February 19, 2010

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U.S Certified Mail No.
7008-1830-0004-2648-5413

HUGO CHAVEZ, President of Venezuela
C/O: Bernardo ALVARAREZ Herrera, Ambassador of Venezuela
Embassy of Venezuela in the USA
1099 30th Street NW
Washington, DC 20007
Tel. (202) 342-2214

RE: EXTRADITIONS FROM VENEZUELA TO THE UNITED STATES - VIOLATIONS OF TREATY

Dear President Chavez:

Currently the United States is committing an "injury in fact" to all persons extradited from Venezuela and countries that include **MAXIMUM SENTENCE LIMITATIONS** expressed within extradition orders, decrees and treaties. Court records reflect that the extradited person is sentenced by U.S. Courts in excess of the maximum sentence - usually 30-years for Venezuela, Colombia and Brazil - with a term of **"SUPERVISED RELEASED".** U.S. Courts have clearly ruled that **"SUPERVISED RELEASE"** is a **"TERM OF IMPRISONMENT",** because it is part of the punishment imposed for the original crime. See, U.S. vs. ROBERTS, 5 F.3d 365, 368-369 (9th Cir. 1993); U.S. vs. ETHERTON, 101 F3d 80, 81 (9th Cir. 1996).

The U.S. Department of State and the U.S. Department of Justice continually challenge Venezuela's justice system under your rule for the past eleven years. Currently banker Eligio Cedeno is fighting extradition to Venezuela on the grounds he can't get a fair trial, due to his arrest in 2007 for helping businessmen defraud the central bank of tens of millions of dollars. In fact, "THE WALL STREET JOURNAL" stated within a December 24, 2009 article entitled "U.S. Immigration Authorities Release Venezuelan Banker" by Dan Molinski and John Lyons:

> "All the same, Mr. Chavez is expected to give a high profile to the extradition fight at home, and the issue could further strain relations between Washington and Caracas. **The U.S. is already refraining from complying with another extradition request from Venezuela."** (emphasis added)

U.S. DOES NOT HONOR EXTRADITION DECREE FROM SUPREME COURT OF VENEZUELA AND THE VENEZUELAN MINISTRY OF FOREIGN AFFAIRS PURSUANT TO EXTRADITION OF CRISTOBAL RODRIGUEZ BENITEZ.

On June 4, 1998, the Supreme Court of Venezuela approved the extradition of **Cristobal Rodriguez Benitez,** a Mexican citizen, as per the June 25, 1997, request by the United States pursuant to the U.S.-Venezuela extradition treaty. The **DECREE** issued by the Court stated in pertinent part:

> "[T]his Supreme Court of Justice ..... GRANTS THE EXTRADITION of ..... BENITEZ .... such extradition being subject to the fact that the referred citizen shall not be imposed a penalty involving death penalty [sic] or life imprisonment **OR PUNISHMENT DEPRIVING HIS FREEDOM FOR MORE THAN THIRTY (30) YEARS** ..." (CT 88) (emphasis added)

On August 17, 1998, the Venezuelan Ministry of Foreign Affairs notified the United States Embassy of the extradition decree. The notice provided that:

> "Said extradition is conditioned to the understanding that [Benitez] will not be sentenced to death or life in prison **OR INCARCERATION FOR MORE THAN THIRTY (30) YEARS** ...." (emphasis added)

On or about September 1999, the State of California sentenced **BENITEZ** to a sentence of **19-years-to-life. BENITEZ'S** attorney argued that his client should not receive a sentence more than thirty (30) years, as per the **DECREE ISSUED BY THE SUPREME COURT OF VENEZUELA.** The trial court denied **BENITEZ'S** request, stating that it was not aware of **ANY AUTHORITY GIVING IT THE POWER TO FASHION AN ALTERNATIVE REMEDY OTHER THAN THE SENTENCE MANDATED BY CALIFORNIA LAW.**

The California appellate court upheld **BENITEZ'S** conviction on

October 11, 2000, stating that the treaty only provides that BENITEZ'S not be subject to the death penalty or life imprisonment and the treaty did not define "imprisonment for life," did not mention the **THIRTY (30) YEAR SENTENCE CAP,** and did not expressly incorporate the Constitution of Venezuela. **FURTHERMORE,** the treaty did not define "satisfactory assurances," nor require the requesting state (here, the United States) to ensure the assurances given are satisfactory to the requested state (here, Venezuela).

The California Supreme Court denied review of BENITEZ'S case on December 20, 2000. BENITEZ'S filed a **HABEAS PETITION** on March 14, 2002, with the United States District Court, Southern District of California.

U.S. District Court Judge J. Sabraw held on June 7, 2004, that the California State appellate court did not violate federal law when it determined that the sentencing court for BENITEZ was not **BOUND BY THE TERMS OF VENEZUELAN EXTRADITION DECREE, WHICH PROVIDED THAT BENITEZ COULD NOT RECEIVE "MORE THAN A THIRTY (30) YEAR SENTENCE."** See, BENITEZ vs. GARCIA, 419 F.Supp.2d 1234, 1244-1246 (S.D. Cal. 2004).

Judge Sabraw stated the following regarding **EXTRADITION DECREES:**

> "On the other hand, an **EXTRADITION DECREE** is simply a pronouncement of a foreign court. Such **DECREES** ordinarily follow a diplomatic exchange between embassies and reflect the assurances provided by the requesting state. Under such circumstances, that is, when a **DECREE** reflects the assurances provided by the requesting state, the limitations contained in the **DECREE** have been held by courts in the Second Circuit to be **BINDING** on the requesting state. See, U.S. vs. CAMPBELL, 300 F.3d 202, 211-212 (2nd Cir. 2002) The Supreme Court, however, has not addressed this issue." (emphasis added)
>
> **Foot Note 7:** "The Second Circuit issued a similar decision in U.S. vs. CASAMENTO, 887 F.2d 1141, 1185 (2nd Cir. 1989). There, the court - as in CAMPBELL - held the sentence imposed by the district judge was limited by the extradition order (which contained a **THIRTY (30) YEAR MAXIMUM.** Id. at 1185." (emphasis added)

