November 23, 2004

John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
**Web site: www.brazilboycott.org**

**CLERK OF THE COURT**
United States District Court
202 U.S. Courthouse
300 South Fourth Street
Minneapolis MN 55415
**U.S. CERTIFIED MAIL NO. 7001 0320 0005 5878 9869**

**RE: LAMBROS v. U.S.A., CRIMINAL NO. 4-89-82(5)(DSD)**

Dear Clerk:

Attached for <u>**FILING**</u> in the above-entitled action is one (1) original and one (1) copy of:

1. November 23, 2004, MOTION TO ALTER OR AMEND JUDGMENT OF THIS COURT'S ORDER DATED NOVEMBER 15, 2004, <u>FILED</u> NOVEMBER 16, 2004, PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

2. November 16, 2004, "MOTION FOR APPOINTMENT OF COUNSEL."

3. November 16, 2004, "MOTION FOR PRODUCTION OF RECORDS."

4. November 16, 2004, "MOVANT LAMBROS' <u>TRAVERSE RESPONSE</u> TO OPPOSITION TO THE UNITED STATES TO PETITIONER'S MOTION TO VACATE FEBRUARY 10, 1997 JUDGMENT, DATED NOVEMBER 03, 2004."

I have mail copy of the above motion to the U.S. Attorney's Office.

Thanking you in advance for your continued assistance in this matter, I am . . .

Sincerely yours,

John G. Lambros, Pro Se

**<u>CERTIFICATE OF SERVICE:</u>**

I declare under the panalty of perjury that a true and correct copy of the above listed documents/motions were mailed within a stamped addressed envelope from the USP Leavenworth legal mail box/room on this **23rd DAY OF NOVEMBER, 2004,** to:

1. Jeffrey S. Paulsen, Attorney, Office of the United States Attorney, 600 United States Courthouse, 300 South Fourth Street, Minneapolis, MN 55415.

2. The Honorable David S. Doty, United States District Judge, 14W U.S. Courthouse, 300 South Fourth Street, Minneapolis, MN 55415.

John G. Lambros

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

| | | |
|---|---|---|
| **JOHN GREGORY LAMBROS,** | * | **CRIMINAL NO. 4-89-82(5)(DSD)** |
| | * | |
| Petitioner, | * | **Civil No.** ______________ |
| | * | |
| vs. | * | |
| | * | |
| **UNITED STATES OF AMERICA,** | * | |
| | * | |
| Respondent. | * | AFFIDAVIT FORM |

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**MOTION TO ALTER OR AMEND JUDGMENT OF THIS COURT'S ORDER DATED NOVEMBER 15, 2004, FILED NOVEMBER 16, 2004, PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE.**

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COMES NOW, Petitioner JOHN GREGORY LAMBORS, Pro Se, (hereinafter Movant) offering his MOTION TO ALTER OR AMEND JUDGMENT OF THIS COURT'S ORDER DATED NOVEMBER 15, 2004, FILED NOVEMBER 16, 2004 PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Movant LAMBROS incorporates the following motions/documents within this response:

a. November 16, 2004, "MOTION FOR APPOINTMENT OF COUNSEL;"

b. November 16, 2004, "MOTION FOR PRODUCTION OF RECORDS;"

c. November 16, 2004, "MOVANT LAMBROS' TRAVERSE RESPONSE TO OPPOSITION OF THE UNITED STATES TO PETITIONER'S MOTION TO VACATE FEBRUARY 10, 1997 JUDGMENT, DATED NOVEMBER 03, 2004.

**THIS COURT DID NOT ALLOW MOVANT LAMBROS THE REQUIRED TIME TO FILE A RESPONSE:**

1. The Government filed an opposition on November 3, 2004. This Court filed its order denying movant in this action on November 15, 2004, filed November 16, 2004. Movant believes he is entitled to ten days to file a response



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to the Government's November 3rd opposition. See U.S. District Court Local Rules 5.5. Therefore Lambros had through November 17th, 2004, to file a response to the Government's opposition. Please note that Saturdays, Sundays, and legal holidays are an automatic extension of time. In this action November 6th, 7th, 13th, and 14th were either Saturday or Sunday, and November 11th, 2004, was Veterans' day.

**STANDARD OF REVIEW:**

1. Rule 59(e) of the Federal Rules of Civil Procedure serves to allow a district court to rectify its own mistakes immediately following the entry of judgement. WHITE vs NEW HAMPSHIRE DEPT. OF EMPLOYMENT SEC., 455 U.S. 445, 71 L. Ed. 2d 325 (1982). District Courts have broad discretion in deciding whether to alter or amend judgment pursuant to this rule. ROBINSON vs WATTS DETECTIVE AGENCY 685 F.2d 729, 743 (1st Cir. 1982)(Rule 59(e) motion addressed to discretion of trial court.); IN RE PRINCE, 85 F.3d 314, 324 (7th Cir. 1996)(decision to grant or deny Rule 59(e) motion is discretionary). Moreover, the timely filing of a motion under Rule 59)e) gives this Court the jurisdiction to amend the judgment for **ANY REASON**, and this Court is not limited to the grounds contained in this motion in granting relief. VARLEY vs. TAMPAX INC., 855 F.2d 696 (10th Cir. 1998). In addition, a motion under Rule 59(e) SUSPENDS THE FINALITY OF THE JUDGMENT FOR purposes of appeal. VAUGHTER vs. EASTERN AIR LINES INC., 817 F.2d 685 (11th Cir. 1987); GRIGGS vs PROVIDENT CONSUMER DISCOUNT CO., 74 L.Ed.2d 225, 229-30 (1982).

**MOTION TO STAY FILED BY MOVANT ON NOVEMBER 17, 2004:**

2. On November 17, 2004 movant filed a motion to stay with this Court due to a lockdown at USP Leavenworth that lasted from November 15th at 10 AM and lasted through November 22, 2004. Therefore movant should be allowed to incorporate all November 16, 2004 motions listed on page one of this motion.

**ARGUMENT**

3. A Rule 59(e) motion to alter or amend judgment may be granted

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when a judgment, absent amendment, results in a manifest injustice or a clear legal error. See, MOBILE OIL CORP. vs. AMOCO CHEMS. CORP., 915 F.Supp.1333, 1377 (D. Del. 1994)(motion to amend damage award granted to prevent manifest injustice).

4. THIS COURT EXPANDED THE REACH OF CASTRO v. UNITED STATES, 157 L.Ed.2d 778 (2003) when it stated in its November 15, 2004, order that the Castro rule does not apply to movant Lambros due to the fact he was represented by counsel, who did not file Rule 33 Motions that were recharacterized as a § 2255 motion. This court cited Burgs v. Johnson County, 79 F.3d 701, 703 (8th Cir. 1996).

5. The Burgs case was taken out of context as it only applied to timely notices of appeal under F.R.A.P.Rule 4(a), 28 U.S.C.A.

6. The Supreme Court did not state in Castro that the court did not have to warn the litigant of its intent to recharacterize the pleading, warn the litigant that this recharacterization meant that any subsequent § 2255 motion would be subject to § 2255 restrictions on "second or successive" motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims that the litigant believes that the litigant has, if he was represented by an attorney who did not file the Rule 33 motions.

7. The Sixth Amendment clearly state that counsel only supplements the right of an accused to make his defense. It is the accused, not counsel, who must be informed of the nature and the cause of the accusation, who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." Although not stated in the Amendment in so many words, the right to self-representation -- to make one's own defense personally -- is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. The counsel provison supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate

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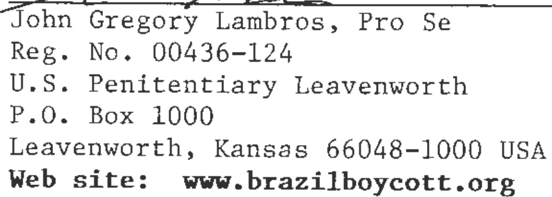
that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant -- not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. See Faretta v. California, 45 L. Ed.2d 562, 572-73 (1975).

**CONCLUSION**

8. Based on the foregoing, Movant Lambros respectfully requests this court amend or alter its judgment ORDER, dated November 15, 2004, filed November 16, 2004, as the Castro rule applies to Movant Lambros.

