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

In re

JUAN RAUL GARZA,

Petitioner.

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

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Dated: May 21, 2001

Petitioner Respectfully Requests the Opportunity to Make An Oral Presentation Before the Pardon Attorney

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INTRODUCTION

Petitioner, Juan Raul Garza, is scheduled to be executed by the United States on June 19, 2001. The current Attorney General has agreed that in administering the ultimate penalty of death, "there is no room for error." Ex. 1 at 6 [Written Answers by John Ashcroft to Questions by Senator Russell D. Feingold 1/22/01]. Nevertheless, Mr. Garza faces execution despite:

- A ruling by the Inter-American Commission on Human Rights – in proceedings on a petition filed by Mr. Garza and in which the United States government participated – that Mr. Garza's execution would violate his human rights under binding commitments of international law made by the United States.
- A written statement by the Mexican government that it would not have granted a request to extradite Mr. Garza from Mexico to the United States had it known that Mr. Garza faced capital prosecution.
- A March, 2001 ruling in Shafer v. South Carolina, 121 S. Ct. 1263 (2001), which demonstrates that the Court of Appeals for the Fifth Circuit erred in affirming Mr. Garza's death sentence – over Mr. Garza's objection that the sentencing jury was required to be given the truthful information that Mr. Garza would be sentenced to life without the possibility of parole if not given a sentence of death.

- The fact that no one can have any confidence that Mr. Garza's ethnicity and state of prosecution were not factors in the Government's decision to seek the death penalty against him.
- The failure of the Department of Justice, or the National Institute of Justice ("NIJ") or any other federal governmental entity to complete a thorough study of the glaring racial, ethnic and geographic disparities in the administration of the federal death penalty.
- The fact that Mr. Garza's record in federal prison reflects that he could spend the remainder of his life in federal prison without posing any threat of future dangerousness.

On September 13, 2000, Mr. Garza submitted a Petition for Clemency, asking that his sentence of death be commuted to a sentence of life imprisonment without possibility of release. On September 28, 2000, Mr. Garza filed a Memorandum in Support of his Petition for Clemency (hereinafter "Clemency Mem.") and provided additional materials in support of his claim for clemency. On December 7, 2000, President Clinton granted a reprieve to Mr. Garza because of the substantial racial and geographic disparities reflected in the Department of Justice's own study of the federal death penalty which was published in September, 2000. President Clinton ordered the Department of Justice to report on these disparities by April 30, 2001 and re-set Mr. Garza's execution date for June 19, 2001.

Mr. Garza's original Clemency Petition and Memorandum provide an ample basis for commutation of his sentence to life in prison without the possibility of release. They address in detail the reasons for clemency based on the unequal application of the federal death penalty along racial and geographic lines and the procedural safeguards that Mr. Garza was denied in the sentencing phase of his trial. The original Clemency Memorandum also demonstrates that it is far from a foregone conclusion that the Government will seek the death penalty against a defendant charged with multiple homicides as part of a drug ring, regardless of race or geography. Indeed, the Clemency Memorandum graphically shows that in many, if not most, multiple victim cases arising out of drug or other criminal enterprises, federal prosecutors either have not sought the death penalty or have allowed defendants to enter a plea bargain to avoid capital prosecution. 1/

The purpose of this Supplemental Memorandum is to present information that was not available at the time Mr. Garza's original Clemency Petition and Memorandum were filed and that provides additional reasons to commute his sentence. Mr. Garza's counsel respectfully request the opportunity to make an oral presentation concerning Mr. Garza's clemency petition to the Office of the Pardon Attorney, the Office of the Attorney General and/or the Office of White House Counsel and stand prepared to respond to any questions concerning Mr. Garza's request for clemency.

1/ See Clemency Mem. at 68-76 (includes information on 27 multiple victim cases where death penalty authorization was not requested or a plea agreement was accepted).

I. THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS HAS RULED THAT THE EXECUTION OF MR. GARZA WOULD VIOLATE HIS HUMAN RIGHTS UNDER INTERNATIONAL LAW COMMITMENTS OF THE UNITED STATES

The execution of Juan Garza would violate his human rights under several provisions of international law to which the United States has subscribed, according to a report of the Inter-American Commission on Human Rights (the "Commission") which was made public on April 4, 2001. Ex. 2 [Report No. 52/01, Case No. 12.243, Organization of American States, Inter-American Commission on Human Rights (April 4, 2001)] (hereinafter the "Commission Report"). 2/ The Commission Report represents the culmination of proceedings, in which the United States government was an active participant, that were conducted in response to a complaint filed by Mr. Garza. The Commission recommended that the United States provide Mr. Garza with a new sentencing hearing to cure the violation of his international human rights that occurred at his trial. To execute Mr. Garza in the face of this decision would serve only to damage the legitimacy of the Commission and to give the international community serious reason to question the commitment of the United States to international human rights at a time when the United States can ill afford that commitment to be questioned.

2/ The Commission was created in 1959 as an autonomous entity of the Organization of American States ("OAS") to promote and protect human rights. In 1967, amendments to the OAS Charter made the Commission a principal organ through which the OAS was to accomplish its purposes. See Protocol of Buenos Aires, 721 U.N.T.S. 324, 21 U.S.T. 607, T.I.A.S. No. 6847, entered into force Feb. 27, 1970. The United States signed the amendments to the OAS Charter in 1967 and ratified them without reservation in 1968. 721 U.N.T.S. 324, 21 U.S.T. 607, T.I.A.S. No. 6847.

On December 20, 1999, just weeks after his domestic legal challenges had been denied, Mr. Garza filed a petition with the Commission arguing that his death sentence violates the American Declaration of the Rights and Duties of Man (the "American Declaration"), the Charter of the Organization of American States (the "OAS Charter"), and other provisions of international law. 3/ Mr. Garza based his claim on, inter alia, the introduction at his sentencing hearing of evidence concerning four murders that took place in Mexico for which Mr. Garza has never been arrested, charged, prosecuted or convicted. See Clemency Mem. at 57-61 (discussing inherent unreliability of evidence concerning these unadjudicated foreign crimes). The United States participated in the proceedings on Mr. Garza's petition before the Commission by filing written responses to Mr. Garza's claims and by participating in oral argument before the Commission. Ex. 2 at ¶¶ 7, 11, 14 [Commission Report].

On December 4, 2000, the Commission issued a preliminary report in which it ruled that, by introducing evidence of the uncharged foreign offenses during the sentencing hearing against Mr. Garza, the Government had violated Mr. Garza's right to a fair trial and to due process under Articles XVIII and XXVI of the American Declaration. The Commission further found that the sentencing of Mr. Garza to death was arbitrary and capricious under Article I of the American Declaration, and that to carry out Mr. Garza's execution would "constitute a further deliberate and egregious violation" of his right to life under Article I. Id. ¶ 111.

3/ Mr. Garza could not file a petition with the Commission before he had

Finally, the Commission recommended that the United States provide Mr. Garza with an effective remedy for these violations, specifically including commutation of his sentence. See id. ¶¶ 118, 121(1).

On April 4, 2001, after considering the Government's response to its preliminary report, the Commission ratified and published its December 4, 2000 report. 4/ The Commission ruled once again that the United States "is responsible for violations of Articles I, XVIII, and XXVI of the American Declaration in condemning Jual Raul Garza to the death penalty" and that "the United States will perpetrate a grave and irreparable violation of the fundamental right to life under Article I of the American Declaration, should it proceed with Mr. Garza's execution based upon the criminal proceedings under consideration." Id. ¶ 120. The Commission also found that, if the Government proceeded with the execution of Mr. Garza, that action would constitute "serious and deliberate violations of its international obligations under the OAS Charter and the American Declaration." Id. ¶ 118.

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exhausted his remedies under United States law. Ex. 2 ¶ 67 [Commission Report].

4/ At the time the Commission issued its preliminary ruling, Mr. Garza was scheduled to be executed on December 12, 2000. Accordingly, the Commission initially gave the Government five days to respond to the preliminary report. On December 7, 2000, President Clinton granted Mr. Garza a reprieve and subsequently re-set Mr. Garza's execution date for June 19, 2001. On March 6, 2001, the Government responded to the Commission Report, reiterating the arguments in its previous submission and stating that the Commission's conclusions were in conflict with United States domestic law. Ex. 2 ¶ 115 [Commission Report].

