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## PRESENTING MITIGATION AGAINST THE CLIENT'S WISHES: A MORAL OR PROFESSIONAL IMPERATIVE?

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## II. Vileness Factor

Although preferably addressed on appeal rather than on mandatory review, the issue of Virginia's application of its "vileness" factor remains suspect.<sup>23</sup> In *Smith v. Commonwealth*, the Virginia Supreme Court said that an "aggravated battery" was a battery "which qualitatively and quantitatively, is more culpable to accomplish an act of murder."<sup>24</sup>

The *Murphy* and *Chabrol* courts' use of this definition as a narrow construction of the unconstitutionally vague statutory language<sup>25</sup> continues to be questionable. One construction might be more acceptable if the court concentrated on its interpreted requirement of a **qualitatively** more culpable battery rather than a purely **quantitative** approach. The qualitative method focuses on a heightened degree of individual culpability involved in the manner of the killing. The quantitative test is little more than a "one-shot, two-shot," rule that distinguishes arbitrarily between life and death.

In both of these cases the court looked to the quantitative standard. In *Murphy*, the court held "that the evidence was more than sufficient to support the trial court's finding that Murphy had committed a battery to the victim which was more than the minimum necessary to accomplish the act of murder."<sup>26</sup> In *Chabrol*, the court found that "...[s]uch conduct

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<sup>22</sup> See *Dubois v. Commonwealth*, 435 S.E. 2d 636 (Va. 1993) and case summary of *Dubois*, Capital Defense Digest, this issue.

<sup>23</sup> See *Lago, Litigating the Vileness Factor*, Capital Defense Digest, Vol. 4, No. 1, p. 24 (1991).

<sup>24</sup> 219 Va. at 478, 248 S.E.2d at 149.

<sup>25</sup> See *Arave v. Creech*, 113 S. Ct. 2680 (1993), and case summary of *Arave*, Capital Defense Digest, this issue.

<sup>26</sup> *Murphy*, 246 Va. at 144, 431 S.E.2d at 52.

<sup>27</sup> *Chabrol*, 245 Va. at 334, 427 S.E.2d at 378. The *Chabrol* court

far exceeded the minimum battery necessary to accomplish an act of murder."<sup>27</sup>

## III. Differences Between Mandatory Review and Appeal

The differences between appeal and mandatory review also suggest implications for the attorney - client relationship. Murphy was able to bring many more issues to the attention of the Supreme Court of Virginia than was Chabrol. Although Mr. Chabrol's attorney did everything possible to convince his client to appeal, his failure to do so underscores the paramount importance of developing a good relationship with the client at an early stage. The Virginia Code of Professional Responsibility requires the attorney to accept the decision of the client about pleas, but a close working relationship established early may help the client accept the advice of counsel at critical points in the case.<sup>28</sup> As it stands, we will never know whether Andrew Chabrol was executed under an unconstitutional application of Virginia's capital murder scheme.

Summary and analysis by:  
Cameron P. Turner

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also found that there had been psychological and physical torture. Had the court previously offered a definite construction of the statutory term, "torture," so that attorneys could defend against it, it would have been constitutionally acceptable. See *Lankford v. Idaho*, 111 S. Ct. 1723 (1991) and case summary of *Lankford*, Capital Defense Digest, Vol. 4, No. 1, p. 9 (1991); and *Dubois v. Commonwealth*, 435 S.E. 2d 636 (Va. 1993) and case summary of *Dubois*, Capital Defense Digest, this issue.

<sup>28</sup> Virginia Code of Professional Responsibility, EC 7-7.

## PRESENTING MITIGATION AGAINST THE CLIENT'S WISHES: A MORAL OR PROFESSIONAL IMPERATIVE?

BY: SUSAN F. HENDERSON

### I. INTRODUCTION

The number of Virginia capital defendants who oppose presentation of evidence in mitigation or who plead guilty, or both, appears to be increasing.<sup>1</sup> Instances involving capital defendants who offer little or no cooperation or who actually obstruct defense counsel in preparation and presentation of mitigation are less visible, but probably arise even more frequently. Examination of legal and ethical issues raised by these situations provides another important example of why "death is different."

The trial of a capital defendant is divided into two phases. At the first phase, a determination of guilt is made. If the defendant is found guilty, then a second separate proceeding follows to determine the

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<sup>1</sup> See, e.g., *DuBois v. Commonwealth*, 435 S.E. 2d 636 (Va. 1993) and case summary of *DuBois*, Capital Defense Digest, this issue; *Murphy v. Commonwealth*, 246 Va. 136, 431 S.E.2d 48 (1993) and case summary of *Murphy*, Capital Defense Digest, this issue; *Chabrol v. Commonwealth*, 245 Va. 327, 427 S.E.2d 374 (1993) and case summary of *Chabrol*, Capital Defense Digest, this issue; *Davidson v. Commonwealth*, 244 Va. 129, 419 S.E.2d 656 (1992) and case summary of *Davidson*, Capital Defense Digest, Vol. 5, No. 1, p. 33 (1992).

sentence to be imposed. At the penalty trial, both the prosecution and the defense may present evidence as to the propriety of the imposition of a sentence of death. The prosecution will seek to prove and emphasize the existence of aggravating factors justifying the imposition of the death penalty. Conversely, the defense has the opportunity to present evidence of mitigating circumstances to persuade the jury to impose a life sentence.

If the defendant entered a guilty plea, the penalty phase may be the first and only opportunity the defense will have to educate the sentencer, whether judge or jury, about the defendant. Even if the defendant was found guilty of capital murder after a full trial, the penalty phase will provide the defense with an opportunity to focus the jury's attention on the defendant solely as a person.<sup>2</sup> Mitigation may include evidence about

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<sup>2</sup> Defense counsel should, however, recognize that the defendant's demeanor during the guilt phase could adversely affect the jury's impressions before the penalty trial begins. See, e.g., *Riggins v. Nevada*, 112 S. Ct. 1810, 1819-20 (1992) (Kennedy, J., concurring) (citing Geimer & Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1, 51-53 (1987-1988)).

the defendant's character, personality, education, and family. Thus, defense evidence offered at the penalty phase will necessarily be presented in a tone and context different from that of the guilt phase.

