Memorandum

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Subject	Date
Death Penalty	August 3, 1993

To	From
Philip B. Heymann Deputy Attorney General	Daniel L. Koffsky DLK Acting Assistant Attorney General Office of Legal Counsel

At the request of your Office, we have prepared an analysis of the constitutional issues raised by proposals to make certain non-homicidal offenses punishable by death. Our analysis is attached. Also attached is a brief comment on section 3591(3)(D) of H.R. 3371 (1991).

Attachments

August 2, 1993

ISSUES PAPER FOR THE DEPUTY ATTORNEY GENERAL

Re: Constitutionality of Imposing Capital Punishment for Drug Kingpin Offenses

This responds to your request for an issues paper examining the constitutionality of imposing a death penalty for certain offenses related to trafficking in illegal drugs when the offender does not kill. In the following, we consider some of the difficult issues raised by this unprecedented application of the death penalty.

I
DESCRIPTION OF PROPOSED DRUG KINGPIN OFFENSES FOR WHICH CAPITAL PUNISHMENT COULD BE IMPOSED

We have reviewed the provisions of the "Death Penalty for Drug Kingpins Act of 1991," as it is contained in the House conference committee version of H.R. 3371 from the 102d Congress. Although this bill was not enacted, we are informed that its provisions with respect to imposing capital punishment on drug kingpins are expected to be resubmitted without substantive change as part of a crime bill that will be considered by the Congress this year.

The bill would create two death-eligible offenses, not contained in current law, relating to trafficking in illegal drugs. First, it would authorize imposition of the death penalty upon certain large-scale illegal drug traffickers. Current law provides a mandatory minimum sentence of life imprisonment if a defendant is convicted of engaging in a continuing criminal enterprise involving illegal drugs; the defendant is a leader, organizer, or principal administrator of the enterprise; and the enterprise, during any one-year period, either traffics in specified, massive amounts of illegal drugs or receives $10 million or more in gross revenues. See 21 U.S.C. § 848. The new provisions would make a defendant currently subject to this mandatory life sentence also subject to the death penalty if the enterprise involved either twice the amount of illegal drugs or

twice the amount of money for which the mandatory life sentence is currently prescribed.[1]

Second, the bill would authorize the death penalty if the defendant is a leader, organizer, or principal administrator of a continuing criminal enterprise involving illegal drugs, and the defendant "in order to obstruct the investigation or prosecution of the enterprise or an offense involved in the enterprise, attempts to kill or knowingly directs, advises, authorizes, or assists another to attempt to kill any public officer, juror, witness, or member of the family or household of such a person."[2]

In order to impose a death sentence, at least one of several prescribed aggravating factors would have to be established.[3]

II
AN OVERVIEW OF THE EIGHTH AMENDMENT'S REQUIREMENT OF PROPORTIONALITY WITH RESPECT TO THE IMPOSITION OF CAPITAL PUNISHMENT

The Supreme Court has held that imposition of the death penalty violates the Eighth Amendment's Cruel and Unusual Punishment Clause if it "is disproportionate in relation to the crime for which it is imposed." Gregg v. Georgia, 428 U.S. 153, 187 (1976) (principal opinion). The reason is that "death as a punishment is unique in its severity and irrevocability." Id.

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[1] For convenience, we will refer to this offense as the "large-scale trafficking offense."

[2] We will refer to this offense as the "obstruction of justice offense." When referring to it and the large-scale trafficking offense collectively, we will use the term "drug kingpin offenses."

[3] These are: (1) having a previous conviction of an offense resulting in the death of a person for which a sentence of death or life imprisonment was authorized; (2) having a previous conviction of two or more other serious offenses, for which a year more of imprisonment was authorized, involving either illegal drug trafficking or serious bodily injury or death to another person; (3) having a previous serious drug felony conviction; (4) using a firearm as part of the offense at issue or as part of a continuing criminal enterprise; (5) distributing illegal drugs to persons under the age of 21; (6) distributing illegal drugs near a school; (7) using minors in illegal drug trafficking; and (8) distributing illegal drugs mixed with a potentially lethal adulterant when the defendant was aware of the presence of the adulterant.

