IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, v. DEMARIO JAMES ATWATER, Defendant.	)	Case No. 1:08CR384-1

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE THE DEATH PENALTY AUTHORIZATION BY ATTORNEY GENERAL MUKASEY UNLESS AND UNTIL BOTH OF THE DEFENDANT'S CONSTITUTIONALLY-APPOINTED COUNSEL ARE PROVIDED THE MANDATORY OPPORTUNITY TO BE HEARD AT THE DEPARTMENT OF JUSTICE IN WASHINGTON, D.C.

Introduction

The Department of Justice violated its internal procedures and this Court's Order when it held its meeting of the Capital Case Review Committee, a critical preliminary proceeding regarding the Government's determination of whether it will seek the death penalty, without the presence of both Defendant Atwater's court-appointed attorneys. This high-profile case requires not only for justice to prevail, but just as important, this case requires every appearance that justice has been administered fairly.

This memorandum argues that: (1) the United States Attorney's Manual's death penalty protocols creates substantive rights in the defendant, and (2) that the express language of the DOJ provisions were violated when both counsel for the accused were denied the right to present oral argument in Washington, D.C.; and (3) that the specific language of this Court's Order appointing counsel ordered that both of Mr. Atwater's appointed attorneys represent the Defendant during the entire pre-authorization process and at any preliminary proceedings regarding the Government's determination of whether it would seek the death penalty. The appropriate remedy for this deprivation is for this Court to strike the authorization of the death penalty in this matter unless and until the government grants the Defendant an opportunity to be represented fully by his Court-appointed counsel before the Capital Case Review Committee at the Department of Justice in Washington, D.C.

FACTS

This Court appointed two attorneys, pursuant to 18 U.S.C. § 3005, to represent the Defendant during the pre-indictment process, including the Department of Justice's death penalty authorization process. The Order appointing Mr. Gregory Davis and Ms. Kimberly Stevens specifically states that they were appointed "as counsel for Mr. Demario Atwater with regard to the current federal investigation and any preliminary proceedings

regarding the Government's determination of whether it will seek the death penalty in this case." (Sealed Order at 3, August 13, 2008). The United States Attorney's Manual states: "[n]o 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" § 9-10.120 (emphasis added).

The Department of Justice, in the case of United States v. Demario James Atwater, held its meeting of the Capital Case Review Committee in Washington, D.C., on September 29, 2008. This hearing was the only opportunity granted by the Department of Justice to the Defendant to present his oral argument in opposition to the authorization of the death penalty. The week before the hearing, lead counsel, Gregory Davis, was seriously ill and hospitalized. This fact was conveyed to the United States Attorney's Office in a timely manner, with a request that the hearing be rescheduled.

Due to his illness, Mr. Davis was unable to fully assist in the preparation for the hearing in the week before the hearing. Nor was Mr. Davis able to travel to Washington, D.C. to assist in representing the Defendant before the Capital Case Review Committee. On the day of the hearing, Mr. Davis was scheduled to have a radiation procedure. Despite repeated requests for a re-scheduling of that hearing, Defendant's attorneys were informed that the hearing would not be re-scheduled.

Failure to reschedule that pivotal meeting not only violated Defendant Atwater's due process rights, it violated this Court's Order that Defendant Atwater be represented by Mr. Davis **and** Ms. Stevens at "any preliminary proceeding regarding the Government's determination of whether it will seek the death penalty in this case." (Sealed Order at 3, August 13, 2008). The Defendant's attorneys had no choice but to send Ms. Stevens alone to Washington, D.C.

As of the time of the September 29, 2008 hearing at the Department of Justice, Mr. Davis had spent more time on the case. Ms. Stevens was appointed by this Court to represent Mr. Atwater approximately 6 weeks before the hearing. Mr. Davis had been appointed by the Court to represent Mr. Atwater approximately 11 weeks before the hearing. Further, Mr. Davis, anticipating that the case would proceed to indictment in federal court, had begun work on the case in the months prior to his appointment by the Court.

On September 29, 2008, at the Capital Case Review Committee hearing, Clifton J. Barrett appeared on behalf of the United States Attorneys' Office along with State Bureau of Investigation Agent Phillip Stevens and Chapel Hill Police Detective Celisa J. Lehew. The United States Department of Justice was represented by five attorneys at the hearing. Appearing on behalf of the Defendant, Demario James Atwater, was Kimberly C. Stevens.

