BEFORE THE PRESIDENT OF THE UNITED STATES

In re

JUAN RAUL GARZA,

Petitioner.

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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Dated: September 28, 2000

[Picture of Juan to be inserted on this page]

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I. INTRODUCTION AND SUMMARY

Petitioner Juan Raul Garza was convicted of intentionally killing three persons in furtherance of a continuing criminal enterprise and was sentenced to death in 1993. Mr. Garza accepts responsibility for these crimes. Mr. Garza has exhausted all opportunities for appeal. He is scheduled to be executed on December 12, 2000. He asks that the President commute his sentence of death to a sentence of life imprisonment without the possibility of parole.

Mr. Garza's petition for clemency comes at an historic moment. At no time since the death penalty was reinstated by the Supreme Court in 1976, have Americans and their leaders voiced such grave doubts about the fairness and reliability of capital punishment. At the state level, those doubts are reflected in the unprecedented moratorium on executions put into place by Governor Ryan of Illinois, in death penalty moratorium bills introduced and enacted in state legislatures and in studies commissioned by a number of Governors. 1/ At the

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1/ In January 2000, Governor George Ryan, expressing concern about a system fraught with error, announced a moratorium on executions in the state of Illinois. Ken Armstrong and Steve Mills, *Ryan: 'Until I Can Be Sure'; Illinois Is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000; at 1; Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1. Five weeks later, Governor Ryan announced the selection of a blue ribbon commission to study the state's death penalty procedures. Tim Novak, *Ryan Picks Panel to Study Death Penalty*, CHI. SUN-TIMES, Mar. 9, 2000, at 12. Among the other states that have called for studies into the administration of the death penalty are Arizona, Indiana, Maryland, Nebraska, and North Carolina. See Mike McCloy, *Death Penalty to Get 'Fresh Look' by Panel*, ARIZ. REPUBLIC, July 22, 2000 (Arizona study); Diana Penner, *Governor Calls for Study of State's Death Penalty: O'Bannon Asks Legal Commission to Review Law's Fairness and Integrity*, THE INDIANAPOLIS STAR, Mar. 10, 2000 (Indiana study); Matthew Mosk, *Some Find Hope in Clemency Decision: Glendening Calls Action Product of Single Case*, WASH. POST, June 9, 2000, at B1; Robynn Tysver, *Penalty Study Outlined: Nebraska Will Be the First State to Undertake Large-Scale Analysis of Capital Punishment*, OMAHA WORLD-HERALD, Oct. 9, 1999, at 31 (Nebraska study); Mark Johnson, *Panel Questions How Death Penalty Is Used: Focus Includes Race, Mentally Retarded Defendants*, CHARLOTTE OBSERVER (North Carolina study). Bills to abolish the death penalty or

national level, several bills have been introduced in the United States Congress calling for a moratorium for state and federal executions, or for greater protections for those prosecuted for capital crimes; 2/ a wide variety of organizations from the National Urban League to the NAACP and the American Bar Association have called on the Executive Branch to suspend federal executions; 3/ and religious

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impose a moratorium on executions have been introduced in more than a dozen states. See generally SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES OF THE ABA, *A Gathering Momentum: Continuing Impacts of the American Bar Association Call for a Moratorium on Executions* (2000), at http://www.abanet.org/irr/report.html. The New Hampshire state legislature passed a law abolishing the death penalty, and the Nebraska state legislature passed a law imposing a moratorium on executions, both of which were vetoed by the respective governors. Rachel M. Collins, *N.H. Senate OK's Death Penalty Ban: Shaheen Vows Veto; Repeal Vote is Nation's First in Two Decades*, BOSTON GLOBE, May 19, 2000, at A1; Rachel M. Collins, *House Plans to Table Veto on Repealing Death Penalty: Legislator Says Time Needed to Regroup*, BOSTON GLOBE, June 25, 2000, at 1; Robynn Tysver, *Moratorium Possible Elsewhere: Brashear Files Override Motion on Bill other States are Eyeing*, OMAHA WORLD-HERALD, May 27, 1999, at 13; Matt Kantz, *Nebraska Governor's Veto of Moratorium Stands*, NAT'L CATH. REP., June 18, 2000, at 8.

2/ See Federal Death Penalty Abolition Act of 1999 (S. 1917) (introduced November 11, 1999, this bill provides for a moratorium on state and federal executions); Accuracy in Judicial Administration Act of 2000 (HR 3623) (introduced February 10, 2000, this bill provides for a temporary moratorium on state and federal executions); The Innocence Protection Act (originally introduced February 10, 2000 as S. 2073; reintroduced June 7, 2000, as S. 2690, this bill provides certain protections for those prosecuted and wrongly convicted of capital crimes); National Death Penalty Moratorium Act of 2000 (S. 2463) (would institute a moratorium on state and federal executions until a national commission studies the implementation of capital punishment); Federal Death Penalty Moratorium Act of 2000 (S. 3048) (introduced September 14, 2000, in the wake of the Department of Justice Study of the Administration of the Federal Death Penalty, this bill would suspend federal executions until a blue ribbon commission reviews the federal death penalty system).

3/ See Ex. 43 [Letter of ABA President William S. Paul to the Hon. William J. Clinton, May 2, 2000]; Ex. 44 [Letter of ABA President Martha W. Barnett to the Hon. William J. Clinton, Sept. 15, 2000]; Paul Shepard, *Urban League President Urges End to Executions: Calls for Stricter Standard of Guilt*, THE RECORD

organizations have intensified their long-standing calls for a death penalty moratorium. 4/ The international community echoes these concerns, 5/ as does public opinion, with recent polls suggesting that a majority of the American public supports a moratorium on executions until issues of fairness in capital punishment can be resolved. 6/

(Northern New Jersey), July 31, 2000; Ex. 45 [Letter of NAACP Chairman of the Board Julian Bond to Deputy Attorney General Eric Holder Jr., Aug. 4, 2000]. Equal Justice USA, a project of the Quixote Center, maintains a list of organizations that have called for a moratorium on executions. See http://www.quixote.org/ej. That list, which currently includes over 1000 organizations, is attached as Exhibit 47.

4/ In late 1999, the National Council of Synagogues and the ecumenical committee of the National Conference of Catholic Bishops launched a joint initiative to abolish the death penalty. Report of The National Jewish/Catholic Consultation, Dec. 6, 1999. Pat Robertson, the founder of the Christian Coalition, declared in April of this year that while he still believes in capital punishment, he supports a moratorium on execution to at least slow it down. Brooke A. Masters, *Pat Robertson Urges Moratorium on U.S. Executions*, WASH. POST, Apr. 8, 2000, at A1. The list of other faith communities and religious organizations that have called for abolition of the death penalty or a moratorium on executions is long and growing. Ex. 48 [Envisioning: Religious Organizing Against the Death Penalty Project, at http://www.envisioning.org].

5/ For example, in April 1999, the United Nations Commission on Human Rights voted overwhelmingly in favor of a moratorium on the death penalty which was introduced by the European Union. In opposing the resolution, the United States was joined by China, Rwanda, and Sudan. *U.N. Panel Votes for Ban on Death Penalty*, N. Y. TIMES, Apr. 29, 1999, at A3. On July 27, 2000, the European Union, through its presidency, the Government of France, wrote to President Clinton asking him not to end the "de facto 37-year moratorium" on federal executions by allowing the execution of Juan Garza to be carried out. Ex. 46 [Letter of Francois Bujon de L'Estang, Ambassador to France, on behalf of the European Union, to the Hon. William J. Clinton, July 12, 2000].

6/ Two new polls by Peter Hart Research, a Democratic research firm, and American Viewpoint, a Republican research firm, found that 64% of Americans support a moratorium on executions until issues of fairness in capital punishment can be resolved and that 80% of Americans support reforming or abolishing the death penalty. THE JUSTICE PROJECT, *New Survey Shows Overwhelming Majority*

In the context of this wrenching reevaluation of the death penalty, the grounds on which Mr. Garza seeks a commutation of his sentence are drawn into sharp focus. In particular, the evidence demonstrates that Mr. Garza's sentence was the product of a death penalty system that is grossly biased against the racial/ethnic group to which Mr. Garza belongs; that the decision to seek the death penalty against him was as much the happenstance of where his crimes were committed as any other factor; that Mr. Garza was denied fundamental procedural safeguards critical to ensuring that the death penalty is imposed in a fair and consistent manner; that Mr. Garza's sentence was disproportionate as compared to the sentences sought against and imposed on others convicted of similar offenses; that the capital prosecution of Mr. Garza contravened United States treaty obligations to Mexico; and that a sentence of life imprisonment without possibility of release would fully serve the ends of justice while protecting Mr. Garza's young children and other family members from the devastation that his death would cause them.

These grounds, individually and together, erode the confidence that one must have to carry out the execution of a fellow human being. One cannot say that, despite these factors, Mr. Garza would have been sentenced to death anyway. These factors could well have influenced the outcome in Mr. Garza's case. In meeting the awesome responsibility of carrying out an execution, the President cannot permit a death sentence to go forward where there is as much doubt about its propriety as there is in Mr. Garza's case.

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Supports Changes to Death Penalty (Press Release) (2000), at http://www.justice.policy.net/proactive/newsroom/release.html; Henry Weinstein, *Support For Executions Declines*, L. A. TIMES, September 15, 2000, at A26.

Racial and Geographic Bias in the Federal Death Penalty System

Recently released Justice Department data demonstrate that racial/ethnic and geographic disparities permeate every level of the federal death penalty system. According to that data, Hispanic and African-American defendants are grossly overrepresented among defendants as to whom U.S. Attorneys and the Justice Department either consider seeking or decide to seek the death penalty. Hispanic and African-American defendants together make up 70 to 80 percent of these groups — three to four times the representation of white defendants in the same groups. At the same time, Hispanic and African-American defendants are about 43 percent less likely than white defendants to avoid the death penalty through plea agreements. These disparities in prosecutorial decision-making are reflected in the outcome of the federal death penalty process. Of 21 federal prisoners under sentence of death, 17 — or 81 percent — are, like Mr. Garza, members of racial/ethnic minorities. Comparing the data in the Justice Department study to statistics about the racial/ethnic profile of state defendants convicted of homicide leads to a startling conclusion — Hispanics are 2.3 times more likely to be authorized for federal capital prosecution than whites.

Deputy Attorney General Eric Holder, whose office compiled the data, said on its release that he was "both personally and professionally disturbed by the numbers we discuss today" and was "particularly struck by the fact that African Americans and Hispanics are over-represented in those cases presented for consideration of the death penalty and those case where the defendant is actually sentenced to death." 7/ And the Attorney General concluded that, in light of the data, "[a]n even broader analysis must . . . be undertaken to determine if bias does,

7/ Ex. 8 [Sept. 12, 2000 Tr. of Press Conf.] at 5.

in fact, play any role in the federal death penalty system." 8/ Numerous broader analyses of death penalty data already have been conducted at the state level — where racial/ethnic disparities are less severe than those revealed in the Justice Department data — and those analyses show a pattern of race-of-defendant discrimination in the imposition of the death penalty. Although there may be societal factors that contribute to the overrepresentation of racial/ethnic minorities in the criminal justice system generally, these factors cannot explain the dramatic differences between the make-up of the federal capital defendant population and the racial/ethnic composition of state prisoners convicted of homicide.

The Justice Department data also reveals striking geographic disparities in the federal death penalty system. U.S. Attorneys in 16 states, including Texas, where Mr. Garza was prosecuted, have been authorized to seek the death penalty in at least 50 percent of the cases submitted for consideration to the Justice Department; whereas that rate ranges from 8 percent to 30 percent for U.S. Attorneys in eight other states, and U.S. Attorneys in 21 states have either never requested or never obtained authorization to seek the death penalty. These disparities persist even among the states with the highest number of cases submitted for consideration. Among the eight states where U.S. Attorneys have submitted 20 or more cases for consideration, the death penalty authorization rate exceeds 50 percent in only one state — Texas — and ranges from 15 percent to 38 percent in the rest. Of the current federal death row inmates, six — almost 30 percent — were prosecuted in a single state: Texas.

This Administration has taken steps in an attempt to eliminate bias in the administration of the federal death penalty. In January 1995, the Justice Department for the first time implemented comprehensive regulations, called the

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8/ Id. at 3.

"Death Penalty Protocols," for deciding whether to seek the death penalty in particular cases. Under the Protocols, every prosecution involving a potential capital offense must be submitted for review by the Justice Department and Attorney General, regardless of whether the U.S. Attorney intends to request death penalty authorization. That requirement marks a departure from prior policy, under which U.S. Attorneys were only required to obtain Justice Department review of cases in which they sought death penalty authorization and were given unlimited discretion not to seek the death penalty. The Protocols also created a formal Review Committee charged with making recommendations to the Attorney General and established uniform substantive standards that U.S. Attorneys, the Review Committee and the Attorney General are required to apply in making decisions and recommendations on death penalty authorization. While the Protocols have enabled the federal government to track and study some aspects of the death penalty authorization process, they have not made a meaningful difference in the racial/ethnic composition of the pool of federal capital defendants at different stages in the process.

The Protocols, moreover, played no role in the decision to seek the death penalty as to Mr. Garza. That decision was made in the waning days of the Bush Administration, when the Justice Department manual devoted only a single sentence to death penalty authorization. As a result, Mr. Garza, like only four other current federal death row inmates prosecuted prior to adoption of the Protocols, did not receive even those protections against racial and geographic bias in prosecutorial decision-making. The Justice Department data, which covers the period from 1988 through 2000, reveals striking racial/ethnic disparities both before and after the Protocols were adopted, and the "pre-Protocol" disparities are the most severe. For example, during the pre-Protocol period, every one of the capital defendants prosecuted by U.S. Attorneys in Texas was Hispanic. The Deputy

Attorney General explained that the gross overrepresentation on federal death row of defendants prosecuted in Texas resulted from the fact that a number of the prosecutions occurred, like Mr. Garza's, during the pre-Protocol period.

The real issue here is not whether there is an unacceptable risk that Mr. Garza's death sentence resulted from racial/ethnic and geographic bias, but what to do about the fact that there plainly is. The Attorney General has stated that the disparities identified in the Justice Department study do not warrant halting executions because the study did not uncover claims of actual innocence among current federal death row inmates. Taken to its logical conclusion, however, that position as applied to particular cases is not just wrong but unconscionable: it sanctions the execution of defendants who, but for their race or ethnicity, might never have been sentenced to death, and it demeans human life by implying that, for defendants who cannot prove their innocence, there is no legal or moral distinction between executing them and imprisoning them. Even the Attorney General expressed discomfort with this position, repeatedly proposing that the "clemency process" be used to address cases in which death sentences may have resulted from the racial/ethnic or geographic bias that the Protocols were intended to eliminate.

The constitutional requirements of rationality and consistency in death penalty administration and equal protection of the laws, international obligations imposing the same requirements, and basic notions of fairness, converge in opposition to carrying out a death sentence that may have resulted from the type of bias reflected in the Justice Department study and previous studies. These considerations, particularly when viewed in light of procedural failures that further undermine the legitimacy of Mr. Garza's death sentence, make clear that the relief he requests is not only just; it is essential to the integrity of the federal death penalty system.

Failure to Afford Critically Important Procedural Safeguards

Even apart from the issue of bias, the sentencing proceedings in Mr. Garza's case were flawed in two fundamental ways that undermine the legitimacy of the resulting sentence. First, Mr. Garza was denied the benefit of a sentencing jury that was accurately informed regarding the applicable sentencing alternatives. The Supreme Court has recognized, and studies of actual and potential jurors confirm, that accurate information as to a defendant's eligibility for life imprisonment without possibility of release dramatically reduces the likelihood that a jury will recommend the death penalty. Accordingly, the Supreme Court holds that, where a defendant would be imprisoned for life without possibility of release if he is not sentenced to death, due process requires that the sentencing jury be apprised of that fact. This Administration has pushed the law in this area one step further by securing enactment of the Federal Death Penalty Act of 1994 (the "FDPA"). In contrast to prior federal law, which limited the jury's role to deciding whether to recommend the death penalty, the FDPA ensures that the sentencing jury has accurate information as to the availability of life imprisonment without possibility of release by giving the jury the authority to impose that sentence as an alternative to the death penalty.

Mr. Garza, though, was sentenced to death approximately one year before the FDPA was enacted. At the time of his sentencing, Mr. Garza had been found guilty of intentional killing, and the Sentencing Guidelines therefore required that he be sentenced to life imprisonment without possibility of release if he was not sentenced to death. However, the prosecution and the court in Mr. Garza's case not only refused to provide this essential information to the jury but affirmatively represented that Mr. Garza could be released from prison in as little as 20 years — an assertion based on a statutory sentencing range, which is superseded by the life imprisonment directive set forth in the Sentencing Guidelines. Even apart from the

plain language of the Sentencing Guidelines, the record of prosecutions under the statute confirms that life imprisonment was Mr. Garza's only alternative: every death-eligible defendant who was prosecuted under that statute, and was not sentenced to death was sentenced to life imprisonment. Because the jury that sentenced Mr. Garza to death possessed materially inaccurate information about the availability of life imprisonment as an alternative sentence, executing him would violate established principles of due process and contravene the federal policy, as reflected in the FDPA, of ensuring that the sentencing jury both knows of and considers the alternative of life imprisonment without possibility of release.

The second fundamental procedural flaw in Mr. Garza's sentencing phase trial was the prosecution's use of inherently unreliable information that Mr. Garza had no meaningful opportunity to deny or explain. Of 13 non-statutory aggravating factors that the prosecution identified as justifications for the death penalty, ten related to four unadjudicated murders committed in Mexico for which Mr. Garza had never been convicted, prosecuted or even charged. Federal courts hold that information regarding unadjudicated offenses is inherently unreliable and may not be introduced in a capital sentencing proceeding unless the prosecution first demonstrates that such information is in fact reliable. Indeed, in many states, the use of such information in capital sentencing proceedings is barred altogether. The prosecution in Mr. Garza's case did not make and could not have made a showing of reliability with respect to the unadjudicated murders, because the only evidence it offered connecting Mr. Garza to those murders was the uncorroborated testimony of former co-defendants who obtained substantially reduced sentences in exchange for their testimony — evidence that is itself inherently unreliable.

The prosecution's introduction of evidence about unadjudicated murders also violated the Supreme Court's prohibition against the use in a capital sentencing proceeding of information that the defendant has no opportunity to deny

or explain. In attempting to show that the four murders had occurred and that their victims had been accurately identified, the prosecution relied on investigative files, statements and other information obtained from Mexican law enforcement officials, none of whom appeared as witnesses. Mr. Garza had literally no opportunity to test the accuracy of that information because there is no mechanism by which a private individual in the United States can compel testimony or document production by Mexican officials or residents. Moreover, the Mexican officials who supplied information regarding the unadjudicated murders were not under any of the constitutional obligations that apply to U.S. law enforcement officials, including the obligation to disclose potentially exculpatory evidence, such as the identities of other suspects. In any event, enormous practical obstacles, including limited financial resources, travel difficulties and language barriers, made it impossible for Mr. Garza's non-Spanish speaking counsel to conduct even a minimally adequate investigation of the four murders — particularly after the court refused to grant the continuance of trial that such an investigation would have required.

Since the modern death penalty era began in 1976, no other capital defendant in the United States has been sentenced to death on the basis of information regarding unadjudicated offenses committed outside the United States. The prosecution's extensive reliance on such information in Mr. Garza's case further undermines the legitimacy of his death sentence.

