or who cause intentional killings.[9] Additionally, the law subjects to death those who intentionally kill law enforcement personnel engaged in official duties. This federal statute clearly demonstrates the public's voice being heard by the elected members of our federal legislature.

This Article will discuss the recent landmark federal legislation enacted as an amendment to Title 21 United States Code, section 848, entitled "Death Penalty in Case of Drug Related Killings."[10] This embarkment to revive the federal death penalty, in the name of combatting the growing criminal drug activity, will undoubtedly serve as a model for future legislation to impose death on "drug kingpins" due to their drug activity, regardless of whether a death results.[11]

The death penalty provision of section 848 was first used in Chicago when the United States Attorney charged two individuals with narcotics

9. The law was part of the Omnibus Crime Bill of 1988. The Senate bill is entitled Death Penalty in Case of Drug Related Killings and is numbered S. 2455. The House version, H.R. 4868 is an amendment to the Anti-Drug Abuse Amendments of 1988 and is identical to S. 2455. 134 CONG. REC. S6950 (daily ed. May 27, 1988).

10. *Id.* When Congress chose to resurrect the federal death sanction, it had surprisingly limited dialogue and debate on the question. The amendment was passed partially as a reaction to the public's desire to "do something" about our drug problem. This drug bill, which is a marked departure from prior federal criminal law, was first introduced in the Senate on May 27, 1988 and debated on June 8, 9, and 10, September 8, and October 21, 1988. The law became effective on November 18, 1988.

In fact, this bill was the last piece of legislation to be passed by Congress prior to adjournment at 2:55 a.m. on October 22, 1988. The time factor is reflected in comments by Rep. Lent who said "[w]hile many in this Chamber are eager to adjourn and begin campaigning in the few weeks remaining before Election Day, the fact that we are gathered here at the 11th hour is testament to Congress' determination to effectively address the Nation's insidious drug problem." 134 CONG. REC. H11245 (daily ed. Oct. 21, 1988); "Mr. President, I am concerned that it is 2:20 in the morning, and I will not take long." *Id.* at S17303 (comments of Sen. Dole); "Mr. President, we are now passing another drug bill, again in October before an election." *Id.* at S17305 (comments of Sen. Chiles).

11. Any such attempt to impose capital punishment without the requirement of a homicide must recognize the limitation imposed by Coker v. Georgia, 433 U.S. 584 (1977). Current debate on the expansion of the death penalty includes the restoration of an enforceable death penalty in Title 18 of the United States Code. This legislation creates a new death penalty authorization for a variety of crimes including murders by federal prisoners who are serving a life sentence and fatal kidnappings. 137 CONG. REC. S3216 (daily ed. Mar. 13, 1991) (description of offenses for which the death penalty would be available). The Senate recently passed this legislation, S. 1241, on July 11, 1991. *See* 137 CONG. REC. S9982 (daily ed. July 15, 1991).

The Senate also passed an omnibus crime bill to impose the death penalty on non-homicidal drug kingpin activity. *See* Sandra R. Acosta, Comment, *Imposing the Death Penalty Upon Drug Kingpins*, 27 HARV. J. ON LEGIS. 596 (1990). Supporters advance this legislation on the theory that one who infects society by placing a quantity of drugs into the stream of commerce is as dangerous as one who kills intentionally. Drug dealing activity creates a high probability that death and destruction will result. The bill essentially provides that those involved in the manufacture or distribution of a huge quantity of drugs will be subject to death if convicted. *Id.* at 598. "[U]nderstand what you are doing because you are killing, and you are participating in the death of innocents throughout the country—those who die on overdoses, and those who die because of the criminal activity of others." 135 CONG. REC. S16,690 (daily ed. Nov. 21, 1989) (statement of Sen. D'Amato).

violations and also notified them that, if convicted, the government would seek the death penalty. This action represents the government's first application of the amended section 848 to a person working in furtherance of a drug enterprise.[12] The jury declined to impose the death sentence on the defendant, a drug kingpin who had ordered the killing that resulted. The co-defendant accused of actually performing the killing at the direction of the drug kingpin likewise was convicted but was not sentenced to death. The first person was sentenced to death under this statute on May 14, 1991 in Alabama.[13]

The Article will briefly review relevant Supreme Court decisions that relate to the amended federal law. Next, the Article examines the status of the federal capital sentencing schemes and the particulars of the statute followed by a review of the legislative history of the statute. The Article will conclude with recommendations of ways that the law should be amended to comport with the legislative purposes. The author submits that revisions are needed in order to bring the statute more in line with its legislative purpose and to tailor the law to its intended goals.

It should be noted at the outset that this Article's review of the current amendment to section 848 does not reflect either an agreement with or an opposition to the death penalty. Rather, this analysis is offered as a critique of the legislative attempt to deal with our nation's drug problem through the enactment of capital legislation. The central focus of the Article is whether the statute is consistent with its legislative purpose, which is to impose the death penalty on drug kingpins and major drug dealers and importers. If the law can be interpreted in ways inconsistent with the legislative goals, it should be amended to conform with the drafters' agenda. Because of the extraordinary nature of the penalty, whenever a state or the federal government seeks to kill criminals, it must do so in a way that does not offend the Constitution, societal norms or the proper functioning of the criminal justice system.

II. Supreme Court Capital Punishment Jurisprudence

Although scholars have argued that the procedures for imposing death are innately unfair in a civilized society, death penalty opponents have failed to stop the return of numerous death penalty statutes. The

12. The first defendant actually sentenced to death under amended section 848 was David Ronald Chandler who was convicted in Birmingham, Alabama for violations of 21 U.S.C. § 848 and 18 U.S.C. § 2. Chandler was sentenced to death on May 14, 1991. No execution method or date has been specified yet. Henry J. Reske, *First Death Penalty Under New Law*, A.B.A. J., Aug. 1991, at 24. *See* discussion Part IV *infra*.

13. *See supra* note 12.

Supreme Court's decisions in the last nineteen years have caused an overhaul of the various state statutes and shaped our modern system of capital punishment by setting constitutional parameters for its imposition. In the legal battleground producing the majority of death penalty jurisprudence, the Supreme Court has not only found that the death penalty is constitutional, but has also accepted the death penalty as a legitimate societal response to certain criminal activity. A brief review of relevant Supreme Court capital punishment jurisprudence follows.

The modern era of capital punishment began in 1972 when the Supreme Court struck down the death penalty statutes in several states in the landmark case of *Furman v. Georgia*.[14] Today only 14 states are without a death penalty statute, while the remaining 36 states have various capital punishment provisions.[15] In the years since *Furman*, states with capital punishment laws have addressed the procedural and substantive issues critical to capital punishment legislation in whole or in

14. 408 U.S. 238 (1972). The *Furman* decision reads in its entirety as follows:

> Petitioner in No. 69-5003 was convicted of murder in Georgia and was sentenced to death pursuant to Ga. Code Ann. § 26-1005 (Supp. 1971) (effective prior to July 1, 1969). Petitioner in No. 69-5030 was convicted of rape in Georgia and was sentenced to death pursuant to Ga. Code Ann. § 26-1302 (Supp. 1971) (effective prior to July 1, 1969). Petitioner in No. 69-5031 was convicted of rape in Texas and was sentenced to death pursuant to Vernon's Tex. Penal Code, Art. 1189 (1961). Certiorari was granted limited to the following question: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?" The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgement in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.
> So ordered.

Id. at 239-40 (citations omitted).

15. The thirty-six states that have a capital punishment law are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey;, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. *Capital Punishment 1989*, DEP'T OF JUSTICE BULL., Oct. 1989, at 24; *see also* NAACP LEGAL DEFENSE FUND, DEATH ROW U.S.A. (Aug. 23, 1991).

Legislative discussion clearly shows that this federal statute was enacted to subject drug killers to federal authority. These same individuals who kill are nevertheless subject to state prosecution for the intentional murder. Double jeopardy is inapplicable where one sovereign "requires proof of a fact that the other [sovereign] does not." Blockburger v. United States, 284 U.S. 299 (1932). A convicted federal defendant remains liable for prosecution under state law for the same killing since the federal statute requires proof of the continuing criminal enterprise which is not required for local prosecution.

Congress discussed the fact that this new legislation would invariably encroach on the states that have no death penalty laws. Thus, since the crimes covered, intentional murders, are also punished under state law, this federal effort directly impacts those citizens of states that have no capital laws. Because of the highly emotional debate that surrounds capital punishment, fourteen states have elected not to allow their citizenry, for whatever reasons, to be subjected to death for even the most violent criminal conduct.

part. Since 1977, almost all capital punishment sentencing has been limited to crimes of murder.[16] Any analysis of the current status of the death penalty in this country begins with *Furman* and continues with the other key case of *Gregg v. Georgia*,[17] decided four years later in 1976.

Prior to *Furman*, juries both adjudicated guilt and determined sentencing in one criminal proceeding. Because juries were left to decide whether the defendants should die or live, without any guidance in making the decision, the brief *Furman per curiam* decision invalidated the capital sentencing procedures insofar as they allowed capricious application of the death penalty. All existing death penalty laws were deemed inoperative because they lacked adequate procedural provisions. No clear majority of the Court spoke with unanimity on a theoretical basis for the invalidation of the capital punishment statutes under consideration.

The one-paragraph *Furman* decision produced a five-to-four split of opinion without any consistent basis or rationale.[18] In order to pass constitutional muster, a death penalty statute must "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.' "[19] Since the sentencer must distinguish between murderers and decide which defendants, if any, should be sentenced to die for their crimes, the standards used cannot be vague.

Four years after *Furman*, the Court in *Gregg* adopted procedural safeguards to ensure that the death penalty would be imposed in a just

16. This limitation was a direct reaction to the Supreme Court's holding in the case of Coker v. Georgia, 433 U.S. 584 (1977), which held that capital punishment is an excessive penalty for the rape of an adult woman where death did not occur as a result of the crime.

17. 428 U.S. 153 (1976).

18. Taken together, the opinions encompass over 225 pages of text. Justices Brennan, Marshall, Douglas, Stewart, and White joined to strike down the three death penalty statutes under consideration by the Court. Justice White found that the death penalty did not operate as a deterrent since it was applied so infrequently. Justice Stewart reasoned that the statutes under consideration allowed death to be capriciously imposed because the juries were given full discretion to apply the penalty. Justices Marshall and Brennan, writing separate opinions, took the position that capital punishment was, *per se*, unconstitutional and a cruel and unusual punishment which violated the Eighth Amendment to the Constitution.

Justice Douglas stated, in a concurring opinion, that capital punishment is "unusual" if it discriminates against any defendant because of race, religion, class or any other characteristic which allows the application of prejudices. *Furman*, 408 U.S. at 242. Moreover, the punishment is both "cruel and unusual" if it is applied unconstitutionally to minorities. *Id.* at 245. He concluded that if juries or judges are left with no guidelines in imposing a sentence of death, then the decisions are inherently unconstitutional because of the ability of the uncontrolled sentencer to capriciously impose death. *Id.* at 255. *Furman* invalidated the then existing jury-discretionary system of capital punishment.

19. Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980).

and rational manner. *Gregg v. Georgia*[20] held that the determination of guilt, whether by judge or by jury, should be made in the first stage of the proceeding. After that, the sentencing court should conduct a post-verdict, pre-sentence hearing where additional evidence is presented concerning any mitigating or aggravating circumstances. At this time, the sentencing authority should have at its disposal all relevant information with which to make an informed decision. Thus, the bifurcated proceeding both allows a jury to consider all relevant information for individualized sentencing and reduces the possibility that a death penalty will be applied arbitrarily.[21]

Several guiding principals reflect the Court's recent holdings. The defendant must be given every opportunity to offer evidence in mitigation of punishment.[22] The sentencer, whether judge or jury, must be guided by established criteria in the exercise of sentencing discretion.[23] Mandatory capital punishment is unconstitutional[24] and any capital punishment scheme must genuinely narrow the class of persons subject to death.[25]

Against this backdrop and the states' nineteen years of experience, Congress established the 1988 federal death penalty statute with a goal of combatting our country's drug problem by providing for death for drug kingpins who kill. In cases of federal jurisdiction, the law imposes the death penalty in states that have not enacted legislation to execute their citizens, even for the most heinous crimes. Congress passed this law in the waning hours of its last session in 1988. The legislation was enacted without the benefit of the usual hearings and/or committee reports relevant to this critical issue.

20. 428 U.S. 153 (1976).

21. There is an inherent conflict between these twin goals of individualized consideration and consistent application of objective standards. On the one hand, a defendant wants the jury to know all relevant information about the crime, the history and any other mitigating factors. On the other hand, the strive for consistent application of capital punishment presupposes that certain defendants who act in certain ways will be treated similarly. *See generally* WHITE, *supra* note 4, at ch. 1, at 6-8 (1991).

22. Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

23. Godfrey v. Georgia, 446 U.S. 420 (1980); Furman v. Georgia, 408 U.S. 238 (1972).

24. While mandatory capital punishment is unconstitutional, recent signals from the Court suggest that this may be subject to review and change.

25. Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 431 U.S. 633 (1977). In addition, judicial and prosecutorial conduct will be closely scrutinized to insure reliability and fairness in the capital sentencing determinations. *See, e.g.*, Caldwell v. Mississippi, 472 U.S. 320 (1985).

III. FEDERAL DEATH PENALTY FOR DRUG KINGPINS WHO KILL

Federal capital legislation is not new. There are numerous death penalty statutes contained in Title 18, United States Code.[26] Any federal death penalty law that has not been amended since the *Furman* decision[27] suffers from the same inadequacy that invalidated the state provisions in *Furman*: the jury is allowed unguided discretion to decide which murders should be punished by death.[28] Thus, Title 18 United States Code, section 1111,[29] the general federal murder provision which has a death penalty component, has been deemed by the United States Department of Justice to be unenforceable since *Furman*.[30]

With the revision of the United States Attorney's Manual,[31] the De-

26. The federal criminal code contains the following sections of Title 18 that have a capital punishment provision:

> 18 U.S.C. § 34 (1982) (aircraft or motor vehicle destruction); § 351 (assassination of high ranking governmental personnel); § 794 (espionage); § 844(d)(f) (using explosives that result in a death); § 1111(b) (general federal murder statute); § 1751 (assassination of President and the staff); § 1992 (train wrecking); § 2381 (treason).

27. After the decision in *Furman*, the kidnapping statute was amended to delete its death penalty provisions, 18 U.S.C. § 1201. The Aircraft Piracy Statute, 49 U.S.C. § 1472, was amended to provide the procedural safeguards discussed in *Furman*. Prior to this amendment, the statute simply provided for a death penalty and nothing more.

