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COMMENT: Judge Over Jury: Judicial Discretion in the Federal Death Penalty Under the Drug Kingpin Act *

SEC-NOTE-1:

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SUMMARY:
... The world is not the same, and the death penalty is not viewed in the same manner in the United States, as when the above statement was written in 1899. ... This Comment asserts that the death penalty sentencing scheme under the Act needs the guidance of a judge to assure that it is not applied in an uncertain or freakish manner. ... sentencing procedure of the Drug Kingpin Act that assures it will never be consistently applied-the jury makes the ultimate determination of whether to impose the death sentence. ... The death sentence is automatically reviewed by the Florida Supreme Court on an accelerated docket, and the court conducts a proportionality review to "guarantee[] that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case." ... Within the trifurcated system, the Florida Supreme Court has defined five specific procedural actions which occur between conviction and the imposition of the death penalty: (1) the sentencing hearing; (2) the jury recommendation from that hearing; (3) the determination and imposition ... In Tedder v. State, the court explained: "A jury recommendation under our trifurcated death penalty statute should be given great weight. ...

TEXT:
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I. Introduction

The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone. n1

The world is not the same, and the death penalty is not viewed in the same manner in the United States, as when the above statement was written in 1899. There are considerably more legal decisions, controlling statutes, administrative procedures, and societal changes that now control how capital punishment is administered. In spite of the passage of time and changes in the legal climate, under the federal death penalty scheme, the ultimate decision whether the defendant is to live or die remains committed "to the sound discretion of the jury, and of the jury alone." n2

In 1988 Congress passed the Drug Kingpin Act n3 which authorized the death penalty for certain drug-related murders. n4 The Drug Kingpin Act gives juries complete discretion in determining whether to sentence a defendant to death. n5 Subsequently, Congress passed the Federal Death

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Penalty Act of 1994. n6 Its sentencing procedures also leave the final determination of death to the jury. n7

In the federal sentencing scheme, statutes guide jury discretion, n8 and wide latitude is provided to the sentencer to consider mitigating circumstances. n9 Since the death penalty in the United States was effectively abolished in 1972 in Furman v. Georgia, n10 and then held to not violate the Constitution in 1976 in Gregg v. Georgia, n11 numerous courts have interpreted state death penalty statutes and sentencing schemes. n12 The Supreme Court, however, has yet to address the interpretation and

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application of the federal death penalty under the Drug Kingpin Act or under the Federal Death Penalty Act of 1994. n13

In 1994 Congress added a substantial number of crimes to the list of federal civilian death offenses. n14 Some of the crimes that now bear the death penalty as a sentencing option include murder related to alien smuggling, n15 destruction of an aircraft or a motor vehicle involved in interstate commerce where death results, n16 murder related to a drive-by shooting, n17 and murder resulting from a conspiracy to violate civil rights. n18 The 1994 additions have their own separate statutory sentencing procedures, but these procedures substantially mimic the Drug Kingpin Act. n19

The Drug Kingpin Act set the stage for the passage of the Federal Death Penalty Act of 1994 because it was the first federal law enacted after Gregg v. Georgia n20 that provided for the death penalty. n21 The Drug Kingpin Act is ideal for analyzing the federal death penalty scheme because of the increasing number of prosecutions brought under the Act, its position as a precursor to the Federal Death Penalty Act of 1994, and the likelihood that a writ of certiorari will be granted in the near future to resolve some of the deeper and complex social issues that have been raised by defendants. n22

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This Comment intends to illustrate that the provision for an absolute jury determination of the life or death of a defendant under the Drug Kingpin Act assures inconsistent and unfair results. n23 The similar jury provision under the Federal Death Penalty Act of 1994 suffers from the same fundamental problem. The balancing of accuracy and uniformity in the hands of various and varied juries is doomed to end in the arbitrary and capricious results the Supreme Court determined to be unconstitutional in Furman. n24

There is no perfect method to determine the circumstances under which the death sentence will best serve the goals of society, but the present procedures do not allow for judicial override of an erroneous jury determination. This Comment suggests that the absence of such a provision in the federal scheme is a mistake that should be corrected.

Part II of this Comment provides background material by explaining the sentencing procedures under the Drug Kingpin Act and some of the relevant constitutional challenges that have been raised. n25 Part III

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illustrates the absurd and inconsistent results that occur under the sentencing provisions of the Drug Kingpin Act by describing two particular cases. Part IV examines the criminal jury system to help explain how the death sentence can be "so wantonly and so freakishly imposed." n26 Finally, Part V suggests the adoption of procedures to allow the trial judge to override unreasonable jury verdicts at the sentencing stage, yet still maintain a constitutional sentencing system that has been upheld by the Supreme Court.

II. The Drug Kingpin Act

A. Capital Sentencing Procedure

Since Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970, n27 there have been numerous amendments to the Act. The basic purpose, however, has remained the same–to fight the "growing menace of drug abuse in the United States." n28 As drug use and drug–related crime increased in the 1980s, pressure intensified for Congress to act. Congress responded with the passage of the Anti–Drug Abuse Act of 1988. n29 The Anti–Drug Abuse Act was labeled in the press as the "Drug Kingpin Act" because of its special provision for punishing those who run criminal drug organizations. n30 While the Drug Kingpin Act is directed against all persons who are members n31 of a drug–related continuing criminal enterprise (CCE), n32 one subsection is specifically applicable to the leaders. It provides for life imprisonment for a person who is the leader–the kingpin–of such an organization. n33

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The death penalty section of the Drug Kingpin Act applies to any member of the enterprise. n34 It specifies that a defendant may be put to death if, while working as a part of the criminal enterprise, he or she "intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual," n35 or a law enforcement officer. n36 The Act details procedures to be followed before a person convicted under the death eligible provisions can be executed. Initially, the government must notify the defendant and the court before trial of its intention to seek the death penalty, n37 and must provide notice of the aggravating factors that it will seek to prove. n38

If a defendant is found guilty of violating the Act, a separate sentencing hearing must be conducted, n39 generally before the same jury that determined guilt. n40 The purpose of the sentencing hearing is to permit consideration of aggravating and mitigating factors relevant to whether the defendant should be sentenced to death. n41 The information presented does not necessarily need to conform to the Federal Rules of Evidence, so long as the court is convinced that the probative value of the information is not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." n42

The Act specifies the process by which the jury must consider the sentencing factors. First, the government must prove beyond a reasonable doubt n43 at least two of the statutory aggravating factors. n44 One of the required factors relates

to the intent of the defendant in the commission

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of the killing, n45 and at least one of the other factors must be from among those listed in 21 U.S.C. 848(n)(2)–(12). n46 The government is limited to the statutory aggravating factors, unless the defendant has been notified of additional factors prior to trial. n47 The jury must be unanimous in its findings of the aggravating factors, and it must return special findings to the court identifying each aggravating factor it finds to exist. n48

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Second, the defendant may present evidence of any mitigating factors, whether statutory or not, and he or she is required to prove each factor by a preponderance of the evidence. n49 The government and the defendant are permitted to rebut any mitigating or aggravating information presented. n50 In contrast to the requirements for aggravating factors, the jury does not need to be unanimous in its finding that a mitigating factor is established; and any individual juror may consider such a factor as proven in making his or her sentencing decision. n51

Finally, a jury finding that the required statutory aggravating factors have been established must consider whether these factors, along with any non–statutory ones, so outweigh any mitigating factors as to justify a sentence of death for the defendant. n52 Even absent any mitigating factors, the jury is still required to consider whether the aggravating factors themselves are sufficient to justify a sentence of death. n53 A jury cannot impose the death sentence absent the required findings, and its vote for death must be unanimous. n54

A jury is never required to sentence a defendant to death even if it finds the aggravating factors outweigh the mitigating factors, n55 and the judge must instruct the jury of its ability to disregard its findings and to refuse to impose a death sentence. n56 This scheme allows the jury to disregard the statutory discretion required by Furman v. Georgia, n57 and essentially to make a decision whether to impose the death penalty completely independent of any of the standards set forth in Gregg v. Georgia. n58

If a capricious jury, for whatever reason, imposes or refuses to impose the death sentence, the judge cannot correct that decision. n59 The jury's

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finding is labeled a "recommended" sentence, n60 but in reality it is determinative. Under the Drug Kingpin Act, without the vote for the death sentence from the jury, the judge must order the defendant to a lesser authorized sentence. n61 The Act defines such a sentence as a range between a minimum of twenty years and a maximum of life imprisonment. n62 If the jury does find the defendant deserving of the death sentence, "the court shall sentence the defendant to death." n63

Each juror must certify that his or her final determination is not based on the race, color, religious belief, national origin, or sex of the defendant or the victim. n64 The defendant is expressly entitled to a review by the court of appeals to ensure that the death sentence was not imposed under the influence of passion, prejudice, or some other arbitrary factor. n65 An appeal of the sentence may be consolidated with a challenge to the conviction, and the case must be given priority on the appellate docket. n66 Even though the Act does give the appeal superior status, it is not automatic. The defendant must file a notice of appeal with the court. n67 The appellate court must examine whether the information submitted at the sentencing hearing supports the special findings of the jury as to the existence of every aggravating factor upon which the sentence was based, as well as to any findings related to the mitigating factors. n68 The court does not, however, independently weigh the aggravating and mitigating factors nor does it conduct a proportionality review to compare the defendant's sentence with those in similar cases. n69

The capital sentencing provisions of the Drug Kingpin Act are substantially reflected in the Federal Death Penalty Act of 1994. n70 In both cases, a jury determination of the death

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sentence is final. n71 Although this Comment specifically focuses on the Drug Kingpin Act and its procedural guidelines regarding the jury's determination of the death sentence, the same basic argument for allowing judicial override of an erroneous jury determination would apply to the 1994 Act.

B. Constitutional Challenges

Challenges to the Drug Kingpin Act's capital sentencing scheme have failed in the lower courts. n72 This Comment asserts that the death penalty sentencing scheme under the Act needs the guidance of a judge to assure that it is not applied in an uncertain or freakish manner. Because the Act requires unanimity in the finding of any aggravating factor, while any mitigating factor may be found by any individual juror, the sentencing provisions generally favor the defendant. n73 A defendant is, therefore, unlikely to argue that a jury might impermissibly refuse to sentence him or her to death. Nonetheless, certain lower court challenges are illustrative of the issues likely to bring the capital sentencing provisions of the Act before the Supreme Court.

