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United States v. Ferebe 332 F.3d 722 (4th Cir. 2003)

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I. Facts

On September 16, 1997, Donald Lee Ferebe ("Ferebe") was indicted, along with a co-defendant, on federal drug, gun, and murder charges.[1] The indictment charged Ferebe with the shootings of Benjamin Harvey Page ("Page") and Yolanda Evans ("Evans").[2] The prosecution sought authorization from the United States Attorney General to seek the death penalty.[3] In May 1998 the Attorney General authorized the death penalty for only the count charging Ferebe with the murder of Page.[4] The United States District Court for the District of Maryland separated Ferebe's trial from his co-defendant's trial because his co-defendant was not eligible for the death penalty.[5]

Ferebe filed a motion for a continuance in order to postpone the trial until his appeal from a prior murder conviction was final.[6] The district court granted Ferebe's motion and postponed the trial.[7] In September 1999 the United States Court of Appeals for the Fourth Circuit affirmed Ferebe's conviction and sentence on the prior murder charge.[8] The United States Supreme Court denied certiorari in early 2000.[9] In June 2000 the prosecution offered Ferebe concurrent life sentences for the murders of Page and Evans in exchange for a guilty plea.[10]

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1. United States v. Ferebe, 332 F.3d 722, 724 (4th Cir. 2003). "Ferebe and his co-defendant were indicted under four provisions of Title 18 of the United States Code." *Id.* at 724 n.1; *see* 18 U.S.C. § 2(a) (2000) (stating that a person who aids or abets the commission of an offense is punishable as a principal); 18 U.S.C. § 924(c)(1)(A) (2000) (stating that the use and carrying of firearms during and in relation to a drug trafficking crime qualifies the accused for an enhanced sentence); 18 U.S.C. § 924(j)(1) (2000) (stating that a person who causes the death of another with a firearm during or in relation to a drug trafficking crime may "be punished by death or by imprisonment for any term of years or for life"); 21 U.S.C. § 841(a)(1) (2000) (stating that it is unlawful for a person to distribute controlled substances).

2. *Ferebe*, 332 F.3d at 724. Page was a "potential witness against Ferebe on an unrelated 1994 murder charge then pending," and Evans was an innocent bystander. *Id.* at 741 (Niemeyer, J., dissenting).

3. *Id.* at 724.

4. *Id.* at 741 (Niemeyer, J., dissenting).

5. *Id.* at 725. The Attorney General did not authorize the death penalty against Ferebe's co-defendant for either of the two murders. *Id.*

6. *Id.* at 741 (Niemeyer, J., dissenting).

7. *Id.* at 742 (Niemeyer, J., dissenting).

8. *Ferebe*, 332 F.3d at 725.

9. *Id.*

10. *Id.*

In October 2000 Ferebe refused the offer and insisted on proceeding to trial.[11] In December 2000 the district court held a hearing at which Ferebe formally rejected the offer.[12] At the hearing, the prosecution formally withdrew the plea offer and the court scheduled Ferebe's trial for September 10, 2001.[13] The prosecution did not file a Notice of Intention to Seek the Death Penalty ("Death Notice") as required under 18 U.S.C. § 3593(a) prior to the December 2000 hearing.[14]

On May 28, 2001, five months prior to the scheduled trial date, the U.S. Attorney asked the Attorney General to reconsider the decision not to authorize the death penalty for the murder of Evans.[15] Approximately one month later, Ferebe's attorney contacted the prosecution to inform them that Ferebe wished to plead guilty to both murders in exchange for concurrent life sentences.[16] On June 19, the parties signed a formal plea agreement subject to approval by the Attorney General.[17] As a result of the conditional plea, several June and July hearings were postponed.[18] On July 6, 2001, just two months before Ferebe's trial, the Attorney General authorized the death penalty on Ferebe's second murder charge.[19] On July 26, the "Assistant Attorney General in charge of DOJ's Criminal Division informed the prosecution that the plea agreement was unacceptable."[20] At a meeting on July 31, defense counsel stated that Ferebe would plead guilty even in the absence of a plea agreement.[21] Counsel for Ferebe explained that this plea would only subject Ferebe to life imprisonment because the Government had not filed its Death Notice.[22] On August 1, 2001, the

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11. *Id.* at 742 (Niemeyer, J., dissenting).

