Department of Justice

STATEMENT

OF

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BEFORE THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

H.R. ____, THE "DEATH PENALTY REFORM ACT OF 2006"

PRESENTED ON

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Introduction

Good afternoon Mr. Chairman, Ranking Member Scott, and members of the Subcommittee. Thank you for the opportunity to appear before you today, and for inviting the Department of Justice to testify about this issue of great importance. The Department applauds Congress for passing the recent improvements to death penalty procedures as part of Patriot Act reauthorization, particularly the provisions combining the Title 21 procedures with those in Title 18, but I think we can all agree that there is more to do in this area. It is our shared goal to ensure that the death penalty is administered in a fair and consistent manner across the country. In the Department's view, the Death Penalty Reform Act of 2006 addresses several of the outstanding issues that have arisen due to recent court decisions and the continuing evolution of death penalty practice across the country. The Department of Justice supports each of those provisions, and I will address them in turn.

Amendments to Death Penalty Procedures

The Department of Justice strongly supports the Death Penalty Reform Act's amendments to existing death penalty procedures. As we are all aware, certain court decisions have created the potential for either uncertainty about, or uneven application of, death penalty procedures, and

the Department supports this effort to provide clarity and consistency in this critical area. There are few greater responsibilities of Congress or the Department of Justice than ensuring that there is a federal death penalty procedure in place that comports with all constitutional requirements, and we should act now to fulfill that responsibility.

Atkins

First and foremost, this legislation provides an appropriate set of procedures to be applied across the country to ensure that individuals who are mentally retarded are not executed. In *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), the Supreme Court held that the execution of mentally retarded offenders violates the Eighth Amendment. Although the federal capital-sentencing scheme already prohibited the execution of mentally retarded offenders, it did not provide a procedure for determining whether a defendant's mental disability is sufficiently severe to foreclose execution. The Death Penalty Reform Act of 2006 responds to the Supreme Court's decision in *Atkins* by providing a procedure for a capital-sentencing jury to determine whether a defendant's mental retardation forecloses a death sentence.

The procedures set forth in this bill provide that the burden would be on the defendant to establish to a jury (not a judge) his mental retardation by

a preponderance of the evidence. The bill would not require a showing of clear of convincing evidence or proof beyond a reasonable doubt on this issue. The Death Penalty Reform Act also would impose a common sense requirement that the defendant properly provide notice of his or her intention to raise a mental retardation defense. The legislation is consistent with all prevailing definitions of mental retardation, in that a determination of mental retardation would require the jury to find that, since some point in time prior to the age of 18, the defendant has had both an IQ of 70 or less and deficits in adaptive functioning. The statute therefore would incorporate the limitations in adaptive functioning feature identified by the Supreme Court in *Atkins*.

At the sentencing phase, the jury would determine first whether a defendant is eligible for the death penalty by finding the existence of alleged statutory aggravating factors beyond a reasonable doubt. At that point, the jury would determine whether the defendant is mentally retarded. The issue of mental retardation would be addressed, therefore, only upon a prior finding of a statutory aggravating factor. Finally, if the jury determines that the defendant is not mentally retarded, the jury would determine the existence of any mitigating factors established by a preponderance of the evidence and proceed to determine sentence.

The Department believes that these provisions address a great need in the death penalty area by providing clear procedures and standards to apply equally across jurisdictions. The Department further believes that the proposed solution satisfies all applicable constitutional requirements.

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The Death Penalty Reform Act of 2006 also includes provisions that eliminate uncertainty about when the United States must file its intention to seek the death penalty and under what circumstances a defendant is statutorily entitled to a second appointed counsel who is learned in the law. The Department supports both sets of amendments.

Timely filing of a notice of intent to seek the death penalty

The legislation before the Committee would revise section 3593(a) to reflect more accurately the purpose of, and identify the consequences of a failure to satisfy, the requirement that a notice of intent to seek the death penalty be filed a reasonable time before trial. All agree that the defendant must be put on notice in a timely manner of the government's intention to seek the death penalty. Unfortunately, in *United States v. Ferebe*, 332 F.3d 722 (4th Cir. 2003), the Fourth Circuit concluded that the determination of whether a notice of intent has been filed in a timely manner must be made

with respect to the trial date in effect at the time the notice is filed and without regard to the additional preparation and issues resulting from a death penalty prosecution. In other words, in the Fourth Circuit, an actual trial date cannot be continued to allow the defense adequate time to prepare for the capital-punishment hearing. Particularly in those courts with what is know as a "rocket docket," the *Ferebe* rule could result in the dismissal of a death notice. In some instances, in order not to forfeit the ability to seek a death sentence, the Department has been forced to file a "protective death notice." A "protective death notice" is one that is filed in a case before the case has been fully reviewed and the Attorney General has made a final decision whether or not to seek the death penalty. In cases in which the Attorney General decides not to seek the death penalty, the protective notice is then withdrawn.

