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,

/s/ Alberto Gonzales

Alberto R. Gonzales
Attorney General

PAUL K. CHARLTON
United States Attorney
District of Arizona

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America Plaintiff, v. Jose Rios Rico, et. al, Defendants.	CR-05-0272-PHX-JAT **UNITED STATES' MOTION TO EXTEND DEADLINE TO FILE NOTICE OF INTENT TO SEEK DEATH PENALTY** **(Expedited Consideration Requested)**

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

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

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

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:

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

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).

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

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

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

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

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

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

Based upon the foregoing,

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

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

DATED this 24th day of August, 2006.

James A. Teilborg
United States District Judge

PAUL K. CHARLTON
United States Attorney
District of Arizona

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America

Plaintiff,

v.

Jose Rios Rico,

Defendant.

CR-05-0272-001-PHX-JAT

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

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

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

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

b. One or more of the statutory aggravating factors set forth by 18 U.S.C. §§ 3592(c)(1-16), and/or 21 U.S.C. §§ 848(n)(1-12).

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

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

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

1. **Defendant's Age.** JOSE RIOS RICO was more than 18 years of age at the time of the offense. 18 U.S.C. § 3591(a), and/or 21 U.S.C. § 848(l).

2. **Intentional Killing.** JOSE RIOS RICO intentionally killed Angela Pinkerton. 18 U.S.C. § 3591(a)(2)(A) and/or 21 U.S.C. § 848(n)(1)(A).

3. **Intentional Infliction of Serious Bodily Injury.** JOSE RIOS RICO intentionally inflicted serious bodily injury that resulted in the death of Angela Pinkerton. 18 U.S.C. § 3591(a)(2)(B) and/or 21 U.S.C. § 848(n)(1)(B).

4. **Intentional Acts to Take Life or Use Lethal Force.** JOSE RIOS RICO intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and that Angela Pinkerton died as a direct result of the act. 18 U.S.C. § 3591(a)(2)(C).

5. **Intentional Acts to Kill or Use Lethal Force.** JOSE RIOS RICO intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against Angela Pinkerton, which resulted in the death of Angela Pinkerton. 21 U.S.C. § 848(n)(1)(C).

6. **Intentional Acts in Reckless Disregard for Life.** JOSE RIOS RICO intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and Angela Pinkerton died as a direct result of the act. 18 U.S.C. § 3591(a)(2)(D).

7. **Intentional Acts which Created a Grave Risk of Death.** JOSE RIOS RICO intentionally engaged in conduct which he knew would create a grave risk of death to a person, other than one of the participants in the offense, and resulted in the death of Angela Pinkerton. 21 U.S.C. § 848(n)(1)(D).

B. Statutory Aggravating Factors under 18 U.S.C. §§ 3592(c)(1-16) and/or 21 U.S.C. §§ 848(n)(1-12):

1. **Procurement of offense by payment.** Defendant JOSE RIOS RICO procured the commission of the offense(s) charged in Count 9 and/or Count 11 of the Second Superseding Indictment by payment, or promise of payment, of anything of pecuniary value. 18 U.S.C. § 3592(c)(7) and/or 21 U.S.C. § 848(n)(6).

2. **Pecuniary gain.** Defendant JOSE RIOS RICO committed the offense(s) described in Count 9 and/or Count 11 of the Second Superseding Indictment as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value. 18 U.S.C. § 3592(c)(8) and/or 21 U.S.C. § 848(n)(7).

3. **Substantial Planning and Premeditation.** Defendant JOSE RIOS RICO committed the offense(s) described in Count 9 and/or Count 11 of the Second Superseding Indictment after substantial planning and premeditation to cause the death of Angela Pinkerton. 18 U.S.C. § 3592(c)(9) and/or 21 U.S.C. § 848(n)(8).

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

1. **Participation in Additional Serious Acts of Violence.** As the leader of a conspiracy to possess with the intent to distribute methamphetamine, as charged in Count 1 of the Second Superseding Indictment, defendant JOSE RIOS RICO participated in other serious acts of violence in addition to the murder of Angela Pinkerton.

2. **Contemporaneous Convictions.** In addition to being convicted of the murder of Angela Pinkerton, defendant JOSE RIOS RICO was convicted of conspiracy to possess with the intent to distribute methamphetamine, possession with the intent to distribute methamphetamine, and firearm offenses as described in Count 1 and/or Count 2 and/or Count 5 and/or Count 6 and/or Count 7 and/or Count 8 of the Second Superseding Indictment.

3. **Obstruction of Justice.** Defendant JOSE RIOS RICO ordered, facilitated or participated in the disposal or destruction of the victim's body and other crime scene evidence in an attempt to obstruct justice.

4. **Victim Impact Evidence.** Defendant JOSE RIOS RICO caused injury, harm, and loss to Angela Pinkerton's family because of the victim's personal characteristics as an individual human being and the impact of her death upon her family. *See* 18 U.S.C. 3593(a) and *Payne v. Tennessee*, 501 U.S. 808, 825-26, 111 S.Ct. 2597, 2608-09 (1991).

5. **Future Dangerousness.** Defendant JOSE RIOS RICO is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of others, including, but not limited to the witnesses, as evidenced by the offense(s) charged in Count 9 and/or Count 11 of the Second Superseding Indictment and the statutory and non-statutory aggravating factors alleged in this Notice. *Simmons v. South Carolina*, 512 U.S. 154,162-64 (1994).

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

Respectfully submitted this 16th day of August, 2006.

PAUL K. CHARLTON
United States Attorney
District of Arizona

s/ *Keith Vercauteren*
KEITH E. VERCAUTEREN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 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:

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s/Keith Vercauteren
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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

STATE OF ARIZONA, Plaintiff, v. JOSE RIOS RICO, ET AL., Defendants.	CR-05-0272-PHX-JAT MOTION TO STRIKE DEATH NOTICE *ALTERNATIVELY* MOTION TO CONTINUE TRIAL DATE.