12. *Id.*

13. *Id.*

14. *Ferebe*, 332 F.3d at 725; *see* 18 U.S.C. § 3593(a) (2000) (stating that "in a case involving an offense described in section 3591 . . . the attorney [for the Government] shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice"). In December 2000 "Ferebe's indictment was more than four years old and the Attorney General's authorization of the death penalty was more than three and a half years old." *Ferebe*, 332 F.3d at 725 n.2. Ferebe offered evidence that federal prosecutors file Death Notices with an average of 8.4 months remaining before trial. *Id.* at 725.

15. *Ferebe*, 332 F.3d at 725.

16. *Id.*

17. *Id.* A new Department of Justice policy took effect on June 7, 2001, "requiring prosecutors to obtain the Attorney General's consent prior to consummating plea agreements with death-eligible defendants." *Id.*

18. *Id.* These hearings were scheduled with the intent to "prepare trial materials such as the jury questionnaires and to address various pre-trial issues." *Id.*

19. *Id.* at 726.

20. *Id.*

21. *Ferebe*, 332 F.3d at 726.

22. *Id.* at 742 (Niemeyer, J., dissenting).

prosecution formally filed a Death Notice for the murders of both Page and Evans pursuant to § 3593(a).[23]

Ferebe filed a motion to strike the notice as untimely.[24] On September 7, 2001, the district court conducted a hearing on the motion.[25] On September 12, the district court denied Ferebe's motion to strike the Death Notice.[26] The district court based its decision to deny the motion upon its finding that the timing of the notice did not cause Ferebe to suffer any prejudice.[27] Ferebe appealed the district court's denial of the motion to the Fourth Circuit on the grounds that the Death Notice was untimely under § 3593(a).[28]

II. Holding

The Fourth Circuit held that denials of motions to strike Death Notices are immediately appealable under the collateral order doctrine.[29] The court also held that the timeliness of a Death Notice should be analyzed by a "pre-trial inquiry into the objective reasonableness of that timing."[30] The Fourth Circuit vacated the district court's order and remanded the case for further proceedings to determine the objective reasonableness of the timing of the Death Notice.[31]

III. Analysis

Ferebe challenged the district court's denial of his motion to strike and bar the Death Notice on the grounds that the notice was not timely provided.[32] He argued that § 3593(a) requires that notice of the Government's intention to seek the death penalty be given within a reasonable time before trial.[33] Ferebe conceded that the district court's denial of his motion to strike the Death Notice was

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23. *Id.* at 726; *see* 18 U.S.C. § 3593(a) (2000) (providing that the Government shall file a notice of its intent to seek the death penalty a reasonable time before trial).

24. *Ferebe*, 332 F.3d at 726. Ferebe claimed that the Death Notice was untimely because it was so late after the filing of the indictment and so close to the September 10 trial date. *Id.* at 742 (Niemeyer, J., dissenting).

25. *Id.* at 742 (Niemeyer, J., dissenting).

26. *Id.* at 743 (Niemeyer, J., dissenting).

27. *Id.* The court stated that Ferebe had actual notice that the Government intended to seek the death penalty on the first murder charge. *Id.* The court reasoned that Ferebe's "preparation for the second death penalty count was not substantially different than that for the first count on which Ferebe had actual notice." *Id.*

28. *Id.* at 726.

29. *Id.* at 724.

30. *Ferebe*, 332 F.3d at 724.

31. *Id.*

32. *Id.*

33. *Id.*; *see* 18 U.S.C. § 3593(a) (2000) (stating that in a case in which the United States Attorney believes that a death sentence is appropriate, he shall give notice to the defendant "a reasonable time before the trial").

not a final judgment.[34] He claimed, however, that the order denying his motion was reviewable as a collateral order under the standards set forth in *Cohen v Beneficial Industrial Loan Corp.*[35] The Government argued that the order was not a collateral order and, if it was, Ferebe received such notice a reasonable time before trial.[36]

