

## 9-10.000 CAPITAL CRIMES

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### **9-10.010 Federal Prosecutions in Which the Death Penalty May be Sought**

This Chapter sets forth policy and procedures to be followed in all Federal cases in which a defendant is charged with an offense subject to the death penalty, regardless of whether the United States Attorney intends to request authorization to seek the death penalty. The effective date of this policy is January 27, 1995. The Federal death penalty is based upon two legislative acts: the Anti-Drug Abuse Act of 1988 and the Federal Death Penalty Act of 1994. *See* the Criminal Resource Manual at 68 *and* 69.

For court decisions discussing the federal death penalty, see the Criminal Resource Manual at 85.

### **9-10.020 Authorization and Consultation Prior to Seeking the Death Penalty**

The death penalty shall not be sought without the prior written authorization of the Attorney General.

Prior to seeking an indictment for an offense subject to the death penalty (other than 18 U.S.C. § 1959), the United States Attorney is encouraged, but not required, to consult, as set forth in Section 9-2.120, with the appropriate section of the Criminal Division or the Criminal Section of the Civil Rights Division. All indictments that charge Section 1959 must be submitted for review to the Criminal Division. For further discussion regarding consultation, see the Criminal Resource Manual at 70.

A listing of the capital eligible statutes assigned by section is contained in the Criminal Resource Manual at 71.

### **9-10.030 Notice of Intention to Seek the Death Penalty**

At the time an indictment charging a defendant with an offense subject to the death penalty is filed or unsealed, or before a United States Attorney's Office decides to request approval to seek the death penalty, whichever comes first, the United States Attorney should give counsel for the defendant a reasonable opportunity to present any facts, including any mitigating factors, to the United States Attorney for consideration. If the United States Attorney decides to request approval to seek the death penalty, the United States Attorney's Office should inform counsel for the defendant.

### **9-10.040 Submissions to the Department of Justice**

In all cases in which the United States Attorney intends to charge a defendant with an offense subject to the death penalty, whether or not the United States Attorney recommends the filing of a notice of intent to seek the death penalty, the United States Attorney shall prepare a "Death Penalty Evaluation" form and a prosecution memorandum. Following (i) an introduction, the prosecution memorandum should include a comprehensive discussion of (ii) the theory of liability, (iii) the facts and evidence, including evidence relating to any aggravating or mitigating factors, (iv) the defendant's background and criminal history, (v) the basis for Federal prosecution (*see* USAM 9-10.070), and (vi) any other relevant information. The Death Penalty Evaluation form is intended primarily to be used as a guideline and worksheet for the internal decision making process, and may be hand written. *See* the Criminal Resource Manual at 73 for a copy of the Death Penalty Prosecution Memorandum form, and the Criminal Resource Manual at 74 through 77 for copies of the Death Penalty Evaluation forms (the offense charged will determine which Death Penalty Evaluation form must be used).

The United States Attorney shall send the above-described documents, a copy of the indictment (the request should include copies of all existing, proposed, and superseding indictments), and any written material submitted by counsel for the defendant in opposition to the death penalty being imposed on the defendant to the Assistant Attorney General for the Criminal Division. Other significant documents (such as confessions, key witness statements, autopsy and crime scene reports) should also be included, when appropriate. Whenever possible these materials should be submitted prior to the return of an indictment containing a charge for which the death penalty could be sought. In no event should these documents be received by the Criminal Division later than 30 days prior to the date on which the Government is required, by an order of the court or otherwise, to file notice that it intends to seek the death penalty.

### **9-10.050 Department of Justice Review**

Each of the documents described above shall be reviewed by a Committee appointed by the Attorney General, including the Deputy Attorney General or designee and the Assistant Attorney General of the Criminal Division or designee. Counsel for the defendant shall be provided an opportunity to present to the Committee, orally or in writing, the reasons why the death penalty should not be sought. The Committee will consider all information presented to it, including any evidence of racial bias against the defendant or evidence that the Department has engaged in a

pattern or practice of racial discrimination in the administration of the Federal death penalty. The Committee should give the Attorney General its recommendation in writing within fifteen days of receiving all documents required by USAM 9-10.040. The Attorney General will conduct a review and make the final decision whether the Government should file a "Notice of Intention to Seek the Death Penalty."

Subsequent to the initial Department of Justice review, the United States Attorney and the Attorney General's Committee shall review any submission defense counsel chooses to make. After considering the information submitted, the Committee will make a recommendation to the Attorney General concerning the application of the death penalty to the case.

### **9-10.060 Notice to Family of Victim**

The United States Attorney shall notify the family of the victim of all final decisions regarding the death penalty.

