December 9, 2013

John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000

CLERK
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543
U.S. CERTIFIED MAIL NO. 7012-3460-0001-8774-3489

Dear Clerk:

Attached for FILING is one (1) original of the following documents:

1. MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS:
2. AFFIDAVIT AND DECLARATION IN SUPPORT OF THE MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS;
3. PETITION FOR A WRIT OF CERTIORARI;
4. PROOF OF SERVICE.

PLEASE NOTE: I am an inmate confined in an institution and not represented by counsel.

Thank you in advance for your consideration in this matter.

Sincerely,

John Gregory Lambros, Pro Se

CERTIFICATE OF SERVICE

I declare under the penalty of perjury that a true and correct copy of the above listed documents/motions where mailed within a stamped addressed envelope from the U.S. Penitentiary Leavenworth mailroom on this **9th DAY OF DECEMBER, 2013, TO:**

5. Clerk, U.S. Supreme Court, as addressed above;
6. Office of the Solicitor General for the United States, Room 5616, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001.

John Gregory Lambros, Pro Se

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2013 - 2014

John Gregory Lambros — PETITIONER
(Your Name)

vs.

Claude Maye, Warden U.S. Penitentiary Leavenworth — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, No. 13-3159
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

John Gregory Lambros, Pro Se
(Your Name)
Reg. No. 00436-124, U.S. Penitentiary Leavenworth
P.O. Box 1000
(Address)
Leavenworth, Kansas 66048-1000
(City, State, Zip Code)
No Phone - Web site: www.Lambros.Name
(Phone Number)

2

QUESTION(S) PRESENTED

Whether the Tenth Circuit Court of Appeals erred, in square conflict with decisions of this Court and other Circuits, by summarily affirming the district court's dismissal of this pro se action requesting retroactivity, pursuant to the Writ of Habeas Corpus, Title 28 U.S.C. §2241 and/or the Writ of Audita Querela, under the All Writs Act, Title 28 U.S.C. §1651(a), due to this Court's rulings that strengthens Sixth Amendment rights to counsel during plea bargaining, that was previously unavailable - See, MISSOURI vs. FRYE, 132 S. Ct. 1399; 182 L. Ed. 2d 379 (March 21, 2012) and LAFLER vs. COOPER, 132 S. Ct. 1376; 182 L. Ed. 2d 398 (March 21, 2012) - to those whose convictions became final before those cases where decided; where:

(1) The court of appeals failed to apply any of the considerations set out by this Court in MISSOURI vs. FRYE and LAFLER vs. COOPER, when the district court failed to apply the threshold standards of adjudication in granting Movant's petition for jurisdiction, pursuant to 28 U.S.C. §2241 and/or 28 U.S.C. §1651(a), when Congress affords every federal prisoner the opportunity to launch at least one (1) collateral attack to any aspect of his conviction or sentence - when Movant was not given an opportunity to bring and test his claim in an initial §2255 Motion?

(2) Whether the rulings of MISSOURI vs. FRYE and LAFLER vs. COOPER, which announced a type of Sixth Amendment violation that was previously unavailable - Plea-Bargaining Process - apply to those whose convictions became final before those cases where decided?

3.

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

Questions Presented: Whether the Tenth Circuit Court of Appeals erred, in square conflict with decisions of this Court and other Circuits, by summarily affirming the district court's dismissal of this Pro Se action requesting retroactivity, pursuant to the Writ of Habeas Corpus, Title 28 U.S.C. §2241 and/or the Writ of Audita Querela, under the All Writs Act, Title 28 U.S.C. §1651(a), due to this Court's rulings that strengthens Sixth Amendment rights to counsel during plea bargaining, that was previously unavailable - See, MISSOURI vs. FRYE, 132 S. Ct. 1399; 182 L.Ed. 2d 379 (March 21, 2012) and LAFLER vs. COOPER, 132 S. Ct. 1376; 182 L.Ed. 2d 398 (March 21, 2012) - to those whose convictions became final before those cases where decided; where: ..... 25.

Question Number One (1):

THE COURT OF APPEALS FAILED TO APPLY ANY OF THE CONSIDERATIONS SET OUT BY THIS COURT IN MISSOURI vs. FRYE AND LAFLER vs. COOPER, WHEN THE DISTRICT COURT FAILED TO APPLY THE THRESHOLD STANDARDS OF ADJUDICATION IN GRANTING MOVANT'S PETITION FOR JURISDICTION,

INDEX OF APPENDICES

7

INDEX OF APPENDICES

(Continued)

TABLE OF AUTHORITIES CITED

TABLE OF STATUTES:

UNITED STATES CONSTITUTION:

FEDERAL RULES OF CRIMINAL PROCEDURE:

FEDERAL RULES OF CIVIL PROCEDURE:

PUBLICATIONS:

12.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix **A.** to the petition and is

[ ] reported at _____; or,
[x] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix **B & C** to the petition and is

[x] reported at **2013 U.S. Dist. LEXIS 91860 (Rule 59(e)) - APP. B.** **2013 U.S. Dist. LEXIS 70285 (Memorandum & Order) - App. C.**; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[XXX] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was **OCTOBER 4, 2013**.

[XXX] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

a. U.S. Constitution, Article I, Section 9, clause 2, "The Privilege of the Writ of Habeas Corpus shall not be suspended, ...";

b. U.S. Constitution, Article I, Section 9, clause 3, The Constitution of the United States prohibits Ex Post Facto laws.;

c. U.S. Constitution, Amendment V, Due Process of Law. The Fifth Amendment, protects persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves;

d. U.S. Constitution, Amendment VI. Right to effective assistance of counsel and to be informed of nature and cause of accusation;

e. Title 28 U.S.C. §1651(a);

f. Title 28 U.S.C. §2241;

g. Title 28 U.S.C. §2255;

h. Title 21 U.S.C. §846; (before and after November 18, 1988)

i. Title 21 U.S.C. §841; (October 27, 1970, initial publication and amendments to same)

j. Title 21 U.S.C. §851;

k. Title 28 U.S.C. §47.

STATEMENT OF THE CASE

1. February 28, 2013: Movant Lambros filed a "WRIT OF HABEAS CORPUS, 28 U.S.C. §2241; and/or "WRIT OF AUDITA QUERELA", under the "ALL WRITS ACT", 28 U.S.C. §1651(a), with the Clerk of the Court for the U.S. District Court for the District of Kansas.

2. The above-entitled writ(s) where brought due to the U.S. Supreme Court's ruling that strengthens rights to counsel during plea bargaining. On March 21, 2012, the U.S. Supreme Court handed down two (2) decisions that expanded the opportunities for defendants to overturn their convictions on the basis of POST-CONVICTION CLAIMS that their attorneys did an unreasonably poor job during plea negotiations. Defendants who can show that their attorney's failed to communicate plea offers or failed to give competent counsel regarding a plea offer can get a lower sentence or have the prosecutor re-extend the plea offer, even if the defendants received a fair trial after they rejected the offer, this court makes clear. See, MISSOURI vs. FRYE, 132 S.Ct. 1399; 182 L.Ed.2d 379 (2012) and LAFLER vs. COOPER, 132 S.Ct. 1376; 182 L.Ed.2d 398 (2012). MISSOURI and LAFLER announced a type of Sixth Amendment violation that was previously unavailable. This Court clearly stated in LAFLER that the Sixth Amendment requires effective assistance of counsel at critical stages of criminal proceedings, a right that extends to the plea-bargaining process. JUSTICE Scalia, Thomas and Alito stated in FRYE, 132 S.Ct. at 1413-1414 "The plea-bargaining process is a subject worthy of regulation, since it is the means most criminal convictions are obtained. It happens not to be, however, a subject covered by the Sixth Amendment, which is concerned not with the fairness of plea bargaining but with the fairness of convictions.", and requires retroactive application to cases on collateral review.

3. RETROACTIVE APPLICATION OF MISSOURI AND LAFLER: Movant Lambros

requested the District Court of Kansas to rule that MISSOURI and LAFLER are retroactive, as Movant offered proof that his §2255 remedy was inadequate or ineffective.

4. The above motion was filed in a timely fashion as per the one (1) year limitation period, "the date on which the right asserted was initially recognized by the Supreme Court." 28 U.S.C. §2255(f)(3). DODD vs. U.S., 545 U.S. 353 (2005).

5. As will be developed later in this motion, Movant was never given an opportunity to file a 28 U.S.C. §2255, as to the issue of ineffective assistance of counsel claims regarding the Count One (1) conspiracy within his indictment. Movant was informed by his attorney and the U.S. Attorney within two (2) written plea agreements that the only sentence he could receive was a MANDATORY LIFE WITHOUT PAROLE. Movant rejected the government's plea offer and was found guilty after a jury trial and sentenced to a MANDATORY LIFE WITHOUT PAROLE that was overturned by the Eighth Circuit on direct appeal. See, U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995)(illegal sentence, because version of statute in place at time of conspiracy did not allow for mandatory life without parole). Therefore, Movant's illegal sentence constituted "a miscarriage of justice", U.S. vs. ANDIS, 333 F.3d 886, 890-893 (8th Cir. 2003)(en banc) and also qualifies for the "actual innocence" exception. See, BAYLESS vs. USA, 14 F.3d 410, 411 (8th Cir. 1993), citing JONES vs. ARKANSAS, 929 F.2d 375, 381 (8th Cir. 1991)("If one is 'actually innocent' of the sentence imposed, a federal habeas court can excuse the procedural default to correct a fundamentally unjust incarceration. Id.; DUGGER vs. ADAMS, 489 U.S. 401, 410 n. 6 (1989)").

6. MAY 17, 2013: The Honorable Judge Richard D. Rogers responded to Movant's February 28, 2013 filing with his "MEMORANDUM AND ORDER". The Court dismissed Movant's petition for "lack of jurisdiction". The court incorrectly stated that Movant's "pro se petition for writ of habeas corpus was filed pursuant to 28 U.S.C. §2241 by ..." - when in fact it was filed pursuant to both 28 U.S.C.

§1651(a) and/or §2241. See, **APPENDIX C.**

Judge Rogers, stated the following facts within his "MEMORANDUM AND ORDER":

a. "On direct appeal, (the Eighth Circuit Court of Appeals) vacated the sentence on the conspiracy count, remanded for resentencing on that count, and affirmed the conviction in all other respects." Id. U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995) .... On remand, Lambros filed multiple new trial motions pursuant to Fed.R.Crim.P. 33,' which the district court treated as 'a single §2255 motion and denied all the claims.' Thus, petitioner's initial §2255 motion was denied by the sentencing court in 1997. In the meantime, 'Lambros appealed the 360-month prison term to which he was resentenced,' and the Eighth Circuit affirmed. ..... 'Two subsequent §2255 motions filed by Lambros were dismissed by the district court because (the Eighth Circuit Court) had not authorized their filing'". See, Page 2 of APPENDIX C. Please note that Movant Lambros addressed the resentencing court on February 10, 1997 and requested the Court NOT TO RECHARACTERIZE his Rule 33 motion into his first §2255. In fact, Movant Lambros' attorney stated that he would be able to submit a §2255 motion regarding the conspiracy court he was being resentenced on. This was not true!!!! Also of interest, is the fact that Movant Lambros was not raising claims of "ineffective assistance" within his Rule 33 motions, which is the only type of claims that Movant Lambros would be able to raise within a §2255 motion. As this Court knows, "ineffective assistance" claims with regard to an issue is "distinct" from any claim concerning the underlying issue itself, "both in nature and in the requisite elements of proof." See, KIMMELMAN vs. MORRISON, 91 L.Ed.2d 305, 318-319 (1986); MOLINA vs. RISON, 886 F.2d 1124, 1130 (9th Cir. 1989). A brief quote from the February 10, 1997 resentencing transcript will assist this court in understanding that this Movant did not want his Rule 33 motion recharacterized as a §2255: "Today is the final judgment, your Honor. So I believe all the motions are valid RULE 33 Motions, and I would like to continue under that - -under those pretenses. Is it proper for me to ask you to RECONSIDER that at this point in time or no? THE COURT: I assume you have asked

me that. If that's what you want to place of record, I recognize that as being your position." See, Pages 19 and 20 of February 10, 1997, RESENTENCING TRANSCRIPTS. Also, this Court ruled in 2003, that a district court could not recharacterize pro se motions under Rule 33 as a first motion for postconviction relief under §2255 absent of the required warning, to determine whether such a dismissal precludes an unconstitutional suspension of the Writ of Habeas Corpus, as embodied within the U.S. Constitution, Art. 1, §9, cl. 2. See, CASTRO vs. USA, 157 L.Ed.2d 778 (2003). Therefore, Movant Lambros' right to a §2255 was unconstitutionally suspended!

b. "In this case, as in PROST, Mr Lambros alleges no facts to dispute that his initial §2255 motion was 'up to the job of testing the question' of whether his conviction should be overturned because has was provided erroneous sentencing information during plea proceedings. While he complains that motions he filed raising claims that should have been brought under §2255 were treated by the sentencing court as his first §2255 motion, he alleges no facts indicating that those claims were not considered." See, Page 14 of APPENDIX C. This is not true! First of all, Movant Lambros nor his attorney could raise an "INEFFECTIVE ASSISTANCE OF COUNSEL" claim during direct appeal and/or resentencing, as the Eighth Circuit does not allow same. See, U.S. vs. HAWKINS, 78 F.3d 348, 351-352 (8th Cir. 1995):

> "Accordingly, we have declined to 'consider an ineffective assistance claim on DIRECT APPEAL if the claim has not been presented to the district court so that a proper factual record can be made."

Again, Movant Lambros did not prepare his Rule 33 motions as a §2255 to address the other convictions the Eighth Circuit affirmed in U.S. vs. LAMBROS, 65 F. 3d 698 (8th Cir. 1995). Movant's RULE 33 motion only addressed the conspiracy - Count One (1) count he was being RESENTENCED on February 10, 1997. Therefore, Movant Lambros did allege facts to dispute that his RULE 33 motions where not up to the job of testing the question! To add insult to injury, how was Movant

to foresee what issues would be developed at his RESENTENCING on February 10, 1997 and include same within the RULE 33 motions he submitted more than twenty (20) days before resentencing?? Movant is not clairvoyant! Therefore, Movant was denied his §2255 motion regarding all issues raised during his February 10, 1997 RESENTENCING.

c. The biggest mistake that occurred during Movant Lambros' RESENTENCING was the fact that he was sentenced illegally on the conspiracy Count One (1) charge. Movant Lambros' new attorney did not research the law as to the fact that mandatory minimum sentences did not apply or the fact that the statute did not allow a life sentence. See, U.S. vs. LAMBROS, 65 F.3d 698, 700 (8th Cir. 1995):

> "The government does not dispute Lambros' argument that the required [mandatory] life sentence of section 841 did not take effect until November 1988, well after the February 1988 CONSPIRACY [21 U.S.C. §846] end date charged in the Count 1 indictment. Under well-known principles of ex post facto law, because the MANDATORY LIFE SENTENCE was not in place at the time of the crime charged, the district court erred in applying it. **(Lambros concedes that the version of §841 in place at the time of his conspiracy, though not requiring a LIFE SENTENCE FOR HIS CRIMES, DOES ALLOW IT.)** Accordingly, Lambros must be resentenced on Count 1." (emphasis added)

**

Id. at 700. **See, APPENDIX G.**

d. Movant Lambros could not be sentenced to more than thirty (30) years imprisonment on the Count 1 conspiracy, due to his prior convictions. See, 21 U.S.C. §841 "PUBLIC LAW 91-513 - October 27, 1970". Movant's attorney Colia Ceisel instructed the Eighth Circuit Court of Appeals and the February 10, 1997 resentencing court that Movant Lambros could be sentenced under 21 U.S.C. §841(b)(1)(A)(ii) for violations of 21 U.S.C. §846 to a term of imprisonment which **"MAY NOT BE LESS THAN 20 YEARS AND NOT MORE THAN LIFE IMPRISONMENT."** This is not true.

e. Congress failed to correct a statutory cross-reference between 21 U.S.C. §§ 846 and 841, when §841 was reorganized. Both §§ 846 and 841 where first published/enacted on October 27, 1970. §846 the conspiracy statute

incorporates §841. §846 was not amended until November 18, 1988, thus staying the same from October 27, 1970 thru November 18, 1988. §841 was amended at least four (4) times by November 18, 1988. It is well settled law that where a statute incorporates another, and the one incorporated is thereafter amended or repealed, the scope of the incorporating statute remains intact and "no subsequent legislation has ever been supposed to affect it." KENDALL vs. U.S., 12 Pet. 524, 625 (1838); In re Heath, 144 U.S. 92, 93, 94 (1892), as cited within KESSLER vs. MERCUR CORP., 83 F.2d 178, 180 (2nd Cir. 1936). The Eighth Circuit also enforces the settled law of "REPEAL OF INCORPORATED STATUTES", as seen within U.S. vs. OATES, 427 F.3d 1086, 1089 (8th Cir. 2009):

> "Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute .... Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications by the statute so taken unless it does so by express intent. U.S. vs. GRINER, 358 F.3d 979, 982 (8th Cir. 2004) (quoting HASSETT vs. WELCH, 303 U.S. 303, 314, 58 S.Ct. 559, 82 L.Ed. 858, 1938-1 C.B. 490 (1938)) (in turn quoting 2 Sutherland on Statutory Construction, 787-88 (2d ed. 1904)).
>
> ** GRINER applied this "well-settled canon" of statutory construction after Congress failed to correct a statutory cross-reference between 18 U.S.C. §§ 3583(d) and 3563(b) when the latter statute was reorganized. See, GRINER, 358 F.3d at 982. We believe this rule applies equally when the Guidelines adopt particular provisions of a statute by specific and descriptive reference, and the statute is thereafter reorganized."

See, OATES, 427 F.3d at 1089.