See BENITEZ vs. GARCIA, 419 F.Supp.2d at 1245

On February 8, 2007 the United States Court of Appeals for the Ninth Circuit held in BENITEZ vs. GARCIA, 476 F.3d 676 (9th Cir. 2007):

> "Benitez's extradition was **CONDITIONED** upon a limitation on what **SENTENCE** could be **ENTERED AGAINST HIM** as well as what sentence he **COULD SERVE.** When the Venezuelan Ministry of Foreign Affairs informed the U.S. Embassy of the Venezuelan Supreme Court's decision to extradite Benitez, the Ministry indicated that the extradition was **"CONDITIONED TO THE UNDERSTANDING** that the aforementioned citizen will **NOT BE SENTENCED** to death or life in prison **OR INCARCERATED FOR MORE THAN THIRTY (30) YEARS"** (emphasis added). **ADDITIONALLY, BENITEZ'S EXTRADITION DECREE LIMITED WHAT SENTENCE COULD BE ISSUED AS WELL AS WHAT SENTENCE COULD BE SERVED."** (emphasis added)
>
> "This **DISPUTE** therefore turns on the term **SENTENCED, NOT THE TERM SERVED."** (emphasis added)

OBSERVATION BY LAMBROS: Basic **CONTRACT LAW** would not allow the U.S Government to take possession of BENITEZ if the U.S. did not agree-upon the sentencing limitation - **"CONDITIONED TO THE UNDERSTANDING .... NOT BE SENTENCED ...".** "Party cannot be permitted to retain benefits received under **CONTRACT** and at same time escape obligations imposed by **CONTRACT."** See, GRILLET vs. SEARS, ROEBUCK & COMPANY, 927 F.2d 217, 220 (5th Cir. 1991).

See, BENITEZ vs. GARCIA, 476 F.3d at 680.

> "Venezuela had the right to **REFUSE** extradition to the United States **UNLESS IT RECEIVED ASSURANCES THAT NEITHER A DEATH SENTENCE NOR LIFE IN PRISON WOULD BE IMPOSED. THE THIRTY (30) YEAR LIMITATION THAT VENEZUELA SOUGHT TO IMPOSE MIGHT BE ENFORCEABLE IF THAT CONDITION WERE AGREED TO BY BOTH COUNTRIES.** We are wary, however, of enforcing extradition conditions that are neither **EXPRESSLY AGREED TO BY BOTH COUNTRIES NOR CONTEMPLATED BY THE RELEVANT EXTRADITION TREATY. A THIRTY (30) YEAR LIMITATION IS THEREFORE NOT ENFORCEABLE."** (emphasis added)

See, BENITEZ vs. GARCIA, 476 F.3d at 682.

On July 16, 2007, the United States Court of Appeals for the Ninth Circuit **SUPERSEDED** it holding in BENITEZ vs. GARCIA, 476 F.3d 676 (9th Cir. 2007):

> "RAUSCHER and BROWNE address limitations on charged offenses; here, the extradition **DECREE** attempts unilaterally to limit BENITEZ'S sentence. No Supreme Court decision addresses this issue." (emphasis added)
>
> "**AGREED-UPON SENTENCING LIMITATIONS ARE GENERALLY ENFORCEABLE.** See, e.g. U.S. vs. CAMPBELL, 300 F.3d 202, 211-12 (2nd Cir. 2002). Though the Supreme Court has not specifically addressed them, RAUSCHER states that '[i]t is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government **WITHOUT ANY LIMITATION,** implied or otherwise, upon it's prosecution of the party.' 119 U.S. at 419, 7 S.Ct. 234." (emphasis added)
>
> "The U.S. - Venezuela extradition treaty expressly provides for extraditions conditioned on **SENTENCING LIMITATIONS,** allowing the extraditing country to extract assurances that 'the death penalty or **IMPRISONMENT FOR LIFE WILL NOT BE INFLICTED.**' See Treaty of Extradition, 43 Stat. 1698, T.S. NO. 675, **AGREED-UPON SENTENCING LIMITATIONS SHOULD BE ENFORCED.**" (emphasis added)
>
> "However, RAUSCHER and BROWNE interpret negotiated agreements to extradite, not unilaterally imposed conditions. **VENEZUELA COULD HAVE REFUSED EXTRADITION OF BENITEZ UNTIL THE UNITED STATES AGREED TO THE SENTENCING LIMITATION. INSTEAD, VENEZUELA RELINQUISHED CUSTODY."**

See, RODRIGUEZ BENITEZ vs. GARCIA, 495 F.3d 640, 644 (9th Cir. 2007).

FRAUD AND MISREPRESENTATION BY UNITED STATES EMBASSY IN VENEZUELA:

On June 25, 1997, when the United States requested BENITEZ's extradition from the Ministry of Foreign Affairs of the Republic of Venezuela, a **LEGAL CONTRACT WAS FORMED,** as per the treaty between the U.S. & Venezuela. On November 4, 1997 and February 27, 1998 the Ministry of Foreign Affairs and the Attorney General of Venezuela corresponded with the U.S. Embassy as to BENITEZ's possible sentence. The U.S. Embassy stated that BENITEZ's could receive a sentence of 25 years to life, which was offered to the Supreme Court of Venezuela to consider as to BENITEZ'S request for a thirty (30) year sentence limit. See, BENITEZ, 419 F.Supp. 2d at 1237-1239.

DECREE OF SUPREME COURT OF VENEZUELA:

On June 4, 1998, a **"FINAL DECREE"** was entered by the Supreme Court of Venezuela as to the extradition of **BENITEZ.** The United States Embassy in Venezuela was a part of the entire **EXTRADITION PROCEEDINGS,** including correspondence from the Ministry of Foreign Affairs of the Republic of Venezuela on November 4, 1997, February 27, 1998, and August 17, 1998. In fact, an employee of the United States Embassy in Venezuela represented the United States during all **JUDICIAL HEARINGS BY THE SUPREME COURT OF VENEZUELA.** When BENITEZ's attorney filed motions and stated during open court that BENITEZ should not be exposed to a sentence of more than **THIRTY (30) YEARS, THE ATTORNEY REPRESENTING THE UNITED STATES DID NOT OBJECT.**

As you know, the term **"FINAL DECREE"** means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for the taking of such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

The United States Embassy in Venezuela **DID NOT APPEAL OR OBJECT TO THE "FINAL DECREE"** entered by the Supreme Court of Venezuela on June 4, 1998, which stated BENITEZ was not to receive "punishment depriving his freedom for more than thirty (30) years, pursuant to the rules [found in the Constitution of Venezuela and the Criminal Code]". See, BENITEZ, 419 F.Supp.2d 1234, 1238 (S.D.Cal. 2004).

