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## *I. Facts*

On the morning of October 10, 1997, Jessie Pressley ("Pressley") was killed instantly when the pickup truck he was driving exploded. The explosion was caused by a homemade pipe bomb that had been hidden under the body of the truck. In the months prior to his death, the decedent carried on an extramarital affair with Sharon Boone, the wife of Gary Boone ("Boone"). After Sharon Boone informed Boone that she was in love with Pressley and wanted a divorce, he refused to end the relationship and threatened to kill her. Even after Sharon Boone left the home and sought legal protection from her husband, Boone made several subsequent threats against her life and Pressley's life. A state court judge issued a restraining order to keep Boone from his wife and from Pressley.[1]

Boone was indicted on charges of possession of a firearm by a felon and with bombing a vehicle used in interstate commerce.[2] The counts were severed, and on January 8, 1998, Boone was convicted of the firearms charge. In February 1998, prior to the start of the second trial, Boone wrote the district court a letter which noted that the death penalty was a possible sentence for the second count of the indictment and inquiring when additional counsel would be available. The district court did not respond to the request but noted on the record that the issue was preserved. Boone proceeded through trial and sentencing with one attorney. He subsequently was convicted and sentenced to life in prison.[3]

## *II. Holding*

The United States Court of Appeals for the Fourth Circuit held that it was reversible error to deny the assistance of two counsel to a defendant charged in a count in which the death penalty is a possible sentence even when the government does not seek the death penalty.[4]

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1. United States v. Boone, 245 F.3d 352, 355-56 (4th Cir. 2001).

2. *See generally* 18 U.S.C. § 844(i) (Supp. V 1999) (providing that any person destroying with explosives a vehicle used in interstate commerce is subject to death penalty if death results to any person from explosion); 18 U.S.C. § 922(g)(1) (1994) (making it unlawful for any person convicted of a crime punishable by imprisonment for one year or more to carry any firearm or ammunition in interstate commerce).

3. *Boone*, 245 F.3d at 357-58.

4. *Id.*

### *III. Analysis / Application in Virginia*

The question on appeal to the Fourth Circuit was whether a defendant, who is charged with an offense for which the death penalty is a possible sentence, is entitled by federal statute to the assistance of two attorneys even when the government has not sought the death penalty.[5] While this case applies only to federal courts, it has application in federal district courts in Virginia. Writing for the majority, Judge Widener explained that the language of 18 U.S.C. § 3005 created an absolute right to additional counsel, even when the government did not opt to seek the death penalty.[6] The majority found that the statutory language, "[w]hoever is indicted for treason or other capital crime," automatically entitled the defendant to additional counsel at the point in which he was indicted under the statute.[7]

In opposing Boone's appeal, the Government pointed to the 1994 amendment of the statute, which required that one of the additional counsel should be "learned in the law applicable to capital cases."[8] The Government argued that Congress's addition of the phrase "applicable to capital cases" demonstrated clear legislative intent to limit the availability of additional counsel to defendants in cases in which the government actively seeks the death penalty.[9]

The majority, however, was not persuaded by this reasoning. The court held that the presence of the word *indictment* in the statute reflected Congress's clear intent to trigger the availability of additional counsel at the time the defendant is charged with a capital offense.[10] The majority explained that Congress could have easily framed the statute to limit the availability of additional counsel to instances in which the Government affirmatively seeks the death penalty.[11] Furthermore, the court pointed out that its reading of the statute was appropriate in light of the federal death penalty process because additional counsel could be instrumental in preventing the defendant from even facing the death penalty.[12] Additional counsel "learned in the law applicable to capital cases" could serve an important function in persuading the prosecution not to seek the death penalty during the critical pre-trial period in which the Government decided whether to seek the death penalty.[13]

In dissent, Judge Kiser took issue with the majority's focus on the triggering event and explained that the dispositive issue was the meaning of the term *capital*

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5. *Id.*
6. *Id.* at 358-59; *see also* 18 U.S.C. § 3005 (1994) (providing for the provision, on request of the defendant, of two counsel to defendants in capital cases).
7. *Boone*, 245 F.3d at 358-59; *see* § 3005.
8. *Boone*, 245 F.3d at 359 (quoting § 3005).
9. *Id.*
10. *Id.*
11. *Id.* at 360.
12. *Id.*
13. *Id.*

*crime*.[14] Judge Kiser reasoned that a capital crime is not an offense for which death is a possible sentence, but rather one for which the government actively seeks a sentence of death.[15] The dissent further argued that the majority's view in *Boone* was inconsistent with the majority of circuits that had decided the issue.[16]