Because of the importance of the evidence offered by the defense at the penalty phase, defense counsel must gain the complete trust and cooperation of the capital defendant from the moment counsel is retained or appointed. The investigation for possible mitigating evidence should begin immediately. Defense counsel should advise the defendant of the importance of mitigation and the need for the defendant's full cooperation in obtaining the necessary facts and information to assist in the development of a case in mitigation.<sup>3</sup> There is, however, a possibility that the defendant will think defense counsel is giving up on presenting a defense at the guilt phase by asking for cooperation with the penalty phase investigation. This situation poses a delicate question and counsel's explanation may strongly impact the attorney/client relationship. Counsel must advise the defendant that there is no break between the penalty and guilt phases of the trial, so there will be no opportunity to investigate mitigation evidence later, after the guilt phase. If the defendant is made to understand the crucial nature of developing mitigation evidence and offers his complete assistance, then defense counsel's job will be much easier.

But what if the defendant refuses to cooperate in developing mitigating evidence? The defendant may say, "walk me or fry me," that is, either win an acquittal or ask the court to impose the death penalty. Or the defendant may advise defense counsel at the outset that he wishes to plead guilty to the charge and accept whatever punishment the court imposes. Perhaps the defendant may even express a desire to be put to death. The defendant may further instruct defense counsel not to prepare or present a case in mitigation. Under these circumstances, what is defense counsel's obligation to develop and present mitigating evidence despite a defendant's request to the contrary? This article will explore these problems and suggest solutions and alternatives in light of defense counsel's obligations to the defendant, the bar and the courts. Specifically, this article will examine whether there are constitutional or statutory requirements for presenting mitigating evidence and whether defense counsel has a separate professional and ethical obligation to present such evidence despite the defendant's instructions to the contrary. In addition, this article will focus on the consequences of failing to present mitigating evidence.

## II. BASIC HISTORY OF MITIGATION

In 1972, the United States Supreme Court ruled that the death penalty, as it was being imposed at that time, constituted cruel and

<sup>3</sup> See generally Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299 (1983).

<sup>4</sup> *Furman v. Georgia*, 408 U.S. 238, *reh'g denied*, 409 U.S. 902 (1972).

<sup>5</sup> See *Gregg v. Georgia*, 428 U.S. 153, *reh'g denied*, 429 U.S. 875 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

<sup>6</sup> At the time these statutes were approved, the Supreme Court also struck down mandatory death sentences, citing, *inter alia*, the failure of such schemes to permit the sentencer to consider "the diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. 280 (1976).

<sup>7</sup> *Gregg*, 428 U.S. at 192-97.

<sup>8</sup> *Lockett v. Ohio*, 438 U.S. 586 (1978) (specifically reaffirmed in *Hitchcock v. Dugger*, 481 U.S. 393 (1987)).

<sup>9</sup> See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986); see also *California v. Brown*, 479 U.S. 538 (1987); and Welsh S. White, *The Death Penalty in the Nineties* 97-100 (1991).

<sup>10</sup> *California v. Brown*, 479 U.S. 538, 541 (1987) (quoting

unusual punishment in violation of the Eighth Amendment to the United States Constitution.<sup>4</sup> The Court's basic concern was that death sentences were being arbitrarily imposed by judges and juries with unfettered discretion. State legislatures responded by enacting death penalty statutes to resolve these problems. In 1976, the Supreme Court upheld the constitutionality of revised death penalty statutes in Georgia, Texas and Florida.<sup>5</sup> These statutes provided for separate guilt and sentencing proceedings which would allow the sentencer to make an individualized determination as to the imposition of the death penalty.<sup>6</sup> In addition, the statutes established separate aggravating factors to be found and weighed against any mitigating evidence before imposing a sentence of death.<sup>7</sup> Virginia adopted a combination of the Texas and Georgia schemes.

In 1978, the Supreme Court held that the nature of the mitigating evidence presented during the penalty phase could not be limited.<sup>8</sup> In other words, while a statute may enumerate aggravating factors to be considered by a sentencer, it may not limit the mitigating factors to be considered. The Court has continued to uphold the flexibility of mitigation evidence in subsequent decisions.<sup>9</sup> In addition, the Court has stated that the consideration of mitigating evidence is "a constitutionally indispensable part of the process of inflicting the penalty of death."<sup>10</sup>

## III. ARE THERE CONSTITUTIONAL AND STATUTORY REQUIREMENTS FOR PRESENTING MITIGATING EVIDENCE?

There have been no direct constitutional or statutory rulings on whether mitigation evidence is indispensable in a capital trial. However, the line of capital cases decided by the United States Supreme Court since 1976 tends to support the argument that the increased reliability necessary to a constitutional death penalty requires the presentation of mitigating evidence. Case decisions from the various states allowing capital punishment also reflect this debate. In addition, the statutory scheme in Virginia actually appears to emphasize the role of mitigation, although the subject is seldom addressed explicitly.

### A. Constitutional Requirements

The United States Supreme Court has ruled that a capital defendant may make a knowing, intelligent and voluntary waiver of his right to appeal.<sup>11</sup> However, the Court has never ruled whether a defendant may choose to withhold all mitigating evidence from a sentencer.<sup>12</sup> In a dissent to the denial of a stay of execution in *Lenhard v. Wolff*,<sup>13</sup>

*Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

<sup>11</sup> See *Gilmore v. Utah*, 429 U.S. 1012 (1976); *Whitmore v. Arkansas*, 495 U.S. 149 (1990). However, thirty-six of the thirty-seven states allowing the death penalty impose an automatic review of some form. And some state courts refuse to allow capital defendants to waive appeal. See Laura A. Rosenwald, *Death Wish: What Washington Courts Should Do When a Capital Defendant Wants to Die*, 68 Wash. L. Rev. 735 (1993) [hereinafter Rosenwald, *Death Wish*].