The Defendant's attorney was not merely asked to give a prepared presentation during the Committee meeting at the Department of Justice. Ms. Stevens was asked questions during the hearing by agents of the Government and Ms. Stevens made strategic decisions alone and at the spur of the moment during that proceeding. This is, no doubt, the traditional function of counsel. However, Defendant's counsel were unable to confer during this hearing. The Defendant was thus deprived of the benefit of his two appointed attorneys with regard to the strategic decisions that had to be made during the only Committee meeting that was granted the Defendant prior to the Attorney General's decision authorizing death.

The Fourth Circuit and this Court have recognized the value of having co-counsel represent a defendant at the presentment of information to the United States Attorney, and have required the appointment of a second lawyer before that proceeding for the very purpose that two lawyers be present. (Sealed Order at 2, August 13, 2008, (quoting United States v. Boone, 245 F.3d 352, 360 (4th Cir. 2001)). The Government announced on January 15, 2009, that it would seek the death penalty against Defendant Atwater.

Mr. Atwater served a lengthy written request for reconsideration of Attorney General Mukasey's death authorization on the Department of Justice on August 10, 2009. That document raised issues, among others, of racial discrimination in the

authorization of the death penalty in this case. Just three business days later, on Thursday, August 13, 2009, the Capital Case Committee denied, without any consultation with Defendant's counsel, the request for reconsideration. Counsel were not provided the opportunity to appear before the Committee in person before the Committee denied the request for de-authorization. Counsel were informed of the Committee's denial on Monday, August 17, 2009. See attached **Exhibit A**, e-mail from Assistant United States Attorney Cliff Barrett to Defendant's counsel.

Argument

A. THE PROCEDURE ESTABLISHED BY § 9-10.000 IS MANDATORY IN EVERY CASE IN WHICH DEATH IS A POSSIBLE PUNISHMENT AND PRECLUDES SEEKING THE DEATH PENALTY UNLESS CERTAIN SUBSTANTIVE REQUISITES ARE MET.

The Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591-3598, requires "the attorney for the government" to "serve on the defendant" "a reasonable time before trial ... a notice

> (1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and
>
> (2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death."

18 U.S.C. § 3593(a).

To implement this provision, the Attorney General has devised a procedure for making the determination whether the

death sentence should be pursued in a particular case. This procedure, set out in § 9-10.000 of the United States Attorneys' Manual, is the exclusive manner in which the government determines whether to give the notice required under 18 U.S.C. § 3593(a). As explained in § 9-10.010, the section

> sets forth policy and procedures for all Federal cases in which a defendant is charged, or could be charged, with an offense subject to the death penalty.

(**Exhibit B**).

The procedure established by § 9-10.000 calls for a three-step process to determine whether the government will seek the death penalty. It begins with the United States Attorney. In any case in involving an indictment that "charges an offense punishable by death or alleges conduct that could be charged by an offense punishable by death" the United States Attorney must prepare a death penalty evaluation form and should prepare a prosecution memorandum. § 9-10.080. The memorandum contains the United States Attorney's recommendation regarding whether to seek death penalty. § 9-10.080A. The United States Attorney is directed to address the theory of liability, the facts and evidence, including evidence relating to any aggravating or mitigating factors, the defendant's background and criminal history, the views of the victim's family, and any other relevant information. *Id*. The above information is then provided (along with written material provided by defense counsel

in opposition to seeking the death penalty) to the Department of Justice. *Id*.

The second step is a review of the case within the Department of Justice by a "Capital Review Committee." § 9-10.120. This Committee "shall review the materials submitted by the United States Attorney and any materials submitted by defense counsel." *Id*. "After considering all information submitted to it, the Committee shall make a recommendation to the Attorney General through the Deputy Attorney General." *Id*.

The third step is a review by 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." *Id*.

The Defendant, through counsel, must be given an opportunity to be heard during the first and second steps of this process. In the first, 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." § 9-10.050 (emphasis added). In the second, a face-to-face meeting to "consider the case" must take place involving defense counsel, the United States Attorney, and the Capital Review Committee. § 9-10.120. In addition, the Capital Review Committee shall review "any materials submitted by defense counsel." *Id*. Finally, "[n]o 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" *Id*. (emphasis added).