28. Pending legislation before Congress intended to remedy the invalid death penalty statutes contained in the federal criminal code has recently passed in the Senate. *See supra* note 11.

29. 18 U.S.C. § 1111(b) provides in pertinent part: "Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment,' in which event he shall be sentenced to imprisonment for life." The Senate recently passed a bill that would amend the death penalty provisions of Title 18 U.S.C. § 1111. *See infra* note 62.

30. Section 9 of the United States Attorney's Manual stated the official position of the Department of Justice that the existing death penalty laws were unenforceable:

> 9-10.010 *Federal Death Penalty Provisions*
>
> With the exception of the Aircraft Piracy statute, the various existing federal death penalty provisions are unenforceable in view of a series of Supreme Court decisions including *Furman v. Georgia*, 408 U.S. 238 (1972) and *United States v. Jackson*, 390 U.S. 570 (1968). These death penalty provisions are void because they set forth no legislated guidelines to control the fact-finder's discretion in determining whether the penalty of death is to be imposed.

UNITED STATES ATTORNEY'S MANUAL, § 9-10 (1984).

31. In the recently revamped UNITED STATES ATTORNEY'S MANUAL, section 9-10.010 (1988), it states that:

> there are some death penalty provisions which are so broad that no reasonable argument could be made that they would survive an Eighth Amendment challenge. For example . . . the general federal murder provision, 18 U.S.C. § 1111, [is unconstitutional because it] gives the jury unguided discretion as to which murders will be punished by the death penalty.

Despite the previous policy that foreclosed the imposition of the death penalty for federal crimes, the Department of Justice recently altered its position on the question of the validity of the death penalty. On October 1, 1988, prior to the amendment of section 848, the Department of Justice completely reissued its United States Attorney's Manual including the provisions concerning the federal death penalty. The Department now states:

> The Office of Legal Counsel has reviewed other federal capital punishment provisions and has concluded that the death penalty may be permissible for certain crimes in addition to aircraft hijacking. There are arguments, never considered by the Supreme Court, that

partment of Justice takes the official position that capital provisions are possibly viable for certain crimes. The policy permits the imposition of the death penalty by reading aggravating factors into the law because the overall federal criminal statutory scheme provides for death only for certain offenses against the United States. Thus, the government's position is that the capital provisions are in accordance with the Court's *Jurek v. Texas* decision, which limited death to certain offenses.[32] In *Jurek*, the Court upheld Texas' capital sentencing scheme because it limited death to only five types of intentional and knowing homicides. This narrowing required the sentencer to focus on the particularized nature of the crime and find aggravating factors before death could be imposed.[33]

Notwithstanding the position of the Department of Justice, with the passage of the law entitled "Death Penalty in Case of Drug Related Killings," Congress has focused on drug "kingpins"[34] who intentionally kill.

imposition of the death penalty for narrowly drawn offenses against the United States and its officials remain viable under the rationale of *Jurek v. Texas*, 428 U.S. 262 (1976).

UNITED STATES ATTORNEYS' MANUAL § 9-10.010 (1988). This provision was included prior to the amendment of section 848 on October 22, 1988.

32. 428 U.S. 262 (1976). By implication, although the statutory provisions have not been altered, the current Department of Justice policy rationalizes that the death penalty is constitutional for a limited group of crimes because they have never been tested in the Supreme Court after the *Furman* decision. The United States Attorney's Manual judiciously states, "[t]hus under *Jurek* certain narrow federal statutes that carry a death penalty sanction, such as assassination of the President *might* survive an Eighth Amendment challenge." UNITED STATES ATTORNEY'S MANUAL, *supra* note 31, § 9-10.010 at 1. The government has not yet presented this theory to the Supreme Court.

Some commentators submit that *all* of the current federal death penalty statutes are constitutional without the need for additional legislation. Paul D. Kamenar, *Death Penalty Legislation for Espionage and Other Federal Crimes is Unnecessary: It Just Needs a Little Re-Enforcement*, 24 WAKE FOREST L. REV. 881 (1989). Kamenar submits that neither *Gregg* nor *Furman* foreclose the imposition of the death penalty for federal capital crimes. *Id.* at 891. "Any constitutional deficiencies with the death penalty can be easily cured by *judicially* imposed sentencing guidelines that comport with the eighth and fifth amendments. Legislatively mandated guidelines are not constitutionally necessary." *Id.* at 891-92 (emphasis in original).

33. *Compare* United States v. Harper, 729 F.2d 1216 (9th Cir. 1984), where the defendant was charged with a violation of 18 U.S.C. § 794, espionage, for delivering secure national defense information to a foreign officer with the intent to injure the United States. The statute called for any penalty, up to and including the death penalty. The parties agreed that the death penalty provision was unconstitutional since the sentencing procedures had not been amended after the decision in Furman v. Georgia, 408 U.S. 238 (1972).

The district court ruled that a sentence of death was permissible because the court could formulate adequate sentencing guidelines and exercise discretion to "minimize the risk of wholly arbitrary and capricious action," citing Gregg v. Georgia, 428 U.S. 153, 159 (1976). The defendant was sentenced to death.

On appeal, the appellate court reversed holding that the guidelines required by *Gregg* must be legislatively and not judicially imposed. To hold otherwise, the court reasoned that the sentencing authority would establish the very guidelines that are intended to limit the sentencing authority itself. *Gregg* requires no less than external limitations, established by the legislature and set forth in the statute.

34. Kingpins are defined in 21 U.S.C. § 848(c), *supra* note 8.

The statute allows for the imposition of the death penalty under the following circumstances:

Death Penalty

(e)(1) In addition to the other penalties set forth in this section —

(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A)[35] or section 960(b)(1)[36] who intentionally kills or counsels, commands, induces, procures or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, or may be sentenced to death; and

(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less then 20 years, and which may be up to life imprisonment, or may be sentenced to death.[37]

Under section A, a defendant may be susceptible to the death penalty under three distinct prongs. Under section (e)(1)(A), a defendant who commits the substantive violation of engaging in a continuing criminal enterprise[38] and intentionally kills or commands the killing of an individual may be sentenced to death if the targeted individual dies.

In the second instance, a defendant who engages in an offense punishable under 841(b)(1)(A) or 960 (b)(1) by transacting in massive quan-

35. Title 21 U.S.C. § 841(b)(1)(A) provides the penalties outlined in section 841(a) for those who:

(1) [ ] manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) [ ] create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Section 841(b)(1)(A) provides enhanced penalties for those dealing in large quantities of drugs and authorizes imprisonment for up to life. If death or serious injury results from the drug dealing activity, the minimum sentence is 20 years.

36. Title 21 U.S.C. § 960(b)(1) details the penalties for those convicted of importing and exporting a controlled substance and provides enhanced penalties of not less than 10 years and up to life, or not less than 20 years if there is death or serious bodily injury resulting from the use of the substance.

37. *Id.* at § 848(e).

38. This is the kingpin. A continuing criminal enterprise is defined in § 848(c). *See supra* note 8.

tities of drugs[39] and, while engaging in a drug transaction, intentionally kills or commands the killing of an individual who may be killed, is subject to the death penalty upon conviction.

Finally, where the defendant acts "in furtherance of a continuing criminal enterprise" and intentionally kills or commands the killing of an individual who subsequently is killed, death is allowed as a penalty. According to the language of the statute, the defendant need not himself "engage in a continuing criminal enterprise."[40]

In section 848(e)(1)(B), the statute provides for a sentence of up to 20 years or the death penalty if the defendant kills a law enforcement officer engaged in official duties. This killing can occur "during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for a felony violation of [any Title 21 drug offense]."[41] The killing need not be committed at the hands of the defendant, but can actually be performed on the defendant's command, as is the case where the defendant "counsels, commands, induces, procures, or causes the intentional killing."[42] Under this section, there is no requirement that the killing be committed by a kingpin or by workers in a kingpin's enterprise. The killing must simply be drug-related.

If the government intends to seek the death penalty against an indicted defendant, it must seek prior approval from the Department of Justice[43] and notify the defendant of this intention within a reasonable time prior to trial.[44]

Procedurally, the finding of guilt must be separate and distinct from the consideration of whether death is the appropriate penalty.[45] A defendant can choose to be sentenced by a court or a jury, but if the defendant elects to be sentenced by the court, the government must approve the

39. These are major drug dealers or importers but are not, by definition, kingpins.

40. The section reads, "any person engaging in or *working in furtherance of a continuing criminal enterprise* . . .. *Id.* at § 848(e)(1) (emphasis added).

Many prosecutors refer to the person "engaged" in the continuing criminal enterprise as the "kingpin," and those persons "working in furtherance" of the continuing criminal enterprise as the "employees" of the kingpin—by definition, the employees are the five or more individuals over whom the kingpin "occupies a position of organizer, a supervisory position, or any other position of management." *Id.* at § 848(c)(2)(A).

41. 21 U.S.C. § 844 makes it a misdemeanor to knowingly possess a controlled substance. A second possessory offense for a violation of 21 U.S.C. § 844(a) is a felony. Section 841(a)(1), also a felony, prohibits possessing a controlled substance with intent to distribute.

42. One who "intentionally kills or *counsels, commands, induces, procures, or causes the intentional killing* of an individual [is subject to the death penalty.]" *Id.* at § 848(e)(1)(B) (emphasis added).

43. "The death penalty shall not be recommended without the approval of the Attorney General." UNITED STATES ATTORNEY'S MANUAL, *supra* note 31, § 2.151. *See generally id.* § 9-10.020.

44. 21 U.S.C. § 848(h).

45. *Id.* at §§ 848(g), (i).

defendant's waiver of jury sentencing.[46]

The sentencing hearing is conducted in two stages. First, the government must prove that the defendant is "death qualified" by proving the existence of at least one of the statutorily articulated aggravating factors.[47] The jury must be unanimous on the existence of any aggravating factor.[48] In the second phase of the penalty hearing, the sentencer must determine whether the defendant is to be put to death for the crime. During this stage, the defendant is allowed to present mitigating factors in an attempt to convince the sentencer that his life should be spared.[49] These mitigating factors must be shown by a preponderance of the evidence and need not be found to exist by a unanimous jury.[50] The jury must determine only whether "the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are

46. *Id.* at § 848(i)(2)(C).

47. *Id.* at § 848(k), Return of Findings, reads:

> [The jury] shall return special findings identifying any aggravating factors set forth in subsection (n) of this section found to exist. If one of the aggravating factors set forth in subsection (n)(1) of this section and another of the aggravating factors set forth in paragraphs (2) through (12) of subsection (n) of this section is found to exist, a special finding identifying any other aggravating factor for which notice has been provided [. . .] may be returned.

Id.

48. *Id.* at § 848(k): "A finding with respect to any aggravating factor must be unanimous." *Id.*

49. *Id.* at § 848(m). The following ten mitigating factors can be considered by the fact finder:

> (1) The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.
> (2) The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charges.
> (3) The defendant is punishable as a principal (as defined by section 2 of Title 18) in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.
> (4) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of murder, or other offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person.
> (5) The defendant was youthful, although not under the age of 18.
> (6) The defendant did not have a significant prior criminal record.
> (7) The defendant committed the offense under severe mental or emotional disturbance.
> (8) Another defendant or defendants, equally culpable in the crime, will not be punished by death.
> (9) The victim consented to the criminal conduct that resulted in the victim's death.
> (10) That other factors in the defendant's background or character mitigate against imposition of the death sentence.

Id.

50. *Id.* at § 848(k) states:

> . . . A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur that the factor has been established. *Id.*

themselves sufficient to justify a sentence of death."[51] A sentence of death may be imposed only by a unanimous verdict. Regardless of the findings to support the death sentence, no jury is required to impose death.[52] However, once the jury makes the recommendation that death is an appropriate sentence, this finding is binding upon the court.[53]

Any defendant sentenced to death has the right to appellate review of both the conviction and sentence.[54] The appellate court must review the conviction to ensure that:

> (A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and
> (B) the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section.[55]

Failing to address the importance of uniformity in federal criminal law, this statute has no specific provision for the manner of execution except that it must be carried out according to state law.[56] Needless to say, states that have no capital punishment laws have no provision for execution. Thus, the sentencing judge selects a site and manner for the execution.[57]

With this overview in mind, the starting point for the interpretation of this statute is the language of the law itself.[58] One need look no fur-

51. *Id.*

52. *Id.* "The jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed." *Id.*

53. *Id.* at § 848(l). "Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death." *Id.* Thus, a court is precluded from setting aside the jury's recommendation and imposing a life sentence instead.

54. *Id.* at § 848(q)(3).

55. *Id.*

56. Title 18 U.S.C. § 3566 provides that:

> [t]he manner of inflicting the punishment of death shall be that prescribed by the laws of the place within which the sentence is imposed . . . . If the laws of the place within which sentence is imposed make no provision for the infliction of the penalty of death, then the court shall designate some other place in which such sentence shall be executed in the manner prescribed by the laws thereof. *Id.*

57. This "pick a state" concept offends death penalty scholars who suggest that at a minimum Congress should provide for a consistent manner of death for a violation of this federal law. The American Civil Liberties Union commented on a draft of the bill in a letter to Senators Levin and Evans dated June 7, 1988 and in an identical letter to Representatives Conyers and Rodino, dated June 24, 1988. The letters were authored by Arvid E. Roach II of Covington & Burling in Washington D.C. Although taking no position on the advisability of the death penalty itself, the author concluded that the law suffered from numerous contradictions and omissions.

This letter is reprinted in the Congressional Record at 134 CONG. REC. S7567-7572 (daily ed. June 10, 1988) [hereinafter Roach Comment].

58. "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" United States v. Turkette, 452 U.S. 576 (1981) (citations omitted).

ther if the legislative intent can be gleaned from a thorough reading of the statutory language. It is questionable whether the law's provisions truly fulfill its legislative purpose. Five issues are of particular concern: use of the category "working in furtherance of" the CCE; focus on status and the use of aggravating factors at the sentencing phase; competency of counsel; overbreadth of the statute in reaching law enforcement-related deaths; and limited appellate review.