<sup>12</sup> See Rosenwald, *Death Wish*, *supra* note 11. In *Burger v. Kemp*, 483 U.S. 776 (1987), the defendant did not specifically request that defense counsel not present mitigating evidence. However, the Supreme Court held that defense counsel did not deprive the defendant of effective assistance of counsel by not presenting mitigating evidence because counsel had tactical reasons for not doing so. In addition, the Court said that although counsel could have done a more thorough investigation for mitigation, "we address not what is prudent or appropriate but only what is constitutionally compelled." *Id.* at 794 (citing *U.S. v. Cronin*, 466 U.S. 748 (1984)).

<sup>13</sup> 444 U.S. 807, *reh'g denied*, 444 U.S. 1301 (1979).

Justice Marshall summarized the role of mitigation evidence as a procedural requirement before the imposition of death and went on to evaluate the impact of allowing a defendant not to introduce mitigating evidence:

The sentencing court deprived itself of the very evidence that this Court has deemed essential to the determination whether death was the appropriate sentence. We can have no assurance that the death sentence would have been imposed if the sentencing tribunal had engaged in the careful weighing process that was held to be constitutionally required in *Gregg v. Georgia* and its progeny. This Court's toleration of the death penalty has depended on its assumption that the penalty will be imposed only after a painstaking review of aggravating and mitigating factors. In this case, that assumption has proved demonstrably false. Instead, the Court has permitted the State's mechanism of execution to be triggered by an entirely arbitrary factor: the defendant's decision to acquiesce in his own death. In my view, the procedure the Court approves today amounts to nothing less than state-administered suicide.<sup>14</sup>

Although the Court has never held that a capital defendant has the right to knowingly and voluntarily waive the right to present mitigating evidence at the penalty phase, Justice Marshall's well-reasoned dissent in *Lenhard*, as well as the Court's basic pronouncement on the enhanced reliability required in capital cases,<sup>15</sup> gives strong credence to an argument that presentation of mitigating evidence is already a Constitutional requirement under the Court's prior holdings.

#### B. The Issue in Other Jurisdictions

In the absence of a definitive United States Supreme Court holding, courts have engaged in spirited debate over the necessity of mitigating evidence. Some have concluded that mitigating evidence is not constitutionally required.

A series of California cases has addressed the issue of the duty of counsel to present mitigating evidence at the penalty phase despite the defendant's instructions to the contrary. In *People v. Deere (Deere I)*,<sup>16</sup> the defendant barred his attorney from presenting mitigating evidence at the penalty phase. Instead, the defendant gave a simple statement to the court that he felt he should die for his crimes. The California Supreme Court held that the defendant received ineffective assistance of counsel and concluded that imposing the death penalty without considering any mitigating evidence was improper:

To allow a capital defendant to prevent the introduction of mitigating evidence on his behalf withholds from the trier of

fact potentially crucial information bearing on the penalty decision no less than if the defendant was himself prevented from introducing such evidence by statute or judicial ruling. In either case the state's interest in a reliable penalty determination is defeated.<sup>17</sup>

Four years later, in *People v. Bloom*,<sup>18</sup> the California Supreme Court disapproved, but did not overrule, *Deere I* in a case involving a pro se capital defendant who withheld mitigating evidence at the penalty phase of trial. The court concluded that the failure to present potentially mitigating evidence at the penalty phase did not automatically render the imposition of the death penalty unreliable. The *Bloom* court went on to note that commentators have criticized any requirement that defense counsel present mitigating evidence over a client's objections and even cited a Virginia Law Review article to that effect.<sup>19</sup>

The subsequent California case of *People v. Lang*<sup>20</sup> and a second appeal of *People v. Deere*<sup>21</sup> further undermined the original holding in *Deere I*. Specifically, the court held that under the invited-error doctrine, "a defendant who insists that mitigating evidence not be presented at the penalty phase is estopped from later claiming ineffective assistance based on counsel's acquiescence in his wishes."<sup>22</sup>

Other jurisdictions have also addressed the effect of a defendant's decision not to present mitigating evidence at the sentencing phase.<sup>23</sup> In *State v. Dodd*,<sup>24</sup> the Washington Supreme Court recently faced this problem in the context of its mandatory review of the death sentence. Washington's statute is very similar to Virginia's in that it requires a determination "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."<sup>25</sup> Despite the fact that the defendant in *Dodd* presented no mitigating evidence, the court conducted its mandatory review and upheld the sentence.<sup>26</sup> However, in a stinging dissent, two justices pointed to the fundamental problems in allowing a defendant to choose not to present mitigating evidence and to waive appeal:

Mr. Dodd's wishes, while entitled to some weight, are not determinative. Our death penalty statute requires us to review every death sentence on the record. In addition, there are several important policy reasons why allowing Dodd to waive his general appeals would be unwise. First, there is the possibility that Dodd may change his mind between now and the execution. Second, society has a significant interest in the nonarbitrary application of the death penalty. To give paramount weight to Mr. Dodd's desires would, in effect, mean that the State is participating in Mr. Dodd's suicide.<sup>27</sup>

<sup>14</sup> *Id.* at 815 (footnote omitted).

<sup>15</sup> *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (holding that "the penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

<sup>16</sup> 710 P.2d 925 (Cal. 1985).

<sup>17</sup> *Id.* at 931.

<sup>18</sup> 774 P.2d 698 (Cal. 1989).

<sup>19</sup> See Bonnie, *The Dignity of the Condemned*, 74 Va. L. Rev. 1363, 1382-89 (1988).

<sup>20</sup> 782 P.2d 627 (Cal. 1989).

<sup>21</sup> 808 P.2d 1181 (Cal. 1991).

<sup>22</sup> *Id.* at 1189.

<sup>23</sup> See, e.g., *Hamblen v. State*, 527 So.2d 800 (Fla. 1988) and *Pettit v. State*, 591 So.2d 618 (Fla. 1992) (holding that a competent defendant may waive the right to present mitigating evidence in a Florida sentencing proceeding); see also *Singleton v. Lockhart*, 962 F.2d 1315 (8th Cir. 1992) (holding that a defendant may make a knowing, intelligent waiver of his right to present mitigating evidence).

<sup>24</sup> 838 P.2d 86 (Wash. 1992).

<sup>25</sup> Wash. Rev. Code § 10.95.130 (West 1990).

<sup>26</sup> For a resounding criticism of the court's ruling, see Rosenwald, *Death Wish*, *supra* note 11.