Disproportionality of Sentence

The disproportionality of Mr. Garza's sentence in comparison to the sentences imposed on others charged with similar offenses also supports his petition for clemency. Indeed, three of Mr. Garza's co-defendants who were charged with direct involvement in the same murders of which he was convicted obtained far more lenient sentences. That discrepancy cannot be justified on the ground that

Mr. Garza was more culpable, because jurors in his case specifically found that "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death." 9/ Mr. Garza's sentence also is disproportionate in comparison to the sentences imposed on defendants in other cases involving capital offenses. In many such cases, the number of murders was equal to or greater than the number of murders with which Mr. Garza was charged, and yet the prosecution never even requested authorization to seek the death penalty. The strikingly different treatment afforded the defendants in those cases further indicates that Mr. Garza's sentence resulted from arbitrary and unfair prosecutorial decision-making.

International Law

In light of the manner in which Mr. Garza was apprehended from Mexico, carrying out his death sentence also raises troubling issues of international law. Under the Extradition Treaty between the United States and Mexico, Mexico has the right to refuse to extradite any person who would face the death penalty if prosecuted in the United States — a right that Mexico has exercised frequently. In Mr. Garza's case, U.S. law enforcement officials secured his deportation from Mexico without ever advising the Mexican government that Mr. Garza would be charged with and prosecuted for capital offenses. Under these circumstances, executing Mr. Garza would contravene the United States' treaty obligations to Mexico.

Effect of Life Imprisonment Without Release

Clemency also is warranted here because life imprisonment without possibility of release would provide a secure and effective means of punishing Mr. Garza for his crimes. Although a prison official predicted at Mr. Garza's sentencing hearing that he would commit violent acts while incarcerated, his record

9/ Ex. 18 [August 2, 1993 Special Findings Form] at 11.

of incarceration demonstrates that nothing of the sort has happened. Further, as indicated in an affidavit submitted by a former warden of a federal maximum-security prison, the actual conditions of confinement in such a prison belie the prosecution's purported concerns about safely incarcerating Mr. Garza.

Commuting Mr. Garza's sentence to life without possibility of parole also would protect Mr. Garza's family, including his young children, from the devastation they would suffer if he were executed. Mr. Garza's family members simply seek the President's mercy.

II. BACKGROUND

A. Procedural History

1. Indictment and Trial

On February 6, 1992, Mr. Garza, who had been indicted on non-capital federal drug-trafficking charges, fled to Mexico when U.S. Customs agents raided his home in Brownsville, Texas. He was arrested in Mexico and deported to the United States on November 6, 1992. U.S. Customs agents arrested him the same day when he re-entered the United States.

On January 3, 1993, a federal Grand Jury in the United States District Court for the Southern District of Texas (the "District Court") returned a new indictment charging Mr. Garza with three counts of murder as part of a Continuing Criminal Enterprise ("CCE") in violation of Sections 848(a) and 848(c) of the Controlled Substances Act, 21 U.S.C. §§ 848(a), 848(c). 10/ The indictment also charged Mr. Garza with five counts of possession of marijuana with intent to distribute in violation of 18 U.S.C. § 841, one count of engaging in a CCE, and one count of money laundering in violation of 18 U.S.C. § 1956. 11/

10/ Ex. 10 [Jan. 5, 1993 Indictment] at 4-7.

11/ Id. at 1-4, 8.

As a result of the three murder charges, Mr. Garza became eligible for the death penalty under Section 848(e) of the CCE statute, 21 U.S.C. § 848(e). The CCE statute, enacted in 1988, was the only federal death penalty statute in effect when Mr. Garza was indicted in 1993, and no other such statute had been in effect since 1976, when the Supreme Court ruled that mandatory death penalty statutes were unconstitutional. 12/ Justice Department regulations in effect in 1993 required U.S. Attorneys to obtain the Attorney General's approval before seeking the death penalty, but the regulations established no procedures or standards for requesting or obtaining Attorney General approval. Attorney General Barr evidently granted the U.S. Attorney's request to seek the death penalty in or before December 1992. 13/ On January 7, 1993, pursuant to 21 U.S.C. § 848(h)(1), the prosecution filed a Notice of Intention to Seek the Death Penalty as to Mr. Garza (the "Death Penalty Notice"). 14/

In the Death Penalty Notice and amended Death Penalty Notices filed on February 12, 1993, and April 20, 1993, the prosecution indicated that it would seek to justify a death sentence based on allegations regarding four murders allegedly committed in Mexico for which Mr. Garza had never been charged, prosecuted or convicted (the "unadjudicated foreign murders"). 15/ Mr. Garza's

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12/ Rory K. Little, *The Federal Death Penalty: History and Some Thoughts about the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 373-379 (1999)

13/ According to contemporaneous press reports, Attorney General Barr approved the request to seek the death penalty against Mr. Garza on December 23, 1992. Rebecca Thatcher, *Judge Demands No Public Talk on J. Garza Case*, BROWNSVILLE HERALD, Jan. 7, 1993.

14/ Ex. 11 [Jan. 7, 1993 Death Penalty Notice].

15/ Ex. 12 [Feb. 12, 1993 Death Penalty Notice]; Ex. 13 [April 20, 1993 Death Penalty Notice].

counsel, who neither spoke nor read Spanish, moved to exclude any evidence of the unadjudicated foreign murders from any sentencing hearing on the ground that he had "no power to subpoena any Mexican authorities, witnesses or documents pertaining to these murders." 16/ The District Court denied Mr. Garza's motion, 17/ and also denied his request for a continuance of the trial to give him additional time to prepare a response to the prosecution's evidence pertaining to those murders, which included an autopsy report and other documents written in Spanish. 18/

Mr. Garza's trial began on July 7, 1993, and continued through July 29, 1993. On that date, the jury rendered a verdict finding Mr. Garza guilty on each of the ten counts charged in the January 1993 indictment.

2. Sentencing

Pursuant to the CCE statute, Mr. Garza's sentencing hearing was conducted before the same jury that determined his guilt, 21 U.S.C. § 848(i)(1)(A), and the jury had the power to make a binding recommendation "that the sentence of death be imposed." 21 U.S.C. § 848(l). Absent such a recommendation, the District Court was required to "impose a sentence, other than death, authorized by law." Id.

Mr. Garza's sentencing hearing began on July 29, 1993, the same day on which the jury rendered its guilty verdict. During the hearing, the prosecution introduced testimony by Mr. Garza's former co-defendants regarding the foreign unadjudicated murders and, to prove the identity of the murder victims, introduced testimony by U.S. Customs agents regarding investigative files and information obtained from Mexican police officials and other Mexican residents, none of whom

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16/ Ex. 14 [June 25, 1993 Mot. in Limine to Exclude Evidence] at 5.

17/ Ex. 15 [June 30, 1993 Tr. (Pretrial Conf.)] at 44.

18/ See United States v. Flores, 63 F.3d 1342, 1364-65 (5th Cir. 1995).

appeared at the hearing. Mr. Garza's hearsay objections to the U.S. Customs agents' testimony were overruled.

The District Court also rejected Mr. Garza's request to inform the jury that Mr. Garza would be sentenced to life imprisonment without possibility of parole if he were not sentenced to death. Instead, in connection with its argument that Mr. Garza posed a continuing threat to society, the prosecution was permitted to argue that, absent a death sentence, Mr. Garza could be released from prison in as little as twenty years. The District Court and the prosecution informed the jury it should not consider any alternative sentence in rendering its decision.

The sentencing hearing concluded on July 31, 1993. Pursuant to Section 848(k), the jury was then asked to make findings regarding certain aggravating factors specified in the CCE statute (the "statutory aggravating factors"), other aggravating factors proposed by the prosecution (the "non-statutory aggravating factors"), and mitigating factors proposed by the defense, and to decide whether any aggravating factors that were unanimously found to exist sufficiently outweighed any mitigating factors found to exist to justify a sentence of death. Of the 13 non-statutory aggravating factors identified by the prosecution, ten related to the foreign unadjudicated murders. 19/ Another non-statutory aggravating factor asked the jury to determine whether Mr. Garza represents a "continuing danger to the lives of others." 20/

On August 2, 1993, the jury issued its Special Findings. The jury found all of the aggravating factors identified by the prosecution with the exception of one of the ten non-statutory aggravating factors pertaining to the foreign

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19/ Ex. 18 [Special Findings Form] at 5-7.

20/ Id. at 7.

unadjudicated murders. 21/ Out of nine specified mitigating factors, the jury found the following four:

> 2. JUAN RAUL GARZA was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.
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> * * *
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> 5. JUAN RAUL GARZA was youthful, although not under the age of 18.
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> * * *
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> 8. Another defendant or defendants, equally culpable in the crime, will not be punished by death.
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> 9. The victim consented to the criminal conducted that resulted in the victim's death. 22/

The jury also indicated that it had found one or more additional mitigating factors that were not specified on the Special Findings Form. 23/

The jury found "that the aggravating factors in this case sufficiently outweigh any mitigating factor or factors" and recommended "that a sentence of death shall be imposed." 24/ On August 10, 1993, the District Court entered judgment sentencing Mr. Garza to death.

On September 15, 1993, Mr. Garza filed a motion for a new sentencing hearing based on, among other grounds, the District Court's "failure to inform the jury of the alternative sentence of life imprisonment." 25/ The District Court denied

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21/ Id. at 1-7.

22/ Id. at 10-11.

23/ Id. at 14.

24/ Id. at 15.

25/ Ex. 19 [Sept. 15, 1993 Mot. for New Sentencing Hn'g.] at __.

the motion by oral order on October 8, 1993. 26/ Mr. Garza filed his notice of appeal the same day.

3. Review

On direct appeal to the United States Court of Appeals for the Fifth Circuit, Mr. Garza challenged his conviction and sentencing on a number of grounds. With respect to the sentencing phase, Mr. Garza argued, among other things, that life imprisonment without possibility of release was the only alternative to the death sentence; that the prosecution's future dangerousness arguments misled the jury as to the possibility of early release; and that the court improperly admitted evidence regarding the unadjudicated foreign murders and improperly admitted hearsay statements. On September 1, 1995, the Fifth Circuit affirmed the District Court's judgment. See United States v. Flores, 63 F.3d 1342 (5th Cir. 1995). Mr. Garza's petition to the Fifth Circuit for rehearing en banc was denied December 15, 1995; his petition to the Supreme Court for a writ of certiorari was denied on October 7, 1996, United States v. Garza, 519 U.S. 825 (1996); and his motion to the Supreme Court for rehearing was denied on December 2, 1996. United States v. Garza, 519 U.S. 1022 (1996).

On December 1, 1997, Mr. Garza filed a motion with the District Court to vacate his sentence pursuant to 28 U.S.C. § 2255. The District Court denied the motion on April 9, 1998 and, on May 18, 1998, denied his subsequent request for a Certificate of Appealability, his motion for relief from judgment under Fed. R. Civ. P. 60(b) and his motion to alter and amend judgment under Fed. R. Civ. P. 59(e). Mr. Garza filed a notice of appeal on July 14, 1998. On January 14, 1999, the Fifth Circuit issued a decision denying Mr. Garza's petition for leave to appeal the District Court's order. United States v. Garza, 165 F.3d 312 (5th Cir. 1999). The

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26/ Ex. 20 [Oct. 8, 1993 Tr. (Sentencing)] at 32-33.

Fifth Circuit denied Mr. Garza's petition for rehearing on April 19, 1999, and the Supreme Court denied his petition for a writ of certiorari on November 15, 1999. Garza v. United States, 120 S. Ct. 502 (1999).

On May 26, 2000, the District Court set August 5, 2000, as the date of Mr. Garza's execution. On August 2, 2000, the President granted a reprieve of the date of execution of the death sentence and set December 12, 2000, as the new date for execution of the death sentence.

On September 13, 2000, Mr. Garza submitted the pending Petition for Clemency asking that his sentence of death be commutted to a sentence of life imprisonment without possibility of release.

B. Post-Sentencing Developments in Federal Death Penalty Law

1. The Federal Death Penalty Act and the Death Penalty Protocols

In the two years following Mr. Garza's sentencing, federal law and policy governing the death penalty changed dramatically with the enactment of the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 et seq. (the "FDPA"), and the Justice Department's adoption of detailed internal regulations called the Death Penalty Protocols.

Enacted on September 13, 1994, the FDPA established new procedures governing imposition of the death penalty that differed in significant respects from the procedures previously applicable to capital prosecutions, including Mr. Garza's prosecution, under the CCE statute. In particular, whereas the CCE statute only gave the jury the power to recommend the death penalty, 21 U.S.C. § 848(k), the FDPA also permits the jury to recommend a sentence of life without possibility of release as an alternative to the death penalty and requires the court to "sentence the defendant accordingly." 18 U.S.C. §§ 3593(e), 3594. In addition, the FDPA permits the exclusion of otherwise relevant evidence whenever the danger of unfair

prejudice "outweigh[s]" the probative value of the evidence, 18 U.S.C. § 3593(c), whereas the CCE statute only permitted exclusion where the danger of unfair prejudice "substantially outweigh[s]" the probative value of the evidence. 21 U.S.C. § 848(j). Thus, a large amount of potentially prejudicial information that was admitted under the CCE balancing test would not pass the FDPA balancing test.

In late 1994, in connection with enactment of the FDPA, the Justice Department began work on comprehensive internal regulations governing the procedures for deciding whether to authorize the death penalty in a particular case. Adopted on January 27, 1995, the Death Penalty Protocols provide that, in every case involving "an offense subject to the death penalty, whether or not the United States Attorney recommends the filing of a notice to seek the death penalty," the U.S. Attorney must submit to the Justice Department a "Death Penalty Evaluation" form and prosecution memorandum providing detailed information on the defendant and the offense. DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-10.000(C). These materials are submitted for review by an internal Justice Department Committee (the "Review Committee"), which must give defense counsel "an opportunity to present to the [Review] Committee, orally or in writing, the reasons why the death penalty should not be sought." Id. § 9-10.000(D). The Review Committee then makes a recommendation to the Attorney General, who must "make the final decision" on whether to seek the death penalty. Id. The Protocols also provide that, in evaluating whether the United States should seek the death penalty, the U.S. Attorney, the Review Committee and the Attorney General must take into account the same balancing of aggravating and mitigating factors that a jury would be required to consider. Id. § 9-10.000(G).

The Protocols state that the "authorization process is designed to promote consistency and fairness." Id. Similarly, when the Protocols were still being developed, the Attorney General described them as part of a broader objective

"to insure that there will be absolutely no bias in our ongoing administration of capital punishment" and explained that their particular purpose was:

> to insure that decisions to seek the death penalty are made in a uniform, fair, and non-discriminatory manner, so that defendants who commit similar acts and who have similar degrees of culpability are treated similarly by the Department. 27/

In a further effort to avoid racially biased decision-making, the Justice Department policy prohibits U.S. Attorneys from providing "information about the race/ethnicity of the defendant to Review Committee members, to attorneys from the Criminal Division's Capital Case Unit (CCU) who assist the Review Committee, or to the Attorney General." 28/

Thus, at the same time that the FDPA established significant new protections for capital defendants at the sentencing stage, the Death Penalty Protocols strove to reduce the virtually unchecked discretion that U.S. Attorneys had previously enjoyed in deciding whether to seek the death penalty. None of these safeguards was in place at the time of Mr. Garza's prosecution and sentencing.

2. The Justice Department Study

In addition to regulating and centralizing the procedures for death penalty authorization, the Death Penalty Protocols enabled the Justice Department to begin gathering a far broader range of data regarding disparities in the federal

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27/ Ex. 6 [Aug. 17, 1994 Letter to Hon. Cleo Fields from the Attorney General] at 1.

28/ Ex. 1 [Department of Justice, *The Federal Death Penalty System: A Statistical Survey (1988-2000)* (2000) (the "Justice Department Study")] at 2-3.

capital punishment system. Based on that data, the Justice Department in late 1999 or early 2000 undertook a study to identify those disparities. 29/

On September 12, 2000, the Justice Department released its findings. As further discussed in Section III.A. below, those findings reveal striking disparities along racial/ethnic and geographic lines at every stage of the capital punishment process. In releasing those findings, Deputy Attorney General Eric Holder said he was "both personally and professionally disturbed by the numbers we discuss today" and was "particularly struck by the fact that African Americans and Hispanics are over-represented in those cases presented for consideration of the death penalty and those case where the defendant is actually sentenced to death." 30/ Asked to comment on the fact that six of the 19 inmates on federal row are from Texas — the state in which Mr. Garza was prosecuted — the Deputy Attorney General noted that "[s]everal [of those cases] are from the pre-protocol period." 31/

In light of the findings, the Attorney General concluded:

> More information is needed to better understand the many factors that affect how homicide cases make their way into the federal system, and once in the system, why they follow different paths. An even broader analysis must therefore be undertaken to determine if bias does, in fact, play any role in the federal death penalty system. 32/

While recognizing that further study would be of little use to those, like Mr. Garza, whom the system already has sentenced to death, the Attorney General did not

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29/ Ex. 7 [Sept. 12, 2000 Justice Department Press Release] at 1.

30/ Ex. 8 [Sept. 12, 2000 Tr. of Press Conf.] at 5.

31/ Id. at 10-11.

32/ Id. at 5.

agree that the Justice Department findings warranted a moratorium on executions. 33/ Instead, the Attorney General noted that "the clemency process is in place to address any question" regarding the implications of the Justice Department findings for current death row inmates. 34/

III. REASONS FOR GRANTING CLEMENCY

C. MR. GARZA'S DEATH SENTENCE WAS THE PRODUCT OF RACIAL AND GEOGRAPHIC DISPARITY IN THE FEDERAL DEATH PENALTY SYSTEM

The Justice Department study reveals gross disparities in the federal death penalty system based on race/ethnicity and geography — disparities that are attributable to bias, not reasoned decision-making. By virtue of his Hispanic ethnicity and his Texas residence, Mr. Garza was vulnerable to the operation of both types of bias when he was indicted for committing death-eligible offenses. Under these circumstances, carrying out Mr. Garza's death sentence would be fundamentally unfair, contrary to principles of equal protection and inconsistent with the United States' obligations under international law.

1. The Federal Death Penalty System Is Fraught with Racial and Ethnic Bias

a) The Justice Department Study Reveals Striking Disparities Among Different Racial/Ethnic Groups

Federal prisons currently house 21 federal prisoners under sentence of death, and 17 of them — 81 percent of the total — are, like Mr. Garza, members of racial/ethnic minorities. 35/ The fact that members of racial/ethnic minorities have

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33/ Id. at 6.

34/ Id. at 9.

35/ Ex. 1 [Justice Department Study] at 34. For two of the 21, the death penalty has been recommended by a jury but the sentence has not been imposed. Id.

been sentenced to death more than four times as often as whites under the federal system is no accident. According to the Justice Department study, since the modern federal death penalty began with enactment of the CCE statute in 1988, Hispanic and African-American defendants have together accounted for 76 percent (26 percent and 51 percent, respectively) of defendants as to whom the Attorney General considered authorizing the death penalty; 70 percent (19 percent and 51 percent, respectively) of the defendants as to whom U.S. Attorneys have recommended authorizing the death penalty; and 69 percent (18 percent and 51 percent, respectively) of the defendants as to whom the Attorney General authorized seeking the death penalty. 36/ By contrast, white defendants have accounted for, respectively, only 20 percent, 23 percent and 25 percent of those groups. 37/

The racial/ethnic composition of capital defendants at the various stages of the federal death penalty process is plainly disproportionate to the composition of broader populations. Hispanics and African-Americans made up 24.3 percent (11.5 percent and 12.8 percent, respectively) of the total population in the United States, while whites make up 71.9 percent of that population — the reverse of their respective percentages among federal capital defendants. 38/

The disproportionalities also exist in comparison to populations of those charged with or convicted of violent crimes — populations whose make-up may have itself resulted from racial/ethnic bias. The Department of Justice does

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36/ Ex. 2 [Table: Racial/Ethnic Disparities in Federal Death Penalty Decision-Making].