FORMATION OF A CONTRACT WAS ESTABLISHED WHEN THE "FINAL DECREE" WAS ENTERED AND THE U.S. TOOK CUSTODY OF BENITEZ:

The elements of a valid contract was entered into between the United States and Venezuela when the **"FINAL DECREE"** was entered on June 4, 1998, as both parties where competent to the mutuality of the extradition treaty and obligation of same. See, HENKE vs. U.S. DEPT. OF COMMERCE, 83 F.3d 1445, 1450 (D.C. Cir. 1996).

Therefore, the United States breached its promise to the Supreme Court of Venezuela of a lawful, conditional **CONTRACT [FINAL DECREE]** when it allowed BENITEZ'S freedom to be deprived for more than thirty (30) years.

WHO IS JOHN GREGORY LAMBROS?:

John Gregory Lambros, a U.S. Citizen, was arrested in Brazil in 1991 by U.S. and Brazilian Officials, as per the request of the United States Government. After contesting extradition to the United States and being guaranteed by his Brazilian lawyers that he would not receive more than a thirty (30) year sentence, **which might have resulted in mandatory release AFTER GOOD TIME CREDITS IN TWENTY-FIVE (25) YEARS,** I was extradited to the United States in June 1992 and convicted of cocaine offenses in January 1993. I was sentenced to **MANDATORY LIFE WITHOUT PAROLE** (death sentence) for conspiracy to distribute cocaine and three counts of possession-with-intent-to distribute cocaine. I challenged the disparity between Brazil's extradition treaty, which clearly states in **ARTICLE XI,**

> "The determination that extradition based upon the request therefore should or should not be granted shall be **MADE IN ACCORDANCE WITH THE DOMESTIC LAW OF THE REQUESTED STATE [BRAZIL],** and the person whose extradition is desired shall have the right to use such remedies and recourses as are authorized by such law." (emphasis added)

See, **EXHIBIT A.** (STATE vs. PANG, 940 P2d 1293, 1358, affirmed 139 L.Ed.2d 608 (1997)

and my sentence, which should not have been more than thirty (30) years including **SUPERVISED RELEASE,** to NO-AVAIL. Brazil's Constitution clearly states within ARTICLE 5, Clause XLVII(b) that there will be no sentence of **LIFE.** Also, **ARTICLE 75** of the Brazilian Criminal Code, limits prison sentences to thirty (30) years. See trial excerpts from the extradition of MARTIN SHAW PANG by the Brazilian Supreme Court Justices MARCO AURELIO, MAURICIO CORREA and Justice CELSO DE MELLO, when they granted the request of extradition of PANG to the United States, with the following **RESTRICTIONS:**

> "I also exclude the possibility of [this person] receiving a **LIFE SENTENCE,** therefore establishing that he **CANNOT REMAIN UNDER THE STATE"S CUSTODY FOR MORE THAN THIRTY (30) YEARS."** (emphasis added)

See, PANG, at 1350.

> "..... I grant the request now under examination, with the **RESTRICTION,** which I consider necessary, of **COMMUTING THE LIFE RESTRICTION,** to a **PRISON SENTENCE NOT TO EXCEED 30 YEARS,** agreeing completely with the learned vote of the Honorable Mauricio Correa." (emphasis added)

See, PANG, at 1352-1353.

> "..... I oppose him, with all due respect, only with the proviso that the Requesting State, in the event that the person sought for extradition is condemned to **LIFE IN PRISON,** that his **PRISON SENTENCE** be limited to a **MAXIMUM OF THIRTY (30) YEARS."** (emphasis added)

See, PANG, at 1345-1347

My attorney **REFUSED** to appeal my **MANDATORY LIFE SENTENCE WITHOUT PAROLE** as to the disparity between Brazil's **DOMESTIC LAW** - which does not allow a prison sentence to exceed 30-years **LESS GOOD TIME CREDITS** - and my sentence. The appeal filed by my attorney was based on the fact that the conspiracy charge sentence was not mandated, as the MANDATORY part did not take effect until November 1988. I was resentenced. See, U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995). See, **EXHIBIT B.** (U.S. vs. LAMBROS, 65 F.3d at 698).

WHO IS "BOYCOTT BRAZIL" - www.BrazilBoycott.org ?:

John Gregory Lambros is Founder and President of "BOYCOTT BRAZIL", a website and non-profit organization to educate the world as to the illegal extradition processes that exist within Brazil's State and Federal Government. Also, the objective of "BOYCOTT BRAZIL" is to undertake actions on the behalf of persons being extradited to the United States "in a way that increasingly assure that they receive **SENTENCE LIMITATIONS CONTAINED WITHIN EXTRADITION DECREES AND TREATIES,** which are made in accordance

with the domestic laws of the requested country." Therefore, effective and enduring representation in the decision making councils of government, as well as by applying processes which will obtain direct and indirect reimbursement for the unfair exploitation to which they may have been subjected. "BOYCOTT BRAZIL" has over one million (1,000,000) supporters worldwide and commanded TOP LISTINGS within search engine ratings within Google, Yahoo! and MSN/BING for over ten (10) years under the terms "BOYCOTT BRAZIL" and "BRAZIL BOYCOTT".

CONCLUSION:

President Chavez, may I suggest that you contact your Attorney General - Luisa Ortega Diaz - and suggest that the U.S.-Venezuela Extradition Treaty be **AMENDED** to **INCORPORATE ALL ORDERS MANDATED WITHIN DECREE'S BY THE SUPREME COURT OF VENEZUELA.** I believe **Article IV** within the extradition treaty needs to be rewritten to express some of the following information:

1. Venezuela prohibits the United States or any court within the United States to impose any sentence greater than thirty (30) years nor will that person serve more than thirty (30) years.