In 1990, in United States v. Cooper, n74 the first case where the government sought the imposition of the death sentence for murder in furtherance of a continuing criminal enterprise, n75 the defendants filed pretrial motions challenging the constitutionality of the Drug Kingpin Act. n76 Interestingly, the two defendants both argued that they had a right to a bench sentencing rather than a jury sentencing, and that because the Act gives the government veto power over a defendant's request for a judge to decide the sentence, n77 the Act violated their constitutional rights. n78 The defendants' argument was based on Justice Stevens's dissent in Spaziano v. Florida, n79 where he discussed the difference between the normal presumption of sentencing by a judge and the function of the sentencing jury in the capital trial. n80 Justice Stevens stated that the

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normal presumption favoring sentencing by judges did not apply in the capital sentencing context. n81

The court in Cooper observed that the defendants' position "really reverses the preference for jury sentencing." n82 It found the reliance upon Spaziano to be "truly mysterious," n83 and said Justice Stevens's opinion did not suggest that

the withholding of bench sentencing from a defendant was unconstitutional. n84 The district court denied the defendants' motions by also relying on Supreme Court opinions that state a preference for a jury sentencing in capital cases in order to provide a connection between the community and the penal system. n85

Other objections raised in Cooper have similarly been raised in later cases. n86 Some of these include: (1) the statute is unconstitutional in its sentencing determination because one of the aggravating factors is an element of the underlying offense; n87 (2) the instructions for the balancing of aggravating and mitigating factors are impermissibly vague; n88 and (3) the relaxed evidentiary standards at sentencing give the government "unfettered discretion" in the introduction of evidence. n89

Although the courts have denied constitutional challenges to the statute itself, some courts have ruled in favor of the defendant when the government has misapplied the statute. In United States v. McCullah, n90 the defendant was able to get his death sentence vacated on direct appeal,

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with a remand for resentencing. n91 The jury had been allowed to weigh overlapping aggravating factors, and thus the sentencing phase had been unconstitutionally skewed against the defendant. n92 In United States v. Tipton, n93 the three defendants were sentenced to death under the Drug Kingpin Act. n94 Although their convictions and sentences were upheld, the court found harmless error in the sentencing phase for the same reason that the conviction had been vacated in McCullah–the jury had been allowed to weigh duplicative factors. n95 The court also found error in the defendants' conspiracy convictions because "the

846 conspiracy as charged is a lesser included offense within the

848 CCE as charged." n96 The conspiracy convictions were vacated, but did not require any change in the death sentences. n97

III. Strange Results

The main concern expressed in Furman v. Georgia n98 was that capital punishment sentencing schemes in the states failed to guide the sentencer's discretion. n99 Under Furman, state statutes that permitted the death penalty "to be . . . wantonly and . . . freakishly imposed" violated the Eighth and Fourteenth Amendments. n100 The states responded to Furman by passing statutes that revamped their sentencing procedures. n101

Georgia was among the states that revamped their sentencing procedures. The remodeled Georgia system was upheld in Gregg v. Georgia. n102 The Justices found that the Georgia statute adequately channeled

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the sentencer's discretion "so as to minimize the risk of wholly arbitrary and capricious action." n103 The capital sentencing provisions of the Drug Kingpin Act are substantially similar to the Georgia statute affirmed in Gregg. n104

Nonetheless, by allowing a jury as the sentencer to have the final word in imposing the death sentence, even with the statutory guidance provided under the Drug Kingpin Act, disparate and seemingly arbitrary results may occur. The

following two cases arose from charges brought under the Act, and they help to illustrate the arbitrariness of the sentencing juries' results.

A. The Thomas Pitera Story

Mobster Thomas Pitera (a.k.a.: "Tommy Karate") n105 was the leader of a Bonanno crime family "crew" with about thirty people under him. He was charged in a twenty count federal indictment in New York state with murder, racketeering, and firearms violations in connection with operating a heroin, cocaine, and marijuana trafficking enterprise. n106 Although Pitera was charged with committing nine murders, two of which qualified for the death penalty under the Drug Kingpin Act, the investigators believed that he may have also been responsible for killing at least thirty people over a ten–year span ending with his arrest in 1990. n107

Pitera had been a towheaded youth who grew up in the Gravesend section of Brooklyn. n108 Others picked on him because he was scrawny and had a high–pitched voice. He began training in karate to help

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counteract the abuse and taunts of his companions. In the early 1970s, Pitera traveled to Japan to continue his study of karate and, after about two years, he returned to Brooklyn in 1976 as a changed man.

He soon began forging friendships with reputed Bonanno family members. Shortly after the execution of Bonanno boss, Carmine Galante, at a Greenpoint restaurant in 1979, an internecine feud broke out that claimed the lives of three Bonanno capos. n109 Out of the feud, Pitera became a "made member" of the family. n110 At about the same time, he set up shop as a bar owner with a childhood friend and used the bar as his clubhouse, as well as a retail drug outlet.

In the mid–1980s, Pitera's girlfriend died of a drug overdose. The evidence presented at trial showed that Pitera blamed one of his Gravesend neighbors, Phyllis Burdi, for providing his girlfriend with the fatal dose. Pitera and three of his associates shot Burdi several times, cut her into pieces, put her remains in plastic bags, and buried her in a Staten Island grave. When Burdi's sister came looking for her at Pitera's bar, she was told that Burdi had become a prostitute in Coney Island.

In the late 1980s, Pitera was aware that law enforcement officials knew who he was. He made himself a difficult target, however, for any investigation. Pitera maintained four separate premises on a regular basis, never had a home telephone, and drove at least ten vehicles–all registered to others. Furthermore, the front seats of those cars were regularly reupholstered at one particular Brooklyn shop, thereby making the recovery of any potential forensic evidence more difficult.

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In addition to numerous shotguns, rifles, submachine guns, and pistols, Pitera personally designed silencers, and he even had a cigarette lighter and a pen which had been converted into .22–caliber, single–shot weapons. Pitera collected

knives and swords of all types, and owned walkie–talkies, police badges, radio scanners, brass knuckles, handcuffs, and bulletproof vests. Pitera also had an impressive library of books and pamphlets on how to kill people, police homicide investigation techniques, and weaponry.

When Pitera was finally arrested in June 1990, it was his first arrest. He showed no sense of guilt or remorse for any of the alleged crimes. Pitera bragged to one of the Drug Enforcement Agents, "I'm a pro, and you're a pro." n111 He even offered unsolicited advice about which weapons were the best for killing people at close range, and how best to use them. When he was told the government was going to seek the death sentence against him, Pitera commented to his court appointed attorney n112 that, if he was sentenced to death, he wanted to be given the dignity of the firing squad rather than a lethal injection; "That's how they put dogs to sleep." n113

During his 1992 trial, the government put on 66 witnesses, 101 taped conversations, 470 pieces of physical evidence, and 143 photographs. The jury of six men and six women heard gruesome evidence about how Pitera would kill his victims, haul their bodies into an empty tub, strip naked, and join the bodies in the tub to cut them into pieces. He would run water to wash away the blood, and as the bodies were dissected, he would stuff the parts into garbage bags or disposable suitcases. Once his task was completed, he would scour himself and the bathroom, dress, and leave the burial of the dismembered remains to his subordinates. In the summer of 1990, the body parts of a half–dozen of his victims were unearthed in a Staten Island wildlife refuge.

The two murders which qualified for the death penalty occurred on March 15, 1989. Pitera incorrectly suspected that Richard Leone and Solomon Stern were informants. He lured them to a Bay Ridge club that he co–owned. Stern was handcuffed and forced to watch as Pitera ordered Leone to dance while he shot him with a .380–caliber, silencer–equipped pistol. Leone was shot twice in his left shoulder, in his lower back, and twice in the chest. Pitera also shot Leone in his head in a manner suggesting that Leone was on his hands and knees at the time. After watching Leone's killing, Stern had several crosses carved into his

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back, after which Pitera shot him seven times in the chest. Jurors were told about how the two men were hacked apart in the club's shower, and their body parts buried by two of Pitera's associates. When their bodies were recovered, their ears were missing. Pitera allegedly kept the ears as war trophies which he could show to his criminal colleagues.

Pitera's defense was to suggest that others committed the murders, and he denied any part in the crimes. The jury deliberated almost thirty–five hours, over six days, before convicting Pitera of six of the nine murders, including those of Leone, Stern, and Burdi.

At the sentencing phase of the trial, the prosecution sought to prove three statutory aggravating factors: n114 (1) that Pitera intentionally killed Leone and Stern; n115 (2) that he committed the murders after "substantial planning and premeditation;" n116 and (3) that they were committed "in an especially heinous, cruel, or depraved manner in that [they] involved torture or serious physical abuse to the victim[s]." n117 The defense put on Pitera's aunt, his sister–in–law, and two of his cousins to present evidence of mitigating factors. They offered testimony about Pitera's loving relationship with them. n118

After four and a half hours of deliberation, the jury decided the aggravating factors did not so outweigh the mitigating factors that justice would be served by the imposition of the death penalty. After the reading of the verdict, Pitera told a marshall: "Ah, the jury had no balls." n119

B. The David Ronald Chandler Story

During the late 1980s, David Ronald Chandler developed an extensive marijuana growing and distribution network from a small town in northeast Alabama. n120 In 1989 and 1990, Chandler had over one hundred plots of land devoted exclusively to cultivating marijuana. As part of his organization, he had people working directly or indirectly for him guarding the plants, obtaining supplies, and dealing marijuana. Chandler

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protected his operation by providing guns to his employees, and by threatening those whom he perceived to be a risk.

One of Chandler's dealers, Donna Shuler, was the half-sister of both his wife and one of his couriers, Charles Jarrell, Sr. In March 1990, the local police searched Mrs. Shuler's home in Piedmont, Alabama and found marijuana. The search was based on information provided by her ex-husband, Marlin Shuler. Chandler was able to discover the basis for the search warrant through Donna Shuler's attorney.

Shortly thereafter, Chandler approached one of his other dealers about killing Marlin Shuler for $500. Chandler showed the dealer a briefcase full of money and told him that he could make extra money if he would kill the Chief of Police. The dealer, however, turned down the offer to murder either man.

On May 8, 1990, Chandler went to Charles Jarrell's house and discovered Marlin Shuler there. Chandler suggested to Jarrell that he should "take care" of Shuler and said "I still got that $500." n121 Jarrell understood the comments to refer to a conversation between Chandler and himself in January, where Chandler had offered Jarrell $500 to eliminate Shuler because of various problems Shuler had caused Jarrell and his family. After Chandler left, Shuler and Jarrell spent the rest of the morning drinking beer.

Shuler and Jarrell later went to a nearby lake to shoot two guns that Jarrell had with him. One of the guns was a nine millimeter pistol that Chandler had left in Jarrell's car the previous night. Jarrell turned the nine millimeter gun on Shuler, shot him twice, and killed him. Jarrell drove to Chandler's home and told him about the murder. The two men then retrieved Shuler's body and buried it. Chandler did not pay Jarrell the $500.

Chandler was charged in a nine count indictment of engaging in a continuing criminal enterprise, murder, drug trafficking, money laundering, and a firearms violation. Jarrell was originally charged as a co-defendant, but pleaded guilty to a conspiracy charge in exchange for his testimony against Chandler.

The prosecution presented the testimony of over forty witnesses, many of whom were co-conspirators, at the trial which began in March 1991. In his defense, Chandler pointed out that Jarrell admitted to having drank twenty-three beers prior to killing Shuler, and that during the trial, Jarrell admitted he had his own motives for wanting to eliminate Shuler. Months before Chandler had offered him the $500, Jarrell had tried to shoot Shuler for battering and abusing Jarrell's sister and mother. Jarrell had pressed a pistol against Shuler's nose and pulled the trigger, but the

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gun did not fire. Despite the admissions made by Jarrell, the man who had carried out the murder, the jury convicted Chandler of all charges.