Both the legislative history and the law entitled "Death Penalty in Case of Drug Related Killings" demonstrate clearly that this amendment was designed to reach murders committed by drug "kingpins."[59] However, reading the language used in the statute reveals that the law paints with a broad brush and reaches killings that have no relationship to drug "kingpins" or even to drugs. Moreover, certain ambiguous language is subject to conflicting interpretations. Because of the speed in which this law was passed, it was not perfected through committee review. Furthermore, no committee reports were issued or debated.[60] Some legal analysts who have studied this law suggest that it not be used as a model for future federal capital legislation.[61] The manner in which this law was passed is significant. Because it is the first federal revival of capital punishment in decades, this statute will form the basis for additional attempts to enact federal death penalty legislation for other criminal

59. The legislative history clearly indicates that the law was designed to reach those "kingpins" who cause untold destruction because of killings related to drug dealing. "Through the death penalty provision we have sent a signal to drug kingpins that we will no longer tolerate the drug related killings. . . ." 134 CONG. REC. S16036 (daily ed. Oct. 14, 1988); "The death penalty will be available as punishment for a drug kingpin who commits or orders a drug-related murder. . . ." *Id.* at S16070; the law reaches "the drug kingpin who orders the assassination of someone or those who have such a reckless disregard for human life [that they] would come into an area and open fire and kill. . . ." 134 CONG. REC. S14752 (daily ed. Oct. 6, 1988).

60. Near the end of a session on June 9, 1988 Sen. Adams observed, "I regret the fact that these issues have been joined in this way. I would have preferred that this bill come before us only after hearings had been conducted and a record established." 134 CONG. REC. S7500 (daily ed. June 9, 1988).

One indication of the rush to enact the law is found in Senator D'Amato's remark when asked why a certain aggravating factor was included. D'Amato, the sponsor of the bill, responded: "[w]ell, I just thought of it on the spur of the moment. I thought it was pretty good." 134 CONG. REC. S7491 (daily ed. June 9, 1988). D'Amato's blatant admission demonstrates some legislators' cavalier attitude toward this critically important subject. The rushed debate without the usual intense congressional study was perhaps a political reaction by Congress to pacify a frustrated constituency fed up with the escalating, drug-related violence. As is evident from a study of the brief legislative history, the hasty passage indicates a lack of probing debate and results in a law that may contain some contradictions and inconsistencies.

61. *Federal Death Penalty Legislation*, 45 Rec. A.B. City N.Y. 617 (June 1990) [hereinafter N.Y. Bar Report]. The Committee on Criminal Law of the Bar Association of New York City studied this legislation and concluded that it suffered from "numerous inconsistencies and defects, some of which we believe to be of constitutional dimensions. Because of the hasty manner in which this legislation was, . . . 'railroaded' through Congress, the glaring defects in this extremely important statute never received adequate Congressional attention." *Id.* at 634.

conduct.[62] The states may look to this law for guidance as a model statute when debating capital punishment legislation.

A. Death Penalty Reaches Enterprise Workers

Kingpins and large-scale drug dealers or importers who intentionally kill or command a killing are susceptible to the death penalty upon conviction under 21 U.S.C. § 848.[63] The two relevant prongs of section 848(e)(1)(A) do not depart from established criminal law concepts of accomplice liability.[64] Individuals who are not themselves drug kingpins or large-scale drug dealers or importers, but who nevertheless work "in fur-

62. On July 11, 1991 the Senate passed the Violent Crime Control Act of 1991. *See* 137 CONG. REC. S9982 (daily ed. July 15, 1991). This legislation authorizes the death penalty for thirty federal offenses. It amends Title 18 to restore an enforceable death penalty for the offenses that have not been amended since the decision in *Furman v. Georgia*. The legislation specifies new procedures for imposing and carrying out death sentences. In addition, the legislation creates new death penalty authorization for any murder involving a firearm that has moved in interstate commerce, for civil rights murders and for certain murders committed by federal prisoners. Moreover, it authorizes the death penalty for drug related murders committed in the District of Columbia and for other murderous drug offenses. The legislation authorizes the death penalty for the murder of federal and state law enforcement officials. *Id.*

63. Congress was concerned that drug kingpins who kill not escape a death sentence under federal law. Clearly, the thrust of the legislation was to reach drug-related killings including not only those performed by the kingpin, but also those committed by other individuals involved in the drug business.

Congressman Traficant remarked that "this bill contains the Federal death penalty for those drug killers who commit murder." 134 CONG. REC. H10710 (daily ed. October 21, 1988); section 848 was enacted for "drug kingpins who are indiscriminately spreading death and violence, [this law will] let them know the ultimate sanction will be used against them." *Id.* at S17303 (remarks of Senate Majority Leader Dole); "Mr. President, that is not some small fish [describing the true kingpin as the target of the legislation]. 134 CONG. REC. S7544 (daily ed. June 9, 1988).

The theme is reflected in these remarks: "The death penalty will be available as punishment for a drug kingpin who commits or orders a drug-related murder. . . ." 134 CONG. REC. S16070 (daily ed. October 14, 1988); "Through the death penalty provision we have sent a signal to drug kingpins that we will no longer tolerate the drug related killings. . . ." *Id.* at S16036; the law reaches the "drug kingpin who orders the assassination of someone or those who have such a reckless disregard for human life [that they] would come into an area and open fire and kill. . . ." 134 CONG. REC. S14752 (daily ed. October 6, 1988); "It would only apply to drug kingpins and those who have profited substantially from selling drugs." 134 CONG. REC. S7585 (daily ed. June 10, 1988); the law targets "the middle level management or the kingpins . . . [not the] [t]rafficker, who is . . . the one that local police apprehend, [and] is usually a juvenile or some addict . . . ." 134 CONG. REC. S15968 (daily ed. October 14, 1988).

64. Accomplice liability includes aiding, abetting, assisting, encouraging, soliciting, advising, and procuring the commission of the offense. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 410, 436-44 (1987); PETER W. LOW, CRIMINAL LAW 236-42 (rev. ed. 1990). One can also be an accomplice by agreeing to aid or attempting to aid. *Id.* Common law accomplice liability is based on intentional conduct, not reckless or negligent conduct.

The Model Penal Code states that a person is guilty of a crime if he commits it "by his own conduct or by the conduct of another person for which he is legally accountable, or both." MODEL PENAL CODE § 2.06(1) (1962). One can be accountable for another's actions if one causes the other to act, if one is an accomplice, or solicits, aids or agrees or attempts to aid. *Id.* § 2.06(3).

A person solicits another to commit a crime if he or she "commands, encourages or requests" another person to commit the crime or to attempt to commit the crime or to become an accomplice in the commission or attempted commission of a crime. *Id.* at § 5.02.

therance of" a drug enterprise are subject to death under this law if they commit an intentional killing. Prior to the passage of section 848(e), section 848 applied only to kingpins. Those working for the enterprise were prosecuted under other sections of Title 21 for their drug-related activities. What this amendment does, then, is bring within its scope the enterprise workers who kill and who would not otherwise be prosecuted under section 848.[65]

"Working in furtherance of" is not defined anywhere within the statutory scheme.[66] A literal reading of the language of the amendment suggests that if an individual is not a kingpin or a drug dealer, but is only tangentially connected with a CCE, he is nonetheless subject to the death penalty if he kills another and the killing is pursuant to the drug enterprise. Moreover, if the defendant commands the killing but does not himself actually perform the killing, and he engages in any of the other outlined criminal activities, his conduct may subject him to capital punishment for the association with the CCE. Thus these two statutory constructions may have different effects on a variety of conceivable fact patterns.

Consider a kingpin who orders a drug addict to murder a drug buyer. Unknown to the kingpin, the addict has a side deal with the buyer to also sell him stolen automobile parts. The buyer and addict meet to consummate both the sale of the drugs and the stolen parts. Prior to the completion of the sale, the addict discovers that the buyer is an informant and has been cooperating with the authorities. For this reason, the addict kills the buyer.

This murder has a dual purpose. Prior to the amendment of section 848, the killing would be related to stolen merchandise and would subject the addict/murderer to various local penalties, ranging from several years incarceration to life imprisonment or to the death penalty, depending on the jurisdiction. Under section 848, since the killing was also in

65. The law reaches those who work in furtherance of the drug enterprise and thus advance various illegal activities including drug-related murders. However, if the congressional goal with this legislation is to reach those *significant* drug dealers who "[reap] the profits while others pay the price in blood [and those who] have been able to stand off from afar and pull the strings," the law reaches much further than necessary. 134 CONG. REC. H11267 (daily ed. Oct. 21, 1988).

66. While the statute and the legislative history indicate that capital punishment applies to a limited group of killers who presumably are not themselves kingpins, the intentional killing must nevertheless take place during the course of a drug transaction. Although the statute does not make this clear, legislative history demonstrates that a killing "in furtherance of a continuing criminal enterprise" requires that the "jury would have to determine that there is a *direct* connection between the intentional killing and [the defendant's drug related activity]." 134 CONG. REC. H7275 (daily ed. Sept. 8, 1988) (remarks of Rep. Gekas, the principal sponsor of the House bill) (emphasis added). There is a critical distinction between *killing* in furtherance of a CCE and *working* in furtherance of a CCE.

furtherance of the drug related CCE, both the murderer and the kingpin are subject to the death penalty. "Working in furtherance of" does not mean working "exclusively" for the CCE.[67]

Consider further several other scenarios: first, an employee in the CCE, a so-called "gofer" who runs errands, is employed to deliver a quantity of cocaine to a buyer. The gofer is armed. During the delivery an altercation occurs over the payment for the drugs and the gofer kills the buyer. Although the gofer was "working" in furtherance of the CCE at the time of the killing, it is less clear that the killing was "in furtherance of the CCE." One of the essential issues raised by this Article is whether section 848 requires the killing itself to be in furtherance of the CCE and whether the killing advances or supports some purpose of the CCE.[68]

Arguably, the killing in the above scenario does not advance any purpose of the CCE because murder brings attention to the CCE, and causes the police to investigate earlier than they otherwise might. On the other hand, the killing can serve as a lesson to others within the CCE that the kingpin will not tolerate any disobedience or disagreements: death will come to those who cross the kingpin. Viewed from this perspective, the killing is in furtherance of the CCE.[69]

67. Cases interpreting the phrase "in furtherance of" are plentiful in the law of conspiracy. *Compare* United States v. Renfro, 620 F.2d 569 (6th Cir. 1980) (agents for a narcotics buyer who consummate a transaction different from the co-defendant seller's are members of a single conspiracy even though the acts further a joint purpose); United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976) (because defendant had dual purpose and was on his own "frolic," hearsay statement was inadmissible against co-conspirator); United States v. Doerr, 886 F.2d 944 (7th Cir. 1989) (statement made to promote prostitution was not made in furtherance of the charged conspiracy); United States v. Fielding, 645 F.2d 719 (9th Cir. 1981) (statements made by a co-conspirator relating to forming a new conspiracy were not made in furtherance of the charged conspiracy and therefore not admissible under FED. R. EVID. 801(d)(2)(E)).

68. For example, a bank president can work in furtherance of a CCE by laundering the profits of the drug operation and routing the money to an off-shore banking network. (Money laundering is a Title 18 offense. 18 U.S.C. §§ 1956, 1957.) If the kingpin decides to kill the bank president because he was skimming CCE profits and hires a hitman to accomplish this and the hit is successful, the killing is arguably in furtherance of the CCE. If, however, the bank president learns of the plan to kill him while he is transacting business related to the CCE, and is able to protect himself by killing the hitman first, is this killing also in furtherance of the CCE? Clearly the bank president was working in furtherance of the CCE at the time of either killing.

Arguably, this self-defensive action was not in furtherance of the CCE because it was not intended to promote any CCE business. The primary motivation was self-defense. On the other hand, the bank president might also want to protect the money belonging to the CCE. If one killing is in furtherance of the criminal venture, why not the other? The fact that both actors are engaged in criminal conduct is not determinative because Congress clearly intended that killings of rival drug actors come within the scope of the law. *See* Part V, section B, *infra*. Whenever a killing takes place between two armed individuals, it is fair to assume that each is primarily seeking personal protection. These drug rival killings are self-defensive in the same way as the bank president's was self-defensive. At the time of the killing, however, each actor is "working in furtherance of a CCE."

69. The legislators did not define the relationship between the drug activity and the killing.

Consider if the gofer, instead, consummates the deal with the buyer. Upon leaving the scene to return the money to the kingpin, the gofer intentionally kills a bystander who gets in the way. A cogent argument can be made that this killing occurred while working in furtherance of the CCE since the return of the financial proceeds of the transaction had not yet been accomplished. But the killing itself was not in furtherance of the CCE since it did not promote any activity of the CCE. Competent defense counsel will argue that this totally accidental encounter with an innocent bystander does not bring this death within section 848.

What these examples illustrate is that *working* in furtherance of a CCE is not synonymous with *killing* in furtherance of a CCE. By choosing a term with a very broad meaning, Congress has allowed for conflicting interpretations and paved the way for the imposition of the death sentence for conduct that has, arguably, only a remote relationship to the CCE and drug dealing activity. The breadth of the statutory language will allow prosecutors tremendous latitude in bringing a variety of conduct within section 848.

Thus, the killer can be subject to the death penalty for simply serving as an operative within the criminal enterprise. An individual who acts as a lookout for the drug operation arguably may subject himself to the death penalty if, while he is "working in furtherance of" the drug operation, he kills an individual, not part of the enterprise, during a dispute over the sale of "hot" merchandise unrelated to drugs.[70] This example reaches the outer limits of the broad interpretation of the statute.

Several emphasized, however, that the killing had to be immediately and temporally related to an on-going drug transaction. (*See, e.g.*, 134 CONG. REC. S17301 (daily ed. Oct. 21, 1988). Sen. Byrd commented that death penalty would be available for drug-related killing; Rep. Lent noted that the death penalty would now be available for killing during the course of a drug-related felony. *Id.* at H11245.

When President Reagan signed the bill into law on November 18, 1988, he noted that the amendment "provid[ed] [a] death penalty for narcotics kingpins and drug related murderers." 24 WEEKLY COMP. OF PRES. DOC. 1522 (Nov. 18, 1988).)

When discussing this critical connection, Rep. Gekas explained that a person who killed while in possession of marijuana would be subject to the death penalty only if he or she killed in order to protect the drugs or avoid apprehension. 134 CONG. REC. H7275 (daily ed. Sept. 8, 1988).

70. One need only be working in furtherance when the killing occurs. The statute does not say "killing in furtherance." Because the statutory language does not specify that the killing must be drug related, any activities committed "in furtherance" of drug dealing would be covered. It is likely that courts will interpret this language in conformity with the prior cases in the area of conspiracy law. Courts have defined what is remote and what is directly connected to a conspiracy in order to define the membership of the conspiracy.

For example, in a prosecution for murder, a witness testified that the defendant was "fixing to kill a Mexican." The court found the statement was nothing more than a casual admission to someone that the defendant decided to trust and the statement did not indicate the defendant intended to further the conspiracy by announcing its object. United States v. Castillo, 615 F.2d 878 (9th Cir. 1980).

