



Office of the Attorney General
Washington, D. C. 20530

TO: Holders of Title 9, United States Attorneys' Manual

FROM: Office of the Attorney General
Janet Reno
Attorney General

SUBJECT: Federal Prosecutions in Which the Death Penalty May Be Sought

NOTE: 1. This is issued pursuant to USAM 1-1.550.
2. Distribute to holders of Title 9.
3. Insert in front of affected section.

AFFECTS: USAM 9-10.000

PURPOSE: This bluesheet 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.

A. AUTHORIZATION TO SEEK THE DEATH PENALTY

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

B. 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 the 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 seek approval for the death penalty, the United States Attorney's Office should inform counsel for the defendant.

C. 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 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 Section F, infra), and (vi) any other relevant information. A copy of the Death Penalty Evaluation form is included as Appendix A.

The United States Attorney shall send the above-described documents, a copy of the indictment,¹ 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. 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.

D. 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 Section C, supra. The Attorney General will conduct an independent 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. The

¹ The request should include copies of all existing, proposed, and superseding indictments.

Committee will make a recommendation to the Attorney General concerning the application of the death penalty to the case.

E. NOTICE TO FAMILY OF VICTIM

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

F. 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:

(1) 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.

(2) 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.

(3) 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.

G. 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 may consider any legitimate law enforcement or prosecutorial reason which weighs 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.

H. 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 as a condition of a plea agreement approved by the United States Attorney. 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.

I. 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 this Bluesheet 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 can 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.



Office of the Attorney General
Washington, D. C. 20530

August 17, 1994

The Honorable Cleo Fields
United States House of Representatives
Washington, DC 20515

Dear Congressman Fields:

I appreciated the opportunity to speak with you concerning the Crime Bill. I respect your deep and principled concerns regarding some of the measures in the Crime Bill and your opposition to capital punishment in all cases. As I told you, the Administration is committed to passing a balanced crime bill and to insuring that the stiff penalties it imposes are enforced in a fair and evenhanded manner, free from any racial, ethnic or other invidious discrimination.

The Administration is working, as am I personally, to insure that there will be absolutely no bias in our ongoing administration of capital punishment. To that end, the Department of Justice has been developing its internal procedures which govern our seeking of the death penalty. These procedures will be in place prior to the effective date of the Crime Bill and will cover the following areas, among others:

- (1) Promulgation of internal procedures to insure that decisions to seek the death penalty are made in a uniform, fair, and non-discriminatory manner, so that defendants who commit similar acts and who have similar degrees of culpability are treated similarly by the Department;
- (2) Adoption of an internal review mechanisms which will insure that those guidelines and procedures are complied with and that evidence of discrimination is reviewed by senior Department officials;
- (3) Creation of an appropriate mechanism for post-trial disclosure of the Department's capital prosecution decisions, so that the public can review and understand the basis for such decisions; and
- (4) Development of improved training and support for prosecutors who seek the death penalty, to insure that their actions will be consistent with Departmental policies, and adequate briefings to insure that they are familiar with our policies.

We will also be taking analogous steps to insure fairness in the administration of other aspects of the criminal justice system, with particular attention to the other enhanced penalties in the Crime Bill including the "three strikes" provision.

I believe that there is no tension between rigorous enforcement of the law and fair application of those laws. Fairness means freedom from discrimination, not freedom from appropriate punishment -- it means that victims from all background and all races see their victimizers punished to the full extent proper under the law.

In addition to our effort to insure fairness, the Administration is committed to making the promise of a balanced Crime Bill a reality. To achieve that end, we will fight to insure that the programs authorized in the bill to receive funding from the Violent Crime Reduction Trust Fund are in fact funded. It is imperative that the promises of more police on our streets, prisons space for violent offenders, and prevention programs to give young people something to say yes to are not turned into empty rhetoric.

Again, I enjoyed the opportunity to discuss with you these important matters and I hope that this letter has addressed any of your remaining concerns. I look forward to continuing to work with you this, and other, matters of mutual concern.

Sincerely,

A handwritten signature in black ink, appearing to read "Janet Reno", written in a cursive style.

Janet Reno

draft Bluesheet (SPW Revision 7/19, 9:00 p.m.)

**FEDERAL PROSECUTIONS IN WHICH THE FEDERAL
DEATH PENALTY MAY BE SOUGHT**

A. AUTHORIZATION TO SEEK THE DEATH PENALTY

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

B. 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 the United States Attorney's Office decides to request approval to seek the death penalty, whichever comes first, the United States Attorney's Office 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 seek approval for the death penalty, the United States Attorney's Office should inform counsel for the defendant.