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

**EXECUTED ON: November 23, 2004.**



John Gregory Lambros, Pro Se
Reg. No. 00436-124
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5.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

| | | |
|---|---|---|
| **JOHN GREGORY LAMBROS,** | * | **CRIMINAL NO. 4-89-82(5)(DSD)** |
| Petitioner, | * | **Civil No.** ____________ |
| vs. | * | |
| **UNITED STATES OF AMERICA,** | * | **AFFIDAVIT FORM** |
| Respondent. | * | |

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**MOTION FOR APPOINTMENT OF COUNSEL**

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Petitioner JOHN GREGORY LAMBROS, pursuant to Title 18 U.S.C. §3006A(g), requests this Court to appoint counsel to represent him in September 07, 2004 "MOTION TO VACATE FEBRUARY 10, 1997, JUDGEMENT DUE TO INTERVENING CHANGE IN CONTROLLING LAW, CASTRO vs. U.S., 157 L.Ed.2d 778 (December 15, 2003), UNDER ANY ONE OF THREE SEPARATE SUBSECTIONS OF FEDERAL RULES OF CIVIL PROCEDURE 60(b) - SECTIONS ONE (1), FIVE (5), AND SIX (6)," for the following reasons:

1. Petitioner is not able to afford counsel.

2. The issues involved in this case are complex.

3. The issues involved in this case will require investigation and review of documents within the government's possession, which the petitioner cannot do while confined in prison.

4. The prison limits the hours that the petitioner may have access to the law library.

5. Petitioner is not educated in law thus a very limited knowledge of law.

6. The end of justice would best be served in this case if an attorney was appointed to represent the petitioner. "In every case, the petitoner should ask the court to appoint counsel to represent him/her." See, NORRIS vs. WAINWRIGHT, 588 F.2d 130 (5th Cir. 1979). Quoting, PRISONERS' SELF-HELP LITIGATION MANUAL, Second Edition, Page 366.

**STATEMENT OF FACTS:**

7. Petitioner LAMBROS' Rule 60(b) action requests this court to VACATE the resentencing judgment on February 10, 1997, in this action, due to the U.S. Supreme Court decision in CASTRO vs. U.S. 157 L.Ed.2d 778. See, "Sept. 7, 2004 Motion to Vacate ......"

8. This Court ORDERED the government to respond to Petitoners' Rule 60(b) motion by November 1, 2004.

9. On November 3, 2004, U.S. Attorney Heffelfinger and Assistant U.S. Attorney Paulsen filed there opposition to petition. Within the government response the government states:

a. that the CASTRO vs. U.S. decision is inapplicable. See Page 2.

b. "At the time of Lambros' February 10, 1997 resentencing, Lambros filed a number of motions, purportedly under Rule 33 of the Federal Rules of Criminal Procedure." See Page 2.

c. "Lambros never appealed the treatment of his motions as a section 2255 petition." See Page 3.

d. "Lambros was not pro se at the time of the February 10, 1997 resentencing. He was represented by attorney Colia Ceisel, an experienced criminal attorney. Although Lambros apparently filed the motions in question on his own, his attorney knew about them and was there to **ADVISE LAMBROS ABOUT THE RAMIFICATIONS OF JUDGE RENNER'S TREATMENT OF THE MOTIONS AS A SECTION 2255 PETITION.**" (emphasis added) See Page 3. "CASTRO created a rule designed to protect pro se petitioners who might not otherwise be aware of the **RAMIFICATIONS OF RECHARACTERIZATION. IT DOES NOT APPLY TO REPRESENTED PETITIONERS.**" (emphasis added) See, Pages 3 and 4.

e. "In denying a certificate of appealability, Judge Renner noted that the **ISSUES RAISED IN THE APRIL 1997 SECTION 2255 PETITION WERE THE SAME AS THE ISSUES RAISED IN THE RE-CHARACTERIZED MOTIONS FILED AT THE TIME OF RESENTENCING**



7.

**IN FEBRUARY 1997, WHICH WERE FOUND TO BE LACKING IN ANY MERIT.** Order, 9/30/97 (Attachment B). Since Lambros' April 1997 petition contained only meritless issues that already had been ruled upon in February 1997, there was no harm in treating it as a successive petition rather than an initial petition. The result was the same either way." (emphasis added) See, Page 5.

10. The government states that Lambros filed **"A NUMBER OF MOTIONS"** at his February 10, 1997 resentencing **"PURPORTEDLY UNDER RULE 33"**. See Paragraph 9(b) above. The government does not offer a list of the motions or offer copy of the motions filed within exhibits. Lambros does not have the full record of all motions he filed before his February 10, 1997 resentencing and requests this court to order the government to enter same within the record and forward copy to this Petitioner.

11. The government states Lambros never appealed the treatment of his motions as a section 2255 petition. See Paragraph 9(c) above. Petitioner Lambros was represented by Attorney Ceisel during resentencing and requested her to appeal the recharacterization during the February 10, 1997 resentencing. Attorney Ceisel needs to be interviewed and a **EVIDENTIARY HEARING HELD**, as Attorney Ceisel did not appeal the recharacterization issue on direct appeal for resentencing. Also, Movant LAMBROS did not **WAIVE HIS RIGHT TO ARGUE INEFFECTIVE ASSISTANCE OF COUNSEL INVOLVING THE FEBRUARY 10, 1997 RESENTENCING IN AN 28 U.S.C. § 2255.** "That, of course, is the 'customary procedure for challenging the effectiveness of defense counsel in a federal criminal trial,' because 'such a claim cannot be advanced without the development of facts outside the original record." See, U.S. vs. NUNEZ, 223 F.3d 956, 959 (9th Cir. 2000); also see, U.S. vs. GRAY, 464 F.2d 632, 634 n. 1 **(8th Cir. 1972)** ("The allegations of ineffective assistance of counsel, raised by the defendant in his pro se brief, are not properly before the court at this time. An adequate post-conviction procedure is **AFFORDED BY 28 USC §2255** for developing a factual record to support these allegations, if they can be so supported. The procedure obviates the deciding of the issues without opportunity for all parties to

unfold the facts.") Also of interest is the fact that most federal courts will **NOT ENTERTAIN SECTION 2255 MOTIONS DURING PENDENCY OF AN APPEAL**, therefore Attorney Ceisel nor Movant Lambros could file an appeal to the resentencing court conversion of Movant Lambros' Rule 33 motions to section §2255. Attorney Ceisel filed a direct appeal to Movant Lambros' resentencing on February 10, 1997. See, U.S. vs. ESPOSITO, 771 F.2d 283, 288 (7th Cir. 1985)("A motion under §2255 is ordinarily improper during the pendency of a direct appeal from a conviction, ...), cert. denied 475 US 1011 (1986); U.S. VS. GORDON, 634 F.2d 638 (1st Cir. 1980)(same); SOSA vs. U.S., 550 F.2d 244, 246 (5th Cir. 1977)(same)("In absence of extraordinary circumstances, orderly administration of criminal justice precludes a district court from considering a motion to vacate judgment of conviction while review of the direct appeal is still pending." GORDON, 634 F.2d 638). See, **EXHIBIT A** ("THE GEORGETOWN LAW JOURNAL," Volume 84, April 1996, Number 4, Page 1455, "Nevertheless, a movant must usually complete a direct appeal as a prerequisite to filing a section 2255 motion." Footnote 2835 offers a listing of case to support same). U.S. vs. THOMPSON, 972 F.2d 201, 204 (**8th Cir.** 1992)( "Claims of ineffective assistance of counsel generally may not be raised on direct appeal, but rather are to be first presented in the district court pursuant to § 2255).