2. Venezuela and Brazil both agree to grant **BAIL** in extradition cases if the extraditee in fact would be admitted to bail in the requesting country. The Supreme Court of the U.S. held that federal courts could grant bail in extradition cases in "special circumstances." See, WRIGHT vs. HENKEL, 190 U.S. 40, 63; 23 S.Ct. 781, 787 (1903). A **"SPECIAL CIRCUMSTANCE"** can be if the extraditee would have been admitted to bail had he been arrested in the requesting country. See, MATTER OF EXTRADITION OF NACIF-BORGE, 829 F.Supp. 1210, 1220-1221 (D.Nev. 1993); MATTER OF EXTRADITION OF MORALES, 906 F.Supp. 1368, 1373-1376 (S.D.Cal. 1995).

3. Venezuela prohibits the United States from denying the person extradited any good time credits and/or benefits other prisoners receive for the same crime.

4. The United States agrees to all **SENTENCING LIMITATIONS** in the prosecution of the party extradited made in accordance with the

DOMESTIC LAWS OF VENEZUELA and stated within the extradition **DECREE ISSUED BY THE SUPREME COURT OF VENEZUELA.**

5. The United States will pay both Venezuela and the person extradited $100,000.00 a day for any agreed-upon sentencing limitation not enforced within this extradition treaty, starting the day of the sentencing breach in the United States. This treaty between the U.S. & Venezuela is sui generis, and as a **CONTRACT** between two sovereigns, sets forth its own law. See, MATTER OF EXTRADITION OF NACIF-BORGE, 829 F.Supp, 1210, 1213 (D.Nev. 1993).

6. The United States has agreed to all sentencing limitations within this extradition treaty including the domestic laws of Venezuela, on the day Venezuela relinquishes custody of the person being extradited to the United States.

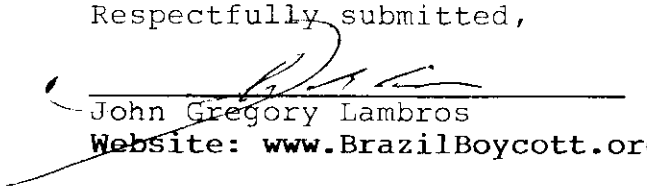
I believe your request to **AMEND** the U.S.- Venezuela Extradition Treaty with the above changes will assist you in your current request for the extradition of Eligio Cedeno from the U.S. and the other extradition request you have pending that the U.S. is refraining from complying with.

Please note that the Colombian Supreme Court **ALWAYS** includes a resolution that states, "....., if extradited and convicted, ... **MUST NOT** be sentenced to more than thirty (30) years." My research indicates that every person extradited from Colombia to the U.S. has never received a sentence greater than 30-years and has been entitled to good time credits and benefits granted to other prisoners serving a sentence for the same crime. May I suggest that Attorney General Luisa Ortega Diaz contact the Attorney General for Colombia for suggestions in **AMENDING** your extradition treaty with the U.S.

The United States fraudulent restrictive policy towards the **"FINAL DECREE"** of the Supreme Court of Venezuela must be stopped in extraditions to the United States.

Thank you in advance for your consideration in this most important matter and please feel free to contact me for any assistance in legal research.

Respectfully submitted,



John Gregory Lambros
Website: www.BrazilBoycott.org

ENCLOSURES:

EXHIBIT A. **(defined within)**

EXHIBIT B. **(defined within)**

EXHIBIT C. (U.S. vs. CASAMENTO, 887 F.2d 1141, 1185 (2nd Cir. 1989) (Note how the Federal Court changes Spain's decree of a prison sentence to no more than 30-years - which would of included good time credits - to a sentence of 45-years with an order that Badalamenti be released after 30-years. The court switched the words "sentence" and "serve".) Again, the U.S. is trying to maintain good relations with foreign powers?????

Exhibit D. (U.S. vs. CAMPBELL, 300 F.3d 202, 211-212 (2nd Cir. 2002) (Costa Rican Court decree stated that Campbell will not receive a "sentence" of more than 50-years in U.S. The U.S. Federal Court in New York sentenced Campbell to a "sentence" of 155-years with an order that Campbell was to "serve" no more than 50-years of that sentence.) The U.S. does it again - switching the words in the extradition decree from "sentence" to "serve".

Exhibit E. (June 4, 1993, letter from U.S. Attorney Hermann for the District of Minnesota to John G. Lambros' attorney Charles W. Faulkner as to "whether a mandatory life sentence [without parole] is barred by the specialty doctrine [as to extradition treaty between Brazil-USA].") Even the office of International Affairs at **MAIN JUSTICE** will not follow the law within the extradition treaty between Brazil-USA. See, U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995).

c:
Internet release to all supporters of "BOYCOTT BRAZIL"
Release to **www.BrazilBoycott.org**
Release to global press
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been frivolous. Denial of Stenson's request served no legitimate purpose.

Most disturbing about the majority's rejection of Stenson's claim is the fact the majority cites nothing in the record upon which it could conceivably be argued Stenson equivocated in his request. The majority merely notes Stenson did not refute the trial court's conclusion he did not really wish to proceed without counsel, as if the trial court's conclusion stands as evidence of Stenson's state of mind. While Stenson's main objective in his motions was [776] to remove Leatherman from his case, his desire in the event his motion for substitution was denied was clear: he wished to represent himself. A conditional request is not an equivocal one. The majority's decision, therefore, stands as the triumph of form over substance.

The denial of the right to self-representation is not amenable to a harmless error analysis: "The right is either respected or denied; its deprivation cannot be harmless." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944, 950 n. 8, 79 L.Ed.2d 122 (1984).

CONCLUSION

I would reverse Stenson's conviction and remand for a new trial without consideration of other issues.

132 Wash.2d 852

[852] STATE of Washington, Respondent,

v.

Martin Shaw PANG, Petitioner.

No. 64786–1.

Supreme Court of Washington, En Banc.

Argued April 8, 1997.

Decided July 31, 1997.

