The "Issues Resources Guide" is designed to aid you in parsing through the supplementary materials and articles related to each case narrative. Below you will find the abstracts or summarizing excerpts of select articles for your reference.

EXPANSION OF THE FEDERAL DEATH PENALTY

RESOURCE GUIDE FOR MANAGING CAPITAL CASES, VOLUME I: FEDERAL DEATH PENALTY TRIALS

This 59-page guide describes the statutes, case law, and policies applicable to federal death penalty case-management issues such as appointment of counsel, case budgeting, and jury selection, and summarizes procedures judges have used in capital cases at each stage of the proceedings. Although information in the guide is generally current to the revision date that follows the title, some portions may become dated as case law develops and new approaches emerge to managing federal death penalty cases. The authors are updating this guide's cost data, which are outdated, especially as to mitigation experts and investigators.

THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000)
United States Department of Justice

This Survey provides information regarding the federal death penalty system since the enactment of the first modern capital punishment statute in 1988. The Survey explains the Department of Justice's internal decision-making process for deciding whether to seek the death penalty in individual cases, and presents statistical information focusing on the racial/ethnic and geographic distribution of defendants and their victims at particular stages of that decision-making process.

WHEN THE FEDERAL DEATH PENALTY IS "CRUEL AND UNUSUAL"
Michael J. Zydney Mannheimer

Recent changes to the way the U.S. Department of Justice decides whether to pursue capital charges have made it more likely that the federal death penalty will be sought in cases in which the criminal conduct occurred within States that do not authorize capital punishment for any crime. As a result, since 2002 [at time of print], five people have been sentenced to death in federal court for conduct that occurred in States that do not authorize the death penalty. This state of affairs is in serious tension with the Eighth Amendment's proscription against "cruel and unusual punishments." A complete understanding of the Bill of Rights can be achieved only by placing primary emphasis on the views of the Anti-Federalists, who conditioned ratification of the Constitution on the inclusion of such a Bill. Such an account of the Bill of Rights recognizes that, with respect to most if not all of its provisions, "structural" and "individual rights" concerns are intertwined. That is, these provisions tie the protection of individual rights to the preservation of state sovereignty from the danger of federal encroachment.

THE FUTURE OF THE FEDERAL DEATH PENALTY
Rory K. Little

... One of the many threads comprising the recent past and likely future of the federal death penalty is the story of Juan Raul Garza. ... Thus, an unusual convergence of diverse political camps may now combine to question the federal death penalty: an uneasy alliance between opponents of federal capital punishment and those opposed to the phenomena known as "federalization" of crime. ... Political and legislative avenues of attack are likely the most hopeful course for opponents of the federal death penalty because the Supreme Court implicitly approved the legality of the statutory structure in 1999, when it affirmed, albeit 5- 4, the death sentence in the first federal capital case to be argued before the Court in over fifty years, *Jones v. United States*. Although the Court was closely divided regarding Jones' death sentence in the face of case- specific issues, no Justice on either side questioned the general validity of the underlying federal death penalty framework. ... Persons familiar with stateside capital punishment regimes are often surprised to learn of the very different way in which the federal death penalty regime is structured. ... According to statistics maintained by the Federal Death Penalty Resource Counsel Project, 60% of white defendants authorized for federal capital prosecution have been permitted to plead to life sentences, as compared to only 41% of black defendants....

RACIAL AND GEOGRAPHICAL DISPARITIES IN THE FEDERAL DEATH PENALTY

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THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW
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This report completes a survey and assessment of the federal death penalty system. At the direction of Attorney General Janet Reno, a study of decision-making processes and demographic factors in federal capital cases was carried out last year. The Department of Justice published an initial report setting out the results of this study on September 12, 2000 (hereafter, the "Sept. 12 report"). Attorney General Reno wished to supplement the information that was available at the time of the Sept. 12 report, and the Department undertook further information gathering and analysis. Noting the pendency of this follow-up study, President Clinton delayed the first scheduled federal execution in the modern period, and directed that the results of the Department's analysis be reported to the President by the end of April 2001.