37/ Id.

38/ U.S. DEP'T OF STATE, *Initial Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination*, at 1-2 (2000), at http://www.state.gov/www/global/human_rights/cerd_report.html.

not maintain records that permit it to track and understand the composition of the population of persons who have committed crimes eligible for federal prosecution from which U.S. attorneys select which defendants to indict. Therefore, the Justice Department study contains no statistics regarding this critical decision, which defines the initial composition of the pool of potential federal capital defendants. Nevertheless, there is information available about persons entering state prisons which does provide a profile of the composition of potential homicide defendants. These statistics show that, in 1993, the year in which Mr. Garza was convicted, 12 percent of all defendants entering state prisons after being convicted for homicide were Hispanic — *33 to 50 percent less* than the percentage of Hispanics at different prosecutorial decision-making stages in the federal death penalty system. By contrast, whites comprised 40 percent of all admissions to state prisons for homicide — *70 to 100 percent higher* than the percentage of federal capital defendants who are white. 39/ Assuming that the composition of the pool of potential federal death-eligible defendants is similar to that of state defendants convicted of homicide, these statistics lead to a startling conclusion – a potential federal death-eligible defendant who is Hispanic is *2.3 times more likely* to be authorized by the Attorney General for capital prosecution than a similar white defendant. 40/

39/ The statistics on state prison admissions in 1993 come from BUREAU OF JUSTICE STATISTICS, NAT'L CORRS. REPORTING PROGRAM, *Total new court commitments to State prison, 1993: Offense by sex, race, and Hispanic origin* (1993), at http://www.oip.gov/bjs/correct.html. See Ex. 3.

40/ This estimate is derived from the following statistics: Whites comprise 39.7% of the convicted state homicide defendants who entered prison in 1993, and 25% of the federal defendants authorized by the Attorney General for capital prosecution during the period from 1988 to 2000. Hispanics comprise 12.4% and 18%, respectively, of these groups.

The level of racial/ethnic disparity is even greater among federal capital defendants who, like Mr. Garza, were prosecuted in Texas. There, 41 percent of the defendants considered for the federal death penalty are Hispanic, as are 39 percent of the defendants recommended for the death penalty by U.S. Attorneys and 39 percent of the defendants for whom the Attorney General has authorized the death penalty. 41/ By contrast, white federal defendants in Texas make up only 22 percent of the defendants considered for the death penalty, 11 percent of the defendants recommended for the death penalty by U.S. Attorneys and just 6 percent of the defendants as to whom the death penalty is authorized. 42/ In fact, during the pre-Protocol period, when Mr. Garza was prosecuted, every single federal defendant in Texas as to whom the death penalty was considered, recommended or authorized was, like Mr. Garza, Hispanic. 43/

Moreover, while minority defendants have been significantly over-represented among federal defendants as to whom the death penalty was considered, recommended and authorized, they were substantially less likely to benefit from post-authorization decisions not to seek the death penalty. Over the 12-year period covered by the study, 47 percent of all white defendants for whom the Attorney General authorized the death penalty were subsequently allowed to plead guilty, thus avoiding the death penalty. 44/ By contrast, only 27 percent of Hispanic defendants and 27 percent of African-American defendants authorized for

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41/ Ex. 4 [Table: Federal Prosecutions in Texas; U.S. Attorney and Attorney General Death Penalty Decision-Making ("Federal Prosecutions in Texas")].

42/ Id.

43/ Id.

44/ Ex. 2 [Table: Racial/Ethnic Disparities in Federal Death Penalty Decision-Making 1988-2000].

the death penalty were allowed to plead guilty. 45/ Thus, white capital defendants have been almost 75 percent more likely than Hispanic and African-American defendants to benefit from a plea agreement. For Hispanic defendants, those disparities were particularly pronounced during the period in which Mr. Garza was prosecuted, prior to adoption of the Death Penalty Protocols, when 3 of 7 white capital defendants, but only 1 of 5 Hispanic defendants, were allowed to avoid the death penalty through a plea agreement. 46/

b) The Racial/Ethnic Disparities in the Federal Death Penalty System Are Attributable to Bias

The Attorney General has concluded that "more information" is necessary to determine whether the disparities reflected in the Justice Department study are attributable to bias. However, analyses of similar disparities in the administration of capital punishment and in the overall criminal justice system leave no question that bias plays a leading role.

With respect to the federal death penalty system, a Congressional subcommittee examining the evidence of racial disparities in federal capital prosecutions and convictions from 1988 to 1994 noted that 78% of the defendants selected for capital prosecutions under the CCE statute were African-American, even though 75% of the defendants convicted under the general provisions of the statute for participating in a drug enterprise were white. 47/ This disparity led the panel to conclude that the "pattern of inequality adds to the mounting evidence that race continues to play an unacceptable part in the application of capital punishment

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45/ Id.

46/ Ex. 1 [Justice Department Study], Table 3B.

47/ Racial Disparities in Federal Death Penalty Prosecutions 1988-1994, House Subcomm. on Civil and Constitutional Rights, Comm. on the Judiciary, 140 Cong. Rec. S5328-01, at S5339 (daily ed. May 6, 1994).

in America today." 48/ Another leading commentator reached a similar conclusion, noting that the "United States Department of Justice . . . is now one of the worst offenders in the discriminatory use of the death penalty." 49/

Studies of state capital punishment systems also provide compelling evidence of the link between racial disparity and racial bias — particularly since no state in the country has as high a percentage of racial minorities condemned to death as the federal government. 50/ In a congressionally mandated 1990 study, the General Accounting Office ("GAO") reviewed 28 previous studies of state death penalty systems and concluded that the studies revealed "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty after the Furman decision." 51/ The GAO determined that that these disparities remained even after statistically controlling for other factors such as aggravating circumstances, prior criminal record, and number of victims and that, in more than half of the studies reviewed, the race of the defendant was a factor in determining whether someone would receive the death penalty. 52/

Studies conducted after the GAO report was completed show that the racial disparities in the imposition of the death penalty continue: In 90 percent of

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48/ Id.

49/ Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 466 (1995).

50/ See DEATH PENALTY INFO. CTR., *Death Row USA: Summary of State Lists of Prisoners on Death Row as of July 1, 2000,* at http://www.deathpenaltyinfo.org/DRUSA-StateSumm.html.

51/ GENERAL ACCOUNTING OFFICE, *Report to the Senate and House Committees on the Judiciary, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities,* at 5 (1990).

52/ Id. at 5-6.

the states that impose the death penalty, studies show discrimination based on the race of the victim, and in 55 percent of the states there is evidence of discrimination based on the race of the defendant. 53/ According to another review, 96 percent of the studies examining the relationship between race and the death penalty in the states reveal a pattern of either race-of-victim or race-of-defendant discrimination, or both, in the imposition of the death penalty. 54/ A more recent study of capital prosecutions in Philadelphia concludes that the odds of receiving a death sentence there are 3.1 times higher if the defendant is African-American than if he is white, even after controlling for factors such as the severity of the crime and the background of the defendant. 55/ Studies further show the existence of racial discrimination in those states where the death penalty is most often imposed. 56/ While most of this research focuses on African-Americans, research also shows similar discrimination against Hispanics, both on the basis of race of the defendant and on the basis of the race of the victim. 57/

53/ Baldus, et al., *Racial Discrimination and The Death Penalty in the Post-Furman Era*, 83 CORNELL L. REV. 1638, 1661.

54/ Richard C. Dieter, *The Death Penalty in Black & White; Who Lives, Who Dies, Who Decides* (1998), at http://www.deathpenaltyinfo.org.

55/ Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era*, 83 CORNELL L. REV. at 1713-15, 1760-1761.

56/ See Stephen B. Bright, *Discrimination, Death and Denial*, 35 SANTA CLARA L. REV. at 434-35 (citing studies from Harris County, Texas and Florida); Michael L. Radelet, Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 U. FLA. L. REV. 1, 29 (1991) (finding that in Florida a defendant who murders a white victim is three times more likely to receive the death penalty than is a defendant convicted of murdering a black victim).

57/ See Robert Garcia, *Latinos and Criminal Justice*, 14 CHICANO-LATINO L. REV. 6, 14 (1994).

In other areas of the American criminal justice system, racial disparities much less significant than those reflected on federal death row have been expressly linked to racial bias. As the President's Race Initiative Advisory Board noted in its September 1998 report:

> Data show that blacks compose approximately 50 percent of State and Federal prison inmates, four times their proportion in society, and Hispanics compose approximately 15 percent. These disparities are probably due in part to underlying disparities in criminal behavior. But evidence shows that these disparities also are due in part to discrimination in the administration of justice and to policies and practices that have an unjustified disparate impact on minorities and people of color. 58/

This bias is evident at all levels of the criminal justice system, including juvenile courts, where studies demonstrate that African-Americans receive harsher dispositions than white juveniles even when controlling for the type of offense charged and prior criminal record. 59/

In sum, although the Attorney General's call for further analysis is plainly warranted, the available data and analyses already provide solid evidence that bias has contributed significantly to the racial/ethnic disparities reflected in the new Justice Department data. Although there may be other societal factors that contribute to the overrepresentation of racial/ethnic minorities in the criminal justice system generally, these factors cannot explain the dramatic differences between the make-up of the federal capital defendant population and the racial/ethnic composition of state prisoners convicted of homicide. As Deputy

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58/ THE PRESIDENT'S INITIATIVE ON RACE, *One America in the 21st Century: Forging a New Future,* at 76-77 (1998).

59/ Alan J. Tomkins, et al., *Subtle Discrimination in Juvenile Justice Decisionmaking: Social Scientific Perspectives and Explanations,* 29 CREIGHTON L. REV. 1619 (1996)

Attorney General Holder explained in presenting that data, "[w]e have to be honest with ourselves. Ours is still a race-conscious society . . . it is imperative, morally, and legally, that we confront this problem." 60/

2. There Are Stark Geographic Disparities in the Application of the Federal Death Penalty System

The Justice Department study also reveals an astonishing level of geographic disparity in the administration of the federal death penalty. According to that data, where a death-eligible defendant is prosecuted has a major impact on the likelihood that the prosecution will seek and obtain death penalty authorization at least 50 percent of the time. 61/ On the other hand, there are eight states in which that rate is much lower, ranging from eight percent to 30 percent. 62/ And there are 21 states in which U.S. Attorneys have either never requested or never obtained authorization to seek the death penalty. 63/ These disparities in death penalty authorization rates are striking even among the states with the highest number of cases submitted for consideration. Among the eight states where U.S. Attorneys have submitted 20 or more cases for consideration, the death penalty authorization rate exceeds 50 percent in only one state – Texas – and ranges from 15 percent to 38 percent in the rest. 64/

Prior to implementation of the Death Penalty Protocols, two Southern states — Texas and Virginia — accounted for one quarter of the federal cases in

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60/ Ex. 7 [Sept. 12, 2000 Tr. of Press Conf.] at 5.

61/ Ex. __ [Table: Federal Death Penalty Decision-Making by State of Prosecution].

62/ Id.

63/ Id.

64/ Id.

which authorization to pursue the death penalty was sought by U.S. Attorneys. 65/ More than half of the cases came from only five of the 94 federal judicial districts — the Eastern District of Virginia (9), the Eastern District of Michigan (6), the District of Columbia (5), the Middle District of Georgia (4), and the Southern District of Florida (3). 66/ The Attorney General's review did nothing to ameliorate the disparity. Of the 47 cases in which the Attorney General approved seeking the death penalty, 26 were from the same five districts. 67/ Further, fourteen of the twenty-one defendants currently on federal death row (or awaiting sentencing after a jury's recommendation of death) are from three states — six are from Texas, Mr. Garza's state, four are from Virginia, and four are from Missouri. 68/ A recent study indicates that the Justice Department seeks the federal death penalty six times more often for murders committed in states that strongly support capital punishment than in the 12 states that forbid it. 69/

These statistics leave little room for disagreement. As Rory Little, former member of the Capital Case Review Committee, has explained, "[t]here is no doubt that that capital punishment is disparately administered in the United States today. Regional diversity of views regarding the death penalty skews its imposition geographically." 70/

65/ Ex. 1 [Justice Department Study] at T-18 - T21.

66/ Id. During the same period, 75 districts did not submit a single case for the Attorney General's review.

67/ Id.

68/ Id. at T-307-T-309.

69/ Raymond Bonner, *Charges of Bias Challenge U.S. Death Penalty*, NEW YORK TIMES, June 24, 2000 at A1.

70/ Rory Little, *Federal Death Penalty*, 26 FORDHAM URB. L.J. at 479.

3. Mr. Garza Was Particularly Susceptible to Racial and Geographical Bias

The Justice Department study and other data raise serious concerns that Mr. Garza's death sentence was the product of racial and geographic discrimination, and there is no basis for concluding that those factors did not contribute to the imposition of that sentence in his case.

As discussed in the prior section, the Justice Department study graphically demonstrates the disparate treatment of Hispanics like Mr. Garza. Hispanics are much more likely to be prosecuted for capital murder than whites. Geographic disparity also tipped the scales against Mr. Garza. Texas U.S. Attorneys have requested authorization to seek the death penalty more often than U.S. Attorneys in any state other than Virginia; no state other than Virginia has more defendants as to whom the Attorney General has approved such requests; no state has more residents on federal death row; and, among states with the most death penalty authorizations, Texas has by far the highest authorization rate. 71/ There is no question that, if Mr. Garza had lived anywhere else, the likelihood that he would have been sentenced to death would have been drastically reduced.

Another important consideration is that Mr. Garza, like only four other federal death row prisoners, did not even have the benefit of the Death Penalty Protocols adopted in 1995, which were instituted, in part, as an effort to produce uniformity in the application of the federal death penalty and, thus, reduce the likelihood of racial and geographic disparity. The Protocols establish internal procedures for the centralized review of "death-eligible" cases. Further, the Protocols now include a screening mechanism designed to reduce the possibility that Justice Department officials involved in the review process will become aware

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71/ Ex. 5 [Table: Federal Death Penalty Decision-Making by State of Prosecution].

of the defendant's race. But those procedures — under which the Attorney General has elected to seek the death penalty in only 23 percent of the eligible cases — came too late for Mr. Garza. 72/ He was selected for capital prosecution in 1992 — two years before the Protocols were adopted — under an informal process for which no internal guidelines had been established. Thus, in Mr. Garza's case the procedure by which capital prosecution was approved afforded the Department of Justice no supervisory role with respect to the actions of local U.S. Attorneys.

Finally, as further discussed in Section III.G below, the record suggests that the prosecution and its witnesses in fact believed that Mr. Garza's ethnicity – in the context of the crimes of which he had been convicted – was a consideration in the jury's life or death decision. In presenting evidence that Mr. Garza would be a danger in prison and was therefore deserving of the death penalty, the prosecution elicited the following testimony from one prison official:

> [Mr. Garza] would be an inmate that would probably be courted by one of our security threat groups. We have five primary security threat groups, gangs that are based along ethnicity. They would probably court him into – immediately just welcome him with open arms. 73/

To the extent such testimony implied that Mr. Garza would pose a threat in prison due in part to his ethnicity, it was unlawful. See Saldano v. Texas, 120 S. Ct. 2214 (2000) (vacating the judgment of the state court's imposition of the death penalty because of the prosecutor's error in relying in part on the defendant's Latino ethnicity). In any event, this testimony lends further support to the data reflected in the Justice Department survey, i.e., that it is reasonably likely Mr. Garza's ethnicity played a role in the events leading to his death sentence.

72/ Id. at 10-11.

73/ Ex. 17e [July 31, 1993 Tr. (Trial)] at 3545 (emphasis added).

4. A Biased and Arbitrary Death Penalty Process Violates Principles of Fundamental Fairness Central to Both U.S. and International Law

For an administration that has made a firm commitment to equal justice for all Americans, issues of racial discrimination and geographic disparity in the imposition of the death penalty must be central to the clemency determination. Permitting Mr. Garza's execution to go forward would constitute an endorsement of a fundamentally arbitrary and capricious capital punishment system. To date, Congress, the courts and previous administrations have refused to address the issues of racial and geographic disparity in the imposition of the death penalty. It is now left to the President's constitutional authority to grant clemency and thereby ensure that the principle of equal justice is applied to Juan Garza. International law also provides strong support for a grant of clemency under these circumstances.

a) A Biased and Disparate Federal Capital Punishment System Violates Notions of Fundamental Fairness

As the Supreme Court explained in Gardner v. Florida, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." 430 U.S. 349, 358 (1977). It was for precisely that reason that the Court, in Furman v. Georgia, 408 U.S. 238 (1972), declared that statutes that give juries open discretion to impose the death penalty violate the Eighth Amendment prohibition on cruel and unusual punishment. Neither the Court nor Congress, however, has adequately addressed the profound issue raised by Mr. Garza's pending execution — whether the government should be permitted to decide to take a person's life through a biased and arbitrary process.

In McCleskey v. Kemp, 481 U.S. 279 (1987), the Supreme Court faced a challenge to the death penalty based upon empirical evidence that race played an impermissible role in the capital punishment system in Georgia. Warren

McCleskey, an African-American convicted of murdering a white victim, supported his claim with a study, conducted by Professor David Baldus and his colleagues, that showed that defendants in Georgia were four times more likely to receive the death penalty for murdering a white victim than they were for murdering a non-white victim, even after controlling for 39 different factors. 481 U.S. at 287. The five-justice McCleskey majority assumed the validity of the Baldus study, 481 U.S. at 292 n.7, and agreed that it established "a discrepancy [in the imposition of the death penalty] that appears to correlate with race." Nevertheless, the Court refused to reverse McCleskey's death sentence, holding that the Baldus study failed to establish any intentional discrimination by the state of Georgia specifically against Mr. McCleskey. Id. at 312.

In the wake of McCleskey, Congress considered legislation that would have allowed death penalty defendants the ability to challenge their individual death sentences on the basis of racial discrimination in much the same way that individuals are allowed to use statistical evidence to establish individual discrimination in housing or employment. While the House of Representatives passed the Fairness in Death Sentencing Act, also known as the Racial Justice Act, in 1990, and again in 1994, each time it was rejected by the Senate. 74/

Thus, despite overwhelming evidence that the death penalty is imposed in a racially discriminatory manner, neither the courts nor Congress have addressed the issue of systemic, race-based bias in capital punishment. In light of those failures, it is incumbent upon the executive branch to give meaning to the

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74/ See David Baldus, et al., *Racial Discrimination and The Death Penalty in the Post-Furman Era: Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. at 1735-36 (1998); David Baldus, George Woodworth, Charles Pulaski, *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 376-402 (1994).

concept of equal justice. Indeed, this Administration has vowed to take further action in light of the Justice Department's recent study of the federal death penalty process. As Deputy Attorney General Holder noted, "[t]he release of this report must serve as a catalyst not only for an informed and constructive dialogue, but also for the creation of a system where every American can have absolute confidence that our federal criminal justice system is completely color-blind. We pledge to you today to begin to make that goal a reality." 75/ Attorney General Reno also recognized that there are substantial questions to be answered: "More information is needed to better understand the many factors that affect how homicide cases make their way into the federal system and, once in the federal system, why they follow different paths. An even broader analysis must therefore be undertaken to determine if bias does in fact play any role in the federal death penalty system." 76/ It would be fundamentally unjust for the government to proceed with this execution, in the face of the study's evidence that, as to Mr. Garza, there can be no confidence that our federal death penalty system is color-blind.

