



Office of the Attorney General
Washington, D. C. 20530

May 31, 2006

The Honorable Paul K. Charlton
United States Attorney
District of Arizona
Phoenix, Arizona 85004

Dear Mr. Charlton:

You are authorized to seek the death penalty against Jose Rios Rico. You are authorized not to seek the death penalty against Sabrina Creeger and Dennis Lane Spor.

~~As described in the United States Attorneys' Manual 9-10.100, you may not enter into a plea agreement that requires withdrawal of the notice of intention to seek the death penalty without the prior approval of the Attorney General.~~

Sincerely,

Alberto R. Gonzales
Attorney General

FROM DOJ CRIMINAL (MFD) 5.31.06 18:17:27 ST:18:18:90 NO:4661153587 P 2

DAG000001645

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7
8 UNITED STATES DISTRICT COURT
9 DISTRICT OF ARIZONA

10 United States of America
11 Plaintiff,
12 v.
13 Jose Rios Rico, et. al,
14 Defendants.

CR-05-0272-PHX-JAT

**UNITED STATES' MOTION TO
EXTEND DEADLINE TO FILE
NOTICE OF INTENT TO SEEK
DEATH PENALTY**

(Expedited Consideration Requested)

15 The United States of America, by and through undersigned counsel, respectfully moves this
16 Court for an Order extending the current deadline for which the United States has to file a Notice
17 of Intent to Seek Death Penalty, from May 31, 2006, to June 30, 2006, for all defendants. This
18 motion is supported by the attached Memorandum of Points and Authorities.

19 Respectfully submitted this 31st day of May, 2006

20
21 PAUL K. CHARLTON
United States Attorney
District of Arizona

22 
23 KURT M. ALTMAN
24 KEITH E. VERCAUTEREN
25 Assistant U.S. Attorneys
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MEMORANDUM OF POINTS AND AUTHORITIES

The current deadline to file a notice as to the death penalty is May 31, 2006. The government certainly wants to move this case forward expeditiously while keeping in mind the ramifications and finality of the potential sentence in this case. However, the United States Attorney's Office for the District of Arizona is still in ongoing dialogue regarding the death penalty process with the Department of Justice in Washington D.C. As such, undersigned counsel request this last additional extension to allow time for each potential capital consideration to be handled thoroughly and sufficiently.

Title 18 U.S.C. § 3593 states:

(a) Notice by the government.—If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, *a reasonable time before trial* or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on defendant, a notice—
... (emphasis added)

The notice required under this section informs the defendants of the governments intention to seek death as a penalty, and sets forth the aggravating factors “the government proposes to prove as justifying a sentence of death.” *Title 18 U.S.C. § 3593(a)(1) and § 3593(a)(2).*

The current trial date in this matter is September 12, 2006. The United States asserts that a deadline June 30, 2006, to file a notice as required under § 3593 is a *reasonable time* prior to trial in this matter.

Due to the urgency of this motion, undersigned counsel has not be able to contact all relevant defense counsel and is unable to avow as to their respective positions. However, defendant Rios Rico has filed his own motion to extend the time for which the government has to file a notice of intent to seek death and a Motion to Continue trial, to which there was no objection.

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Excludable delay under 18 U.S.C. § 3161(h) may occur as a result of this motion or an order based thereon.

Respectfully submitted this 31st day of May, 2006.

PAUL K. CHARLTON
United States Attorney
District of Arizona



KURT M. ALTMAN
KEITH E. VERCAUTEREN
Assistant U.S. Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2006, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant:

- | | |
|---|--|
| Antonio D. Bustamante 1001 N. Central Ave., Suite 660 Phoenix, AZ 85004 Attorney for Jose Rios Rico | Patrick E. McGillicuddy 331 North First Ave., Suite 108 Phoenix, AZ 85003-4528 Attorney for Sabrina Creeger |
| Robert A. Dodell 3080 North Civic Center Plaza #9 Scottsdale, AZ 85251-6958 Attorney for Jesus Ricardo Rios-Trujillo | Tonya J. McMath 111 West Monroe, Suite 1650 Phoenix, AZ 85003 Attorney for Dennis Lane Spor |
| J. Scott Halverson 1761 E. McNair Dr., Suite 103 Tempe, AZ 85283-5002 Attorney for Michael Hannebaum | Daniel R. Raynak 45 West Jefferson, Suite 225 Phoenix, AZ 85003 Attorney for Bradley Williams |
| Jason R. Leonard 1201 South Alma School Rd., Suite 7550 Mesa, AZ 85210 Attorney for Reese Roy Hartnett | Michael S. Ryan 45 West Jefferson, Suite 220 Phoenix, AZ 85003-0001 Attorney for Kenneth Kostuck |
| Phil Noland Luhrs Towers 45 West Jefferson, Suite 403 Phoenix, Arizona 85003 Attorney for Mark Alan Bender | Marc J. Victor Victor & Hall, PLC 1630 S. Stapley Dr., Suite 231 Mesa, AZ 85204 Attorney for Jonathan Atkins |

s/Carol Strachan
Carol Strachan
Legal Assistant
U.S. Attorney's Office

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSE RIOS RICO (01),
SABRINA CREEGER (02),
DENNIS SPOR (05),
REESE HARTNETT (08),

Defendants.

CR-05-00272-PHX-JAT

(dfts 1, 2, 5 and 8)

ORDER

(Fifth Request)

Upon motion of the defendant (Doc. #238) Jose Rios Rico, the Government having no objection, no other Defendant having objected, and good cause appearing,

IT IS ORDERED granting Rios Rico's Motion to Motion To Extend The Deadline To File Notice Of Intent To Seek Death to August 20, 2006.

IT IS FURTHER ORDERED granting Rios Rico's Motion to Continue the Trial date as to all defendants' pending trial (Rico (01), Creeger (02), Spor (05) and Hartnett (08)). This Court specifically finds that the ends of justice served by granting the extension outweigh the best interests of the public and the defendants in a speedy trial. 18 U.S.C. Sec. 3161(h)(8)(A). This finding is based upon the Court's conclusion that the failure to grant such a continuance would deny counsel for the defendants and the attorney for the government reasonable time necessary for effective preparation, taking into account the exercise of due diligence. 18 U.S.C. Sec. 3161(h)(8)(B)(iv).

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IT IS FURTHER ORDERED continuing the trial date from September 12, 2006 to Tuesday, November 28, 2006 at 9:00 a.m.

IT IS FURTHER ORDERED extending the time to file pre-trial motions to September 22, 2006.

IT IS FURTHER ORDERED that excludable delay under Title 18 U.S.C. § 3161(h) will commence on September 12, 2006 through November 28, 2006, for a total of 77 days.

DATED this 12th day of June, 2006.



James A. Teilborg
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

| | | |
|---------------------------|---|-------------------|
| United States of America, |) | CR 05-272-PHX-JAT |
| Plaintiff, |) | (Def. 1) |
| vs. |) | |
| Jose Rios Rico (1), |) | ORDER |
| Defendant. |) | |

Pending before the Court is Defendant Rios Rico's motion to prohibit the Government from seeking the death penalty, filed January 12, 2006. (Dkt. 166.) Defendant contends that the Government is barred from seeking the death penalty because it failed to provide timely notice of its intention to do so.

DISCUSSION

On September 15, 2005, the Government obtained a first superceding indictment, Count 9 of which charges Defendant with use of a firearm during a drug trafficking offense resulting in death, a charge carrying a potential death sentence. (Dkt. 70.) At a status conference on January 12, 2006, the Government informed the Court that all of the relevant materials from the District of Arizona had been forwarded to the capital case review committee in Washington, D.C.; that a meeting between Defendant's counsel and the committee was scheduled for February 27, 2006; and that within approximately sixty days thereafter the Department of Justice was expected to render a final decision as to whether to seek the death penalty. On January 13, 2006, the Court, granting co-defendant Creeger's motion for a trial continuance, set a new trial date of September 12, 2006, along with a

1 deadline of May 5, 2006, for the Government to file its death notice. (Dkt. 168.) The Court
2 subsequently granted motions by the Government seeking to extend the deadline for filing
3 the notice (Dkts. 221, 245.) The deadline was extended to June 30, 2006. (Dkt. 245.)

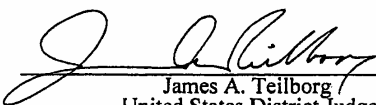
4 On May 4, 2006, Defendant filed a motion seeking to continue the trial from
5 September 12, 2006, to December 12, 2006. (Dkt. 238.) Defendant also requested an
6 extension of the Government's deadline for filing the death notice to August 31, 2006,
7 indicating that he needed additional time to prepare a mitigation presentation for the
8 Department of Justice. (*Id.* at 2-8; *see* Dkt. 241, letter from Mexican Ambassador supporting
9 request for extension of death notice deadline based on need to gather mitigation
10 information.) The Court granted the motion, continuing the trial date to November 28, 2006,
11 and the notice deadline to August 20, 2006. (Dkt. 249.) On August 16, 2006, the
12 Government filed its notice of intent to seek the death penalty against Defendant (Dkt. 255),
13 but not against co-defendants Creeger (Dkt. 256) or Spor (Dkt. 257).

14 Based upon the foregoing,

15 **IT IS ORDERED** that Defendant inform the Court as to the status of his motion to
16 prohibit the Government from seeking the death penalty based upon the timeliness of its
17 death notice. (Dkt. 166.)

18 **IT IS FURTHER ORDERED** that if Defendant does not intend to withdraw the
19 motion, Defendant shall file a supplemental brief explaining why the motion has not been
20 rendered moot by his request for an extension of the Government's filing deadline. The brief
21 shall be due no later than ten days from the date of this Order.