Thomas A. Gorman and Antonio Bustamonte, counsel for defendant Jose Rios respond to this Court's August 24, 2006 order and moves this Court as follows:

RELIEF SOUGHT: The entry of an order striking the August 16, 2006 Death Notice *alternatively* ordering a severance of RIOS from the co-defendant's and a continuance of RIOS's trial date in this matter for not less than twelve months from this date.

GROUNDS: (1) Said Death Notification came as a result of an authorization by the Attorney General which violated the Defendant's Fifth Amendment right to procedural and substantive due process of law, equal protection of the law, as well as his Sixth Amendment Right to counsel. In short RIOS was given absolutely no

opportunity to participate in the Phase I protocol and his minimal participation in the Phase II protocol (a memo to the Attorney General delivered by the local US Attorney's office) was constitutionally deficient in that RIOS's "opportunity" to participate in Phase II with Main Justice was meaningless, inadequate and unreasonable. RIOS's motion to continue the notice (death) deadline to August, 2006 was *premised on and in reliance* on the Attorney General's/Main Justice's *constitutional obligation and offer to give* RIOS a *meaningful* and *reasonable* opportunity to participate in the Phase II protocol. Counsel undersigned has been available at all times to speak with or meet with the Attorney Generals office since the filing of his May 4, 2006 motion to extend the time to file the death notice. Counsel for RIOS was *never* given the opportunity to directly communicate with Capital Case Committee of the Attorney General's office on this critical issue. There was absolutely no dialogue between RIOS and the Attorney Generals Office. The Attorney General's office refused to meet with counsel for RIOS. Therefore, RIOS respectfully submits the Government (nor this honorable Court) can invoke RIOS's motion to extend the filing deadline as grounds of waiver to deny this motion to strike the August 16, 2006 Notice of Intent To Seek Death. *RIOS's Motion to Extend the Time to Notice Death was premised on and in reliance on the Government's (Attorney General's) obligation and offer to permit RIOS a meaningful opportunity to participate in the Phase II protocol.*

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

(3) Alternatively, the appropriate remedy to Striking a Notice of Death is to

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

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

Summary Statement

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

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

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

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

FACTS/LAW

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

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

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

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

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

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

Prior to **December 15, 2006** the Defendant was given no opportunity to present any fact, including mitigating factors to the local United States Attorney for consideration. The Defendant was not death eligible until January 3, 2006 and there was no request by the government for a defense presentation of facts or mitigation evidence to the local U.S. Attorneys office. There was no discussions/ plea negotiations regarding the death penalty or the appropriateness of seeking the death penalty between privately retained defense counsel and the government. Nor was there any offer by the government or request by the government that privately retained counsel conduct any type of discussions or make a presentation of mitigation to the government. Defense counsel had absolutely no participation in what as known as the Phase I protocol. On **January 6, 2006** Mr. Bustamonte filed

a Motion to Prohibit Request For Death Penalty. The Government filed a Response to Rios's Motion to Prohibit Request For Death Penalty ("Government Response") on **February 1, 2006.** The Government's Response states that counsel for RIOS, "after the first superceding indictment of September 15, 2005...[was aware] that he was death **eligible**." *see Government's Response pp3.* This statement is incorrect as a matter of law. There was no Notice of Special Findings in the first superceding indictment, without which RIOS was not death eligible. RIOS was not death eligible until the second superceding indictment filed **January 3, 2006** *which added the omitted Notice of Special Findings.* Mr. Bustamonte, upon review and analysis of the second superceding indictment and Notice of Special Findings timely requested learned counsel on **January 12, 2006.**

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

Counsel undersigned and Mitigation Specialist Keith Rohman were appointed on Friday afternoon , **February 24, 2006.** On February 24, 2006

counsel undersigned received a phone call from this Court's staff advising counsel of his appointment and the Monday **February 27, 2006** Phase II in Washington D.C.. Counsel undersigned having no file, no information about the client, no discovery etc. obviously was in no position to attend. Counsel undersigned immediately phoned the Government and requested the Phase II meeting be postponed. The Government, per Mr. Vercauteren advised the meeting would go forward as scheduled but the Government would provide the opportunity for counsel for Rios Rico to make a presentation in the future **should court imposed deadlines permit.** Since counsel undersigned's appointment he has requested on several occasions the opportunity to meet or at least speak with the Capital Case Committee regarding whether this case should be death certified. Counsel undersigned was *never permitted to meet or communicate directly* with Main Jusice (the Capital Case Committee). Counsel undersigned was permitted to tender a memo regarding facts and mitigation to Asst. United States Attorney Kurt Altman for delivery to the Capital Case Committee for consideration.

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

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

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

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

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

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

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[2]"Once the U.S. Attorney provides the Committee with these documents, a meeting is held at which the defendant is given an opportunity to persuade the government not to seek the death penalty. Specifically, the guidelines provide that "[c]ounsel for the defendant ***shall be provided an opportunity*** to present to the Committee, orally or in writing, the reasons why the death penalty should not be 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).

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

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

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

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

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[3]Moreover, the government specifically made an 11th hour offered that RIOS participate in the Phase II protocol procedure and that Rios present any substantive facts or reasons why he should not be sentenced to death. Mr.Bustamonte accepted that 11th hour offer. Subsequent to his acceptance of that offer the Government unilaterally added unreasonable and unacceptable 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.

