

Criminal Resource Manual

67. THE FEDERAL DEATH PENALTY

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.

68. THE ANTI-DRUG ABUSE ACT OF 1988

The death penalty under 21 U.S.C. 848(e)(1)(A)-(B) was enacted as part of the Anti-Drug Abuse Act of 1988 and became effective on November 18, 1988. *See* Pub. L. 100-690, Nov. 18, 1988, 102 Stat. 4181. In passing this legislation, Congress expressly intended to punish and deter anyone who intentionally kills or counsels, commands, induces, procures, or causes an intentional killing of: (A) any person while (1) engaging in or (2) working in furtherance of any continuing criminal enterprise, or (3) while engaging in a major Federal drug felony; or (B) any law enforcement officer during or in relation to a Federal drug felony. *See* 134 Cong. Rec. S. 16042 (daily ed. Oct. 14, 1988) (statement of Sen. D'Amato); *see also* 134 Cong. Rec. H. 7274 (daily ed. Sept. 8, 1988) (statement of Rep. Gekas). Offenses under 21 U.S.C. 848(e) include "any person" who commits or causes another to commit a drug-related intentional killing as defined by the statute, not just "drug kingpins."

69. THE FEDERAL DEATH PENALTY ACT OF 1994

The Federal Death Penalty Act of 1994 was enacted as Title VI of the Violent Crime Control and Law Enforcement Act of 1994 and became effective on September 13, 1994. *See* Pub. L. 103-322, Title VI, Sections 60001-26, Sept. 13, 1994, 108 Stat. 1959 (codified at 18 U.S.C. 3591-3598). In passing this legislation, Congress established constitutional procedures for imposition of the death penalty for 60 offenses under 13 existing and 28 newly-created Federal capital statutes, which fall into three broad categories: (1) homicide offenses; (2) espionage and treason; and (3) non-homicidal narcotics offenses. Drug-related killings under 21 U.S.C. 848(e) and political assassinations under 18 U.S.C. 1751 (presidential and staff) and 18 U.S.C. 351 (congressional and cabinet, etc.) are not expressly included in the Act's otherwise exhaustive listing of death penalty offenses. However, Section 3591(a)(2) of the Act expressly extends to "any other offense for which a sentence of death is provided"

70. CONSULTATION PRIOR TO SEEKING THE DEATH PENALTY

A submission to the Assistant Attorney General for the Criminal Division is required in any case in which an offense subject to the death penalty has been, or could be, or will be charged. Early consultation with attorneys in the Capital Case Unit is encouraged so that prosecutors can receive timely advice and assistance in preparing and presenting a potential capital case for Department review and decision by the Attorney General to seek, or not to seek, the death penalty ([JM Chapter 9-10.000](#)). The death penalty protocol review process is also required for plea agreements that preclude imposition of the death penalty, and for consent to a bench trial in cases where the United States Attorney has been authorized to seek the death penalty.

Before obtaining an indictment for an offense subject to the death penalty, the United States Attorney or Assistant United States Attorney assigned to the case should consult with the Capital Case Unit of the Criminal Division regarding the inclusion in the indictment of the statutory factors that render the offense death penalty-eligible. Prior to filing or amending a notice of intent to seek the death penalty in a case in which the Attorney General has decided to seek the death penalty, the Capital Case Unit must approve the notice or the proposed amendment.

Attorneys in the Capital Case Unit and other appropriate sections can alert prosecutors to current issues in the prosecution of capital cases and provide them with resources that will assist in the preparation for trial and for the punishment hearing.