The Commission reiterated its recommendation that the United States provide Mr. Garza with an effective remedy for these violations, including commutation of his sentence. Id.¶ 121(1). In particular, the Commission found, in pertinent part, the following:

- The American Declaration prohibits the application of the death penalty in an arbitrary manner. Id. ¶¶ 90-91.

- Due process protections apply equally in the guilt and the sentencing stages of a criminal prosecution. Id. ¶ 102.

- The introduction of evidence of the uncharged offenses did not comply with due process requirements, with the result that Mr. Garza "was also convicted and sentenced to death for the four murders alleged to have been committed in Mexico, but without having been properly and fairly charged and tried for these additional crimes." Id. ¶ 105.

- "[T]he prejudice resulting from the determination of Mr. Garza's guilt for four additional murders during his sentencing hearing was compounded by the fact that lesser standards of evidence were applicable during the sentencing process." Id. ¶ 108.

- "[A] significant and substantive distinction exists between the introduction of evidence of mitigating and aggravating factors concerning the circumstances of an offender or his or her offense, such as those enumerated in 21 U.S.C. 848(n), and an effort to attribute to an offender individual criminal responsibility for violations of additional serious offenses that have not, and indeed could not under the State's criminal law be charged and tried pursuant to a fair trial offering the requisite due process guarantees. The State itself asserts that the purpose of a sentencing hearing is to determine the appropriate punishment for a defendant's crime, not to prove guilt. Yet proving Mr. Garza's guilt for the four unadjudicated murders so as to warrant imposition of the death penalty was, by the Government's own admission, precisely the intended and actual effect of its effort in introducing evidence in this regard during Mr. Garza's sentencing hearing." Id. ¶ 109 (emphasis added).

- The Government's "conduct in introducing evidence of unadjudicated foreign crimes during Mr. Garza's capital sentencing hearing was antithetical to the most basic and fundamental judicial guarantees applicable in attributing responsibility and punishment to individuals for crimes." Id. ¶ 110 (emphasis added).

On April 24, 2001, just weeks after the Commission ratified and published its final report, Mr. Garza filed, in the United States District Court for the Southern District of Indiana, a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 seeking recognition of the Commission's decision in his favor and a new sentencing hearing free of the evidence concerning the unadjudicated foreign murders which the Commission found violated his human rights. Ex. 3 [Petition for Writ of Habeas Corpus]. Mr. Garza also filed a motion with the district court to stay his June 19, 2001 execution date. In response to a show cause order issued by the district court, the United States argues primarily that Mr. Garza is procedurally barred from bringing his claim, and secondarily that the Commission's decision is only a recommendation to the United States and provides no basis for relief for Mr. Garza. Mr. Garza has been provided until May 21, 2001 to file a reply to the Government's response to the show cause order and will request oral argument before the district court.

Mr. Garza should be granted clemency in the form of commutation of his sentence to life in prison without the possibility of release regardless of the outcome of the court's disposition of his habeas petition concerning the

Commission's decision in his favor. 5/ In considering whether Mr. Garza should be granted clemency based on the Commission's decision, the procedural objections raised by the Government in response to the habeas petition are irrelevant. 6/ Compliance with the substance of the Commission's Report, in the form of a commutation by the President of Mr. Garza's sentence, is particularly appropriate because the Executive branch of our government has the primary role in conducting foreign affairs. Providing Mr. Garza with clemency on this basis is further consistent with a recent statement by the Attorney General that "we will—by virtue of going even beyond the technical demands of the law to achieve justice . . . pursue the ends of justice so thoroughly that [the American people] can have confidence in the [federal death penalty] system." Ex. 4 [Tr. of Statement by Attorney General Ashcroft (5/11/01)].

In recent weeks, the leading role of the United States in the area of international human rights has been called into question by, among other things, the recent vote through which the United States lost its position as a member of the United Nation's Commission on Human Rights. In light of this development, the President has expressed, through White House Press Secretary Ari Fleischer, that the United States plans to "continue its role as a beacon of freedom and human rights." Ex. 5 [Tr. of Press Briefing by Ari Fleischer (5/8/01)]. Granting Mr. Garza

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5/ At a minimum, Mr. Garza requests that he be granted a further reprieve to allow the courts to consider his habeas petition.