A. Appealability

The district court's order, which Ferebe appealed, was a pre-trial order.[37] Under 28 U.S.C. § 1291, federal courts of appeals are authorized to review "final decisions of the district courts."[38] The term "final decision" refers to a final judgment that terminates a criminal proceeding.[39] Generally, that is a judgment of guilt.[40] Defendants seeking review of pre-trial orders normally must wait until the end of trial.[41] However, the Supreme Court has identified exceptions to this general rule.[42] A preliminary decision is appealable as a collateral order if it: (1) is conclusive; (2) resolves an issue separate from the merits; and (3) is "effectively unreviewable on appeal from a final judgment."[43]

The Fourth Circuit agreed with Ferebe that the district court's order was reviewable as a collateral order.[44] The court held that "district court orders denying motions to strike Death Notices as untimely filed are immediately appealable."[45] The Fourth Circuit stated that the order satisfied the three-part test set forth by the United States Supreme Court in *Cohen* and *Abney v United States*.[46] Under *Abney*, the order was sufficiently collateral to permit interlocutory

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34. *Ferebe*, 332 F.3d at 724; *see* 28 U.S.C. § 1291 (2000) (stating that the courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States").

35. *Ferebe*, 332 F.3d at 724; *see* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (discussing that an order is appealable as a collateral order when it is conclusive, is not intertwined with the merits, and is effectively unreviewable on appeal from a final judgment).

36. *Ferebe*, 332 F.3d at 724.

37. *Id.* at 726.

38. 28 U.S.C. § 1291.

39. *Ferebe*, 332 F.3d at 726; *see* Sell v. United States, 123 S. Ct. 2174, 2182 (2003) (discussing appealability of collateral orders); Meghan H. Morgan, Case Note, 16 CAP. DEF. J. 295 (2003) (analyzing Sell v. United States, 123 S. Ct. 2174 (2003)).

40. *See Sell*, 123 S. Ct. at 2182 (stating that collateral orders are conclusive, separate from the merits, and effectively unreviewable on appeal).

41. *Id.*

42. *Id.* at 2182; *see* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468–69 (1978) (discussing the collateral order exception to the rule that only final judgments may be reviewed on appeal).

43. *Sell*, 123 S. Ct. at 2182 (quoting *Coopers & Lybrand*, 437 U.S. at 468).

44. *Ferebe*, 332 F.3d at 726.

45. *Id.*

46. *Id.*; *see* Abney v. United States, 431 U.S. 651, 658 (1977) (explaining the three factors for

appeal because it: (1) fully disposed of the issue it addressed; (2) was collateral to the merits of the prosecution; and (3) involved an important right which would be lost if review awaited a final judgment.[47]

The Government conceded that the district court's order satisfied the first two factors.[48] The Fourth Circuit explained that the order was conclusive because it denied "once and for all" Ferebe's motion to strike the Death Notice.[49] Ferebe's motion sought avoidance of a capital trial, but upon denial the district court scheduled the case for such a trial.[50] Therefore, the district court's order denying Ferebe's motion fully disposed of the issue it addressed.[51] The Fourth Circuit also found that the second factor was satisfied because the order resolved an issue collateral to the merits of the case.[52] The court stated that "[t]he question of whether Ferebe received the statutorily-required reasonable notice is entirely separate from the question of his guilt for the murders committed, and its resolution will neither affect nor be affected by resolution of this latter question."[53] Thus, the Fourth Circuit held that the first two factors under *Abney* were satisfied.[54]

The third *Abney* factor addresses "whether the right allegedly at stake will likely be lost irreparably if immediate review is denied."[55] The Fourth Circuit stated that the focus of this inquiry is "whether the assurances underlying the asserted right will be [lost] if review is delayed until after trial."[56] The court found that the underlying right guaranteed by § 3593(a) is the right "not to stand trial" without adequate time to prepare for a death penalty trial.[57] The court reasoned that the underlying right would be lost if review of the order was

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determining whether an order is sufficiently collateral to permit interlocutory appeal); *see also Cohen*, 337 U.S. at 546 (discussing the three requirements for finding finality under the collateral order doctrine).

47. *Ferebe*, 332 F.3d at 726 (citing *Abney*, 431 U.S. at 658).

48. *Id.*

49. *Id.* at 727.

50. *Id.*

51. *Id.*

52. *Id.* at 728.

53. *Ferebe*, 332 F.3d at 728; *see Abney*, 431 U.S. at 659–60 (stating that an order is collateral to the merits when the elements of the petitioner's claim are "completely independent of his guilt or innocence").

54. *Ferebe*, 332 F.3d at 730.