12. The government implys that Attorney Colia Ceisel advised Movant Lambros about the ramifications of Judge Renner's treatment of the motions [Rule 33] as a section 2255 petition and CASTRO does not apply to represented petitioners. See, Paragraph 9(d) above. Again, Attorney Colia Ceisel needs to be interviewed and an **EVIDENTIARY HEARING HELD** as to Attorney Ceisel not advising Movant Lambros of the ramifications of filing Rule 33 Motions with the resentencing court. Also, **JUSTICE BREYER**, who delivered the opinion in CASTRO vs. U.S., 157 L.Ed.2d 778, clearly stated, "...., we hold that the **COURT CANNOT** so recharacterize a pro se litigant's motion as the litigant's first §2255 motion **UNLESS** the **COURT** informs the litigant of its intent to recharacterize, warns the litigant that the re-

characterization will subject subsequent §2255 motions to the law's "second or successive" restrictions, and provide the litigant with an opportunity to withdraw, or to amend, the filing. Where these things are not done, a recharacterized motion **WILL NOT COUNT** as a §2255 motion for purposes of applying §2255's "second or successive" provision." Therefore, if Movant Lambros filed the **RULE 33 MOTIONS HIMSELF** with the court, CASTRO clearly states it is **THE COURT'S DUTY TO INFORM MOVANT LAMBROS** of its intent to recharacterize and subject Movant to the law's "second or successive" restrictions, and provide Movant an opportunity to withdraw, or amend his filing. The government thinks the above duty is Attorney Ceisel's and not the courts???? Id. at 784.

13. The government states that Movant Lambros raised the **"SAME"** issues within his April 1997 Section §2255 as the issues raised within his Rule 33 Motions at resentencing. See, PARAGRAPH 9(e) above. Movant Lambros does not have the complete record of all motions he filed with the District Court and is not sure if he has the complete April 1997 Section 2255 he filed due to "SHAKE-DOWNS" of property within the institution at the United States Penitentiary Leavenworth. Therefore Movant requests an attorney to be appointed to secure a copy of the following document to be placed within the record and review by Movant Lambros:

a. Copy of the Docket Sheet;

b. Copy of all Motions Movant Lambros filed from **September 8, 1995** (Eight Circuit vacated and remanded for resentencing, U.S. vs. LAMBROS, 65 F.3d 698) thru April 21, 1997, filing date of Movant's alleged Section 2255, as per the government's OPPOSITION, page 4.

**LAW:**

14. **THE COURT SHOULD APPOINT COUNSEL FOR MOVANT LAMBROS:** In deciding whether to appoint counsel for an indigent litigant, the court should consider "the factual complexity of the case, the ability of the indigent to investigate the facts,

the existance of conflicting testimony, the ability of the indigent to present his claims and the complexity of the legal issues." ABDULLAH vs. GUNTER, 949 F.2d 1032, 1035 **(8th Cir. 1991)**(citation omitted), cert. denied, 112 S.Ct. 1995 (1992). In addition, courts have suggested that the most important factor is whether the case appears to have merit. COOPER vs. A. SARGENTI CO, INC., 877 F.2d 170, 173 (2nd Cir. 1989). Each of those factors weighs in favor of appointing counsel in this case.

15. **FACTUAL COMPLEXITY:** The government alleges that this Movant filed the same claims within his RULE 33 MOTIONS as in his §2255. Also, Movant's Attorney should of advised Movant not to file his Rule 33 Motions. Movant believes he filed almost twenty-five (25) Rule 33 Motions with the court before resentencing and thinks expert testimony is needed for this Movant as to the validity of same at resentencing. This issue alone requires expert testimony supporting the appointment of counsel. MOORE vs. MABUS, 976 F.2d 268, 272 (5th Cir. 1992); JACKSON VS. COUNTY OF McLEAN, 953 F.2d 1070, 1073 (7th Cir. 1992); TUCKER vs. RANDALL, 948 F.2d 388, 392 (7th Cir. 1991).

16. **THE MOVANT'S ABILITY TO INVESTIGATE:** This case will require discovery concerning all motions filed and statements from Attorney Ceisel and U.S. Assistant Attorney Peterson. TUCKER vs. DICKEY, 613 F.Supp. 1124, 1133-34 (W.D.Wis. 1985) (need for discovery supported appointment of counsel).

17. **CONFLICTING TESTIMONY:** This Movant's account of his conversations with Attorney Ceisel and the issues he filed at resentencing are in square conflict with the government. This aspect of the case will be a credibility contest between this Movant and the U.S. Attorney. The existance of these credibility issues supports the appointment of counsel. GATSON vs. COUGHLIN, 679 F.Supp. 270, 273 (W.D.N.Y. 1988).

18. **THE ABILITY OF INDIGENT TO PRESENT HIS CLAIMS:** This Movant is an indigent prisoner with no formal legal training, a factor that supports the appointment of counsel. WHISENANT vs. YUAM, 739 F.2d 160, 163 (4th Cir. 1984).

19. **MERIT OF THE CASE:** On its face, Movant has filed a meritorious

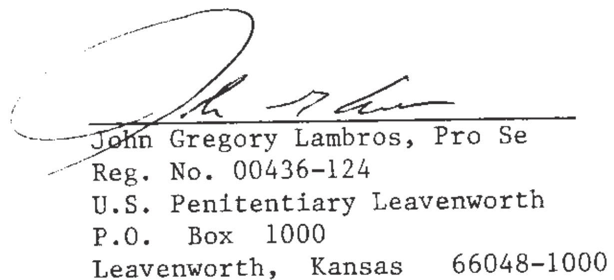
case in this above-entitled action.

**CONCLUSION:**

20. The the foregoing reasons, the court should grant the Movant's motion and appoint counsel in this case.

21. Movant JOHN GREGORY LAMBROS, declares under penalty of perjury that all facts and statements contained herein are true and correct, as per Title 28 U.S.C. §1746.

**EXECUTED ON: NOVEMBER 16, 2004**



John Gregory Lambros, Pro Se
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Leavenworth, Kansas 66048-1000

**Web site: www.brazilboycott.org**

12.

Thus, violations of federal law often are not cognizable under section 2255.[2833]

*Exhaustion and Procedural Bar.* Section 2255 does not contain a provision requiring a prisoner to exhaust other available remedies, but provides that a motion "may be made at any time."[2834] Nevertheless, a movant must usually complete a direct appeal as a prerequisite to filing a section 2255 motion.[2835] In limited circumstances, this requirement will not be enforced.[2836] Failure to raise a claim at trial or on direct appeal will generally result in waiver of the claim.[2837] In *United States v. Frady,*[2838] the Supreme Court held that a federal

THE GEORGETOWN LAW JOURNAL, Volume 84, Number 4, April 1996, Page 1455. See Footnotes 2835 & 2836.

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Pogue, 865 F.2d 226, 228-29 (10th Cir. 1989) (per curiam) (defendant's claim of Rule 11 violation that court informed petitioner that maximum fine $2,000 but ordered payment of $1.75 million in restitution cognizable under § 2255).

2833. *See* Fiumara v. U.S., 727 F.2d 209, 213 (2d Cir.) (violation of wiretapping statute not fundamental defect and not cognizable under § 2255), *cert. denied,* 466 U.S. 951 (1984); U.S. v. Stevens, 851 F.2d 140, 143-44 (6th Cir. 1988) (violation of FED. R. CRIM. P. 32(a)(1)(A), when court failed to ensure that defendant and attorney read and discussed presentence report, not cognizable under § 2255 because court did not rely on false information contained in report at sentencing); Shigemura v. U.S., 726 F.2d 380, 381 (8th Cir. 1984) (per curiam) (violation of rights under Interstate Agreement on Detainers Act not cognizable under § 2255 absent showing of prejudice in imprisonment or defense).

2834. 28 U.S.C. § 2255 (1988); *accord* Section 2255 Rules, *supra* note 1, Rule 5 advisory committee's note (no requirement that movant exhaust remedies prior to seeking § 2255 relief, but probably must complete pending direct appeal first).

2835. Section 2255 Rules, *supra* note 1, Rule 5 advisory committee's note (courts have held § 2255 motion inappropriate if movant simultaneously appealing decision). *See* U.S. v. Gordon, 634 F.2d 638, 638-39 (1st Cir. 1980) (petitioner may not have § 2255 motion considered while direct appeal pending); Fassler v. U.S., 858 F.2d 1016, 1019 (5th Cir. 1988) (per curiam) (petitioner may not collaterally attack conviction until affirmed on direct appeal), *cert. denied,* 490 U.S. 1099 (1989); U.S. v. Robinson, 8 F.3d 398, 406 (7th Cir. 1993) (petitioner may not have § 2255 motion considered while direct appeal pending, absent extraordinary circumstances); U.S. v. Deeb, 944 F.2d 545, 548 (9th Cir. 1991) (petitioner may not file § 2255 motion when direct appeal pending), *cert. denied,* 503 U.S. 975 (1992); U.S. v. Thurmond, 7 F.3d 947, 949 n.2 (10th Cir. 1993) (petitioner's § 2255 motion inappropriate except in extraordinary circumstances if simultaneously appealing), *cert. denied,* 114 S. Ct. 1311 (1994); U.S. v. Chapman, 866 F.2d 1326, 1335 (11th Cir.) (court of appeals may not consider movant's appeal from denial of § 2255 motion while direct appeal pending), *cert. denied,* 493 U.S. 932 (1989). *But see* DeRango v. U.S., 864 F.2d 520, 522 (7th Cir. 1988) (§ 2255 motion may be raised while direct appeal pending); U.S. v. Montgomery, 998 F.2d 1468, 1472 (9th Cir. 1993) (§ 2255 motion appeal consolidated with direct appeal when both contained same issue).

