

**BEFORE THE PRESIDENT OF THE UNITED STATES
AND THE UNITED STATES PARDON ATTORNEY**

In re

JUAN RAUL GARZA,

Petitioner.

**SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION
FOR CLEMENCY AND FOR COMMUTATION OF SENTENCE OF DEATH
TO SENTENCE OF LIFE IMPRISONMENT WITHOUT
POSSIBILITY OF RELEASE**

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EXECUTIVE SUMMARY

Petitioner, Juan Raul Garza, was granted a six-month reprieve last December so that the Department of Justice could gather additional information and complete further analysis concerning the racial and geographic disparities that are starkly evident in the administration of the federal death penalty. Today, with the scheduled execution of Mr. Garza just one week away, it is clear that the additional study and analysis necessary to show that the federal government is imposing the death penalty fairly – by treating similarly situated defendants similarly regardless of race or where the crime was prosecuted – has in no way been completed.

Instead, on June 6, 2001, Attorney General Ashcroft released a report that serves only to document the existing disparities and demonstrate that the most important questions have not been answered. Based solely on speculation and not on the statistical data included in the report or earlier DOJ study, the Ashcroft Report confidently states that there is no evidence that the disparities are the result of racial or ethnic bias. Notwithstanding the report's confident conclusions, the Attorney General ordered the initiation of independent expert studies of the system. But, even though the studies that were the reason for Mr. Garza's earlier reprieve are just now being started, the Attorney General expressed the belief that the execution of Mr. Garza should proceed, without offering any explanation for this anomalous conclusion.

More particularly, the failings of the Ashcroft Report include:

- **A conclusion that the cause of the disparities is the composition of the pool of potential capital defendants, without offering any data as to the racial and ethnic makeup of that pool.** The composition of those on federal death row is now 90% minority and 10% white, and the composition of those reviewed by the Department of Justice for federal capital prosecution is 78% minority and 17% white. These statistics reflect a population more disproportionately minority than that of defendants on state death rows, or the group of defendants convicted of drug-related homicides. The missing piece of the puzzle, which the Ashcroft Report makes no attempt to address, is the racial composition of the pool of death-eligible cases that could have been selected for federal prosecution, but were not. Federal jurisdiction over capital crimes is almost completely overlapping with, and supplemental to, state jurisdiction over homicide. The result is that federal prosecutors wield extraordinary discretion over which homicides to pursue for capital prosecution. Until data is gathered on the pool of death-eligible federal defendants, it will be impossible to determine whether the exercise of that discretion reveals racial unfairness.
- **An attempt to create the misleading impression that, far from being biased against minorities, the system actually recommends capital prosecution of whites at a higher rate than minorities.** This argument can only be intended to confuse a public that has not read the DOJ Study or Ashcroft Report. In fact, the data only show that, after prosecutors have selected a group of potential defendants for federal prosecution from all possible homicides of whom 78% are minorities and 17% are white, that white defendants are authorized for death penalty prosecution at a higher rate than the minorities. This argument totally ignores the fact that the disparities were created in the initial selection of potential defendants for federal prosecution, and the focus of study should be on the factors involved in that selection process.
- **A misleading focus on intentional discrimination.** The Ashcroft Report describes the issue as favoritism towards white defendants or a racially motivated desire to secure the death penalty for minority defendants. While any such racial animus would be cause for grave concern, the real issue is whether the statistical disparities can be explained as arising from racially-neutral, legitimate differences in individual cases. In the absence of a well-documented study, it is impossible to reach a conclusion that the unexplained differences are not based on race or geography.
- **Substitution of conjecture and unsupported racial stereotyping for analysis of actual data.** The Ashcroft Report argues that the high proportion of minority defendants subject to federal capital prosecution results from the federal law enforcement focus on drug trafficking, but offers

no statistics on the racial composition of defendants accused of drug-related homicides and offers no explanation for why the death penalty is not generally sought in cases of white mob racketeering-related homicides.

- **A failure to document or understand the extreme racial disparities in those who accept plea bargains after authorization of federal capital prosecution: 48% of the white defendants compared with 25% for blacks and 28% for Hispanics.** The Ashcroft Report fails to even attempt to document which defendants were offered plea agreements in exchange for a sentence of life in prison, instead relying on pure conjecture to imply that the reason whites are allowed to plead guilty in return for a life sentence nearly twice as often as minority defendants is that minorities are less likely to accept an offered plea. It would have been a relatively easy matter for the Department to gather information on the cases in which pleas were not entered, but that information is not reflected in the Report.
- **A failure to provide any systematic statistical analysis explaining the striking difference in the frequency with which the death penalty is used in different districts.** Instead the Report offers unsubstantiated rationales based on supposed differences in local conditions with no effort to analyze whether similar conditions exist in other districts that do not use the death penalty as frequently. One of the stated goals of the federal death penalty protocols was to promote national uniformity in the use and administration of the federal death penalty. While the Attorney General purports to endorse that goal, the Ashcroft Report appears to accept without criticism the widely varying usage of the death penalty throughout the country.
- **The Attorney General's willingness to conclude that there is no evidence of racial bias and to proceed with executions while acknowledging that further study is needed.** The Attorney General has ordered the National Institute of Justice ("NIJ") to further study the racial and geographic disparities in the imposition of the federal death penalty. The Attorney General inexplicably concludes, however, that executions of minority defendants such as Mr. Garza may proceed even before that research is completed. To perform executions while this research is ongoing cannot help but erode public confidence in the administration of the death penalty. The Attorney General does not attempt to explain what action the government can possibly take after Mr. Garza has been executed, if that additional research and study reveals racial bias or unfairness.

