No. 06-672

In the Supreme Court of the United States

KENNETH WILK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Florida Association of Criminal Defense Lawyers ("FACDL") is a non-profit organization with a membership of over 1,500 attorneys and 23 chapters throughout the state of Florida.[1] The FACDL's members all are practicing criminal defense attorneys, and many focus on representing defendants in capital cases.

The question presented in this case relates directly to the role of defense counsel in capital cases, and the FACDL has substantial expertise in that area. The correct construction of the Federal Death Penalty Act's reasonable notice requirement has important practical implications for the proper resolution of capital criminal cases, and the issue potentially affects numerous federal capital prosecutions. Particularly because its members practice in the Eleventh Circuit, the FADCL has a strong interest in the appropriate resolution by this Court of this significant question.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the requirement of the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 *et seq.*, that the government "shall, a reasonable time before trial * * *, sign and file with the court, and serve on the defendant," notice of its intent to seek the death penalty. 18 U.S.C. § 3593(a). The Eleventh Circuit held in this case that the timeliness of the notice must be determined by assessing the period between its filing and the date the trial begins, and that an untimely

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk of this Court.

notice therefore may be rendered timely simply by delaying the trial. It expressly rejected the contrary conclusion of the Fourth Circuit that the relevant time period is the interval between the filing of the notice and the then-scheduled trial date, even if the trial is later rescheduled.

This question regarding the proper construction of Section 3593(a) has substantial practical importance, and review of the issue now by this Court is therefore warranted, for three interrelated reasons. First, the Eleventh Circuit's interpretation of Section 3593(a) inevitably will produce inconsistent administration of the federal death penalty. This Court has long recognized that the law abhors capriciousness in the application of the death penalty. "[A] matter so grave as the determination of whether a human life should be taken or spared" must be decided carefully and consistently without reference to arbitrary factors such as jurisdiction. *Zant* v. *Stephens*, 462 U.S. 862, 874 (1983) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 189 (1976)). "[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." *Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982).

The disagreement among the lower courts regarding Section 3593(a) undercuts the reliability and rationality of the federal death penalty. The Fourth Circuit has interpreted Section 3593(a)'s mandate of a "reasonable" period of time between the government's notice of intent to seek the death penalty and the trial to require that reasonableness be assessed on the basis of the scheduled trial date *at the time the notice was filed*, and would strike any notice filed unreasonably close to that trial date. *United States* v. *Ferebe*, 332 F.3d 722 (4th Cir. 2003). In the present case, the Eleventh Circuit interpreted the statute to allow the district court to cure an untimely death notice by delaying the trial date, in effect ensuring that *every* death notice, no matter how close to the scheduled trial date it is filed, could be rendered reasonable by simply granting a delay. The Second Circuit in *United States* v. *Robinson*, 473 F.3d 487 (2d Cir. 2007) held that de-

nials of motions to strike a death notice are not immediately appealable, so the issue may not be addressed by an appellate court until after the trial.

As a result of these differing interpretations, defendants indicted for the same crime who receive an untimely notice of intent to seek the death penalty *may* still be eligible for the death penalty in the Eleventh Circuit but *not* in the Fourth, based on no more than the federal jurisdiction in which they are charged. And in the Second Circuit, district courts may adopt differing constructions of Section 3593(a), so that the rule applied to a defendant depends upon the particular district judge assigned to his case.

Second, in every circuit but the Fourth Circuit, defendants and their attorneys cannot be certain whether or not the government will seek the death penalty until the very day their trials begin. Because specialized death penalty defense attorneys are invariably requested and assigned at the outset of potential capital cases, this uncertainty needlessly extends the period of time during which capital defense resources are consumed in preparing for trials that in the end turn out to be *non*-death cases. It is well documented that defense attorneys already have to sacrifice the thorough representation of some defendants by rationing their limited resources. The unnecessary expenditures of scarce resources resulting from the decision below thus deprives defendants in capital cases of funds needed for a vigorous defense.

Third, the Eleventh Circuit's rule invites potentially prejudicial delay of trials, further threatening to impede the fair and effective use of death defense resources. The rule allows the government to seek pre-trial delay in order to render reasonable what otherwise would be an untimely notice of intent to seek the death penalty. By extending the pretrial period – and stretching investigative resources even thinner – this delay reduces the effectiveness of these very limited resources.

