

## 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 the policies and procedures for all Federal cases in which a defendant is charged, or could be charged, with an offense subject to the death penalty. The provisions of this Chapter apply regardless of whether the United States Attorney intends to charge the offense subject to the death penalty or to request authorization to seek the death penalty for such an offense. The provisions in this Chapter are effective July 1, 2007, and they apply to any case currently under indictment.

### **9-10.020 Relevant Statutory Provisions**

Federal death penalty procedure is based on the Federal Death Penalty Act of 1994, codified at 18 U.S.C. § 3591 *et seq.*

The death penalty procedures introduced by the Anti- Drug Abuse Act of 1988, codified in Title 21, were repealed on March 6, 2006, when President Bush signed the USA PATRIOT Improvement and Reauthorization Act of 2005. A district indicting a Title 21 capital offense, *see* 21 U.S.C. § 848, that occurred before March 6, 2006, should consult with the Capital Case Unit of the Criminal Division

regarding indictment and procedure.

### **9-10.030 Purposes of the Capital Case Review Process**

The review of cases under this Chapter culminates in a decision to seek, or not to seek, the death penalty against an individual defendant. Each such decision must be based upon the facts and law applicable to the case and be set within a framework of consistent and even-handed national application of Federal capital sentencing laws. Arbitrary or impermissible factors—such as a defendant's race, ethnicity, or religion—will not inform any stage of the decision-making process. The overriding goal of the review process is to allow proper individualized consideration of the appropriate factors relevant to each case.

### **9-10.040 General Process Leading to the Attorney General's Determination**

In all cases subject to the provisions of this Chapter, the Attorney General will make the final decision about whether to seek the death penalty. The Attorney General will convey the final decision to the United States Attorney in a letter authorizing him or her to seek or not to seek the death penalty.

The decision-making process preliminary to the Attorney General's final decision is confidential. Information concerning the deliberative process may only be disclosed within the Department and its investigative agencies as necessary to assist the review and decision-making. This confidentiality requirement does not extend to the disclosure of scheduling matters or the level at which the decision is pending within the Department during the review process. The scope of confidentiality includes, but is not limited to: (1) the recommendations of the United States Attorney's Office, the Attorney General's Review Committee on Capital Cases (hereinafter the "Capital Review Committee"), the Deputy Attorney General, and any other individual or office involved in reviewing the case; (2) a request by a United States Attorney that the Attorney General authorize withdrawal of a previously filed notice of intent to seek the death penalty; (3) a request by a United States Attorney that the Attorney General authorize not seeking the death penalty pursuant to the terms of a proposed plea agreement; and (4) the views held by anyone at any level of review within the Department.

In no event may the information identified in this paragraph be disclosed outside the Department and its investigative agencies without prior approval of the Attorney General. The United States Attorneys may exercise their discretion, however, to place additional limits on the scope of confidentiality in capital cases prosecuted in their Districts.

### **9-10.050 Preliminary Consideration in the United States Attorney's Office**

Prior to seeking an indictment for an offense subject to the death penalty, the United States Attorney is strongly advised, but not required, to consult with the Capital Case Unit.

If possible, before obtaining an indictment charging a capital offense, the United States Attorney should make a preliminary determination of whether he or she will recommend that the death penalty be sought. If the case is sufficiently developed to allow the United States Attorney to make a pre-indictment determination that he or she will not recommend seeking the death penalty, the United States Attorney should submit the case expeditiously for review under the provisions of this Chapter prior to obtaining an indictment charging a capital-eligible offense, unless public safety requires obtaining the indictment more quickly.

In all cases, the United States Attorney must immediately notify the Capital Case Unit when a

capital offense is charged and provide the Unit with a copy of the indictment and cause number, even if the materials described in [§ 9-10.080](#), *infra*, are not yet ready for submission.

In any post-indictment case in which the United States Attorney is considering whether to request approval to seek the death penalty, the United States Attorney shall give counsel for the defendant a reasonable opportunity to present any facts, including any mitigating factors, for the consideration of the United States Attorney.

### **9-10.060 Special Findings in Indictments**

For all charged offenses subject to the provisions of this Chapter, regardless of whether the United States Attorney ultimately recommends that the Attorney General authorize seeking the death penalty for the charged offense, the indictment shall allege as special findings: (1) that the defendant is over the age of 18; (2) the existence of the threshold intent factors specified in 18 U.S.C. § 3591(a)(2); and (3) the existence of the statutory aggravating factors specified in, as relevant, 18 U.S.C. §§ 3592(b), (c), or (d).