2836. Section 2255 Rules, *supra* note 1, Rule 5 advisory committee's note (no "jurisdictional bar" to district court's entertaining § 2255 motion during pendency of direct appeal, but "orderly administration of criminal law precludes considering such a motion absent exceptional circumstances"). It is unclear exactly what situations will lead to a finding of exceptional circumstances. *Compare* Sunal v. Large, 332 U.S. 174, 179, 181 (1947) (prisoner may obtain habeas relief without exhausting direct appeals only in exceptional circumstances when error flagrant and no other remedy available; apparent futility of appeal does not excuse failure to appeal) *and* Bowen v. Johnston, 306 U.S. 19, 27 (1939) (prisoner may obtain habeas relief based on exceptional circumstances when split of authority exists between state and federal law regarding her basis for petition) *with* Ingber v. Enzor, 841 F.2d 450, 454-55 (2d Cir. 1988) (prisoner's failure to exhaust direct appeals excused when new interpretation of mail fraud rule, announced by Supreme Court after time for appeals expired, applied retroactively) *and* Poor Thunder v. U.S., 810 F.2d 817, 823 (8th Cir. 1987) (prisoner's failure to appeal from denial of FED. R. CRIM. P. 35 motion excused when proceeding pro se). A court may review an unexhausted claim to promote judicial efficiency. *See* Jackson v. Carlson, 707 F.2d 943, 949 (7th Cir.) (doctrine of exhaustion of administrative remedies not jurisdictional requirement but based on obvious good sense; reviewing court disposed of issue on merits when convinced that claim without merit and no purpose served by remand for hearing on exhaustion question), *cert. denied,* 464 U.S. 861 (1983).

2837. U.S. v. Frady, 456 U.S. 152, 162-66 (1982). A variety of claims have been deemed waived because of failure to raise them at trial or on direct appeal. *See* Marone v. U.S., 10 F.3d 65, 67 (2d Cir. 1993) (per curiam) (waiver of right to jury trial claim waived under § 2255 when not raised on direct appeal); U.S. v. Walsh, 733 F.2d 31, 34-35 (6th Cir. 1984) (involuntary guilty plea claim

**EXHIBIT A.**

13.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

| | | |
|---|---|---|
| **JOHN GREGORY LAMBROS,** | * | **CRIMINAL NO. 4-89-82(5)(DSD)** |
| Petitioner, | * | **Civil No.** ________________ |
| vs. | * | |
| **UNITED STATES OF AMERICA,** | * | **AFFIDAVIT FORM** |
| Respondent. | * | |

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**MOTION FOR PRODUCTION OF RECORDS**

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Petitioner, JOHN GREGORY LAMBROS (hereinafter Movant), respectfully moves this Honorable Court for an ORDER under the provisions of Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure requiring the attorney for the Government to permit the Defendant to inspect and copy or photograph (1) any and all books, papers, documents or tangible objects within the custody or control of the Government and which are material to the preparation of this Movant's defense, or which the Government intends to use as evidence in this action, or which were obtained from or belong to this Movant; and (2) any and all notes, reports, files, information, motions and records obtained by the U.S. Attorney Office, District of Minnesota, from Attorney **COLIA CEISEL**, covering the period of time from the ORDER of the Eighth Circuit vacating and remanding Movant's case in this action, **SEPTEMBER 08, 1995**, in U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir.), through **NOVEMBER 01, 1997**, and relating to any motions filed as to Movant February 10, 1997 RESENTENCING and Section §2255 filed during such period of time.

The government stated within the November 3, 2004, OPPOSITION, that Movant raised the same issues within his Rule 33 Motions as he raised within his April 1997 section §2255 (See, Page 5 Govt. Opposition) and that Movant's attorney Colia Ceisel knew of Movant's Rule 33 Motions and advised Movant about the ramifications of Judge Renner's treatment of the motions as a section 2255 petition. (See Page 3 Govt. Opposition)



14.

Movant LAMBROS incorporates the following documents within this Motion For Production of Records:

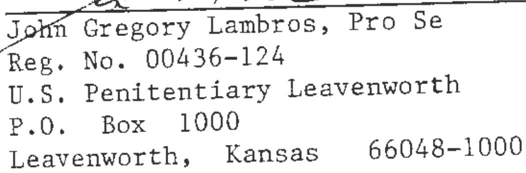
a. November 16, 2004, MOTION FOR APPOINTMENT OF COUNSEL;

b. November 16, 2004, MOVANT LAMBROS' TRAVERSE RESPONSE TO OPPOSITION OF THE UNITED STATES TO PETITIONER'S MOTION TO VACATE FEBRUARY 10, 1997 JUDGMENT.

The items hereinabove set forth are material to the preparation of the defense and this request is reasonable.

Movant JOHN GREGORY LAMBROS, declares under penalty of perjury that all facts and statements contained herein are true and correct, as per Title 28 USC §1746.

**EXECUTED ON: NOVEMBER 16, 2004**



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

**Web site: www.brazilboycott.org**

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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|---|---|---|
| **JOHN GREGORY LAMBROS,** | * | **CRIMINAL NO. 4-89-82(5)(DSD)** |
| Petitioner, | * | **Civil No.** ____________ |
| vs. | * | |
| **UNITED STATES OF AMERICA,** | * | **AFFIDAVIT FORM** |
| Respondent. | * | |

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**MOVANT LAMBROS' TRAVERSE RESPONSE TO OPPOSITION OF THE UNITED STATES TO PETITIONER'S MOTION TO VACATE FEBRUARY 10, 1997 JUDGMENT, DATED NOVEMBER 03, 2004.**

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Petitioner JOHN GREGORY LAMBROS (hereinafter Movant) response to U.S. Attorney Thomas B. Heffelfinger and Assistant U.S. Attorney Jeffrey S. Paulsen's November 03, 2004, "OPPOSITION OF THE UNITED STATES TO PETITIONER'S MOTION TO VACATE FEBRUARY 10, 1997 JUDGMENT."

Movant LAMBROS incorporates the following motions/documents within this response:

a. November 16, 2004, "MOTION FOR APPOINTMENT OF COUNSEL;"

b. November 16, 2004, "MOTION FOR PRODUCTION OF RECORDS."

Movant denies each and every allegation made by the government except as admitted or explained herein.

1. Page 1 OPPOSITION: The government states "It is not entirely clear what relief he seeks [Lambros]." This is not correct. Movant Lambros clearly stated that he was requesting the court to vacate the February 10, 1997 JUDGMENT thus giving Movant LAMBROS an opportunity to decline to have his Rule 33 MOTIONS converted into his first §2255, thus allowing the court to rule on Movant LAMBROS' Rule 33 motions. This is the procedure followed and ORDERED by the Second Circuit Court of Appeals in a recharacterization case under CASTRO vs. U.S., 157 L.Ed.2d

778 (December 15, 2003), in SIMON vs. U.S., 359 F.3d 139, 144-145, & fn. 12, Page 145 (2nd Cir. 2004)("In view of the various potential obstacles to relief on successive §2241 petitions, and in the absence of Simon's consent, we find that the district court's sua sponte recharacterization of his §3582 motion as a §2241 petition was improper. Accordingly, the judgment of the district court is VACATED and the case REMANDED to give Simon an opportunity to decline to have his §3582 motion converted into a §2241 petition. Foot Note 12: '.... If Simon opts to decline, he is then free to pursue whatever relief he may have available, in whatever venue available, issues as to which we express no view. If instead, upon receiving notice of the consequences of conversion, he elects to proceed, the district court should act on the converted §2241 petition.'") See, Movant LAMBROS' September 07, 2004, MOTION, Page 21, ¶45. Movant LAMBROS believes this is the fair procedure to follow but is not educated in law and has requested this Court of appoint counsel to assist Movant. Of interest is the relationship SIMON had with his attorney, in which he characterized as "like Judas representing Jesus." SIMON, at 140, fn. 1.