6/ The Government's objections are also meritless, as will be shown by Mr. Garza before the district court.

clemency would effectuate the Commission's Report and signal to the international community that the United States takes seriously matters of international human rights.

In contrast, to execute Mr. Garza in the face of a decision by an international tribunal – created by an organization to which the United States is a signatory member and has provided substantial funding for more than 50 years – squarely ruling that Mr. Garza's execution would violate the United States' treaty obligations, would send a message to the international community that the United States considers itself above the law in matters of international human rights. The failure of the United States to act in response to the Commission's recommendation could severely damage the integrity and authority of the OAS and the Commission in issuing future reports finding violations of international law by member states. If the statement of the White House Press Secretary on behalf of the President that "[t]he United States is the land where human rights prevail" has any substance, the President cannot disregard the Commission's reasoned decision. See id.

Granting clemency by commuting Mr. Garza's sentencing would also allow the Executive branch to show the United States' respect for the bilateral commitments to our neighbor, Mexico. In Mr. Garza's Clemency Memorandum, he explained that he was deported from Mexico under circumstances that strongly suggest that his deportation was engineered by U.S. Customs Agents so as to circumvent the United States-Mexico Extradition Treaty. See Clemency Mem. at 80-84. In a letter from the Mexican Counselor for Legal Affairs, Rodolfo Quilantan,

to Mr. Garza's counsel, Mexico confirms that there was no request by the United States to extradite Mr. Garza. See Ex. 6 [Letter from R. Quilantan to G. Wiercioch (12/15/00)]. Furthermore, Mr. Quilantan's letter confirms that had the United States sought to extradite Mr. Garza pursuant to the treaty, Mexico would have "refused to extradite Mr. Garza until the United States furnished assurances that the death penalty would not be imposed, or, if imposed, would not be executed, against Mr. Garza." Id.

Clemency for Mr. Garza, accordingly, is also appropriate to show that the United States respects the deeply held principles of its neighbor, Mexico, and will not permit its officials to ignore those principles when it appears expedient to do so.

II. RECENT SUPREME COURT PRECEDENT CONFIRMS THAT MR. GARZA'S DEATH SENTENCE VIOLATES DUE PROCESS BECAUSE HIS SENTENCING JURY WAS DENIED CRITICALLY RELEVANT INFORMATION THAT THE ONLY ALTERNATIVE TO THE DEATH PENALTY WAS LIFE IMPRISONMENT WITHOUT POSSIBILITY OF RELEASE

In a decision entered just two months ago, the United States Supreme Court confirmed that Mr. Garza's death sentence violates his constitutional right to due process because the jury that sentenced him to death was not informed that if Mr. Garza did not receive the death penalty, he would be sentenced to life in prison without the possibility of release. See Shafer, 121 S.Ct. 1263. Mr. Garza should be granted clemency to remedy this violation of his due process rights and to prevent him from becoming the only federal prisoner to be executed where the sentencing jury was denied accurate information about sentencing alternatives.

The jury that sentenced Mr. Garza to death was not provided with the accurate information that the only sentence other than death available under the Federal Sentencing Guidelines once the jury found – as it did – that Mr. Garza was responsible for intentional murder, was life in prison without the possibility of release. See Clemency Mem. at 43-53. As we explained in the original Clemency Memorandum, the prosecution in Mr. Garza's case repeatedly and inaccurately told the jury that Mr. Garza could be released from prison in as little as 20 years if he were not sentenced to death. Id. The United States Court of Appeals for the Fifth Circuit rejected Mr. Garza's claim on direct appeal that, pursuant to Simmons v. South Carolina, 512 U.S. 154 (1994), the district court had erred by failing to instruct the jury that Mr. Garza would be sentenced to life in prison without the possibility of release if he were not sentenced to death. United States v. Flores, 63 F.3d 1342, 1367-68 (5th Cir. 1995). In affirming Mr. Garza's death sentence, the Fifth Circuit reasoned as follows:

> [A]ssuming without deciding that the jury's findings of intentional killing would be binding on the sentencing judge and therefore prevent a downward departure, the court could not predict before the jury begins its deliberation whether it is going to find the necessary intent. Thus, when the attorneys make their final arguments in the penalty phase and when the court gives its penalty instructions, no one would know whether life imprisonment would be the only permissible sentence.