The government provided notice to Chandler that it would seek the death penalty based on four statutory aggravating factors: (1) Chandler intentionally killed Shuler; n122 (2) he engaged "in conduct intending that Shuler be killed;" n123 (3) he procured the murder by a "promise of payment of money;" n124 and (4) Chandler committed the murder after "substantial planning and premeditation." n125 Two mitigating factors were stipulated to by the parties: (1) Chandler did not have a significant prior criminal record; n126 and (2) Jarrell would not be prosecuted for murder. n127 Chandler's mother and wife also testified for the defense. Despite the stipulated mitigating factors, the jury unanimously recommended that Chandler be sentenced to death, finding the existence of two aggravating factors: (1) he intentionally caused the death of Shuler; and (2) he procured the murder by promising the payment of money. n128 His death sentence was upheld on appeal. n129

IV. How the Disparate Sentences Arose

What is the explanation for the difference between the jury sentence of death for Chandler and the failure of the jury to sentence Pitera to death? How can these dichotomous results arise? Pitera was convicted of six brutal and grotesque murders and sentenced to life in prison, while Chandler was sentenced to death when he did not pull the trigger and when the actual killer had his own motives for committing the murder. This Comment does not question the moral implications of the death penalty itself, but rather suggests that the jury sentences under the Drug Kingpin Act should be fair and consistent–whether imposed in New York or Alabama.

Perhaps the differing results would be less surprising if the charges had been brought under separate state laws. In that situation, the jury in Alabama may have been completely justified in sentencing David Ronald

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Chandler to death. n130 In a town of 5,000 people in a rural area of the state, the community may have felt such a sense of outrage against Chandler that death seemed the fitting punishment. n131 Similarly, in New York, a jury determination of its own community's sense of fairness and justice would seem appropriate if the case were under state law. n132 Perhaps living in New York, a teeming metropolis, the Pitera jury was prompted by some unfathomable sympathetic response or more likely, was inured to the violence of Pitera's crimes. In any case, under their own state law, the jury members could decide as they saw fit as members of the sentencing community.

Differences in demographics and the geo–political forces at work in different states illustrate a possible explanation for the incongruous results. n133 Alabama has a death penalty and juries in that state have not shown any particular reluctance to sentence defendants to death. n134 Yet, in New York, at the time of Pitera, there was no state death penalty available and a jury comprised of that state's citizens may have felt uncomfortable in sentencing any defendant to death. n135

These two defendants were not sentenced under separate state laws, however, but under the federal Drug Kingpin Act. Like all federal laws, the Act should be applied consistently throughout thecountry. Consistent application of federal law is important whether for income taxes, nuclear power plant regulations, or murder charges. This concept of consistency is at the heart of federalism in the United States. For example, in the Sentencing Reform Act of 1984, n136 Congress stated

that its purpose in enacting the new sentencing provisions was to establish reasonable uniformity and proportionality in sentencing. n137 There is a problem in the

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sentencing procedure of the Drug Kingpin Act that assures it will never be consistently applied–the jury makes the ultimate determination of whether to impose the death sentence. n138

Under the Drug Kingpin Act, the jury is charged with a duty to "recommend" the appropriate sentence, n139 but it is not a suggested sentence at all. The jury's "recommendation" is final in deciding the life or death of the defendant. There is no provision for correcting inconsistent sentences, like those illustrated in the Pitera and Chandler cases. If a jury recommends death, the judge is compelled to sentence the defendant in accordance with that determination. n140 Even in the most egregious of cases, the judge cannot override the jury to correct any misapplication or misunderstanding of the law. n141

A. Jury Sentencing Under the "Death is Different" Doctrine n142

The jury holds an almost mythic position in American jurisprudence. n143 Criminal jury trials have long been held in high regard for their apparent fairness and justice. n144 From the time the concept of a jury first arose, n145 the jury system provided some protection from the abuses of those in

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power and it assuaged fears of judicial corruption or political influence. n146 This protection may be especially important for determining the guilt of a defendant. The considerations for sentencing are not the same, however, as the considerations for determining guilt. The Supreme Court noted the differences in Spaziano v. Florida:

The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause, however, does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial. The court's concern in Bullington was with the risk that the State, with all its resources, would wear a defendant down, thereby leading to an erroneously imposed death penalty. There is no similar danger involved in denying a defendant a jury trial on the sentencing issue of life or death. The sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant and the sentencer's decision for life is final. More important, despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding–a determination of the appropriate punishment to be imposed on an individual. n147

Historically judges, rather than juries, have been assigned the task of sentencing a criminal defendant. n148 The judicial duty was to consider the defendant's culpability in light of the purposes to be served by criminal punishment. n149 The capital trial in the modern age has its own jurisprudence, n150 however, and the "death is different" doctrine remains a viable controlling concept in Supreme Court rulings. n151

Under the "death is different" doctrine, in the guilt phase, the jury assesses the credibility of the witnesses, n152 determines what facts are established by the requisite proof, n153 and applies the legal principles as defined by the court to the facts of the case. n154 Following the guilt determination, the jury is responsible for recomending a death sentence if it is deemed appropriate. The sentencing decision in the capital trial

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requires the jury to do more than simply determine if the facts or elements of the charge are proven: [ep

[T]he determination of punishment is more than a mere finding of fact. It is a prediction that the ends of society will best be served by the imposition of a given penalty. Unless such a prediction is based upon facts, it will be inaccurate; yet, it is difficult to determine the relationship any given fact bears to the type of punishment that should be inflicted. n155

Society asks for a "reasoned moral response" n156 from the jury in pronouncing the capital sentence of a defendant. The actual operation of the jury is, however, much different from what society requests. An analysis of some of the problems in our modern criminal jury system in the United States n157 will help to put the sentencing function in context, where in the "bifurcated" procedure, a sentencing hearing follows a determination of the defendant's guilt. n158

B. Problems With the Jury

Before trial, there are forces at work that greatly influence the jury decision. When a prosecutor brings capital charges against a particular defendant, there is no requirement that he or she believe that the defendant is guilty. n159 The evidence may not be convincing beyond a reasonable doubt to the prosecutor, but since the pressure to proceed in a capital case can be extreme, he or she may feel obliged to present the evidence to a jury–to let the jury decide. n160 If the crime involved is especially heinous or the victim well known, there will likely be press coverage and related public pressure to solve the crime and bring justice

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to the community. n161 That pressure may endure from the police investigation until the completion of the trial. Although judges may mitigate some of the prejudicial effects of pre–trial publicity by allowing a change of venue, some judges may also refuse to allow a change of venue in the interest of having the community affected by the crime involved in the outcome of the trial. n162

In the formation of the venire, jurors are not sought from the particular neighborhood in which the defendant lives. Instead the jury pool is determined by voter registration, tax roles, or some other broad procedure for selecting eligible members of a geographic region. n163 Unfamiliarity with the people involved in the trial is virtually a prerequisite to qualifying for the jury. n164 Ignorance of the facts also is required. Therefore, people who have the knowledge, experience, or expertise to make them ideal for determining the facts from the evidence or for weighing witness credibility are typically excluded from participation. n165 As one author has stated:

We have evolved a comprehensive legal procedure that not only permits but encourages the exclusion from a modern jury of one possessing the slightest knowledge of the facts he is supposedly summoned to determine. Abysmal ignorance constitutes a condition precedent in the qualification of jurors, and that ignorance must be established to the satisfaction of contending counsel, else the prospective juror is summarily dismissed from the body to which he would, if permitted, have brought enlightenment. n166

If those whose experience and background would make them ideal for the jury are excluded, then a typical juror is not "the common man," but rather an individual who is often not equipped for the task at hand. n167 The defendant may have his fate decided by people who

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have never entered a courtroom before, or who may know nothing of the subtleties of debate, argument, and cross–examination. n168 This same jury may even include people who themselves have participated in criminal activity. n169 All of this suggests that the creation and selection of the jury creates serious problems in its efficiency and operation.

Another problem related to the knowledge and experience of the jury arises in the presentation of the evidence. In the modern criminal trial the evidence can be extremely complicated: for example, the forensic testimony concerning the cause of death, the evidence of how a bullet matches a particular gun or wound, the increasingly common DNA evidence, and the use of the psychiatric expert to testify about the defendant's state of mind. The jury hears the presentation of the evidence as it is explained or drawn out by biased witnesses and by counsel who must advocate a particular position with regard to the evidence. Thus, both sides are desperately trying to convince the jury that the evidence means some fact or another that is likely not readily apparent from the presentation of the evidence itself. n170

The jury is asked to evaluate witness credibility by using its common sense and experience. n171 Intuitively this makes sense in that the jury is considered a cross–section of the community. n172 Most people want to believe that they can tell when someone is lying. n173 Unfortunately, people do lie on the stand and a lie can be extremely difficult to determine, even when the person is familiar to the listener. n174 In the context of a capital trial, the motivation for witnesses and others involved in the crime to lie is great, n175 and the truth is easily lost.

[*1515] The truth may also become clouded because of efforts by a skillful attorney to manipulate the passions of the jury. n176 Some obvious efforts at jury manipulation are the appearance of the defendant, the manner of speaking to an adverse witness, n177 and even loading the courtroom with spectators. n178 These techniques are certainly not new, n179 but their influence can be powerful on a lay jury that is all too often unconscious of their effect. n180

C. Why We Need the Jury

The argument presented here is not for the abolishment of the jury, though there have been many such arguments. n181 The jury serves a purpose beyond simply determining the guilt of the defendant or the sentence he or she deserves. n182 When people feel as though they are excluded from the legal process, they tend to take the law into their own hands, or to make their dissatisfaction known in other disruptive ways, as evidenced by the riots in Los Angeles following the Rodney King verdict. n183 At times, when the jury has disagreed with the legal action against a particular defendant, it has acted to nullify the prosecution by acquitting against the evidence. n184

The jury can proclaim to society the correctness of the verdict, and confirm the appropriateness of the sanction imposed on a defendant. n185 A jury's recommendation for the death sentence can act as a stamp of

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approval for society's most severe sanction. n186 In pronouncing the death sentence upon the defendant, the jury expresses the community's sense of moral outrage, n187 and lends credence to society's demand for retribution. n188

Another primary argument for the validity of the jury system has been the protection it affords from the abuses of law enforcement, police, and judges. n189 Indeed, this concern remains relevant. n190 The protection from potential governmental abuse is especially important in the guilt phase of a trial, where the culpability of the defendant has yet to be decided.

Yet, the potential for abuse of authority by making false accusations or through malicious prosecutions does not carry over into the modern capital sentencing scheme. This concern should not mandate that the jury exclusively impose the death sentence. n191 The statutes limit and guide the sentencer's discretion, and the imposition of the death sentence by judge or jury is reviewable by the appellate court. At the sentencing stage, the jury's function should essentially be limited to an expression of the

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community's moral outrage and to maintaining community involvement in the penal system. n192

In the federal death penalty scheme under the Drug Kingpin Act, where the community's outrage is balanced against the national interests encompassed by the statute, how can justice be equally and fairly applied? The representative community is much larger than just the one where the sentence is imposed. Should a defendant be subjected to the small town community's anger like David Ronald Chandler was? Should Thomas Pitera be able to mock the jury system that spared his life? Under the present system, the answer in both cases is "yes."