In support, the dissent criticized *United States v Watson*,[17] the primary authority for the majority opinion.[18] In *Watson*, the defendant was charged with first degree murder under 18 U.S.C. § 1111.[19] The trial court denied the defendant's request for the appointment of two counsel.[20] On appeal, the Government argued that because the United States Supreme Court's ruling in *Furman v Georgia*[21] invalidated the death penalty, the defendant was not entitled to the appointment of multiple counsel.[22] The Fourth Circuit held that *Furman* addressed only the constitutional validity of the death penalty and did not address the validity of the statutorily provided procedural protections associated with "capital crimes."[23]

Judge Kiser opined that *Watson* lacked precedential or persuasive value because of Congress's 1994 amendment to 18 U.S.C. § 3005.[24] Kiser explained that the amendment showed clear congressional intent to base the right to additional counsel on the intent of the prosecution to seek death rather than on the penalties provided in the statute.[25]

Judge Kiser's dissent is important because the characterization of an offense as capital gives rise to a number of procedural safeguards for the defendant. The

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14. *Id.* at 365.

15. *Id.*

16. *Id.*; *see also* United States v. Grimes, 142 F.3d 1342, 1347 (11th Cir. 1998) (holding that defendant is not entitled to benefits otherwise available in a capital case when the death penalty is not a possible sentence); United States v. Steel, 759 F.2d 706, 709-10 (9th Cir. 1985) (holding that when death penalty is unavailable, defendant no longer entitled to witness lists or additional counsel); United States v. Dufur, 648 F.2d 512, 514-15 (9th Cir. 1980) (holding that the purpose of § 3005 derives from severity of punishment, therefore right to multiple counsel eliminated when death penalty no longer available); United States v. Shepherd, 576 F.2d 719, 727-28 (7th Cir. 1978) (holding that defendant is no longer entitled to statutorily guaranteed procedural safeguards when death sentence is no longer a possibility); United States v. Weddell, 567 F.2d 767, 770 (8th Cir. 1977) (holding that constitutional invalidation of death penalty stripped an 18 U.S.C. § 1111 indictment of its capital nature and eliminated right to multiple counsel); 18 U.S.C. § 1111 (1994).

17. 496 F.2d 1125 (4th Cir. 1973).

18. *Boone*, 245 F.3d at 365; *see* United States v. Watson, 496 F.2d 1125 (4th Cir. 1973).

19. *Watson*, 496 F.2d at 1125; *see* § 1111.

20. *Watson*, 496 F.2d at 1125.

21. 408 U.S. 238 (1972).

22. *Watson*, 496 F.2d at 1126; *see* Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (holding that the death penalty was constitutionally invalid).

23. *Id.*

24. *Boone*, 245 F.3d at 366; *see also* 18 U.S.C. § 3005 (1994) (providing for the provision, upon the request of the defendant, of two counsel to defendants in capital cases).

25. *Boone*, 245 F.3d at 366-67.

number of peremptory juror strikes, production of prosecution witness lists, and the number of court-appointed counsel available to a defendant all hinge on whether the defendant is charged with a capital offense.[26] Under the current Fourth Circuit view, as expressed in *Boone*, these safeguards are available to a defendant at the moment he is indicted under a statute which provides for the imposition of the death penalty.[27]

Judge Kiser's view, however, is echoed by a number of other circuits, presenting an issue that could be amenable to resolution in the United States Supreme Court. In *United States v Steel*,[28] the United States Court of Appeals for the Ninth Circuit held that the unavailability of the death penalty in a case invalidates the defendant's right to the production of government witness lists and additional counsel.[29] In *United States v Weddell*,[30] the United States Court of Appeals for the Eighth Circuit held that the invalidation of the death penalty stripped an indictment under 18 U.S.C. § 1111 of its capital nature and eliminated the right to the appointment of multiple counsel.[31] In *United States v Shepherd*,[32] the United States Court of Appeals for the Seventh Circuit reached the same result, holding that when the death penalty is no longer a possibility, the defendant is no longer entitled to procedural safeguards that are statutorily guaranteed to capital defendants.[33]

While the Fourth Circuit adhered to its reasoning in *Watson* in the wake of the 1994 amendments to 18 U.S.C. § 3005, the United States Court of Appeals for the Eleventh Circuit held in *United States v Grimes*[34] that "a defendant is not entitled to benefits he would otherwise receive in a capital case if the government announces that it will not seek the death penalty or the death penalty is otherwise unavailable by force of law."[35] *Grimes* is directly analogous to *Boone*. In *Grimes*, the defendant was charged under 18 U.S.C. § 844(i) for placing a bomb on the premises of his former place of employment, an apartment complex, intending to cause property damage.[36] When a resident of the complex unwittingly picked up a box containing the bomb, the bomb detonated and killed the resident

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26. *See* § 3005 (providing for the appointment of two defense counsel in capital cases); 18 U.S.C. § 3432 (1994) (providing capital defendant with indictment, list of jurors and list of prosecution witnesses at least three days prior to trial); FED. R. CRIM. P. 24(b) (2001) (providing 20 peremptory challenges for defendant facing charge punishable by death).