The indictment shall allege threshold intent and statutory aggravating factors that meet the criteria for commencing prosecution as set forth in USAM §§ [9-27.200](#), [9-27.220](#). Prosecuting Assistant United States Attorneys are encouraged to consult with the Capital Case Unit regarding the inclusion of special findings in the indictment.

### **9-10.070 Consultation with the Family of the Victim**

Unless extenuating circumstances exist, the United States Attorney should consult with the family of the victim, if reasonably available, concerning the decision on whether to seek the death penalty. The United States Attorney should include the views of the victim's family concerning the death penalty in any submission made to the Department. The United States Attorney should notify the family of the victim of all final decisions regarding the death penalty. This consultation should occur in addition to notifying victims of their rights under 18 U.S.C. § 3771.

### **9-10.080 Submissions from the United States Attorney**

The United States Attorney must submit to the Assistant Attorney General for the Criminal Division every case in which an indictment has been or will be obtained that charges an offense punishable by death or alleges conduct that could be charged as an offense punishable by death.

The United States Attorney must make submissions to the Assistant Attorney General as expeditiously as possible following indictment, but no fewer than 90 days before the Government is required, by an order of the court, to file a notice that it intends to seek the death penalty. In the absence of a court established deadline for the Attorney General's death penalty decision, the United States Attorney must make the submission sufficiently in advance of trial to allow for both the 90 day time period encompassed by the review process plus any additional time necessary to ensure that a notice of intent to seek the death penalty is timely filed under 18 U.S.C. § 3593(a). If a case is not submitted 90 days in advance of a deadline for the Attorney General's decision or 150 days in advance of a scheduled trial date, the prosecution memorandum should include an explanation of why the submission is untimely.

The prosecution memoranda, death penalty evaluation forms, non-decisional information forms and any other internal memoranda informing the review process and the Attorney General's decision are

not subject to discovery by the defendant or the defendant's attorney.

Submissions should include the following documents:

A. Prosecution memorandum. This should be sufficiently detailed to fully inform reviewers of the basis for the United States Attorney's recommendation. The prosecution memorandum should include:

(1) Unusual circumstances. To ensure that subsequent review is appropriately directed, the first page of the memorandum should note plainly whether the case fits any of the following unusual circumstances:

- a. The case is submitted for "expedited review," as described in [§ 9-10.100](#), *infra*.
- b. The case involves extradition of the defendant from a country where waiver of the authority of the United States to seek the death penalty is necessary for extradition.
- c. The case presents a significant law enforcement reason for not seeking the death penalty (such as the defendant's willingness to cooperate in an important but otherwise difficult prosecution).
- d. The case has been submitted for pre- indictment review as suggested in [§ 9-10.050](#), *supra*.

(2) Deadlines. Any deadline established by the Court for the filing of a notice of intent to seek the death penalty, trial dates, or other time considerations that could affect the timing of the review process should also be noted on the first page of the memorandum.

(3) A narrative delineation of the facts and separate delineation of the supporting evidence. Where necessary for accuracy, a chart of the evidence by offense and offender should be appended.

(4) Discussion of relevant prosecutorial considerations.

(5) Death penalty analysis. The analysis must identify applicable threshold intent factors under 18 U.S.C. § 3591, applicable statutory aggravating factors under the subsections of 18 U.S.C. §§ 3592(b)-(d), and applicable mitigating factors under 18 U.S.C. § 3592(a). In addition, the United States Attorney should include his or her conclusion on whether all the aggravating factor(s) found to exist sufficiently outweigh all the mitigating factor(s) found to exist to justify a sentence of death, or in the absence of mitigating factors, whether the aggravating factor(s) alone are sufficient to justify a sentence of death.

(6) Background and criminal record of the capital defendants.

(7) Background and criminal record of the victim.

(8) Victim impact. Views of the victim's family on seeking the death penalty and

other victim impact evidence should be provided.

(9) Discussion of the federal interest in prosecuting the case.

(10) Foreign citizenship. The memorandum should include a discussion on whether the defendant(s) are citizens of foreign countries, and if so, whether the requirements of the Vienna Convention on Consular Relations have been satisfied.

(11) Recommendation of the United States Attorney on whether the death penalty should be sought.