C. SUBMISSIONS TO THE DEPARTMENT OF JUSTICE

In all cases in which the United States Attorney intends to charge a defendant with commission of any offense punishable by death, whether or not the United States Attorney recommends the filing of a notice 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 mitigating or aggravating factors, (iv) the defendant's background and criminal history, (v) the basis for federal prosecution (see Section FG, *infra*), and (vi) a statement summarizing and analyzing the substance of any arguments made by defense counsel against imposition of the death penalty, and (vii) any other relevant information. A copy of the Death Penalty Evaluation form is included as Appendix A.

The United States Attorney shall send the above-described documents, a copy of the indictment¹ 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. Whenever possible these materials should be submitted prior to the return of an indictment containing a charge for which the death penalty could

¹ The request should include copies of all existing, proposed, and superseding indictments.

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.

D. DEPARTMENT OF JUSTICE REVIEW

Each of the documents described above shall first 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, with the reasons why the death penalty should not be sought. The Committee should give the Attorney General its recommendation in writing within fifteen days of the receipt of all documentation required by Part C above. The Attorney General will conduct an independent 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 subsequent submission defense counsel chooses to make concerning application of the death penalty to the case. The Committee will make a recommendation to the Attorney General concerning the application of the death penalty to the case.

E. NOTICE TO FAMILY OF VICTIM

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

F. SUBSTANTIAL FEDERAL INTEREST

~~Where concurrent jurisdiction exists with a state or local government, it is anticipated that a federal indictment under Section 848(e) will be obtained only when the federal interest in a prosecution for murder is more substantial than the interests of the state or local authorities. 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 exhaustive, may be considered in deciding whether there is a more substantial interest in federal as opposed to state prosecution of the drug related murder:—~~

~~(1) 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.~~

~~(2) The extent to which the criminal activity reached beyond the local jurisdiction. The extent to which the criminal activity reached substantially beyond the boundaries of a single local prosecutorial jurisdiction should be considered. The amount of drugs distributed, the size and geographic reach of the drug distribution criminal organization to which the defendant belonged, the geographic reach of the drug organization, the number and location of the murders, and the need to procure evidence from other jurisdictions, in particular other states or foreign countries, are all relevant to this analysis.~~

~~(3) 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.~~

GF. 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 may consider any legitimate law enforcement or prosecutorial reason which weighs 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:

(a) the statutory aggravating factors under ~~Section 848(n)~~ and any non-statutory aggravating factors under ~~Section 848(h)~~ sufficiently very substantially outweigh the known mitigating factors under ~~Section 848(m)~~ to justify a sentence of death, or, in the absence of any known mitigating factors, whether the admissible evidence of aggravating factors themselves are is sufficient to conclude with a high degree of certainty that a

~~jury would administer justify a sentence of death and that such sentence would be affirmed on appeal.~~

To qualify for consideration in this analysis, an aggravating factor must be found by the United States Attorney, the Attorney General's Committee, and/or the Attorney General 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 by the United States Attorney, the Attorney General's Committee, or the Attorney General,~~ any mitigating factor(s) 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 so 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.~~

~~(b) the case presents a particularized and strong federal interest in capital prosecution. In states where the imposition of the death penalty is not authorized by law, the fact that the maximum federal penalty is death may not be used is insufficient, standing alone, to show a more substantial interest in federal prosecution.~~

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.

~~In sum, the death penalty should not be sought under Section 848(e) unless there exist: (1) a federal interest more substantial than that of state or local authorities; (2) facts which can be proven through admissible evidence which fully warrant the death penalty; and (3) the aggravating factors found to exist sufficiently outweigh any mitigating factor(s) found to exist to justify a sentence of death.~~

HG. 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 may be withdrawn only: (a) if withdrawal is authorized by the Attorney General; or (b) as a condition of a plea agreement approved by the United States Attorney. If the United States Attorney wishes to withdraw the notice and proceed to trial, the United States Attorney shall advise the Criminal Division of the reasons for that request, including any changes in facts or circumstances.

Any subsequent submissions made by defense counsel, and any request to withdraw a notice of intention to seek the death penalty shall be reviewed by the Committee appointed by the Attorney General pursuant to Section D, supra, which will make a recommendation to the Attorney General. The Attorney General shall conduct an independent review and make the final decision.

III. 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 this Bluesheet 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 can 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 capital case, the United States Attorney shall advise the Criminal Division in writing of the plea agreement and the reasons for it.