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

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

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

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

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

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

Defense counsel should not be required to expend the time and resources required to mount a death defense until the Government gives notice that it actually intends to seek the death penalty. *United States v. McGriff, 427 Supp.2d 253 (D.C. NY 2006).* Moreover, it is counsel's own experience having been appointed as learned counsel in three other federal trial level death penalty cases that the District Court will not approve the funding to conduct a full blown mitigation investigation prior to the Government formally noticing death. At present the time between the filing of the Government's death notice and the trial date, August 16, 2006 and 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

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

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

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

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

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

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

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

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

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

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

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

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

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

> [c]ounsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert. . . . A lawyer who knows of but does not inform his expert witnesses 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.

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

deficient because the psychologists had not asked for it. *See id. at 1038.* ***At the penalty phase, however, this same lack of diligence did constitute ineffective assistance.***

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

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

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

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

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

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

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

539 U.S. at 524. The Court also adopted ABA Guideline 11.8.6, stating that:

> that among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. (emphasis in original).

Id.

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

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

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

Revised ABA Guideline 10.7 provides:

> A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.
>
> 1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence or guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.
>
> 2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

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

require that counsel do at least the following:

> With the assistance of appropriate experts, counsel should . . . aggressively reexamine all of the government's forensic evidence and conduct appropriate analysis of all other available forensic evidence.
>
> Counsel need to explore poverty, familial instability, neighborhood environment, experience or racism or other social or ethnic bias, cultural or religious influences, failure of government or social intervention.
>
> If the client is a recent immigrant, counsel must also learn about the client's culture, about the circumstances of his upbringing in his country of origin, and about the difficulties the clients's immigrant community faces in this country.

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

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

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

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

664 F.2d at 1173.

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

Essentially, there are four stages of investigation in preparing for RIOS's capital penalty phase. *(1)* Locating and interviewing mitigation (foreign) witnesses and securing their attendance for trial, *(2)* collecting all institutional records of RIOS and his family, *(3)* compiling the same into a narrative report with supporting documentation, *(4)* submitting RIOS's life history for review by experts for their opinion, *(5)* conducting testing recommended by experts and evaluating their

findings/opinion. RIOS's request for additional time is consistent with the heightened concern for fairness and accuracy that has characterized the Supreme Court's review of the process requisite to the taking of a human life. Twelve months to prepare for a capital sentencing in this matter is reasonable and necessary.

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

Thomas A. Gorman

I hereby certify that on September 4th 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 registrants.

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America Plaintiff, v. Jose Rios Rico, 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**

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

Respectfully submitted this 14th day of September, 2006.

PAUL K. CHARLTON
United States Attorney
District of Arizona

s/ *Kurt M. Altman*
KURT M. ALTMAN
Assistant United States Attorney

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

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

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

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

II. LEGAL ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Defendant requests this Court continue the trial date in the matter for 12 months. [1/] At this point a 12 month continuance is not necessary and the United States would object. There is no objection however, to a continuance to February of 2007. A February, 2007 trial date is approximately 6 months after the actual August 16, 2006, filing of the Notice of Intent to Seek Death Penalty and 16 months after defendant was charged by the First Superceding Indictment with Count 9, a charge that carries a potential sentence of death. After the First Superceding Indictment of September 15, 2005, it was clear through court filings and defendant's arraignment that he was death eligible. Defendant's assertion that he was not death eligible prior to the Second Superceding Indictment of January 3, 2006, is without merit. The maximum sentence provided for by statute for violation Title 18 U.S.C. §§ 924(c), and 924(j) (1), 1111. and (2), is death. Nothing in the Second Superceding Indictment authorized a sentence exceeding the

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[1/] Defendant also requests a severance from all other defendants with his request for 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.

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

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

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

> among other factors that may appear relevant, (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 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.

The *Ferebe* Court did not use prejudice to the defendant as a factor. *Id.* at 732. Other courts have used the *Ferebe* factors which are a "non-exhaustive list of factors" for courts to consider, (*United States v. Breeden, supra*, 366 F.3d at 374), but also used potential prejudice as part of the analysis. *See United States v. Wilk*, 366 F.Supp 1178 (S.D. Florida, 2005) (finding that a prejudice analysis is necessary since it is unclear whether the 11th Circuit would adopt a standard that does not take prejudice into account.)

Applying the *Ferebe* factors to the present case, if this court were to reset the trial for February, 2007, it is clear that the August 16, 2006, Death Notice will have provided the defense "reasonable time" to prepare a death defense. The charges in the indictment that expose defendant to a potential death sentence are not complex. In fact, the defense has had the time since the First Superceding Indictment of September 15, 2006, to start to prepare a death defense. Conservatively, defendant has known since January 12, 2006, the day of the status hearing, that he should begin to prepare a death defense. A February, 2007 trial date is at least 14 months of preparation for a defense to a death case.

Defendant's motion also makes clear that the mitigation, investigation and death defense has progressed extensively. Defendant devotes almost 5 pages of his motion to his background and life circumstances clearly showing that the mitigation and investigation defendant desires is quite far along and complete. At this stage a 12 month continuance for this date is unnecessary. Moving the current trial date from November 28, 2006, to February, 2007, gives defendant ample time to continue the preparation of his defense. At this time defendant has presented nothing that persuades the government that more time is necessary. Certainly circumstances may change and the United States' position on an appropriate trial date may change as well. However, to date, the United States believes a February, 2007, trial date is appropriate. That gives defendant conservatively 14 months to prepare a "death defense," and 6 months from the filing of the Notice to Seek Death Penalty which is clearly the "reasonable time" anticipated by 18 U.S.C. §3593(a)(1).

II. CONCLUSION

For the reasons stated herein, the United States respectfully requests that this Court deny defendant RIOS RICO's Motion to Strike Death Notice *Alternatively* Motion to Continue Trial Date for 12 months. The United States further requests this court grant defendant's Motion to Continue Trial in part and continue the November 28, 2006, trial to a date in February, 2007.