22 DATED this 24th day of August, 2006.

23
24 
25 James A. Teilborg
United States District Judge

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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF ARIZONA

8 United States of America
9 Plaintiff,
10 v.
11 Jose Rios Rico,
12 Defendant.

CR-05-0272-001-PHX-JAT

**UNITED STATES' NOTICE OF
INTENT TO SEEK THE DEATH
PENALTY AS TO DEFENDANT
JOSE RIOS RICO**

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14
15 The United States of America, by and through undersigned counsel, notifies the Court and
16 defendant JOSE RIOS RICO, in the above captioned case, that if the defendant is convicted of
17 Count 9 and/or Count 11 of the Second Superseding Indictment, the United States believes the
18 circumstances of the offense(s) charged in Count 9 and/or Count 11 are such that a sentence of
19 death is justified pursuant to Chapter 228 (Sections 3591-3598) of Title 18 United States Code
20 and/or Title 21 United States Code Section 848, and that the United States will seek the sentence
21 of death as to JOSE RIOS RICO for this offense(s): Possession or Use of a Firearm During and
22 in Relation to a Drug Trafficking Offense Resulting in a Death, and Aiding and Abetting, in
23 violation of 18 U.S.C. §§ 924(c) & 924(j)(1) and 2, and/or Killing A Person While Engaging in
24 an Offense Punishable Under 21 U.S.C. § 841(b)(1)(A), and Aiding and Abetting, in violation
25 of 21 U.S.C. § 848(e)(1)(A)(ii) and 18 U.S.C. § 2, which carry a potential sentence of death.

26 As required by 18 U.S.C. §§ 3593(a), (d), and (e), and 21 U.S.C. § 848, for defendant JOSE
27 RIOS RICO as to Count 9 and/or Count 11 of the Second Superseding Indictment, the United
28 States will introduce evidence establishing beyond a reasonable doubt:

- 1 a. One or more of the statutory proportionality factors set forth by 18 U.S.C. §§
2 3591(a), 3591(a)(2)(A-D), and/or 21 U.S.C. §§ 848(l) and 848(n)(1)(A-D), and
3 b. One or more of the statutory aggravating factors set forth by 18 U.S.C. §§
4 3592(c)(1-16), and/or 21 U.S.C. §§ 848(n)(1-12).

5 As permitted by 18 U.S.C. §§ 3593(a) and (d), and 21 U.S.C. § 848(h), the United States
6 will also seek to prove certain non-statutory aggravating factors set forth in this Notice. The
7 United States believes that the circumstances of each charged offense in Count 9 and/or Count
8 11 of the Second Superseding Indictment are such that if defendant JOSE RIOS RICO is
9 convicted, a sentence of death is justified under Chapter 228 of Title 18 of the United States
10 Code and/or Title 21 United States Code Section 848.

11 The United States will seek to prove the following factors justifying a sentence of death for
12 JOSE RIOS RICO, as to Count 9 and/or Count 11 of the Second Superseding Indictment, the
13 allegations of which are fully realleged and incorporated herein by reference:

14 A. Statutory Proportionality Factors under 18 U.S.C. §§ 3591(a) and 3591(a)(2)(A-D)
15 and/or 21 U.S.C. §§ 848(l) and 848(n)(1)(A-D):

- 16 1. **Defendant's Age.** JOSE RIOS RICO was more than 18 years of age at the time
17 of the offense. 18 U.S.C. § 3591(a), and/or 21 U.S.C. § 848(l).
18 2. **Intentional Killing.** JOSE RIOS RICO intentionally killed Angela Pinkerton.
19 18 U.S.C. § 3591(a)(2)(A) and/or 21 U.S.C. § 848(n)(1)(A).
20 3. **Intentional Infliction of Serious Bodily Injury.** JOSE RIOS RICO intentionally
21 inflicted serious bodily injury that resulted in the death of Angela Pinkerton. 18
22 U.S.C. § 3591(a)(2)(B) and/or 21 U.S.C. § 848(n)(1)(B).
23 4. **Intentional Acts to Take Life or Use Lethal Force.** JOSE RIOS RICO
24 intentionally participated in an act, contemplating that the life of a person would
25 be taken or intending that lethal force would be used in connection with a person,
26 other than one of the participants in the offense, and that Angela Pinkerton died
27 as a direct result of the act. 18 U.S.C. § 3591(a)(2)(C).
28

- 1 5. **Intentional Acts to Kill or Use Lethal Force.** JOSE RIOS RICO intentionally
2 engaged in conduct intending that the victim be killed or that lethal force be
3 employed against Angela Pinkerton, which resulted in the death of Angela
4 Pinkerton. 21 U.S.C. § 848(n)(1)(C).
- 5 6. **Intentional Acts in Reckless Disregard for Life.** JOSE RIOS RICO
6 intentionally and specifically engaged in an act of violence, knowing that the act
7 created a grave risk of death to a person, other than one of the participants in the
8 offense, such that participation in the act constituted a reckless disregard for
9 human life and Angela Pinkerton died as a direct result of the act. 18 U.S.C. §
10 3591(a)(2)(D).
- 11 7. **Intentional Acts which Created a Grave Risk of Death.** JOSE RIOS RICO
12 intentionally engaged in conduct which he knew would create a grave risk of
13 death to a person, other than one of the participants in the offense, and resulted in
14 the death of Angela Pinkerton. 21 U.S.C. § 848(n)(1)(D).
- 15 B. Statutory Aggravating Factors under 18 U.S.C. §§ 3592(c)(1-16) and/or 21 U.S.C. §§
16 848(n)(1-12):
- 17 1. **Procurement of offense by payment.** Defendant JOSE RIOS RICO procured the
18 commission of the offense(s) charged in Count 9 and/or Count 11 of the Second
19 Superseding Indictment by payment, or promise of payment, of anything of
20 pecuniary value. 18 U.S.C. § 3592(c)(7) and/or 21 U.S.C. § 848(n)(6).
- 21 2. **Pecuniary gain.** Defendant JOSE RIOS RICO committed the offense(s)
22 described in Count 9 and/or Count 11 of the Second Superseding Indictment as
23 consideration for the receipt, or in the expectation of the receipt, of anything of
24 pecuniary value. 18 U.S.C. § 3592(c)(8) and/or 21 U.S.C. § 848(n)(7).
- 25 3. **Substantial Planning and Premeditation.** Defendant JOSE RIOS RICO
26 committed the offense(s) described in Count 9 and/or Count 11 of the Second
27 Superseding Indictment after substantial planning and premeditation to cause the
28 death of Angela Pinkerton. 18 U.S.C. § 3592(c)(9) and/or 21 U.S.C. § 848(n)(8).

1 C. Non-Statutory Aggravating Factors under 18 U.S.C. § 3593(a)(2) and/or 21 U.S.C. §
2 848(h):

- 3 1. **Participation in Additional Serious Acts of Violence.** As the leader of a
4 conspiracy to possess with the intent to distribute methamphetamine, as charged
5 in Count 1 of the Second Superseding Indictment, defendant JOSE RIOS RICO
6 participated in other serious acts of violence in addition to the murder of Angela
7 Pinkerton.
- 8 2. **Contemporaneous Convictions.** In addition to being convicted of the murder of
9 Angela Pinkerton, defendant JOSE RIOS RICO was convicted of conspiracy to
10 possess with the intent to distribute methamphetamine, possession with the intent
11 to distribute methamphetamine, and firearm offenses as described in Count 1
12 and/or Count 2 and/or Count 5 and/or Count 6 and/or Count 7 and/or Count 8 of
13 the Second Superseding Indictment.
- 14 3. **Obstruction of Justice.** Defendant JOSE RIOS RICO ordered, facilitated or
15 participated in the disposal or destruction of the victim's body and other crime
16 scene evidence in an attempt to obstruct justice.
- 17 4. **Victim Impact Evidence.** Defendant JOSE RIOS RICO caused injury, harm, and
18 loss to Angela Pinkerton's family because of the victim's personal characteristics
19 as an individual human being and the impact of her death upon her family. *See*
20 18 U.S.C. 3593(a) and *Payne v. Tennessee*, 501 U.S. 808, 825-26, 111 S.Ct. 2597,
21 2608-09 (1991).
- 22 5. **Future Dangerousness.** Defendant JOSE RIOS RICO is likely to commit
23 criminal acts of violence in the future which would be a continuing and serious
24 threat to the lives and safety of others, including, but not limited to the witnesses,
25 as evidenced by the offense(s) charged in Count 9 and/or Count 11 of the Second
26 Superseding Indictment and the statutory and non-statutory aggravating factors
27 alleged in this Notice. *Simmons v. South Carolina*, 512 U.S. 154,162-64 (1994).
28

1 The United States further gives notice that in the event of a conviction on Count 9 and/or
2 Count 11 of the Second Superseding Indictment, and in support of the imposition of the death
3 penalty, it intends to rely upon all the evidence admitted by the Court during the guilt phase of
4 the trial and the offense(s) of conviction described in the Second Superseding Indictment as they
5 relate to the background and character of defendant JOSE RIOS RICO, his moral culpability,
6 and the nature and circumstances of the offenses charged in the Second Superseding Indictment.
7 Additionally, the United States will present further evidence during the penalty phase in support
8 of the Statutory and Non-Statutory aggravating factors described in this Notice.

9 Respectfully submitted this 16th day of August, 2006.

10 PAUL K. CHARLTON
11 United States Attorney
12 District of Arizona

13 *s/ Keith Vercauteren*
14 KEITH E. VERCAUTEREN
15 Assistant United States Attorney
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1 CERTIFICATE OF SERVICE

2 I hereby certify that on August 16, 2006, I electronically transmitted the attached document
3 to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of
4 Electronic Filing to the following CM/ECF registrant:

5 antonio_b@qwest.net

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9 s/Keith Vercauteren
Keith E. Vercauteren
Assistant United States Attorney

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6 Attorneys for Jose Rios Rico

7 UNITED STATES DISTRICT COURT
8 DISTRICT OF ARIZONA

9
10 STATE OF ARIZONA,

11 Plaintiff,

12 v.

13 JOSE RIOS RICO, ET AL.,

14 Defendants.

CR-05-0272-PHX-JAT

MOTION TO STRIKE DEATH NOTICE
ALTERNATIVELY MOTION TO
CONTINUE TRIAL DATE.