By the plain language of The United States Attorneys' Manual, **both** of Defendant's counsel are required to attend this pivotal meeting. Also by the plain language of § 9-10.120, a Committee representative must "confer" with the United States Attorney's Office to "establish" a date and time for the meeting "with defense counsel" before the Committee. Once again, the reference to "defense counsel" contemplates that both defense attorneys must be present, particularly in the context of this Court's Order appointing counsel (to be discussed, *infra*).

During all three of the above steps, the decision-makers must adhere to particular standards for making their determination. These standards focus heavily on a weighing of aggravating and mitigating factors. Section 9-10.130C requires that:

> 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 sufficiently outweigh the applicable mitigating factors to justify a sentence of death, or, in the absence of any mitigating factors, whether the aggravating themselves are sufficient to justify a sentence of death. Reviewers are to resolve ambiguity as to the presence or strength of mitigating factors in favor of the defendant. The analysis employed in weighing the aggravating and mitigating factors that are found to exist 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.

Without the thorough, dual representation at the Committee Meeting contemplated by the Death Penalty Protocol and the Court's Order Appointing Counsel in this case during the pre-authorization proceedings (see below), a defendant will miss his singular chance to provide the decision-making authority with the information necessary to make an informed, educated decision with regard to whether to seek the death penalty against him. It is critical that, when the Attorney General is asked to weigh the aggravating factors against the mitigating factors, the mechanism provided for the production of the mitigating factors and full representation by both learned counsel who have been Court-appointed to represent the Defendant has been followed completely.

In summary, the procedure set out in § 9-10.000 is universal -- it governs "all federal cases in which a defendant is charged, or could be charged, with an offense subject to the death penalty." § 9-10.010. It is also mandatory -- 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." § 9-10.050. The Capital Review Committee "**shall**" review any materials submitted by defense counsel. 9-10.120. Finally,

"[n]o 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." *Id.* The Defendant respectfully submits that both of the Defendant's learned counsel must be presented the opportunity to fully present his case before the Capital Case Review Committee.

II. THE DEPARTMENT OF JUSTICE IS OBLIGATED TO FOLLOW THE DEATH PENALTY PROTOCOL SET FORTH IN § 9-10.000

Having established the mandatory nature of the Death Penalty Protocol above, the next issue is whether the Department of Justice is legally obligated to follow its own protocol. Put another way, the issue is whether a criminal defendant has a legal remedy for the DOJ's failure to follow its mandatory protocol.

The basic premise from which to begin the analysis is the *Accardi* doctrine which provides that an administrative agency must follow its own procedural rules if those rules will affect an individual's rights. *See* Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954). In Accardi, section 19(c) of the Immigration Act of 1917 gave the Attorney General the discretion to suspend the deportation of an illegal alien if certain criteria were established. *Id.* at 262-633, 74 S.Ct. 499. The Attorney General, however, passed regulations that delegated this discretionary decision to the Board of Immigration Appeals. *Id.* at 266, 74 S.Ct. 499. The respondent, Mr.

Accardi, argued that the decision to deport him was invalid because the Board and the Attorney General failed to follow the procedures mandated by those regulations. *Id.* at 266-67, 74 S.Ct. 499. The Supreme Court held that although Mr. Accardi did not have the right to interfere with the Board's or the Attorney General's discretion by questioning their *ultimate and substantive* decision to deport him, he did have a right to require them to follow their self-imposed procedures when making that determination. *Id.* In this respect, the Court explained:

> It is important to emphasize that we are not here reviewing and reversing the manner in which discretion was exercised. If such were the case we would be discussing the evidence in the record supporting or undermining the alien's claim to discretionary relief. Rather, we object to the Board's alleged failure to exercise its own discretion, contrary to valid regulations.