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

PAUL K. CHARLTON
United States Attorney
District of Arizona

s/ *Kurt M. Altman*
KURT M. ALTMAN
Assistant United States Attorney

I hereby certify that on September 14, 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 registrants:

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lawyergorman@aol.com

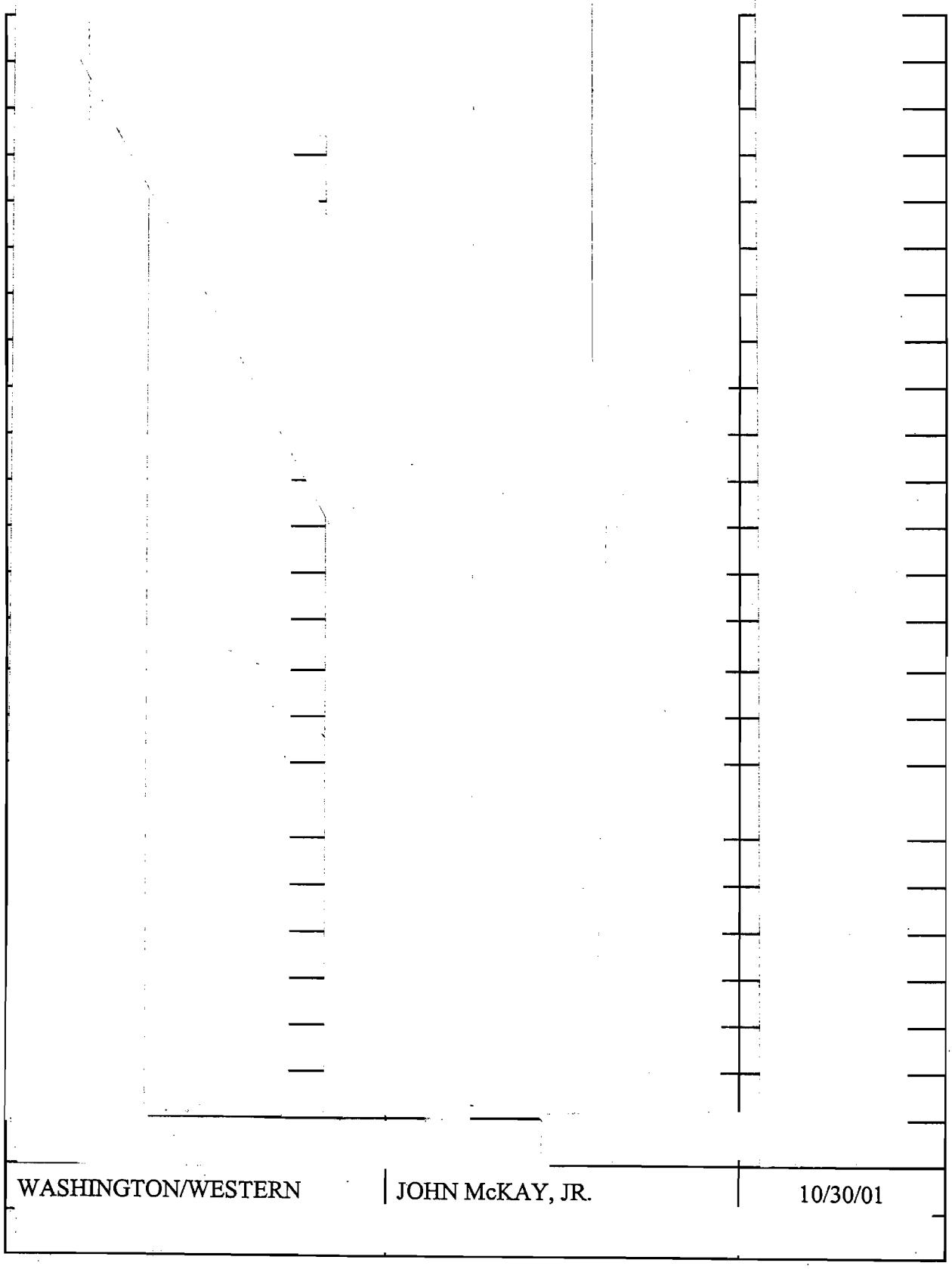
s/ *Kurt M. Altman*
KURT M. ALTMAN

UNITED STATES ATTORNEYS – APPOINTMENT SUMMARY

(8/8/06)

PRESIDENTIALLY APPOINTED – 79		
DISTRICT	**NAME**	**DATE OF OATH**
ARIZONA	PAUL K. CHARLTON	11/14/01
ARKANSAS/EASTERN	**H.E. "BUD" CUMMINS, III**	**1/9/02**
CALIFORNIA/NORTHERN	KEVIN V. RYAN	8/2/02
CALIFORNIA/SOUTHERN	CAROL C. LAM	11/18/02

MICHIGAN/WESTERN	MARGARET M. CHIARA	11/02/01
NEVADA	DANIEL G. BOGDEN	11/02/01
NEW MEXICO	DAVID C. IGLESIAS	10/17/01



WASHINGTON/WESTERN	JOHN McKAY, JR.	10/30/01

PENDING COMMISSION - 2	
FLORIDA/S	R. ALEXANDER ACOSTA - confirmed 8/4/06
COLORADO	TROY A. EID - confirmed 8/4/06
PENDING CONFIRMATION - 5	
WEST VIRGINIA/N	SHARI L. POTTER - nominated 6/9/06
ILLINOIS/S	PHILLIP J. GREEN - nominated 6/9/06
NORTH CAROLINA/E	GEORGE E.B. HOLDING - nominated 6/9/06
ALABAMA/S	DEBORAH J. RHODES - nominated 7/27/06
ILLINOIS/C	RODGER A. HEATON - nominated 7/27/06
MINNESOTA	RACHEL K. PAULOSE - nominated 8/3/06
PENDING BI - 1	