This Court should therefore grant review to eliminate unacceptable arbitrariness in the administration of the federal death penalty and to prevent the waste of resources that imperils the effective defense of individuals put on trial for their lives.

ARGUMENT

THE PROPER INTERPRETATION OF THE FEDERAL DEATH PENALTY ACT'S REASONABLE NOTICE REQUIREMENT IS A QUESTION OF SUBSTANTIAL PRACTICAL IMPORTANCE WARRANTING THIS COURT'S IMMEDIATE ATTENTION.

A. The Divergent Approaches Of The Lower Courts Produce Unacceptable Arbitrariness In The Administration Of The Federal Death Penalty.

The conflicting decisions of the lower courts regarding Section 3593(a) inevitably will lead to arbitrary application of the federal death penalty, with the decision whether a defendant will face the death penalty turning entirely on the circuit in which the prosecution takes place. Because this Court has long held that the death penalty must be administered fairly and consistently, the Court should grant review to remedy this geography-based arbitrariness in the application of the federal death penalty.

The cornerstone of this Court's death penalty jurisprudence is that "a matter so grave as the determination of whether a human life should be taken or spared" must be decided carefully and consistently. *Zant* v. *Stephens*, 462 U.S. 862, 874 (1983) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)). As the Court, speaking through Justice Thomas, observed in *Jones* v. *United States*, 527 U.S. 373 (1999), "the Eighth Amendment requires that a sentence of death not be imposed arbitrarily." *Id.* at 381 (citing *Buchanan* v. *Angelone*, 522 U.S. 269, 275 (1998)). Accordingly, "capital punishment [must] be imposed fairly, and with reasonable

consistency, or not at all." *Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982).

The reason that consistency and fairness are constitutionally indispensable in the context of the death penalty is that "the penalty of death is qualitatively different from any other sentence [and] this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (citation and internal quotation marks omitted). "[T]here is no doubt that death is different." *Ring* v. *Arizona*, 536 U.S. 584, 605-06 (2002) (citation omitted). Accordingly, the death penalty necessitates stricter scrutiny and defendants are afforded greater protections than are available in other contexts. See, *e.g.*, *Ake* v. *Oklahoma*, 470 U.S. 68 (1985) (recognizing constitutional right to expert witnesses regarding mental state in capital trials).

If identical cases arise in the Fourth Circuit and in the Eleventh Circuit and the prosecutor in each case files an identically untimely notice of intent to seek the death penalty, the defendant in the Fourth Circuit will not face the death penalty (under the holding of *United States* v. *Ferebe*, 332 F.3d 722 (4th Cir. 2003)), while the similarly situated defendant in the Eleventh Circuit will continue to face death, albeit with a delayed trial date, under the decision in the present case. Based on nothing more than geographic location, the defendant in the Fourth Circuit will be spared the death penalty while the similarly situated defendant in the Eleventh Circuit may still be executed.

Moreover, the Second Circuit's holding that an order denying a motion to strike a death notice for violating Section 3593(a) "fails to qualify as a collateral order" (*United States* v. *Robinson*, 473 F.3d 487, 492 (2d Cir. 2007)) means that the applicable standard in that circuit will be left to individual district courts – thus multiplying the arbitrariness based on geographic location. In *United States* v. *McGriff*, 427 F. Supp. 2d 253 (E.D.N.Y. 2006), *appeal dismissed for lack of*

jurisdiction sub nom. United States v. *Robinson*, 473 F.3d 487 (2d Cir. 2007), the district court observed that "the existing cases divide" on the proper interpretation of the provision (*id*. at 266), and declined to hold that "an untimely Death Notice cannot be rescued by delaying the trial date." *Id*. at 268 (citation omitted). The district court also rejected the "equally extreme" rule that "striking an untimely death-penalty notice is never appropriate" (*ibid*.), suggesting that the remedy should be based on a number of factors applied on a case-by-case basis. Another court in the same district has indicated a different view. See *United States* v. *Pepin*, 367 F. Supp. 2d 315, 318 (E.D.N.Y. 2005) (suggesting that a court may "effectively address the concerns raised by a motion to strike a death notice as untimely by postponing the trial").