The unexplained disparities contained in the Ashcroft Report are not merely abstract concerns; they directly affect Mr. Garza's case in the following ways: 1/

- Mr. Garza is Hispanic.
- Mr. Garza was prosecuted in the state of Texas, where there are a relatively high number and percentage of federal capital prosecutions against Hispanic defendants.
- Mr. Garza was not offered a plea bargain.
- Mr. Garza was convicted of crimes committed in the course of drug trafficking, while available data suggests that federal prosecutors generally have not used the death penalty against white defendants in drug rings.
- Mr. Garza did not even have the benefit of the death penalty protocols which were instituted in 1995, after he was prosecuted and convicted, and the Ashcroft Report does not attempt to explain the even greater racial disparities evident in the death penalty authorization process as it existed prior to 1995.

The Attorney General testified before the House Judiciary Committee on June 6, 2001 concerning his position that the government should proceed with Mr. Garza's execution. As discussed more fully below, his testimony ignores the issues raised by the Ashcroft Report and misstates the relevant facts.

In sum, the American people can have no confidence that the selection of Juan Garza for federal capital prosecution was unrelated to his Hispanic ethnicity or to his prosecution in the state of Texas, and there can be no justification for

1/ Mr. Garza's other arguments in support of his clemency petition, which include: violations of international human rights; the fact that Juan Garza is the only federal death row inmate whose jury was not instructed that if he failed to be sentenced to death he would receive a penalty of life in prison without the possibility of parole; and the fact that the Government of Mexico would not have extradited Mr. Garza if it had known a capital sentence could result, are more fully

proceeding with the execution of Mr. Garza when these unexplained disparities are directly implicated in his case.

BACKGROUND

Petitioner, Juan Raul Garza, is scheduled to be executed by the United States on June 19, 2001. Mr. Garza submitted his original Petition for Clemency on September 13, 2000. The day before, on September 12th, the U.S. Department of Justice issued a report entitled The Federal Death Penalty System: A Statistical Survey (1988-2000) (hereinafter "DOJ Study"). In response to the petition, and in light of substantial racial and geographic disparities reflected in the Department's own study of the federal death penalty, President Clinton granted Mr. Garza a reprieve on December 7, 2000. The President ordered the Department of Justice to explain the disparities revealed in the statistical survey by April 30, 2001 and re-set Mr. Garza's execution date for June 19, 2001. Upon issuing a temporary reprieve, President Clinton articulated his rationale:

This Fall, the Department of Justice released the results of a statistical survey of the federal death penalty. . . . As the Deputy Attorney General said at the time the survey was released, no one confronted with those statistics can help but be troubled by those disparities. We do not, however, fully understand what lies behind those statistics. The Attorney General has said that more information and a broader analysis are needed to better interpret the data we now have and to determine whether the disparities that are evident reflect any bias in our system.

* * *

set forth in the original Petition and Memorandum in Support thereof and in the May 23, 2001 Supplement to the Petition.

After a close and careful review of the issue, . . . I am not satisfied that, given the uncertainty that exists, it is appropriate to go forward with an execution in a case that may implicate the very issues at the center of that uncertainty.

Ex. 8 to Supplemental Clemency Memorandum [Statement of President Clinton, White House Office of the Press Secretary (12/7/00)] (emphasis added). ^{2/}

Attorney General Janet Reno was even more specific about what still needed to be addressed by the statistical survey. After the Department's September survey was released, Attorney General Reno stated:

There are important limitations on the scope of our survey. This survey . . . does not address a number of important issues that arise before the U.S. Attorney submits a case: . . . Why did the defendant get arrested and prosecuted by federal authorities? Why did the U.S. attorney submit the case for review rather than enter a plea bargain? . . . More information is needed to better understand the many factors that effect how homicide cases make their way into the federal system, and once in the federal system, why they follow different paths.

Ex. 8 to Clemency Memorandum at 3 [Sept. 12, 2000 Tr. of Press Conf.].

On June 6, 2001, Attorney General Ashcroft issued a supplemental report on the racial and geographic disparities existing in the administration of the federal death penalty. U.S. Dep't of Justice, The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review (June

^{2/} Attorney General Ashcroft has agreed that in administering the ultimate penalty of death, "there is no room for error." See Ex. 1 to Supplemental Clemency Memorandum at 6 [Written Answers by John Ashcroft to Questions by Senator Russell D. Feingold 1/22/01].

6, 2001) (hereinafter “Ashcroft Report”). Mr. Garza files this memorandum to respond to that report, and to further articulate the need for clemency – or a stay of execution – in light of racial and geographic disparities in the federal death penalty.

ARGUMENT

1. The Ashcroft Report concludes that the cause of disparities in the federal death penalty system is the composition of the pool of potential capital defendants, without offering any data as to the racial and ethnic makeup of that pool.