- B. Death-penalty evaluation form. The Department will specify a standardized death-penalty evaluation form, which should be completed by the United States Attorney for each capital-eligible offense charged against each defendant.
- C. Non-decisional information form. This form should be submitted in a sealed envelope clearly labeled as containing the non-decisional information.
- D. Indictment. Copies of all existing and proposed superseding indictments should be attached. As described in 9-10.060, *supra*, the indictments should include the special findings necessary for the death penalty to be authorized by statute.
- E. Draft notice of intention to seek the death penalty. This document is to be included in the submission only if the United States Attorney recommends seeking the death penalty.
- F. Materials provided by defense counsel. Any documents or materials provided by defense counsel to the United States Attorney in the course of the United States Attorney's Office death penalty review process should be provided.
- G. Point-of-contact. The name of the assigned attorney in the United States Attorney's Office who is responsible for communicating with the Capital Case Unit about the case should be provided.
- H. Relevant court decisions. The first page of the memorandum should highlight court orders and deadlines. The point-of-contact in the United States Attorney's Office is under a continuing obligation to update the Capital Case Unit about developments or changes in court scheduling or any other material aspect of the case.

### **9-10.090 Substantial Federal Interest**

When concurrent jurisdiction exists with a State or local government, a Federal indictment for an offense subject to the death penalty generally should 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 [Chapter 9-27.000](#). The judgment as to whether there is a more substantial interest in Federal, as opposed to State, prosecution may take into account any factor that reasonably bears on the relative interests of the State and the Federal Governments, including but not limited to the following:

- A. The relative strength of the State's interest in prosecution as indicated by the Federal and State characteristics of the criminal conduct. One jurisdiction 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 that are peculiarly within the jurisdiction of either Federal or State authorities or will assist an ongoing investigation being conducted by one of them.

- B. The extent to which the criminal activity reached beyond the boundaries of a single local prosecutorial jurisdiction. Relevant to this analysis are the nature, extent, and impact of the criminal activity upon the jurisdictions, the number and location of any murders, and the need to procure evidence from other jurisdictions, in particular other States or foreign countries.
- C. The relative ability and willingness of the State to prosecute effectively and obtain an appropriate punishment upon conviction. Relevant to this analysis are 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, and other circumstances that enhance the ability to prosecute effectively or, alternatively, that cast doubt on the likelihood of a thorough and successful prosecution.

### **9-10.100 Expedited Review Procedures**

- A. Certain defendants and categories of cases are appropriate for summary disposition on an expedited basis. These include: (1) cases in which the defendant is ineligible for the death penalty because the evidence is insufficient to establish the requisite intent under 18 U.S.C. § 3591 or an applicable statutory aggravating factor under 18 U.S.C. § 3592 (b)-(d); (2) cases that involve the extradition of a defendant or crucial witness from a country that, as precondition to extradition, requires assurances that the death penalty will not be sought for the defendant or the evidence obtained from the witness will not be used to seek the death penalty; (3) cases in which, but for proffer protected evidence, the evidence is insufficient to convict the defendant of the capital offense to which he will plead guilty; (4) cases that involve a potential cooperator whose testimony is necessary to indict the remaining offenders; and (5) cases that have been submitted for pre-indictment review under [§ 9-10.050](#), *supra*.
- B. The cover of the submission should indicate in bold lettering that the United States Attorney is seeking expedited review, and it should also indicate the basis on which the case qualifies for expedited review. The accompanying memorandum may be abbreviated, but it should be sufficiently thorough to make clear the basis upon which the case qualifies for expedited review.
- C. The Capital Case Unit will screen all cases in which the United States Attorney's Office seeks expedited review to ensure that such review is appropriate. The Unit will then give priority to cases so designated. If the Capital Case Unit finds that the case does not qualify for expedited review, it will be scheduled for review on a non- expedited basis or returned to the United States Attorney's Office for later submission.

### **9-10.110 Plea Agreements**

The death penalty may not be sought, and no attorney for the Government may threaten to seek it, solely for the purpose of obtaining a more desirable negotiating position. Absent the authorization of the Attorney General, the United States Attorney may not enter into a binding plea agreement that precludes the United States from seeking the death penalty with respect to any defendant falling within the scope of this Chapter.

The United States Attorney, however, may agree to submit for the Attorney General's review and possible approval, a plea agreement relating to a capital eligible offense or conduct that could be charged as a capital eligible offense. At all times, the United States Attorney must make clear to all parties that the conditional plea does not represent a binding agreement, but is conditioned on the authorization of the Attorney General. The United States Attorney should not inform the defendant, court, or public of whether he or she recommends authorization of the plea agreement.