2. Page 1 and 2 OPPOSITION: The government states, "If the present petition is viewed as an attack on Lambros' February 10, 1997 sentence as such, it must be denied as a successive section 2255 petition for which no Court of Appeals authorization has been obtained." This is not true. Movant Lambros clearly offered within his September 07, 2004, MOTION TO VACATE ...., Page 20, ¶ 43, that the Seventh Circuit dismissed as UNNECESSARY an application for leave to commence a successive collateral attack AFTER being denied collateral relief under §2255 **OVER TWO (2) YEARS EARLIER, UNDER CASTRO.** See, WILLIAMS vs. U.S., 366 F.3d 438, 439 (7th Cir. 2004). The Seventh Circuit gave CASTRO **RETROACTIVE APPLICATION ON APRIL 22, 2004.** Movant LAMBROS clearly requested this Court of VACATE THE FEBRUARY 10, 1997, **JUDGMENT.** Movant Lambros has requested the appointment of counsel so he/she may argue the differences between vacating the judgment and/or sentence, as Movant does not understand the difference within this proceeding and requests this



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Court to guide Movant is this action.

3. Page 2 OPPOSITION: The government admits, "At the time of Lambros' February 10, 1997 resentencing, Lambros filed a number of motions, purportedly under Rule 33 of the Federal Rules of Criminal Procedure. Finding that the motions would be untimely under Rule 33, Judge Renner decided to follow existing case law and treat the motions as a petition under 28 U.S.C. § 2255." This is only partially true, as the existing case law used by Judge Renner was NOT BINDING ON THE COURT. Judge Renner quoted, "U.S. vs. DiBERNARDO, a 1989 case decided by the Eleventh Circuit Court of Appeals." See, February 10, 1997, RESENTENCING TRANSCRIPTS, Page 5. Also of interest is the fact that Movant LAMBROS' RULE 33 Motions where not untimely, as the rules of RULE 33 clearly states, "A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after judgment, but if an appeal is pending the court may grant the motion ONLY ON REMAND OF THE CASE."

4. Page 2 and 3 OPPOSITION: The government stated, "The Court told Lambros and his attorney on the record that the motions would be so treated." This is true. "Lambros' attorney did not object." This is true. "Lambros himself said that he would prefer to have the motions considered under Rule 33, but did not actually object to the recharacterization." This is not true. Movant Lambros clearly stated within his September 07, 2004, MOTION TO VACATE ...., Page 5, that he did object when he quoted from the RESENTENCING TRANSCRIPT, Exhibit C, Pages 19 and 20, "So I believe all the motions are valid Rule 33 Motions, and I would like to continue under that - - under those pretenses. Is it proper for me to ask you to reconsider that at this point in time or no?" The government then states, "Lambros never appealed the treatment of his motions as a section 2255 petition." This is not totally true, as Movant requested his attorney to appeal the recharacterization of his Rule 33 motion into his § 2255 and Attorney Ceisel also informed Movant that he could file another §2255 motion. Of interest, the Second Circuit Court of Appeals in SIMON vs. U.S., 359 F.3d at 141, fn. 3 stated, "But even if he

had not challenged the conversion in his appellate papers, the Supreme Court has recently indicated that we should raise the issue NOSTRA SPONTE. This is so because the "very point" of the ADAMS rule, which we explained below, is that petitioners who lack notice of the consequences of a recharacterization will not necessarily seek to contest it on appeal. See, CASTRO, 124 S.Ct. at 793." (emphasis added) Therefore, according to the Second Circuit, Movant Lambros was not responsible due to LACK OF NOTICE.

5. Page 3 OPPOSITION: The government states CASTRO does not help Lambros for two (2) reasons, "First, CASTRO applies only to pro se petitioners. Lambros was not pro se at the time of the February 10, 1997 resentencing." "Although Lambros apparently filed the motions in question on his own, his attorney knew about them and was there to advise Lambros about the ramifications of Judge Renner's treatment of the motions as a section 2255 petition." This is not a completely true statement by the government. Movant Lambros was represented by Attorney Colia Ceisel at resentencing and Movant did file his Rule 33 Motions in question as a pro se petitioner. Attorney Colia Ceisel did not advise Movant Lambros about the ramifications of the recharacterization of Movant's Rule 33 motions as a section 2255 petition, nor does the record reflect same. Therefore, Movant Lambros was not aware of the ramifications of recharacterization and was denied any way of appealing the ineffectiveness of Attorney Colia Ceisel not advising Movant of the ramifications of recharacterizations, as Movant could not file a section 2255 **AFTER** the February 10, 1997 resentencing.

6. Page 4 OPPOSITION: The government states, "Second, CASTRO does not help Lambros because there is no indication that the Supreme Court intended it to apply **RETROACTIVELY** to petitions that were recharacterized long before CASTRO was decided." .... "While Lambros relies on a contrary Seventh Circuit case, WILLIAMS vs. UNITED STATES, 366 F.3d 438 (7th Cir. 2004)(per curiam), that per curiam decision contains no analysis of the issue and is not binding on this court."

(emphasis added) This is not true. The government did not read Movant Lambros' September 07, 2004, "MOTION TO VACATE ....", pages 11 thru 16, Paragraphs 17 thru 31, and Pages 19 thru 21, Paragraphs 41 thru 47, where Movant Lambros offers an excellent overview as to the **RETROACTIVE APPLICATION OF CASTRO**. Also, the WILLIAMS vs. U.S., 366 F.3d 438 decision offers an excellent overview of **RETROACTIVE APPLICATION OF CASTRO**, when the Seventh Circuit per curiam decision stated:

> Brian Williams did not appeal his sentence in a drug conspiracy. However, after the time to appeal expired, he filed a motion to withdraw his guilty plea. The district court construed the filing as a motion under 28 USC §2255. Ultimately, the district court denied collateral relief, and this court denied Williams request for a Certificate of Appealability. Williams has filed an application pursuant to 28 USC 2244(b)(3) authorizing the district court to consider a **SECOND OR SUCCESSIVE COLLATERAL ATTACK**. (emphasis added)(citations omitted and summarized)
>
> ****** Relying on CASTRO vs. U.S., 157 L.Ed.2d 778 (2003), Williams argues that he need not obtain authorization because he did not receive adequate notice of the consequences of pursuing his motion under §2255. Under CASTRO, **DECIDED TWO (2) YEARS AFTER THE EVENTS AT ISSUE HERE,** a district court may not "recharacterize a pro se litigent's motion as the litigant's first §2255 **UNLESS** the court informs ..... The record clearly establishes that the district court notified Mr. Williams of its intent to recharacterize his motion and allowed him to add claims to the recharacterized motion. The application, however, **DOES NOT SHOW THAT THE DISTRICT COURT WARNED WILLIAMS ABOUT THE CONSEQUENCES OF RECHARACTERIZATION UNDER §2255.** Assuming the district court did not warn WILLIAMS about the restrictions on **SECOND OR SUCCESSIVE COLLATERAL ATTACKS,** the warnings were inadequate under CASTRO and, thus, the prior proceeding does not count for purposes of §2255. (emphasis added)
>
> Accordingly, we **DISMISS AS UNNECESSARY WILLIAMS APPLICATION FOR LEAVE TO COMMENCE A SUCCESSIVE COLLATERAL ATTACK.**

WILLIAMS, 366 F.3d 438-439 (7th Cir. April 22, 2004)

7. Page 4 and 5 OPPOSITION: The government states, "A holding that Lambros is bound by the recharacterization of his 1997 motions as a section 2255 petition would not prejudice Lambros." ...... "... Judge Renner noted that the

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issues raised in the April 1997 section 2255 petition were the **SAME** as the issues raised in the re-characterized motions filed at the time of resentencing in February 1997, which were found to be lacking in any merit." .... Since Lambros' April 1997 petition contained only **MERITLESS ISSUES** that already had been ruled upon in February 1997, there is no harm in treating it as a successive petition rather than an inital petition. The result was the same either way." (emphasis added) This is not true. Movant Lambros does not believe that he raised the **SAME** issues within his Rule 33 Motions at resentencing as he raised within his April 1997 section 2255 and is requesting an **EVIDENTIARY HEARING AND ALL DOCUMENTS RELATING TO SAME.** Movant Lambros was PREJUDICED.