If this killing furthers the CCE by avoiding detection, however, although the killing itself was not directly related to drugs, it arguably falls more squarely within the perceived intent of the law. In addition, the killing can be committed by gross reckless conduct because the statute calls for death even if the defendant "intentionally engaged in conduct which the defendant knew would create a grave risk of death to a person."[71]

It remains unclear under the Constitution how active a role an individual must play in a killing before being subject to the death penalty.[72] Section 848 fails to articulate precisely just how an individual who does not perform a killing will be subject to the death penalty. The law also fails to specify how involved the killer should be with the drug enterprise to qualify as "working in furtherance of" the CCE.

It is expected that courts will turn to an analogous test in conspiracy law, requiring the government to prove that each overt act of a conspir-

71. 21 U.S.C. § 848(n)(1)(D). The statute aggravates a defendant's conduct if he intentionally engaged in conduct that he "knew would create a grave risk of death." *Id.* The Model Penal Code defines intentional killing as murder when:

> (a) it is committed purposely or knowingly; or
> (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit, robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

MODEL PENAL CODE § 210.2 (1962).

The Supreme Court has held that the death penalty is a permissible sanction for killings where the defendant substantially participated in a felony and was recklessly indifferent to the value of human life and a death resulted. *See* Tison v. Arizona, 481 U.S. 137 (1987).

72. *See* Tison v. Arizona, 481 U.S. 137 (1987). *Tison* raised the question whether the death penalty was permitted where the defendant demonstrated major participation but whose mental state was one of reckless indifference to the value of human life. The defendant supplied weapons, assisted in the father's and another's prison escape, assisted in stopping the victims' vehicle, participated in the robbery and kidnapping of the victims, watched without protest while the father and inmate killed the four victims with a shotgun and assisted in flight and a shootout with police. This conduct satisfied the culpability requirement because the defendants evidenced "major participation in the felony committed, combined with reckless indifference to human life . . . ." *Id.* at 158.

One who does not participate in the physical act of killing but only aids, abets or counsels another accomplice who performs the murder can be held liable based on vicarious liability under the felony murder rule. *Compare* Enmund v. Florida, 458 U.S. 782 (1982) (death penalty imposed on an accomplice who neither took life, intended to take life or attempted to do so violates the constitution); *see* John H. Wickert, *Eighth Amendment—The Death Penalty and Vicarious Felony Murder: Nontriggerman May Not Be Executed Absent a Finding of an Intent to Kill*, 73 J. CRIM. L. & CRIMINOLOGY 1553 (1982).

Many commentators have criticized the felony murder rule as a basis of liability and punishment for intentional killings. Because liability is based on the legal fiction of transferred intent, the mens rea of the accomplice is never considered. The American Law Institute has proposed to abolish the felony murder rule and require that homicides committed during a felony be prosecuted under intent to kill theories. MODEL PENAL CODE § 210.2 (1962). This has had little impact on states that have, for the most part, retained the felony murder rule in some form. *See also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, HANDBOOK ON CRIMINAL LAW 560-61 (1972); Andrew H. Freidman, Note, Tison v. Arizona: *The Death Penalty and the Non-Triggerman: The Scales of Justice are Broken*, 75 CORNELL L. REV. 123, 152-53 (1989).

acy was committed in furtherance of the conspiracy.[73] Similarly, the law of evidence requires statements against a co-conspirator to be made in furtherance of the conspiracy in order to be admitted into evidence.[74] The Federal Rules of Evidence, Rule 801(d)(2)(E) states:

> Statements which are not hearsay. A statement is not hearsay if —
> . . . (2) Admission by party-opponent. The statement is offered against a party and is
> . . . (E) a statement by a coconspirator of a party during the course and *in furtherance of* the conspiracy.

This hearsay exception is "firmly established" in the context of the law of conspiracy.[75] There exists a plethora of cases that interpret the term "in furtherance of" in the contexts of the rules of evidence and the law of conspiracy. Conversations dealing "with such topics as selling drugs, arranging delivery and payment, reassuring each other of trustworthiness, and discussing the current status of the conspiracy" are clearly made in furtherance of the conspiracy and are admissible as an exception to the hearsay rule.[76]

The broad phrase "in furtherance of" serves the prosecution well for purposes of the admissibility of hearsay or bringing conduct within the scope of a conspiracy. Courts construe this phrase broadly so as not to defeat the purpose of the exception to the hearsay rule. The law recognizes that co-conspirators are partners in crime, and deems them each to be agents of the others. Thus, the "in furtherance of" requirement is analogous to the agency theory "in the scope of the agent's authority."[77]

Considerations of both fact and policy dictate against such an expansive application in the area of capital punishment. If the term "in furtherance of" can be interpreted inconsistently with the legislative purpose, the law should be amended to clearly state the specific relationship necessary between the killing and the business of the enterprise.[78] Courts

73. 18 U.S.C. § 371.

74. FED. R. EVID. 801(d)(2)(E).

75. Krulewitch v. United States, 336 U.S. 440, 443 (1949). The sufficiency of evidence required under Rule 801(d)(2)(E) to establish that a statement was made in furtherance of and during the course of a conspiracy is by a preponderance of the evidence. Bourjaily v. United States, 483 U.S. 171 (1987). This standard of proof is to be established through traditional evidentiary means. Preliminary questions of admissibility are established according to Rule 104(a) of the Federal Rules of Evidence, which allows a court to rely on otherwise inadmissible evidence to establish the admissibility of the proposed evidence. *See also* United States v. Inadi, 475 U.S. 387 (1986) where the Supreme Court held that a statement of a co-conspirator is admissible without showing that the declarant is unavailable because the co-conspirator's statement is sufficiently reliable.

76. United States v. Molinaro, 877 F.2d 1341 (7th Cir. 1989).

77. United States v. James, 576 F.2d 1121 (5th Cir. 1978).

78. Conspiratorial overt acts need not be themselves criminal in nature. Innocent acts that

may interpret this language in section 848 to include a variety of killings categorized as "in furtherance of" a CCE.

In the rush to address the nation's drug problem, Congress may have overlooked the potential breadth of this language. Because reasonable interpretations of this phrase include killings by addicts and other low level workers in the CCE, but which are not necessarily killings in furtherance of the CCE, the statutory language should be amended to limit the law's application to killings demonstrated to be in furtherance of the CCE and eliminate the prong of liability for death in cases where the defendant worked in furtherance of the CCE. The issue is whether such a potentially broad judicial interpretation is consistent with a sound congressional policy decision. Death is only appropriate under this statute if the killing was in furtherance of the CCE, regardless of whether the killing took place while working in furtherance of the CCE. Again, the issue is not the validity of capital punishment but, rather, the statute's broad language which reaches a variety of conduct.

B. Status of Defendants

One significance of this amendment is that it focuses on a certain class of defendants. The statute can be viewed, due to the enhanced penalty of death, as punishing status rather than conduct. A consistent theme throughout the legislative history is concern over the killing committed by significant drug kingpins, dealers and importers.[79] Two individuals who commit the same act with the same state of mind—i.e., intentional killings—may receive different punishments. In fact, a person can kill in a manner more heinous than the defendant under the statute, but because he is not a kingpin or major drug dealer or importer, that person will not be subject to the death penalty.[80] When individuals

further the criminal venture will suffice. Yates v. United States, 354 U.S. 298 (1957); United States v. Rose, 590 F.2d 232 (7th Cir. 1978).

The nature of the scope of a conspiracy depends on the facts of each case and, therefore, a determination as to what constitutes "in furtherance of" testimony varies from case to case. United States v. Mackey, 571 F.2d 376 (7th Cir. 1978).

79. *See supra* note 59.

80. This criticism is reflected in the observations of the New York Bar Association:

> The legislation is focused upon a class of defendants rather than the class of victims. In our judgement, this distinction makes no sense. For example, why, after all, should the organized crime figure who intentionally kills a law enforcement officer to avoid apprehension for obstruction of justice arising from the contract killing of a potential witness be viewed as less threatening to society or even less deserving of the death penalty than the Federal drug felon who engages in precisely the same conduct?

N.Y. Bar Report, *supra* note 61, at 622. Of course, Congress often legislates in a given area and continues to add or modify penalties step-by-step. The absence of a death penalty for other crimes does not negate the validity of the penalty set forth in section 848 (e).

are put to death it should be for acts committed, not because of status.

Drug dealing activities of the extensive character targeted by Congress is criminal activity of an ongoing and diversified nature. Many of the daily activities engaged in by individuals connected with the criminal network are highlighted by the listed aggravating factors. Two-thirds of the aggravating factors arguably are related to the fact that the defendant is in a CCE or other major drug organization.[81] The aggravating factors reinforce in the jury's mind that they are dealing with a drug kingpin and may impose death for that reason alone. Although the term "kingpin" is not an operative element of the law, the status of being a kingpin elevates the killing to a capital offense under section 848 with the application of the aggravating factors.[82]

Because the law does not limit "working in furtherance of" to solely drug-related activities, it is not clear if this clause means that the killing must be part of an ongoing drug transaction or part of a turf battle between rival drug gangs.[83] The law does not say whether drugs must be

81. Aggravating factors in §§ 848(n)(4)(10) and (11) all concern drug related activity. Drug dealing activity generates huge profits and factors (6) and (7) direct the jury's attention to the monetary profits. Drug dealing on a large scale is an activity that creates a grave risk of death to people and the kingpins within an organization are individuals who may have had prior convictions in state court as listed in (2), (3) and (5). Thus two-thirds of the aggravating factors are related to the fact that the defendant is in a continual drug operation. *See infra* note 99.

82. Congress focused on the major drug dealers by aggravating any killing to a capital offense when committed by those connected with the drug network. Clearly Congress wanted to reach drug kingpins and those on the level of kingpins. *See supra* note 59.

Similarly, in 1970 Congress passed the Racketeer Influenced and Corrupt Organizations Act ("RICO") in an effort to reach racketeers and organized crime members. 18 U.S.C. §§ 1961-1968. It is clear in the legislative history of RICO that Congress was concerned with the infiltration of legitimate businesses by organized criminals or racketeers. Although Congress enacted RICO in an attempt to eradicate organized crime, RICO does not define organized crime. United States v. Turkette, 452 U.S. 576, 587-89 (1981) (RICO was not limited to legitimate businesses, but, rather, an "enterprise" under RICO included both legitimate and illegitimate organizations).

RICO has been interpreted as focusing on a pattern of criminal conduct, not a specific status. United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976), *aff'd in part and vacated in part*, 591 F.2d 1347 (4th Cir. 1979). There would be "many real problems, both constitutional and practical, attendant to implying an organized crime gloss onto RICO." G. Richard Strafer et al., *Civil RICO in the Public Interest: "Everybody's Darling"*, 19 AM. CRIM. L. REV. 655, 670 (1982); *see also* Robinson v. California, 370 U.S. 660 (1962) (unconstitutional to punish for the status of being addicted).

83. The statutory language also reaches those who kill during drug wars or turf battles. Legislative history supports this interpretation. Sen. D'Amato noted that "this bill does hold out the possibility of the death penalty being utilized, as it relates to the killings of people *who themselves are involved in drug transactions* . . . drug related murders [are covered that] were the result of drug turf disputes or disputes in drug dealer transactions. . . ." 134 CONG. REC. S7469-70 (daily ed. June 9, 1988) (emphasis supplied). He stated that the public's desire to "really have a war on drugs" requires the "ultimate penalty," including targeting for execution those who are "dealing in drugs." *Id.* at 7480.

The theory behind this law enforcement strategy is that a universal capital punishment threat will aid law enforcement in efforts to gain cooperation from the rival drug dealers. In the words of one Senator:

You will never see a rat run so fast as when he faces the death penalty himself. Get the

temporally or directly related to the killing. Since section 848 also applies to the drug dealer who kills another drug dealer,[84] if a rival dealer decides to eliminate his competition by murdering him, this intentional killing subjects the murderer, upon conviction, to a sentence of death.[85]

With respect to international kingpins, one Department of Justice observer opined that the law would be somewhat counter-productive by stating, "[i]f we imposed the death penalty, we wouldn't be able to get any of the true drug lords . . ." because most countries do not extradite individuals who are subject to a capital offense.[86] Rather than allowing

> trigger man who goes out and kills another drug person. When he is threatened with the possibility of the forfeiture of his life, the code of silence is broken. . . . When they face the gallows or the electric chair . . . they begin to cooperate.

134 CONG. REC. S7495 (daily ed. June 9, 1988) (comments of Sen. D'Amato). Cooperation is often vital to successful law enforcement. Congressional intent reflects that the desire in this provision was to deter drug dealers from waging war on law enforcement officers.

84. "[I]t seems almost perverse that Congress chose to exact retribution by making the drug dealer who kills another drug dealer subject to the enhanced penalty of a death sentence, while the bank robber who kills an innocent bank employee or law enforcement officer is not." N.Y. Bar Report, *supra* note 61, at 623.

At two points in the statute, the law refers to co-felons who may be killed during drug related violence. For example, in section 848(n)(1)(D)(i), one of the aggravating factors is limited if the victim is killed as a result of intentional conduct "that the defendant knew would create a grave risk of death to a person, *other than one of the participants in the offense* . . ." *Id.* (emphasis supplied). Under section 848(m)(9), if "the victim consented to the criminal conduct that resulted in the victim's death," this may be considered by the jury as a mitigating factor against the death penalty. *Id.*

Thus, the killer of the rival drug dealer may be put to death, but the fact that the victim was engaged in criminality will mitigate against death under this latter section. Further, if the victim intentionally created a risk of death by virtue of the rival criminal activities, the victim's status negates a listed aggravating factor under the former section.

85. A proposal was discussed that would eliminate the perceived anomaly of identical punishments of death for killers of rival criminals, police and innocent bystanders. As Senator Levine commented: "This bill violates I believe common sense, traditional values of our people, in providing the same penalty for people convicted of the killing of a law enforcement officer or other innocent people as it provides for people convicted of the killing of a drug czar." 134 CONG. REC. S7492 (daily ed. June 9, 1988).

The proposed amendment provided a more severe penalty for killers of innocent bystanders and police officers. Because individuals can be released after service of 20 years, the amendment would provide for mandatory imprisonment without the possibility of release for the killings in place of the death penalty. It was proposed that one who kills a law enforcement officer would be sentenced to life without the possibility of parole. *Id.* at 7492-93.

This alternative would have provided for a maximum sentence of life without parole for the intentional killing of others engaged in the drug business rather than a death sentence. Otherwise, it was suggested, the law could become known as the "drug trafficker protection bill."