The key finding of the Ashcroft Report is that:

the augmented data [in the Ashcroft Report] provides no evidence that minority defendants are subjected to bias or otherwise disfavored in decisions concerning capital punishment. Within the broader universe of potential capital cases, capital charges and submission to the review procedure for a decision about seeking the death penalty did not occur with any greater frequency in cases involving Black or Hispanic defendants than in cases involving White defendants. [Ashcroft Report at 4]

The report further asserts that:

[t]he information gathered by the Department indicates that the cause of this disproportion [in the number of minority defendants in capital cases as compared to the general population] is not racial or ethnic bias, but the representation of minorities in the pool of potential federal capital cases. [Id. at 3 (emphasis added)]

These sweeping conclusions, which in effect give the entire federal death penalty system a clean bill of health, find no support in the data contained in the Ashcroft Report. The statements imply that the report contains information regarding the pool from which the defendants considered for federal capital prosecution were selected and a detailed analysis of the initial selection process.

Yet, the report contains no data about the defendants who were eligible for federal capital prosecution but were not selected, or about the factors employed in making that critical decision.

The composition of those on federal death row is now 90% minority and 10% white, 3/ and the composition of those reviewed for federal capital prosecution is 78% minority and 17% white. Ashcroft Report at 13. These statistics reveal a population more disproportionately minority than that of defendants on state death rows, 4/ or the group of defendants convicted of drug-related homicides. 5/ The missing piece of the puzzle, which the Ashcroft Report makes no attempt to address, is the pool of death-eligible defendants who could be prosecuted federally, but are not. 6/ Because federal jurisdiction over capital crimes is almost completely overlapping with, and supplemental to, state jurisdiction over homicide, see DOJ Study at 4, federal prosecutors wield extraordinary discretion over which homicides to even consider pursuing for capital prosecution.

3/ With the execution of Timothy McVeigh, there are now 2 whites and 18 minorities on federal death row. Naftali Bendavid, "Federal Death Penalty Back in Operation," Chicago Tribune (June 11, 2001).

4/ 55% of state death row inmates across the country at the end of 1998 were white, and 63% of the 505 inmates executed in the United States from 1988 through 1999 were white. DOJ Study at 36 n. 28.

5/ See note 10 infra.

6/ See Ex. 8 to Clemency Memorandum at 3 [Sept. 12, 2000 Tr. of Press Conf.] (Attorney General Reno explaining that "[t]he answer to all of these questions [has] a significant impact on whether a particular homicide is included in or excluded from the group of cases that become potential federal capital cases . . .").

The significance of this missing data can be illustrated by the following example provided by Professor Sam Gross. ^{7/} A large nationwide company is accused of discriminating in the hiring of women because 80% of its employees are men. The company attempts to explain that there is no bias in its hiring by pointing out the high qualifications of its male employees and that 80% of the people who interviewed with the company were male. No one would accept this explanation without first exploring and understanding the qualifications of the female applicants that the company did not hire and the reasons why so few females were interviewed. This is what the Ashcroft Report fails to do: it does not address the question whether there were many white defendants with cases just as suitable for federal capital prosecution, or even more suitable, as the minority defendants who were charged. And the procedures by which potential cases were brought to the attention of federal prosecutors by the FBI, the DEA, or other law enforcement agencies may have involved bias that the Ashcroft Report has not addressed.

Until data is gathered on the pool of death-eligible federal defendants, it will be impossible to determine whether any racial unfairness underlies the exercise by federal prosecutors of their vast discretion to select defendants for federal capital prosecution.

^{7/} Professor Gross is scheduled to testify about the Ashcroft Report tomorrow at a hearing before the Senate Committee on the Judiciary, Subcommittee on the Constitution, Federalism and Property Rights.

2. The Ashcroft Report creates the misleading impression that, far from being biased against minorities, the system actually recommends capital prosecution of whites at a higher rate than minorities.

In addition to asserting that the disparities in federal death penalty cases merely reflect the racial and ethnic makeup of the defendants who commit potential death-eligible crimes, the Ashcroft Report argues that, rather than being biased against minorities, the "death penalty is sought at lower rates for Black and Hispanic defendants than for White defendants." Ashcroft Report at 10; see id. at 4, 13. This argument seems designed to persuade the public, rather than a careful reader of the Ashcroft Report or the DOJ Study. This statement refers to the decrease in the disparities that results during the review of cases under the protocol system – from 78% minorities that are initially submitted for capital review to 70% minorities authorized for death penalty prosecution by the Attorney General – and the higher rate that whites in this pool are authorized for federal capital prosecution.

This argument is akin to the hypothetical employer referred to above, again as provided by Professor Gross, responding to charges of discrimination in hiring women by saying that it cannot be guilty of discrimination because it pays its women employees well. One's first response would be that the complaint was hiring discrimination, not pay discrimination and, moreover, how does one know the employer pays women well unless we know whether they are more or less qualified than the company's male employees.

The fact remains that, even if there is no evidence of bias in the administration of the protocol system by the Department of Justice, which is hardly surprising, there is still an astounding disproportion in the percentage of minorities initially selected for potential capital prosecution and ultimately approved. This is the disparity that needs to be explained before the government and the American people can have any confidence that race and ethnicity do not play a role in deciding which defendants are prosecuted for federal capital crimes.