However, the Justice Department has indicated that it is unwilling to halt executions until questions regarding racial and ethnic bias and geographical disparity can be answered. The Department has implied instead that a moratorium on the death penalty would only be called for if there were legitimate claims of actual innocence brought by those sentenced to die. 77/ Apparently, in the view of the Department of Justice, as long as the inmates currently on federal death row are guilty as charged, they should be executed even if the decision to impose the death penalty may have been the result of ethnic or racial bias.

75/ Ex. 7 [Sept. 12, 2000 Tr. of Press Conf.] at 5.

76/ Id.

77/ Id. at 6.

Plainly, the concept of equal justice leaves no room for such a possibility. Allowing Mr. Garza to die in the face of overwhelming evidence that the federal death penalty is imposed in a racially discriminatory and arbitrary fashion would be fundamentally unfair and would constitute complete abandonment of President Clinton's "responsibility to make sure that there's nothing wrong with the [death penalty] process."

b) A Biased and Disparate Federal Capital Punishment System Violates Binding International Obligations

In addition to fundamental principles of fairness and the Administration's own policies, international law also provides grounds for the President to grant clemency based on the striking evidence of racial disparity in the federal death penalty system. 78/ Under both the Convention on the Elimination of All Forms of Racial Discrimination (the "CERD") and the International Covenant on Civil and Political Rights (the "ICCPR"), statistical evidence of racial disparity is enough to warrant — and require — corrective action by the United States.

The CERD, which the United States signed in 1966 and ratified in 1994, requires that signatory states "review governmental, national and local policies, and . . . amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists," CERD

78/ Whether U.S. courts, as opposed to the President of the United States, have the ability to reexamine McCleskey by invoking international law is slightly more complicated because treaties like the Convention on the Elimination of All Forms of Racial Discrimination are non-self-executing. But see David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 152 (1999) (explaining that because treaty is non-self-executing does not mean that it cannot be directly applied by U.S. courts); Robin H. Gise, Note, *Rethinking McClesky v. Kemp: How U.S. Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination Provides a Remedy for Claims of Racial Disparity in Death Penalty Cases*, 22 FORDHAM INT'L L.J. 2270, 2307–16 (1999).

art. 2(1)(c) (emphasis added), and expressly extend that requirement to the administration of criminal justice systems. Id. art. 5(a). Further, the CERD defines "racial discrimination" as any distinction based on race or ethnicity that has the purpose or effect of impairing the exercise of human rights and fundamental freedom. Id. art. 1(1) (emphasis added). In its ratification resolution, the Senate declared that the CERD "shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein . . . ." See 140 Cong. Rec. S7634–02, at S7634 (daily ed. June 24, 1994). Under the plain language of the CERD, the United States can and must take action to correct governmental policies that have a discriminatory effect, regardless of whether they also have a discriminatory purpose.

The ICCPR, which the United States signed in 1977 and ratified on April 2, 1992, see 138 Cong. Rec. S4783, at S4783 (daily ed. Apr. 2, 1992), specifically addresses the administration of capital punishment. It provides:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

ICCPR, art. 6(1). The United States ratified the ICCPR subject to a reservation on Article 6 allowing for the imposition of capital punishment, but the reservation does not apply to the arbitrary deprivation clause of Article 6(1). Because the available data reveal that the federal death penalty system has operated in an arbitrary manner, the ICCPR also provides a strong basis for granting clemency under the circumstances present in Mr. Garza's case. See United States v. Duarte-Acero, 208 F.3d 1282, 1284–85 (11th Cir. 2000) (holding that the ICCPR is "coexistent" with the United States Constitution).

Members of the international community have been highly critical of the United States for failing to take steps to eliminate racial discrimination in the

administration of the death penalty. For example, the United Nations Commission on Human Rights, after reporting in 1998 that the race of the defendant and the victim are "key elements" in the administration of the death penalty in the United States, has requested that the United States impose a moratorium on executions and "comply fully" with the applicable ICCPR obligations. 79/ Similarly, in 1996 the International Commission of Jurists concluded that racial discrimination in the United States in the administration of the death penalty violates the United States' obligations under the ICCPR and CERD. 80/

This Administration has laid the groundwork for ensuring that the United States lives up to its international obligations in this area: the ICCPR and the CERD are now in force after decades of dormancy, and the Executive Branch is under orders to implement international law. 81/ In addition to fulfilling the promise and requirements of domestic law, granting Mr. Garza's petition for clemency would demonstrate that the United States takes those obligations seriously.

5. Conclusion

If the prosecutorial decision to seek the death penalty in federal cases were made fairly and evenhandedly across the United States – so that the venue of

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79/ Bacre Waly Ndiaye, U.N. COMM'N ON HUMAN RIGHTS, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* (1998); Statement of Mary Robinson, U.N. High Commissioner for Human Rights (Oct. 12, 1999).

80/ See International Commission of Jurists, Administration of the Death Penalty in the United States at 58,60, 65–69 (1996); (*Report of United National Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*), *Addendum: Mission to the United States,* at 62, U.N. Doc. E/CN.4/1998/68/Add.3 (1998).

81/ In Executive Order 13107, 63 Fed. Reg. 68,991 (Dec. 10, 1998), the President required that the United States abide by the ICCPR, the CERD, and other treaties concerned with the protection and promotion of human rights.

one's crime, the color of one's skin, and the country of one's origin or ancestry played no role in the selection of any federal criminal defendant as death-eligible – Juan Garza might still have been selected as one against whom the United States would seek the death penalty. However, no one can be certain of this. What one can be certain of is that because Mr. Garza committed potentially capital federal crimes in Texas and because he was Hispanic, he was more likely to be chosen for capital prosecution than he would have been had he committed the crimes in almost any other state and had he been white. No one's fate should be determined by the happenstance of geography or the pernicious effects of racial or ethnic bias. Any doubt about whether Juan Garza's fate was influenced by these factors should be resolved in favor of clemency.

D. JUAN RAUL GARZA WAS DENIED PROCEDURAL SAFEGUARDS NECESSARY TO ENSURE THAT THE DEATH PENALTY WAS REQUESTED AND IMPOSED IN A FAIR AND RATIONAL MANNER

The Supreme Court has recognized in the capital sentencing context that a "defendant has a legitimate interest in the character of the procedure which leads to imposition of a sentence even if he may have no right to object to a particular result of the sentencing process." Gardner, 430 U.S. 349 at-359 (citation omitted). The President, acknowledging the same principle, has stated: "[T]hose of us who support the death penalty have an extra heavy responsibility to assure both that the result is accurate and that the process was fair and constitutional." 82/ The importance of procedural safeguards in capital sentencing is embodied in two related principles that the decisions of the Supreme Court — and the policies of this Administration — have steadfastly embraced. First, death penalty procedures must "ensure[ ] that the sentencing authority is given adequate information and

82/ June 28, 2000 Press Conf. Transcript, reprinted in 2000 WL 868841 **5-6.

guidance." Gregg v. Georgia, 428 U.S. 153, 195 (1976). Second, because "[t]he decision to exercise the power of the State to execute a defendant is unlike any other decision . . . standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case." Mills v. Maryland, 486 U.S. 367, 383-384 (1988).

In the proceedings that culminated in the death sentence of Juan Raul Garza, both of these fundamental principles were forsaken. Rather than obtaining all relevant information necessary to an informed decision on whether to impose the death sentence, Mr. Garza's sentencing jury was denied highly material information — that, for Mr. Garza, the only alternative to death was life without the possibility of parole — and was misled into believing that he would eventually be released if he were not sentenced to death. The concealment of that information from Mr. Garza's jury cannot be reconciled with the decisions of the Supreme Court, the Federal Death Penalty Act or basic notions of fairness.

Mr. Garza's sentencing also disregarded the principle that a death sentence must be predicated on uniquely reliable evidence. Far from ensuring that only the most reliable evidence was introduced against him, Mr. Garza's sentencing proceeding resulted in the admission of grossly unreliable evidence: uncorroborated testimony by accomplices, who were given reduced sentences in exchange for their testimony, as to crimes allegedly committed in Mexico for which Mr. Garza has never been charged, prosecuted or convicted.

1. Mr. Garza's Sentencing Jury Was Denied Critically Relevant Information Regarding the Alternative to the Death Penalty — Life Imprisonment Without Possibility of Release

a) Due Process and Basic Notions of Fairness Require that the Sentencing Jury Possess Accurate Information Regarding Alternatives to the Death Penalty

"[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die" — particularly where that determination is made "by a jury of people who may never before have made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 189-190 (1976) (emphasis added). As a matter of due process — and common sense — that principle extends not only to information concerning the defendant and the offense charged but also to information regarding the "noncapital sentencing alternative." Simmons v. South Carolina, 512 U.S. 154, 162 (1994); see California v. Ramos, 463 U.S. 992, 1009 (1983).

In Simmons, the Supreme Court reversed a death sentence imposed by a South Carolina court because that court failed to inform the sentencing jury that the defendant, who had plead guilty to beating an elderly woman to death in her home, would be sentenced to life imprisonment without the possibility of parole if he were not executed. 512 U.S. at 156. During the penalty phase, in response to the prosecution's repeated argument that the defendant posed a risk to society, the defendant requested an instruction that, if not executed, "he actually will be sentenced to imprisonment . . . for the balance of his natural life." Id. at 160. The trial court denied that request and, instead, instructed the jury that it was "not to consider parole or parole eligibility in reaching your verdict." Id.

The Supreme Court held that, under these circumstances, imposition of the death sentence violated the defendant's due process rights. The four-justice plurality opinion explained:

> [T]he jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration. This grievous misperception was encouraged by the trial court's refusal to provide the jury with accurate information regarding petitioner's parole ineligibility, and by the State's repeated suggestion that petitioner would pose a future danger to society if he were not executed. . . . The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole.

Id. at 161-162. The plurality opinion emphasized that, "[i]n assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant . . . . Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole." Id. at 163-164. The Court rejected the state's argument that such information would be misleading "because future exigencies such as legislative reform, commutation, clemency, and escape might allow petitioner to be released into society." Id. at 166. As the plurality noted, "a large majority of States which provide for life imprisonment without parole as an alternative to capital punishment inform the sentencing authority of the defendant's parole ineligibility." Id. at 166-167.

This Administration and the U.S. Congress have taken the principle recognized in Simmons one step further by enacting the FDPA, which ensures that juries in federal capital cases would not only obtain accurate information regarding the life-imprisonment alternative but would have the authority to impose that alternative. The FDPA provides that "the jury by unanimous vote . . . shall

recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence," 18 U.S.C. § 3593(e) (emphasis added), and further provides that, "[u]pon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly." 18 U.S.C. § 3594. Thus, by giving the jury the authority to make a binding recommendation that the defendant should be sentenced to "life imprisonment without possibility of release," the FDPA helps ensure that the jury is not misled as to whether the defendant would be released if he is not executed.

The critical importance of accurately informing a jury as to the possibility of life imprisonment is reflected not only in Supreme Court precedent and the FDPA but also in the well-documented beliefs of actual and potential jurors. According to a variety of survey and polling data, most actual and potential jurors believe that convicted murders will not spend the rest of their lives in prison — even if sentenced to life imprisonment — and will instead be released in a fraction of the minimum time they would actually be required to serve. 83/ For example:

- only 4 percent of those responding to a 1993 nationwide poll believed that a defendant sentenced to life imprisonment for first degree murder would be imprisoned for the rest of his life; 84/

83/ Marshall Dayan et al., *Searching for an Impartial Sentencer through Jury Selection in Capital Trials*, 23 LOY. L.A. L. REV. 151, 166-167 (1989).

84/ Richard C. Dieter, *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty* (1993), at http://www.deathpenaltyinfo.org/dpic/07.html.

- 70 percent of those responding to a 1989 nationwide survey believed "that a person given a life sentence will not remain incarcerated for the remainder of his life"; 85/

- most of the potential jurors surveyed in a Georgia capital case (the "Georgia survey") believed that a convicted murderer sentenced to life imprisonment would serve about eight years in prison — less than a third of the minimum sentence he would actually serve; 86/

- almost 65 percent of the potential jurors surveyed in a Mississippi case (the "Mississippi survey") — in which the defendant, if sentenced to life imprisonment, would have been ineligible for parole — believed that a convicted murderer sentenced to life imprisonment would serve only five to ten years in prison; 87/

- in a survey of actual and potential jurors in several Maryland capital cases (the "Maryland survey"), most of those responding believed that a defendant sentenced to life in prison would serve only ten to fifteen years before being released on parole; 88/

- only seven percent of those responding to a statewide poll of potential jurors in South Carolina "firmly believed that an inmate sentenced to life imprisonment in South Carolina actually would be required to spend the rest of his life in prison"; 89/ and

- in a survey of potential jurors in a Virginia county (the "Virginia survey"), most "[b]elieved that a capital defendant sentenced to life imprisonment will likely serve only 10 years in prison." 90/

85/ Id. (citing Bennack, *The Public, the Media, and the Judicial System: A National Survey of Citizen's Awareness*, 7 STATE CT. J. 4, 10 (1983)).

86/ *Impartial Sentencer*, 23 LOY. L.A. L. REV. at 170.

87/ Id. at 170-171.

88/ Id. at 171.

89/ Simmons, 512 U.S. at 158.

90/ W. Hood, Note: *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605, 1624-1625 (1989).

Thus, as the plurality opinion in Simmons recognized, "[p]ublic opinion and juror surveys support the commonsense understanding that there is a reasonable likelihood of juror confusion about the meaning of the term 'life imprisonment.'" 512 U.S. at 170 n.9. Similarly, a three-justice concurring opinion noted: "The rejection of parole by many States (and the Federal Government) is a recent development that displaces the longstanding practice of parole availability, and common sense tells us that many jurors might not know whether a life sentence carries without the possibility of parole." Id. at 177-178 (O'Connor, J., concurring).

Furthermore, the evidence also demonstrates that jurors' gross misconceptions regarding the life imprisonment alternative have a striking impact on whether they would recommend imposition of the death sentence. For example:

- in the Georgia case survey, "[o]ver two-thirds of the potential jurors stated they would be more likely to impose a sentence of life if assured that 'life' meant at least twenty-five years"; 91/
- in the Mississippi case survey, almost two-thirds of the potential jurors said they "would have been more likely to return a life sentence if they knew the person would never be eligible for parole"; 92/
- in the Maryland survey, 60 percent of the jurors "acknowledged that their sentencing decision was affected by knowing a defendant might eventually be released if a life sentence was imposed," and 50 percent of those who entered deliberations favoring a sentence of death "held this opinion because the defendant might be paroled"; 93/ and
- most of the prospective jurors in the Virginia survey said they believed that the length of time a capital defendant will actually serve when sentenced to life imprisonment is important to the

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91/ *Impartial Sentencer*, 23 LOY. L.A. L. REV. at 170.

92/ Id. at 170-171.

93/ Id. at 171.

> penalty determination and that they would be influenced significantly in their sentencing decisions by the information that Virginia imposes a mandatory minimum sentence of 25 years for defendants in capital cases. 94/

Data on juror decision-making is mirrored in data on attitudes toward the death penalty generally. In numerous state and nationwide polls, the percentage of those who say they support the death penalty drops dramatically, to less than 50 percent in some polls, when respondents are asked whether they would support the death penalty if life without the possibility of release were available as an alternative sentence — a drop the ranges from 14 percentage points to 23 percentage points in recent Gallup polls and a drop of approximately 15 percentage points or more in various statewide surveys. 95/ Thus, such data confirms that potential jurors are far less likely to recommend the death penalty if that sentence is evaluated in light of accurate information regarding the life imprisonment alternative.

Therefore, the Supreme Court's decision in Simmons, the policies of the Federal Government under this Administration and the views of actual and potential jurors all establish that, as a matter of due process, basic fairness and common sense, a jury cannot recommend imposition of the death sentence on an informed basis — and a court may not impose that sentence — unless the jury is given accurate information regarding the life imprisonment alternative.

94/ *Meaning of "Life" for Virginia Jurors*, 75 VA. L. REV. at 1624-1625.

95/ Death Penalty Info. Ctr, PUBLIC OPINION ABOUT THE DEATH PENALTY, at http://www.deathpenaltyinfo.org/po.html, passim.

2. Mr. Garza's Jury Was Denied Any Accurate Information Regarding the Life Imprisonment Alternative

Mr. Garza was not sentenced to death by an informed jury. Instead, he was sentenced to death by a jury that was not only uninformed, but actively misled as to the sentence he would receive if he were not executed.

There is no question that Mr. Garza, if not sentenced to death, would have been sentenced to life imprisonment without possibility of release. Under the federal Sentencing Guidelines, the base offense level for first degree murder under 21 U.S.C. § 848(e), the offense for which Mr. Garza was convicted, is 43 — a level that results in a sentence of life imprisonment. U.S.S.G. § 2A1.1 & application nt. 1 ("[t]he Commission has concluded that in the absence of capital punishment life imprisonment is the appropriate punishment for premeditated killing"); U.S.S.G. § 5A, Sentencing Table. Downward departures from the Sentencing Guidelines are permitted under certain conditions, but the Sentencing Guidelines expressly provide that a downward departure from the first degree murder guideline may be considered only "[i]f the defendant did not cause the death intentionally or knowingly." U.S.S.G. § 2A1.1, application nt. 1 (emphasis added). That exception would be clearly inapplicable in Mr. Garza's case because the jury already had convicted Mr. Garza of an intentional killing. Further, pursuant to the Sentencing Reform Act of 1984, the Sentencing Guidelines not only rendered Mr. Garza ineligible for parole but "abolished parole" altogether. Hutchings v. U.S. Parole Comm'n, 201 F.3d 1006, 1008 n.2 (8th Cir. 2000). Thus, sentencing Mr. Garza to life imprisonment would have foreclosed any possibility of release.

Mr. Garza's jury was not provided any of this information and, on the contrary, was led to believe that, if the jury did not recommend death, the court would have unfettered discretion to sentence Mr. Garza to a much shorter term. The prosecution's efforts to deprive the jury of accurate information on the

alternative sentence began during voir dire, when the prosecution obtained a ruling that barred any questions or statements about noncapital sentencing alternatives that did not make clear that those alternatives were "exclusively within the Court's province" and were not limited to life without the possibility of parole. 96/ The prosecution immediately capitalized on that ruling by telling the prospective jurors:

> It is the Court's sole discretion what the sentence is if it is not death. He has the discretion to sentence him to anything less than death.
>
> * * *
>
> If the jury says we are not going to give him the death penalty, then the Judge decides how many years he gets. Does everybody understand that? You don't say, okay, we are going to give him 60 years or 80 years or whatever. Your only decision is the death penalty: yes or no. If you say "no," then it goes back to the Judge and the Judge can give him anywhere from 20 years to life without parole. 97/

The prosecution's claim that "the Judge can give him anywhere from 20 years to life" was based on the sentencing range set forth in Section 848(e), but the prosecution failed to disclose that the life imprisonment directive set forth in the Sentencing Guidelines renders that range inapplicable for those found to have engaged in an intentional killing.