RACE AND THE DECISION TO SEEK THE DEATH PENALTY IN FEDERAL CASES
Stephen P. Klein, Richard A. Berk, Laura J. Hickman (RAND Corporation)

This study examined the relationship between the federal government’s decision to seek the death penalty in a case and that case’s characteristics, including the defendant’s and victim’s races. This research began by identifying the types of data that would be appropriate and feasible to gather. Next, case characteristics were abstracted from Department of Justice Capital Case Unit (CCU) files. Defendant- and victim-race data were obtained from electronic files. Finally, three independent teams used these data to investigate whether charging decisions were related to defendant or victim race. The teams also examined whether these decisions were related to case characteristics and geographic area. There are large race effects in the raw data that are of concern. However, all three teams found that controlling for nonracial case characteristics eliminated these effects, and that these characteristics could predict the seek decision with 85 to 90 percent accuracy. These findings support the view that decisions to seek the death penalty were driven by heinousness of crimes rather than by race. Nevertheless, these findings are not definitive because of the difficulties in determining causation from statistical modeling of observational data.

INTERNATIONAL LAW AND OPINION

UNITED STATES OF AMERICA: NO RETURN TO EXECUTION – THE US DEATH PENALTY AS A BARRIER TO EXTRADITION
Amnesty International

Since 1990, around 40 countries have abolished the death penalty in law. In the same period more than 600 men and women have been killed in execution chambers in the United States of America (USA). Today, as some 3,700 prisoners await execution in the USA, 109 countries have abandoned capital punishment in law or practice. In other words, a clear majority of countries have concluded that justice is not to be found at the hands of state executioners. The USA's growing isolation on this fundamental human rights issue has significant consequences for its foreign relations.

CAPITAL PUNISHMENT AND AMERICAN EXCEPTIONALISM
Carol S. Steiker

In 1931, the year before his appointment to the U.S. Supreme Court, Benjamin Cardozo predicted that "[p]erhaps the whole business of the retention of the death penalty will seem to the next generation, as it seems to many even now, an anachronism too discordant to be suffered, mocking with grim reproach all our clamorous professions of the sanctity of life." The operative word here has turned out to be perhaps, given that here we are in the United States almost three-quarters of a century later and still going strong. But, ironically, Cardozo's prediction proved more or less true for the rest of the Western industrialized world. Soon after World War II and the spate of executions of wartime collaborators that ensued, the use of the death penalty began to decline in Western Europe, and capital punishment for ordinary crimes has at this point been abolished, either de jure or de facto, in every single Western industrialized nation except for the United States.

THE DEATH PENALTY IN THE UNITED STATES: FOLLOWING THE EUROPEAN LEAD?
Nora V. Demleitner

…. Despite the declaration of a "war" on terrorism by the United States, a number of European countries have announced that they will not extradite alleged terrorists if the suspects are threatened by a death sentence. In addition, they will not provide specific intelligence information on defendants charged with the death penalty. …This Article provides a short historical overview of the death penalty abolitionist movement in various European states, and highlights how after largely parallel paths, during the 1970s Europe and the United States parted ways. Next it discusses the various ways in which individual European states, the European human rights machinery and the European Union (EU) have indicated their disagreement and disenchantment with the United States over the issue of the death penalty….

PROSECUTORIAL DISCRETION

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SUPERVISING FEDERAL CAPITAL PUNISHMENT: WHY THE ATTORNEY GENERAL SHOULD DEFER WHEN U.S. ATTORNEYS RECOMMEND AGAINST THE DEATH PENALTY
Judge John Gleeson

In this Essay, I will focus on two issues. The first is the goal of uniformity, and whether it is either achievable or desirable. Though the Attorney General must formulate and implement national law enforcement policies, there are nonetheless many reasons to defer to the decisions of the U.S. Attorneys in particular cases, even if doing so means that the federal death penalty is not sought in some districts like it is sought in others. The Attorney General should overrule U.S. Attorneys to require them to seek the death penalty only in exceptional circumstances, to vindicate specific and narrow federal interests that are not present in the garden-variety murder cases in which the Attorney General has recently acted.

