

JUNE 8, 2012

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U.S. CERTIFIED MAIL NO.  
7008-1830-0004-2646-9581

**CLERK OF THE COURT**

U.S. District Court for the District of Minnesota  
U.S. Federal Courthouse  
316 N. Robert Street  
Saint Paul, Minnesota 55101

**RE: U.S. vs. LAMBROS, Criminal No. 4-89-82**

Dear Clerk:

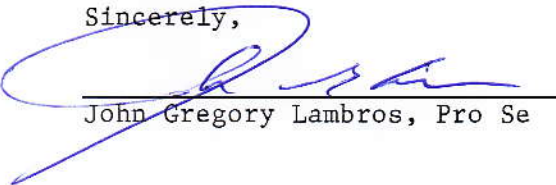
Attached for **FILING** in the above-entitled criminal matter is copy of my:

1. MOTION FOR LEAVE TO FILE SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255(f)(3) and §2255(h)(2) BY A PRISONER IN FEDERAL CUSTODY AND MEMORANDUM OF FACT AND LAW IN SUPPORT OF SAME. Dated: June 8, 2012.

I have served copy on the U.S. Attorney.

Thank you in advance for your continued support in this matter.


Sincerely,

  
\_\_\_\_\_  
John Gregory Lambros, Pro Se

**CERTIFICATE OF SERVICE**

I JOHN GREGORY LAMBROS certify that I mailed a copy of the above-entitled motion within a stamped envelop with the correct postage to the following parties on **JUNE 8, 2012** from the U.S. Penitentiary Leavenworth mailroom:

2. U.S. Clerk of the Court, as addressed above;
3. U.S. ATTORNEY'S OFFICE, U.S. COURTHOUSE, 316 N. Robert Street, St. Paul, Minnesota 55101.

  
\_\_\_\_\_  
John Gregory Lambros, Pro Se

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA  
FOURTH DIVISION

JOHN GREGORY LAMBROS, \*

Defendant - Movant, \*

vs. \*

UNITED STATES OF AMERICA, \*

Plaintiff - Respondent. \*

CIVIL NO. \_\_\_\_\_

CRIMINAL NO. 4-89-82

AFFIDAVIT FORM

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MOTION FOR LEAVE TO FILE SECOND OR SUCCESSIVE MOTION TO  
VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255(f)(3)  
AND §2255(h)(2) BY A PRISONER IN FEDERAL CUSTODY AND  
MEMORANDUM OF FACT AND LAW IN SUPPORT OF SAME.

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COMES NOW the Defendant - Movant, JOHN GREGORY LAMBROS, and hereby moves this Honorable Court for leave to file a second or successive motion to vacate, set aside or correct a sentence under 28 U.S.C. §§ 2255(f)(3) and 2255(h)(2) by a prisoner in federal custody. This motion is brought due to the U.S. Supreme Court's rulings 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 attorneys failed to communicate plea offers or failed to give them 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, the court makes clear. See, MISSOURI vs. FRYE, 132 S. Ct. 1399; 182 L. Ed. 2d 379 (March 21, 2012) and LAFLEER vs. COOPER, 132 S. Ct. 1376; 182 L. Ed. 2d 398 (March 21, 2012). MISSOURI and LAFLEER announced a type of Sixth Amendment

violation that was previously unavailable, and requires retroactive application to cases on collateral review.

#### I. TIMELINESS OF THIS MOTION

1. Movant Lambros argues that the Supreme Court recognized a new right in deciding MISSOURI and LAFLER, and seek relief pursuant to same. Title 28 U.S.C. §2255(f)(3) states that the one year limitations period begins on "the date on which the right asserted was initially recognized by the Supreme Court." The Supreme Court has clarified that the statute means what it says and rejects the argument that §2255(f)(3)'s limitations period should start when the right asserted is made retroactive. DODD vs. U.S., 545 U.S. 353, 162 L.Ed.2d 343 (2005). The United States Supreme Court decided MISSOURI and LAFLER on March 21, 2012. Therefore, this motion is timely.

#### II. RETROACTIVE APPLICATION OF MISSOURI AND LAFLER

2. MISSOURI v. FRYE: On HABEAS CORPUS REVIEW, Frye claimed his SIXTH AMENDMENT RIGHT to effective assistance of counsel was violated because his counsel failed to inform him of the prosecution's plea offer and he would have accepted the offer if he had known about it. The first hurdle Frye had to overcome in making his claim was to convince the Supreme Court that he had a right to effective assistance of counsel at the PLEA-BARGAINING STAGE, GIVEN THAT THE SUPREME COURT HAS NEVER RECOGNIZED A CONSTITUTIONAL RIGHT TO PLEA BARGAINING. Yet the majority in Frye had little trouble recognizing PLEA BARGAINING AS A "CRITICAL STAGE" AT WHICH THE SIXTH AMENDMENT GUARANTEED THE DEFENDANT THE RIGHT TO COUNSEL.

Extrapolating from the court's opinion in HILL v. LOCKHART, 474 U.S. 52 (1985) and its more recent decision in PADILLA v. KENTUCKY, 176 L. Ed. 2d 284 (2010),

Kennedy held that the SIXTH AMENDMENT GUARANTEED FRYE THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA BARGAINING. Neither HILL nor PADILLA was directly on point because they focused more on whether counsel's misadvice negated their client's guilty plea. In HILL, defense counsel misinformed the defendant of the amount of time he would have to serve before he became eligible for parole. In PADILLA, the court set aside a plea because defense counsel misinformed the defendant of the immigration consequences of the conviction. Yet the language from these cases became critical to the task of finding a general duty of effective assistance of counsel in plea bargaining. In particular, KENNEDY focused on the court's statement in PADILLA that **"THE NEGOTIATION OF A PLEA BARGAIN IS A CRITICAL PHASE OF LITIGATION FOR PURPOSES OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL."** (emphasis added)

Yet, recognizing the right to effective assistance of counsel during plea bargaining was just step number one (1) in the court's analysis. The more challenging task was defining what standard should be used in measuring whether counsel has met SIXTH AMENDMENT REQUIREMENTS. Pursuant to the ineffective assistance of counsel standard set forth in STRICKLAND v. WASHINGTON, 466 U.S. 668 (1984), a defendant must demonstrate that counsel's representation fell below professional standards.

STEP NUMBER TWO (2) OF THE STRICKLAND ANALYSIS, as applied to plea bargaining, is a little more challenging. How does a defendant show that counsel's ineffective assistance during plea bargaining prejudiced his or her case? **HERE, THE COURT HELD 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."** 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.

JUSTICE ANTONIN SCALIA wrote for the four dissenters, who objected to the majority's decision on the most basic level. As the dissent states, "The plea-bargaining process is a subject worthy of regulation, since it is the means by which 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 conviction." (emphasis added) FRYE never argued that he was not guilty of the offense to which he pleaded guilty. His conviction was fair, even though he might have hoped for a more favorable resolution of the case.

3. LAFLER v. COOPER: On HABEAS CORPUS REVIEW PURSUANT TO 28 U.S.C. §2254 AND SUBJECT TO THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (AEDPA), Anthony Cooper was charged with assault with intent to murder, possession of a firearm by a felon, possession of a firearm in commission of a felony, misdemeanor possession of marijuana, and for being a habitual offender. Cooper pointed a gun and shot at his victim's head. The shot missed and the victim ran, Cooper shot again and hit her in the buttocks, hip, and abdomen. She survived the shots.

Prosecutors twice offered to dismiss two of the charges and recommended a sentence of 51 to 85 months for the other charges. Defendant admitted his guilt in communications with the court and expressed a willingness to accept the offer. However, he 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 ended up going to trial, rejecting yet 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, the Supreme Court held that counsel's advice constituted ineffective assistance of counsel. First, the parties conceded that counsel's performance was deficient.

No competent counsel would have believed that COOPER could not be found to have the intent to murder simply because his shots had hit the victim below the waist. Second, the 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.

The real issue was what the remedy should be. HOW COULD COOPER BE MADE WHOLE AT THIS POINT? The Supreme Court held that the PROPER REMEDY WAS TO ORDER THE STATE TO REOFFER THE PLEA BARGAIN.

While raising issues similar to those of FRYE, COOPER added another dimension to the court's decision to recognize a right to effective assistance of counsel during plea bargaining. COOPER'S case was not like that of HILL, in which the court had held that improper advice by counsel could invalidate a guilty plea. COOPER WENT TO TRIAL. He did not argue that he received an unfair trial. Rather, he RELIED ON A YET-TO-BE-RECOGNIZED RIGHT TO ACCEPT A PLEA BARGAIN.

In the end, the court found the distinction to be without a difference. The defendant's fair trial did not wipe clean his lawyer's deficiencies. With plea bargaining such a critical aspect of the criminal justice system, saying that a fair trial makes up for any deficiencies in counsel's conduct during the pretrial process ignores the reality of the substantial effect plea bargaining can have on a defendant's future.

4. CONCLUSION: The lessons of FRYE and COOPER seem simple on their face: Defense counsel must convey all plea offers to a client and then provide adequate advice as to whether to accept such offers. Defense lawyers have a SIXTH AMENDMENT duty to professionally advise their clients with respect to such negotiations.

#### II(A). TITLE 28 U.S.C. §2255(f)(3):

5. The relevant portion of 28 U.S.C. §2255(f)(3) states that the

"if that right has been newly recognized by the the Supreme Court and made retroactively applicable to cases on collateral review;".

Movant Lambros states that §2255(f)(3) does not require that the **RETROACTIVITY DETERMINATION MUST BE MADE BY THE SUPREME COURT ITSELF**. Had Congress desired to limit §2255(f)(3)'s retroactivity requirement, it would have similarly placed a **"BY THE SUPREME COURT"** limitation immediately after the phrase "made retroactively applicable to cases on collateral review" in §2255(f)(3). Both FRYE and COOPER are retroactively applicable on collateral review.

II(B). TITLE 28 U.S.C. §2255(h)(2):

6. The relevant portion of 28 U.S.C. §2255(h)(2) is premised on:

"a NEW RULE OF CONSTITUTIONAL LAW, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." (emphasis added)

II(C). TEAGUE vs. LANE, 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989)

7. TEAGUE and subsequent cases, the Supreme 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, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007) (quoting GRIFFITH vs. KENTUCKY, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed. 2d 649 (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. (quoting SAFFLE vs. PARKS, 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (quoting in turn TEAGUE vs. LANE, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)(plurality opinion)(internal quotations omitted)).

8. If this Court concludes that the Supreme Court has announced an OLD RULE, **THIS MOTION APPLIES RETROACTIVELY**; however, if the RULE IS NEW, this Court must then consider whether one of the two (2) exceptions applies to make this motion retroactive. See, WHORTON, 549 U.S. at 416.

9. Movant Lambros 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 vs. WASHINGTON, 466 U.S. 668 (1984) - requiring effective assistance of counsel -, and that its holding should apply retroactively. The Supreme Court's conclusion in FRYE and COOPER is OPPOSITE THE HOLDING OF EVERY FEDERAL CIRCUIT COURT TO HAVE ADDRESS THE ISSUE. Therefore, the Supreme Court held that plea bargaining is a "critical stage" at which the SIXTH AMENDMENT GUARANTEES THE DEFENDANT THE RIGHT OF EFFECTIVE COUNSEL. The Supreme Court concluded that STRICKLAND applies to advice regarding plea bargaining.