The assertion that the judge "has the discretion to sentence him to anything less than death" was further emphasized at the commencement of the penalty phase hearing. The court informed the jurors at that point that if "you, for example, do not recommend death, then the sentence is entirely left to the Court"

96/ Ex. 16 [July 7, 1993 Tr. (Voir Dire)] at 69.

97/ Id. at 80, 86-87 (emphasis added).

and Mr. Garza "is subject to life without parole or another sentence." 98/ The prosecution's opening statement went even further, expressly advising the jurors to disregard any alternative sentence:

> You are also here to make one determination as the Court just told you, and this is whether or not the imposition of the death sentence will be recommended. There is no other consideration. In other words, you will not consider what else would be done if you do not impose the death penalty. 99/

In its oral instructions to the jury, which were given prior to closing arguments, the court confirmed that the jury should not even consider information on alternative sentences:

> In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence. That is a matter for the court to decide in the event you conclude that a sentence of death should not be recommended. 100/

The prosecution returned to the same theme in closing arguments, purporting to respond to an argument that the defense never made and could not have made under the Court's rulings:

> The defense says, well, he is going to die in prison, but the law is twenty years to life. We don't know that he is going to die in prison. The Judge can give him any term. 101/

98/ Ex. 17c [July 29, 1993 Tr. (Trial)] at 3017-3018 (emphasis added).

99/ Id. at 3022 (emphasis added).

100/ Ex. 17c [July 29, 1993 Tr. (Trial)] at 3580 (emphasis added).

101/ Id. at 3625 (emphasis added).

Pandering further to popular misconceptions regarding parole eligibility, the prosecution followed up that assertion with the equally misleading statement that "ten years . . . is more than most murderers spend in jail these days, as we all know." 102/ Then, having established — falsely — that Mr. Garza might be released from prison if he were not executed, the prosecution drove this point home by charging the jury with responsibility for protecting their community from Mr. Garza:

> Brownsville would say to you, you have got to stop him, please. Our society and the entire Rio Grande Valley is asking you, "Do it for us." You have got to stop him. His future victims, the next one, is asking, "Please, do it for us." You have got to stop him. 103/

The prosecution also stressed its future-dangerousness argument by asserting that recommending the death penalty would be "a form of self-defense" and "the only thing that we can do to stop someone, like Juan Raul Garza in this case." 104/ The prosecution's arguments in this regard were made in support of its request that the jury find future dangerousness as a non-statutory aggravating factor justifying execution. 105/

In sum, the record demonstrates that Mr. Garza's jury was prevented from learning that Mr. Garza would be sentenced to life imprisonment without possibility of release if not executed; was, instead, repeatedly informed that Mr. Garza could be released from prison in as little as twenty years; was instructed that it should not even consider any noncapital sentencing alternative; and yet was

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102/ Id. at 3636 (emphasis added).

103/ Id. at 3641.

104/ Id. at 3596.

105/ See Ex. 18 [Special Findings Form] at 7.

asked to recommend the death penalty based in part on the prosecution's assertion that Mr. Garza would pose a danger to society if he were not executed. Under these circumstances, that jury, through no fault of its own, could not have rendered an informed decision as to whether the death penalty was justified.

3. Executing Mr. Garza Would Contravene the Due Process Principles Recognized in Simmons and the Established Practice and Policy in Federal Death Penalty Cases

In light of the grossly inaccurate and misleading information submitted to Mr. Garza's jurors, executing him on the basis of their recommendation would contravene the due process principles recognized in Simmons and also would contravene the established practice and policy in federal death penalty cases.

Each of the grounds on which the Supreme Court reversed the death sentence at issue in Simmons was also present in Mr. Garza's case. The defendants in both cases would have been sentenced to life imprisonment without the possibility of release if they were not executed; the sentencing juries in both cases were denied that information; and the prosecution in both cases exploited the juries' lack of information by arguing — in strikingly similar language — that recommending the death penalty would be an act of "self-defense" because the defendants posed a risk of future dangerousness to "society." Indeed, the resulting due process violation was even more flagrant in Mr. Garza's case. In his case, unlike Simmons, the prosecution and the court not only failed to disclose the sentence that would be imposed under the Sentencing Guidelines but affirmatively conveyed the false impression that he could be released from prison in as little as twenty years. Further, the jurors in Simmons, while not informed of the defendant's parole ineligibility, were apparently told that they could recommend a

sentence of life imprisonment, whereas Mr. Garza's jury was not given that choice and was specifically instructed not to consider any alternative sentence.

In affirming Mr. Garza's sentence, the Fifth Circuit held that Simmons did not apply because Mr. Garza might have obtained a downward departure from the Sentencing Guideline's life imprisonment directive. Flores, 63 F.3d at 1368. The court based that holding on the conclusion that, until the jury issued its sentencing findings, the trial court "could not predict" whether the jury would find that Mr. Garza acted "intentionally or knowingly" — a finding that would preclude a downward departure under Section 2A1.1 of the Guidelines. Id. at 1367-1368. However, the court's analysis ignores the fact that the jury already had made that finding in convicting Mr. Garza on charges that he "intentionally killed, and did counsel, command, induce, procure, and cause the intentional killing of" Thomas Rumbo, Gilbert Matos and Erasmo de la Fuente. 106/ Thus, contrary to the premise of the appellate court's holding, it was not only a probability but a certainty that Mr. Garza would not qualify for a downward departure from the life sentence required under Section 2A1.1.

The Fifth Circuit's conclusion that the trial judge could not have predicted whether life imprisonment would be Mr. Garza's alternative sentence also is contradicted by the trial judge's ruling on Mr. Garza's motion for a new sentencing hearing. The trial judge denied that motion based on the incredible finding that "the jury was very much aware of the fact that if they did not give him death the defendant would be facing life imprisonment." 107/ The judge's assertion that "the jury was very much aware" of that fact is completely contrary to the record, but the rest of the statement makes clear that the judge understood that

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106/ Ex. 10 [Indictment] at 5-7.

107/ Ex. 20 [Oct. 8, 1993 Tr. (Sentencing)] at 32-33 (emphasis added).

Mr. Garza would be sentenced to life imprisonment if he were not executed. The record of prosecutions under Section 848(e) confirms that that the judge was correct on that point. Out of 24 "death-eligible" defendants prosecuted under that statute, 18 were not sentenced to death. 108/ For every one of those 18 defendants, the sentence imposed by the court was the same: life imprisonment. 109/

The Fifth Circuit, evidently uncomfortable with the implications of its holding, took the unusual step of cautioning district courts not to take that holding too far:

> This does not mean that district courts should allow the government to freely hammer away on the theme that the defendant could some day get out of prison if that eventuality is legally possible, but actually improbable. By this point in any penalty hearing, the judge will have heard the same evidence as the jury and will ordinarily know whether he would consider a downward departure if the jury declines to recommend death. If the court knows that a twenty-year sentence is highly unlikely, it should, in its discretion, preclude the government from arguing

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108/ Another defendant prosecuted under Section 848, Reynaldo Sambrano Villarreal, did not have the intent necessary to make him death-eligible, but instead had only been convicted of aiding and abetting his co-defendants' crime under § 848(e)(1)(B). See United States v. Villarreal, 963 F.2d 725, 730-31 (5th Cir.), cert. denied, 506 U.S. 927 (1992) (evidence was sufficient to convict Reynaldo Villarreal, pursuant to 18 U.S.C. § 2, of aiding and abetting the crime specified in § 848(e)(1)(B)). After the jury found that the government had failed to establish the threshold "intent" aggravating factor of § 848(n)(1)(A), he was legally ineligible for the death penalty. United States v. Reynaldo Sambrano Villarreal, Special Findings at 1 (E.D.Tex. July 11, 1991); 21 U.S.C. § 848(k). The parties therefore agreed that the judge was free to sentence Mr. Villarreal outside the guideline range. The judge found that a downward departure was warranted and sentenced him to 40 years. Such a downward departure was justified by § 3B1.2 of the Sentencing Guidelines, which applies to "minimal" or "minor" participants. This provision was not applicable in Mr. Garza's case.

109/ Ex. 21 [Table: Sentences Actually Imposed on Capital Defendants Under 21 U.S.C. § 848].

> that the defendant may be free to murder again two decades hence.

Garza, 63 F.3d at 1368-1369. Here, notwithstanding the Fifth Circuit's conclusory assertion to the contrary, there is simply no question that, for Mr. Garza, a twenty-year sentence was, at a minimum, "highly unlikely." Thus, the Fifth Circuit's holding contradicted its own analysis.

Moreover, regardless of whether the failure to afford Mr. Garza an accurately informed jury violated his due process rights under Simmons, the Fifth Circuit's analysis simply demonstrates the critical importance of the change that the FDPA effected by giving capital sentencing juries the authority to make a binding recommendation of life imprisonment. That change reflects a determination by this Administration and the Congress that, to the extent any uncertainty exists as to what sentence a court would impose if the jury does not recommend the death penalty, the solution is not to let the jury impose the death penalty anyway but to eliminate that uncertainty by granting the jury the power to choose either death or life without the possibility of release.

Given the overwhelming evidence, described above, that jurors are substantially less likely to recommend the death sentence if they are aware that the defendant would otherwise be sentenced to true life imprisonment, there is no question that Mr. Garza's jury might well have declined to impose the death penalty if it had possessed accurate information regarding the likelihood of that alternative in his case. Thus, whether or not life imprisonment without possibility of release was Mr. Garza's only alternative — and it plainly was — the substantial likelihood is that his execution would result not from a reasoned determination that the death penalty was justified but from the fortuity that Mr. Garza was sentenced less than one year before the FDPA was enacted. The President should exercise his constitutional prerogative to prevent such a result.

2. Mr. Garza Was Sentenced to Death Based on Alleged Crimes Committed in Mexico for Which He Has Never Been Charged, Prosecuted or Convicted

The prosecution in Mr. Garza's case sought to justify imposition of the death sentence based on a number aggravating factors specified in 21 U.S.C. 848(e) and on thirteen additional aggravating factors that are not specified in the statute (the "non-statutory aggravating factors"). Ten, or more than 75 percent, of those non-statutory aggravating factors related to four murders committed in Mexico under investigation by the Mexican federal police for which Mr. Garza has never been charged, prosecuted or convicted (the "unadjudicated foreign murders"). Executing Mr. Garza on the basis of the unadjudicated foreign murders would be wrong because evidence on which the prosecution relied — uncorroborated testimony by purported accomplices — did not satisfy the applicable standards of reliability and because the prosecution also relied on files and information obtained from Mexican law enforcement officials which Mr. Garza had no opportunity to explain or deny.

a) Evidence Regarding the Foreign Unadjudicated Murders Failed to Satisfy the Applicable Standards of Reliability

Federal courts hold that, unless the prosecution makes an affirmative showing of reliability, evidence that a capital defendant committed unadjudicated offenses does not satisfy the heightened reliability standard that applies to capital sentencing procedures. On the contrary, "evidence of unadjudicated offenses [is] inherently unreliable" because "no untainted jury, utilizing the Federal Rules of Evidence and the requisite burdens of proof, has found the defendant guilty." United States v. Bradley, 880 F. Supp. 271, 287 (M.D. Pa. 1994) (emphasis added); see United States v. Davis, 912 F. Supp. 938, 948 (E.D. La. 1996) ("[t]o present unadjudicated criminal conduct to a jury that has just convicted the defendant of

first degree murder is anathema to" the presumption of innocence); United States v. Walker, 910 F. Supp. 837, 853 (N.D.N.Y. 1995) ("the inherently prejudicial nature of such unadjudicated criminal conduct . . . rises with the severity of the conduct alleged"). For that very reason, of the 27 states that have addressed the admissibility of evidence of unadjudicated offenses in capital sentencing proceedings, ten states impose significant restrictions on the use of such evidence 110/ and eight states bar such evidence altogether. 111/

In federal courts, evidence of unadjudicated offenses is not admissible in a capital sentencing proceeding unless the prosecution demonstrates that the evidence is in fact reliable. The court in United States v. Beckford, 964 F. Supp. 993 (E.D. Va. 1997), described the prosecution's burden this way:

> [T]he proffered unadjudicated criminal conduct may be presented to the jury only if the Court has determined that it meets the threshold test of reliability . . . [T]he Government must present to the Court and to the specific defendants the information which it intends to introduce as unadjudicated conduct. The Court will then determine whether the information is reliable. Only if the Government satisfies that threshold determination will the evidence be presented to the jury.

110/ See Miller v. State, 660 S.W.2d 163 (Ark. 1983); People v. Balderas, 711 P.2d 480 (Cal. 1986); State v. Cohen, 634 A.2d 380 (Del. Super. 1993); Fair v. State, 268 S.E.2d 316 (Ga.), cert. denied, 449 U.S. 986 (1980); People v. Owens, 464 N.E.2d 261 (Ill. 1984); State v. Brooks, 541 So.2d 801 (La. 1989); State v. Reeves, 453 N.W.2d 359 (Neb. 1989), cert. granted and judgment vacated on other grounds, 498 U.S. 964 (1990); Lisle v. State, 937 P.2d 473 (Nev. 1997), cert. denied, 119 S.Ct. 101 (1998); State v. Middleton, 368 S.E.2d 457 (S.C.), cert. denied, 488 U.S. 872 (1988); State v. Taylor, 818 P.2d 1030 (Utah 1991), cert. denied, 503 U.S. 966 (1992).

111/ See Cook v. State, 369 So.2d 1251 (Ala. 1978); Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977); State v. McCormick, 397 N.E.2d 276 (Ind. 1979); Scott v. State, 465 A.2d 1126 (Md. 1983); State v. Glenn, No. 82-CR-72, 1990 WL 136629 (Ohio Ct. App. Sept. 21, 1990); Commonwealth v. Hoss, 283 A.2d 58 (Pa. 1971); State v. Bobo, 727 S.W.2d 945 (Tenn.), cert. denied, 484 U.S. 872 (1987); State v. Bartholomew, 683 P.2d 1079 (Wash. 1984).

Id. at 1000 (emphasis added); see also Davis, 912 F. Supp. at 949 (requiring pre-trial hearing on the admissibility of unadjudicated criminal conduct "to insure the necessary heightened reliability and offset the risk of undue prejudice, confusion of the issues and/or misleading of the jury"). 112/ Proof of reliability is a separate requirement that must be satisfied in addition to the statutory requirement that sentencing evidence be relevant and not unfairly prejudicial. Davis, 912 F. Supp. at 948; 21 U.S.C. § 848(j).

In Mr. Garza's case, the prosecution could not have made a showing of reliability with respect to the foreign unadjudicated murders because the only evidence connecting Mr. Garza to those murders was the uncorroborated testimony of purported accomplices. Even outside the capital sentencing context, the courts have long recognized that "inculpatory accomplice testimony is inherently unreliable." United States v. Regilio, 669 F.2d 1169, 1178 (7th Cir. 1981) (emphasis added); see Tillery v. United States, 411 F.2d 644, 646-647 (5th Cir. 1969) (referring to the "inherent untrustworthiness" of "[a]ccomplice testimony"). The courts' unwillingness to treat such testimony as reliable evidence "reflects the danger, underscored by experience, that [the accomplice] may be giving a false account to secure lenient treatment." United States v. Lee, 506 F.2d 111, 119 (D.C. Cir. 1974).

Precisely the same concerns render the accomplice testimony in Mr. Garza's case inherently unreliable. Each of the three accomplices who offered testimony regarding the foregoing unadjudicated murders obtained a substantially reduced sentence in exchange for that testimony. Specifically, Israel Flores and

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112/ See also, e.g., Richardson v. Johnson, 864 F.2d 1536, 1541 (11th Cir. 1989); Walker, 910 F. Supp. at 853-854 (court requires "a high level of probity . . . to guard against the danger of unfair prejudice" and will "employ procedures which will ensure the reliability of the evidence supporting the government's allegations of unadjudicated conduct"); Bradley, 880 F. Supp. at 286 (evidence of unadjudicated offenses only admissible "upon a showing of reliability").

Jesus Flores each testified pursuant to a plea agreement under which, in exchange for testifying, their sentences were reduced from more than 24 years to 10 years, and Greg Srader testified pursuant to a plea agreement under which, in exchange for testifying, his sentence was reduced from 10 years to one year. 113/

Moreover, the accomplice testimony was not only uncorroborated by reliable evidence but was internally implausible and contradictory. For example, with respect to the murder of Oscar Cantu, Srader and Israel Flores testified that Mr. Garza told them he had Mr. Cantu killed after Mexican police confiscated money from Mr. Cantu that belonged to Mr. Garza. 114/ Neither Srader nor Israel Flores offered any information as to how Mr. Cantu was killed, but Srader testified that the murder occurred when "Mr. Cantu and Jesus Flores," another prosecution witness and the cousin of Israel Flores, "went on a trip to Mexico and [Mr. Cantu] never came back." 115/ However, Jesus Flores denied Srader's account:

> Q Did you ever go to Mexico with Oscar Cantu?
>
> A No.
>
> * * *
>
> Q You didn't go over there to kill Oscar Cantu, did you?
>
> A No.
>
> Q You didn't tell Greg Srader that you were leaving to go to Mexico with Oscar Cantu, did you?
>
> A No. 116/

113/ Ex. 22 [Table: Sentences Imposed Upon Co-Defendants.]

114/ Ex. 17c [July 29, 1993 Tr. (Trial)] at 3105-3106, 3058.

115/ Id. at 3105.

116/ Id. at 3204 (emphasis added).

Further, statements made by Israel Flores to U.S. Customs officials flatly contradicted the assertion that Mr. Cantu was killed for losing Mr. Garza's money. Those statements implicated Mr. Garza in other serious offenses but blamed Mr. Cantu's death on someone else, a drug trafficker identified as Medina, for whom Mr. Cantu worked as a pilot. When asked during the U.S. Customs interrogation about Mr. Cantu's death, Israel Flores stated that "he owed Medina some money and Medina wanted to get rid of him" and insisted that the money "was actually Medina's money and not" Mr. Garza's. 117/

Thus, because the only evidence connecting Mr. Garza to the foreign unadjudicated murders was the inherently unreliable, uncorroborated and internally inconsistent testimony of former co-defendants who exchanged their testimony for lighter sentences, those murders did not satisfy and could not have satisfied the heightened reliability standards that apply to capital sentencing proceedings.

b) The Prosecution Relied on Information that Mr. Garza Had No Opportunity to Deny or Explain

Closely related to the requirement of heightened reliability is the due process principle that the death sentence may not be imposed "on the basis of information which [the defendant] had no opportunity to deny or explain." Gardner, 430 U.S. at 362. That principle was violated in Mr. Garza's case because the prosecution, in attempting to prove that the foreign unadjudicated murders occurred and that their victims had been correctly identified, relied on photographs, reports, files and other information provided by Mexican law enforcement officials 118/ — information which Mr. Garza had literally no opportunity to

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117/ Id. at 3066-3067 (emphasis added).