The Fourth Circuit also continues to enforce the above "well-settled canon" and refers back to OATES in U.S. vs. MYERS, 553 F.3d 328, 331 (4th Cir. 2009).

f. As stated above, a violation of 21 U.S.C. §846 **BEFORE NOVEMBER 18, 1988 "DID NOT ALLOW MANDATORY MINIMUM PENALTIES"** - no minimum term of imprisonment applied to the conspiracy Count One (1) Movant Lambros was sentenced under or his resentencing on February 10, 1997. The following cases support same:

1. U.S. vs. RUSH, 874 F.2d 1513, 1514 (11th Cir. 1989);
2. U.S. vs. ROBINSON, 883 F.2d 940 (11th Cir. 1989);

21.

3. U.S. vs. GILTNER, 889 F.2d 1004, 1009 (11th Cir. 1989);

4. U.S. vs. CURRY, 902 F.2d 912, 917 (11th Cir. 1990);

5. U.S. vs. McNeese, 901 F.2d 585, 602-603 (7th Cir. 1989)

6. U.S. vs. BROWN, 887 F.2d 537, 541 (5th Cir. 1989);

7. U.S. vs. CAMPBELL, 704 F. Supp. 661, 663-665 and FootNotes 2 thru 7 (E.D. VA. 1989).

g. A violation of Title 21 U.S.C. §846 allowed for punishment by imprisonment **OR** fine **OR** both which may not exceed the maximum punishment for the offense, which in Movant Lambros' case is Title 21 U.S.C. §841, **BEFORE NOVEMBER 18, 1988.** A violation of Title 21 U.S.C. §841(b)(1)(A) allowed a term of imprisonment of not more than 15 years and 30 years if a person commits such a violation after one or more prior convictions. See, October 27, 1970 initial publication of §841.

h. Movant Lambros' plea agreement allowed him to plea without the filing of "INFORMATION" by the U.S. Government to establish prior convictions. See, 21 U.S.C. §851. Therefore, Lambros' plea agreement should of read that his maximum sentence exposure was 15-years on the Count 1 conspiracy without the §851 filing and 30-years with the §851 filing.

i. Movant was not able to file a §2255 as to his February 10, 1997 RESENTENCING. The above clearly proves that Movant Lambros received incorrect information during plea bargaining, sentencing and resentencing, as the trial court and his attorney erroneously believed that a 20-year mandatory minimum and life maximum sentence applied at the February 10, 1997 resentencing. Movant should be resentenced under the correct statute, as he is currently incarcerated under an illegal sentence, because version of statute in place at time of conspiracy did not allow 20-year mandatory minimum and life maximum sentence. See, U.S. vs. LAMBROS, 65 F.3d 698, 700 (8th Cir. 1995).

7. JUNE 5, 2013: Movant Lambros filed a "MOTION TO ALTER OR AMEND OF THE COURT'S 'MEMORANDUM AND ORDER' filed May 17, 2013, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure."

22

8. JULY 1, 2013: The Court issued an "ORDER" stating that Movant's action was dismissed and all relief was denied .... May 17, 2013." "Having considered the [Rule 59(e)] motion, the court finds that it fails to state grounds for relief."

9. DENIAL OF CERTIFICATE OF APPEALABILITY: The Court stated on page 8 of the July 1, 2013 "ORDER" "Several Circuit Courts have held that a certificate of appealability is required under these circumstances. Thus, to the extent that one may be required, the Court finds that petitioner has made no 'substantial showing of the denial of a constitutional right' with respect to an appeal of either the order of dismissal or this order denying this motion." See. APPENDIX B.

10. AUGUST 28, 2013: Movant Lambros files a "COMBINED OPENING BRIEF AND APPLICATION FOR A CERTIFICATE OF APPEALABILITY", with the Tenth Circuit Court of Appeals. See, LAMBROS vs. CLAUDE MAYE, No. 13-3159

11. OCTOBER 4, 2013: The Tenth Circuit Court of Appeals issued an "ORDER AND JUDGMENT" in this action. The Court affirmed the district court's order of dismissal. See, APPENDIX A. "This court cannot improve upon the reasoning of the district court as set out in its orders dated May 17, 2013 and July 1, 2013. Accordingly, this Court affirms the district court's order of dismissal for substantially the reasons set out in those thorough orders."

PRIOR PROCEEDINGS MOVANT LAMBROS SOUGHT RELIEF FROM THE CONVICTION AND SENTENCE IN THIS "PETITION FOR A WRIT OF CERTIORARI"

CASE HISTORY:

12. Movant Lambros offers USA vs. LAMBROS, 404 F.3d 1034 (8th Cir. 2005). The Eighth Circuit offers an excellent overview of Lambros' jury trial conviction, direct appeal, resentencing and subsequent §2255 motions - with legal citing to cases.

23.

13. A brief summary of the above that includes important dates:

a. 1993: Movant was offered two (2) different plea agreements by the U.S. Attorney. Both plea agreements offered incorrect information as to the correct sentences Movant could receive under the version of the statute in place at time of conspiracy - Count 1 - and Counts 5, 6, and 8.

b. January 27, 1994, Movant was sentenced on Counts 1, 5, 6, and 8 by the district court after trial.

c. September 8, 1995, Eighth Circuit Court of Appeals vacated Count One (1) - the MANDATORY LIFE WITHOUT PAROLE sentence.

d. WRIT OF CERTIORARI was filed for Counts 5, 6, and 8.

e. January 16, 1996, Writ of Certiorari was denied on Counts 5, 6, and 8, as to the Eighth Circuit ruling in U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995). See, LAMBROS vs. USA, 516 U.S. 1082 (1996).

f. FEBRUARY 10, 1997, Movant Lambros was RESENTENCED on Count One (1). Movant's attorney refused to raise an ineffective assistance of counsel claim against Movant's trial attorney as to his illegal sentence of MANDATORY LIFE WITHOUT PAROLE. To be fair, Movant does not believe an ineffective assistance of counsel claim could have legally been raised at resentencing for Count One (1), as Movant was being sentenced as if he had never been sentenced before - De Novo - anew. Thus, Movant was denied the right to raise an ineffective assistance claim on direct appeal for his resentencing, as the Eighth Circuit does not allow ineffective assistance of counsel claims on direct appeal. See, USA vs. HAWKINS, 78 F.3d 348, 351-352 (8th Cir. 1995).

g. APRIL 18, 1997, Movant filed his first §2255 attacking Counts 5, 6, and 8, as Movant was on direct appeal from resentencing on Count One (1). The district court denied Movant's §2255 as a SECOND AND SUCCESSIVE §2255.

h. SEPTEMBER 2, 1997, the Eighth Circuit denied Movant's direct appeal as to his resentencing on Count One (1). See, USA vs. LAMBROS, 124 F.3d 209 (8th Cir. 1997).

i. JANUARY 12, 1998, the U.S. Supreme Court denied Movant's writ of certiorari as to his resentencing direct appeal on Count One (1) on February 10, 1997. See, LAMEROS vs. USA, 522 U.S. 1065 (1998).

j. JANUARY 2, 1999, Movant Lambros filed his FIRST §2255 motion regarding his February 10, 1997 - RESENTENCING. The district court denied Movant's §2255, as a SECOND AND SUCCESSIVE PETITION.

14. The above time-line clearly proves Movant Lambros was never given an opportunity to file a habeas corpus petition under 28 U.S.C. §2255, as to Count One (1). The law within the Eighth Circuit and Tenth Circuit does not allow a defendant to file a §2255 while an appeal from conviction is pending. See, MASTERS vs. EIDE, 353 F.2d 517, 518 (8th Cir. 1965). Rule 5, governing Section 2255, also enforces same, citing MASTERS vs. EIDE. Also, USA VS. COOK, 997 F.2d 1312, 1319 (10th Cir. 1993)(District Court improperly characterized defendant's §2255 motion as second motion, approximately a year and a half before we decided defendant's direct appeal.)

15. Movant Lambros believed that the District Court of Kansas had jurisdiction under Title 28 U.S.C. §2241 and/or 28 U.S.C. §1651(a) - Writ of Audita Querela - to rule, as the Tenth Circuit allowed in USA vs. COOK, 997 F.2d 1312, 1319 (10th Cir. 1993), that Movant's January 2, 1999 §2255 motion was incorrectly denied by the District Court of Minnesota as a SECOND AND SUCCESSIVE PETITION and Lambros should be offered his first §2255, as to his February 10, 1997 RESENTENCING on Count One (1). Therefore, Movant Lambros' June 8, 2012 "MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE §2255, as to the issues raised within this action - MISSOURI vs. FRYE and LAFLER vs. COOPER - was not a second or successive motion as per the Court's ruling and clearly proves Movant's Title 28 U.S.C. §2255

was "INADEQUATE AND/OR INEFFECTIVE". See, LAMBROS vs. USA, No. 12-2427 (8th Cir. 2012).

EIGHTH CIRCUIT RELATED CASE IN THIS ACTION: LAMBROS vs. USA, No. 12-2427 (8th Cir. 2012)

16. JUNE 8, 2012: Movant filed a SECOND OR SUCCESSIVE MOTION under §2255, as to his counsel failing to give him competent counsel regarding two (2) plea offers, as to the maximum and minimum illegal sentence he received on Count One (1) after a jury trial - MANDATORY LIFE WITHOUT PAROLE. See, MISSOURI vs. FRYE and LAFLER vs. COOPER, (March 21, 2012). MISSOURI and LAFLER announced a type of Sixth Amendment violation that was previously unavailable, and requires retroactive application to cases on collateral review. The November 16, 1992, "PLEA AGREEMENT AND SENTENCING GUIDELINES RECOMMENDATIONS" by U.S. Attorney Thomas B. Heffelfinger stated the following incorrect facts as to the sentences Movant could receive:

> a. Page 1, Paragraph 1: "The defendant will enter plea of guilty to **COUNT VIII** of the indictment which charges him with the possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and **841(b)(1)(B).**" (emphasis added)
>
> b. Page 2, Paragraph 2: "The defendant understands that because of his prior convictions, the **COUNT VIII** charge carries a **MAXIMUM POTENTIAL PENALTY OF:**
>
> 1. **LIFE IMPRISONMENT WITHOUT PAROLE;**
>
> 2. A $4,000,000 fine; ..... "
>
> c. Page 2, Paragraph 4: "The government agrees to **DISMISS COUNTS I, V, and VI** at the time of sentencing. **COUNTS V and VI CARRY THE SAME MAXIMUM POTENTIAL PENALTIES AS THE COUNT VIII CHARGE.** Conviction on the **COUNT I CHARGE, HOWEVER, WOULD CARRY A MANDATORY TERM OF IMPRISONMENT OF LIFE WITHOUT PAROLE** and a fine maximum of $8 million. ...."

The U.S. Attorney and Movant's attorney incorrectly stated that Movant could receive a MANDATORY LIFE WITHOUT PAROLE on Count One (1), when in fact he could not receive more than 30 years due to his priors. See, Paragraph 6(g) above. Counts five (5)

and six (6) do not "carry the same maximum potential penalties as the Count eight (8) charge" [**life imprisonment without parole**]. Both Counts 5 and 6 occurred **BEFORE** November 1, 1987 and carried a maximum potential penalty of thirty (30) years, because of Movant's prior penalties and a fine of not more than $250,000. See, 21 U.S.C. **841(b)(1)(B)**. See, APPENDIX H.

17. Movant just reviewed the HISTORY; ANCILLARY LAWS and DIRECTIVES of 21 U.S.C. §841, which states amendments to §841 occurred on the following dates - that would effect the penalties within Movant's indictment:

a. 1986: October 27, 1986;

b. 1988: November 18, 1988 (effective 120 days after enactment).

Therefore, Count 8 did not carry a "maximum potential penalty of LIFE IMPRISONMENT WITHOUT PAROLE", as stated within the November 16, 1992 "PLEA AGREEMENT". The maximum potential penalty for Count 8 was 30-years. All of the information within the government's "PLEA AGREEMENT" was incorrect, as to the potential sentences Movant could receive in Counts 1, 5, 6 and 8. See, APPENDIX H.

18. JULY 23, 2012: The United States responded to Movant's application to file a successive section 2255. The government admitted Movant was sentenced to an illegal sentence on Count One (1) and cites U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995) and offers copy of the plea offer mailed to Movant's attorney on December 10, 1992. Movant offered copy of the government's November 16, 1992 plea offer within his June 8, 2012 motion. Both plea offers state that the only sentence Movant could receive on Count One (1) was a MANDATORY LIFE WITHOUT PAROLE, the sentence Movant received at sentencing for Count One (1).

19. AUGUST 13, 2012: Movant Lambros responds to government's response, informing the Court that Movant qualifies for the exemption of "A MIS-CARRIAGE OF JUSTICE" - U.S. vs. ANDIS, 333 F.3d 886, 890-893 (8th Cir. 2003) - and "ACTUAL INNOCENCE EXCEPTION" - BAYLESS vs. USA, 14 F.3d 410, 411 (8th Cir. 1993), citing JONES vs. ARKANSAS, 929 F.2d 375, 381 (8th Cir. 1991)("If one is 'actually innocent' of the sentence imposed, a federal habeas court can excuse the procedural

default to correct a fundamentally unjust incarceration. Id.; DUGGER vs. ADAMS, 489 U.S. 401, 410 n.6 (1989)). The en banc Eighth Circuit clearly stated in U.S. vs. ANDIS, at 891-892:

> "As the MISCARRIAGE OF JUSTICE EXCEPTION relates to Mr. Andis's appeal, we reaffirm that in this Circuit a defendant has the right to appeal an ILLEGAL SENTENCE, EVEN THOUGH THERE EXISTS AN OTHERWISE VALID WAIVER. ..... In U.S. vs. PELTIER, we recently addressed what constitutes an illegal sentence:
>
> [a] sentence is illegal when it is not authorized by law; for example,
> ** when the sentence is 'in **EXCESS OF A STATUTORY PROVISION OR OTHERWISE CONTRARY TO THE APPLICABLE STATUTE.**' A sentence is not illegal if the 'punishment meted out was not in excess of that prescribed by the relevant statutes ... or the terms of the sentencing itself are not legally or constitutionally invalid in any other respect.' 312 F.3d 938, 942 (8th Cir. 2002) (emphasis added)

See, APPENDIX I.

The Eighth Circuit clearly stated within JONES vs. ARKANSAS, 929 F.2d 375, 380-381 (8th Cir. 1991):

> "We hold that sentencing Jones under the habitual offender statute, as amended by Act 409 in 1983, which was not in force when Jones committed his offense, violates the ex post facto clause of the Constitution. See, MILLER vs. FLORIDA, 482 U.S. 423, 435-36 (1987) ..... U.S. vs. SWANGER, 919 F.2d 94, 95 (8th Cir. 1990)..." Id. at 380.

ACTUAL INNOCENCE EXCEPTION:

> "Although the Supreme Court believed that the cause and prejudice standard of SYKES would take care of most cases in which the habeas petitioner was a victim of a MISCARRIAGE OF JUSTICE, it recognized that in a small number of extraordinary cases this would not be true. MURRAY vs. CARRIER, 477 U.S. 478, 495-96 (1986). The Court thus developed a NARROW EXCEPTION of the procedural default rule which is directed toward 'THE IMPERATIVE OF CORRECTING A FUNDAMENTALLY UNJUST INCARCERATION.' ENGLE vs. ISAAC, 456 U.S. 107, 135 (1981). The Court has subsequently expressed this exception as applying to incarcerations in which 'a constitutional violation has probably resulted in the conviction of one who is **ACTUALLY INNOCENT** ....' MURRAY, 477 U.S. at 496; see also SMITH vs. ARMONTROUT, 888 F.2d 530, 545 (8th Cir. 1989)." (emphasis added) Id. at 380-81.
>
> "Although recognizing that the CARRIER **ACTUAL INNOCENCE EXCEPTION** did not translate easily into the sentencing phase of a capital trial, the Court nevertheless did so in SMITH vs. MURRAY, 477 U.S. 527, 537 (1986). If one is **"ACTUALLY INNOCENT"** of the sentence imposed, a federal habeas court can excuse the procedural default to correct a fundamentally unjust incarceration. ..... It would be difficult to think of one who is more **'INNOCENT'** of a sentence than a defendant sentenced under a **STATUTE THAT BY ITS VERY TERMS DOES NOT EVEN APPLY TO THE DEFENDANT.**" Id. at 381 (emphasis added)

"Jones' case falls within the extremely narrow band of cases in which a federal habeas court can grant the writ based on a **MISCARRIAGE OF JUSTICE**. ...." Id. at 381 (emphasis added)

See, APPENDIX J. (JONES vs. ARKANSAS, 929 F.2d 375, 380-81 (8th Cir. 1991)

20. Movant LAMBROS claims is therefore like the **ACTUAL-INNOCENCE** claim in JONES vs. ARKANSAS and "**MISCARRIAGE OF JUSTICE**" claim in U.S. vs. ANDIS, in which the Eighth Circuit held that a petitioner was entitled to habeas relief because he had been sentenced under a statute that did not apply to him, in violation of the ex post facto clause of the Constitution, U.S. Const. art. I, §9, cl. 3; U.S. Const. art. I, §10, cl. 1.

21. Movant LAMBROS' claim extends further to cover ineffective assistance by his counsel and prosecutorial misconduct in the unwarranted concealment of the minimum and maximum sentences Movant could receive during the plea-bargaining phase. See, POWELL vs. ALABAMA, 53 S. Ct. 55 (1932); MISSOURI vs. FRYE, 132 S. Ct. 1399, 1407 (2012)("defense counsel have responsibilities in the plea bargaining process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires.") Both written plea proposals from the U.S. Attorney, November 16, 1992 and December 10, 1992 prove same.