Defendant was charged with four counts murder in the first degree and one count of arson in the first degree. The Superior Court, King County, Larry Jordan, J., denied motion to dismiss or sever murder counts. Defendant moved for direct discretionary review. The Supreme Court, Smith, J., held that: (1) defendant had standing to object to violation of terms of order on extradition issued by Federal Supreme Court of Brazil; (2) Brazil did not waive any objection it could have made to prosecution for murder; (3) specialty doctrine prohibited state from prosecuting defendant for crimes specifically excluded in extradition order; and (4) state was obligated to follow decision of Federal Supreme Court of Brazil which ruled that, as a condition for extradition, defendant could not be prosecuted on murder counts.

Reversed.

Durham, C.J., filed dissenting opinion in which Dolliver and Talmadge, JJ., joined.

Alexander, J., filed opinion joining in dissent.

1. Extradition and Detainers ⇐19

In absence of asylum country's consent to prosecution of accused for crime other than that for which accused was extradited, extradited person may raise any objections to post-extradition proceedings that might have been raised by rendering country.

2. Extradition and Detainers ⇐19

Only asylum country's express consent to prosecution will be considered a waiver of doctrine of specialty, under which requesting country may not prosecute accused for a crime other than that for which accused was extradited.

3. Extradition and Detainers ⇐19

Letter from Brazil Minister of Justice to United States Attorney General, in which Minister discussed ruling by Brazil's Federal Supreme Court that state could try extraditee for arson but not for murder, was neither an implicit waiver nor an explicit waiver of doctrine of specialty, and thus defendant had standing to assert limitations on his post-extradition prosecution; Minister explained in follow-up letter than he had provided no type

EXHIBIT A.

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AFFIRMED by Supreme Ct. 139 L.Ed.2d 608 (1997)

OPINION APPENDIX B—Continued

4. A declaration that there exist and will be forthcoming the relevant documents required by Article IX of the present Treaty.

If, within a maximum period of 60 days from the date of the provisional arrest of the fugitive in accordance with this Article, the requesting State does not present the formal request for his extradition, duly supported, the person detained will be set at liberty and a new request for his extradition will be accepted only when accompanied by the relevant documents required by Article IX of the present Treaty.

Article IX

The request for extradition shall be made through diplomatic channels or, exceptionally, in the absence of diplomatic agents, it may be made by a consular officer, and shall be supported by the following documents:

1. In the case of a person who has been convicted of the crime or offense for which his extradition is sought: a duly certified or authenticated copy of the final sentence of the competent court.

2. In the case of a person who is merely charged with the crime or offense for which his extradition is sought: a duly certified or authenticated copy of the warrant of arrest or other order of detention issued by the competent authorities of the requesting State, together with the depositions upon which such warrant or order may have been issued and such other evidence or proof as may be deemed competent in the case.

The documents specified in this Article must contain a precise statement of the criminal act of which the person sought is charged or convicted, the place and date of the commission of the criminal act, and they must be accompanied by an authenticated copy of the texts of the applicable laws of the requesting State including the laws relating to the limitation of the legal proceedings or the enforcement of the penalty for the crime or offense for which the extradition of the person is sought, and data or records which will prove the identity of the person sought.

The documents in support of the request for extradition shall be accompanied by a duly certified translation thereof into the language of the requested State.

OPINION APPENDIX B—Continued

Article X

When the extradition of a person has been requested by more than one State, action thereon will be taken as follows:

1. If the requests deal with the same criminal act, preference will be given to the request of the State in whose territory the act was performed.

2. If the requests deal with different criminal acts, preference will be given to the request of the State in whose territory the most serious crime or offense, in the opinion of the requested State, has been committed.

3. If the requests deal with different criminal acts, but which the requested State regards as of equal gravity, the preference will be determined by the priority of the requests.

Article XI

The determination that extradition based upon the request therefor should [1968]or should not be granted shall be made in accordance with the domestic law of the requested State, and the person whose extradition is desired shall have the right to use such remedies and recourses as are authorized by such law.

Article XII

If at the time the appropriate authorities of the requested State shall consider the documents submitted by the requesting State, as required in Article IX of the present Treaty, in support of its request for the extradition of the person sought, it shall appear that such documents do not constitute evidence sufficient to warrant extradition under the provisions of the present Treaty of the person sought, such person shall be set at liberty unless the requested State or the proper tribunal thereof shall, in conformity with its own laws, order an extension of time for the submission by the requesting State of additional evidence.

Article XIII

Extradition having been granted, the surrendering State shall communicate promptly

OPINION AP

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EXHIBIT A.

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OPINION APPENDIX A—Continued

according to the Criminal Law Code, Article 250:

> . . . to cause a fire, exposing to risk of life, the physical integrity or the property of another:
>
> Penalty—confinement, from three to six years, . . .

In considering the resulting "death", there is the qualifying [clause] included in the first portion of Article 258, which says:

> . . . If serious bodily harm results from an intentional crime of common danger, the prison sentence is increased by half—the penalty of Article 250—if it results in death, it is doubled. In the case of non-intentional [crime] [illegible] and then by lack of prudence, negligence and lack of skill—if bodily harm—as it relates to fire—results from the act, the penalty would be increased by half, if it results in death, the sentence imposed for Non-Intentional Homicide is increased by one third.

Now, looking at the facts in the narrative, my opinion is that the case, from the point of view of dual criminality, taking into consideration Brazilian legislation, fits in the first portion of Article 258 of our Criminal Law Code. Therefore I agree, on this, with Justice Francisco Rezek.

There is the issue of life sentence. The established jurisprudence of this Court, I believe, unless I am mistaken, is to lay down conditions for granting the Extradition, when there is the risk of the Person Sought being sentenced to death. Therefore, we proceed with the utmost care in clause XLVII of the list of basic guarantees, as included in the Constitution, Article 5's "caput", pertaining to foreign nationals living in Brazil. The question is: Is it possible to distinguish; is it possible to establish the application of the clause, obstructing certain procedure, if it implies in "death", and not proceed in exactly the same way, when there is risk of a life sentence? What would be the basis for the divergence, if guarantees are placed in the same clause of Article 5?

Article 5 is categorical, in clause XLVII:

> XLVII—there will be no sentences:
>
> a) of death, unless war has been declared, according to Article 84, XIX;
>
> b) of life [in prison];
>
> c) of forced labor;
>
> d) of exile;
>
> e) of cruelty;

I do not see how this Court's Jurisprudence can make a stand as to the restriction, concerning paragraph "a" and not continue in the same vein, since the basis is the same, as to paragraph "b", concerning the impossibility of a life sentence, as it exists in American law.