INTERVIEWED and PENDING WH DECISION - 5

VACANCY and PENDING CANDIDATE - 1	
DISTRICT	CURRENT USA
MAINE	PAULA D. SILSBY (ct-apptd)

VACANCIES REFORM ACT APPOINTMENTS - 4

DISTRICT	NAME	APPT DATE	EXP DATE	NOMINATION DATE/NOMINEE
Alaska	Deborah M. Smith	1/23/06	8/22/06	
Illinois/S	Randy G. Massey	3/20/06	~~10/16/06~~	6/9-Green
West Virginia/N	Rita Valdrini	4/17/06	~~11/13/06~~	6/9-Potter
North Carolina/E	George E.B. Holding	6/30/06	~~1/26/07~~	6/9-Holding

ATTORNEY GENERAL APPOINTMENTS - 7

DISTRICT	NAME	APPT DATE
Illinois/C	Rodger A. Heaton	12/1/05
Florida/S	R. Alexander Acosta	2/8/06
West Virginia/S	Charles T. Miller	2/24/06
Minnesota	Rachel K. Paulose	3/1/06
Missouri/W	Bradley J. Schlozman	3/25/06
Puerto Rico	Rosa Rodriguez-Velez	6/9/06
Tennessee/E	James R. Dedrick	6/19/06

COURT APPOINTMENTS - 3

DISTRICT	NAME	DATE OF OATH
Maine	Paula D. Silsby	9/3/01
Colorado	William J. Leone	11/25/05
Alabama/S	Deborah J. Rhodes	1/29/06

RESIGNATIONS FORTHCOMING -6

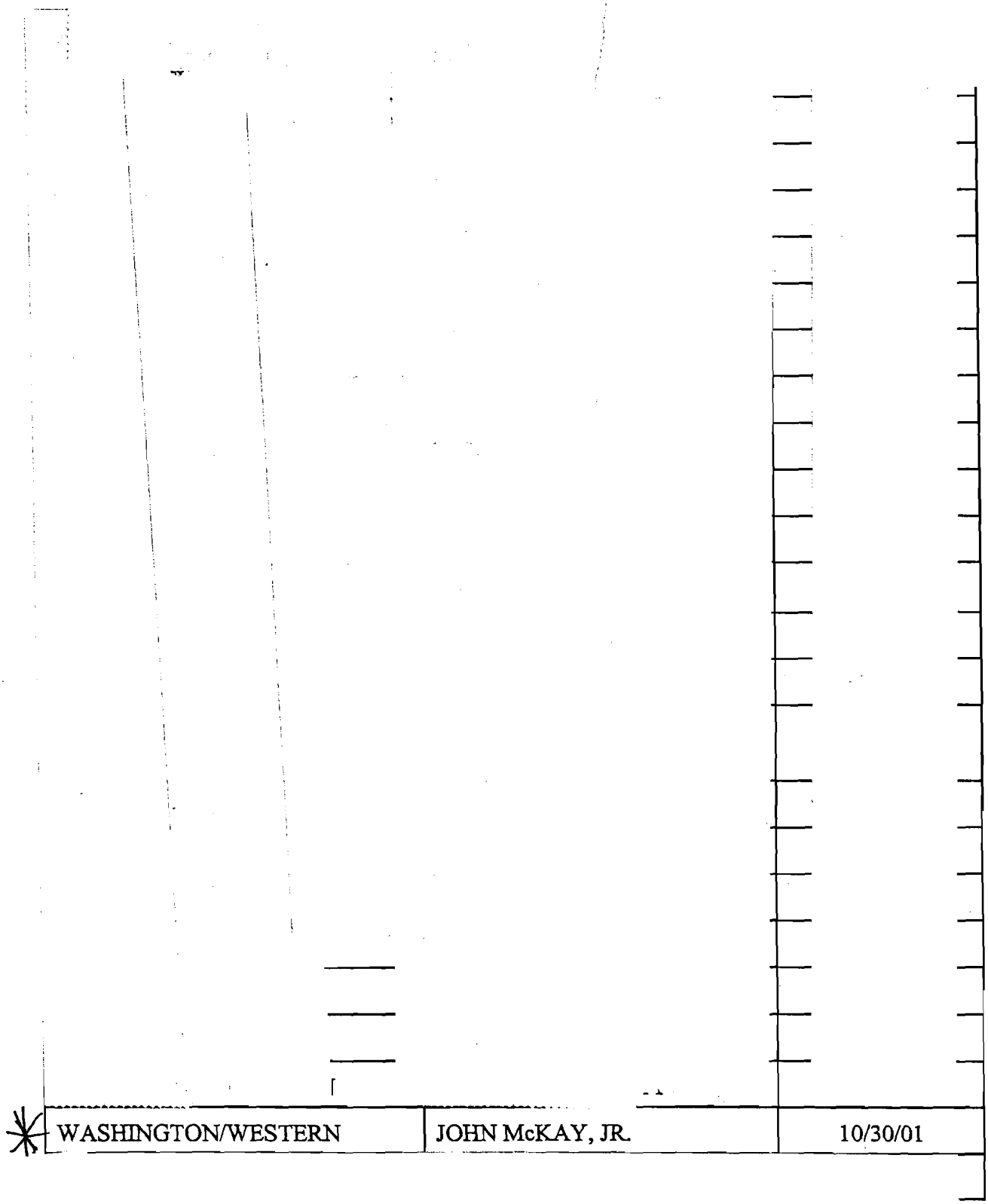
DISTRICT	NAME	
Arkansas/E	H.E. "Bud" Cummins	TBD