3. The Ashcroft Report Focuses Incorrectly on Intentional Discrimination.

The central theme of the Ashcroft Report is that because individual U.S. Attorneys are not consciously engaged in "favoritism towards White defendants," Ashcroft Report at 13, or acting out of a particular "desire based on racial or ethnic bias to secure capital sentences for minority defendants," *id.* at 21, there is no further need to question whether the federal death penalty is being imposed in a racially unfair manner. While any such racial animus would be cause for grave concern, the real issue is whether the existing statistical disparities can be explained as arising from racially-neutral, legitimate differences in individual cases.

The DOJ Study and the Ashcroft Report do not provide the kind of information necessary to answer that question. The fact that Justice Department officials are not openly biased in their determinations is hardly enough to absolve the government of its responsibility to understand the racial disparities revealed by the report. Indeed, it is possible that there is no bias on the part of federal

prosecutors or the Justice Department, once the cases are identified to them. The Ashcroft Report ignores completely that, to the extent that federal prosecutors find out about potential cases, that information comes in substantial part from federal or state law enforcement officials, the same officials whose conduct has prompted the Attorney General to commence a study regarding the possibility that they have engaged in racial profiling practices.

4. The Ashcroft Report substitutes conjecture and unsupported racial stereotyping for analysis of actual data.

The Ashcroft Report added very little additional data to the DOJ Study. The only new information relates to approximately 290 cases that were never submitted to the protocol system. See Ashcroft Report at 13 n.10. The significance (if any) of these cases is impossible to determine, because the only data provided are the racial and ethnic breakdown of the defendants. There is no indication as to whether these cases are similar to those already included in the DOJ Study in terms of deathworthiness and other relevant factors.

The remainder of the Ashcroft Report, although styled "Analysis," is largely an effort, through anecdotal discussion, to provide a color blind rationale for the troubling statistics in the DOJ Study. 8/ The Ashcroft Report fails to provide any data to support its conjecture as to the reasons behind the existing racial disparities among the defendants selected for review by the federal government for capital prosecution. Instead, the report bases most of its purported explanations for the

overall disparity on unsupported (and perhaps unsupportable) assumptions about minorities and certain types of crimes.

For example, according to the report, 59 of 66 inmates (89%) who faced federal capital charges in the Eastern District of Virginia were Black. Ashcroft Report at 16. ^{9/} As a partial explanation for this extreme disparity, the report states: “The defendants in these [drug-related killings] cases are not White because the members of drug gangs that engage in large-scale trafficking in the Eastern District of Virginia are not White.” *Id.* at 17 (emphasis added). The report offers no support for this remarkable statement and, equally troubling, makes no effort to explain why that justifies the application of the federal death penalty for many cases in some districts while, in other districts with similar drug problems, such as the Southern and Eastern Districts of New York, the death penalty is not used in such contexts.

Even if it were true that White people did not commit crimes warranting use of the federal death penalty in particular judicial districts, the Ashcroft Report offers no evidence, or other reason to believe, that one should expect nationwide that 78% of those facing capital charges will come from the ranks of Black, Hispanic, and other minority Americans. This is especially so in light of other

^{8/} In addition, it seems entirely too convenient that three of the four districts the report picks to explain racial disparities are the District of Columbia, Puerto Rico, and Los Angeles as opposed to more heterogeneous districts.

^{9/} All five of the white defendants submitted for capital review in the Eastern District of Virginia were charged with espionage. Ashcroft Report at 18. The two remaining defendants submitted for capital prosecution in that district were Hispanic. *Id.* at 16.

known facts about criminal activity in the United States. For example, nationwide crime data shows that whites commit nearly 33% of all drug-related homicides in the United States and 56% of all gang-related homicides, but the Ashcroft Report provides no data comparing similar statistics from the federal death penalty system against these known facts.^{10/}

As a further example, the Ashcroft Report provides no analysis or data as to the reasons behind the apparent determination by the Department of Justice that the federal death penalty should be pursued in cases concerning street level drug gangs, but should not be pursued against white organized crime defendants who commit murder in the course of racketeering activity. Mr. Garza's original Clemency Memorandum lists more than two dozen cases, involving over 50 defendants, in which a federal defendant committed criminal activity with an apparent culpability level that was similar to or greater than that committed by Mr. Garza, and in which the death penalty was not sought or a plea agreement was offered. Original Clemency Memorandum at 68-71. Further research has found at least 35 cases involving murders in connection with criminal enterprises where the defendants were white but either no authorization for the death penalty was sought or a plea bargain was accepted. See Ex. 1 attached hereto [Summary of Federal Capital Cases Involving Caucasian Organized Crime Enterprises, and Multiple Victim Cases Where Federal Prosecutors Did Not Seek Death Penalty or Accepted a

^{10/} See U.S. Department of Justice Bureau of Justice Statistics, Homicide Trends in the U.S.: Trends by Race, available at www.ojp.usdoj.gov/bjs/homicide/race.htm

Plea Bargain]. The Ashcroft Report does not even recognize the troubling difference between how the federal government appears to handle white mob violence as opposed to black and Hispanic gang violence. Furthermore, it provides no information that would explain these differences.