RACE AND THE FEDERAL DEATH PENALTY: A NONEXISTENT PROBLEM GETS WORSE
Kevin McNally

Under Attorney General Ashcroft, the probability of being targeted for a federal capital prosecution is: 40% (16 of 40) if you are a black defendant who kills a white victim, 28% (40 of

142) if you are a black defendant who kills a non-white victim, 31% (56 of 182) if you are a black defendant who kills anyone, 36% (26 of 72) if you are a white defendant who kills anyone, 17% (18 of 105) if you are an Hispanic defendant who kills anyone, and 27% (103 of 381) if you are any federal defendant who kills any victim. ... In his testimony at the June 2001 Senate Hearing on the Federal Death Penalty, Deputy Attorney General Larry Thompson said this, and little more, about the race and ethnic background of victims in murder cases selected for the federal death penalty....

THE TEXAS CLEMENCY MEMOS
Alan Berlow

As the legal counsel to Texas Governor George W. Bush, Alberto R. Gonzales—now the White House counsel, and widely regarded as a likely future Supreme Court nominee—prepared fifty-seven confidential death-penalty memoranda for Bush's review. Never before discussed publicly, the memoranda suggest that Gonzales repeatedly failed to apprise Bush of some of the most salient issues in the cases at hand.

THE EFFECT OF RACE, GENDER, AND LOCATION ON PROSECUTORIAL DECISIONS TO SEEK THE DEATH PENALTY IN SOUTH CAROLINA
Michael J. Songer and Isaac Unah

... These decisions animate and shape the nature of capital prosecution and punishment in the United States. ... Paternoster found that the odds of a prosecutor charging a defendant with capital murder in South Carolina were 9.6 times greater in white victim cases than in black victim cases. ... Hypothesis 1: Prosecutors are more likely to seek the death penalty in white victim cases than in black victim cases. ... Streib's statistics demonstrate that female homicide defendants are less likely to face the death penalty than male defendants, but the data do not address the relative severity of crimes committed by men and women. ... The death penalty data file was merged with the SHR murder data to create a comprehensive database of each South Carolina homicide and its legal disposition. ... But the data suggest that the nature of the relationship between defendant and victim does impact the prosecutorial charging decision. ... Murders incident to robbery, burglary, larceny, or motor vehicle theft were combined into a single variable denoted "murder with theft." ... South Carolina prosecutors are 3 times more likely to seek the death penalty in white victim cases than in black victim cases. ...

PROSECUTORIAL DISCRETION IN REQUESTING THE DEATH PENALTY: A CASE OF VICTIM-BASED RACIAL DISCRIMINATION
Raymond Paternoster

Data from 300 homicides involving an aggravating felony were examined to determine what factors influence the prosecutor’s decision to seek the death penalty. It was found that the race of the victim was significantly related to the decision to seek the death penalty even when several legally relevant factors were taken into account. The data also revealed that black killers of

whites were more likely and black killers of blacks less likely to have the death penalty requested. A breakdown of homicides into those involving a single aggravating felony and those involving multiple felonies revealed that racial effects were stronger in the former category. There was some evidence that this difference in the effects of race reflected a different threshold of tolerance for white and black murders. Black victim homicides resulted in a death request only when they crossed a threshold of aggravation that was higher than that found for white deaths.

RACE AND PROSECUTORIAL DISCRETION IN HOMICIDE CASES
Michael L. Radelet; Glenn L. Pierce

This paper examines the cases of 1017 homicide defendants in Florida. Two main data sources are used: the police department's classification of the case, as found in the FBI's Supplemental Homicide Reports, and the prosecutor's classification, as determined by court records. Each data set characterizes the homicide as involving felonious circumstances, possible felonious circumstances, or nonfelonious circumstances. Attention is focused on cases that differ in their police and prosecutorial classifications. Results indicate that differences in these classifications are related to defendant's and victim's race, with blacks accused of killing whites the most likely to be 'upgraded' and the least likely to be 'downgraded.' The process of upgrading is then shown to significantly increase the likelihood of the imposition of a death sentence in cases with white victims where no plea bargain is offered.