District courts in other circuits also are grappling with the issue. In *United States* v. *Gomez-Olmeda*, 296 F. Supp. 2d 71 (D.P.R. 2003), the court struck a death penalty notice filed fewer than twenty-four hours before a defendant was scheduled to plead guilty. *Id*. at 87. The court agreed with the Fourth Circuit that the determination of whether a death notice was filed a "reasonable time before the trial" should be addressed prior to trial. However, like the courts in *Pepin* and *McGriff*, the court in *Gomez-Olmeda* refused to hold, as have several district courts in the Fourth Circuit post-*Ferebe*,[2] that a continuance could *never* be an appropriate remedy for an untimely death notice. *Gomez-Olmeda*, 296 F. Supp. 2d at 87. See also *United States* v. *Roman*, 371 F. Supp. 2d 36 (D.P.R. 2005) (striking a death notice that was unreasonably delayed, but refusing to hold that such a remedy is the exclusive cure for an untimely death notice).

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[2] *United States* v. *Cuong Gia Le*, 316 F. Supp. 2d 343 (E.D. Va. 2004); *United States.* v. *Hatten*, 276 F. Supp. 2d 574 (S.D. W. Va. 2003).

Disagreements among the lower courts that make geographic location alone determinative of whether the federal death penalty is available create a regime that is arbitrary and irrational. Not surprisingly, this Court has been vigilant in its review of conflicting interpretations of federal law when the statute determines whether a defendant is eligible for or ultimately receives the death penalty. In *Jones*, for instance, this Court granted certiorari to resolve whether, under the Federal Death Penalty Act, the jury's failure to reach a unanimous verdict recommending either a death sentence or life imprisonment creates "good cause" for discharge of the jury. 527 U.S. at 380-82.

Similarly, the Court routinely reviews conflicting interpretations of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") to ensure that federal habeas standards are consistent throughout the nation. Last term the Court resolved whether courts may raise *sua sponte* the statutory limitations created by AEDPA. *Day* v. *McDonough*, 126 S. Ct. 1675 (2006). See also *Pace* v. *DiGuglielmo*, 544 U.S. 408, 410 (2005) (resolving conflict among courts of appeals as to whether an untimely state post-conviction petition rejected by the state court is "properly filed" for purposes of AEDPA); *Johnson* v. *United States*, 544 U.S. 295 (2005) (resolving disagreement among courts of appeals as to whether vacatur of prisoner's prior state convictions could renew the one year period of limitations for attacking a federal sentence under AEDPA).

Ensuring that the courts of appeals consistently interpret federal statutes that can have an outcome-determinative effect on the imposition of capital punishment is essential to exclude arbitrariness from the federal death penalty system. This Court should grant certiorari here because the lower courts' inconsistent decisions with respect to Section 3593(a) undercut the fair and consistent application of the federal death penalty.

By granting review in this case, moreover, the Court may address both of the issues that divide the courts of appeals. First, it can determine the appealability under the collateral order doctrine of district court orders denying motions to strike death notices (because that jurisdictional question is necessarily before the Court). The Second Circuit's holding in *Robinson* that such orders are not immediately appealable conflicts with the decision of the Fourth Circuit in *Ferebe* (see 332 F.3d at 726-30) and the Eleventh Circuit here (see Pet. App. 1a-2a). See also *United States* v. *Ayala-Lopez*, 457 F.3d 107, 108 (1st Cir. 2006) (assuming without deciding that denial of a motion to strike pursuant to Section 3593(a) is a collateral order).

This Court has held that a court of appeals may entertain an appeal of a district court's interlocutory order if the order "(1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment." *Sell* v. *United States*, 539 U.S. 166, 176 (2003) (quotation marks and alterations omitted). In *Ferebe*, the Fourth Circuit explained that "[t]here is no question but that the district court's order [denying the motion to strike the death notice] fully disposes of the issue to which it is directed," and that the issue is separate from the merits of the underlying criminal action. *Ferebe*, 332 F.3d at 726-27. As to the third element, Section 3593(a) "creates for defendants not merely the right not to be convicted and sentenced without adequate time to prepare, but also the right not to stand trial for one's life absent the same;" therefore, vacating a sentence and remanding *after* trial "does not protect (nor, for that matter, even remedy the denial of) the right not to be forced to endure a capital trial except upon reasonable notice that one will be required to do so." *Id.* at 730.

