

# CRS Report for Congress

## The Death Penalty: Capital Punishment Legislation in the 109<sup>th</sup> Congress

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## Summary

The USA PATRIOT Improvement and Reauthorization Act (Reauthorization Act), P.L. 109-177, 120 Stat. 192 (2006) contains a number of death penalty related provisions. Some create new federal capital offenses making certain death-resulting maritime offenses punishable by death. Some add the death penalty as a sentencing option in the case of pre-existing federal crimes such as those outlawing attacks on mass transit. Some make procedural alterations such as those governing federal habeas corpus provisions for state death row petitioners. Other proposals offered during the 109<sup>th</sup> Congress would have followed the same pattern: some new crimes; some new penalties for old crimes; and some procedural adjustments. Other than the Adam Walsh Child Protection and Safety Act, P.L. 109-248, 120 Stat. 587 (2006), which makes a federal capital offense commit a murder in the course of any of several federal sex offenses, none of the other proposals were enacted. Several, however, passed in one House or the other. Among these, H.R. 1279 would have amended the venue provision for capital cases and would have made it a federal capital offense to use the facilities of interstate commerce to commit multiple murders and another to commit murder during and in relation to a drug trafficking offense. As would have H.R. 4472. H.R. 1751; and H.R. 4472 would have made it a federal capital offense to murder a federally funded public safety officer. H.R. 3132 would have created special expedited habeas review of state child murder cases. And S. 2611 would have made evasion of immigration, customs or agricultural border inspections when death resulted a federal capital offense.

Of other capital proposals pending on adjournment, H.R. 4923 and S. 122 would have abolished the death penalty as a federal sentencing alternative and H.R. 379 would have imposed a moratorium barring the states from imposing or carrying out the death penalty.

The report is available in an abridged form – without footnotes, citations to most authorities and appendices – as CRS Report RS22433, *The Death Penalty: An Abridged Look at Capital Punishment Legislation in the 109<sup>th</sup> Congress*.

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# The Death Penalty: Capital Punishment Legislation in the 109<sup>th</sup> Congress

## Introduction

The USA PATRIOT Improvement and Reauthorization Act (Reauthorization Act) contains a number of death penalty related provisions. Some create new federal capital offenses; some add the death penalty as a sentencing option in the case of pre-existing federal crimes; some alter the procedural attributes of federal capital cases. Other proposals offered during the 109<sup>th</sup> Congress would have followed the same pattern: some new crimes; some new penalties for old crimes; and some procedural adjustments. Only one of the other proposals, the Adam Walsh Child Protection and Safety Act, passed, although at least one House approved several others. Three proposals do not fit the pattern; they either would have abolished the death penalty as a federal sentencing alternative or would have imposed a moratorium upon executions.

## Procedural Adjustments

The Reauthorization Act changes procedures associated with federal capital cases including those relating to air piracy cases arising before 1994, capital offenses under federal drug laws, appointment of counsel in capital cases, and habeas procedures for state capital petitioners.

### Pre-1994 Capital Air Piracy Cases.

In the early 1970s, the U.S. Supreme Court held unconstitutional the imposition of capital punishment under the procedures then employed by the federal government and most of the states.<sup>1</sup> In 1974, Congress established a revised procedure for imposition of the death penalty in certain air piracy cases.<sup>2</sup> In 1994, when Congress made the procedural adjustments necessary to revive the death penalty as a sentencing option for other federal capital offenses, it replaced the air piracy procedures with those of the new regime.<sup>3</sup> At least one court, however, held that the new procedures could not be applied retroactively to air piracy cases occurring after the 1974 fix but before the 1994 legislation, in the absence of an explicit statutory provision.<sup>4</sup>

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<sup>1</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>2</sup> P.L. 93-366, 88 Stat. 409 (1974), 49 U.S.C. 1473 (1976 ed.)

<sup>3</sup> P.L. 103-322, 108 Stat. 1796, 1970 (1994), 18 U.S.C. 3591-3598.

<sup>4</sup> *United States v. Safarini*, 257 F.Supp.2d 191, 202-3 (D.D.C. 2003).

The Reauthorization Act adds an explicit provision to the end of the 1994 legislation.<sup>5</sup> The amendment provides for the application of the existing federal capital punishment procedures, 18 U.S.C. ch.228, after consideration of the mitigating and aggravating factors in place in capital air piracy cases prior to the 1994 revival.<sup>6</sup> It also provides for severance should any of the pre-1994 factors be found constitutionally invalid, and includes a limiting definition of the “especially heinous, cruel, or depraved” aggravating factor in section 46503 to avoid the vagueness problems that might otherwise attend the use of such an aggravating factor.<sup>7</sup>

The conference report on the Reauthorization Act notes that the changes apply to a relative small group of individuals responsible for murders committed during the course of hijackings in the mid 1980s who would otherwise be eligible for parole within 10 years of sentencing and could not be effectively sentenced to more than 30 years in prison.<sup>8</sup>

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<sup>5</sup> “An individual convicted of violating section 46502 of title 49, United States Code, or its predecessor, may be sentenced to death in accordance with the procedures established in chapter 228 of title 18, United States Code, if for any offense committed before the enactment of the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103-322), but after the enactment of the Antihijacking Act of 1974 (Public Law 93-366), it is determined by the finder of fact, before consideration of the factors set forth in sections 3591(a)(2) and 3592(a) and (c) of title 18, United States Code, that one or more of the factors set forth in former section 46503(c)(2) of title 49, United States Code, or its predecessor, has been proven by the Government to exist, beyond a reasonable doubt, and that none of the factors set forth in former section 46503(c)(1) of title 49, United States Code, or its predecessor, has been proven by the defendant to exist, by a preponderance of the information. The meaning of the term ‘especially heinous, cruel, or depraved’, as used in the factor set forth in former section 46503(c)(2)(B)(iv) of title 49, United States Code, or its predecessor, shall be narrowed by adding the limiting language ‘in that it involved torture or serious physical abuse to the victim’, and shall be construed as when that term is used in section 3592(c)(6) of title 18, United States Code,” § 211(a), P.L. 109-177, 120 Stat. 230 (2006), adding subsection 60003(c) to P.L. 103-322, 108 Stat.1970 (1994).

<sup>6</sup> P.L. 103-272, 108 Stat. 1242 (1994). Because the 1994 legislation was enacted almost immediately after recodification of title 49, 49 U.S.C. 46503 never appeared in the official United States Code or any of its supplements. The predecessor to 49 U.S.C. 46503 as repealed in the 1994 capital punishment revival statute appears in 49 U.S.C. App. 1473 (1988 ed.).

<sup>7</sup> See, e.g., *Maynard v. Cartwright*, 486 U.S. 356, 359-61 (1988).

<sup>8</sup> H.Rept. 109-333, at 101 (2005) (“This provision is particularly important for several reasons. In the absence of a death penalty that could be implemented for pre-FDPA hijacking offenses resulting in death that also occurred before the effective date of the Sentencing Guidelines on November 1, 1987, the maximum penalty available would be life imprisonment. Under the pre-Sentencing Guidelines structure, even prisoners sentenced to life imprisonment were eligible for a parole hearing after serving only ten years. While there is a split in the Circuit Courts of Appeals as to whether a sentencing judge can impose a sentence that could avert the 10-year parole hearing requirement, the current position of the Bureau of Prisons is that a prisoner is eligible for a parole hearing after serving ten years of a life sentence. Even if parole is denied on that first occasion, such prisoners are eligible to have regularly scheduled parole hearings every two years thereafter. Moreover, in addition to parole eligibility after ten years, the old sentencing and parole laws incorporated

H.R. 1763 and H.R. 3060 contained comparable provisions, but lacked the severability clause found in the Reauthorization Act.