Id. at 268, 74 S. Ct. 499. Hence, the Court ruled that if Mr. Accardi could establish that the procedures were in fact violated, he would be entitled to a new deportation hearing. *Id.*

In the case of Morton v. Ruiz, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974), the Supreme Court held that the Accardi doctrine also applied to procedural rules found in an agency's *internal manual.* In Morton, the Bureau of Indian Affairs ("BIA") denied the respondents' request for general assistance benefits because the respondents failed to satisfy a geographic limitation promulgated by the Bureau. *Id.* at 205, 94 S.Ct. 1055. On appeal, the respondents claimed that the geographic regulation

was invalid because it was not published in the Federal Register or Code of Federal Regulations as required by the Bureau's "internal-operations brochure." *Id.* at 235-36, 94 S.Ct. 1055. The Supreme Court held that the geographic limitation was invalid, not because of the substance of that regulation, but because the BIA failed to publish it in compliance with their self-imposed rule requiring them to do so. *Id.* In reaching this conclusion, the Court said:

> Where the rights of individuals are affected, *it is incumbent* upon agencies to follow their own procedures. This is so even where the *internal procedures* are possibly *more rigorous* than otherwise would be required.... Before the BIA may extinguish the entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own *internal procedures.*

Id. at 235, 94 S. Ct. 1055 (internal citations omitted)(emphasis added).

From these cases, it is clear that an individual has the right to force an administrative agency to follow its own procedural rules, even when those rules are contained in an internal manual and are more stringent than the broad authority given to that agency, if the decision made under those rules will affect the individual's rights.

In the aforementioned cases, the courts applied this doctrine when the individual rights affected were citizenship and eligibility for general assistance benefits. In the present case, the right affected is the most fundamental right of all -

the Defendant's constitutional right to life. Hence, because Defendant's right to life will be affected by the Attorney General's decision on whether to certify the case for the death penalty, he has a right to require the Attorney General to follow his self-imposed procedures found in the Protocol before the Attorney General makes that substantive decision.

As the Supreme Court noted in Accardi, the ruling requested in no way impinges upon the Attorney General's broad discretion to make this *substantive* decision that he alone decides in this case. However, this Court can require him to follow his *procedural* protocol before making this decision.

The Defendant is mindful that the Government's position will be that the Attorney General and the United States Attorneys are somehow exempt from the Accardi doctrine because it is impermissible for a Court to impinge upon their broad prosecutorial discretion. In fact, other jurisdictions have held that defendants do not have a protected, substantive due process interest in enforcing the provisions of the Death Penalty Protocol of the United States Attorneys' Manual. *See* United States v. Feliciano, 998 F. Supp. 166 (D. Conn.1998); United States v. McVeigh, 944 F. Supp. 1478 (D. Colo.1996); United States v. Boyd, 931 F.Supp. 968 (D.R.I.1996), cert. denied, 528 U.S. 1098, 120 S.Ct. 842, 145 L.Ed.2d 708 (2000); United States v. Roman, 931 F.Supp. 960 (D.R.I.1996), cert. denied, 528 U.S.

1127, 120 S. Ct. 960, 145 L.Ed.2d 833 (2000); Walker v. Reno, 925 F. Supp. 124 (N.D.N.Y.1995); United States v. Lee, 274 F.3d 485, 493 (8th Cir. 2001), cert. denied, 537 U.S. 1000, 123 S.Ct. 513, 154 L.Ed.2d 394 (2002); United States v. Torres-Gomez, 62 F. Supp. 2d 402, 406 (D.P.R., 1999) (accused neither obtains nor possesses any rights at the DOJ's Death Penalty Committee hearing); United States v. Ng, 699 F.2d 63, 71 (2nd Cir. 1983) ("to hold the policy legally enforceable would be to invite the Attorney General to scrap it, which would hardly be in the public interest."); United States v. Fernandez, 231 F.3d 1240, 1246 (9th Cir. 2000); United States v. Lopez-Matias, 522 F.3d 150(1st Cir. 2008); Nichols v. Reno, 124 F.3d 1376 (10th Cir. 1997) (defendant has no "protectable interest" in enforcement of death penalty protocols); United States v. Myers, 123 F.3d 350, 355-56 (6th Cir. 1997) ("[A] violation by the government of its internal operating procedures, on its own, does not create a basis for suppressing . . . grand jury testimony."); United States v. Gillespie, 974 F.2d 796, 800-02 (7th Cir. 1992); United States v. Busher, 817 F.2d 1409, 1411-12 (9th Cir. 1987). Research has failed to reveal a Fourth Circuit decision on this question.