Thus, it may not be applied unless a crime is "so grievous an affront to humanity that the only adequate response may be the penalty of death." Id. at 184 (footnote omitted). As an "extreme sanction" it is only "suitable to the most extreme of crimes." Id. at 187. See Tison v. Arizona, 481 U.S. 137, 148, 149 (1987); Enmund v. Florida, 458 U.S. 782, 797-98 (1982); Coker v. Georgia, 433 U.S. 584, 597-98 (1977) (plurality opinion); see also Solem v. Helm, 463 U.S. 277, 294 (1983) ("[T]he death penalty is different from other punishments in kind rather than degree.").

On the other hand, the Court will not lightly overturn a legislative judgment that the death penalty may be imposed for an offense:

> [I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Gregg, 428 U.S. at 175; see id. at 176 ("The deference we owe to the decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for these are peculiarly questions of legislative policy.") (citations and internal quotation marks omitted); Stanford v. Kentucky, 492 U.S. 361, 373 (1989) ("It is not the burden of Kentucky and Missouri . . . to establish a national consensus approving what their citizens voted to do; rather it is the 'heavy burden' of petitioners, Gregg v. Georgia, . . . to establish a national consensus against it.") (emphasis in original).

The Supreme Court has considered three significant proportionality challenges to a death sentence in modern times.[4] In Coker v. Georgia, 433 U.S. 584 (1977), the Court held that the death penalty was "grossly disproportionate and excessive punishment" for the defendant's crime of raping an adult woman, and was "therefore forbidden by the Eighth Amendment as cruel and unusual punishment." 433 U.S. at 592 (plurality opinion); id. at 601 (Powell, J., concurring in part in the judgment and

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[4] The only earlier case of which we are aware is Kawakita v. United States, 343 U.S. 717, 745 (1954) (declining to set aside a death sentence for treason as disproportionate to the offense).

dissenting in part). The plurality[5] examined state legislative enactments and jury sentencing decisions and concluded that the modern consensus was not to impose the death penalty for rape. It also brought its own judgment to bear, independently of the modern consensus, on the question of the acceptability of the death penalty under the Eighth Amendment:

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' Gregg v. Georgia, . . . is an excessive penalty for the rapist who, as such, does not take human life.

433 U.S. at 598.[6]

In Enmund v. Florida, 458 U.S. 782 (1982), the defendant had participated in a robbery as the driver of a getaway car. His companions murdered the robbery victims. The defendant, however, was not present at the killings, did not anticipate that the victims would be killed, and did not himself have any intent to kill. He had, however, participated sufficiently in the underlying felony to be held liable as a principal in the murders under Florida's felony murder law. He was therefore also death-eligible under Florida law and, in fact, was sentenced to death. Id. at 783-89.

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[5] Justice White wrote for the plurality. He was joined by Justices Stewart, Blackmun, and Stevens. Justices Brennan and Marshall concurred separately, reiterating their views that the death penalty is unconstitutional per se. Justice Powell concurred in the judgment that the death penalty was grossly disproportionate in this case but dissented from the plurality opinion insofar as it would have invalidated the death penalty for rape in all cases. Chief Justice Burger and then-Justice Rehnquist joined in dissent.

[6] The fact that one of the statutory aggravating circumstances had to be found before the death penalty could be imposed did not convince the plurality that the penalty was not excessive. It wrote that the aggravating circumstances "do not change the fact that the instant crime being punished is a rape not involving the taking of life." Id. at 599.

The Court found that contemporary standards did not support a death sentence in these circumstances because only eight jurisdictions (including Florida) would have allowed it, and research disclosed that juries in the last twenty-five years had very rarely sentenced non-triggerman felony murderers to die. Id. at 789-96. Turning to its own proportionality review, the Court found that the defendant's participation in the murders (as opposed to the robbery) was so minimal that it would have been unjust to put him to death (i.e. would not have served the purpose of retribution), nor would such a punishment have had deterrent value (with respect to the crime of murder) since the defendant himself did not kill or have any intention that life be taken. Id. at 798-801.[7] In short, the defendant's culpability was not sufficient to justify a death sentence. Consequently, the Court vacated the death sentence.

In Tison v. Arizona, 481 U.S. 137 (1987), the Court held that two defendants convicted of felony murder and accomplice liability for murder could, consistently with the Eighth Amendment, be punished with death (when they had not themselves engaged in killing) because they were major participants in the underlying felony and acted with a mental state of reckless indifference to human life. The Court found that in these circumstances contemporary standards (i.e. legislative enactments and jury decisions) permitted execution, and also that Enmund's culpability requirement was satisfied. Id. at 154, 158.