### **Habeas Corpus in State Capital Cases.**

Federal law provides expedited habeas corpus procedures for state death row inmates in those states that qualify for application of the procedures and have opted to take advantage of them.<sup>9</sup> Subject to a one time 30 day extension, district courts with whom habeas petitions are filed by a prisoner challenging his state capital conviction or sentence must make a final determination within the sooner of 60 days after the case is submitted for decision or 450 days after the application is filed.<sup>10</sup> In such cases, the court of appeals has 120 days after the final briefs have been submitted to render a decision; the court has 30 days to consider a petition for rehearing or rehearing en banc and another 30 days to render an en banc decision should it grant rehearing.<sup>11</sup> No such judicial deadlines apply in other federal habeas cases.

Before enactment of the Reauthorization Act, these expedited procedures found in chapter 154 applied in capital cases only if the state met certain conditions. “A state must [have] establish[ed] ‘a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel’ in state postconviction proceedings, and ‘must [have] provide[d] standards of competency for the appointment of such counsel.’”<sup>12</sup> As of enactment of the Reauthorization Act apparently, few if any states had sought and been found qualified to opt in.<sup>13</sup>

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a presumption that even persons sentenced to life imprisonment would be released after no more than 30 years. In the context of the individuals responsible for the hijacking incidents described above, most of the perpetrators were no older than in their twenties when they committed their crimes. The imposition of a pre-Guidelines sentence of life imprisonment for these defendants means that many, if not all of them, could be expect to be released from prison well within their lifetime. Given the gravity of these offenses, coupled with the longstanding Congressional intent to have a death penalty available for the offense of air piracy resulting in death, such a result would be at odds with the clear directive of Congress.”)

<sup>9</sup> 28 U.S.C. ch. 154.

<sup>10</sup> 28 U.S.C. 2266(b).

<sup>11</sup> 28 U.S.C. 2266(c).

<sup>12</sup> *Calderon v. Ashmus*, 523 U.S. 740, 743 (1998).

<sup>13</sup> At least for a short period of time Arizona was qualified to opt in, *cf.*, *Spears v. Stewart*, 283 F.3d 992, 996 (9th Cir. 2002)(denying rehearing en banc)(“The three judge panel . . . determined that although (a) the question whether Arizona had opted-in to the short-fuse habeas scheme provided in Chapter 154. . . was entirely irrelevant to the outcome of the case before it; (b) the linchpin provision for the procedures by which Arizona had once sought to opt-in under Chapter 154 had already been repealed by the state; (c) the state did not even comply with its own procedures in the case before the panel; (d) Arizona was unquestionably not in compliance with Chapter 154 at the time the appeal was heard; (e) in fact, the state had never at any time effectively complied with its short-lived procedures; and (f) no other state in the nation has ever been held to have successfully opted-in under Chapter 154, the panel would seize this opportunity to issue an advisory opinion stating that

Critics implied that the states have been unable to take advantage of the expedited capital procedures only because the courts have a personal stake in the outcome. The solution, they contended, was the amendment found in section 507 of the Reauthorization Act, which allows the Attorney General to determine whether a state qualifies, permits the determination to have retroactive effect,<sup>14</sup> and allows review by the federal appellate court least likely to have an interest in the outcome,

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the no-longer-existent Arizona procedures were in compliance with Chapter 154's requirements")(citing, *Ashmus v. Woodford*, 202 F.3d 1160, 1160 (9th Cir. 2000)(California has not opted-in); *Harris v. Bowersox*, 184 F.3d 744, 7848 (8th Cir. 1999)(Missouri has not opted-in); *Duvall v. Reynolds*, 139 F.3d 768, 776 (10th Cir. 1998)(Oklahoma has not opted-in); *Hill v. Butterworth*, 941 F.Supp. 1129, 1146-147 (N.D.Fla. 1996), *vac'd on other grounds*, 147 F.3d 1333 (11th Cir. 1998)(Florida has not opted-in); *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vac'd on other grounds*, 105 F.3d 209 (5th Cir. 1997)(Texas has not opted-in); *Austin v. Bell*, 126 F.3d 843, 846 n.3 (6<sup>th</sup> Cir. 1997)(Tennessee has not opted-in); *Holloway v. Horn*, 161 F.Supp.2d 452, 478 n.11 (E.D.Pa. 2001), *rev'd on other grounds*, 355 F.3d 707 (3d Cir. 2004)(Pennsylvania has not opted-in); *Smith v. Anderson*, 104 F.Supp. 2d 773, 786 (S.D.Ohio 2000)(Ohio has not opted-in); *Oken v. Nuth*, 30 F.Supp.2d 877, 879 (D.Md. 1998)(Maryland has not opted-in); *Tillman v. Cook*, 25 F.Supp.2d 1245, 1253 (D.Utah 1998)(Utah has not opted-in); *Weeks v. Angelone*, 4 F.Supp.2d 467, 506 n.4 (E.D.Va. 1998)(Virginia has not opted-in); *Ryan v. Hopkins*, 1996 WL 539220, at \*3-4 (D.Neb. 1996)(Nebraska has not opted-in)). Related cases include, *Grayson v. Epps*, 338 F.Supp.2d 699, 700-704 (S.D. Miss. 2004)(Mississippi has not opted-in); *Keel v. French*, 162 F.3d 263, 267 n.1 (4th Cir. 1998)(North Carolina has not opted-in); *High v. Head*, 209 F.3d 1257, 1262 n.4 (11th Cir. 2000)(Georgia does not claim to have opted-in); *Allen v. Lee*, 366 F.3d 319, 353 (4th Cir. 2004)(Luttig, J. dissenting)(noting that the Fourth Circuit has adopted by rule the section 2266 time lines).

<sup>14</sup> "This chapter is applicable if – (1) the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265; and (2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent," 28 U.S.C. 2261(b).

"If requested by an appropriate State official, the Attorney General of the United States shall determine – [(1)](A) whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death; (B) the date on which the mechanism described in subparagraph (A) was established; and (C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).

"(2) EFFECTIVE DATE. – The date the mechanism described in (1)(A) was established shall be the effective date of the certification under this subsection," 28 U.S.C. 2265(a)(1)(2).

"(1) IN GENERAL. – The determination by the Attorney General regarding whether to certify a state under this section is subject to review exclusively as provided under chapter 158 of this title.

"(2) VENUE. – The Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction over matters under paragraph (1), subject to review by the Supreme Court under section 2350 of this title.

"(3) STANDARD OF VIEW. – The determination by the Attorney General regarding whether to certify a state under this section shall be subject to de novo review," 28 U.S.C. 2265(c).

the U.S. Court of Appeals for the D.C. Circuit.<sup>15</sup> Opponents raised separation of powers issues and questioned whether the chief federal prosecutor or the courts are more likely to make an even handed determination of whether the procedures for providing capital defendants with qualified defense counsel are adequate.<sup>16</sup>

Under the Reauthorization Act, states opt-in or have opted-in as of the date, past or present, upon which the Attorney General determines they established or have established qualifying assistance of counsel mechanism.<sup>17</sup> Opting-in to the expedited procedures of chapter 154 only applies, however, to instances in which “counsel was appointed pursuant to that mechanism [for the death row habeas petitioner], petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.”<sup>18</sup> The earlier provision required that the mechanism include competency standards for appointed counsel.<sup>19</sup> The Reauthorization Act removed the requirement, but granted the Attorney General regulatory authority sufficient to establish such standards.<sup>20</sup>

The Act establishes a *de novo* standard of review for the Attorney General’s determination before the D.C. Circuit.<sup>21</sup> It also extends the expedited time deadline for U.S. district court action on a habeas petition from a state death row inmate from 6 to 15 months (180 days to the sooner of 450 days after filing or 60 days after the

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<sup>15</sup> See 151 CONG. REC. S5540, 5541 (daily ed. May 19, 2005) (statement of Sen. Kyl) (“The SPA [Streamlined Procedures Act] also expands and improves the special expedited habeas procedures authorized in chapter 154 of the United States Code. The procedures are available to States that establish a system for providing high-quality legal representation to capital defendants. Chapter 154 sets strict time limits on Federal court action and places limits claims. Currently, however, the court that decides whether a State is eligible for chapter 154 is the same court that would be subject to its time limits. Unsurprisingly, these courts have proven resistant to chapter 154. The SPA would place the eligibility decision in the hands of a neutral party – the U.S. Attorney General, with review of his decision in the D.C. Circuit, which does not hear habeas appeals”).