<sup>27</sup> *Dodd*, 838 P.2d at 101 (Utter, J., dissenting) (emphasis added).

<sup>28</sup> *Id.* at 107-10. The dissent based its conclusion on the decisions

In addition, the dissent looked to the requirements of the Eighth Amendment and found a constitutional mandate for denying a defendant's request not to present mitigating evidence.<sup>28</sup>

### C. Virginia Law

The Supreme Court of Virginia has never addressed the effect of a defendant's demand that no mitigation evidence be offered during the penalty phase of trial. There is no explicit statutory requirement in Virginia that defense counsel present mitigating evidence at the penalty phase of a capital murder trial, nor has the Supreme Court of Virginia imposed such a requirement. However, Virginia Code section 17-110.1 does establish guidelines for the court's mandatory review of the sentence of death: "In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine: . . . whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."<sup>29</sup>

By refusing to allow defense counsel to present mitigating evidence at the penalty phase, a defendant thwarts the supreme court's statutory obligations under section 17.110.1. If a defendant offers no mitigating evidence, the supreme court will know little or nothing about the defendant's background, education, personality, intelligence, or other circumstances. If no mitigating evidence is presented at the penalty trial, the supreme court can hardly comply with its statutory duty to consider both the crime and the defendant in determining whether the sentence of death is "excessive or disproportionate to the penalty imposed in similar cases."<sup>30</sup>

The Supreme Court of Virginia has held that a capital defendant is prohibited from waiving the mandatory review of a death sentence.<sup>31</sup> Therefore, under section 17.110.1, there arises a necessary duty for defense counsel to present mitigating evidence at the penalty phase in order to provide to the supreme court the necessary information with which to fulfill its statutory obligation. Thus, because a Virginia capital defendant cannot waive review of a death sentence, a Virginia capital defendant should not be allowed to waive his case in mitigation.

Further, under this interpretation of section 17.110.1, if a capital defendant instructs his attorney not to present mitigating evidence at the penalty phase and such evidence is, in fact, not presented, but then defendant decides to appeal, defendant may raise two additional issues. First, the defendant can argue that his attorney had a duty under section 17.110.1 to present mitigating evidence despite the defendant's instructions to the contrary. Defense counsel's failure to comply with this duty, therefore, denies defendant his right to effective assistance of counsel. Second, the defendant can argue that the trial court erred by not requiring defendant's counsel to present mitigating evidence pursuant to the duty established by section 17.110.1.

of the United States Supreme Court in *Furman*, *Gregg*, and the *Lockett* line of cases. See *infra* notes 3-8.

<sup>29</sup> Va. Code Ann. § 17.110.1C.2. (1990) (emphasis added).

<sup>30</sup> *Id.*

<sup>31</sup> See, e.g., *Davidson v. Commonwealth*, 244 Va. 129, 132, 419 S.E.2d 656, 658 (1992) and case summary of Davidson, Capital Defense Digest, Vol. 5, No. 1, p. 33 (1993); see also Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. Cal. L. Rev. 575, 579-83 (1981). Appellate courts in other states have made similar rulings with regard to their mandatory appeal statutes. See, e.g., *Commonwealth v. McKenna*, 383 A.2d 174 (Pa. 1978); *Goode v. State*,

## IV. ETHICAL CONSIDERATIONS

When a client in effect "chooses to die" by instructing defense counsel not to investigate or present mitigating evidence, the attorney is faced with a number of ethical dilemmas.<sup>32</sup> The following discussion offers guidance from the various applicable codes of professional responsibility. More specifically, they suggest authority to act for any defense counsel who wants to defend her client.

### A. Virginia Code of Professional Responsibility

The Commonwealth of Virginia, with some modification, has basically adopted the American Bar Association's Model Code of Professional Responsibility. A number of its disciplinary rules and ethical considerations give support and guidance to the defense attorney seeking to investigate and present mitigating evidence despite a client's failure to cooperate or instructions to the contrary.

Canon 7, of course, obliges counsel to zealously represent her client within the bounds of the law. Under DR 7-101, an attorney is required to "seek the lawful objectives of his client":

*DR 7-101. Representing a Client Zealously.*—(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). . . .

....

(B) In his representation of a client, a lawyer may:

(1) With the express or implied authority of his client, exercise his professional judgment to limit or vary his client's objectives and waive or fail to assert a right or position of his client.

....

Avoiding the death penalty is unquestionably a lawful objective. But if the defendant has indicated a desire to be put to death, or a desire simply to withhold mitigating evidence at the penalty phase, is avoiding the death penalty a lawful objective of the client? As posited, arguably not. But pose the question a different way: Is requesting defense counsel to assist in killing the defendant a lawful objective? In essence, a defendant who desires to be put to death and instructs counsel to withhold mitigating evidence is doing just that—requesting his counsel to assist in his suicide. Posited in that manner, defendant's request is arguably not a lawful objective. Therefore, defense counsel arguably does not risk violating DR 7-101(A)(1) by presenting mitigating evidence despite her client's instructions.<sup>33</sup>

Even if presenting mitigating evidence were considered to violate DR 7-101(A)(1), defense counsel may turn to the exception found in DR 7-101(B)(1). If defense counsel has implied authority from his client, he

365 So.2d 381 (Fla. 1978); *People v. Stanworth*, 457 P.2d 889 (Cal. 1969); *Evans v. State*, 361 So.2d 666 (Ala. 1978); *State v. Dodd*, 838 P.2d 86 (Wash. 1992).

<sup>32</sup> See generally Welsh S. White, *The Death Penalty in the Nineties* 164-85 (1991).

<sup>33</sup> For an opposing interpretation of DR 7-101 of the Model Code of Professional Responsibility, see Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 Tenn. L. Rev. 95 (1987) [hereinafter Carter, *Maintaining Systemic Integrity*].

may exercise his independent professional judgment to vary the client's lawful objectives. What constitutes "implied authority"? The Code gives no guidance as to the meaning of "implied authority." Without specific guidance, defense counsel could reasonably consider the totality of the circumstances in which the capital defendant finds himself. Defense counsel should observe the defendant's behavior, listen carefully to discern his true feelings about dying, consider the emotional pressures faced by the defendant, and consider the defendant's possible embarrassment, depression or bravado. Any inconsistencies in the defendant's actions and words could be considered to invoke the "implied authority" exception. Although DR 7-101(B) appears to contemplate variances in order to waive rights, not assert them, it could be argued that anything short of continued, vocal, clear, in-court objections by the client to the presentation of mitigating evidence constitutes "implied authority."