The inquiry undertaken in each of these three cases into contemporary standards has been described by the Court as "objective," because it is intended to be independent of the Court's own judgment. Coker, 433 U.S. at 593-97; Enmund, 458 U.S. at 788; Tison, 481 U.S. at 148. In addition, the Court believes that it also has the Constitutional duty to exercise its "own judgment" concerning the inquiry into whether a death sentence would be disproportionate to the degree of harm inflicted and the defendant's culpability. Coker, 433 U.S. at 597; Enmund, 458 U.S. at 797, 798-801; Tison, 481 U.S. at 148-49. Yet the Court has said that the exercise of its own judgment with regard to proportionality "should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent." Coker, 433 U.S. at 592. In short, by incorporating objective and subjective components into the inquiry, the Court has sought to

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[7] The Court relied upon the fact that killing only rarely occurred during robberies. The Court acknowledged that "[i]t would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony." Id. at 799. See also Tison, 481 U.S. at 148-49 (noting this qualification).

proceed "with an awareness of the limited role to be played by the courts" in a proportionality review, while still honoring its "obligation to insure that [the Eighth Amendment's] bounds are not overreached." Gregg, 428 U.S. at 174-75.[8]

II
ISSUES RAISED BY THE IMPOSITION OF CAPITAL PUNISHMENT FOR DRUG KINGPIN OFFENSES

Justice O'Connor has aptly summarized the approach embodied in Coker as follows:

> Coker teaches . . . that proportionality--at least as regards capital punishment--not only requires an inquiry into [1] contemporary standards as expressed by legislators and jurors, but also involves the notion that the magnitude of the punishment imposed must be related to [2] the degree of the harm inflicted on the victim, as well as to [3] the degree of the defendant's blameworthiness.

Enmund, 458 U.S. at 815 (O'Connor, J., dissenting). We now undertake, within this framework, to analyze some of the key issues raised under the Eighth Amendment by an authorization of the death penalty for drug kingpin offenses.

1. Contemporary Standards. The states and the federal government have never before authorized imposition of the death penalty for drug kingpin offenses.[9] This history certainly

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[8] The Court has also followed this general methodology in other recent cases considering the propriety under the Eighth Amendment of imposing a death penalty. See, e.g., Stanford v. Kentucky, 492 U.S. 361 (1989) (no blanket prohibition against death penalty for 16- and 17- year olds); Penry v. Lynaugh, 492 U.S. 302 (1989) (no blanket prohibition against death penalty for mentally retarded persons); Thompson v. Oklahoma, 487 U.S. 815 (1988) (death penalty may not be imposed upon persons under age 16). These cases were not proportionality challenges, but rather involved claims that the imposition of a death sentence in the circumstances presented violated the Eighth Amendment's "evolving standards of decency." See, e.g., Stanford, 492 U.S. at 369.

[9] For this reason, there are no jury sentencing and prosecutorial charging decisions to consider for these offenses. See Coker, 433 U.S. at 596-97 (examining data concerning jury sentencing decisions); Enmund, 458 U.S. at 794-96 (same); see also Penry, 492 U.S. at 331 ("We have also looked to data

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could be said to point toward a national consensus that "weighs very heavily on the side of rejecting capital punishment as a suitable penalty." Coker, 433 U.S. at 596; id. at 595-96 (Georgia was the only state that authorized a death sentence for the rape of an adult woman); Enmund, 458 U.S. at 792 (finding national consensus against imposing a death penalty in the circumstances presented even though the laws of 8 states permitted it). It might be taken to suggest that American society, at least until now, has not considered capital punishment appropriate for drug kingpin offenders.