22. The November 16, 1992 written plea proposal from the U.S. Attorney states Movant can enter a plea of guilty to Count 8 in violation of 21 USC §841 (b)(1)(B), that carries a maximum penalty of **LIFE IMPRISONMENT WITHOUT PAROLE** and a mandatory minimum sentence of ten (10) years without parole, due to his prior convictions. The government would dismiss Counts 1, 5, and 6. Counts 5 and 6 carry the same maximum and minimum penalty as Count 8. Count 1 carries a **MANDATORY TERM OF LIFE WITHOUT PAROLE** and maximum fine of $8 million. See, Paragraph 16 above. Also, see **APPENDIX K**. (Pages 1 thru 3.)

23. The December 10, 1992 **REVISED PLEA PROPOSAL** from the U.S. Attorney states that **"THE GOVERNMENT WAIVES ITS RIGHT TO FILE AN INFORMATION**

UNDER 21 U.S.C. § 851 TO ENHANCE THE APPLICABLE MANDATORY MINIMUM PENALTIES. If an Information identifying the defendant's prior record had been filed, a mandatory minimum term of imprisonment of **TEN (10) YEARS** without parole would apply to **COUNTS 8 AS WELL AS COUNTS 5 and 6.** The **STATUTORY MAXIMUM TERM OF IMPRISONMENT ON THOSE COUNTS WOULD HAVE BEEN LIFE.** The Information would also trigger a **MANDATORY TERM OF LIFE IMPRISONMENT ON THE COUNT 1 CONSPIRACY CHARGE.** See, Paragraph 5. This information is not correct, as the above statutes do not apply to Movant, in violation of the ex post facto clause. See, **APPENDIX L.**

24. The December 10, 1992, **REVISED PLEA PROPOSAL** also stated within paragraph 2:

> "The defendant understands that absent the filing of an Information, the **Count 8** charge carries a maximum potential penalty of:
>
> a. Forty (40) years imprisonment without parole;
>
> b. A $2,000.000 fine;"

Within paragraph 3:

> "The defendant also understands that Court 8 charge carries a mandatory minimum term of imprisonment of five (5) years without parole and a mandatory term of supervised release of four (4) years."

Within paragraph 4:

> "The government agrees to dismiss Counts 1, 5, and 6 at the time of sentencing. **COUNTS 5 and 6 CARRY THE SAME MAXIMUM AND MINIMUM POTENTIAL PENALTIES AS THE COUNT 8 CHARGE.** Conviction on the **COUNT 1 CHARGE**, however, would trigger a **MAXIMUM TERM OF IMPRISONMENT OF LIFE WITHOUT PAROLE**, a **MANDATORY MINIMUM OF TEN (10) YEARS WITHOUT PAROLE**, and a fine maximum of $4 million. (emphasis added)

See, **APPENDIX L.** (December 10, 1992, **REVISED PLEA PROPOSAL** by U.S. Attorney, Pages 1 thru 3.)

25. As developed within the above paragraphs 6(c)-(h) the maximum sentence Movant could receive on Count 1 was 15-years without the filing of an INFORMATION, under 21 U.S.C. §851. Also, the maximum sentences for Counts 5, 6 and 8 was 15-years without the filing of INFORMATION, under § 851. See, **APPENDIX H.** (Title 21 U.S.C.S. §841**(b)(1)(B)**, 1986 Act, October 27, 1986 enactment.)

26. OCTOBER 17, 2012: Movant filed a supplemental motion offering the Ninth Circuit case that applied LAFLER and FRYE **RETROACTIVELY**. See, MILES vs. MARTEL, 696 F.3d 889, 899-900, and FootNote 3 and 4 (9th Cir. 2012)("By applying this holding in LAFLER, a habeas petition subject to AEDPA, the Court necessarily implied that this holding applies to habeas petitioners whose cases are **ALREADY FINAL ON DIRECT REVIEW; i.e. THAT THE HOLDING APPLIES RETROACTIVELY** ...." Id. Foot-Note 3. (emphasis added) Therefore, Movant made a "PRIMA FACIE SHOWING THAT FRYE and LAFLER RETROACTIVE TO HABEAS CORPUS MOTIONS SUBJECT TO THE AEDPA".

27. OCTOBER 24, 2012: The Eighth Circuit filed "JUDGMENT" in this action, "The petition for authorization to file a successive habeas application in the district court is denied. ..."

28. NOVEMBER 5, 2012: Movant filed two (2) motions with the Eighth Circuit:

a. Motion for Recusal of Circuit Court Judge Murphy;

b. Petition for Rehearing with suggestion for Rehearing in Banc. In brief, Circuit Court Judge Diana Murphy - who was one of the three judges on the October 24, 2012 "JUDGMENT", was the District Court Judge that originally conducted the trial and sentencing of Movant Lambros in this action. Movant Lambros clearly pointed out within his request for a REHEARING that he had made a "PRIMA FACIE SHOWING" and the Eighth Circuit did not make a finding of facts and state its conclusions of law, citing cases to support same. Also, Movant pointed out that the second paragraph within 28 USC §2255 states that the court is required to "determine the issues and make findings of fact and conclusions of law with respect thereto."

29. PLAIN ERROR: Circuit Court Judge Diana Murphy, as stated within the above paragraph 28, committed "PLAIN ERROR" in violation of Title 28 U.S.C. §47, that provides "no judge shall hear or determine an appeal from the decision of a case or issue tried by him," is an **ERROR SO SERIOUS AS TO CONSTITUTE PLAIN ERROR**. This is the reason Movant filed a MOTION FOR RECUSAL on November 5, 2012, as Judge Murphy was the judge who conducted the jury trial and sentencing in this action.

31

See, USA vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995), and was one of the three judge panel that denied "JUDGMENT" on October 24, 2012. See, WEDDINGTON vs. ZATECKY, 721 F.3d 456, 461-462: (7th Cir. 2013):

> "**Appearance of Partiality.** In an opinion by Judge John Daniel Tinder, the Seventh Circuit agreed with the Third circuit [CLEMMONS vs. WOLFE, 377 F.3d 322 (3rd Cir. 2004)] that the principles underlying **Section 47 apply any time a judge sits on a case, regardless of whether it is direct review or habeas.** Therefore, the District Judge in this case should have recused herself, it held." (emphasis added)
>
> "The CLEMMONS court found the **ERROR TO BE SO SERIOUS AS TO CONSTITUTE PLAIN ERROR, ...**" (emphasis added)

See, CRIMINAL LAW REPORTER, August 1, 2013, Vol. 93, No. 18, Pages 614 and 615.

30. NOVEMBER 9, 2012: Clerk Gans of the Eighth Circuit letter to Movant stating his petition for rehearing received on November 8, 2012 will not move forward and no action will be taken, as second or successive §2255 applications shall not be appealable and not subject to a writ of certiorari. See, APPENDIX E.

31. NOVEMBER 29, 2012: "ORDER" from the Eighth Circuit stating "The motion for the appellant for RECUSAL IS DENIED." See, APPENDIX D.

ADDITIONAL INFORMATION REGARDING EVIDENCE THE RESENTENCING COURT COULD CONSIDER ON FEBRUARY 10, 1997 - THE RESENTENCING.

32. On February 10, 1997, the Honorable Judge Robert Renner did not apply the precedent of the Eighth Circuit Court of Appeals in U.S. vs. CORNELIUS, 968 F.2d 703, 705 (8th Cir. 1992), in which he was bound to hear **"RELEVANT EVIDENCE ON REMAND" - RULE 33 MOTIONS:**

> "Once a sentence has been vacated or a finding related to sentencing has been reversed and the case has been remanded for resentencing, the district court can hear **ANY RELEVANT EVIDENCE ON THAT ISSUE THAT IT COULD HAVE HEARD AT THE FIRST HEARING.**" (emphasis added)

Id. at 705.

The Eighth Circuit clearly stated within U.S. vs. LAMBROS, 65 F.3d 698, 700 and 702 (8th Cir. 1995) "Accordingly, Lambros must be resentenced on Count 1." Id. 700.

"For the foregoing reasons, we vacate the sentence imposed on Count 1 and remand for resentencing on that count." Id. at 702. Therefore, the district court must proceed within the scope of "any limitations imposed on its function at resentencing by the Appellate Court." CORNELIUS, 968 F.2d at 705. The Court DID NOT impose any limitations as to Movant Lambros' February 10, 1997 resentencing on the Count 1 conspiracy. The conspiracy allegedly lasted from 1983 thru February 1988. Again, the Eighth Circuit did not issue any ORDER detailing the scope of the February 10, 1997 resentencing on Count 1. Also see, U.S. vs. KING, 598 F.3d 1043, 1050 (8th Cir. 2010)("... remand without limitations."); U.S. vs. DUNLAP, 452 F.3d 747, 749-750 (8th Cir. 2006):

> "But where a court of appeals vacates a sentence or reverses a finding related to sentencing and remands the case for re-sentencing **WITHOUT PLACING ANY LIMITATIONS ON THE DISTRICT COURT**, the court 'can hear **ANY RELEVANT EVIDENCE ON THAT ISSUE** that it could have heard at the first hearing.' U.S. vs. CORNELIUS, 968 F.2d 703, 705 (8th Cir. 1992) ..." (emphasis added)

See, DUNLAP, 452 F.3d at 749-50.

** > "Because nothing in our original remand order precluded the government from presenting its evidence at resentencing, we cannot say that the district court erred in allowing it to do so." (emphasis added)

See, DUNLAP, 452 F.3d at 750.

33. The February 10, 1997 resentencing court erred when it recharacterized Movant Lambros' Rule 33 Motions, letters, and various documents into Movant's first §2255. Judge Renner admits within his September 30, 1997, ORDER, "Had the Court considered the motions as Lambros had preferred, under Rule 33, it would have dismissed them as **UNTIMELY**."

34. Movant was represented by appointed attorney and the court and should of ORDERED Movant's Rule 33 motions to be filed by his attorney. See, ABDULLAH vs. U.S., 240 F.3d 683, 685-686 (8th Cir. 2001)("Noting that a represented party must file pleadings through his attorney, the district court denied the motion without consideration of its contents and instructed the clerk to return the motion to Abdullah's attorney of record.") (emphasis added)

33

REASONS FOR GRANTING THE PETITION

Certiorari should be granted to clarify once and for all, the criteria if any, that must be applied to the Writ of Habeas Corpus, Title 28 U.S.C. §2241 and/or the Writ of Audita Querela, under the All Writs Act, Title 28 U.S.C. §1651(a), when substantial government interference from the U.S. Attorney's office occurred during two (2) separate written plea proposals, that failed to inform Movant of the relevant statutory minimum and maximum sentences he could receive - in violation of Movant's Fifth Amendment due process rights. Movant's attorney was ineffective during the plea-bargaining process when he failed to offer the relevant statutory minimum and maximum sentences Movant could receive during two (2) separate written plea proposals from the U.S. Attorney - in violation of Movant's Sixth Amendment right to effective assistance of counsel. Movant's Sixth Amendment rights continued to be violated as he proceeded to trial due to the incorrect information within the plea proposal, when he was sentenced to mandatory life without parole.

On September 8, 1995, the Eighth Circuit Court of Appeals vacated Movant's sentence of mandatory life without parole. The court held under the ex post facto doctrine, the mandatory life sentence without parole sentence must be vacated and remanded for resentencing, because version of statute in place at time of conspiracy did not allow for mandatory life without parole. See, U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995).

The September 8, 1995 "ORDER" from the Eighth Circuit included incorrect resentencing information from the Court and Movant's attorney, as it directed the resentencing court to resentence Movant under an illegal version of Title 21 U.S.C. §846, that was not in place at time of conspiracy that allowed a life sentence. The Court stated, "(Lambros concedes [Lambros' attorney conceded] that the version of §841 in place at the time of his conspiracy, though not requiring a life sentence for his crimes, does allow it.)" Id. at 700. Therefore, the Court and Movant's

attorney, again in violation of Movant's Sixth Amendment rights to effective counsel, instructed the resentencing court to sentence Movant Lambros to an illegal version of Title 21 U.S.C. §846 in place at ime of conspiracy, a sentence of imprisonment not less than 20 years and not more than life. See, 21 U.S.C. §841(b)(1)(A). As stated within the "STATEMENT OF THE CASE", paragraph 6(d) thru (h) Movant's maximum sentence was 30 years with no mandatory minimum sentence, due to the "well-settled canon" of statutory construction after Congress failed to correct a statutory cross-reference between 21 U.S.C. §§ 846 and 841 when the latter statute was reorganized. See, 21 U.S.C. §841 "PUBLIC LAW 91-513 - October 27, 1970." and U.S. vs. OATES, 427 F.3d 1086, 1089 (8th Cir. 2009). Also, a drug conspiracy does not allow a mandatory minimum sentence before November 18, 1988. See, paragraph 6(f) within "STATEMENT OF CASE", for collection of cases.

Resentencing occurred on February 10, 1997. Movant's attorney was again ineffective in violation of Movant's Sixth Amendment rights, as the Court re-sentenced Movant on the Count 1 conspiracy with the understanding that he could only receive a sentence of 20-years to life, due to the Eighth Circuits resentencing ORDER. Movant was resentenced to 30-years. Also, Movant was denied his right to file a 28 U.S.C. §2255, as to his resentencing, as the resentencing court ruled Movant's Rule 33 Motions at resentencing was Movant's §2255, attacking for the first time the constitutionality of a newly imposed sentence at resentencing. Since Movant Lambros' conspiracy conviction was initially vacated on direct appeal, he could not have pursued claims against his sentence at resentencing during his first collateral proceedings. See, HAWKINS vs. U.S., 415 F.3d 738, 740 (7th Cir. 2005) "WALKER vs. ROTH, 133 F.3d 454, 455 (7th Cir. 1997), holds that 'a second habeas [corpus] petition attacking for the first time the constitutionality of a newly imposed sentence is not a second or successive petition within the meaning of §2244.' Mr. Hawkins' conspiracy conviction was vacated on direct review; it therefore was not the subject of his prior collateral attack. .... We note that,

because Mr. Hawkins' conspiracy conviction was initially vacated on direct appeal, he could not have pursued claims against his sentence for that offense during his first collateral proceedings. ... we vacate the district court judgment as to Mr. Hawkins' attack on the reinstated conspiracy conviction and sentence and remand the case for further proceedings." Id. 415 F.3d at 740. This is exactly what happened to Movant Lambros. The following cases also support Movant's position: In re GREEN, 215 F.3d 1195 (11th Cir. 2000)("The §2255 motion is transferred back to the district court, and the district court is instructed to accept the motion as filed on the date it was originally filed with the district court."); ESPOSITO vs. U.S., 135 F.3d 111, 112-114 (2nd Cir. 1997); SUSTACHE-RIVERA vs. U.S., 221 F.3d 8, 12-14 (1st Cir. 2000); GALTIERI vs. U.S., 128 F.3d 33 (2nd Cir. 1997).

Movant's illegal sentences constituted a "miscarriage of justice", U.S. vs. ANDIS, 333 F.3d 886, 890-893 (8th Cir. 2003)(en banc)("... sentence is illegal when it is not authorized by law; for example, when the sentence is 'in excess of a statutory provision or otherwise contrary to the applicable statute.'" Id. at 892) and also qualifies for the "actual innocence" exception. See, BAYLESS vs. USA, 14 F.3d 410, 411 (8th Cir. 1993)("JONES vs. ARKANSAS, 929 F.2d 375, 381 (8th Cir. 1991) applying procedural default's actual innocence exception to defendant sentenced under inapplicable statute.)

Movant's attorney was again not effective, as she stated that Movant would be able to file a §2255 as to his resentencing judgment, when the resentencing judge turned Movant's Rule 33 motions into his first §2255.

No meaningful explanation for the dismissal of this action was provided by any court at any level in this case, as the court of appeals' decision ignores Movant's jurisdiction, pursuant to 28 U.S.C. 2241 and/or 28 U.S.C. §1651(a), when Congress affords every federal prisoner the opportunity to launch at least one (1) collateral attack to any aspect of his conviction or sentence. This Court did not expressly limit MISSOURI vs. FRYE and LAFLER vs. COOPER.

The need to clarify the law in the application of MISSOURI vs. FRYE and LAFLER vs. COOPER, requires that the court grant the petition in this case.

ARGUMENT

WHETHER THE TENTH CIRCUIT COURT OF APPEALS ERRED, IN SQUARE CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS, BY SUMMARILY AFFIRMING THE DISTRICT COURT'S DISMISSAL OF THIS PRO SE ACTION REQUESTING RETROACTIVITY, PURSUANT TO THE WRIT OF HABEAS CORPUS, TITLE 28 U.S.C. §2241 AND/OR THE WRIT OF AUDITA QUERELA, UNDER THE ALL WRITS ACT, TITLE 28 U.S.C. §1651(a), DUE TO THIS COURT'S RULINGS THAT STRENGTHENS SIXTH AMENDMENT RIGHTS TO COUNSEL DURING PLEA BARGAINING, THAT WAS PREVIOUSLY UNAVAILABLE - SEE, MISSOURI vs. FRYE, 132 S. Ct. 1399; 182 L.Ed. 2d 379 (March 21, 2012) AND LAFLER vs. COOPER, 132 S. Ct. 1376; 182 L.Ed. 2d 398 (March 21, 2012) - TO THOSE WHOSE CONVICTIONS BECAME FINAL BEFORE THOSE CASES WHERE DECIDED; WHERE:

I. THE COURT OF APPEALS FAILED TO APPLY ANY OF THE CONSIDERATIONS SET OUT BY THIS COURT IN MISSOURI vs. FRYE AND LAFLER vs. COOPER, WHEN THE DISTRICT COURT FAILED TO APPLY THE THRESHOLD STANDARDS OF ADJUDICATION IN GRANTING MOVANT'S PETITION FOR JURISDICTION, PURSUANT TO 28 U.S.C. §2241 AND/OR 28 U.S.C. §1651(a), WHEN CONGRESS AFFORDS EVERY FEDERAL PRISONER THE OPPORTUNITY TO LAUNCH AT LEAST ONE (1) COLLATERAL ATTACK TO ANY ASPECT OF HIS CONVICTION OR SENTENCE - WHEN MOVANT WAS NOT GIVEN AN OPPORTUNITY TO BRING AND TEST HIS CLAIM IN AN INITIAL §2255 MOTION?