First, I am unable—and in this respect I am one of Justice Francisco Rezek's disciples—to place the Treaty above the Political Document of the Republic [Constitution]. I look at its content and I place the treaties at the same level as our ordinary laws.

Second, concerning specific law, which some think it is demanded by constitutional rule, we do have that. Our Criminal Law Code states that no one will remain in prison for more than thirty years. Thus, the requirement defined in our jurisprudence is being echoed by the very Brazilian Criminal Law Code.

Therefore, in this case, I remove the possibility for the Person sought for Extradition to answer for Murder in the First Degree—having in mind the material conflict, the four counts, the four Murders—and, further, I also exclude the possibility of [this person] receiving a life sentence, therefore establishing that he cannot remain under the State's custody for more than thirty years.

I grant the Request [for Extradition] on these terms, therefore, partially.

[Signature illegible]

FULL SESSION

EXTRADITION No. 654-1 USA

VOTE

JUSTICE CARLOS VELLOSO: Mr. President, in examining the request for extradition, the Brazilian judge must verify if the mentioned criminal acts, according to the laws of the Requesting State, are also typical here, [dual criminality] i.e., if they

OPINION APPENDIX A--Continued

mately joined in international treaties, and another based on constitutional statute--standard regulations that are clearly revealed as unmatched in degree of validity, efficacy and authority.

It is necessary to accentuate, in this respect, that the standard derived from international treaties, within the Brazilian legal system, allows the placement of these acts of public international law, in the hierarchy of sources, in the same plane and degree of efficacy given to internal laws of an infra-constitutional character. (JOSÉ ALFREDO BORGES, in Revista de Direito Tributário [Taxation Law Magazine], vol. 27–28, pg. 170–173; FRANCISCO CAMPOS, in RDA [expansion unknown] 47 / 452; ANTONIO ROBERTO SAMPAIO DORIA, "Da Lei Tributária no Tempo" [Of Taxation Law in Time], pg. 41, 1968; GERALDO ATALIBA, "Apontamento de Ciencia das Finanças, Direito Financeiro e Tributário" [Finance Science Finance and Taxation Law Code, Annotated], pg. 110, 1969, RT [expansion unknown]; IRINEU STRENGER, "Curso de Direito Internacional Privado" [Private International Law Course], pg. 108-112, 1978, Forense; JOSÉ FRANCISCO REZEK, "Direito dos Tratados" [Treaty Laws], pg. 470-475, items 393–395, 1984, Forense, v.g.).

Indeed, there is no hierarchic-standard precedence or priority of these [960] international acts, compared to internal positive law, specially according to clauses contained in the Constitution of the Republic, since the external standard practice is not superimposed on what is found in our Basic Law level.

I know, Mr. President that in 1986 this Court changed its orientation as far as the jurisprudence is concerned, which conditioned the handing over of the person sought for extradition to the existence of a formal agreement –previously done by the requesting State– concerning the commutation of the life sentence penalty in temporary sanction of prison sentences (RTJ 108 / 18 –RTJ 111 / 16).

In fact, Extradition Hearing No. 426 3, requested by the Government of the United States of America, led the Federal Supreme

OPINION APPENDIX A—Continued

Court, per majority vote to declare "... irrelevant the allegation for the restriction of life sentence commutation in prison sentences, due to lack of provision in the Law or in the treaty" (RTJ 115 / 969).

Despite the current prevailing orientation in this Court, I do not see—consistent with the votes in previous extradition hearings (Ext. 486--The Monarchy of Belgium, for instance)--how to give precedence to penalty rules only present in formal agreements (international treaties) or simply of a legal nature as far as rules contained in the Constitution, which prohibit, absolutely, the imposition of any penalty of a lifelong character (CC, Article 5, clause XLVII, b).

This constitutional prohibition, absolute and impossible to bypass, contains, in reality, the very basis of the legal norm consolidated by Article 75 of the Brazilian Criminal Code, which limits the maximum prison sentence to 30 (thirty) years (DAMÁSIO E. DE JESUS, "Código Penal Anotado" [Criminal Law Code Annotated] pg. 212, 5th Edition, 1995, Saraiva; CELSO DELMANTO "Código Penal Comentado" [Comments on the Criminal Law Code], pg. 121, 3rd ed., 1991, Renovar; JULIO FABRINI MIRABETE, "Manual de Direito Penal" [Criminal Law Manual], vol. I/320, item 7.6.7, 9th ed., 1995, Atlas; ALVARO MAYRINK DA COSTA, "Direito Penal--Parte Geral" [Criminal Law—General Part], vol. I, tome II / 579, 4th ed., 1992, Forense; JORGE ALBERTO ROMEIRO, "Curso de Direito Penal Militar" [Military Criminal Law Course], p. 196, item No. 114, 1994, Saraiva; LUIZ VICENTE CERNICHIARO / PAULO JOSÉ DA COSTA JÚNIOR, "Direito Penal na Constituição" [Criminal Law in the Constitution], p. 112-114, 1990, RT).

From the teachings of CELSO RIBEIRO BASTOS (Comentário à Constituição do Brasil" [Comments on the Brazilian Constitution], vol. 2 / 242, 1989, Saraiva) for whom the Brazilian criminal legislature "... grasped very well the sense of the Greater Law precept", because in fixing the limit of time mentioned (CC, Article 75), it defined the maximum penalty legally possible in our country.

EXHIBIT A.

Id. The Fifth Circuit reasoned that the Commission's invocation of broader authority to support section 4B1.1 would have prospective application. *Id.* Following the *Bellazerius* opinion, the Sentencing Commission submitted to Congress a nearly identical amendment to the background commentary to section 4B1.1. 60 Fed.Reg. 25074, 25086–87 (1995). If there is any doubt that the Commission was relying on section 994(h) as its authority for the inclusion of conspiracy in the enumeration of offenses, such doubt is swept away by the Commission's more recent efforts to extend the statutory basis to section 994, specifically subsections (a)–(f). The amendment specifically cites 28 U.S.C. § 994(a)–(f) as authority for section 4B1.1. Moreover, the stated reason for the additional background commentary is the *Price* decision. 60 Fed.Reg. at 25087. This proposed amendment confirms that the Commission's sole rationale and authority for section 4B1.1 is section 994(h), and remained so at the time Mendoza–Figueroa committed his offense, entered his guilty plea, and received his sentence.