<sup>16</sup> “[T]he SPA intimates that courts can’t objectively evaluate whether states meet the ‘opt-in’ provisions detailed in the AEDPA because their dockets are implicated in the timelines created by opt-in status. The legislation attempts to resolve this by empowering the chief prosecutor in the United States, the Attorney General, to make these decisions. Giving federal prosecutors control over even part of the federal judiciary’s docket and decisionmaking authority would have serious implications for the separation of powers necessary for fair administration of criminal justice,” *Habeas Corpus Proceedings and Issues of Actual Innocence: Hearings Before the Senate Comm. on the Judiciary*, 109th Cong., 1st sess. (2005) (testimony of Bryan Stevenson, Executive Director of Equal Justice Initiative of Alabama, available on Jan. 6, 2006, at [[http://judiciary.senate.gov/print\\_testimony.cfm?id=1569&wit\\_id=4458](http://judiciary.senate.gov/print_testimony.cfm?id=1569&wit_id=4458)]).

<sup>17</sup> 28 U.S.C. 2265(a)(2).

<sup>18</sup> 28 U.S.C. 2261(b)(2).

<sup>19</sup> 28 U.S.C. 2261(b)(2000 ed.).

<sup>20</sup> 28 U.S.C. 2265(b).

<sup>21</sup> 28 U.S.C. 2265(c)(3).

completion of all pleadings, hearings, and submission of briefs).<sup>22</sup> The Streamlined Procedures Acts in the House and Senate, H.R. 3035 and S. 1088, would have made similar changes in the opt in procedure, but set a different standard for appellate review of the Attorney General's decision,<sup>23</sup> and would have included a wide range of habeas amendments unknown to the Reauthorization Act.

In *McFarland v. Scott*, 512 U.S. 849, 859 (1994), the Supreme Court held that federal district courts might stay the execution of a state death row inmate upon the filing of a petition for the appointment of counsel but prior to the filing of a federal habeas petition in order to allow for the assistance of counsel in the filing of the petition. In an amendment described as overruling *McFarland*,<sup>24</sup> the Reauthorization Act amends federal law to permit a stay in such cases of no longer than 90 days after the appointment of counsel or the withdrawal or denial of a request for the appointment of counsel.<sup>25</sup>

S. 956, H.R. 2388, and *H.R. 3132*<sup>26</sup> contained a common amendment governing federal habeas cases of an individual convicted under state law of killing a child, proposed 28 U.S.C. 2254. Habeas under section 2254 would have been unavailable in such cases except for claims that both (1) relied on a new constitutional interpretation made retroactively applicable by the Supreme Court or on evidence that the petitioner could not reasonably have been previously discovered and (2) were predicated upon facts in the face of which no reasonable judge or jury would have found the petitioner guilty but for the constitutional error, proposed 28 U.S.C. 2254(j)(1), (2).

Under the bills, judicial consideration of claims that met the dual criterion would have been subject to deadlines under which evidentiary hearings had to be (1) requested within 90 days of the state's answer to the petition and granted or denied within 30 days, (2) held within 60 days and completed within 150 days, and (3) decided within 15 months of the state's answer; the state could enforce deadlines through a mandamus petition to the court of appeals, proposed 28 U.S.C. 2254(j)(3). Appellate courts would have had 120 days to pass upon an appeal, 30 days to consider whether to grant a hearing en banc, and 120 days to decide a case en banc, proposed 28 U.S.C. 2254(j)(4).

The rights of victims under 18 U.S.C. 3771(b) to be notified, attend, and participate in relevant criminal proceedings would have been expanded to include habeas proceedings under an amendment found in each of the bills, proposed 18 U.S.C. 3771(b).

<sup>22</sup> 28 U.S.C. 2266(b).

<sup>23</sup> "The Attorney General's determination of whether to certify a state under this section shall be conclusive unless manifestly contrary to the law and an abuse of discretion," proposed 28 U.S.C. 2267(c)(3).

<sup>24</sup> H.Rept. 109-333, at 109 (2005).

<sup>25</sup> 28 U.S.C. 2251(b).

<sup>26</sup> Legislation that has passed one of the two Houses of Congress (other than the Reauthorization Act) appears in italics throughout.

Proponents pointed to examples of delays of up to 20 years between conviction and the completion of habeas proceedings to explain the amendment; they contended that the Supreme Court has upheld past restrictions on protracted federal habeas proceedings conducted on behalf of state prisoners; and they argued the appropriateness of confining relief to those who can establish their innocence.<sup>27</sup>

Critics claimed the amendment was unnecessary and that great care should be taken before closing the doors of the federal courts to claims that a state criminal court has convicted an accused and imposed the death penalty in an unconstitutional manner.<sup>28</sup> Some observers might have suggest that the participation of victims in the habeas process is more likely to prolong it than to streamline it.

### **Capital Procedures in Drug Cases.**

Prior to the Reauthorization Act, federal law provided two sets of death penalty procedures for capital drug cases, the procedures applicable in federal capital cases generally<sup>29</sup> and the procedures specifically applicable in federal capital drug cases.<sup>30</sup> The two procedures were virtually identical and either might be employed in a capital drug case.<sup>31</sup> The Reauthorization Act eliminates the specific drug case procedures so that only the general procedures apply in such cases. According to the conference report, this “eliminates duplicative death procedures under title 21 of the United States code, and consolidates procedures governing all Federal death penalty prosecutions in existing title 18 of the United States Code, thereby eliminating confusing requirements that trial courts provide two separate sets of jury instructions.”<sup>32</sup>

### **Appointment of Counsel in Capital Cases.**

Prior to the Reauthorization Act, the federal capital drug provisions called for the appointment of counsel to assist indigents facing federal capital charges and indigent federal and state death row inmates during federal habeas proceedings.<sup>33</sup> The Reauthorization Act transfers these provisions to title 18.<sup>34</sup>

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<sup>27</sup> H.Rept. 109-218, at 30-8 (2005), citing inter alia, *Felker v. Turpin*, 518 U.S. 651 (1996).

<sup>28</sup> H.Rept. 109-218, at 254 (2005)(dissenting views of Reps. Conyers, Robert Scott and Linda Sanchez).

<sup>29</sup> 18 U.S.C. 3591-3598.

<sup>30</sup> 21 U.S.C. 848 (2000 ed.).

<sup>31</sup> *United States v. Matthews*, 246 F.Supp.2d 137, 141 (N.D.N.Y. 2002).

<sup>32</sup> H.Rept. 109-333, at 102 (2005).

<sup>33</sup> 21 U.S.C. 848(q)(4)-(10)(2000 ed.).

<sup>34</sup> § 222, P.L. 109-177, 120 Stat. 231 (2006), adding new 18 U.S.C. 3599.

## Life Time Supervised Release Regardless of Risks.

Prior to the Reauthorization Act, in capital and noncapital cases alike a federal sentencing court could impose a term of supervised release for any term of years or for life (to be served upon release from prison) *if* the defendant has been convicted of a federal crime of terrorism (18 U.S.C. 2332b(g)(5)(B)) involving the foreseeable risk of physical injury of another, 18 U.S.C. 3583(j)(2000 ed., Supp.I).<sup>35</sup> The Reauthorization Act amends section 3583(j) to eliminate the requirement that the defendant be convicted of a crime involving a foreseeable risk of injury; conviction of any federal crime of terrorism is sufficient.