1. The record clearly establishes the facts offered within this writ, as stated within the "STATEMENT OF THE CASE" and "REASONS FOR GRANTING THE

PETITION", Movant incorporates and restates same here.

2. Movant Lambros' case is very similar to LAFLER vs. COOPER, when Anthony Cooper when prosecutors twice offered to dismiss two of the charges and recommend a sentence of 51 to 85 months for other charges. Cooper changed his mind when his lawyer convinced him that the prosecution would be unable to establish intent to murder the victim because she had been shot below the waist. Cooper went to trial, rejecting another plea offer on the first day of trial. He was convicted by a jury and received a mandatory minimum sentence of 185 to 360 months' imprisonment, more than three times what he would have received if he had accepted the prosecution's initial plea offer. Using the analytic structure established in FRYE and STRICKLAND, this Court held that counsel's advice constituted ineffective assistance of counsel. After all parties to the LAFLER action conceded that counsel's performance was deficient, this court held that, but for counsel's deficient performance, there was a reasonable probability that he and the trial court would have accepted the guilty-plea.

3. **REAL ISSUE IN LAFLER vs. COOPER:** The real issue was what the remedy should be. How could COOPER be made whole at this point? This Court held that the proper remedy was to order the state to reoffer the plea bargain.

4. Movant will now offer a summary of facts, as offered in detail within, as to the lessons of FRYE and COOPER on their face, that the Tenth Circuit Court of Appeals failed to give consideration:

a. Justice Kennedy in FRYE held that the Sixth Amendment guaranteed Frye the right to effective assistance of counsel during plea bargaining, where the challenge was to defense counsel's conduct during plea bargaining before the plea proceedings.

b. STRICKLAND ANALYSIS: Justice Kennedy in FRYE held that the STRICKLAND analysis, as applied to plea bargaining, that to establish prejudice, Frye would have to show "a reasonable probability that the end result of the

criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. Cf. GLOVER vs. U.S., 531 U.S. 198, 203 (2001)("[A]ny amount of [additional] jail time has Sixth Amendment significance")" Id. at 132 S. Ct. 1409. If it is an offer, like that in FRYE, that could be withdrawn by the prosecution or rejected by the court, the defendant must show that the offer would have remained and that he would have received the benefit of the plea bargain.

5. Movant Lambros has clearly proved he was prejudiced within the STRICKLAND analysis, as applied to plea bargaining, as the end result has been a sentence of less prison time due to an ex post facto doctrine violation during the plea bargaining process and sentencing. The U.S. Attorney and Movant's attorney both stated within two (2) separate written plea proposals that the only sentence Movant could receive for his conspiracy charge was a "MANDATORY LIFE SENTENCE WITHOUT PAROLE". Movant was sentenced to same and the Eighth Circuit Court of Appeals reversed, stating that Movant "mandatory life without parole" sentence was illegal, because version of statute in place at time of conspiracy did not allow the sentence. See, U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995).

6. The Tenth Circuit Court of Appeals erred when it did not allow a successful ex post facto defense by Movant Lambros during direct appeal to be assigned the fullest treatment of the STRICKLAND analysis, as applied to plea bargaining, to FRYE and COOPER. The Eighth Circuit ruling in U.S. vs. LAMBROS, 65 F.3d 698, as to the illegal sentence Movant received, because version of statute in place at time of conspiracy did not allow a "mandatory life sentence without parole" does not raise a different "ground" than does one predicated on an adjudication of the performance of counsel under the Sixth Amendment. An ex post facto violation of the U.S. Constitution (Article I, §9, Clause 3) cannot be contrary to a violation of performance under the Sixth Amendment - even though

ex post facto says nothing about the STRICKLAND standard of effectiveness. An ex post facto prejudice inquiry presumes a constitutional violation, whereas STRICKLAND seeks to define one. See, SANDERS vs. U.S. 373 U.S. 1, 16 (1963) "In other words, identical grounds may often be proved by different factual allegations. So also, identical grounds may often be supported by different legal arguments, ... Should doubts arise in particular cases as to whether two (2) grounds are different or the same, they should be in favor of the applicant." (emphasis added) Again, Movant proved both plea proposals from the U.S. Attorney stated Movant Lambros could only receive a "mandatory life sentence without parole" on the conspiracy count, when the conspiracy only allowed a maximum sentence of 30 years with no minimum sentence. Therefore, a clear violation of the Sixth Amendment. See, GLOVER vs. U.S., 531 U.S. 198 (2001)("... erroneous sentencing determination unlawfully increased defendant's prison sentence held to establish prejudice for purposes of Sixth Amendment ineffective - counsel claim.")

7. Additionally, if the resentencing court had not illegally recharacterized Movant's Rule 33 Motions as his first section 2255 motion, as the court did not give warning that any subsequent §2255 motion would be subject to the restrictions on "second or successive" motions, and provide this Movant an opportunity to withdraw his Rule 33 Motions or to amend same so that they contained all of Movant's §2255 claims, CASTRO v. U.S., 540 U.S. 375 (2003) - Movant would of been entitled to raise an ineffective assistance of counsel claim as to his illegal sentences in section 2255 proceedings, as case law in Eighth Circuit does not allow same during direct appeal, See, HAWKINS 78 F 3d at 351-352 (8th Cir. 1995). Federal prisoners are always allowed to raise ineffective assistance of counsel claims in section 2255 proceedings, even though he or his attorney could have, but did not, raise claim on direct appeal. See, MASSARO vs. U.S., 538 U.S. 500 (2003).

8. Movant was also denied due process when his conspiracy conviction was vacated on direct appeal, LAMBROS, 65 F.3d 698, as Movant's attorney allowed his judgment to be disaggregated so that individual counts become final at different time. See, U.S. vs. DODSON, 291 F.3d 268, 274 (4th Cir. 2002). This rule holds even if a defendant is convicted on multiple counts. In such circumstances, the judgment of conviction cannot be disaggregated so that individual counts become final at different times. This is because "only a single 'judgment of conviction' arises from a case ... in which a defendant is convicted at one trial on multiple counts of an indictment." Id. at 272. Accordingly, as in Movant Lambros' case, where a defendant is convicted on multiple counts, and the court of appeals affirms as to some counts but remands as to others, the "judgment of conviction" is not final until both the conviction and sentence are final for all counts. Id. Also see, U.S. vs. COLVIN, 204 F.3d 1221, 1225 (9th Cir. 2000). Therefore, the above instructs this court that the February 10. 1997 resentencing court could not convert Movant's Rule 33 Motions into a §2255, as Movant's "judgment or conviction" was not final for all counts.

9. **IMPORTANT FACT:** On January 16, 1996, this Court denied Movant's attorney filed Writ of Certiorari on Counts 5, 6, and 8, as to the Eighth Circuit's ruling in U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995) (Conspiracy count vacated due to illegal sentence and remanded for resentencing). To the best of Movant's recollection, Movant's attorney stated that he would be able to file a §2255 motion as to counts 5, 6, and 8 **AFTER RESENTENCING.** Resentencing on the Count one (1) conspiracy occurred on February 10, 1997. Therefore, the one (1) year limitation for filing a §2255 had passed for filing a §2255 on Counts 5, 6, and 8. See, 28 U.S.C. §2255 ("A 1-year period of limitation shall apply to a motion under this section.") See, LAMBROS vs. U.S., 516 U.S. 1082 (January 16, 1996).

10. The above paragraph proves the following facts:

a. Resentencing Court on February 10, 1997, did not have jurisdiction to rule on a §2255 on Counts 5, 6, and 8, as it was time barred.

b. Resentencing Court denied Movant his §2255 as to the Conspiracy Count One at resentencing, as Movant could not of pursued claims against his sentencing at resentencing during his first direct appeal. Movant's Rule 33 Motion should not of been converted into a §2255. See, HAWKINS vs. U.S., 415 F.3d at 740; In re GREEN, 215 F.2d 1195; ESPOSITO vs. U.S., 135 F.3d at 112-14; GALTIERI vs. U.S., 128 F.3d 33.

c. Movant's attorney was ineffective for allowing the above actions to occur and the resentencing court denied Movant's his right to a §2255 as to his resentencing and possibly Counts 5, 6, and 8, if this Court follows the holdings of U.S. vs. DODSON and U.S. vs. COLVIN. See, Paragraph 8 above.

11. Movant does not believe the AEDPA's restrictions on relief in this action and procedural complications come into play, as Movant was denied his rights to file a §2255 motion. See, PANETTI vs. QUARTERMAN, 127 S.Ct. 2842, 2855 (2007); STEWART vs. MARTINEZ-VILLAREAL, 523 U.S. 637, 642 (1998). Accordingly, as a threshold inquiry, it is critical for the court to determine whether Movant's subsequent pleadings at issue was actually a second or successive section 2255 motion.

12. Judge Rogers clearly stated within his May 17, 2013 "MEMORANDUM AND ORDER", that the Tenth Circuit adapted, ".... a prisoner can proceed to §2241 only if his initial §2255 motion was itself inadequate or ineffective to the task of providing petitioner with a chance to test his sentence or conviction. PROST v. ANDERSON, 636 F.3d 578, 587 (10th Cir. 2011)." See, Page 10. "However, Mr. Lambros completes ignores that the sentencing court's, or the appropriate appellate court's, refusal to consider claims that are second and successive or untimely, has clearly been held not to establish that the §2255 remedy was inadequate or ineffective." See, Page 11. This is not true, as Movant Lambros was denied his right to his first §2255, as to his resentencing and possibly Counts 5, 6, and 8.

42

13. In fact, Judge Rogers also stated Movant did not qualify for and/or show that the conditions prescribed by §2255(e)'s so-called "SAVINGS CLAUSE," applied to his case. See, PROST, 636 F.3d at 583-84. "The Court in PROST then meticulously set forth a relatively simple test for when the 'SAVINGS CLAUSE' applies, and their underlying rationale: The relevant . . . measure, we hold, is whether a petitioner's argument challenging the legality of his detention could have been tested in an initial §2255 motion. If the answer is yes, then the petitioner may not resort to the SAVINGS CLAUSE and §2241 ....; to invoke the SAVINGS CLAUSE, it must 'also appear [ ] that the remedy by motion is inadequate or ineffective.' . . . Here again, the clause emphasizes it concern with ensuring the prisoner an opportunity or chance to test his argument. ..... but the SAVINGS CLAUSE is satisfied so long as the petitioner had an opportunity to bring and test his claim. PROST, at 584-87." See, Page 13. Movant has proven to this Court that he did not have "challenging [challenged] the legality of his detention ... in an initial §2255 motion" Therefore, Movant may resort to the SAVINGS CLAUSE and §2241 and/or the Writ of Audita Querela, 28 U.S.C. §1651(a).

14. This Court has ruled that subsequent motions are not second or successive where the prior or subsequent motion was not a §2255 motion. Again, §2255's restrictions on relief and complicated procedures apply only to "[a] second or successive motion" under §2255. See, §2255(h). Accordingly, they do not apply if the prior or subsequent filing was not a section 2255 motion. See, GONZALEZ v. CROSBY, 545 U.S. 524, 532, 125 S.Ct. 2641, 2648, 162 L.Ed.2d 480 (2005)(Rule 60(b) motion which "attacks ... some defect in the integrity" of the section 2255 proceeding is not a second or successive section 2255 motion); U.S. vs. ESOGBUE, 357 F.3d 532, 534 (5th Cir. 2004)(subsequent filing was a true writ of error coram nobis); JACOBS vs. McCAUGHTRY, 251 F.3d 596, 597 (7th Cir. 2001)(subsequent application sought relief available only via petition for writ of habeas corpus under 28 USC §2241).

15. As this Court stated in DRETKE vs. HALEY, 541 U.S. 386 (2004), "'fundamental fairness [remains] the central concern of the writ of habeas corpus.' STRICKLAND vs. WASHINGTON, 466 U.S. 668, 697 (1984)". Id. at 393. Movant requests, as did DRETKE vs. HALEY, "to extend the actual innocence exception to procedural default of constitutional claims challenging noncapital sentencing error[s]." This Court responded stating "We decline to answer the question in the posture of this case and instead hold that a federal court faced with allegations of actual innocence; whether of the sentence or the crime charged, must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse procedural default. This avoidance principle was implicit in Carrier itself, where we expressed confidence that, 'for the most part, 'victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard.' .... Our confidence was bolstered by the availability of ineffective assistance of counsel claims - either as a ground for cause or as a freestanding claim for relief - to safeguard against miscarriages of justice." Id. at 393-394. Movant has proved his illegal mandatory life without parole sentence and resentencing constituted a miscarriage of justice. See, ANDIS, 333 F.3d at 890-893 (en banc).

16. Movant believes his relationship with his Attorney's during all critical phases of his proceedings, was like Judas representing Jesus. Movant did not have knowledge of the potential adverse consequences of the plea bargaining terms that where illegal, an illegal sentence[s], the Eighth Circuit ORDERING a resentencing of Movant to an illegal sentence - statute not in place at time of conspiracy - and the district court's recharacterization of his Rule 33 motions that denied Movant his first §2255 motion. The District Court and his Attorney closed the door to one clear full round of federal habeas review.

17. In sum, the Tenth Circuit's summary affirmance of the district court's judgment, clearly conflicts with this Court's direction in FRYE, COOPER and jurisdiction pursuant to 28 U.S.C. §§ 2241 and 1651(a). See, U.S. vs. MORGAN, 74 S.Ct 247, 249-253 & FN 4 (1954); U.S. vs. SILVA, 423 Fed. Appx. 809, & FN 2

(10th Cir. 2011), citing - U.S. vs. MILLER, 599 F.3d 484, 487-488 (5th Cir. 2010) (collecting cases)(offering an excellent overview as to the available jurisdiction of the "WRIT OF AUDITA QUERELA", 28 USC §1651(a)).

II. **WHETHER THE RULINGS OF MISSOURI vs. FRYE AND LAFLER vs. COOPER, WHICH ANNOUNCED A TYPE OF SIXTH AMENDMENT VIOLATION THAT WAS PREVIOUSLY UNAVAILABLE - PLEA-BARGAINING PROCESS - APPLY TO THOSE WHOSE CONVICTIONS BECAME FINAL BEFORE THOSE CASES WHERE DECIDED?**

18. Chief Justice Roberts and Justice Kennedy joins, dissenting, in DANFORTH vs. MINNESOTA, 169 L.Ed. 2d 859, 888-889 (2008), state:

> "The majority explains that when we announce a new rule of law, we are not 'creating the law,' but rather 'declaring what the law already is.' .... It necessarily follows that we must choose whether 'NEW' or 'OLD' law applies to a particular category of cases. Suppose, for example, that a defendant, whose conviction became final before we announced our decision in CRAWFORD vs. WASHINGTON, 541 U.S. 36 (2004), argues (correctly) on collateral review that he was convicted in violation of both CRAWFORD and OHIO vs. ROBERT, 488 U.S. 56 (1980), the case that CRAWFORD overruled. Under our decision in WHORTON vs. BOCKTING, 549 U.S. 406 (2007), the 'NEW' rule announced in CRAWFORD would not apply retroactively to the defendant. But I take it to be uncontroversial that the defendant would nevertheless get the benefit of the 'OLD' rule of ROBERTS, even under the view that the rule not only is but always has been an incorrect reading of the constitution. See, e.g., YATES, 484 U.S. at 218, 98 L.Ed. 2d 546 (1988). Thus, the question whether a particular federal rule will apply retroactively is, in a very real way, a choice between NEW and OLD law. The issue in this case is who should decide." (emphasis added) Id. at 888.

19. This Court supported the following by reference to the statement in U.S. vs. JOHNSON, 457 U.S. 537, 549 (1982), within YATES vs. AIKEN, 98 L.Ed. 2d 546, 549 (1988):

> "When a decision of the United States Supreme Court has merely applied settled precedents to new and different factual situations, no real question arises as to whether the later decision should apply retroactively; in such cases, it is a foregone conclusion that the rule of the later case applies in earlier cases, because

the later decision has not in fact altered that rule in any way."

II(A): TEAGUE vs. LANE, 489 U.S. 288 (1989)

20. TEAGUE and subsequent cases, this Court laid out the framework for determining when a rule announced in one of its decisions should be applied retroactively in criminal cases that are already final on direct review. Under TEAGUE "an OLD RULE applies both on direct and collateral review, but a NEW RULE is generally applicable only to cases that are still on direct review." See, WHORTON vs. BOCKTING, 549 U.S. 406, 416 (2007) (quoting GRIFFITH vs. KENTUCKY, 479 U.S. 314 (1987). A NEW RULE may "appl[y] retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Id.

21. Movant argues that TEAGUE is inapplicable, because it is simply the application of an OLD RULE. FRYE and COOPER does not announce a new rule and that it is an extension of the rule in STRICKLAND - requiring effective assistance of counsel -, and that its holding should apply retroactively.