[updated November 2003]

71. CAPITAL ELIGIBLE STATUTES ASSIGNED BY SECTION

The capital eligible statutes in the United States Code are assigned to the following sections:

- Terrorism and Violent Crime Section TVCS
- Narcotic and Dangerous Drug Section NDDS
- Organized Crime and Racketeering Section OCRS
- Office of Special Investigations OSI
- Child Exploitation and Obscenity Section CEOS
- Criminal Section, Civil Rights Division CRCS

The capital eligible statutes in the United States Code are assigned to these sections as follows:

STATUTE	DESCRIPTION	SECTION
8 U.S.C. 1324(a)	Alien Smuggling Resulting in Death	TVCS
18 U.S.C. 32, 34	Destruction of Aircraft Death	TVCS
18 U.S.C. 33, 34	Destruction of Motor Vehicle Death	TVCS
18 U.S.C. 36	Drive By Shooting Murder in re 848(c), 846, 841(b)(1)(A)	NDDS
18 U.S.C. 37	Intern'l Airport Violence Death	TVCS
18 U.S.C. 241	Conspiracy Against Rights Death	CRCS

18 U.S.C. 242	Deprivation of Rights Death	CRCS
18 U.S.C. 245(b)	Federally Protected Activity Death	CRCS
18 U.S.C. 247(c)	Exercise of Religious Rights Death	CRCS
18 U.S.C. 351	Congress, Cabinet Etc. Murder/Death	TVCS
18 U.S.C. 794	Espionage	TVCS
18 U.S.C. 844	Explosive Materials Death --	TVCS
(d)	transport in interstate commerce	
(f)	destroying government property	
(i)	and property affecting commerce	
18 U.S.C. 924(i)	Gun Murder re Violent or Drug Crime	TVCS
18 U.S.C. 930(c)	Murder in a Federal Facility	TVCS
18 U.S.C. 1091(b)	Genocide Resulting in Death	OSI
18 U.S.C. 1111	First Degree Murder (Premed-Felony)	TVCS
18 U.S.C. 1114	Murder of Federal Officials, Etc.	TVCS
18 U.S.C. 1116(a)	Murder of Foreign Officials, Etc.	TVCS
18 U.S.C. 1118	Murder by Federal Prisoner	TVCS
18 U.S.C. 1119	Foreign Murder of United States National	TVCS
18 U.S.C. 1120	Murder by Escaped Federal Prisoner	TVCS
18 U.S.C. 1121(a)	Murder of Person Aiding Federal Law	TVCS
18 U.S.C. 1121(b)	Murder of State Corrections Officer	TVCS
18 U.S.C. 1201(a)	Kidnapping Resulting in Death	TVCS
18 U.S.C. 1203(a)	Hostage Taking Resulting in Death	TVCS
18 U.S.C. 1503	Murder of Court Officer or Juror	TVCS

18 U.S.C. 1512(a)	Murder of Federal Witness, Etc.	TVCS
18 U.S.C. 1513	Retaliatory Murder of Witness, Etc.	TVCS
18 U.S.C. 1716	Mailing Injurious Articles Death	TVCS
18 U.S.C. 1751	Presidential, Staff, Etc. Murder	TVCS
18 U.S.C. 1959(a)	Racketeering Murder (State-Federal)	OCRS
18 U.S.C. 1992	Wrecking Trains Resulting in Death	TVCS
18 U.S.C. 2113(e)	Bank Robbery Resulting in Death	TVCS
18 U.S.C. 2119(3)	Carjacking Resulting in Death	TVCS
18 U.S.C. 2241-45	Sexual Abuse Resulting in Death	CEOS
18 U.S.C. 2251(d)	Child Sexual Exploitation Death	CEOS
18 U.S.C. 2280	Maritime Navig'n Violence Death	TVCS
18 U.S.C. 2281	Maritime Platform Violence Death	TVCS
18 U.S.C. 2332(a)(1)	Foreign Murder of United States National	TVCS
18 U.S.C. 2332a	Weapon of Mass Destruction Death	TVCS
18 U.S.C. 2340A	Foreign Torture Resulting in Death	TVCS
18 U.S.C. 2381	Treason	TVCS
18 U.S.C. 3591(b)(1)	Non-Homicide Mega-Narcotics Offense	NDDS
18 U.S.C. 3591(b)(2)	CCE-Obstruction Attempted Killing	NDDS
21 U.S.C. 848(e)(1)(A)	CCE/Major Drug Felony Killing	NDDS
21 U.S.C. 848(e)(1)(B)	Drug Felony Killing of Law Officer	NDDS
49 U.S.C. 46502	Aircraft Piracy Resulting in Death	TVCS