#### II(C)(1). THE EXTENSION OF AN OLD RULE

10. In highlighting the importance of the right to effective assistance of counsel at the plea-bargaining stage, the Supreme Court recognized plea bargaining as a "critical stage" at which the SIXTH AMENDMENT guarantees a defendant the right to counsel. **THE SUPREME COURT HAS NEVER RECOGNIZED A CONSTITUTION RIGHT TO PLEA BARGAINING**. Justice Kennedy held that the SIXTH AMENDMENT GUARANTEES THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA BARGAINING. In his opinions in FRYE and COOPER, Justice Kennedy held that the minimum standards set forth in STRICKLAND vs. WASHINGTON, also apply to plea bargaining.

11. The Supreme Court did not break new ground, it simply pointed out the errors in the lower courts that prevented them from considering ineffective assistance of counsel claims under STRICKLAND. The Supreme Court found that the lower courts' impermissibly removed advice regarding plea bargaining from the



the ambit of the SIXTH AMENDMENT RIGHT TO COUNSEL.

12. Movant Lambros' research has not found a case that could show how FRYE and COOPER can be construed as a new rule not dictated by STRICKLAND. The Supreme Court has noted that "the STRICKLAND test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims," and Movant Lambros requests this Court find STRICKLAND has provided such guidance in FRYE and COOPER. See, WILLIAMS vs. TAYLOR, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed. 2d 389, 416 (2000). Therefore, FRYE and COOPER applied STRICKLAND to a new set of facts without establishing a new rule because, the Supreme Court merely cited to professional standards and expectations and identified competent counsel's duty in accordance thereof. Movant Lambros again requests this Court to find FRYE and COOPER apply retroactively.

II(C)(11). TYLER v. CAIN, 533 U.S. 656, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001).

13. In TYLER, the Supreme 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 habeas petitions if and "only if this Court has 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 THE NEW RULE." Id. at 666.

14. 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, 150 L.Ed. 2d at 646-47. 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."

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 strictly logical - - i.e., the holdings must dictate the conclusion and not merely provide principles from which one may conclude that the rule applies retroactively."

TYLER vs. CANE, 533 U.S. at 668-69, 150 L.Ed. 2d at 646-47.

**III. MOVANT LAMBROS' BACKGROUND AND FACTS IN THIS ABOVE-ENTITLED ACTION:**

**III(A). THE CHARGES IN THE INDICTMENT:**

15. Movant JOHN GREGORY LAMBROS was named as a defendant in a SECRET INDICTMENT filed on May 17, 1989, in the United States District Court for the District of Minnesota, Indictment number: **CR-4-89-82**.

16. The indictment charged Movant in five (5) counts of a nine (9) count indictment in violations of Title 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A), 841(b)(1)(B) and Title 18 U.S.C. §§ 2(a), 1952(a)(3), 1952(b)(1). The violations specifically charged:

a. **COUNT ONE (1):** Conspiracy to possess with intent to distribute in excess of five kilograms of cocaine; all in violation of Title 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). From January, 1983 to February, 1988.

b. **COUNT FIVE (5):** Aiding and abetting with intentionally possess with intent to distribute approximately two kilograms of cocaine; all in violation of Title 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and Title 18 U.S.C. § 2(a). From on or about July 8, 1987.

c. **COUNT SIX (6):** Aiding and abetting with intentionally possess with intent to distribute approximately two kilograms of cocaine; all in violation of Title 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and Title 18 U.S.C. § 2(a). From on or about October 23, 1987.

d. **COUNT EIGHT (8):** Aiding and abetting with intentionally possess with intent to distribute approximately two kilograms of cocaine; all in violation of Title 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and Title 18 U.S.C. § 2(a). From on or about December 22, 1987.

e. **COUNT NINE (9):** Travel in interstate commerce from Minnesota to California with intent to promote and manage unlawful activities, namely, the distribution of cocaine; all in violation of Title 18 U.S.C. §§ 1952(a)(3) and 1952(b)(1). From on or about February 12, 1988.

**III(B). CASE HISTORY:**

17. Movant was arrested in 1991 in Brazil on a Parole Violation Warrant and approximately 30-days later served on Indictment number **CR-4-89-82**, a "SECRET INDICTMENT" filed on May 17, 1989.

18. The Brazilian Supreme Court extradited Movant on all Counts **EXCEPT** Count Nine (9), violations of Title 18 U.S.C. §§ 1952(a)(3) and 1952(b)(1), as they **are not** crimes in Brazil.

19. Movant LAMBROS made his initial appearance in front of the U.S. District Court for the District of Minnesota and pled not guilty. Movant was represented by Attorney Charles W. Faulkner and the government was represented by U.S. Attorney Thomas B. Heffelfinger and Assistant U.S. Attorney Douglas R. Peterson.

20. MAXIMUM PENALTY FOR VIOLATIONS OF TITLE 21 U.S.C. § 841: To assist this Court in the following, Movant Lambros states that the MAXIMUM PENALTY for any violation of 21 U.S.C. §841 from July 8, 1987 thru February 1, 1988 is a term of imprisonment of "NOT MORE THAN 40 YEARS" for a violation of §841(b)(1)(A) and "NOT MORE THAN 30 YEARS" for a violation of §841(b)(1)(B). Both the 40-year and 30-year above maximum sentences are REPEAT OFFENDER PROVISIONS. Without the "REPEAT OFFENDER PROVISION", the maximum sentences are 20-YEARS and 15-YEARS. See, 21 U.S.C. §841, 1986. Act October 27, 1986, in subsec. (b). EXHIBIT A. (2002 LexisNexus Lawyers Ed., Title 21 U.S.C. Section 841, HISTORY, ANCILLARY LAWS and DIRECTIVES). PLEASE REFER TO PARAGRAPH 16 for dates of Movant Lambros' violations.

21. TITLE 21 U.S.C. §851: Please note that the U.S. Attorney did not file an "INFORMATION" within the meaning of 21 U.S.C. §851 until after the expiration of "PLEA AGREEMENT AND SENTENCING GUIDELINES RECOMMENDATION", November 23, 1992. See, November 16, 1992 letter from U.S. Attorney to Attorney Charles W. Faulkner. The docket sheet reflects that the government filed the "INFORMATION" [21 U.S.C. §851] on December 17, 1992. Therefore, if Movant Lambros had signed the "PLEA AGREEMENT" on or before NOVEMBER 23, 1992, the MAXIMUM SENTENCES HE COULD OF RECEIVED WOULD OF BEEN 20-YEARS FOR §841(b)(1)(A) AND 15-YEARS FOR §841(b)(1)(B). Movant Lambros' attorney would of been ineffective within the Sixth Amendment and a presumption of vindictiveness by the U.S. Attorney would be present if he had filed the 21 U.S.C. §851 "INFORMATION" after Movant Lambros has signed same. See, EXHIBIT B (Docket Sheet, CR-4-89-82, USA vs. LAMBROS, et al., Pages 1 thru 4)

22. NOVEMBER 16, 1992: On November 16, 1992, U.S. Attorney Thomas B. Heffelfinger and Assistant U.S. Attorney Douglas R. Peterson mailed Movant Lambros' Attorney Charles W. Faulkner a copy of the government's "PLEA AGREEMENT AND SENTENCING GUIDELINES RECOMMENDATIONS", that was valid until Monday, November 23, 1992. The "PLEA AGREEMENT" - five (5) pages in length - stated the following facts:

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:**

- 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. (emphasis added)

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 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.**" (emphasis added)

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**GUIDELINE RECOMMENDATIONS**

d. Page 3, Paragraph 7: "The defendant understands that his sentence on the **COUNT VIII** charge will be determined and based upon the applicable sentencing guidelines under the Sentencing Reform Act of 1984. The proper application of those guidelines is a matter solely within the discretion of the Court. The defendant understands that he will not be entitled to withdraw from the plea agreement in the event the Court calculates the guidelines differently from the defendant, the government and/or the probation office." (emphasis added)

e. Page 3, Paragraph 9: "For its part, the government will take the **FOLLOWING POSITION** with respect to the sentencing factors applicable to **COUNT VIII:**

- a. ....
- b. ....
- c. ....
- d. ....
- e. ....

f. The government's position results in a combined **RESULT IN A COMBINED OFFENSE LEVEL OF 32.**"

f. Page 4, Paragraph 10: "The defendant understands that his criminal history includes two drug trafficking charges from the District of Minnesota and one assault charge from this district. Given that the defendant was on parole from these offenses, the parties ESTIMATE that the defendant will receive **8 CRIMINAL HISTORY POINTS, LEAVING HIM WITHIN CATEGORY IV. ...**" (emphasis added)

g. Page 4 & 5, Paragraph 11: "The government will be FREE TO ARGUE THAT THE DEFENDANT'S CRIMINAL HISTORY MAKES HIM A CAREER OFFENDER UNDER U.S.S.G. § 4B1.1. If the Court deems the defendant to be a career offender, the APPLICABLE OFFENSE LEVEL WOULD BE LEVEL 35 (level 37 less the acceptance of responsibility reduction) and the defendant's applicable guideline range would be **292 TO 365 MONTHS**. Absent a career offender finding, the government's guideline calculations (level 32-Category IV) find the applicable guideline range to be 168 to 210 months." (emphasis added)

EXHIBIT C: (November 16, 1992 letter from U.S. Attorney Heffelfinger to Attorney Charles Faulkner - 1 page - and attached "PLEA AGREEMENT AND SENTENCING GUIDELINES RECOMMENDATION", in USA vs. LAMBROS, CR-4-89-82(5).)

23. NOVEMBER 17, 1992: On November 17, 1992, Attorney Charles W. Faulkner mailed Movant Lambros a copy of U.S. Attorney Heffelfinger's November 16, 1992 letter to him - as described in paragraph 22 - and stated the following facts within the cover letter to Movant Lambros:

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"Attached please find the results of our negotiations for a **PLEA AGREEMENT IN YOUR CASE**. It allows you considerable latitude to argue that you ought to be treated in the same range as the other defendants and it AVOIDS THE MANDATORY LIFE COUNT. I think it is reasonable to conclude that the Government won't go much further than this and that they would relish the possibility of telling Judge Murphy that you were made a fair offer and rejected it. thus setting you up for a **LIFE TERM WITHOUT POSSIBILITY OF PAROLE**." (emphasis added)

.....

"My best advice given all the circumstances is that you should accept this offer. You must contact me to do so before **NOVEMBER 23, 1992**." (emphasis added)

EXHIBIT D: (November 17, 1992 letter from Attorney Faulkner to Movant Lambros).

24. JANUARY 4, 1993: Movant's jury panel and trial started on January 4, 1993. The government moved to dismiss Count 9 due to the Brazilian Supreme Court's extradition order.

25. On January 15, 1993, the jury found Movant Lambros guilty of **COUNTS 1, 5, 6, and 8.**

26. On January 27, 1994, Movant Lambros was sentenced to the following terms of imprisonment:

- a. **COUNT ONE (1):** Mandatory life without parole sentence.
- b. **COUNT FIVE (5):** 120 months sentence.
- c. **COUNT SIX (6):** 120 months sentence.
- d. **COUNT EIGHT (8):** 360 months sentence.

all sentences are to be served concurrently. Movant was also sentenced to serve eight (8) years of supervised release.