II(B): THE EXTENSION OF AN "OLD RULE"

22. On February 20, 2013, this Court offered an excellent overview on when TEAGUE does not announce a NEW RULE. See, CHAIDEZ vs. U.S., 133 S. Ct. 1103, 1107 (2013):

> "But that account has a flipside. TEAGUE also made clear that a case does not 'announce a new rule, [when] it' [is] merely an application of the principle that governed'' a prior decision to a different set of facts. .... As Justice Kennedy has explained, '[w]here the beginning point' of our analysis is a rule of 'general application, a rule designed for the specific purpose of evaluating a myraid of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.' .... Otherwise said, when all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule for TEAGUE purposes." id. at 1107.
>
> "Because that is so, garden-variety applications of the test in STRICKLAND vs. WASHINGTON, ..., for assessing claims of ineffective

assistance of counsel do not produce new rules. In STRICKLAND, we held that legal representation violates the Sixth Amendment if it falls 'below an objective standard of reasonableness,' as indicated by 'prevailing professional norms,' and the defendant suffers prejudice as a result. ... That standard, we later concluded, 'provides sufficient guidance for resolving virtually all' claims of ineffective assistance, even though their particular circumstances will differ. .... And so we have granted relief under STRICKLAND in diverse contexts without ever suggesting that doing so required a new rule. In like manner, PADILLA would not have created a new rule had it only applied STRICKLAND'S general standard to yet another factual situation -- that is, had PADILLA merely made clear that a lawyer who neglects to inform a client about the risk of deportation is professionally incompetent." Id. at 1107-1108.

23. Of great importance is the following sentences within CHAIDEZ, 133 S. Ct. at 1108:

> "In addressing his claim of ineffective assistance, we first held that the STRICKLAND standard extends generally to the **PLEA PROCESS.** We then determined, however, that Hill had failed to allege prejudice from the lawyer's error and so could not prevail under that standard."

24. Movant Lambros has alleged prejudice due to the incorrect sentencing information he received from the U.S. Attorney and his attorney within two plea proposals. The above clearly proves that STRICKLAND applies to the plea process and the Eighth Circuit in U.S. vs. LAMBROS, 65 F.3d 698, proves Movant's attorney and the U.S. Attorney acted unreasonably by not knowing the law. Thus, MISSOURI and LAFLER are retroactive.

II(C): TYLER vs. CAIN, 533 U.S. 656 (2001)

25. In TYLER, this Court explained that a case is "made retroactive to cases on collateral review by the Supreme Court" for purposes of the statutory limitations on second or successive petitions if and "only if this Court had held that the new rule is retroactively applicable to cases on collateral review." Id. at 662. The TYLER court explained, however, that "this Court can make a rule retroactive OVER THE COURSE OF TWO (2) CASES ... Multiple cases can render a new rule retroactive .... if the holdings in those cases NECESSARILY DICTATE RETROACTIVITY OF TEH NEW RULE." Id. at 666. (emphasis added)

26. Justice O'Connor, who supplied the crucial fifth vote for the majority, wrote a concurring opinion, and her reasoning adds to the understanding of the impact of TYLER. She explains that it is possible for the Court to "make" a case retroactive on collateral review without explicitly so stating, as long as the Court's holdings "logically permit no other conclusion than that the rule is retroactive." See, 533 U.S. at 668-69. For example, Justice O'Connor explained that:

> "..., if we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review. In such circumstances, we can be said to have 'made' the given rule retroactive to cases on collateral review." Id. at 668-69.

But Justice O'Connor qualified this approach by explaining that:

> "The relationship between the conclusion that a new rule is retroactive and the holdings that 'make' this rule retroactive, however, must be strickly logical - - i.e., the holdings must dictate the conclusion and not merely provide principles from which one may conclude that the rule applies retroactively." Id. at 669.

II(D): THIS COURT AND THE NINTH CIRCUIT IMPLIED LAFLER AND FRYE ARE RETROACTIVE:

27. The Ninth Circuit applied LAFLER and FRYE retroactively within MILES vs. MARTEL, 696 F.3d 889, 899-900, FootNote 3 and 4 (9th Cir. 2012):

> "By applying this holding in LAFLER, a habeas petition subject to AEDPA, the Court necessarily implied that this holding applies to habeas petitioners whose cases are already final on direct review; i.e. that the holding applies retroactively ...." Id. at FootNote 3 (emphasis added)

28. This Court applied LAFLER and FRYE retroactively when it granted BURT vs. TITLOW, No. 12-414 (November 5, 2013). TITLOW was convicted in 2002 for murder at trial. Has his sentenced affirmed on direct appeal and denied by the Michigan Supreme Court in 2004. TITLOW filed a writ of habeas corpus under 28 USC §2254 in 2007, that was denied in 2010, but was granted a COA. The Sixth Circuit granted relief based on LAFLER, TITLOW vs. BURT, 680 F.3d 577, 588 (6th Cir. 2012)(second attorney failed to conduct adequate investigation before advising her

to back out of plea deal and go to trial). This Court granted TITLOW oral arguments on October 8 and decided November 5, 2013, holding:

> "Because we conclude that the Sixth Circuit erred in finding Toca's representation constitutionally ineffective, we do not reach the other question presented by this case, namely, whether the Sixth Circuit's remedy is at odds with our decision in LAFLER vs. COOPER, 566 U.S. ____ (2012)"

See, Criminal Law Reporter, Vol. 94, No. 7, page 217, FootNote 3. (Nov. 13, 2013)

CONCLUSION

29. Petitioner Lambros' case truly is extraordinary. Not only are the inequities exceptional, but the circumstances - judicial ambush - as Petitioner Lambros' two (2) separate written plea proposals from the U.S. Attorney failed to inform Petitioner of the relevant statutory minimum and maximum sentences he could receive in violation of Movant's Fifth Amendment due process rights. Petitioner's attorney was also ineffective during the plea-bargaining process due to the same incorrect sentencing information, that continued to sentencing, when he was sentenced to mandatory life without parole. The Eighth Circuit verified this information by vacating Petitioner's sentence, due to the illegal version of statute in place at time of conspiracy. Additional facts contained within only turns matters worst, due to another illegal sentence at resentencing, judgment of conviction becoming disaggregated so that individual counts become final at different times, and Pro Se Rule 33 Motions at re-sentencing being recharacterized into Petitioner's first §2255 without warning, as required by CASTRO.

30. There remains time to rectify the consequences of the misunderstanding before they become fatal in undermining the public's confidence in the judicial process, as "justice must satisfy the appearance of justice." LILJEBERG vs. HEALTH SERVICES CORP., 486 U.S. 847, 864 (1988). This Court should instruct the Courts below to do so.

31. For the foregoing reasons, certiorari should be granted.

32. I JOHN GREGORY LAMBROS, declare under penalty of perjury that the foregoing is true and correct pursuant to Title 28 U.S.C. §1746.

Executed on: December 9, 2013.

Respectfully submitted,

John Gregory Lambros, Pro Se
Reg. No. 00436-124
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2013 - 2014

JOHN GREGORY LAMBROS — PETITIONER
(Your Name)

VS.

CLAUDE MAYE, Warden U.S. Penitentiary Leavenworth — RESPONDENT(S)

PROOF OF SERVICE

I, John Gregory Lambros, do swear or declare that on this date, December 9, 2013, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

OFFICE OF THE SOLICITOR GENERAL
U.S. Department of Justice, Room 5614
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 9, 2013.

(Signature)

John Gregory Lambros

51.

INDEX OF APPENDICES

INDEX OF APPENDICES

(Continued)

28 U.S.C. § 2241 habeas corpus petition without prejudice for lack of jurisdiction. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court **affirms** the district court's order of dismissal.

Lambros's § 2241 petition seeks to challenge the judgment underlying his four drug-related convictions, which judgment was entered in 1993 in the United States District Court for the District of Minnesota. *See generally United States v. Lambros*, 404 F.3d 1034, 1035 (8th Cir. 2005) (discussing Lambros's numerous attempts, via multiple procedural avenues, to have his convictions set aside). In two exceedingly comprehensive orders, the district court concluded it lacked jurisdiction over Lambros's § 2241 petition because the relief he sought was within the purview of 28 U.S.C. § 2255 (properly filed in the court of conviction) and Lambros had failed to demonstrate the remedy set out in § 2255 was inadequate or ineffective.[1] *See Caravalho v. Pugh*, 177 F.3d 1177, 1178 (10th

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[1]As this court has made clear,

> A petition brought under 28 U.S.C. § 2241 typically attacks the execution of a sentence rather than its validity and must be filed in the district where the prisoner is confined. A § 2255 motion, on the other hand, is generally the exclusive remedy for a federal prisoner seeking to attack the legality of detention, and must be filed in the district that imposed the sentence.

Brace v. United States, 634 F.3d 1167, 1169 (10th Cir. 2011) (quotations, citations, and alteration omitted); *see also Williams v. United States*, 323 F.2d 672, 673 (10th Cir. 1963) ("The exclusive remedy for testing the validity of a [federal] judgment and sentence, unless it is inadequate or ineffective, is that

(continued...)

Cir. 1999) (setting out the "extremely limited circumstances" in which federal courts have concluded the remedy set out in § 2255 is inadequate or ineffective); *see also Brace v. United States*, 634 F.3d 1167, 1169 (10th Cir. 2011) (holding a petitioner "bears the burden of demonstrating that the remedy in § 2255 is inadequate or ineffective").[2] The district court likewise concluded Lambros could not evade AEDPA's limitations on successive § 2255 motions by creatively captioning his petition, in the alternative, as a request for a writ of audita querela.

This court cannot improve upon the reasoning of the district court as set out in its orders dated May 17, 2013 and July 1, 2013. Accordingly, this court **AFFIRMS** the district court's order of dismissal for substantially the reasons set out in those thorough orders.[3]

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

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[1](...continued)
provided for in 28 U.S.C. § 2255.").

[2]The record in this case makes clear Lambros is attempting to use § 2241 to take an end-run around the Eighth Circuit's consistent denial of his requests for relief under § 2255. As aptly recognized by the district court, Lambros has not offered a single citation to any authority supporting the notion § 2241 can be used in this fashion.

[3]Lambros's request for a certificate of appealability ("COA") is **denied** as moot. A federal prisoner does not need a COA to appeal the dismissal of a § 2241 habeas petition.

DATED: July 1, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN GREGORY LAMBROS,

Petitioner,

v. CASE NO. 13-3034-RDR

CLAUDE MAYE,

Respondent.

O R D E R

This action was dismissed and all relief was denied by Memorandum and Order entered May 17, 2013. The matter is now before the court upon petitioner's Motion to Alter or Amend Judgment . . . Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure," which was timely filed on June 8, 2013. Having considered the motion, the court finds that it fails to state grounds for relief.

RULE 59(e) STANDARDS

"A motion to alter or amend a judgment pursuant to Fed.R.Civ.P. 59(e) may be granted only if the moving party can establish (1) an intervening change in controlling law; (2) the availability of new evidence that could not have been obtained previously through the exercise of due diligence; or (3) the need to correct clear error or prevent manifest injustice." *Wilkins v. Packerware Corp.*, 238 F.R.D. 256, 263 (D. Kan. 2006), *aff'd*, 260 Fed.Appx. 98 (10th Cir. 2008)(citing *Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 948

APPENDIX B.

57.

(10th Cir. 1995)). Rule 59(e) does not permit a losing party to rehash or restate arguments previously addressed or to present new legal theories or supporting facts that could have been raised earlier. *Id.* (citing *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1332 (10th Cir. 1996), *cert. denied*, 520 U.S. 1181 (1997)); *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000); *Steele v. Young*, 11 F.3d 1518, 1520 n. 1 (10th Cir. 1993); see also Charles Alan Wright, et al., Federal Practice and Procedure: Civil 2d § 2810.1 ("The Rule 59(e) motion may not be used . . . to raise arguments or present evidence that could have been raised prior to the entry of judgment."); *Voelkel v. Gen. Motors Corp.*, 846 F.Supp. 1482, 1483 (D.Kan.)(A 59(e) motion is not "a second chance for the losing party to make its strongest case or to dress up arguments that previously failed."), *aff'd*, 43 F.3d 1484 (10th Cir. 1994). The party seeking relief from a judgment bears the burden of demonstrating that he satisfies the prerequisites for such relief. *Van Skiver v. U.S.*, 952 F.2d 1241, 1243-44 (10th Cir. 1991), *cert. denied*, 506 U.S. 828 (1992).

DISCUSSION

Petitioner moves the court to alter or amend its judgment based upon one of the three available grounds: to correct or prevent clear error or manifest injustice. As support for his motion, petitioner again sets forth a barrage of claims, arguments, and cites and quotes

APPENDIX B.

58.

from many cases, none of which convinces the court that he is entitled to relief. Some of his allegations are: he believes this court has jurisdiction to review his claim(s) "under the writ of Audita Querela," which the court never mentioned; he proved he was sentenced to an illegal sentence that was vacated; he qualifies for the "actual innocence" and the "miscarriage of justice" exceptions; he was not allowed to raise his ineffective assistance of counsel claim on direct appeal under Eight Circuit law; he filed Rule 33 motions that were incorrectly construed by the sentencing court as his first § 2255 motion; in April 1997 he filed his first § 2255 motion to attack only three of the four counts of conviction because his resentencing on Count 1 was on direct appeal; and he was never provided the § 2255 remedy to attack his conviction of count 1 because his attempt to file a § 2255 motion in 1999 was found to be second and successive. The court is again asked to vacate petitioner's convictions and sentences. The court has reviewed every argument and citation presented in the motion and, like in its order of dismissal, discusses only the main allegations and those it finds warrant some discussion.

In his motion, Mr. Lambros states that the court was correct in finding it lacked jurisdiction under 28 U.S.C. § 2241, but then argues that the court erred by failing to find that it had jurisdiction "pursuant to the Writ of Audita Querela" under the All Writs Act, 28 U.S.C. § 1651(a). This argument has no merit. First, petitioner presented no legal or factual basis whatsoever in his

APPENDIX B.

59.

petition showing his entitlement to relief under § 1651(a).[1] Instead, he merely cited this provision and writ on the first and two other pages of his 19-page petition with no discussion as to why the writ would be an available remedy to challenge his conviction or why this court would have jurisdiction to issue this ancient writ with regard to his Minnesota convictions. Conclusory assertions do not entitle a petitioner to relief and need not be discussed by the court. Nor may a court construct arguments on behalf of a pro se litigant.

Second, petitioner's assertion that this court has jurisdiction under § 1651(a) utterly lacked legal merit for the same reason and more as his assertion of jurisdiction under § 2241.[2] Numerous

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[1] Petitioner has nowhere shown that the sentencing court or the Eighth Circuit acted other than in accord with § 2255. Logically, every time a court denies a § 2255 motion as second and successive it could be said that it "refused to consider" the motion. As the court previously advised however, it has been clearly and repeatedly held that a court's "refusal to consider" claims that are successive or untimely does not establish that the § 2255 remedy is inadequate or ineffective. *Sines v. Wilner*, 609 F.3d 1070, 1072-74 (10th Cir. 2010) (citing *Caravalho v. Pugh*, 177 F.3d 1177, 1178-79 (10th Cir. 1999)).

[2] It has long been settled that a petitioner may not obtain the remedy he unsuccessfully pursued in a § 2255 motion simply by altering his pleadings to seek a common-law writ such as audita querela. "[T]o allow a petitioner to avoid the bar against successive § 2255 petitions by simply styling a petition under a different name would severely erode the procedural restraints imposed under 28 U.S.C. §§ 2244(b)(3) and 2255." *United States v. Torres*, 282 F.3d 1241, 46 (10th Cir. 2002); see also *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998) (even if statutory limitations foreclosed the use of 28 U.S.C. §§ 2241 and 2255 by federal prisoners, "it would be senseless to suppose that Congress permitted them to pass through the closed door [by way of the All Writs Act] simply by changing the number 2241 to 1651 on their motions"). Common law writs, including the writs of coram nobis and audita querela, if available at all, are extraordinary remedies that are appropriate only in compelling circumstances and not when other remedies exist. *Torres*, 282 F.3d at 1245-46) ("[A] writ of audita querela is not available to a petitioner when other remedies exist, such as a motion to vacate sentence under 28 U.S.C. § 2255."); *U.S. v. Holly*, 435 Fed.Appx. 732, 734 (10th Cir. 2011) (unpublished) (It is well established that "a writ of audita querela is 'not available to a petitioner when other remedies exist, such as a motion to vacate

APPENDIX B.

60

federal prisoners have asserted that this ancient writ is an alternative remedy for challenging their convictions after they failed to obtain relief at trial, on direct appeal, and in § 2255 motions. However, they appropriately did so in the sentencing court where the judgment the writ is sought to act upon was entered. As one often-quoted Circuit Court explained years ago:

> The ancient writ of audita querela, long ago abolished in federal civil proceedings, see Fed.R.Civ.P. 60(b), has no apparent relevance to criminal sentences. Black's Law Dictionary 126 (7th ed. 1999), describes it as a "writ available to a judgment debtor who seeks a rehearing of a matter on grounds of newly discovered evidence or newly existing legal defenses." (Petitioner) is not a judgment debtor, and the territory of new facts and law is occupied for civil matters by Rule 60(b) and for criminal matters by Fed.R.Crim.P. 33 plus § 2255. Prisoners cannot avoid the AEDPA's rules by inventive captioning. Any motion . . . substantively within the scope of § 2255, . . . is a

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sentence under 28 U.S.C. § 2255.'") (Unpublished cases are cited herein as persuasive rather than controlling authority); *U.S. v. Silva*, 423 Fed.Appx. 809, (10th Cir. 2011) (unpublished) (same); *Thornbrugh v. U.S.*, 424 Fed.Appx. 756, 759 (10th Cir. 2011) (unpublished) (same); see also *United States v. Valdez-Pacheco*, 237 F.3d 1077, 1080 (9th Cir. 2000) ("We agree with our sister circuits that a federal prisoner may not challenge a conviction or a sentence by way of a petition for a writ of audita querela when that challenge is cognizable under § 2255."); *United States v. Johnson*, 962 F.2d 579, 582 (7th Cir. 1992) (explaining that audita querela may "not be invoked by a defendant challenging the legality of his sentence who could otherwise raise that challenge under 28 U.S.C. § 2255"); *U.S. v. Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005) (The Fourth, Fifth, Seventh, Ninth, Tenth and Eleventh Circuits have determined that a federal prisoner may not use the writ of audta querela where postconviction relief is available through § 2255.).