5. The Ashcroft Report fails to document or attempt to understand the extreme racial disparities in those who accept plea bargains after authorization of federal capital prosecution.

The one aspect of the current federal death penalty process that Attorney General Ashcroft clearly finds inadequate is the discretion given to individual U.S. Attorneys to offer a plea agreement to defendants subsequent to their approval for federal capital prosecution. The Attorney General has announced that, in the future, after a decision by the Attorney General to seek a capital sentence is made, he will require the individual U.S. Attorneys' offices to obtain his approval before offering a non-capital plea agreement. Ashcroft Report at 22 and n.16. Regardless of the wisdom of this "fix" to the death penalty protocols, it undeniably reflects the shocking disparity in the percentage of white defendants, as opposed to minorities, who obtain a plea agreement to avoid federal capital prosecution.

While 48% of the white defendants enter into a plea agreement after authorization for federal capital prosecution, the rate for blacks is 25%, and for Hispanics, 28%. Ashcroft Report at 22. In testimony before Congress prior to release of the Ashcroft Report, Attorney General Ashcroft described this data as "a slight statistical disparity in the treatment of plea agreements." Transcript of

(figures based on police and prosecution data from 1976 to 1999 and further noting

Testimony of Attorney General John Ashcroft Before the House Judiciary Committee at 10 (June 6, 2001). That whites are almost twice as likely as minority defendants to obtain a plea agreement to escape the death penalty, however, is neither "slight" nor insignificant.

Given the obvious concern of the Attorney General on this point, one would expect the Ashcroft Report to include supplemental data on those defendants who did not enter into plea agreements to determine, for example, whether a plea was ever offered. The Ashcroft Report offers no such data, instead relying on pure speculation to imply that the reason whites are allowed to plead guilty in return for a life sentence nearly twice as often as minority defendants is that minorities are less likely to accept an offered plea. Ashcroft Report at 23 (referencing "possible differences in the inclination of defendants from different groups to seek or accept plea agreements"). It would have been an easy matter for the Department to gather information on the cases in which pleas were not entered, but that information is not reflected in the Report. *See id.* at 23 n.17. Instead we are left with bald conjecture, a remarkable theory based on racial stereotyping, and a complete lack of data on this important issue.

6. The Ashcroft Report fails to provide any systematic statistical analysis explaining the striking difference in the frequency with which the death penalty is used in different districts.

As explained in Mr. Garza's Original Clemency Memorandum, the DOJ Study revealed an astonishing level of geographic disparity in the administration of

that whites commit 58.1% of all multiple victim homicides in the U.S.).

the federal death penalty. Original Clemency Memorandum at 31-33. At the time of the DOJ Study, there were 21 states in which U.S. Attorneys either never requested or never obtained authorization to seek the death penalty. Id. at 31 and Ex. 5. In addition, the authorization rate for federal capital prosecutions pursuant to the death penalty protocols varies widely from state to state. Among the eight states in which U.S. Attorneys have submitted 20 or more cases for consideration, the death penalty authorization rate exceeds 50% in only one state – Texas. Id.

The Ashcroft Report simply brushes aside regional differences in the application of the federal death penalty as "neither avoidable nor undesirable." Ashcroft Report at 21. The Ashcroft Report further offers unsubstantiated rationales based on supposed differences in local conditions with no effort to analyze whether similar conditions in fact exist in other districts that do not use the death penalty as frequently. The report also fails to explain the wide divergence in how similar kinds of crimes (such as drug related violence) are treated in different districts. The Ashcroft Report appears to have abandoned one of the stated goals of the federal death penalty protocols: to promote consistency in the use and administration of the federal death penalty. 11/ This is particularly surprising in the context of Attorney General Ashcroft's written statement during the confirmation process that "federal law should be applied uniformly across the country" and his pledge to work, if confirmed, "to ensure that this is the case." Ex. 1

11/ See U.S. Dep't of Justice, U.S. Attorney's Manual § 9-10.000 (G); Ex. 6 to Original Clemency Memorandum [August 17, 1994 Letter to Hon. Cleo Fields from Attorney General Reno] at 1.

to Supplemental Clemency Memorandum at 5. Although the report acknowledges the need to instill public confidence in the system, it appears to be blind to the corrosive effect that geographic disparities can have on the public's confidence that the federal government is seeking the death penalty in an evenhanded manner against similarly deathworthy defendants throughout the country. More important, the report fails to acknowledge that these disparities result in the arbitrary application of capital punishment on individuals like Mr. Garza, whose crimes are no more deathworthy than the numerous cases involving multiple victims in criminal enterprises where death was not sought.

7. The Attorney General is willing to conclude that there is no evidence of racial bias and to proceed with executions while acknowledging that further study is needed.

The Attorney General has ordered the National Institute of Justice (“NIJ”) to further study the racial and geographic disparities in the imposition of the federal death penalty. 6/6/01 Ashcroft Hearing Tr. at 11. While the contours of the contemplated NIJ study are currently unclear, the Attorney General has concluded, inexplicably, that executions of minority defendants such as Mr. Garza may proceed even before that research is completed. Ashcroft Report at 12.