On the other hand, if such a provision were to become law, it would be the "heavy burden" of those challenging it to show that there was a national consensus against imposing the death penalty in these circumstances. Stanford, 492 U.S. at 373; Gregg, 428 U.S. at 175. It may be questioned whether the Court will be receptive to this view in the face of a contemporary Act of Congress to the contrary. Cf. Stanford, 492 U.S. at 373 (the absence of a federal statute permitting execution of 16- or 17-year olds would be evidence that there is no national consensus in favor of such punishment, although it would not remotely establish a national consensus against such punishment in the face of state statutes to the contrary, which was petitioner's real burden); Thompson, 487 U.S. at 852 (O'Connor, J., concurring in the judgment) (that the statutes of the "Federal government and 19 states" render some juvenile offenders under the age of 16 death-eligible "is a real obstacle in the way of concluding that a national consensus forbids this practice"). As a national legislature, Congress's enactments are much more persuasive on the issue of a national consensus than the enactment of any single state or minority of states.[10]

It is unlikely, however, that a federal statute could be considered completely dispositive of the question of contemporary standards. The Court has included federal law in its Eighth Amendment surveys of legislative enactments without necessarily according it controlling weight. See, e.g., Enmund, 458 U.S. at 789; Gregg, 428 U.S. at 180; Thompson, 487 U.S. at 852 (O'Connor, J., concurring in the judgment). Moreover, when a federal

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concerning the actions of sentencing juries" as "objective evidence of how our society views a particular punishment today.").

[10] Nor is this a situation in which a majority of states had previously authorized the death penalty for drug kingpin offenses but had repealed such laws in recent times. In that more difficult case, the Supreme Court would be forced to balance the probative value of a recent enactment of Congress versus repeal by a majority of states in determining the national consensus.

statute itself is under Eighth Amendment scrutiny, one could not grant that same enactment controlling weight as a measure of contemporary standards without eviscerating the inquiry.

On the other hand, it is important to consider, too, the increasingly harsh sanctions for illegal drug crimes that Congress and the states have imposed in recent years. The Court has recognized that contemporary standards can evolve toward, as well as away from, the death penalty. See Thompson, 487 U.S. at 854-55 (O'Connor, J., concurring in the judgment) (recognizing that the apparent trend away from death penalty in the 1950s and 1960s has been reversed); Gregg, 428 U.S. at 179-80 (same). Because the more recent trend is away from leniency, it would arguably be misleading to rely heavily on the past practice of Congress and the state legislatures as an indicator of contemporary standards. Even if the absence of prior state and federal enactments indicated disapproval of a death penalty for drug kingpin offenders in the past, a challenge to a recent congressional enactment would have the difficult task of showing that the national consensus remained unchanged. In short, the imposition of capital punishment might be viewed as merely the next logical step in a popular legislative effort to thwart the perceived growing evil of drug trafficking.

Finally, Congress and the states have long provided capital punishment for treason, espionage, and other non-homicidal crimes. Moreover, they have continued to do so even after Coker.[11] This fact suggests at least that there is not a national consensus against imposing the death penalty on non-homicidal criminal conduct as such.[12]

The obstruction of justice offense raises an additional question concerning contemporary standards. In advising with respect to a proposed capital punishment for attempted assassination of the President, this Office observed that there may be serious problems of proof in showing the element of intent in crimes of attempt. For this reason, as well as an apparent

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[11] There are few actual cases in which a death sentence has been imposed for a non-homicidal crimes. In part, this may be because capital non-homicidal crimes are rarely committed. Nonetheless, even if it is because prosecutors and juries usually conclude that such crimes should rarely be punished with death, that does not permit a valid inference that they believe a death sentence should never be imposed. See Stanford, 492 U.S. at 373-74.

[12] That the Supreme Court has not adjudicated the constitutional validity of these provisions does not detract from their relevance to the inquiry concerning what is the national consensus.

deeply held societal conception that attempted crimes are less deserving of retribution, we suggested that contemporary standards might not support imposing a death penalty. See Memorandum for Lowell Jensen, Assistant Attorney General, Criminal Division, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel 1, 7-9 (April 30, 1981) (OLC Opinion); see also Solem, 463 U.S. at 293 (attempts have generally been recognized as less serious than completed crimes). These concerns seem equally applicable to the obstruction of justice offense,[13] although it may be that the defendant's criminal conduct as a drug kingpin combined with his engaging in attempted murder to obstruct prosecution would be sufficient to overcome them. Cf. OLC Opinion at 11-12 (suggesting that magnitude of the harm from the crime of attempted assassination of the President might override, inter alia, historically lenient treatment of attempts).