The Second Circuit disagreed with the last element of the Fourth Circuit's analysis in *Ferebe*, concluding that "§ 3593(a) does not create a right not to be tried." *Robinson*,

473 F.3d at 492. The Second Circuit reasoned that it could "review the district court's order--and the government's conduct--in the ordinary course, in the event [the defendant] is convicted and elects to appeal." *Ibid*.

That is the precise opposite of the view of the statute taken by the Fourth Circuit, which – speaking through Judge Luttig – explained in *Ferebe*:

> a post-trial assessment of prejudice to the accused * * * cannot possibly be correct. For such an analysis substitutes for the statutorily-mandated inquiry into the pre-trial, objective reasonableness of the time between issuance of the Death Notice and trial, a quite different, post-trial inquiry into the prejudice suffered by the accused as a result of the timing of the Death Notice – in effect a "harmless error" inquiry. This is to transform what was intended as a prophylactic statute into a mere remedial one, and to deny to the accused the right afforded by the statute, not merely to avoid sufferance of the punishment of death without adequate notice, but to avoid sufferance of trial for capital offense except upon adequate notice.

332 F.3d at 727.

Second, the Court can resolve the disagreement between the Fourth and Eleventh Circuits – and numerous district courts – regarding the proper interpretation of Section 3593(a), a disagreement discussed fully in the petition. The Court should grant the petition to restore uniformity to the administration of the federal death penalty with respect to this important issue.

B. Uncertainty About The Correct Legal Standard Squanders Scarce Defense Resources On Non-Capital Cases And Therefore Threatens To Impede The Ability Of Defendants In Capital Cases To Mount An Effective Defense.

Expanding the time period during which it is not certain whether a defendant may face the death penalty – the inevitable practical impact of the decision below – means that limited death penalty defense resources will be diverted from defendants who actually will be tried for their lives to defendants who *might*, but ultimately do not, face the death penalty. The Fourth Circuit's construction of the statute, by contrast, limits the period during which capital defendants are uncertain of whether the government will seek the death penalty and therefore conserves scarce capital defense resources for those defendants who actually are put on trial for their lives.

A recent report by the Judicial Conference of the United States found that "[j]udges generally report[] that prosecution resources in death penalty cases seem[] unlimited." Judicial Conference of the United States, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION, at § I(B)(5), May 1998, *available at* http://www.uscourts.gov/dpenalty/2TABLE.htm (hereinafter "JUDICIAL REPORT"). By contrast, defense attorneys often have to sacrifice the "thorough representation" of some defendants by "rationing" their limited resources. Darryl K. Brown, *Defense Attorney Discretion to Ration Services and Shortchange Some Clients*, 42 Brandeis L.J. 207, 211(2003).

Under federal law, any person indicted for a capital offense may obtain additional government-provided resources and defense counsel "learned in the law applicable to capital cases." *See* Act of June 25, 1948, c. 645, 62 Stat. 814 (codified at 18 U.S.C. § 3005) (amended Sept. 13, 1994, Pub. L.

103-322, Title VI, § 60026, 108 Stat. 1982).[3] Defendants are not required to wait for the government to file a death notice in order to begin utilizing these resources to prepare for a death penalty trial. Specialized death penalty defense attorneys, who are authorized by law to receive compensation greater than regular appointed defense attorneys (see 21 U.S.C. § 848(q)), are therefore invariably requested and assigned at the outset of a case in which the United States Attorney is likely to seek the death penalty.[4]

Available data indicates that a defendant can never be certain whether the United States will seek the death penalty until the time for filing a death notice has expired. There are a substantial number of cases in which the United States Attorney requests the death penalty, but the Attorney General declines to approve the request.[5] And there are a substantial

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[3] One study estimates that approximately 90% of capital defendants are indigent. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 329, 333 (Fall 1995). Defense costs in capital cases are therefore virtually always funded by the government.

[4] Failure to treat the case as a capital case until the expiration of the time for filing a death notice could inflict significant prejudice on a defendant, because evidence that is not relevant in a non-death case often is relevant in a death case. For example, delay in the investigation of sentencing considerations – especially investigation of mitigating factors such as the defendant's mental state – can harm the defendant because delay could mean that the evidence will no longer be fresh and could even be unavailable.