27. **SEPTEMBER 8, 1995:** The U.S. Court of Appeals for the Eighth Circuit **VACATED** Count One (1) "MANDATORY LIFE WITHOUT PAROLE SENTENCE" and remanded the case for resentencing on that Count. See, U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995). The Court held that under the Ex Post Facto Doctrine, the MANDATORY LIFE WITHOUT PAROLE SENTENCE MUST BE VACATED, AS IT WAS IMPOSED UNDER THE VERSION OF THE STATUTE NOT IN PLACE AT THE TIME OF THE CONSPIRACY. Therefore, proof that Movant Lambros was given ineffective assistance of counsel, as the Court, U.S. Attorney and Movant's attorney gave Movant incorrect advise as to the maximum sentence he could receive during plea bargaining.

28. **FEBRUARY 10, 1997:** Movant Lambros was **RESENTENCED ON COUNT ONE (1)**. Movant was resentenced to **360-MONTHS ON COUNT ONE (1)**. The following facts occurred during Movant's resentencing:

- a. Movant was represented by Attorney Colia Ceisel.
- b. RESENTENCING TRANSCRIPT PAGES 4, 5, 6, & 7: "Despite the limited nature of these proceedings, the defendant has interposed numerous motions and supporting papers requesting relief from resentencing. Procedurally, these motions are somewhat unorthodox in that they appear to be addressed both towards convictions and sentences for which the defendant is currently incarcerated as well as the conviction for which he is **ABOUT TO BE SENTENCED.** **THE DEFENDANT HAS INFORMALLY SUGGESTED THAT THESE MOTIONS BE CONSIDERED UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 33, AS QUOTE, NEW TRIAL, END QUOTE, MOTIONS.**

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ALTERNATIVELY, THE COURT CAN SIMPLY DISMISS ALL OF THE MOTIONS NOT DIRECTLY RELATED TO THE PROCEEDINGS WITHOUT PREJUDICE.

However, this would merely seem to ensure the defendant would rise them again on appeal and beyond, although many were previously litigated and thus are procedurally barred."

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"THEREFORE, WITH THE EXCEPTION OF CERTAIN PRELIMINARY MATTERS, DEFENDANT'S MOTIONS WILL BE TREATED AS ARISING UNDER 28 UNITED STATES CODE, SECTION 2255, AND SUBJECT TO THE STATUTE -- I AM SORRY -- THE STRICTURES OF THAT STATUTE." See, Page 5, Line 18 thru 23. (emphasis added)

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"THE DEFENDANT'S MOTIONS AT THIS TIME ARE DENIED. A written detailed order to that effect will follow." See, Page 7, Lines 19 thru 21. (emphasis added)

c. TRANSCRIPT PAGES 19 and 20: "Your Honor, when you were speaking now, YOU SAID ALL THE MOTIONS THAT ARE FILED TO DATE ARE BEING CONSTRUED UNDER § 2255?"

"THE COURT: THAT'S WHAT I SAID, YES."

"THE DEFENDANT: Okay. And you are saying none of them are under the RULE 33?"

"THE COURT: Yes."

"THE DEFENDANT: Okay. I would like to read for you the RULE 33, and again I would like to reemphasize the interest of justice facet of RULE 33, WHICH I BELIEVE THIS COURT IS DENYING ME THE DUE PROCESS OF, and a motion for a new trial based on the grounds of newly discovered evidence may be made only before or within two years after -- the key word -- final judgment. 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?"

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"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." (emphasis added)

EXHIBIT E: (February 10, 1997, RESENTENCING TRANSCRIPT in USA vs. LAMBROS, Criminal No. 4-89-82(05). Pages 1, 2, 3, 4, 5, 6, & 7)

29. MOVANT WAS DENIED THE RIGHT TO FILE A TITLE 28 U.S.C. § 2255 TO RAISE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AGAINST HIS ATTORNEY: As proved above, the RESENTENCING COURT reclassified Movant's RULE 33 Motions as a §2255 motion against Movant's requests not to. Also, the Court did not offer Movant an opportunity to withdraw his RULE 33 motions. The Court deprived Movant the



opportunity for effective collateral review because Movant's FIRST § 2255 WAS DISMISSED AS A SECOND AND SUCCESSIVE § 2255 MOTION UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (AEDPA). The Eighth Circuit Court of Appeals allowed the above action to occur when Movant appealed.

30. SEPTEMBER 6, 2002: The Eight Circuit finally addressed the above issue of district court's reclassifying MOTIONS/PETITIONS as a 28 U.S.C. § 2255 motion. See, MORALES vs. USA, 304 F.3d 764 (8th Cir. 2002). The Court held:

"When a district court intends to reclassify a pro se litigant's pleading as a § 2255 motion, it must do two (2) things. First, the court MUST warn the litigant of the restrictions on second or successive motions, and of the one-year limitations period, set forth in 28 U.S.C. § 2255. Second, the court MUST provide him an opportunity either to consent to the reclassification or to withdraw his motion. Because the district court did not provide Morales with this information and an opportunity to choose which course of action to take, this case MUST BE REMANDED so that Morales may decide whether to consent to reclassification or to withdraw his motion."

See, MORALES, at 766.

31. The U.S. Supreme Court held that "Federal District Court's intending to RECHARACTERIZE pro se litigant's motion as first motion for post-conviction relief under 28 U.S.C. § 2255 held REQUIRED (1) to notify litigant of intended recharacterization and its consequences, and (2) to provide opportunity to withdraw or amend motion. See, CASTRO vs. USA, 540 U.S. 375, 157 L.Ed. 2d 778, 124 S. Ct. 786 (2003). OF INTEREST IS THE FACT THAT IN 1994 CASTRO FEDERAL PRISONER ATTACKED HIS FEDERAL DRUG CONVICTION BY FILING A "MOTION FOR A NEW TRIAL UNDER RULE 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE." THE EXACT SAME TYPE OF MOTION MOVANT LAMBROS FILED TO NO-AVAIL. What is important here is the fact that the Supreme Court held:

\*\*\* a. "Because of the absence of the required warning, the prisoner's 1994 motion COULD NOT BE CONSIDERED A FIRST § 2255 MOTION."

\*\*\* b. "Thus, THE PRISONER'S 1997 MOTION COULD NOT BE CONSIDERED "SECOND OR SUCCESSIVE" FOR § 2255 PURPOSES."

EXHIBIT F. (CASTRO vs. USA, 157 L.Ed. 2d 778 (2003))

32. April 18, 1997, Habeas Corpus petition under 28 U.S.C. §2255 filed by Movant Lambros.
33. April 28, 1997, direct appeal as to RESENTENCING.
34. May 1, 1997, Habeas Corpus petition dismissed.
35. May 8, 1997, Motion for leave to reconsider/amend May 1, 1997 ORDER.
36. July 31, 1997, District Court denied motion for leave to amend motion for reconsideration.
37. August 25, 1997, Application for a Certificate of Appealability and Notice of Appeal filed.
38. September 2, 1997, direct appeal denied.
39. Writ of Certiorari on denial filed.
40. January 12, 1998, Writ of Certiorari denied.
41. July 7, 1998, Court of Appeals for the Eighth Circuit denied application for Certificate of Appealability dated April 18, 1997.
42. **JANUARY 2, 1999, Movant filed § 2255 petition REGARDING RESENTENCING ON COUNT ONE (1).**
43. March 5, 1999, Traverse Response to government opposition dated February 19, 1999.
44. April 6, 1999, Honorable Judge Robert G. Renner, DISMISSED Movant's § 2255 petition.
45. May 3, 1999, April 30, 1999, Motion for Issuance of Certificate of Appealability and Notice of Appeal filed.
46. May 19, 1999, Honorable Judge Robert G. Renner, granted Movant's Application for a Certificate of Appealability.
47. Order granting Movant's motion for extension of time to file appellate brief, dated September 24, 1999. Movant granted until October 4, 1999,

to file appellate brief.

48. November 30, 2000, U.S. Court of Appeals for the Eighth Circuit affirmed the District Court.

49. Movant brought a motion for reconsideration.

50. December 1, 2000, Motion for Reconsideration DENIED.

51. Movant Lambros requested REHEARING by the panel.

52. February 1, 2001, the Petition for Rehearing was DENIED.

53. May 2, 2001, Movant Lambros filed a Writ of Certiorari to the U.S. Supreme Court that was DENIED.

#### IV. INEFFECTIVE ASSISTANCE OF COUNSEL

##### IV(A): LEGAL CASES TO SUPPORT INEFFECTIVE ASSISTANCE OF COUNSEL AT PLEA BARGAINING AS TO POTENTIAL SENTENCE LAMBROS COULD RECEIVE.

54. U.S. vs. GORDON, 156 F.3d 376 (2nd Cir. 1998). Defense counsel's performance in grossly underestimating defendant's SENTENCE EXPOSURE IN LETTER to defendant FELL BELOW PREVAILING PROFESSIONAL NORMS FOR ADVISING CRIMINAL DEFENDANT DURING PLEA NEGOTIATIONS. *Id.* at 376 Head Note 5. Reasonable probability existed that, but for defense counsel's unprofessional error in grossly underestimating that defendant's maximum sentencing exposure was ten years, defendant would have accepted guilty plea offer, even if court and government had advised defendant before trial that he faced "MINIMUM" sentence of ten years, where actual maximum sentence was approximately 27 years, and defendant stated that BUT FOR his counsel's advise he would have accepted whatever plea had been offered. *Id.* at 376, Head Note 6. District Court did not abuse its discretion in VACATING DEFENDANT'S CONVICTIONS and ordering NEW TRIAL AS REMEDY for violation of defendant's right to effective assistance of counsel at PLEA BARGAINING STAGE, resulting from defense COUNSEL'S FAILURE TO CORRECTLY ADVISE DEFENDANT OF POTENTIAL MAXIMUM SENTENCE. *Id.*

\*\*\*

at 376, Head Note 8. This is an excellent case that outlines the steps needed in analyzing ineffective assistance of counsel, "reasonable probability" that the outcome would be different and "objective evidence" precedent. It is clear that Attorney Faulkner was ineffective in informing Movant Lambros that the only sentence he could receive was a **MANDATORY LIFE SENTENCE WITHOUT PAROLE ON COUNT ONE (1) AND LIFE SENTENCES ON THE OTHER COUNTS.**

55. U.S. vs. HERNDON, 7 F.3d 55 (5th Cir. 1993). The Fifth Circuit addressed the question, "[T]he question is whether AWARENESS of a mandatory minimum [maximum] would have affected the defendant's decision to PLEAD GUILTY." Id. at 58. Due to the fact the defendant was NOT "AWARE OF OR UNDERSTOOD" the existence of the **STATUTORY SENTENCE [21 U.S.C. §841(b)(1)(B)]** he could receive the Court VACATED his conviction and sentence, and REMANDED his case to the trial court for REPLEADING.

56. U.S. vs. SOTO, 132 F.3d 56 (D.C. Cir. 1997). The Court stated, "[W]hether lawyers get SENTENCING GUIDELINES WRONG by misinterpreting implication of particular provision or by failing to raise potentially helpful provision altogether, such drastic missteps CLEARLY satisfy professional standards portions of test for INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS: THEY AMOUNT TO ERRORS SO SERIOUS THAT COUNSEL WAS NOT FUNCTIONING AS COUNSEL GUARANTEED DEFENDANT BY SIXTH AMENDMENT." See, Id. at 56, Head Note 6.