WHEN PROSECUTORS CONTROL CRIMINAL COURT DOCKETS: DISPATCHES ON HISTORY AND POLICY FROM A LAND TIME FORGOT
Andrew M. Siegel

... Incarcerated defendants who might otherwise exercise their right to a jury trial routinely plead guilty instead of waiting in jail until the solicitor deigns to bring their cases to a court's attention. ... This appearance system bears a striking resemblance to the compromise system enacted in North Carolina as a result of the clamor against pure prosecutorial docket control. ... For those whose definition of wrongful conviction focuses narrowly on the question of factual innocence, the most troubling aspect of calendar manipulation is that it systematically brings defendants to court with cases that are under-investigated and under-prepared, thereby increasing the chance that an innocent person will be convicted. ... Aggressive manipulation of the calendar by a prosecutor has adverse consequences for that solicitor's ability to perform his duties that must be balanced against the strategic advantages gained. ... The excessive noticing of defendants for court appearances in a system of prosecutorial docket control is one of many factors that might make it more likely that factually innocent defendants will plead guilty out of frustration or calculation. ... As a consequence, the bulk of judges in South Carolina are culturally indisposed to challenge the authority of solicitors, while those who might be willing to exert stronger oversight over prosecutors must often back down for pragmatic reasons. ...

JURY INSTRUCTIONS: JURORS' UNDERSTANDINGS AND MISUNDERSTANDINGS

THE DEADLY PARADOX OF CAPITAL JURORS
Theodore Eisenberg, Stephen P. Garvey, Martin T. Wells

We examine support for the death penalty among a unique group of respondents: 187 citizens who actually served as jurors in capital trials in South Carolina. We find that capital jurors support the death penalty as much as, if not more than, members of the general public. Yet capital jurors, like poll respondents, harbor doubts about the penalty's fairness. Moreover, jurors—black jurors and Southern Baptists in particular—are ready to abandon their support for the death penalty when the alternative to death is life imprisonment without the possibility of parole, especially when combined with a requirement of restitution. Support for the death penalty thus exists side-by-side with doubts about its fairness and a distinct preference for some alternative to it. What explains this deadly paradox? We hypothesize that the paradox arises where democratic politics fail to make life imprisonment without parole one of the alternatives to death, or where democratic education fails to inform or to persuade jurors that capital defendants sentenced to life imprisonment will really remain in prison for the rest of their lives.

FORECLOSED IMPARTIALITY IN CAPITAL SENTENCING
William J. Bowers, Marla Sandys, and Benjamin D. Steiner

The bifurcation of the capital trial into separate guilt and sentencing phases is the most decisive and uniform change in the administration of the death penalty under the capital statutes approved in *Gregg v. Georgia* and companion cases. By law, jurors make the life or death sentencing decision at a separate penalty trial after the determination of guilt in accordance with carefully drawn sentencing instructions. These sentencing instructions are intended to guide the exercise of sentencing discretion by articulating those aggravating and mitigating considerations that are relevant to this decision. In this way, the exercise of capital sentencing discretion is to be guided and thus freed of constitutionally impermissible caprice, arbitrariness, and discrimination. The Supreme Court has underscored the importance of a separate and independent sentencing decision in *Morgan v. Illinois*, requiring that capital jurors give effect to the statutory considerations that are appropriate for the sentencing decision.

RACIAL DISCRIMINATION AND THE DEATH PENALTY IN THE POST- FURMAN ERA: AN EMPIRICAL AND LEGAL OVERVIEW, WITH RECENT FINDINGS FROM PHILADELPHIA
David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt

... Racial discrimination and the death penalty has been a matter of scholarly interest since the 1930s. ... The theory underlying this rule is that a decision either to seek or impose a death sentence that bears a substantial risk of being influenced by the race of the defendant or victim is arbitrary within the meaning of the Eighth Amendment because it is not based on the criminal culpability of the defendant (the only constitutionally permissible basis for a sentence of death). ... Moreover, for the reasons stated in section D.1 below and in Appendix C (section C), we consider the latter results, which are based on an analysis that includes hung cases, to be more

reliable than the race-of-victim estimate based on the model that excludes the hung cases. ... In particular, the empirical findings from Philadelphia and New Jersey reported in this Article, indicate that the problem of arbitrariness and discrimination in the administration of the death penalty is a matter of continuing concern and is not confined to southern jurisdictions. ...