63 F.3d at 1368.

In Shafer, the Supreme Court emphatically rejected identical reasoning that was employed by the South Carolina Supreme Court. The South Carolina Supreme Court had refused to apply Simmons on the basis that when a

South Carolina capital jury begins its punishment phase deliberations – like the federal capital jury in Mr. Garza's case – the possibility of a sentence of less than life without parole is available if the jury does not find a statutory aggravating circumstance. South Carolina v. Shafer, 531 S.E.2d 524, 528 (S.C. 2000). In support of its erroneous holding, the South Carolina Supreme Court relied on the Fifth Circuit's decision in Mr. Garza's case. Id.

The United States Supreme Court held that the South Carolina Supreme Court had misapplied Simmons. Shafer, 121 S. Ct. at 1271-73. The Court noted that a South Carolina capital jury may not impose a sentence of life without the possibility of parole unless it unanimously finds a statutory aggravator. Where the jury finds no aggravating facts, the choice of sentence is removed from the jury and transferred to the judge, and Simmons has no relevance. Only if the jury finds an aggravating circumstance may it consider a death sentence; and once the jury finds an aggravating circumstance, its choice is limited to the two options of death or life without parole. The Court explained:

> The South Carolina Supreme Court was no doubt correct to this extent: At the time the trial judge instructed the jury in Shafer's case, it was indeed possible that Shafer would receive a sentence other than death or life without the possibility of parole. That is so because South Carolina, in line with other States, gives capital juries, at the penalty phase, discrete and sequential functions. Initially, capital juries serve as factfinders in determining whether an alleged aggravating circumstance exists. Once that factual threshold is passed, the jurors exercise discretion in determining the punishment that ought to be imposed.
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> * * *

> In sum, when the jury determines the existence of a statutory aggravator, a tightly circumscribed factual inquiry, none of Simmons' due process concerns arise. There are no 'misunderstanding[s]' to avoid, no 'false choice[s]' to guard against . . . . The jury, as aggravating circumstance factfinder, exercises no sentencing discretion itself. If no statutory aggravator is found, the judge takes over and has sole authority to impose the mandatory minimum . . . . It is only when the jury endeavors the moral judgment whether to impose the death penalty that parole eligibility may become critical. Correspondingly, it is only at that stage that Simmons comes into play, a stage at which South Carolina law provides no third choice, no 30-year mandatory minimum, just death or life without parole.

Id. at 1272-73 (internal quotation omitted). When the prosecution puts a capital defendant's future dangerousness at issue and a capital jury has decided that one or more aggravating circumstances are present and, therefore, assumes the duty of deciding whether or not to impose the death penalty, Shafer requires that the jury must clearly understand the choices available. If life imprisonment without parole is the only alternative to the death penalty, as it was in Shafer, due process requires that the jury receive an instruction to that effect. Id.

The Supreme Court's reasoning in Shafer applies with equal force to the federal capital sentencing scheme in effect at the time of Mr. Garza's trial. Shafer reiterates and clarifies the rule of Simmons: Where (1) the Government relies on the defendant's alleged future dangerousness as an aggravating factor, and (2) life imprisonment without parole is the only *actual* alternative to the death penalty in the defendant's case, due process requires that the jury be told that the defendant can never be released from prison if his life is spared. Shafer teaches that the availability of a sentence of less than life without the possibility of parole at the

beginning of closing arguments or deliberation cannot form the basis for refusing a Simmons instruction if the jury's later findings on aggravating circumstances will necessarily have eliminated consideration of that sentence as an alternative to death by the time the jury actually comes to make its sentencing decision. In other words, Shafer demonstrates the error committed by the Court of Appeals for the Fifth Circuit in affirming Mr. Garza's sentence because the government raised the issue of Mr. Garza's future dangerousness, and the jury was not instructed that once it found Mr. Garza to have committed international murder the only permissible sentences were death or life in prison without the possibility of parole.