Some of the above cases are distinguishable because they involve substantive challenges to the Attorney General's ultimate decision to seek the death penalty. Other of the above cases are distinguishable because they involve the issue of whether the

defendant can force the DOJ, in the absence of a claim of racial discrimination or other unlawful conduct, to produce various documents relevant to the certification process. The present case can be distinguished from those lines of cases because it involves the issue of whether the DOJ must follow a mandatory procedural element related to the opportunity of counsel to be heard at the Department of Justice before deciding whether to authorize death. Additionally, the Defendant IS claiming that this case has been authorized in a racially discriminatory manner and has raised the issue internally with the Department of Justice.

In the cases arising out of the bombing of the Oklahoma City federal building, the courts rejected Defendant Nichols' and McVeigh's substantive challenges to Attorney General Reno's ultimate decision to seek the death penalty. McVeigh, 944 F.Supp. 1478; Nichols, 931 F.Supp. 748. Importantly, in those cases the DOJ *had in fact followed the procedures mandated by the Protocol,* and hence such procedural compliance was not an issue. *See* McVeigh, 944 F.Supp. at 1483. Instead, Defendants McVeigh and Nichols claimed that the Attorney General's ultimate and substantive decision to seek the death penalty was invalid because she publicly announced her decision to do so before a suspect was even identified, and that her decision was improperly influenced by President Clinton's public pledge that the death

penalty would be sought. McVeigh, 944 F.Supp. at 1483; Nichols, 931 F.Supp. at 750.

Likewise in Feliciano, Boyd, Roman and Fernandez, the defendants asked the courts to force the Government to disclose the mitigating and aggravating factors provided to the Attorney General's Capital Case Review Committee even though no such procedural rights were found in or mandated by the Protocol. Feliciano, 998 F. Supp. 166; *Boyd*, 931 F. Supp. 968; Roman, 931 F. Supp. 960; Fernandez, 231 F.3d 1240. Hence, these cases have no bearing on whether Defendant has a right to require the DOJ and the Attorney General to follow their procedural Protocol with regard to both attorneys appearing at the DOJ hearing before making the decision whether or not to seek the death penalty in his case.

The case of Walker v. Reno, 925 F. Supp. 124 (N.D.N.Y.1995) explicitly made the above distinction. In that case, the court concluded that a defendant does not have a right to challenge the Attorney General's *ultimate and substantive decision* to seek the death penalty. However, the Walker court declared, albeit in *dicta*, that pursuant to the Accardi doctrine, a defendant would have a right to force the DOJ and the Attorney General to follow the *procedural protocol* found in the DOJ Manual. On this matter, the Court explained:

> In this case, plaintiffs' Complaint contains no allegation that defendant Reno ignored the procedures contained in her

> Protocol. Indeed, from all appearances defendant Reno scrupulously followed her self-prescribed Protocol procedures. Plaintiff has not alleged, for instance, that the U.S. Attorney sought the death penalty without the prior written authorization of the Attorney General, Protocol at § 9-10.000(A), or failed to submit a prosecution memorandum to the Attorney General, *Id.* at § 9-10.000(A); *or that plaintiff's counsel were denied a reasonable opportunity to present matters in opposition to capital punishment to the U.S. Attorney and DOJ*, *Id.* § 9-10.000(B), (D); or that the Attorney General failed to appoint a special committee to review all submissions, *Id.* § 9-10.000(D), or failed to receive a recommendation from that committee. *Id. Under the foregoing cases, such allegations might well provide a basis for this Court to set aside defendant Reno's determination and remand the matter to the Attorney General for reconsideration pursuant to the procedures she has prescribed for herself in the Protocol.*

Walker, 925 F. Supp. at 132-33 (emphasis added) (footnotes omitted). A later Fifth Circuit case made a similar distinction. United States v. Frye, 372 F. 3d 729, 740 (5th Cir. 2004).

In United States v. Pena-Gonzalez, 62 F. Supp. 2nd 358 (D. P. R. 1999),[1] the District Court held that the Death Penalty Protocol did create substantive rights for a criminal defendant. *Pena-Gonzalez* held that the United States Attorneys' Manual conferred substantive rights to the defendant and that the failure of counsel to adequately represent defendant through the

[1]It is important to note, however, that the First Circuit Court of Appeals (which presides over the District of Puerto Rico) has subsequently held to the contrary on very similar facts. *See* United States v. Lopez-Matias, 522 F.3d 150 (1st Cir. 2008). The Pena-Gonzalez decision has arguably been overruled with respect to its interpretation of the law in this regard.

certification process was sufficient to strike the death penalty certification. *Id*. at 366.