55. *Id.* at 728.

56. *Id.* at 729; *see Abney*, 431 U.S. at 660–61 (finding the third prong satisfied because the Double Jeopardy clause would be violated by the postponement of review because the defendant would lose the right not to "endure the personal strain, public embarrassment, and expense of a criminal trial").

57. *Ferebe*, 332 F.3d at 730.

postponed until after the defendant stood trial.[58] The court stated that "delay in the review of a claimed denial of this right until after the trial itself has taken place is tantamount to countenance of the denial of the right."[59] Once an accused is forced to stand trial without timely notice, the right guaranteed by § 3593(a) has been irreparably lost.[60] The Fourth Circuit held that the third *Abney* factor was satisfied because the district court's order was effectively unreviewable post-trial.[61]

B. Objective Reasonableness

The Fourth Circuit held that the district court erred by adopting a post-trial, prejudice-based, analytical framework.[62] The court stated that the proper analysis required an inquiry into the pre-trial objective reasonableness of the notice provided.[63] Because the district court failed to use the proper analytical framework, certain elements necessary to a merits determination were not addressed by the district court.[64] The Fourth Circuit stated that it was unable to dispose of Ferebe's claim without such findings, vacated the order, and remanded the case for further proceedings.[65]

1. Objective Assessment of Pre-trial Reasonableness

The Fourth Circuit interpreted § 3593(a) as guaranteeing capital defendants the right not to stand trial unless notice was provided a reasonable time before trial.[66] The court stated that this "prophylactic requirement . . . *necessitates* a pretrial inquiry into the objective reasonableness of the notice provided."[67] A post-trial prejudice analysis forces "defendants to risk *permanent forfeiture* of" this statutory right by forcing them to endure possible unlawful trials.[68] A defendant's § 3593(a) right is denied at the point he is forced to proceed to trial without reasonable notice that the Government will seek the death penalty.[69]

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58. *Id.* at 729.
59. *Id.*
60. *Id.* at 730.
61. *Id.*
62. *Id.*
63. *Ferebe*, 332 F.3d at 730.
64. *Id.*
65. *Id.*; *see* 18 U.S.C. § 3593(a) (2000) (stating that the prosecution must file its Death Notice a reasonable time before trial).
66. *Ferebe*, 332 F.3d at 730.
67. *Id.* at 731.
68. *Id.*
69. *Id.* at 732; *see* 18 U.S.C. § 3593(a) (stating that the prosecution must file its Death Notice a reasonable time before trial).

The court stated that the critical determination is the denial of this right and not the possible prejudice suffered.[70] The Fourth Circuit stated that "*any objection* raised on the right, whether to late notice before trial, to late notice after trial begins, or to no notice at all, must establish that notice was not provided a *reasonable* time before trial."[71] Thus, the Fourth Circuit adopted an "objective assessment of pre-trial reasonableness."[72]

2. *Rejection of the Speedy Trial Analogy*

The district court analogized the § 3593(a) right to the speedy trial right, which is governed by a post-trial assessment of prejudice.[73] The Fourth Circuit rejected this analogy and laid out numerous differences between the two rights.[74] First, the court noted the unique nature of the speedy trial right "in that it belongs to *both* the defendant *and* society."[75] A "violation of the speedy trial right 'might work to the accused's advantage.' "[76] In contrast, the § 3593(a) right not to stand trial without adequate notice "provides a guarantee only to the criminal defendant."[77] A violation of this right denies the accused adequate time to prepare his case and could not work to his advantage.[78] Second, the Fourth Circuit noted that under *United States v. MacDonald*,[79] the speedy trial right is *not* a right not to stand trial.[80] This fact differentiates the speedy trial right from the

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70. *Ferebe*, 332 F.3d at 732.

71. *Id.*

72. *Id.* at 734.

73. *Id.*; *see* U.S. CONST. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial"); 18 U.S.C. § 3593(a) (requiring the prosecution to file a timely Death Notice).

74. *Ferebe*, 332 F.3d at 734.

75. *Id.*; *see* U.S. CONST. amend. VI (guaranteeing the accused's right to a speedy trial); Barker v. Wingo, 407 U.S. 514, 519 (1972) (stating that "[t]he right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused"). "In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Barker*, 407 U.S. at 519.