15
16 Thomas A. Gorman and Antonio Bustamonte, counsel for defendant Jose
17 Rios respond to this Court's August 24, 2006 order and moves this Court as
18 follows:
19 **RELIEF SOUGHT:** The entry of an order striking the August 16, 2006 Death
20 Notice *alternatively* ordering a severance of RIOS from the co-defendant's and a
21 continuance of RIOS's trial date in this matter for not less than twelve months from
22 this date.
23 **GROUND:** (1) Said Death Notification came as a result of an authorization by
24 the Attorney General which violated the Defendant's Fifth Amendment right to
25 procedural and substantive due process of law, equal protection of the law, as well
26 as his Sixth Amendment Right to counsel. In short RIOS was given absolutely no
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1 opportunity to participate in the Phase I protocol and his minimal participation in
2 the Phase II protocol (a memo to the Attorney General delivered by the local US
3 Attorney's office) was constitutionally deficient in that RIOS's "opportunity" to
4 participate in Phase II with Main Justice was meaningless, inadequate and
5 unreasonable. RIOS's motion to continue the notice (death) deadline to August,
6 2006 was *premised on and in reliance* on the Attorney General's/Main Justice's
7 *constitutional obligation and offer to give* RIOS a *meaningful and reasonable*
8 opportunity to participate in the Phase II protocol. Counsel undersigned has been
9 available at all times to speak with or meet with the Attorney Generals office since
10 the filing of his May 4, 2006 motion to extend the time to file the death notice.
11 Counsel for RIOS was *never* given the opportunity to directly communicate with
12 Capital Case Committee of the Attorney General's office on this critical issue.
13 There was absolutely no dialogue between RIOS and the Attorney Generals Office.
14 The Attorney General's office refused to meet with counsel for RIOS. Therefore,
15 RIOS respectfully submits the Government (nor this honorable Court) can invoke
16 RIOS's motion to extend the filing deadline as grounds of waiver to deny this
17 motion to strike the August 16, 2006 Notice of Intent To Seek Death. *RIOS's*
18 *Motion to Extend the Time to Notice Death was premised on and in reliance on the*
19 *Government's (Attorney General's) obligation and offer to permit RIOS a*
20 *meaningful opportunity to participate in the Phase II protocol.*

21 (2) The second Grounds to Strike the Death Penalty Notification is based on
22 lack of timeliness. The present trial date is November 28, 2006. Barely three
23 months after the filing of the Notice of Intent to Seek Death. That amount of time is
24 objectively unreasonable to prepare to defendant a foreign national in a federal
25 death penalty guilt and sentencing prosecution.

26 (3) Alternatively, the appropriate remedy to Striking a Notice of Death is to
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1 sever RIOS from the Co-Defendants trial and **continue**¹ RIOS's trial date. RIOS
2 respectfully submits that if the Court is not inclined to Strike the Death Penalty
3 based on the grounds set forth in # 2 that the continuance of the trial for not less
4 than 12 months would permit him time to prepare. See *United States v. McGriff*,
5 *427 F.Supp. 2d 253 (DC NY 2006)* A continuance will not remedy the
6 constitutional violations set forth in #1.

7 Excludable delay under 18 U.S.C. Sec. 3161(h) may occur as a result
8 of this motion or order based thereon.

9 **Summary Statement**

10 On **January 6, 2006** Mr. Bustamonte filed a Motion to Prohibit Request For
11 Death Penalty. The Government filed a Response to Rios's Motion to Prohibit
12 Request For Death Penalty ("Government Response") on **February 1, 2006**. The
13 Government's Response states that counsel for RIOS, "after the first superceding
14 indictment of September 15, 2005...[was aware] that he was death **eligible**." see
15 *Government's Response pp 3*. This statement is incorrect as a matter of law. RIOS
16 was not death eligible until the second superceding indictment filed **January 3,**
17 **2006**. The Notice of Special Findings was absent from the first superceding
18 indictment, without which RIOS **was not death eligible**. RIOS was not death
19 eligible until the second superceding indictment filed **January 3, 2006** *which*
20 *added the omitted Notice of Special Findings*.

21 This Court entered an order on August 24, 2006 directing Counsel for Rios
22 to inform the Court as the status of RIOS January 12, 2006 to prohibit the death
23 penalty based upon lack of timeliness of its death notice. Counsel undersigned
24 agrees with the Government's Response that at the time of its filing (January 12,
25

26 ¹. Counsel for Creeger, Rios-Trijillo, Bender, Spor, Harnett, Atkins, Kostuck have no
27 objection. Counsel for Hannebaum, Williams and the Government object to more than a two
28 month continuance from the present trial date of November 28, 2006.

1 2006) no Notice of Intent To Seek Death was filed so RIOS's motion was
2 premature. In short the Government's position as set forth in it's Response of
3 February 1, 2006 was correct. The grounds set forth in RIOS's January 12, 2006
4 motion are legally insufficient to strike the death penalty notification. However,
5 RIOS renews the request to Strike the Death Penalty in this motion based on the
6 grounds set forth below.

7 **FACTS/LAW**

8 The Defendant was arrested on **March 29, 2005**. The Defendant retained
9 counsel Antonio Bustamonte. Mr. Bustamonte had no previous federal death
10 penalty experience or training. The Defendant was indicted on **March 31, 2005** in
11 the above captioned matter. In the **March 31, 2005 original indictment** there was
12 no count alleging a death or serious injury to a victim. It was not until not until
13 almost 6 months later in the **September 15, 2005 first superseding indictment** that
14 the Government elected to add Count 9 and charge the Defendant with the use of a
15 firearm during a drug trafficking offense resulting in death. However, the *first*
16 *superceding indictment* lacked the aggravating factors necessary to make the
17 Defendant death-eligible. See *Jones v. United States*, 526 U.S. 227, 243 n. 6, 119
18 S.Ct. 1215, 143 L. Ed. 2d 311 (1999); *Almendarez-Torres v. United States*, 523
19 U.S. 224, 228, 118 S.Ct. 1219, 140 L. Ed. 2d 350 (1998); *United States v.*
20 *Promise*, 255 F. 3d 150, 152 (4th Cir. 2001). The *first superseding indictment* was
21 legally insufficient to support a sentence of death.

22 Prior to **December 15, 2005** there was absolutely no communications
23 between Mr. Bustamonte and the Government that suggested Mr. Bustamonte
24 anticipated or was aware that the Government intended to consider a death
25 prosecution. The Government never shared the possibility of a death prosecution
26 with Mr. Bustamonte prior to **December 15, 2005**. Nor was there any mention by

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1 the Government to Mr. Bustamonte of the death penalty certification process
2 involving the local United States Attorneys Office and the Capital Case Committee
3 of the Attorney Generals office in the Phase I & Phase II stages. In that Mr.
4 Bustamonte had no federal death penalty experience or training he had did not even
5 know what the Death Penalty certification protocol was or that such a thing
6 existed. On **December 15, 2005** at 2:55 pm the Government per Keith Vercauteren
7 left a telephonic message documented by Mr. Bustamonte's secretary as, [Keith
8 Vercauteren called] , "*to let you know that he is sending a packet to the Attorney
9 General in Washington regarding the death penalty. He doesn't know if you are
10 already preparing mitigating evidence and you might be contacted to present this
11 evidence by the Attorney General. It might be done via video-teleconference or you
12 might be asked to travel to Washington. Call him if you have any questions.*"

13 On **January 3, 2006** the Government filed a *second superceding Indictment*.
14 The government added a new Count 11 (Adding and Abetting) which was based on
15 the same facts previously set forth in Count 9 of the *first superceding indictment*.
16 The Government's *also annotated* Count 9. The *gilded* Count 9 of the *second*
17 *superceding indictment* remained the same but the prosecution *appended its*
18 *previously omitted* list of aggravating factors. The **January 3, 2006** gilded Count
19 9 and Count 11 of the *second superceding indictment* are the counts upon which
20 the Government's (August 16, 2006) Notice of Intent to Seek the Death Penalty is
21 based. The **January 3, 2005** *second superceding indictment* is identical to the
22 Count 9 alleged in the *first superceding indictment*. However, the second
23 superceding indictment appends a Notice of Special Findings which references
24 provisions of the Death Penalty Act, 18 U.S.C. Sec. 3591, 3592 and sets forth the
25 aggravating circumstances required for the imposition of the death penalty as
26 required by 18 U.S.C. Sec. 3592. **January 3, 2006** was the first date that the

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1 **Defendant was death-eligible.** The addition of the Notice of Special Findings in
2 the *second superceding indictment* is not a type of minor variation in facts. For
3 with this addendum came the Government's ability to seek the death penalty. This
4 severe sanction did not previously exist. *United States v. Gomez-Olmeda, 296 F.*
5 *Supp.2d 71 at 78 (U.S. District Court, PR).*

6 On **January 5 2006** Asst. U.S. Attorney Kurt Altman called Mr. Bustamonte
7 without leaving a message. Mr. Altman called again and left a message, "*needs to*
8 *discuss logistics of process because of the capital implications regarding*
9 *Department of Justice*". Mr. Bustamonte returned his call but Mr. Altman was
10 unavailable. They finally, spoke on **January 9, 2006.** *Mr. Altman mentioned that*
11 *his local office had put together information and sent it to the Capital Case*
12 *Committee at Main Justice in Washington D.C.. Mr. Altman went on to state that if*
13 *the Committee thought it was a death case then the defense attends the Committee*
14 *meeting in Washington D.C.. Mr. Altman advised that the possible date for the*
15 *Committee meeting was January 30, 2006.*

16 Prior to **December 15, 2006** the Defendant was given no opportunity to
17 present any fact, including mitigating factors to the local United States Attorney for
18 consideration. The Defendant was not death eligible until January 3, 2006 and there
19 was no request by the government for a defense presentation of facts or mitigation
20 evidence to the local U.S. Attorneys office. There was no discussions/ plea
21 negotiations regarding the death penalty or the appropriateness of seeking the death
22 penalty between privately retained defense counsel and the government. Nor was
23 there any offer by the government or request by the government that privately
24 retained counsel conduct any type of discussions or make a presentation of
25 mitigation to the government. Defense counsel had absolutely no participation in
26 what as known as the Phase I protocol. On **January 6, 2006** Mr. Bustamonte filed
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1 a Motion to Prohibit Request For Death Penalty. The Government filed a Response
2 to Rios's Motion to Prohibit Request For Death Penalty ("Government Response")
3 on **February 1, 2006**. The Government's Response states that counsel for RIOS,
4 "after the first superceding indictment of September 15, 2005...[was aware] that he
5 was death **eligible**." *see Government's Response pp3*. This statement is incorrect as
6 a matter of law. There was no Notice of Special Findings in the first superceding
7 indictment, without which RIOS was not death eligible. RIOS was not death
8 eligible until the second superceding indictment filed **January 3, 2006** which
9 *added the omitted Notice of Special Findings*. Mr. Bustamonte, upon review and
10 analysis of the second superceding indictment and Notice of Special Findings
11 timely requested learned counsel on **January 12, 2006**.