Without amendment, this bill can be perceived as a "drug czar or a drug trafficker protection bill." 134 CONG. REC. S7492 (daily ed. June 9, 1988). Sen. Levine cited a survey conducted by his staff wherein they contacted police departments nationwide. The results revealed that "probably 99 percent of the drug related murders are murders where people in the drug business kill other people in the drug business. Perhaps 1 percent of the murders are murders of law enforcement and other innocent people . . . . Let us protect [the innocents and the police] more strongly than we protect the 99 percent of the victims in drug related murders who are drug czars being bumped off by other drug people." *Id.*

86. Richard Gregorie, formerly the Chief Assistant United States Attorney in Miami Florida, stated that the capital punishment provision of section 848 would interfere with the priority of extra-

the long arm of the United States government to reach such individuals, this law may preclude certain types of intervention *because* of its capital provision.[87]

While another statutory section sets out the monetary amount that a kingpin must make from the drug trade,[88] the statute contains no monetary minimum that must be attributed to the murderer in order to bring the killing within this law.[89] If the law provided that those who kill or work in furtherance of the CCE also have a financial stake in the criminal enterprise, this would clearly set forth one direct connection that is necessary for prosecution under this section. In order to bring all drug related killings within the scope of the law, Congress apparently intended that there be no financial conditions precedent to prosecution for these intentional murders.

C. *Law Enforcement Deaths*

Under section 848(e)(1)(B), the government does not have to prove the existence of a CCE as a predicate for the invocation of this statute. The government need *not* prove that the defendant engaged in any substantial drug activities, or that the enterprise grossed in excess of $10 million, or any of the other additional requirements needed to prove a case under section 848(e)(1)(A). Rather, focus is only on the killing of a law enforcement officer connected to "any felony violation" of the federal drug control statutes. The law focuses on the murder victim's status, not the severity of the underlying offense. Congress intended to deter drug dealers from waging war on law enforcement with the passage of this section.

This section states that anyone who intentionally kills a law enforcement officer, "during the commission of, in furtherance of, or while at-

diting kingpins abroad. His comments are reproduced in 134 CONG. REC. H7266 (daily ed. Sept. 8, 1988).

87. 134 CONG. REC. H7275 (daily ed. Sept. 8, 1988).

88. 21 U.S.C. § 848(b)(2)(B) requires that the *enterprise* receive $10 million dollars in gross receipts during any 12 month period (emphasis added).

89. Consistent with the targeting of kingpins, Congress focused on the huge profits reaped in the criminal drug trade. In discussing this issue prior to passage, Sen. Presler commented that the legislation "was carefully crafted so the death penalty only would be used in very rare cases. It would only apply to drug kingpins and those *who have profited substantially from selling drugs*." 134 CONG. REC. S7585 (daily ed. June 10, 1988) (emphasis added) (this reference is to those who profit substantially, to those who violate 21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1) and who intentionally kill). As mentioned, this law as enacted sets no monetary minimum on anyone within the CCE. The law was designed to target "the middle level management or the kingpins, [not the] trafficker, who is the one that local police apprehend, [and] is usually a juvenile or some addict. . . ." 134 CONG. REC. S15968 (daily ed. October 14, 1988). As demonstrated earlier, the law reaches not only the major importers and distributors who make millions of dollars, but also the low level addict.

tempting to [avoid the authorities]" for a felony violation of the drug laws is subject to the death penalty.[90] Thus, consider a person, in possession of a small quantity of marijuana and on probation resulting from conviction of a similar, previous possession.[91] If a probation officer visits the home of the probationer and is killed by the probationer when the officer knocks on the door, this killing could fall within section 848 because the defendant has attempted to "avoid apprehension." Under a broad interpretation of this statute, if an officer is killed during a domestic disturbance unrelated to drugs, yet the killer is in possession of drugs,[92] he could be subject to the death penalty as the statute is written.[93]

"Drug-related" can be as broadly defined as a drug-addicted defendant in possession of marijuana. If the police attempt arrest with use of firearms,[94] and an officer dies from return fire originating from the fleeing addict, the addict is subject to the death penalty for possessing drugs and killing the officer.

This section appears to be needlessly broad in its scope. It is not clear that Congress intended to reach low-level drug users and include them within the concept of "drug-related." Congress could have been specific in requiring that the law enforcement murder be directly related to the enterprise and drug dealing activity which is proscribed under section 848 before it is punishable by death. If, however, the congressional aim was to punish those who kill law enforcement officers regardless of the severity of the underlying drug offense, then this goal has been met. Under the previous example, the addict may be lawfully put to death if he kills a law enforcement officer.

D. *Statutory Aggravating Factors*

It is a "fundamental requirement" that the statutory aggravating factors "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sen-

90. 21 U.S.C. § 848(e)(1)(B).

91. 21 U.S.C. §§ 848(e)(1)(B), 844(a). Under section 844(a) first time possession is a misdemeanor offense but the second possessory offense is a felony.

92. Possession with the intent to distribute is punishable as a felony under 21 U.S.C. § 841(a)(1). *See* Roach Comment, *supra* note 57, at 13.

93. The statute also does not require that the federal felony be a charged offense. Rather section 848(e)(B) only states that the killing must be drug related by being committed "during commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for" a felony violation of the drug laws. The law has not been interpreted to require the government to allege and prove the underlying felony violation. *See* discussion Part IV *infra*.

94. The use of deadly force by an officer attempting an arrest would in most circumstances offend Tennessee v. Garner, 471 U.S. 1 (1985).

tence on the defendant compared to others. . . ."[95] Prior to the adoption of section 848, Congress did not study the actual application of various aggravating factors used by the states today. Aggravating factors are of crucial importance in determining the constitutionality of a particular death penalty law. Section 848 is structured to divide the aggravating factors into two groups. The first category of aggravating factors is satisfied if

> The defendant —
> (A) intentionally killed the victim;
> (B) intentionally inflicted serious bodily injury which resulted in the death of the victim;
> (C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim; or
> (D) intentionally engaged in conduct which
> (i) the defendant knew would create grave risk of death to a person, other than one of the participants in the offense; and
> (ii) resulted in the death of the victim.[96]

Although aggravating factors are designed to ferret out those most deserving of death from among those convicted and eligible for death, the language of this statute makes clear that any defendant who commits an offense as defined in section 848(e)(1) satisfies the aggravating factors listed above and thereby is death-qualified.[97]

Because the aggravating factors listed in section 848(n)(1) restate the *mens rea* necessary for conviction of the underlying offense, by proving that this particular defendant is guilty, the prosecutor has already proven a substantial case for death.[98] Section 848(k) requires the sentencer to weigh the aggravating factors against the mitigating factors. In

95. Zant v. Stephens, 462 U.S. 862 (1983).

96. 21 U.S.C. § 848(n)(1).

97. This point was articulated by Sen. Levin who observed that:

> There have been no committee hearings on this and no committee report on this bill. . . My question is: Why is this an aggravating factor when what it says is, basically, you did it. These are the elements of the offense. Or to put the question another way, how is this aggravating factor any different from the elements of the offense? . . .
> How can you be convicted unless you "intentionally killed the victim;" or "intentionally inflicted serious bodily injury;" or "intentionally engaged in conduct intending," so forth; or "intentionally engaged in conduct which the defendant knew would create a grave risk of death to a person?" How can you be convicted of a crime unless you also did one of those four things . . .?

134 CONG. REC. S7490 (daily ed. June 9, 1988) (comments of Sen. Levin).

Responding to this line of questioning, Sen. D'Amato opined that this duplication was necessary because the jury considering the sentence may not be the same jury that convicted the defendant of the crime initially. *Id.* at 7491 ("There may be a new jury; there may be a new judge as it relates to the imposition of the death penalty . . . . I just thought of [this] on the spur of the moment. I thought it was pretty good."). However, this apparent redundancy in the provision, making intentional homicides both an element of the offense and an aggravating factor, is not satisfactorily explained in the legislative history.

98. *See* Lowenfeld v. Phelps, 484 U.S. 231 (1988).

every case the jury must find at least one aggravating factor since the defendant has already been convicted based on the intentional language of section 848(n)(1). Although there still must be evidence of an additional aggravating factor, a prosecutor thus is the beneficiary of judicial momentum toward death because of the overlap. These factors do not segregate out those most deserving of death, but rather include as death-qualified all who have been convicted. The capital sentencing option is consistently available by virtue of the underlying conviction.

The statute continues to list another group of aggravating factors that focus on prior convictions for narcotics offenses. The only aggravating factors that shall be considered, unless notice of additional aggravating factors is provided, are:

> (2) The defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.
>
> (3) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury upon another person.
>
> (4) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.
>
> (5) In the commission of the offense or in escaping apprehension for a violation of subsection (e) of this section, the defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.
>
> (6) The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
>
> (7) The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.
>
> (8) The defendant committed the offense after substantial planning and premeditation.
>
> (9) The victim was particularly vulnerable due to old age, youth or infirmity.
>
> (10) The defendant had previously been convicted of violating this subchapter or subchapter II of this chapter for which a sentence of five or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.
>
> (11) The violation of this subchapter in relation to which the conduct described in subsection (e) of this section occurred was a violation of section 845 of this title.
>
> (12) The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physi-

cal abuse to the victim.[99]

Aggravating factors (n)(4), (10) and (11) all concern prior criminal drug activities. Thus, several aggravating items can be found based on the same underlying criminal conduct.[100] Coupled with this is the fact that the underlying offense is drug-related. The result is that a single episode of drug-related conduct can satisfy up to four aggravating factors. This may be precisely what Congress intended. However, this overlap does not serve as a genuine distinction among murderers.[101] Besides weighing heavily against defendants with prior narcotics convictions, these aggravating factors allow the imposition of death upon a defendant without aggravating information other than a prior history of drug dealing coupled with the basic elements of the present conviction.[102]

Section 848(j) allows the prosecution to introduce at the sentencing

99. 21 U.S.C. §§ 848(k), (n)(2)-(12).

100. For example, a defendant who has previously been convicted of two violations of section 845, by distributing drugs to persons under the age of 18 satisfies subsection (4), (10), and (11). If a defendant has two prior federal drug offenses, this conduct may fall under subsections (4) and (10).

101. While the aggravating factors arguably are duplicative and broad, it has been pointed out that three of the mitigating factors appear to be nullities that would not be relevant at a sentencing hearing. *See* N.Y. Bar Report, *supra* note 61, at 629-630; Roach Comment, *supra* note 57. Section 848(m)(4) states that the defendant "could not have foreseen that the defendant's conduct in the course of the commission of murder, or other offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person." Once the jury has rendered its verdict convicting the defendant of acting intentionally, it is unlikely that a defendant could convince a jury that the death was not foreseeable.

Moreover, the defendant's impaired capacity in section 848(m)(1) and any "severe mental or emotional disturbance" in 848(m)(7) can mitigate against the imposition of death. Section 848(l), however, provides that:

> Death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability — (1) cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment, or the nature of the punishment; or (2) lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

While the Supreme Court has held that it is unconstitutional to execute the insane, Ford v. Wainwright, 477 U.S. 399 (1986), and those under the age of sixteen when the crime was committed, Thompson v. Oklahoma, 487 U.S. 815 (1988), the Court declined to extend this protection to the mentally retarded in Penry v. Lynaugh, 493 U.S. 302 (1989).

By virtue of section 848(l), since a sentence of death cannot be carried out against one who suffers from mental retardation or mental disability, the two mitigating factors relating to impaired capacity and emotional disturbance appear to be of little value to a defendant. On the other hand, inclusion of these seemingly irrelevant mitigating factors provides a dual protection for the mentally disturbed. Should a prosecutor successfully convict a defendant who is mentally retarded or who suffers from a mental disability, arguably, sections 848(m)(1) and (7) afford double protection in addition to section 848(l). But the sentencer must find that the defendant acted under *severe* mental or emotional disturbance. *See* § 848(m)(7). Thus it may be reasonable for jurors to believe that they can only consider that the defendant acted under severe mental or emotional disturbance but that they cannot consider significant mental or emotional disturbance as a mitigating factor.

102. Roach Comment, *supra* note 57. "As a result, in many cases several aggravating factors will be found based on the same underlying conduct. In a more carefully drafted statute, the defendant's involvement in drug-related activities would at most constitute a single aggravating factor"; *see also* N.Y. Bar Report, *supra* note 61, at 620-21, 626.

proceeding evidence obtained possibly in violation of a defendant's constitutional rights. This section allows the jury to consider evidence "regardless of the admissibility of that evidence under the rules governing the admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[103] Evidence that is inadmissible at the trial[104] could be admitted at the sentencing phase under the language of this section, including illegally seized evidence.[105]

Despite the language of section 848(j), courts should consider more carefully the admissibility of evidence obtained via a constitutional violation affecting the *substantive* rights of the defendant.[106] The heightened

103. 21 U.S.C. § 848(j). This language is taken from Rule 403 of the Federal Rules of Evidence: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

104. For example, if it was shown to the satisfaction of the trial judge that a confession was coerced from the defendant, it would be excluded as a violation of the *Miranda* holding. Under the language of section 848(j), such evidence could be presented by the government against the defendant at the sentencing phase "regardless of its admissibility under the rules governing admission of evidence at criminal trials." 21 U.S.C. § 848(j).

At the sentencing hearing, prosecutors routinely introduce evidence of a defendant's past criminal record, evidence that is not usually admissible on the question of guilt. A defendant can take the stand at the sentencing hearing and testify without the fear of incrimination, in mitigation of punishment. Generally, the rules of evidence are inapplicable during sentencing hearings.

The Model Penal Code also allows that all relevant evidence come in at the time of the sentencing phase. "Any such evidence not legally privileged, which the Court deems to have probative force, may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut any hearsay statements." MODEL PENAL CODE § 210.6 (1962).

105. This is the standard for admission of evidence at bond hearings as well as at sentencing hearings. *See* United States v. McCrory, 930 F.2d 63 (D.C. Cir. 1991) (evidence seized in violation of the Fourth Amendment may be used against a defendant at the time of the sentencing hearing under the sentencing guidelines because of the explicit mandate from Congress that "no limitation" be placed on relevant evidence in arriving at a guidelines sentence).

Under the Federal Sentencing Guidelines, 18 U.S.C. § 3661, the sentencing judge may consider any information that has a "sufficient indicia of reliability to support its probable accuracy." United States v. Marshall, 519 F. Supp. 751 (D. Wis. 1981), *aff'd*, 719 F.2d 887 (7th Cir. 1983). This would include reliable hearsay evidence and out-of-court declarations of an unidentified informant. For example, evidence of prior bad acts can be excluded at trial under Rule 404(b) of the Federal Rules of Evidence. Such evidence may come in, however, at the time of sentencing. The Federal Rules of Evidence do not apply to the sentencing hearing. FED. R. EVID. 1101(d)(3).