V. Jury Sentencing Schemes in the States

Since 1972, when the Supreme Court began creating the majority of its constitutional jurisprudence concerning capital punishment, n193 those states implementing a death penalty have struggled with balancing the need for uniformity, n194 the need for accuracy in sentencing, n195 and the need for community involvement. n196 Of the thirty–eight states that currently have a death penalty, n197 four states allow the judge alone to

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determine the sentence. n198 Nevada allows a three–judge panel to determine the defendant's fate when the jury cannot decide. n199 Four states allow for the involvement of both the trial judge and the jury in the verdict. n200 Nonetheless, the majority of states continue to allow the jury to be the final arbiter of the fate of the capital defendant.

Whether a state chooses a scheme granting exclusive sentencing power to the jury or one allowing the judge to make the ultimate decision, either solution presents problems in balancing the three competing needs. On the one hand, those states that give the ultimate power to the jury to impose a death sentence have opted for a scheme that places the life or death of the defendant in the hands of twelve lay persons who may or may not understand the complex legal concepts, the legal context, or the evidentiary rulings involved. While these states have given the power to represent the community's voice to the members of the panel, they have sacrificed the needs for uniformity and accuracy in sentencing. On the other hand, those states that have assigned the sentencing decision solely to the judge have opted for a scheme that presumes the sentencer understands the legal framework surrounding the decision. n201 Yet, community involvement and the expression of the community's feelings toward the defendant for his or her crime is lost when the sentencing decision is made by a single judge.

Therefore, a system that makes use of a jury advisory verdict–a true "recommended" sentence–seems to draw from the best of both systems. Whether the jury feels compassion or outrage towards the defendant and his or her actions, the public would be involved, and the community's feelings about the appropriate sentence for the defendant would be known to the sentencing judge. In addition, the judge would be able to use his or her superior legal vantage point to ensure greater accuracy and uniformity. Such a system achieves the balance desired between the three competing needs.

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A. The Trifurcated Sentencing Scheme

One system that appears to provide the necessary involvement and guidance from the jury in sentencing an individual to death, yet allows the judge to use his or her greater experience and understanding of the law, exists in Florida's "trifurcated" sentencing scheme. n202 Under this system, there are three steps taken: (1) the determination of the guilt or innocence of the defendant; (2) the sentencing hearing held before the jury, generally the same jury that determined guilt; n203 and (3) the actual sentencing by the judge. n204

At the sentencing hearing before the jury, the State and the defendant may present evidence of any matter the court deems relevant to the nature of the crime and the character of the defendant. n205 The jury is directed to weigh the statutory aggravating factors against any mitigating factors, and then "render an advisory sentence to the court." n206

The jury needs only a majority votefor making a recommendation to sentence the defendant to death. The trial judge then separately weighs the aggravating and mitigating factors, and, if imposing a sentence of death, the judge must explain the findings upon which the sentence is based. n207 The death sentence is automatically reviewed by the Florida Supreme Court on an accelerated docket, n208 and the court conducts a proportionality review to "guarantee[] that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case." n209

Within the trifurcated system, the Florida Supreme Court has defined five specific procedural actions which occur between conviction and the imposition of the death penalty: (1) the sentencing hearing; (2) the jury recommendation from that hearing; (3) the determination and imposition

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by the trial judge of the appropriate sentence; (4) the written justification of the sentence imposed on the defendant; and (5) the review by the Florida Supreme Court. n210 In 1973, in the first challenge to its new death penalty scheme, the court explained the reasons for the state's sentencing procedures:

Death is a unique punishment in its finality and it in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes. In so doing, the Legislature has also recognized the inability of man to predict the myriad tortuous paths which criminality can choose to follow. If such a prediction could be made, the Legislature could have merely programmed a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors included–with ranges of possible impact of each–and provided for the imposition of death under certain circumstances,

and for the imposition of a life sentence under other circumstances. However, such a computer could never be fully programmed for every possible situation, and computer justice is, therefore, an impossibility. The Legislature has, instead, provided a system whereby the possible aggravating and mitigating circumstances are defined, but where the weighing process is left to the carefully scrutinized judgment of jurors and judges. n211

B. The Tedder Standard

Although the death penalty statute in Florida does not explain what weight the sentencing judge is to assign to the jury's recommended sentence, the Florida Supreme Court has provided guidance to the trial judge by defining those circumstances that will allow for an override of the jury's advisory sentence. n212 In Tedder v. State, n213 the court explained: "A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." n214

The Tedder standard has received support in the other jurisdictions that allow for jury override, n215 though only one other state has adopted it

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outright. In Martinez–Chavez v. State, n216 the Indiana Supreme Court adopted the Tedder standard as that state's jury override provision. n217 The court noted the essential purpose served by the jury in the state's sentencing scheme, n218 but found that the trial court should not have overridden the jury's recommendation for a life sentence. n219 The defendant had been charged as a co–conspirator in a murder, and reasonable people could differ about his culpability. n220

The Seventh Circuit considered the Tedder standard in Schiro v. Clark, n221 another Indiana case, where it reviewed the trial judge's imposition of the death penalty over a jury's recommendation to the contrary. The court rejected the defendant's challenges to the trial judge's sentencing determination n222 and based its ruling on Spaziano v. Florida. n223 Because jury sentencing is not a constitutional mandate, there was no basis for holding that a particular standard was required for jury override. n224 The Seventh Circuit noted the "significant safeguard" provided by Tedder, n225 but held that the safeguard was not an essential requirement. n226

The Seventh Circuit explained that its purpose in reviewing the trial court's sentencing determination was not to second guess the deference accorded to the jury's recommendation in a particular case, but to ensure that the application of the death penalty statute was neither arbitrary nor discriminatory. n227 The statutory scheme must "furnish clear and objective

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standards, specific and detailed guidance, and an opportunity for rational review of the process for imposing the death sentence." n228

The Delaware Supreme Court appeared to adopt the Tedder standard for its jury override provision in Pennell v. State. n229 The court called the standard "didactic," n230 but then later determined that the evidence supporting the imposition of the death penalty on the defendant was "so clear and convincing that virtually no reasonable person could differ." n231 The court also conducted a proportionality review and determined that the sentence imposed was comparatively fair in consideration of similar cases. n232

The United States Supreme Court reviewed the jury override provision in Alabama's death penalty scheme in Harris v. Alabama. n233 The Court observed that the Alabama and Florida sentencing systems were essentially the same, n234 except the Alabama Supreme Court had not identified any particular deference to be accorded to the jury determination. n235 The Court continued to support the application of Tedder in cases of jury override, but asserted that the Court's role was only to ensure that the result of the sentencing process was not arbitrary or discriminatory. n236 The Court had already held that the trial judge, acting alone, could impose a capital sentence. n237 The Constitution, therefore, was not **[*1523]** violated by jury override, nor was any particular deference to the jury required in order for the trial judge to impose a different sentence on the defendant than that supported by the jury. n238

Justice Stevens wrote the lone dissent in Harris. n239 He noted that Alabama sentencing judges are elected, and their positions might be jeopardized by unpopular decisions. n240 When elections are upcoming, they may be more inclined to appear tough oncrime by imposing a death sentence. Instead, a jury operates as an expression of the community's moral conscience, free from political pressures. Justice Stevens pointed out that

> [a]n expression of community outrage carries the legitimacy of law only if it rests on fair and careful consideration, as free as possible from passion or prejudice. Although the public's apparent zeal for legislation authorizing capital punishment might cast doubt on citizens' capacity to apply such legislation fairly, I am convinced that our jury system provides reliable insulation against the passions of the polity. n241

He insisted that relying on judges to pronounce death sentences was "constitutionally unacceptable." n242 In his opinion, the advisory verdict offered no particular assistance in ameliorating concerns about judicial sentencing, especially where the jury's recommendation was accorded no specific weight. n243 Although he asserted that any judicial override was harmful and showed contempt for the jury system, he concluded: "I would follow [our previous suggestions that a jury override scheme is unconstitutional without Tedder] and recognize Tedder as a constitutional imperative." n244

VI. Conclusion

The ideal jury may operate the way Justice Stevens believes, but in reality the jury's true operation is somewhat more questionable. Jurors may not run for office, but they are not as free of political, social, or peer pressure as Justice Stevens seems to suggest. Many jurors are aware of the media coverage focused on capital trials. This awareness of the media and, therefore, of the public sentiment may intensify the effect of

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societal demands to reach the "correct" verdict upon a jury. Failure to reach the "correct" verdict may subject the individual jurors to intense questioning or disapproval from the press, friends, and acquaintances.

Despite the potential for bias, recognition and deference to the jury is important. The jury serves to prevent judges from making sentencing determinations that are contrary to the community's expectations. When a judge makes what the community feels is a sentencing error, there is a general sense of disappointment, a feeling of "they never do anything

anyway." This sentiment is more likely to be expressed, however, when judges are too lenient, rather than too strict. In today's social climate, there is general approval of the death penalty, and for "getting tough." n245

The concern for the jury's function as a check on prosecutorial and judicial authority, and for maintaining community involvement in the criminal justice system, may be accommodated by limiting the jury's involvement to determining the guilt of the defendant. By the sentencing phase, the community has already qualified the defendant for the death penalty, and has thus expressed its "outrage."

The concerns at sentencing are quite different from those at guilt. The guilt phase is focused on the culpability of that particular person for a specific crime, while the sentencing phase is concerned with the appropriate punishment for the defendant following conviction for a crime. The Supreme Court has consistently held that a jury is not constitutionally required for sentencing, but rather, the Court's concern has been with the sentencing guidance provided by the statute involved and its application to the defendant. n246

The Drug Kingpin Act does provide sufficient statutory guidance to the jury in the aggravating and mitigating factors, but the Act fails to account for differences in the social, political, and economic circumstances in the states. The Act does not account for the weaknesses and problems inherent in a jury of lay persons with limited or no legal training, understanding, or experience. Likewise, the Act does not consider the disparity in death sentences that may be imposed on similarly situated defendants accused of the same crime, because the jury does not have the

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ability or background to judge what has happened in similar cases under the same law.

The trial judge has the training, the education, and the awareness of similar death sentence cases to make a proper and final sentencing determination. With a true advisory sentence from the jury, the judge would have the balance provided by the community's voice in the form of the jury's recommendation, yet could still help to remove from the sentencing scheme the arbitrary and capricious determinations that are prone to occur under the present system.

There have been many previous examinations and suggestions for changes of the criminal justice system. n247 For example, two recommendations for changes in the use of the jury have been to allow a panel of judges to determine the guilt and sentence of a defendant, n248 or to require the judge to advise the jury on the facts. n249 Commentators have recognized that the system needs improvement, but questions remain as to what systemic changes are needed, how best to incorporate them within the criminal justice system, and what the repercussions will be after any changes are made. n250

This Comment suggests that the federal government has a capital sentencing process under the Drug Kingpin Act which allows for unfair, inconsistent, and arbitrary results by requiring the jury to make the final death sentencing determination. This should be changed.