57. U.S. vs. GAVIRIA, 116 F.3d 1498, 1511-14 (D.D. Cir. 1997). The United States Court of Appeals for the District of Columbia Circuit stated, "[R]emand was REQUIRED of defendant's claim that counsel was INEFFECTIVE FOR INCORRECTLY INFORMING DEFENDANT THAT IF HE ACCEPTED PROSECUTION'S "WIRED" PLEA AGREEMENT requiring codefendants to plead guilty as well, HE WOULD BE SUBJECT TO SENTENCE OF 36 YEARS TO LIFE, WHEN, IN FACT, HE ACTUALLY WOULD HAVE FACED SENTENCE OF 15 TO 22 YEARS; evidentiary hearing was required on issues of whether defendant would have taken government's plea offer had he known his TRUE EXPOSURE under SENTENCING GUIDELINES, and whether government would have entertained "unwired plea from defendant." Id. at 1498, Head Note 5.

OF THE LAW IN RELATION TO THE FACTS," Id. at 936.

V. MOVANT LAMBROS' CONVICTION AND SENTENCES MUST BE VACATED BASED ON THE FOLLOWING VIOLATIONS OF MISSOURI vs. FRYE, 132 S. CT. 1399 (2012) AND LAFLEER vs. COOPER, 132 S.Ct. 1376 (2012):

ISSUE ONE (1):

MOVANT LAMBROS' ATTORNEY WAS INEFFECTIVE DURING THE PLEA OFFER AS HE DID NOT POSSESS AN UNDERSTANDING OF THE STATUTORY LAW AND GUIDELINES ABOUT POSSIBLE SENTENCES MOVANT LAMBROS COULD RECEIVE. LAMBROS' SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED.

Movant Lambros, pursuant to the ineffective assistance of counsel standard set forth in STRICKLAND vs. WASHINGTON, 466 U.S. 668 (1984), will offer the following facts that demonstrate that his counsel's representation fell below professional standards during plea bargaining. Also the following will prove that Movant Lambros was PREJUDICED, as he has already proven that his "MANDATORY LIFE SENTENCE WITHOUT PAROLE" was illegal as per the Eighth Circuit Court of Appeals in U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995) and that "a reasonable probability [exists] 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."

No competent counsel would have believed the following facts are true if he had researched the statutory law and sentencing guidelines:

64. **November 16, 1992: "PLEA AGREEMENT AND SENTENCING GUIDELINE RECOMMENDATION"**, by U.S. Attorney Heffelfinger to Movant Lambros. See, Paragraph 22 and 23 above and EXHIBITS C and D.

a. **COUNT ONE (1)**, a conspiracy to distribute in excess of

five (5) kilograms of cocaine from January 1983 thru February, 1988; all in violation of Title 21 U.S.C. §§ 846 and 841(B)(1)(A) carried a **STATUTORY PENALTY OF MANDATORY LIFE IMPRISONMENT WITHOUT PAROLE**. The maximum penalty was "**NOT MORE THAN 40 YEARS**" if the government had filed a Title 21 U.S.C. §851. See, Paragraph 21. Please note that the government had not filed a § 851 during PLEA BARGAINING. Therefore, a maximum sentence of **20-YEARS**. See, EXHIBIT A.

b. **COUNT FIVE (5):** Intent to possess two (2) kilograms of cocaine on July 8, 1987; in violation of Title 21 U.S.C. § 841(b)(1)(B), carried a **MAXIMUM PENALTY OF LIFE IMPRISONMENT WITHOUT PAROLE**. The maximum penalty was **NOT MORE THAN 30-YEARS** with the "REPEAT OFFENDER PROVISION" and **15-YEARS** without the filed § 851.

c. **COUNT SIX (6):** Intent to possess two (2) kilograms of cocaine on October 23, 1987; in violation of Title 21 U.S.C. § 841(b)(1)(B), carried a **MAXIMUM PENALTY OF LIFE IMPRISONMENT WITHOUT PAROLE**. The maximum penalty was **NOT MORE THAN 30-YEARS** with the "REPEAT OFFENDER PROVISION" and **15-YEARS** without the filed § 851.

d. **COUNT EIGHT (8):** Intent to possess two (2) kilograms of cocaine on December 22, 1987; in violation of Title 21 U.S.C. § 841(b)(1)(B) carried a **MAXIMUM PENALTY OF LIFE IMPRISONMENT WITHOUT PAROLE**. The maximum penalty was **NOT MORE THAN 30-YEARS** with the "REPEAT OFFENDER PROVISION" and **15-YEARS** without the filed § 851.

e. **"CRIMINAL HISTORY MAKES HIM [Lambros] A CAREER OFFENDER UNDER U.S.S.G. § 4B1.1.** If the Court deems him a **CAREER OFFENDER, THE APPLICABLE OFFENSE LEVEL WOULD BE LEVEL 35 (Level 37 less the acceptance of responsibility reduction):** This is not true. None to the above Counts carried a **STATUTORY MAXIMUM OF LIFE**. Therefore, the offense level under § 4B1.1(B) is **34 (25 years or more)**. The plea agreement should of read, **THE APPLICABLE OFFENSE LEVEL WOULD BE LEVEL 32 (Level 34 less acceptance of responsibility reduction.**

f. As stated above, the PLEA BARGAIN stated on page 4 and 5 in a continuation of Movant Lambros' "CAREER OFFENDER" status, "... and the defendant's applicable guideline range would be 292 to 365 months [24.3 to 30.4-years]. Absent a career offender finding, the government's guideline calculations (level 32-Category IV) find the applicable guideline range to be 168 to 210 months [14 to 17.5-years]". **THIS IS NOT TRUE.** As stated within the above paragraph and this paragraph, Movant Lambros could not of received a life sentence in any of the counts he was indicted on, as per the STATUTES - 21 U.S.C. §§ 846 and 841. Therefore, the maximum sentence per the applicable "CAREER GUIDELINE" finding **WOULD BE LEVEL 32 within Category VI - A SENTENCING RANGE OF 210 to 262 MONTHS [17.5 to 21.8-years]**.

65. The above can also be verified by review of Movant Lambros' "PRESENTENCE INVESTIGATION REPORT", that was prepared by U.S. Probation Officer Jay F. Meyer. This report was prepared after Movant was found guilty by a jury. The PSI clearly states on pages F.1 and F.2 that the "STATUTORY PENALTY" for Count 1 was a "MANDATORY LIFE" and Counts 5, 6, and 8 [renumbered by the Court "Counts 2, 3, and 4"] "A minimum 10 years imprisonment up to LIFE IMPRISONMENT ..". Also, Page 7 and 8, Paragraph 40 offers an overview of Movant Lambros being considered a "CAREER OFFENDER" according to §4B1.1 with an offense level 37.

66. EXHIBIT G. - Movant Lambros' "PRESENTENCE INVESTIGATION REPORT", Pages F.1, F.2, 7, and 8.

67. CAREER-OFFENDER STATUS NOT LAWFULLY APPLICABLE TO DEFENDANTS CONVICTED OF AIDING AND ABETTING, ATTEMPTING, OR CONSPIRING TO COMMIT DRUG CRIMES AT THE TIME OF MOVANT LAMBROS' "PLEA BARGAINING" - NOVEMBER 16, 1992: Movant Lambros' attorney did not research the law regarding "CAREER-OFFENDER" and improperly advised Movant that he could be sentenced as a "CAREER-OFFENDER". This was not true on November 16, 1992, as it was improper to apply "CAREER CRIMINAL" enhancements to defendants convicted of aiding and abetting, attempting, or conspiring to commit

**CERTAIN NARCOTIC OFFENSES WHICH INCLUDED 21 U.S.C. §§ 846 and 841.** See, U.S. vs. PRICE, 990 F.2d 1367 (D.C. Cir. April 23, 1993) and U.S. vs. BELLAZERIUS, 24 F.3d 698 (5th Cir. June 17, 1994). The Eight Circuit addressed this issue in MENDOZA-FIGUEROA, 65 F.3d 691, 693 (8th Cir. December 6, 1994) and denied same.

68. **EXHIBIT H. - U.S. vs. SEALS**, 130 F.3d 451, 463 (D.C. Cir. 1997), which offers an excellent overview of U.S. vs. PRICE, 990 F.2d 1367 (D.C. Cir. 1993). (aiding and abetting, conspiracy and attempting to commit certain narcotic offenses are not .... sentenced as a "CAREER OFFENDER" ...)

69. It is important to note that the **SENTENCING GUIDELINES** went into effect on **November 1, 1987**. See, U.S. vs. CURRY, 902 F.2d 912, 917 (11th Cir. 1990).

70. The Eighth Circuit made it clear that Movant Lambros' attorney was ineffective in not knowing the **STATUTORY MAXIMUM SENTENCES** Movant could receive. What is more than strange in Movant Lambros' case is the fact that the U.S. Attorney, U.S. Probation Office and the Court did not **KNOW THE STATUTORY MAXIMUM SENTENCES MOVANT LAMBROS COULD RECEIVE!!!** See, U.S. vs. GRANADOS, 168 F.3d 343, 345 (8th Cir. 1999).

**CONCLUSION OF ISSUE ONE (1):**

71. WHEREFORE, as per MISSOURI vs. FRYE and LAFLEER vs. COOPER, Movant Lambros respectfully requests this court to vacate Counts 1, 5, 6, and 8 due to Movant's attorney being ineffective during PLEA BARGAINING. Movant believes the U.S. Attorney must re-extend the plea offer to Movant.

**VI. MOVANT LAMBROS REQUESTS AN EVIDENTIARY HEARING:**

72. Movant Lambros believes he is entitled to an evidentiary hearing in this action and requests same. "A § 2255 motion can be dismissed without a hearing if (1) the petitioner's allegations, accepted as true, would not entitle



him to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." See, CARDENAS-CELESTINO vs. U.S., 552 F.Supp. 2d 962, 968 (W.D. Mo. 2008)(citing SANDERS vs. U.S., 341 F.3d 720, 721 (8th Cir. 2003)). In other words, a petitioner is "entitled to a hearing on a \$2255 motion 'unless the motion, files, and record conclusively show' that the defendant is not entitled to relief." See, U.S. vs. REGENOS, 405 F.3d 691, 694 (8th Cir. 2005) (quoting KOSKELA vs. U.S., 235 F.3d 1148, 1149 (8th Cir. 2001)). In this case, Movant Lambros' allegations are proven facts and can be accepted as true, as the record is attached as exhibits.

**VII: CASES SUPPORTING RETROACTIVE APPLICATION OF MISSOURI vs. FRYE and LAFLER vs. COOPER:**

73. U.S. vs. RAFAEL E. RIVAS-LOPEZ, No. 10-20436 (5th Cir. April 18, 2012). The court vacated Movant's sentence due to ineffective assistance of counsel when his attorney overestimated his sentence exposure under a proffered plea due to the holdings in MISSOURI vs. FRYE and LAFLER vs. COOPER. This action was filed as a **§ 2255 MOTION** raising claims of ineffective assistance of counsel.

74. U.S. vs. YUBY RAMIREZ, the Eleventh Circuit offered immediate release to a women sentenced to **LIFE** on a 2001 conviction. This was a **§2255 motion submitted by Yuby Ramirez**. Movant Lambros is not able to offer the case cite, as the prison law library computers have not been updated to provide May 2012 rulings. The information was contained within **THE WALL STREET JOURNAL, Monday, May 7, 2012,**

**Page B6:**

**"Less than TWO MONTHS AGO, A DIVIDED U.S. SUPREME COURT RULED THAT A DEFENDANT'S CONVICTION MAY BE VOIDED IF THE DEFENDANT HAD TURNED DOWN A PLEA BARGAIN BECAUSE OF IN-COMPETENT LEGAL ADVICE.**

On Thursday, a federal appeals court threw out the life sentence of a women convicted in 2001 on a drug-related

murder-conspiracy charge.