**DISCUSSION AND THEORY OF INTEREST:**

8. **RESENTENCING ON FEBRUARY 10, 1997:** Movant Lambros requested Judge Renner at resentencing to **BEGIN ANEW WITH DE NOVO PROCEEDINGS.** See February 10, 1997, RESENTENCING TRANSCRIPTS, Pages 14 thru 16. "De novo resentencing permits the **RECEIPT OF ANY RELEVANT EVIDENCE THE COURT COULD HAVE HEARD AT THE FIRST SENTENCING HEARING.** U.S. vs. ORTEZ, 25 F.3d 934, 935 (10th Cir. 1994); U.S. vs. WARNER, 43 F.3d 1335, 1340 (10th Cir. 1994)." See, Id. at 14-15. **PLEASE NOTE** that the Tenth Circuit in BOTH ORTEZ and WARNER referred to the EIGHTH CIRCUIT case U.S. vs. CORNELIUS, 968 F.2d 703, 705 **(8th Cir. 1992):**

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

See, **EXHIBIT A,** (U.S. vs. CORNELIUS, 968 F.2d 703, 705 (8th Cir. 1992)

9. As this Court understands, JUDGE RENNER and U.S. Assistant Attorney Peterson were **BOUND TO APPLY THE PRECEDENT OF THE EIGHTH CIRUCIT** in U.S. vs. CORNELIUS, and allow Movant Lambros to present **ANY RELEVANT EVIDENCE THAT COULD OF BEEN PRESENTED AT MOVANT'S FIRST SENTENCING.** See, HOOD vs. U.S., 342 F.3d 861, 864 **(8th**



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**Cir. 2003)**(The District Court, however, is bound, as are we, to apply the precedent of this Court.)

10. The U.S. Supreme Court held that the double jeopardy clause does not bar resentencing on counts which were AFFIRMED ON APPEAL, when the sentences on other counts have been vacated. See, PENNSYLVANIA vs. GOLDHAMMER, 88 L.Ed.2d 183 (1985). Therefore, **ANY RELEVANT EVIDENCE** presented to the resentencing court on February 10, 1997, could of affected all counts Movant was sentenced on and Movant could of been resentenced on all counts if RELEVANT EVIDENCE required the Court to do same. See, FEDERAL SENTENCING AND FORFEITURE GUIDE, Third Edition, Volume I, Page 1, by Attorney's HAINES, COLE, and WOLL.

11. Also of interest is the fact Movant Lambros received a larger sentence than any of his co-defendants, even though he was charged with only receiving a controlled substance. The leader of the drug conspiracy that distributed controlled substances throughout the United States only received a four (4) year sentence and had a criminal history equal of Movant Lambros. Movant received an initial mandatory life sentence without parole that was reduced to thirty (30) years. Disparity in sentences violates due process when one defendant receives a longer sentence for equal involvement. Movant Lambros exercised his constitutional right to stand trial while everyone else testified and assistaed the government. See, U.S. vs. CAPRIOLA, 537 F.2d 319 (9th Cir. 1976) (Holds that a disparity in sentencing SHOULD BE EXPLAINED when that disparity might suggest that a more severe sentence was imposed upon a defendant **BECAUSE HE EXERCISED HIS RIGHT TO STAND TRIAL)** Therefore, Movant Lambros had his constitutional rights infringed because he exercised his rights to stand trial and suggests that the record offers an impermissable motive by Judge Renner to punish Movant Lambros for exercising his trial rights.

12. **$64,000.00 QUESTION!** DID JUDGE RENNER ILLEGALLY CONVERT/RECHARACTERIZE SOME OF MOVANT LAMBROS' SENTENCING ISSUES, REMAND MAY TAKE ANY MATTER INTO ACCOUNT AND ANY EVIDENCE RELEVANT TO SENTENCING, INTO RULE 33 MOTIONS AND THAN

CONVERT SAME INTO A SECTION 2255? The Eighth Circuit clearly stated in U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995), "Accordingly, Lambros must be resentenced on Count I." Therefore, the general rule is that a district court on remand may take any matter into account and may hear any evidence relevant to sentencing. The general practice in the 9th Cir. is to vacate the entire sentence and remand for resentencing whenever it finds that a sentence was imposed in excess of the sentencing court's authority. See, U.S. vs. CATERINO, 29 F.3d 1390 (9th Cir. 1994). Movant is attaching a listing of cases from the 7th, 8th, and 9th Circuits supporting the above. **EXHIBIT B** (**FEDERAL SENTENCING GUIDE**, Third Edition, Volume 3, Cases Published between April 15, 1994 and July 15, 1996, by Attorney HAINES, COLE, and WOLL, Section 197, "RESENTENCING ON REMAND AFTER APPEAL," Pages 124 thru 127.

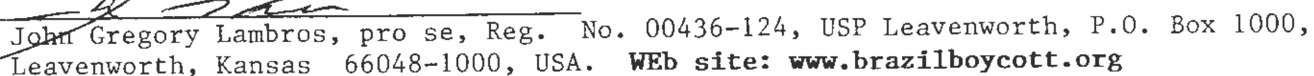
13. It is clear from the cases offered within **EXHIBIT B** that Movant Lambros was entitled to offer evidence that could of been offered at the first sentencing, as the remand from the Eighth Circuit did away with the entire initial sentence of Count One and allowed the court to impose any sentence which could lawfully been imposed originally. Movant Lambros believes Judge Renner illegally converted/recharacterized SENTENCING ISSUES into Rule 33 Motions that he inturn recharacterized into a Section 2255.

**CONCLUSION:**

14. For the foregoing reasons, Movant Lambros requests this Court to (a) Appoint Counsel; (b) grant motion for Production of Records; (c) grant an evidentiary hearing; and grant relief as requested within this Movant's September 07, 2004 original motion to vacate February 10, 1997 JUDGMENT.

15. I JOHN GREGORY LAMBROS, declare under the penalty of perjury that the foregoing is true and correct. Title 28 USCA §1746.

**EXECUTED ON: NOVEMBER 16, 2004.**



John Gregory Lambros, pro se, Reg. No. 00436-124, USP Leavenworth, P.O. Box 1000, Leavenworth, Kansas 66048-1000, USA. **WEb site: www.brazilboycott.org**



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that the Guidelines range was thirty years to life, and sentenced Cornelius to thirty years.

On appeal, Cornelius argues that the district court erred in finding that it could not consider any new issues on remand. He claims that the district court erred in refusing to consider evidence that his guilty plea in the conviction used to enhance his sentence under § 924(e) was constitutionally invalid. He also claims that the district court erred when it refused to consider his argument that the two convictions used to enhance his sentence under U.S.S.G. § 4B1.1 were "related" cases under the Guidelines and could only be counted as one conviction rather than two.

### I. Consideration of New Evidence on Remand

[1] Cornelius first argues that the district court erred when it refused to consider new evidence about the validity of certain prior convictions used to enhance his sentence under § 924(e) and § 4B1.1. The government replies that the district court was correct because this court decided in the first appeal that Cornelius was both a career offender and an armed career criminal. Therefore, the mandate on remand was limited and only allowed the district court to decide the proper sentence term under the Guidelines given those findings. We disagree.