UNITED STATES ATTORNEYS – APPOINTMENT SUMMARY

11/13/06

PRESIDENTIALLY APPOINTED – 82		
DISTRICT	**NAME**	**DATE OF OATH**
ARIZONA	PAUL K. CHARLTON	11/14/01
ARKANSAS/EASTERN	**H.E. "BUD" CUMMINS, III**	**1/9/02**
CALIFORNIA/NORTHERN	KEVIN V. RYAN	8/2/02
CALIFORNIA/SOUTHERN	CAROL C. LAM	11/18/02

MICHIGAN/WESTERN	MARGARET M. CHIARA	11/02/01
NEVADA	DANIEL G. BOGDEN	11/02/01
NEW MEXICO	DAVID C. IGLESIAS	10/17/01



WASHINGTON/WESTERN	JOHN McKAY, JR.	10/30/01

PENDING CONFIRMATION - 2	
ILLINOIS/S	PHILLIP J. GREEN - nominated 6/9/06
MINNESOTA	RACHEL K. PAULOSE - nominated 8/3/06

PENDING FINAL INTERVIEW BEFORE NOMINATION - 1

PENDING BI - 2		
DISTRICT/NAME	BI PKG MAILED	PKG RECEIVED/ BI INITIATED

INTERVIEWED and PENDING WH DECISION - 6
V

VACANCY and PENDING CANDIDATE - 4	
DISTRICT	CURRENT USA

VACANCIES REFORM ACT APPOINTMENTS - 1

DISTRICT	NAME	APPT DATE	EXP DATE	NOMINATION DATE/NOMINEE
Illinois/S	Randy G. Massey	3/20/06	~~10/16/06~~	6/9-Green

ATTORNEY GENERAL APPOINTMENTS - 9

DISTRICT	NAME	APPT DATE
West Virginia/S	Charles T. Miller	2/24/06
Minnesota	Rachel K. Paulose	3/1/06
Missouri/W	Bradley J. Schlozman	3/25/06
Puerto Rico	Rosa Rodriguez-Velez	6/9/06
Tennessee/E	James R. Dedrick	6/17/06
Alaska	Nelson P. Cohen	8/23/06
District of Columbia	Jeffrey A. Taylor	9/28/06
Nebraska	Joe W. Stecher	10/2/06
Tennessee/M	Craig S. Morford	10/10/06

COURT APPOINTMENTS - 1

DISTRICT	NAME	DATE OF OATH
Maine	Paula D. Silsby	9/3/01

RESIGNATIONS FORTHCOMING - 8

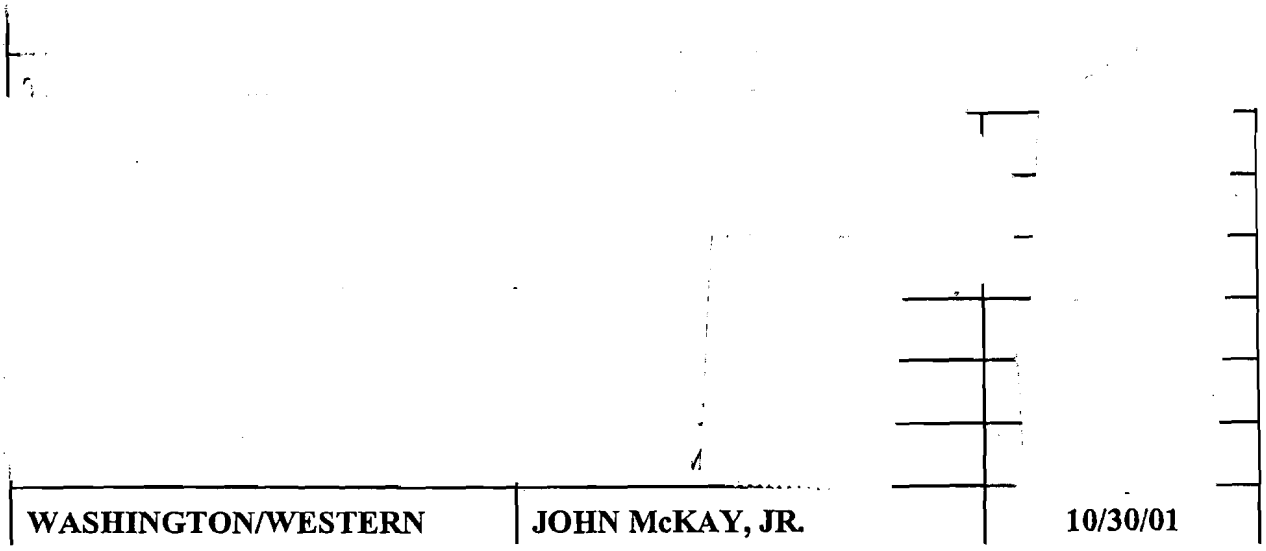
DISTRICT	NAME	
Arkansas/E	H.E. "Bud" Cummins	TBD

UNITED STATES ATTORNEYS – APPOINTMENT SUMMARY

12/20/06

PRESIDENTIALLY APPOINTED – 81		
DISTRICT	**NAME**	**DATE OF OATH**
ARIZONA	**PAUL K. CHARLTON**	**11/14/01**
ARKANSAS/EASTERN	**H.E. "BUD" CUMMINS, III**	**1/9/02**
CALIFORNIA/NORTHERN	**KEVIN V. RYAN**	**8/2/02**
CALIFORNIA/SOUTHERN	**CAROL C. LAM**	**11/18/02**