118/ Ex. 17d [July 30, 1993 Tr. (Trial)] at 3296-3297 (testimony of R. Gracia regarding Fernando Escobar-Garcia investigation); id. at 3302, 3304-3305, 3323

investigate independently. Mr. Garza was denied that opportunity, and the prosecution's information failed to satisfy the heightened reliability standard, for several reasons.

First, the Mexican police who compiled the information were not subject to any of the requirements and procedures necessary to ensure that Mr. Garza could test the accuracy of that information. For example, unlike U.S. law enforcement officials, the Mexican police had no constitutional duty to preserve and disclose exculpatory evidence, Brady v. Maryland, 373 U.S. 83 (1963), impeachment evidence, United States v. Bagley, 473 U.S. 667 (1985), or the identity of suspects arrested questioned by the police. Kyles v. Whitley, 514 U.S. 419 (1995); Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995). Mr. Garza could not force U.S. authorities to procure such information from the Mexican police because the prosecution insisted that the Mexican police were not acting on its behalf. See Kyles, 514 U.S. at 437 (holding that the prosecution "has a duty to learn of any favorable evidence known to others acting on the government's behalf").

Second, Mr. Garza had no power to compel testimony or the production of documents by individuals located in Mexico. The Mutual Legal Assistance Treaty between the United States and Mexico, Dec. 9, 1987, U.S.-Mex., 27 I.L.M. 447, facilitates the exchange of information between law enforcement officials in those countries. However, there is no letter rogatory procedure or comparable mechanism in place between the United States and Mexico that gives private individuals like Mr. Garza the right to obtain information from individuals located in Mexico. United States v. Resurreccion, 978 F.2d 759, 762 (1st Cir. 1992); United States v.

(testimony of R. Pineda regarding Oscar Cantu investigation); id. at 3306-3308, 3311, 3326-3328, 3331 (testimony of R. Pineda regarding Antonio Nieto investigation); id. at 3313-3315 (testimony of R. Pineda regarding Bernabe Sosa investigation).

Zabaneh, 837 F.2d 1249, 1260 (5th Cir. 1988). Thus, even if Mr. Garza could have identified individuals in Mexico who were knowledgeable about any of the foreign unadjudicated murders, he could not have forced them to disclose their knowledge, much less appear as witnesses at the sentencing hearing.

Third, enormous practical obstacles precluded any meaningful investigation into the foreign unadjudicated murders. On January 7, 1993, when the prosecution initially gave notice of its intent to seek the death penalty and identified certain of the foreign unadjudicated murders as aggravating factors, Mr. Garza's non-Spanish speaking counsel was confronted with the impossible task of conducting a massive investigation in Mexico at the same time he was preparing a defense to the three capital murder charges on which trial was scheduled to begin in less than three months. The District Court granted a 90-day continuance in March 1993 after the prosecution amended the Death Penalty Notice to identify an additional unadjudicated murder, but the court refused to grant a further continuance after the prosecution on April 20, 1993, identified yet another unadjudicated murder as an aggravating factor. The government's evidence against Mr. Garza involved approximately 500 sixty-minute audio cassette tapes of telephone conversations, nearly 400 exhibits, and a witness list containing 467 names only one week before jury selection began. Much of the evidence was in Spanish and needed to be translated for the benefit of Mr. Garza's non-Spanish speaking counsel. Further, even if the District Court had afforded Mr. Garza's counsel sufficient time to investigate the unadjudicated murders, the requirements of such an investigation — including foreign travel and professional translation services — would have substantially exceeded Mr. Garza's limited resources.

Fourth, the information from Mexican sources that the prosecution relied upon carried no indicia of reliability sufficient to justify its admission in a capital sentencing proceeding. In particular, the prosecution did not offer any

evidence regarding the procedures and criteria that Mexican law enforcement officials followed in compiling such information. See United States v. McDonald, 905 F.2d 871, 875 (5th Cir. 1990) (holding that testimony regarding "the U.S. Custom Service's liaison with the Mexican state police" and information obtained through a search of the Mexican state police reports constituted inadmissible hearsay where there was "nothing in the record to indicate whether such reports were regularly made and preserved by Mexican officials"). 119/ Moreover, it is widely recognized that the Mexican police officials frequently engage in practices that undermine the integrity and reliability of any information they provide. In fact, the prosecution's own witnesses offered testimony regarding abuses by the Mexican police, including robbery, assault and torture, that, in the United States, would totally invalidate the results of any investigation. 120/ Well-respected observers of Mexican law enforcement activities practices report similar practices. 121/ Thus, the record not only fails to support but contradicts any assertion that the information obtained from the Mexican police was reliable.

The Fifth Circuit rejected Mr. Garza's challenge to the introduction of evidence regarding the foreign unadjudicated murders on the ground that the prosecution had satisfied its disclosure obligations under Brady v. Maryland, 373 U.S. 83 (1963), with respect to that evidence, and on the ground that Mr. Garza had the opportunity to cross-examine the prosecution's witnesses. Unites States v.

119/ See also United States v. Tajeddini, 996 F.2d 1278, 1286 (1st Cir. 1993) (statement in Iranian police report properly excluded on the ground that it did not fall within a hearsay exception and "lacked sufficient other indicia of reliability")

120/ See, e.g., Ex. 17c [July 29, 1993 Tr. (Trial)] at 3057 (I. Flores) ("[t]hey pick you up, they beat you up, and they ask you your name").

121/ See AMERICANS WATCH COMMITTEE, *Human Rights in Mexico: a Policy of Impunity*, at 2 (1990) ("Federal narcotics police are accountable for a large number of the cases of murder, torture, and abuse of due process in Mexico today").

Garza, 165 F.3d at 314-315. However, that analysis simply disregards the fact that the United States government files and its witnesses were not the source of the information in question. Instead, the sources of that information were Mexican law enforcement officials who were not in any way subject to the Brady disclosure requirement and whom Mr. Garza could neither cross-examine nor compel to testify. In any event, the prosecution's disclosure of Brady material and Mr. Garza's ability to cross-examine the prosecution's witnesses did nothing to demonstrate that the information itself was sufficiently reliable to justify its introduction in a capital sentencing proceeding.

In sum, because the information submitted by the prosecution with respect to the foreign unadjudicated murders did not satisfy the applicable standards of reliability, and because Mr. Garza had no adequate opportunity to respond to that information, those murders provided no legitimate basis for sentencing Mr. Garza to death.

E. MR. GARZA'S DEATH SENTENCE IS DISPROPORTIONATE TO THE SENTENCES GIVEN HIS EQUALLY CULPABLE CO-DEFENDANTS AND THE TREATMENT OF MANY OTHER DEFENDANTS CHARGED WITH MULTIPLE MURDERS IN CRIMINAL ENTERPRISES

The arbitrariness of Mr. Garza's death sentence is starkly evident when it is contrasted with the far more lenient treatment granted by the federal prosecutors to his co-defendants, some of whom were equally culpable in the crimes for which Mr. Garza was sentenced to death, and with the Attorney General's treatment of defendants charged with as many or more murders in other drug ring or racketeering cases.

1. Mr. Garza's Co-Defendants Received Far More Lenient Treatment for Their Roles in the Same Crimes for Which Mr. Garza was Prosecuted for Capital Murder

The prosecution brought murder and drug-trafficking relating charges against 16 other defendants who were alleged to have participated in Mr. Garza's drug-trafficking operation. Of those 16 defendants, nine were sentenced to less than five years in prison; six received sentences ranging from eight to twelve years; and one — the only defendant who chose not to enter a plea agreement — received a life sentence. 122/ The sentencing jury in Mr. Garza's case specifically found that the discrepancy between these sentences and the death sentence imposed upon Mr. Garza — the only defendant who was not offered a plea agreement — could not be justified on the ground that Mr. Garza was more culpable. According to the jury's Special Findings: "Another defendant or defendants, equally culpable in the crime, will not be punished by death." 123/

Indeed, three of Mr. Garza's co-defendants who received drastically more lenient treatment participated directly in carrying out the same three murders for which Mr. Garza was charged and convicted. According to the trial testimony, co-defendant Manuel Flores murdered Gilberto Matos by shooting him in the back of the head after breaking into his auto repair shop. Several months later, Manuel Flores shot and killed Erasmo de la Fuente while Mr. de la Fuente was sitting in his car. Co-defendant Jesus Flores assisted Manuel Flores in murdering Mr. de la Fuente and assisted Mr. Garza in abducting and murdering Thomas Rumbo. Co-defendant Israel Flores assisted Manuel Flores in murdering Mr. Matos and also played a role in Mr. de la Fuente's murder. Moreover, Israel Flores and

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122/ Ex. 18 [Table: Sentences Imposed Upon Co-Defendants].

123/ Ex. 18 [Special Findings Form] at 11 (emphasis added). The form does not indicate how many jurors made this finding.

Jesus Flores also either committed or participated directly in the foreign unadjudicated murders on which the prosecution relied in support of its death penalty request. Israel Flores admitted to committing one of the murders and assisting in another, and Jesus Flores admitted to assisting in one of the murders.

As a result of their participation in the three murders for which Mr. Garza was charged, Manuel Flores, Israel Flores and Jesus Flores each were charged with the same capital offense that was charged in Mr. Garza's indictment. However, none of these co-defendants ever faced the death penalty, and Israel Flores and Jesus Flores both were allowed to enter plea agreements under which they obtained drastically reduced prison terms. The roles of these co-defendants in the murders at issue and the sentences they received are as follows:

Co-Defendant	Murders and Roles	Sentence
Manuel Flores	• Matos, triggerman • De la Fuente, triggerman	Life
Israel Flores	• Matos, active participant • De la Fuente, participant • Nieto (unadjudicated), triggerman • Garcia (unadjudicated), active participant	10 years
Jesus Flores	• De la Fuente, active participant • Rumbo, active participant • Sosa (unadjudicated), active participant	10 years

In view of the fact that each of these co-defendants committed or participated in multiple murders and that Mr. Garza's jury determined that one or more of the co-defendants was equally as culpable as Mr. Garza, the sentences imposed on these co-defendants establish that Mr. Garza's sentence was disproportionate.

2. Mr. Garza's Sentence is More Severe than the Sentence Sought in Many Cases involving Multiple Victims in Similar Contexts.

It is far from a foregone conclusion that a federal defendant indicted for multiple murders will face capital prosecution. Indeed, according to the Justice Department Study, prosecutors recommend the death penalty in only 43 percent of the cases involving multiple victims. 124/ As a result of plea bargains and decisions by the Review Committee or the Attorney General, the percentage that actually face capital prosecution is even lower. While we were unable to obtain statistical data as to the prosecutorial decisions in multiple victim cases arising out of drug or other criminal enterprises, 125/ the available information shows that in many – if not most – such cases prosecutors have either not sought the death penalty or have allowed defendants to enter a plea bargain to avoid capital prosecution. The following table graphically demonstrates this practice:

Case	Description	Death Penalty Disposition
U.S. v. Hoyle, No. 92-CR-284-01 (D.D.C. 1992)	Four reputed leaders of the "Newton Street Crew" drug gang were prosecuted in a triple homicide in which the killers wrapped the victims' heads in duct tape before shooting them at close range.	Authorization request withdrawn.
U.S. v. Williams, No. WMN-97-0355 (D. Md. 1997)	One defendant was charged in four drug-related homicides, including one in which he was the triggerman.	Notice of intent withdrawn.

124/ Ex. 1 [Justice Department Study] at 17.

125/ In response to a FOIA request filed by Mr. Garza's counsel, the Department of Justice declined to provide capital prosecution recommendation forms or other documents that would have permitted counsel to explore the prosecutorial and sentencing decisions in cases similar to Mr. Garza's. The information provided below has been gathered by Federal Death Penalty Resource Council from public sources, press reports, and information provided by defense counsel.

Case	Description	Death Penalty Disposition
U.S. v. Perry, No. 92-CR-474 (D.D.C. 1992)	The defendant, a hitman for a D.C. cocaine ring, was charged with eight homicides.	Plea agreement.
U.S. v. Bryant, CR No. 92-81127 (E.D. Mich. 1992)	Five defendants, members of a Michigan cocaine conspiracy, were charged with eleven drug-related murders.	Plea agreement.
U.S. v. Johnson, CR No. 92-159-C-S (W.D.N.Y. 1992)	The defendant was charged with three drug-related killings.	Plea agreement.
U.S. v. Pena, CR No. 97-CR-145-ALL (E.D. La. 1997)	The defendant, the purported head of a Louisiana drug ring, was charged in eight drug-related murders.	Plea agreement.
U.S. v. Heatley, CR No. 96 CR 515 (MJW) (S.D.N.Y. 1996)	Two defendants, the leaders of a longstanding New York drug ring, were charged with fourteen murders in a multiple murder racketeering and continuing criminal enterprise prosecution.	Plea agreement.
U.S. v. Bullock, III, CR No. 3:98CR150 (E.D. Va. 1998)	Multiple defendants were charged with four drug-related homicides.	Plea agreement.
U.S. v. Carter, CR No. 92-81058 (E.D. Mich. 1992)	Two defendants, members of a cocaine distribution ring in Detroit, were charged with five drug-related murders.	Authorization not requested.
U.S. v. Gardner, CR No. 4:95-CR-41 (E.D.N.C. 1995)	Two defendants were charged with three drug-related murders.	Authorization not requested.
US v. Brown, CR No. 96-149 (S-5) (RJD) (E.D.N.Y. 1996)	Defendants were charged in eight drug-related homicides.	Authorization not requested
U.S. v. Weaks, CR No. 3:98-CR-150 (E.D. Va. 1998)	In a prosecution on charges of four drug-related homicides.	Authorization not requested.
U.S. v. Aguirre, CR No. 95-345(A)-RSWL (C.D. Cal. 1995)	Nine defendants, all alleged members of the "Mexican Mafia," were charged in six racketeering homicides.	Authorization not requested.

Case	Description	Death Penalty Disposition
U.S. v. Rodriguez, CR 95-CR-0942 (S.D.N.Y. 1995)	Numerous defendants, all alleged members of the "Bryant Avenue Boys," were charged with and convicted of between eight and eleven gang-related murders.	Authorization not requested.
U.S. v. James, CR No. 97-1121 (S-10) (RJD) (E.D.N.Y. 1997)	Numerous defendants were charged in four drug-related murders.	Authorization not requested.
U.S. v. Bass, CR No. 97-80235 (E.D. Mich. 1997)	Eleven death-eligible defendants prosecuted for four drug-related murders in Detroit.	Sentenced to terms of imprisonment.
U.S. v. Guzzo, CR No. 95-754 (S-7) (SJ) (E.D.N.Y. 1995)	Two defendants faced charges involving four gang-related murders.	Plea agreement.
U.S. v. Hill, No. 98-CR-329-ALL (D.D.C. 1998)	Defendants charged with 19 murders as part of the “K Street Crew” drug ring.	Authorization not requested.
U.S. v. Muyet, No. S3 Cr. 941 (S.D.N.Y. 1995)	Defendants, part of the “Nasty Boys” drug ring, charged with 11 conspiracy-related murders.	Authorization not requested.
U.S. v. Mateo-Feliz, 96-CR-527-S4 (E.D.N.Y. 1998)	Defendants charged with committing five murders as part of a crack cocaine conspiracy.	Authorization not requested.
U.S. v. Brown, No. 99-CR-125-ALL (S.D. Fla. 1999)	Defendants charged in continuing criminal enterprise involving five homicides.	Authorization not requested.
U.S. v. Padilla, S-194-CR-872 (S.D.N.Y. 1996)	Defendants charged with 14 murders in CCE (in addition to seven to eight uncharged murders).	Authorization not requested; defendants received sentences from twenty to fifty years.
U.S. v. Mazzini, CR No. 95-538-MV (D.N.M. 1995)	Defendants were part of a gang responsible for seven or more racketeering murders.	Plea agreement.
U. S. v. Diaz, CR No. 97-4009- NMG(D. Ma. 1997)	Four defendant are part of an alleged "anti-mob" group that was killing members of organized crime. This case involve three homicides.	Authorization not requested

Case	Description	Death Penalty Disposition
U.S. v. Pappa, CR No. 97-1005 (S-1) (RJD) (E.D. NY 1997)	Two defendants charged with four organized crime murders. The victims are apparently mob-connected.	Authorization not requested
U.S. v.Guzzo, CR No. 95-754 (S- 7) (SJ) (E.D.N.Y. 1995)	Three defendants responsible for four mob murders, three of which were drug-related and one a racketeering murder.	Guilty plea before DOJ review
U. S. v. Benanti, CR No. 99:CR-520 (E.D.N.Y. 1999)	Five defendants in an organized crime narcotics trafficking prosecution alleging six homicides.	Authorization not requested

Thus, it is undeniable that numerous federal defendants prosecuted for multiple murders as part of a drug-trafficking operation have avoided the death penalty at various stages in the prosecutorial decision-making process. A more detailed description of certain of those prosecutions makes clear that the decision to seek the death penalty in Mr. Garza's case was indeed arbitrary.

a) United States v. Hill

In United States v. Hill et al., the United States Attorney for the District of Columbia did not seek the death penalty despite an indictment alleging that the defendants had committed nineteen murders over the course of a decade-long drug conspiracy. Between 1988 and early 1999, the defendants, part of a group known as the "K Street Crew," sold crack cocaine, marijuana, and PCP from their base in Southwest Washington. 126/ Over the course of their conspiracy, the defendants allegedly committed nineteen murders and numerous assaults,

126/ See Indictment, United States v. Hill, et al., No. 98-CR-329-ALL (D.D.C.) (hereinafter "Hill Indictment"); see also Maria Elena Fernandez and Bill Miller, *10 Members of SW Gang Indicted on Drug Counts*, WASH. POST, September 23, 1998, at B1.

including several armed assaults upon D.C. and Maryland police officers. 127/ According to the indictment, the pattern of violence central to the conspiracy, included numerous shootings and one murder in which the victim was beaten to death with a pole.

At least four defendants in United States v. Hill – William Sweeney, Erik Jones, Samuel Carson, and lead defendant Vincent Hill – were considered death eligible, yet none of those four faced the death penalty. Alleged mastermind Vincent Hill, also known as "Vito," worked out of a public housing complex and defended his territory with force, at times "beating competitors with sticks and bats when they did not follow his orders to leave the area." Hill himself allegedly shot and killed a rival in 1989, attempted to rob and shoot another drug rival in 1993, and shot an innocent bystander in a botched 1994 attempt to gun down another drug rival. Hill faced, among other counts, charges of conspiracy to distribute narcotics under 21 U.S.C. § 846, racketeering under RICO, 18 U.S.C. § 1962(d), and various RICO predicate acts including several murders and assaults with intent to kill. 128/ Prosecutors did not request authorization to seek the death penalty.

The other three death-eligible members of the K Street Crew allegedly committed similar acts of violence and likewise never faced the death penalty. Jones allegedly took a direct part in the murders of two men and attempted to shoot several members of a neighboring gang. 129/ Jones faced, among other counts, charges of conspiracy to distribute under 21 U.S.C. § 846, racketeering under 18 U.S.C. § 1959(a)(3) & (5), and two charges of first-degree murder. Sweeney allegedly carried out numerous drive-by shootings, kidnapped, shot, and attempted

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127/ See Hill Indictment at 7-24.

128/ See id. passim.