12 On **January 12, 2006** at the Arraignment and Status conference before this
13 Court Mr. Bustamonte expressly communicated to the Government that counsel for
14 RIOS would attend the Phase II Committee meeting in Washington D.C. in person.
15 At the Status conference the death penalty protocol was discussed. The
16 Government advised Mr. Bustamonte the Phase II Committee meeting was set for
17 **February 27, 2006**. *This date was picked unilaterally by the Government without*
18 *consulting defense counsel regarding availability for that date*. This created a
19 problem for Mr. Bustamonte since he had a jury trial scheduled for **February 21,**
20 **2006** in *State v. Jesus Ivan Lom CR2004-022941-002 DT*. Mr. Bustamonte
21 communicated this problem to the Government. However the Phase II **February**
22 **27, 2006** date remained the same. The Government would not continue the date.
23 Mr. Bustamonte was in trial from Tuesday **February 21, 2006** through Friday
24 **March 3, 2006** and unavailable to attend the Phase II meeting.

25 Counsel undersigned and Mitigation Specialist Keith Rohman were
26 appointed on Friday afternoon , **February 24, 2006**. On February 24, 2006
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1 counsel undersigned received a phone call from this Court's staff advising counsel
2 of his appointment and the Monday **February 27, 2006** Phase II in Washington
3 D.C.. Counsel undersigned having no file, no information about the client, no
4 discovery etc. obviously was in no position to attend. Counsel undersigned
5 immediately phoned the Government and requested the Phase II meeting be
6 postponed. The Government, per Mr. Vercauteren advised the meeting would go
7 forward as scheduled but the Government would provide the opportunity for
8 counsel for Rios Rico to make a presentation in the future **should court imposed**
9 **deadlines permit**. Since counsel undersigned's appointment he has requested on
10 several occasions the opportunity to meet or at least speak with the Capital Case
11 Committee regarding whether this case should be death certified. Counsel
12 undersigned was *never permitted to meet or communicate directly* with Main
13 Justice (the Capital Case Committee). Counsel undersigned was permitted to tender
14 a memo regarding facts and mitigation to Asst. United States Attorney Kurt Altman
15 for delivery to the Capital Case Committee for consideration.

16 Essentially, the RIOS, through no fault of his own was never at any time
17 given an adequate, meaningful or reasonable opportunity to present his case. The
18 Defendant was given absolutely no opportunity to participate in the local U.S.
19 Attorney's Phase I protocol. Counsel undersigned was not yet appointed. Mr.
20 Bustamonte was never advised by the local U.S. Attorney's office it was
21 conducting a Phase I protocol and he had no experience or training that educated
22 him as to it's existence. Nor was RIOS even death eligible until **January 3, 2006**
23 after the filing of the *second superceding indictment* and **after** the local U.S.
24 Attorney's office had already sent it's information to Main Justice. (Per Mr.
25 Vercauteren's **December 15, 2005** phone message). RIOS was not permitted an
26 adequate, meaningful or reasonable opportunity to present his case to the ultimate

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1 decision maker on the issue of death, the Capital Case Committee. The Phase II
2 meeting was scheduled at the last minute with no consideration or inquiry as to Mr.
3 Bustamonte's schedule. He was unavailable to attend as was learned counsel who
4 was appointed less than one working day before the February 27, 2006 meeting.

5 **1. The Death Notice Came As A Result Of An Authorization By The**
6 **Attorney General Which Violated The Defendant's Fifth Amendment**
7 **Right To Procedural And Substantive Due Process Of Law and Equal**
8 **Protection Of Law As Well As His Sixth Amendment Right To**
9 **Counsel.**

10 Defense counsel must be given a reasonable opportunity to present any fact,
11 including mitigating factors, to the United States Attorney for consideration.
12 *United States v. Pena-Gonzalez*, 62 F. Supp. 2d 358, 361 (D.P.R. 1999) (quoting
13 January 27, 1995, Memorandum from Janet Reno, P B, Federal Prosecution in
14 Which the Death Penalty May Be Sought), "[A] capital punishment certification
15 hearing is a 'critical' stage of a criminal proceeding where substantial rights of a
16 criminal accused may be affected." 62 F. Supp. 2d at 363 (quoting *Mempa v. Rhay*,
17 389 U.S. 128, 134, 88 S.Ct. 254, 19 L.Ed. 2d 336 (1967)). In *Pena-Gonzalez* the
18 court found that this hearing "is of paramount importance in a capital case...
19 [which] can literally lead to a determination of life or death" and as such,
20 determined that the Sixth Amendment right to counsel attaches at a death penalty
21 certification hearing. Id. at 363-364. also see *United States v. Gomez-Olmeda*, 296
22 F. Supp. 2d 71, 78 (D.P.R. 2003) Under the Constitution, laws or rules designed to
23 assure fairness and protect the substantive rights of defendants create liberty
24 interests, and thus give rise to indirect due process rights. See *Fetterly v. Paskett*,
25 997 F.2d 1295, 1300-01 (9th Cir. 1993). The US Attorney protocol for determining
26 whether to seek the death penalty in a given case makes it clear that the
27 substantive predicates detailed therein limit the discretion of the government in its
28 decision making. No notice of intent to seek death may be issued unless the terms

1 of the protocol are followed and satisfied. The terms of the protocol are mandatory²
2 and the language is unambiguous. In these circumstances the protocol creates a
3 liberty interest protected by the due process clauses of the 5th and 14th
4 Amendments. A statute or rule creates a liberty interest if the discretion of the
5 decision maker is limited by substantive predicates and if the statute or rule uses
6 mandatory language in specifying the outcome. *See, e.g., Bonin v. Calderon*, 59
7 F.3d 815, 842 (9th Cir. 1995); *Oviatt By and Through Waugh v. Pearce*, 954 F.2d
8 1470, 1474 (9th Cir. 1993); *Chaney v. Stewart*, 156 F.3d 921, 927-29 (9th Cir.
9 1998)(Reinhardt, J. concurring and dissenting in part); *see also Olim v.*
10 *Wakinekona*, 461 U.S. 238, 249 (1983)("State creates a protected liberty interest by
11 placing substantive limitations on official discretion."); *Taylor By and Through*
12 *Walker v. Ledbetter*, 818 F.2d 791, 799 (11th Cir. 1987); *Rogers v. Okin*, 738 F.2d
13 1, 7 (1st Cir. 1984). The government may argue that a potential capital defendant
14 has no right at all to the benefit of the procedures contained in the protocol and no
15 right to meet with local and main Justice officials. That may be true. But once the
16 government extends certain procedural rights to individuals which implicate life or
17 liberty, the due process clauses of the 5th and 14th Amendments protect individuals'
18 rights to access to these fair procedures.

19 The Ninth Circuit decision in *U.S. v. Fernandez*, 231 F.3d 1240 (9th Cir.
20 2000), presented and resolved a very different question than the one this case
21 presents. In *Fernandez*, the defendants sought and obtained an order from the

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23 ²⁴“Once the U.S. Attorney provides the Committee with these documents, a
24 meeting is held at which the defendant is given an opportunity to persuade the
25 government not to seek the death penalty. Specifically, the guidelines provide that
26 “[c]ounsel for the defendant *shall be provided an opportunity* to present to the
27 Committee, orally or in writing, the reasons why the death penalty should not be
28 sought.” [USAM § 9-10.000 et seq. (1997)] § 9-10.050. After this meeting, the
Committee then makes a recommendation to the Attorney General, who makes the
final decision whether to seek the death penalty in a particular case. *Id.*” *U.S. v.*
Fernandez, 231 F.3d 1240, 1243 (9th Cir. 2000)(emphasis added).

1 district court compelling the government to disclose to the defendants the
2 government's internal memoranda regarding its decision whether to seek the death
3 penalty. RIOS seeks nothing of the kind. RIOS merely sought to obtain sufficient
4 *time and resources* to conduct *his own investigation* of the case and mitigation
5 evidence, sufficient to allow him to participate *meaningfully*³ in the two forums
6 being offered by the government. Thus, the holding in *Fernandez* is inapposite to
7 the circumstances of this case.

8 By way of example, convicted felons have no constitutional right to parole,
9 but when a state institutes procedures for granting parole to certain inmates and
10 establishes a procedure for granting parole, it creates a liberty interest protected by
11 the Fourteenth Amendment in the fair administration of the parole procedures. *See,*
12 *e.g., Biggs v. Terhune*, 334 F.3d 910 (9th Cir. 2003). The Supreme Court in
13 *Greenholtz v. Inmates of Nebraska Penal*, 442 U.S. 1, 7, 11-12 (1979), and *Board*
14 *of Pardons v. Allen*, 482 U.S. 369, 373 (1987), established that:

15 while there is no constitutional or inherent right of a convicted person
16 to be conditionally released before the expiration of a valid sentence, a
17 state's statutory scheme, if it uses mandatory language, creates a
18 presumption that parole release will be granted when or unless certain
19 designated findings are made, and thereby gives rise to a constitutional
20 liberty interest. *McQuillion v. Duncan*, 306 F.3d 895, 901 (9th Cir. 2002)

21 In analyzing the procedural safeguards owed to individuals under the Due
22 Process Clause, the Ninth Circuit looks at two distinct elements: (1) a deprivation

23 ³Moreover, the government specifically made an 11th hour offer that
24 RIOS participate in the Phase II protocol procedure and that Rios present any
25 substantive facts or reasons why he should not be sentenced to death.
26 Mr. Bustamonte accepted that 11th hour offer. Subsequent to his acceptance of
27 that offer the Government unilaterally added unreasonable and unacceptable
28 terms which rendered the process unfair and meaningless, the Phase II meeting
was scheduled on a date in which Mr. Bustamonte was in trial. Under basic
contract principles RIOS is entitled to a reasonable opportunity to participate
meaningfully in these discussions that cannot be frustrated in an arbitrary way by
government conduct such as waiting until the last minute to give defense counsel
notice of the Phase II meeting and unreasonably scheduling the meeting at time
that makes it physically impossible for Rios counsel to attend.