In my view, *Price* and *Bellazerius* have the better argument because they apply the guidelines and commentary as written. The Sentencing Commission plainly meant what it said in stating that section 994(h) was the basis of its Guideline. This is made abundantly clear by the Commission's proposal to modify the basis for the Guideline, as noted by the Fifth Circuit in *Bellazerius*, 24 F.3d at 702, and by the Commission's subsequent submission of the modification to Congress. 60 Fed.Reg. at 25086.

For these reasons, I conclude that the Sentencing Commission exceeded its statutory authority by including a drug conspiracy offense in the definition of a career offender, and I would reverse the sentence.

UNITED STATES of America, Appellee,

v.

John Gregory LAMBROS, Appellant.

No. 94–1332.

United States Court of Appeals, Eighth Circuit.

Submitted May 18, 1995.

Decided Sept. 8, 1995.

Following his extradition from Brazil, defendant was convicted in the United States District Court for the District of Minnesota, Diana E. Murphy, J., of conspiracy to distribute cocaine and three counts of possession of cocaine with intent to distribute. Defendant was sentenced to life in prison, and he appealed. The Court of Appeals, Wollman, Circuit Judge, held that: (1) defendant was not subject to statute's mandatory life sentence for conspiracy to distribute cocaine; (2) career offender provisions of Sentencing Guidelines were applicable to defendant's conspiracy conviction and one of his possession convictions; (3) evidence established that defendant was not tortured in Brazil with complicity of American officials while he awaited extradition; (4) evidence sustained finding that defendant was competent to stand trial; and (5) evidence sustained finding that defendant willfully perjured himself, warranting sentencing enhancement for obstruction of justice.

Convictions affirmed; sentence vacated and remanded.

1. Conspiracy ⇨51

Defendant who was convicted of a conspiracy to distribute cocaine was not subject to statute's mandatory life sentence, where statute did not take effect until well after conspiracy end date charged in indictment. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(A)(ii), as amended, 21 U.S.C.A. § 841(b)(1)(A)(ii).

2. Criminal Law ⇨51

Defendant who was convicted of conspiracy to distribute cocaine was not eligible for

authorities that he was to be tried for heroin dealing when, Badalamenti asserts, the evidence at trial showed, at most, that he had participated in a conspiracy to import only cocaine.

The factual premise of Badalamenti's argument is incorrect. The government sought Badalamenti's extradition from Spain on the basis of an indictment which charged Badalamenti with participating in a conspiracy to import *narcotics* into the United States. At trial, the government presented evidence that Badalamenti indeed had participated in such a conspiracy. Since the government represented to Spanish authorities that Badalamenti was involved in a *narcotics* trafficking conspiracy, and then presented evidence at trial to support this charge, his claim of deception fails. His first argument, therefore, is without merit.

[47] Next, Badalamenti argues that his conviction on count two, for engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848, violated the terms of the treaty under which he was extradited. He argues that, since under the treaty a person can only be extradited for crimes punishable in both Spain and the United States, *Treaty on Extradition, May 29, 1970, United States–Spain,* art. II, 22 U.S.T. 738, 738, T.I.A.S. No. 7136, and since Spain has no crime equivalent to the one delineated at 21 U.S.C. § 848, his conviction for that crime was improper. This argument also lacks merit. In *Messina v. United States,* 728 F.2d 77, 79 (2d Cir.1984), we made it clear that an extradition treaty's requirement that extraditable crimes be punishable in both nations "is met if the particular acts charged are criminal in both jurisdictions, regardless of whether the crimes bear the same names." *See also Collins v. Loisel,* 259 U.S. 309, 311, 42 S.Ct. 469, 470, 66 L.Ed. 956 (1922). Here, count two of the indictment charged Badalamenti with having committed a series of narcotics-related violations. In essence, count two charged Badalamenti with having participated in narcotics trafficking. As Badalamenti concedes, trafficking in narcotics is punishable as a crime in Spain, thus, we conclude, his conviction on count two did not violate the extradition treaty. The fact that Spain may have no narcotics law bearing the characterization "continuing criminal enterprise" or containing the identical elements as § 848 is of no consequence here.

[48] Finally, Badalamenti argues that his forty-five year prison sentence violates the terms of his extradition order from Spain. Badalamenti argues that in the extradition order, Spain prohibited the court from sentencing him to more than thirty years in prison. However, the extradition order requires only that "the maximum period of imprisonment may not in any event exceed 30 years." Instead of selecting a thirty-year sentence, which might have resulted in mandatory release after good time credits in twenty to twenty-three years, the district judge sentenced Badalamenti to prison for forty-five years but ordered that he be released after thirty years. Therefore, the sentence does not violate the extradition order.

XIII. *Cross–Examination of Badalamenti*

[49] In its case-in-chief, the government presented evidence of taped telephone conversations in which Badalamenti spoke in what appeared to be code with several of his co-defendants about what appeared to be business transactions. In his defense case, Badalamenti took the stand and testified that these telephone conversations had nothing to do with drug trafficking. On cross-examination, the prosecutor questioned Badalamenti at length about the subject matter of these conversations. Badalamenti refused to answer many, but not all, of the prosecutor's questions. After the completion of the prosecutor's cross-examination, the other defendants and the government stipulated that if questioned by the other defendants, Badalamenti would refuse to answer the same questions he refused to answer during cross-examination by the government.

On appeal, Catalano, Mazzurco, and Giuseppe and Salvatore Lamberti argue that their rights under the due process clause of

quent conviction for violating the statute.

(AUSA's Affidavit ¶ 17.)

Presented with this affidavit and copies of the indictment and the statutory provisions, the Costa Rican Criminal Court granted extradition, and its decision was affirmed on appeal. We thus reject Campbell's contention that the Costa Rican government did not knowingly consent to his extradition to face § 924(c) charges carrying cumulative penalties.