MICHIGAN/WESTERN	MARGARET M. CHIARA	11/02/01
NEVADA	DANIEL G. BOGDEN	11/02/01
NEW MEXICO	DAVID C. IGLESIAS	10/17/01



WASHINGTON/WESTERN	JOHN McKAY, JR.	10/30/01

PENDING COMMISSION - 1	
MINNESOTA	**RACHEL K. PAULOSE - confirmed 12/8/06**

PENDING CONFIRMATION - 1	
ILLINOIS/S	**PHILLIP J. GREEN - nominated 6/9/06**

PENDING FINAL INTERVIEW BEFORE NOMINATION - 1	
PUERTO RICO	**ROSA RODRIGUEZ-VELEZ**

PENDING BI - 2		
DISTRICT/NAME	**BI PKG MAILED**	**PKG RECEIVED/ BI INITIATED**

INTERVIEWED and PENDING WH DECISION - 5

VACANCY and PENDING CANDIDATE - 6	
DISTRICT	**CURRENT USA**
ARKANSAS/EASTERN	**H.E. "BUD" CUMMINS (Presidentially-apptd)**

VACANCIES REFORM ACT APPOINTMENTS - 2

DISTRICT	NAME	APPT DATE	EXP DATE	NOMINATION DATE/NOMINEE
Illinois/S	Randy G. Massey	3/20/06	~~10/16/06~~	6/9-Green
California/C	George S. Cardona	11/18/06	6/16/07	

ATTORNEY GENERAL APPOINTMENTS - 9

DISTRICT	NAME	APPT DATE
West Virginia/S	Charles T. Miller	2/24/06
Minnesota	Rachel K. Paulose	3/1/06
Missouri/W	Bradley J. Schlozman	3/25/06
Puerto Rico	Rosa Rodriguez-Velez	6/9/06
Tennessee/E	James R. Dedrick	6/17/06
Alaska	Nelson P. Cohen	8/23/06
District of Columbia	Jeffrey A. Taylor	9/28/06
Nebraska	Joe W. Stecher	10/2/06
Tennessee/M	Craig S. Morford	10/10/06

COURT APPOINTMENTS - 1

DISTRICT	NAME	DATE OF OATH
Maine	Paula D. Silsby	9/3/01

RESIGNATIONS FORTHCOMING - 5

DISTRICT	NAME	
Arkansas/E	H.E. "Bud" Cummins	12/20/06

California/N	**Kevin V. Ryan**	**TBD**
California/S	**Carol C. Lam**	**TBD**
Michigan/W	**Margaret M. Chiara**	**TBD**
Nevada	**Daniel G. Bogden**	**TBD**
New Mexico	**David C. Iglesias**	**Late January or February 2006**
Washington/W	**John McKay, Jr.**	**1/26/06**

.inkley, Winnie

From: Long, Linda E
Sent: Monday, February 05, 2007 1:37 PM
To: Brinkley, Winnie
Subject: Fw: (Clearance) AMS-110-15 (DAG Testimony on USA, S.214)

Follow Up Flag: Follow up
Flag Status: Completed

Attachments: ODAGMcNultyTestimonySJC2-6-07PoliticizationofUSAttorneysclearedfinal.REV.pdf

-----Original Message-----
From: Scott-Finan, Nancy
To: Sampson, Kyle; Goodling, Monica; Hertling, Richard; Seidel, Rebecca; Elston, Michael (ODAG); Moschella, William; Battle, Michael (USAEO); Nowacki, John (USAEO); Kirsch, Thomas
CC: Long, Linda E
Sent: Mon Feb 05 13:06:25 2007
Subject: FW: (Clearance) AMS-110-15 (DAG Testimony on USA, S.214)

ODAGMcNultyTesti
monySJC2-6-07P...

This is a revised statement to reflect Leahy as Chairman of the full Committee and Specter as the RRM.

Cc:Linda for Paul

Department of Justice

STATEMENT

OF

PAUL J. MCNULTY
DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"PRESERVING PROSECUTORIAL INDEPENDENCE:
IS THE DEPARTMENT OF JUSTICE
POLITICIZING THE HIRING AND FIRING
OF U.S. ATTORNEYS?"

PRESENTED ON

FEBRUARY 6, 2007

Testimony
of

Paul J. McNulty
Deputy Attorney General
U.S. Department of Justice

Committee on the Judiciary
United States Senate

"Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?"

February 6, 2007

Chairman Leahy, Senator Specter, and Members of the Committee, thank you for the invitation to discuss the importance of the Justice Department's United States Attorneys. As a former United States Attorney, I particularly appreciate this opportunity to address the critical role U.S. Attorneys play in enforcing our Nation's laws and carrying out the priorities of the Department of Justice.

I have often said that being a United States Attorney is one of the greatest jobs you can ever have. It is a privilege and a challenge—one that carries a great responsibility. As former Attorney General Griffin Bell said, U.S. Attorneys are "the front-line troops charged with carrying out the Executive's constitutional mandate to execute faithfully the laws in every federal judicial district." As the chief federal law-enforcement officers in their districts, U.S. Attorneys represent the Attorney General before Americans who may not otherwise have contact with the Department of Justice. They lead our efforts to protect America from terrorist attacks and fight violent crime, combat illegal drug trafficking, ensure the integrity of government and the marketplace, enforce our immigration laws, and prosecute crimes that endanger children and families—including child pornography, obscenity, and human trafficking.

U.S. Attorneys are not only prosecutors; they are government officials charged with managing and implementing the policies and priorities of the Executive Branch. United States Attorneys serve at the pleasure of the President. Like any other high-ranking officials in the Executive Branch, they may be removed for any reason or no reason. The Department of Justice—including the office of United States Attorney—was created precisely so that the government's legal business could be effectively managed and carried out through a coherent program under the supervision of the Attorney General. And unlike judges, who are supposed to act independently of those who nominate them, U.S. Attorneys are accountable to the Attorney General, and through him, to the President—the head of the Executive Branch. For these reasons, the Department is committed to having the best person possible discharging the responsibilities of that office at all times and in every district.