The system at work in Florida's capital sentencing process represents an intermediate ground between the jury and the judge. Implementation of a feasible, constitutional, and proven procedure for judicial discretion and control over the capital sentencing process under the Drug Kingpin Act can be accomplished without requiring an overhaul of the entire federal criminal justice system. Incorporating the judicial override into the Drug Kingpin Act's sentencing scheme will resolve some of the concerns discussed here. Many more changes are required to address all of the concerns with the criminal justice system at work in the United States.

In restructuring the federal sentencing guidelines, Congress expressed its concern for achieving reasonable uniformity in the penalization of

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similar criminal offenders. n251 In a federal capital case, this may best be achieved under a system that allows for the input of a jury, yet gives the judge the ability to utilize his or her knowledge and experience to ensure the realization of a national sense of fairness.

The Drug Kingpin Act should be amended to allow for a judicial override of a fallacious jury sentence. The judge could either adopt the findings of the jury with regard to the factors and its verdict, or justify in writing any departure. The appellate court could not only review the trial court's imposition of the sentence for the undue influence of any arbitrary factors, n252 but could also conduct a "comparative proportionality review." n253

As one author has written:

Whether Mr. Pitera deserves to be executed for his crimes or whether Mr. Chandler deserves to have his life spared are questions laden with moral considerations. The more important question is whether the judge should have any discretion or involvement in the sentencing procedure. To this, we propose that the tides must be channeled in such a way so as to provide a judicial safety–valve to the determinations of a death penalty jury. Otherwise, justice, no matter what view one may have of this concept, will not be guaranteed. n254

FOOTNOTES:

n1 *Winston v. United States, 172 U.S. 303, 313 (1899)* (interpreting the application of a federal murder statute).

n2 Id.

n3 Anti–Drug Abuse Act of 1988, Pub. L. No. 100–690, 7001, 102 Stat. 4181, 4387 (1988) (codified as amended at *21 U.S.C. 848* (1994)). The Anti–Drug Abuse Act of 1988 was labeled in the popular press as the "Drug Kingpin Act" for its provisions targeted at those who control continuing criminal enterprises related to illegal drugs. See, e.g., New York Mobster Might Be Hit With Death Penalty, S.F. Examiner, Reuters, April 19, 1992, at A14, available in *1993 WL 8563380* [hereinafter New York Mobster] (referring to the "drug kingpin law"). The 1988 Act was an amendment to the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91–513, 84 Stat. 1236 (1970).

n4 See *21 U.S.C. 848*(e) (1994).

n5 See id. 848(k).

n6 *18 U.S.C. 3591*–3598 (1994). This was section 60002(a) of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 60002(a), 108 Stat. 1796, 1959 (1994).

N7 See *18 U.S.C. 3593*(e). One noticeable difference between death penalty procedures in the Drug Kingpin Act and the Federal Death Penalty Act of 1994 is in the return of findings sections. Compare *21 U.S.C. 848*(k) which directs the judge to instruct the jury that it is not required to impose a death sentence, with *18 U.S.C. 3593*(e) which does not have this instruction requirement. See also H.R. Rep. No. 103–467, at 21–22 (1994) (dissenting

views on the constitutional problems resulting from informing the jury that it does not have to impose the death sentence).

n8 See *21 U.S.C. 848; 18 U.S.C. 3591*–3598; *Gregg v. Georgia, 428 U.S. 153, 189 (1976)* (plurality opinion) ("Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

n9 See *Lockett v. Ohio, 438 U.S. 586, 608 (1978)* (holding that the Ohio death penalty statute was incompatible with the Eighth and Fourteenth Amendments because it failed to allow for individualized consideration of the defendant's character, prior record, age, and other mitigating factors).

n10 *408 U.S. 238, 239–40 (1972)* (per curiam). The five concurring opinions generally stated that the death penalty, as it was applied at the time, was cruel and unusual punishment in violation of the Eighth Amendment because the sentencing schemes failed to guide the sentencer's discretion. See *id. at 257, 305, 309, 314, 371.*

n11 *428 U.S. at 169.* Considering Gregg along with its four companion cases, the Court upheld three of the sentencing schemes that provided the judge or jury some guidance so as to avoid the arbitrariness and capriciousness condemned in *Furman. See 408 U.S. at 305* (Brennan, J., concurring). The five consolidated cases were: Gregg; *Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976);* and *Roberts v. Louisiana, 428 U.S. 325 (1976).* For an overview of the Supreme Court death penalty jurisprudence and the responses by the states, see Stephen R. McAllister, The Problem of Implementing a Constitutional System of Capital Punishment, *43 U. Kan. L. Rev. 1039 (1995);* see also Abe Muallem, Harris v. Alabama: Is the Death Penalty in America Entering a Fourth Phase?, *22 J. Legis. 85 (1996).*

n12 See generally McAllister, supra note 11, at 1044–49 (noting the change in the Supreme Court from non–involvement in capital punishment as a constitutional issue to the growing number of decisions since 1972).

n13 The Court has addressed other aspects of the Anti–Drug Abuse Act of 1988. See, e.g., *Rutledge v. United States, 116 S. Ct. 1241, 1247 (1996)* (discussing the interpretation of "conspiracy" in the context of a "continuing criminal enterprise"); *Libretti v. United States, 116 S. Ct. 356 (1995)* (discussing the forfeiture provisions of the Act).

n14 The capital sentencing procedures added by the Federal Death Penalty Act of 1994 "shall not apply to prosecutions under the Uniform Code of Military Justice *(10 U.S.C. 801).*" Pub. L. No. 103–322, 60004, 108 Stat. 1796, 1970 (1994). There are forty–six total civilian death eligible offenses following the passage of the Federal Death Penalty Act of 1994, and that figure includes offenses under the Drug Kingpin Act. See Elizabeth B. Bazan, Present Federal Death Penalty Statutes, CRS Report for Congress, 95–321 A, Feb. 27, 1995, at CRS–2–CRS–6. Recently, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (1996). It modified some of the death penalty procedures, such as the right to habeas corpus relief. It also clarified some interpretative phrases, but did not add any new offenses to the list. See id. 101–08, 1217–26.

n15 See *8 U.S.C. 1324*(a) (1994).

n16 See *18 U.S.C. 34* (1994).

n17 See *18 U.S.C. 36.*

n18 See *18 U.S.C. 241.*

n19 Compare *18 U.S.C. 3591*–3598 (1994), with *21 U.S.C. 848*(e), (g)–(r) (1994).

n20 *428 U.S. 153 (1976).*

n21 See Bazan, supra note 14, at CRS–2 n.2 (discussing the history of federal legislation).

n22 One challenge likely to be heard by the Court is the allegation of racial bias in the prosecution of the Drug Kingpin Act. See, e.g., *United States v. DesAnges, 921 F. Supp. 349, 357 (W.D. Va. 1996)* (arguing that the indictment was sought against the defendant because he is black, as demonstrated by evidence showing that 66% of death penalty cases are against black defendants, and that most of the defendants prosecuted for crack cocaine are black).

n23 See, e.g., Robert E. Knowlton, Problems of Jury Discretion in Capital Cases, *101 U. Pa. L. Rev. 1099, 1131–32 (1953)* ("There can be no uniformity of punishment for like offenders, and the interests of the state as well as the defendant will be jeopardized as long as the jury is allowed to fix the punishment.").

n24 *408 U.S. 238 (1972).* For an explanation of the difficulties with the Supreme Court's death penalty jurisprudence, and the contradictory principles laid down by previous cases, see *Walton v. Arizona, 497 U.S. 639, 656–74 (1990)* (Scalia, J., concurring). Justice Scalia pointed out the difficulty in balancing the classification of the defendants eligible for the death penalty against allowing unfettered discretion for the sentencer to consider any mitigating factors. In Walton, Justice Scalia stated: [s]ince the individualized determination is a unitary one (does this defendant deserve death for this crime?) once one says each sentencer must be able to answer "no" for whatever reason it deems morally sufficient (and indeed, for whatever reason any one of the 12 jurors deems morally sufficient), it becomes impossible to claim that the Constitution requires consistency and rationality among sentencing determinations to be preserved by strictly limiting the reasons for which each sentencer can say "yes." In fact, randomness and "freakishness" are even more evident in a system that requires aggravating factors to be found in great detail, since it permits sentencers to accord different treatment, for whatever mitigating reasons they wish, not only to two different murderers, but to two murderers whose crimes have been found to be of similar gravity.*Id. at 666–67.*

n25 The first constitutional challenge to the Drug Kingpin Act was in *United States v. Cooper, 754 F. Supp. 617, 620 (N.D. Ill. 1990),* aff'd, *19 F.3d 1154 (7th Cir. 1994).* For cases upholding the constitutionality of the Drug Kingpin Act, see *United States v. Tipton, 90 F.3d 861 (4th Cir. 1996); United States v. McCullah, 76 F.3d 1087,* reh'g en banc denied, *87 F. 3d 1136 (10th Cir. 1996); United States v. Flores, 63 F.3d 1342,* reh'g en banc denied, *77 F.3d 481 (5th Cir. 1995),* cert. denied, *117 S. Ct. 87 (1996); United States v. Chandler, 996 F.2d 1073,* reh'g en banc denied, *5 F.3d 1501 (11th Cir. 1993),* cert. denied, *114 S. Ct. 2724 (1994); United States v. Villarreal, 963 F.2d 725 (5th Cir. 1992),* cert. denied, *506 U.S. 927 (1992); United States v. DesAnges, 921 F. Supp. 349 (W.D. Va. 1996); United States v. Tidwell, No. CIV.A.94–CR–353, 1995 WL 764077* (E.D. Pa. Dec. 22, 1995); *United States v. Walker, 910 F. Supp. 837 (N.D.N.Y. 1995); United States v. Bradley, 880 F. Supp. 271 (M.D. Pa. 1994); United States v. Escobar, 803 F. Supp. 611 (E.D.N.Y. 1992); United States v. Pitera, 795 F. Supp. 546 (E.D.N.Y. 1992),* aff'd, *5 F.3d 624 (2d Cir. 1993); United States v. Pretlow, 779 F. Supp. 758 (D.N.J. 1991).*

n26 *Furman, 408 U.S. at 310* (Stewart, J., concurring).

n27 Pub. L. No. 91–513, 84 Stat. 1236 (1970).

n28 H.R. Rep. No. 91–1444, reprinted in 1970 U.S.C.C.A.N. 4566, 4567. See also *21 U.S.C. 801* (1994) (stating congressional findings and declarations).

n29 Pub. L. No. 100–690, 102 Stat. 4181 (1988).

n30 See, e.g., Pete Bowles, Death Penalty Stirs Discord, Newsday, May 7, 1992, at 30, available in *1992 WL 7531601* [hereinafter Death Penalty] (noting the use of the "drug kingpin law" in the Thomas Pitera case); see also, New York Mobster, supra note 3. As part of the Act, the "drug czar" position was created (officially known as the "national drug policy director"). See Michael Isikoff, Search Under Way for a 'Drug Czar', Wash. Post, Nov. 17, 1988, at A23.