## Additional Procedural Proposals.

**Venue.** Several anti-gang bills would have purported to change the place where capital cases may be tried. S. 155, H.R. 970, *H.R. 1279*, and *H.R. 4472* would each have rewritten 18 U.S.C. 3235. Section 3235 provides that where possible

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<sup>35</sup> The federal crimes of terrorism are violations of: 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 81 (arson within special maritime and territorial jurisdiction), 175 or 175b (biological weapons), 175c (variola virus), 229 (chemical weapons), subsection (a), (b), (c), or (d) of section 351 (congressional, cabinet, and Supreme Court assassination and kidnapping), 831 (nuclear materials), 842(m) or (n) (plastic explosives), 844(f)(2) or (3) (arson and bombing of Government property risking or causing death), 844(i) (arson and bombing of property used in interstate commerce), 930(c) (killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) (protection of computers), 1030(a)(5)(A)(i) resulting in damage as defined in 1030(a)(5)(B) (ii) through (v) (protection of computers), 1114 (killing or attempted killing of officers and employees of the United States), 1116 (murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (hostage taking), 1361 (government property or contracts), 1362 (destruction of communication lines, stations, or systems), 1366(a) (destruction of an energy facility), 1751(a), (b), (c), or (d) (Presidential and Presidential staff assassination and kidnapping), 1992 (train wrecking), 1993 (terrorist attacks and other acts of violence against mass transportation systems), 2155 (destruction of national defense materials, premises, or utilities), 2156 (national defense material, premises, or utilities), 2280 (violence against maritime navigation), 2281 (violence against maritime fixed platforms), 2332 (certain homicides and other violence against United States nationals occurring outside of the United States), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2332f (bombing of public places and facilities), 2332g (missile systems designed to destroy aircraft), 2332h (radiological dispersal devices), 2339 (harboring terrorists), 2339A (providing material support to terrorists), 2339B (providing material support to terrorist organizations), 2339C (financing of terrorism), 2340A (torture); 42 U.S.C. 2122 (prohibitions governing atomic weapons), 2284 (sabotage of nuclear facilities or fuel); 49 U.S.C. 46502 (aircraft piracy), the second sentence of 46504 (assault on a flight crew with a dangerous weapon), 46505(b)(3) or (c) (explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), 46506 (if homicide or attempted homicide is involved (application of certain criminal laws to acts on aircraft), and 60123 (b) (destruction of interstate gas or hazardous liquid pipeline facility). Section 112 of the Act adds 18 U.S.C. 2339D (foreign military training) and 21 U.S.C. 1010A (narco-terrorism) to the list, 18 U.S.C. 2332b(g)(5)(B) as amended by the Act.

capital cases should be tried in the county in which the crime occurred.<sup>36</sup> Section 3235 is followed by a section that states that murder and manslaughter cases should be tried where the death-causing injury was inflicted regardless of where death actually occurs, 18 U.S.C. 3236.<sup>37</sup> Section 3236 is followed in turn by a section that provides that multi-district crimes may be tried where they are begun, continued, or completed and that offenses involving the use of the mails, transportation in interstate or foreign commerce, or importation into the United States may be tried in any district from, through, or into which commerce, mail, or imports travel.<sup>38</sup>

At least one federal appellate court has held that the specific instruction of section 3236 overrides the general instructions of section 3237(a) only with regard to “unitary” murder offenses, such as murder by a federal prisoner.<sup>39</sup> Section 3236 does not apply, the court held, to “death resulting” cases, cases where murder is a sentencing element rather than a substantive element of the offense, such as in cases of a violation of 18 U.S.C. 924(c)(use of a firearm during and relating to the commission of crime of violence), the sentence for which is determined in part by whether death resulted from the commission of the offense.<sup>40</sup>

The proposal would have repealed the “county trial” language of section 3235 and would have replaced it with language reminiscent of the multi-district terms of section 3237(a): “(a) the trial of any offense punishable by death shall be held in the district where the offense was committed or in any district in which the offense began, continued, or was completed. (b) If the offense, or related conduct, under subsection (a) involves activities which affect interstate or foreign commerce, or the importation of an object or person into the United States, such offense may be prosecuted in any district in which those activities occurred,” proposed 18 U.S.C. 3235.

Although it is far from certain, the proposal appeared intent upon repealing both the “county trial” feature of section 3235 and, by indirection, the section 3236 override of multi-district section 3237 in murder cases. The manslaughter features of 3236 would presumably have continued in place since they are not capital cases and thus by definition are beyond the reach of the proposed capital venue provisions of the amended section 3235.

The proposal would have operated in the shadow of two constitutional provisions and of two Supreme Court cases which construe them. Article III declares that “[t]he trial of all crimes . . . shall be held in the state where the said crimes shall

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<sup>36</sup> “The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience,” 18 U.S.C. 3235.

<sup>37</sup> “In all cases of murder or manslaughter, the offense shall be deemed to have been committed at the place where the injury was inflicted, or the poison administered or other means employed which caused the death, without regard to the place where the death occurs,” 18 U.S.C. 3236.

<sup>38</sup> 18 U.S.C. 3237(a).

<sup>39</sup> 18 U.S.C. 1118.

<sup>40</sup> *United States v. Barnette*, 211 F.3d 803, 814 (4<sup>th</sup> Cir. 2000).

have been committed.”<sup>41</sup> The Sixth Amendment directs that, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.”<sup>42</sup>

The Supreme Court in *United States v. Cabrales* held that in light of these provisions the crime of money laundering committed in Florida could not be tried in Missouri where the laundered funds had been criminally generated – absent other circumstances.<sup>43</sup> Shortly thereafter, the Court held in *United States v. Rodriguez-Moreno*, that the crime of using a firearm during and in relation to the crime of kidnaping could be tried in New Jersey into which the victim had been carried, notwithstanding the fact that the firearm was acquired and used in Maryland after the victim had been moved there from New Jersey. The Court reasoned (1) that a crime may be tried wherever one of its conduct elements occurs; (2) that the kidnaping constituted a conduct element of the offense of using a firearm during and in relation to the crime of kidnaping; (3) that the kidnaping was a form of continuous conduct beginning where the victim was seized (in Texas) and continuing (to New Jersey and then into Maryland) until he was released or escaped; (4) that the kidnaping could be tried in New Jersey; and (5) consequently the firearm use charge could be tried in New Jersey.<sup>44</sup>

It is not clear how the proposal would have fared in light of *Cabrales* and *Rodriguez-Moreno*. It says “(a) the trial for any offense punishable by death shall be held in the district where the offense was committed or in any district in which the offense began, continued, or was completed. (b) if the offense, or related conduct, under subsection (a) involves activities which affect interstate or foreign commerce, or the importation of an object or person into the United States, such offense may be prosecuted in any district in which those activities occurred,” proposed 18 U.S.C. 3235. It would appear to permit trial of an offense in a district in which related conduct affecting interstate or foreign commerce occurs even if the offense itself is committed entirely in another district. The *Cabrales*’ money generating drug trafficking in Missouri would seem to qualify as conduct related to the laundering in Florida for purposes of the proposal, and yet in *Cabrales* that was not enough. Nor would the proposal always appear to meet *Rodriguez-Moreno*’s “conduct element” standard. There is nothing in the proposal that requires that the “related conduct affecting interstate commerce” be an element of the offense to be tried. In fact, the alternative wording – “if the offense, or related conduct . . . involves activities which

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<sup>41</sup> U.S. Const. Art. III, §2, cl.3.

<sup>42</sup> U.S. Const. Amend. VI.

<sup>43</sup> 524 U.S. 1, 7-10 (1998)(“The money laundering counts included no act committed by Cabrales in Missouri. . . nor did the government charge that Cabrales transported the money from Missouri to Florida. . . the counts at issue do not charge Cabrales with conspiracy; they do not link her to, or assert her responsibility for, acts done by others. . . . In the counts at issue, the government indicted Cabrales for transactions which began, continued, and were completed only in Florida”).

<sup>44</sup> 526 U.S. 275, 280-82 (1999).

affect interstate commerce” – seems to contemplate situations in which affecting commerce is not an element, conduct or otherwise, of the offense.