The Attorney General and I are responsible for evaluating the performance of the United States Attorneys and ensuring that they are leading their offices effectively. It should come as no surprise to anyone that, in an organization as large as the Justice Department, U.S. Attorneys are removed or asked or encouraged to resign from time to time. However, in this Administration U.S. Attorneys are never—repeat, never—removed, or asked or encouraged to resign, in an effort to retaliate against them, or interfere with, or inappropriately influence a particular investigation, criminal prosecution, or civil case. Any suggestion to the contrary is unfounded, and it irresponsibly undermines the reputation for impartiality the Department has earned over many years and on which it depends.

Turnover in the position of U.S. Attorney is not uncommon. When a presidential election results in a change of administration, every U.S. Attorney leaves and the new President nominates a successor for

confirmation by the Senate. Moreover, U.S. Attorneys do not necessarily stay in place even during an administration. For example, approximately half of the U.S. Attorneys appointed at the beginning of the Bush Administration had left office by the end of 2006. Given this reality, career investigators and prosecutors exercise direct responsibility for nearly all investigations and cases handled by a U.S. Attorney's Office. While a new U.S. Attorney may articulate new priorities or emphasize different types of cases, the effect of a U.S. Attorney's departure on an existing investigation is, in fact, minimal, and that is as it should be. The career civil servants who prosecute federal criminal cases are dedicated professionals, and an effective U.S. Attorney relies on the professional judgment of those prosecutors.

The leadership of an office is more than the direction of individual cases. It involves managing limited resources, maintaining high morale in the office, and building relationships with federal, state and local law enforcement partners. When a U.S. Attorney submits his or her resignation, the Department must first determine who will serve temporarily as interim U.S. Attorney. The Department has an obligation to ensure that someone is able to carry out the important function of leading a U.S. Attorney's Office during the period when there is not a presidentially-appointed, Senate-confirmed United States Attorney. Often, the Department looks to the First Assistant U.S. Attorney or another senior manager in the office to serve as U.S. Attorney on an interim basis. When neither the First Assistant nor another senior manager in the office is able or willing to serve as interim U.S. Attorney, or when the appointment of either would not be appropriate in the circumstances, the Department has looked to other, qualified Department employees.

At no time, however, has the Administration sought to avoid the Senate confirmation process by appointing an interim U.S. Attorney and then refusing to move forward, in consultation with home-State Senators, on the selection, nomination, confirmation and appointment of a new U.S. Attorney. The appointment

of U.S. Attorneys by and with the advice and consent of the Senate is unquestionably the appointment method preferred by both the Senate and the Administration.

In every single case where a vacancy occurs, the Bush Administration is committed to having a United States Attorney who is confirmed by the Senate. And the Administration's actions bear this out. Every time a vacancy has arisen, the President has either made a nomination, or the Administration is working—in consultation with home-state Senators—to select candidates for nomination. Let me be perfectly clear—at no time has the Administration sought to avoid the Senate confirmation process by appointing an interim United States Attorney and then refusing to move forward, in consultation with home-State Senators, on the selection, nomination and confirmation of a new United States Attorney. Not once.

Since January 20, 2001, 125 new U.S. Attorneys have been nominated by the President and confirmed by the Senate. On March 9, 2006, the Congress amended the Attorney General's authority to appoint interim U.S. Attorneys, and 13 vacancies have occurred since that date. This amendment has not changed our commitment to nominating candidates for Senate confirmation. In fact, the Administration has nominated a total of 15 individuals for Senate consideration since the appointment authority was amended, with 12 of those nominees having been confirmed to date. Of the 13 vacancies that have occurred since the time that the law was amended, the Administration has nominated candidates to fill five of these positions, has interviewed candidates for nomination for seven more positions, and is waiting to receive names to set up interviews for the final position—all in consultation with home-state Senators.

However, while that nomination process continues, the Department must have a leader in place to carry out the important work of these offices. To ensure an effective and smooth transition during U.S. Attorney

vacancies, the office of the U.S. Attorney must be filled on an interim basis. To do so, the Department relies on the Vacancy Reform Act ("VRA"), 5 U.S.C. § 3345(a)(1), when the First Assistant is selected to lead the office, or the Attorney General's appointment authority in 28 U.S.C. § 546 when another Department employee is chosen. Under the VRA, the First Assistant may serve in an acting capacity for only 210 days, unless a nomination is made during that period. Under an Attorney General appointment, the interim U.S. Attorney serves until a nominee is confirmed the Senate. There is no other statutory authority for filling such a vacancy, and thus the use of the Attorney General's appointment authority, as amended last year, signals nothing other than a decision to have an interim U.S. Attorney who is not the First Assistant. It does not indicate an intention to avoid the confirmation process, as some have suggested.

No change in these statutory appointment authorities is necessary, and thus the Department of Justice strongly opposes S. 214, which would radically change the way in which U.S. Attorney vacancies are temporarily filled. S. 214 would deprive the Attorney General of the authority to appoint his chief law enforcement officials in the field when a vacancy occurs, assigning it instead to another branch of government.

As you know, before last year's amendment of 28 U.S.C. § 546, the Attorney General could appoint an interim U.S. Attorney for the first 120 days after a vacancy arose; thereafter, the district court was authorized to appoint an interim U.S. Attorney. In cases where a Senate-confirmed U.S. Attorney could not be appointed within 120 days, the limitation on the Attorney General's appointment authority resulted in recurring problems. Some district courts recognized the conflicts inherent in the appointment of an interim U.S. Attorney who would then have matters before the court—not to mention the oddity of one branch of government appointing officers of another—and simply refused to exercise the appointment authority. In those cases, the Attorney General was consequently required to make multiple successive 120-day interim appointments. Other district