

Section 3.01: Death penalty procedures

- (b) If the defendant is found guilty of conduct that is a capital offense, beyond a reasonable doubt, would you always find in favor of the death penalty?<sup>13</sup>

Note that the harmless error analysis does not apply to *Witherspoon* violations.<sup>14</sup>

8. When the jury retires to consider its verdict, do not discharge the alternate jurors.<sup>15</sup> Instruct the alternates to avoid discussing the case with anyone. If an alternate juror replaces a juror after deliberations have begun, instruct the jury to begin its deliberations anew. Fed. R. Crim. P. 24(c)(3).

B. After Verdict or Plea

1. No presentence report should be prepared. 18 U.S.C. § 3593(c); 21 U.S.C. § 848(j).
2. Unless defendant moves for a hearing without a jury and the government consents, the hearing must be before a jury.
  - (a) If defendant was convicted after a jury trial, the hearing should be before the jury that determined guilt, unless such jury has been discharged for good cause.
  - (b) If defendant was convicted upon a plea or after a bench trial, a jury and alternates should be impaneled in accordance with Fed. R. Crim. P. 24(c).  
18 U.S.C. § 3593(b); 21 U.S.C. § 848(i)(1).
3. Instruct the jury about the purpose of the hearing.<sup>16</sup>
  - (a) Inform the jurors that they will be required to make specific findings about possible aggravating circum-

13. See *Morgan v. Illinois*, 504 U.S. 179 (1992).

14. *Gray v. Mississippi*, 481 U.S. 648 (1987).

15. Effective Dec. 1, 1999, Fed. R. Crim. P. 24(c)(3) gives district courts the discretion to retain alternate jurors when the jury retires. Note that §§ 3593(b) and 848(i) do not allow a jury of less than twelve members unless the parties stipulate to a lesser hearing before the conclusion of the sentencing hearing. See *Chambers to Chambers*, Vol. 10, No. 1 (1995), for a discussion of retaining the alternate jurors.

16. Samples of jury instructions that have been used in death penalty cases are available from the Federal Judicial Center's Information Services Office.