n31 See *21 U.S.C. 848*(a) (1994) ("Any person who engages in a continuing criminal enterprise shall be

sentenced to a term of imprisonment . . .").

n32 See id. Section 848(c) defines a continuing criminal enterprise as an organization used for drug–related felonies, with five or more people, where an individual acts as the supervisor, manager, or organizer, and from which that person derives substantial income or resources. See id. 848(c).

n33 See id. 848(b).

n34 See id. 848(e)(1)(A) ("any person engaging in or working in furtherance of a continuing criminal enterprise . . .").

n35 Id. 848(e)(1)(A).

n36 See id. 848(e)(1)(B). Section 848(e)(2) defines a law enforcement officer as "a public servant authorized by law . . . to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions." Id. 848(e)(2).

n37 Id. 848(h)(1)(A).

n38 See id. 848(h)(1)(B). The court may also allow the government to amend its notice of the aggravating factors providing it shows good cause. See id. 848(h)(2).

n39 See id. 848(i) (allowing for a bifurcated proceeding in accordance with *Gregg v. Georgia, 428 U.S. 153, 190–91 (1976)).*

n40 See 848(i)(1)(A). Sentencing may be before a specially impaneled jury, see id. 848(i)(1)(B); or before the court alone, provided the defendant requests it and the government approves, see id. 848(i)(1)(C).

n41 See id. 848(j).

n42 Id.

n43 See id.

n44 See id. 848(k). The government may offer proof of other non–statutory aggravating factors for which notice has been provided, but two statutory factors still have to be proven to qualify the defendant for the death sentence. See id.

n45 See id. 848(n)(1). The government must establish that 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, which resulted in the death of the victim; (D) intentionally engaged in conduct which–(i) the defendant knew would create a 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. Id.

n46 The factors listed are as follows: (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), 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 859 of this title. (12) The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.Id. 848 (n)(2)–(12).

n47 See id. 848(j); see also supra note 38 and accompanying text.

n48 See *21 U.S.C. 848*(k).

n49 See id. 848(j). Section 848(m) sets forth a list of mitigating factors; however, this list is not exclusive. See 848(m), (j).

n50 See id. 848(j).

n51 See id. 848(k). The statute's allowance for different processes in the consideration of the aggravating and mitigating factors is an illustration of the "counterdoctrine" that Justice Scalia found objectionable in *Walton v. Arizona, 497 U.S. 639, 661 (1990).*

n52 See *21 U.S.C. 848*(k).

n53 See id.

n54 See id.

n55 See 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.").

n56 See id. Thus, the jury has discretion guided by the statute in its ability to impose the death sentence, but has unfettered discretion in its ability to decline to impose it. See id.

n57 *408 U.S. 238, 310 (1972)* (Stewart, J., concurring).

n58 *428 U.S. 153, 195 (1976).* See also Brian Serr, Of Crime and Punishment, Kingpins and Footsoldiers, Life and Death: The Drug War and the Federal Death Penalty Provision–Problems of Interpretation and Constitutionality, *25 Ariz. St. L.J. 895, 922–23 (1993)* (discussing the problems with the "nullification instruction" under *21 U.S.C. 848*(k)).

n59 Cf. *21 U.S.C. 848*(l).

n60 See id.; see also id. 848(k).

n61 See id. 848(l).

n62 See id. 848(e)(1). The judge can also impose a sentence of life imprisonment without parole. See id. 848(p).

n63 Id. 848(l) ("Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, authorized by law.").

n64 See id. 848(o)(l).

n65 See id. 848 (q)(1)–(3).

n66 See id. 848(q)(1).

n67 See id.

n68 See id. 848(q)(3)(B).

n69 See infra note 141 and accompanying text.

n70 *18 U.S.C. 3591*–3598 (1994).

n71 See *18 U.S.C. 3594; 21 U.S.C. 848*(l).

n72 See supra note 25.

n73 See supra notes 43–69 and accompanying text.

n74 *754 F. Supp. 617 (N.D. Ill. 1990),* aff'd, *19 F.3d 1154 (7th Cir. 1994).*

n75 See *id. at 620.* The indictment charged that the defendants, Alexander Cooper and Anthony Davis, "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 Robert Parker, and such killing resulted; In violation of Title *21, United States Code, Section 848*(e)(1)(A), and Title *18, United States Code, Section 2.*" Id.

n76 See id.

n77 See *21 U.S.C. 848*(i)(1)(C) (1994).

n78 See *Cooper, 754 F. Supp. at 624–25.*

n79 *468 U.S. 447, 467–90 (1984)* (Stevens, J., dissenting).

n80 See id. (Stevens, J., dissenting). The Court correctly notes that sentencing has traditionally been a question with which the jury is not concerned. Deciding upon the appropriate sentence for a person who has been convicted of a crime is the routine work of judges. By reason of this experience, as well as their training, judges presumably perform this function well. But, precisely because the death penalty is unique, the normal presumption that a judge is the appropriate sentencing authority does not apply in the capital context. The decision whether or not an individual must die is not one that has traditionally been entrusted to judges. This tradition, which has marked a sharp distinction between the usual evaluations of judicial competence with respect to capital and noncapital sentencing, not only eliminates the general presumption that judicial sentencing is appropriate in the capital context, but also in itself provides reason to question whether assigning this role to governmental officials and not juries is consistent with the community's moral sense. *Id. at 476* (Stevens, J., dissenting) (citations omitted).

n81 See id. (Stevens, J., dissenting).

n82 *Cooper, 754 F. Supp. at 625.*

n83 *Id. at 624.*

n84 See *id. at 625.*

n85 See id. (citing *Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968),* and *Gregg v. Georgia, 428 U.S. 153, 190 (1976)).*

n86 See cases cited supra note 25. The constitutional challenges related to *21 U.S.C. 848* are not the focus of this Comment, and are intended only as examples of the types of issues that have been raised by defendants concerning the statute.

n87 See *United States v. Chandler, 996 F.2d 1073, 1092 (11th Cir. 1993); United States v. DesAnges, 921 F. Supp. 349, 356–57 (W.D. Va. 1996); Cooper, 754 F. Supp. at 621–22.*

n88 See *Chandler, 996 F.2d at 1093; Cooper, 754 F. Supp. at 622 .*

n89 *Cooper, 754 F. Supp. at 622–23;* see also *DesAnges, 921 F. Supp. at 355.*

n90 *76 F.3d 1087,* reh'g en banc denied, *87 F.3d 1136 (10th Cir. 1996),* cert. denied, *65 U.S.L.W. 3753* (U.S. May 12, 1997) (No. 96–6841).

n91 See *id. at 1114.*

n92 See *id. at 1112.*

n93 *90 F.3d 861 (4th Cir. 1996),* cert. denied, U.S.L.W. (U.S. June 2, 1997) (No. 96–7639).

n94 See *id. at 870.*

n95 See *id. at 899–900.* The factors addressing the defendant's intent to commit the murder are listed in *21 U.S.C. 848*(n)(1)(A)–(D). The jury had been allowed to consider all four factors in its weighing process. The court in Tipton ruled that the factors as considered and found by the jury allowed consideration of four instances of intent where one factor subsumes the others. *Tipton, 90 F.3d at 899–900.*

n96 *Tipton, 90 F.3d at 891.*

n97 See *id. at 903.*

n98 *408 U.S. 238 (1972).*

n99 See *id. at 253* (Douglas, J., concurring). Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.Id. (Douglas, J., concurring).

n100 *Id. at 310* (Stewart, J., concurring).

n101 See infra notes 193–244 and accompanying text.

n102 *428 U.S. 153 (1976).*

n103 *Id. at 189.*

n104 See generally Serr, supra note 58, at 920–23 (discussing the relationship between Supreme Court jurisprudence and the sentencing provisions of *21 U.S.C. 848).*

n105 Trial Begins Monday in NY for Reputed Mobster Accused of Dismemberment Killings, Orange County (Cal.) Reg., Reuters, Apr. 19, 1992, at A7, available in *1992 WL 6347517* [herinafter Trial Begins Monday].

n106 *United States v. Pitera, 795 F. Supp. 546, 550 (E.D.N.Y. 1992),* aff'd, *986 F.2d 491 (2d Cir. 1992)* (Table), aff'd, *5 F.3d 624 (2d Cir. 1993);* vacated and remanded, *28 F.3d 103 (2d Cir. 1994)* (Table).

n107 Phillip Messing, The Beast of Gravesend: Part II, Newsday, Oct. 21, 1992, at 52, available in *1992 WL 7562166.*

n108 The details of Pitera's background and the allegations against him are substantially taken from Messing, supra note 107, unless otherwise noted. See also Edward Frost, Judge Upholds Death Penalty in Fed'l Case: *Constitutional Challenge by Defendant is Rebuffed, 207 N.Y. L.J. 1 (1992);* Hitman Spared Death Penalty, Newsday, AP, July 3, 1992, at 18, available in *1992 WL 7542535;* Ronald Powers, Federal Death–Penalty Trial of Reputed Mobster Opens, AP, May 6, 1992, available in *1992 WL 5296439;* Trial Begins Monday, supra note 105; New York Mobster, supra note 3; Pete Bowles, Death Case in NY, Execution a Fed Option, Newsday, Apr. 21, 1992, at 8, available in *1992 WL 7528382; Death Penalty, supra* note 30; Emily Sachar, Death Penalty Here? B'klyn Jury Could Decide on Execution in Fed Case, Newsday, June 15, 1992, at 18, available in *1992 WL 7539300;* Thomas F. Liotti, Judicial Discretion: *A Life or Death Issue, 208 N.Y. L.J. 56 (1992).*

n109 See *United States v. Tortora, 922 F.2d 880, 882 (1st Cir. 1990).* The record reveals that the Mafia (sometimes called "La Cosa Nostra") is organized around regional mobs called "Families." . . . At the top of the Family hierarchy is the "Boss," who has absolute authority within the Family. The underboss and the consigliere (counselor) are the Boss's principal deputies. The next echelon comprises capo regimes (captains) who are line officers. Soldiers (members) are individuals who are officially "made" or "baptized" into the Family. Associates perform duties for the organization, but are not members of it. Id.

n110 See *id. at 885* (providing a description of Tortora's baptism into the Patriarca Family. The final predicate act is even more damning: Tortora is accused of violating the Travel Act by participating in a ritualistic ceremony inducting new members (Tortora included) into the Patriarca Family. During the meeting, Tortora swore lifelong allegiance to the Mafia and agreed to murder any individual who posed a threat to it. On inquiry, he vowed to kill his brother if the latter posed a danger to any member of the organization. In essence, Tortora made the Mafia his highest priority in life and pledged fealty to its needs, whatever the circumstances. As the district judge observed: "I think a fair reading . . . of that meeting was that there was a commitment by all to do whatever was necessary, an oath, whatever it costs to who[m]ever else was involved, to further the objectives of this so–called organization." Id.

n111 Messing, supra note 107.

n112 See id. "Pitera's assets had been seized in a civil forfeiture by the government, so he was declared indigent and assigned three defense attorneys . . . who were being paid by the taxpayer. Total fees for Pitera's legal defense would exceed $400,000." Id.