**Mitigating and Aggravating Factors.** The death penalty may be imposed in a federal capital case only after consideration of the mitigating and aggravating factors listed in 18 U.S.C. 3592 and only if at least one aggravating factor is found.<sup>45</sup> Several bills adjust the factors. One of the aggravating factors in homicide cases consists of the fact that the death resulted from the commission of a list of designated felonies.<sup>46</sup> The Adam Walsh Child Protection and Safety Act, P.L. 109-248, 120 Stat. 587, 614 (2006) adds 18 U.S.C. 2245 to the list, 18 U.S.C. 3592(c)(1). Among the proposals that failed to secure passage, H.R. 3060 would have placed 18 U.S.C. 2339D (receipt of military training from a foreign terrorist organization) on the list. H.R. 5040 would have done the same and would have added 18 U.S.C. 241 (civil rights conspiracy), 245 (deprivation of federally protected activities), 247 (interference with religious exercise), 1512 (tampering with federal witnesses), and 1513 (retaliating against federal witnesses), proposed 18 U.S.C. 3592(c)(1). Both H.R. 3060 and H.R. 5040 would have made obstruction of justice an aggravating factor in homicide cases, proposed 18 U.S.C. 3592(c)(17).

**Other Procedural Proposals.** H.R. 3060 would have allowed the court *upon a finding of good cause* or agreement of the parties to proceed with a capital sentencing jury of fewer than 12 members, proposed 18 U.S.C. 3593(b). Existing law requires agreement of the parties.<sup>47</sup>

The bill also would have amended Rule 24(c) of the Federal Rules of Criminal Procedure to allow for the selection of a maximum of 9 alternate jurors and to allow each side 4 peremptory alternate juror challenges when either 7, 8, or 9 alternates were to be selected, proposed F.R.Crim.P. 24(c). The present Rule calls for a

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<sup>45</sup> 18 U.S.C. 3593.

<sup>46</sup> “In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist: (1) Death during commission of another crime.— The death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense under section 32 (destruction of aircraft or aircraft facilities), section 33 (destruction of motor vehicles or motor vehicle facilities), section 37 (violence at international airports), section 351 (violence against Members of Congress, Cabinet officers, or Supreme Court Justices), an offense under section 751 (prisoners in custody of institution or officer), section 794 (gathering or delivering defense information to aid foreign government), section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of Government property by explosives), section 1118 (prisoners serving life term), section 1201 (kidnaping), section 844(i) (destruction of property affecting interstate commerce by explosives), section 1116 (killing or attempted killing of diplomats), section 1203 (hostage taking), section 1992 (wrecking trains), section 2280 (maritime violence), section 2281 (maritime platform violence), section 2332 (terrorist acts abroad against United States nationals), section 2332a (use of weapons of mass destruction), or section 2381 (treason) of this title, or section 46502 of title 49, United States Code (aircraft piracy),” 18 U.S.C. 3592(c)(1).

<sup>47</sup> 18 U.S.C. 3593(b).

maximum of 6 alternates and affords the parties 3 alternate juror peremptory challenges.<sup>48</sup> These and other similar proposals passed the House initially as part of H.R. 3199, but were dropped in conference and were not part of the Reauthorization Act as passed.

H.R. 5040 would have struck the provision which outlaws the execution of the mentally retarded, proposed 18 U.S.C. 3596(c). The omission, although perhaps surprising to some, appeared inconsequential since execution of the mentally retarded is constitutionally proscribed.<sup>49</sup> The bill also would have required notice to the government and would have permitted the government to request an independent mental health examination when a defendant intended to enter mental retardation as a mitigating factor for capital sentencing purposes, proposed 18 U.S.C. 3593(b). The existing statute mentions no such requirements.<sup>50</sup> Presumably recourse to the proposed procedure would have been more infrequent in those cases where the district court conducted a pre-trial evidentiary hearing to determine whether the mental retardation of the accused precluded imposition of the death penalty following any conviction.<sup>51</sup>

Present law permits a capital jury to unanimously recommend a sentence of death or of imprisonment without possibility of release; if they do not, the court is to sentence the defendant to any lesser sentence authorized by law, i.e., imprisonment for life or a term of years.<sup>52</sup> H.R. 5040 would have provided that if the jury could not agree on a capital recommendation, a new sentencing jury should be empaneled and the issue retried, proposed 18 U.S.C. 3594.

Existing law specifically contemplates that the execution of federal capital sentences will be carried out in state facilities.<sup>53</sup> H.R. 5040 would have granted the Attorney General regulatory implementing authority without exclusive reference to state facilities, proposed 18 U.S.C. 3596, 3597.

The bill also would have rewritten 18 U.S.C. 3005 which assures defendants two assigned counsel in capital cases. The proposal would have made it clear that the statute only applied when the government sought the death penalty and not in capital cases where it had elected not to do so, proposed 18 U.S.C. 3005(a). The federal appellate courts are divided on the question over whether section 3005 now entitles a defendant to the assistance of two attorneys in all capital cases or only in those in which the government actively seeks the death penalty.<sup>54</sup> The proposal

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<sup>48</sup> F.R.Crim.P. 24(c).

<sup>49</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>50</sup> 18 U.S.C. 3593.

<sup>51</sup> E.g., *United States v. Nelson*, 419 F.Supp.2d 891 (E.D.La. 2006).

<sup>52</sup> 18 U.S.C. 3594; *Jones v. United States*, 527 U.S. 373, 380-81 (1999).

<sup>53</sup> 18 U.S.C. 3596, 3597.

<sup>54</sup> *United States v. Boone*, 245 F.3d 352, 358-61 (4<sup>th</sup> Cir. 2001)(all capital cases), *contra*, *United States v. Waggoner*, 339 F.3d 915, 917-19 (9<sup>th</sup> Cir. 2003); *United States v. Grimes*, 142 F.3d 1342, 1347 (11<sup>th</sup> Cir. 1998).

would have explicitly authorized the government to strike for cause potential jurors in capital cases whose opposition to the death penalty “would prevent or substantially impair the performance” of their duties as jurors, proposed 18 U.S.C. 3005(b). The proposal borrowed language from Supreme Court cases that indicate a potential juror may be struck if his views on capital punishment “would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”<sup>55</sup>

## New Federal Capital Offenses

Title III of the Reauthorization Act, designated the Reducing Crime and Terrorism at America’s Seaports Act, creates three new federal capital offenses:

- 18 U.S.C. 2282A (devices or dangerous substances in waters of the United States likely to destroy or damage ships or to interfere with maritime; causing a death);
- 18 U.S.C. 2283 (transportation of explosive, biological, chemical, or radioactive or nuclear materials; causing a death); and
- 18 U.S.C. 2291 (destruction of vessel or maritime facility; intentionally causing a death).<sup>56</sup>

The provisions supplement federal capital offenses created earlier, e.g., 18 U.S.C. 2280 (violence against maritime navigation where death results), 229 & 229A (possession of chemical weapons where death results), 1111 (murder within the maritime jurisdiction of the United States).

Two other port security bills would have suggested similar new death penalty offenses, H.R. 2651 and S. 378 (as reported) (proposed 18 U.S.C. 2282A, 2283, and 2291), and a third would have offered three slightly less comparable offenses, H.R. 173 (proposed 18 U.S.C. 1372 (destruction of vessel or maritime facility; if death results), 2280A (devices or substances in waters of the United States likely to destroy or damage ships; if death results), and 2282 (malicious dumping; if death results)).

The bills drafted to counter gang violence – *H.R. 4472* and *H.R. 1279*,<sup>57</sup> H.R. 970, and S.155 – frequently included two new federal death penalty offenses. One of the proposed offenses would have proscribed the use of interstate facilities with the intent to commit multiple murders and would have been a capital offense where death resulted.<sup>58</sup> The other, modeled after the provision that condemned the use of

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<sup>55</sup> *Wainwright v. Witt*, 469 U.S. 412, 420 (1985), quoting, *Adams v. Texas*, 448 U.S. 38, 45 (1980).