73. NON-EXPEDITED DECISION CASES

Non-Expedited Decision Cases

IMPORTANT NOTE: this form is to be utilized for **Non-Expedited Decision Cases** described in USAM 9-10.080 and **Expedited Decision Cases** described in USAM 9-10.070 A(4-5). Cases described in USAM 9-10.070 A(4-5) should be marked as an **Expedited Decision Case** on this form.

United States Department of Justice

**United States Attorney/Assistant Attorney
General**

District of _____/_____ Division

Date

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL

TO: P. Kevin Carwile
Chief, Capital Case Section
Criminal Division

FROM: [Name]
United States Attorney/Assistant Attorney General
District of _____/_____ Division
[Telephone Number]

[Name of Primary AUSA(s)/Component Attorney(s)]
[Telephone Number(s)]

SUBJECT: Request from the United States Attorney for the District of _____/Assistant Attorney General, _____ Division for Authorization **To Seek/Not to Seek** the Death Penalty Against **[Name the Defendant(s)]**

The United States Attorney for the District of _____ /Assistant Attorney General, _____ Division requests the authorization of the Attorney General, pursuant to United States Attorneys' Manual, § 9-10.080, **to seek/not to seek** the death penalty against **[defendant(s)]** for [specify the capital offense and name victim(s)].

[Set forth the basis for expedited decision pursuant to USAM-10.070 A(4-5), if applicable.]

TIMETABLE

[Identify date(s) of indictment(s), any deadline established by the trial court for filing a notice of intent to seek the death penalty, and trial date. If there is no deadline for filing the death notice, identify any additional considerations that could impact the time available for the review process. USAM 9-10.080 A(1).]

PROCEDURAL HISTORY

[In addition to delineating the procedural history of the case, identify each capital charge, distinguishing by defendant as appropriate.]

STATEMENT OF FACTS

A. Description of capital offense

[Narrative delineation of the facts of the offense(s), the government's theory of the offense(s). See USAM 9-10.080 A(2).]

B. The evidence

[Set forth a comprehensive delineation of the evidence including, but not limited to: expected testimony of key witnesses; plea agreements with cooperating witnesses; eyewitness identifications; confessions and admissions; intercepted communications and surveillance videos; physical evidence; and forensic evidence. See USAM 9-10.080 A(2).]

C. Chart of admissible evidence

[If the case involves multiple death penalty-eligible offenses or offenders, with different evidence applicable to each, include a chart to clarify how the government will establish its case. USAM 9-10.080 A(2).]

DEATH PENALTY ANALYSIS

A. Prosecutorial Considerations Affecting the Death Penalty Decision

[Discuss relevant prosecutorial considerations, including any legal and evidentiary issues affecting the prosecution of the capital charges or a punishment hearing on those charges. See USAM 9-10.140 D.]

B. Intent Factors and Aggravating Factors

1. Threshold intent factors

[As a prerequisite to imposing the death penalty, the government must establish, beyond a reasonable doubt, that at least one of the four threshold intent requirements under 18 U.S.C. § 3591(a)(2) applies to the defendant's conduct. For each defendant, identify the intent factor(s) applicable to each capital offense charged against that defendant and, if not self-evident from the facts, describe why the factor is applicable. USAM 9-10.080 A(4)]

2. Statutory Aggravating Factors

[Statutory aggravating factors are specific to defendant and charged offense. In order for a defendant to be eligible for the death penalty for a charged offense, the government must establish beyond a reasonable doubt that at least one of the statutory aggravating factor under 18 U.S.C. § 3592(c) applies to the defendant for the charge. For each defendant, identify all of the statutory aggravating factors applicable to each capital offense charged and, if not self-evident from the facts, describe why the factor is applicable. USAM 9-10.080 A(4)]