27. *Boone*, 245 F.3d at 364.

28. 759 F.2d 706 (9th Cir. 1985).

29. United States v. Steel, 759 F.2d 706, 709-10 (9th Cir. 1985).

30. 567 F.2d 767 (8th Cir. 1977).

31. United States v. Weddell, 567 F.2d 767, 770-71 (8th Cir. 1977); *see also* 18 U.S.C. § 1111 (1994).

32. 576 F.2d 719 (7th Cir. 1977).

33. United States v. Shepherd, 576 F.2d 719, 727-28 (7th Cir. 1977).

34. 142 F.3d 1342 (11th Cir. 1998).

35. United States v. Grimes, 142 F.3d 1342, 1347 (11th Cir. 1998).

36. *Id.* at 1345.

instantly.[37] Prior to trial, the Government stipulated that it would not seek the death penalty.[38] The court held that the Government's stipulation effectively transformed the proceeding into a non-capital one and extinguished any rights of the defendant to additional procedural safeguards normally available to capital defendants.[39]

In what could be characterized as a glaring inconsistency, the *Grimes* reasoning does not appear to apply when a defendant seeks the dismissal of an indictment because of the federal statute of limitations. Because federal law applies a five-year statute of limitations to all non-capital crimes, a defendant could argue that if a crime is stripped of its capital nature that the statute of limitations should apply.[40] The Eighth Circuit took up such an argument in *United States v. Emery*,[41] in which the court held that the statute of limitations did not apply, even though the death penalty was invalidated under *Furman*.[42] The *Emery* court explicitly found that the defendant was charged with a capital crime, even though the death penalty was not available under *Furman*.[43] *Emery* appears to overrule the central holding of *Weddell*, but the Eighth Circuit has not taken up the issue of multiple counsel since *Emery*.

## *IV. Conclusion*

In the wake of these decisions, in most circuits, the issue of whether a defendant is entitled to the procedural safeguards afforded capital defendants will turn on whether the Government has served notice on the defendant of its intent to seek the death penalty.[44] The rule announced in *Boone*, however, will require federal district courts in the Fourth Circuit to provide additional counsel for defendants at the moment they are indicted for offenses where death is a possible sentence. Current United States Department of Justice ("DOJ") procedures require the United States Attorney to receive written approval from the Attorney

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37. *Id.*

38. *Id.* at 1347.

39. *Id.*

40. *See also* 18 U.S.C. § 3281 (1994) ("An indictment for any offense punishable by death may be found at any time without limitation."); 18 U.S.C. § 3282 (1994) ("Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.").

41. 186 F.3d 921 (8th Cir. 1999).

42. United States v. Emery, 186 F.3d 921, 924 (8th Cir. 1999).

43. *Id.*

44. *See, e.g.*, United States v. Edelin, 128 F. Supp. 2d 23, 32 (D.D.C. 2001) (finding that death-eligible co-defendants not facing death penalty, but tried alongside a capital defendant, are not entitled to production of government witness lists); United States v. Davidson, No. 92-CR-35, 1992 WL 165825, at *4 (N.D.N.Y July 10, 1992) (holding that defendant not facing possible death sentence is not entitled to appointment of second counsel even if statute facially permits death sentence).

General prior to seeking the death penalty in any case.[45] DOJ policy further requires that the United States Attorney grant the defendant the opportunity to present any facts, including mitigation evidence, during the Government's consideration of whether to seek the death penalty.[46] Finally, the Government's request for authorization to seek the death penalty must be reviewed by a DOJ committee convened by the Attorney General for the purpose of reaching a determination as to whether to seek death.[47] Defense counsel is entitled to appear before this committee to show cause as to why the Government should not seek death.[48] The additional counsel can then assist the defendant in persuading the Government to take the death penalty off the table early on.

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45. United States Department of Justice, *U.S. Attorney's Manual* § 9-10.020 (June 7, 2001), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm (last visited Oct. 10, 2001).

46. *Id.* at § 9-10.030.

47. *Id.* at § 9-10.050.

48. *Id.*

# Denial of Certificate of Appealability