76. *Ferebe*, 332 F.3d at 734 (quoting *Barker*, 407 U.S. at 521). In *Barker*, the Court explained that a defendant may benefit from a delayed trial by securing more attractive plea bargains and having the chance to jump bond. *Barker*, 407 U.S. at 519–21. The Government is at a disadvantage because of the detrimental effect a delay between trial and arrest have on the preservation of evidence and the high cost of lengthy pre-trial detention. *Id.*

77. *Ferebe*, 332 F.3d at 734.

78. *Id.* at 734–35.

79. 435 U.S. 850 (1978).

80. *Ferebe*, 332 F.3d at 735; *see* U.S. CONST. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial"); United States v. MacDonald, 435 U.S. 850, 861 (1978) (finding that speedy trial claims are not collaterally appealable and can only be examined post-trial).

§ 3593(a) right that ensures that defendants will not be tried without valid notice.[81] The Fourth Circuit held that the district court's analogy to the speedy trial right did not support a post-trial prejudice standard.[82]

3. *Double Jeopardy and Indictments*

The Fourth Circuit drew an analogy between the § 3593(a) right and the Double Jeopardy right.[83] Similar to § 3593(a), the Double Jeopardy clause encompasses a right not to stand trial.[84] The Fourth Circuit noted that Double Jeopardy violations are not analyzed under a prejudice framework.[85] The court also compared Death Notices to indictments because both put the defendant on notice and ensure adequate preparation prior to trial.[86] Objections to the lawfulness of indictments are not analyzed under a prejudice inquiry.[87] Thus, the Fourth Circuit rejected a post-trial, prejudice analysis for alleged violations of § 3593(a).[88]

4. *Four Factors for Reasonableness*

The Fourth Circuit set forth the following four factors to be considered when evaluating the reasonable timeliness of a Death Notice:

> (1) the nature of the charges presented in the indictment; (2) the nature of the aggravating factors provided in the Death Notice; (3) the period of time remaining before trial, measured at the instant the Death Notice was filed and irrespective of the filing's effects; and, in addition, (4) the status of discovery in the proceedings.[89]

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81. *Ferebe*, 332 F.3d at 735; *see* U.S. CONST. amend. VI (ensuring the accused's right to a speedy trial); 18 U.S.C. § 3593(a) (2000) (providing that the Government shall file a notice of its intent to seek the death penalty a reasonable time before trial).

82. *Ferebe*, 332 F.3d at 734–35.

83. *Id.* at 736; *see* U.S. CONST. amend. V (stating that "[n]o person shall . . . be twice put in jeopardy of life or limb"); 18 U.S.C. § 3593(a) (providing that the Government shall file a notice of its intent to seek the death penalty a reasonable time before trial).

84. *Ferebe*, 332 F.3d at 735; *see* U.S. CONST. amend. V (prohibiting trying an accused twice for the same crime); 18 U.S.C. § 3593(a) (discussing the prosecution's obligation to file a Death Notice).

85. *Ferebe*, 332 F.3d at 736; *see* U.S. CONST. amend. V (stating that no person shall "be twice put in jeopardy of life or limb").

86. *Ferebe*, 332 F.3d at 736.

87. *Id.*

88. *Id.* at 737; *see* 18 U.S.C. § 3593(a) (setting forth the Death Notice requirement).

89. *Ferebe*, 332 F.3d at 737. In order to evaluate the time period discussed in the third factor, the court must know the date the Death Notice was filed and the trial date. *Id.* at 737 n.6. The court explained that the scheduled trial date constitutes the trial date for challenges under § 3593(a). *Id.*

The district court did not properly address or make findings relevant to the four reasonableness factors.[90] The Fourth Circuit held such findings necessary for review of the order.[91]

In particular, the district court did not make findings concerning the third factor, the period of time between the filing of the Death Notice and the trial.[92] The record did not reveal whether a set trial date existed at the time the Death Notice was filed.[93] Although the district court set a trial date for September 10, 2001, the record did not indicate whether that date remained fixed.[94] The district court suggested that the postponements of the June and July hearings and the lack of a jury questionnaire effectively cancelled the September trial date.[95] The Fourth Circuit noted that it was unclear whether "the trial start date was cancelled *in advance of the Death Notice's filing and irrespective of it.*"[96] The court was unable to determine whether the September 10 trial date firmly existed at the time the Death Notice was filed.[97] Without knowing the trial date, the Fourth Circuit could not measure the period of time from the filing of the Death Notice to the trial and was unable to reach any conclusions "as to the objective reasonableness of *that* yet unknown and unidentified interval."[98] The Fourth Circuit remanded the case to allow the district court to produce findings under a pre-trial objective reasonableness analysis.[99]