The decision by the 11th U.S. Circuit Court of Appeals means that a Miami woman, YUBY RAMIREZ, soon will be released from prison after serving 11-years.

Ms. Ramirez's former lawyers turned down two plea offers from federal prosecutors, believing that she faced no more than 10-years in prison and that she would prevail on a statute-of-limitations argument.

The appeals court on Thursday ordered that she be released from custody because she had already served more than 10-years in prison - the longest of the two plea offers."

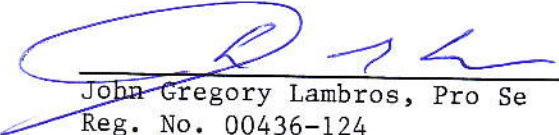
**VIII: CONCLUSION:**

75. For all of the foregoing reasons, this Court must authorize a SECOND or SUCCESSIVE motion and VACATE Movant's convictions and sentences in Counts 1, 5, 6, and 8.

76. Movant requests this Court to follow the majority in LAFLER v. COOPER and offer Movant Lambros a remedy that must "NEUTRALIZE THE TAIN" of the constitutional violations and due to the fact that **MANDATORY SENTENCES** limited sentencing discretion, the circumstances require "the prosecution to re-offer the plea proposal."

77. I declare under penalty of perjury that the foregoing is true and correct pursuant to Title 28 U.S.C. Section 1746.

**EXECUTED ON: JUNE 8, 2012**

  
\_\_\_\_\_  
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## 21 USCS

### Food and Drugs

### §§ 601 – 847

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EXHIBIT A.

P. L. 91-513, 84 Stat. 1285, which appears generally as 21 USCS §§ 951 et seq. For full classification of such Title, consult USCS Tables volumes.

**Effective date of section:**

This section took effect on the first day of the seventh calendar month that began after the day immediately preceding the date of enactment, pursuant to § 704(a) of Act Oct. 27, 1970, P. L. 91-513, which appears as 21 USCS § 801 note.

**Amendments:**

**1978.** Act Nov. 10, 1978 (effective on enactment, as provided by § 203(a) of such Act, which appears as 21 USCS § 830 note), in subsec. (b), in para. (1)(B), inserted “, except as provided in paragraphs (4) and (5) of this subsection,” and added para. (5); and added subsec. (d).

**1980.** Act Sept. 26, 1980, in subsec. (b), in para. (1)(B), substituted “except as provided in paragraphs (4), (5), and (6) of this subsection” for “except as provided in paragraphs (4) and (5) of this subsection”, and added para. (6).

**1984.** Act Oct. 12, 1984, in subsec. (b), in the introductory matter, inserted “or 405A”, in para. (1), redesignated subparas. (A) and (B) as subparas. (B) and (C), added new subpara. (A), in subpara. (B) as so redesignated, substituted “except as provided in subparagraphs (A) and (C)”, for “which is a narcotic drug”, substituted “\$125,000” for “\$25,000”, substituted “of a State, the United States, or a foreign country” for “of the United States”, and substituted “\$250,000” for “\$50,000”, in subpara. (C) as so redesignated, substituted “less than 50 kilograms of marihuana, 10 kilograms of hashish, or one kilogram of hashish oil” for “a controlled substance in schedule I or II which is not a narcotic drug” substituted “and (5)” for “, 5), and (6)”, substituted “\$50,000” for “\$15,000”, substituted “of a State, the United States, or a foreign country” for “of the United States”, and substituted “\$100,000” for “\$30,000”, in para. (2), substituted “\$25,000” for “\$10,000”, substituted “of a State, the United States, or a foreign country” for “of the United States”, and substituted “\$50,000” for “\$20,000”, in para. (3), substituted “\$10,000” for “\$5,000”, substituted “of a State, the United States, or a foreign country” for “of the United States”, and substituted “\$20,000” for “\$10,000”, in para. (4), substituted “(1)(C)” for “(1)(B)”, substituted para. (5) for one which read: “Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this title, phencyclidine (as defined in section 310(c)(2)) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than \$25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this title or 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 20 years, a fine of not more than \$50,000, 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

HISTORY; ANCILLARY LAWS AND DIRECTIVES OF TITLE 21 U.S.C. TITLE 841.

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

HISTORY; ANCILLARY LAWS AND DIRECTIVES OF TITLE 21 U.S.C. TITLE 841.

“(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

4.

HISTORY; ANCILLARY LAWS AND DIRECTIVES OF TITLE 21 U.S.C. TITLE 841.

who violates subsection (a) by cultivating a controlled substance on Federal property shall be fined not more than—

- “(A) \$500,000 if such person is an individual; and
- “(B) \$1,000,000 if such person is not an individual.”;

in subsec. (c), substituted “, 405A, or 405B” for “405A”; and in subsec. (d), in the concluding matter, 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 \$15,000”, and added subsec (e).

Such Act further (effective as provided by § 1004(b) of such Act, which appears as a note to this section), in subsecs. (b)(1)(D), (b)(2) and (c), substituted “term of supervised release” for “special parole term”.

1988. Act Nov. 18, 1988, in subsec. (b)(1), in subpara. (A), in cl. (vi), deleted “or” following the semicolon, in cl. (vii), inserted “, or 1,000 or more marihuana plants regardless of weight”, added “or” following the semicolon, and added cl. (viii), and in the concluding matter, substituted “a prior conviction for a felony drug offense has become final” for “one or more prior convictions” and inserted the sentence beginning “If any person commits a violation . . .”.

Such Act further, in subsec. (b), in para. (1), in subpara. (B), in cl. (vi), deleted “or” following the semicolon, in cl. (vii), inserted “, or 100 or more marihuana plants regardless of weight”, added “or” following the semicolon, and added cl. (viii), and in subpara. (D), substituted “50 or more marihuana plants” for “100 or more marihuana plants”, and added para. (6).

Act Nov. 18, 1988 (effective 120 days after enactment, as provided by § 6061 of such Act, which appears as 21 USCS § 802 note) substituted subsec. (d) for one which read:

- “(d) Any person who knowingly or intentionally—
  - “(1) possesses any piperidine with intent to manufacture phencyclidine except as authorized by this title, or
  - “(2) possesses any piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture phencyclidine except as authorized by this title,

shall be sentenced to a term of imprisonment of not more than 5 years, 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, or both.”.

Such Act further added subsecs. (f) and (g).

1990. Act Nov. 29, 1990, in subsec. (b)(1), in subparas. (A)(ii)(IV) and (B)(ii)(IV), substituted “any of the substances” for “any of the substance”.

Such Act further, in subsec. (b)(1)(A)(viii), substituted “or 1 kilogram or more of a mixture of substance containing a detectable amount of methamphetamine” for “or 100 grams or more of a mixture or substance containing a detectable among of methamphetamine”.

Such Act further, in subsec. (b), substituted “section 418, 419, or 420” for “section 405, 405A, or 405B”.

Such Act further, in subsec. (c), purported to substitute “section 418, 419,



S.

or 420” for “section 405, 405A, or 405B”; such substitution was not executed since subsec. (c) was repealed by Act Oct. 12, 1984, P. L. 98-473, 98 Stat. 2030.

**1994.** Act Sept. 13, 1994, in subsec. (b), in the introductory matter, inserted “409,” in para. (1), in subpara. (A), in the concluding matter, inserted “409” and deleted “For purposes of this subparagraph, the term “felony drug offense” means an offense that is a felony under any provision of this title or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances.” following “preceding sentence.”, and, in subpara. (B) concluding matter and in subparas. (C) and (D), substituted “a prior conviction for a felony drug offense has become final” for “one or more prior convictions 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”.

**1996.** Act Oct. 3, 1996, in subsec. (d), in the concluding matter, substituted “not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical,” for “not more than 10 years,”; and, in subsec. (f), inserted “manufacture, exportation,” and deleted “regulated” preceding “transaction”.

Act Oct. 13, 1996, in subsec. (b), in para. (1), in subpara. (C), inserted, “or 1 gram of flunitrazepam,” and, in subpara. (D), inserted “or 30 milligrams of flunitrazepam,”, and added para. (7).

**1998.** Act Oct. 21, 1998, in subsec. (b)(1), in subpara. (A)(viii), substituted “50 grams” for “100 grams” and substituted “500 grams” for “1 kilogram” and, in subpara. (B)(viii), substituted “5 grams” for “10 grams” and substituted “50 grams” for “100 grams”.

**2000.** Act Feb. 18, 2000, in subsec. (b), in para. (1), in subpara. (C), inserted “gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillary J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999),” and, in subpara. (D), substituted “(other than gamma hydroxybutyric acid), or 30” for, “or 30” and, in para. (7)(A), inserted “or controlled substance analogue”; and redesignated subsecs. (d)–(g) as subsecs. (c)–(f), respectively.

#### Other provisions:

**Repeal of subsec. (d).** Act Sept. 26, 1980, P. L. 96-359, § 8(b), 94 Stat. 1194, deleted § 203(d) of Act Nov. 10, 1978, P. L. 95-633, 92 Stat. 3777, which would have repealed subsec. (d) of this section, effective Jan. 1, 1981.

**Effective date of Oct. 27, 1986 amendments.** Act Oct. 27, 1986, P. L. 99-570, Title I, Subtitle A, § 1004(b), 100 Stat. 3207-6, provides: “The amendments made by this section [amending 21 USCS §§ 841, 845, 845a, 960, 962] shall take effect on the date of the taking effect of section 3583 of title 18, United States Code.”



CRIMINAL DOCKET - U.S. District Court

U.S.

(LAST, FIRST, MIDDLE)

PO  0864 4 Assigned 6412  
 Misd.  Disp./Sentence  
 Felony  District Off Judge/Magistr.

WRIT  
 JUVENILE  
 ALIAS  
 OFFENSE ON INDEX CARD

VS. LAMBROS, JOHN GREGORY

Case Filed Mo. Day Yr. 05 17 89  
 Docket No. 00082 Def. 05  
 No. of Def's U.S. MAG. CASE NO.

I. CHARGES	U.S. TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS	DISM. NG
	21 846	Conspiracy to possess w/intent to distribute cocaine a Schedule II controlled drug substance. Ct. I		1
21 841(a)(1)(b)(1)(B); 18 2(a)	Aiding & abetting; possession w/intent to distribute cocaine, a Schedule II controlled drug substance. Cts. 5, 6 & 8		3	<input type="checkbox"/>
18 1952(a)(3)(b)(1)	Interstate transportation to promote unlawful drug activity. Ct. 9		1	<input type="checkbox"/>

II. KEY DATE

INTERVAL ONE: KEY DATE 5-17-89 (Arrest, Summons, Custody, Appears on complaint)

END ONE AND/OR BEGIN TWO (OR RESTART PERIOD TO TRIAL):  Indictment filed/unsealed,  consent to Magr. trial on complaint,  Information,  Felony-W/waiver

KEY DATE: a)  1st appears on pending charge /R40, b)  Receive file R20/21, c)  Supsdg. Ind. Inf, d)  Order New trial, e)  Remand, f)  G/P Withdrawn

END INTERVAL TWO:  Dismissal,  Pled guilty,  Nolo,  Trial (voir dire) began,  Jury,  N.J.