Concerning attempted assassination of the President, we also advised that the death-eligible offense be narrowly crafted to include cases in which the "defendant's intent was unambiguous and the crime was almost completed. Such a statute would be more likely to be upheld if an element of the crime was the actual commission of some bodily injury to the President. . . . [O]r [it might be upheld] if it were otherwise narrowly confined to nearly successful attempts." Id. at 12. No such limitations appear with respect to the language of the obstruction of justice offense.

2. The Degree of Harm. Another salient consideration in a proportionality review would be whether a death sentence was grossly disproportionate to the degree of harm caused by the offense.

(a) As a threshold matter, it may be asked whether Coker signals that capital punishment is excessive under the Eighth Amendment in relation to any crime in which death does not result.[14] In that case, the Court viewed rape as "[s]hort of

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[13] This is especially true because its language seems to encompass even a solicitation to murder by a drug kingpin (where his underling makes no attempt to carry it out). Historically, the crime of solicitation has been treated at least as leniently as attempts, if not more so. Furthermore, the concerns of proof are serious if the death-eligible conduct is no more than a conversation soliciting murder.

[14] In his dissent in Coker, Chief Justice Burger wrote:

> The clear implication of today's holding appears to be that the death penalty may be properly imposed only as

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homicide; . . . the ultimate violation of self," 433 U.S. at 597 (internal quotation marks and citation omitted), but since the victim retained her life, which in the Court's view was "normally . . . not beyond repair," the Court had the "abiding conviction" that it was disproportionate to punish the rapist with death. Id. at 598.[15] The argument for a broad reading of Coker is that, given the severity of the injury inflicted on a rape victim, which the Court said in Coker could not be punished with death, there is no crime short of taking human life that could justify imposition of a death penalty. See Enmund, 458 U.S. at 797 (applying Coker's reasoning to the crime of robbery not resulting in death).

A cogent response to this argument is that some conduct may so profoundly endanger the public welfare, or cause such injury to the community -- even though no death directly results -- that a punishment of death for the offender would not be grossly disproportionate. Nothing in Coker would appear to foreclose

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[14](...continued)
to crimes resulting in the death of the victim. This casts serious doubt upon the constitutional validity of statutes imposing the death penalty for a variety of conduct which, though dangerous, may not necessarily result in any immediate death, e.g., treason, airplane hijacking, and kidnapping.

433 U.S. at 621.

[15] The plurality did not undertake an analysis of the harm caused by the defendant's rape, but set forth instead its understanding of the magnitude of the harm caused by rape in general. Id. at 597-98. Justice Powell, although concurring in the judgment, dissented from the plurality's failure to confine itself to the specifics of the defendant's offense:

> Today, in a case that does not require such an expansive pronouncement [that rape may never be punished with death], the plurality draws a bright line between murder and all rapes -- regardless of the degree of brutality of the rape or the effect upon the victim. I dissent because I am not persuaded that such a bright line is appropriate.
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> Some victims are so grievously injured physically or psychologically that life is beyond repair.

Id. at 603 (emphasis in the original).

this possibility. On the contrary, the Coker Court expressly recognizes that the degree of harm caused by an offense may be measured by the resulting "public injury." 433 U.S. at 598; see also id. ("injury to the . . . public"). Although the public injury caused by a rape did not justify the imposition of death, id., the Court's recognition of this measure of harm would seem to leave open the possibility that some offenses might cause public injury of sufficient magnitude to warrant death.[16]

Indeed, it seems unlikely that the Court would invalidate application of a death penalty to public injury crimes such as treason and espionage that traditionally have been thought to merit that punishment. The case for the constitutionality of punishing treason with death is particularly strong. The Constitution expressly says that "Congress shall have the "Power to declare the Punishment of Treason." U.S. Const., Art. III, § 3. In addition, the first statute passed by Congress defining federal crimes after the framing of the Constitution prescribed capital punishment for those guilty of treason. See Act of April 30, 1790, 1 Stat. 112 (1790). Legislation passed by the First Congress sheds light on the scope of constitutional limitations on legislative action. See Marsh v. Chambers, 463 U.S. 783, 787-90 (1983). Moreover, the Court has upheld the imposition of a death sentence for treason. See Kawakita v. United States, 343 U.S. 717, 745 (1954).