<sup>56</sup> For an inventory of federal capital offenses in effect at the beginning of the 109<sup>th</sup> Congress see, *Capital Punishment: An Overview of Federal Death Penalty Statutes*, CRS Rep. RL30962. The text of the new crimes is appended.

<sup>57</sup> See also, H.Rept. 109-74 (2005).

<sup>58</sup> “Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, or who conspires or attempts to do so, with intent that 2 or more intentional homicides be committed in violation of the laws of any state or the United States shall, in addition to being subject to a fine under this

a firearm during or in relation to a crime of violence or a drug offense, would have outlawed crimes of violence committed during or in relation to a drug trafficking offense and would have made the offense punishable by death if a death results.<sup>59</sup>

A few bills would have made it a federal capital offense to kill a police officer under various circumstances. For example, H.R. 2363 would have outlawed killing a peace officer and fleeing the country, proposed 18 U.S.C. 1121(c). *H.R. 1751*<sup>60</sup> and H.R. 2194 would have prohibited murdering federally funded state or local law enforcement officers, proposed 18 U.S.C. 1123.

Other proposed new federal capital offenses would have included:

- agroterrorism when death results, proposed 18 U.S.C. 2339D (S.1532);<sup>61</sup>
- interference with federal disaster relief efforts if death results, proposed 18 U.S.C. 1370 (H.R. 3728);
- death resulting from a violation of 18 U.S.C. 1590 (trafficking in persons) that involves raping or kidnaping more than one person, proposed 18 U.S.C. 1590 (S. 2437);
- death resulting from a violation of proposed 18 U.S.C. 555 (*S. 2611*) that proscribes evading immigration, customs or agricultural inspection at the border; and
- death resulting from the commission of federal crimes of terrorism, violations of 18 U.S.C. 175 (biological weapons), 175b (biological materials), 229 (chemical weapons), 831 (nuclear materials), or of 42 U.S.C. 2284 (atomic weapons), or conspiracies or attempts to commit such crimes or violations, proposed 18 U.S.C. 2339E (H.R. 3060, H.R. 5939, S. 3882, and S.3848).<sup>62</sup>

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title – (1) if the offense results in the death of any person, be sentenced to death or life in prison. . . .” proposed 18 U.S.C. 1123.

<sup>59</sup> “Whoever commits, or conspires, or attempts to commit, a crime of violence during and in relation to a drug trafficking crime, shall, unless the death penalty is otherwise imposed, in addition and consecutive to the punishment provided for the drug trafficking crime and in addition to being subject to a fine under this title – (1) if the crime of violence results in the death of any person, be sentenced to death or life in prison. . . .” proposed 21 U.S.C. 865.

<sup>60</sup> See also, H.Rept. 109-271 (2005).

<sup>61</sup> “(a) Any person who knowingly develops, produces, stockpiles, transfers, acquires, possesses, or uses any biological agent, toxin, or delivery system in furtherance of or in commission of an act causing damage or harm to, or destruction or contamination of a crop, livestock, raw agricultural commodity, food product, farm or ranch equipment, material, or any other property associated with agriculture, or a person engaged in agricultural activity, that is committed to – (1) intimidate or coerce a civil population; (2) influence the policy of a government by intimidation or coercion; and (3) disrupt interstate commerce or foreign commerce of the United States agricultural industry, shall be fined under this title or imprisoned for any term of years or for life.

“(b) If a death results from a violation of subsection (a) and such killing constitutes a murder (as defined in section 111(a)), the person shall be punished by death, fined under this title, or imprisoned for a term of 10 years to life,” proposed 18 U.S.C. 2339D.

<sup>62</sup> A similar provision appeared in H.R. 3199 as passed by the House but was not included in the final Reauthorization Act. In S. 3882 and S. 3848 the proposed new section is 18 U.S.C. 2339G.

## Capital Punishment for Violation of Existing Crimes

Section 110 of the Reauthorization Act merges 18 U.S.C. 1992 (2000 ed.) (wrecking trains) and 18 U.S.C. 1993 (2000 ed.) (attacks on mass transit) into a new 18 U.S.C. 1992. The train wreck offense was a capital offense; the mass transit offense was not; under the new section both are now capital offenses, 18 U.S.C. 1992.

The most common example of a proposed death penalty sentencing option for an existing crime came from some of the child safety bills, many of which would have made the death penalty available when a child died as a result the commission of a federal crime of violence or some other federal crime:

- S. 956 (crime of violence, proposed 18 U.S.C. 3559(d)),<sup>63</sup>
- H.R. 2388 (same);
- *H.R. 3132* (same);
- *H.R. 4472* (same); and
- H.R. 3860 (violations of 18 U.S.C. ch.110 (sexual exploitation of children), ch. 117 transportation of illegal sexual activity), or 1591 (sex trafficking in children), proposed 18 U.S.C. 2245(b)).

Congress adopted a variation of this theme in the Adam Walsh Child Protection and Safety Act when it amended 18 U.S.C. 2245 to read, “A person who, in the course of an offense under this chapter [chapter 109A], or sections 1591[(sex trafficking in children], 2251, 2251A, 2260, 2421[transportation for sexual purposes], 2422[coercion or enticement to travel for sexual purposes], 2423[transportation followed by sexual abuse of minors], or 2425[interstate transmission of information about a minor], murders an individual shall be punished by death or imprisoned for any term of years or for life.” The section had previously covered only death resulting violations of chapter 109A, 18 U.S.C. 2245 (2000 ed.) which then as now included sections 2251, 2251A and 2260.

The gang bills would have rewritten the federal criminal gang statute (18 U.S.C. 521) to permit imposition of capital punishment for a death-resulting violation of the newly crafted provisions or of the Travel Act (18 U.S.C. 1952): *H.R. 1279*, proposed 18 U.S.C. 521, 1952; S. 155, proposed 18 U.S.C. 523, 1952; *H.R. 4472*, proposed 18 U.S.C. 521, 1952; see also, H.R. 970, proposed 18 U.S.C. 523.<sup>64</sup>

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<sup>63</sup> “A person who is convicted of a federal crime of violence against the person of an individual who has not attained the age of 15 years shall. . . (1) if the crime of violence results in the death of a person who has not attained the age of 15 years, be sentenced to death or life in prison,” proposed 18 U.S.C. 3559(c)(1). Some death-causing federal crimes of violence are already capital offenses, e.g., carjacking (18 U.S.C. 2119); others are not, interference with commerce by threat or violence (18U.S.C. 1951).

<sup>64</sup> A criminal street gang violation is now punishable by imprisonment for not more than 10 years; the maximum penalty remains the same regardless of whether the offense results in a death, 18U.S.C. 521, although the killing would be punishable under other state and/or federal laws, e.g., 1111, 1112 murder and manslaughter within U.S. special maritime and

H.R. 3060, H.R. 5939, S. 3882, and S. 3848 would have made capital offenses of several death-resulting terrorism-related offenses that are now punishable by no more than life imprisonment, specifically, proposed 18 U.S.C. 832 (participating in foreign nuclear or other weapon of mass destruction programs), proposed 18 U.S.C. 2332g (anti-aircraft missiles), proposed 18 U.S.C. 2332h (radiological dispersal devices), proposed 18 U.S.C. 175c (smallpox virus), and proposed 18 U.S.C. 42 U.S.C. 2272 (atomic weapons).

It is possible that the drafters of H.R. 3060 also intended to treat receipt of military training from a foreign terrorist organization, 18 U.S.C. 2339D, like treason and espionage; that is, to make it a capital offense even if no death results from commission of the offense. The statutes that outlaw treason and espionage make them punishable by death or a term of imprisonment, 18 U.S.C. 2381, 794. Section 3591(a)(1) of the federal capital punishment procedures provides that treason or espionage are punishable by death if execution is found justified after considering the mitigating and aggravating factors listed in section 3592. Section 3592(b) lists three aggravating factors for treason and espionage cases, i.e., (1) the offender has a prior espionage or treason conviction, (2) the offense involved a grave risk to national security, and (3) the offense involved a grave risk of death.