ARRAIGNMENT: 1st appears with or waives counsel, 1st Trial Ended, RE-TRIAL, 2nd Trial Began, DISPOSITION DATE, SENTENCE DATE

FINAL CHARGES DISMISSED:  on S.T. grounds,  W.P.,  WOP,  on def motion on gov't motion

III. MAGISTRATE

Search Warrant	Issued	Return	DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL/NO.	OUTCOME:
Summons	Issued	Served			PRELIMINARY EXAMINATION: Date Scheduled, OR Date Held		<input type="checkbox"/> DISMISSED HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT <input type="checkbox"/> HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW
Arrest Warrant	Issued				<input type="checkbox"/> REMOVAL HEARING, <input type="checkbox"/> WAIVED, <input type="checkbox"/> NOT WAIVED, <input type="checkbox"/> INTERVENING INDICTMENT	Tape Number	
COMPLAINT			DATE OF ARREST	OFFENSE (In Complaint)			

Show last names and suffix numbers of other defendants on same indictment/information:  
 Pebbles (1), Amero (2), Berine (3), Angelo (4), Lemon (6)

ATTORNEYS: U.S. Attorney or Asst. Douglas R. Peterson

Defense: 1  CJA, 2  Ret., 3  Waived, 4  Self, 5  Non / Other, 6  PD, 7  CD

Charles Faulkner, Suite 500, 701 Fourth Avenue South, Minneapolis, Mn. 55415

John Lambros, Anoka County Jail, 325 East Jackson Street, Anoka, MN 55303, Reg No 00436-124, PO Box 1000, Leavenworth, KS 66048-1000

For re-sentencing: Colia Ceisel, Ste 500 46 E 4th St, St. Paul, MN 55101

John Gregory Lambros, #00436-124, USP, P. O. Box 1000, Leavenworth, KS 66048-1000

4/21/97 2255 filed

IV. NAMES & ADDRESSES OF ATTORNEYS, SURETIES, ETC.

APPEALS FEE PAYMENTS

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

Docket Entries Begin On Reverse Side

DATE	DOCUMENT NO	Yr	Docket No	Def	MASTER DOCKET - MULTIPLE DEFENDANT CASE PROCEEDINGS DOCKET FOR SINGLE DEFENDANT John Gregory Lambros	PAGE 2 of 1	VI EXCLUDABLE DELAY		
							Start Date	End Date	Total Days
5-17-89	1	89	00082	05	<input checked="" type="checkbox"/> V. PROCEEDINGS				
					INDICTMENT (DDA/Catherine Fahy) Bond set @ \$50,000 c/s. ORDER (DDA) for issuance of W/Arrest. Issued W/Arrest & delvd. to USMS for service. Judge Murphy, Assignment #160 Master Criminal List.				SECRET
8-29-91	2				ORDER (DEM) THAT: deft's motion is granted and the clerk of court shall release copies of the judgment and commitment orders for the codefendants who have been sentenced thus far to attorney Jay McNabb. (cc:AUSA)				
6-22-92	3				MINUTES OF INITIAL APPEARANCE (FLN): Deft. charged Deft. Temp Order of Detention, Public defender appointed Govt. moved for detention. Detention hearing June 25, at 9:00				
6-22-92	4				ORDER (FLN) Court appoints FPD to represent deft.				
	5				ORDER OF TEMPORARY DETENTION PENDING HEARING PURSUANT TO BAIL REFORM ACT				
	6				MINUTES OF DETENTION HEARING - DEFT ORDERED DETAINED On the court's own motion a hearing will be held to determine competence of deft. Deft place in custody of Atty General				
6/23/92	7				ARREST WARRANT Returned Executed on 6/19/92				
6-26-92	8				CJA 20 Form appointing Counsel				
6/29/92	9				ORDER (FLN) : Deft be committed to custody of Atty General for confinement Deft. shall be afforded reasonable consult w/atty. Court directs a hearing to determine mental competency of deft. Time period between 6/25/92 and Court's determination of competency shall be excluded when computing speedy trial. Deft motion to postpone arraignment is also granted.				
9/30/92	10				MINUTES OF COMPETENCY HEARING (FLN)(Bruce Tiffany, Reporter). Matter of competency of deft. is taken under advisement. Govt. Exhibit 2 is withdrawn, to be kept with other medical records of deft. (2 pgs).				
10/26/92	11				MOTION OF THE DEFT. to compel attorney for the Govt. to initiate polygraph test, to disclose evidence favorable to the deft in regards to bio-medical implants and torture that occurred while in pretrial detention. Also forced questioning in what deft. was informed as a U. S. Grand Jury investigation. (2 pgs).				
	12				COPY OF PRIVACY ACT STATEMENT. (1 pg).				
	13				REQUEST FOR FREEDOM OF INFORMATION ACT SUPPLEMENTAL DISCOVERY by deft.				
	14				LTR FROM DEFT. TO MAGISTRATE JUDGE NOEL. (5 pgs).				
10/30/92	15				LTR FROM DEFT. TO MAGISTRATE JUDGE NOEL. (3 pgs).				
11/2/92	16				ORDER (FLN/10/30/92) that deft. is competent to stand trial, and this matter shall proceed to trial. (cc: attys) (8 pgs)				
11/6/92	17				ARRAIGNMENT (JGL) . Plea not not guilty entered. Reading waived. motions due: 12/2/92; heard: 12/9/92 at 2:30 b/4 JGL; trial: to be notified; deft. returned to custody of U. S. Marshal.				
11/10/92	18				ORDER (JGL) that: 1. motions filed and served on or before 12/2/92. 2. motions heard on 12/9/92 at 2:30 p.m. 3. The govt. is ordered to make all disclosures required by FRCP 16 by				

LETTER CODES

For identifying periods of excludable delay per 18 USC 3161 (h) (Sections in brackets)

A Exam or hearing for mental/physical incapacity (18 USC 4244) (1) (A)

a NARA exam (18 USC 2902) (1) (B)

C State/Fed proceedings on other charges (1) (D)

D Interlibrary appeal (1) (E)

E Pretrial motion (from filing to hearing or to other prompt disposition) (1) (F)

F Transfer from other district per FRCP 20.21 or 40 or Mag Rule 6a (1) (G)

G Proceeding under advisement, not to exceed 30 days, after all necessary submissions filed and hearings completed (1) (J)

H Misc. proceedings, arraignment, parole/probation, revocation, Deportation, extradition (1) (I)

5 Deferral of prosecution (see 28 USC 2902) (1) (C)

6 Transportation from another district or to/from examination or hospitalization in 10 days or less (1) (H)

7 Consideration by Court of proposed plea agreement (1) (K)

I Prosecution deferred by mutual agreement (2)

M Unavailability of defendant or essential witness (1) (A, B)

N Period of mental/physical incompetence of def. to stand trial (14)

O Period of NARA commitment/treatment (15)

P Superseding indictment and/or new charges (16)

R Def. awaiting trial of codefendant & no severance has been granted (17)

T Continuances granted per (h)(B) use "T" alone if more than one of the following reasons (T1 thru T4) is given in support of continuance (H)(A, B)

T1 Failure to continue would stop further proceedings or result in miscarriage of justice (1) (B, iii)

T2 Case unusual or complex (1) (B, iii)

T3 Indictment following arrest can't be filed in 30 days (1) (B, vi)

T4 Continuance granted to obtain or substitute counsel, or give reasonable time to prepare (1) (B, vi)

U Time up to withdraw plea, 3161(h)

W Grand Jury indictment time extended 30 more days, 3161 (b)

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
11/10/92	18) (Cont'd).  11/25/92. 4. all voir dire questions and jury instructions shall be submitted one week before trial; 5. the parties will be notified of the date and time of trial; and 6. deft. be returned to the custody of the U. S. Marshal. (cc: attys).				
12/02/92	19) MOTION OF DEFT. to dismiss for violation of speedy trial rights, Title 18:S 3161 (4 pgs). 20) MOTION OF DEFT. to dismiss for extradition treaty violation (6 pgs). 21) MOTION OF DEFT. for discovery and inspection (2 pgs). 22) MOTION OF DEFT. for disclosure of grand jury minutes and transcript (2 pgs). 23) MOTION OF DEFT. to require Justice Department to conduct search of other government agencies (2 pgs). 24) MOTION OF DEFT. for pre-trial disclosure of rule 404 evidence (1 pg). 25) MOTION OF DEFT. for notice by the govt. of intent to use evidence arguably subject to suppression (2 pgs). 26) MOTION OF DEFT. for early disclosure of Jencks Act material (2 pgs). 27) MOTION OF DEFT. for disclosure of impeaching information (3 pgs). 28) MOTION OF DEFT. for disclosure and suppression of electronic surveillance and wiretapping (1 pg). 29) MOTION OF DEFT. for disclosure and suppression of all evidence including statements and physical evidence (2 pgs). 30) MOTION OF DEFT. for list of government witnesses (2 pgs). 31) MOTION OF DEFT. for participation by counsel in voir dire (1 pg). 32) MOTION OF DEFT. of intent to raise issues of law arising out of deft's incarceration in Brazil (1 pg). 33) MOTION OF DEFT. for extension of time to file additional motions (1 pg).				
11/20/92	34) NOTICE OF TRIAL scheduled for 1/4/93 at 9:30 a.m., before Chief Judge Diana E. Murphy, Courtroom #3, in Mpls., MN. (notice mailed by Mary Kaye Conery).				
12/09/92	35) MINUTES OF MOTION HEARING (JGL/Larry Lindberg). Deft's pretrial motions were argued and taken under advisement. Exhibits retained by Court.				
12/17/92	36) INFORMATION.				

AO 256A

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
12/17/92	37) GOVT'S NOTICE UNDER FED.R.EVID. 404(b) AND ITS NOTICE OF MENTAL CONDITION EVIDENCE.				
12/21/92	38) TRANSCRIPT OF MOTIONS HEARING on 12/9/92 before Magistrate Lebedoff (Court reporter: L. Lindberg) (Separate). 39) ORDER (JGL) re pretrial motions. 1. deft's motion for discovery and inspection is DENIED as moot. 2. deft's motion for disclosure of grand jury transcripts is DENIED except to the extent the transcripts contain Jencks act material, those transcripts shall be provided to deft on or before 12/11/92; 3. deft's motion to require the U. S. Dept. of Justice to conduct a search of other government agencies is DENIED; 4. deft's motion for pretrial disclose of Rule 404 evidence is GRANTED; 5. deft's motion for notice by the govt. of intent to use evidence arguably subject to suppression is DENIED as moot; 6. deft's motion for early disclosure of Jencks Act material is DENIED except with respect to the transcripts ordered produced above, the govt. has represented that they will disclose the information to the deft. three days prior to trial; 7. deft's motion for disclosure of impeaching information is DENIED as moot; 8. deft's motion for a list of government witnesses is DENIED; 9. deft's motion for participation by counsel in voir dire is DENIED except to the extent the trial judge in her discretion decides to permit it; and 10. deft's motion for an extension of time in which to file add'l motions is DENIED absent a showing of good cause by deft as to why the motion could not have been brought earlier. (cc: attys) 40) REPORT & RECOMMENDATION (JGL) that: 1. deft's motion to dismiss for violations of the Right to Speedy Trial Act be DENIED; 2. deft's motion to dismiss for vicoaltions of the extradition treaty be DENIED; 3. deft's motion to suppress evidence obtained through illegal search and seizure be DENIED; and 4. deft's motion to suppreee statements, admissions and answers be DENIED. (cc: attys)				
12/30/92	41) SUPPLEMENTAL GOVERNMENT NOTICE UNDER FED.R.EVID. 404(b).				
01/04/93	42) JURY PANEL RECORD. 43) MINUTES OF JURY TRIAL (DEM/Kitto) Govt. moves to dismiss the travel count (original ct. 9 - new count 5) motion unopposed. Motion granted. The jury is selected and sworn in.				
01/05/93	44) MINUTES OF FURTHER JURY TRIAL (DEM/Kitto) Govt. gives opening statement. Govt. calls Michelle Leonhart & Lawrence Pebbles to testify.				