n113 Id.

n114 See *United States v. Pitera, 795 F. Supp. 546, 556 (E.D.N.Y. 1992),* aff'd, *986 F.2d 491 (2d Cir. 1992)* (Table), vacated and remanded, *28 F.3d 103 (2d Cir. 1994)* (Table).

n115 See id.; see also *21 U.S.C. 848*(n)(1)(A) (1994).

n116 *Pitera, 795 F. Supp. at 556;* see also *21 U.S.C. 848*(n)(8).

n117 *Pitera, 795 F. Supp at 556;* see also *21 U.S.C. 848*(n)(12).

n118 See Messing, supra note 107.

n119 Id.

n120 The details of Chandler's background and the allegations against him are all substantially taken from

United States v. Chandler, 996 F.2d 1073, 1080–82 (11th Cir. 1993), unless otherwise noted. See also Liotti, supra note 108; Bill Rankin, Pot Dealer May be First Executed as "Drug Kingpin." Atlanta J. & Const., Jan. 23, 1994, at G1, available in *1994 WL 4473523.*

n121 *Chandler, 996 F.2d at 1081*.

n122 See *id. at 1080;* see also *21 U.S.C. 848*(n)(1)(A).

n123 *Chandler, 996 F.2d at 1080;* see also *21 U.S.C. 848*(n)(1)(C).

n124 *Chandler, 996 F.2d at 1080,* see also *21 U.S.C. 848*(n)(6).

n125 *Chandler, 996 F.2d at 1080,* see also *21 U.S.C. 848*(n)(8).

n126 See *Chandler, 996 F.2d at 1082;* see also *21 U.S.C. 848*(m)(6).

n127 See *Chandler, 996 F.2d at 1082;* see also *21 U.S.C. 848*(m)(8) ("Another defendant or defendants, equally culpable in the crime, will not be punished by death.").

n128 See *Chandler, 996 F.2d at 1082* (finding the existence of the minimum required statutory aggravating factors: one 848(n)(1) factor, and one 848(n)(2)–(12) factor).

n129 See *Chandler, 996 F.2d at 1107.*

n130 See *Spaziano v. Florida, 468 U.S. 447, 464 (1984)* ("The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.").

n131 See Rankin, supra note 120.

n132 See *Spaziano, 468 U.S. at 464.*

n133 See Liotti, supra note 108.

n134 See James J. Stephan & Tracy L. Snell, Capital Punishment 1994, Bureau of Just. Stat. Bull., Feb. 1996.

n135 See N.Y. Correction Law, 22–B (McKinney 1996) (demonstrating that the death penalty did not become effective in New York until Sept. 1, 1995).

n136 Pub. L. No. 98–473, 217(a), 98 Stat. 2017, 2018 (1984) (codified at *28 U.S.C. 991*(b)(1)(B) (1994)).

n137 See id. This section states the purposes of the sentencing guidelines: [To] provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices. . . .Id.

n138 See *21 U.S.C. 848*(k) (1994).

n139 See id. 848(l).

n140 See id.

n141 See id. Nor is there a proportionality review at the appellate level. The reviewing court only determines that the sentence of death was not imposed under the influence of any undue passion or prejudice, and that the

information supports the findings of any of the aggravating factors. See id. at 848(q)(3). The Supreme Court has held that a comparative proportionality review is not a constitutional requirement. See *Pulley v. Harris, 465 U.S. 37, 44 (1984).* In that procedure, the reviewing court determines whether the sentence is disproportionate to that imposed in similar cases. See id.

n142 For a brief discussion of this idea, see *Gregg v. Georgia, 428 U.S. 153 (1976)* (plurality opinion). While Furman did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.*Id. at 188.* See generally Daniel Ross Harris, Capital Sentencing After Walton v. Arizona: A Retreat From the "Death is Different" Doctrine, *40 Am. U. L. Rev. 1389 (1991)* (summarizing Supreme Court jurisprudence in light of the decision in that case which upheld the Arizona sentencing scheme).

n143 See Charles E. Green, Jury Injustice, 20 Jurid. Rev. 132, 134 (1909) ("So much has been made of Trial by Jury by constitutional and even legal writers that it seems to some almost sacrilegious to raise a hand against it.").

n144 See *Duncan v. Louisiana, 391 U.S. 145, 151–55 (1968)* (discussing the history of the criminal jury trial).

n145 See *id. at 151* (suggesting that the jury trial has been in existence since the Magna Carta).

n146 See *id. at 156.*

n147 *468 U.S. 447, 459 (1984)* (citations omitted).

n148 See *id. at 476* (Stevens, J., concurring in part and dissenting in part).

n149 See *Williams v. New York, 337 U.S. 241, 248–49 n.13 (1949)* (quoting **Judge Ulman's** discussion of the considerations of the sentencing **judge,** as stated in Glueck, Probation and Criminal Justice 113 (1933)).

n150 See, e.g., McAllister, supra note 11, at 1044–65 (discussing the evolution of Supreme Court decisions from the ratification of the Constitution through 1993).

n151 See David O. Stewart, Dealing with Death, A.B.A. J., Nov. 1994, at 50, 50–52 (discussing the continual presence of death penalty cases brought before the Supreme Court). But see Harris, supra note 142 (asserting the Supreme Court departed from the doctrine with the decision in *Walton v. Arizona, 497 U.S. 639 (1990)).*

n152 See Model Criminal Jury Instructions, Ninth Circuit, 1.01 (1995).

n153 See *Sparf v. United States, 156 U.S. 51, 66–67 (1895)* (quoting *Marshall, C.J., 4 Cranch 75).*

n154 See id. at 64.

n155 Knowlton, supra note 23, at 1110.

n156 *California v. Brown, 479 U.S. 538, 545 (1987)* (O'Connor, J., concurring).

n157 For a critique of the civil jury, see generally Henry T. Lummus, Civil Juries and the Law's Delay, *12 B.U. L. Rev. 487 (1931);* Shaun P. Martin, Rationalizing the Irrational: The Treatment of Untenable Federal Civil Jury Verdicts, *28 Creighton L. Rev. 683 (1995).*

n158 See *Gregg v. Georgia, 428 U.S. 153, 195 (1976)* (plurality opinion). In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general

proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.Id.

n159 ABA Standards Relating to the Administration of Criminal Justice, Standard 3–3.9(b) (1992) (requiring only probable cause to believe the defendant is guilty for the prosecutor to charge the defendant).

n160 See Samuel R. Gross, The Risks of Death: Why Erroneous Convictions are Common in Capital Cases, *44 Buff. L. Rev. 469, 490 (1996).*

n161 See generally Darlene Ricker, Holding Out, A.B.A. J., Aug. 1992, at 48 (discussing juries and public pressure for a particular verdict).

n162 See generally Gross, supra note 160, at 494 (discussing publicity and venue in the context of capital cases).

n163 See Ingo Keilitz & Linda R. Caviness, National Evaluation of the Jury Utilization and Management Demonstration Program 44 (1979) (discussing the various potential problems in source lists for jurors).

n164 See Bruce G. Sebille, Trial by Jury: An Ineffective Survival, *10 A.B.A. J. 53, 53 (1924);* see also *Kan. Stat. Ann. 22–3410* (1995) (challenges for cause); *28 U.S.C. 1865* (1994) (qualifications for jury service).

n165 For example, lawyers, police officers, psychologists, or certain other professionals who are presumed to have an implied bias favoring the prosecution are regularly excluded.

n166 Sebille, supra note 164, at 53.

n167 See Harry Kalven, Jr. & Hans Zeisel, The American Jury 5 n.4 (1971) (citing Dean Griswold in the 1962–63 Harvard Law School Dean's Report, at 6 ("The jury trial at best is the apotheosis of the amateur. Why should anyone think that 12 persons brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons?")).

n168 See Green, supra note 143, at 135.

n169 See *United States v. Humphreys, 982 F.2d 254, 261 (8th Cir. 1992),* cert. denied, *510 U.S. 814 (1992)* (holding that the Sixth Amendment does not require automatic reversal of a conviction reached by a jury that included a felon).

n170 See Kalven & Zeisel, supra note 167, at 3–11, 149–62. The authors point out that whether the jury understands the case and its evidence is a source of disagreement by those examining the system. The authors conclude that the jury generally does understand the case. This issue still seems unsettled in the context of the more advanced scientific techniques available for examining evidence, and the efficacy of those examinations. See id.

n171 See *Barnes v. United States, 412 U.S. 837, 845 (1973)* (ruling that the common sense and experience of the jury were appropriate for deciding if the defendant knew he had possession of the stolen property).

n172 See Steven I. Friedland, On Common Sense and the Evaluation of Witness Credibility, *40 Case W. Res. L. Rev. 165, 176–77 (1990).*

n173 See id.

n174 See id.

n175 See Gross, supra note 160, at 480–84.

n176 See generally Victor Gold, Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom, *65 N.C. L. Rev. 481 (1987)* (discussing manipulation of the jury by attorneys).

n177 See *id. at 487* ("One expert in communications goes so far as to suggest that attorneys should pit their personal credibility directly against the credibility of adverse witnesses . . . .").

n178 See *id. at 494–95;* see also Messing, supra note 107 and accompanying text (noting that Pitera's courtroom was filled with his supporters).

n179 See Gold, supra note 176, at 481 n.1 (quoting Cicero, On the Character of the Orator, in Basic Works of Cicero 189 (M. Hadas ed. 1951)).

n180 See id. at 497.

n181 See generally Kalven & Zeisel, supra note 167, at 3–11 (discussing historical arguments both in favor of and in opposition to the jury system).

n182 See generally Edson R. Sunderland, The Inefficiency of the American Jury, *13 Mich. L. Rev. 302, 304 (1915)* ("[T]he jury has always been considered not only a finder of facts, but a bulwark against the arbitrary power of judges.").

n183 See Ricker, supra note 161, at 48 (noting the comments of Los Angeles Mayor Tom Bradley concerning the Rodney King verdict and the riots in his city: "The system failed us.").

n184 See generally Andrew D. Leipold, Rethinking Jury Nullification, *82 Va. L. Rev. 253 (1996)* (discussing the power of the jury to nullify the prosecution, and suggesting this power should be limited).

n185 See generally Charles Nesson, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, *98 Harv. L. Rev. 1357 (1985)* (discussing the public's perception of a jury verdict).

n186 See *Gregg v. Georgia, 428 U.S. 153, 184 (1976)* (plurality opinion) ("Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.").

n187 See *Spaziano v. Florida, 468 U.S. 447, 461 (1984).* The Court held that jury sentencing was not constitutionally required, and discussed one of the petitioner's arguments: Petitioner's primary argument is that the laws and practice in most of the States indicate a nearly unanimous recognition that juries, not judges, are better equipped to make reliable capital sentencing decisions and that a jury's decision for life should be inviolate. The reason for that recognition, petitioner urges, is that the nature of the decision whether a defendant should live or die sets capital sentencing apart and requires that a jury have the ultimate word. Noncapital sentences are imposed for various reasons, including rehabilitation, incapacitation, and deterrence. In contrast, the primary justification for the death penalty is retribution. As has been recognized, "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." The imposition of the death penalty, in other words, is an expression of community outrage. Since the jury serves as the voice of the community, the jury is in the best position to decide whether a particular crime is so heinous that the community's response must be death. Id. (quoting *Gregg, 428 U.S. at 184)* (citation omitted).