Under EC 7-7, the client appears to be given some autonomy in certain decisions:

*EC 7-7.*—In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. . . . A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

The client autonomy granted by EC 7-7, however, is ambiguous. The only clear guidance given in the criminal context is the single example that decisions on pleas and appeals are to be made in the sole discretion of the client. The capital defense attorney should note a clear caveat to this rule: Defense counsel has the continuing duty to advise his client against pleading guilty without obtaining an agreement for a non-capital disposition and sentence. If the client ignores this advice and expresses a desire to plead guilty without such an agreement, it is highly advisable to continue to advise the client on the subject in an attempt to convince him to at least permit a defense.<sup>34</sup>

The provisions of EC 7-11 and EC 7-12 are also relevant to the capital defendant:

*EC 7-11.*—The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, . . .

*EC-12.*—Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. . . .

<sup>34</sup> For examples of the many Virginia cases where pleas of guilty resulted in the imposition of a death sentence, see *DuBois v. Commonwealth*, 1993 Va. LEXIS 113 and case summary of *DuBois*, Capital Defense Digest, this issue; *Davidson v. Commonwealth*, 244 Va. 129, 419 S.E.2d 656 (1992) and case summary of *Davidson*, Capital Defense Digest, Vol. 5, No. 1, p. 33 (1992); *Savino v. Commonwealth*, 239 Va. 534, 391 S.E.2d 276 (1990) and case summary of *Savino*, Capital Defense Digest, Vol. 3, No. 1, p. 15 (1990); *Stout v. Commonwealth*, 237 Va. 126, 376 S.E.2d (1989) and case summary of *Stout*, Capital Defense Digest, Vol. 1, No. 2, p. 4 (1989). Not coincidentally (but unfortunately),

Capital defense counsel will many times be faced with a client whose capacities are limited as outlined in EC 7-11. For example, a number of Virginia capital defendants have shown special disabilities, such as being a juvenile<sup>35</sup> or being mentally retarded.<sup>36</sup> The nature of the capital proceeding will also vary the lawyer's responsibilities. While no guidance is given on how the responsibilities of the lawyer will vary, the attorney should act in the best interests of the client taking into consideration the totality of the client's circumstances, including the fact that he is facing a capital charge.

As previously noted, a capital defendant suffers much mental pain and anguish, with varying manifestations of embarrassment, depression, sadness, anger, or bravado. A capital defendant's decision to seek the death penalty and to withhold mitigating evidence at the penalty trial actually exhibits a desire to commit state-assisted suicide. In other contexts, the law considers suicidal tendencies, or being a danger to one's self, as a significant factor in determining whether an individual should be deprived of the autonomy to which he is otherwise entitled. If the evidence of guilt in a particular capital case is strong, as it often is, the defendant could not become much more suicidal than by refusing to permit counsel to prepare and present mitigating evidence on his behalf.

## B. American Bar Association Standards for Criminal Justice

The American Bar Association Standards for Criminal Justice provide some further support for imposing a duty upon defense counsel to present mitigating evidence at the penalty phase. While these Standards lack the mandatory nature of the Code of Professional Responsibility, their explicit principles of good practice point directly toward defense counsel making every effort to present mitigating evidence.

Standard 4-4.1 deals with the duty to investigate:

### Standard 4-4.1. Duty to Investigate

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . . The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty. (emphasis added)

The accompanying comments note that "this standard contemplates. . . that an attorney should vigorously seek to ascertain all mitigating circumstances concerning the offense and characteristics of the defendant."<sup>37</sup>

Standard 4-5.2 establishes the decisions which may be left to a defendant after full consultation with counsel:

### Standard 4-5.2. Control and Direction of the Case

(a) Certain decisions relating to the conduct of the case

these are all cases where little or no mitigation was presented.

<sup>35</sup> See, e.g., *Wright v. Commonwealth*, 245 Va. 177, 427 S.E.2d 379 (1993) and case summary of *Wright*, Capital Defense Digest, this issue.

<sup>36</sup> See, e.g., *Washington v. Commonwealth*, 228 Va. 535, 323 S.E.2d 577 (1984), cert. denied, 471 U.S. 1111 (1985); *Mason v. Commonwealth*, 219 Va. 1091, 254 S.E.2d 116, cert. denied, 444 U.S. 919 (1979).

<sup>37</sup> ABA Standards for Criminal Justice Standard 4-4.1 cmt. (2d ed. 1980 & Supp. 1986) (emphasis added).

are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

- (i) what pleas to enter;
- (ii) whether to accept a plea agreement;
- (iii) whether to waive jury trial;
- (iv) whether to testify in his or her own behalf;
- (v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

(emphasis added)

As opposed to EC 7-7 of the Code of Professional Responsibility, Standard 4-5.2 gives much more guidance as to the identity of the ultimate decisionmaker in specific circumstances in representing a criminal defendant. Of particular help is the list of decisions that rest exclusively with the client. In addition, the strategic and tactical decisions specifically reserved for defense counsel, after consultation with the client, include what evidence should be introduced. By limiting the exclusive decisions of the client, and by placing the decisions on evidence in the hands of defense counsel, this standard clearly places the decision on presenting mitigating evidence with defense counsel. There is no requirement that defense counsel defer to the wishes of the defendant in such a situation. The standard simply requires that the decision be made "after consultation with the client."

Standard 4-8.1(b) provides the duties of defense counsel at sentencing: "Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused. . . ." This standard is a clear mandate to present mitigating evidence on behalf of the defendant. This duty is enhanced when the automatic review of a death sentence requires considering the defendant, thereby requiring that the appellate court have some specific information in the record about the defendant. The appellate court will receive the information required only if defense counsel presents mitigating evidence at the penalty trial.