On May 7, 2001, Mr. Garza filed a motion with the United States Court of Appeals for the Fifth Circuit seeking leave to file a successive motion under 28 U.S.C. § 2255 to vacate Mr. Garza's sentence based on the Supreme Court's decision in Shafer. Ex. 7 [Motion To Vacate Sentence Under 28 U.S.C. § 2255]. 7/ Clemency on the basis of the due process violation that occurred in Mr. Garza's sentencing proceeding, regardless of the outcome of this request for leave to file a successive motion to vacate his sentence, is appropriate given the difficult procedural barriers imposed by ADEPA. These procedural hurdles may ultimately thwart the ability of Mr. Garza to get a hearing on the substantive issue raised by his petition. If one takes seriously the Attorney General's recent statement that "the American people . . . have a right to have confidence in our processes" in

7/ At a minimum, Mr. Garza requests a further reprieve to allow the courts to decide his pending application to file a successive motion and, if leave to do so is granted, the merits of that motion.

imposing the federal death penalty, Mr. Garza cannot be executed. Ex. 4 [Tr. of Statement by Attorney General Ashcroft (5/11/01)]. The Supreme Court's most recent precedent shows that Mr. Garza's constitutional rights were violated in the process that resulted in the federal death penalty he received.

Clemency is further appropriate on this ground because Mr. Garza is the only person now on federal death row who was sentenced by a jury that was not properly informed that if the jury did not agree on a capital sentence, the only alternative punishment was life in prison without the possibility of release. In 1994, after the Supreme Court decided Simmons, Congress amended the statute under which Mr. Garza was sentenced so that juries in federal capital cases not only would obtain accurate sentencing information regarding life in prison without the possibility of parole but also would have the authority to impose that sentence. See 18 U.S.C. § § 3593(e), 3594. Every defendant convicted under the federal Drug Kingpin Act who was not sentenced to death has been sentenced to life imprisonment without the possibility of release. Clemency is thus appropriate to ensure that Mr. Garza does not fall through the cracks and become the only federal prisoner executed in violation of his due process right to have the jury accurately informed about the punishments available where life in prison without parole is the only alternative to death and where the prosecution has raised the issue of the defendant's future dangerousness.

III. MR. GARZA SHOULD BE GRANTED CLEMENCY BECAUSE NO ONE CAN HAVE ANY CONFIDENCE THAT THE GOVERNMENT'S DECISION TO SEEK THE DEATH PENALTY AGAINST HIM WAS NOT BASED ON HIS ETHNICITY OR STATE OF PROSECUTION

Mr. Garza was granted a six-month reprieve in December, 2000 because a report by the Department of Justice revealed disparities that President Clinton believed had to be further studied before Mr. Garza, a Hispanic American from the State of Texas, should be executed. During the confirmation process, Attorney General Ashcroft pledged his commitment to continuing the study of racial/ethnic and geographic disparities in the administration of the federal death penalty. But, today, with Mr. Garza's execution date fast approaching, no such studies have been completed. Indeed, it appears that research contemplated by the National Institute of Justice ("NIJ") designed to explore the potential causes of these disparities, has not even begun. The same disparities and concerns, therefore, that provided the basis for a reprieve for Mr. Garza in December 2000 exist, unameliorated, today. It would be unconscionable to execute Mr. Garza now, when grave doubts exist as to whether or not his ethnicity and state of prosecution played a role in the Government's decision to seek the death penalty in his case.

On September 12, 2000, the Department of Justice released The Federal Death Penalty System: A Statistical Survey (1988-2000) (hereinafter "DOJ Study"). As detailed in Mr. Garza's original Clemency Memorandum, the DOJ Study revealed striking disparities along racial/ethnic and geographic lines at every stage of the capital punishment process. In light of the DOJ Study, Attorney General Janet Reno 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 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.**

Ex. 8 to Clemency Mem. at 3 [Sept. 12, 2000 Tr. of Press Conf.] (emphasis added).