For proposed plea agreements that precede a decision by the Attorney General to seek or not to seek the death penalty, the United States Attorney should send a request for approval to the Assistant Attorney General for the Criminal Division as early as possible. Absent unavoidable circumstances, the United States Attorney must send the request no later than 90 days prior to the date on which the Government would be required, by an order of the court or by the requirements of 18 U.S.C. § 3593(a), to file a notice that it intends to seek the death penalty. (Proposed plea agreements that would require withdrawing a previously filed notice of intent to seek the death penalty should follow the procedures described in [9-10.150](#), *infra*.)

Unless a potential capital defendant's testimony is necessary to indict the remaining offenders or other circumstances compel separate consideration, review of the case against the prospective cooperator will occur simultaneously with the review of the cases against the remaining offenders who would be indicted for the offenses at issue. Submissions in support of requests for approval of plea agreements under this section should include a prosecution memorandum that includes an explanation of why the plea agreement is an appropriate disposition of the charges, a death penalty evaluation form for each capital eligible offense that has been or could be charged against the prospective cooperator, and a non-decisional information form. The Capital Review Committee will review requests for authorization to enter into a plea agreement under this subsection and may request a submission from defense counsel and schedule the case for a hearing before the Committee.

See USAM [9-16.000](#) for more information on the topic of pleas and plea agreements.

## **9-10.120 Department of Justice Review**

Upon receipt of the materials submitted by the United States Attorney, the Assistant Attorney General for the Criminal Division will forward the materials to the Criminal Division's Capital Case Unit.

In any case in which (1) the United States Attorney recommends that the Attorney General authorize seeking the death penalty, or (2) a member of the Capital Review Committee requests a Committee conference, a Capital Case Unit attorney will confer with representatives of the United States Attorney's Office to establish a date and time for the Capital Review Committee to meet with defense counsel and representatives of the United States Attorney's Office to consider the case. No final decision to seek the death penalty shall be made if defense counsel has not been afforded an opportunity to present evidence and argument in mitigation.

The Capital Review Committee shall review the materials submitted by the United States Attorney and any materials submitted by defense counsel. The Capital Review Committee will consider all information presented to it, including any allegation of individual or systemic racial bias in the Federal administration of the death penalty. After considering all information submitted to it, the Committee shall make a recommendation to the Attorney General through the Deputy Attorney General.

If the Committee's recommendation differs from that of the United States Attorney, the United



States Attorney shall be provided with a copy of the Committee's recommendation memorandum when it is transmitted to the Deputy Attorney General. The United States Attorney may respond to the Committee's analysis in a memorandum directed to the Deputy Attorney General. The Deputy Attorney General will then make a recommendation to the Attorney General. The Attorney General will make the final decision whether the Government should file a notice of intent to seek the death penalty.

### **9-10.130 Standards for Determination**

The standards governing the determination to be reached in cases under this Chapter include fairness, national consistency, adherence to statutory requirements, and law-enforcement objectives.

- A. Fairness requires all reviewers to evaluate each case on its own merits and on its own terms. As with 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 play no role in any recommendation or decision as to whether to seek the death penalty.
- B. National consistency requires treating similar cases similarly, when the only material difference is the location of the crime. Reviewers in each district are understandably most familiar with local norms or practice in their district and State, but reviewers must also take care to contextualize a given case within national norms or practice. For this reason, the multi-tier process used to make determinations in this Chapter is carefully designed to provide reviewers with access to the national decision-making context, and thereby, to reduce disparities across districts.
- C. In determining whether it is appropriate to seek the death penalty, the United States Attorney, the Capital Review Committee, and the Attorney General will determine whether the applicable statutory aggravating factors and any non-statutory aggravating factors sufficiently outweigh the applicable mitigating factors 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. Reviewers are to resolve ambiguity as to the presence or strength of aggravating or mitigating factors in favor of the defendant. The analysis employed in weighing the aggravating and mitigating factors should be qualitative, not quantitative: a sufficiently strong aggravating factor may outweigh several mitigating factors, and a sufficiently strong mitigating factor may outweigh several aggravating factors. Reviewers may accord weak aggravating or mitigating factors little or no weight. Finally, there must be substantial, admissible, and reliable evidence of the aggravating factors.
- D. In deciding whether it is appropriate to seek the death penalty, the United States Attorney, the Capital Review Committee, the Deputy Attorney General, and the Attorney General may consider any legitimate law-enforcement or prosecutorial reason that weighs for or against seeking the death penalty.