106. The author recognizes that the court routinely admits hearsay evidence and other evidence during the sentencing hearing that would otherwise be inadmissible. *See* discussion *supra* notes 103-105. Recently, the District of Columbia Circuit held that illegally seized evidence is admissible under the federal sentencing guidelines. The court recognized the wide discretion to consider all relevant evidence without limitation. United States v. McCrory, 930 F.2d 63 (D.C. Cir. 1991). *See also* MODEL PENAL CODE § 210.6(2) (1962) ("Any such evidence not legally privileged, which the Court deems to have probative force, may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut any hearsay statements.").

Green v. Georgia, 442 U.S. 95 (1979), addressed the admissibility of hearsay evidence offered on

importance of fact-finding in death penalty cases may require a stricter test or a heavier burden when the question is the life or death decision under consideration. The Supreme Court has recognized that death is a uniquely different sanction, unlike all others in its severity and finality, and "in capital proceedings generally . . . factfinding procedures [should] aspire to a heightened standard of reliability."[107] Thus, at the death penalty phase, additional safeguards should be required.

While the traditional rules of evidence do not generally apply in sentencing hearings, a significant number of states have altered that policy in death penalty sentencing hearings. Alabama, Florida, Mississippi, Nevada, Oklahoma, Oregon, South Carolina, Tennessee, and Texas all follow the same approach in this matter. These states grant that relevant evidence is generally admissible, regardless of the rules of evidence, but with the stipulation that the statute shouldn't be construed to authorize introduction of any evidence secured in violation of the federal Constitution, or the constitution of a particular state.[108] The Florida Supreme Court stated: "It is clear that whenever evidence is suppressed because it was seized in violation of the 4th or 5th Amendments, this statute prohibits its introduction during the penalty phase unless there is an appropriate exception. . . ."[109]

Arizona, Arkansas, Connecticut, Illinois, Massachusetts, and New Jersey take a different approach, differentiating between evidence offered by the state to establish aggravating circumstances, and evidence offered in support of mitigating circumstances. Generally, evidence offered by either party regarding mitigation is not bound by the rules of evidence, while information relevant to aggravating factors is bound by those

behalf of a defendant at the sentencing phase. The Supreme Court held that "[i]n these unique circumstances the hearsay rule may not be applied mechanically to defeat the ends of [J]ustice." *Id.* at 97 (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). Courts will carefully examine the limitations on the admissibility of hearsay evidence at the time of sentencing, and not exclude the proffered information if to do so will affect the defendant's substantive rights. The defense is able to introduce evidence without regard to the rules of evidence under a broad interpretation of section 848(j). For a discussion of the types of evidence proffered on behalf of defendants at the time of sentencing, *see* WHITE, *supra* note 4, at 97-111.

107. Ford v. Wainwright, 477 U.S. 399, 411 (1986).

108. ALA. CODE § 13A-5-45(d); FLA. STAT. ch. 921.141(1)(1985); MISS. CODE. ANN. § 99-1-101 (Supp. 1991); NEV. REV. STAT. § 175.552 (1986); OKLA. STAT. ANN. tit. 21, § 701.10(d)(1983); TENN. ANN. § 39-204(c)(1991); TEX. CRIM. PROC. CODE ANN. § 37.01 (West Supp. 1992). These laws generally state that any evidence with probative value and relevance to the sentence shall be received at the sentencing hearing, but this is not to be construed to allow introduction of any evidence secured in violation of the state or federal Constitution.

109. Harach v. State, 437 So.2d 1082, 1085-1086 (Fla. 1983). *See*, Mhoon v. States, 464 So.2d 77 (Miss. 1985)(an incriminating statement elicited from the defendant by 5th and 6th Amendment violations is inadmissible in the sentencing phase).

rules.[110] Louisiana, Missouri, and Virginia have taken the most conservative approach and applied the rules of evidence as in the guilt phase.[111]

The limitations placed by the majority of states is only that the evidence be relevant, reliable, probative and/or subject to the discretion of the judge. Nonetheless, a significant minority of the states have found a need to apply the protection afforded by the exclusionary rule to death penalty sentencing proceedings. The policies behind the exclusionary rule may not necessarily be served by enforcement during the sentencing proceedings, as there would normally be minimal deterrent impact upon law enforcement officers. However, in a proceeding as significant as a death penalty sentencing, there seems to be a growing trend reflected among the states that the exclusionary rule should still be observed.

Congress may have meant to exclude unconstitutionally seized evidence where the admission of such evidence affects the substantive rights of a capital defendant. The courts may well interpret this section by reading in this exclusion. At the time where an individual's life is at stake, at this most critical point in the prosecution, the Constitution should not be abandoned in favor of a lenient standard of admissibility.

E. Competency of Counsel

Section 848 provides for the appointment of "one or more attorneys and the furnishing of such other services" as required.[112] The statute sets minimum standards for the legal counsel who may be appointed to represent the capital defendant.[113] In setting these minimum standards, Congress must have been mindful of the research suggesting that competency

110. ARIZ. REV. STAT. ANN. § 13-703(c)(1989); ARK. CODE ANN. § 5-4-602(4) (Michie 1987); CONN. GEN. STAT. ANN. § 53a-46a(c) (West 1985); IL. ANN. STAT. ch. 38, ¶ 9-1(e) (Smith-Hurd 1992); MASS. GEN. LAWS ANN. ch. 279, § 68 (West Supp. 1992); N.J. STAT. ANN. § 2C:11-3)c)(2)(b) (West Supp. 1991).

111. LA. CODE CRIM. PROC. ANN. art. 905.2 (West 1991); MO. ANN. STAT. § 565.006(1)(Vernon 1990); VA. CODE ANN. § 19.2-264.4 (Michie 1991).

112. 21 U.S.C. § 848(q)(4)(A). In addition, the court may, in its discretion and *ex parte*, authorize the payment for investigative, expert or other services necessary for the defense of the case or for the sentencing proceeding. *Id.* § 848(q)(9).

113. *Id.* § 848(q)(5) states:

> If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

A similar requirement is stated for appointments occurring after judgment:

> If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less that five years, and must have had not less that three years experience in the handling of appeals in that court in felony cases.

Id. § 848(q)(6).

of counsel plays a critical role in the determination of who is put to death in this country. Section 848 recognizes the complexity of capital representation when it says that any appointment shall last from the pretrial stages through trial, sentencing, (unlike some state laws) through appeal, post-conviction proceedings and the filing of any writ to the Supreme Court.[114] This representation encompasses a variety of settings and requires a great deal of legal expertise and specialization in each distinct phase of the proceeding.

Capital defendants frequently suffer the consequences of being put to death because their trial counsel are ill-equipped to handle capital cases.[115] Counsel must be thoroughly knowledgeable about a very complex body of constitutional and procedural laws specific to capital litigation and not commonly applicable to other criminal cases. It is commonly understood that the representation of a capital defendant is an extraordinary responsibility even for conscientious and experienced counsel.[116]

Representation of the defendant charged with a capital crime often involves the most heinous killers and gruesome facts. The requirement that the trial be bifurcated from the sentencing phase means two trials with two distinct sets of issues and strategies. Pre-trial investigation can be extensive, since it involves both the question of guilt and the query into the critical sentencing considerations. Penalty phase investigation

114. Section 848(q)(8) states:

> [E]ach attorney . . . shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

115.
> Death penalty litigation has become a specialized field of practice, and even the most well intentioned attorneys often are unable to recognize, preserve, and defend their client's rights. Often trial counsel simply are unfamiliar with the special rules that apply in capital cases. Counsel—whether appointed or retained—often are handling their first criminal cases, or their first murder cases, when confronted with the prospect of a death penalty. Though acting in good faith, they inevitably make very serious mistakes.

Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 1-2 (1986).

116. Most lawyers do not want to handle death cases. The work is hard and unrewarding, the issues are complex and often there is very little or no compensation.

> For the local lawyer representing a capital client in an atmosphere of outrage, fear, or racial hostility, [the demand of the profession] has always been a grueling one. But in a legal climate that is increasingly poisoned by the Supreme Court's own denigration of capital appeals, and the petitioners and lawyers who bring them, only the super-human lawyer may be able to resist the temptation to approach her client and her task with scorn, distaste or resignation.

Julia E. Boaz, Note, *Summary Process and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts*, 95 YALE L.J. 349, 361 (1985).

involves delving into issues about the defendant's family, personal and psychological history because of the importance of such information at the time of sentencing. This investigation must be completed prior to the criminal trial.

There are numerous documented instances of inadequate legal representation[117] ranging from no legal representation at all,[118] to ignorance of the current case law directly on point with the issues pending during the criminal litigation,[119] to ignorance of the capital procedural requirements,[120] to unfamiliarity with the state's capital statute.[121] Counsel's failure to investigate[122] or present mitigating evidence,[123] and even one instance where an attorney conceded the client's guilt,[124] are further examples of inadequate legal assistance. In some cases the difference between the competence of counsel resulted in the death of a defendant where the co-defendant's life was spared because co-counsel raised the relevant legal issue.[125]

Moreover, plea bargaining in capital cases is a powerful factor in deciding who is ultimately put to death. Skilled and well-prepared defense counsel can cause the prosecutor to engage in plea bargaining where this might not otherwise occur.[126] Jury selection poses special

117. *See, e.g.*, Tom Wicker, *Defending the Indigent in Capital Cases*, 2 CRIM. JUST. ETHICS 2 (1983) (noting that there is a pattern of incompetent counsel in capital cases).

118. *See, e.g.*, House v. Balkcom, 725 F.2d 608, 612 (11th Cir.) (counsel not even present during portions of capital trial), *cert. denied*, 469 U.S. 870 (1984); Young v. Zant, 677 F.2d 792, 795 (11th Cir. 1982) (counsel failed to provide "even a modicum of professional assistance at any time" during capital trial).

119. *See, e.g.*, Brooks v. Estelle, 697 F.2d 586 (5th Cir.), *cert. and stay of execution denied*, 459 U.S. 1061 (1982); Goodwin v. Balkcom, 684 F.2d, 794, 817-20 (11th Cir. 1982) (conviction and death sentence set aside because counsel was unaware of the law and rendered ineffective assistance, and distanced himself from his client), *cert. denied*, 460 U.S. 1098 (1983).

120. *See* Young v. Zant, 677 F.2d 741, 797-98 (11th Cir. 1982) (counsel unaware that sentencing phase followed finding of guilt).

121. *See id.* at 799; House v. Balkcom, 725 F.2d 603, 613 (11th Cir. 1984).

122. *See, e.g.*, Curry v. Zany, 258 Ga. 526, 371 S.E.2d 647, 649 (1988) (counsel ineffective for failing to obtain independent psychiatric evaluation of the defendant in order to determine competency).

123. *See, e.g.*, Knighton v. Maggio, 105 S. Ct. 32, 33 (1984) (Brennan, J., dissenting); Thomas v. Kemp, 796 F.2d 1322, 1324-25 (11th Cir.) (death sentence vacated because counsel failed to present any evidence in mitigation), *cert. denied*, 479 U.S. 996 (1986).

124. Francis v. Spraggins, 720 F.2d 1190, 1193 (11th Cir. 1983) (defense counsel conceded guilt during the closing argument).

125. Smith v. Kemp, 715 F.2d 1459, 1476 (11th Cir. 1983) (Hatchett, J., dissenting) (defendant executed because lawyer failed to raise unconstitutional jury selection; co-defendant raised identical issue and was granted a new trial and client sentenced to life); Stanley v. Kemp, 737 F.2d 921 (11th Cir. 1987) (defendant executed because attorney did not raise issue of improper burden shifting instruction; more culpable co-defendant granted relief on same issue in Thomas v. Zant, 800 F.2d 1024 (11th Cir. 1986)).

126. For example, a well prepared, experienced counsel can cause the prosecutor to offer a plea bargain by filing meritorious pretrial motions, or numerous time consuming motions, secure the expertise of persons who will testify on behalf of the defendant and who will require the prosecutor

problems not usually considered by competent and experienced criminal law practitioners. Counsel may have an ethical obligation to ask for private, individualized voir dire and to select people with an open mind on the question of death.[127] There is a continuing duty to discover all evidence that may be offered in mitigation of death in order to ensure a meaningful penalty phase. This duty may involve extensive investigative work on the part of the attorney, not of the type previously engaged in by the attorney in a non-capital criminal practice.

After the trial, the penalty phase of a capital case makes it radically different from all other criminal trials.[128] Ordinarily little thought is given to the sentencing until the defendant has been found guilty. But in a capital case, the attorney must prepare for both phases before trial since it is likely that a court will proceed with the sentencing phase immediately after a finding of guilt.[129]

At the sentencing phase of a capital case the attorney must be an advocate for life and affirmatively present evidence on behalf of the client. No presentence report may be required.[130] "A capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision . . . that counsel's role in the proceeding is comparable to counsel's role at trial . . . ."[131]

Even experienced practitioners can find themselves in unfamiliar territory. Defense attorneys are accustomed to reacting to the government's case and meeting the prosecution's burden of proof. In the capital sentencing phase, the roles are reversed. Defense counsel must "ensure that the adversarial testing process works to produce a just result under

to similarly hire an expert, or delay the trial until a time when it is politically expedient to dispose of the case. Moreover, the personal relationship between the prosecutor and the defense attorney can play an important role in whether a plea bargain is offered. *See* WHITE, *supra* note 4, at 54-57.

127. In fact, in a capital case, 18 U.S.C. § 3432 provides: "A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the . . . list of the veniremen, and of the witnesses to be produced on the trial . . . stating the place of abode of each venireman and witness." This provision allows counsel the opportunity to conduct thorough pretrial investigation. This section departs from the common practice in federal courts by giving prior notice of jurors' and witnesses' names and addresses.

128. A capital case is really two different, but related, proceedings. "The differences are so fundamental that counsel quite able to try a complex criminal case may not be competent to handle a penalty trial in a capital case." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 303 (1983) (discussing the many ways that a capital case is different from any other felony trial).

129. At a non-capital criminal sentencing, the defense attorney's professional efforts on behalf of the client basically conclude once the major task is over: the client has been found guilty and all that remains is for the court to sentence the defendant. Although a thorough presentence report may be presented to the court, all relevant defense information has usually already been included in such a report.

130. *See, e.g.*, 21 U.S.C.A. § 848(j) (West Supp. 1991).

131. Strickland v. Washington, 466 U.S. 668, 686-87 (1984).

the standards governing decision:"[132] presenting evidence and bearing the burden of convincing the jury to impose life. Thus, the trial strategy during the guilt stage is markedly different from the sentencing strategy.[133]

The American Bar Association Task Force on Death Penalty Habeas Corpus focused in 1989 on the effectiveness of trial counsel as a critical problem in capital cases, recognizing that "many of the procedures involved in the trial and review of death penalty cases turn on the effectiveness or ineffectiveness of trial counsel."[134] The ABA Report recognized what was widely known: capital litigation is complex. It is a specialized field of practice within the criminal law and defense counsel must be familiar with the special procedural rules that apply.[135] It is fair to say that there is a small, discrete group of practitioners who routinely handle capital defendants with a relative degree of expertise.[136]

132. *Id.* at 687.