5. Dissent

The dissent argued that the district court's order was not immediately appealable under the collateral order doctrine.[100] The dissent stated that the first *Abney* factor was not satisfied because the order did not conclusively determine whether the Death Notice was timely filed.[101] The dissent agreed with the district court that the Death Notice was filed a reasonable time before trial because

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90. *Id.* at 737.
91. *Id.*
92. *Id.* at 738.
93. *Id.*
94. *Id.*
95. *Ferebe*, 332 F.3d at 738–39.
96. *Id.* at 738.
97. *Id.* at 739.
98. *Id.* at 740.
99. *Id.* at 737.
100. *Id.* at 751–53 (Niemeyer, J., dissenting).
101. *Ferebe*, 332 F.3d at 751 (Niemeyer, J., dissenting). The dissent cites *Cohen* in its discussion of the collateral order doctrine and refers to the three requirements as "*Cohen* factors." *Id.* at 750–51 (Niemeyer, J., dissenting); *see Cohen*, 337 U.S. at 546 (setting forth the three requirements under the collateral order doctrine).

Ferebe did not suffer any prejudice.[102] In addition to the four factors identified by the majority for assessing reasonableness, the dissent added a fifth.[103] The dissent stated that "the prejudice that the timing of the formal notice has on the defendant's preparation for trial and on his presentation of the defense" is the most important factor for determining reasonableness.[104] The dissent argued that the order was "merely speculative" because it left open "the question of the potential prejudice to Ferebe of trying a death penalty case with inadequate preparation time."[105] According to the dissent's rationale, a determination of the reasonableness of the length of time between the filing of the Death Notice and the trial may be made after the trial.[106] Therefore, the dissent concluded that the order was inconclusive because an assessment of prejudice could be made post-trial.[107]

The dissent also argued that the second *Abney* factor was not satisfied because the order involved issues intertwined with the merits.[108] A determination of prejudice often depends on the events occurring at trial.[109] The lack of adequate preparation time may become evident as the defendant presents his case at trial.[110] The dissent stated that this type of analysis is not "sufficiently separate from the merits to satisfy the second requirement of the collateral order doctrine."[111]

Finally, the dissent argued that the third *Abney* requirement was not met because the order remained "effectively reviewable upon final judgment."[112] The dissent stressed that Ferebe would retain his full rights to review after conviction at trial.[113] The dissent stated that Ferebe's objection to the timeliness of the Death Notice was effectively reviewable only after the trial, when the court could

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102. *Ferebe*, 332 F.3d at 743 (Niemeyer, J., dissenting).

103. *Id.* at 749 (Niemeyer, J., dissenting).

104. *Id.*

105. *Id.* at 751 (Niemeyer, J., dissenting); *see Abney*, 431 U.S. at 658 (stating that an order is sufficiently collateral to permit interlocutory appeal if it fully disposes of the issue it addresses).

106. *Ferebe*, 332 F.3d at 751 (Niemeyer, J., dissenting).

107. *Id.*

108. *Id.*; *see Abney*, 431 U.S. at 658 (stating that an order is sufficiently collateral to permit interlocutory appeal if it resolves an issue completely collateral to the merits of the case).

109. *Ferebe*, 332 F.3d at 751 (Niemeyer, J., dissenting); *see MacDonald*, 435 U.S. at 859–60 (stating that a fair assessment of possible prejudice to the defendant can normally be made only after the trial).

110. *Ferebe*, 332 F.3d at 751–52 (Niemeyer, J., dissenting).

111. *Id.* at 752 (Niemeyer, J., dissenting).

112. *Id.*; *see Abney*, 431 U.S. at 658 (stating that an order that is sufficiently collateral to permit interlocutory appeal involves an important right which is effectively unreviewable on appeal from a final judgment).