3. Non-statutory aggravating factors

[Title 18 capital sentencing provisions allow the government to rely on non-statutory aggravating factors. See 18 U.S.C. § 3592(b)-(d). Identify applicable non-statutory factors by defendant and offense charged. Describe why it applies and the supporting evidence. The factor must be “sufficiently specific to provide meaningful guidance to the jury” and have a “core meaning that a criminal jury should be capable of understanding.” Avoid pejorative adjectives, such as heinous or atrocious which describe the crime as a whole. USAM 9-10.080 A(4)]

C. Mitigating Factors

1. Statutory mitigating factors

[For each death penalty-eligible offender, identify the statutory mitigators raised by the defense or suggested by the evidence. The statutory mitigating factors for Title 18 are set forth at § 3592(a)(1)-(7). Classify mitigators by offense as appropriate. USAM 9-10.080 A(4)]

2. Non-Statutory Mitigating Factors

[18 U.S.C. § 3592(a)(8) allows the defendant to present evidence of other mitigating factors. Mitigating factors are those aspects of a defendant’s character, background or the circumstances of the offense that reflect a reduced personal culpability for the offense or otherwise mitigate against imposition of a death sentence. Identify the non-statutory mitigators raised by the defense or suggested by the evidence. USAM 9-10.080 A(4)]

D. Weighing of aggravating and mitigating factors under 18 U.S.C. § 3593

[The U.S. 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. USAM 9-10.080 A(4); see also Standard for Determination USAM 9-10.140 C.]

THE DEFENDANT(S)

[Age, background, and criminal history. USAM 9-10.080 A(5). Do not include racial or ethnic information here.]

THE VICTIM(S)

[Age, background, and criminal history. USAM 9-10.080 A(6). Do not include racial or ethnic information here.]

[Include the views of the victim's family concerning the death penalty. USAM 9-10.080 A(7).]

FEDERAL INTEREST

[Discuss whether there is exclusive federal jurisdiction or whether concurrent jurisdiction exists with a State or local government. If jurisdiction is concurrent, identify the federal interest in the prosecution. See USAM 9-10.080 A(8); see also USAM 9-10.110]

CONSULAR NOTIFICATION

[If a defendant is a citizen of a foreign country, describe steps taken to adhere to the consular notification requirement of the Vienna Convention. (See State Department website at <http://travel.state.gov/content/travel/english/consularnotification.html>). Otherwise, state that the defendant is a United States citizen only and not a citizen of a foreign country. USAM 9-10.080 A(9).]

CONCLUSION AND RECOMMENDATION

[Set forth basis for U.S. Attorney's recommendation whether the death penalty should be sought against the capital defendant(s). The conclusion should be sufficiently detailed to make clear the bases for the recommendation. USAM 9-10.080 A(10).]

[State request for authorization to seek/not to seek the death penalty against **defendant(s)** for the specified offense.]

[Name]

United States Attorney/Assistant Attorney General

District of _____/_____ Division

Attachments

Indictment, Proposed Indictment, or Superseding Indictment

Proposed Notice of Intent to Seek the Death Penalty

Defense Submission(s)

Non-Decisional Information Form(s) **Under Seal**

Death Penalty Evaluation Form(s)

74. EXPEDITED DECISION CASES

Expedited Decision Cases

IMPORTANT NOTE: this short form is to be utilized for **Expedited Decision Cases** described in USAM 9-10.070 A(1-3). Cases described in USAM 9-10.070 A(4-5) should be marked as an **Expedited Decision Case** but the longer **Non-Expedited Decision Case** form should be utilized for the submission.