THE CAPITAL JURY PROJECT: RATIONALE, DESIGN, AND PREVIEW OF EARLY FINDINGS
William J. Bowers

Now underway in fourteen states, the Capital Jury Project ("CJP") is a multidisciplinary study of how capital jurors make their life or death sentencing decisions. Drawing upon three-to-four hour interviews with 80-120 capital jurors in each of the participating states, the CJP is examining the extent to which jurors' exercise of capital sentencing discretion is still infected with, or now cured of, the arbitrariness which the United States Supreme Court condemned in *Furman v. Georgia*, and the extent to which the principal kinds of post-*Furman* guided discretion statutes are curbing arbitrary decision-making – as the Court said they would in *Gregg v. Georgia* and its companion cases.

AGGRAVATION AND MITIGATION IN CAPITAL CASES: WHAT DO JURORS THINK?
Stephen P. Garvey

... The Capital Juror Project in South Carolina interviewed jurors who sat in forty-one capital murder cases. ... So, for example, while the state can require a defendant to prove the existence of a mitigating factor by a preponderance of the evidence, it cannot stop him from presenting evidence to the jury that, for instance, shows his comparatively minor role in the events leading up to the murder. ... Consequently, jurors with principled reservations against the death penalty usually do not make it onto capital juries. ... Death-case jurors were more likely than life-case jurors to report that a particular aggravating or mitigating circumstance would make them just as likely to vote for death, whereas life-case jurors were more likely than death-case jurors to report that a particular aggravating or mitigating circumstance would make them more or less likely to vote for death. ... For example, the well-known "Baldus study" of Georgia's capital sentencing system found that the race of the victim exercised a strong influence on prosecutorial charging decisions. ...

MISGUIDED INSTRUCTIONS: DO JURORS ACCURATELY UNDERSTAND THE LAW IN DEATH PENALTY TRIALS?
Chasity Anne Stoots-Fonberg

The Sixth Amendment of the U.S. Constitution guarantees individual's right to trial by an impartial jury. However, empirical research indicates that the jury system is flawed, especially regarding judicial sentencing instructions. More specifically, jurors frequently misunderstand or misinterpret State patterned instructions. On a more encouraging note, there is evidence that comprehension of jury instructions can be improved. Thus, this research assessed improvement

in juror comprehension using revised sentencing instructions. For the current investigation, participants included 201 volunteers called for jury duty in Western Tennessee. Data were generated via a questionnaire, which allowed for the collection of information relating to participant's understanding of the sentencing instructions. Findings suggest that comprehension is low when jurors are only exposed to instructions written by the State. Furthermore, when jurors were given a more detailed explanation of certain problematic terminology, comprehension significantly increased. Policy implications of this research and directions for future improvement are discussed.

THE ROCKY ROAD TO LEGAL REFORM: IMPROVING THE LANGUAGE OF JURY INSTRUCTIONS
Peter Tiersma

One of the fundamental principles of our justice system is that the judge decides what the law is and the jury applies that law to the facts. We all realize that this distinction is sometimes a fiction, or in any event, an exaggeration. We know—or at least strongly suspect—that jurors sometimes ignore the law. Likewise, judges can strongly influence determinations of fact, most notably by excluding certain evidence. All of this presupposes that we can neatly and facts in the first place.

STILL SINGULARLY AGONIZING: LAW'S FAILURE TO PURGE ARBITRARINESS FROM CAPITAL SENTENCING
William J. Bowers and Wanda D. Foglia

In the following pages, we will briefly introduce the CJP (Capital Jury Project) and review seven different problems with the capital jury decision-making process. We will describe how the CJP results replicated findings from prior studies and provide additional evidence of: (1) premature decision making; (2) bias in jury selection; (3) failure to comprehend instructions; (4) erroneous beliefs that death is required; (5) evasion of responsibility for the punishment decision; (6) racial influence in juror decision making; and (7) underestimation of non-death penalty alternatives.