Violation of section 2339D is punishable by imprisonment for not more than 10 years, 18 U.S.C. 2339D(a). H.R. 3060 would have made no change in section 2339D, but it would have amended section 3591(a)(1) of the capital procedures provisions to say that violations of sections 2381 (treason), 794 (espionage), or 2339D (terrorist training) might be punished by death if execution were found justified after considering the mitigating and aggravating factors listed in section 3592, proposed 18 U.S.C. 3591(a)(1). It also would have amended the list of 3592(c) aggravating factors to add a fourth factor, i.e., the defense involved substantial planning by the defendant, proposed 18 U.S.C. 3592(c)(4). Assuming the conforming amendment to section 2339D – making it a capital offense – was an oversight and in spite of the proposal’s caption (“addition of terrorism to death penalty offenses not resulting in death”), it is not clear that the courts would permit imposition of the death penalty for a violation of section 2339D unless the offense also involved a first degree murder. The Eighth Amendment’s cruel and unusual punishment clause precludes imposing the death penalty for the rape of an adult woman by an individual already under a sentence of life imprisonment at the time of the rape;<sup>65</sup> it precludes imposition of the death penalty even in the case of murder unless the defendant at least acted intentionally or acted with reckless indifference to human life while participating in a felony involving a murder;<sup>66</sup> and since the Court’s decision in *Furman v. Georgia*, it has never been called upon to approve, and

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territorial jurisdiction. A death causing violation of the Travel Act, 18 U.S.C. 1952, is not punishable by imprisonment for any terms of years or for life, although the same misconduct might be a capital offense under either federal or state law or both, e.g., 18 U.S.C. 1111.

<sup>65</sup> *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

<sup>66</sup> *Tison v. Arizona*, 481 U.S. 137, 156-58 (1987) (“In *Enmund v. Florida* [458 U.S. 782 (1982)], the Court recognized again the importance of mental state, explicitly permitting the death penalty in at least those cases where the felony murderer intended to kill and forbidding it in the case of a minor actor not shown to have had any culpable mental state”).

consequently has never approved, imposition of the death penalty for a crime that did not involve murder.<sup>67</sup>

## Moratorium

H.R. 4923/S. 122 would have repealed federal death penalty provisions and would have barred imposition or execution of any capital sentence for violation of federal law. It made no mention of capital punishment imposed for violation of state law. H.R. 379, on the other hand, would have set a ten year moratorium on imposition and execution of capital sentences in any state in which an individual originally sentenced to death had subsequently been judicially found innocent. It said nothing of capital punishment imposed or executed under federal law.

## Appendix (Statutory Text)

### **Expedited Habeas Procedures in State Capital Cases.**

(Provisions added by the Reauthorization Act in italics)

(Provisions repealed by the Reauthorization Act have been struck)

#### **28 U.S.C. 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment**

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

*(b) Counsel.— This chapter is applicable if – (1) the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265; and (2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.*

~~(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.~~

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<sup>67</sup> “Some legal scholars have concluded that the decisions in *Coker v. Georgia* and *Enmund v. Florida* stand as an absolute bar to imposition of the death penalty in any non-homicide case,” Pinkard, *The Death Penalty for Drug Kingpins: Constitutional and Interpretational Implications*, 24 VERMONT LAW REVIEW 1, 3 (1999), citing *inter alia*, Matura, *When Will It Stop? The Use of the Death Penalty for Non-Homicide Crimes*, 24 JOURNAL OF LEGISLATION 249 (1998); see also, *None Dare Call It Treason: The Constitutionality of the Death Penalty for Peacetime Espionage*, 87 CORNELL LAW REVIEW 820, 851 (2002).

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record –

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer; (2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or (3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial ~~or on direct appeal~~ in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

## **28 U.S.C. 2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions**

(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

(b) A stay of execution granted pursuant to subsection (a) shall expire if – (1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263; (2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or (3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).

## **28 U.S.C. 2263. Filing of habeas corpus application; time requirements; tolling rules**

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled – (1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review; (2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and (3) during an additional period not to exceed 30 days, if – (A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and (B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

#### **28 U.S.C. 2264. Scope of Federal review; district court adjudications**

(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is – (1) the result of State action in violation of the Constitution or laws of the United States; (2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or (3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

#### **28 U.S.C. 2265. Certification and judicial review**

(a) *Certification.* –

(1) *In general.*—If requested by an appropriate State official, the Attorney General of the United States shall determine – (A) whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death; (B) the date on which the mechanism described in subparagraph (A) was established; and (C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).

(2) *Effective date.*—The date the mechanism described in paragraph (1)(A) was established shall be the effective date of the certification under this subsection.

(3) *Only express requirements.*—There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.

(b) *Regulations.*—The Attorney General shall promulgate regulations to implement the certification procedure under subsection (a).

(c) *Review of certification.*—

(1) *In general.*—The determination by the Attorney General regarding whether to certify a State under this section is subject to review exclusively as provided under chapter 158 of this title.

(2) *Venue.*—The Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction over matters under paragraph (1), subject to review by the Supreme Court under section 2350 of this title.

*(3) Standard of review.— The determination by the Attorney General regarding whether to certify a State under this section shall be subject to de novo review.*

**28 U.S.C. 2266. Limitation periods for determining applications and motions**

(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

(b)(1)(A) A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than *450 days after the date on which the application is filed, or 60 days after the date on which the case is submitted for decision, whichever is earlier* ~~180 days after the date on which the application is filed.~~ (B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision. (C)(i) A district court may delay for not more than one additional 30-day period beyond the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application. (ii) The factors, among others, that a court shall consider in determining whether a delay in the disposition of an application is warranted are as follows: (I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice. (II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate briefing within the time limitations established by subparagraph (A). (III) Whether the failure to allow a delay in a case that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence. (iii) No delay in disposition shall be permissible because of general congestion of the court's calendar. (iv) The court shall transmit a copy of any order issued under clause (i) to the Director of the Administrative Office of the United States Courts for inclusion in the report under paragraph (5).

(2) The time limitations under paragraph (1) shall apply to – (A) an initial application for a writ of habeas corpus; (B) any second or successive application for a writ of habeas corpus; and (C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3)(A) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal. (B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence. (B) The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.

(5)(A) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section. (B) The report described in subparagraph (A) shall include copies of the orders submitted by the district courts under paragraph (1)(B)(iv).

(c)(1)(A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed. (B)(i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later than 30 days after the date on which the responsive pleading is filed. (ii) If a petition for rehearing or rehearing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered.

(2) The time limitations under paragraph (1) shall apply to— (A) an initial application for a writ of habeas corpus; (B) any second or successive application for a writ of habeas corpus; and (C) any redetermination of an application for a writ of habeas corpus or related appeal following a remand by the court of appeals en banc or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence. (B) The State may enforce a time limitation under this section by applying for a writ of mandamus to the Supreme Court.

(5) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the courts of appeals with the time limitations under this section.

## **~~2265. Application to State unitary review procedure~~**

~~—(a) For purposes of this section, a "unitary review" procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule~~

of court or statute must provide standards of competency for the appointment of such counsel.

~~—(b) To qualify under this section, a unitary review procedure must include an offer of counsel following trial for the purpose of representation on unitary review; and entry of an order, as provided in section 2261(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.~~

~~—(c) Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State "post-conviction review" and "direct review" in such sections shall be understood as referring to unitary review under the State procedure. The reference in section 2262(a) to "an order under section 2261(c)" shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2263 shall be deferred until a transcript is made available to the prisoner or counsel of the prisoner.~~

### **Capital Offenses Created by the Reauthorization Act.**

#### **18 U.S.C. 2282A. Devices or dangerous substances in waters of the United States likely to destroy or damage ships or to interfere with maritime commerce**

(a) A person who knowingly places, or causes to be placed, in navigable waters of the United States, by any means, a device or dangerous substance which is likely to destroy or cause damage to a vessel or its cargo, cause interference with the safe navigation of vessels, or interference with maritime commerce (such as by damaging or destroying marine terminals, facilities, or any other marine structure or entity used in maritime commerce) with the intent of causing such destruction or damage, interference with the safe navigation of vessels, or interference with maritime commerce shall be fined under this title or imprisoned for any term of years, or for life; or both.