The Supreme Court has not considered whether death is excessive for espionage. The only court of appeals to decide the question upheld a death sentence. See United States v. Rosenberg, 195 F.2d 583 (2d Cir.), cert. denied, 344 U.S. 838 (1952). The Rosenberg court, however, did not undertake a proportionality review, believing that it lacked the power to do so. Id. at 607. That court also suggested that even if it were empowered to engage in such a review, the test would be whether imposing death "shocks the conscience and sense of justice of the people of the United States," which the court found had not been met. Id. at 608. That test appears more difficult to meet than

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[16] In addition, the plurality opinion in Coker seems careful to avoid any suggestion that its views concerning the imposition of death for the rape of an adult woman extend a fortiori to any other individual-victim type of crime. Indeed, the opinion's careful description of its holding, "that death is indeed a disproportionate penalty for the crime of raping an adult woman," 433 U.S. at 597 (emphasis added), seems to reserve the question of whether death could be imposed for raping a child. But see Buford v. Florida, 403 So. 2d 943, 950, 954 (Fla. 1981) (applying Coker to vacate a death sentence for rape of a child).

the one in Coker. The Rosenberg decision might nonetheless carry some weight, given the paucity of case law.[17]

(b) We turn now to whether the drug kingpin offenses could be thought to cause public injury of a sufficient degree that a death sentence would not be grossly disproportionate. This issue is extremely difficult.

It is not clear exactly how Coker would apply in this setting. In Coker, the Court balanced the harm to the victim against the life of the defendant and concluded that where the victim did not die, the defendant also should not -- seemingly an application of a principle of "no more than an eye for an eye, a tooth for a tooth." With the drug kingpin offenses, the issue would be whether the widespread societal harm caused by overseeing a continuing criminal enterprise that engages in the distribution of illegal drugs warranted the death of the defendant. Because Congress will have already made the judgment that such conduct warrants death, under Coker this judgment may be upset only if a court has an "abiding conviction" that Congress was wrong.[18]

There is an argument that a drug kingpin's conduct is too removed from the societal harm resulting from the illegal drugs

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[17] It also seems unlikely -- although not inconceivable --- that the Court would accept a death penalty for treason and espionage but apply a blanket prohibition against legislative extension of the death penalty to other public injury crimes, such as drug trafficking, that have not traditionally been subject to that punishment. Of course, nothing in Coker supports such a rule, and the Court has said that contemporary standards of decency may evolve toward the death penalty. Thus, proponents of such a limitation on legislative power would face serious obstacles to persuading the Court to adopt it.

[18] In the past, the Court has deferred to the legislative judgment concerning proper punishment when illegal drugs are involved. Thus, it has consistently rejected Eighth Amendment proportionality challenges to lengthy terms of imprisonment for possession and distribution of illegal drugs. See Harmelin v. Michigan, 111 S.Ct. 2680 (1991) (life term without parole for possessing more than 650 grams of cocaine); Hutto v. Davis, 454 U.S. 370 (1982) (per curiam) (40-year prison term for distributing about nine ounces of marijuana). These decisions are some evidence of how the Court might respond to a death sentence for drug kingpin offenses. Nonetheless, the probative value of these decisions is diminished by the fact that Coker, Enmund, and Tison indicate that the Court will be more willing to intrude upon a legislative judgment when the defendant's life is at stake.

that the enterprise has distributed, because any harm is realized only through subsequent conduct by other persons, such as illegal drug users. In other words, although there is enough of a causal link between the trafficker and resulting societal harm to permit imposition of criminal liability and punishment, the nexus might be sufficiently attenuated that imposition of capital punishment would be grossly disproportionate. For example, a defendant need not be guilty of felony murder in order to incur the death penalty for a large-scale trafficking offense. Thus, such an offender may be even more removed as a cause-in-fact from any particular resultant death than the defendant in Enmund, who was at least guilty of felony murder under Florida law. This question was not considered in Coker because there the defendant was clearly the direct cause of the harm to the woman he raped.[19]

It might be responded that treason and espionage can be punished without proof that actual harm was caused or even an actual risk created. See, e.g., Kawakita, 343 U.S. at 738 (even minor assistance to the enemy can be treason). Nonetheless, the issue is not whether punishment may be imposed, but whether the punishment may be death. Of course, in Kawakita the Court upheld a death sentence for non-homicidal acts of treason that resulted in a concededly minor contribution to the Japanese war effort. Id.