In Pena-Gonzalez, the district court judge was informed by the local United States Attorney that they would not be seeking the death penalty in that case. *Id*. at 359. Accordingly, only one attorney was appointed to represent the defendant. *Id*. That attorney got into a personality conflict with the defendant and refused to represent him at all in the pre-authorization process. *Id*. The attorney refused to file anything with the Department of Justice and refused to go to Washington to appear before the Committee. *Id*. The Attorney General subsequently certified that she would seek the death penalty against the defendant. *Id*.

The defendant moved to strike the death penalty certification, arguing that his right to counsel and due process rights were violated because his counsel failed to represent him throughout the certification process. *Id*. The district court judge struck the death authorization because the Defendant's right to counsel was violated by the attorney's refusal to participate. *Id*. at 363-364. In striking the certification, the court held that "a capital punishment certification hearing is a 'critical' stage of a criminal proceeding where the 'substantial rights of a criminal accused may be affected.'" *Id*. at 363. The Court found that the capital punishment certification is:

> undoubtedly a pivotal and enormously important moment in any criminal prosecution. The hearing can literally lead to a determination of life or death.

Id. at 364. Note, however, as set forth above in footnote 2, that this point of law has arguably been overruled by the First Circuit. Respectfully, the Defendant submits that this Court should nonetheless reach a similar decision on the substantive law.

In the instant case, like Pena-Gonzalez, Atwater was deprived of his full legal counsel; *i.e.*, both of his learned counsel, and thus the representation Ordered by this Court and the Death Penalty Protocol was not scrupulously complied with. Given the high stakes of this litigation, it is critical to the administration of justice that these procedures be followed to the letter. This deprivation, at a pivotal juncture in the case, requires the government to provide a remedy to Mr. Atwater identical to that provided Pena-Gonzalez; to wit, a new death penalty authorization hearing conducted before the Capital Case Review Committee in Washington, D.C. prior to the new Attorney General deciding whether to authorize the death penalty. It is critical that justice, in the present case, provide the appearance of fairness.

Pursuant to the Accardi doctrine, the Defendant respectfully submits that he has a substantive due process right in the life-or-death provisions of the United States Attorneys' Manual's Death

Penalty Protocol, and to require the DOJ and the Attorney General to comply with its self-imposed and internal procedures respecting the Defendant's full right to counsel before the Attorney General makes the final substantive decision whether to certify the death penalty in this case.

III. THIS COURT GRANTED THE DEFENDANT TWO ATTORNEYS PURSUANT TO 18 U.S.C. § 3005 TO FULLY REPRESENT THE DEFENDANT IN THE PRE-AUTHORIZATION PROCEDURES OF THE UNITED STATES DEPARTMENT OF JUSTICE

Title 18 U.S.C. § 3005 provides that a defendant indicted for a capital crime "shall be allowed to make his full defense by counsel; and the court before which the defendant is to be tried, or a judge thereof, shall promptly, upon the defendant's request, assign 2 such counsel, of whom of at least 1 shall be learned in the law applicable to capital cases . . . ." In United States v. Boone, 245 F.3d 352 (4th Cir. 2001), the Court held that a defendant had a right to two attorneys if the offense charged could be punished by death (even if the death penalty was not sought).

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defendant had a right to two attorneys if the offense charged could be punished by death (even if the death penalty was not sought).

This Court granted Defendant Atwater's motion for the appointment of two lawyers under *Boone*, specifically stating: "to ensure that Mr. Atwater is provided with sufficient representation and opportunity to prepare for and participate in this preliminary process, the Court will in its discretion grant Mr. Atwater's Motion for Appointment of Second Counsel." (Sealed Order at 3, August 13, 2008). Further, the Order stated that "the Court notes that the guidance outlined above contemplates that defense counsel will be provided with an ample opportunity to present facts, including mitigating factors, to the United States Attorney for consideration before the Government proceeds with any determination regarding whether the death penalty might be sought." (Sealed Order at 3, August 13, 2008). Nevertheless, only one of Mr. Atwater's two appointed attorneys was allowed to participate in this critical meeting at the Department of Justice.