The Department of Justice is committed to the goal of the consistent, fair and even-handed application of the death penalty, regardless of geography and local sentiment. The decision whether it is appropriate to seek the death penalty involves awesome responsibilities and consequences. The *Ferebe* court's understanding of the existing section 3593(a) provisions favors expedience over considered decision-making, and when a considered decision cannot be reached in a limited amount of time, it forces the

government to choose between filing a protective death notice or abandoning the goal of consistency and evenhandedness in the application of the death penalty.

The Department therefore supports these provisions, which are aimed at ensuring that the government has adequate time to consider whether to seek the death penalty based on the facts and circumstances of each individual case.

Appointment of second counsel upon the filing of a notice of intent to seek the death penalty.

The bill would also limit the *mandatory* appointment of counsel learned in the law applicable to capital cases to those cases in which the government has filed a notice of intent to seek the death penalty. The courts would retain, however, the discretion to appoint capital counsel or other experts before a notice of intent to seek the death penalty is filed. The proposed amendment to 18 U.S.C. § 3005 would thereby address two concerns. Because there is no procedural difference between the trial of a non-capital offense and the non-death penalty trial of a capital offense, it is clear that the appointment of learned capital counsel was intended to provide a defendant with the assistance of a second counsel in a death penalty prosecution. Despite the clear intent to provide additional assistance to defendants in death penalty prosecutions, the Fourth Circuit has construed

the existing provisions of section 3005 in such a way as to require a trial court to retain capital counsel through to the conclusion of the trial -- even in those cases in which the Attorney General decides not to seek the death penalty.[1] This amendment would eliminate the unnecessary expenditure of resources in this manner.

Second, the courts have not infrequently complained about the expenditure of resources in providing expert capital counsel in cases in which, in a court's view, a death penalty prosecution is unlikely. Currently, the right to second, learned capital counsel adheres upon indictment for a capital offense. Courts outside the Fourth Circuit have construed this to require the assistance of expert counsel only until there is a decision not to seek the death penalty.[2] As previously noted, trial judges would retain discretion to appoint learned counsel and other experts even prior to the filing of a notice of intent to seek the death penalty if it appears that such assistance is necessary or appropriate.

Given the principles animating Congress's decision to provide a statutory right to a learned second counsel, and the costs of misguided application of section 3005, the Department supports this clarifying amendment.

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[1] *United States v. Boone*, 245 F.3d 352 (4th Cir. 2004).
[2] *United States v. Waggoner*, 339 F.3d 915, 919 (9th Cir. 2003); *see also United States v. Grimes*, 142 F.3d 1342, 1347 (11th Cir. 1998); *United States v. Weddell*, 567 F.2d 767, 770 (8th Cir. 1977).

Modification of statutory provisions for executions

Finally, the bill would modify the statutory provisions relating to the carrying out of executions to allow them to be implemented in the federal facilities at Terre Haute, Indiana. Prior to the establishment of the federal death row in Terre Haute, and the building of an execution facility there, it was necessary for federal death-sentenced inmates to be housed in state facilities and, it was anticipated, executed under state procedures. Existing statutes reflect this practice and expectation. As it turns out, the federal facility was in place prior to the first federal execution. There is therefore no reason to continue to provide courts with the option of designating a state facility or method of execution as applicable in a particular case, particularly as this state of affairs can create uncertainty. Consequently, under the modification, the federal government will carry out the execution of those prisoners sentenced to death in federal courts.

Additional Statutory Aggravators

The death penalty is and should be reserved for appropriate circumstances—and the "worst of the worst" offenders. Examples of appropriate circumstances include those in which individuals put multiple lives at risk or threaten the integrity of our judicial system. Currently,

however, these circumstances are not always death-penalty eligible. The Death Penalty Reform Act of 2006 would help remedy this situation.