This position is indefensible. The report seems to excuse the Justice Department for failing to continue with the independent study that the prior administration initiated in January 2001, in the following self-serving justification:

[The discussion at a January 10, 2001 meeting of experts organized by the NIJ] further indicated that even if such a study were carried out, it could not be expected to yield definitive answers concerning the reasons for disparities in

death penalty cases. It was also clear that this approach could not produce policy-relevant findings within the time frame specified by President Clinton, or in time to inform decisions about carrying out death sentences whose execution dates were approaching. [Ashcroft Report at 12]

Participants at this meeting have disputed the Ashcroft Report's assertion that further study would not yield meaningful results, and have stated that the clear consensus at the meeting was that a thorough and highly informative study of the federal death penalty could be done, if researchers were provided the resources and appropriate access to DOJ data. ^{12/} In light of these statements and the Attorney General's own decision to pursue further study, the rationalization quoted above is unconvincing.

Even more important, the Ashcroft Report's purported justification for conducting an inadequate review, as quoted above, displays a gross insensitivity to the moral gravity of knowingly proceeding with an execution while the Justice Department recognizes it does not understand the full implications of the disparities in death penalty cases. There is only one acceptable path to follow in this situation: take the time to complete the necessary studies before making any decision as to whether the federal government can fairly execute a minority defendant who was selected for capital prosecution by this system.

^{12/} See Testimony of David I. Bruck to be delivered on June 13, 2001 before the Senate Committee on the Judiciary, Subcommittee on the Constitution, Federalism and Property Rights; Statement of Sam Gross (to be delivered at same hearing).

8. The unexplained disparities contained in the DOJ Study directly affect Mr. Garza's case.

The issues detailed above with regard to the shortcomings of the Ashcroft Report are far from merely intellectual problems. The impetus for the entire study of the racial and geographic disparities in the federal death penalty system was Mr. Garza's scheduled execution. None of the questions raised by those disparities have been answered by the government, and yet the Attorney General has stated that "there is no reason I know of to defer [Mr. Garza's] execution." 6/6/01 Ashcroft Hearing Tr. at 32.

The unexplained disparities affect Mr. Garza because: (1) he is Hispanic; (2) he was prosecuted in the state of Texas, where there are a relatively high number and percentage of federal capital prosecutions brought against Hispanic defendants; and (3) Mr. Garza was not offered a plea bargain. In addition, Mr. Garza was convicted of crimes committed in the course of drug trafficking. As discussed earlier and in Mr. Garza's Original Clemency Memorandum, available data shows that federal prosecutors frequently have not used the death penalty against white defendants in organized crime or drug rings or even against other minority defendants accused of multiple murders in criminal enterprises. Moreover, Mr. Garza did not even have the benefit of the death penalty protocols, which were not instituted until 1995, after his conviction, and the Ashcroft Report

does not attempt to explain the death penalty authorization process as it existed prior to 1995. 13/

9. The Attorney General's position that there is no reason not to proceed with the execution of Mr. Garza is inexplicable in light of the continued studies of the system and ignores the significance of the unexplained disparities found in the DOJ Study.

The Attorney General testified before the House Judiciary Committee on June 6, 2001, concerning his opinion of why the government should proceed with Mr. Garza's execution, but the reasons identified by the Attorney General ignore the issues raised by the Ashcroft Report. The Attorney General's reasons for concluding that Mr. Garza is not a victim of ethnic bias were that (1) Mr. Garza was clearly guilty of his crimes; (2) the district in which he was prosecuted did not seek the death penalty against any other Hispanic defendant during the pre-1995 period when Mr. Garza was indicted; and (3) the jury included Hispanics. 6/6/01 Ashcroft Hearing Tr. at 32.

This is a remarkably insubstantial basis for such a grave decision. First, the fact that Mr. Garza is guilty of terrible crimes is not the issue. As noted elsewhere, not every person guilty of three murders is automatically subjected to death penalty prosecution. Given that fact, the government must be confident that the selection process is racially neutral before further proceeding. Second, the Attorney General is wrong about the practices in the Southern District of Texas. The data to which

13/ The Ashcroft Report merely notes the finding by the DOJ Study that in the pre-protocol period, the composition of defendants against whom the federal death penalty was sought was 13% white, 85% minority and 2% other. Ashcroft Report at 11 n.6, citing DOJ Study at 6-7, 23-24.

he was referring related to the 1995-2000 time period, when the protocols were in effect. While there is relatively little information available regarding the pre-protocol period that is relevant for Mr. Garza, one statistic is known. During that period, federal prosecutors from all districts in Texas recommended seeking the death penalty in four cases, and the defendant in every one of them was Hispanic. DOJ Study at T-21. And, finally, no one has suggested that Mr. Garza's jury was racially biased. Instead, it is the unexplained disparities at the front end of the system which led to Mr. Garza's selection for federal capital prosecution, and at the stage before trial where Mr. Garza was not offered a plea agreement that directly effect Mr. Garza's case.