Once a sentence has been vacated or a finding related to sentencing has been reversed and the case has been remanded for resentencing, the district court can hear any relevant evidence on that issue that it could have heard at the first hearing. *United States v. Smith,* 930 F.2d 1450, 1456 (10th Cir.) (de novo resentencing on remand appropriate), *cert. denied,* — U.S. —, 112 S.Ct. 225, 116 L.Ed.2d 182 (1991); *United States v. Sanchez Solis,* 882 F.2d 693, 699 (2d Cir.1989) (court on remand should be able to take new matter into account); *United States v. Romano,* 749 F.Supp. 53, 55 (D.Conn.1990) (on remand sentencing court may proceed as it might have in first instance), *aff'd sub nom. United States v. Lanese,* 937 F.2d 54 (2d Cir.1991). The sentencing court must, however, adhere to any limitations imposed on its function at resentencing by the appellate court. *See United States v. Prestemon,* 953 F.2d 1089 (8th Cir.1992) (trial court could not consider new bases for downward departure on remand where remand was limited to resentencing within the applicable guideline sentencing range); *United States v. Cassity,* 720 F.2d 451, 458 (6th Cir.1983) (district court erred when it considered issue of retroactivity of new case on remand where circuit court explicitly stated remand limited to determining whether privacy interest invaded), *vacated on other grounds,* 468 U.S. 1212, 104 S.Ct. 3581, 82 L.Ed.2d 879 (1984); *see also Romano,* 749 F.Supp. at 55. Therefore, we must decide whether our mandate to the district court in this case was specifically limited to resentencing within the applicable guideline range, as the court interpreted it, or whether the mandate was broad enough to allow the court to consider new evidence regarding whether Cornelius is an armed career criminal.

[2] We find that the district court erred when it refused to hear Cornelius' evidence relating to whether he is an armed career criminal. In the previous appeal, the issue presented was whether Cornelius' 1970 conviction for breaking and entering constituted generic burglary under *Taylor v. United States,* 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). The conviction could not be counted as a prior conviction for purposes of a sentence enhancement under § 924(e) unless it qualified as generic burglary. The district court held that it did not constitute generic burglary and, therefore, Cornelius was not an armed career criminal under § 924(e). We reversed on appeal. *Cornelius,* 931 F.2d 490. The government claims that we found that Cornelius is an armed career criminal, and that that finding is now the law of the case. Such a reading misinterprets our opinion. We held that "Cornelius' 1970 conviction did constitute generic burglary under *Taylor.* Consequently, we reverse the district court's determination that Cornelius was not an armed career criminal under § 924(e) and remand for resentencing."

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# FEDERAL SENTENCING GUIDE

Third Edition

**Volume 3**

**Cases Published**

**Between April 15, 1994**

**and July 15, 1996**

**Roger W. Haines, Jr.**
**Kevin Cole**
**Jennifer C. Woll**

25.

EXHIBIT B.

Circuit rejected all but one of his challenges to his sentence. The district court had relied on an improper basis for an obstruction of justice enhancement. In remanding, the court stated that "the sentence is vacated and the case is remanded for resentencing on the issue of obstruction of justice." After resentencing, defendant appealed the district court's refusal on remand to hear arguments outside the obstruction of justice issue. The Seventh Circuit affirmed, finding it had limited its remand to resentencing only on the obstruction of justice issue. The only open issue was the obstruction enhancement. The previous appellate opinion summarily rejected all of defendant's other sentencing claims; therefore the law of the case doctrine barred the district court from reconsidering these issues. *U.S. v. Polland*, 56 F.3d 776 (7th Cir. 1995).

**7th Circuit, en banc, says recalculating sentence on resentencing did not violate double jeopardy. (197)** The district court originally sentenced defendant as an armed career criminal based on a 1975 juvenile burglary conviction, a 1980 burglary conviction, and three 1983 convictions for burglary. In an unpublished opinion, a 7th Circuit panel remanded for further findings. At resentencing, the district court concluded that defendant's three 1983 burglaries were separate crimes, and again sentenced him as an armed career criminal. Defendant argued that the district court's recalculation of his sentence after his resentencing hearing violated double jeopardy. The en banc 7th Circuit disagreed, stating that the case was remanded to ask the sentencing court to expand the record on evidence that had already been received. This did not preclude correction of the sentence after further review of the record. The Double Jeopardy Clause does not preclude the recalculation of a defendant's sentence enhancement initially vacated for an insufficient record. *U.S. v. Hudspeth*, 42 F.3d 1015 (7th Cir. 1994) (*en banc*).

**8th Circuit agrees remand was for limited purpose of recalculating restitution. (197)** Defendant embezzled money while acting as a court receiver. The district court originally ordered him to pay restitution slightly in excess of $1 million. The Eighth Circuit remanded the case for the limited purpose of recalculating the amount of restitution. On remand, the district court reduced the restitution significantly. However, it refused to reconsider the original sentencing court's upward departure. The Eighth Circuit agreed that the law of the case doctrine precluded the district court from reconsidering anything but restitution. Defendant did not introduce "substantially different" evidence on remand. The revised PSR did not present different substantive evidence, but merely a recalculation of the same evidence that was offered at the original sentencing hearing. While the previous decision affirming the upward departure was based on both the extent of defendant's embezzlement and his position as an officer of the court, defendant's corruption of his federal office was a sufficient basis for the departure. Moreover, even if it was not, defendant still conceded embezzling well over $1 million. *U.S. v. Bartsh*, 69 F.3d 864 (8th Cir. 1995).

**9th Circuit says resentencing was not limited by scope of the remand. (197)** Where the scope of the remand is expressly limited to consideration of a single sentencing issue, the district court is without authority to revisit other issues. *U.S. v. Pimentel*, 34 F.3d 799 (9th Cir. 1994), *cert denied*, 115 S.Ct. 777 (1995). However, unless there is clear evidence in the remand of either an express or implied limitation, "our general practice . . . is to vacate the *entire* sentence and remand for resentencing whenever we find that a sentence was imposed in excess of the sentencing court's authority." *U.S. v. Caterino*, 29 F.3d 1390, 1394-95 (9th Cir. 1994) (emphasis in original). In this case, there was no evidence that the court either expressly or by implication limited the prior remand only to a portion of the sentence. The court simply said the sentences were vacated and the case was remanded for resentencing. *U.S. v. Petty*, 80 F.3d 1384 (9th Cir. 1996).

**9th Circuit says retroactive amendments require use of guidelines in effect at time of offense, not at time of resentencing. (197)** Defendant was convicted of being a felon in possession of a firearm under 18 U.S.C. §922(g). Under the 1988 guidelines this was a "crime of violence, so defendant was sentenced as a career offender under U.S.S.G. §4B1.2. Thereafter, in November, 1991, the Commission adopted retroactive amendment 433 stating that the term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon. In December, 1993, defendant filed a petition seeking resentencing under the retroactive amendment. The district court declined to sentence him under the 1988 guidelines (without the career offender enhancement), but instead applied the November, 1993 guidelines in effect at the time of resentencing. Defendant appealed, claiming this violated the ex post facto clause. On appeal, the 9th Circuit agreed, relying on *U.S. v. Garcia-Cruz*, 40 F.3d 986, 990 (9th Cir. 1994) which held that if application of the amended guidelines results in a harsher sentence, the court must apply the guidelines in effect at the time of the offense, but must also consider the clarification provided by amendment 433. *Hamilton v. U.S.*, 67 F.3d 761 (9th Cir. 1995).

**9th Circuit remands to different judge for resentencing. (197)** To remand to a different judge, the Ninth Circuit considers (1) whether the original judge could reasonably be expected to put out of his mind previously expressed views or findings that were subsequently found to be erroneous; (2) whether reassignment is advisable to preserve the appearance of justice; and (3) whether reassignment would entail waste or duplication of effort out of proportion to the gain realized in preserving the appearance of fairness. Only one of the two factors must be present. In this case, the Ninth Circuit concluded that the sentencing judge would likely have substantial difficulty in putting out or his mind the views and findings which the appeals court held to be erroneous. Accordingly the case was remanded for resentencing before a different judge. *U.S. v. Huckins*, 53 F.3d. 276 (9th Cir. 1995).

**9th Circuit says breach of plea agreement requires remand to new judge for resentencing. (197)** The 9th Circuit remanded for resentencing before a different judge to insure the specific performance of a plea agreement concededly breached by the original sentence. Although Ninth Circuit cases are split on the necessity for a new sentencing judge following a breached plea agreement, *Santobello v. New York*, 404 U.S. 257, 262-263 (1971) indicated that resentencing should take place before a different judge to insure specific performance of a breached plea bargain. *U.S. v. Camper*, 66 F.3d 229 (9th Cir. 1995).