### **9-10.140 Post-Decision Actions**

In any case in which the Attorney General has authorized the filing of a notice of intention to seek the death penalty, the United States Attorney shall not file or amend the notice until the Capital Case Unit of the Criminal Division has approved the notice or the proposed amendment. The notice of intention to seek the death penalty shall be filed as soon as possible after transmission of the Attorney General's decision to seek the death penalty.

The United States Attorney should promptly inform the district court and counsel for the



defendant once the Attorney General has made the final decision. Expeditious communication is necessary so that the court is aware, in cases in which the Attorney General authorizes the United States Attorney not to seek the death penalty, that appointment of counsel under 18 U.S.C. § 3005 is not required or is no longer required. In cases in which the Attorney General authorizes the United States Attorney to seek the death penalty, the district court and defense counsel should be given as much opportunity as possible to make proper scheduling decisions.

### **9-10.150 Withdrawal of the Notice of Intention to Seek the Death Penalty**

Once the Attorney General has authorized the United States Attorney to seek the death penalty, the United States Attorney may not withdraw a notice of intention to seek the death penalty filed with the district court unless authorized by the Attorney General.

If the United States Attorney wishes to withdraw the notice, the United States Attorney shall advise the Assistant Attorney General for the Criminal Division of the reasons for that request. The United States Attorney should base the withdrawal request on material changes in the facts and circumstances of the case from those that existed at the time of the initial determination.

Reviewers should evaluate the withdrawal request under the principles used to make an initial determination, and limit the evaluation to determining if the changed facts and circumstances, had they been known at the time of the initial determination, would have resulted in a decision not to seek the death penalty. For this reason, information or arguments that had been advanced initially are not normally appropriate bases for withdrawal requests. In all cases, however, reviewers should consider all necessary information to ensure every defendant is given the individualized consideration needed for full review and appropriate decision-making.

The Assistant Attorney General for the Criminal Division will review any request by a United States Attorney for reconsideration of the decision to seek the death penalty or authorization to withdraw the notice of intent to seek the death penalty. The Assistant Attorney General will make a recommendation to the Attorney General through the Deputy Attorney General on whether the notice of intent to seek the death penalty should be withdrawn. In making that recommendation, the Assistant Attorney General will be advised by the Capital Case Unit.

In all cases, the Attorney General shall make the final decision on whether to authorize the withdrawal of a notice of intention to seek the death penalty. Until such a decision is made, the United States Attorney should proceed with the case as initially directed by the Attorney General. As with all communications between United States Attorneys and the Department of Justice, the fact that a withdrawal request has been made is confidential and may not be disclosed to any party outside the Department of Justice and its investigative agencies.

### **9-10.160 Approval Required For Judicial Sentencing Determination**

In cases in which the Attorney General has authorized seeking the death penalty, the United States Attorney must obtain the approval of the Assistant Attorney General for the Criminal Division before agreeing to a request by the defendant pursuant to 18 U.S.C. § 3593(b)(3) for the sentence to be determined by the trial court rather than a jury.

### **9-10.170 Reporting Requirements**

Each United States Attorney's Office must identify a point-of-contact who will be responsible for

ensuring compliance with the following reporting requirements.

The Capital Case Unit must be immediately notified when:

- A. A capital offense is charged or when an indictment is obtained pertaining to conduct that could be, but has not been, charged as a capital offense. The point-of contact should provide the Unit with a copy of the indictment and cause number.
- B. A deadline for filing a notice of intent to seek the death penalty or a trial date is established or modified.
- C. There are any developments that could affect the ability to file a notice of intent to seek the death penalty sufficiently in advance of trial to allow the defense and prosecution to prepare for a capital punishment hearing.
- D. A verdict and sentence are reached in a case in which the Attorney General authorized seeking the death penalty.
- E. The Government intends to accept a guilty plea to a capital offense when, but for the defendant's protected proffer, there would be insufficient evidence to charge the offense. The Capital Case Unit may authorize the United States Attorney to proceed with such pleas without submitting the cases to the review process.

The victim's family must be notified of all final decisions regarding the death penalty.

### **9-10.180 Forms and Procedures**

The Assistant Attorney General for the Criminal Division, the Deputy Attorney General, and the Attorney General may promulgate forms and procedures to implement the provisions of this Chapter. The United States Attorney should contact the Capital Case Unit to discuss the applicable procedures and obtain the appropriate forms.

### **9-10.190 Exceptions for the Proper Administration of Justice**

To ensure the proper administration of justice in an appropriate case, the Attorney General may authorize exceptions to the provisions of this Chapter.