133. Goodpaster, *supra* note 128, at 329-30. Added to these concerns, counsel who undertake representation in capital cases often suffer judicial chastisement for pursuing legal avenues available to the client. They may be perceived as attempting to "frustrate valid judgments after painstaking judicial review over a number of years," Gray v. Lucas, 463 U.S. 1237, 1240 (1983), or attempting to turn "the administration of justice into a sporting contest," Sullivan v. Wainwright, 464 U.S. 109, 112 (1983) (Burger, J., concurring).

134. IRA P. ROBBINS, REPORT AND RECOMMENDATIONS OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON DEATH PENALTY HABEAS CORPUS 48 (1989) [hereinafter ABA Report]. The report concluded that:

> [D]eath penalty litigation is extraordinarily complex, both for the courts and for the attorneys involved. Not only do the cases incorporate the evidentiary and procedural issues that are associated with virtually every noncapital case, but they also involve a host of issues that are unique to capital cases. These issues include: special voir dire of jurors; presentation of evidence going to guilt or innocence and to punishment; special penalty procedures, including additional factual findings by the jury; proportionality review (under some state appellate procedures); and critical questions of competence of counsel.

Id. at 43.

135. *Id.*; *see also* Marshall, *supra* note 115, at 1-3.

136. ABA Report, *supra* note 134, at 49. This group of practitioners is most likely drawn from the ranks of former assistant state defenders and assistant state prosecutors. These individuals have had the most concentrated practical experience with death penalty cases within a given jurisdiction.

The pool of competent practitioners able and willing to handle a capital defense is small. There are several factors that may account for the lack of practitioners. Whenever the defendant is financially unable to pay for privately retained counsel, the court will usually assign the case to the local public defenders office. It is widely known that these offices are overworked and burnout is high. The turnover is great and there is a constant new crop of young lawyers who are learning how to try cases, including capital cases. If there is a conflict of interest because the public defender cannot represent more than one defendant charged in the same indictment, the court must appoint outside counsel from the bar association.

The standard for pay is low compared to the amount of money that can be commanded within the private sector. While it is clear that a defendant is only entitled to competent counsel, not counsel of her choice, the amount of pay directly impacts the quality of legal effort put forth. ABA Report, *supra* note 134, at 61-65. For example, it is not unusual for the fee of $1000 to be provided by statute for the representation of a criminal defendant charged with a capital crime. This amount may represent the entire sum of money available for the case. Almost every criminal case will quickly exhaust this sum just with the research and pretrial preparation needed to perform ade-

The Supreme Court has defined what is ineffective representation in the context of capital litigation. In *Strickland v. Washington*,[137] the Supreme Court defined the constitutional floor for attorney conduct: "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result."[138] In order for a defendant to show, constitutionally, that her counsel was ineffective, there are

> two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[139]

In order to show deficient performance, the defendant must prove that her lawyer's representation was below the reasonableness standard, measured by "prevailing professional norms."[140] Any such showing faces the "strong presumption" of constitutionally adequate assistance.[141] A "heavy measure of deference" applies to counsel's representational decisions.[142] As the Court said, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial."[143]

Furthermore, even though there may be a body of criminal practitioners experienced with the handling of capital proceedings in the state courts, many state practitioners do not regularly practice in federal court. Any appointed practitioner must not only be admitted to practice in federal court, but also should be experienced with capital cases. Up until now, death penalty experience meant state court experience because there have not been any federal death penalty cases since before the 1972 *Furman* decision.[144]

quately. It is not clear whether a defendant receives competent representation or only $1000 worth of representation.

137. 466 U.S. 668 (1984).

138. *Id.* at 686.

139. *Id.* at 687.

140. *Id.* at 690.

141. *Id.* at 689. The presumption was that the action taken at the trial "might be considered sound trial strategy." *Id.* (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

142. *Id.* at 691.

143. *Id.* at 689.

144. The last federal execution occurred in 1963 when Victor Feuger was hung in Iowa for

Since section 848 requires both that the appointed counsel be admitted to federal court for five years and, in addition, have three years of federal criminal trial experience, the federal courts might have difficulty locating competent counsel for appointment to capital cases.[145] In addition, because this is a new statute, there is not a body of law or resources for the appointed counsel to rely upon in representing the defendant.[146] The backup and supporting consultation so vital in this specialized area of the law is lacking.[147]

Recognizing that it might be difficult to locate defense counsel who meet the statutorily defined standards, section 848 states further: "[t]he court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.[148] This section authorizes the appointment of an additional attorney should the primary attorney be lacking in experience to adequately represent the defendant. This is a very real possibility, given the complexities of capital practice in general and the uniqueness of this statute in particular.

Practitioners with experience in state capital cases will undoubtedly constitute the majority of the pool of attorneys the court will appoint under this statute. The above-cited section was probably written to address this reality, since state practitioners may not have the requisite number of years of federal practice, and, therefore, it is likely that they

murder and kidnapping. *First Death Under Drug Law is Favored by Alabama Jury*, N.Y. TIMES, Apr. 4, 1991, at A20; Tony Mauro, *28 Years Since Last Federal Execution*, USA TODAY, Mar. 14, 1991, at 3A; *U.S. to Push for Death Penalty in a Drug Slaying*, N.Y. TIMES, May 12, 1990, § 1, at 10.

145. See discussion of *Pitera* case, *infra* Part IV. The first appointments will most likely be assigned to the Federal Public Defenders who serve the court by representing indigent defendants in each federal district court nationwide. Because this is a new statute, it is fair to assume that none of the federal public defenders have federal experience with death penalty litigation. This is not to ignore the possibility that the federal public defender may have had previous state capital experience. Nevertheless, section 848 is distinctively different from state capital schemes.

The securing of competent counsel to represent defendants in capital cases is difficult. Often, when a lawyer takes one case on a volunteer basis or for low pay, he or she is reluctant to do so again. Therefore, there is little incentive for lawyers to develop any expertise in capital practice. ABA Report, *supra* note 134, at 61.

146. Resource centers have been established in some states to address the problem of strengthening trial counsel through recruitment, training, monitoring and other assistance in appointed cases. ABA Report, *supra* note 134, at 58-59; *see also Judicial Conference Semi-Annual Meeting Decisions Announced*, BULL. OF THE FED. CTS. (Third Branch), Apr. 1989, at 1, 6 (authorizing the formation of "expert consultant" panels to assist appointed counsel).

147. This deficiency will eventually remedy itself as more and more attorneys become familiar with the law. The critical inquiry, however, is who suffers because of the learning process.

148. 21 U.S.C. § 848(q)(7).

might not otherwise fall within the statutorily defined pool of potential appointees.

The section requiring federal litigation experience clearly demonstrates Congress' attempt to insure that the most competent defense counsel was available for appointment to death penalty cases. In reality, however, those with the most up-to-date capital defense experience will be the current or former assistant state attorney or the local assistant public defender who may have defended, prosecuted or negotiated pleas in numerous capital cases on the state level. But under the statute, the local practitioners may be excluded because they do not have the requisite number of years of federal experience and do not fall under the statutory standards.

The catch-all section allowing the court to appoint "another" attorney in the case was probably intended to insure that the attorneys with this valuable local capital experience were available under this law. Instead of being optional, this section should be mandatory and require at least three years of relevant *capital* felony experience. Otherwise, if the court appoints someone with the statutory number of years of federal trial court experience, this person might not be skilled in the nuances of capital litigation, even though they meet the statutory requirements. If none of the counsel has ever tried a capital case, the standards are meaningless because of the crucial differences between capital litigation and other criminal litigation outlined above. If the law were amended to require mandatory capital litigation, the courts would avoid the appointment of counsel to a defense involving novel litigation where life is at stake.

However, the situation is more alarming in those fourteen states that do not have a death penalty law.[149] For example, within the Seventh Circuit Wisconsin does not have a death penalty statute. Presumably there are very few Wisconsin attorneys who have any up-to-date practical experience with federal *or* state capital cases. Since no state capital cases are prosecuted, neither the public defenders nor the district attorneys have any state court experience with death penalty litigation.

As another example, New York also does not have a state death penalty. New York does, however, have a growing drug problem with associated violence and drug-related killings. It is reasonable to assume that persons admitted to the bar of New York who have practiced exclusively within the state have no practical experience with the death

149. *See supra* note 15.

penalty.[150]

The drafters of the law should have required more than the bare minimum of representation: one of the appointed counsel should have at least three years of experience with *capital cases*. As it now stands, the law only requires that the attorney have federal felony experience. As pointed out, this does not necessarily satisfy the question of competence in capital cases because of the unique and complex nature of death penalty cases. Much of the current backlog in our courts is directly related to inadequate, but constitutionally sanctioned, legal representation.[151]

F. Appellate Review

Sections 848(q)(2) and (3) say that the appellate court should review

> the record, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under this section . . . [and affirm the death sentence if]
>
> (3)(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (B) the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section.[152]

The law does not provide for review of the sentence to determine whether the sentence is excessively harsh in comparison to the defendant's involvement in the crime, whether the imposition of death in any given case is a fundamental miscarriage of justice or whether any constitutional violation resulted in the conviction of an innocent individual.[153] It limits appellate review to the enumerated subjects. By comparison, thirty-four states have a provision calling for automatic review of all death sentences, typically by the highest state court.[154] To the extent that the language of section 848(q)(3) limits "meaningful appellate re-

150. See discussion of *Pitera* case, *infra* Part IV. Of course, some practitioners have extensive national criminal litigation experience, including capital cases.

151. It is critical that trial counsel perform adequately since competent trial counsel will insure that fewer constitutional errors occur that can infect the conviction and sentence and add to the courts' backlog.

152. 21 U.S.C. §§ 848(q)(2), (3)(A) and (B).

153. Statewide review of death penalty cases has caused the courts to vacate several sentences of death after determining that the imposition of capital punishment in particular cases was not warranted because of the crime, the defendant's personal history or the comparison to similarly situated defendants who did not receive a sentence of death. Pulley v. Harris, 465 U.S. 37, 72-73 (1984) (Brennan, J., dissenting).

154. Department of Justice Bulletin, Death Penalty Statistics, p. 5, October 1989. Both Indiana and Illinois call for automatic review by each state's supreme court. *See, e.g.*, IND. CODE ANN. § 35-50-2-9(h); 38 ILL. REV. STAT. ch. 38, para 9-1(i) (1989).

view,"[155] this section should be expanded to allow appellate review of all issues germane to both the conviction and the imposition of the death sentence.[156]

Although proportionality review is not constitutionally mandated,[157] many states provide for automatic appeal[158] and mandatory review of all death sentences imposed to determine whether the sentence is disproportionate to that imposed in other cases.[159] As Justice Stevens stated in his concurrence in *Pulley*, "some form of meaningful appellate review is an essential safeguard against the arbitrary and capricious imposition of death sentences by individual juries and judges."[160]

IV. THEORIES OF PROSECUTION

As of this writing, the government has sought the death penalty under this law in eight cases. In 1989 the government sought the imposi-

155. Pulley v. Harris, 465 U.S. at 56 (1984) (Stevens, J., concurring).

156. In an effort to alleviate the log jam of death row appeals choking the judicial process, the Supreme Court again made it more difficult for convicted criminals on death row to challenge their convictions and sentences in the federal courts. Recently, the Supreme Court limited the number of times that a death row inmate could raise in a federal habeas corpus petition questions raised in previous petitions. McCleskey v. Zant, 111 S. Ct. 1454 (1991). The *McCleskey* Court held that after the government demonstrated that a prior writ of habeas corpus had been filed that excluded certain claims, the burden shifted to the petitioner to demonstrate that he had cause for the failure to include every viable claim in the original petition. *Id.* at 1470.

The *McCleskey* opinion permits successive petitions to prevent a fundamental miscarriage of justice. "The cause and prejudice standard we adopt today leaves ample room for consideration of constitutional errors in a first federal habeas petition and in a later petition under appropriate circumstances." *Id.* at 1475.

See also Ylst v. Nunnemaker, 111 S. Ct. 2590 (1991) (barring federal court review of a state habeas claim unless the claimant can establish "cause and prejudice" for a procedural default); Coleman v. Thompson, 111 S. Ct. 2546 (1991) (claim of ineffective assistance of counsel in capital case does not amount to an independent constitutional violation where claimant defaulted on his federal claim because of an independent and adequate state procedural rule).

157. Pulley v. Harris, 465 U.S. at 45. Although not constitutionally required, the Supreme Court has said that such review is an additional safeguard against arbitrarily imposed executions. In Indiana proportionality review is not required. The court has stated that the death penalty statute provides sufficient procedures and structure in order to prevent arbitrary application. *See, e.g.*, Townsend v. State, 533 N.E.2d 1215, 1230 (Ind. 1989). Similarly, while not requiring proportionality review, the Illinois courts have applied such a review in limited circumstances, such as when comparing the sentences between co-defendants. *See, e.g.*, People v. Jimerson, 535 N.E.2d 889, 908 (Ill. 1989).

158. *See, e.g.*, 38 ILL. REV. STAT. ch. 38, para. 9-1(i) (1989); IND. CODE ANN. § 35-50-2-9.

159. Over 30 states require some sort of comparative proportionality review of death sentences. *See, e.g.*, GA. CODE ANN. § 17-10-35(c)(3) (1990); N.J. STAT. ANN. § 2C:11-3.e. David C. Baldus et al., *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1, 2-3, n.2 (1980).

As discussed in the *Pulley* case, traditional proportionality review is a "reference to an abstract evaluation of the appropriateness of a sentence for a particular crime." *Pulley v. Harris*, 465 U.S. at 42-43. Comparative proportionality review questions whether the death sentence is "unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime." *Id.* at 43.

160. *Pulley v. Harris*, 465 U.S. at 59 (Stevens, J., concurring).

tion of the death penalty against two men in Chicago in a case of first impression.[161] Alexander Cooper and Darnell Davis were charged with the murder of a potential government witness in furtherance of a CCE and cocaine and heroin trafficking conspiracy, in violation of 21 U.S.C. § 848(e)(1)(A) and 18 U.S.C. § 2.[162]

The counts of the indictment that are pertinent to this discussion and relate to amended section 848 include Count One, where the government alleged that Davis and Cooper conspired to distribute controlled substances, in violation of 21 U.S.C. § 846. Count Two incorporated by reference all of the allegations contained in Count One and charged Cooper with a substantive violation of engaging in a CCE in violation of section 848 (a). Count Three charged that Davis and Cooper, "while engaged in and working in furtherance of a continuing criminal enterprise, intentionally killed and counseled, commanded, induced, procured and caused the intentional killing of [a government witness], and such killing resulted."[163] In Count Fifty-four, Davis was charged with possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). Davis, unlike Cooper, was not charged with a violation of the CCE section of 848(a).