The "extremely limited circumstances" rendering the § 2255 remedy inadequate or ineffective plainly do not include procedural limitations imposed by Congress on the filing of § 2255 motions, or the non-retroactive effect of new Supreme Court decisions in relation to criminal judgments that have already become final. In fact, very few such circumstances have ever been found in the published cases. Certainly a Circuit Court's summary denial of preauthorization after a petitioner has been allowed to present his arguments as to why he believes he qualifies is not such a circumstance. As this court found in its order of dismissal, petitioner described no extraordinary or compelling circumstances to establish that his § 2255 remedy was ineffective or inadequate. This failure, which was the precise reason that this court lacks jurisdiction under § 2241, as Mr. Lambros now agrees, also established the court's lack of jurisdiction to hear his claim(s) by petition for writ of audita querela.

APPENDIX B.

61

> motion under § 2255, no matter what title the prisoner plasters on the cover. Call it a motion for a new trial, arrest of judgment, mandamus, prohibition, coram nobis, coram vobis, audita querela, certiorari, capias, habeas corpus, ejectment, quare impedit, bill of review, (or) writ of error . . . the name makes no difference. It is substance that controls. (Citations omitted).

Melton v. U.S., 359 F.3d 855, 856-57 (7th Cir. 2004); *Holly*, 435 Fed.Appx. at 734 (quoting *Melton*, 359 F.3d at 857); *United States v. Baker*, ___F.3d___, 2013 WL 1867427 (10th Cir. 2013)(same); *Torres*, 282 F.3d at 1246. This "inventive" assertion of jurisdiction has failed repeatedly in sentencing courts across the nation, and petitioner here presented no authority or reasoned basis to view it more favorably in this court having no connection to his sentencing, conviction, or decisions regarding his § 2255 motions. Thus, had this court expressly discussed petitioner's alternative assertion of jurisdiction, it would still have rejected it.

If petitioner is implying that the court erred by failing to discuss his "and/or" list following his citation of § 2241, this argument does not entitle him to relief from judgment. As the court stated in its prior order, it reviewed all petitioner's allegations and complaints, his attachments, and the relevant legal authority. His listing of the All Writs Act with no discussion of facts or legal authority in support did not warrant specific discussion by the court.

Other than the foregoing main claim of legal error, petitioner's allegations in his motion are nothing more than the rehashing and

APPENDIX B.

62.

restating of arguments already rejected by the court or additional arguments that could have been presented prior to dismissal. Such allegations do not entitle petitioner to relief under Rule 59(e).[3]

Furthermore, petitioner's allegations in his motion that directly seek relief from his conviction are likewise not properly raised in a Rule 59(e) motion. *See Baker*, 2013 WL at 1867427("[A] 60(b) motion is a second or successive petition if it in substance or effect asserts or reasserts a federal basis for relief from the petitioner's underlying conviction.").

Finally, the court reiterates that before ruling on any of petitioner's numerous underlying claims, arguments, and citations regarding his convictions, it examined whether or not it had jurisdiction over his petition under the primary source in the

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[3] For example, petitioner rehashes his argument that the sentencing court erred in treating several post-judgment Rule 33 motions filed by him as his first 2255 motion without providing him notification and a chance to withdraw. The court will not speculate as to how this 1997 ruling might have fared had it been rendered after, rather than before, the Supreme Court decided *Castro v. U.S.*, 540 U.S. 375 (2003). While this may have been appropriate grounds for a timely Rule 60(b) motion in the sentencing court, it is not grounds for a Rule 60(b) motion regarding the judgment on petitioner's § 2241 habeas application to this court. Petitioner's ultimate remedy for this alleged error by the sentencing court was to appeal to the Eight Circuit Court of Appeals and then the U.S. Supreme Court, which he did without success. Moreover, petitioner's allegations and exhibits show that, contrary to his arguments, when he sought authorization to file what was unquestionably a successive § 2255 motion, he was provided the opportunity to and did argue to the Eighth Circuit that the sentencing court improperly re-characterized his new trial motions as his first 2255 motion. As this court previously found, petitioner presented no authority that would allow this court to overturn the rulings by the Minnesota sentencing court, the Eighth Circuit, and the Supreme Court regarding his first § 2255 motion. This is true even if the decisions of those courts were erroneous.

Furthermore, by the time Mr. Lambros filed his § 2255 motion in 2011 raising his claim of ineffective assistance of counsel during plea bargaining, he had filed multiple prior § 2255 motions, each of which could have been treated as his first. Thus, it can hardly be said that his 2011 motion would have been accepted as his first had the sentencing court not treated his 1997 Rule 33 motions as his first.

APPENDIX B.

63.

custodial judicial district - § 2241, and found that it did not. As a result, this court could not consider petitioner's claim(s) on the merits. The reasons for this court's dismissal of this petition for lack of jurisdiction and the legal standards applied were fully explained in its Memorandum and Order of Dismissal. Petitioner's restatement and refinement of his myriad arguments and his disagreement with the findings and rulings of the court fail to demonstrate the existence of any extraordinary circumstances that would justify a decision to alter or amend the judgment dismissing this action.

DENIAL OF CERTIFICATE OF APPEALABILITY

Ordinarily, a federal prisoner does not need a certificate of appealability for appellate review of the denial of a § 2241 petition. See 28 U.S.C. § 2253(c). However, in his petition and this motion, Mr. Lambros is clearly attempting to obtain review of his federal criminal conviction. Several Circuit Courts have held that a certificate of appealability is required under these circumstances. Thus, to the extent that one may be required, the court finds that petitioner has made no "substantial showing of the denial of a constitutional right" with respect to an appeal of either the order of dismissal or this order denying this motion. As the court already has done with regard to its prior order of dismissal, it hereby certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from

APPENDIX B.

64.

the instant order would not be taken in good faith. Petitioner's request that this court "retract" its previous denial of certification is denied. Accordingly, in forma pauperis status is denied for purpose of any appeal in this matter. See *Coppedge v.United States*, 369 U.S. 438, 444-45 (1962).

IT IS THEREFORE ORDERED that petitioner's Motion to Alter or Amend Judgment pursuant to Fed.R.Civ.P. Rule 59(e) is denied, and that a certificate of appealability is denied.

IT IS SO ORDERED.

DATED: This 1st day of July, 2013, at Topeka, Kansas.

s/RICHARD D. ROGERS
United States District Judge

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN GREGORY LAMBROS,

Petitioner,

v. CASE NO. 13-3034-RDR

CLAUDE MAYE, Warden,
USP-Leavenworth, et al.,

Respondents.

MEMORANDUM AND ORDER

This pro se petition for writ of habeas corpus was filed pursuant to 28 U.S.C. § 2241 by an inmate of the United States Penitentiary, Leavenworth, Kansas. The filing fee was paid. Petitioner seeks to challenge his federal convictions under § 2241 in this district in which he is currently confined after having failed to obtain relief from the sentencing court in another federal judicial district. Having considered the petition together with the 155 pages of attached exhibits and relevant published court opinions, the court finds that petitioner fails to show that his § 2255 remedy was inadequate or ineffective and, as a result, dismisses this petition for lack of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

In 1993, Mr. Lambros was convicted by a jury in the United States District Court for the District of Minnesota of four cocaine-related

APPENDIX C.

66.

offenses, including a conspiracy count. *See U.S. v. Lambros*, 404 F.3d 1034, 1035 (8th Cir. 2005), *cert. denied*, 545 U.S. 1135 (2005). "On direct appeal, (the Eighth Circuit Court of Appeals) vacated the sentence on the conspiracy count, remanded for resentencing on that count, and affirmed the conviction in all other respects." *Id.* (citing *U.S. v. Lambros*, 65 F.3d 698 (8th Cir. 1995), *cert. denied*, 516 U.S. 1082 (1996)). His other convictions were also affirmed. "On remand, Lambros filed multiple new trial motions pursuant to Fed.R.Crim.P. 33," which the district court treated as "a single § 2255 motion and denied all the claims." *Id.* Thus, petitioner's initial § 2255 motion was denied by the sentencing court in 1997. In the meantime, "Lambros appealed the 360-month prison term to which he was resentenced," and the Eighth Circuit affirmed. *See id.* (citing *U.S. v. Lambros*, 124 F.3d 209 (8th Cir. 1997)(unpublished), *cert. denied*, 522 U.S. 1065 (1998)). "Two subsequent § 2255 motions filed by Lambros were dismissed by the district court because (the Eight Circuit Court) had not authorized their filing." *Id.* In 2001 petitioner began a series of post-judgment motions attempting to overturn the district court's denials of habeas relief. However, these were construed as successive § 2255 motions, and dismissed because he had not obtained Eighth Circuit pre-authorization. *Id.* (citing *U.S. v. Lambros*, 40 Fed.Appx. 316 (8th Cir. 2002)(unpublished), *cert. denied*, 537 U.S. 1195 (2003)); *Lambros*, 404 F.3d at 1037 ("When Lambros filed multiple new trial motions,

APPENDIX C.

67.

after our limited remand for resentencing following his conviction, the district court correctly treated those new trial motions as seeking § 2255 post-conviction relief. His subsequent Rule 60(b) motions and his most recent Rule 59(e) motion were, in reality, efforts to file successive motions for post-conviction relief. Those motions were properly denied because Lambros did not have authorization from this court.").

In 2012 the United State Supreme Court decided *Missouri v. Frye*, 132 S.Ct. 1399 (2012) and *Lafler v. Cooper*, 132 S.Ct. 1376 (2012). The Tenth Circuit recently summarized these cases as follows:

> Both Frye and Lafler concern the Sixth Amendment right to the effective assistance of counsel in the plea bargaining process. Frye held that counsel's failure to inform his client of a plea offer may constitute ineffective assistance of counsel. 132 S.Ct. at 1408, 1410-11. Lafler held that an attorney who rendered constitutionally deficient advice to reject a plea bargain was ineffective where his advice caused his client to reject the plea and go to trial, only to receive a much harsher sentence. 132 S.Ct. at 1383, 1390-91. In each case, the Court reached its decision by applying the well-established principles regarding the assistance of counsel that were initially set forth in Strickland v. Washington, 466 U.S. 668 (1984). See Frye, 132 S.Ct. at 1409-11; Lafler, 132 S.Ct. at 1384, 1390-91.

Id.

CLAIMS

Petitioner's main claim is that based upon *Frye* and *Lafler*, he is entitled to have his convictions and sentences vacated and for the prosecution to re-offer its plea proposal that he rejected prior

APPENDIX C. 68,

to trial. In support of this claim he alleges that his attorney did not understand the statutory law and guidelines regarding the possible sentences, that he received incorrect information[1] from his attorney and the prosecutor during plea negotiations as to the sentences he could receive on all four counts, and that he was incorrectly advised that he could be sentenced as a career offender. He argued in a prior § 2255 motion that he "only had to show that his attorney failed to communicate pleas offers or failed to give competent counsel regarding a plea offer." He also argued in the Minnesota sentencing court and to the Eighth Circuit that his claims were timely under 28 U.S.C. § 2255(f)(3)[2] because they were brought within a year of *Frye* and *Lafler*. He repeats that argument here. He cited a Ninth Circuit case, which he argued applied *Lafler* and *Frye* retroactively, and asserted that he had thus "made a prima facie showing" that "*Frye* and *Lafler* are retroactive."

Petitioner's arguments are not always clearly presented or consistent with each other or the cases he cites.[3] He alleges that

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[1] Petitioner suggests that his claim of erroneous advice during plea proceedings is already proven since both plea proposals provided that the only sentence he could receive for Count One was mandatory life without parole and his sentence of mandatory life without parole was overturned by the Eighth Circuit.

[2] Section 2255(f)(3) pertinently provides that the 1-year period of limitation shall run from the latest of several dates including "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."

[3] For example, he argues that the two recent Supreme Court cases upon which he relies "announced a type of Sixth Amendment violation that was previously unavailable and thus require[] retroactive application to cases on collateral review" while acknowledging that they announced an extension of *Strickland* rather

in June 2012 he sought authorization from the Eighth Circuit to file a successive § 2255 motion that raised the same issues he presents in the instant § 2241 petition and the U.S. Attorney for the District of Minnesota was required to respond. He exhibits many pleadings and rulings from that case, and requests incorporation of all filings from his "second or successive § 2255" into this action. He argues that his illegal sentence constituted a miscarriage of justice and that he qualifies for the "actual innocence exception," apparently based on the fact that his sentence on one count was overturned. In addition, petitioner claims that the sentencing court denied effective review of his ineffective assistance of counsel claim when it re-characterized his new trial motions as his first 2255 motion without giving him the option to withdraw and denied his next 2255 motion as successive. He complains that the Eighth Circuit erroneously denied authorization for a successive § 2255 motion, did not make findings of fact and conclusions of law, and refused to hear his petition for rehearing because preauthorization denials are not appealable. Based on these complaints, he contends that the Eighth Circuit improperly refused to consider his request for a second and successive § 2255 motion, and that such refusal is one of the circumstances noted by the Tenth Circuit as rendering the § 2255 remedy inadequate or ineffective. He thus contends that he is entitled to relief under § 2241.

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than a new rule.

APPENDIX C.

70.

However, the § 2241 petition does not ordinarily encompass claims of unlawful detention based on the conviction or sentence of a federal prisoner. The Tenth Circuit has explained the difference between the two statutory provisions. "A 28 U.S.C. § 2255 petition attacks the legality of detention, and must be filed in the district that imposed the sentence." *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996). By contrast, the § 2241 petition "attacks the execution of a sentence rather than its validity." *McIntosh v. U.S. Parole Com'n*, 115 F.3d 809 811-12 (10th Cir. 1997); *Bradshaw*, 86 F.3d at 166. A § 2241 petition "is not an additional, alternative, or supplemental remedy to the relief afforded by motion in the sentencing court under § 2255." *Williams*, 323 F.2d at 673.

Section 2255 motions are subject to two significant statutory "gate-keeping" restrictions: a one-year statute of limitations, § 2255(f); and a ban on second and successive motions, § 2255(e). A habeas petitioner may not avoid these restrictions by simply bringing his claims under § 2241.

DISCUSSION

This petition is deficient in several ways. First, arguments are not properly raised in a habeas corpus petition by merely incorporating numerous pleadings from another case. For this reason and based upon local court rules, petitioner could be required to submit an amended petition upon court-approved forms. However, an

APPENDIX C. 72.

amended petition is not required because it is apparent from the materials filed that this court has no jurisdiction over petitioner's claims.

Many of petitioner's claims are challenges to rulings made by the Minnesota sentencing court and the Eighth Circuit on his prior § 2255 motions. He has already presented the arguments he seeks to incorporate into this action to the appropriate courts including that his recent § 2255 motion based on *Frye* and *Lefler* should be considered timely and authorized under § 2255(f)(3). To the extent that petitioner seeks to have this court overturn decisions made by those courts of equal or greater authority, he provides no legal basis for this court to take such action and the court is aware of none. Even if this court had such authority under § 2241, it would reject petitioner's *Frye/Lafler* claims based upon persuasive reasoning and precedent in recent Tenth Circuit opinions. In *United States v. Lawton*, 2012 WL 6604576, at *3 (10th Cir. Dec.19, 2012), the Tenth Circuit emphasized the conditional language in § 2253(f)(3): "*if that right has been newly recognized by the Supreme Court* and made retroactively applicable to cases on collateral review," and held that neither *Lafler* nor *Frye* established a new rule of constitutional law to be applied retroactively to cases on collateral review. The reasoning in *Lawton* is persuasive:

> [N]either decision announced a "newly recognized" right. Several circuit courts have so held. *See In re King*, 697 F.3d 1189, 1189 (5th Cir. 2012)(per curiam); *Hare v. United*

APPENDIX C.

73.

> *States*, 688 F.3d 878-80 (7th Cir. 2012); *Buenrostro v. United States*, 697 F.3d 1137, 1140 (9th Cir. 2012); *In re Arras*, No. 12-2195 (10th Cir. Dec. 11, 2012)(denying authorization to file a second or successive § 2255 motion because neither *Lafler* nor *Frye* established a new rule of constitutional law); *In re Perez*, 682 F.3d 930, 932-34 (11th Cir. 2012). Indeed, before *Lafler* and *Frye* this court granted habeas relief on such a claim in *Williams v. Jones*, 571 F.3d 1086, 1091 (10th Cir. 2009), relief that we could not have granted if based on a newly recognized right, *see Danforth v. Minnesota*, 552 U.S. 264, 266 & n. 1, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008). And the Supreme Court could not have granted relief in *Lafler* itself if it were recognizing a new right. *See Lafler*, 132 S.Ct. at 1395-96 (Scalia, J., dissenting)(pointing out that habeas relief cannot be granted under 28 U.S.C. § 2254 unless the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court). Thus, the extension of the limitations period provided by § 2255(f)(3) did not apply to Defendant's case.

Lawton, 2012 WL at *3. Another court recently observed in *U.S. v. Williams*, 2013 WL 139635 (S.D.N.Y. Jan. 11, 2013):

> Since Frye was decided, "nearly every court to have addressed the issue has held that Frye did not create a new constitutional right to be applied retroactively to cases on collateral review; it merely applied Strickland v. Washington . . . to a particular set of circumstances, i.e., the obligation of defense counsel to advise a defendant of plea offers." Ortiz v. United States, No. 12 Civ. 5326, 2012 WL 5438938, at *2 (E.D.N.Y. Nov.7, 2012) (compiling cases).

Then the Tenth Circuit held as follows in *In re Graham*, 714 F.3d 1181, 2013 WL 1736588 (10th Cir. Apr. 23, 2013):

> any doubt as to whether Frye and Lafler announced new rules is eliminated because the Court decided these cases in the post conviction context." Perez, 682 F.3d at 933; see also Hare, 688 F.3d at 879. Lafler recognized that for a federal court to grant habeas relief, the state court's decision must be contrary to or an unreasonable application of clearly established federal law, and it

APPENDIX C.