**9th Circuit says remand was unlimited and resentencing did not violate double jeopardy or due process. (197)** Absent clear evidence to the contrary, when a case is remanded for resentencing the district court may reconsider the entire sentence anew. In remanding, the court of appeals stated that the sentences were vacated and were to be "recalculated." This did not limit the scope of the remand, and therefore the district court did not err in resentencing without regard to its previous determinations. The Ninth Circuit also rejected defendant's argument that resentencing violated the double jeopardy clause and due process. *U.S. v. Ponce*, 51 F.3d 820 (9th Cir. 1995).

**9th Circuit remands case to new judge where original judge heard materially false and unreliable evidence. (197)** Reassignment to a different judge on remand is justified if the original judge would have substantial difficulty in putting out of his or her mind findings based on evidence that must be rejected. Here, the original judge based his sentencing findings on materially false and unreliable evidence, i.e., the unsupported allegations of a co-defendant. The Ninth Circuit ordered the case reassigned to a different sentencing judge on remand. *U.S. v. Hanna*, 49 F.3d 572 (9th Cir. 1995).

**9th Circuit explains effect of appeals court's mandate on district court. (197)** The Ninth Circuit noted that "[t]he rule of mandate is similar to, but broader than, the law of the case doctrine." A district court upon receiving the mandate of an appellate court, "cannot vary it or examine it for any other purpose than execution." Thus, a district court cannot "revisit its already final determinations unless the





EXHIBIT B.

26.

mandate allowed it." "Once the mandate issues, jurisdiction over a criminal case revests in the district court." Unless the reversing court indicates in its mandate or opinion that a retrial is prohibited because of double jeopardy or similar infirmity, a second trial is appropriate. Accordingly, in this case, retrial was appropriate, even though the mandate did not expressly remand the case after reversal. *U.S. v. Cote*, 51 F.3d 178 (9th Cir. 1995).

**9th Circuit finds no double jeopardy despite increase in legal portion of sentence on remand. (197)** On remand after the original sentence was vacated, the district court increased the legal portion of defendant's sentence in the course of resentencing him. Defendant argued that this constituted double jeopardy, relying on *U.S. v. Jordan*, 895 F.2d 512, 515 (9th Cir. 1989), which held that a court may not increase the legal portion of a sentence in the course of correcting an illegal sentence under Rule 35 (now Rule 35(c)). The Ninth Circuit rejected the argument, noting that a resentencing mandate from the court of appeals "does away with the entire initial sentence," and authorizes the district court to impose "any sentence which could lawfully have been imposed originally." Increasing the legal portion of defendant's sentence in order to achieve the total guideline sentence under § 5G1.2(d) did not violate double jeopardy. *U.S. v. Moreno-Hernandez*, 48 F.3d 1112 (9th Cir. 1995).

**9th Circuit remands case to a different judge for resentencing. (197)** At the original sentencing, the district judge erroneously applied the second degree murder guideline where an ATF agent was killed while attempting to dispose of defendant's illegal fireworks. On remand, the district court departed upward by eleven levels based on grounds which the court of appeals again found to be error. At the second sentencing, the district court refused to consider mitigating and impeaching evidence offered by the defendant. Accordingly, the case was remanded to the chief judge of the district court "for reassignment to another district judge for purposes of resentencing the defendant." *U.S. v. Williams*, 41 F.3d 496 (9th Cir. 1994).

**9th Circuit declines to remand to a different judge for resentencing. (197)** At the time of the original sentencing, it was unclear whether the Guidelines were constitutional, and defendant was sentenced to three years probation. In 1990, the district court revoked probation and sentenced defendant to five years in custody, again under pre-Guidelines law. On appeal, the 9th Circuit vacated the sentence and held that the Guidelines applied. On remand, the court departed upward from the Guideline range of 0-6 months and imposed the same 5 year sentence. In obtaining a reversal in this case, defendant sought to have the case remanded to a different judge. The 9th Circuit rejected the request, ruling that although the district judge created the departure error, "there is no significant showing that he was biased against [defendant]." Reassignment to a new judge was not necessary to preserve the appearance of justice. *U.S. v. Donaghe*, 50 F.3d 608 (9th Cir. 1994).

**9th Circuit says limited scope of remand precluded additional arguments. (197)** The 9th Circuit's general practice "is to vacate the entire sentence and remand for resentencing whenever we find that a sentence was imposed in excess of the sentencing court's authority." *U.S. v. Caterino*, 29 F.3d 1390 (9th Cir. 1994). In such cases the district court is empowered to address all sentencing issues following remand. In this case, however, the 9th Circuit "expressly limited the scope of our remand to consideration of a single sentencing issue: whether, and to what extent, the district court would exercise its authority to depart based on [defendant's] extraordinary family circumstances. Thus, the district court in this case was without authority to re-examine any other sentencing issues on remand. The sentence was affirmed. *U.S. v. Pimentel*, 34 F.3d 799 (9th Cir. 1994).

**9th Circuit assumes remand permits complete resentencing, absent contrary evidence. (197)** The general rule is that a district court on remand may take any matter into account and may hear any evidence relevant to sentencing. The general practice in the 9th Circuit is to vacate the entire sentence and remand for resentencing





whenever it finds that a sentence was imposed in excess of the sentencing court's authority. Accordingly, "we presume that this general practice was followed unless there is clear evidence to the contrary." Because no such clear evidence existed here, the court held that the original remand in this case should have been read as granting a general rather than a limited remand to the district court. *U.S. v. Caterino*, 29 F.3d 1390 (9th Cir. 1994).

**9th Circuit says "law of the case" did not prevent court from correcting illegal sentence on remand. (197)** In defendant's first appeal, the 9th Circuit held that he waived the issue of apportionment of loss by failing to raise it in the district court. On remand, the district court refused to address the apportionment issue on the ground that it was bound by the law of the case. In this second appeal, the 9th Circuit held that since it did not reach the merits of the issue the district court had authority to consider it. The district court's failure to correct its illegal sentence required a second remand for resentencing. *U.S. v. Caterino*, 29 F.3d 1390 (9th Cir. 1994).

**9th Circuit says restructuring sentence on remand did not violate double jeopardy. (197)** On remand, the district court restructured the guidelines counts from uniform 97-month terms served concurrently, to a single 18-month term to be served consecutively to the remaining concurrent terms of 60 months. The court made this change to account for the vulnerable victim reduction required by the remand and to correct the previous sentences that illegally exceeded the 60-month statutory maximum. In this second appeal, the 9th Circuit found no violation of double jeopardy, noting that a prisoner "has no legitimate expectation of finality in the original sentence when he has placed those sentences in issue by direct appeal and has not completed serving a valid sentence." *U.S. v. Andersson*, 813 F.2d 1450, 1461 (9th Cir. 1987). Here, the defendant placed his initial sentence in issue by his appeal. *U.S. v. Caterino*, 29 F.3d 1390 (9th Cir. 1994).

**9th Circuit finds no need to remand to different judge for resentencing. (197)** In deciding whether to remand to a different judge, the Ninth Circuit considers (1) whether the original judge would reasonably be expected on remand to have difficulty setting aside views determined to be erroneous, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. Here, the district court was originally reversed for basing defendant's sentence on "aggravated" sexual abuse, which the government agreed not to charge as part of the plea bargain. On remand, the court based the extent of the departure in part on an analogy to aggravated sexual abuse. The Ninth Circuit found that this violated its remand order and required resentencing, but concluded that remand to a different judge was "not required." *U.S. v. Chatlin*, 51 F.3d 869 (9th Cir. 1995).

**9th Circuit refuses to order resentencing before a different judge. (197)** Absent proof of personal bias, remand to a different judge is granted only in unusual circumstances. The 9th Circuit considers the following factors: (1) whether the original judge would reasonably be expected on remand to have substantial difficulty in putting out of his or her mind previously expressed views, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication. In the present appeal, defendant failed to present any evidence of bias by the district court. The fact that this was the third reversal of defendant's sentence did not in itself warrant remand to a different judge. *U.S. v. Gray*, 31 F.3d 1443 (9th Cir. 1994).

**10th Circuit permits full resentencing on remand because ineffective counsel failed to file appeal. (197)** Defendant filed a motion under 28 U.S.C. § 2255 alleging ineffective assistance of counsel for failing to file an appeal from his sentence. The district court agreed that counsel was ineffective, and granted a new sentencing hearing. At resentencing, defendant's new counsel attempted to raise new arguments



EXHIBIT B.

27.