113. *Ferebe*, 332 F.3d at 752 (Niemeyer, J., dissenting).

properly assess any prejudice suffered.[114] In addition, the dissent noted the possible post-trial remedies to cure improper notice, such as a new trial or resentencing.[115] Thus, the dissent concluded that the district court's order did not satisfy any of the three requirements for collateral orders.[116]

IV. Application in Virginia

The Fourth Circuit's holding has no direct effect on Virginia state cases because Virginia does not have a Death Notice process.[117] In Virginia, the indictment provides notice to defendants that the Commonwealth intends to seek the death penalty.[118] Yet, section 19.2-231 of the Virginia Code allows the indictment to be amended "at any time before the jury returns a verdict or the court finds the accused guilty . . . provided the amendment does not change the nature or character of the offense charged."[119] In *Powell v Commonwealth*,[120] the Supreme Court of Virginia held that it was reversible error for the trial court to allow pre-trial amendment of a capital murder indictment.[121] The court explained that when amendments are allowed they "must provide that the substantial rights of the accused are protected by informing him of the nature and character of the accusations."[122] In *Powell*, the amended indictment charged two new gradation crimes that were never considered by the grand jury.[123] The court held that this type of amendment "materially changed the nature of the offense originally charged."[124] Capital defense attorneys should use *Powell* to prevent the Commonwealth from amending capital indictments without aggravators to include aggravators. Thus, even without a formal Death Notice process, Virginia capital defendants have the right to adequate notice that the Commonwealth will seek the death penalty against them.

The four factors for reasonableness are relevant to attorneys defending federal capital cases. In particular, the third factor focuses on the interval

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114. *Id.*

115. *Id.*

116. *Id.* at 753 (Niemeyer, J., dissenting).

117. *See* VA. CODE ANN. § 19.2-220 (Michie 2000) (stating that the indictment or information shall describe the offense charged). *But see* 18 U.S.C. § 3593(a) (2000) (requiring a notice of intent to seek the death penalty in a federal capital prosecution).

118. *See* VA. CODE ANN. § 19.2-220 (stating that the indictment shall describe the offense charged).

119. *See* VA. CODE ANN. § 19.2-231 (Michie 2000) (discussing when an indictment, presentment, or information may be amended and the procedure for such amendment).

120. 544 S.E.2d 679 (Va. 2001).

121. Powell v. Commonwealth, 544 S.E.2d 679, 692 (Va. 2001).

122. *Id.* at 691.

123. *Id.* at 692.

124. *Id.*

between the filing of the Death Notice and the trial.[125] For purposes of pre-trial Death Notice challenges, the scheduled trial date is an important part of the court's analysis.[126] In order for reviewing courts to assess the reasonableness of Death Notice filings, they must be able to reference both the filing date and the trial date.[127] To ensure proper review, attorneys should get a trial date and hold that date pending the arrival of a Death Notice.

The court in *Ferebe* stated that "one of the rights guaranteed by section 3593(a) is that not to be forced to stand trial *for one's life* without having received adequate notice."[128] Implicit in the majority's opinion is the sense that the complexity of capital trials necessitates sufficient preparation time. *Ferebe* seems to support the idea that death cases impose unique demands on the preparation of a defense.[129] In particular, defense counsel need substantial time to prepare mitigation for a death case.[130] Although the court in *Ferebe* did not explicitly base its decision on the notion that "death is different," its repeated emphasis that defendants should not stand trial for their lives without adequate preparation time recognizes the inherent differences between capital and non-capital cases.[131]

Ferebe emphasizes the prophylactic nature of § 3593(a) by stating that "[t]his statutorily-created right not to be tried for a capital sentence without having received reasonable notice can only be effectuated by an interpretation that the statute imposes a prophylactic requirement which, in turn, *necessitates* a pretrial inquiry into the objective reasonableness of the notice provided."[132] The court suggested that judges cannot cure defective Death Notices by postponing the trial date.[133] Once a defendant is denied adequate time to prepare his defense, his

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125. *Ferebe*, 332 F.3d at 737.

126. *Id.* at 737 n.6.

127. *Id.* The Fourth Circuit stated that in order to quantify the time remaining before trial:

> [A] court naturally must have reference to *two* dates: the first, obviously, being the date the Death Notice is filed, and the second, obviously being the trial date. Less obvious is that the scheduled trial date may constitute the trial date for purposes of analysis under section 3293(a) because of the prophylactic nature of the statutory right.