74.

> held that the state court's failure to apply Strickland was contrary to clearly established federal law. See Lafler, 132 S.Ct. at 1390; see also Williams v. Jones, 571 F.3d 1086, 1090-91 (10th Cir.2009) (recognizing Strickland as clearly established federal law with regard to a habeas claim that counsel was constitutionally deficient when he persuaded the applicant to reject a plea bargain). But where the law is clearly established, then the rule "must, by definition, have been an old rule," not a new one. Perez, 682 F.3d at 933; see also Hare, 688 F.3d at 879.

Id. Thus, in *Graham* the Tenth Circuit expressly held that neither *Frye* nor *Lafler* established a new rule of constitutional law. It necessarily follows that the condition in § 2255(f)(3) is not met by *Frye* and *Lafler*. Accordingly, § 2253(f)(3) does not apply in petitioner's case.

The underlying claims that petitioner seeks to have considered are undoubtedly challenges to his federal convictions and sentences. The Tenth Circuit has clearly admonished that the "plain language of § 2255 means what it says and says what it means: a prisoner can proceed to § 2241 only if his initial § 2255 motion was *itself* inadequate or ineffective to the task of providing petitioner with a *chance to test* his sentence or conviction." *Prost v. Anderson*, 636 F.3d 578, 587 (10th Cir. 2011). As noted, in this § 2241 petition Mr. Lambros attempts to raise the same claims that he already raised in motions under § 2255 in the sentencing court and on appeal to the Eighth Circuit. He contends that relief is available under § 2241 because the Minnesota district court rendered the § 2255 remedy ineffective by refusing to consider his second and successive § 2255

APPENDIX C.

75.

motions. However, Mr. Lambros completely ignores that the sentencing court's, or the appropriate appellate court's, refusal to consider claims that are second and successive or untimely, has clearly been held not to establish that the § 2255 remedy was inadequate or ineffective. The Tenth Circuit recently discussed a situation similar to that of petitioner's:

> The issue on appeal is whether Mr. Sines had an adequate and effective remedy under § 2255. Only in rare instances will § 2255 fail as an adequate or effective remedy to challenge a conviction or the sentence imposed. . . . In Caravalho v. Pugh, 177 F.3d 1177 (10th Cir. 1999), we held that the remedy under § 2255 is not inadequate or ineffective merely because the statute greatly restricts second or successive motions. We noted only a few circumstances suggested by courts of appeal as rendering § 2255 inadequate or ineffective: abolition of the original sentencing court; the sentencing court's refusal to consider, or inordinate delay in considering, the § 2255 motion; and the inability of a single sentencing court to grant complete relief when sentences have been imposed by multiple courts. See id. at 1178. Mr. Sines's argument that § 2255 was inadequate and ineffective rests on his assertion that the district court's dismissal of his § 2255 motion as untimely amounted to a refusal to consider it. He contends that his motion had been timely under 28 U.S.C. § 2255(f)(3) because he filed it within a year of the Supreme Court's decision in Chambers.
>
> We are not persuaded. A district court's erroneous decision on a § 2255 motion does not render the § 2255 remedy inadequate or ineffective. After all, the decision could be appealed. . . . Having failed to establish that the remedy provided in § 2255 was inadequate or ineffective, Mr. Sines could not proceed under § 2241.

Sines v. Wilner, 609 F.3d 1070, 1072-74 (10th Cir. 2010). Under the reasoning in *Sines*, even though Mr. Lambros was precluded from proceeding on another § 2255 motion by the statute-of-limitations

APPENDIX C.

76.

and successive-writ provisions of § 2255, these circumstances do not establish that the § 2255 remedy was inadequate. *See also Caravalho*, 177 F.3d at 1178-1179 (finding § 2255 remedy was not ineffective or inadequate where procedural obstacles set forth in Antiterrorism and Effective Death Penalty Act barred petitioner from bringing successive § 2255 motion); *see Bradshaw*, 86 F.3d at 166 ("Failure to obtain relief under 2255 does not establish that the remedy so provided is either inadequate or ineffective.") (quotation omitted).

It plainly appears that Mr. Lambros has resorted to all the remedies available to him for challenging his federal convictions and sentences. In *Prost*, the Tenth Circuit meticulously described the range of available remedies:

> Even though a criminal conviction is generally said to be "final" after it is tested through trial and appeal, . . Congress has chosen to afford every federal prisoner the opportunity to launch at least one collateral attack to any aspect of his conviction or sentence. . . .
>
> But Congress didn't stop there. If a prisoner's initial § 2255 collateral attack fails, . . Congress has indicated that it will sometimes allow a prisoner to bring a second or successive attack. Recognizing the enhanced finality interests attaching to a conviction already tested through trial, appeal, and one round of collateral review, however, Congress has specified that only certain claims it has deemed particularly important—those based on newly discovered evidence suggestive of innocence, or on retroactively applicable constitutional decisions—may be brought in a second or successive motion. See 28 U.S.C. § 2255(h); supra n. 2.
>
> Yet, even here Congress has provided an out. A prisoner who can't satisfy § 2255(h)'s conditions for a second or successive motion may obviate § 2255 altogether if he can show that "the remedy by motion" provided by § 2255 is

APPENDIX C.

77.

itself "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). In these "extremely limited circumstances," (citation omitted), a prisoner may bring a second or successive attack on his conviction or sentence under 28 U.S.C. § 2241, without reference to § 2255(h)'s restrictions. It is, however, the prisoner's burden to show that these conditions, prescribed by § 2255(e)'s so-called "savings clause," apply to his case. See Miller v. Marr, 141 F.3d 976, 977 (10th Cir. 1998).

See Prost, 636 F.3d at 583-84. The Court in *Prost* then meticulously set forth a relatively simple test for when the "savings clause" applies, and their underlying rationale:

> The relevant . . . measure, we hold, is whether a petitioner's argument challenging the legality of his detention could have been tested in an initial § 2255 motion. If the answer is yes, then the petitioner may not resort to the savings clause and § 2241. . . .
>
> . . . . Section 2255(e) expressly distinguishes between the terms remedy and relief, stating that § 2241 is not available to a petitioner simply because a "court has denied him relief"; to invoke the savings clause, it must "also appear[ ] that the remedy by motion is inadequate or ineffective." . . . Here again, the clause emphasizes its concern with ensuring the prisoner an opportunity or chance to test his argument. Here again it underscores that with this opportunity comes no guarantee about outcome or relief. The ultimate result may be right or wrong as a matter of substantive law, but the savings clause is satisfied so long as the petitioner had an opportunity to bring and test his claim.
>
> Recognizing these features of the savings clause's plain language, we have long and repeatedly said that a petitioner's "[f]ailure to obtain relief under § 2255 does not establish that the remedy so provided is either inadequate or ineffective," . . . and that an "erroneous decision on a § 2255 motion" doesn't suffice to render the § 2255 remedy itself inadequate or ineffective, (citations omitted). . . .
>
> . . . [I]t is evident that a prisoner generally is entitled

APPENDIX C.

78.

> to only one adequate and effective opportunity to test the legality of his detention, in his initial § 2255 motion. If the rule were otherwise—if the § 2255 remedial mechanism could be deemed "inadequate or ineffective" any time a petitioner is barred from raising a meritorious second or successive challenge to his conviction—subsection (h) would become a nullity, "a meaningless gesture." United States v. Barrett, 178 F.3d 34, 50 (1st Cir. 1999). If the rule were otherwise—if, say, courts were to read subsection (h) as barring only losing second or successive motions—the statute's limitations would be effectively pointless and, as the Second Circuit has recognized, Congress would have "accomplished nothing at all in its attempts—through statutes like the AEDPA—to place limits on federal collateral review." (Citations omitted).
>
> . . . Federal prisoners seeking to take advantage of new rulings of constitutional magnitude that would render their convictions null and void are not always allowed to do so in second or successive motions. See, e.g., 28 U.S.C. § 2255(h)(permitting federal prisoners to take advantage only of new constitutional rules that the Supreme Court has expressly declared to have retroactive application); see also Dodd v. United States, 545 U.S. 353, 125 S.Ct. 2478, 162 L.Ed.2d 343 (2005). . . .

Id. at 584-87.

In this case, as in *Prost*, Mr. Lambros alleges no facts to dispute that his initial § 2255 motion was "up to the job of testing the question" of whether his conviction should be overturned because he was provided erroneous sentencing information during plea proceedings. While he complains that motions he filed raising claims that should have been brought under § 2255 were treated by the sentencing court as his first § 2255 motion, he alleges no facts indicating that those claims were not considered. To paraphrase the reasoning of the Court in *Prost*, the fact that § 2255(h)'s restrictions on second and successive motions barred Mr. Lambros from

trying a *Frye/Lafler* argument nearly a decade after his convictions and long after pursuing his initial § 2255 motion, does not mean that the § 2255 remedial regime is inadequate or ineffective to test such an argument. "It only means that, in Congress's considered view, finality concerns now predominate and preclude relitigation of Mr. (Lambros's) criminal judgment." *Id.*

Like Mr. Prost, Mr. Lambros obviously believes that "a federal prisoner should have recourse to § 2241 through the savings clause any time he can demonstrate that his initial § 2255 proceeding finished before the Supreme Court announced a new (interpretation) that would likely undo his conviction," and that "he should be excused for failing to bring a "novel" argument for relief that the Supreme Court hadn't yet approved. . . ." The Tenth Circuit in Prost rejected this position:

> We cannot agree that the absence of *Santos* from the U.S. Reports at the time of a prisoner's first § 2255 motion has anything to do with the question whether § 2255 was an inadequate or ineffective remedial mechanism for challenging the legality of his detention. As we've explained, it is the infirmity of the § 2255 remedy itself, not the failure to use it or to prevail under it, that is determinative. To invoke the savings clause, there must be something about the initial § 2255 procedure that itself is inadequate or ineffective for testing a challenge to detention. . . .
>
> . . . The § 2255 remedial vehicle was fully available and amply sufficient to test the argument, whether or not Mr. Prost thought to raise it. And that is all the savings clause requires.
>
> . . . [I]n subsection (h) Congress identified the excuses it finds acceptable for having neglected to raise an

> argument in an initial § 2255 motion. Failing to pursue novel statutory interpretations is not on that list, though Congress was aware situations like this one might arise and fully intended § 2255(h) to bar otherwise meritorious successive petitions. The simple fact is that Congress decided that, unless subsection (h)'s requirements are met, finality concerns trump and the litigation must stop after a first collateral attack. . . .
>
> . . . [T] the plain language of the savings clause does not authorize resort to § 2241 simply because a court errs in rejecting a good argument.

Id. at 588-90.

Having considered all petitioner's allegations and complaints together with the relevant legal authority, the court finds that Mr. Lambros fails to establish that his § 2255 remedy was inadequate or ineffective. Consequently, he has failed to establish that this court has jurisdiction to hear his challenges to his convictions and sentences under § 2241. *See Gibson v. Fleming*, 28 Fed.Appx. 911, 913 (10th Cir. 2001)(court should have dismissed § 2241 habeas petition without prejudice for lack of jurisdiction where petition challenged federal conviction or sentence and petitioner did not show § 2255 remedy was inadequate or ineffective).

Finally, the court hereby certifies, pursuant to 28 U.S.C. § 1951(a)(3), that any appeal from this Order would not be taken in good faith, and therefore in forma pauperis status is denied for the purpose of an appeal. See *Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

IT IS THEREFORE BY THE COURT ORDERED that this action is

APPENDIX C. 81.

dismissed for lack of jurisdiction.

IT IS SO ORDERED.

DATED: This 17th day of May, 2013, at Topeka, Kansas.

s/RICHARD D. ROGERS
United States District Judge

APPENDIX C.

82.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 12-2427

John Gregory Lambros

Petitioner

v.

United States of America

Respondent

Petition for permission to file a Successive Habeas Petition

ORDER

The motion of the appellant for recusal is denied.

November 29, 2012

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

November 09, 2012

Mr. John Gregory Lambros
U.S. PENITENTIARY
00436-124
P.O. Box 1000
Leavenworth, KS 66048-0000

RE: 12-2427 John Lambros v. United States

Dear Mr. Lambros:

Your petition for enbanc rehearing and also for rehearing by panel was received on November 8, 2012. Pursuant to Section 106 of the Antiterrorism and Effective Death Penalty Act of 1996, the grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari. No action will be taken on the petition for rehearing you submitted.

Michael E. Gans
Clerk of Court

LMT

Enclosure(s)

cc: Ms. Ann Anaya
Mr. James Lackner

District Court/Agency Case Number(s):

APPENDIX E.

84.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 12-2427

John Gregory Lambros

Petitioner

v.

United States of America

Respondent

Appeal from U.S. District Court for the District of Minnesota - Minneapolis

JUDGMENT

Before MURPHY, SMITH, BENTON, Circuit Judges.

The petition for authorization to file a successive habeas application in the district court is denied. Mandate shall issue forthwith.

October 24, 2012

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States of America, Appellee, v. John Gregory Lambros, Appellant.
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
65 F.3d 698; 1995 U.S. App. LEXIS 25237
No. 94-1332
May 18, 1995, Submitted
September 8, 1995, Filed

Opinion

{65 F.3d 699} WOLLMAN, Circuit Judge.

John Gregory Lambros, who was extradited from Brazil, appeals his conviction of four cocaine charges on various grounds. Because the district court erred in applying a mandatory life sentence on one count, we remand.

I

Lambros was indicted in May 1989 of multiple counts stemming from a cocaine importing conspiracy. Count I, the overarching conspiracy-to-distribute count under 21 U.S.C. §§ 841(a)(1), 846 charged a conspiracy end date of February 27, 1988. The other three counts of possession-with-intent-to-distribute charge conduct in July, October and December of 1987.

Lambros fled the country, and was arrested in Brazil in May 1991. After contesting extradition, he was remanded to United States custody in June 1992, and convicted of all four counts in January 1993. Lambros **{65 F.3d 700}** received concurrent sentences of life on Count I, ten years each on Counts II and III, and 30 years on Count IV.

II

The district court sentenced Lambros to life on the Count I conspiracy charge because it believed a life sentence was mandated by 21 U.S.C. § 841(b)(1)(A)(ii) (hereafter section 841). Judgment, R. at 11-12. The government does not dispute Lambros's argument that the required life sentence of section 841 did not take effect until November 1988, well after the February 1988 conspiracy end date charged in the Count I indictment. Under well-known principles of *ex post facto* law, because the mandatory life sentence was not in place at the time of the crime charged, the district court erred in applying it. (Lambros concedes that the version of § 841 in place at the time of his conspiracy, though not requiring a life sentence for his crimes, does allow it.) Accordingly, Lambros must be resentenced on Count I.

Lambros's further argument that he may be eligible for parole because parole was

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APPENDIX H.

87.

such term of imprisonment.'', and deleted para. (6), which read: ''In the case of a violation of subsection (a) involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this title, title III, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.''.

Such Act further (effective and applicable as provided by § 235 of such Act, which appears as 18 USCS § 3551 note), in subsec. (b)(4), deleted ''subsections (a) and (b) of'' preceding ''section 404'', and inserted ''and section 3607 of title 18, United States Code''; and deleted subsec. (c), which read: ''Revocation of supervised release term. A term of supervised release imposed under this section or section 418, 419, or 420 may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the term of supervised release and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose term of supervised release has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A term of supervised release provided for in this section or section 418, 419, or 420 shall be in addition to, and not in lieu of, any other parole provided for by law.''.

1986. Act Oct. 27, 1986, in subsec. (b), in the introductory matter, substituted '', 405A, or 405B'' for ''or 405A'', in para. (1), substituted subparas. (A) and (B) for ones which read:

''(A) In the case of a violation of subsection (a) of this section involving—

''(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug other than a narcotic drug consisting of—

''(I) coca leaves;

''(II) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

''(III) a substance chemically identical thereto;

''(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

''(iii) 500 grams or more of phencyclidine (PCP); or

''(iv) 5 grams or more of lysergic acid diethylamide (LSD);

such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both

88.

''(B) In the case of a controlled substance in schedule I or II, except as provided in subparagraphs (A) and (C), such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $125,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $250,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.''.

Such Act further, in subsec. (b), in para. (1), redesignated former subpara. (C) as subpara. (D), and added a new subpara. (C), and substituted subpara. (D), as so redesignated, for one which read: ''In the case of less than 50 kilograms of marijuana, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $50,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $100,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.'', in para. (2), substituted ''a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual'' for ''a fine of not more than $25,000'', and substituted a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual for ''a fine of not more than $50,000'', in para. (3), substituted ''a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual'' for ''a fine of not more than $10,000'', and substituted ''a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual'' for ''a fine of not more than $20,000'', in para. (4), substituted ''1(D)'' for ''1(C)'', and substituted para. (5) for one which read ''Notwithstanding paragraph (1), any person

United States of America, Plaintiff-Appellee, v. John Robert Andis, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
333 F.3d 886; 2003 U.S. App. LEXIS 13021
No. 01-1272
September 11, 2002, Submitted
June 27, 2003, Filed

Editorial Information: Subsequent History

US Supreme Court certiorari denied by Andis v. United States, 124 S. Ct. 501, 2003 U.S. LEXIS 7931 (U.S., Nov. 3, 2003)

Editorial Information: Prior History

Appeal from the United States District Court for the Eastern District of Missouri. United States v. Andis, 2002 U.S. App. LEXIS 5944 (8th Cir. Mo., Apr. 2, 2002)

Disposition:

Appeal was dismissed.

Counsel For United States of America, Plaintiff - Appellee: Donald Garrett Wilkerson, Sr., U.S. ATTORNEY'S OFFICE, St. Louis, MO.