3. *Compliance With the 50–Year Condition*

[8] Campbell also contends that his 155–year sentence violated the terms of the Costa Rican government's grant of extradition, which included the condition that the United States would not sentence him to a prison term longer than 50 years. Given the record of the communications between the two nations, and the district court's judgment as a whole, we see no violation.

In the initial grant of extradition, as translated, the Costa Rican Criminal Court imposed the condition that the United States must promise that Campbell "will not receive a sentence of more than 50 years." Extradition Decree. In response to that condition, the United States Department of State promised that Campbell would "not be sentenced *to serve* a term of imprisonment greater than 50 years" (State Department Note (emphasis added)), and the United States District Court for the Eastern District of New York gave the assurance that that court would not "impose any sentence pursuant to which the defendant *would serve* a term of imprisonment of greater than fifty years" (1997 Order at 2 (emphasis added)).

In light of the possible lack of congruence between the phrases "will not receive a sentence" and "will not be sentenced to serve," the United States, following Campbell's conviction, sought clarification as to whether the judgment could permissibly announce a longer term, so long as Campbell's release was guaranteed after no more than 50 years. The Costa Rican government plainly responded in the affirmative. The Costa Rican Ministry stated that

> the guilty verdict issued in the United States against a person who was extradited from Costa Rica *may make reference to the general amount of jail time to be imposed.* However, both the dispositive part and the explanation of purposes must establish in a clear and manifest fashion that the maximum sentence to be served is fifty years, as provided by Article 51 of the Costa Rican Criminal Code.

(Costa Rican Ministry Letter (emphasis added).) We think it plain that the Costa Rican government's reference to "verdict"—given its conception of a document that would not only announce guilt but would also impose sentence—was a reference not to the jury's finding but rather to the judgment of conviction. And plainly the Costa Rican Ministry stated that so long as the dispositive part of the judgment made clear that Campbell could "serve[ ]" no more than 50 years, the judgment could permissibly make reference to the amount of jail time that would generally be applicable. Our interpretation of the Costa Rican Ministry Letter is confirmed by the language of the accompanying letter from the Costa Rican Consul General, which stated that

> *[T]he verdict in the United States against an extradited person[ ] can refer to the total years that the accused can be indicted for.* Nevertheless, the sentence must state, in a clear and manifest way, that the maximum time the

accused must serve is 50 years. This would be the real serving time.

(Costa Rican Consul General's Letter (emphasis added).)

In accordance with these clarifications, the district court, after announcing a sentence of 155 years, stated that in order to comply with the terms of the Extradition Decree the judgment would be clarified by an accompanying order making clear that Campbell was to serve no more than 50 years of that sentence. The court then attached to the judgment of conviction an order stating that Campbell "shall be released after he serves a period of incarceration not greater than 50 years." Judgment Addendum at 2. That order constitutes an integral part of the judgment, and it clearly and dispositively establishes that the "maximum sentence" to be served by Campbell—his "real serving time"—is 50 years. Accordingly, the sentence imposed complies with the terms of the Costa Rican government's grant of extradition.

Finally, we note that it was well within the discretion of the district court to impose its sentence in the form of a 155–year sentence with an order that exactly 50 years be served, without any diminution for, *e.g.*, good time credits, in order to ensure that Campbell would be incarcerated for the full 50 years permitted by the Extradition Decree. *See, e.g., United States v. Casamento*, 887 F.2d 1141, 1185 (2d Cir.1989) (extradition decree requiring only that "the maximum period of imprisonment may not in any event exceed 30 years" not violated by judgment "sentenc[ing the defendant] to prison for forty-five years but order[ing] that he be released after thirty years" (internal quotation marks omitted)), *cert. denied*, 493 U.S. 1081, 110 S.Ct. 1138, 107 L.Ed.2d 1043 (1990).

B. *The* Apprendi *Challenge to the 20–Year § 924(c) Sentences*

[9] At the time of Campbell's offenses, § 924(c), which prohibits the use or carrying of a firearm during and in relation to a crime of violence, provided that a defendant's first § 924(c) conviction requires imposition of a prison term of five years and that "[i]n the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years." 18 U.S.C. § 924(c)(1) (1988 & Supp. II 1990). Campbell was convicted of § 924(c) violations in counts 7, 9, 11, 13, 15, 17, and 23 of the indictment. Because it was proper to treat Campbell's conviction on count 7 as his first such conviction and his convictions on the other six counts as second or subsequent convictions under that section, *see Deal v. United States*, 508 U.S. 129, 131–32, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993) (first, second, and subsequent firearms convictions may be established in the same trial), the district court sentenced Campbell to 20–year terms on each of counts 9, 11, 13, 15, 17, and 23. Campbell contends that the imposition of the 20–year sentences on those six counts violated the principle announced in *Apprendi* because the status of these convictions as second or subsequent § 924 offenses was neither alleged in the indictment nor found by the jury. We disagree.

The *Apprendi* Court, though holding that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," stated that that requirement is applicable only to facts "[o]ther than the fact of a prior conviction." 530 U.S. at 490, 120 S.Ct. 2348. And this Court has held that the fact of a prior conviction is not an element of a § 924(c) offense. *See, e.g., United States v. Anglin*, 284 F.3d 407, 409

U.S. Department of Justice

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June 4, 1993

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(05)

Dear Mr. Faulkner:

I write with regard to your request of yesterday that the government consider withdrawing the Information in order to avoid protracted litigation over whether a mandatory life sentence is barred by the specialty doctrine. The government will stand by its decision to file the Information and we will persist in our plea for a mandatory life term.

As you requested, I conferred with the Office of International Affairs at Main Justice and with the Chief of our Criminal Division. All agree that the specialty principle should not work to bar a mandatory life sentence under the circumstances of this case. Your client's conduct justifies such a penalty. Our decision to pursue that sentence is not only consistent with the Congressional penalty scheme, it is also appropriate under the policies governing plea bargaining by federal prosecutors. In that regard, I must note that your client has not expressed any interest in admitting his guilt.

Very truly yours,

FRANCIS X. HERMANN
United States Attorney

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

DRP:ac
cc: Richard Ripley, DEA
John Boulger, BCA

EXHIBIT E.