U.S. Department of Justice

United States Attorney  
District of Minnesota

1  
2

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

613549-1500

FTS/777-1500

→ November 16, 1992

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

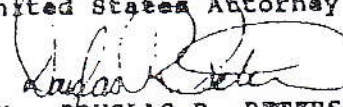
Re: United States v. John Gregory Lambros  
Criminal No. 4-89-82(5)

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 Kay 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

11.

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 \$3 billion. 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

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plea or otherwise challenge his prosecution based upon a challenge to the extradition process which brought the defendant from Brazil to the United States.

GUIDELINE RECOMMENDATIONS

→ 7. The defendant understands that his sentence on the Count VIII charge will be determined and based upon the applicable sentencing guidelines under the Sentencing Reform Act of 1984. The proper application of those guidelines is a matter solely within the discretion of the Court. The defendant understands that he will not be entitled to withdraw from the plea agreement in the event the Court calculates the guidelines differently from the defendant, the government and/or the probation office.

8. Under this agreement, the defendant is not bound to any particular guideline recommendations and will be free to dispute any guidelines calculation which may be found applicable to his case. The defendant will also be free to argue for a downward departure from the applicable guideline range.

9. For its part, the government will take the following position with respect to the sentencing factors applicable to Count VIII:

- a. Because the government's investigation links the defendant to the receipt of approximately six kilograms of cocaine, it will argue that the applicable base offense level is level 32 under U.S.S.G. § 2D1.1(c)(6); ←
- b. Although the Count I conspiracy charge involves larger quantities of cocaine, the government agrees to waive its right to argue that additional quantities of cocaine should be attributed to the defendant under U.S.S.G. §§ 1B1.3 and 2D1.4;

14.



- c. There should be no adjustment for role in the offense as contemplated by U.S.S.G. § 3B1.4;
- d. Because of the defendant's flight to Brazil, the two level enhancement for obstruction of justice under U.S.S.G. 3C1.1 is applicable;
- e. Although the government agrees that the defendant is entitled to a two level adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1, the defendant's flight to Brazil does not entitle him to the additional one point reduction available as of November 1, 1992; and
- f. The government's position results in a combined offense level of 32.

10. The defendant understands that his criminal history includes two drug trafficking charges from the District of Minnesota and one assault charge from this district. Given that the defendant was on parole from these offenses, the parties estimate that the defendant will receive 8 criminal history points, leaving him within Category IV. Investigation concerning the defendant's criminal history continues. The defendant understands that if the presentence investigation reveals any prior adult or juvenile sentences which should be included within his criminal history under the sentencing guidelines, then the guideline range outlined in this agreement will be adjusted to reflect the range appropriate for the criminal history of the defendant.

11. The government will be free to argue that the defendant's criminal history makes him a career offender under U.S.S.G. § 4B1.1. If the Court deems the defendant to be a career offender, the applicable offense level would be level 35 (level 37 less the acceptance of responsibility reduction) and the defendant's

15.

applicable guideline range would be 292 to 365 months. Absent a career offender finding, the government's guideline calculations (level 32-Category IV) find the applicable guideline range to be 168 to 210 months.

The foregoing accurately sets forth the full extent of the plea agreement and sentencing stipulations in the above-captioned case.

Respectfully submitted,

Dated:

THOMAS B. HEFFELFINGER  
United States Attorney

BY: DOUGLAS R. PETERSON  
Assistant U.S. Attorney  
Attorney ID Number 14437X

Dated:

CHARLES FAULKNER, Esq.  
Attorney for Defendant

Dated:

JOHN GREGORY LAMBROS  
Defendant

16.

FAULKNER & FAULKNER  
Attorneys-at-Law  
Suite 500  
701 Fourth Avenue South  
Minneapolis, Minnesota 55415  
Telephone: (612) 337-9573  
Telecopier: (612) 338-0218

Charles W. Faulkner  
Sheila Regan Faulkner

→ November 17, 1992

Mr. John Lambros  
Anoka County Jail  
325 East Jackson St  
Anoka, MN 55303]

Re: United States v John Lambros

Dear John,

→ X Attached please find the results of our negotiations for a plea agreement in your case. It allows you considerable latitude to argue that you ought to be treated in the same range as the other defendants and it avoids the mandatory life count. I think it is reasonable to conclude that the Government won't go much further than this and that they would relish the possibility of telling Judge Murphy that you were made a fair offer and rejected by you and you up for a life term without possibility of parole.

→ My best information is that the witnesses against you are available and willing to testify in a trial. The case against you is one without a chance of success either on the legal or factual issues. The agents would prefer you go to trial and get life. \* X

→ My best advice given all the circumstances is that you should accept this offer. You must contact me to do so before November 23, 1992. \* X

Sincerely,

  
Charles W. Faulkner

UNITED STATES FEDERAL COURT  
FOR THE DISTRICT OF MINNESOTA

United States of America,  
Plaintiff,

-vs-

File No. CR.4-89-82(05)

John G. Lambros,  
Defendant.

COPY

TRANSCRIPT OF PROCEEDINGS in the  
above-entitled matter before the Honorable  
Robert G. Renner on February 10, 1997 at  
United States Federal Courthouse, St. Paul,  
Minnesota, at 10:00 a.m.

APPEARANCES:

Douglas Peterson, Assistant United States  
Attorney, appeared as counsel on behalf of the  
Government.

Colia Ceisel, Attorney, appeared as  
counsel on behalf of the Defendant.

REPORTED BY:

BARBARA J. EGGERTH, R.P.R.

EXHIBIT E.

RAY J. LERSCHEN & ASSOCIATES

EXHIBIT E.

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1 THE COURT: The Court has before it  
2 the matter of the United States of America  
3 versus John Gregory Lambros. Present and  
4 before the court, representing the government,  
5 is Mr. Douglas Peterson. Also present is  
6 Colia Ceisel.

7 MS. CEISEL: It's Ceisel, Your  
8 Honor.

9 THE COURT: And, of course, the  
10 defendant, John Gregory Lambros.

11 Before the court commences with the  
12 parties proceeding, I would ask if there is  
13 anyone else who should be placed of record at  
14 this time, whose name should be placed of  
15 record. Mr. Peterson?

16 MR. PETERSON: Not to my knowledge,  
17 Your Honor, no.

18 MS. CEISEL: Your Honor,  
19 Mr. Lambros's parents are also present and he  
20 has --

21 THE COURT: Excuse me. Would you  
22 plan on using the microphone when you address  
23 the court? I am having trouble hearing you.

24 MS. CEISEL: Yes, Your Honor.  
25 Mr. Lambros's parents are also here, Your

EXHIBIT E. 19.

RAY J. LERSCHEN & ASSOCIATES

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Honor, and he has a motion before the court to allow them to address the court.

THE COURT: I'll take it under advisement. We'll see how things go.

MS. CEISEL: Thank you, Your Honor.

THE COURT: I am ready to commence the court's part of this matter. I would ask that you listen closely and I will tell you that all parties will have an opportunity to make their presentations, although the court intends to limit oral presentations.

Before the court is the matter of the United States versus John Lambros, Criminal Number 4-89-82(05). It is necessary to briefly review the procedural history of this case. The defendant was previously convicted in this court on four counts involving a conspiracy to distribute cocaine. The Honorable Diana Murphy sentenced the defendant to two 120-month terms for Counts 2 and 3, a 360-month term for Count 4, and a term of life imprisonment on Count 1. The defendant appealed. Subsequently, the Eighth Circuit affirmed all convictions, but vacated the life sentence on Count 1 finding that while such a



**EXHIBIT E.**

20.

1 sentence was permitted under the applicable  
2 law, it was not mandatory as the Sentencing  
3 Board had believed. The limited remand to  
4 this court requires it to impose sentence  
5 consistent with the version of 21 United  
6 States Code, Section 841 (b) (1) (a) (2), in  
7 effect as of February 27th, 1988, the ending  
8 date of the cocaine conspiracy in which the  
9 defendant participated. Despite the limited  
10 nature of these proceedings, the defendant has  
11 interposed numerous motions and supporting  
12 papers requesting relief from resentencing.  
13 Procedurally, these motions are somewhat  
14 unorthodox in that they appear to be addressed  
15 both towards convictions and sentences for  
16 which the defendant is currently incarcerated  
17 as well as the conviction for which he is  
18 about to be sentenced. The defendant has  
19 informally suggested that these motions be  
20 considered under Federal Rule of Criminal  
21 Procedure 33 as, quote, new trial, end quote,  
22 motions. However, such motions would clearly  
23 be untimely even if correctly denominated as  
24 Rule 33 motions. Alternatively, the court can  
25 simply dismiss all of the motions not directly

EXHIBIT E.

RAY J. LERSCHEN & ASSOCIATES

21.

1 related to the proceedings without prejudice.  
2 However, this would merely seem to ensure the  
3 defendant would raise them again on appeal and  
4 beyond, although many were previously  
5 litigated and thus are procedurally barred.  
6 The defendant is in agreement with -- I am  
7 sorry -- the court is in agreement with the  
8 view expressed in United States versus  
9 DiBernardo, a 1989 case decided by the  
10 Eleventh Circuit Court of Appeals. DiBernardo  
11 held that a motion could properly be  
12 considered under 28 United States Code,  
13 Section 2255, if imprisonment based on a  
14 previous adjudication of guilt was imminent.  
15 While defendant has not technically been in  
16 custody on Count 1 since the Eighth Circuit's  
17 remand, such custody has indeed been  
18 imminent. Therefore, with the exception of  
19 certain preliminary matters, defendant's  
20 motions will be treated as arising under 28  
21 United States Code, Section 2255, and subject  
22 to the statute -- I am sorry -- the strictures  
23 of that statute.

24 The court will proceed as follows.

25 First, the defendant's motion for a competency

EXHIBIT E.

RAY J. LERSCHEN & ASSOCIATES

22'



1 hearing and/or the request that his family  
2 members and associates be permitted to testify  
3 as to his competency is denied. 18 United  
4 States Code, Section 4241, requires that a  
5 hearing be held only when the court finds  
6 there is a reasonable cause to believe that  
7 the defendant may be suffering from a mental  
8 disease or defect which renders him unable to  
9 understand the nature of the proceedings  
10 against him or to assist properly in his  
11 defense. By order dated October 30, 1992,  
12 Magistrate Judge Franklin Noel judged  
13 defendant competent to stand trial after  
14 conducting a hearing. By order dated  
15 January 19, 1994, Judge Murphy denied the  
16 defendant's motion for a second competency  
17 hearing finding that his behavior at trial  
18 displayed competence. These findings were  
19 affirmed by the Eighth Circuit Court of  
20 Appeals which noted how defendant had lucidly  
21 and ably argued precisely how his delusional  
22 condition affected his behavior. The  
23 proceedings were delayed by several months to  
24 permit the defendant's examination by a second  
25 expert. This expert also concluded that the

**EXHIBIT E.**

RAY J. LERSCHEN & ASSOCIATES

23,

1 defendant was competent. During the past  
 2 month, this court has reviewed the various  
 3 papers as submitted by the defendant, and  
 4 while some of the defendant's contentions are  
 5 bizarre and found to be without merit by a  
 6 previous court, defendant has displayed  
 7 intelligence and a rational appreciation for  
 8 the legal system and his role in those  
 9 proceedings. He is plainly competent.