For JOHN ROBERT ANDIS aka Robert Andis, Defendant - Appellant: Ilene A. Goodman, Asst. Pub. Defender, FEDERAL PUBLIC DEFENDER'S OFFICE, St. Louis, MO. Norman S. London, FEDERAL PUBLIC DEFENDER'S OFFICE, Cape Girardeau, MO.

JOHN ROBERT ANDIS, Defendant - Appellant, Pro se, Sandstone, MN.

Judges: Before HANSEN, 1 Chief Judge, BRIGHT, McMILLIAN, BOWMAN, WOLLMAN, LOKEN, MORRIS SHEPPARD ARNOLD, MURPHY, BYE, RILEY, MELLOY, and SMITH, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge, concurring, with whom LOKEN, Chief Judge, BOWMAN, and RILEY, Circuit Judges, join. BYE, Circuit Judge, concurring. BRIGHT, Circuit Judge, concurring in part and dissenting in part, with whom MCMILLIAN, Circuit Judge, joins.

CASE SUMMARY

90.

APPENDIX I.

00436124

C. Miscarriage of Justice

Assuming that a waiver has been entered into knowingly and voluntarily, we will still refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice. Although we have not previously defined this exception, we have described many of its components. See DeRoo, 223 F.3d at 923-24 (stating that a waiver of appellate rights does not prohibit the appeal of an illegal sentence or a sentence in violation of the terms of an agreement, or a claim asserting ineffective assistance of counsel); Michelsen, 141 F.3d at 872 n.3 (describing the right to appeal an illegal sentence).

Other circuits have adopted the miscarriage of justice exception and included within this exception, inter alia, sentences based on constitutionally impermissible factors (e.g., race) and claims asserting ineffective assistance of counsel. See, e.g., Teeter, 257 F.3d at 25 n.9 & 10 (stating that the court would address, inter alia, sentences based on constitutionally impermissible factors, even when a valid waiver existed); Khattak, 273 F.3d at 562 (discussing circumstances where other circuits have found appeal waivers to be invalid).

Although we have not provided an exhaustive list of the circumstances that might constitute a miscarriage of justice, we recognize that these waivers are contractual agreements between a defendant and the Government and should not be easily voided by the courts. As such, we caution that this exception is a narrow one and will not be allowed to swallow the general rule that waivers of appellate rights are valid.

As the miscarriage of justice exception relates to Mr. Andis's appeal, we reaffirm that in this Circuit a defendant has the right to appeal an illegal sentence, **{333 F.3d 892}** even though there exists an otherwise valid waiver. See DeRoo, 223 F.3d at 923; Michelsen, 141 F.3d at 872. 6 In United States v. Greatwalker, we explained that "[a] sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime." 285 F.3d 727, 729 (8th Cir. 2002). In United States v. Peltier, we recently addressed what constitutes an illegal sentence:

> [a] sentence is illegal when it is not authorized by law; for example, when the sentence is "in excess of a statutory provision or otherwise contrary to the applicable statute." A sentence is not illegal if the "punishment meted out was not in excess of that prescribed by the relevant statutes . . . or the terms of the sentence itself are not legally or constitutionally invalid in any other respect." 312 F.3d 938, 942 (8th Cir. 2002) (internal citations omitted).

We wish to make clear that the illegal sentence exception to the general enforceability of an appeal waiver is an extremely narrow exception. Any sentence imposed within the statutory range is not subject to appeal. Specifically, an allegation that the sentencing judge misapplied the Sentencing Guidelines or abused his or her discretion is not subject to appeal in the face of a valid appeal waiver. Other circuits have explicitly addressed these situations. See, e.g., United States v. Brown, 232 F.3d 399, 403 (4th Cir. 2000) ("an express waiver of [a defendant's] right to appeal, which was knowing and voluntary, [precludes] an appeal based on [a] claim that [a] district court misapplied the Guidelines."); United States v. Atterberry, 144 F.3d 1299, 1300 (10th Cir. 1998) (dismissing the defendant's appeal of the base offense level used by the district court in determining his sentence, because he had waived his appellate rights); United States v. Feichtinger, 105 F.3d 1188, 1190 (7th Cir. 1997) ("an improper application of the guidelines is not a reason to invalidate a knowing and voluntary waiver of appeal rights.").

91.

APPENDIX I.

Kenneth Jones, Appellant, v. State of Arkansas, Appellee
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
929 F.2d 375; 1991 U.S. App. LEXIS 4878
No. 89-2013
October 11, 1990, Submitted
March 27, 1991, Filed

Editorial Information: Prior History

Appeal from the United States District Court for the Eastern District of Arkansas. On Petition for Rehearing. Magistrate Judge John Forester. This Opinion Substituted by Court for Vacated Opinion of January 14, 1991, Reported at 1991 U.S. App. LEXIS 422.

Counsel Counsel who represented the Appellant was Brian Allen Brown of Little Rock, Arkansas.

Counsel who represented the Appellee was Jack Gillian of Little Rock, Arkansas.

Judges: Lay, Chief Judge, Bright, Senior Circuit Judge, and Bruce M. Van Sickle, * Senior District Judge.

CASE SUMMARY

APPENDIX J.

92.

APPENDIX J.

The Arkansas Supreme Court has held that sentencing a defendant as a habitual offender when that statute did not apply to him is prejudicial error requiring that the defendant either be re-tried or have his sentence modified to the minimum applicable punishment under the general sentencing statute. *Ellis v. State*, 270 Ark. 243, 603 S.W.2d 891, 892 (1980); *McDonald v. State*, 266 Ark. 56, 582 S.W.2d 272, 274 (1979). We conclude that the erroneous application of the habitual offender statute **{929 F.2d 380}** prejudiced Jones. 13

C.

We hold that sentencing Jones under the habitual offender statute, as amended by Act 409 in 1983, which was not in force when Jones committed his offenses, violates the ex post facto clause of the Constitution. *See Miller v. Florida*, 482 U.S. 423, 435-36, 96 L. Ed. 2d 351, 107 S. Ct. 2446 (1987) (holding that application of state sentencing statute not in effect when defendant committed offense violates ex post facto provision); *United States v. Swanger*, 919 F.2d 94, 95 (8th Cir. 1990) (per curiam) (holding that application of federal sentencing guidelines amendments not in force when defendant committed offense violates ex post facto clause); *United States v. Suarez*, 911 F.2d 1016, 1021-22 (5th Cir. 1990) (same). 14

II.

The state does not deny that Jones was sentenced under a statute that did not apply to him. The state asserts, however, that Jones is raising this issue for the very first time. It argues that he is barred from raising new issues on appeal and from raising issues not presented previously to the state courts. 15 Generally, appellate courts will refuse to consider issues not raised in the district court. *Hormel v. Helvering*, 312 U.S. 552, 556, 85 L. Ed. 1037, 61 S. Ct. 719 (1941); *United States v. Glass*, 720 F.2d 21, 23 (8th Cir. 1983). A special exception exists, however, for instances when "injustice might otherwise result." *Hormel*, 312 U.S. at 557; *Beavers v. Lockhart*, 755 F.2d 657, 662 (8th Cir. 1985). This case falls within that narrow exception, as Jones has presented a compelling case for review. *See United States v. McCall*, 915 F.2d 811, 814 (2d Cir. 1990) (exercising discretion to hear claim, not presented below, that defendant was sentenced under the wrong Guidelines section); *Beavers*, 755 F.2d at 662 (exercising discretion to consider habeas petitioner's claim of ineffective assistance not raised in district court).

The state also asserts that Jones' failure to raise his claim in the state courts is a procedural default barring this court's consideration of the claim. Normally, a habeas petitioner must show "cause" and "prejudice" to excuse the default. *Wainwright v. Sykes*, 433 U.S. 72, 87, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977). Although the Supreme Court believed that the cause and prejudice standard of *Sykes* would take care of most cases in which the habeas petitioner was a victim of a miscarriage of justice, it recognized that in a small number of extraordinary cases this would not be true. *Murray v. Carrier*, 477 U.S. 478, 495-96, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986). The Court thus developed a narrow exception to the procedural default rule which is directed toward "the imperative of correcting a fundamentally unjust incarceration." *Engle v. Isaac*, 456 U.S. 107, 135, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1981). The Court has subsequently expressed this exception as applying to incarcerations in which "a constitutional violation has probably resulted in the conviction of one who is actually innocent. . . ." *Murray*, 477 U.S. at 496; **{929 F.2d 381}** *see also Smith v. Armontrout*, 888 F.2d 530, 545 (8th Cir. 1989).

Although recognizing that the *Carrier* actual innocence exception did not translate easily into the sentencing phase of a capital trial, the Court nevertheless did so in *Smith v. Murray*, 477 U.S. 527, 537, 91 L. Ed. 2d 434, 106 S. Ct. 2661 (1986). If one is "actually innocent" of the sentence imposed, a federal habeas court can excuse the procedural default to correct a fundamentally unjust

93.

APPENDIX J.

00436124

incarceration. *Id.; Dugger v. Adams*, 489 U.S. 401, 411 n.6, 103 L. Ed. 2d 435, 109 S. Ct. 1211 (1989); *Smith v. Armontrout*, 888 F.2d at 545; *Stokes v. Armontrout*, 893 F.2d 152, 156 (8th Cir. 1989). 16 It would be difficult to think of one who is more "innocent" of a sentence than a defendant sentenced under a statute that *by its very terms* does not even apply to the defendant.

Jones' case falls within the extremely narrow band of cases in which a federal habeas court can grant the writ based on a miscarriage of justice. As Justice Frankfurter wrote almost half a century ago, "the history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347, 87 L. Ed. 819, 63 S. Ct. 608 (1943).

CONCLUSION

Jones was sentenced under an amended version of the Arkansas habitual offender statute not in force when he committed his crime and which on its face did not apply to him. This violated the ex post facto clause of the Constitution, denying Jones due process.

The judgment of the magistrate denying habeas relief is REVERSED and the case remanded. The district court is ordered to grant the writ unless the state elects to re-try Jones or re-sentence him properly under Arkansas law within 120 days of the filing of this opinion. 17

94.

APPENDIX J.

00436124

U.S. Department of Justice

United States Attorney
District of Minnesota

234 United States Courthouse
110 South Fourth Street
Minneapolis, Minnesota 55401

612/349-1500
FTS/777-1500

November 16, 1992

Charles W. Faulkner, Esq.
Suite 500
701 Fourth Avenue South
Minneapolis, MN 55415

Re: United States v. John Gregory Lambros
Criminal No. 4-89-82(5)

Dear Mr. Faulkner:

Enclosed please find the government's written plea proposal consistent with our discussions within the last ten days. This offer will remain outstanding until Monday, November 23, 1992. If it is acceptable, please contact Mary Kaye Conery, Judge Murphy's calendar clerk, to schedule entry of the plea.

Very truly yours,

THOMAS B. HEFFELFINGER
United States Attorney

BY: DOUGLAS R. PETERSON
Assistant U.S. Attorney

DRP:ac

Enclosure

cc: Dick Ripley, DEA

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Criminal No. 4-89-82(5)

UNITED STATES OF AMERICA, Plaintiff, v. JOHN GREGORY LAMBROS, Defendant.	PLEA AGREEMENT AND SENTENCING GUIDELINES RECOMMENDATIONS

The parties to the above-captioned case, the United States of America, by its attorneys, Thomas B. Heffelfinger, United States Attorney for the District of Minnesota, and Douglas R. Peterson, Assistant United States Attorney, and the defendant John Lambros, and his attorney, Charles Faulkner, Esquire, hereby agree to dispose of this case on the following terms and conditions:

FACTUAL BASIS

The parties agree that on or about December 22, 1987, the defendant arranged for an associate, George Angelo a/k/a "Rapid Rick", to pick up approximately two kilograms of cocaine at the Sheraton Northwest at Brooklyn Park, Minnesota. This cocaine was distributed by Lawrence Randall Pebbles through his courier, Tracy Penrod. Subsequent to delivery, Lambros paid Pebbles with cash delivered by Angelo to Penrod.

PLEA AGREEMENT

1. The defendant will enter a plea of guilty to Count VIII of the Indictment which charges him with the possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B).

2. The defendant understands that because of his prior convictions, the Count VIII charge carries a maximum potential penalty of:

a. Life imprisonment without parole;

b. A $4,000,000 fine;

c. A term of supervised release of life;

d. A mandatory special assessment fee of $50; and

e. The assessment to the defendant of the cost of prosecution, supervision and imprisonment.

3. The defendant also understands that because of his prior criminal record, the Count VIII charge carries a mandatory minimum term of imprisonment of ten years without parole and a mandatory minimum term of supervised release of eight years.

4. The government agrees to dismiss Counts I, V, and VI at the time of sentencing. Counts V and VI carry the same maximum potential penalties as the Count VIII charge. Conviction on the Count I charge, however, would carry a mandatory term of imprisonment of life without parole and a fine maximum of $8 million. The government will also reconfirm its prior agreement to dismiss Count IX pursuant to the agreement entered into between the governments of the United States and Brazil at the time of the defendant's extradition.

5. The defendant agrees he is competent to enter into this plea agreement and he waives any right he may have to challenge the competency finding of the Honorable Franklin L. Noel, United States Magistrate, dated October 30, 1992.

6. Likewise, the defendant waives any right to upset his

U.S. Department of Justice 1210-92

United States Attorney
District of Minnesota

234 United States Courthouse
110 South Fourth Street
Minneapolis, Minnesota 55401

612/348-1500
FTS/777-1500

December 10, 1992

VIA REGISTERED MAIL

Charles W. Faulkner, Esq.
Suite 500
701 Fourth Avenue South
Minneapolis, MN 55415

Re: United States v. John Gregory Lambros
Criminal No. 4-89-82(5)

Dear Mr. Faulkner:

Enclosed is a revised plea proposal based upon our numerous plea conversations. At your special request, I will wait until Tuesday to file the Information which I forwarded via letter dated December 7. That delay will allow you to review the enclosed offer with your client this weekend. This offer will be withdrawn at noon on Tuesday, December 15, 1992.

I also write to memorialize that we have been trying to resolve this case for over a month now. As the enclosed offer shows, the government has made a sincere effort to reach a compromise, including extending the negotiating period several times. If we cannot come to terms by Tuesday morning, your client must understand that all offers are withdrawn and the time for negotiation will be over.

Very truly yours,

THOMAS B. HEFFELFINGER
United States Attorney

BY: DOUGLAS R. PETERSON
Assistant U.S. Attorney

DRP:ac

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Criminal No. 4-89-82(5)

UNITED STATES OF AMERICA, Plaintiff, v. JOHN GREGORY LAMBROS, Defendant.	)	PLEA AGREEMENT AND SENTENCING GUIDELINES RECOMMENDATIONS

The parties to the above-captioned case, the United States of America, by its attorneys, Thomas B. Heffelfinger, United States Attorney for the District of Minnesota, and Douglas R. Peterson, Assistant United States Attorney, and the defendant John Lambros, and his attorney, Charles Faulkner, Esquire, hereby agree to dispose of this case on the following terms and conditions:

FACTUAL BASIS

The parties agree that on or about December 22, 1987, the defendant arranged for an associate, George Angelo a/k/a "Rapid Rick", to pick up approximately two kilograms of cocaine at the Sheraton Northwest at Brooklyn Park, Minnesota. This cocaine was distributed by Lawrence Randall Pebbles through his courier, Tracy Penrod. Subsequent to delivery, Lambros paid Pebbles with cash delivered by Angelo to Penrod.

PLEA AGREEMENT

1. The defendant will enter a plea of guilty to Count VIII of the Indictment which charges him with the possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B).

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2. The defendant understands that absent the filing of an Information, the Count VIII charge carries a maximum potential penalty of:

a. Forty years imprisonment without parole;

b. A $2,000,000 fine;

c. A term of supervised release of life;

d. A mandatory special assessment fee of $50; and

e. The assessment to the defendant of the cost of prosecution, supervision and imprisonment.

3. The defendant also understands that the Count VIII charge carries a mandatory minimum term of imprisonment of five years without parole and a mandatory minimum term of supervised release of four years.

4. The government agrees to dismiss Counts I, V, and VI at the time of sentencing. Counts V and VI carry the same maximum and minimum potential penalties as the Count VIII charge. Conviction on the Count I charge, however, would trigger a maximum term of imprisonment of life without parole, a mandatory minimum of ten years without parole, and a fine maximum of $4 million. The government will also reconfirm its prior agreement to dismiss Count IX pursuant to the agreement entered into between the governments of the United States and Brazil at the time of the defendant's extradition.

5. As part of this agreement, the government waives its right to file an Information under 21 U.S.C. § 851 to enhance the applicable mandatory minimum penalties. If an Information identifying the defendant's prior record had been filed, a

mandatory minimum term of imprisonment of ten years without parole would apply to Count VIII as well as Counts V and VI. The statutory maximum term of imprisonment on those counts would have been life. The Information would also trigger a mandatory term of life imprisonment on the Count I conspiracy charge.

6. The defendant will receive credit against any prison term imposed for the time spent in custody in Brazil which began on May 17, 1991, the date of his arrest at the Rio de Janeiro airport.

7. The defendant understands that this agreement does not resolve the outstanding parole violation charges. The sentence to be imposed for the defendant's violation of his 15 year parole term from his prior convictions will be left to the Parole Commission. As part of this agreement, the U.S. Attorney's office for the District of Minnesota will request that the Parole Commission hold its violation hearing and sentence the defendant after his change of plea hearing but before his sentencing hearing in district court.

8. The defendant agrees he is competent to enter into this plea agreement and he waives any right he may have to challenge the competency finding of the Honorable Franklin L. Noel, United States Magistrate, dated October 30, 1992.

9. Likewise, the defendant waives any right to upset his plea or otherwise challenge his prosecution based upon a challenge to the extradition process which brought the defendant from Brazil to the United States.