The facts established at trial that Cooper, identified as the drug kingpin, hired Davis to kill Robert Parker, who was cooperating with federal officials in an investigation of Cooper's drug network. Parker, a government informant, was found shot to death with 5 bullet wounds to the head and upper body.

The defendants filed numerous pretrial motions alleging a wide-ranging constitutional attack on the statute.[164] Judge Shadur, of the United States District Court for the Northern District of Illinois, severed Davis from the Cooper trial and ordered that Cooper be tried first. The judge rejected the defense challenges to the two-year-old law. Cooper was convicted, but after a sentencing hearing where the government urged

161. This is the first case charging a death penalty offense. As of this writing, the Department of Justice has approved death penalty indictments in Alabama, New York, Texas, New Jersey, Florida, Virginia, and Georgia.

162. United States v. Cooper, 754 F. Supp. 617 (N.D. Ill. 1990).

163. Count Four charged Davis with intentionally killing this government witness "with the intent to prevent the communication . . . to a law enforcement officer or judge . . . of information relating to the possible commission of a federal offense" in violation of 18 U.S.C. § 1512(a)(1)(C). *Id.* at 620.

164. The defendants argued, *inter alia*, that section 848 is unconstitutional based on the Fifth, Eighth, Ninth, and Tenth Amendments, that Count Three (the count that charged Davis and Cooper with killing "while engaged in and working in furtherance of a continuing criminal enterprise") failed to state an offense and was therefore unconstitutionally vague. *Id.*

that the death penalty be imposed, the jury declined to impose that sentence. Davis was convicted but the death penalty was not imposed.

The December 21, 1990 opinion of the district court represents the first judicial opinion addressing the merits of the death penalty provision of section 848. The court ruled against the defendants on all of the pretrial issues related to the constitutionality of the use of the statute in this case.[165]

Because Davis was not charged with engaging in a CCE, the indictment did not allege that the killing took place in connection with a drug transaction. Davis was charged with "working in furtherance of a continuing criminal enterprise" at the time of the killing. As discussed earlier, the statute does not define "working in furtherance of a continuing criminal enterprise," although it does define "engaging in a continuing criminal enterprise."[166] The issue is a question of statutory vagueness.[167] It is likely that even though Congress did not define the term "working in furtherance of," courts will look to similar broad usage of that term in the law of conspiracy and the Federal Rules of Evidence.[168]

The Illinois prosecution is an example of one way in which Congress intended to reach the killings committed on the orders of a kingpin. Since the killer was not engaged in a CCE at the time of the killing, he was charged with working in furtherance of the CCE. Because the killing was intended to prevent communication with the authorities about the drug enterprise, the killing was also in furtherance of the CCE.

The first defendant actually to be sentenced to death under this statute was David Chandler, who was sentenced in Birmingham, Alabama on May 14, 1991.[169] Chandler was indicted and charged with operating a substantial marijuana enterprise in a rural part of Northern Alabama.

165. *Id.* In addition to finding that the statute was constitutionally applied in this prosecution, the court rejected the defendants' claim that the government did not provide adequate pretrial discovery of the aggravating circumstances upon which it would rely in seeking the death penalty. The court also rejected the defense attack on section 848(n)(1) based on the argument that the aggravating factors are duplicative of the underlying offense. In reliance on Lowenfield v. Phelps, 484 U.S. 231 (1988), the court noted that the statute requires the jury to find an additional aggravating factor listed in section 848(n)(2)-(12).

Further, the court rejected other defense arguments, to wit, the statute impermissibly shifted the burden of proof to the defendant on the mitigating factors, the statute was impermissibly vague, the anti-discrimination aspect of the law precluded the jury from considering mitigating factors related to the defendant's race, color, religious beliefs, national origin or sex, and the law infringed on the defendant's claimed right to a judge imposed rather than a jury imposed sentence.

166. *See supra* note 40.

167. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). The Fourteenth Amendment Due Process clause states that a law is invalid when its prohibitions are not clearly stated and defined so that the citizenry is put on notice of the prohibitions.

168. *See* discussion *supra* at notes 70-78.

169. United States v. Chandler, No. 90-H-266-E (N.D. Ala. Jan. 9, 1991).

His network involved importation, cultivation and distribution of marijuana in at least four states. Chandler was convicted of soliciting the murders of a police informant and two other individuals whom Chandler believed stole marijuana from his fields.

The admitted killer, Charles Ray Jarrell, Sr., was paid $500.00 by Chandler to kill the informant. Jarrell entered into a plea agreement with the government that guaranteed that he would not be subject to a death sentence. Jarrell then testified against Chandler, pursuant to the agreement.[170] This case represents the government's first successful use of the statute against a non-triggerman kingpin who ordered a killing for hire. Clearly, the killer was not engaged in the CCE and had no stake in the financial profits of the enterprise. However, he had worked in furtherance of the CCE.

The government's theory of prosecution was that the kingpin caused the killing by seeking out a murderer, offering to pay for the act and providing the weapon. This solicitous action subjected Chandler to a death sentence under 21 U.S.C. § 848(e).[171] Using solicitation as a theory raises the issue of cooperation in an effort to gain the advantage of saving one's life. It stands to reason that those most culpable, for example, the kingpin who orders and pays for the murder, will readily accept a plea bargain that eliminates the possibility of a death sentence by cooperating with the government and fingering the triggerman.

On the other hand, as the government stated in its Response to Chandler's pre-trial "Motion to Strike and Dismiss Counts Two and Three of the Indictment,"

> In essence, the Government has reached a plea agreement with a low-level soldier in a drug organization in order to obtain his testimony against the drug kingpin . . . it is the position of the Government that a defendant who will actively seek others to carry out a murder, offer to pay money and provide the weapon for the act is a far more dangerous

170. The decision to accept a plea may be inversely related to the defendant's perception of the chances for an acquittal at trial. *See* WHITE, *supra* note 4, at 62. At trial the likelihood of conviction and the possibility of death increases. Criticism of plea bargaining in capital cases focuses on the dilemma where those most culpable, like Chandler, plea bargain for life and avoid the death penalty. When the government has a weak case, it usually proceeds to trial. Those who believe they have a good chance at acquittal will most likely reject any plea offer tendered by the government. *Id.*; *see also* Lockett v. Ohio, 438 U.S. 586 (1978).

171. Section 848 contains an aiding and abetting section and subjects to death anyone who "counsels, commands, induces, procures, or causes" the intentional killing. Accomplice liability is stated generally in the federal aiding and abetting statute which reads as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
> (b) Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2.

actor than an uneducated habitual drunkard who actually pulled the trigger.[172]

Several other cases have concluded where the Attorney General authorized the United States Attorney to seek a death sentence. The theories of prosecution included the killing of a rival drug dealer,[173] the murder of law enforcement personnel,[174] and a case where the victim was involved in the drug trade as a competitor of the defendant.[175] Three other cases are under indictment.[176]

In the *Pitera* case in the Eastern District of New York,[177] the defense counsel acknowledged a lack of capital litigation experience and requested the appointment of co-counsel with death penalty experience.[178] The judge recognized that this was a case of first impression in

172. Government Response to Motion to Strike and Dismiss Counts Two and Three of the Indictment at 2, 4, *Chandler* (No. 90-H-266-E).

173. United States v. Pitera, No. 90-424 (E.D.N.Y. 1990). In the Eastern District of New York, Thomas Pitera was convicted on June 25, 1992 for the intentional killing of nine criminal associates. Two of these murders occurred after the amendment of 848 and all involve the Bonnano organized crime family. The murders involve, with one exception, the deaths of drug competitors or criminal associates who were believed to be police informants.

The jury declined to impose the death sentence. The defendant will be sentenced to life without parole on September 18, 1992. The court had a difficult time locating defense counsel with experience in capital cases since there is no death penalty statute in the state of New York. *See* Part III, section E *supra*. Ultimately, the court assigned counsel from New Jersey, where there is a local death penalty statute, to assume the defense. Transcript of Motion, United States v. Pitera, March 15, 1991, E.D.N.Y. at 7-8.

174. The government has sought the death penalty where a local constable was killed. United States v. Villarreal, No. 91-4607, 1992 U.S. App. LEXIS 12917 (5th Cir. June 8, 1992). In the Eastern District of Texas, the United States Attorney charged Baldemar Villarreal, Reynaldo Villarreal and Jesus Zambrano with murdering a local constable who stopped their vehicle during a routine traffic stop. According to the indictment, the defendants wanted to prevent the discovery of marijuana in the trunk of the car.

In this case the government did not allege that the defendants were part of a CCE. The one count indictment traced the statutory language by alleging that the killing took place:

> during the commission of, in furtherance of, and while attempting to avoid prosecution and service of a prison sentence for a felony violation; to wit: violation of Title 21 U.S.C. § 841(a) Distribution and possession with Intent to Distribute a Controlled Substance (Marijuana) . . .

The government did not allege a substantive violation of the underlying drug felony. The government focused only on the murder victim's status as a law enforcement officer.

After conviction, the jury declined to recommend death for any of the defendants, and on July 11, 1991, the judge sentenced one defendant to life imprisonment without parole and another defendant to 40 years imprisonment without parole.

175. United States v. Pretlow, 779 F. Supp. 758 (D.N.J. 1991). In the District of New Jersey the government indicted Bilal Pretlow for the murders of a criminal associate and a cooperating witness. According to the charges, Pretlow committed both murders in an attempt to maintain his cocaine importation and distribution enterprise. Pretlow committed suicide during the trial. Joseph S. Sullivan, *Union County Jailed Inmate is Found Hanged in Shower*, N.Y. TIMES, Dec. 31, 1991, at B5.

176. United States v. Mathis, No. 91-301-CR-T-17 (M.D.Fla. 1992); United States v. Tipton, No. 3:CR92-68 (E.D.Va. 1992);United States v. Williams, No. 1:92-CR-142 (N.D.Ga. 1992).

177. See *supra* note 173.

178. Transcript of Motion Before Judge Raggi, March 15, 1991, United States v. Pitera (No. 90-424).

the district and indicated that she "would like to try to find someone who has done [the trial or the appellate part of a capital case, not] attorneys who have never had this experience . . . [specifically] someone who has some experience in capital cases."[179] The defense attorney admitted his lack of knowledge about the death penalty, and specifically asked the court to appoint a death penalty specialist to aid with the unique issues germane to such cases.[180]

After hearing from attorneys present at the proceeding who noted that there is an "entire generation of [New York] lawyers who have grown up without capital punishment,"[181] the court decided to compile a list of potential candidates with "experience in trial practice, Federal trial practice and capital cases."[182] Those present at the hearing agreed that it would be a difficult task to find someone meeting those criteria from the ranks of the New York bar. The court finally stated that it was not necessary that the candidate for appointment be a member of the New York bar.[183] This scenario points out the very real difficulties courts may confront in states where there is no local death penalty.

These cases and hypotheticals demonstrate the breath of the statute. As suggested earlier, the statute brings within its scope low-level individuals who have no connection to drugs but who nevertheless assist the kingpin in the CCE, law enforcement killings related to any federal drug felonies, and the intentional killings of rival drug dealers. The language of the statute readily supports each prosecution, and others, that may result from an even more expansive reading of the law.

VI. Conclusion

Judicial analysis of this law awaits the case-by-case examination of many of the issues raised in this Article as well as other questions not addressed. Prosecutorial theories will be particularly significant because, to the extent that the law allows an expansive reading and scope, the government has a powerful tool to rightfully and aggressively prosecute the most serious cases.

Provisions of the law that may be constitutional may nevertheless stand on the outer limits of the permissible punishment. Reasonable interpretations of the statutory language could allow for results perhaps not intended by the legislators. With an admirable purpose, that of com-

179. *Id.* at 7-8.
180. *Id.* at 10, 15.
181. *Id.* at 22.
182. *Id.* at 20.
183. *Id.* at 25.

batting this nation's hideous drug trade, Congress set out to reach the targeted group: drug kingpins, major dealers and importers. However, the law sweeps broadly and catches within its net those not connected to a drug kingpin's network and those who are not major players in the drug trade.

Assessment of this law will ultimately be determined by the proportionality of the death sentences to the culpability of individuals "working in furtherance of" the CCE. The critical inquiry will be whether the death sentences imposed comport with notions of common sense, judicial fairness and equal protection of the laws.

A practical effect of this legislation is that the appointment of competent counsel will be an issue, particularly in those jurisdictions that have no state death penalty law. Of particular concern to the Seventh Circuit is the lack of a state death penalty in Wisconsin. Expert practitioners with exemplary criminal litigation experience may not be well versed in the professional pitfalls of capital litigation. Because of the unique and complex procedures involved, the appointment of counsel should ignore state boundaries in favor of real capital experience. The courts should consider a prerequisite to appointment that the attorney have a minimal level of state felony experience with *capital* cases prior to representing a defendant under section 848.

The broadening of the federal death penalty will undoubtedly increase the clutter in an already overburdened federal court. Death penalty litigation translates into longer and more detailed pre-trial investigation, jury selection, trials and post-conviction appeals and habeas corpus proceedings. The U.S. Attorney in Chicago, after failing to secure a death sentence against Alexander Cooper, called for an amendment to this law to make it easier to secure death sentences.[184] Such politically expedient solutions are simplistic in approach and do not take into account the devastating impact such amendments would have on the federal courts. Serious consideration should be given to the supportive resource centers established in some states to assist in the fair representation of capital cases. Avoidance of this critical need will undoubtedly exacerbate the avalanche of ineffectiveness of counsel claims that presently clogs the system.

184. Fred Foreman, the United States Attorney for the Northern District of Illinois, drew upon his background as a state prosecutor to recommend that the federal law be changed to parallel the Illinois death penalty statute. In Illinois the jury is allowed to consider non-statutory aggravating factors while under the federal law the jury is limited to considering only statutory aggravating factors. Moreover, a federal jury is told that they do not have to recommend the death penalty. *Foreman Wants U.S. Death Penalty Charges*, CHICAGO DAILY L. BULL., March 18, 1991, p. 1.

Only time will bear out whether the issues raised will impact prosecutions brought under this statute. It must be kept in mind that the legislative purpose is to address the major drug-related killings committed by kingpins, dealers and importers. Minor players, those working within the CCE who kill, are no different from any other intentional felons. Any Congressional amendment to this law should address these concerns.