United States Department of Justice

**United States Attorney/Assistant Attorney
General**

District of _____/_____ Division

Date

MEMORANDUM FOR THE ATTORNEY GENERAL

TO: P. Kevin Carwile
Chief, Capital Case Section
Criminal Division

FROM: [Name]
United States Attorney/Assistant Attorney General
District of _____/_____ Division
[Telephone Number]

[Name of Primary AUSA(s)/Component Attorney(s)]
[Telephone Number(s)]

SUBJECT: Request from the United States Attorney for the District of _____/Assistant Attorney General, _____ Division for Authorization **Not to Seek** the Death Penalty against **[Name the Defendant(s)]**

The United States Attorney for the District of _____/Assistant Attorney General, _____ Division requests the authorization of the Attorney General, pursuant to the United States Attorneys' Manual, § 9-10.070, **not to seek** the death penalty against **[defendant(s)]** for {specify the capital offense and name victim(s)}.

[Set forth the applicable basis for expedited decision pursuant to USAM-10.070 A(1-3)]

TIMETABLE

[Identify date(s) of indictment(s), any deadline established by the trial court for filing a notice of intent to seek the death penalty, and trial date. If there is no deadline for filing the death notice, identify any additional considerations that could impact the time available for the review process. USAM 9-10.060]

STATEMENT OF FACTS

[Narrative description of capital offense and supporting evidence.]

RATIONALE FOR NOT SEEKING THE DEATH PENALTY

[Brief description of the applicable provision under USAM 9-10.070 A(1-3).]

THE DEFENDANT(S)

[Age, background, and criminal history. Do not include racial or ethnic information here-
-this information should be provided as described in USAM 0-10.080 C.]

FEDERAL INTEREST

[Discuss whether there is exclusive federal jurisdiction or whether concurrent jurisdiction exists with a State or local government. If jurisdiction is concurrent, identify federal interest in the prosecution. See USAM 9-10.070 B; see also USAM 9-10.110]

[Name]

United States Attorney/Assistant Attorney General

District of _____/_____ Division

Attachments

Non-Decisional Information Form(s) **Under Seal**

74. EXTENUATING CIRCUMSTANCES

Extenuating Circumstances

IMPORTANT NOTE: this form should be utilized to 1) provide notice that a capital eligible case cannot be submitted for pre-indictment review due to extenuating circumstances and 2) to provide 45 day status updates leading up to the eventual case submission. USAM 9-10.060.

United States Department of Justice

**United States Attorney/Assistant Attorney
General**

District of _____/_____ Division

Date

NOTICE OF EXTENUATING CIRCUMSTANCES PRECLUDING SUBMISSION

TO: P. Kevin Carwile
Chief, Capital Case Section
Criminal Division

FROM: [Name]
United States Attorney/Assistant Attorney General
District of _____/_____ Division
[Telephone Number]

[Name of Primary AUSA(s)/Component Attorney(s)]
[Telephone Number(s)]

The United States Attorney for the District of _____/Assistant Attorney General, _____ Division hereby provides notice that, due to extenuating circumstances, capital eligible defendant(s) will be/have been charged in the District of _____ prior to submitting their case for capital review.

CAPITAL ELIGIBLE DEFENDANT(S)

[Names of all capital eligible defendants]

BRIEF DESCRIPTION OF FACTS AND CAPITAL ELIGIBLE OFFENSES

[Brief narrative description of potential capital offense(s)]

EXTENUATING CIRCUMSTANCES

[Description of the extenuating circumstances which necessitate filing criminal charges prior to submitting the case for pre-indictment review. USAM 9-10.060]

TIMETABLE

[Identify indictment/charging date, any deadline established by the trial court for filing a notice of intent to seek the death penalty and trial date. If there is no deadline for filing a death notice, identify any additional considerations that could impact the time available for the review process. Finally, specify the anticipated date for submitting the case for capital review]

NOTE: every 45 days after an initial notice is submitted, the United States Attorney/Assistant Attorney General must submit an updated notice setting forth 1) the extenuating circumstances that continue to justify not submitting the case for review, 2) the progress made toward a submission, and 3) the estimated date by which the case will be submitted for capital review. USAM 9-10.060]

[Name]

United States Attorney/Assistant Attorney General

District of _____/_____ Division

Attachment

Indictment or other charging document