### **9-10.070 Substantial Federal Interest**

Where concurrent jurisdiction exists with a State or local government, it is anticipated that a Federal indictment for an offense subject to the death penalty will be obtained only when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities. *See* Principles of Federal Prosecution, USAM 9-27.000, *et seq.* In states where the imposition of the death penalty is not authorized by law, the fact that the maximum Federal penalty is death is insufficient, standing alone, to show a more substantial interest in Federal prosecution.

The following factors, which are not intended to be an exhaustive list, may be considered in deciding whether there is a more substantial interest in Federal as opposed to State prosecution of the offense:

**A. The relative strength of the state's interest in prosecution.** The Federal and State characteristics of the criminal conduct should be considered. One of the jurisdictions may have a particularly strong interest because of the nature of the offense; the identity of the offender or victim; the fact that the investigation was conducted primarily by its investigators or through its informants or cooperators; or the possibility that prosecution will lead to disclosure of violations which are peculiarly within the jurisdiction of either the Federal or State authorities or which will assist an ongoing investigation being conducted by one of them.

**B. The extent to which the criminal activity reached beyond the local jurisdiction.** The extent to which the criminal activity reached beyond the boundaries of a single local prosecutorial jurisdiction should be considered. The nature, extent, and impact of the criminal activity upon the jurisdiction, the number and location of any murders, and the need to procure evidence from other jurisdictions, in particular other States or foreign countries, are all relevant to this analysis.

**C. The relative ability and willingness of the State to prosecute effectively.** The relative likelihood of effective prosecution in the State and Federal jurisdictions should be considered, including the ability and willingness of the authorities in each jurisdiction; the prosecutorial and judicial resources necessary to undertake prosecution promptly and effectively; legal or evidentiary

problems that might attend prosecution; conditions, attitudes, relationships or other circumstances that enhance the ability to prosecute effectively, or alternatively, that cast doubt on the likelihood of a thorough and successful prosecution.

### **9-10.080 Standards for Determination**

In deciding whether it is appropriate to seek the death penalty, the United States Attorney, the Attorney General's Committee and the Attorney General shall consider any legitimate law enforcement or prosecutorial reason which weighs for or against seeking the death penalty.

In determining whether or not the Government should seek the death penalty, the United States Attorney, the Attorney General's Committee and the Attorney General must determine whether the statutory aggravating factors applicable to the offense and any non-statutory aggravating factors sufficiently outweigh the mitigating factors applicable to the offense to justify a sentence of death, or, in the absence of any mitigating factors, whether the aggravating factors themselves are sufficient to justify a sentence of death. To qualify for consideration in this analysis, an aggravating factor must be found to exist beyond a reasonable doubt. Recognizing that there may be little or no evidence of mitigating factors available for consideration at the time of this determination, any mitigating factor reasonably raised by the evidence should be considered in the light most favorable to the defendant. The analysis employed in weighing the aggravating and mitigating factors that are found to exist should be qualitative, not quantitative. Finally, there must be sufficient admissible evidence of the aggravating factors to obtain a death sentence and to sustain it on appeal.

The authorization process is designed to promote consistency and fairness. As is the case in all other actions taken in the course of Federal prosecutions, bias for or against an individual based upon characteristics such as race or ethnic origin may play no role in the decision whether to seek the death penalty. For additional discussion of the issue of aggravating and mitigating factors, see the Criminal Resource Manual at 78-83.

### **9-10.090 Withdrawal of Notice of Intention to Seek the Death Penalty**

Once the Attorney General has authorized the United States Attorney to seek the death penalty, a notice of intention to seek the death penalty filed with the court shall not be withdrawn unless authorized by the Attorney General or approved by the United States Attorney as a condition of a plea agreement. If the United States Attorney wishes to withdraw the notice and proceed to trial, the United States Attorney shall advise the Assistant Attorney General for the Criminal Division of the reasons for that request, including any changes in facts or circumstances.

Any request to withdraw a notice shall be reviewed by the Committee appointed by the Attorney General, which will make a recommendation to the Attorney General. The Attorney General shall make the final decision.

### **9-10.100 Plea Agreements**

The death penalty may not be sought, and no attorney for the Government may threaten to seek it, for the purpose of obtaining a more desirable negotiating position. No plea agreement shall be negotiated until an evaluation in accordance with USAM 9-10.020 has been conducted by the United States Attorney. After an evaluation has been completed by the United States Attorney regarding whether or not to recommend the seeking of the death penalty, the United States Attorney may approve any plea agreement. There is no need for the United States Attorney to obtain prior authority from the Attorney General to approve a plea agreement.

Should a plea be entered in any death penalty case, the United States Attorney shall advise the Assistant Attorney General for the Criminal Division in writing of the plea agreement and the reasons for it.

See USAM 9-16.000 for more information on the topic of pleas and plea agreements.

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