Id.

128. *Id.* at 729 (emphasis added).

129. *See id.* at 740 n.8 (discussing possible delay resulting from the "unique requirements of a capital trial").

130. *See* Wiggins v. Smith, 123 S. Ct. 2527, 2535 (2003) (discussing defense counsel's inadequate investigation of mitigation evidence).

131. *Ferebe*, 332 F.3d at 732; *see* Fahy v. Horn, 240 F.3d 239, 245 (3d Cir. 2001) (stating that "less than 'extraordinary' circumstances" should trigger equitable tolling in death penalty cases).

132. *Ferebe*, 332 F.3d at 731; *see* 18 U.S.C. § 3593(a) (2000) (providing that the Government shall file a notice of its intent to seek the death penalty a reasonable time before trial).

133. *Ferebe*, 332 F.3d at 740 n.8 (discussing the ambiguity of the district court's suggestion that prejudice to defendants may be cured by having the court grant additional time to prepare the defense case).

§ 3593(a) right is denied.[134] *Ferebe* implies that this statutory right is preventative and cannot be cured by subsequent judicial action.[135] Attorneys should object to judges' attempts to cure late Death Notices by postponing the trial date.

The Fourth Circuit's decision illustrates the importance of timely Death Notices. In *United States v Hatten*,[136] the United States District Court for the Southern District of West Virginia barred the Government from seeking the death penalty.[137] The court found that the prosecution unreasonably delayed its decision to seek the death penalty by waiting for approval from the United States Attorney General.[138] Attorneys should object to attempts by prosecutors to delay the filing of Death Notices pending approval by the United States Attorney General. Defense counsel should also be aware of prosecutorial attempts to file "protective" Death Notices.[139] Protective Death Notices are notices filed by the prosecution prior to certification by the Attorney General. However, a Death Notice filed without approval by the Attorney General violates the United States Attorneys' Manual Rule 9-10.020, which requires prior written approval for any decision to seek the death penalty.[140] Therefore, attorneys should object to any attempt by the prosecution to file a Death Notice without having obtained written approval from the Attorney General to seek the death penalty.

V. Conclusion

In *Ferebe*, the Fourth Circuit clarified that pre-trial orders challenging the timeliness of a Death Notice are immediately appealable under the collateral order exception.[141] Under § 3593(a), defendants have the right not to stand trial without having adequate notice that the Government intends to seek the death

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134. *See id.* at 732 (stating that a defendant's rights are "denied at the point when he proceeds toward trial, or actually to trial, in the absence of a reasonable time between his receipt of the Death Notice and his capital trial").

135. *Id.* at 740 n.8.

136. 276 F. Supp. 2d 574 (S.D. W. Va. 2003).

137. United States v. Hatten, 276 F. Supp. 2d 574, 575 (S.D. W. Va. 2003).

138. *Id.* at 580. The court held that the thirty-six day interval between the filing of the Death Notice and the scheduled trial date did not satisfy the reasonable timeliness requirement of § 3593(a). *Id.* at 579–80. *See* Posting of Kevin McNally, kmcnally@dcr.net, to fedtrials-l@Hofstra.edu (Sept. 6, 2003) (copy on file with author) (discussing district court's decision to prohibit the death penalty due to untimely notice).

139. Posting of Jean D. Barrett, JeanBarrett@RuhnkeandBarrett.com, to fedtrials-l@Hofstra.edu (June 6, 2003) (copy on file with author); *see* Posting of Kevin McNally, kmcnally@dcr.net, to JeanBarrett@RuhnkeandBarrett.com (June 6, 2003) (copy on file with author) (responding to question concerning protective Death Notices).

140. *See* U.S. Att'y Man. § 9-10.020 (1997) (stating that "[t]he death penalty shall not be sought without the prior written authorization of the Attorney General").

141. *Ferebe*, 332 F.3d at 730.

penalty.[142] Most importantly, the timeliness of Death Notices is determined by a pre-trial objective reasonableness analysis.[143]

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142. *Id.* at 729; *see* 18 U.S.C. § 3593(a) (2000) (providing that the Government shall file a notice of its intent to seek the death penalty a reasonable time before trial).

143. *Fevrier*, 332 F.3d at 734.