Regardless of Mr. Garza's guilt, the federal government has not explained, on race neutral grounds, why 85% of the defendants against whom federal prosecutors sought the death penalty were black or Hispanic during the pre-protocol period or why whites are allowed to plea to a non-capital offense at twice as high a rate as minorities. In the face of these, and the other, unanswered questions, the reasons relied on by the Attorney General to move ahead with Mr. Garza's execution are simply beside the point. The American public demands and deserves better than this before taking the life of Mr. Garza.

CONCLUSION

The Ashcroft Report fails entirely to provide the American people with any confidence that Juan Raul Garza's ethnicity and state of prosecution played no role in the federal government's choice to prosecute him for federal capital crimes.

**SUMMARY OF FEDERAL CAPITAL CASES INVOLVING
CAUCASIAN ORGANIZED CRIME ENTERPRISES**

Case	Description	Death Penalty Disposition
1. <i>U.S. v. Bartolotta</i> , CR No. 95-754 (S-7) (SJ) (E.D. NY 1995)	Defendant alleged to have been involved in <u>1 drug-related murder</u>	Plea agreement
2. <i>U.S. v. Benanti</i> , CR No. 99-CR-520 (E.D. NY 1999)	Defendant alleged member of the Bonnano Crime Family, and alleged to have been involved in <u>6 execution drug-related murders</u>	Pre-protocol case
3. <i>U.S. v. Bloome, Robert</i> , CR No. 98-841 (E.D. NY 1998)	Defendant alleged member of organized crime group the "Port Richmond Crew" of the Luchese Family, and alleged to have been involved in <u>1 murder and 1 racketeering murder</u>	Authorization not requested by USA
4. <i>U.S. v. Bloome, Michael</i> , CR No. 98-841 (E.D. NY 1998)	Defendant alleged member of organized crime group the "Port Richmond Crew" of the Luchese Family, and alleged to have	Authorization not requested by USA

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| | | been involved in <u>1 murder and 1 racketeering murder</u> | |
| 5. | <i>U.S. v. Borgesi</i> , CR No. 363 (E.D. PA) | Defendant, a reputed organized crime mob consigliere, charged with <u>2 slayings</u> | Authorization not requested by USA |
| 6. | <i>U.S. v. Calandra</i> , CR No. 99-CR-520 (E.D. NY 1999) | Defendant alleged member of the Bonnano Crime Family, and alleged to have been involved in <u>6 execution drug-related murders</u> | Pre-protocol case |
| 7. | <i>U.S. v. Calco, Charles</i> , CR No. 99-CR-520 (E.D. NY 1999) | Defendant alleged member of the Bonnano Crime Family, and alleged to have been involved in <u>6 execution drug-related murders</u> | Government witness |
| 8. | <i>U.S. v. Calco, Joseph</i> , CR No. 99-CR-520 (E.D. NY 1999) | Defendant alleged member of the Bonnano Crime Family, and alleged to have been involved in <u>6 execution drug-related murders</u> | Government witness |
| 9. | <i>U.S. v. Caruso</i> , CR NO. S-97-0082-PMP (RLH) (NV 1997) | Defendant alleged to have arranged the <u>execution murder</u> of reputed mobster | Authorization request rejected by AG |

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| | | Herbert Blitzstein,
a.k.a. Fat Herbie, in
order to infiltrate
his business
activities | |
| 10 | <i>U.S. v. Ciami</i> , CR No. 97-4009-NMG (D. MA 1997) | Defendant part of an “anti-mob” group that is connected to <u>3 murders and 11 attempted murders</u> | Authorization not requested by USA |
| 11 | <i>U.S. v. Ciancaglioni</i> , CR No. 363 (E.D. PA) | Defendant, a soldier of organized crime mob, charged with <u>1 slaying</u> | Authorization not requested by USA |
| 12 | <i>U.S. v. Cino</i> , CR NO. S-97-0082-PMP (RLH) (NV 1997) | Defendant alleged to be tied to the <u>execution murder</u> of reputed mobster Herbert Blitzstein, a.k.a. Fat Herbie, in order to infiltrate his business activities | Authorization request rejected by AG |
| 13 | <i>U.S. v. Davi</i> , CR NO. S-97-0082-PMP (RLH) (NV 1997) | Defendant admitted to being present with a loaded gun at the <u>execution murder</u> of reputed mobster Herbert Blitzstein, a.k.a. Fat Herbie | Authorization request rejected by AG |
| 14 | <i>U.S. v. Diaz</i> , CR No. 97-4009-NMG (D. MA 1997) | Defendant part of an “anti-mob” group that is connected to <u>3 murders and 11</u> | Authorization request rejected by AG; plea agreement; net effect was defendant will serve |

		<u>attempted murders, including 1 murder in which the defendant is alleged to be the triggerman</u>	about 3 more years on his state sentence
15	<i>U.S. v. DiConstanzo</i> , CR No. 98-841 (E.D. NY 1998)	Defendant alleged member of organized crime group the “Port Richmond Crew” of the Luchese Family, and alleged to have been involved in <u>1 murder and 1 racketeering murder</u>	Authorization not requested by USA
16	<i>U.S. v. Dipietro</i> , CR No. 98-841 (E.D. NY 1998)	Defendant alleged member of organized crime group the “Port Richmond Crew” of the Luchese Family, and alleged to have been involved in <u>1 murder and 1 racketeering murder</u>	Authorization not requested by USA
17	<i>U.S. v. Friedman</i> , CR NO. S-97-0082-PMP (RLH) (NV 1997)	Defendant alleged to have been the triggerman man in the <u>execution murder</u> of reputed mobster Herbert Blitzstein, a.k.a. Fat Herbie	Authorization request rejected by AG
18	<i>U.S. v. Guzzo</i> , CR No. 95-	Defendant alleged to	Plea agreement

