

Testimony of
Paul K. Charlton

June 27, 2007

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Oversight of the Federal
Death Penalty
United States Senate
Judiciary Committee
Subcommittee on the Constitution

The Hon. Russell D. Feingold, Chairman
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Chairman Feingold, Ranking Member Brownback, and distinguished Members of the Committee, thank you for inviting me to testify about the death penalty and my experience with its implementation during my time as U.S. Attorney for the District of Arizona. Prior to leaving my position as U.S. Attorney, I served as a career prosecutor with over 16 years of experience. I loved the job of prosecutor. It is a profession that allows you to get up each morning with the single goal of doing what is right, and affords you the opportunity to go to bed each night knowing that you have contributed in some way to the betterment of society.

While there are surely a number of professions that can provide the same rewards, few carry the enormous responsibility and power that a prosecutor possesses. The decisions a prosecutor makes may alter or destroy reputations and careers. Where appropriate, a prosecutor will bring charges in order to deprive a criminal of his liberty interest.

But it is the ultimate penalty that marks the profession of prosecutor as unique. Federal law allows a prosecutor to seek to take another person's life, and to do so methodically and intentionally. Of all of the decisions that a prosecutor will make in his or her career, none will be more important than the whether to seek the death penalty.

In all cases it is important that prosecutors strive to do right as well as be right about the cases they bring. Before a case is presented to a grand jury, and long before a case makes its way to a petit jury, it is the prosecutor's responsibility to weigh the evidence of a prospective case. In order to assure that a prosecutor correctly decides to seek the death penalty, that prosecutor must carefully look at all of the evidence and take into consideration the opinions of all who have special knowledge of the case and facts.

To illustrate this point, I wish to share my experience with you on a case which is currently set for trial. In that case, *United States v. Rios Rico*, the Attorney General ordered that the Arizona U.S. Attorney's office seek the death penalty. I disagree with the Attorney General's decision in *Rios Rico*. I understand, however, that it is a decision for the Attorney General, not me, to make.

The object of my testimony is not argue with the ultimate decision of the Attorney General, though, as I say, it is one with which I disagree. My goal, instead, is to illuminate the process, or lack thereof, that went into supporting the decision of the Attorney General to seek the death penalty. In arriving at its decision to seek the death penalty in Rios Rico, I believe that the Department of Justice erred in two ways. First, the Department failed to consider the quality of the evidence underlying the charges in the case. Second, the Department did not adequately take into consideration the opinions of the U.S. Attorney or the line prosecutors. Failing to consider these issues raises the risk that we will execute someone who is not deserving of the death penalty, and that is a mistake that we as a society cannot make.

The facts underlying the case of United States v. Rios Rico allege that the defendant, a methamphetamine dealer, murdered his supplier. The majority of the government's case relies on the testimony of cooperating witness, witnesses who have pleaded guilty to a charge and agreed to testify against the defendant. This evidence justifies, in my opinion, bringing a case against the defendant and, in the event of a conviction, seeking a term of prison for a term of years or life.

What removes Rios Rico from the realm of a death penalty case is the lack of forensic evidence directly linking the defendant to the victim's death. That means, for example, that there is no gun, no ballistics, no victim's DNA on the defendant. In fact, there is no body.

This paucity of forensic evidence, evidence that doesn't forget and cannot lie, means, in my opinion, that Rios Rico should not be a death penalty case. If a government seeks to take another person's life it should do so on only the best of evidence. I argue, therefore, that it is right to consider not just that the government is likely to win a prosecution, here I believe that there is a great likelihood of success, I argue that it is right to consider the quality of the evidence before seeking death. Where the evidence is largely testimonial, and forensic evidence is lacking, the risk that we are wrong, that we might convict and execute the wrong man, however slight, is too high.

Just as compelling though, is this additional fact: the government knows where the body lies. The victim is buried in a landfill in Mobile, Arizona. For the price of between \$500,000 to \$1,000,000, the government can exhume the body. While I served as the U.S. Attorney, we asked DOJ to pay for the exhumation. DOJ refused.

The body of the victim, were it recovered, might provide the forensic evidence that would ensure sufficient evidence to allow the government to seek the death penalty in good conscience. The body might, on the other hand, provide evidence that exculpates the defendant in some manner. Either way, it is wrong for the government to both seek the death penalty and at the same time refuse to provide funds to obtain evidence that could prove a vital link in supporting or negating its position.

With this in mind, I sought to convince the Death Penalty Committee not to recommend death in this case. The line Assistant U.S. Attorney's, the prosecutors assigned to the case, made their arguments to the Death Penalty Committee in person and we submitted a written memorandum setting out the reasons in support of my view that the death penalty was not appropriate.

Under the previous Attorney General, when the Death Penalty Committee disagreed with my decision, I was notified of that disagreement. Here, the Death Penalty Committee rejected my position and that of the line Assistants. I received no word of their disagreement until I received a letter from Attorney General Gonzales "authorizing" me to seek the death penalty. No one had sought my opinion or provided me with an opportunity to give additional input after our initial presentation to the Death Penalty Committee.

Once I received the Attorney General's letter, I asked to have the decision reconsidered. In so doing I spoke with a number of individuals, including people within the Office of the Attorney General and the Assistant Attorney General for the Criminal Division. My most memorable discussion took place with Deputy Attorney General Paul McNulty. After speaking with McNulty, I received a call from his chief of staff, Mike Elston. Elston indicated that McNulty had spoken to the Attorney General and that McNulty wanted me to be aware of two things. First, that McNulty had spent a significant amount of time on this issue with the Attorney General, perhaps as much as 5 to 10 minutes. Second, McNulty wanted me to know that in presenting my view, he, McNulty, had remained neutral, neither supporting nor opposing my position. I was struck that on an issue as important as whether to execute someone, so little time would be devoted to the topic and that the Deputy Attorney General would maintain a neutral position. Elston reported that the Attorney General remained in favor of seeking the death penalty. When I asked to speak with the Attorney General personally on this issue, he denied my request.

The Rios Rico case is instructive for a number of reasons. The Department should consider the quality of the evidence before determining whether to seek the death penalty. That did not happen here. The Department should give great weight to the opinions of the line prosecutors who are prosecuting the case. That did not happen here. The Attorney General should provide the U.S. Attorney with the opportunity to speak with the Attorney General personally on the issue of whether to seek the death penalty. That did not happen here.

These issues are not so unique that they cannot be repeated. My hope is that my testimony will provide this Subcommittee and the Department with an opportunity to reflect on the current process for deciding which cases merit seeking the death penalty and to make changes where appropriate.

Thank you again for the opportunity and privilege of testifying before you.