(b) A person who causes the death of any person by engaging in conduct prohibited under subsection (a) may be punished by death.

(c) Nothing in this section shall be construed to apply to otherwise lawfully authorized and conducted activities of the United States Government.

(d) In this section:

(1) The term "dangerous substance" means any solid, liquid, or gaseous material that has the capacity to cause damage to a vessel or its cargo, or cause interference with the safe navigation of a vessel.

(2) The term "device" means any object that, because of its physical, mechanical, structural, or chemical properties, has the capacity to cause damage to a vessel or its cargo, or cause interference with the safe navigation of a vessel.

#### **18 U.S.C. 2283. Transportation of explosive, biological, chemical, or radioactive or nuclear materials**

(a) In General- Whoever knowingly transports aboard any vessel within the United States and on waters subject to the jurisdiction of the United States or any

vessel outside the United States and on the high seas or having United States nationality an explosive or incendiary device, biological agent, chemical weapon, or radioactive or nuclear material, knowing that any such item is intended to be used to commit an offense listed under section 2332b(g)(5)(B), shall be fined under this title or imprisoned for any term of years or for life, or both.

(b) Causing Death- Any person who causes the death of a person by engaging in conduct prohibited by subsection (a) may be punished by death.

(c) Definitions- In this section:

(1) BIOLOGICAL AGENT- The term “biological agent” means any biological agent, toxin, or vector (as those terms are defined in section 178).

(2) BY-PRODUCT MATERIAL- The term “by-product material” has the meaning given that term in section 11(e) of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)).

(3) CHEMICAL WEAPON- The term “chemical weapon” has the meaning given that term in section 229F(1).

(4) EXPLOSIVE OR INCENDIARY DEVICE- The term “explosive or incendiary device” has the meaning given the term in section 232(5) and includes explosive materials, as that term is defined in section 841(c) and explosive as defined in section 844(j).

(5) NUCLEAR MATERIAL- The term “nuclear material” has the meaning given that term in section 831(f)(1).

(6) RADIOACTIVE MATERIAL- The term “radioactive material” means –

(A) source material and special nuclear material, but does not include natural or depleted uranium;

(B) nuclear by-product material;

(C) material made radioactive by bombardment in an accelerator; or

(D) all refined isotopes of radium.

(8) SOURCE MATERIAL- The term “source material” has the meaning given that term in section 11(z) of the Atomic Energy Act of 1954 (42 U.S.C. 2014(z)).

(9) SPECIAL NUCLEAR MATERIAL- The term “special nuclear material” has the meaning given that term in section 11(aa) of the Atomic Energy Act of 1954 (42 U.S.C. 2014(aa)).

## **18 U.S.C. 2291. Destruction of vessel or maritime facility**

(a) Offense- Whoever knowingly –

(1) sets fire to, damages, destroys, disables, or wrecks any vessel;

(2) places or causes to be placed a destructive device, as defined in section 921(a)(4), destructive substance, as defined in section 31(a)(3), or an explosive, as defined in section 844(j) in, upon, or near, or otherwise makes or causes to be made unworkable or unusable or hazardous to work or use, any vessel, or any part or other materials used or intended to be used in connection with the operation of a vessel;

(3) sets fire to, damages, destroys, or disables or places a destructive device or substance in, upon, or near, any maritime facility, including any aid to navigation, lock, canal, or vessel traffic service facility or equipment;

(4) interferes by force or violence with the operation of any maritime facility, including any aid to navigation, lock, canal, or vessel traffic service facility or equipment, if such action is likely to endanger the safety of any vessel in navigation;

(5) sets fire to, damages, destroys, or disables or places a destructive device or substance in, upon, or near, any appliance, structure, property, machine, or apparatus, or any facility or other material used, or intended to be used, in connection with the

operation, maintenance, loading, unloading, or storage of any vessel or any passenger or cargo carried or intended to be carried on any vessel;

(6) performs an act of violence against or incapacitates any individual on any vessel, if such act of violence or incapacitation is likely to endanger the safety of the vessel or those on board;

(7) performs an act of violence against a person that causes or is likely to cause serious bodily injury, as defined in section 1365(h)(3), in, upon, or near, any appliance, structure, property, machine, or apparatus, or any facility or other material used, or intended to be used, in connection with the operation, maintenance, loading, unloading, or storage of any vessel or any passenger or cargo carried or intended to be carried on any vessel;

(8) communicates information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safety of any vessel in navigation; or

(9) attempts or conspires to do anything prohibited under paragraphs (1) through (8), shall be fined under this title or imprisoned not more than 20 years, or both.

(b) Limitation- Subsection (a) shall not apply to any person that is engaging in otherwise lawful activity, such as normal repair and salvage activities, and the transportation of hazardous materials regulated and allowed to be transported under chapter 51 of title 49.

(c) Penalty- Whoever is fined or imprisoned under subsection (a) as a result of an act involving a vessel that, at the time of the violation, carried high-level radioactive waste (as that term is defined in section 2(12) of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10101(12)) or spent nuclear fuel (as that term is defined in section 2(23) of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10101(23))), shall be fined under this title, imprisoned for a term up to life, or both.

(d) Penalty When Death Results- Whoever is convicted of any crime prohibited by subsection (a) and intended to cause death by the prohibited conduct, if the conduct resulted in the death of any person, shall be subject also to the death penalty or to a term of imprisonment for a period up to life.

(e) Threats- Whoever knowingly and intentionally imparts or conveys any threat to do an act which would violate this chapter, with an apparent determination and will to carry the threat into execution, shall be fined under this title or imprisoned not more than 5 years, or both, and is liable for all costs incurred as a result of such threat.

## **18 U.S.C. 2290. Jurisdiction and scope**

(a) Jurisdiction- There is jurisdiction, including extraterritorial jurisdiction, over an offense under this chapter if the prohibited activity takes place –

(1) within the United States and within waters subject to the jurisdiction of the United States; or

(2) outside United States and –

(A) an offender or a victim is a national of the United States (as that term is defined under section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)));

(B) the activity involves a vessel in which a national of the United States was on board; or

(C) the activity involves a vessel of the United States (as that term is defined under section 2 of the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1903)).

(b) Scope- Nothing in this chapter shall apply to otherwise lawful activities carried out by or at the direction of the United States Government.

### **Adam Walsh Child Protection and Safety Act Amendments.**

(Provisions added in italics)

(Provisions repealed have been struck)

#### **18 U.S.C. 2245. Sexual abuse resulting in death**

(a) *IN GENERAL.* – A person who, in the course of an offense under this chapter [18 U.S.C. 2241-2248 relating to sexual abuse], *or section 1591 [sex trafficking of children or by force, fraud, or coercion], 2251[sexual exploitation of children], 2251A [selling or buying children], 2260 [production of sexually explicit depictions of a minor for importation into the U.S.], 2421 [transportation for illicit sexual purposes], 2422 [coercion and enticement for illicit sexual purposes], 2423 [transportation for illicit sexual purposes involving minors], or 2425 [use of interstate facilities to transmit information about a minor], murders an individual engages in conduct that results in the death of a person* shall be punished by death or imprisoned for any term of years or for life.

#### **18 U.S.C. 3592. Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified**

\* \* \*

(c) **Aggravating factors for homicide.** – In determining whether a sentence of death is justified for an offense described in section 3591(c)(2), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) **Death during commission of another crime.** – The death or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of , an offense under . . . *section 2245 (offenses resulting death).* . . . of this title . . . .