The current language of Section 3592 identifies as a statutory aggravating factor that the death occurred during the commission of another crime and lists the other crimes or offenses that trigger application of the factor. The Death Penalty Reform Act of 2006 would expand the listed offenses upon which to base the relevant statutory aggravating factor to include three civil rights offenses: conspiracy against rights resulting in death under 18 U.S.C. § 241, interference with federally protected activities resulting in death under 18 U.S.C. § 245, and interference with religious exercise resulting in death under 18 U.S.C. § 247. Moreover, this legislation would add two witness-related offenses, 18 U.S.C. § 1512 (tampering with a witness, victim, or an informant) and 18 U.S.C. § 1513 (retaliating against a witness, victim, or an informant) -- as well as 18 U.S.C. § 2339D (terrorist offenses resulting in death). Sections 1512 and 1513 of title 18 encompass the murder of a law enforcement informant, or a witness or cooperator in a federal or state prosecution when such person is killed because of his or her status as such. Violations of section 245 include deprivations of civil rights based on class, race, color, religion, or national origin and riotous action against businesses. Because of the flagrant nature of these offenses and the

heightened interest of the government in deterring such action, the Department of Justice supports proposals to associate a statutory aggravating factor with each.

The Department also supports the bill's clarification of the application of the aggravating factor in section 3592 (c)(2) ("previous conviction of a violent felony involving a firearm"). As currently worded, the factor is susceptible to two interpretations, which could undermine the clear and consistent application of the factor. Under one interpretation, a prior conviction for an offense involving a firearm could constitute an aggravating factor for all capital offenses *except* those involving firearms, an illogical interpretation considering that a defendant's prior firearm conviction may be most relevant when that same defendant's later use of a firearm has resulted in death. The other interpretation would only prohibit basing the aggravating factor on the immediately-prior section 924(j) conviction for which the defendant faces the death penalty. The amendment clarifies that the latter is the correct application of this factor.

In addition, the Department supports amending the pecuniary-gain aggravating factor (section 3592(c)(8)) to eliminate the current uneven and illogical application of that factor. As now interpreted by the courts, the pecuniary-gain aggravating factor applies when the murder, as viewed by the

defendant, is necessary to initially secure the pecuniary gain, but does not apply when committed to maintain possession of a stolen gain.[3] Thus, for example, courts have held the factor to be applicable when a carjacking victim is killed at a dark intersection before the vehicle is taken but not applicable if the carjacking occurs in a public setting and the victim is taken a few miles away before he is killed.[4] The amendment in this section proposes to fix the inconsistent application of the pecuniary-gain aggravator by making it applicable to killings committed "in order to retain illegal possession" -- not just to secure possession in the first instance -- of the item of pecuniary gain.

The Department further supports the addition of a new statutory aggravator related to obstruction of justice. Protecting the integrity of the justice system is a paramount goal for the Department. The proposed section 3592(c)(17) aggravator would apply if the defendant engaged in conduct, which resulted in harm or a threat of harm to another person, intending to obstruct the investigation or prosecution of any offense. This aggravator would apply to criminal conduct that is not encompassed by any other current or proposed statutory aggravator. For example, neither section 3592(c)(14)(D) nor the proposal related to section 3592(c)(1) would cover

[3] *United States v. Chanthadara*, 230 F.3d 1237, 1263 (10th Cir. 2000).
[4] *Compare United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002) *with United States v. Barnette*, 390 F.3d 775 (4th Cir. 2004).

the murder of a jury member, or a jury member's family. The obstruction of justice aggravator would apply more generally to the criminal justice system to encompass harm or threat of harm to other parties that the government also maintains a heightened interest in protecting.

Conclusion

Again, the Department commends this Committee for holding this hearing and taking the lead in finding legislative solutions to lingering concerns about death penalty procedures. The Department of Justice fully understands the gravity of the issues addressed by the Death Penalty Reform Act of 2006 and supports the approach taken in that legislation. In the Department's view, it goes a long way toward ensuring that the death penalty is available in appropriate circumstances and is applied consistently across the country.

Thank you again for the opportunity to testify. I have tried to focus on those issues of the most importance to the Department of Justice, so I have not addressed each and every provision of the Death Penalty Reform Act of 2006. I look forward to your questions.