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| . | 754 (S-7) (SJ) (E.D. NY 1995) | have been involved in <u>3 drug-related murders and 1 racketeering murder</u> | |
| 19 | <i>U.S. v. Henniger</i> , CR No. 97-1005 (S-1) (RJD) (E.D. NY 1997) | Defendant alleged to have been involved in <u>1 organized crime murder</u> in which the victim was apparently mob-connected | Authorization not requested by USA |
| 20 | <i>U.S. v. Loffredo</i> , CR No. 98-841 (E.D. NY 1998) | Defendant alleged member of organized crime group the “Port Richmond Crew” of the Luchese Family, and alleged to have been involved in <u>1 murder and 1 racketeering murder</u> | Authorization not requested by USA |
| 21 | <i>U.S. v. Mauriello</i> , CR NO. S-97-0082-PMP (RLH) (NV 1997) | Defendant alleged to have arranged the <u>execution murder</u> of reputed mobster Herbert Blitzstein, a.k.a. Fat Herbie, in order to infiltrate his business activities | Authorization request rejected by AG |
| 22 | <i>U.S. v. Mazzone</i> , CR No. 363 (E.D. PA) | Defendant, a reputed organized crime mob underboss, charged with <u>1 slaying</u> | Authorization not requested by USA |

23	<i>U.S. v. Merlino</i> , CR No. 363 (E.D. PA)	Defendant, a reputed organized crime mob boss, charged with <u>2 slayings</u>	Authorization not requested by USA
24	<i>U.S. v. Natale</i> , CR No. 363 (E.D. PA)	Defendant, a reputed “Godfather,” admitted involvement in up to <u>24 murders</u>	Government witness
25	<i>U.S. v. Panaro</i> , CR NO. S-97-0082-PMP (RLH) (NV 1997)	Defendant alleged to be tied to the <u>execution murder</u> of reputed mobster Herbert Blitzstein, a.k.a. Fat Herbie, in order to infiltrate his business activities	Authorization request rejected by AG
26	<i>U.S. v. Papapietro</i> , CR No. 98-841 (E.D. NY 1998)	Defendant alleged member of organized crime group the “Port Richmond Crew” of the Luchese Family, and alleged to have been involved in <u>1 murder and 1 racketeering murder</u>	Authorization not requested by USA
27	<i>U.S. v. Pappa</i> , CR No. 97-1005 (S-1) (RJD) (E.D. NY 1997)	Defendant alleged to have been involved in <u>4 organized crime murders</u> in which the victims were apparently	Authorization not requested by USA

mob-connected

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| 28 | <i>U.S. v. Reynolds</i> , CR No. 99-CR-520 (E.D. NY 1999) | Defendant alleged member of the Bonnano Crime Family, and alleged to have been less involved than other defendants in <u>6 execution drug-related murders</u> | Pre-protocol case |
| 29 | <i>U.S. v. Riddle</i> , CR No. 4: 97-CR-385 (N.D. OH 1997) | Defendant alleged to have been involved in <u>at least 1 murder</u> , in an organized crime prosecution | Authorization not requested by USA |
| 30 | <i>U.S. v. Romano</i> , CR No. 97-4009-NMG (D. MA 1997) | Defendant part of an “anti-mob” group that is connected to <u>3 murders and 11 attempted murders, including 1 murder in which the defendant is alleged to be the triggerman</u> | Authorization not requested by USA |
| 31 | <i>U.S. v. Schlitz</i> , CR No. 98-841 (E.D. NY 1998) | Defendant alleged member of organized crime group the “Port Richmond Crew” of the Luchese Family, and alleged to have been involved in <u>1 murder (1 racketeering murder used as</u> | Authorization not requested by USA |

**punishment
enhancement)**

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| 32 . <i>U.S. v. Spero</i> , CR No. 99-
CR-520 (E.D. NY 1999) | Defendant alleged member of the Bonnano Crime Family, and alleged to have been involved in <u>6 execution drug-related murders</u> | Pre-protocol case |
| 33 . <i>U.S. v. Spisak</i> , CR No. 97-4009-NMG (D. MA 1997) | Defendant part of an “anti-mob” group that is connected to <u>3 murders and 11 attempted murders</u> | Authorization not requested by USA |
| 34 . <i>U.S. v. Stollo</i> , CR No. 4:97-CR-385 (N.D. OH 1997) | Defendant is the <u>principal defendant in which there was at least 1 murder,</u> in an organized crime prosecution | Authorization not requested by USA |
| 35 . <i>U.S. v. Tabbita</i> , CR No. 95-754 (S-7) (SJ) (E.D. NY 1995) | Defendant alleged to have been involved in <u>3 drug-related murders and 1 racketeering murder</u> | Authorization not requested by USA |