n188 See *Gregg, 428 U.S. at 184.*

n189 See *Duncan v. Louisiana, 391 U.S. 145, 151–52 (1968)* (discussing the protections afforded by the jury).

n190 See, e.g., *United States v. Cooper, 754 F. Supp. 617, 625 n.14 (1990)* (pointing out that federal indictments

were returned against judges for accepting bribes), aff'd, *19 F.3d 1154 (7th Cir. 1994).*

n191 See *Spaziano, 468 U.S. at 464–65.*

n192 The jury is not necessarily the only link to a community's sense of moral outrage. A judge may serve that function as well. See *Barclay v. Florida, 463 U.S. 939, 948–49 (1983)* (plurality opinion) (stating that a judge's own sense of moral outrage does not offend constitutional principles in sentencing under the statute); see also *id. at 970–71* (Stevens, J., concurring).Similarly, the judge's candid exposition of his deeply felt concern about racial crimes had no bearing on any statutory aggravating circumstance, but in and of itself it does not undermine the legitimacy of the ultimate sentence. The sentencing process assumes that the trier of fact will exercise judgment in light of his or her background, experiences, and values. Just as sentencing juries "maintain a link between contemporary community values and the penal system," sentencing judges "'with experience in the facts of criminality possess[] the requisite knowledge to balance the facts of the case against the standard criminal activity. . . .'"*Id. at 970–71* (Stevens, J., concurring) (quoting *Gregg, 428 U.S. at 190,* and *Proffitt v. Florida, 428 U.S. 242, 252 n.10 (1976)* (quoting *State v. Dixon, 283 So. 2d 1, 8 (Fla. 1993))).*

n193 See generally McAllister, supra note 11, at 1099.

n194 See generally *Furman v. Georgia, 408 U.S. 238 (1972)* (per curiam) (standing for the principle of guided discretion).

n195 See generally *Woodson v. North Carolina, 428 U.S. 280 (1976)* (plurality opinion) (standing for the principle of an individualized determination of the appropriateness of the death penalty for a particular defendant).

n196 See supra notes 181–88 and accompanying text.

n197 These states are: Alabama, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. See Steven H. Jupiter, Comment, Constitution Notwithstanding: The Political Illegitimacy of the Death Penalty in American Democracy, *23 Fordham Urb. L.J. 437, 438–39 & n.13 (1996).*

n198 These states are: Arizona, Idaho, Montana, and Nebraska. See Katheryn K. Russell, The Constitutionality of Jury Override in Alabama Death Penalty Cases, *46 Ala. L. Rev. 5, 10 & n.38 (1994).*

n199 See *Nev. Rev. Stat. 175.556* (1995).

n200 These states are: Alabama, Delaware, Indiana, and Florida. See Muallem, supra note 11, at 87.

n201 See *Walton v. Arizona, 497 U.S. 639, 653 (1990).* When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in Maynard and Godfrey. But the logic of those cases has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions.Id.

n202 See generally *Fla. Stat. Ann. 921.141* (West 1996) (setting forth the trifurcated scheme used in Florida).

n203 See id. 921.141(1) (stating that in circumstances of impossibility or inability on the part of the original jury, an alternate jury may be appointed for the purpose of sentencing).

n204 See *Spaziano v. Florida, 468 U.S. 447, 470 (1984)* (Stevens, J., dissenting). The trifurcated procedure differs from the bifurcated sentencing scheme approved in *Gregg v. Georgia, 428 U.S. 153, 191 (1976),* by adding the actual imposition of the sentence by the trial judge.

n205 See *Fla. Stat. Ann. 921.141(7)* (West 1996). The presentation may include evidence not strictly allowed by the rules of evidence. Although any evidence obtained in violation of the Constitution of the United States or in violation of a State constitution is expressly not authorized for consideration at the sentencing hearing, the statute does allow for the admission of victim impact evidence. See id.

n206 Id. 921.141(2).

n207 See *Dobbert v. Florida, 432 U.S. 282, 296 n.9 (1976)* (exemplifying a trial court's reasoning for overriding a jury recommendation for life).

n208 See *Fla. Stat. Ann. 921.141(4).*

n209 *State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973).*

n210 See *id. at 7–8.*

n211 *Id. at 7.*

n212 In *Proffitt v. Florida, 428 U.S. 242, 249 (1976)* (plurality opinion), and in *Spaziano v. Florida, 468 U.S. 447, 465 (1984),* the Court upheld the jury–override standard provided by the Florida Supreme Court with approbation.

n213 *322 So. 2d 908, 910 (Fla. 1975).*

n214 Id.; See also *Dobbert v. Florida, 432 U.S. 282, 295 (1977)* (calling the Tedder standard a "crucial protection" in the Florida scheme by providing significant safeguards to the defendant).

n215 The four states allowing for jury override are: Florida, Indiana, Alabama, and Delaware. See Muallem, supra note 11, at 87.

n216 *534 N.E.2d 731 (Ind. 1989).*

n217 See *id. at 734.*

n218 The court cannot just make a simple entry noting the jury's advisory verdict. "This Court regards the recommendation of the jury as 'a very valuable contribution to the process, in that it comes from a group representative of the defendant's peers, who are likely to reflect, collectively, the standards of the community.'" See id. (quoting *Brewer v. State, 417 N.E.2d 889, 909 (Ind. 1981)).*

n219 See id. at 735.

n220 See id. The co–defendant had been sentenced to death by the jury, and the facts suggested he had been the main perpetrator. See id.

n221 *963 F.2d 962 (7th Cir. 1992).* Schiro was sentenced to death for a murder committed in 1981, prior to the adoption of the Tedder standard by the Indiana Supreme Court. See *Schiro v. State, 451 N.E.2d 1047 (Ind. 1983).* Schiro challenged his death sentence based on the failure of the trial judge to use any clear standard in overriding the jury's sentence. He argued the standard was a constitutional requirement. See *Schiro v. Clark, 963 F.2d at 968.*

n222 See *Schiro, 963 F.2d. at 969–70.*

n223 *468 U.S. 447 (1984)* (involving a death penalty case in which a majority of the sentencing jury recommended a life sentence but the trial judge chose to impose the death penalty).

n224 See *Schiro, 963 F.2d at 969–70.*

n225 See *id. at 969* (quoting *Spaziano, 468 U.S. at 465).*

n226 See id. at 967–70.

n227 See id. at 969.

n228 Id. The Court also noted the difficulty in reviewing the application of the Tedder standard. Short of mind–reading or the submission of evidence regarding a sentencing judge's thought processes, this Court knows of no way to distinguish a case in which a trial judge gave serious consideration to the jury's sentencing recommendation before rejecting it, from a case in which the trial judge did not give serious consideration to the jury's recommendation before rejecting it. In short we cannot discern a practicable standard for reviewing the amount of deference the trial judge accorded to the jury's recommendation.Id. at 968–69.

n229 *604 A.2d 1368, 1377–78 (Del. 1992).*

n230 *Id. at 1377.*

n231 *Id. at 1378.*

n232 See id.

n233 *115 S. Ct. 1031 (1995).* The defendant asserted the same argument as in *Schiro v. Clark, 963 F.2d 962 (7th Cir. 1992)*–that the Tedder standard was a constitutional requirement. See *Harris, 115 S. Ct. at 1032.*

n234 See *Harris, 115 S. Ct. at 1034* ("Alabama's capital sentencing scheme is much like that of Florida.").

n235 See id. ("This distinction between the Alabama and Florida schemes forms the controversy in this case–whether the Eighth Amendment to the Constitution requires the sentencing judge to ascribe any particular weight to the verdict of an advisory jury.").

n236 See *id. at 1035* ("We thus made clear that, our praise for Tedder notwithstanding, the hallmark of the analysis is not the particular weight a State chooses to place upon the jury's advice, but whether the scheme adequately channels the sentencer's discretion so as to prevent arbitrary results.").

n237 See *Spaziano v. Florida, 468 U.S. 447, 464–65 (1984); Walton v. Arizona, 497 U.S. 639, 647–48 (1990).*

n238 See *Harris, 115 S. Ct. at 1035.*

n239 See *id. at 1037.* Justice Stevens also dissented in *Spaziano, 468 U.S. at 467, 469* ("I am convinced that the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by the jury rather than by a single governmental official.").

n240 See *Harris, 115 S. Ct. at 1039.* This same concern under the Drug Kingpin Act loses considerable force since federal district judges are appointed and have tenure for as long as they have "good behavior." *28 U.S.C. 134*(a) (1994).

n241 *Harris, 115 S. Ct. at 1039.*

n242 *Id. at 1039–40.*

n243 See id.

n244 *Id. at 1042.*

n245 See, e.g., Wayne Woolley, Support for Death Penalty Increases Among Black Americans, Ashville Citizen–Times, Oct. 12, 1996, at A3, available in *1996 WL 4388501;* see also Barry M. Anderson, Politics of Fear vs. Reality of Education, Des Moines Reg., Feb. 11, 1995, at 7, available in *1995 WL 7181405.* In addition, there have been recent initiatives in Iowa, Wisconsin, and West Virginia to pass death penalty legislation. See, e.g., S. 503, 77th Gen. Assem., 1st Sess. (Iowa 1997); S. 30, 93d Legis., Reg. Sess. (Wis. 1997); H.R.J. Res. 14, 73d Legis., Reg. Sess (W.Va. 1997).

n246 See *Harris, 115 S. Ct. at 1031–32; Spaziano v. Florida, 468 U.S. 447, 459–60 (1984); Proffitt v. Florida, 428 U.S. 242, 258 (1976).*

n247 See, e.g., Ariane M. Schreiber, States That Kill: Discretion and the Death Penalty–A Worldwide Perspective, *29 Cornell Int'l L.J. 263 (1996)* (comparing the treatment of the death penalty in the United States with India and the Philippines); Richard S. Frase, Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?, *78 Calif. L. Rev. 539 (1990)* (suggesting selective changes in the criminal justice system in the United States based on an analysis of the French and German systems).

n248 See Sebille, supra note 164, at 55; Knowlton, supra note 23, at 1132–33.

n249 See Sunderland, supra note 182, at 310–16.

n250 Such system wide evaluations and recommendations are beyond the scope of this Comment.

n251 See, e.g., The Sentencing Reform Act of 1984, Pub. L. No. 98–473, 98 Stat. 2017 (codified at *48 U.S.C. 991* (1994)).

n252 See *21 U.S.C. 848*(q)(3) (1994).

n253 *Pulley v. Harris, 465 U.S. 37, 44 (1984).* This issue was raised in *United States v. Cooper, 754 F. Supp. 617 (1990),* aff'd, *19 F.3d 1154 (7th Cir. 1994),* as an attack on the constitutionality of the statute. The Court stated that Pulley had expressly rejected the requirement of such an appellate review. See *Cooper, 754 F. Supp. at 626.*

n254 Liotti, supra note 108.