Defense counsel has a critical role to play in the administrative process by which the Government decides whether to seek the death penalty. In this connection, the Commentary accompanying the 1998 Spencer Subcommittee report on federal capital defense costs pointed out that:

> appointment of specially qualified counsel "at the outset" of a case [is desirable], because virtually all

> aspects of the defense of a federal death penalty case, beginning with decisions made at the earliest stages of the litigation, are affected by the complexities of the penalty phase. Early appointment of "learned counsel" is also necessitated by the formal "authorization process" adopted by the Department of Justice to guide the Attorney General's decision-making regarding whether to seek imposition of a death sentence. (See United States Attorney's Manual § 9-10.000.) **Integral to the authorization process is a presentation to Justice Department officials of the factors which would justify not seeking a death sentence against the defendant**. A "mitigation investigation" therefore must be undertaken at the commencement of the represen-tation. Since an early decision not to seek death is the least costly way to resolve a potential capital charge, a prompt preliminary mitigation investigation leading to effective advocacy with the Justice Department is critical both to a defendant's interests and to sound fiscal management of public funds.

Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation (May 1998) (emphasis added).

While this comment was addressed to the more common situation in which the government has obtained an indictment charging an offense punishable by death but has not yet decided whether to seek imposition of the death penalty, In re Quester Sterling-Suarez, 306 F.3d 1170 (1st Cir. 2002) (granting mandamus relief to require such appointment upon indictment), the same considerations apply to the pre-indictment stage of this case. Here, the Defendant was a target of a federal investigation involving conduct that is alleged to be punishable by death under

federal law, and the Department of Justice death penalty authorization procedures were triggered before an indictment was even issued in this case.

In the case at bar, Mr. Atwater had already been charged with first degree murder in the State of North Carolina at the time of the Department of Justice hearing. The death penalty had already been authorized by a Superior Court Judge sitting in Orange County, North Carolina, and the case was proceeding capitally in the state courts of North Carolina before an indictment was ever issued in this case. (**Exhibit C**, Rule 24 Order, Orange County Superior Court). The primary justification for federal prosecution appears to be a double effort at obtaining a death sentence against Mr. Atwater. It is particularly striking to note that Mr. Atwater's state court co-defendant, the minor Lawrence Alvin Lovette, has not even been indicted federally for his alleged role in the events at issue here.

In sum, appointment of counsel at this early stage was authorized by this Court, was authorized by statute and was authorized by the Sixth Amendment to the United States Constitution. Nonetheless, the one hearing that the Defendant was granted by the Department of Justice to present his oral argument in opposition to the authorization of death and to answer any questions posed by the Committee, a critical stage of

these proceedings, went forward in the absence of both of the Defendant's appointed learned counsel.

IV. THE GOVERNMENT BEARS THE BURDEN OF DEVISING A PROCEDURE THAT ASSURES A MEANINGFUL DETERMINATION OF WHETHER TO SEEK THE DEATH PENALTY

Having deprived Mr. Atwater of his valuable right to counsel, the government bears the responsibility for devising a remedy. The remedy must afford Mr. Atwater the same opportunity he would have had to avoid the government's seeking the death penalty had the Attorney General not made and announced any decision concerning whether to seek the death penalty in violation of the Defendant's Fifth Amendment due process rights, his Sixth Amendment Right to Counsel, and the plain language of this Court's Order appointing counsel. In the circumstances here, such a remedy must afford Mr. Atwater the process he is due, a part of which requires a new hearing before the Department of Justice.

The Department of Justice should be Ordered to "start over" in making the decision whether to pursue the death penalty in this case. Although the language applies to the Courts, the principle of impartiality described in In re Murchison, 349 U.S. 133, 136 (1955) is a principle that should be honored by the Attorney General or anyone owing allegiance to him in these circumstances:

> Fairness of course requires an absence of actual bias in the trial of cases. But our

> system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be define with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14.

In order to "'hold the balance nice, clear, and true'" and fairly weigh the option of not seeking the death penalty against Mr. Atwater, the Department of Justice's mandatory policies must be followed here and a hearing awarded that fully respects this Court's Order Appointing Counsel and the Fifth, Sixth and Eighth Amendments to the United States Constitution.