Standard 18-6.3 requires that "the defense attorney should recognize that the sentencing stage is the time at which for many defendants the most important service of the entire proceeding can be performed." This standard also establishes specific duties for defense counsel, including:

The attorney should satisfy himself or herself that the factual basis for the sentence will be adequate both for the purposes of the sentencing court and, to the extent ascertainable, for the purposes of subsequent dispositional authorities. The attorney should take particular care to make certain that the record of the sentencing proceedings will accurately reflect all relevant mitigating circumstances relating either to the offense or to the characteristics of the defendant which were not disclosed during the guilt phase of the case and to ensure that such record will be adequately preserved.

<sup>38</sup> Examples of the types of information to be collected with regard to the sentencing phase are contained in Paragraph 2.C. of Guideline 11.4.1:

- C. collect information relevant to the sentencing phase of trial including, but not limited to: medical history (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior), special educational needs

(emphasis added)

Obviously, this standard recognizes the importance not only of presenting mitigating evidence at the penalty proceeding, but also the importance of having mitigating evidence in the record for review by the appellate court. When coupled with the implied statutory duty placed upon Virginia counsel under Virginia Code section 17.110.1, defense counsel's duty to present mitigating evidence on behalf of the capital defendant is solidified.

### C. American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

In 1989, the American Bar Association adopted Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. These guidelines are specifically geared to capital defense and provide detailed direction on developing and presenting the case in mitigation.

Guideline 11.4.1 establishes the need for early investigation of mitigating evidence despite any objections by the client:

#### Guideline 11.4.1 Investigation

A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

....

C. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

....

D. Sources of investigative information may include the following:

#### 2. The Accused:

....

B. explore the existence of other potential sources of information relating to . . . the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors<sup>38</sup>;

....

#### 3. Potential Witnesses:

....

B. witnesses familiar with ... possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death;

C. members of the victim's family opposed to having the client killed.

(including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in the institution, education or training, and clinical services); and religious and cultural influences.

(emphasis added)

The above investigation standards clearly recognize the need to establish a relationship with the defendant and to initiate investigation for mitigating evidence as soon as possible. The guidelines also emphasize that such investigation should be performed regardless of the expressed wishes of the client at that time.

Guidelines 11.8.1 through 11.8.6 establish detailed obligations for defense counsel at the sentencing phase:

*Guideline 11.8.1 Obligation of Counsel at the Sentencing Phase of Death Penalty Cases*

Counsel should be aware that the sentencing phase of a death penalty trial is constitutionally different from sentencing proceedings in other criminal cases.

*Guideline 11.8.2 Duties of Counsel Regarding Sentencing Options, Consequences and Procedures*

....

D. Counsel should ensure that all reasonably available mitigating and favorable information consistent with the defense sentencing theory is presented to the sentencing entity or entities in the most effective possible way.

E. Counsel should develop a plan for seeking to avoid the death penalty and to achieve the least restrictive and burdensome sentencing alternative which can reasonably be obtained.

*Guideline 11.8.3 Preparation for the Sentencing Phase*

A. ... [P]reparation for the sentencing phase, in the form of investigation, should be immediately upon counsel's entry

<sup>39</sup> Paragraph F. of Guideline 11.8.3 gives counsel guidance on deciding what witnesses and evidence to use at the penalty phase:

F. In deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following:

1. Witnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evidence presented by the prosecutor;

2. Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor;

3. Witnesses with knowledge and opinions about the lack of effectiveness of the death penalty itself;

4. Witnesses drawn from the victim's family or intimates who are willing to speak against killing the client.

<sup>40</sup> Paragraph B. of Guideline 11.8.6 lists the topics counsel should consider presenting at the penalty phase; paragraphs C. and D. consider the methods for presenting the evidence, including testimony of the defendant:

B. Among the topics counsel should consider presenting are:

1. Medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays);

2. Educational history (including achievement, perfor-

into the case. Counsel should seek information to present to the sentencing entity or entities in mitigation or explanation of the offense and to rebut the prosecution's sentencing case.

B. Counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between strategy for the sentencing phase and for the guilt/innocence phase.<sup>39</sup>

....

*Guideline 11.8.6 The Defense Case at the Sentencing Phase*

A. Counsel should present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence.<sup>40</sup>

Again, these guidelines squarely emphasize the need for early investigative action on the part of the attorney. In addition, the guidelines stress the strategic nature of the presentation of mitigating evidence during the sentencing phase. Further, these guidelines support the proposition that strategic decisions, including the decisions on presenting mitigating evidence, are within the province of defense counsel.

With guidance from all of these ethical codes, defense attorneys should become comfortable with initiating the case in mitigation despite the client's initial feelings or instructions. Further, as the investigation progresses and trial draws near, defense counsel should remain in close contact with the client, encouraging the presentation of the thoroughly prepared case in mitigation. Even if the client persists in instructing defense counsel not to present mitigating evidence, the ethical standards will permit, and may actually require, the attorney to present the case in mitigation despite the client's desires.<sup>41</sup>

mance and behavior), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof;

3. Military service (including length and type of service, conduct, and special training);

4. Employment and training history (including skills and performance, and barriers to employability);

5. Family and social history (including physical, sexual or emotional abuse, neighborhood surroundings and peer influence); and other cultural or religion influence, professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services);

6. Rehabilitative potential of the client;

7. Record of prior offenses (adult and juvenile), especially where there is no record, a short record, or a record of non-violent offenses;

8. Expert testimony concerning any of the above and the resulting impact on the client, relating to the offense and to the client's potential at the time of sentencing.

C. Counsel should consider all potential methods for offering mitigating evidence to the sentencing entity or entities, including witnesses, affidavits, reports (including, if appropriate, a defense presentence report which could include challenges to inaccurate, misleading or incomplete information contained in the official presentence report and/or offered by the prosecution, as well as information favorable to the client), letters and public records.