[5] The Attorney General makes the ultimate decision whether the government will seek the death penalty. See United States Department of Justice, United States Attorneys' Manual § 9-10.020. Between 1995 and 2000, United States Attorneys submitted 183 recommendations to seek the death penalty. The Attorney General ultimately declined to approve 24, or more than 13%, of those recommendations. See United States Department of Justice, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY,

number of cases in which the Attorney General overrules a United States Attorney's recommendation *not* to seek the death penalty.[6]

The longer that the government may delay its decision whether to seek the death penalty, the greater the amount of defense resources that will be misallocated to defendants who will not in fact face the death penalty – because each defendant's attorneys must prepare as if their client will be on trial for his life until the time for the government to request the death penalty has expired. Many millions of dollars therefore may be expended in preparing for capital trials that never occur because the government ultimately decides against seeking the death penalty – on average, a federal public defender spends 1,889 hours on a capital trial, *sixteen times more* than the average of 117 hours spent on a non-capital homicide case. *See* JUDICIAL REPORT at §§ I(A)(2), (B)(4). Defense resources are not unlimited, and this substantial diversion of funds means that fewer resources will be available to those individuals who actually end up facing the death penalty.

Sept. 12, 2000, *at* http://www.usdoj.gov/dag/pubdoc/dpsurvey.html.

[6] Between 2001 and 2003, the Attorney General overruled 33 of 286 recommendations of United States Attorneys not to seek the death penalty. *See* Memorandum from the Federal Death Penalty Resource Counsel, *Attorney General Ashcroft's Decisions Regarding the Federal Death Penalty* 3, July 17, 2003, *available at* http://www.capdefnet.org/pdf_library/81393.pdf. During this same period, the Attorney General nullified at least five plea agreements that United States Attorneys had executed with death-eligible defendants, transforming them into death penalty cases, at the surprise of even the United States Attorneys. John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When the U.S. Attorneys Recommend Against the Death Penalty*, 89 Va. L. Rev. 1697, 1698 (2003). See also Leigh Jones, *DOJ Is Quietly Rejecting Death Penalty Deals*, N.Y.L.J. (Feb. 7, 2003).

The disagreement among the lower courts creates considerable uncertainty regarding the time within which the government must file a death notice. That uncertainty exacerbates non-capital defendants' consumption of scarce capital defense resources. The Court should grant review to eliminate this uncertainty and the resulting diminution of resources available to effectively defend those individuals whose life actually is at stake.

C. The Delay Produced By The Eleventh Circuit's Approach Prejudices Defendants.

The Eleventh Circuit's rule also produces delay in the start of a capital trial – the delay that in the Eleventh Circuit's view renders reasonable an untimely notice of intent to seek the death penalty. That delay can prejudice defendants.

For example, funds available to indigent defendants for investigatory resources are already greatly constrained by federal statute. Section 222 of the USA PATRIOT Improvement and Reauthorization Act of 2006 sets capital defense teams' total investigative and expert budgets at just $7,500 for both the guilt and sentencing phases of trial. Pub. L. No. 109-177, 120 Stat. 192, 232 (codified at 18 U.S.C. § 3599). Defense counsel may exceed their budgets only "for services of an unusual character or duration" and following certification by the court and approval by the chief judge of the circuit in which the case is pending. *Ibid*.

Delaying a trial stretches investigative resources thinner, reducing their effectiveness. For instance, experts must be retained for longer periods of time, costing more money and requiring difficult rationing decisions. In fact, the Eleventh Circuit's rule may invite tactical delay on the government's part, as "[d]eliberate governmental delay in the hope of obtaining an advantage over the accused is not unknown. In such a circumstance, the fair administration of criminal jus-

tice is imperiled." *Dickey* v. *Florida*, 398 U.S. 30, 43 (1970) (Brennan, J., concurring).[7]

This Court should grant certiorari in order to avoid unfair and unjust rationing decisions that may imperil the effective defense of individuals put on trial for their lives.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[7] For specific examples of strategic governmental delay at trial, see, for example, *United States.* v. *Becerra*, 435 F.3d 931, 934-35 (8th Cir. 2006) (concluding that "the government made a voluntary decision to delay [trial] in order to seek a strategic or tactical advantage," and noting that "similar tactics [have been] used by the government in other cases") (quotation omitted); and *United States* v. *Foxman*, 87 F.3d 1220, 1222 (11th Cir. 1996) (finding the government had delayed trial in a "deliberate act * * * to gain a tactical advantage").