1 of a constitutionally protected life, liberty or property interest, and (2) a denial of
2 adequate procedural protections. *McQuillion v. Duncan*, *supra*, 306 F.3d 895, 900
3 (9th Cir. 2002), *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d
4 971, 982 (9th Cir. 1998). Liberty interests have been recognized, for example, in
5 remaining free of forced medication, *See Benson v. Terhune*, 304 F.3d 874 (9th Cir.
6 2002); in receiving uncensored mail in prison, *See Bd. of Regents v. Roth*, 408 U.S.
7 564, 569 (1972); in the guarantee that parents and children will not be separated by
8 the state without due process of law except in an emergency, *See Wallis v. Spencer*,
9 202 F.3d 1126 (9th Cir. 2000). *See also Hicks v. Oklahoma*, 447 U.S. 343
10 (1980)(Where . . . a state has provided for the imposition of criminal punishment in
11 the discretion of the trial jury. . . . the defendant has a substantial and legitimate
12 expectation that he will be deprived of his liberty only to the extent determined by
13 the jury in the exercise of its statutory discretion, and that liberty interest is one that
14 the Fourteenth Amendment preserves against arbitrary deprivation by the State.)

15 While the government's discretion in determining whether to file a notice of
16 intent to seek death is broad, even the government would concede that it is not
17 unbridled and is circumscribed not only by the specific terms of the protocol, but
18 by the 8th Amendment's prohibition on arbitrary and capricious capital charging,
19 which results in the arbitrary and standard-less imposition of the death penalty. The
20 8th Amendment also imposes upon the government that it ensure a heightened
21 degree of "reliability" in capital cases. *Woodson v. North Carolina*, 428 U.S. 280
22 (1976); *Gardner v. Florida*, 430 U.S. 349 (1977); *Skipper v South Carolina*, 476
23 U.S. 1 (1986); *Simmons v. South Carolina*, 512 U.S. 154 (1994).

24 The finality and severity of a death sentence makes it qualitatively
25 different from all other forms of punishment. (citations omitted) The
26 Supreme Court has stressed the great need for reliability in capital
27 cases requiring that "capital proceedings be policed at all stages by an
28 especially vigilant concern for procedural fairness and for the accuracy
of factfinding." (citations omitted) "[T]he qualitative difference of

1 death from all other punishments requires a correspondingly greater
2 degree of scrutiny of the capital sentencing determination". (footnote
3 omitted). "The defendant has a legitimate interest in the character of
4 the procedure which leads to the imposition of [the death] sentence . . .
5 ." (citations omitted) When human life is at stake, the need to ensure
6 that punishment is meted out fairly and in a noncapricious manner is
7 preeminent. (citations omitted). *Coleman v. McCormick*, 874 F.2d at
8 1280, 1288.

9 Such cannot be ensured if the process by which cases are chosen for the
10 ultimate punishment is reduced to a hollow formalism in which the potential capital
11 defendant has no meaningful opportunity to participate. Therefore, counsel for
12 RIOS respectfully requests this Court Strike the Government's Notice of Intent To
13 Seek The Death Penalty.

14 **2. The Time Interval Between The of Filing The Notice Of Death And The
15 Present Trial Date Is Objectively Unreasonable Period Of Time To
16 Prepare To Defend A Foreign National In A Death Penalty Guilt And
17 Sentencing Phase Federal Prosecution. *The Remedies Available To This
18 Court are To Strike The Death Notice Or Continue RIOS's Trial And Sever
19 His Case From The Co-Defendants.***

20 Defense counsel should not be required to expend the time and resources
21 required to mount a death defense until the Government gives notice that it actually
22 intends to seek the death penalty. *United States v. McGriff*, 427 Supp.2d 253 (D.C.
23 NY 2006). Moreover, it is counsel's own experience having been appointed as
24 learned counsel in three other federal trial level death penalty cases that the District
25 Court will not approve the funding to conduct a full blown mitigation investigation
26 prior to the Government formally noticing death. At present the time between the
27 filing of the Government's death notice and the trial date, August 16, 2006 and
28 November 28, 2006 is barely 3 months. Three months is objectively unreasonable
amount of time to investigate, develop and present mitigation at a capital
sentencing proceeding in the representation of a foreign national. Counsel
undersigned agrees with the Government's Response as to the standard to
determine whether the filing of a Death Notice was a "reasonable time" before

1 trial. That determination, “ requires an inquiry into the objective reasonableness of
2 the time between the issuance of the Death Notice and the trial itself.” *United*
3 *States v. Ferebe*, 332 F.3d 722 at 727 (4th Cir. 2003). However, counsel would add
4 that an appropriate alternative remedy for the Court to consider is a continuance.
5 “Although the statute is silent as to a remedy, there are only two possibilities that
6 would ensure that a defendant would not be compelled to defend against the death
7 penalty without adequate notice: striking the notice or granting a continuance.”
8 *United States v. McGriff* 427 F.Supp. 2d 253 at 264 (2006) “The factors relevant to
9 the remedy at issue require the Court to deny McGriff’s motion to strike the death-
10 penalty notice and to order a severance and continuance.” *Id* at 266.

11 A full blown mitigation investigation in this matter requires an investigation
12 in Mexico where RIOS was raised until the age of 12 years. A minimally
13 competent mitigation investigation will require identifying, locating and
14 interviewing family, friends, teachers, medical personal and other significant
15 persons in RIOS life. Some or all may not speak english. Secondly and even more
16 laborious is the collection of all institutional records from Mexico that pertain to
17 his and his families mental health and physical health history. After the completion
18 of the same a Social History/Life History with all supporting institutional records
19 must be composed in written/report form for review by any expert consulted. It is
20 the only way to get an informed and competent opinion from an expert. It is
21 ineffective assistance of counsel for counsel to fail to investigate, develop and
22 present all relevant factual information to a defense expert.

23 An investigation must be conducted into what counsel is presently aware of
24 as well as to uncover other unknown facts that are relevant to a sentence of life
25 over death. Counsel has identified significant areas to investigate, develop, present
26 to experts and to prove/secure for admission into evidence at trial (1)*Potential*

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1 *brain damage, (2) Custodial Parent father was a drug addict and abused alcohol,*
2 *(3) Desertion by father (4) Parental mental illness, (5) Exposure to violence and*
3 *Exposure to intra-family violence (6) Cultural disruption (7) Drug Addiction (8)*
4 *Exposure to racism.*

5 The factual investigation (witness interviews in Mexico in two separate cities
6 and locating crew from the oil tanker) must be supplemented by an investigation
7 into all institutions that treated RIOS and his family for mental health, physical
8 health and substance abuse as well as employment histories, employee records,
9 incarceration histories etc. It is only after the completion of the factual
10 investigation and document collection that appropriate experts to retain as
11 consultants can be effectively considered. Moreover, the defense must compile a
12 written narrative of RIOS's life history (as required by case law) to give any and all
13 experts consulted in order to secure an informed expert opinion.

14 There are a number of potential indicators of potential brain damage in
15 Jose's background including the possibility of in-utero or early childhood
16 exposure to toxic chemicals followed by years of drug and alcohol abuse. *Rios*
17 *Rico may have been exposed to a toxicity while in utero and for the first six years*
18 *of his life.* Jose Rios Rico's father is a Mexican national and was the first officer
19 on a oil tanker operated by the Mexican oil company, Pemex. The practice on
20 these ships was to permit officers to have their wives and families with them on
21 board ship. As a consequence, Jose's mother became pregnant with Rios Rico
22 while onboard ship. She remained on board throughout most of her pregnancy.
23 There exists the distinct possibility that Rios Rico's mother was exposed to toxic
24 chemicals on a regular basis during her pregnancy, and that he was exposed to
25 these chemicals in utero and throughout his early years. Exposure to toxic
26 chemicals while in-utero, and during a child's developmental years have been

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1 associated with organic brain damage. Moreover, Rios Rico was born in a third
2 world country under less than ideal conditions. Rios Rico's mother reports that
3 she had a lengthy and difficult labor, complicated by his large size at birth. She
4 reports the need for a surgical intervention to facilitate his birth. Birth difficulties
5 have been associated with brain damage to the child. After his birth, Rios Rico
6 spent much of his first six years on board various Pemex vessels. He had the run of
7 the ship, and was able to go almost anywhere on the ships. The vessels were his
8 toxic playground the first six years of his life.

9 Rois Rico's father was an alcoholic whose drinking led him to lose his
10 marriage and his career. Rois Rico's father was also a heroin addict. Rois Rico's
11 mother reports that his father was terminated as a ship's captain following the crash
12 of a boat he was captaining. His father was reportedly drunk at the time. She also
13 reports him to have been drunk to the point of passing out on numerous occasions.
14 When Rois Rico was 15 years old, he visited his father in Tijuana and observed
15 his father use heroin, as well as other illegal drugs. A family history of drug and
16 alcohol addiction, particularly on the father's side, is a major risk factor for the
17 development of the offspring's propensity and likelihood for alcohol and drug
18 addiction. Jose's father deserted his family after Jose was six, and Jose saw him
19 only sporadically in the years that followed. Jose saw his father briefly when he
20 was around 11 years old, and then he did not see him again until he was around 14
21 or 15 years old. At 14 or 15 years old, Jose left the United States and went to live
22 with his father in Tijuana, Mexico for approximately nine months. During this
23 period Rois Rico's did not attend school. Rather, he assisted his father with odd
24 jobs and witnessed his father's use and abuse of heroin and other illegal drugs. This
25 period was a turning point for Rois Rico's. Following his return to the United
26 States (to live with his mother) he turned to drugs, drug abuse and drug dealing.

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1 Perhaps the most significant mitigating factor in Rois Rico's life will be
2 his obsessive and complete addiction to alcohol, cocaine and finally, and most
3 destructively to methamphetamine. Rois Rico began drinking at the age of 12.
4 From the age of 17 until he was 24, Jose used cocaine and alcohol whenever he
5 could get it, which, as he was dealing drugs, was virtually on a daily basis. His use
6 of cocaine was cut back in September 2001 when he began using
7 methamphetamine. Rois Rico's was dealing the drug for a long time before
8 trying it himself, however, once he tried it, the drug consumed his life. Rois Rico
9 used this toxic brain altering drug *every day* from September 2001 until his arrest
10 in 2003. He used the drug daily except for brief periods where he would pass out
11 and sleep for days at a time. He would then wake up, and reuse the drug.
12 Methamphetamine is a hallucinogen and it's chronic use leads to sleep deprivation,
13 paranoid psychosis and delusion. There are a number of indications that Rois
14 Rico's father suffers from mental illness. There are reports that he underwent a
15 mental breakdown following his divorce. There are reports that he attempted
16 suicide, that he has been unable to work for many years due to emotional
17 difficulties and had other life issues that suggest a strong likelihood of mental
18 illness. A family history of mental illness is a risk factor for the child's mental
19 health. The marriage between Jose's parents became increasingly strained, and
20 eventually led to the end of the marriage. Before that happened, Jose was witness
21 to violent altercations where his father attacked his mother, often after drinking.
22 On at least one of these occasions, Jose attempted to intervene to protect his
23 mother, even though he was only five or six years old. There are indications that
24 the transformation from Mexican life to the United States was a difficult one for
25 Rios Rico, and created significant problems for him in his adolescent
26 development. Rios Rico's adolescence development and education were

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1 disrupted, damaged and deficient because of racism during his life in Mesa,
2 Arizona as a young Mexican-American. There were outbreaks of anti-Mexican
3 violence in Jose's high school which resulted in a race riot at the school where
4 Mexican-American and Mormon students fought pitched battles.