I DID NOT WANT TO KILL HIM BUT THOUGHT I HAD TO: IN LIGHT OF PENRY II'S INTERPRETATION OF BLYSTONE, WHY THE CONSTITUTION REQUIRES JURY INSTRUCTIONS ON HOW TO GIVE EFFECT TO RELEVANT MITIGATING EVIDENCE IN CAPITAL CASES
David Barron

Death is unique because of its irrevocability. Therefore, one of the most important decisions a person can make is whether another individual should live or die. Although mistaken decisions could cost people their lives, throughout history juries have been free to impose the death penalty on any individual convicted of a capital crime who they believed deserved a sentence of death. Over the past thirty years, however, the Supreme Court has placed restrictions on who can be sentenced to death. In doing so, the Supreme Court clearly stated that only very serious crimes

such as murder permit the jury to impose a death sentence. As a result, the Supreme Court imposed requirements that death penalty statutes narrow the number of people eligible for a sentence of death, and provide for an individualized sentencing scheme. An individualized sentencing scheme requires jurors, prior to sentencing a defendant to death, to consider both "aggravating" circumstances—factors making the crime worse—and "mitigating" circumstances—factors making either the crime or the defendant appear less heinous.

DEATH BY DEFAULT: AN EMPIRICAL DEMONSTRATION OF FALSE AND FORCED CHOICES IN CAPITAL SENTENCING
William J. Bowers and Benjamin D. Steiner

How capital jurors should make the life or death sentencing decision is a critical issue at the core of modern capital jurisprudence. Since its 1976 decisions in *Gregg v. Georgia*, *Proffitt v. Florida*, and *Jurek v. Texas* authorized the states' return to capital punishment, the United States Supreme Court has grappled with the two-sided question: To what extent can we trust jurors to understand and apply the law correctly and to what extent must they be explicitly directed in their decision-making? Once the Court has determined that some constraints are necessary, it then must decide whether they are needed only to correct misbehavior or, more fundamentally, to shape the constitutional contours of capital sentencing. What the Court decides to do, or not to do, has often depended on untested assumptions about how jurors make the critical punishment decision. Such empirical assumptions need to be informed, and sometimes revised in light of the kind of data presented in this article.

DEADLY CONFUSION: JUROR INSTRUCTIONS IN CAPITAL CASES
Theodore Eisenberg & Martin T. Wells

... Yet our interviews with jurors who served in South Carolina capital cases indicate that this nightmare is a reality. ... The fifty-page interview instrument, designed and tested by the Capital Jury Project, covered all phases of the guilt and sentencing trials. ... Table 2 presents juror responses to three principal interview questions about their impressions of the role of dangerousness and the time defendants might serve if a death sentence were not imposed. ... If an aggravating circumstance is found by the jury, but no death sentence is imposed, the minimum period of incarceration before parole is thirty years. ... Second, what we know about juror behavior contemporaneous with the capital sentencing decision suggests that expected time in jail influences jurors in the direction we observe. ... Juror confusion, particularly about the mitigating circumstance burden of proof, cannot simply be attributed to inability to grasp legal terminology and concepts. ... The data suggest that the sentencing phase of a capital trial commences with a substantial bias in favor of death. ... The empirical data remove any support for the view that, on balance, keeping juries ignorant about parole protects defendants in capital cases. ... Since the 1976 capital punishment cases, state statutes requiring guided discretion in sentencing have dominated death penalty adjudication. ...

CORRECTING DEADLY CONFUSION: RESPONDING TO JURY INQUIRIES IN CAPITAL CASES
Stephen P. Garvey, Sheri Lynn Johnson, Paul Marcus

Members of a capital jury who ask the trial judge to clarify the sentencing instructions he had given them probably didn't understand the instructions. Why else would they have asked the question? Moreover, the trial judge might think it best to clarify matters, since the first effort had apparently left the jury confused. But the judge presiding over Lonnie Weeks' capital murder trial thought differently. The jurors there asked if they were required to sentence Weeks to death if they believed his crime was heinous, or if they believed Weeks himself constituted a continuing threat to society. But rather than answering the question, or otherwise making sure the jurors understood the point, the trial judge simply told them to go back and read the instruction—the very same instruction that prompted their question in the first place. The jury sentenced Weeks to death. Weeks appealed. He worked his way through the Virginia courts on direct appeal, and then through the federal courts in habeas corpus proceedings. He lost at every step. He now finds himself in the United States Supreme Court….