The causation issue was considered in Harmelin v. Michigan, 111 S.Ct. 2680 (1991), although it was not expressly cast in those terms by the Justices. In that case, the State of Michigan had imposed a mandatory life sentence without possibility of parole as punishment for the defendant's possession of more than 650 grams of cocaine. Five members of the Court, the Chief Justice and Justices Scalia, Kennedy, O'Connor, and Souter, voted to uphold the sentence. Justice Kennedy, joined by Justices

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[19] It does not seem likely, however, that the plurality would have considered death appropriate if the particular victim in Coker had had a preexisting psychological condition that caused her to be unable to return her life to normal after the rape, even though the plurality believed that most women could recover from such an ordeal. See 433 U.S. at 603 (Powell, J., concurring in the judgment in part and dissenting in part). The plurality may have felt that it was unfair to charge the defendant -- for death penalty purposes -- with all harm actually resulting from his act of rape, if part of the harm was not ordinarily foreseeable. Even so, with respect to the large-scale distribution of illegal drugs, much of the resulting societal harm may be considered ordinarily foreseeable.

O'Connor and Souter,[20] engaged in a proportionality review that justified the sentence by emphasizing the magnitude of the harm caused by the offense:

> This amount of pure cocaine has a potential yield of between 32,5000 and 65,000 doses. . . . From any standpoint, this crime falls in a different category from . . . relatively minor, nonviolent crime. . . . Petitioner's suggestion that his crime was nonviolent and victimless . . . is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society.

111 S.Ct. at 2705-06; see also Solem, 463 U.S. at 299 n.26 ("No one suggests that . . . [a sentence of life imprisonment] may not be applied constitutionally to fourth-time heroin dealers or other violent criminals.") (emphasis added); Rummel v. Estelle, 445 U.S. 263, 296 n.12 (1980) (Powell, J., dissenting) ("A professional seller of addictive drugs may inflict greater bodily harm upon members of society than the person who commits a single assault.").

In support of this proposition, Justice Kennedy detailed various statistical evidence about the pernicious effect of illegal drugs on our society. 111 S.Ct. at 2706. From "[t]hese and other facts and reports detailing the pernicious effects of the drug epidemic in this country," he concluded "that the Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine -- in terms of violence, crime, and social displacement -- is momentous enough to warrant the deterrence and retribution of a life sentence without parole." Id.

Justice White, joined in his dissent by Justices Blackmun and Stevens, also engaged in a proportionality review.[21] He, however, assessed quite differently the magnitude of the harm caused by the defendant:

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[20] Justice Scalia, writing for himself and the Chief Justice, would have held that the Eighth Amendment does not contain a proportionality guarantee regarding the length of a prison sentence (although based on stare decisis he would continue to recognize proportionality limits on the death penalty). Id. at 2701. Thus, his opinion in Harmelin does not address the question of whether the life sentence there was disproportionate to the offense.

[21] Justice Marshall, dissenting separately, indicated his agreement with Justice White's opinion except insofar as it asserted that the Eighth Amendment does not contain a blanket prohibition of the death penalty. Id. at 2719.

> Drugs are without doubt a serious societal problem. . . . Unlike crimes directed against the persons and property of others, [however,] possession of drugs affects the criminal who uses drugs most directly. The ripple effect on society caused by possession of drugs, through related crimes, lost productivity, health problems, and the like, is often not the direct consequence of possession, but of the resulting addiction, something which this Court held in Robinson v. California . . . cannot be made a crime.
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> To be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt. See Enmund v. Florida, ... Justice Kennedy attempts to justify the harsh mandatory sentence imposed on petitioner by focusing on the subsidiary effects of drug use, and thereby ignore this aspect of our Eighth Amendment jurisprudence. While the collateral consequences of drugs such as cocaine are indisputably severe, they are not unlike those which flow from the misuse of other, legal, substances.
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> Indeed, it is inconceivable that a State could rationally choose to penalize one who possesses large quantities of alcohol in a manner similar to that in which Michigan has chosen to punish petitioner for cocaine possession, because of the tangential effects which might ultimately be traced to the alcohol at issue.

Id. at 2716-17.