D. Counsel may consider having the client testify or speak during the closing argument of the sentencing phase.



## V. THE CONSEQUENCES OF FAILING TO PRESENT MITIGATING EVIDENCE AT THE PENALTY PHASE

A recent Virginia case, *Davidson v. Commonwealth*<sup>42</sup> illustrates some of the problems that arise when a capital defendant instructs his attorney not to present mitigating evidence at the sentencing phase. On June 13, 1990, Mickey Wayne Davidson killed his wife and his two teenage stepdaughters. Davidson pleaded guilty to three charges of capital murder. Before accepting the guilty pleas, the trial court heard witness testimony and considered numerous exhibits. The court also examined Davidson and determined that he had made the guilty pleas knowingly, voluntarily and intelligently.

At the penalty phase of Davidson's trial, Davidson's counsel advised the court that Davidson had ordered him not to present any mitigating evidence. Davidson testified under oath that he understood his decision and that he did not want any mitigating evidence presented. The Commonwealth presented an array of evidence in support of a sentence of death. The court found that the evidence supported a finding that Davidson's conduct satisfied the statutory "vileness" aggravating factor and sentenced Davidson to death by order dated July 11, 1991.

Davidson's attorneys filed a timely notice of appeal, but Davidson later requested permission to waive his appeal of right. After conducting an evidentiary hearing, the circuit court found that Davidson had knowingly, voluntarily and intelligently waived his right to appeal. The Supreme Court of Virginia proceeded to review Davidson's sentence under the mandatory provisions of Virginia Code section 17-110.1. Having no mitigating evidence with which to evaluate the defendant, the supreme court upheld Davidson's death sentence on June 5, 1992. Davidson was scheduled to be executed on August 20, 1992.

In August, 1992, after discussions with death row advocates, and despite his several "knowing, voluntary and intelligent" waivers of rights, Davidson decided to fight his death sentence. The circuit court granted a stay of execution just two days before he was scheduled to die.<sup>43</sup> Davidson then changed his mind and requested a new execution date. He was scheduled to be executed on February 3, 1993. On January 31, 1993, Davidson again changed his mind and requested a stay of execution so he could pursue an appeal.<sup>44</sup> Davidson was granted a stay just hours before he was scheduled to die in the electric chair.<sup>45</sup> In August, 1993, Davidson filed a request to suspend his appeal and have a new execution date set.<sup>46</sup>

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<sup>41</sup> At least two alternatives have been proposed to prevent defense counsel from being faced with the ethical dilemmas of presenting mitigating evidence despite a client's wishes. First, separate counsel could be appointed by the court to handle only the presentation of mitigating evidence when the defendant advocates death:

The best accommodation of interests would be achieved by appointing an attorney whose specific role is to present mitigating evidence. . . . The appointment of an independent attorney would avoid the conflicts in loyalties and roles inherent in requiring the defendant's attorney to present evidence counter to the defendant's position. It would further preserve the roles of the other players in the courtroom.

Carter, *Maintaining Systemic Integrity*, *supra* note 33, at 149.

It is suggested that this appointment of separate counsel be made at the first indication by either the defendant or his attorney that the defendant desires not to present mitigating evidence. This will allow the separate counsel ample time and opportunity to develop a proper case in mitigation. *Id.* at 150-51.

Davidson's uncertainty regarding execution is now apparent. He has changed his mind about being executed numerous times. His indecision vividly illustrates the problems with any judicial determination at the trial or mandatory appeal stages that a defendant's decision not to present mitigating evidence is made "knowingly, voluntarily and intelligently." This kind of indecision ultimately results in harm to the defendant, harm to the judicial system, and a waste of money and time. The biggest problem faced by a defendant who changes his mind is that any legal avenues open to help him will be severely limited because he refused to have mitigating evidence presented at trial. Davidson's case is a classic illustration of the need for defense counsel to recognize his ethical duties to encourage defendants to support the presentation of mitigating evidence, or to present such evidence despite a defendant's instructions to the contrary.

## VI. CONCLUSION

While there is no explicit constitutional or statutory mandate for defense counsel to present mitigating evidence on behalf of a capital defendant, the United States Supreme Court has consistently emphasized the importance of mitigation to a constitutionally permissible death penalty. Further, in Virginia, the legislature itself has imposed an implied obligation on defense counsel and the trial court to see that mitigation evidence is presented in order to comply with the requirements for mandatory review of any death sentence.

In addition to the suggested constitutional and statutory requirements for mitigation, the various standards of professional responsibility actually **authorize, permit, and encourage** defense counsel to present mitigating evidence despite a client's request to the contrary. For capital defense counsel, the bottom line is really an individual issue of personal and professional integrity. The job of defense counsel is to **defend**—anything less than a **complete defense, including mitigation**, mocks the very essence of that calling.

Defense counsel should make every effort to simply avoid the dilemma presented by a client who fails to cooperate with mitigation. The adage that "an ounce of prevention is worth a pound of cure" certainly applies here. Every effort should be made by defense counsel to see that the defendant understands the nature and importance of mitigation. Counsel **must** keep in consistent, frequent contact with the defendant, constantly explain the role of mitigation, and inform, or even cajole, the defendant on the issue. However, if push comes to shove, and

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The second suggested alternative involves the establishment of a state procedure by which a trial court could obtain evidence of mitigation even when the defendant desires not to present it. *See Rosenwald, Death Wish, supra* note 11. Such a procedure would involve the appointment of a third party to investigate, gather and present mitigating evidence to the sentencer. This third party could be a social worker, another attorney, or some neutral agency. *Id.* By having the court appoint a neutral third party, the defendant's attorney would be insulated from any ethical dilemmas or claims of ineffective assistance of counsel for failing to present mitigating evidence.

<sup>42</sup> 244 Va. 129, 419 S.E.2d 656 (1992). *See also* case summary of *Davidson*, Capital Defense Digest, Vol. 5, No. 1, p. 33 (1992).

<sup>43</sup> *Condemned Killer Wins Stay of Execution*, UPI, August 18, 1992, available in LEXIS, Nexis Library.

<sup>44</sup> *Condemned Man Flip-Flops, Seeks Stay*, The Washington Times, February 1, 1993, available in LEXIS, Nexis Library.

<sup>45</sup> *Killer of Wife, Stepdaughters is Granted Stay of Execution*, The Washington Post, February 4, 1993, available in LEXIS, Nexis Library.