Accordingly, Mr. Atwater respectfully urges the Court to enter an order striking the notice of death penalty, and precluding the government from seeking the death penalty unless and until it grants both of the Defendant's legal counsel the opportunity to be heard at the Department of Justice in Washington, D.C. and the case submitted to Attorney General

Holder for consideration of whether to authorize the death penalty.

This the 28th day of October, 2009.

/s/ Gregory Davis
GREGORY DAVIS
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Counsel for Demario James Atwater

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Mr. Clifton Barrett
Assistant United States Attorney
P. O. Box 1858
Greensboro, NC 27402

Respectfully submitted,

/s/ Gregory Davis
GREGORY DAVIS
Senior Litigator
North Carolina State Bar No. 7083
251 N. Main Street, Suite 849
Winston-Salem, NC 27101
(336) 631-5278

US v. Atwater
Barrett, Cliff (USANCM)
to:
Greg Davis, kimstevensnc
08/17/2009 12:45 PM
Show Details

History: This message has been forwarded.

Greg/Kim - The Committee responsible for the Atwater case (the same four members from the initial meeting) voted on Thursday to deny your request for reconsideration. As I understand it that ends the reconsideration process.

Cliff Barrett, Criminal Chief

United States Attorney's Office

Middle District of North Carolina

Post Office Box 1858

Greensboro, NC 27402

Phone: (336) 333-5351

Fax: (336) 333-5381

EXHIBIT A

9–10.000

CAPITAL CRIMES

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 § 9–10.000, *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. *See* http://10.173.2.12/usao/eousa/ole/usabook/deat/01deat.htm

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 § 9–27.000 *et seq.* 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

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.

STATE OF NORTH CAROLINA

ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 08CRS 51241

ORANGE COUNTY
FILED
AUG 19 2008
AT 1040 O'CLOCK A M
BY CRS
CLERK OF SUPERIOR COURT

STATE OF NORTH CAROLINA

v.

ORDER

DEMARIO JAMES ATWATER,
Defendant

THIS MATTER CAME ON FOR A HEARING upon a Petition for a Pretrial Hearing filed by the District Attorney, pursuant to N.C.G.S. 7A-34, Rule 24, for an ORDER that the above-named defendant shall be tried for the death penalty. After hearing statements by the District Attorney, James R. Woodall, Jr. and the Public Defender, James E. Williams and Co-Counsel Jonathan Broun, the Court finds the facts to be as follows:

1. The Defendant is charged with First Degree Murder that is alleged to have occurred on March 5, 2008.
2. On March 31, 2008, the Grand Jury of Orange County returned a true bill of indictment charging the Defendant with one count of First Degree Murder, thereby causing the superior court to have jurisdiction over this case.
3. On July 7, 2008, the Grand Jury of Orange County returned additional true bills of indictment charging Possession of a Weapon of Mass Death and Destruction, Possession of Firearm By a Felon, Robbery With A Dangerous Weapon, Felonious Larceny, Felonious Possession of Stolen Goods and First Degree Kidnapping.
4. The State informed the court of facts and circumstances supporting the following aggravating circumstances:
    a. 15A-2000 (e)(5) – The capital felony was committed while the Defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, robbery, burglary or kidnapping.
    b. 15A-2000 (e)(6) - The capital felony was committed for pecuniary gain;
    c. 15A-2000 (e)(9) - The capital felony was especially heinous, atrocious, or cruel.

EXHIBIT C

WHEREFORE, IT IS HEREBY ORDERED THAT:

The charge of First Degree Murder against the Defendant may be tried as a capital offense under N.C.G.S. 15A-2000, because it appears that there is evidence supporting the existence of at least one of the following "Aggravating Circumstances," to wit:

a. 15A-2000 (e)(5) – The capital felony was committed while the Defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, robbery, burglary or kidnapping.

b. 15A-2000 (e)(6) - The capital felony was committed for pecuniary gain;

c. 15A-2000 (e)(9) - The capital felony was especially heinous, atrocious, or cruel.

The Court informs defense counsel, James E. Williams, Public Defender, to notify the Capital Defenders office to appoint second counsel to represent the Defendant.

This the 11th day of August, 2008.

Honorable Thomas H. Lock,
Superior Court Judge Presiding