5 The world of Rios Rico's peers was heavily impacted by violence while he
6 was still an adolescent. Two of his closest friends were convicted of murder in two
7 separate incidents, one involving a drive-by shooting, the other involving the
8 shooting of a pregnant girlfriend. Another of Rios Rico's friends was murdered
9 while he was in high school. All of the aforementioned facts have to be confirmed,
10 corroborated and secured for admission at trial to prove at a capital sentencing
11 proceeding.

12 The facts here are similar to those in recent cases where the 9th Circuit
13 remanded for an evidentiary hearing on the question of ineffective assistance of
14 counsel at the penalty phase. In *Caro v. Calderon*, 165 F.3d 1223 (9th Cir. 1999),
15 the 9th Circuit stated that "[i]t is imperative that all relevant mitigating
16 information be unearthed for consideration at the capital sentencing phase." *Id.* at
17 1227. In *Caro*, defense counsel knew that the defendant had been abused as a child
18 and exposed to neurotoxic chemicals throughout his life. However, the lawyer did
19 not seek out neurochemical experts or *even provide the examining doctors with the*
20 *information he had about the defendant's background.* Upon learning the full
21 extent of Caro's background, one examining doctor declared that had he known it
22 earlier, he would have testified that the defendant had diminished mental capacity.
23 *See id.* at 1226. Although the lawyer's failure to develop and relay medical
24 evidence did not constitute ineffective assistance at the guilt phase, *the 9th Circuit*
25 *concluded that sentencing — where mitigation evidence may well be the key to*
26 *avoiding the death*

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1 penalty — is different. See *id.* at 1227. The 9th Circuit explained that:

2 [c]ounsel have an obligation to conduct an investigation
3 which will allow a determination of what sort of experts
4 to consult. Once that determination has been made,
5 counsel must present those experts with information
6 relevant to the conclusion of the expert. . . . A lawyer
7 who knows of but does not inform his expert witnesses
8 about . . . essential pieces of information going to the
heart of the case for mitigation does not function as
'counsel' under the Sixth Amendment. *Id.* at 1226, 1228.

9 RIOS's situation also bears some similarity to two cases where the 9th
10 Circuit affirmed findings of ineffective counsel at the penalty phase. At the
11 sentencing hearing in *Clabourne v. Lewis*, 64 F.3d 1373 (9th Cir. 1995),
12 Clabourne's lawyer relied on the trial testimony of one psychologist, and
13 inadequately cross-examined the State's psychologists. See *id.* at 1384. However,
14 he had barely prepared his own psychologist for his trial testimony, and had
15 provided him with *scant information* about the defendant and his background. See
16 *id.* Nor had the lawyer provided the State's psychologists with statements and
17 records that would have helped them profile the defendant's mental health
18 accurately. See *id.* at 1385. The point being that RIOS counsel is obligated to
19 provide complete and accurate information to experts. That can only be done after
20 the investigation in Mexico and collection of institutional records in Mexico are
21 complete and the same is put in narrative form. In *Hendricks v. Calderon*, 70 F.3d
22 1032 (9th Cir. 1995), the 9th Circuit concluded that the defense lawyer had
23 reasonably relied on psychologists' findings in not pursuing a *mental defense at*
24 *trial*. See *id.* at 1037-39. Even though the psychologists lacked important
25 information about Hendricks's drug problems and hard childhood, the 9th Circuit
26 held that counsel's failure to investigate and relay this information was not
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1 deficient because the psychologists had not asked for it. *See id. at 1038. At the*
2 *penalty phase, however, this same lack of diligence did constitute ineffective*
3 *assistance.*

4 Recognizing that "[e]vidence of mental problems may be offered to show
5 mitigating factors in the penalty phase, even though it is insufficient to establish a
6 legal defense . . . in the guilt phase," the 9th Circuit said that "where counsel is on
7 notice that his client may be mentally impaired, counsel's failure to investigate his
8 client's mental condition as a mitigating factor in a penalty phase hearing, without
9 a supporting strategic reason, constitutes deficient performance." *Id. at 1043.*

10 To descend to the level of ineffective assistance of counsel, a lawyer's
11 performance must be poor indeed. Yet, *Caro, Hendricks and Clabourne* establish
12 that, at the penalty phase of a capital case, a failure to investigate *or to adequately*
13 *prepare expert witnesses may sink to that level.*

14 Once RIOS's mitigation investigation and collection of records is complete
15 counsel will be in a position to consult with appropriate experts and solicit their
16 opinion and not until such time. It appears the following experts will need to be
17 consulted (1) Neuro-psychologist or Neuro-psychiatrist;(2) Toxicologist or
18 Occupational Medical Expert (3) Mental Health Expert with specialty in Childhood
19 Exposure to Intra-family Violence/Parental Substance Abuse and Parental
20 Abandonment (4) Substance Abuse Expert (5) Mexican Cultural Expert. Secondly,
21 it is anticipated that one or more of the experts will request testing such as MRI,
22 brain scan etc.

23 The Due Process Clause requires the appointment of competent counsel
24 capable of giving effective aid because a defendant facing capital punishment
25 "requires the guiding hand of counsel at every step in the proceeding against him."
26 *Powell v. Alabama, 287 U.S. 45; 69-71 (1932).* In *Strickland v. Washington, 466*

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1 *U.S. 668 (1982)*, the Supreme Court said that counsel in such cases must act with
2 “reasonableness under prevailing professional norms” as “guided” by American Bar
3 Association standards and the like. This standard includes counsel’s duty to
4 investigate fully and present mitigating evidence at the penalty phase of the case.

5 In *Wiggins v. Smith*, 539 *U.S. 510 (2003)*, a recent case on ineffective
6 assistance of counsel, the Court held that counsel’s investigation and presentation
7 “fell short of the standards for capital defense work articulated by the American Bar
8 Association (ABA) – standards to which we have long referred as ‘guides to
9 determining what is reasonable.’” *Id. at 524*. In its discussion of the 1989 ABA
10 Guidelines for counsel in capital cases, the Court held that the Guidelines set the
11 applicable standards of performance for counsel. The Court stated:

12 Investigation into mitigating evidence Should comprise efforts to
13 discover all reasonably available mitigating evidence and evidence to
14 rebut any aggravating evidence that may be introduced by the
15 prosecutor.” ABA Guidelines for the Appointment and Performance of
16 Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) . . . Despite
17 these well-defined norms, however, counsel abandoned their
18 investigation of petitioner’s background after having acquired only
19 rudimentary knowledge of his history from a narrow set of sources.
20 (emphasis in original).

21 *539 U.S. at 524*. The Court also adopted ABA Guideline 11.8.6, stating that:
22 that among the topics counsel should consider presenting are medical
23 history, educational history, employment and training history, family
24 and social history, prior adult and juvenile correctional experience, and
25 religious and cultural influences. (emphasis in original).

26 *Id.*
27 The Court described the mitigating evidence that counsel in *Wiggins* failed to
28 discover and present as “powerful.” *Wiggins* experienced severe privation and
29 abuse in the first six years of his life while in the custody of his alcoholic absentee
30 mother, he suffered physical torment, sexual molestation, and repeated rape during
31 his subsequent years in foster care. *539 U.S. at 535*. The Court found “that had the
32 jury been confronted with this considerable mitigating evidence, there is a

1 reasonable probability that it would have returned with a different sentence.” *Id.* at
2 536. See also *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (“Evidence about the
3 defendant’s background and character is relevant because of the belief, long held by
4 this society, that defendants who commit criminal acts that are attributable to a
5 disadvantaged background . . . may be less culpable than defendants who have no
6 such excuse”). The mitigating evidence in the defendant’s case is potentially no
7 less powerful. Reviewing the Court’s history of defining what the “effective
8 assistance of counsel” means, the Sixth Circuit rightly concluded that “the Wiggins
9 case now stands for the proposition that the ABA Standards for counsel in death
10 penalty cases provide the guiding rules and standards to be used in defining the
11 prevailing professional norms’ in ineffective assistance cases.” *Hamblin v.*
12 *Mitchell*, 354 F.3d 482, 486 (6th Cir. 2003).

13 The 1989 ABA Guidelines were revised in 2003. The ABA Guidelines for
14 the Appointment and Performance of Defense Counsel in Death Penalty Cases,
15 Revised Edition, February 2003, are available at www.abanet.org/deathpenalty.
16 Counsel’s obligation to perform a full and complete investigation and to present
17 mitigating evidence is defined by these standards.

18 Revised ABA Guideline 10.7 provides:

19 A. Counsel at every stage have an obligation to conduct thorough and
20 independent investigations relating to the issues of both guilt and penalty.

21 1. The investigation regarding guilt should be conducted regardless of
22 any admission or statement by the client concerning the facts of the
23 alleged crime, or overwhelming evidence or guilt, or any statement by
24 the client that evidence bearing upon guilt is not to be collected or
25 presented.

26 2. The investigation regarding penalty should be conducted
27 regardless of any statement by the client that evidence bearing
28 upon penalty is not to be collected or presented.

As described in the Commentary to Guideline 10.7, elements of an appropriate
investigation

1 require that counsel do at least the following:

2 With the assistance of appropriate experts, counsel should . . .
3 aggressively reexamine all of the government's forensic evidence and
4 conduct appropriate analysis of all other available forensic evidence.

5 Counsel need to explore poverty, familial instability, neighborhood
6 environment, experience or racism or other social or ethnic bias,
7 cultural or religious influences, failure of government or social
8 intervention.

9 If the client is a recent immigrant, counsel must also learn about the
10 client's culture, about the circumstances of his upbringing in his
11 country of origin, and about the difficulties the clients' s immigrant
12 community faces in this country.