On December 7, 2000, President Clinton granted a reprieve to Mr. Garza "to allow the Justice Department time to gather and properly analyze more information about racial and geographic disparities in the federal death penalty system." Ex. 8 [Statement of President Clinton, White House Office of the Press Secretary (12/7/00)]. The President further explained that:

> [T]he examination of possible racial and regional bias [in the administration of the federal death penalty] should be completed before the United States goes forward with an execution in a case that may implicate the very questions raised by the Justice Department's continuing study. In this area there is no room for error.

Id. President Clinton further asked that the Attorney General report by the end of April 2001 "on the Justice Department's analysis of the racial and geographic disparities in federal death penalty prosecutions." Id. To date there has been no release of an additional study from the Department of Justice that addresses the causes of the identified racial/ethnic and geographic disparities.

In addition to examination of data by the Department of Justice, the NIJ also planned to sponsor independent research to further explore the racial and geographic disparities in the administration of the federal death penalty. On January 10, 2001, the acting Director of NIJ, Julie Samuels, convened a group of

researchers as well as practitioners for both the government and defense to examine research questions, data sources and related issues. At this meeting, Ms. Samuels suggested that NIJ would issue requests for proposals for several different studies concerning potential bias in the administration of the federal death penalty. Under the timeline proposed by Ms. Samuels, none of the studies would be completed for at least a year to 18 months after the requests for proposals were issued. To date, we understand that no requests for proposals have been issued by NIJ for this project.

To execute Mr. Garza in the face of this official recognition that additional study is necessary to determine whether bias exists in the administration of the federal death penalty would be unconscionable. It would further be inconsistent with expressions of concern about the disparities revealed in the DOJ Study that have been expressed by Attorney General Ashcroft, among others. Attorney General Ashcroft has stated that the racial and ethnic disparities evident in the DOJ Study "trouble[ ] [him] deeply," and has agreed that "the fair, just and sure administration of the federal death penalty requires that it be applied completely free of racial bias." Ex. 1 at 5. [Written Answers by John Ashcroft to Questions by Senator Russell D. Feingold (1/22/01)]. Attorney General Ashcroft has further stated that he agrees with President Clinton's assessment that "in this area there is no room for error." Id. at 6.

Recognizing the seriousness of the disparities evident in the DOJ Study, Attorney General Ashcroft pledged his commitment, during the confirmation process, to further studies of potential bias in the administration of the federal

death penalty. In the following questioning by Senator Feingold, Attorney General Ashcroft pledged that if confirmed as Attorney General he would continue the studies called for by Attorney General Reno:

Feingold: . . . I would ask if you agree with President Clinton that the gravity and finality of the death penalty demand that we be certain that, when it is imposed, it is imposed fairly?

Ashcroft: I think it is a very serious responsibility, and it should be only after a very reliable process of integrity has been undertaken.

. . . **I take very seriously doing what we can to make sure that we have thorough integrity and validity in the judgments we reach.**

Feingold: Well, in light of that answer, I will ask if you will support the effort of the National Institute of Justice that is already under way to undertake the study of racial and geographic disparities in the administration of the federal death penalty that President Clinton deemed necessary.

Ashcroft: Yes.

Feingold: Thank you for that.

Will you continue and support all efforts initiated by Attorney General Reno's Justice Department to undertake a thorough review and analysis of the federal death penalty system?

Ashcroft: I thought that's what you were referring to in the first instance, but the studies that are underway, I'm grateful for them. When the material from those studies comes, I will examine them carefully and eagerly to see if there are ways for us to improve the administration of justice. I have absolutely no reason, in any respect, to think that we want to turn our backs on a capacity to elevate the integrity of our judicial

system, especially in criminal matters, and most importantly in matters that are capital in nature.

Feingold: So those studies will not be terminated?

Ashcroft: **I have no intention of terminating those studies.**

Ex. 9 at 32-33 [Tr. of Jan. 17, 2001 Hearing Before Senate Judiciary Committee] (emphasis added).

In answers to written questions from Senator Feingold, the Attorney General further pledged his commitment to a federal capital punishment system free from racial bias, stating:

> I fully agree that the **Department of Justice should do everything necessary to eliminate any racial bias from the federal death penalty system**, including undertaking all reasonably and appropriate research necessary to understand the nature of the problem.