10 Next, the defendant shall be permitted to  
 11 address the court regarding its various  
 12 motions. At the conclusion, the government  
 13 shall be allowed sufficient time to respond.  
 14 The parties shall not exceed one-half hour to  
 15 present their arguments. Defendant's  
 16 attorney, Colia Ceisel, shall be allowed to  
 17 address the court at the conclusion of the  
 18 government's remarks.

19 The defendant's motions at this time are  
 20 denied. A written, detailed order to that  
 21 effect will follow.

22 At this time then, we will submit the  
 23 matter to the government for its remarks.

24 MR. PETERSON: Your Honor, I have  
 25 provided the court a fair amount of written

**EXHIBIT E.**

RAY J. LERSCHEN & ASSOCIATES

24.

157 LED2D 778, 540 US 375 CASTRO v UNITED STATES

HERNAN O'RYAN CASTRO, Petitioner

vs.

UNITED STATES

540 US 375, 157 L Ed 2d 778, 124 S Ct 786

[No. 02-6683]

Argued October 15, 2003.

Decided December 15, 2003.

DECISION

Federal District Court intending to recharacterize pro se litigant's motion as first motion for postconviction relief under 28 USCS § 2255 held required (1) to notify litigant of intended recharacterization and its consequences, and (2) to provide opportunity to withdraw or amend motion.

SUMMARY

In 1994, a federal prisoner attacked his federal drug conviction by filing, in a Federal District Court, a pro se motion that the prisoner called a motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure. The District Court denied the motion on the merits, referring to it as both a Rule 33 motion and a motion for relief under 28 USCS § 2255, which restricted a litigant's right to file a "second or successive motion" under § 2255. The prisoner, on his pro se appeal, did not challenge the District Court's recharacterization of the motion as a § 2255 motion. The United States Court of Appeals for the Eleventh Circuit summarily affirmed (82 F.3d 429).

Subsequently, in 1997, the prisoner filed a pro se motion that the prisoner called a § 2255 motion, which motion raised new claims, including a claim of ineffective assistance of counsel, that had not been raised in the 1994 motion. After the District Court denied the motion, the

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EXHIBIT F.

25.

Court of Appeals, on appeal, remanded for the District Court to consider, among other matters, whether the 1997 motion was the prisoner's second § 2255 motion. The District Court (1) determined that the 1997 motion was the prisoner's second § 2255 motion (the 1994 motion having been his first); and (2) dismissed the 1997 motion for failure to comply with § 2255's requirement that the prisoner obtain the Court of Appeals' permission to file a "second or successive" motion. The Court of Appeals affirmed (290 F.3d 1270).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by Breyer, J., expressing the unanimous view of the court with <\*pg. 779> respect to the court's judgment, and joined by Rehnquist, Ch. J., and Stevens, O'Connor, Kennedy, Souter, and Ginsburg, JJ., with respect to the holdings below, it was held that:

(1) A District Court could not recharacterize a pro se litigant's motion as a first motion for postconviction relief under § 2255, unless the court (a) notified the litigant that the court intended to recharacterize the pleading, (b) warned the litigant that this recharacterization meant that any subsequent § 2255 motion would be subject to § 2255's restrictions on "second or successive" motions, and (c) provided the litigant an opportunity to withdraw the motion or to amend it so that it contained all the § 2255 claims that the litigant believed that the litigant had.

\* (2) Because of the absence of the required warnings, the prisoner's 1994 motion could not be considered a first § 2255 motion.

→ (3) Thus, the prisoner's 1997 motion could not be considered "second or successive" for § 2255 purposes.

Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment, (1) agreed that the Supreme Court had the power to review the prisoner's claim; but (2) expressed the view that (a) because of the risk involved, pleadings never ought to be recharacterized as § 2255 motions, and (b) even if this were not so, running the risk was unjustified where, as in the case at hand, there was nothing to be gained by recharacterization.

#### RESEARCH REFERENCES

IN UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA

v.

Docket No. CR 4-89-82

Defendant No. (05)

JOHN GREGORY LAMBROS

PRESENTENCE INVESTIGATION

Prepared For:

The Honorable Diana E. Murphy  
Chief U. S. District Judge

Prepared By:

Jay F. Meyer  
U. S. Probation Officer  
426 U. S. Courthouse  
110 South Fourth Street  
Minneapolis, MN 55401-2295  
612/348-1980

Assistant U. S. Attorney

Douglas P. Peterson  
234 U. S. Courthouse  
110 South Fourth Street  
Minneapolis, MN 55401  
612/348-1500

Defense Counsel

Charles Faulkner  
Suite 500  
701 Fourth Avenue South  
Minneapolis, MN 55415  
612/337-9573

Plea/Verdict:

On January 15, 1993, a jury returned guilty verdicts on Counts 1, 2, 3, and 4.

Offense:

Count 1: Conspiracy to Distribute in Excess of Five Kilograms of Cocaine, in violation of 21 U.S.C. §§ 841(a) and 846; a Class A felony.

Count 2: Possession With Intent to Distribute Approximately Two Kilograms of Cocaine in violation of 21 U.S.C. § 841; a Class B felony.

Count 3: Possession With Intent to Distribute Approximately Two Kilograms of Cocaine in violation of 21 U.S.C. § 841; a Class B felony.

Count 4: Possession With Intent to Distribute Approximately Two Kilograms of Cocaine in violation of 21 U.S.C. § 841; a Class B felony.

Statutory Penalty:

Count 1: Mandatory life imprisonment, up to \$8,000,000 fine, and a \$50 special assessment.

Defendant's Name:  
Docket Number:

John Gregory Lambros  
CR 4-89-82(05)

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\*

Counts 2, 3 and 4: A minimum 10 years imprisonment up to life imprisonment, a minimum 8-year term of supervised release, a fine of up to \$4,000,000, and a special assessment of \$50 on each count.

Mandatory Minimum:

YES

Plea Agreement:

None.

Arrest Date:

May 17, 1991.

Custodial Status:

Ordered detained; in custody.

F.2

EXHIBIT G.

28.

According to U.S.S.G. §3C1.1, comment.(n.3)(b) committing perjury is the type of conduct to which the obstruction enhancement applies.

Adjustment for Acceptance of Responsibility

29. The defendant declined to comment on the jury's verdict.

Offense Level Computations

Level

- \* → 30. The Guideline Manual incorporating guideline amendments effective November 1, 1987, was used to determine the defendant's offense level.

31. Counts 1 and 4 are grouped under §3D1.2(d). The aggregate loss is used to determine the offense level pursuant to §3D1.3. No further multiple count adjustment is applicable under §3D1.4.

- \* → 32. Counts 2 and 3 are offenses which occurred prior to November 1, 1987. However, the drug amounts contained in those counts are included in Count 1, Conspiracy.

Counts 1 and 4 - Conspiracy to Distribute Cocaine

33. Base Offense Level: The guideline for a violation of 21 U.S.C. §§ 841(a)(1) and 846 is found in §2D1.1 of the Guidelines. The base offense level is 32 because the offense involved more than five kilograms of cocaine. 32

34. Specific Offense Characteristics: None. 0

35. Victim Related Adjustments: None. 0

36. Adjustment for Role in the Offense: Because the defendant exercised some decision-making authority, participating in the planning of the cocaine conspiracy and exercised an authority over several coconspirators, two levels are added under §3B1.1(c). +2

37. Adjustment for Obstruction of Justice: +2

38. Adjustment for Acceptance of Responsibility: 0

39. Total Offense Level 36

- \* → 40. The offense of conviction is a controlled substance offense under the meaning of §4B1.2. Because the defendant has two previous convictions for "controlled substances offenses" (in 1976 and in 1977) he is considered a career offender. According to §4B1.1, Career Offender, the defendant's offense level is

\* →

adjusted to level 37. Because the defendant did not receive an adjustment for acceptance of responsibility, the adjusted offense level remains at 37.

37

41. Total Offense Level

37

PART B. DEFENDANT'S CRIMINAL HISTORY

XXXXXXXXXXXXXXXXXXXX

30.



kidnapping {130 F.3d 463} charge. 13

**D. Sweatt as "Career Offender" Under Section 4B1.1**

We held in *United States v. Price*, 301 U.S. App. D.C. 97, 990 F.2d 1367 (D.C. Cir. 1993), that "the Sentencing Commission adopted §§ 4B1.1 & 4B1.2 solely in an effort to fulfill the mandate of 28 U.S.C. § 994(h)" and therefore only those offenses specified in section 994(h) can render the defendant a "career offender." 990 F.2d at 1368. Because aiding and abetting, conspiring and attempting to commit certain narcotics offenses are not among those offenses listed in section 994(h), we held that the defendant could not be sentenced as a career offender on the basis of prior convictions of those offenses. *Id.* *Price* concluded that Application Note 1 to section 4B1.2 of the Guidelines was invalid to the extent it suggested that convictions of certain inchoate offenses counted in treating the defendant as a career offender. *Id.* We held open the question, however, whether the Sentencing Commission could repromulgate Application Note 1 pursuant to statutory authority other than section 994(h), including its discretionary authority under section 994(a). *See id.* at **1370** ("Thus, without passing on the Commission's authority to re-adopt Application Note 1 to § 4B1.2 (or some variation of Note 1) on alternative grounds, we vacate the sentence and remand the case to the district court for resentencing.").

The Commission responded by amending and repromulgating the Background Commentary to section 4B1.1 of the Guidelines. The repromulgated version clarified that, pursuant to the Commission's general statutory authority, 28 U.S.C. § 994(a)-(f), and its amendment authority, 28 U.S.C. § 994(o)-(p), prior convictions that can count toward career offender status include convictions of attempts, aiding and abetting and other inchoate offenses. *See* 1995 Guidelines Manual, App. C, Am. 528 at 434-35. The repromulgated Background Commentary to section 4B1.1 became effective on November 1, 1995.

Sweatt argues that in light of *Price* the district court improperly sentenced him as a career offender under the repromulgated version of section 4B1.1 because his 1987 conviction of attempted distribution of heroin could not be used under the November 1994 version of section 4B1.1--the version in effect when he committed the crimes. 14 By retroactively applying the November 1995 version of section 4B1.1, he reasons, the trial court imposed a greater punishment than it could have imposed under the law as it existed when the crimes were committed, violating the *Ex Post Facto* Clause. *See, e.g., United States v. Stover*, 93 F.3d 1379, 1386 (8th Cir. 1996); *United States v. Smallwood*, 35 F.3d 414, 417-18 n.18 (9th Cir. 1994); *United States v. Saucedo*, 950 F.2d 1508, 1515 (10th Cir. 1991).

The Government essentially concedes that Sweatt's reading of *Price* is correct but it contends that we should overrule *Price*. *See* Appellee Br. at 43. Nevertheless, the law is well settled that one panel may not "overrule the decision of another panel of this court." *United States v. Doe*, 235 U.S. App. D.C. 99, 730 F.2d 1529, 1531 n.2 (D.C. Cir. 1984). Accordingly, we vacate Sweatt's sentence as a career offender pursuant to section 4B1.1 of the Guidelines and remand to the district court for resentencing.

**III. CONCLUSION**

For the foregoing reasons, we affirm the appellants' convictions. We vacate appellant {130 F.3d 464} Sweatt's sentence as a career offender and remand for resentencing in accordance with the terms of this opinion.

*So ordered*

31.