129/ See id. at 32.

to rob a drug rival, and murdered four other persons, including a 1996 triple homicide and attempted robbery in Temple Hills, Maryland. 130/ Sweeney faced numerous charges including two counts of first-degree murder, conspiracy to distribute narcotics under 21 U.S.C. § 846, and racketeering under 18 U.S.C. § 1959(a)(3) & (5). Carson allegedly participated directly in several shootings and murders, killed a woman scheduled to testify in the trial of a fellow gang member, and attempted to kill another witness in the trial of a fellow gang member. Carson faced numerous charges including conspiracy to distribute narcotics under 21 U.S.C. § 846 and five counts of first-degree murder. 131/ As with Hill, though, prosecutors never requested authorization to seek the death penalty against Jones, Sweeney, or Carson.

b) United States v. Jose Muyet, et al.

In 1995, federal authorities cracked down on a similarly sophisticated and violent New York drug ring known as the "Nasty Boys." In United States v. Jose Muyet, et al., the government issued a nineteen-count indictment against nine defendants, alleging among other crimes eleven conspiracy-related murders. 132/ Published opinions painted a grisly portrait of the lengths to which some of the defendants went in furtherance of their conspiracy. For example, defendant Julio Matias allegedly shot to death a victim who lay prone on the ground after being viciously beaten by co-defendant Juan Machin. See United States v. Muyet, 945 F. Supp. 586, 592 (S.D.N.Y. 1996). The victim's companions had tried to flee, but defendant Pedro Narvaez allegedly "hunted them both down and shot them to

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130/ See id. at 29-30.

131/ See id. at 28-29, passim.

132/ See Indictment, United States v. Muyet, No. S3 Cr. 941 (S.D.N.Y.) (PKL) (hereinafter "Muyet Indictment").

death." See id. These brutal murders were examples of an alleged eleven homicides carried out on the orders of Nasty Boys leaders Jose and John Muyet. Along with two rival gangs, the Nasty Boys controlled a $30 million-a-year heroin and crack cocaine empire in the Bronx, and they used violence to protect and extend their boundaries. 133/

Despite the facts alleged in the indictment, the government did not request authorization to seek the death penalty. Ringleader Jose Muyet, who was charged in seven murders, was sentenced in July 1998 and received life in prison. 134/ Jose's brother and co-leader John Muyet, who was charged in three murders, received life in prison plus a mandatory constructive term of 130 years. Narvaez, also known as "Basic," was charged with five murders and received life in prison. The remaining defendants who were charged in the killings received terms ranging from five years to life, with the exception of Juan Machin, who was charged in three murders but received a sentence of time served plus three years supervised release. 135/

c) United States v. Mateo-Feliz, et al.

In United States v. Mateo-Feliz, et al., the United States Attorney for the Eastern District of New York did not request authorization to seek the death penalty despite an indictment alleging that the defendants had committed five murders over the course of a decade-long crack cocaine conspiracy. The members of the conspiracy sold approximately fifteen kilograms of crack cocaine a week, using

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133/ See Greg B. Smith & Corky Siemaszko, *Drug Gangs Busted in Bx.*, N.Y. DAILY NEWS, November 1, 1995, at 22.

134/ No. S3 Cr. 941 (S.D.N.Y. March 11, 1999) (PKL); Criminal Docket for Case #95-CR-941-ALL, United States v. Muyet, et. al., at 137 (hereafter "Muyet Docket").

135/ See Id., passim.

several businesses and an apartment building in a six-block area of Brooklyn as base of its operations. 136/ Lead defendant Roberto Mateo-Feliz, allegedly the conspiracy leader and the person who authorized all five murders, received a total of thirty years in prison with five years supervised release on each of two counts, to run concurrently. Defendant Rocky Freeman, the alleged triggerman in two conspiracy-related murders, was convicted at trial and sentenced to two consecutive life terms plus five years on a gun count. Other defendants in the conspiracy received sentences ranging from life to time served.

The facts of these cases do not mitigate the magnitude of the offenses for which Mr. Garza was convicted. Nonetheless, in terms of the numbers of murders committed and personal involvement of the defendants, the difference between the sanctions handed down in these cases and the sentence received by Mr. Garza is inexplicable. Mr. Garza, the leader of a drug enterprise convicted of killing three erstwhile associates and accused of killing five other associates by self-proclaimed accomplices, was sentenced to death. In United States v. Hill, United States v. Muyet, and United States v. Mateo-Feliz, et al. conspiracy leaders who were each directly involved in a larger number of killings received prison sentences. In addition, conspiracy members in those cases who were directly involved in drug transactions, murders, and attempted murders received prison terms. In no instance did the government seek to impose the death penalty in those cases.

This is not to suggest that a decision to seek the death penalty must be based on a mechanical tallying of murders or other generic facts. However, fairness in the administration of the death penalty clearly does require, at a minimum, that the reasons for seeking the death penalty in some cases but not others be

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136/ See Edward Wong, *Neighborhood Report: East New York; Reputed Drug Enforcer Guilty of Murder*, THE NEW YORK TIMES, July 12, 1998.

articulable and understandable and founded neither on quirks of geography or other arbitrary or ephemeral factors nor on more insidious factors such as race or ethnicity. Whenever a prosecutor decides to seek the death penalty, there is a reasonable likelihood that a death sentence will be imposed. This awesome power must be exercised upon the basis of fair-minded reason, nothing else. As the Supreme Court explained so eloquently in Gardner, 430 U.S. at 357-358:

> From the point of view of society, the action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

If there is no articulable, understandable and legitimate basis for a prosecutor's decision to seek death against one defendant, but not to seek death against others in similar cases, this vital safeguard has been dishonored. Given the sheer volume of prosecutions that are otherwise identical to or more severe than Mr. Garza's in terms of the offenses and number of murders involved, yet in which U.S. Attorneys have not sought the death penalty, there is strong reason to believe that this safeguard was in fact dishonored in Mr. Garza's case.

3. Clemency is a Traditional Remedy for Disproportionately Severe Sentences.

One of the traditional grounds for granting clemency is to remedy disproportionately severe sentencing. The Department of Justice Manual's section on Federal Prosecutions in Which the Death Penalty May Be Sought states that the "authorization process is designed to promote consistency and fairness." 137/ Furthermore, the Office of the Pardon Attorney Manual's Standards for Considering

137/ UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-10.000(G).

Commutation Petitions states, "[a]ppropriate grounds for considering commutation have traditionally included disparity or undue severity of sentence...." 138/

President Clinton and his predecessors have commuted sentences where they found disparities among co-defendants in contexts involving less severe penalties than death. The following are only a few of the more publicized examples. We believe that there are many other examples, but our efforts to review letters of advice issued by the Office of the Pardon Attorney in prior cases (including the ones cited below) were unsuccessful because the OPA believes that such letters are privileged. 139/

- On August 11, 1999, President Clinton offered clemency to 16 Puerto Rican nationalists, members of the FALN. In a letter explaining the decision to Representative Henry Waxman, the President noted that "the prisoners were serving extremely lengthy sentences – in some cases 90 years – which were out of proportion to their crimes." 140/
- Earlier this year, President Clinton commuted the sentence of Serena Nunn, a young woman sentenced under the federal sentencing guidelines to 188 months in prison for conspiracy to possess with the intent to distribute cocaine. Similar to the case of Mr. Garza, the prosecution refused to offer Ms. Nunn the opportunity to plead guilty and receive a lighter sentence. Instead, the government allowed other participants in the conspiracy to plead to lesser sentences, leaving Ms. Nunn with a grossly disproportionate sentence. Judge David S. Doty, the federal judge who sentenced Ms. Nunn, sent a letter to President Clinton supporting commutation of her sentence. 141/ Judge Doty noted the extreme disproportionate sentence

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138/ Id. § 1-2.113.

139/ Ex. 23 [Letter of Deputy Pardon Attny Susan Kuzma to Greg Wiercioch, August 31, 2000].

140/ Ex. 24 [Letter of President Clinton to Rep. Henry Waxman, Sept. 21, 1999].

141/ Ex. 25 [Letter of Sr. Judge David Doty to President Clinton, March 14, 2000, hereinafter "Doty Letter"].

received by Ms. Nunn, and cited the opinion of Judge Heaney of the Eighth Circuit in United States v. Hammer, 940 F.2d 1141, 1142 (8th Cir. 1991). Judge Heaney wrote:

> From my view of the record, it is clear that there is a great disparity in sentence length among defendants with similar degrees of involvement in the drug ring. ... The sentences imposed on drug traffickers in the Plukey Duke cases illustrate that sentencing disparity continues to exist under the guidelines, . . . and that the prosecutor largely determines the sentence of the defendant by deciding who to charge, what to charge, and when to charge.

- President Clinton also commuted the sentence of Amy Pofahl on July 7, 2000. Ms. Pofahl was sentenced to 24 years for her role in a conspiracy to import and distribute MDMA ("ecstasy"), while her husband, the acknowledged leader of the drug importing scheme, served no time in the United States, and four years in prison in Germany. President Clinton therefore commuted Ms. Pofahl's sentence to time served (nine years) and ordered her release.

- In 1977, President Carter commuted the prison sentence of G. Gordon Liddy, the infamous Watergate burglar. In 1973, Liddy was sentenced to 20 years in a federal penitentiary for his misguided efforts as the head of security for the Committee to Reelect the President. In recommending that Mr. Liddy's sentence be commuted, Attorney General Griffin Bell noted that Mr. Liddy's sentence was "far more severe" than the sentences of his co-defendants. 142/ White House Counsel Bob Lipshutz supported the decision to commute Mr. Liddy's sentence. In the course of analyzing Mr. Liddy's commutation request, Mr. Lipshutz wrote a memorandum to the Attorney General stating his views of the commutation deliberations. Lipschutz wrote:

> In addition to the obvious legal considerations involved in this matter, there are serious and perhaps far-reaching consideration of such matters as 'equity in

142/ Ex. 26 [Letter of Attorney General Griffin Bell to President Carter, Apr. 7, 1997 at 6, hereinafter "Bell Letter"].

> sentencing under the criminal law system'; 'utilization of the sentencing process to obtain testimony'; political ramifications in a very broad context, considerations of compassion, perhaps not for the individual but certainly for the wife and five children of the prisoner; and utilization of the Presidential power when all judicial remedies have been exhausted by a convicted person. 143/
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> In advising the President, Attorney General Bell noted that other Watergate sentences ranged from a minimum of one month to maximum sentences of 8 years for John Mitchell, H.R. Haldeman, and Ehrlichman. Liddy's sentence greatly exceeded any other sentence given to co-conspirators. Despite the serious nature of Mr. Liddy's crimes, President Carter commuted the sentence on April 12, 1977.

- In December, 1981, President Reagan commuted the prison sentence of Marvin Mandel, the former Governor of Maryland, because his sentence was disproportionate to the sentences of his co-defendants. Mandel was convicted in 1977 on political corruption charges and was sentenced to three years in prison. Of the six co-defendants convicted of federal mail fraud and racketeering, Mandel was the only one still in prison at the time of his commutation. Attorney General William French Smith said that Reagan's decision to commute the sentence was based "primarily on the fact that Mandel, having received the same three-year sentence as three other co-defendants, would have been required to serve nearly four months more than any of the others," which would have created "an unwarranted disparity between Mandel and the others." 144/ Therefore, President Reagan commuted Mandel's sentence to 19 months.

Prosecutors legitimately must retain considerable discretion in deciding how to prosecute individual defendants. But where, as here, that discretion leads to grossly disproportionate punishment of one member of a criminal

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143/ Ex. 27 [Memorandum of Bob Lipshutz for the Attorney Griffin Bell, Feb. 12, 1977] at 2.

144/ Ex. 28 [Saundra Saperstein, *Reagan Commutes Mandel Sentence*, WASH. POST, Dec. 4, 1981].

enterprise, and there is other overwhelming evidence that a defendant's sentence has been imposed through an arbitrary and biased system, the President rightly should exercise his clemency power to prevent an unjust and irremediable punishment.

F. U.S. CUSTOMS AGENTS OBTAINED CUSTODY OF MR. GARZA FROM MEXICO BY CIRCUMVENTING MEXICO'S TREATY PROHIBITING EXTRADITION OF PEOPLE TO FACE CAPITAL PUNISHMENT IN ANOTHER COUNTRY.

Like most of the nations we consider our allies, Mexico is strongly opposed to capital punishment. Its Extradition Treaty prohibits extradition of a person to face prosecution for an offense where the death penalty is available, unless the country seeking extradition gives assurances that it will not seek the death penalty. 145/ Mexico has consistently relied on Article 8 of the Extradition Treaty to resist extradition of U.S. fugitives until U.S. prosecutors waive the death penalty for those individuals. 146/ Mexican officials have stated, "[w]e cannot extradite any fugitive if he or she will face [the] death penalty." 147/ As a result, in

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145/ Article 8 of the Extradition Treaty, which went into effect on January 25, 1980, provides:

> When the offense for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused unless the requesting Party furnishes such assurances as the requested party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

146/ See, e.g., Ex. 29 [Jonathan Karl, CNN INTERACTIVE, *U.S., Mexico at odds over return of murder suspect* (originally posted Dec. 13, 1997), at http://www.cnn.com/US/9712/13/mexico.extradition/index.html.].

147/ See id. (quoting Gustavo Gonzales-Baez, spokesperson for Mexican embassy, Washington, D.C.).

at least six cases since 1989, U.S. prosecutors have waived capital punishment for a fugitive in order to win extradition. 148/

The facts surrounding the original arrest of Mr. Garza by U.S. Customs agents at the Texas-Mexico border strongly suggest that the U.S. engineered the deportation of Mr. Garza without informing the Mexican officials that they were investigating Mr. Garza for several murders, rather than seeking the extradition of Mr. Garza under the treaty. If U.S. officials had respected the sovereign policies of Mexico and abided by the spirit of the Extradition Treaty, it is highly unlikely that Mr. Garza would be facing the death penalty today.

On February 6, 1992, Mr. Garza, who had recently been indicted on federal non-capital drug-trafficking charges, fled to Mexico when U.S. Customs agents raided his home in Brownsville, Texas. Over the next several months, law enforcement authorities in the United States conducted an extensive search for Mr. Garza, apparently coordinating their efforts with the Mexican Federal Judicial Police. Mr. Garza, who was in Mexico under an assumed name, was arrested by the Mexican Police on November 6, 1992, in Matamoros, Mexico. At the time of his arrest, Mexican Police officials showed Mr. Garza a copy of his U.S. birth certificate, which they had presumably obtained from U.S. officials. Mr. Garza was deported from Mexico that day, and U.S. Customs agents arrested him when he crossed the Gateway International Bridge and reentered the United States in Brownsville. 149/

There is no question that, as of November 6, 1992, the United States knew of Mr. Garza's involvement in all of the murders with which he was charged, as well as with four of the five murders that served as aggravating factors in his

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148/ See id.

149/ Ex. 30 [Rebecca Thatcher, *Drug Suspect Juan Raul Garza Arrested at Bridge*, BROWNSVILLE HERALD, Nov. 10, 1992].

sentencing. Mr. Garza was identified as a suspect in the murder of Erasmo de la Fuente in September of 1990 and in the murder of Thomas Rumbo in January of 1991. 150/ In February of 1992, U.S. Customs Service Officer Mark Reich testified before a grand jury that Mr. Garza was involved in four murders, and stated that "[a]ll indications [are] that Juan Raul Garza would be the one who ordered these murders." 151/ Officer Reich mentioned by name victims Thomas Rumbo and Bernabe Sosa.

The evidence is also clear that no later than March 1992, more than seven months before Mr. Garza was deported from Mexico, the United States intended to charge Mr. Garza with multiple murders that would make him eligible for the death penalty. On March 25, 1992, the Assistant United States Attorney who prosecuted Mr. Garza told counsel for Mr. Garza's accomplice, Jesus Flores, that "unless all Defendants enter guilty pleas to the current indictment, the United States of America would seek a superseding indictment against Jesus Flores which would allege that he conspired to murder three (3) individuals in furtherance of the alleged continuing criminal enterprise of the alleged Juan Raul Garza organization." 152/ Not surprisingly, after receiving that message two of Mr. Garza's accomplices, Jesus Flores and Israel Flores, told the United States Customs Service that Mr. Garza was involved in seven of the eight murders for which he was eventually charged or which were introduced as aggravators at

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150/ Police received a tip from an anonymous caller in September 1990 that Mr. Garza had ordered the murder of Mr. de la Fuente. Gov. Tr. Ex. 104. In January 1991, a Cameron County, Texas law enforcement officer swore in an affidavit in support of a search warrant that Mr. Garza was "under investigation" for the murder of Thomas Rumbo. Gov. Tr. Ex. 138. See Ex. 31.

151/ Ex. 32 [Grand Jury Testimony re: Juan Raul Garza, Feb. 3, 1992] at 12.

152/ Ex. 33 [Mot. to Withdraw] at 2.

sentencing. Statements of Israel Flores, April 14, 1992 and April, 27, 1992; Statements of Jesus Flores, April 13, 1992 and April 27, 1992. In June, 1992, Judge Vela, who presided over Mr. Garza's trial, stated at the sentencing of some of Mr. Garza's accomplices that the "evidence indicated that as a result of the activity of this organization, there were at least three deaths." 153/

Thus, by November 6, 1992, the United States had made clear to everyone involved in the United States, including Mr. Garza's accomplices, Judge Vela, and the press, that it intended to charge Mr. Garza with multiple murders as soon as he was apprehended, making him eligible for capital prosecution. 154/ Apparently, the United States never sought permission from the Mexican Attorney General to conduct its extensive investigation in Mexico, as was required by a treaty with Mexico, 155/ or otherwise informed Mexican officials of its intent to charge Mr. Garza with multiple murders. The overwhelming inference is that U.S. officials knew that, had they done so, Mexico would have insisted on receiving

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153/ Shawn Foster, *10 Drug Case Codefendants Sentenced*, BROWNSVILLE HERALD, June 19, 1992, at 15.

154/ Several newspapers reported at the time of Mr. Garza's deportation that he was being investigated for numerous murders. See Laura Martinez, *Reputed Drug Ring Leader Behind Bars*, HARLINGEN STAR, Nov. 10, 1992; Ex. 30 [Thatcher, BROWNSVILLE HERALD, Nov. 10, 1992].

155/ The Mutual Legal Assistance Cooperation Treaty between the United States and Mexico requires that U.S. or Mexican officials obtain authorization from the Mexican Attorney General's Office in order to engage in any investigations in Mexico. Art. 2, 27 I.L.M. 443, 447 (1988). Neither the United States nor Mexico has provided for means for investigation outside of this treaty. For example, there does not currently exist a letters rogatory process between the United States and Mexico with respect to criminal matters. Specifically, neither the United States nor Mexico has applied the Inter-American Convention on Letters Rogatory, OAS Treaty Series, No. 43, Art. 16, reprinted in 14 I.L.M. 339 (1975), which allows states to apply the Convention to criminal matters.

assurances from the United States that Mr. Garza would not face capital prosecution if he were returned to the United States.

In obtaining custody of Mr. Garza from Mexico, U.S. officials circumvented the policies of Mexico and disregarded the Justice Department's own pronouncements concerning respect for the laws of foreign countries when seeking to obtain custody of a fugitive. If these policies had been respected, Mr. Garza would almost certainly not be facing a death sentence today. By granting clemency to Mr. Garza, the President can send a message that the United States respects the deeply held principles of its neighboring countries and will not permit its officials to ignore those principles just because they happen to impede our law enforcement efforts.

G. LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE WOULD PROVIDE SEVERE AND EFFECTIVE PUNISHMENT OF MR. GARZA.

If the President commutes Mr. Garza's death sentence to life without possibility of parole, he will not present a future danger to society. He will live the rest of his life in a maximum security facility of the Federal Bureau of Prisons, where he is now incarcerated and has a spotless disciplinary record.

1. Although the jury that sentenced Mr. Garza to death acted upon the testimony of a prosecution witness who predicted with certainty that Mr. Garza would commit violent offenses in prison, in fact Mr. Garza's prison records are completely devoid of any violent offenses.

In making its case for death at the punishment phase of Mr. Garza's trial, the prosecution presented the testimony of Captain Daniel Julius Alberts, Chief Correctional Supervisor with the Federal Bureau of Prisons (FBOP) at Bastrop, Texas. Captain Alberts testified about the FBOP's security and custody classification system, which is used to evaluate an incoming inmate and predict which inmates will be violent in the prison system, and concluded that an inmate

like Mr. Garza would be "of the highest risk" to commit violent crimes inside the federal prison system. 156/

Although Captain Alberts had never interviewed Mr. Garza, he alerted the sentencing jury that an inmate like Mr. Garza would be a "high level maximum custody inmate," then forecast with confidence that Mr. Garza would quickly become violent when incarcerated. He informed the jury that, because Mr. Garza had been convicted of a drug crime, he immediately would be courted by a prison gang, and that these gangs "are responsible for probably sixty to seventy percent of our major incidents that happen in the facilities, being homicides, escape, drug introductions, and assaults." 157/ It was "very possible," he stated, that an inmate like Mr. Garza would order contract murders from within the federal prison system. 158/ Then, Captain Alberts assured the jury that a sentence of life without parole would be completely ineffective. Asked by the prosecutor about a person sentenced to life without parole in the federal prison system, Captain Alberts testified:

> What does a person like that have to lose? I mean, if he assaults a correctional officer and we take him down to Federal court, and he picks up a sentence of maybe another five years, what's five years on top of life? If he attempts to escape, that is a two to five year sentence in this day and age in the courts. What does he have to lose if he kills someone? 159/

Despite his familiarity with the FBOP and its methods and expertise in supervising and controlling violent inmates, Captain Alberts drew a shocking conclusion: that

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156/ Ex. 17e [July 31, 1993 Tr. (Trial)] at 3560.

157/ Id. at 3545-46.

158/ Id.

159/ Id.

the FBOP had almost no way to stop an inmate like Mr. Garza from committing murders, assaults and other violent crimes from within the prison system. 160/

Captain Alberts was wrong, and his alarming testimony was misleading and highly prejudicial. ***Mr. Garza's prison records show absolutely no violent offenses during his incarceration.*** To the contrary, Mr. Garza is a model federal inmate. Since being moved to the federal death row facility in Terre Haute, Indiana, where he is now housed, his record contains no offenses whatsoever, either violent or nonviolent. Rather, his recent Progress Report from the United States Prison at Terre Haute states that "[h]e has maintained a clear conduct record while at this institution." 161/ The Progress Report further states that Mr. Garza "has been active in religious services and counseling services with the Chaplain on a weekly basis," and that he participates in recreational programs. 162/ Upon his arrival at Terre Haute, the prison's Chief Psychologist assessed him as "calm, cordial, and cooperative." 163/

For the first six years of his sentence, the federal government chose to incarcerate Mr. Garza in the Texas Department of Criminal Justice (TDCJ) rather than in a federal prison system, where Captain Alberts told the jury Mr. Garza would be housed. Even in the state prison system, however, and in the county jails where he was held awaiting trial, 164/ Mr. Garza committed no violent offenses –

160/ Id.

161/ Ex. 34 [Sept. 7, 2000 Progress Report] ¶ 16(e).

162/ Id. ¶¶ 16(c) & (d).

163/ Ex. 35 [May 24, 2000 Brief Counseling Session, Bill Elliott, Ph.D.].

164/ The prosecution maintained at Mr. Garza's trial that Mr. Garza orchestrated an "escape attempt" from the Montgomery County Jail while awaiting trial. Tr. Vol. XVI at 3512-13. This is a gross overstatement of the incident, which is more accurately characterized as a failed attempt by one of Mr. Garza's visitors to

again disproving the prosecution's predictions of serious violent behavior. Mr. Garza's records from TDCJ reflect the following offenses over his six years of incarceration: possessing a point spread sheet (12/19/93); possessing 194 stamps, considered contraband by the prison (6/27/94); hanging a sheet on his cell bars (11/27/94); dropping a broom out of his cell window (5/22/95); gambling with scrabble and domino chips (12/9/96); refusing to provide identification (12/23/96); storing food on a steam table outside his cell (1/1/97); possessing a homemade shank found in cell mattress (3/14/97); 165/ refusing to submit immediately to hand restraints (3/22/97); playing a radio too loudly (3/23/97); and possessing a "small amount" of marijuana (3/22/98). None of the TDCJ records reflect the gang membership or violent gang activity that Captain Alberts predicted. 166/ Indeed,

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smuggle contraband into the jail. In particular, the visitor apparently attempted to give Mr. Garza a shoe with blades and $900 cash in the sole. The visitor's unsophisticated attempt to smuggle the materials was quickly intercepted by the authorities. Mr. Garza never even *received* the contraband, and certainly never used it to attempt an escape from the jail. Such a scheme, even if attempted again, surely would fail in a maximum security federal prison, where Mr. Garza will be housed for the rest of his life.

165/ During a routine cell search in March 1997, TDCJ personnel noticed a small hole in the mattress in Mr. Garza's cell and located a homemade shank inside the mattress. Mr. Garza had been moved to that cell shortly before the search, and had only briefly been assigned the mattress in which the shank was found. He has always maintained that the shank was not his, and that he had never seen it before the officers retrieved it from the mattress. See Exhibit 36 [TDCJ Supplemental Offense Report]. In any event, the shank never was on Mr. Garza's person, and certainly never was used by Mr. Garza to attempt or commit the type of violent offense that Captain Alberts predicted.

166/ A 1994 Progress Report written by federal officials less than a year after his arrival at TDCJ makes a flat accusation of gang *affiliation*, as opposed to gang membership, basing its conclusion on the fact that Mr. Garza "had one visit by a known gang member and continues to correspond with them," and that he had made requests to be moved to cells near gang members. Ex. 37 [1994 Progress Report]. There are no records supporting this allegation of gang affiliation. Although Mr. Garza was housed in TDCJ for another five years after this report

upon his transfer from TDCJ to the federal system, the federal Unit Team who met with Mr. Garza recommended that he participate in recreational and physical fitness activities, indicating that the federal officials assessed him to be at low risk for violence. Captain Alberts' confident prediction to the sentencing jury that Mr. Garza would be active in prison gangs, and through the gangs would carry out homicides, contract murders, assaults, and other violent offenses, 167/ was simply wrong.

Through Captain Alberts' testimony, the prosecution convinced the jury that the only way Mr. Garza could be controlled was to sentence him to die. Captain Alberts was the last witness the jury heard before adjourning to decide whether to impose the death penalty. His testimony was fresh in their minds as they deliberated Mr. Garza's punishment and surely was crucial to their decision. Mr. Garza's records from both the federal and state prison systems clearly demonstrate that the sentencing jury acted on inaccurate information when it sentenced him to death.

2. The prosecution's erroneous prediction of Mr. Garza's future dangerousness was highly improper because it was based in part on Mr. Garza's ethnicity.

Captain Alberts testified before the sentencing jury that Mr. Garza's dangerousness was enhanced by his ethnicity. This testimony was not only flawed, but highly improper and prejudicial. In particular, Captain Alberts stated that "security threat groups," or gangs, are a major source of trouble in the prison system. 168/. He further testified that there were five major gangs in the prison,

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was written, there are absolutely no other records alleging any gang affiliation or membership, much less the violent gang activity that Captain Alberts predicted.

167/ Ex. 17e [July 31, 1993 Tr. (Trial)] at 3545-46.

168/ Id.

and that these gangs were "responsible for probably sixty to seventy percent of our major incidents that happen in the facilities," including homicides, contract murders, escapes, and assaults. 169/ An inmate like Mr. Garza, he explained to the jury, was extremely likely to become a member of these gangs and thus to engage in violent behavior in the prison system. 170/ Captain Alberts supported his opinion by noting that inmates like Mr. Garza have connections to the drug world and have financial resources. 171/ He also made his assessment based on the fact that Mr. Garza is Latino:

> [An inmate like Mr. Garza] would probably be courted by one of our security threat groups. We have five primary security threat groups, gangs that are based along ethnicity. They would probably court him into – immediately just welcome him with open arms. 172/

Captain Alberts' reliance on Mr. Garza's ethnicity as one factor supporting his assessment of dangerousness was highly improper and has been condemned by prosecutors and the courts. In the recent case of Victor Hugo Saldano, who had been sentenced to death in Texas, the Supreme Court vacated the judgment of the Texas courts because the State's case in favor of the death penalty had relied in part on his ethnicity. See Saldano v. Texas, 120 S. Ct. 2214 (2000). At the punishment phase of Mr. Saldano's trial an expert psychiatric witness for the prosecution, Dr. Walter Quijano, had testified that 24 factors – one of which was the fact that Saldano was Latino – made Saldano a future danger to society. In confessing error in Saldano, Texas Attorney General John Cornyn candidly

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169/ Id.

170/ Id. at 3545-46.

171/ Id. at 3545.

172/ Id.

admitted that "it is inappropriate to allow race to be considered as a factor in our criminal justice system." 173/

The prosecution's reliance on ethnicity in Mr. Garza's federal case was no less deplorable than the expert testimony elicited by Texas in Saldano. This Administration has committed to the elimination of racial discrimination in the federal justice system, as discussed previously in Section I.B., conducting its own study into racial disparities on federal death row. As articulated by Attorney General Janet Reno, the over-representation of minorities in the federal death penalty system "should be of concern to us all." 174/ Deputy Attorney General Eric Holder has stated that the recent Department of Justice report documenting racial disparities in the federal death penalty system "must serve as a catalyst not only for an informed and constructive dialogue, but also for the creation of a system where every American can have absolute confidence that our federal criminal justice system is completely color-blind. We pledge to you today to begin to make this goal a reality." 175/

The system that sentenced Juan Raul Garza to death was not color-blind. To the contrary, the prosecution relied in part on his ethnicity when presenting the jury with its case in favor of the death penalty. Race should play no part in sentencing decisions in this nation – especially decisions so grave as capital sentencing.

3. The Federal Bureau of Prisons has the expertise to incarcerate the most violent of inmates, and certainly is

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173/ *Texas to Review Death Sentences; State Says Race May Have Been Factor in Cases of 9 Men*, WASH. POST, June 11, 2000, at A10.

174/ Ex. 8 [Sept. 12, 2000 Press Conference] at 1.

175/ Id. at 5.

equipped to control an inmate like Mr. Garza who has no record of violence in prison.

The FBOP specializes in supervising and controlling persons convicted of federal crimes, including violent inmates. Thomas F. Keohane, Jr., who served as Warden of the United States Penitentiary at Terre Haute and has extensive experience at numerous federal prisons, explains that "[f]ederal prison officials have the authority to use all force that is necessary and reasonable to maintain order within a facility." 176/

Contrary to the testimony of Captain Alberts that inmates sentenced to life without parole cannot be controlled by federal officials, Mr. Keohane explains that such inmates can and have been successfully incarcerated by the FBOP:

> Based on my experience in the federal prison system, I strongly disagree with Captain Alberts's testimony that the Federal Bureau of Prisons has no effective way of preventing an inmate sentenced to Life Without Parole from committing violent offenses while incarcerated. 177/

As Mr. Keohane details, the tools available to federal officials include barring inmates from all group activities, monitoring their phone calls and mail, revoking their privileges such as commissary and possession of reading materials, housing them in a "control cell," placing them in severe and immobilizing restraints, and keeping them on fifteen-minute watch. 178/ Even if these measures are ineffective, federal officials have the option of transferring unruly inmates to "super-maximum"

176/ Ex. 38 [Affidavit of Thomas F. Keohane, Jr. ("Keohane Aff.")] ¶ 11.

177/ Id. ¶ 10.

178/ Ex. 38 [Keohane Aff.] ¶¶ 12-16. See, e.g., Bureau of Prisons Program Statement 5212.06 § 541.40 (FBOP can separate uncooperative inmates); id. at 5265.11, § 540.14 (FBOP may open and inspect all incoming general correspondence"). In fact, the FBOP has informed Mr. Garza that monitors his phone conversations for security purposes. See Ex. 39 [Notification signed by Garza that phone conversations would be monitored].

facilities at Florence, Colorado or Marion, Indiana, where restrictions are particularly severe. 179/ At the facility at Florence, known as ADX, inmates are locked in their cells for 23 out of every 24 hours, with prison guards providing their only direct human contact. 180/ ADX houses "the worst of the worst," and its "raison d'etre" is "to try and extract reasonably peaceful behavior from extremely violent career prisoners." 181/

In fact, the FBOP routinely imprisons inmates who, like Mr. Garza, have been convicted of serious violent crimes, and does so successfully without violent incident. Powerful mob boss John Gotti, whom many feared would continue to control mob operations even while serving his federal life sentence, is an example of a violent inmate who has been successfully controlled by FBOP. As Mr. Keohane states,

> The Bureau of Prisons is designed to effectively control inmates of a more violent nature than Juan Raul Garza. I am familiar with John Gotti, who was sentenced to life in federal prison for murders committed in connection with his Mafia leadership. It is my understanding that John Gotti's criminal conduct evidenced a much greater violent nature than Juan Raul Garza. Press accounts feared that John Gotti would stir up violence in the federal prison system. To my knowledge, however, the Federal Bureau of Prisons has been able to control John Gotti, and he has

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179/ Ex. 38 [Keohane Aff.] ¶ 17. Captain Alberts testified that the "super-maximum" facilities did not have space for all of the "problem inmates." Ex. 17e [July 31, 1993 Tr. (Trial)] at 3560, 3562. However, both of these "super-maximum" facilities currently have space for additional inmates. See Ex. 38 [Keohane Affidavit] ¶ 7 (facility at Marion currently houses 339 inmates and has capacity of 482); id. ¶ 8 (facility at Florence currently houses 343 inmates and has capacity of 490).

180/ Lisa Anderson, *Is 'Supermax' Too Much? Strict Isolation of Inmates Called Cruel, Ineffective,* CHI. TRIB., Aug. 2, 1998, at 1.

181/ Michael Taylor, *The Last Worst Place,* S. F. CHRON., Dec. 28, 1998, at A3.

> not committed any violent acts during his incarceration. 182/

At the United States Penitentiary in Marion, Gotti is in solitary 21 hours per day, is allowed only five visits and five 15-minute phone calls per month, is monitored by video and audio during all of his visits, and receives his meals through a slot in his cell door. 183/ His incarceration has caused the "virtual disintegrat[ion]" of "his once-vaunted crime family." 184/

Mr. Keohane further states that, in his experience, Captain Alberts' assessment of Mr. Garza's propensity for violence while in FBOP was erroneous. 185/ Captain Alberts worked at a "low security level federal facility" in Bastrop, Texas, 186/ , which did not give him a proper basis to predict Mr. Garza's behavior in a maximum security facility. By contrast, Mr. Keohane has experience in various maximum security facilities. 187/ Having reviewed Captain Alberts' testimony at Mr. Garza's trial, Mr. Keohane states as follows:

> I disagree with Captain Alberts's testimony in which he states that an inmate like Mr. Garza would be at the

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182/ Ex. 38 [Keohane Aff.] ¶ 9.

183/ Gene Mustain and Jerry Capeci, *Fan Mail is His Solitary Joy/ 500 People Wrote to Me in One Week, Gotti Boasts*, N. Y. DAILY NEWS, Aug. 3, 1999, at 6.

184/ Id.

185/ Mr. Garza will always, even if this petition for clemency is granted, be classified as high or maximum security. See FEDERAL BUREAU OF PRISONS SECURITY DESIGNATION AND CUSTODY CLASSIFICATION MANUAL, Ch. 7, at 4 ("A male inmate with more than 30 years remaining to serve (including non-parolable LIFE sentences) shall be housed in a High security level institution"); id. Ch. 1 at 1 ("Bureau of Prisons institutions are grouped into security levels: MINIMUM, LOW, MEDIUM, HIGH, plus an ADMINISTRATIVE category").

186/ Ex. 17e [July 31, 1993 Tr. (Trial)] at 3535.

187/ Ex. 38 [Keohane Aff.] ¶ 2.

> highest risk for committing violent offenses in prison. The Bureau of Prisons has effective methods of controlling and supervising inmates who have been convicted of drug trafficking and murder, and the fact that an inmate was involved in such offenses before incarceration does not accurately predict violent behavior during federal incarceration. 188/

In fact, had Mr. Keohane been called to testify at Mr. Garza's trial, he would *not* have predicted that the hypothetical inmate presented by the prosecution would commit homicides, contract murders or other violent offenses during federal incarceration. 189/

The FBOP's expertise in dealing with and controlling inmates clearly has been more than adequate in Mr. Garza's case. Mr. Garza has had absolutely no infractions while imprisoned at Terre Haute, and is a model federal inmate. His prison record to date establishes that, contrary to the misleading testimony considered by his sentencing jury, he would pose no danger if his sentence were commuted to life without possibility of parole.

H. MR. GARZA'S EXECUTION WOULD BRING FURTHER SUFFERING TO YET ANOTHER GROUP OF INNOCENT PEOPLE — HIS FAMILY

The friends and loved ones of those victimized by Mr. Garza's crimes have suffered unimaginable pain and anguish. He is responsible for their suffering, and deserves punishment. It does not minimize the severity of Mr. Garza's crimes, nor diminish his responsibility for harm caused to the victims and their families, to request that consideration also be given to another group of innocent people — the members of Mr. Garza's family – who seek the President's mercy in commuting Mr. Garza's sentence. For them, the grave issues of public concern that arise from

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188/ Id. ¶ 18.

189/ Id. ¶ 19.

Mr. Garza's death sentence give way to the profound private concern of simply keeping him alive.

In the videotape and written statements accompanying this memorandum, Mr. Garza's family members describe their relationships with Mr. Garza and express their thoughts about the irrevocable penalty he faces. 190/ Mr. Garza is the seventh and youngest child born to Emilio, who is 87 years old, and Elida Perez Garza, who died in 1990. Emilio Garza worked for much of his life in southwest Texas as a migrant laborer, together with Juan Garza and other members of their family. In 1987, Juan Garza married Mary Elizabeth Hinojosa. They have two children: a 13-year old son, Juan Raul Garza Jr., and a 10-year old daughter, Elizabeth Ann Garza, born in 1990. Mr. Garza also has two daughters from a previous marriage: Maribel, who is 28, and Norma, who is 24.

As reflected in the accompanying materials, Mr. Garza has maintained close, meaningful and mutually supportive relationships with these and other members of his family, despite his lengthy incarceration. His execution would be devastating to each of them.

190/ See Ex. 42 [letters from Juan Garza's family members]; Ex. 41 [photographs of Juan Garza with family members]; Ex. 40 [Videotape].

IV. CONCLUSION

For the foregoing reasons, petitioner Juan Raul Garza respectfully requests that his Petition for Clemency be granted and that his sentence of death be commuted to a sentence of life without the possibility of parole.

Respectfully submitted,

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