13 See Commentary to Guideline 10.7. Judged by these standards, the investigation of
14 mitigating evidence underway in the defendant's case has barely scratched the
15 surface. Knowledge of his history is rudimentary and is acquired from "a very
16 narrow set of sources."⁴

17 As recently as last term, the Supreme Court reiterated that "[v]irtually no
18 limits are placed on the relevant mitigating evidence a capital defendant may
19 introduce concerning his own circumstances. *Tennard v. Dretke*, ___ U.S. ___, 124
20 S.Ct. 2562, 2370 (2004). Inadequate time for case preparation limits the relevant
21 mitigating evidence a defendant may introduce and can jeopardize an accused's
22 right to effective assistance of counsel. As noted by the Tenth Circuit in *United*
23 *States v. King*, 664 F.2d 1171, 1173 (10th Cir. 1981), "[a]lthough frequently the
24 result of a slothful lawyer, inadequate preparation can also be caused by
25 unreasonable time constraints imposed by a trial court." Whether court induced
26 lack of preparation deprives a defendant of Sixth Amendment rights "turns on the
27 circumstances underlying his particular case." *Id.* Factors for determining whether

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⁴ *Wiggins*, 539 U.S. at 524. Counsel in *Wiggins* did not expand their investigation
beyond the written Presentence Report which included a written account of *Wiggins*' personal
history noting his "misery as a youth," and quoting his description of his own background as
"disgusting," and available Department of Social Services records. In this case, counsels'
knowledge of the defendant's history is still limited to information acquired from the defendant.

1 the given preparation time was sufficient were set out by the court in *King*. Those
2 factors include:

3 (1) the time afforded for investigation and preparation; (2) the
4 experience of counsel; (3) the gravity of the charge; (4) the complexity
of possible defenses; and (5) the accessibility of witnesses to counsel.

5 664 F.2d at 1173.

6 While the prompt disposition of criminal cases is to be commended and
7 encouraged, the Court in *King* cautioned that a defendant charged with a serious
8 crime, must not be "stripped of his right to have sufficient time to advise with
9 counsel and prepare his defense." *Id.* This guiding principle was implicitly
10 recognized by the Supreme Court's in *Wiggins* by virtue of its acceptance of the
11 ABA Guidelines as the "prevailing professional norms" in capital cases." Other
12 courts have also recognized that the denial of a motion for continuance raises
13 constitutional concerns "if there is an unreasoning and arbitrary insistence upon
14 expeditiousness in the face of a justifiable request for delay." *United States v. Gallo*,
15 763 F.2d 1504, 1523 (6th Cir. 1985), cert. denied, 474 U.S. 1068 (1986); *United*
16 *States v. Mitchell*, 744 F.2d 701, 704 (9th Cir. 1984). See also *United States v.*
17 *Verderame*, 51 F.3d 249 (11th Cir.1995). The Supreme Court opined in *Ungar v.*
18 *Sarafite*, 378 U.S. 575 (1964), that "a myopic insistence upon expeditiousness in the
19 face of justifiable request for delay can render the right to defense with counsel an
20 empty formality . . ." *Id.* at 849-50.

21 Essentially, there are four stages of investigation in preparing for RIOS's
22 capital penalty phase. (1) Locating and interviewing mitigation (foreign) witnesses
23 and securing their attendance for trial, (2) collecting all institutional records of
24 RIOS and his family, (3) compiling the same into a narrative report with supporting
25 documentation, (4) submitting RIOS's life history for review by experts for their
26 opinion, (5) conducting testing recommended by experts and evaluating their
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1 findings/opinion. RIOS's request for additional time is consistent with the
2 heightened concern for fairness and accuracy that has characterized the Supreme
3 Court's review of the process requisite to the taking of a human life. Twelve months
4 to prepare for a capital sentencing in this matter is reasonable and necessary.

5
6 Respectfully submitted this 4th day of September 2006 *s/Thomas A. Gorman*

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9 Thomas A. Gorman

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13 hereby certify that on September 4th 2006
14 electronically transmitted the attached
15 document to the Clerk's Office using the
16 CM/ECF system for filing and transmittal
17 of a Notice of Electronic Filing to the
18 following CM/ECF registrants.

19 RADodell@worldnet.att.net

20 antonio_b@qwest.net

21 pmcgillicuddy@quest.net

22 mcmath@qwest.net

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8 UNITED STATES DISTRICT COURT
9 DISTRICT OF ARIZONA

10 United States of America
11 Plaintiff,
12 v.
13 Jose Rios Rico,
14 Defendant.

CR-05-0272-PHX-JAT
**UNITED STATES' RESPONSE TO
DEFENDANT RIOS RICO'S
MOTION TO STRIKE DEATH
NOTICE *ALTERNATIVELY*
MOTION TO CONTINUE TRIAL
DATE**

15 The United States of America, by and through undersigned counsel, responds to defendant
16 JOSE RIOS RICO's Motion to Strike Death Notice *Alternatively* Motion to Continue Trial Date,
17 and respectfully requests this Court deny defendant's Motion to Strike Death Notice and Motion
18 to Continue Trial date for 12 months. However, the United States of America, by and through
19 undersigned counsel does not object to a trial continuance to early February of 2007, a date
20 approximately 6 months from the filing of the government's Notice of Intent to Seek Death
21 against defendant Rios Rico, on August 16, 2006. This response and its request is supported by
22 the attached Memorandum of Points and Authorities.

23 Respectfully submitted this 14th day of September, 2006.

24 PAUL K. CHARLTON
United States Attorney
District of Arizona
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26
27 *s/ Kurt M. Altman*
KURT M. ALTMAN
Assistant United States Attorney
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MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

On September 15, 2005, the United States obtained a First Superceding Indictment charging defendant JOSE RIOS RICO with Count 9, Possession or Use of a Firearm During and In Relation to a Drug Trafficking Offense Resulting in Death. This charge by statute carries a potential sentence of death if convicted. The First Superceding Indictment, for the first time, contained a charge against defendant that carried a potential death sentence. A Second Superceding Indictment was obtained by the United States on January 3, 2006. The additions in the Second Superceding Indictment included Count 11, also a death eligible offense by statute, and Notice of Special Findings.

On January 12, 2006, a status conference was held with all remaining defendants, including RIOS RICO. The status conference was called for by this Court in light of a motion to continue the trial date filed by a defendant. At that status conference a number of issues were covered, a few of which are pertinent to this motion.

First, at the Court's request, the United States informed the Court on the status of the Department of Justice's Death Penalty Protocol. The government indicated that all of the relevant work product material from the District of Arizona had been forwarded to the capital case review committee in Washington, D.C. The material was associated only with defendants RIOS RICO, Spor and Creeger, since they were the only defendants who faced a potential death sentence. After review in Washington D.C., the capital case review committee extended an invitation to counsel for RIOS RICO to travel to Washington to meet with the committee and present any material counsel believed relevant to the final death notice decision. This Court was informed that the meeting between RIOS RICO's counsel and the committee was scheduled for February 27, 2006. Contrary to defendant's motion, this date was reached in consultation with defense counsel Antonio Bustamonte. A final decision on whether to seek death against the

1 three eligible defendants would be rendered by the Department of Justice within approximately
2 60 days of the scheduled meeting.

3 A representative of the Federal Public Defender's Office was also present at the status
4 conference and informed the Court that they had been notified by the United States Attorney's
5 Office in late December, 2005, of the potential death penalties in this case. As such, they had
6 began the search for second counsel as to Spor and Creeger but had not done so as to RIOS
7 RICO since he had retained counsel privately. RIOS RICO's counsel told the Court that he
8 wanted second counsel and that his client could not pay for such counsel privately. An *ex parte*
9 hearing on that issue was held after the status conference, the results of which the government
10 presumes was the appointment of Thomas A. Gorman as second counsel.

11 As a result of the information gathered, this Court set a "death notice" deadline of May 5,
12 2006, for the government to notice whether or not death against any eligible defendant would
13 be sought. On April 25, 2006, the government filed a Motion to Extend Time to File Notice of
14 Intent to Seek Death Penalty, to May 31, 2006, which was granted by this Court. The
15 government again filed a Motion to Extend Time to File Notice of Intent to Seek Death Penalty
16 on May 31, 2006, requesting an additional month to June 30, 2006. This Court granted the
17 motion. The deadline in which to file any death notice by the government was again extended
18 by this Court on defendant's motion. The court set a death filing deadline of August 20, 2006,
19 a trial date of November 28, 2006, and a motions deadline for September 22, 2006. The United
20 States filed a Notice of Intent to Seek the Death Penalty against defendant on August 16, 2006,
21 complying with the deadlines set by the court.

22 II. LEGAL ANALYSIS

23 24 1. THE DECISION WHETHER TO SEEK THE DEATH PENALTY IS WITHIN THE 25 SOLE DISCRETION OF THE PROSECUTOR AND IN NO WAY IMPLICATES 26 THE 6TH AMENDMENT:

27 Defendant asserts that the government's Notice of Intent to Seek Death Penalty should
28 be stricken because the authorization to seek death from the Attorney General of the United

1 States violated "defendant's Fifth Amendment right to procedural and substantive due process
2 of law, equal protection of the law, as well as his Sixth Amendment right to Counsel."
3 Defendant's assertions are without merit.

4 Defendant argues that he "must be given reasonable opportunity" to present facts and
5 mitigation to the United States Attorney prior to any decision to seek death by the government.
6 Defendant relies on an District Court opinion in *United States v. Pena-Gonzalez*, 62 F.Supp. 2d
7 358 (D.P.R. 1999). Defendant's reliance is misplaced. The decision of whether to seek the
8 death penalty in a particular case is "essentially a prosecutor's charging decision." *United States*
9 *v. McVeigh*, 944 F.Supp. 1478, 1484 (D.Colo. 1996). The charging decision made by the
10 prosecution creates no constitutional right in a defendant. "The constitutional protections of the
11 life and liberty of a defendant are provided by a sentencing hearing following trial of the charges
12 in the indictment." *Id.* No matter how it is presented by the defense, a decision to seek death
13 in a federal case is a charging decision that creates no rights in a defendant.