Justices Kennedy and White appear in Harmelin to agree that illegal drugs are a source of widespread harm in our society. To Justice Kennedy, this warranted a severe sentence, if the legislature so determined, for one who intentionally distributed large amounts of illegal drugs and thus "threatened to cause" grave harm to society. (Whether he and Justices O'Connor and Souter would balk at a death sentence is not apparent.)

Justice White, however, took a narrower view of the harm caused by the defendant. He insisted, invoking Enmund, that an evaluation of the harm caused by the defendant's crime of possessing (and he would probably extend this view to selling) illegal drugs should exclude "collateral effects" caused by misuse, addiction, or other deleterious conduct engaged in by other persons. Justice White, in other words, argued that the defendant is only remotely causally responsible for this societal harm; it would therefore be grossly disproportionate for him to

be punished as if he were the direct cause. This argument would no doubt have even greater resonance for the Harmelin dissenters if death were the challenged punishment.

3. The Degree of the Defendant's Blameworthiness. This factor reflects the requirement from Enmund and Tison, of a sufficient nexus between the defendant (his conduct plus mental state) and the commission of a death-eligible offense, such that the defendant may justly be punished for it, and might rationally have been deterred from engaging in the offense by the threat of such punishment. In both Enmund and Tison, the death-eligible conduct was a murder that had been carried out by persons other than the defendants. In the case of the drug kingpin offenses, however, the Enmund/Tison culpability requirement is clearly met because the defendant himself will have (intentionally or knowingly) engaged in the death-eligible conduct (the drug kingpin offenses). See supra Section I (definition of death-eligible offenses). A defendant charged with an obstruction of justice offense, moreover, will be responsible for an attempted murder and will have had an intent to kill that fits even more directly within the culpability requirements of Enmund/Tison.

With respect to a large-scale trafficking offense, it might be argued that the legislative line-drawing in defining the offense is arbitrary. For example, a leader of a continuing criminal enterprise grossing 20 million dollars may be put to death, but one who employs only four persons and sells the same dollar amount of illegal drugs would not meet the definition of continuing criminal enterprise in 21 U.S.C. § 848(c) and therefore would not be death-eligible. It might be argued that disparate terms of imprisonment may be imposed based on seemingly arbitrary distinctions such as these, but that "death is different." Cf. Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring) ("I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.").

Conversely, because the defendant has advance notice of these distinctions, infliction of death is in no sense capricious. As to the consideration of arbitrariness, that is inherent in legislative line-drawing, even with respect to imposing life or death, depending upon degrees of homicide. When an offense is non-homicidal, it is even more likely that any line will to a certain extent be arbitrary. Nonetheless, nothing in the Court's prior decisions suggests that this consideration would lead to invalidation of a death sentence under the Eighth Amendment.

ANALYSIS OF § 3591(3)(D)

We have reviewed § 3591(3)(D) of the "Federal Death Penalty Act of 1991," as it is contained in the House conference committee version of H.R. 3371 from the 102d Congress, for conformity with the requirements of Tison v. Arizona, 481 U.S. 137 (1987). We are informed that § 3591(3)(D) is expected to be resubmitted without substantive change as part of a crime bill that will be considered by the Congress this year.

Section 3591(3) permits imposition of a death penalty upon a defendant guilty of "an offense for which a sentence of death is provided," if he has:

> (D) intentionally and specifically engaged in an act, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act.

The Tison decision holds that if a defendant is guilty of "major participation" in a felony, "combined with reckless indifference to human life," the Eighth Amendment's culpability requirement is satisfied. 481 U.S. at 158. Section 3591(3)(D) requires that the defendant have engaged in an act "knowing that the act created a grave risk of death." This phrasing seems to meet the Tison mens rea standard. In addition, § 3591(3)(D)'s conduct requirement -- that the defendant participate not only in the underlying death-eligible offense, but also in "an act . . . [from which] the victim died as a direct result" -- appears equivalent to "major participation" in a felony resulting in death. Thus, § 3591(3)(D) appears to comply with Tison.*

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* We read the phrase "such that participation in the act constituted a reckless disregard for human life" as descriptive of the mental state one has by virtue of committing an act knowing that it carries a grave risk of death to another. If the phrase were read to add additional requirements before capital punishment may be imposed, that would only strengthen the conclusion that Tison's requirements have been satisfied.