<sup>46</sup> *Inmate Switches, Asks For New Execution Date*, The Washington Times, September 12, 1993, available in LEXIS, Nexis Library.

the client persists in refusing to cooperate, then defense counsel still has a duty to find a way to defend. The dissenting opinion in *Dodd* stated

it well: "[S]ociety has a significant interest in the nonarbitrary application of the death penalty."<sup>47</sup> So does the legal profession.

<sup>47</sup> *Dodd*, 838 P.2d at 101 (Utter, J., dissenting).

## WHAT EVERY VIRGINIA CAPITAL DEFENSE ATTORNEY SHOULD KNOW ABOUT THE FEDERAL DRUG KINGPIN STATUTE

BY: PAUL M. O'GRADY

### I. INTRODUCTION

No person has been executed under a federal statute in the United States since 1963, when authorities hanged Victor Feguer, a convicted kidnapper, in Iowa. That is likely to change soon. Responding to ever increasing public anxiety about drug related violence in the United States, Congress, in one of its last acts before the 1988 elections, amended section 848 of Title 21 of the United States Code. 21 U.S.C. § 848(e) exposes to the death penalty people involved in a "continuing criminal enterprise"<sup>1</sup> who either commit murders or cause them to be committed.<sup>2</sup> The law also provides a possible sanction of death in cases involving the drug-related homicide of a law enforcement officer. This amendment is commonly referred to as the Federal Drug Kingpin statute, though as shall be discussed *infra*, the reach of the statute extends beyond drug kingpins.

When the 1988 amendments to section 848 were passed there were a number of nominally capital federal crimes on the books.<sup>3</sup> However, the death sanction has not been imposed under these statutes since the United States Supreme Court's decision in *Furman v. Georgia*,<sup>4</sup> because in light of *Furman*, the Justice Department has considered these statutes

<sup>1</sup> A person is engaged in a continuing criminal enterprise or "CCE" if: (1) she violates any provision of [Title 21, Chapter 13, "Drug Abuse Prevention and Control," subchapter I (control and enforcement) or subchapter II (import and export) of the United States Code], and (2) the violation is a part of a continuing series of violations of [the above statutory provisions] 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 from which such person obtains substantial income or resources. 21 U.S.C. §848(c).

<sup>2</sup> 21 U.S.C. § 848(e)-(r)(1988). These sections will be referred to hereinafter as "the Drug Kingpin Statute."

<sup>3</sup> The general federal death penalty statute for murder is 18 U.S.C. § 1111(b). Other statutes carrying a death penalty include: 18 U.S.C. § 34 (aircraft or motor vehicle destruction); 18 U.S.C. § 351 (assassination of high ranking government personnel); 18 U.S.C. § 794 (espionage); 18 U.S.C. § 844 (using explosives that result in death); 18 U.S.C. § 1751 (assassination of President and the staff); 18 U.S.C. § 1992 (train wrecking); 18 U.S.C. § 2381 (treason).

<sup>4</sup> 408 U.S. 238 (1972)(ruling that capital sentencing procedures which create a substantial risk that punishment could be inflicted in an arbitrary and capricious manner violate the Eighth and Fourteenth Amendments).

<sup>5</sup> In addition, many of the dormant federal death penalty crimes will not be enforced because they violate *Coker v. Georgia*, 433 U.S. 584 (1977)(holding that the death penalty is disproportionate in a case where a woman was raped but not killed). *Coker* has been interpreted as barring the death penalty in cases where a murder was not committed.

A recent revision of the United States' Attorneys Manual suggests

unconstitutional, and therefore unenforceable, in their current form.<sup>5</sup> This act has been called a revival of the federal death penalty because, while the death penalty provisions under 21 U.S.C. § 848 should not be considered a prototype for a constitutionally unassailable death penalty law, that statute does not carry many of the constitutional infirmities which previous federal capital provisions contained, and therefore U.S. Attorneys can pursue prosecutions under it.<sup>6</sup>

Even given the few serious doubts about its constitutionality, the Attorney General has approved death requests under section 848(e) approximately twenty times, and has received only four death verdicts.<sup>7</sup> To put these statistics in context, it should be noted that there are more than 1300 drug related homicides in the United States each year.<sup>8</sup> There are a number of explanations for why the statute has not been more widely employed, but before delving into those reasons, the statute should be analyzed.

### II. A FEDERAL DEATH PENALTY FOR "DRUG KINGPINS" (AND OTHERS)

The death penalty provision of section 848 reads as follows:

that the death penalty could be imposed under some of these statutes (which do not otherwise violate *Coker*). The manual suggests that prosecutors may be able to rehabilitate the death eligible offenses by characterizing them as crimes against the United States. Such a characterization would limit the death penalty to a small segment of federal cases, and therefore would pass constitutional muster under *Jurek v. Texas*, 428 U.S. 262 (1976). See Sandra D. Jordon, *Death For Drug Related Killings: Revival of the Federal Death Penalty*, 67 Chi.-Kent L. Rev. 79, 86 n. 31 (1991).

<sup>6</sup> For example, the Drug Kingpin statute of 1988 provides specific statutory aggravating and mitigating factors as well as numerous other procedural protections, unlike the general federal homicide statute, 18 U.S.C. §1111, which gives the jury no guidance whatsoever: "[w]hoever 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 . . ." 18 U.S.C. §1111(b).

<sup>7</sup> Three Richmond crack dealers were sentenced to death in February 1993 for a number of drug related killings. In 1991, David R. Chandler, an Alabama marijuana dealer was sentenced to death. Chandler's appeal is pending before the 11th Circuit. See Robert F. Howe, *U.S. Jury Orders Death For 3 Va. Drug Dealers*, Wash. Post, Feb. 17, 1993, at A1.

<sup>8</sup> See, Edward Frost, *Arbitrary Prosecution?: Alleged Drug Kingpin Challenges Constitutionality of Federal Death Penalty Law*, ABA Journal, Jan. 1992, at 30. Note also that although more than 200 executions have taken place since the death penalty was reinstated in 1976, there have only been thirty-four federal executions in our entire history. See Betty Parham & Gerrie Ferris, *Atlanta J.-Const.*, Mar. 15, 1993, at A2.