14 In *United States v. Boyd*, 931 F.Supp 968 (D.R.I. 1996), the defendant, facing the federal
15 death penalty argued that without certain disclosure of aggravating and/or mitigating information
16 relied on by the Department of Justice in deciding to file the notice of intent to seek the death
17 penalty, he was being denied effective assistance of counsel by placing him in a "ring with an
18 invisible opponent." *Id.*, at 969. Boyd claimed that the decision whether or not to seek the death
19 penalty by the Department of Justice was a critical stage of the proceedings and that depriving
20 him of the information requested effectively deprived him of his Sixth Amendment right to
21 counsel. *Id.*, at 970. The Court strenuously disagreed with defendant's proposition. "This court
22 finds that the invitation extended Boyd to present mitigating information does not constitute a
23 critical stage of the proceeding." *Id.*, at 973. The District Court relied on the long list of
24 reported 6th Amendment cases including *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct.
25 2052, 80 L.Ed.2d 674 (1984), and its progeny. Critical stages occur "at or after the initiation of
26 adversary criminal proceedings—whether by way of formal charge, preliminary hearing,
27 indictment, information or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877,
28 1882, 32 L.Ed.2d 411, (1972).

1 Presenting potentially mitigating information to the Department of Justice and United States
2 Attorney for the District of Arizona, simply is not an adversarial proceeding as defined by law.
3 Counsel for defendant does not have to defend, rebut, or discredit evidence presented to a fact
4 finder, like a jury, for final determination. The invitation is nothing but a courtesy, formalized
5 by internal policy, offered prior to a final charging decision by the United States Attorney
6 General. This internal policy, or Protocol, in no way “creates any individual right or entitlement
7 subject to the due process protections applicable to an adjudicative or quasi-adjudicative
8 governmental action.” *McVeigh*, 944 F.Supp., at 1483. As such, defendant’s reliance on the 6th
9 Amendment as a basis to object to the process and time line is misplaced.

10
11 **2. THE DEPARTMENT OF JUSTICE DEATH PENALTY PROTOCOL CREATES NO**
12 **INDIVIDUAL LIBERTY INTEREST OF ENTITLEMENT:**

13 To begin, defendant’s premise that the United States Attorney for the District of Arizona and
14 the Department of Justice death penalty protocol creates some type of substantive right to be
15 exercised by defendant is false. The United States Attorneys’ Manual (hereinafter USAM)
16 “provides the defendant with an opportunity to appear before the Committee and present reasons
17 why the government should not seek the death penalty. *See* USAM § 9-10.050.” *United States*
18 *v. Fernandez*, 231 F.3d 1240, 1245 (9th Cir. 2000). “To begin, it is clear that the USAM does
19 not create any substantive or procedural rights, including discovery rights.” *Id.*, at 1246. The
20 USAM itself, clearly indicates its intention not to create any individual right. “The Manual
21 provides only internal Department of Justice Guidance. It is not intended to, does not, and may
22 not be relied upon to create any rights, substantive or procedural, enforceable at law by any party
23 in any matter civil or criminal. USAM § 1-1.100. “In addition, several courts, have consistently
24 held that these guidelines do not create any rights in criminal defendants.” *Fernandez*, 231 F.3d
25 at 1246, *citing*, *United States v. Montoya*, 45 F.3d 126, 1289 (9th Cir. 1995); *United States v.*
26 *Piervinanzi*, 23 F.3d 670, 682 (2d Cir. 1994); *United States v. Lorenzo*, 995 F.2d 1448, 1453 (9th
27 Cir. 1993); *United States v. Busher*, 817 F.2d 1409, 1411 (9th Cir. 1987).

28

1 Defendant argues that *Fernandez* is distinguishable from the case at bar because in that case
2 the defendant was seeking discovery of the government's internal memorandum regarding the
3 decision whether to seek the death penalty. In this case, defendant is not seeking disclosure, but
4 moving to strike the notice to seek death because it violates defendant's "rights." The distinction
5 drawn by defendant does not affect the analysis. Defendant's argument relies on his assertion
6 of a constitutional liberty interest created by the Protocol. There is no such interest.

7 The Protocol was again scrutinized in 2002. In *United States v. Lee*, 274 F.3d 485 (8th Cir.
8 2002), defendant, along with his co-defendant, was convicted of a federal capital murder charge.
9 *Id.*, at 488. Lee was eventually sentenced to death by a jury. *Id.* A jury found that life without
10 parole was the appropriate sentence for Lee's co-defendant, prior to Lee's sentencing hearing.
11 *Id.* The United States Attorney, Paula Casey, informed the Court that it was her intention to
12 withdraw the intention to seek death against Lee, but was unsure if she needed Department of
13 Justice approval. *Id.*, at 488-489. The Protocol requires United States Attorney General
14 approval to withdraw a notice to seek the death penalty. USAM § 9-10.090. During a Court
15 granted recess, United States Attorney Casey called the Department of Justice seeking
16 permission to withdraw the notice of intention to seek the death penalty. *Lee*, 274 F.3d, at 489.
17 She was told that Attorney General Janet Reno was unavailable for consultation. Deputy
18 Attorney General Eric Holder convened the committee and it was decided that Casey could not
19 withdraw the death notice. *Id.* Casey informed the Court and Lee's sentencing hearing began
20 the next day. *Id.*

21 The District Court granted Lee's motion for a new sentencing trial. "The predicate for this
22 order was the court's conclusion that the government had breached the protocol when Deputy
23 Attorney General Holder acted in the Attorney General's absence and decided not to withdraw
24 Lee's death notice and that Lee had a right to enforce compliance with the protocol under the
25 *Accardi* doctrine." *Id.*, at 492. The 8th Circuit Court of Appeals, using the same analysis used
26 by other Circuits addressing the Protocol, disagreed. *Id.*, at 493. "We agree with those courts
27 which have concluded that the death penalty protocol is unenforceable by individuals." *Id.*
28 "Since the death penalty protocol does not create individual rights that Lee can enforce, any

1 violation of it was not a basis on which the district court could issue its conditional order for a
2 new penalty hearing.” *Id.*

3 Clearly, the Protocol creates no substantive or procedural rights as argued by defendant.
4 Even when the Protocol is not followed to the letter, as in the *Lee* case, a defendant has no legal
5 recourse. A decision whether to seek the death penalty is soundly within the discretion of the
6 prosecution. The manner or time line of that deliberation, information and mitigation relied on
7 by the prosecution, and process used by the government in deciding to seek a death sentence,
8 cannot be challenged by defendants. Therefore, defendant’s request to strike the Notice of Intent
9 to Seek the Death Penalty against him because it somehow violates rights which he does not
10 possess, should be denied.

11

12 3. **THE UNITED STATES DOES NOT OBJECT TO A CONTINUANCE OF THE**
13 **TRIAL DATE TO EARLY FEBRUARY, 2007:**

14 Defendant requests this Court continue the trial date in the matter for 12 months.¹¹ At this
15 point a 12 month continuance is not necessary and the United States would object. There is no
16 objection however, to a continuance to February of 2007. A February, 2007 trial date is
17 approximately 6 months after the actual August 16, 2006, filing of the Notice of Intent to Seek
18 Death Penalty and 16 months after defendant was charged by the First Superceding Indictment
19 with Count 9, a charge that carries a potential sentence of death. After the First Superceding
20 Indictment of September 15, 2005, it was clear through court filings and defendant’s arraignment
21 that he was death eligible. Defendant’s assertion that he was not death eligible prior to the
22 Second Superceding Indictment of January 3, 2006, is without merit. The maximum sentence
23 provided for by statute for violation Title 18 U.S.C. §§ 924(c), and 924(j) (1), 1111. and (2), is
24 death. Nothing in the Second Superceding Indictment authorized a sentence exceeding the
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27 ¹¹ Defendant also requests a severance from all other defendants with his request for
28 continuance. Defendant cites no authority for the severance and does not argue it beyond its
mere mention. This response will not address severance of defendants. If presented with a legal
basis to request severance the United States will evaluate the alleged basis and respond
appropriately.

1 maximum already determined by Congress. Defendant takes extreme liberties with the facts and
2 holdings of *Jones v. United States*, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 143 L.Ed. 2d 311
3 (1999); *Almendarez-Torrez v. United States*, 523 U.S. 224, 228, 118 S.Ct. 1219, 140 L.Ed. 2d
4 350 (1998); and *United States v. Promise*, 255 F.3d 150, 152 (4th Cir. 2001), when he argues
5 that the First Superceding Indictment was legally insufficient to support a sentence of death. The
6 United States could have filed a Notice of Intent to Seek Death on September 16, 2005, and
7 defendant, if convicted, would have been facing a sentencing trial wherein a jury could have
8 sentenced him to death. This discussion is merely academic however, when addressing the
9 defendant's proffered justification to strike the United States' Notice.

10 Defendant RIOS RICO was not appointed counsel because he had retained an attorney
11 privately. It was not until January 12, 2006, after the Second Superceding Indictment, that
12 retained counsel requested a second counsel for assistance.

13 The statute authorizing the death penalty, 18 U.S.C. 3593(a) (1), requires a notice of intent
14 to seek a death sentence to be filed "a reasonable time before trial. . ." 18 U.S.C. §3593(a)(1).
15 Few courts have decided the timeliness issue relating to the death notice requirement of 18
16 U.S.C. § 3593(a)(1). However, the 4th Circuit has discussed this issue in *United States v. Ferebe*,
17 332 F.3d 722 (4th Cir. 2003). The 4th Circuit in *Ferebe* established an analytic framework for
18 evaluating reasonableness after a defendant challenged the district court's denial of the
19 defendant's Motion to Strike the death notice arguing it was not filed a reasonable time before
20 trial. *Id.* at 722. The 4th Circuit in *Ferebe* held that 18 U.S.C. §3593 is a "prophylactic statute,
21 one of the chief aims of which is to protect the accused from having to endure a trial for his life
22 for which he was not on reasonable notice" and "require[s] an inquiry into the objective
23 reasonableness of the time between issuance of a Death Notice and the trial itself." *Id.* at 727.
24 The court stated that the factors to be considered were:

25 among other factors that may appear relevant, (1) the nature of the charges presented
26 in the indictment; (2) the nature of the aggravating factors provided in the Death Notice;
27 (3) the period of time remaining before trial, measured at the instant the Death Notice
28 was filed and irrespective of the filing's effects; and in addition (4) the status of
discovery in the proceeding. It should be determined on the basis of these factors
whether sufficient time exists following notice and before trial for a defendant to
prepare his death defense. *Id.* at 737.