Ex. 1 at 6 [Written Answers by John Ashcroft to Questions by Senator Russell D. Feingold (1/22/01)] (emphasis added). Ashcroft also stated that "race [should not] play any role in determining whether someone is subject to the capital punishment." Id.

The DOJ Study shows that the American people can have no confidence that race and ethnicity have not played a role in determining whether someone is subject to federal capital prosecution. During the period of 1988-1994 – the period after reinstatement of the federal death penalty and before the Department of Justice instituted the Death Penalty Protocols – every single federal defendant in Texas as to whom the death penalty was considered, recommended or

authorized was, like Mr. Garza, Hispanic. Ex. 4 to Clemency Mem. [Tables: Federal Prosecutions in Texas: U.S. Attorney and Attorney General Death Penalty Decision-Making]. No data has been published since the issuance of the DOJ Study that would eliminate the concern that the disparities clearly evident in the DOJ Study may be the result of either conscious or unconscious bias at some stage of the process.

The disparities evident in the administration of the federal death penalty are the ultimate form of racial profiling by which minorities are treated differently from whites committing similar acts, with one important difference. Whereas, in the more conventional racial profiling situation, the harsher treatment of minorities results in a traffic stop and search, here the harsher treatment results in selection for capital prosecution. In either case, it should not be permitted to occur in the United States. As Attorney General Ashcroft has stated:

> The Justice Department . . . is undertaking a review of all federal law enforcement agencies and policies with regard to race, to make sure that we don't inappropriately deal with people based on their race. **It's unacceptable for the federal government to do so. I think it's wrong for any government to do so. I believe it to be a breach of the constitutional rights of individuals if they are interfered with or otherwise treated in a way which singles them out because of their race.**

Ex. 10 at 4 [April 4, 2001 Speech by Attorney General to Newspaper Editors (transcript available at www.usdoj.gov/ag/speeches/2001/0404newspapereditors.htm)] (emphasis added).

Put most simply, there can be no confidence that the choice of Mr. Garza for federal capital prosecution was "completely free of racial bias." See

Ex. 1 at 5 [Written Answers by John Ashcroft to Questions by Senator Russell D. Feingold (1/22/01)]. Our government should not execute Juan Garza unless it can be fully confident that his ethnicity and state of prosecution did not play a role in the decision to seek the death penalty in his case. If it cannot achieve the high degree of confidence necessary where the death penalty is at issue, Mr. Garza's sentence must be commuted. As Attorney General Ashcroft has stated, when it comes to the death penalty, "[i]f any questions or doubts remain [at the time the defendant is executed] it would cast a permanent cloud over justice." Ex. 4 at 3. [Tr. of Statement by Attorney General Ashcroft (5/11/01)].

IV. MR. GARZA'S PRISON RECORD CONTINUES TO REFLECT THAT HE WILL BE NO DANGER TO OTHERS IF ALLOWED TO SPEND THE REMAINDER OF HIS LIFE IN PRISON

At the sentencing phase of Mr. Garza's trial, the Government argued that the death penalty was necessary because Mr. Garza posed a threat of future dangerousness while in prison. In his Clemency Memorandum and subsequent filing under seal of November 18, 2000, 8/ Mr. Garza provided information showing that the Government's prediction was entirely incorrect and that he has not posed a threat of future dangerousness from prison. Mr. Garza's clean disciplinary record while in federal custody has continued. As shown by the most recent Progress Report from the Federal Bureau of Prisons, Mr. Garza has "maintained clear institutional conduct." Ex. 11 [May 4, 2001 Progress Report from Federal Bureau of

8/ Our supplemental filing on November 18, 2000 was filed under seal. It was re-submitted to the Office of White House Counsel and the Attorney General by hand delivery on May 11, 2001.

Prisons]. It is clear that if Mr. Garza were allowed to spend the remainder of his life in federal prison, he would not pose a threat of future harm to anyone.

V. CONCLUSION

For the foregoing reasons, and the reasons stated in his Clemency Memorandum and supporting materials, 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 in prison without the possibility of parole.

Respectfully submitted,

/S/ BRUCE W. GILCHRIST

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